No. 02-11309

In The Supreme Court of the United States

ROBERT SMITH,

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 PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that the use of a "nullification" instruction was improper?

LIST OF PARTIES

1. Robert Smith (Real name: Robert McBride)

2. Doug Dretke, Director of the Texas Department of Criminal Justice, Correctional Institutions Division

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BRIEF OF PETITIONER

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the petitioner, Robert Smith, through the undersigned counsel, and respectfully requests that the decision of the United States Fifth Circuit Court of Appeals be reversed, and that the order of the United States District Court which granted judgment for the petitioner be reinstated, for reasons set forth as follows.

LOWER COURTS' OPINIONS

The Fifth Circuit Court of Appeals reversed the judgment of the United States District Court and ordered judgment in favor of the respondent on November 4, 2002. *Smith v. Cockrell*, 311 F.3d 661 (5th Cir. 2002). The Fifth Circuit denied rehearing and reconsideration *en banc* on March 17, 2003. The District Court's opinion, the Fifth Circuit's panel opinion, and the order denying rehearing and reconsideration *en banc* are attached to the petition for writ of certiorari as Appendix B, Appendix A, and Appendix E, respectively.

BASIS FOR JURISDICTION

1. The Fifth Circuit's order denying rehearing was issued on March 17, 2003.

2. The petition for writ of certiorari was filed on June 16, 2003 and was granted on September 30, 2003.

3. The petitioner asks this Court to review a final decision of the United States Fifth Circuit Court of Appeals with respect to questions of law arising under the United States Constitution.

4. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS RELIED UPON

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

STATEMENT OF THE CASE

A. Procedural History

This cause is an application under 28 U.S.C. §2254 by a Texas prison inmate. An indictment filed in the 351st District Court of Harris County, Texas accused the petitioner of killing James Wilcox, by shooting Wilcox with a firearm, while the petitioner was in the course of committing a robbery, in violation of TEX. PENAL CODE §19.03(a)(2). A jury found the petitioner guilty as charged. The offense occurred on May 15, 1990. Therefore the punishment phase of the petitioner's case was tried under a former version of TEX. CODE CRIM. PROC. art. 37.071 which included three special issues, but did *not* include a special issue specifically designed to guide a jury's consideration of mitigating evidence. The jury answered the three special issues presented affirmatively, requiring the judge of the state district court to assess the death penalty. JA 123-126.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and this Court denied a petition for writ of certiorari. *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 843 (1995). Among the arguments rejected by the Court of Criminal Appeals was an argument, based on *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*") that the framework of the special issues, modified by what was called a "nullification instruction," failed to provide an adequate vehicle for the jury's consideration of mitigating evidence. 898 S.W.2d at 854.[1] Such a vehicle is required in order to satisfy U.S.

[1] The Court of Criminal Appeals used the term "nullification instruction" in its opinion. 898 S.W.2d at 854.

CONST. AMEND. VIII, which is applicable in state Capital Murder trials through U.S. CONST. AMEND. XIV.

The petitioner then filed a state application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.071. The state district court recommended to the Court of Criminal Appeals that relief be denied. The state district court's findings of fact and conclusions of law made short work of the petitioner's argument regarding the adequacy of the special issues as modified by a nullification instruction. The state district court stated that the issue already had been rejected on appeal and need not be reconsidered. The state district court also declared that the instructions were adequate to provide a vehicle for consideration of mitigating evidence.

The petitioner timely filed an application under 28 U.S.C. §2254 in the United States District Court for the Southern District of Texas, Houston Division. The respondent filed a motion for summary judgment. The district court instead entered an order granting relief to the petitioner on October 31, 2001, based on two issues found in the petitioner's favor. The district court held that the petitioner was deprived of the effective assistance of counsel at the punishment phase of his trial. The federal district court also held, based on *Penry v. Johnson*, 532 U.S. 782 (2001) (hereinafter "*Penry II*"), that the petitioner was denied fair consideration of mitigating evidence because a nullification instruction was used (District Court Opinion, pp. 25-44). The district court granted summary judgment for the respondent on other issues. The petitioner's motion for new trial under FED. R. CIV. PROC. 59 was denied.

Notice of appeal was filed by both parties. On appeal the respondent challenged the two findings in favor of the petitioner. The petitioner presented three issues by cross-appeal, and also asked the Court of Appeals to grant relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), which was decided in the middle of the briefing period and had not been an issue in the district court. This issue was not decided on appeal due to lack of exhaustion.

Argument was presented before a panel of the Fifth Circuit Court of Appeals on the afternoon of November 4, 2002. *The very same day*, the panel reversed the judgment of the district court and ordered the entry of summary judgment for the respondent. The petitioner filed a petition for rehearing and a suggestion of reconsideration *en banc*. The petition and suggestion were denied on March 17, 2003 in a short order which relied on the *en banc* Court of Appeals decision in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003), decided three days earlier.

The petitioner sought review of three issues by this Court in a petition for writ of certiorari filed on June 16, 2003. On September 30, 2003 this Court granted the writ as to one issue concerning the standard applied by the Fifth Circuit in upholding the use of the nullification instruction in the petitioner's trial.

B. Factual Background

The relevant factual background consists of the facts surrounding the offense and the evidence regarding possibly mitigating characteristics of the petitioner. The evidence at the trial, which included a written confession, showed that the petitioner and a colleague, known only as "Larry," entered the Fayco clothing store in Houston on

the evening of May 15, 1990. SF 40:314, 316.[2] After pretending to shop for some items, the petitioner approached a sales clerk, displayed a handgun, and demanded the store's money. SF 40:315. While the sales clerk was complying with that demand, the petitioner set the keys to his automobile on the counter, and when the robbers fled the petitioner left the keys behind. Unable to start their getaway car, the robbers ran off in search of another vehicle.

The petitioner and Larry came across James M. Wilcox, who was camped out in a tent on the lot of a nearby abandoned trailer park. SF 40:133-134, 44:176. Wilcox had a pickup truck. According to the petitioner's testimony, he asked Wilcox for a ride but Wilcox refused, and Larry then asked Wilcox for the keys to the truck. SF 44:177. As Larry got into the truck, the petitioner struggled with Wilcox, and in the course of doing that he shot Wilcox in the right arm. SF 44:178-183. The petitioner and his colleague again fled on foot as a private security officer appeared. The petitioner was apprehended within a few minutes. His colleague has never been apprehended.

The petitioner at first did not believe that Wilcox had died from the gunshot wound because the police had not put up any yellow tape at the scene. SF 44:72. The bullet entered the upper part of Wilcox's arm. Instead of passing through, the bullet traveled lengthwise up the arm, entered the torso in the armpit area, and penetrated the

[2] References to the court reporter's record, called the "Statement of Facts" at that time, are designated by "SF." References to the clerk's record of documents, called "Transcript" at that time, are designated by "T."

lung. A physician, Mary Jumbelic, M.D., testified at the punishment stage that the petitioner probably did not act deliberately, and with a reasonable expectation that death would result, given the unusual manner in which a gunshot wound to the arm proved fatal. SF 44:124. The jury nevertheless found against the petitioner on the first special issue, dealing with deliberateness.

At the punishment stage, the State put on additional evidence in an effort to show that the petitioner posed a risk of being dangerous to society in the future. That evidence included evidence of other offenses committed by the petitioner, records of the petitioner's juvenile confinement, a large number of disciplinary memoranda in the petitioner's file from prison, and testimony that the petitioner somehow acquired a small amount of marihuana in jail while he was awaiting trial. The defense put on the petitioner's own testimony, testimony by the petitioner's father, and testimony by psychiatrist Fred Fason, M.D., along with a few documents. Together this evidence showed three types of potentially mitigating factors in the petitioner's background.

(1) *Subnormal intelligence.* According to records reviewed by Dr. Fason, the petitioner's I.Q. tested as low as 64, which would make him "definitely retarded." SF 45:90; JA 99. Fason said that "another time" the I.Q. result was a "74" (actually 72). SF 45:90; JA 99. Fason gave a few examples of how the petitioner exhibited some functional deficits, such as not knowing how much change he should get if he bought something for 39 cents and paid with a dollar bill. SF 45:90-91; JA 100. Fason also noted that school records indicated that the appellant "was a slow learner in special education classes." SF 45:91; JA 100. Fason characterized the petitioner as having "borderline

intelligence." SF 45:91; JA 100. Fason thought, based on the way the petitioner conversed with him, that the petitioner was "above the cutoff line for mental retardation," but the petitioner "doesn't have a lot left over or a lot extra upstairs." SF 45:91; JA 100. The jury was not presented with a formal definition of mental retardation in terms of a combination of I.Q. levels and functional deficits, and the jury was not presented with abstract theory as to how low intellect may affect conduct.

(2) *Antisocial reaction.* Fason stated that the petitioner's criminal conduct was "not a product of just his I.Q." SF 45:31; JA 64. The "not just" phrasing used by Fason indicated that low intellect played some part, but Fason thought a psychiatric disorder was the dominant adverse influence. Fason said the petitioner was afflicted with "antisocial reaction." Fason described this psychiatric disorder as follows:

> It's a condition characterized by rebelliousness against the rules of society, difficulties in conforming to common social standard and self-destructiveness and behavior patterns. It was first described back over a hundred years ago by psychiatrists in France. . . . Later by the 1950's when I was in medical school the condition was referred to as psychopathic personality disorder and antisocial type. This was replaced in the '60's by the term sociopathic disturbance. It is now referred to as antisocial reaction. And it is characterized by, as I mentioned, the rebelliousness, self-centeredness, concern for oneself and difficulties with the law of antisocial behavior. In essence, it's the person's mental problem manifested in their behavior rather than in their thinking or their feelings.

SF 45:12; JA 54. When asked how this condition was brought about, Fason said there are "different theories," but the problem starts at "an early age of development." SF 45:13; JA 55. Whereas infants are supposed to move out of a "narcissistic" phase at around the age of two, a person who does not remains "self-centered" as he grows. SF 45:14-15; JA 55. Fason added that another factor, superimposed on the narcissism, is "an attitude expressed by what people say to themselves . . . if you will pardon the expression, it's f – k it, I don't care. And this is what the individual says to himself about the things that are normally stressful to him." SF 45:15; JA 56. The petitioner, for example, acknowledged "saying that to himself" when Fason asked him about it. SF 45:15; JA 56. "It's a way of avoiding shame," Fason continued. "It's a way of avoiding the ordinary drive control that we use to control our impulses." SF 45:16; JA 56. Fason said the normal "drive controls" of shame, guilt, and fear of consequences do not operate when a person has this disorder. SF 45:17-18; JA 57. "Mr. Smith doesn't have those. He quit using those a long time ago" Fason concluded. SF 45:18-19; JA 58.

Fason thought the problem existed even before the death of the petitioner's mother, but "it became very pronounced" after that. SF 45:19; JA 58. At that point the petitioner stopped caring about other people. SF 45:19; JA 58. The petitioner identified a turning point as his release from prison "and no one wanted to help him other than his father," but Fason thought "it started much earlier than that." SF 45:20; JA 58.

Fason specifically connected the petitioner's disorder to the charged offense, based on hearing the petitioner's testimony about it:

> [H]e just didn't think. He was thinking about getting away. But it is all consistent with the accepted behaviors associated with that diagnosis.

SF 45:22; JA 60. Fason also predicted that the danger inherent in the petitioner's personality disorder would diminish with age:

> Anyone in the criminal justice system who has been here a while sees an awful lot of people who are 18 to 29 that would fall into that category. When people get past the age of 30 you don't see that many in the criminal justice system. And past age 40 you rarely ever see someone with this diagnosis past the age of 40.

SF 45:24; JA 60-61. Fason further explained that "people when they get into their thirties by and large begin to mature enough to become aware that they do care." SF 45:25; JA 61. This particular aspect of Fason's testimony was pertinent to a defense argument that the petitioner would not be out of prison until his dangerousness had diminished.

(3) *Head injury*. Regarding the petitioner's head injury as a child, the evidence was far less developed than it should have been. Nevertheless, medical records from 1974 (DX-2 in SF 47), apparently provided by the petitioner's father, showed that the petitioner received a head injury when he was six years old. A truck backed into him, knocking him unconscious for ten to fifteen minutes. SF 44:84; JA 10. The petitioner then staggered home, where he cried all night from the pain he felt in his head and eyes. SF 44:89; JA 13. He was taken to a medical clinic for evaluation, where the doctor found that he had a concussion. The report further stated that follow-up EEG and x-ray examinations indicated results which, according to a

pediatric resident, were "within normal limits," so the recommended treatment was aspirin and a return visit in three months.

The clinic physician had told the petitioner's father that the petitioner had something to build on because he was young, but the physician also told the petitioner's father that "in the long run it could take an effect on him." SF 44:90; JA 14. There was no evidence at trial of any follow-up neurological examinations.

SUMMARY OF THE ARGUMENT

At the punishment phase of his Capital Murder trial, the petitioner presented mitigating evidence, consisting of evidence of low intelligence, evidence that he suffered from "antisocial reaction," and possibly residual effects of a head injury. Despite an objection, the trial court submitted a nullification instruction to the jury as the vehicle which the jury was to use to give effect to mitigating evidence. SF 46:19-22; JA 114-115, 119. This type of nullification instruction was held to be unconstitutional in *Penry II*.

The federal district court held that *Penry II* applied to the petitioner's case, but on appeal a panel of the Fifth Circuit reversed the district court's decision because the mitigating evidence offered by the petitioner did not fit within the Fifth Circuit's standard. Specifically, the Fifth Circuit held that the petitioner did not show that he was afflicted by a "uniquely severe permanent handicap." The Fifth Circuit had adopted that standard in *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*).

The Fifth Circuit's standard is an improperly restrictive interpretation of the type of potentially mitigating evidence which requires a proper vehicle for the jury's consideration. The Fifth Circuit's standard is not supported by this Court's case law, despite the assertion in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003) that this Court adopted the Fifth Circuit's *Graham* formulation in *Graham v. Collins*, 506 U.S. 461 (1993). It is not supported by this Court's decision in *Johnson v. Texas*, 509 U.S. 350 (1993). It appears to be inconsistent with the recent decision in *Wiggins v. Smith*, __ U.S. __, 123 S.Ct. 2527 (2003). The real principle which emerges from this Court's case law is deference to juries, which are capable of making reliable assessments of mitigating evidence if properly instructed. Furthermore, as a dissenting judge in *Robertson* pointed out, only this Court's case law is supposed to matter in a case under 28 U.S.C. §2254, as amended. The Antiterrorism and Effective Death Penalty Act of 1996 may have orphaned the Fifth Circuit's test.

The Fifth Circuit's standard is inherently flawed. The wording of the standard does not comport with the full concept of mitigating evidence as set forth in *Penry v. Lynaugh*, 492 U.S. 302 ("*Penry I*"). Nothing in *Penry I* indicates that constitutional protection extends only to a defendant afflicted with a "uniquely severe" problem, as judged by an appellate court rather than a jury. In fact, the *Penry* doctrine is not properly even limited to "handicaps," since *Penry I* specifically stated that "circumstances of the offense" could be mitigating factors.

It also is questionable whether the Fifth Circuit's standard should apply to issues under *Penry II*, since it was developed in a context which is distinguishable. Cases interpreting *Penry I* involved determinations of whether

any kind of vehicle for consideration of mitigating evidence was needed. It was in that context that the question arose whether evidence which could be deemed mitigating existed in a given case. In a case where a trial court gave a nullification instruction, however, the trial court had already determined that some evidence might have mitigating value.

The flaws in the Fifth Circuit's standard matter in this cause. There was evidence indicating that the petitioner's I.Q. had tested as low as 64. Dr. Fason did not believe the petitioner met a clinical definition of retardation, but the petitioner's intellect was "borderline." The petitioner also suffered from a psychiatric affliction, *i.e.* antisocial reaction, which in Fason's view largely explained the petitioner's criminal behavior. Additionally, there was some evidence that the petitioner suffered a head injury as a child, although the potential significance of that injury was not well developed.

ARGUMENT

Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that the use of a "nullification" instruction was improper?

A. The *Penry* Doctrine and the Use of Nullification Instructions

This Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*") held that the then-existing special

issues in TEX. CODE CRIM. PROC. art. 37.071 did not provide an adequate mechanism for the jury to give effect to mitigating factors which could justify a life sentence. *Penry I* rested on the "cruel and unusual punishment" clause of U.S. CONST. AMEND. VIII and the due process clause of U.S. CONST. AMEND. XIV. Texas courts crafted various *ad hoc* solutions for cases which were tried after *Penry I* was decided but before the Texas Legislature provided a new special issue to cover mitigation. One attempted solution, used in many cases, was a nullification instruction, telling jurors to alter their answer to one of the existing special issues if they believed there were sufficient mitigating considerations. This type of instruction is well illustrated by the instruction given in the petitioner's trial:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the Defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration,

> rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to that special issue under consideration.

T-260-261; JA 119.

The petitioner complained during his trial that the use of a nullification instruction in his trial was an inadequate mechanism for the jury's consideration of mitigating evidence. SF 46:19-22; JA 114-116. He raised the issue on direct appeal but was rebuffed. 898 S.W.2d at 854. The petitioner raised the issue in his state habeas application and in his federal application. All of this occurred before *Penry II* was decided.

The majority opinion in *Penry II* held that the use of a nullification instruction was "confusing" because it made the jury instructions, taken as a whole, susceptible to different readings by the jury. Under Article 37.071, jurors had to decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The addition of a nullification instruction "made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." 532 U.S. at 799-800. Specifically, jurors believing that the answer to the statutory question should be "Yes" were asked to untruthfully answer "No" as a way to give full effect to mitigating evidence. Jurors would have to violate their oaths to render a "true verdict," under TEX. CODE CRIM. PROC. art. 35.22, in order to give effect to mitigating evidence through nullification of a correct "Yes" answer. There was at least a "reasonable likelihood" that jurors who believed in their oath and in answering questions truthfully would not follow an instruction which called upon them to give a

false answer to the special issue. *Id.* Even when the explanatory role of attorneys' argument was taken into account, the majority opinion held that "at best, the jury received mixed signals." 532 U.S. at 802. The Court concluded that "the supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned response to Penry's mitigating evidence." *Id.* at 802.[3]

The nullification instruction in this cause had the same effect as the nullification instruction in *Penry II*. Especially in light of the protean nature of the word "probability," aggravated by jury ignorance (or worse) as to a likely release date on a life sentence, a reasonable jury called upon to answer that question truthfully could look at the petitioner's criminal record, remember their oaths as jurors, and say "Yes." For example, the petitioner committed two robberies (apart from the effort to obtain the murder victim's truck) while at large on parole. He had a long record of disciplinary infractions in prison, though some of them were trivial matters which would be ignored anywhere except in the authoritarian regime of a prison. There is the same "reasonable likelihood" identified in *Penry II* that, despite some feeling that there was adequate

[3] In fairness to Texas trial courts, much of the blame belongs on the Texas Legislature, which for two years left the district courts in Texas to their own devices in trying to satisfy *Penry I*. The Governor of Texas may call the Texas Legislature into special session for the purpose of addressing an important issue. That should have happened as soon as *Penry I* was final. That the issue languished without legislative action ought to make this Court red-hot angry at the State of Texas, for the federal courts are still trying to clean up a mess that the State of Texas easily could have prevented.

mitigation evidence, the jurors were unwilling to give a facially false answer. One easily can picture an aggressive juror, unreceptive to the mitigation evidence, browbeating another juror with a question like "What part of 'Yes' or 'No' do you not understand?" Unanimity was required under Texas law, so harm occurred if even one juror caved in and abandoned a willingness to "nullify" for the sake of mitigation. In fact, the process was inadequate to satisfy *Penry II* if even one juror was simply confused.

B. The Fifth Circuit's Test for Mitigating Evidence

Nothing in the particular nullification instruction used in the petitioner's trial distinguished it from the nullification instruction used in *Penry II*. The Fifth Circuit panel nevertheless held that the petitioner was not entitled to anything better than a nullification instruction. In the panel's view, the petitioner had not brought forward evidence at trial which fit the Circuit's concept of "constitutionally relevant" mitigating evidence. 311 F.3d at 680. The panel postulated that *Penry II* does not apply unless mitigating evidence meets the test developed by the Fifth Circuit in the wake of *Penry I*. That test is whether the mitigating evidence shows "a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own." 311 F.3d at 680. As the panel stated, the Fifth Circuit has "found a *Penry I* problem to exist only where the petitioner presents mitigating evidence relating either to severe mental retardation or to extreme child abuse." 311 F.3d at 680.

The petitioner argued both to the panel and in a suggestion of *en banc* reconsideration that the "uniquely severe permanent handicap" standard was inappropriate.

Reconsideration was delayed while the *en banc* court decided a similar issue in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003). Reconsideration *en banc* was denied in this cause, with a brief order citing *Robertson*, three days after *Robertson* was decided. For the reasons discussed below, the Fifth Circuit's "uniquely severe permanent handicap" test is an incorrect restriction on the *Penry* doctrine and should not have barred application of *Penry II* to this cause.

C. How the Fifth Circuit Has Misconstrued *Penry I*

(1) The *Graham*/*Robertson* Fallacy

The Fifth Circuit's standard was adopted in *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*), a case where Graham was not claiming a "handicap" at all. Whether the standard was correct in Graham's case became academic after this Court wrote its own opinion in *Graham v. Collins*, 506 U.S. 461 (1993), not relying on such a characterization of what constitutes mitigating evidence. On this point the Fifth Circuit majority opinion in *Robertson* made a major mistake, asserting that "*Graham*'s logic was sustained – twice – in the Supreme Court's next term. The first instance occurred in the course of the Court's review of *Graham* . . . " 325 F.3d at 255. A portion of this Court's *Graham* opinion excerpted by the *Robertson* majority merely said that this Court was "not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests" without undermining prior case law. 506 U.S. at 476. The evidence Graham was relying upon in his case was "good character" evidence rather than evidence of afflictions or handicaps, and the case law up to that point seemed to draw a distinction between evidence of good character and evidence

of afflictions. Compare *Penry I* with *Franklin v. Lynaugh,* 487 U.S. 164 (1988). The *Robertson* majority read far too much into the excerpted statement in this Court's *Graham* opinion when the Fifth Circuit treated *Graham* as an endorsement by this Court of the "uniquely severe permanent handicap" test.

The *Robertson* majority opinion also claimed that the Court of Appeals' test in *Graham* was endorsed "more emphatically" in *Johnson v. Texas*, 509 U.S. 350 (1993). The claimed mitigation in *Johnson*, as *Robertson* characterized it, was "youth and immaturity." Everyone experiences youth and immaturity. Neither youth nor immaturity is a "handicap," *i.e.* a long-term problem which is not a part of normal life. Thus *Johnson* does not provide any basis in this Court's case law for drawing a line between types of handicaps, which is what the Fifth Circuit has done with the "uniquely severe permanent handicap" standard. Unfortunately the standard lived on in Fifth Circuit case law after *Graham* because, under the Fifth Circuit's rules, subsequent Fifth Circuit panels considered themselves bound by the *en banc* decision of the Fifth Circuit in *Graham*.

This Court never has attempted to draw a "bright line" separating "constitutionally relevant" evidence, meaning evidence sufficiently mitigating to require the protection of an adequate mechanism for the jury's consideration, from evidence which is not "constitutionally relevant." *Graham* has already been discussed, but this Court also did not engage in line-drawing as to different types of mitigating evidence in *Johnson v. Texas, supra.* In seeking summary judgment, the respondent cited language in *Johnson v. Texas* to the effect that it is only necessary that the special-issue instructions not "foreclose"

consideration of some mitigating evidence. As the petitioner reads *Johnson*, the comment about not "foreclosing" consideration was aimed at the procedural mechanism used to consider mitigating evidence, not at distinctions between types of mitigating evidence. The Fifth Circuit was incorrect in attempting to press *Johnson v. Texas* into a service for which it was not designed. This Court should make it clear that *Johnson* gives no support to the substantive test of "uniquely severe permanent handicap" crafted by the Fifth Circuit.

Recently this Court implied that, at the very least, this Court does not limit the scope of constitutionally relevant mitigating evidence to evidence of retardation. It did so in the context of addressing an ineffective assistance of counsel claim in *Wiggins v. Smith*, __ U.S. __, 123 S.Ct. 2527 (2003). The mitigating evidence which was central to the issue in *Wiggins* was not evidence of retardation or low intellect. If the highly restrictive test applied by the Fifth Circuit defines the full scope of mitigating evidence which is constitutionally relevant, then there would be little reason to have found that counsel's inadequate investigation in *Wiggins* made a difference.

There is one indisputable rule which guides *Penry I* and all of its progeny, including *Penry II*. That is respect for the jury as the deliberative body best qualified to evaluate whether particular evidence is sufficiently mitigating to call for a sentence less than the death penalty. This Court has focused on jury instructions in much of its Eighth Amendment jurisprudence. In the petitioner's view, this demonstrates a belief by this Court that juries will, on the one hand, reach appropriate decisions if given correct legal guidance, while on the other hand, jury instructions which unduly restrict the ability of

juries to function, or instructions which inadvertently restrict jurors by confusing them, are apt to produce unreliable and constitutionally unacceptable results.[4]

The fact that this Court has never adopted a bright line rule, let alone that crafted by the Fifth Circuit, leads to the intriguing and important point made in Judge DeMoss' dissent in *Robertson, supra* at 268:

> I think the majority errs in relying on whatever may be "this Court's consistent interpretation of *Penry I* to decide the critical issues in this case." After Congress adopted the AEDPA, it is settled law that on our review under §2254 we look only to the decisions of the United States Supreme Court to determine whether a state court decision was consistent with "clearly established federal law."

The "uniquely severe permanent handicap" language appears nowhere in this Court's jurisprudence. This Court's decision in *Graham* did not adopt the Fifth Circuit's standard. Writs of certiorari have been denied in many cases where the Fifth Circuit applied its standard, but denial of the writ of certiorari is not a decision on the merits. *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950) (Opinion of Frankfurter, J.). The Antiterrorism and Effective Death Penalty Act of 1996 may have made the Fifth Circuit's standard obsolete by virtue of the

[4] Two examples outside the realm of *Penry* would be the cases, such as *Beck v. Alabama,* 447 U.S. 625 (1980), concerning instructions on lesser offenses in capital cases, and the cases, such as *Victor v. Nebraska*, 511 U.S. 1 (1994), concerning instructions to juries on the burden of proof beyond a reasonable doubt.

fact that the standard is *only* that of the Fifth Circuit, not part of this Court's case law. Thus it may be enough, for present purposes, to "retire" the standard rather than repudiating it.

(2) Inherent Flaws in the Fifth Circuit's Standard

Even if this Court were inclined to adopt a bright-line standard, it should not be the "uniquely severe permanent handicap" standard crafted by the Fifth Circuit. That standard has some inherent flaws.

The first major problem with the Fifth Circuit's standard is the wording. The word "uniquely" cannot literally be accurate. "Unique" means one of a kind, and *Penry* doctrine surely was not tailor-made for one man or one group. If what the Fifth Circuit meant was rarity rather than uniqueness, then immediately the standard takes on shades of gray, and it is not really a standard at all.

Turning to the word "severe," neither *Penry* decision suggested that different "handicaps" are to be compared for "severity" by either a jury or a reviewing court. In fact, such a comparison could not be made by the jury in any one case with any degree of reliability, for the facts needed for comparison would not be before the jury. How would the jury in the petitioner's case, for example, know how the petitioner's mental acuity compared to that of Johnny Penry, or to that of any other person charged with Capital Murder? The Fifth Circuit itself could have some comparative information available with respect to other cases already reviewed by that court, but any federal appellate comparison made between cases is far removed from the

question of how a jury considered the potentially mitigating facts in a given case.

Furthermore, it is fallacious to limit *Penry* doctrine to a "permanent" handicap, or for that matter, even a long-term one. To see why that is so, the Court need only look to *Penry I, supra* at 318, which specifically said that "circumstances of the offense" could be mitigating evidence. Obviously the transient circumstances of a crime are not a "permanent" characteristic of the actor.[5] Furthermore, if "handicap" was intended by the Fifth Circuit to mean the type of condition now generally called a "disability," then that also is inconsistent with the observation in *Penry I* that circumstances of the offense could be mitigating.

The majority opinion in *Robertson* presented a chilling list of the potentially mitigating afflictions which have been held to fall short of the Fifth Circuit's test, including "subnormal intelligence" and head injuries. *Robertson*, 325 F.3d at 249-250, citing the petitioner's case. A similar list was set forth in the district court's memorandum opinion in this case. There was nothing in *Penry I*, however, which said particular types of mitigating evidence automatically lacked constitutional significance. In the real world, problems often are significant because of their degree rather than their type. Yet the Fifth Circuit has read *Penry I* as defining a very narrow class of handicaps as the universe of what mitigating evidence has "constitutional" significance, effectively distinguishing by type rather than degree. In a masterpiece of understatement, a concurring

[5] The present statutory mitigation issue in Texas law also treats circumstances of the offense as potentially mitigating evidence.

judge in *Robertson* commented that "we have danced close to categorical characterization of evidence of disabilities." 325 F.3d at 259.

The Fifth Circuit's test also gives short shrift to the possibility that the combined effect of disabilities or circumstances could be sufficiently mitigating. A mixture of problems is a common phenomenon among people who are mentally ill. For example, in *Penry I* itself the potential mitigating effect of the defendant's mental retardation was compounded by psychiatric effects of Penry's abused childhood. The significance of combined problems – and the inadequacy of the Fifth Circuit's test as a measure of their mitigating significance – need not rely on anecdotal examples, however, for comorbidity is a bedrock concept in modern psychiatry. The American Psychiatric Association's diagnostic system, used in most forensic mental evaluations, subdivides analysis into more than one "axis" because a single individual can have different types of problems which interact. For example, mental retardation is placed on a separate axis, not lumped in with psychoses, but any competent clinician would heed the existence of both retardation and a psychosis. Few jurors are experts in psychiatry, but most jurors probably have an intuitive sense that problems compound. The Fifth Circuit's test seems to lag behind jurors' common sense in this respect.

(3) Is a Nexus Needed?

The Fifth Circuit's analysis in the petitioner's case did not focus on the lack of a "nexus" between mitigating factors and the offense, given the finding that the type of mitigating evidence presented did not meet the "uniquely severe permanent handicap" standard. It is still worth

considering whether *Penry I* actually created a nexus requirement and, if so, what it is. *Penry I* at 310 referred to testimony that Penry's retardation prevented him from learning from his mistakes, but it would be reading far too much into that aspect of *Penry I* to say that the existence of a constitutional violation depends on whether some mitigating factor goes so far as to "explain" the charged offense. It is questionable whether proof of any causal link, to any degree, should be required. Causation is a complicated concept, even when dealing with causation of a single event, and it seems almost unmanageable when it is considered that the future dangerousness determination usually involves evidence of other antisocial events in the defendant's life. Must a defendant also prove a causal link between a mitigating factor and those extraneous events which may be a major part of the evidence against him? If so, must he show causation as to all of them, or just some of them? Furthermore, a nexus requirement may clash with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the extent that it creates a defendant's burden to prove a causal link between mitigating factors and matters which, under Texas law, determine the maximum punishment. In short, a nexus requirement creates more problems than it solves. Even if a nexus requirement exists, however, there was enough evidence to satisfy it in this case, as discussed in Part F below.

The validity of the nexus requirement is thoroughly discussed in the brief filed by Robert Tennard, and the petitioner adopts that discussion.

D. If Not the Fifth Circuit's Standard, What Standard?

The petitioner does not suggest that this Court should tear down the Fifth Circuit's standard without providing a suitable substitute. That is an easy enough task, however, for a workable and fair standard may be gleaned from this Court's case law. A plurality opinion in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) stated that a sentencing jury should not be "precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis in original). A majority of the Court endorsed that position in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). The word "any" means exactly what it says.

The task at hand is a question concerning jury instructions, and a doctrine which meshes easily with that of *Lockett* and *Eddings* is found in this Court's jury charge case law. In the context of instructions on lesser offenses, a requested charge should be given if there is enough evidence to "permit a jury rationally to find" a defendant guilty of the lesser offense but not guilty of the greater offense. *Beck, supra* at 635, quoting from *Keeble v. United States*, 412 U.S. 205, 208 (1973). By analogy, if there is enough evidence to rationally permit a jury finding that some mitigating factor exists, a proper vehicle for the jury's consideration of that mitigating factor should be required.

The Fifth Circuit itself articulated a similar test, though phrased in the negative, in a case decided three years before *Penry I*. In *Brock v. McCotter*, 781 F.2d 1152, 1158 (5th Cir. 1986), *cert. denied*, 476 U.S. 1153 (1986), the

Fifth Circuit stated: "We believe that where no reasonable person would view a particular fact as mitigating, it may properly be excluded as irrelevant." The *Brock* court framed the question as one of exclusion of evidence, so the usefulness of this language in *Brock* as a standard for determining the need for jury instructions may not have been obvious. Probably because *Penry I* came along soon thereafter, the idea expressed in *Brock* seems to have been forgotten, but it actually is consistent with what this Court was trying to accomplish in *Penry I*. This Court could use *Brock*, along with *Beck, Lockett*, and *Eddings*, as the foundation for a standard which truly captures what the Court intended in its *Penry* jurisprudence: A proper jury instruction is required if there is any evidence which a rational juror could view as showing the existence of a mitigating factor. Indeed, adoption of a standard other than an "any evidence" standard would be backing away from this Court's earlier death-penalty jurisprudence.

E. The Fifth Circuit's Standard Should Not Apply to *Penry II* Issues

Apart from the shortcomings of the Fifth Circuit's standard, there is an alternative approach which raises a valid question whether that standard should even apply to issues under *Penry II*. The petitioner would prefer to jettison the Fifth Circuit's standard entirely, but a man on Death Row takes whatever help he can get.

As a starting point, the very existence of a nullification instruction in a case tried after *Penry I* is an indication that the trial judge thought there was some sort of mitigating evidence. After that threshold determination is made by a judge, should not the weight of the evidence be

decided by the jury? The "uniquely severe permanent handicap" standard presupposes that no reasonable juror could have found anything less than evidence meeting that standard to be mitigating. That demeans the role of the jury. It does so on the type of issue which *most* calls for the collective community wisdom which a jury brings into the courtroom, *i.e.* what circumstances are mitigating under current community norms.

The concurring opinion in *Robertson, supra* at 259 perceived a "sudden tolerance of jury discretion" in this Court's case law. Actually *Penry I*, decided fourteen years ago, rested in large part on the idea that Capital Murder juries should have discretion with respect to mitigating factors. There would be nothing "sudden" about repudiation of a Fifth Circuit doctrine which declines to respect jury discretion as to what is "mitigating."

Once respect for the jury is given its proper place in the calculus, it is easy to see that the "uniquely severe permanent handicap" test need not be superimposed on *Penry II*. With proper instructions, rather than a nullification instruction, the jury in the petitioner's trial might well have found some condition or circumstance outside the Fifth Circuit test to be sufficiently mitigating. Therefore the evil of "mixed signals" in the jury charge existed whether or not a federal appellate court agreed that this particular defendant's mitigation evidence was adequate. The superimposition of the Fifth Circuit's standard on *Penry II* has the effect of severely limiting *Penry II*.

F. Mitigating Evidence in This Cause

There was enough potentially mitigating evidence in the petitioner's trial to make the risk inherent in a nullification

instruction a significant problem in this cause. There were three potentially mitigating factors, as discussed in the Factual Background, *supra*. These are the petitioner's low intelligence, his affliction with antisocial reaction, and possible residual effects of a juvenile head injury. Each of the three could be a "two-edged sword," as that term was used in *Penry I*, because each of the factors could have some tendency to support a "Yes" answer to the future dangerousness special issue.[6]

(1) *Subnormal intelligence.* The fact of the matter is that the petitioner has a significantly impaired intellect. As was shown in habeas proceedings, the petitioner several times had I.Q. scores below the 70-75 range:

> In 1980, a report indicated a verbal I.Q. of 67, a Performance I.Q. of 64, and a Full Scale I.Q. of 63. An evaluation from the Harris County Department of Education from 1982 reported a Verbal I.Q. of 57, a Performance I.Q. of 55, and a Full Scale I.Q. of 52. This report also characterized Smith as falling within the "[m]entally deficient range of intellectual development." In 1983, the Texas Youth Counsel Child Care System placed Smith's Verbal I.Q. at 60, his Performance I.Q. at 72, and his Full Scale I.Q. at 64, noting that these results put him within the "mild mental retardation" range.

[6] The petitioner does not believe *Penry I* established an ironclad rule that evidence be "two-edged" in order to require some mitigation vehicle which is better than a nullification instruction. On the facts of this case, where the mitigating evidence had "two-edged" potential, the petitioner's right to relief does not hinge on whether there is a requirement that mitigating evidence be "two-edged."

311 F.3d at 673. Unfortunately much of that information was not before the jury. What was introduced at trial was at least sufficient, however, to show that the petitioner had a very low intellect and that this low intellect could have contributed to his criminal behavior. Dr. Fason mentioned an I.Q. score of 64, which would make the petitioner "definitely retarded." SF 45:90; JA 99. He also mentioned a score of 74 (actually 72). Fason's personal opinion was that the petitioner had "borderline intelligence." SF 45:91; JA 100. He indicated that the petitioner exhibited at least two types of functional deficits, *i.e.* the petitioner fell behind educationally and he had difficulty understanding simple transactions with money.

Dr. Fason also suggested enough of a "nexus" to meet any legitimate requirement, stating that the petitioner's condition "is not a product of just his I.Q." SF 45:31; JA 64. That "not just" phrasing was evidence that Fason believed I.Q. *was* a contributing factor. Putting aside the obviously wrong "uniquely" component of the Fifth Circuit's test, a rational jury could find that either a 64 I.Q. or a 74 I.Q. (actually a 72) was mitigating, or even that it was a severe permanent handicap. A rational jury also could find that the petitioner's mental limitations made some contribution to the petitioner's history of antisocial activity, including the charged offense. Indeed, a low intellect most readily explains such things as the petitioner's foolish relinquishment of the getaway car keys in the middle of a robbery and his failure to appreciate how serious a gunshot wound in the arm could be.

This cause was tried long before *Atkins* was decided. Therefore it is important to not fall into the trap of trying to determine at this point whether the petitioner was shown to meet the clinical definition of retardation recognized in

Atkins. Something less than that could legitimately be considered mitigating by a jury. Moreover, it would be absurd to require litigants relying on *Penry II* to satisfy *Atkins*, for anyone covered by the absolute ban arising under *Atkins* does not need the protection of *Penry II*.

The Fifth Circuit relied heavily on the comment by Dr. Fason during cross-examination that the petitioner was "above the cutoff line for mental retardation." SF 45: 91; JA 100. *Smith,* 311 F.3d at 682. Fason's stated basis for that conclusion, however, was "the way he related things to me," meaning an interview. *Id.* This approach by the Fifth Circuit was off base, since Fason was not called by the defense as an expert on retardation, he was not relying on systematic testing to support that remark, and he made the remark as part of a rambling answer to a cross-examination question. Furthermore, as the Fifth Circuit admitted, an earlier evaluation *had* stated that the petitioner was "mildly retarded." SF 44:196.

The Fifth Circuit perceived a "vast difference" between the evidence in this cause and the evidence in *Penry II*. 311 F.3d at 681. This reveals the underlying fallacy of "categorical characterization," inherent in the Fifth Circuit's standard, that was mentioned in the *Robertson* concurrence. 325 F.3d at 259. The "vast" difference is mainly one of degree. Fason focused on the petitioner's intellect less than the expert in *Penry I*, but finding that to be a critical distinction gives a jury too little credit. Someone other than a trained psychiatrist or Ph.D. scientist could understand that a person of very low intellect would (a) be more likely to fail to appreciate the risk of shooting someone in the upper arm, and (b) be more likely to be a failure in life, with life events like those portrayed in the State's punishment evidence.

(2) *Antisocial reaction.* The federal district court's memorandum opinion held that "antisocial reaction" does not fall within the Fifth Circuit's standard. Without the filter of that standard, however, it might be considered to be mitigating. A jury which was not applying the Fifth Circuit's standard might consider it mitigating, yet be confused as to how to express that view when given nothing but a nullification instruction as a vehicle.

Dr. Fason presented a cogent theory of why antisocial reaction could have a nexus to the petitioner's criminal lifestyle. While it was plainly Fason's preference to emphasize his theory, he also indicated that low intellect and antisocial reaction could have a combined effect when he said the petitioner's condition was "not a product of just his I.Q."

(3) *Head injury.* The Court of Appeals declined to consider evidence of the petitioner's head injury in its *Penry II* analysis, declaring that the issue was not briefed and therefore was waived. 311 F.3d at 679. It would have been silly to argue on appeal that the United States district court had erred in finding that the head injury evidence met all components of the Fifth Circuit's test. On the contrary, the fact that something as serious as traumatic brain injury falls outside the current test is strong proof of the invalidity of that test. The petitioner's brief did attack the Fifth Circuit's standard as part of the response to the respondent's point of error.

In any event, some evidence of a head injury was part of the totality of evidence which formed a backdrop for the evidence of low intellect. In that sense it was like the childhood abuse evidence in *Penry I*. It is true that there was no expert testimony which explained the possible

significance of juvenile head trauma, but jurors did not need to be neurological experts to consider this evidence mitigating. The popular understanding of the effect of head injuries probably lags behind the popular understanding of mental retardation, but it cannot be assumed that all twelve jurors were completely ignorant on the topic. At least some of the jurors could have appreciated the clinic physician's comment to Johnny McBride that, in the long run, the head injury might affect the petitioner.

Taken together, those factors could have been considered sufficiently mitigating by a jury which was properly instructed. The same is true of the evidence of mental retardation or subnormal intelligence, standing alone. The federal district court was correct in holding that *Penry II* applied because there was evidence which a properly instructed jury could consider to be mitigating.

The state habeas court did not make the kind of detailed factual findings which would require a different conclusion by the federal district court. The state district court's findings of fact and conclusions of law were entered in 1999, and they were accepted by the Court of Criminal Appeals that same year, so neither state court in the habeas process had occasion to address the applicability of *Penry II*. The Fifth Circuit panel cited a non-specific state habeas finding that "the jury could give effect to the applicant's alleged mitigating evidence." 311 F.3d at 678. It cannot be assumed, however, that the state district court would enter the same finding after *Penry II*. Furthermore, the state court findings of fact and conclusions of law contained no findings that the mitigating evidence offered by the petitioner lacked credibility. The state district court entered no findings of fact or conclusions of law expressing a view as to whether any particular mitigating factor

constituted a "uniquely severe permanent handicap." Given the absence of state habeas findings as to the foregoing matters, it cannot plausibly be argued that the federal district court failed to show sufficient deference to state court factual findings.

G. The Appropriate Disposition

The petitioner argued in the Fifth Circuit that, even if the respondent prevailed on appeal, the most relief the respondent should have received was a remand to the federal district court. That argument was based primarily on the issue of ineffective assistance, which could have been better illuminated if additional evidence were considered in the federal district court. The ineffectiveness issue is not under consideration now. For present purposes, if the Fifth Circuit's test falls, then so does the legal basis for the respondent's appeal of the federal district court's order. A remand to the Fifth Circuit is not really necessary, since the district court's application of *Penry II* would require relief. This Court could simply affirm the district court's order (though not necessarily all of its reasoning) and vacate the state district court's judgment with respect to the punishment assessed. The petitioner should receive a new trial on the issue of punishment unless the petitioner's sentence is commuted by Texas authorities.

CONCLUSION

For the foregoing reasons, the decision of the United States Fifth Circuit Court of Appeals should be reversed and the judgment of the United States District Court should be reinstated.

Respectfully submitted,

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