No. 02-10038

In The Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUG DRETKE, 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

I. Whether the United States Court of Appeals for the Fifth Circuit correctly denied a certificate of appealability to review the district court's holding that, pursuant to 28 U.S.C. § 2254(d)(1), Tennard failed to prove that the state court's denial of his Eighth Amendment claim based on *Penry v. Lynaugh,* 492 U.S. 302 (1989), was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent.

II. Whether this Court's intervening decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), undermines the propriety of the Fifth Circuit's denial of a certificate of appealability to review the district court's application of 28 U.S.C. § 2254(d) & (e) to the state court's rejection of Tennard's Eighth Amendment jury instruction claim.

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BRIEF OF RESPONDENT

This Court should affirm the lower court's decision denying a certificate of appealability ("COA") because Petitioner Robert James Tennard ("Tennard")[1] fails to show that jurists would debate the reasonableness of the state court's rejection of his Eighth Amendment claim. The Court of Criminal Appeals of Texas identified the correct United States Supreme Court authority and reasonably applied it to Tennard's claim under *Penry v. Lynaugh,* 492 U.S. 302 (1989) ("*Penry I*"), when it determined that Tennard's jury was not altogether prevented from considering his IQ score and truthfully answering the punishment phase special issues in such a way that Tennard would receive a sentence of life imprisonment. Moreover, this Court's intervening decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), is irrelevant to the instant controversy because it was not clearly established federal law at the time the state court decided Tennard's *Penry I* claim. Similarly, any application of the substantive rule of *Atkins* to the procedural concept of *Penry I* would require the retroactive employment of a new rule of law in violation of *Teague v. Lane,* 489 U.S. 288 (1989). As a result, habeas corpus relief is not available to Tennard.

[1] Respondent Doug Dretke will be referred to herein as "the Director." "JA" refers to the joint appendix, followed by page numbers. "PA" refers to the appendices to Tennard's petition for writ of certiorari, followed by a tab number and page numbers.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals accurately summarized the evidence of Tennard's guilt in its opinion on direct appeal:

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marihuana with the eventual victims, Larry Neblett and Chester Smith, for about half an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand.[2] [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims. Later that evening, the three men arrived at the home of Fred Stewart and Ruby Montgomery. [Tennard] enlisted Stewart to help sell the proceeds of the

[2] In its opinion on state habeas review, the Court of Criminal Appeals noted that "[Tennard] stabbed [Neblett] fifteen times with a knife." JA:80.

> robbery.[3] Stewart testified that [Tennard] gave him a couple of gasoline credit cards which he used to purchase gasoline. Stewart was arrested for the unauthorized use of the credit cards, and this ultimately resulted in [Tennard]'s arrest.

Tennard v. State, 802 S.W.2d 678, 679 (Tex. Crim. App. 1990). On October 6, 1986, Tennard was convicted of murder during the course of a robbery, a capital offense. *Id.*; Tr 165.[4]

II. Facts Relating to Punishment

The Court of Criminal Appeals also summarized the evidence supporting the jury's sentencing verdict in its state habeas opinion:

> The evidence from the punishment hearing shows [Tennard] had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified [Tennard] and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, [Tennard], who was displaying about a foot-and-a-half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."

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[3] The state court also found that "[Tennard] played a dominant role in disposing of the victims' stolen property." JA:80.

[4] "Tr" refers to the transcript of pleadings and documents filed with the court during trial, followed by page numbers. "SF" refers to the statement of facts – the transcribed trial proceedings – preceded by volume number and followed by page numbers.

The victim testified [Tennard] and his friends took her to an abandoned apartment at some government project where [Tennard] forced her to engage in oral, vaginal and anal sex with him. After that, [Tennard]'s two friends took turns sexually assaulting her.

[Tennard] and his friends then took the victim to another house where [Tennard] began using drugs and discussing "pimping out" the victim.[5] She asked [Tennard] if she could go to the bathroom to take a bath, which he allowed her to do:

> Q. Now you told them that you wanted to take a bath?
>
> A. Yes, I did.
>
> Q. Did [Tennard] say anything?
>
> A. He told me I wasn't going to try to run away, was I.
>
> Q. What did you tell him?
>
> A. I told him, "No, baby. I like you. I wouldn't do that."

After [Tennard] let the victim go to the bathroom, she escaped through a window, and [Tennard] was arrested later that day.[6] The victim testified

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[5] The victim testified that Tennard ingested pills and marijuana until he was "high." JA:15, 24.

[6] After her escape, the victim summoned the police and identified the house where she left Tennard. JA:17-18; 29 SF 48-50. At that moment, Tennard was observed leaving in a car which he subsequently abandoned and was apprehended minutes later on foot. JA:18; 29 SF 51-52, 54.

[Tennard] appeared to be the leader during her ordeal. [Tennard] impeached the victim's testimony with a prior statement she made from which the jury could have inferred one of [Tennard]'s friends was the leader.

[Tennard]'s parole officer testified that a Texas Department of Correction's (TDC) record from [Tennard]'s incarceration for the rape conviction indicated he had a 67 IQ.

> Q. . . . And did you in fact bring a documentation of what [Tennard's] intelligence quotient is according to the test from the penitentiary?
>
> A. Yes, I did.
>
> Q. And what was the result of the test?
>
> A. It's a 67, sir.

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before [Tennard] committed this offense, and there is a notation on the record indicating [Tennard] had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

> Q. Mr. Kinard, this doesn't purport to be any report by any particular psychologist or anything, does it?
>
> A. No, sir.
>
> Q. It's basically just sort of, as its says, social and criminal history of [Tennard]?
>
> A. Right, sir.

> Q. And it says, there's basically a line for IQ, and it says 67?
>
> A. That's correct.
>
> Q. And it has no indication of who may have given those tests or under what conditions?
>
> A. No sir, it doesn't.

This is *all* the evidence presented at [Tennard]'s 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. [Tennard] also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

During closing arguments at the punishment phase, the prosecutor argued the facts of the crime itself showed [Tennard]'s "special dedication to violence."

> Look at the facts of the crime itself. You know pulling a pistol or pulling a trigger on a pistol is a fairly easy way to kill someone. Not easy, but it's a detached way. It takes a special dedication to violence to plunge a knife into a human body sixteen times.

[Tennard] referred to the IQ evidence twice during closing arguments at punishment. He referred to the evidence in responding to portions of the rape victim's testimony:

> . . . the information that they gave is that [Tennard] has got a 67 IQ. The same guy that told this poor unfortunate woman that was trying to work

> that day, "Well, if I let you in there, will you leave?" And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient before us that is that low.

And, he asked the jury to take into account the IQ evidence in answering the special issues:[7]

> . . . none of you are suffering from a 67 IQ. So you're going to have to try to judge this man and decide what his punishment would be as his peers.

JA:81-84 (emphasis in original, internal quotations omitted).

At the conclusion of the punishment phase on October 7, 1986, Tennard was sentenced to death. JA:69-71.

III. Direct Appeal and Postconviction Proceedings in State Court

Tennard's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari review. *Tennard v. State,* 802 S.W.2d at 686, *cert. denied,* 501 U.S.

[7] Two special issues concerning deliberateness and future dangerousness were submitted to the jury. JA:66-70; *see also* TEX. CODE CRIM. PROC. art. 37.071 § 2(b) (West 1984). A third special issue concerning provocation was not raised by the evidence and, thus, was not submitted. JA:66-70.

1259 (1991). On April 7, 1992, Tennard filed an application for habeas relief in state court asserting that the jury was unable to give mitigating effect to his IQ of 67 in violation of *Penry I*. SHTr 6-11.[8] The trial court[9] considered Tennard's claim and found that, although Tennard's lone IQ score was presented to the jury, "no evidence was presented to the jury regarding what an 'IQ' is or what a 'normal' IQ is." JA:73. The court also found that "no evidence was presented as to what an IQ of 67 meant to [Tennard]," or "when or where the IQ test was administered to [Tennard] or if more than one IQ test was administered." JA:73. Further, the court noted that there was no evidence of the score's reliability and "no scientific or medical explanation of [Tennard]'s IQ." JA:73.

Additionally, the court found that Tennard had worked at a temporary employment agency, effectively used the city bus system, possessed "a basic understanding of business and the value of items" and "a significant ability to reason," was "capable of accepting responsibility," and filed seven *pro se* motions prior to trial which "illustrate[d his] cognitive ability." JA:74-75. The court also explained that Tennard did not demonstrate an inability "to learn from his mistakes" or that he was brain damaged. JA:75-76.

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[8] "SHTr" refers to the state habeas transcript – the transcript of pleadings and documents filed with the court during state habeas proceedings – followed by page numbers.

[9] The state district judge who adjudicated Tennard's *Penry I* claim was the same judge who presided over Tennard's capital murder trial. *Cf.* JA:68, 78.

The Court of Criminal Appeals then heard oral argument and held that Tennard did not meet the requirements for a diagnosis of mental retardation as defined by the American Association on Mental Retardation ("AAMR") or the relevant Texas law, TEX. HEALTH & SAFETY CODE § 591.003. JA:85-88. The state court reasoned that, "[b]ecause of their unreliability in determining mental retardation, IQ scores should not be used as a 'unitary measure of mental retardation.'" JA:87. Under the commonly accepted three-part definition, *i.e.,* "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period," Tennard's "low IQ score, standing alone, does not meet this definition." JA:85-88. The court concluded that there was "no evidence in this record that [Tennard] is mentally retarded." JA:88.[10]

[10] The state habeas opinion was a plurality opinion in which four of the nine Court of Criminal Appeals judges joined. However, six judges in total reached the same conclusion on the issue of mental retardation. As Judge Meyers explained:

> The evidence presented at [Tennard]'s trial did not show that [he] was mentally retarded as the [AAMR] or the [American Psychiatric Association] has defined it. There was no testimony regarding when [Tennard]'s IQ was measured or what tests were used to measure it. There was no testimony as to the range of IQ or what is considered mentally retarded. There was no testimony or notation on the parole record that [Tennard] was mentally retarded. And, the record is devoid of any evidence indicating that [Tennard]'s adaptive functioning was that of a mentally retarded individual.

JA:101-02 (Meyers, J., concurring, joined by Price, J.).

The state court then applied *Penry I* in an effort to determine whether Tennard's jury was precluded from considering and giving effect to his IQ evidence. JA:88-92. The court first cited the relevant Supreme Court jurisprudence:

> The issue in cases like this is "whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence." *See Johnson* [*v. Texas*], 509 U.S. [350,] 367-71 [(1993)]. We should evaluate the instructions with a "commonsense understanding of the instructions in the light of all that has taken place at trial." *See* [*id.*] at 367-69 [ ]. This involves a case-by-case approach requiring a consideration of the specific facts of each case. And, this is the approach the Supreme Court followed in *Penry* [*I*]. [ ] 492 U.S. at 307-14, 320-330 [ ]. There are no bright-line rules in cases like this.

JA:89 (internal quotations omitted).

The state court noted that, in *Penry I,* the evidence suggested that Penry was unable to learn from his mistakes, to control his impulses, or to evaluate the consequences of his conduct. JA:89-90 (citing *Johnson,* 509 U.S. at 363-65, *Graham v. Collins,* 506 U.S. 461, 473-75 (1993), and *Penry I,* 492 U.S. at 307-09, 320-30). As a result, Penry's mitigating evidence was relevant only as an aggravating factor in answering the special issue on future dangerousness. JA:90 (citing *Johnson,* 509 U.S. at 363-65, and *Penry I,* 492 U.S. at 322-24). The Court of Criminal Appeals then distinguished the instant case and held that Tennard's 67 IQ was not solely aggravating. JA:91. Rather, the court explained that the jury could have determined that Tennard's conduct was less than deliberate as result

of his IQ, or it could have found that Tennard was a "follower" rather than a "leader" during his criminal activities, or that he acted under duress or domination of his co-defendants, suggesting he would not be dangerous in a structured prison environment. JA:91. On December 18, 1997, the court denied habeas corpus relief and, thereafter, this Court declined to grant a writ of certiorari. JA:92; *Ex parte Tennard,* 960 S.W.2d 57, 63 (Tex. Crim. App. 1997), *cert. denied,* 524 U.S. 956 (1998).

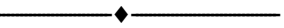
IV. Federal Habeas Proceedings

Tennard raised the same *Penry I* claim in his federal habeas petition, filed on December 18, 1998. JA:1. Applying the deferential scheme contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court concluded that the state trial court's factual findings concerning Tennard's lack of mental retardation were "fully supported by the evidence." JA:124, 128-29. The district court also held that the state court's decision applying *Penry I* was "consistent with the law." JA:129-30. As a result, the district court granted summary judgment in favor of the Director and denied habeas relief on July 25, 2000. JA:1-2, 132; *Tennard v. Johnson,* No. H-98-4238 (S.D. Tex. 2000) (unpublished opinion). The court also denied a COA. JA:2-3.

Tennard subsequently requested a COA in the Fifth Circuit regarding his *Penry I* claim. JA:3. On March 1, 2002, the court of appeals declined to issue a COA. JA:3; PA2:5; *Tennard v. Cockrell,* 284 F.3d 591, 597 (5th Cir. 2002). The lower court explained that, "although defense counsel presented evidence of Tennard's low IQ, he did not argue that Tennard was mentally retarded." PA2:4. Thus,

Tennard failed to rebut the state court's presumptively correct finding that there was no evidence of mental retardation. PA2:4-5. The court below also held that, under circuit precedent, Tennard's IQ score was not beyond the effective reach of the jury in answering the special issues. PA2:5 (citing *Boyd v. Johnson,* 167 F.3d 907, 912 (5th Cir. 1999), *Harris v. Johnson,* 81 F.3d 535, 539 & n.11 (5th Cir. 1996), *Lackey v. Scott,* 28 F.3d 486, 489-90 (5th Cir. 1994), and *Andrews v. Collins,* 21 F.3d 612, 629-30 (5th Cir. 1994)). The court of appeals denied Tennard's petition for rehearing *en banc*. JA:4.

This Court then granted Tennard's petition for writ of certiorari, vacated the Fifth Circuit's opinion denying a COA, and remanded "for further consideration in light of *Atkins v. Virginia*." *Tennard v. Cockrell,* 537 U.S. 802 (2002). On remand, the lower court reinstated its prior opinion on January 3, 2003, declining to address any claim based on *Atkins* because Tennard never before argued that the Eighth Amendment prohibited his execution on the basis of his putative mental retardation. JA:4; PA1:1; *Tennard v. Cockrell,* 317 F.3d 476, 477 (5th Cir. 2003). This Court again granted a writ of certiorari on October 14, 2003. *Tennard v. Dretke,* 124 S. Ct. 383 (2003).



SUMMARY OF THE ARGUMENT

The Fifth Circuit properly denied a COA concerning Tennard's *Penry I* claim because it is not debatable that the Court of Criminal Appeals reasonably applied *Penry I* and its progeny in determining that his jury was not altogether prevented from considering his IQ score and truthfully answering the punishment phase special issues

in such a way that Tennard would receive a sentence of life imprisonment. Indeed, the state court correctly engaged in the kind of case-by-case analysis of the evidence dictated by *Penry I* and required under its own extensive *Penry I* jurisprudence. The court first determined the mitigating impact of the IQ score presented during Tennard's punishment trial, then ascertained whether the deliberateness and future dangerousness special issues provided the jury with a vehicle to give that evidence *some* mitigating effect. In this case the IQ score had meaningful relevance to both special issues because Tennard argued to the jury that he was merely a follower and committed his crimes under the domination of his co-defendants. The fact that Tennard might be able to identify additional mitigating relevance outside the scope of the special issues is immaterial to the instant *Penry I* analysis, and does not undermine the reasonableness of the state court's denial of relief.

Finally, the Court's recent opinion in *Atkins* is immaterial to Tennard's case because it was not clearly established federal law when the Court of Criminal Appeals considered Tennard's *Penry I* claim. Consequently, it may not be considered in assessing the reasonableness of the state court's decision under 28 U.S.C. § 2254(d)(1). Likewise, any extension of the substantive rule of *Atkins* to a procedural *Penry I* claim would necessitate the retroactive application of a new rule of law in violation of *Teague*. Because Tennard fails to establish that any exception to *Teague* applies, habeas corpus relief is not available and the Fifth Circuit's denial of COA must be affirmed.

ARGUMENT

I. Standard of Review

Tennard's right to appeal is governed by the COA requirement of 28 U.S.C. § 2253(c). *Slack v. McDaniel,* 529 U.S. 473, 478 (2000). To satisfy this requirement, Tennard is obligated to make a substantial showing of the denial of a constitutional right, *i.e.,* "reasonable jurists could debate whether (or, for that matter, agree that)" the district court should have resolved the claims in a different manner, "or that the questions are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003) (quoting *Slack,* 529 U.S. at 483-84); *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983). This determination "requires an overview of the claims in the habeas petition and a general assessment of their merits" but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El,* 537 U.S. at 336.

Because Tennard alleges a *Penry I* violation, "resolution of his COA application requires a preliminary, though not definitive, consideration of the [rule] mandated by [*Penry I*] and reaffirmed in [the Court's] later precedents," and "whether the District Court's application of AEDPA deference" to Tennard's claim was debatable among reasonable jurists. *Miller-El,* 537 U.S. at 338, 341. The AEDPA provides 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.[11]

28 U.S.C. § 2254(d) (West 2003).

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 correctly identifies 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

[11] Where, as here, Tennard does not dispute the underlying fact that he is not mentally retarded, § 2254(d)(2) is inapplicable. *Price v. Vincent,* 123 S. Ct. 1848, 1853 (2003).

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).

Although Tennard does not dispute the state court's finding that he is not mentally retarded, the AEDPA provides that this determination "shall be presumed to be correct" unless the petitioner carries "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Finally, "in addition to performing any analysis required by the AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the [S]tate." *Horn v. Banks,* 536 U.S. 266, 272 (2002).

II. The Court of Appeals Properly Denied a COA Because it Is Not Debatable That the Court of Criminal Appeals Reasonably Applied *Penry I* in Denying Habeas Relief.

Tennard vigorously and extensively attacks the Fifth Circuit's longstanding *Penry I* jurisprudence as "misconceived," unsupported by Supreme Court precedent, arbitrary, and overly "rigid." Brief of Petitioner ("Brief") at 11-12, 24-47. However, Tennard entirely fails to acknowledge the AEDPA and the fact that it is the state court's application of *Penry I* that is at issue here. As shown below, the Court of Criminal Appeals correctly identified *Penry I* as

the controlling Supreme Court authority concerning Tennard's Eighth Amendment claim and reasonably applied that precedent in denying relief. JA:88-92. Thus, it cannot be demonstrated that the lower courts improperly denied a COA.

A. Where the constitutionality of the Texas special issues is challenged, *Jurek, Eddings,* and *Penry I* dictate a case-by-case inquiry into the mitigating significance of the evidence presented and whether the jury was altogether prevented from giving 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 v. Texas,* 428 U.S. 262, 276 (1976) (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 that both this Court, the Fifth Circuit, and the Court of Criminal Appeals have repeatedly refused to extend to other types of mitigating evidence.

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 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. *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.[12] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988), and in *Franklin,* 487 U.S. at 182. 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.[13] 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.

During its next term, however, the Court held that a mere possibility that the jury was precluded from considering relevant mitigating evidence did not establish Eighth Amendment error. *Boyde v. California,* 494 U.S. 370, 380 (1990). Rather, such error occurred only if there

[12] Tennard fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham,* 506 U.S. at 474-77 (explaining that *Penry I* is the exception to *Jurek*).

[13] Penry's evidence suggested that he was mildly or moderately retarded, may have suffered traumatic damage to his brain at birth or as a result of later injuries, and was frequently beaten about the head and locked in his room as a child. *Penry I,* 492 U.S. at 307-09. 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.

was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.* The Court further limited its holding in *Saffle v. Parks,* 494 U.S. 484 (1990), applying *Teague*[14] to preclude relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence. *Id.* at 490-92. Indeed, 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 imposed a *Teague* bar and declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence – "that his brief spasm of criminal activity . . . was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" – from Penry's. *Id.* at 475. 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

[14] The Court had previously found that *Teague* did not bar the relief sought in *Penry I,* because Penry merely requested vindication of his Eighth Amendment rights under *Eddings* as required by the evidence presented "*in his particular case.*" *Penry I,* 492 U.S. at 318-19 (emphasis in original). This holding unequivocally did "not 'impos[e] a new obligation' on the State of Texas." *Id.* at 319 (quoting *Teague,* 489 U.S. at 301).

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).

The same term, the Court reconsidered a *Graham*-type challenge to the special issues on direct appeal, where it was not bound by *Teague*. *Johnson,* 509 U.S. at 352. In *Johnson,* the Court again concluded that "[i]t strains credulity to suppose that the jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future dangerousness] special issue." *Id.* at 368. This is the case even if the mitigating evidence 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. Thus, the Court has clearly mandated a case-by-case inquiry into the nature of the mitigating evidence presented in Texas cases in order to determine whether there is any reasonable likelihood the jury was prevented from giving effect to that evidence when answering the special issues.

B. The Court of Criminal Appeals reasonably analyzed Tennard's mitigating evidence under the foregoing precedent.

Following *Penry I,* death-sentenced inmates in Texas have repeatedly claimed that the former capital sentencing scheme prevented the consideration of various types of mitigating evidence, "including but not limited to subnormal intelligence, youth, troubled or abused childhood, intoxication, substance abuse, head injury, good character, mental illness, antisocial personality disorders, and dyslexia." *Robertson v. Cockrell,* 325 F.3d 243, 249-50 (5th Cir.) (*en banc*) (footnotes omitted), *cert. denied,* 124 S. Ct.

28 (2003). In numerous decisions, the Court of Criminal Appeals developed a "coherent rationale," based on this Court's decisions, for analyzing the mitigating significance of different types of evidence to determine whether a *Penry I* violation occurred. *Robison v. State,* 888 S.W.2d 473, 487 (Tex. Crim. App. 1994); *see also, e.g., Mines v. State,* 888 S.W.2d 816, 820 & n.5 (Tex. Crim. App. 1994) (cataloging mitigating evidence deemed within and outside the scope of the special issues) (opinion on remand) (Baird, J., concurring); *Earhart v. State,* 877 S.W.2d 759, 764-65 (Tex. Crim. App. 1994) (same).

1. The state court developed a reasonable structure for adjudicating *Penry I* claims.

In considering *Penry I* claims, "the pertinent inquiry is and has been, by what principle should the line between *Penry I* and non-*Penry I* evidence be drawn?" *Robertson,* 325 F.3d at 251. As the Court of Criminal Appeals has noted, a case-by-case approach is necessary because "[t]here are no bright-line rules in cases like this." *Ex parte Tennard,* 960 S.W.2d at 62. First, it is important to recognize that not all evidence produced by a defendant during the punishment phase of a capital murder trial actually reduces his or her "moral culpability" in a significant way. For example, in order to establish Eighth Amendment error under *Penry I,* any disability claimed as mitigating must be involuntary in nature.[15] *Miniel v. State,*

[15] Fifth Circuit precedent has paralleled the state court's treatment of *Penry I* claims in many ways, including the requirement of involuntariness. *See Robertson,* 325 F.3d at 251 ("The principle of voluntariness

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831 S.W.2d 310, 320-21 (Tex. Crim. App. 1992). Voluntary intoxication or drug addiction would neither "diminish [the defendant]'s moral culpability or blameworthiness," nor fall outside the jury's effective reach in answering the deliberateness special issue. *Id.* at 321; *see also, e.g., Rousseau v. State,* 855 S.W.2d 666, 671-72 (Tex. Crim. App. 1993); *Nobles v. State,* 843 S.W.2d 503, 507-08 (Tex. Crim. App. 1992); *Ex parte Kelly,* 832 S.W.2d 44, 47 (Tex. Crim. App. 1992); *Lane v. State,* 822 S.W.2d 35, 39 (Tex. Crim. App. 1991); *Ex parte Ellis,* 810 S.W.2d 208, 211-12 (Tex. Crim. App. 1991). A person who voluntarily engages in proscribed conduct such as drug abuse is not less culpable for their crimes in the eyes of society as is someone who is involuntarily burdened with the pain of an abused childhood or the difficulties of mental retardation. *See Penry I,* 492 U.S. at 307-09 (suggesting Penry's mental retardation and brain damage may be the result of child abuse or birth defect); *cf., e.g., Barnard v. Collins,* 958 F.2d 634, 639 (5th Cir. 1992).

Second, the mitigating circumstances must be continuing, long-term, or permanent in nature to be relevant to culpability *and* outside the scope of the special issues.[16] *Nobles,* 843 S.W.2d at 506; *Joiner v. State,* 825 S.W.2d 701, 707 (Tex. Crim. App. 1992). In this context, evidence of "sporadic and isolated" childhood mistreatment or of a

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is found in the Court's insistence on the defendant's constitutional right to a thorough assessment of his "culpability") (citing *Penry I,* 492 U.S. at 319).

[16] A showing of permanence is also required by the Fifth Circuit. *See Robertson,* 325 F.3d at 251 ("Permanence is derived from the fixed biological character of Penry's evidence") (citing *Penry I,* 492 U.S. at 307-09).

single psychiatric hospitalization could be given mitigating effect in answering the future dangerousness special issue negatively, because the defendant's conduct could be reasonably viewed as aberrant in nature and something not likely to be repeated. *Nobles,* 843 S.W.2d at 505-06; *Goss v. State,* 826 S.W.2d 162, 166-67 (Tex. Crim. App. 1992), *overruled on other grounds, Barnes v. State,* 876 S.W.2d 316 (Tex. Crim. App. 1994); *Joiner,* 825 S.W.2d at 706-07. A mental illness which is treatable or controllable with medication does not equate to mental retardation, which is permanent in nature, because "one's level of intelligence 'should be a relatively stable factor throughout one's life.'" *Rios v. State,* 846 S.W.2d 310, 315 (Tex. Crim. App. 1992); *see also, e.g., Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir.), *cert. denied,* 534 U.S. 1043 (2001); *cf. Penry I,* 492 U.S. at 323-24 (suggesting Penry's mental retardation and brain damage indicated he would be a permanent danger to others).

Third, the mitigating evidence must be sufficiently severe, or "of the same quality and character" as the evidence presented in *Penry I* to be significantly outside the scope of the special issues.[17] *Delk v. State,* 855 S.W.2d 700, 709 (Tex. Crim. App. 1993); *Goss,* 826 S.W.2d at 166-67; *Trevino v. State,* 815 S.W.2d 592, 620-22 (Tex. Crim. App. 1991), *remanded on other grounds,* 503 U.S. 562 (1992). As the Court of Criminal Appeals explained in *Trevino,* the severity inquiry is necessary because the mitigating evidence must be related to some "aspect of how or why death in this case would or would not be an

[17] Severity must also be demonstrated under Fifth Circuit precedent. *Robertson,* 325 F.3d at 251-52.

appropriate response." 815 S.W.2d at 622. Because *Penry I* "implicitly reaffirmed the facial constitutionality of the Texas death penalty laws," holding that "the slightest bit of good character testimony" amounted to *Penry I* error in every case would be inconsistent with the special issues' constitutionality. *Id.* In *Lewis v. State,* for example, the court rejected a *Penry I* claim based on evidence that Lewis often had bruises and did not have "a happy childhood" because it was insufficiently severe. *Lewis v. State,* 815 S.W.2d 560, 567 (Tex. Crim. App. 1991); *see also, e.g., Madden v. Collins,* 18 F.3d 304, 308 (5th Cir. 1994). In contrast, the court found the requisite severity and granted relief where the evidence established that the defendant "was beaten with a broom and an extension cord, to the point where physical scars remained," and where "[t]estimony from expert witnesses presented at trial indicated that he suffered severe emotional problems as a result of the abuse." *Ex parte McGee,* 817 S.W.2d 79, 79-80 (Tex. Crim. App. 1991).

Finally, there must be a "connection between the [mitigating evidence] and the commission of the crime."[18]

[18] The "nexus" requirement is also a part of Fifth Circuit jurisprudence and arises "from the Court's belief that Penry, like other defendants whose 'criminal acts . . . are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Robertson,* 325 F.3d at 252 (quoting *Penry I,* 492 U.S. at 319) (internal quotations omitted). Contrary to Tennard's argument, Brief at 35-36, the Fifth Circuit always allowed an *inference* of causation to support a nexus showing. As the lower court explained, nexus merely requires a showing by the habeas petitioner on collateral review that a causal connection may be inferred from the trial evidence. *See, e.g., Smith v. Cockrell,* 311 F.3d 661, 680-81 (5th Cir. 2002) (citing *Davis v. Scott,* 51 F.3d 457, 460-61 (5th Cir. 1995), *Russell v. Collins,* 998 F.2d 1287, 1292 (5th Cir. 1993),

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Nobles, 843 S.W.2d at 506; *Goss,* 826 S.W.2d at 166; *Trevino,* 815 S.W.2d at 621-22. "Without such a connection, the evidence offered was not helpful to the jurors' determination of . . . moral blameworthiness." *Nobles,* 843 S.W.2d at 506. For example, in *Richardson v. State,* the court explained how the lack of a nexus limited the mitigating relevance of the evidence:

> . . . [Richardson] has made no showing that, from the viewpoint of society as a whole, his alleged childhood experience of poverty, parental neglect, illiteracy, and a speech disorder tends to excuse his capital crime. He has also made no showing that the alleged fact that his mother taught him to shoplift tends to excuse his capital crime.
>
> * * *
>
> Our conclusion might be different if [Richardson] had presented evidence that his mother had taught him to kill or commit other crimes of violence, or if his capital crime had begun as a robbery. Such evidence might, from the viewpoint of society as a whole, tend to excuse [Richardson]'s criminal behavior in that it might indicate that his personality had been damaged through no fault of his own and that his capital crime was caused in part by that damaged personality.

879 S.W.2d 874, 884-85 (Tex. Crim. App. 1993).

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and *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*)), *cert. granted,* 124 S. Ct. 46 (2003).

As the court noted, without such a requirement, "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." *Richardson,* 879 S.W.2d at 884 n.11; *see Parks,* 494 U.S. at 493 ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"); *Brown,* 479 U.S. at 542-43 (holding instruction telling the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" during the sentencing phase did not violate the Eighth Amendment).[19]

It is important to note that in cases involving legitimate evidence of mental retardation, the Court of Criminal Appeals consistently held that a nexus is *automatically established. Earhart,* 877 S.W.2d at 765 n.9. In fact, the court granted relief based on *Penry I* in numerous such cases. *See, e.g., Rios,* 846 S.W.2d at 315-17 (mental retardation); *Richard v. State,* 842 S.W.2d 279, 281-83 (Tex. Crim.

[19] Tennard essentially admits that such a connection must exist when he suggests that the jury's reasoned moral response must be the result of an assessment of the facts of each particular case. Brief at 40. And his reliance on *Payne* is disingenuous at best. *Id.* at 41. In *Payne,* the Court explained that it would be unfair to hold that the Eighth Amendment prohibits the State from presenting victim impact testimony, which is relevant to the circumstances of the crime, where the defendant is allowed to present mitigating evidence whether it is relevant to the circumstances of the crime or not. 501 U.S. at 825-26. The inquiry of relevance for the purposes of admissibility is quite different from the *Penry I* inquiry.

App. 1992) (mental retardation, severe child abuse, mental illness); *Ex parte Williams,* 833 S.W.2d 150, 151-52 (Tex. Crim. App. 1992) (mental retardation); *McGee,* 817 S.W.2d at 79-80 (severe child abuse, mental retardation); *Ex parte Goodman,* 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991) (mental retardation, child abuse, brain damage); *Ramirez v. State,* 815 S.W.2d 636, 654-55 (Tex. Crim. App. 1991) (mental retardation, child abuse). In one case involving severe sexual abuse, the court granted relief because expert testimony established a nexus to the defendant's psychosis and sexually sadistic crimes. *Gribble v. State,* 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990).

In each of these cases, the mitigating evidence established an involuntary, permanent, and severe disability that was directly connected to the crime.[20] Mitigating evidence that fails to meet these criteria is not relevant to moral culpability "beyond the scope of the special issues" in violation of *Penry I* because "it tends to show that

[20] For example, in *Richard,* expert testimony established that the defendant's abusive childhood triggered his antisocial personality disorder, which rendered him unable to consider consequences and made it likely that he would engage in criminal behavior. 842 S.W.2d at 281-83. Similarly, in *McGee,* "[t]estimony from expert witnesses . . . indicated that [McGee] suffered severe emotional problems as a result of the abuse." 817 S.W.2d at 79-80. Although Tennard makes much of the fact that the Fifth Circuit has granted *Penry I* relief in only one published opinion, Brief at 37 (citing *Blue v. Cockrell,* 298 F.3d 318 (5th Cir. 2002)), it is clear that most meritorious *Penry I* claims have been vindicated in state court, before reaching federal habeas review. Moreover, unlike Tennard, Blue presented "abundant evidence" of "parental abandonment, physical and sexual abuse, minimal brain injury, schizophrenia, and resultant poor impulse control." *Robertson,* 325 F.3d at 253 (citing *Blue,* 298 F.3d at 321-22). Tennard presents nothing other than an unsubstantiated and unexplained IQ score.

special issues should be answered in the negative" and, thus, does not deprive the jury of "a vehicle by which to give effect to that evidence." *Mines v. State,* 852 S.W.2d 941, 951-52 (Tex. Crim App. 1992), *aff'd on remand,* 888 S.W.2d 816; *Felder v. State,* 848 S.W.2d 85, 100 (Tex. Crim. App. 1992). Tennard's evidence of a 67 IQ is similarly within the scope of the special issues.

2. The Court of Criminal Appeals reasonably rejected Tennard's *Penry I* claim.

As discussed above, the state court recognized the double-edged character of Penry's mitigating evidence and the fact that it was only relevant to the special issues as an aggravating factor. JA:89-90. However, the Court of Criminal Appeals also correctly noted that "Supreme Court decisions before and after *Penry* [*I*] have upheld the constitutionality of Texas' former special issues framework because this framework has allowed juries in the vast majority of cases to consider and give effect to relevant mitigating evidence in a meaningful manner." JA:88 (citing *Johnson,* 509 U.S. at 361-67, *Graham,* 506 U.S. at 473-75, *Franklin,* 487 U.S. at 181-82, and *Jurek,* 428 U.S. at 262). "[A]s long as relevant mitigating evidence is within 'the effective reach of the sentencer' the requirements of the Eighth Amendment are satisfied." JA:88 (quoting *Johnson,* 509 U.S. at 367-69). Importantly, "[t]he Constitution does not require that 'a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.'" JA:89 (quoting *Johnson,* 509 U.S. at 367-69).

As the Court of Criminal Appeals reasoned:

> Here, there is no evidence [Tennard]'s low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or diminished his ability to control his impulses or to evaluate the consequences of his conduct. *See Johnson,* 509 U.S. at 363-65 [ ]; *Graham,* 506 U.S. at 473-75 [ ]. Therefore, there was no danger, as in *Penry* [*I*], that the jury would have given any mitigating qualities of the evidence of [Tennard]'s low IQ *only* aggravating effect in answering [the future dangerousness] special issue [ ]. *See Johnson,* 509 U.S. at 363-65, 369-71 [ ]; *Penry* [*I*], 492 U.S. at 322-24 [ ].
>
> In addition, the special issues did not place mitigating qualities of the evidence of [Tennard]'s low IQ beyond the effective reach of the jury. The jury could have used this evidence for a "no" answer to the first special issue on "deliberateness." *See Penry* [*I*], 492 U.S. at 322-24 [ ]. Moreover, in considering the circumstances of this offense and [Tennard]'s prior felony rape conviction in connection with [the future dangerousness] special issue [ ], the jury could have used the low IQ evidence to conclude [Tennard] was a "follower" instead of a "leader" since he participated in the commission of both crimes with others. *See, e.g., Ellason v. State,* 815 S.W.2d 656, 660 (Tex. Cr[im]. App. 1991) (one factor to consider in determining whether the evidence is sufficient to support an affirmative answer to [future dangerousness] special issue [ ] is whether the defendant was acting under duress or the domination of another at the time of the offense); *see also*

> *Johnson,* 509 U.S. at 371-73 [ ]. There was ample room within [the future dangerousness] special issue [ ] for the jury to give effect to any mitigating qualities of [Tennard]'s low IQ evidence.

JA:91-92.

The circumstances of the crime and whether a defendant was operating under duress or emotional disturbance were explicitly recognized by this Court as factors which could be considered within the scope of the future dangerousness special issue. *Jurek,* 428 F.3d at 272-73. Here, the defense painted Tennard as gullible by virtue of allowing his prior rape victim to escape and relentlessly attacked the State's theory that Tennard was the primary actor in both the rape and the murders. Thus, the jury could have easily viewed Tennard as a follower rather than a leader because of his 67 IQ, and could have given mitigating effect to 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.

Tennard argues that the jury "could easily have concluded" that his "impaired intellectual functioning" was not relevant to the deliberateness special issue. Brief at 15. Similarly, Tennard suggests that the jury "could reasonably have viewed his low IQ as *aggravating*" under the future dangerousness special issue. *Id.* at 18 (emphasis in original). Although Tennard appears to concede that he is not mentally retarded, he suggests that "[l]ow intelligence manifests itself in impaired judgment, and impaired judgment can lead to involvement in crimes that can be violent." Brief at 23. Yet Tennard never explained this to the jury. Indeed, as the trial court found, Tennard never even explained that an IQ of 67 was particularly low.

JA:73. Nor did Tennard's punishment evidence establish that he was less able to learn from his mistakes, control his impulses, or "to assess the consequences of his behavior [or] to make reasoned, responsible decisions." JA:75-76, 89-92; Brief at 25. Instead, the jury heard that Tennard worked at a temporary employment agency, could use public transportation and drive an automobile, and possessed "a basic understanding of business and the value of items" with which he endeavored to profit from his criminal behavior and dispose of the evidence. JA:18, 74-75; 21 SF 167-70, 174-91, 231-34, 262-63, 291-92; 22 SF 413-33, 447-48; 29 SF 51-52, 54. Tennard also knew enough to wear gloves or socks on his hands to avoid leaving fingerprints at the crime scene. 21 SF 291; 22 SF 342-44, 406, 413. Crucially, Tennard makes no effort to rebut the state court's presumptively correct fact findings that he was neither mentally retarded nor burdened with the commonly understood characteristics of mental retardation.

Nevertheless, the fact that Tennard can identify "*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*). Tennard must prove more than "the mere possibility" that the jury was prevented from giving effect to his IQ evidence. *Johnson,* 509 U.S. at 367. Thus, the issue is not whether Tennard's 67 IQ had some relevance outside the special issues *but whether the evidence had some relevance within the special issues.* Because Tennard's mitigating evidence

did have such relevance, the state court's adjudication of his *Penry I* claim was not unreasonable.

C. The Fifth Circuit's denial of COA was a proper application of the AEDPA.

As discussed *supra,* the question before the Court is whether the lower court was correct in holding that the district court's denial of relief under the AEDPA was not debatable among reasonable jurists. For the purposes of this inquiry, it is the unreasonable application prong of § 2254(d)(1) that is at issue. Initially, the district court explained that the state courts' finding that Tennard was not mentally retarded was "fully supported by the evidence." JA:128.

> Although Tennard's prison records indicate an old IQ score of 67, Tennard presented no evidence about which test he took, who administered the test, and under what circumstances the test was given. The evidence at trial indicated that Tennard understood the value of the items stolen from Neblett and Smith, recognized the necessity of covering his hands to avoid leaving fingerprints, and understood that he and his friends needed to remove from the murder scene items that might have their fingerprints. The evidence at trial indicated that Tennard gave directions to Bogany and Groom during the murder and in connection with disposing of the stolen property. The evidence supports the finding that Tennard's low score is not necessarily indicative of mental retardation and that Tennard's ability to reason and to accept responsibility indicates that his low IQ score does not interfere with his general intellectual functioning or behavior.

JA:128-29.

Further, the district court held that the state court reasonably decided "the jury in Tennard's case was permitted to give meaningful effect to Tennard's evidence that he has a low IQ score." JA:129. The court noted that trial counsel "argued that Tennard's low IQ affected his ability to act deliberately" and cited, as an example, the fact that Tennard "permitted a prior rape victim to escape through a bathroom window because he believed her when she told him that she would not try to run away if he let her go into the bathroom alone and take a bath." JA:129; *cf.* JA:50-51 (defense counsel arguing that Tennard was not the principal in the prior rape, and that he allowed the victim to escape). The court also found that trial counsel "argued specifically to the jury that they should 'take all these things into consideration, the 67 IQ – in deciding how you answer those questions.'" JA:129 (quoting JA:57). Thus, the court reasoned, Tennard's IQ score was before the jury, "both sides argued its significance for punishment," and the jury was not foreclosed from considering and giving effect to that evidence in answering the special issues. JA:129-30.

The Fifth Circuit adopted this reasoning, adding that Tennard could not demonstrate the debatability or the unreasonableness of the state court's conclusions under § 2253(c)(2) or § 2254(d)(1) because Tennard could not establish that he was mentally retarded or that his IQ diminished his moral culpability in a way not cognizable by the jury in answering the special issues. PA1:5. The Fifth Circuit based its decision on prior precedent holding that evidence of low IQ does not in itself give rise to *Penry I* error, a fact which Tennard protests. Brief at 21-23 (citing *Lackey,* 28 F.3d at 489-90, and *Andrews,* 21 F.3d at 629-30). However, neither case is distinguishable because,

in both cases, there was no evidence that the defendant was mentally retarded or that the defendant's low IQ score would make him dangerous in the future; thus, the evidence was not solely aggravating under the future dangerousness special issue. *Lackey,* 28 F.3d at 289-30; *Andrews,* 21 F.3d at 629-30; *see also Boyd,* 167 F.3d at 912 (holding IQ of 67 derived from prison records, absent showing of mental retardation, did not result in *Penry I* error); *Harris,* 81 F.3d at 539 (rejecting *Penry I* claim based on IQ scores of 68, 71, and 93 and borderline mental retardation diagnoses). Underlying each of these cases is the principle that the IQ score was not relevant to the future dangerousness special issue in an exclusively aggravating way. *See Boyd v. State,* 811 S.W.2d 105, 111-12 (Tex. Crim. App. 1991) (holding Boyd's mitigating evidence "has no significance independent of its relevance to the second special issue"). Importantly, this Court denied certiorari review in each instance. *Boyd v. Johnson,* 527 U.S. 1055 (1999); *Harris v. Johnson,* 517 U.S. 1227 (1996); *Andrews v. Scott,* 513 U.S. 1114 (1995); *Lackey v. Scott,* 513 U.S. 1086 (1995); *Boyd v. Texas,* 502 U.S. 971 (1991).

Even more important than the consistency of the Fifth Circuit's jurisprudence on the application of *Penry I* to low IQ scores is the fact that, in all of the above-cited cases, the court of appeals was engaging in a *de novo* review of the issue under pre-AEDPA law. Thus, the bulk of Tennard's argument, Brief at 24-47, is merely specious.[21]

[21] As argued *supra,* the Fifth Circuit's *Penry I* jurisprudence is not at issue here. However, the Director believes that, historically, the court of appeals has properly analyzed *Penry I* claims, and that matter is directly at issue in the companion case, *Smith v. Dretke,* 124 S. Ct. 46. In any event, Tennard relies on several distinguishable cases to suggest

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Indeed, any opinion from this Court condemning the Fifth Circuit's approach would be necessarily advisory in nature where the *state court* judgment is subject to review only for unreasonableness under § 2254(d)(1).[22] Therefore, the Fifth Circuit's analysis of the underlying facts and application of *Penry I* is largely irrelevant where, as here, it is not debatable that the state court properly and reasonably applied *Penry I* to Tennard's claim and denied relief.

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that the Fifth Circuit's *Penry I* jurisprudence does not pass constitutional muster. Brief at 29, 41-44 & n.21. However, the facts of *Bell v. Ohio* are not comparable to the instant case because Bell introduced "detailed information" of emotional instability and mental deficiency, and he was not the triggerman in his crime. 438 U.S. 637, 639-41 (1978) (plurality opinion). Both *McKoy v. North Carolina* and *Mills v. Maryland* were reversed because the relevant statute required all twelve jurors to agree on the existence of a mitigating factor before they could give effect to it. *McKoy,* 494 U.S. 433, 444 (1990); *Mills,* 486 U.S. 367, 384 (1988). In *Hitchcock v. Dugger,* the "jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." 481 U.S. 393, 398-99 (1987). And this Court's "rejection" of a nexus requirement in *Williams* pertained only to an evaluation of whether counsel's failure to investigate or present mitigating evidence prejudiced the defendant under *Strickland v. Washington,* 466 U.S. 668 (1984). *Williams,* 529 U.S. at 397-98; *see also Dowthitt v. Johnson,* 230 F.3d at 733, 746 n.15 (5th Cir. 2000) (also "rejecting" a nexus requirement under *Strickland* based on *Williams*).

[22] Additionally, " . . . while it is inappropriate to ascribe undue significance to denials of certiorari, it should at least be noted that the Supreme Court has been loathe to disturb [the Fifth Circuit]'s interpretation of *Penry I,*" and has denied certiorari review in at least thirty-nine such cases. *Robertson,* 243 F.3d at 256.

III. Both the AEDPA and the Non-retroactivity Principle of *Teague v. Lane* Bar this Court from Holding That *Atkins* Renders the State Court's Decision Unreasonable.

Finally, Tennard argues that this Court's recent decision in *Atkins v. Virginia,* 536 U.S. at 321, holding that the Eighth Amendment prohibits the execution of mentally retarded offenders, somehow alters the analysis of his *Penry I* claim. Brief at 47-48. Initially, for the purposes of § 2254(d)(1), *Atkins* was not "clearly established Federal law, as determined by [this Court]," as of the time of the state court's denial of habeas relief. *Williams,* 529 U.S. at 412. Thus, *Atkins* could not render the state court's decision unreasonable unless it also qualifies as an "old rule" under *Teague. Williams,* 529 U.S. at 412. *Atkins* is unquestionably a "new rule" under *Teague, i.e.,* it was not "*dictated* by precedent at the time [Tennard]'s conviction became final" in 1991. 489 U.S. at 301 (emphasis in original). "The question is '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, where the *opposite* conclusion was compelled by *Penry I,* there is no doubt that *Atkins* would be a "new rule." Thus, to the extent Tennard argues that the state court's decision must be re-examined in light of *Atkins,* the AEDPA bars any such relief.

Additionally, Tennard is not entitled to the retroactive application of any new rule of law unless he demonstrates that a *Teague* exception applies. As stated *supra,* "in

addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the [S]tate" because the two inquiries are distinct. *Banks,* 536 U.S. at 272. Under *Teague,* "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1971)). "Second, a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'" *Id.* (quoting *Mackey,* 401 U.S. at 693 (internal quotations omitted)). While the rule of *Atkins* falls within the first *Teague* exception because it "plac[es] a certain class of individuals beyond the State's power to punish by death," *Penry I,* 492 U.S. at 330, "Tennard has never argued that the Eighth Amendment prohibits his execution."[23] PA1:1.

The second *Teague* exception does not apply either. Indeed, *Atkins* could no more retroactively alter the rule of *Penry I* than could *Penry I* alter the rule of *Eddings.* This is especially true where *Atkins* does not purport to announce a

[23] Nor could he. As the state court determined, Tennard is not mentally retarded. JA:88. Tennard has never challenged the reasonableness of this determination and has produced no evidence that might rebut this factual finding. In order to properly invoke the jurisdiction of this Court, it is crucial that a federal question not only be raised in prior proceedings, but that it be raised at the proper point. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919). In this context, Tennard should have raised such a challenge in the district court or he should have requested permission to file a successive habeas corpus petition under the "new rule" provision of 28 U.S.C. § 2244(b)(2)(A).

"watershed rule of criminal procedure." *See Atkins,* 536 U.S. at 317, 321 (holding *Atkins* is a *substantive* rule of law, but procedures for implementing *Atkins* must be left to states). Applying the substantive rule of *Atkins* to hold that a *procedural Penry I* error occurs whenever the defendant introduces low IQ evidence would "impose a new obligation" on the State of Texas to treat such defendants differently and would implicitly overrule *Jurek* where the Court has repeatedly assured Texas that *Jurek* remains good law. *Penry I,* 492 U.S. at 318-19; *Lowenfield,* 484 U.S. at 245; *Franklin,* 487 U.S. at 182. Such a holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents, as well as *Graham* and *Johnson*, that the state court relied upon in adjudicating Tennard's claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [1991] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of the Eighth Amendment" with regard to Tennard'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 Tennard advances a new, procedural interpretation of *Atkins,* 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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