No. 02-10038

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JAMES TENNARD,
Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department
of Criminal Justice, Institutional Division,
Respondent.

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

REPLY BRIEF for PETITIONER

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SUMMARY OF ARGUMENT

Tracking the opinion of the Texas Court of Criminal Appeals (CCA), Respondent argues that the Eighth Amendment was satisfied in this case because Mr. Tennard's jury conceivably could have given some indirect mitigating effect to his 67 IQ. This contention depends on a post hoc reconstruction of the evidence and arguments at Mr. Tennard's punishment phase – a reconstruction that differs markedly from the actual trial. In fact, no direct and unambiguous vehicle existed for Mr. Tennard's jury to give effect to this classically mitigating evidence. Indeed, Mr. Tennard's situation was arguably worse than the one Penry faced in his original trial because Mr. Tennard's sole mitigating evidence was emphatically placed outside the special issues by the arguments of the prosecution.

Perhaps recognizing that the former Texas special issue scheme cut off meaningful consideration of Mr. Tennard's evidence by the jury, Respondent urges a dramatic departure from the settled legal standard. Instead of asking whether the special issues afforded "meaningful consideration" of Mr. Tennard's mitigating evidence, Respondent asks only whether the jury was "altogether prevented" from giving it effect. In addition, Respondent, like the CCA, remarkably invokes a post-conviction judicial fact-finding concerning the extent of Mr. Tennard's impairment as a basis for concluding that, *at trial*, the jury was afforded an adequate vehicle for giving mitigating effect to his 67 IQ. Respondent's arguments represent wrongheaded and unprecedented approaches to evaluating Eighth Amendment

individualization claims, and this Court should reject them as objectively unreasonable.

The evidence of Mr. Tennard's substantial cognitive disability falls within the heartland of circumstances that this Court has long recognized as central to a sentencing jury's informed assessment of the defendant's personal culpability and the appropriateness of a death sentence. Mr. Tennard's jury was unable to respond to the evidence in that manner, and post-conviction judicial assessments of the strength and significance of his evidence in no way validate the constitutionally inadequate sentencing phase. A straightforward application of *Penry I* compels the conclusion that Mr. Tennard's death sentence cannot stand.

ARGUMENT

I. RESPONDENT'S PROPOSED STANDARD OF REVIEW SQUARELY CONFLICTS WITH *PENRY V. LYNAUGH*, 492 U.S. 302 (1989) [*PENRY I*], *JOHNSON V. TEXAS*, 509 U.S. 350 (1993), AND *PENRY V. JOHNSON*, 532 U.S. 782 (2001) [*PENRY II*], WHICH REQUIRE "MEANINGFUL CONSIDERATION" OF MITIGATING EVIDENCE TO FACILITATE A "REASONED MORAL RESPONSE" TO THE OFFENDER AND THE OFFENSE.

Respondent misdescribes the standard for reviewing a claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). According to Respondent, the *Penry* inquiry is whether the jury was "altogether prevented from considering [Mr. Tennard's] IQ score and truthfully answering the punishment phase special issues in such a way that [Mr.] Tennard would receive a sentence of life imprisonment." Brief of Respondent ("R.B.") at 1; *see also* R.B. at 12, 17, 20. This Court has never used

that language in its four decisions addressing the merits of as-applied challenges to the former Texas special issue scheme. *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989) [*Penry I*]; *Johnson v. Texas*, 509 U.S. 350 (1993); *Penry v. Johnson*, 532 U.S. 782 (2001) [*Penry II*].[1] Such language is flatly inconsistent both with those decisions and with the Court's general Eighth Amendment framework implementing individualized sentencing.

In *Penry I*, the Court described the inquiry as whether Penry's evidence of mental retardation and childhood abuse had "relevance to his moral culpability beyond the scope of the special issues [such] that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." 492 U.S. at 322. Accordingly, even when the former issue scheme does not "altogether prevent" consideration of a defendant's mitigating evidence in a given case, the scheme is nonetheless constitutionally inadequate if the jury cannot "consider *fully* [a defendant's] mitigating evidence as it bears on his personal culpability." 492 U.S. at 323 (emphasis added). While Respondent maintains that the Constitution is satisfied so long as the State can assert any conceivable connection between a defendant's evidence and the special issues, *Penry I* itself explicitly rejected such a rule. The Court acknowledged that Penry's "mental retardation was relevant to the question whether he was capable of acting

[1] *Jurek v. Texas*, 428 U.S. 262 (1976), by contrast, upheld this scheme against a facial challenge, which is, "of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

'deliberately.'" 492 U.S. at 322. But the Court insisted that the jury be afforded a more robust vehicle for considering and giving effect to Penry's mitigating evidence because "it also 'had relevance to his moral culpability beyond the scope of [that question].'" 492 U.S. at 322 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1987) (O'Connor, J., concurring)).[2]

Likewise, in *Johnson v. Texas*, in evaluating Johnson's claim that the special issues unconstitutionally constrained the jury's consideration of his youth, the Court understood the issue to be whether "the jury had a *meaningful* basis to consider the relevant mitigating qualities" of that evidence. 509 U.S. at 369 (emphasis added). Because "the signature qualities of youth are transient," the Court held that in Johnson's case, unlike in Penry's, there was "ample room" to take account of Johnson's youth in assessing his dangerousness in the future. 509 U.S. at 368. And, in *Penry II*, the Court emphatically reaffirmed *Penry I*'s holding that "'a sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances.'" 532 U.S. at 797 (quoting *Johnson v. Texas*, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting)).[3]

[2] Accepting Respondent's invitation to adopt a new standard under which "the issue is not whether [a defendant's mitigating evidence] had some relevance outside the special issues *but whether the evidence had some relevance within the special issues*," R.B. at 32, would be plainly inconsistent with *Penry I* because the Court acknowledged that Penry's mitigating evidence "was relevant" to the deliberateness special issue, 492 U.S. at 322, and nonetheless reversed Penry's death sentence.

[3] To the extent that any tension existed between *Penry I*'s insistence that jury instructions must unmistakably inform the jurors of their right to fully consider a defendant's mitigating evidence, on the one hand, and *Johnson*'s recognition that a State may reasonably regulate consideration of mitigating evidence on the other, *Penry II*'s explicit endorsement of *Penry I*'s holding that the jury must be allowed to give "full" consideration and "full" effect to mitigating circumstances confirms that cases

Notably, Respondent imports the "altogether prevented" language, not from a decision resolving the merits of a challenge to the former Texas scheme, but from *Saffle v. Parks*, 494 U.S. 484, 491 (1990), in which the Court rejected on nonretroactivity grounds a habeas challenge to an antisympathy instruction in an Oklahoma capital murder trial. In *Parks*, the jury had been explicitly directed to consider mitigating evidence and was afforded an unconstrained vehicle for giving it effect.[4] In comparing Parks's claim to Penry's, the Court contrasted the failure of the Texas special issue scheme to permit full consideration of mitigating evidence with the purported defect of the antisympathy instruction – that it undermined solicitous consideration of mitigating evidence that was otherwise within the jury's effective reach under the Oklahoma scheme. This was the context for the Court's observation that, while Penry's jury was "altogether prevented" from giving effect to his mitigating evidence, Parks's jury was expressly instructed to consider mitigating evidence.

Thus, the context of the discussion in *Parks* makes clear that the Court was not announcing a new test for *Penry* claims, nor suggesting that it was permissible for a state scheme to "somewhat" prevent consideration of relevant mitigating evidence. Indeed, elsewhere in the *Parks* opinion itself, the Court declared that the "State must

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like Mr. Tennard's, involving evidence of classically mitigating cognitive impairment, are squarely within the ambit of *Penry I*. *Penry II*, 532 U.S. at 797.

[4] The jury was instructed to "consider *all* of the mitigating circumstances, statutory or nonstatutory," offered by the defendant, as well as "*any* mitigating circumstances that it found from the evidence." *Parks*, 494 U.S. at 486-87 (emphasis added).

not cut off *full* and *fair* consideration of mitigating evidence." 494 U.S. at 493 (emphasis added). Moreover, the fact that *Parks*' "altogether prevented" language appears nowhere in the Court's two subsequent decisions addressing the merits of *Penry* claims – *Johnson* and *Penry II* – suggests that the Court's observation about the significant limitations of the former special issues scheme was not intended to raise the burden for those seeking relief from death sentences imposed under that defective scheme.

II. RESPONDENT'S COUNTER-INTUITIVE, POST HOC SPECULATION ABOUT HOW THE JURY MIGHT HAVE GIVEN EFFECT TO MR. TENNARD'S 67 IQ WITHIN THE SPECIAL ISSUE SCHEME DISTORTS THE ACTUAL EVIDENCE AND ARGUMENTS PRESENTED AT MR. TENNARD'S TRIAL.

Respondent endorses the CCA's contention that there was "ample room within [the future dangerousness inquiry] for the jury to give effect to any mitigating qualities of [Mr. Tennard's] low IQ evidence." JA 92.[5] On this account, the jury could have used the evidence of Mr. Tennard's 67 IQ to conclude based on "the circumstances of this offense and [Mr. Tennard's] prior felony rape conviction" that Mr. Tennard was "a 'follower' instead of a 'leader' since he participated in the commission of both crimes with others." JA 91. Respondent then surmises that the

[5] Respondent also repeats and embraces the CCA's unexplained assertion that Mr. Tennard's evidence could have supported a negative answer to the deliberateness special issue. R.B. at 30. But neither the CCA nor Respondent explains how that issue provided any better vehicle for considering Mr. Tennard's impairment than it provided for Penry's. Just as in *Penry I*, the jury might have thought that Mr. Tennard acted deliberately but did not deserve to die because of his cognitive impairment. In such a case, the special issue scheme did not meet constitutional standards, and the absence of a separate vehicle for considering Mr. Tennard's evidence of his 67 IQ requires relief under *Penry I*.

jury -- if it believed that Mr. Tennard's 67 IQ supported the notion that he was a follower -- "could have given mitigating effect to Mr. Tennard's IQ by determining that there was a reasonable doubt whether he would be a future danger once incarcerated in the structured environment of prison and removed from his peer group." R.B. at 31.

At Mr. Tennard's trial, however, no one ever suggested to the *jury* that it might give effect to the mitigating evidence of Mr. Tennard's substantial disability in this convoluted fashion. Indeed, defense counsel never argued that Mr. Tennard's cognitive impairment made him less dangerous. Counsel's evident purpose in offering testimony to establish Mr. Tennard's 67 IQ and the guilelessness Mr. Tennard showed toward his prior victim Valerie Soto was to demonstrate his impaired judgment. The commonsense appeal of this evidence went not to Mr. Tennard's future dangerousness (it was aggravating in this regard) but to his limited capacity to resist, and understand the consequences of, criminal conduct. Counsel did challenge, on the basis of her own prior statement, Ms. Soto's characterization of Mr. Tennard as the "leader" of the group that assaulted her. SF 29:43-44; JA 22-23. However, counsel never asserted that Mr. Tennard acted as a "follower" or under the duress or domination of his codefendants in committing that assault. Perhaps more importantly, Mr. Tennard did not and could not claim that "peer pressure" caused him to take part in the offense for which he was sentenced to death. Indeed, Respondent recounts, as support for the conclusion that Mr. Tennard does not have

mental retardation, the fact that "Tennard gave directions to Bogany and Groom during the murder." R.B. at 33 (quoting JA 129).

Respondent invokes *Johnson* to justify the CCA's tortured chain of inferences by which the jury might conceivably have given some indirect mitigating effect to Mr. Tennard's 67 IQ. But the "relevant mitigating qualities" of the evidence at issue in *Johnson* – the transient characteristics of immaturity – were directly and unambiguously relevant in a mitigating way to whether Johnson posed a continuing threat to society. *Johnson*, 509 U.S. at 368-69. The relevant mitigating qualities of Mr. Tennard's cognitive impairment, by contrast, are indistinguishable in kind from those of Penry's mental retardation and experience of abuse as a child. As a consequence, they bore no such straightforward and sensible mitigating relevance to the "continuing threat" issue, and, in the absence of additional instructions, this Court can have no confidence that they lay within the jury's "effective reach" in imposing sentence.

The specific inference Respondent now says the jury could have drawn – that a person whose 67 IQ makes him "a follower" would pose no risk of future criminal behavior once he is "removed from his peer group" and placed in the "structured environment of a prison" – is objectively unreasonable for two additional reasons. First, no reasonable juror would share that speculation. Jurors know that one's "peer group" in prison will include convicts likely to take advantage of a cognitively disabled "follower" to promote their own criminal misbehavior. More importantly,

this argument powerfully reveals how far Respondent is willing to depart, in trying to salvage Mr. Tennard's death sentence, from the straightforward "moral culpability" inquiry at the heart of capital sentencing. A capital defendant might be a "follower" for any number of reasons unrelated to cognitive impairment (emotional dependency, blood kinship, gang loyalty, drug addiction, etc.) -- but those reasons might have very different implications for his personal culpability. It is utterly inconsistent with this Court's individualized sentencing decisions to permit a State to so limit the mitigating relevance of a capital defendant's 67 IQ that it can bear no more mitigating significance in the jury's ultimate calculus of moral desert than, *e.g.*, another capital defendant's gang membership. *Cf. Lockett v. Ohio*, 438 U.S. 586, 593, 608 (1978) (Ohio scheme unconstitutional because facts universally understood to have mitigating relevance were not permitted *as such* to affect the sentencing decision, but could be considered only for their relevance to other inquiries, including whether defendant acted "under duress, coercion, or strong provocation").

Finally, both sides' closing arguments demonstrate the logical constraints imposed by the unadorned special issues. Rather than try to convince the jurors that they could sensibly answer the "future dangerousness" issue "no" by following some lengthy chain of speculative inferences, defense counsel simply argued that "under Texas law" they had "a right" to "take all the things into consideration that [he had] talked to [them] about," including Mr. Tennard's "67 IQ" and their own "attitude[s]

toward the death penalty."[6] SF 29:94; JA 57-58. At the same time, the prosecution maintained that Mr. Tennard's evidence of his 67 IQ was irrelevant to the special issues. Regarding the deliberateness special issue, the prosecution suggested that considering Mr. Tennard's impairment was tantamount to nullification and that his 67 IQ was not a "fact" relevant to that question:

> I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. But I ask you to make your decision based on the facts. (SF 29:72; JA 41.)

The prosecution likewise insisted that Mr. Tennard's low intelligence should not be considered via the dangerousness special issue:

> But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, [sic] the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question. (SF 29:98; JA 60.)

Respondent quotes the CCA's assertion that "both sides argued [the low IQ's] significance for punishment." R.B. at 34. It is much fairer to say that after defense counsel put evidence of Mr. Tennard's low IQ before the jury and essentially begged the jury to think about that evidence notwithstanding the narrow compass of the special issues, the prosecution insisted that it not be considered at all.[7] The CCA's defense of Mr. Tennard's death sentence thus rests on a strained interpretation of the

[6]In this respect, defense counsel's argument functioned much like the nullification instruction that this Court invalidated in *Penry II*.

evidence and instructions that no party to the trial proceedings articulated, giving this Court no confidence that the jury would have arrived at that understanding on its own. On this record, there is certainly a "reasonable likelihood" that the jury felt compelled to ignore Mr. Tennard's evidence. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (proper test is "whether there is a reasonable likelihood" that the jury was constrained in considering constitutionally relevant evidence).

III. THE POST-TRIAL JUDICIAL FACT-FINDING THAT MR. TENNARD DOES NOT MEET THE AAMR DIAGNOSTIC CRITERIA FOR MENTAL RETARDATION IS IRRELEVANT TO AN ASSESSMENT OF THE CONSTITUTIONAL ADEQUACY OF THE PUNISHMENT PHASE JURY INSTRUCTIONS.

Much of Respondent's brief – like much of the CCA's opinion denying relief – disputes whether Mr. Tennard has mental retardation. *See, e.g.*, R.B. 27 (contrasting cases involving "legitimate evidence of mental retardation"). Indeed, Respondent insists that a state postconviction judicial "fact-finding" that Mr. Tennard does not have mental retardation is entitled to deference and is fatal to Mr. Tennard's *Penry* claim. R.B. 32. This argument succeeds only if this Court agrees that a permanent, substantial mental impairment short of mental retardation can somehow be given meaningful effect via the deliberateness and dangerousness special issues. Moreover, relying on post-conviction judicial fact-findings to assess the adequacy of a jury instruction at trial represents a bizarre and unprecedented departure from this Court's cases elaborating and enforcing the individualization

[7] Despite asserting that "both sides argued its significance for punishment," Respondent's entire brief omits any quotation of or citation to the prosecution's actual argument concerning how Mr. Tennard's

requirement.

Mr. Tennard did not raise in the proceedings below an *Atkins* claim alleging that he is ineligible for the death penalty based on mental retardation. Throughout this litigation, the central question before the courts has been whether the former Texas special issue scheme, in the context of Mr. Tennard's trial, provided a constitutionally adequate vehicle for the jury to consider the evidence of his very low IQ. But instead of focusing on whether that evidence (like Penry's evidence of mental retardation and abuse) had mitigating significance beyond the special issues, the CCA and Respondent have asked only whether Mr. Tennard's evidence was identical to Penry's. This approach mistakes the facts of *Penry* for its underlying principle and cannot excuse the CCA's failure to determine whether the jury's verdict represented a reasoned moral response in light of Mr. Tennard's evidence.

As demonstrated above, Mr. Tennard's evidence of mental impairment could be given no more meaningful consideration via the special issues than Penry's evidence that he met the clinical definition of "mental retardation." The deliberateness question as submitted to Mr. Tennard's jury did not appear to ask anything other than whether he contemplated that death would occur.[8] Indeed, the prosecution encouraged the jury to understand the issue as precluding a broader assessment of

67 IQ might connect to the special issues.

[8] As indicated in Petitioner's initial brief, the deliberateness issue was in fact intended to perform this modest function in accomplice liability cases. *See* Brief of Petitioner ("P.B.") at 15 n.7.

Mr. Tennard's moral culpability.[9] Nor could Mr. Tennard's counsel have plausibly claimed that Mr. Tennard's very low IQ was a "transient" condition supporting a negative answer to the dangerousness special issue. Just as in *Penry I*, Mr. Tennard's evidence of mental impairment was *aggravating* rather than *mitigating* under the second special issue of the former Texas scheme, and the prosecution repeatedly warned the jury not to venture beyond the scheme's narrow inquiry. In short, Mr. Tennard's evidence faced the exact same obstacles as Penry's, and the fact that Penry's impairment was labeled as mental retardation has no bearing on the resolution of Mr. Tennard's claim.

More broadly, the CCA's reliance on a postconviction fact-finding regarding the extent of Mr. Tennard's impairment represents a striking departure from this Court's cases.[10] The Court has long regarded the weight of evidence offered in mitigation as exclusively a matter for the sentencer and has invalidated state-created obstacles to the consideration of such evidence. *See, e.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990) ("the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could

[9]As described above, the prosecution recognized that the deliberateness special issue was not an appropriate vehicle for considering Mr. Tennard's 67 IQ and implied that such consideration would be tantamount to nullification. *See supra* 9-10. Far from suggesting that the deliberateness question involved a comprehensive assessment of Mr. Tennard's personal moral culpability, the prosecution asserted that the testimony of the coroner and the facts contained in the autopsy report conclusively established deliberateness: "[T]he testimony of Dr. Espinola and the autopsy that he performed [] proves beyond any doubt that this was a deliberate act." SF 29:74; JA 43.

[10] Indeed, the jury at Penry's recent retrial found him not to have mental retardation for *Atkins* purposes. *See* Associated Press, "Jury Gives Penry Death" (July 3, 2002). By Respondent's logic, the sentencing instructions in *Penry I* and *Penry II* should now be regarded as constitutionally sufficient in light of this "new evidence" regarding the severity of Penry's impairment. On this view, *Penry* is not

reasonably find that it warrants a sentence less than death"). Given this Court's strong protection of a sentencer's right to assess the moral significance of such evidence, it was objectively unreasonable for the CCA to discount the constitutional significance of Mr. Tennard's evidence of mental impairment based on post-conviction judicial fact-findings that Mr. Tennard does not have mental retardation.[11]

In resolving dozens of cases resolving individualization claims, this Court has never looked to post-trial fact-findings to determine whether the sentencer was afforded an adequate opportunity to consider and give effect to mitigating evidence.[12] This Court has always focused on the nature of the evidence offered by the defendant, the language of the instructions provided to the jury, and the arguments advanced by counsel respecting the appropriate application of those instructions. Here, these traditional considerations all point to the inadequacy of the former Texas scheme in the context of Mr. Tennard's trial. The CCA's and Respondent's attempt to salvage this death sentence based on post-trial judicial assessments of his mitigating evidence finds no support in this Court's decisions. And, as argued above, even if this Court credited "the state court's presumptively

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simply limited to its facts, but unavailable to Penry himself.

[11] Notably, the CCA also suggested that Mr. Tennard should not prevail under *Penry I* even if his impairment constituted mental retardation. JA 88 ("Assuming the evidence of applicant's low IQ somehow falls with *Penry I*'s definition of mental retardation, we still hold applicant is not entitled to relief under *Penry*.")

[12] Ironically, Respondent insists on consulting post-conviction findings in adjudicating Mr. Tennard's claim while at the same time refusing to analyze Mr. Smith's claim (in the companion case) in light of the recent acknowledgment by the State that Mr. Smith has mental retardation. Although Respondent informs this Court that the State's psychologist has found Mr. Smith to have mental retardation, R.B. at 13 n.8, Respondent repeatedly describes Mr. Smith's impairment as something other than mental retardation. *See, e.g.,* R.B. at 14 ("low intelligence"); *id.* at 37 ("low IQ"); *id.* at 38 ("low IQ"). We

correct fact findings," R.B. at 32, the result would remain the same because Mr. Tennard's permanent mental impairment was no different from Penry's with respect to the jury's ability to give it full effect within the special issues.

IV. THE SEVERITY AND NEXUS TESTS DEFENDED BY RESPONDENT UNDERMINE RATHER THAN ADVANCE THE RELIABILITY OF CAPITAL SENTENCING AND ARE OBJECTIVELY UNREASONABLE IN LIGHT OF THIS COURT'S DECISIONS.

The decision of the Court of Appeals below rested on two core premises: (1) that Mr. Tennard's cognitive disability, as reflected by his IQ of 67, was constitutionally irrelevant to his appropriate punishment because it was insufficiently severe; and (2) that counsel failed to offer specific testimony causally linking Mr. Tennard's disability to his crime. 284 F.3d 591, 596 (5th Cir. 2002) (IQ of 67 "does not constitute a uniquely severe condition"); *id.* (defense "made no showing at trial that the criminal act was attributable to [this] condition"). Respondent defends these propositions only indirectly, arguing that decisions of the CCA resting on the same assumptions represent a "reasonable" interpretation of *Penry*.[13] For the reasons set out in detail in our opening brief, such a reading is so divorced from the principles underlying *Lockett*, *Eddings*, and both *Penry* decisions as to be objectively

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believe that the appropriate, consistent position in both cases, under this Court's uniform practice, is to evaluate the petitioners' respective *Penry* claims based solely on the evidence presented at trial.

[13] As Respondent describes it, under the CCA's test a defendant's mitigating evidence does not entitle him to additional instructions beyond the former special issues unless it reflects a condition that is "involuntary" (R.B. at 22-23), "long-term [or] permanent in nature" (R.B. at 23-24), at least as severely disabling as the evidence at issue in *Penry I* (*i.e.*, a combination of clinically diagnosed mental retardation and long-term severe child abuse) (R.B. at 24-25), and caused him to commit the crime (R.B. at 25-26). These same elaborate features are central to the Fifth Circuit's interpretation of *Penry I* – and absent from this Court's own cases. P.B. at 11, 24-48.

unreasonable. *See* P.B. 27-47. We will confine our reply to the most serious of Respondent's misstatements of the governing law.

Respondent defends the "nexus" requirement on the basis of a purported national consensus. According to Respondent, it is "the viewpoint of society as a whole" that proffered mitigating conditions do not "tend to excuse" criminal offenses unless the defendant demonstrates that they "caused" him to commit the crime. R.B. at 26-27 (citing and quoting *Richardson v. State*, 879 S.W.2d 874, 884-885 (Tex. Crim. App. 1993)). Moreover, in the CCA's view, "without such a requirement [of causation], 'a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which death is imposed from [those] in which it is not.'" R.B. at 27 (quoting *id.* at 884 n.11).

This argument errs, first, because it is impossible to square with *Penry I*. Justice O'Connor did observe for the *Penry I* Court 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 (citation omitted). We have explained, however, why this passage cannot be read to impose a requirement that a defendant establish a definitive causal link between his mitigating evidence and his crime. *See* P.B. at 37-41. Moreover, real-world mental health experts take it as a given that no disability – *even mental retardation* – can be shown to have the sort of one-to-one correspondence with

individual acts of human behavior necessary to satisfy the "nexus" requirement as articulated in the opinions Respondent defends. *See, e.g.*, Brief of the American Association on Mental Retardation, et al., in Support of Petitioners, at 11-15.

Second, the assertion that "society as a whole" shares such a mechanistic conception of mitigation is belied by the legislative judgment reflected in statutes providing for plenary consideration of circumstances urged in mitigation of sentence, without any reference to whether those conditions are shown to have been causally linked with the crime. *See, e.g.*, P.B. at 45 n.26 (citing statutory provisions). Such enactments – like the post-*Penry I* Texas capital sentencing scheme which places no "nexus" limitation on the jury's consideration of mitigating evidence – surely reflect more accurately what "society as a whole" regards as mitigating than does Respondent's insupported assertion. Indeed, Respondent can point to no statutory scheme embodying the purportedly "national" view that evidence lacking a deterministic causal link to the crime may be dismissed as irrelevant.

In addition, in enforcing their "nexus" requirement, the Fifth Circuit and the CCA have focused exclusively on what the defendant has "shown" as opposed to what the jury reasonably could have *inferred* from the evidence. *See, e.g.*, *Richardson*, 879 S.W.2d at 884-885 (blaming the defendant for having "made no showing" that a nexus existed; stating that its conclusion might be different if he had "presented evidence" establishing "that his capital crime was caused in part by [his] damaged personality"); *see also Robertson v. Cockrell*, 325 F.3d 243, 272 (5th Cir.

2003) (en banc) (Stewart, J., dissenting) ("nexus" and "severity" requirements "prevent[] the jury from determining whether [the defendant's] childhood abuse is mitigating and whether to give it any weight").[14] Imposing such a condition on the consideration of mitigating evidence is impossible to reconcile with this Court's cases which rightly assume that properly instructed jurors can draw such inferences where they are consistent with common sense and shared human experience.

Ultimately, Respondent claims that this Court must confine the reach of *Penry I* by adopting the restrictions imposed by the Fifth Circuit and the CCA -- including both the "unique severity" and "nexus" requirements -- because "without [such] requirement[s], 'a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which death is imposed from the cases in which it is not.'" R.B. at 27 (quoting *Richardson*, 879 S.W.2d at 884 n.11). According to Respondent, affording Mr. Tennard's jury a direct and unambiguous vehicle for expressing the view that he should be spared the death penalty because he has an IQ of 67 would "allow[] the fate of [defendants] to turn on the vagaries of particular jurors' emotional sensitivities," in violation of the Eighth Amendment requirement

[14] Respondent argues that an "inference of causation" will show a sufficient "nexus," but the sheer number and variety of circumstances which the Fifth Circuit has dismissed as having no arguable nexus with a defendant's criminal behavior belie that contention. *See, e.g.*, *Nelson v. Cockrell*, 77 Fed. Appx. 209, 213 (5th Cir. 2003) (brain damage); *Robertson v. Cockrell*, 325 F.3d 243, 253 (5th Cir. 2003) (en banc) (child abuse); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) (very low I.Q.); *Davis v. Scott*, 51 F.3d 457, 461-462 (5th Cir. 1995) (paranoid schizophrenia, violent paraphilia, and child abuse); *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994) (mental illness); *Lackey v. Scott*, 28 F.3d 486, 489-490 (5th Cir. 1994) (child abuse and very low I.Q.); *Madden v. Collins*, 18 F.3d 304, 307-308 (5th Cir. 1994) (avoidant personality disorder, organic brain impairment, and child abuse);

that capital sentencing be "reliable, accurate, and nonarbitrary." R.B. at 27 (quoting *Parks*, 494 U.S. at 493-94). But post hoc judicial evaluations of mitigating evidence on a cold record are unlikely to result in more "reliable" or "accurate" sentences. Moreover, adopting Respondent's view that the "severity" and "nexus" constraints are indispensable to nonarbitrary sentencing would render unconstitutional all existing schemes, because they impose no such limitations.[15]

V. *TEAGUE* DOES NOT PRECLUDE RELIEF.

Contrary to Respondent's assertions, *Teague v. Lane*, 489 U.S. 288 (1989), is no bar to relief. Mr. Tennard seeks only the application of a fair reading of *Penry I*, decided before his conviction became final. He is not asking this Court to announce any "new rule." *See Penry I*, 492 U.S. at 319 (result Penry sought was "dictated by *Eddings* and *Lockett*"). Respondent's mistaken reliance on *Teague* arises from his failure to appreciate how *Atkins v. Virginia*, 536 U.S. 304 (2002), confirms the correct resolution of Mr. Tennard's *Penry I* claim.

Atkins recognizes a firm national consensus that capital defendants with mental retardation are "categorically less culpable" than other offenders, 536 U.S. at 315-16, and so may not be sentenced to death, no matter how terrible their crimes. If a capital defendant suffers from a severe cognitive impairment that falls just short of

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Barnard v. Collins, 958 F.2d 634, 638 (5th Cir. 1992) (head trauma and troubled childhood).

[15] *Penry II*'s endorsement of the current, post-*Penry I* Texas sentencing scheme forecloses this conclusion. 532 U.S. at 803 (describing Tex. Code Crim. Proc. Ann. art. 37.071(2)(e)(1) (Vernon Supp. 2001)), which directs the jury to consider, without any nexus or severity limitation, whether "there is a sufficient mitigating circumstance … to warrant [a] sentence of life imprisonment" as a "clearly drafted catchall instruction on mitigating evidence [that would have] complied with *Penry I*").

satisfying the clinical criteria for mental retardation, he is still eligible for the death penalty. But it flies in the face of reason to conclude, as have the Fifth Circuit and the CCA, that his impairment is therefore constitutionally irrelevant to whether a death sentence ought to be imposed because it is insufficiently severe. Falling just outside the scope of *Atkins* necessarily entails the presence of constitutionally relevant mitigating evidence.

Thus understood, *Atkins* does not govern this case directly but simply illuminates why the CCA's rejection of Mr. Tennard's *Penry I* claim was objectively unreasonable. A cognitive impairment so severe that it nearly exempts a defendant from capital punishment altogether (like Mr. Tennard's 67 IQ) cannot reasonably be treated as constitutionally irrelevant to the jury's assessment of his culpability. This was the evident implication when this Court directed the Fifth Circuit to reconsider its rejection of Mr. Tennard's *Penry* claim after *Atkins*. *See Tennard v. Cockrell*, 537 U.S. 802 (2002) (mem.). *Teague* cannot excuse the Fifth Circuit's failure to recognize the significance of *Atkins* in this context, nor save the CCA's misapplication of *Penry I* in Mr. Tennard's case.

CONCLUSION

This Court should grant a new sentencing hearing.[16]

Respectfully submitted,

[16] The interests of judicial economy support resolving the merits of Mr. Tennard's *Penry* claim rather than simply reversing the Court of Appeals' denial of a certificate of appealability (COA). *See Penry II*, 532 U.S. at 796-804 (addressing merits of Eighth Amendment claim after Court of Appeals denied COA).

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