No. 05-11287

In The Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the pre-1991 Texas capital sentencing instructions – which permitted jurors to return only a "yes" or "no" answer to two "special issues" inquiring whether a defendant had killed "deliberately" and would probably constitute a "continuing threat to society" – deprive Mr. Brewer of constitutionally adequate consideration of mitigating evidence about his mental impairment and childhood mistreatment and deprivation, in light of this Court's recognition in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment?

2. Do this Court's opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), and *Smith* preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), whenever the pre-1991 special issues might have afforded some stunted consideration of a defendant's mitigating evidence?

3. Does the Fifth Circuit's insistence that a defendant's mental disorder must be severe, permanent or untreatable in order to qualify for relief under *Penry,* impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

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

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Gary Johnson, Janie Cockrell, and Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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OPINIONS BELOW

The Fifth Circuit's opinion, *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006), reversing the unreported District Court opinion granting habeas relief, appears at JA 214-29. The District Court's opinion appears at JA 185-213.

JURISDICTION

The Fifth Circuit entered judgment on March 1, 2006. *See* JA 214. Petitioner filed his Petition for Writ of Certiorari in this Court on May 30, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and the pre-1991 version of the Texas capital sentencing statute. The relevant portion of the Eighth Amendment provides: "nor [shall] cruel and unusual punishments [be] inflicted." U.S. Const., amend. VIII. The relevant portion of the Fourteenth Amendment provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV.

The former Texas capital sentencing statute, Texas Code of Criminal Procedure Ann., art. 37.071 (Vernon's ed. 1989), provided as follows:

. . .

> b) On conclusion of the presentation of the evidence [at the separate sentencing hearing], the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

. . .

e) If the jury returns an affirmative finding on each issue submitted under this Article, the Court shall sentence the defendant to death. . . .

STATEMENT OF THE CASE

A. Course of proceedings

Petitioner ("Mr. Brewer") was convicted and sentenced to death in Randall County, Texas. The judgment was affirmed on appeal. *Brewer v. State*, No. 71,307 (Tex. Crim. App. 1994) (unpublished), JA 122-71, *cert. denied*, *Brewer v. Texas*, 514 U.S. 1020 (1995). He unsuccessfully sought state post-conviction relief. *Ex parte Brewer*, 50 S.W.3d 492 (Tex. Crim. App. 2001) (unpublished). *See* JA 177-84.

On federal habeas review, the District Court granted relief as to sentence. *Brewer v. Dretke*, 2004 WL 1732312 (N.D. Tex. 2004), JA 213. Respondent appealed; a Fifth Circuit panel reversed. *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005). Mr. Brewer sought rehearing; the panel denied rehearing but withdrew its original opinion, substituting another. *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006), JA 214. Mr. Brewer sought review in this Court, which was granted on October 13, 2006. *Brewer v. Quarterman*, 2006 WL 1528242 (U.S.) (Mem.), JA 230.

B. Facts material to the issues presented

Mr. Brewer was convicted and sentenced to death for murdering Robert Laminack in the course of robbery. Taken in the light most favorable to the verdict, the evidence showed that Mr. Brewer and Kristie Nystrom solicited a ride to the Salvation Army from Mr. Laminack. After they had traveled about a block in Mr. Laminack's truck, Mr. Brewer stabbed Mr. Laminack several times while Nystrom held his arm to keep him from fighting back. Nystrom was later seen with Mr. Laminack's property; a witness testified that Mr. Brewer told him he had killed a man for $140, the amount of money Mr. Laminack was believed to have had on his person. *See* JA 124.

Significant mitigating evidence was introduced at punishment, including details about Mr. Brewer's abused background and mental illness. Mr. Brewer and his mother were subjected to extensive physical abuse at the hands of Mr. Brewer's father, causing Mr. Brewer to become violent to protect his mother – a fact that the prosecution emphasized in closing argument as supporting

an affirmative answer to the "future dangerousness" special issue. JA 116-17.[1] The defense also introduced evidence establishing that Mr. Brewer suffered from depression severe enough to have required his involuntary commitment to a psychiatric hospital just three months before his offense. The District Court summarized the evidence as follows:

> At trial, witnesses testified that [Mr. Brewer] was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, [Mr. Brewer] was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.
>
> [Mr. Brewer] did not know his father until he was fifteen years old. After his father, Albert, reconciled with [his] mother, Karon, Albert abused both Karon and [Mr. Brewer]. Karon testified that Albert hit [Mr. Brewer] numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit [Mr. Brewer] with a stick of firewood. When Albert went outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.
>
> [Mr. Brewer] witnessed the physical abuse of his mother by his father. [He] would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic

[1] We cite the transcript of testimony from Mr. Brewer's trial as "RR" ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

> stress disorder and depression, stated, 'If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you.' There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that [Mr. Brewer] was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged that the incident was his fault and that he needed to be stopped. He testified that [Mr. Brewer] was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how [Mr. Brewer] might pose a continuing threat to society.
>
> [Mr. Brewer] became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats.

JA 187-88.

Defense counsel unsuccessfully requested a "separate proposed special issue on mitigation evidence." JA 189. As a result, the jury was instructed to answer only the "deliberateness" and "future dangerousness" special issues of the pre-1991 Texas capital sentencing scheme. Defense counsel nonetheless sought to encourage jurors to respond to Mr. Brewer's mitigating evidence by answering "no" to one of the special issues. JA 109. The prosecution fought to undermine this effort, arguing that under their instructions the jurors had no authority to render a moral judgment about whether Mr. Brewer should live or die. *See, e.g.*, JA 114 (telling jurors they do not "have the power to say whether [Mr. Brewer] lives or dies"). Instead, the prosecution insisted: "You answer the questions according

to the evidence, mu[ch] like you did at the guilt or innocence. That's all. It's not a matter of life and death." JA 114-15.

SUMMARY OF THE ARGUMENT

More than ten years ago, this Court reaffirmed in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), that capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of whatever mitigating factors the defendant offers. *Accord Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), *Smith v. Texas*, 543 U.S. 37 (2004). The Texas system under which Mr. Brewer was condemned failed to provide his jurors an opportunity to consider the relevant mitigating qualities of his abused childhood and mental impairment, in light of the sentencing instructions as they functioned in the context of his trial. Just as in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the deliberateness and dangerousness special issues failed to address the relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment. Worse, and again as in *Penry*, the only common-sense inference to be drawn from Mr. Brewer's mitigating evidence was that he would likely be dangerous in the future. And the prosecution exploited the facial narrowness of the special issues by insisting that jurors focus solely on whether Mr. Brewer was dangerous or would pose a dangerous threat in the future, rather than considering what potentially mitigating factors might account for or explain his dangerousness.

The District Court, in an opinion issued just six weeks after this Court announced *Tennard v. Dretke*, 542 U.S. 274 (2004), correctly found that under *Tennard* the state court's treatment of Mr. Brewer's *Penry* claim was objectively unreasonable and thus subject to correction under 28 U.S.C. §2254(d). *See* JA 192-96. On the warden's

appeal, however, the Fifth Circuit overrode the District Court's straightforward application of *Tennard*, invoking a set of categorical rules of the very sort that *Tennard* had held unacceptable. The Fifth Circuit found a "constitutional distinction" between being physically abused as a young child (like Penry) and suffering such mistreatment as an adolescent (like Mr. Brewer). JA 223 n.16. Given this "constitutional distinction," the Fifth Circuit regarded the abuse Mr. Brewer endured as insufficiently severe to implicate *Penry*. JA 224. ("Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in *Penry*"). Respecting Mr. Brewer's mental impairment, the Fifth Circuit invoked yet another categorical rule: "This circuit has made a distinction between mental retardation and mental illness. . . ." JA 224. Evidence of mental illness, it held, requires no additional jury instructions unless "the illness in question is chronic and/or immutable." JA 225. Mr. Brewer's "single episode of non-psychotic major depression" failed the "chronic and/or immutable" test, making *Penry* relief unavailable. JA 228. None of these rationales can be squared with *Tennard* or with *Penry* itself.

The decision of the Texas Court of Criminal Appeals ("CCA") earlier in the case was equally at odds with this Court's precedents and thus an objectively unreasonable application of the Court's clearly established Federal law. The CCA ignored *Penry*'s command to examine the particular mitigating evidence offered by a capital defendant and determine whether or not, as a practical matter, the instructions given to the jury under Texas' former special issue scheme put that evidence beyond the jurors' "effective reach." Instead, the CCA interposed a set of rules of its own design purporting to define the limits of *Penry* and holding specifically that mitigating evidence could pose no

Penry problem unless it was as severe as Penry's own and possessed an explicit causal "nexus" to the crime. In this respect, the CCA's methodology was indistinguishable from the one dismissed in *Tennard* as having "no foundation in the decisions of this Court." 542 U.S. at 284. Above and beyond this flawed methodology (though produced by it), the decision of the CCA was objectively unreasonable under *Penry* because no principled distinction can be drawn between the circumstances of Mr. Brewer's case and those which led the Court to grant relief in *Penry* itself.

In the final analysis, neither the Fifth Circuit nor the CCA ever directly confronted the constitutionally controlling question under *Penry* and *Johnson*: whether jurors could give meaningful consideration and effect to the relevant mitigating qualities of Mr. Brewer's abused childhood and mental illness. Neither court offered any commonsensical explanation of how these mitigating circumstances could have been understood to *make Mr. Brewer less dangerous*, so that they would have been within the jurors' effective reach in answering the "future dangerousness" issue. Realistically, Mr. Brewer's evidence of his abused childhood and psychological impairment could have served only to support the inference that he *would* probably continue to be dangerous in the future – an inference that the prosecutor forcefully urged jurors to draw. *Tennard*, 542 U.S. at 288-89 (a reasonable juror might give evidence of cognitive impairment aggravating effect under the future dangerousness question "as a matter of probable inference from the evidence"). Because the former Texas special issues gave Mr. Brewer's jurors no "meaningful basis" for considering the relevant mitigating qualities of those factors but treated them as exclusively and decisively aggravating, Mr. Brewer's death sentence cannot stand.

ARGUMENT

A. THE FORMER TEXAS SPECIAL ISSUES AFFORDED MR. BREWER'S JURY NO MEANINGFUL BASIS FOR GIVING EFFECT TO THE RELEVANT MITIGATING QUALITIES OF HIS ABUSED CHILDHOOD AND MENTAL IMPAIRMENT.

1. Mr. Brewer's mitigating evidence was extensive and powerful.

Mr. Brewer's mitigating evidence included both violent abuse as a child and mental impairment resulting from emotional instability as a young adult. This Court has recognized these very circumstances as ones which could justifiably motivate jurors to impose a life sentence. Exposure to family violence is unquestionably mitigating. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (the fact that the defendant's "father, who had a vicious temper, frequently beat [defendant's] mother, leaving her bruised and black-eyed," was mitigating) (citation and internal quotation marks omitted).[2] Being victimized by child abuse is mitigating. *Rompilla*, 545 U.S. at 392 (the defendant "was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks.") (citation and internal quotation marks omitted).[3] This

[2] *See also, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 790, 790 n.7 (1987) (expressing "no doubt" that the fact that defendant's stepfather "beat his mother in petitioner's presence when he was 11" was "relevant mitigating evidence").

[3] *See also, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003) (describing the mitigating evidence counsel failed to discover – including physical abuse at the hands of his mother and foster parents – as "powerful," being "the kind of troubled history we have declared relevant to assessing . . . moral culpability."); *Penry II,* 532 U.S. at 796 (evidence of child abuse was mitigating); *Williams v. Taylor*, 529 U.S.

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Court has also consistently reaffirmed that emotional problems or mental impairments are mitigating. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[e]vidence of . . . emotional disturbance is typically introduced by defendants in mitigation"); *Bell v. Ohio*, 438 U.S. 637, 641-42 (1978) (reversing death sentence where the sentencer could not consider evidence that the defendant "was mentally deficient . . . because of his drug problem and emotional instability"); *Penry*, 492 U.S. at 319 (a defendant's "emotional and mental problems" can reduce his culpability).[4]

2. The "deliberateness" special issue did not afford an adequate vehicle for the jurors to consider and give effect to Mr. Brewer's evidence.

The deliberateness inquiry afforded no vehicle for meaningful consideration of Mr. Brewer's mitigating evidence because it required no assessment of his moral

362, 398 (2000) (evidence that Williams was, *inter alia*, physically mistreated as a child "might well have influenced the jury's appraisal of his moral culpability"); *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("no question" that evidence of Parker's "difficult childhood, including an abusive, alcoholic father," was mitigating); *Penry*, 492 U.S. at 322 (agreeing that evidence of childhood abuse was "relevan[t] to his moral culpability"); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[e]vidence of a difficult family history [of physical abuse at the hands of one's father]" is mitigating).

[4] *See also, e.g.*, *Tennard*, 542 U.S. at 288 (defendant's "[i]mpaired intellectual functioning" was mitigating); *Williams*, 529 U.S. at 398 (evidence of Williams' mental impairments "might well have influenced the jury's appraisal of his moral culpability"); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998) (jury instructions permitted consideration of defendant's "family background and mental and emotional problems"); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990) (jury instruction precluded consideration of evidence that McKoy, *inter alia*, exhibited signs of mental or emotional disturbance).

culpability.[5] *Penry* recognized this basic shortcoming. *Penry*, 492 U.S. at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately' "); *id*. at 323 (absent additional instructions, a juror who believed that Penry's mitigating circumstances "diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' "). Tellingly, since *Penry* this Court has never upheld a Texas death sentence on the theory that the "deliberateness" issue afforded the defendant's evidence adequate consideration. Nor could it do so here.[6]

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[5] The "deliberateness" question was originally designed to ensure that the *mens rea* of defendants convicted under a theory of vicarious liability satisfied the Eighth Amendment. Such a finding was necessary because, although a capital murder conviction in Texas typically requires an "intentional" killing, persons convicted under Texas' "law of parties" need not themselves have intended to kill. *See* Tex. Pen. Code §§7.01, 7.02. The post-*Penry I* statute clarified this by substituting a new *mens rea* question applicable only to persons convicted under the "law of parties." *See* Tex. Crim. Proc. Code Ann. art. 37.071, §2(b)(2) (Vernon 2002). Given that the "deliberateness" inquiry was never intended as a vehicle for assessing moral culpability, it comes as no surprise that Texas courts came to treat it simply as confirming the presence of a culpable mental state vaguely "more than intent but . . . less than premeditation." *Bigby v. State*, 892 S.W.2d 864, 890 (Tex. Crim. App. 1994).

[6] *Penry I* suggests that the deliberateness question might enable meaningful consideration of mitigating evidence if the key term were defined so as to focus jurors on broadly assessing the defendant's moral culpability. *Penry*, 492 U.S. at 323. The instruction here, however, simply recited a "premeditation" formula, directing jurors that "deliberately" meant "a manner . . . resulting from careful and thorough consideration," "awareness of the consequences," "willful," "allowing time for a decision." *See* JA 8-90. Further, the jury had already convicted Mr. Brewer of an "intentional" killing, and the prosecutor had emphasized during voir dire that the only difference between "deliberately" and "intentionally" was that the former required "more planning." *See, e.g*., voir dire of juror Stafford, XI RR 1656) (deliberately "is

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3. The "future dangerousness" special issue afforded no vehicle for the jury to consider and give effect to the relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment.

Mr. Brewer's evidence of his abused childhood and mental impairment possessed the same relationship to the second special issue as Penry's evidence of an abused childhood and mental retardation. *See Tennard*, 542 U.S. at 288 (suggesting *Penry* error where "[t]he relationship between the special issues and Tennard's low IQ evidence ha[d] the same essential features as the relationship between the special issues and Penry's mental retardation evidence"). That is to say, the circumstances offered as factors in mitigation tended to *explain*, rather than *rebut*, the strong inference of Mr. Brewer's dangerousness. The prosecuting attorney's closing argument took advantage of this commonsense inference in urging the jurors that Mr. Brewer came within the plain language of the "continuing threat" inquiry, no matter how blameless he might have been for the person he became: "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if

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somewhat similar to" intentional, but would "require more planning, more thinking beforehand. . . ."); *see also* XII RR 1859, VI RR 620-22, X RR 1447, 1452-53 (comparable voir dire of jurors Stephen, Ambers, and Needham). Jurors might have concluded that Mr. Brewer committed the crime "deliberately" in the manner thus described, but yet that Mr. Brewer's abused background and mental illness reduced his moral culpability so as to make a death sentence unwarranted. *See Penry*, 492 U.S. at 322-23. Under those circumstances, their instructions required them to answer the "deliberateness" question "yes," calling for a death sentence. In short, particularly against the backdrop of the prosecutor's comments, the definition of "deliberately" in the charge was inadequate to transform the limited *mens rea* inquiry framed by the first special issue into an evaluation of Mr. Brewer's moral culpability.

that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change*." JA 118 (emphasis added). This Court recognized in *Tennard* the deadly effect of such a "future dangerousness" argument. *See Tennard*, 542 U.S. at 289 (jurors might have given Tennard's low IQ evidence aggravating effect under the future dangerousness issue in part "because the prosecutor told them to do so" by arguing that Tennard's low IQ was "really not the issue" and that the focus of the question was "the fact that he is a danger," rather than "the reasons why he became a danger"). Here, just as in *Tennard*, the prosecutor "pressed exactly the most problematic interpretation of the special issues" when he ruled out consideration of "whatever got [Mr. Brewer] to this point" and directed the jurors to focus instead on "what he is today." *Id*.

No court in this case has offered any theory of how a history of being abused renders a defendant like Mr. Brewer less dangerous, and common sense teaches the opposite. Experts recognize that children and teenagers subjected to abuse may act out violently due to impaired impulse control.[7] Lay experience confirms this connection.

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[7] *See, e.g., Chris Mallett, Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 [No. 4] CRIM. LAW BULLETIN 3 (July 2003) at 2 (researchers have documented that "physical and psychological maltreatment" of children "is associated with aggressive behaviors," and that "[l]ong-standing psychological and behavioral impairments are often the outcomes of [childhood] physical abuse"); Dorothy Otnow Lewis, *From Abuse to Violence: Psychophysiological Consequences of Maltreatment*, 31 J. AM. ACAD. CHILD AND ADOLESCENT PSYCHIATRY 383 (1992) at 383-85 (children who have been physically abused tend to behave more aggressively); JAMES GARBARINO & ANNE C. GARBARINO, MALTREATMENT OF ADOLESCENTS (National Committee for Prevention of Child Abuse, 1982) (severe punishment correlates with increased future aggression).

See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting on other grounds) ("A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens").

Impaired mental or psychological functioning likewise undermines a person's judgment and capacity to appreciate the appropriateness and likely consequences of his actions. *Penry* recognized that those features of mental impairment would tend to persuade jurors that the impaired defendant would likely be dangerous in the future. Yet the same aspects of mental impairment reduce the defendant's moral culpability and call the fitness of a death sentence into question. *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment) (a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment"); s*ee, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). A forced choice in answering the unadorned future-dangerousness question "yes" or "no" gave jurors no way to express the conclusion that notwithstanding Mr. Brewer's probable dangerousness, a death sentence would be excessive for him in light of his mental impairment and abused background, and the bearing of those factors on his moral culpability for the crime. In this respect, too, this case is squarely controlled by *Penry*.

Moreover, and as the District Court emphasized in granting relief, the evidence in this case reflected that Mr. Brewer's involuntary commitment to a mental hospital, based on his suicidal behavior, occurred "just three months before the murder." JA 187. Given the short time interval involved, jurors likely drew an intuitive connection between Mr. Brewer's struggle with mental illness and the violent outburst that took Mr. Laminack's life. Focusing on that link, jurors would have been particularly likely to conclude – faced with the prosecutor's forceful argument that Mr. Brewer was a beaten puppy who would "bite [for] the rest of his life" and "never change" – that Mr. Brewer's mitigating circumstances simply contributed to the probability that he "would commit criminal acts of violence that would constitute a continuing threat to society." JA 118.

4. The prosecutor repeatedly reinforced that the special issues posed a narrow inquiry and emphatically discouraged the jurors from viewing the special issues as permitting a broad assessment of Mr. Brewer's moral culpability or the appropriate sentence in light of all the evidence.

This Court has explained that in assessing whether a jury charge precluded the jury from considering or giving effect to a defendant's mitigating evidence, the reviewing court must consider the context of the entire trial. *See, e.g.*, *Boyde v. California*, 494 U.S. 370, 380-83 (1990); *see also, e.g., Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469 (2006). One key part of that context is what the jurors were told, during voir dire and closing argument, about how to reach their decision. Here, the prosecutors repeatedly told jurors to answer the special issues literally on the facts, warning them not to undertake any broader

inquiry into the defendant's culpability or consider the appropriateness of the sentence required by their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions.

Jurors received no indication that the "deliberateness" issue concerned anything other than the defendant's *mens rea* prior to the crime, and were told that the distinction between killing "intentionally" (the *mens rea* applicable to the underlying offense under Tex. Pen. Code §19.03) and killing "deliberately" was simply that the latter required "more planning." *See* n. 6 *supra*. Such guidance did not prepare jurors to view their answer to the "deliberateness" inquiry as expressing their judgment about Mr. Brewer's personal moral culpability in light of his history of child abuse and his psychological impairment as a young adult. The prosecutors' closing argument about the first special issue reflected the same perspective, emphasizing Mr. Brewer's state of mind immediately prior to and during "the act of the killing" as sufficient to support an affirmative answer. *See, e.g.*, JA 116 ("But the act itself, the act of the killing, wanting the money, wanting the man dead, how much more deliberate can you get?"); *see also* JA 99.

During voir dire, the prosecution also instructed the jurors that the "future dangerousness" question did not invite them to express their conclusion about the appropriate sentence in light of all the evidence. Rather, the prosecutors stressed, jurors were to exercise no "discretion" in answering either question; they were duty-bound to answer the questions strictly according to the evidence. For example, after explaining the special issue scheme, a prosecutor told juror White that it was "this Court, not the jury," that must assess death. VIII RR 1091. He emphasized that the "decision about what punishment is to be assessed really lies within the laws of the State," adding that "the Judge

doesn't have any discretion in the punishment" and that the jury would simply be "answering questions about the evidence itself." *Id*. As he did with other jurors, the prosecutor also took care to elicit juror White's agreement to "answer [those] questions . . . without considering what punishment the Court must assess" in light of the answers. *Id*. at 1092-93.

The prosecutor made the same point to juror Needham, stressing that it would be "improper" for Needham, after hearing the evidence, to "determine . . . that this person should get life imprisonment," and then "answer a [special issue] question 'no' contrary to the evidence, just so the defendant will get the punishment [you] think is proper." X RR 1460. He demanded to know whether Needham could answer the questions "solely upon the evidence and put aside the fact that the [answers] would require . . . death or life imprisonment." *Id*. at 1460-61. He repeated that "the law . . . takes away from a juror the ability [to] say, this person should get life [or] this person should die." *Id*. at 1461. The prosecutor assured Needham that only by adhering to the literal meaning of the special issues could he give both sides "a fair trial." *Id*. at 1461.

The prosecutor likewise warned juror Robertson that the jurors would not be asked "what needs to be done to this particular defendant for committing this act." XIII RR 1969. He explained that under the special issue format, "there's not a lot of discretion that's really allowed to a jury," because the law would require them to answer the special issues "yes" or "no" as the evidence dictated. *Id*. at 1970. The prosecutor emphasized again that to treat the special issues as making any broader inquiry into moral culpability would deny both parties "a fair trial:"

> For the State and the Defendant to receive a fair trial, you have to answer those according to . . . the evidence submitted, without regard to the punishment that this Court must assess. It's very important that jurors be able to do that because their job is not to determine whether a person goes to the penitentiary for life imprisonment or whether the person should be executed. . . . What's important is that the jury . . . answer those questions 'yes' or 'no' based solely upon the evidence. . . .

Id. at 1972-73.[8]

During voir dire, then, the prosecutors told the jurors to treat the special issues as literally as possible, and not to respond to them as a license to exercise "discretion" in an attempt to achieve an appropriate sentence in response to the evidence as a whole.

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[8] *See also, e.g*., XII RR 1853 (prosecutor to juror Stephen: "Our law says the jurors can't do that [answer the special issues to ensure that a particular sentence is imposed]. Our law says that the jury has to answer those questions according to the evidence. And basically, the law requires a juror be able to answer those without considering what the result of the answers may be;" prosecutor elicits juror's agreement to "answer those questions . . . according to the evidence, without regard to the punishment that this Court must assess"); XI RR 1652 (prosecutor to juror Stafford: "The laws of this State require that *if you feel that life imprisonment is a proper form of punishment, you set that feeling aside and render your decision according to those answers [sic] the way they should be answered under the evidence that you hear*") (emphasis added); VI RR 624 (prosecutor to juror Ambers: "*[Y]ou don't have any discretion from the standpoint of what punishment is assessed*, . . . this Court has no discretion at [sic] what punishment is assessed. . . . [T]he way these questions are answered determines what punishment is going to be applied") (emphasis added), *id*. at 626 (prosecutor to juror Ambers: "[O]ur law says that you must render a decision . . . according to the evidence that you hear. [Could you] answer those questions according to the evidence without considering . . . what the law of this State may require this Judge to do as far as the punishment?").

The punishment-phase closing arguments of both parties likewise reflect the inadequacy of the pre-1991 special issues as applied to Mr. Brewer's mitigating evidence. Unsurprisingly, defense counsel never argued that Mr. Brewer's background of physical and psychological abuse and his mental illness could support an honest "no" answer to the "future dangerousness" question. Instead, after reviewing the State's evidence in favor of a finding of "future dangerousness," defense counsel simply said, "I'm fixing to sit down now, but I want you to realize that this is what we're here for. *You're determining what to do about Brent* in answering those special issues." JA 107 (emphasis added). In the same vein, Penry's defense counsel initially "urged the jury to answer the first special issue 'no' because it would be the just answer, and [a] proper answer." *Penry*, 492 U.S. at 325. Ultimately, defense counsel here, like his counterpart in *Penry*, was foreclosed from arguing that jurors could reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question, and so for all practical purposes simply pleaded for nullification.

The prosecutor here, like his counterparts in *Penry* and *Smith*, responded to defense counsel's plea for mercy by demanding that jurors honor their oath to answer the special issues honestly according to the evidence. He specifically echoed his own comments from voir dire, insisting that for the jurors to do otherwise than address the special issues factually on the evidence would deny both parties "a fair trial:"

> Contrary to what [defense counsel] would have you believe, I don't have the power to say whether [Mr. Brewer] lives or dies. *You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, [j]ust like you did at the guilt or innocence. That's all. It's not a matter of*

> *life or death.* It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? *That's all you answer*. And every one of you people told me you would base that not on the result, but upon what the evidence dictates you must do. If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held. You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

JA 114-15 (emphasis added).[9] The prosecutor also argued that even if Mr. Brewer's background had resulted in his being dangerous, his dangerousness was all that mattered:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change.* That will never change.

JA 118 (emphasis added).[10]

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[9] Undeniably, the prosecutor hoped jurors could be led to feel no personal moral responsibility for Mr. Brewer's fate. That impression could readily be conveyed by emphasizing the narrowness of the special issues presented for the jury's decision under the pre-1991 Texas scheme; the circumstances of this case raise a serious question whether the jurors whose verdict resulted in Mr. Brewer's death sentence were conscious of their important role in expressing the community's sentiment about the appropriate sentence, which lies at the heart of the individualization requirement. Justice Breyer has recognized the importance of following "procedures that will help assure that, *in a particular case*, the community indeed believes application of the death penalty is appropriate. . . ." *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (emphasis added); *see also Smith*, 543 U.S. at 38 (jurors' instructions must enable them to perform the essential task of "choosing the defendant's appropriate sentence").

[10] This Court confronted a similar prosecutorial argument in *Tennard*: "[W]hether he has a low IQ or not is not really the issue.

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The prosecutor summed up his argument by pointing once again to the jurors' sworn obligation to answer the special issues according to the evidence, not according to what sentence they thought was appropriate in light of that evidence:

> But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no" [to the "deliberateness" question], you're not looking. . . . You can't get more deliberate than . . . that. If you feel comfortable that he will be walking in any society, in the penitentiary or anyone [sic] else, and he will not be a continuing threat to whoever is around him, that can be your decision. . . . *But base your decision on what's dictated according to the facts and not on what punishment must be assessed. Do what the facts say, answer the questions according to the law, and a fair trial will be held*.

JA 118-19 (emphasis added). This argument is precisely the type of entreaty that this Court identified in *Penry* and *Smith* as manifesting the failure of the pre-1991 special issues to permit meaningful consideration of mitigating evidence. *See Penry*, 492 U.S. at 325 ("You've all taken an oath to follow the law. . . . [Y]our job as jurors and your

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Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." *Tennard*, 542 U.S. at 288-89. The prosecutor's closing argument against Mr. Brewer – that "[w]hatever got him to this point, he is what he is today. And that will never change" – had precisely the same impact. Both arguments "press[ ] exactly the most problematic interpretation of the special issues," by painting the defendant's most important mitigating evidence as "irrelevant in mitigation, but relevant to the question whether he posed a future danger." *Tennard*, 542 U.S. at 289.

duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); *Smith*, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'Yes' answer to the special issues [if] the State met its burden of proof"). Here, as in those cases, the argument only compounded the problem presented by the special issues themselves.

In the past, this Court has assumed that the former Texas special issues system permitted jurors to "exercise a range of judgment and discretion," *Johnson*, 509 U.S. at 370, when that interpretation of the process "accord[ed] with a 'commonsense understanding' of how the jurors were likely to view their instructions . . . ," *id*. Here, however, the fact that the jurors in Mr. Brewer's case were told repeatedly and explicitly that they were *forbidden* to exercise any discretion in answering the special issues makes it highly unlikely that in doing so they weighed Mr. Brewer's mitigating evidence "in a manner similar to that employed by capital juries in 'pure balancing' States." *Id*. at 370-71 (citation omitted).

B. IN REVERSING THE DISTRICT COURT'S JUDGMENT THAT *TENNARD* COMPELLED RELIEF, THE FIFTH CIRCUIT CREATED NEW AND INSUPPORTABLE "CONSTITUTIONAL DISTINCTION" THAT SIMPLY RESURRECTS THE "SCREENING TESTS" REJECTED BY THIS COURT IN *TENNARD*.

The District Court below recognized that *Tennard* and *Penry* required relief from Mr. Brewer's death sentence. *See* JA 194-96. In reversing that judgment, the Fifth Circuit did not painstakingly examine the record to justify

the conclusion that Mr. Brewer's mitigating evidence could have been given meaningful consideration under the special issues in light of everything that took place at his trial. Rather, the Fifth Circuit discounted the significance of Mr. Brewer's mitigating evidence by applying new "constitutional distinctions" that effectively resurrected the "screening tests" condemned in *Tennard*.

First, the Fifth Circuit altogether ignored the state court's basis for rejecting Mr. Brewer's *Penry* claim. Indeed, other than mentioning the prior state court decisions in reciting the procedural history of the case, *see* JA 216, there is no analysis at all in the Fifth Circuit's opinion of the CCA's approach. *Cf. Penry*, *Tennard*, and *Smith*. Had the Fifth Circuit undertaken that analysis, it would have found that the CCA denied relief because Mr. Brewer allegedly demonstrated no "nexus" between his mitigating evidence and his crime, and further because the CCA perceived Mr. Brewer's child abuse and mental impairment as insufficiently "severe" to implicate *Penry*. *See* Section C *infra*. *Tennard*, of course, condemned such preconditions for applying *Penry* as lacking any basis in this Court's jurisprudence. *See Tennard*, 542 U.S. at 284.

Second, apart from ignoring the CCA's reliance on the now-discredited conceptual framework of "nexus" and "severity," the Fifth Circuit failed to improve on that framework with its new "constitutional distinction" between violent physical abuse suffered as an adolescent (as in Mr. Brewer's case) versus the same mistreatment suffered as a younger child (as in *Penry*). JA 223 n.16. Nothing in any opinion of this Court suggests that the relevant mitigating qualities of being physically mistreated as an adolescent are any different than those of

being abused as a child,[11] and the recourse to such categorical, mechanistic reasoning is just what *Tennard* denounced. Equally important, as a result of its reliance on such categorical analysis in the *Penry* context, the Fifth Circuit has consistently failed to consider how a defendant's mitigating evidence was actually presented and argued at trial, as required under *Boyde*.[12]

Nor can the Fifth Circuit's analysis be upheld on the theory that evidence of child abuse can be given meaningful mitigating effect in answering the future dangerousness question, not least because *Penry* held squarely to the contrary. The Fifth Circuit's attempt to limit *Penry* by suggesting that the child abuse evidence in Mr. Brewer's case was more like the background evidence in *Graham v. Collins*, 506 U.S. 461 (1993), than the child abuse evidence in

[11] Nor does available research appear to support any such inference. *See, e.g.*, sources cited in n.7, *supra*.

[12] *Garcia v. Quarterman*, 456 F.3d 463 (5th Cir. 2006), illustrates the Fifth Circuit's continuing noncompliance with *Penry*. Garcia argued that the jury was unable to give mitigating effect to evidence that he had been sexually abused as a young child. *Id.* at 468-71. The Fifth Circuit majority found no *Penry* error, asserting that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to preserve a claim that his client was harmed by the preclusive effect of the "nullification" charge condemned in *Penry II* and *Smith*. *Id.* at 472. It rejected "the . . . position that any evidence of childhood abuse must be considered under *Penry* regardless of [how] it was offered at trial." *Id.* In other words, the Fifth Circuit *will* consider the full context of trial in evaluating a *Penry* claim – but only as an innovative basis for denying relief. As Judge Benavides regretfully noted in dissent, *Garcia* shows that the Fifth Circuit persists in applying *Penry* by crafting new "screening tests," despite this Court's clear holdings to the contrary. *See Garcia*, 456 F.3d at 479 (Benavides, J., dissenting) (majority's approach makes "an end run" around *Penry*, is at odds "at least with the spirit of *Tennard*" and introduces another "threshold screening test . . . [unfounded in] Supreme Court precedent").

Penry, *see* JA 223-26, misstates *Graham*'s holding and broadly erodes the basic distinctions between *Graham* and *Penry*.

This Court in *Graham* was not called upon to define the scope of *Penry*, because Graham was not entitled to the benefit of *Penry* in any event. *Graham*, 506 U.S. at 477.[13] Moreover, the Court's analysis of how Graham's background evidence fared under the special issues responded to the nature of that evidence and how it was presented and argued at trial – aspects of Graham's case that, in every regard, contrast with Penry's and Mr. Brewer's.

Graham's youth, being inevitably transient, bore straightforward mitigating relevance to his future dangerousness. *Graham*, 506 U.S. at 475-76. Regarding Graham's background, the Court emphasized that Graham "offered testimony . . . concerning his upbringing and positive character traits" that painted him as a "real nice, respectable" person who "would pitch in on family chores" and supported his own children. *Graham*, 506 U.S. at 463-64. Graham's grandmother, with whom he had stayed from time to time as a child during his mother's periodic hospitalizations for a "nervous condition," attested that Graham was "never . . . violent or disrespectful," "attended church regularly," and "loved the Lord." *Id*. at 464. This portrayal permitted defense counsel to argue in closing that "Graham's criminal behavior [w]as aberrational," and on that basis counsel "vigorously urged the jury to answer 'no' to the special issues." *Id*. at 464, 475. Contrary to the Fifth Circuit's characterization, *see* JA 223 n.16, *Graham* did not

[13] *Graham* applied *Teague v. Lane*, 489 U.S. 288 (1989), to hold that in 1984, five years prior to *Penry*, existing law did not *dictate* the conclusion Graham urged – that his youth and background evidence could not be given mitigating effect without additional instructions beyond the former special issues. *Graham*, 506 U.S. at 477.

involve evidence of a "troubled childhood." This Court nowhere described Graham's background in those terms. Instead, Graham's evidence was offered to highlight his positive character traits and portray him as an excellent prospect for rehabilitation. Thus framed, such evidence, like Graham's youth itself, tended naturally to support a "no" answer to the question whether Graham posed a continuing threat to society. None of these aspects of *Graham* resemble Mr. Brewer's case, in which defense counsel presented evidence of Mr. Brewer's abused background and mental impairment to help jurors understand why he came to commit murder, rather than to prove he had positive character traits showing a capacity for rehabilitation. These distinctions make the Fifth Circuit's strained attempt to invoke *Graham* to dismiss Mr. Brewer's evidence of child abuse – and thereby to circumscribe *Penry* – untenable.[14]

While defense counsel in *Graham* explicitly connected Graham's mitigating evidence to negative answers to the special issues, neither party at Mr. Brewer's trial made any argument that Mr. Brewer's abused childhood logically warranted a "no" answer to the "future dangerousness"

[14] Moreover, *Graham* also expressly likened Graham's background evidence to that in *Jurek v. Texas*, 428 U.S. 262 (1976), which included "evidence reflecting *good character traits* such as steady employment and helping others." *Graham*, 506 U.S. at 466 (emphasis added) (quoting the Fifth Circuit's description of Graham's evidence); *id*. at 476 (agreeing that "Graham's evidence . . . more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse"). The plain import of this observation is that *Graham* and *Jurek* involved evidence of *positive* character traits (good work history and familial ties), not evidence of the *destructive* effects of child mistreatment. Indeed, this very passage of *Graham* reemphasizes that under *Penry*, evidence of "harsh physical abuse" like that suffered by Mr. Brewer as an adolescent falls outside the scope of the special issues.

question, and no reason exists to assume that jurors would have drawn such a counter-intuitive inference on their own. *See* Section A *supra*. Indeed, the prosecutor argued to the contrary, urging that Mr. Brewer's experience of abuse made him more dangerous. "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change*." JA 118 (emphasis added). Any speculation that the jury understood Mr. Brewer's history of child abuse as reducing his likely "future dangerousness" would be inconsistent with both common sense perceptions and judicial assessments of the relationship between abusive backgrounds and future dangerousness.[15]

[15] Childhood abuse is understood to have long-term effects, *see*, *e.g.*, *Williams*, 529 U.S. at 398; *Santosky*, 455 U.S. at 788-89 (dissenting opinion), and no responsible expert would suggest that there is a knowable endpoint to the destructive consequences of such experiences. *See, e.g.*, n.7 *supra.* Respondent has not identified any case in which a capital defendant offered evidence of such abuse to support the inference that such trauma has only fleeting impact and tends to support a prediction of non-dangerousness. Moreover, the Fifth Circuit and other courts, in rejecting claims of ineffective assistance of counsel challenging counsel's failure to develop or present evidence that the defendant was abused as a child, have recognized that jurors can infer future dangerousness from such evidence. *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994) (endorsing as reasonable the strategic decision by Mann's trial counsel "not to introduce evidence of [Mann's] . . . abusive childhood because such evidence had a 'double-edged' nature which may have harmed Mann's case" under the Texas special issues); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (excusing counsel's decision not to introduce evidence that the defendant "suffered from child abuse, family instability, a poor educational background, low IQ, gunshot injuries, and that his mother was severely and chronically mentally ill," because counsel reasonably feared that under the former Texas statute "the jury might very well consider that evidence aggravating, rather than mitigating"); *Kitchens v. Johnson*, 190 F.3d 698, 701-02 (5th

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As for the Fifth Circuit's refusal to find *Penry* error based on Mr. Brewer's mental impairment, that conclusion, too, turned upon the court's perpetuation of its pre-*Tennard* categorical limitations upon the scope of *Penry*. *See* JA 227 ("mental illness [is not] tantamount to mental retardation for the purposes of our [*Penry*] case law"); JA 228 ("not . . . one iota of evidence suggest[s] either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result"). *Tennard* forecloses these refurbished models of the Fifth Circuit's long-time "severity" screen for mental ailments. Jurors could well have found that Mr. Brewer's psychiatric impairment undermined his culpability. Yet, as with Penry's mental retardation, the fact that Mr. Brewer was suicidal and suffered a major depressive episode shortly before the crime was relevant to dangerousness, if at all, only as aggravating; his chances of receiving a "no" answer would actually have been improved had jurors not heard that evidence.[16]

Cir. 1999) (counsel acted reasonably in not presenting, *inter alia*, "evidence of child abuse" at defendant's 1986 trial because of its "double-edged" quality under the former Texas statute); *Lovitt v. True*, 403 F.3d 171, 179-80 (4th Cir. 2005) (trial counsel acted reasonably in not presenting evidence of defendant's destructive family background because the prosecution was focusing on future dangerousness and such evidence might have "suggest[ed] violent tendencies"). Nor can Respondent credibly assert that evidence of mental impairment is generally associated with non-dangerousness and proffered for that purpose. *See, e.g., Martinez v. Dretke*, 404 F.3d 878, 889-90 (5th Cir. 2005) (counsel acted reasonably in not introducing evidence of defendant's "organic brain damage" in a 1989 trial because it would have "increased the likelihood of a future dangerousness finding"); *Walker v. True*, 401 F.3d 574, 582-83 (4th Cir. 2005) (counsel acted reasonably in not introducing evidence of defendant's "mental incapacity" because she concluded that it "would tend to support the government's argument that he constituted a future danger").

[16] There is a widespread perception, accurate or not, that those suffering from mental disability or disorder are likely to be dangerous.

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Nor can the decision below be salvaged on the ground that Mr. Brewer's mental impairment might conceivably be treatable – the basis on which the Fifth Circuit has categorically ruled out *Penry* relief in most cases involving mental illness.[17] No evidence before the jury indicated that Mr. Brewer's mental illness was treatable. And even if the jurors could have imagined that treatment was available,

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See, e.g., JOHN MONAHAN, ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 2001 at 3 ("Beliefs about the causes of mental disorder have changed over the centuries, but the belief that mental disorder presupposes many of those suffering from it to behave violently has endured"); Ann Hubbard, *The ADA, the Workplace, and the Myth of the 'Dangerous Mentally Ill*,' 34 U.C. DAVIS L. REV. 849, 850-51 (Summer 2001) ("Surveys consistently show that the public harbors widespread fear of 'the mentally ill,' " and that over the past 50 years "the dangerousness stereotype has . . . probably increased"); Harold I. Kaplan & Benjamin J. Sadock, *Synopsis of Psychiatry: Behavioral Sciences*, CLINICAL PSYCHIATRY 873 (8th ed. 1998) (acknowledging "the fear with which some people regard all psychiatric patients," though "few [patients] are an authentic danger to others"); Susan G. Goldberg, Mary B. Killeen, & Bonnie O'Day, *The Disclosure Conundrum: How People With Psychiatric Disabilities Navigate Employment*, 11 PSYCH. PUB. POL. AND L. 463, 491-92 (September 2005) ("[N]egative feelings toward people with psychiatric disabilities [derive] from the fear that [such people] are dangerous"); Behney, C., Hall, L.L., & Keller, J., *Psychiatric Disabilities, Employment, and the Americans With Disabilities Act* (background paper; Washington, D.C.: Office of Technology Assessment, 1997) at 7 (calling "the homicidal maniac" a "prevalent and damaging" stereotype of mental illness); Phelan, G.C., Link, B.G., Stueve, A., and Pescosolido, B.A., *Public Conceptions of Mental Illness in 1950 and 1996: Has Sophistication Increased? Has Stigma Declined?*, 41 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 188 (2000) (although media depictions of people with psychiatric disabilities are improving, negative articles continue to dominate the news and emphasize dangerousness).

[17] *See, e.g.*, JA 227-28; *Coble v. Dretke,* 444 F.3d 345, 359-60 (5th Cir. 2006) (no *Penry* problem because defendant's post-traumatic stress disorder and bipolar disorder could be ameliorated by medication); *Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir. 2001) (no *Penry* problem because defendant's mental illness could be controlled by treatment).

and predicted how effectively it might control the dangerous tendencies of Mr. Brewer's illness, those several steps of cumulative guesswork would only have reduced, not reversed, the aggravating potential for his likely future dangerousness of the fact that he was mentally ill. The "signature qualities" of mental impairment – unlike those of youth, *see Johnson*, 509 U.S. at 368 – are not transient. It would have been speculative at best for jurors to assume that Mr. Brewer's mental illness, even if treated, would not in the future substantially impair his judgment or behavior in a way that would make him act out dangerously again. Certainly, jurors were not required to infer that Mr. Brewer would necessarily receive any such treatment or care in the prison system. In short, there was abundant evidence from which the jury "might well have" concluded, as this Court put it in *Tennard*, that Mr. Brewer's mental impairment made him a future danger to society, regardless of the "treatability" of his psychological impairment.[18]

Moreover, a focus on the potential "treatability" of Mr. Brewer's condition misses the point. The relevant mitigating quality of Mr. Brewer's mental illness is not that it may be dormant at times in the future, or that it might be effectively treated in the future with some combination of medication and/or therapy. The relevant mitigating quality of Mr. Brewer's mental disorder is that a reasonable juror could have found that it made him *less culpable* for murdering Robert Laminack. Just as in *Penry*, the second special issue provided no vehicle through which the jury could express its response to the mitigating force of Mr.

[18] Although the CCA made no mention of the purported "treatability" of Mr. Brewer's mental impairment in rejecting his *Penry* claim on direct appeal, any such ground of decision would have been objectively unreasonable under 28 U.S.C. §2254(d) for the reasons just stated in text.

Brewer's mental impairment with respect to his moral culpability for the crime.

The Fifth Circuit has described many different types of evidence as having mitigating relevance to the former second special issue. That conclusion has consistently been reached by *a priori* reasoning that treats large classes of evidence as categorically non-problematic under *Penry*. *See, e.g., Robertson v. Cockrell*, 325 F.3d 243, 249-51 (5th Cir. 2003) (*en banc*) (citing numerous cases denying *Penry* claims based on "many different types of mitigating evidence," including "subnormal intelligence," "troubled or abused childhood," "head injury," and "mental illness").[19] The Fifth Circuit has invoked these classifications as the bases for reflexive threshold judgments that obviate the need to explain how the particular evidence in a given case could reasonably have been understood to support a finding of non-dangerousness. This is exactly the kind of foreshortened analysis this Court condemned in *Tennard*, because it derails the analysis called for by *Penry* and *Boyde*: an examination of whether there was a reasonable likelihood, in light of everything that happened at trial, that meaningful consideration was precluded.

[19] Judge Higginbotham expressed concern about this mechanistic approach to *Penry*. *See Robertson*, 325 F.3d at 258-59 (Higginbotham, J., concurring) (cautioning against "categorical characterization of evidence of disabilities as transient or permanent," and calling it "judicial hubris" to "pronounce as a matter of law that even the most severe child abuse creates only a transient condition," a rule that "would be the result of neither logic nor law" because child abuse manifests itself with "myriad levels of intensity" and affects "victims with myriad degrees of vulnerability"). He added that Texas had "wisely" solved the problem by "mov[ing] to the common sense solution of asking the jury . . . whether, considering all the mitigating evidence, death should be imposed.").

This Court's recent decision in *Ayers v. Belmontes* models the analysis necessary to determine whether jurors were precluded from giving mitigating effect to a defendant's evidence under their penalty-phase instructions. Eschewing any categorical rules, the Court took care to attend to the challenged instruction in the context of all guidance given to the jury by counsel and the court. *See, e.g., Belmontes*, 127 S. Ct. at 475-77 (examining in detail the closing arguments of counsel and the defendant's allocution); *id*. at 477-79 (reviewing the instructions from the court to assess whether jurors would have "fairly read the limitation in the instruction to apply to [the defendant's] central mitigation theory"); *id*. at 479-80 (considering whether questions from jurors during deliberations indicated confusion about their understanding of their sentencing task).

Moreover, the Court in *Belmontes* gave thoughtful consideration to the evidence presented and whether jurors would have been able both to perceive its intuitive connection to the defendant's deserts and express that judgment in their verdict. *Belmontes*, 127 S. Ct. at 473-74 (describing evidence in detail), *id*. at 475 (jury would have understood defendant's mitigation theory as "analogous to the good-character evidence . . . in *Boyde*" and thus within the purview of the California statute's "catch-all" factor), *id*. at 476 (jurors could not have believed their instructions precluded consideration of the defendant's good-character evidence without also perceiving the hearing as an exercise in futility), *id*. at 477 (counsel's argument "would have left the jury believing it could and should contemplate [the defendant's] potential" for self-transformation). In sum, this Court upheld Belmontes' death sentence only after completing a careful exegesis of his trial which convinced it that his jurors appreciated the scope of their power to give effect to his claimed mitigating circumstances. By contrast, the Fifth Circuit

rejected Mr. Brewer's *Penry* claim without any serious examination of his mitigating evidence or how it was presented in the context of his trial. That failure demands reversal under *Penry*, *Johnson*, *Tennard*, and *Smith* alike.

C. THE STATE COURT DECISION REJECTING MR. BREWER'S *PENRY* CLAIM WAS OBJECTIVELY UNREASONABLE.

As we have noted, the Fifth Circuit never examined the CCA's assessment of Mr. Brewer's *Penry* claim; it simply conducted its own analysis – an incorrect one – in reversing the District Court's grant of sentencing relief. Properly examined, the CCA decision is deeply flawed, "objectively unreasonable,"[20] in two respects. It imposes the same "severity" and "nexus" limitations on *Penry* that *Tennard* found indefensible. *See* Section C.1, *infra*. And its conclusion constitutes an unreasonable application of *Penry* to the record of Mr. Brewer's trial. *See* Section C.2, *infra*.

Evaluating both of these aspects of the CCA's decision begins with identifying the rule of "clearly established Federal law, as determined by [this] Court" that it was obliged to apply. 28 U.S.C. §2254(d). Namely, capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. *Johnson*, 509 U.S. at 369. *See also Graham*, 506 U.S. at 475 (the special issues must give the jury a "reliable means of giving mitigating effect to th[e] evidence").[21]

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[20] *Williams*, 529 U.S. at 409 (Justice O'Connor speaking for the Court on this point).

[21] Accepting that Mr. Brewer's mitigating evidence was beyond the jury's effective reach under the former special issues does not compel

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1. The CCA's decision was objectively unreasonable because it rested on a theory of mitigation that was baseless under *Penry*, *Johnson*, and *Graham*, and that this Court declared untenable in *Tennard*.

Explaining how the CCA has distorted this straightforward constitutional rule in a series of cases leading up to Mr. Brewer's will require extended discussion. That is because the CCA's opinions often fail to make clear whether it is using its "nexus" and "severity" concepts as threshold screening tests before applying any *Penry* analysis or whether it is intruding them into the *Penry* analysis proper. One thing is clear: the CCA has never explained how the mitigating qualities of evidence like Mr. Brewer's – evidence of an abused childhood and of mental impairment resulting from emotional instability – could be given meaningful effect by a jury in answering either the "deliberateness" or the "future dangerousness" special issues. Yet the CCA almost invariably rejects *Penry* claims based on comparable evidence because, in its view, such evidence fails to show a condition which has both the requisite severity and nexus to the crime to be simultaneously within *Penry* and beyond the two special issues.

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the conclusion that the former scheme was unconstitutional as applied in most or even many cases. Many frequently encountered varieties of mitigating evidence – *e.g.*, remorse; youth; advanced age; evidence of general good character prior to the crime; evidence of religious devotion; a relatively minor role in the offense; positive adaptation to prison; evidence of success in a structured environment such as the workplace, school or the military – generally would receive meaningful consideration through the jurors' assessment of whether the defendant posed a continuing threat to society.

The CCA opinion addressing Mr. Brewer's *Penry* claim on direct appeal,[22] first described his mitigating evidence:

> 1) [Mr. Brewer] was not mentally retarded, but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note [Mr. Brewer] wrote to his mother. On January 25, [Mr. Brewer] signed a request for voluntary admission to Big Springs State Hospital for fourteen days.
>
> 2) [Mr. Brewer] came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen years old. [Mr. Brewer's] father hit him on several occasions, once with the butt of a pistol and once with a flashlight. [Mr. Brewer's] father frequently beat his mother. [Mr. Brewer's] father had once told him, "If you ever draw your hand back, you'd better kill me because I'll kill you."
>
> 3) [Mr. Brewer] had smoked marijuana when he was a teenager.

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[22] This opinion provides the only explanation by a state court of why *Penry* relief was denied in Mr. Brewer's case. When Mr. Brewer raised the same claim in state post-conviction proceedings, the trial court pronounced – and the CCA adopted – a one-sentence ruling embracing the direct appeal result as the law of the case ("The . . . special issues . . . were an adequate vehicle for the jury's consideration of the mitigating evidence. . . ."). *See* JA 176, 178; *see also*, *e.g.*, *Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994) (claims litigated on direct appeal are generally not cognizable on habeas corpus); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (declining to address a contention that was rejected on direct appeal).

The CCA then stated without further elaboration that the future dangerousness issue was "an adequate vehicle for the jurors to give effect to [Mr. Brewer's] mitigating evidence." JA 141. It noted that it had previously held that "a stay in a mental hospital does not evidence a 'long term mental illness which would affect [one's] ability to conform to the requirements of society.'" *Id*. (quoting *Joiner v. State*, 825 S.W.2d 701, 707 (Tex. Crim. App. 1992)). It further stated that Mr. Brewer's "evidence of drug abuse and an abusive homelife [sic] was given effect within the scope of the punishment issues." *Id*. (footnotes omitted) (citing *Ex parte Ellis*, 810 S.W.2d 208, 211-12 (Tex. Crim. App. 1991)), and *Goss v. State*, 826 S.W.2d 162, 166 (Tex. Crim. App. 1992). It offered no explanation for how jurors might have viewed those circumstances as logically supporting a "no" answer to either of the special issues.

In emphasizing that Mr. Brewer was "not mentally retarded," and suffered no "long term mental illness" preventing him from "conform[ing] to the requirements of society," the CCA delivered a pre-emptive strike against Mr. Brewer's *Penry* claim. It did not examine the trial record to consider whether, under all the circumstances of this case, jurors would have felt themselves precluded from considering the mitigating qualities of Mr. Brewer's abused childhood and mental impairment. Instead, the CCA foreclosed any such inquiry with its finding that Mr. Brewer's mental impairment was insufficiently severe to implicate *Penry*.[23] That rationale cannot survive *Tennard*.

[23] Tellingly, the CCA first notes that Mr. Brewer "was not mentally retarded." The CCA decision which this Court criticized in *Tennard* likewise assumed that only mental retardation could implicate *Penry*. *See Ex parte Tennard*, 960 S.W.2d 57, 61 (Tex. Crim. App. 1997) (assuming that *Penry* would apply only if "the evidence of [Tennard's]

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Nor did the CCA explain the rest of its holding, that Mr. Brewer's mitigating evidence of suffering violent physical abuse at his father's hands as an adolescent likewise "was given effect within the scope of the punishment issues." None of the three decisions cited in support of the CCA's bald assertion that the jury was able to give effect to Mr. Brewer's mitigating evidence – *Joiner*, *Ellis*, and *Goss* – articulates any rationale supporting that conclusion. In each case, the CCA simply observes that the evidence reflected impairment less severe than Penry's, and/or lacked a causal "nexus" to the crime,[24] and then states that under such circumstances, the jury could give effect to the evidence in answering the

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low IQ somehow falls within *Penry I*'s definition of mental retardation"). This Court as much as held that such a view of *Penry* would be objectively unreasonable, and the Fifth Circuit subsequently agreed. *Tennard*, 542 U.S. at 288 (Tennard's *Penry* claim was legitimate because the relationship between the former special issues and his low IQ "ha[d] the same essential features" as the relationship between those issues and Penry's evidence); *see also Tennard v. Dretke*, 442 F.3d 240, 255 (5th Cir. 2006) (opinion on remand) (acknowledging that "the Supreme Court has never indicated that only . . . mental retardation mitigates" against a potential death sentence).

[24] *See Joiner*, 825 S.W.2d at 707 (Joiner offered "no testimony concerning [his] mental or emotional condition *at the time of the offense*") (emphasis added); *see also Goss*, 826 S.W.2d at 165 ("mitigating evidence is relevant to [sentence] if there is a nexus between the mitigating evidence and . . . the crime," which means "the evidence must tend to excuse or explain the criminal act. . . .") (citations omitted). *Goss* adds a footnote citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings* with a "*But cf.*" signal, suggesting an awareness that this Court's cases supported no such limitation. *See Goss*, 826 S.W.2d at 165 n.2. The same attitude toward the authority of this Court's precedents was on display in the CCA's more recent decision in *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004), which this Court found warranted summary reversal. *See Smith*, 132 S.W.3d at 422 n.2 (Hervey, J., concurring) (asserting that jurors would have understood their power to "nullify" their honest answers to the special issues, and footnoting this Court's contrary decision in *Penry II* with a "but see" signal).

former special issues.[25] It never ventures an explanation of how a juror might have reasoned from the respective defendants' mental impairments to a "no" answer to the future dangerousness question.

Although the CCA's opinions themselves certainly make the point clearly enough, Respondent has already represented to this Court that the CCA developed and applied "severity" and "nexus" tests in the *Penry* context that "paralleled" the Fifth Circuit screening tests struck down in *Tennard*. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 22-28 and accompanying notes (describing how the CCA developed an elaborate jurisprudence limiting *Penry* to cases involving "continuing, long-term, or permanent" conditions that were "sufficiently severe" to be comparable to Penry's own and which possessed a "connection between the [mitigating evidence] and the commission of the crime"). Respondent cited both *Joiner* and *Goss* as examples of the CCA's approach. Respondent thus has already recognized that the CCA was following the same approach in Mr. Brewer's case as the Fifth Circuit followed prior to *Tennard* – and which this Court has resoundingly rejected.

Deciding whether a defendant's mitigating evidence is relevant beyond the scope of the "deliberateness" and

[25] *Joiner*, like *Brewer*, simply asserts that the future dangerousness question provided the jury with a vehicle with which to give effect to the evidence that Joiner had been hospitalized for emotional problems and threatening suicide shortly before the crime. *Joiner*, 825 S.W.2d at 707 (citing *Ellis*). Although *Ellis* states that mitigating evidence other than mental retardation and child abuse might raise a *Penry* claim, it observes that because the defendant's suicide attempt, drug problem, and low academic achievement did not "rise to the level" of Penry's own impairments, the statutory special issues permitted the jury to consider that evidence and give it effect. *Ellis*, 810 S.W.2d at 212.

"dangerousness" issues, *see Penry*, 492 U.S. at 321-22, requires a reviewing court to consider whether that evidence could be given meaningful effect within the facially narrow special issues "in the light of all that has taken place at the trial," *Boyde*, 494 U.S. at 381; *see also Tennard*, 542 U.S. at 288-89. But the CCA has instead applied broad categorical rules that made such contextual analysis unnecessary. It has defined mitigating evidence by reference to the now-discredited "severity" and "nexus" tests and then assumed that any evidence not "constitutionally relevant" or not "relevant beyond the scope of the special issues" *according to that definition* must have been within the jurors' effective reach in answering the special issues. That is why the CCA in Mr. Brewer's case never reached the point of undertaking the *Penry* analysis which *Boyde* and *Tennard* require – an explanation of why or how Mr. Brewer's history of child abuse and psychological impairment as a young adult could have been given meaningful consideration under the "deliberateness" and "future dangerousness" questions.[26]

[26] The CCA's analysis, to be sure, is confusing and inconsistent. Sometimes the CCA's "nexus" and "severity" tests appear identical to the Fifth Circuit's, *i.e.*, rigid threshold tests of constitutional relevance that foreclose further *Penry* analysis. *See, e.g., Goss*. At other points, the CCA seems to cite its "nexus" and "severity" requirements as a sort of shorthand for its understanding of what kind of evidence would raise *Penry* problems under the former special issues. But in the latter case, even when the CCA mouths what looks like the right question (*i.e.*, can this evidence be given effect within the special issues?), it conducts no analysis beyond asking whether the evidence is substantially identical to Penry's. *See, e.g., Ellis*. In *Tennard*, for example, the CCA ultimately asserted that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of [Tennard's] low IQ evidence." *Tennard*, 960 S.W.2d at 63. But as this Court later recognized, that outcome turned on what the CCA perceived as the categorical distinction between mental retardation and other types of mental

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In *Tennard*, this Court flatly rejected the use of identical limitations on the definition of "constitutionally relevant mitigating evidence" as a substitute for conducting a case-specific review of the relationship between a particular defendant's mitigating evidence and the special issues, with due regard for the full context of the trial.[27] Just as those criteria were unreasonable when imposed by the Fifth Circuit as threshold bars to *Penry* relief, they were no less unreasonable when articulated and imposed by the CCA to the same end.[28]

This Court need not labor to disentangle the CCA's application of its "severity" and "nexus" conditions in Mr. Brewer's case from the CCA's unexplained assertion that "the second punishment issue provided an adequate vehicle for the jurors to give effect to [Mr. Brewer's] mitigating evidence." Where such misstatements of the law are woven into the framework for a state court decision, that decision as a whole is objectively unreasonable under 28 U.S.C. §2254(d). *Williams v. Taylor*, 529 U.S.

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impairment, rather than on the relationship between Tennard's evidence and the special issues in the full context of his trial. *See id.* at 60-61 (addressing in detail, under the sub-heading "Mental Retardation," why the evidence of Tennard's 67 IQ did not mean that he was mentally retarded and hence within *Penry*'s scope); *see Tennard*, 542 U.S. at 288-89 (modeling the correct approach).

[27] *Tennard*'s dismissal of the nexus and severity tests as having "no foundation in the decisions of this Court," 542 U.S. at 284, compels the conclusion that it is "objectively unreasonable" to treat them, as the CCA has, as defining the scope of *Penry*.

[28] The CCA consistently applied its threshold "nexus" and "severity" criteria to *Penry* claims from 1991 right up until this Court's decision in *Tennard*. The last case in which it did so was its initial opinion in the Laroyce Smith litigation, which this Court then summarily reversed in the wake of *Tennard*. *Ex parte Smith,* 132 S.W.3d 407 (Tex. Crim. App. 2004), *rev'd*, *Smith v. Texas*, 543 U.S. 37 (2004).

362, 414 (2000) (where the state court had erroneously identified *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), as stating the test for "prejudice" resulting from ineffective assistance of counsel, this Court treated that decision as an unreasonable application of clearly established Federal law in part because "[i]t is impossible to determine . . . the extent to which the [state court's] error . . . affected its ultimate finding [of] no prejudice").

2. The CCA's reasoning aside, the result it reached was objectively unreasonable because the jury lacked a "meaningful basis to consider the relevant mitigating qualities" of Mr. Brewer's mitigating evidence in answering the special issue questions.

Even putting aside the objectively unreasonable analysis underlying the CCA's rejection of Mr. Brewer's *Penry* claim, this Court cannot endorse the conclusion that the jury could give meaningful mitigating effect to Mr. Brewer's history of childhood abuse and mental impairment in answering the future dangerousness issue. When the CCA rejected Mr. Brewer's *Penry* claim in 1994, the "clearly established Federal law" relevant to his claim consisted primarily of *Jurek v. Texas*, 428 U.S. 262 (1976), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Penry*, *Graham*, and *Johnson*. *Penry* pointed unambiguously to the result Mr. Brewer urged, and nothing in *Jurek*, *Franklin*, *Graham* or *Johnson* should have changed that result. Simply put, it was objectively unreasonable for the CCA to find *Penry* relief foreclosed for Mr. Brewer when he was, in principle, indistinguishably situated from Penry himself.

Penry held that mitigating evidence of mental retardation and childhood abuse could not be given meaningful mitigating consideration by a jury limited to assessing the defendant's "deliberateness" and "future dangerousness," because such evidence lacked a straightforward mitigating relevance to those issues. 492 U.S. at 328. Unlike the mitigating evidence presented in *Jurek* (relative youth, good work history, and aid to his family) or *Franklin* (the defendant's clean prison disciplinary record), the circumstances of Penry's background could well have been given *aggravating* effect under the future dangerousness issue. *Id*. at 323-24. And although those factors bore some mitigating relevance to the "deliberateness" question, *id*. at 322, their primary mitigating relevance in reducing Penry's moral culpability was not reliably captured by their logical relevance to whether he was capable of "deliberate" conduct as that term is commonly understood. Accordingly, this Court held that some instruction beyond the "deliberateness" and "dangerousness" issues was required.

The second case that could have informed the CCA's evaluation of Mr. Brewer's *Penry* claim was *Graham*. But for the reasons explained in Section B *supra*, *Graham* cannot save the CCA's decision. Graham offered background evidence to highlight his positive character traits and emphasize his prospects for rehabilitation. The thrust of Mr. Brewer's case in mitigation, by contrast, was that he had spent his adolescence in a violent home environment in which he was subjected to physical abuse by his father and forced to witness the physical mistreatment of his mother, and that very shortly before the crime he was so tormented by mental illness that he threatened to take his own life and was committed to a mental hospital, where he fell under the spell of the woman who would lead him into killing Mr. Laminack. In short, the mitigating

evidence here, unlike in *Graham*, tried to offer an *explanation* for Mr. Brewer's violent behavior.

Graham nowhere purported to modify *Penry*'s firm holding that jurors could give no meaningful effect to evidence of mental impairment or "harsh physical abuse" under the former special issues. Accordingly, if the CCA in 1994 thought *Graham* required it to deny *Penry* relief to Mr. Brewer, that conclusion was objectively unreasonable.

The final potentially relevant precedent, *Johnson*, concerned exclusively whether Johnson's mitigating evidence of youth *simpliciter* received meaningful consideration under the former Texas special issues. *Johnson*, 509 U.S. at 367 ("The question presented [is] whether the Texas special issues allowed adequate consideration of petitioner's youth"). Thus, the Court was obliged to decide whether *Penry*'s reasoning extended to evidence of a defendant's youthful age, without more. (Johnson was nineteen at the time of his crime). Embracing parts of the analysis in *Graham*, the Court concluded that because "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient," the future dangerousness question could afford it meaningful consideration. *Id.* at 368.

Johnson had presented very little other background evidence. *See Johnson*, 509 U.S. at 356-57. That evidence indicated that Johnson had been a regular churchgoer as a child, that his mother died and his sister was murdered during his adolescence, that he was negatively influenced by bad friends and illegal drugs, and that he was remorseful for his crimes. *Id*. Given that the Court had granted review to decide solely whether youth could be given effect as mitigating under the former Texas special issues, it is not surprising that the Court did not address separately

whether Johnson's other mitigating evidence required an additional instruction beyond the "deliberateness" and "future dangerousness" issues. Had it done so, the Court surely would have found that those aspects of Johnson's background were within the jurors' effective reach due to their nature and how they were presented at trial.

First, like Graham and unlike Mr. Brewer, Johnson aimed his mitigating evidence directly at the "future dangerousness" question. *See Johnson*, 509 U.S. at 369 (Johnson's lawyer urged the jury to regard any negative consequences of Johnson's background as imminently "subject to change," and thus "readily comprehended as a mitigating factor in consideration of the second special issue"). Further, and again unlike Mr. Brewer, Johnson did not object to the standard special issue questions as inadequate to permit consideration of his evidence, nor offer alternative instructions to broaden the scope of the jury's inquiry into Johnson's personal culpability. *Id*. at 355 (Johnson made "no request that a more expansive instruction be given concerning any particular mitigating circumstance . . . "); *id.* at 358 (same). Because Johnson explicitly directed his mitigating presentation to portraying himself as a teenager likely soon to mature into a non-dangerous adult – a prediction bolstered by evidence of prior good character and remorse for the crime – this Court concluded that the future dangerousness issue gave the jury a meaningful vehicle for responding to that evidence.

The nature of Johnson's mitigating evidence and the manner in which it was presented at his trial linked the evidence in a direct, commonsensical fashion to non-dangerousness, allowing this Court to conclude under *Boyde* that no reasonable likelihood existed that Johnson's jurors would have felt themselves precluded from giving

effect to his evidence in answering the second special issue. Johnson's counsel determinedly argued the mitigating relevance of Johnson's evidence to the "future dangerousness" inquiry, and the prosecution neither disavowed nor disputed that connection. The "signature qualities" of the key feature of Johnson's mitigating evidence, his youth, were inevitably transient, giving them unique relevance to an assessment of his future dangerousness. *Johnson*, 509 U.S. at 368. None of these factors supporting the result in *Johnson* (and in *Graham*) under *Boyde* are present here.

Perhaps most important, *Johnson* expressly reaffirmed *Penry*'s core holding. *Johnson*, 509 U.S. at 369 ("*Penry* remains the law and must be given a fair reading"). It cast no doubt on the insufficiency of the special issues as applied to mitigating evidence sharing the same essential features as Penry's mental impairment and child abuse. For that reason, if the CCA interpreted *Johnson* as a license to deny *Penry* relief in Mr. Brewer's case, it was objectively unreasonable in doing so.[29]

This court's decisions since *Graham* and *Johnson* are consistent in treating those opinions as not disturbing the core holding of *Penry*. Both *Penry II* and *Smith* rest on the principle that the jury's sentencing instructions must not exclude from meaningful consideration the "relevant

[29] This Court held numerous petitions for writ of certiorari from death-sentenced Texas prisoners pending *Johnson*. Although it denied most of them in *Johnson*'s wake, it also issued "GVR" orders in a number of cases, indicating the seriousness of its intent that the CCA enforce a "fair reading" of *Penry*. *See, e.g., Lucas v. Texas*, 509 U.S. 918 (1993); *Mines v. Texas*, 510 U.S. 802 (1993); *Granviel v. Texas*, 509 U.S. 917 (1993); *Earhart v. Texas*, 509 U.S. 917 (1993); *Richardson v. Texas*, 509 U.S. 917 (1993); *Zimmerman v. Texas*, 510 U.S. 938 (1993).

mitigating qualities" of the defendant's evidence. Regardless of the precise terms in which the test is framed, its central requirement is that the jury must have a "reliable means for giving mitigating effect to [the defendant's] evidence." *Graham*, 506 U.S. at 475. In the context of this case, Mr. Brewer's jury had no such "reliable means" for expressing the conclusion that a sentence less than death was the appropriate punishment for a defendant with a history of child abuse and mental impairment. Neither the CCA nor the Fifth Circuit articulated any explanation of how those mitigating factors could be linked to "non-dangerousness" in a way that would make the "future dangerousness" question a sensible, direct way to give effect to their relevant mitigating qualities – because no such way exists.

The result in *Penry* turned on how Penry's mitigating evidence related to the special issues, rather than on any unique abstract quality of that evidence itself. *See, e.g. Tennard*, 542 U.S. at 288 (finding that the relationship between Tennard's low IQ and the former special issues had the "same essential features" as those found to require relief in *Penry*). *Penry* held that the relevant mitigating qualities of a defendant's childhood deprivation – of abuse, mistreatment, abandonment, neglect, and the like – could not be meaningfully addressed via the special issues. Nothing in *Graham* or *Johnson* retreated from that clear holding with respect to evidence of the destructive impact of such experiences. Given that Mr. Brewer's abused childhood and mental illness shared the same relevant mitigating qualities as Penry's abused childhood and mental retardation, it was objectively unreasonable for the CCA to reach a different outcome in Mr. Brewer's case than this Court reached in *Penry*.

3. Recognizing the CCA's decision in Mr. Brewer's case as objectively unreasonable does no violence to this Court's decisions giving the States wide latitude to guide how a capital jury considers mitigating evidence.

Just as in *Penry*, *Penry II*, *Tennard*, and *Smith*, nothing about Mr. Brewer's claim challenges *Jurek*, which sustained the former Texas capital sentencing statute against facial attack. *See Penry*, 492 U.S. at 315 (distinguishing the "as applied" challenge in *Penry* from the facial challenge turned aside in *Jurek*); *cf. Graham*, 506 U.S. at 474 (*Penry* did not "effect[ ] a sea change" in the Court's view of the constitutionality of the former Texas scheme). Unlike the petitioner in *Johnson*, Mr. Brewer seeks no requirement that every Texas jury "be instructed in a manner that leaves it free to depart from the special issues in every case." *Johnson*, 509 U.S. at 373. Accepting that Mr. Brewer's mitigating evidence of an abused childhood and mental impairment was not within the jury's "effective reach" under the former special issues does not compel the inference that the former scheme was generally unconstitutional as applied. *See* n. 21 *supra.* It simply recognizes that where, as here, a defendant's mitigating evidence bears no straightforward or commonsensical relationship to non-dangerousness, *and* the prosecutor has attempted to exploit the facial narrowness of the former issues and bind jurors to answering them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed, the special issues give jurors "no reliable means of giving mitigating effect to that evidence." *Graham*, 506 U.S. at 475.

Thus, Mr. Brewer's argument is in every particular consistent with the Court's recognition that States may structure the consideration of mitigating evidence in order

to achieve a more rational administration of the death penalty. The rule Mr. Brewer seeks here acknowledges the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Johnson*, 509 U.S. at 372-73 (citing *Saffle v. Parks*, 494 U.S. 484, 490 (1990)). Mr. Brewer's claim raises no question about the continuing vitality of the mechanisms States may employ to ensure that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Those practices, including anti-sympathy instructions, *California v. Brown*, 479 U.S. 538, 542 (1987); exclusion of evidence relating to issues conclusively resolved at the guilt phase, *Oregon v. Guzek*, ___ U.S.___, 126 S. Ct. 1226, 1231 (2006); placement of the burden of proof as to the weight of mitigation, *Kansas v. Marsh*, ___ U.S.___, 126 S. Ct. 2516 (2006); assignment of the burden of proof as to the existence of mitigation, *Walton v. Arizona*, 497 U.S. 639, 649 (1990); restricting jurors' authority to weigh factors in aggravation where no mitigation exists, *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990); and others, are unaffected by straightforward enforcement of a fair reading of *Penry*.

The problem with the view of *Penry* shared by the CCA and the Fifth Circuit has become ever clearer as those courts have ignored the successive guidance provided by *Penry II*, *Tennard* and *Smith*. This problem is that both courts persist in declaring that broad categories of mitigating evidence could be given meaningful effect by jurors limited to answering the former Texas special issues

– and they both repeat and endlessly expand those categorical declarations without ever explaining what plausible, sensible connection the evidence in any particular case might bear to the terms of the "deliberateness" and "future dangerousness" issues. At most, the Fifth Circuit and the CCA have occasionally offered counterintuitive, *post hoc* rationalizations which occurred to no one at trial, in an attempt to suggest that jurors might have taken an equally strained view of the evidence. But that approach ignores the fact that evidence like Mr. Brewer's lacks any logical connection to either special issue except that it strongly, affirmatively suggests that the defendant would pose a continuing threat to society – exactly as the prosecutor argued at Mr. Brewer's sentencing trial. In short, the CCA and the Fifth Circuit have veered far from the course set by *Penry*, because they treat broad swaths of mitigating factors as addressable through the special issues but never undertake the analysis necessary to demonstrate that, in a given case, the jurors actually had a meaningful opportunity to consider and give effect to the relevant mitigating qualities of the condemned defendant's evidence.

CONCLUSION

The Fifth Circuit wrongly reversed the District Court's thoughtful opinion granting Mr. Brewer relief in light of *Tennard*. The Circuit's own opinion cannot be squared with *Tennard*, and it completely ignores that the CCA's decision rejecting Mr. Brewer's *Penry* claim did so by applying the same "nexus" and "severity" requirements for *Penry* relief that *Tennard* has declared completely baseless. Mr. Brewer's mitigating evidence bore no relationship to either of the two pre-1991 Texas special issues

that were submitted to the jury as the sole determiners of his sentence. Furthermore, the prosecutor deliberately exploited the facial narrowness of the special issues by insisting that Mr. Brewer's jurors answer them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed. Under these circumstances, the CCA applied *Penry* in an objectively unreasonable manner in finding that the jury had any meaningful way under its instructions to respond to the relevant mitigating qualities of Mr. Brewer's abused childhood and psychological problems as a young adult.

Mr. Brewer's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and instruct it to reinstate the judgment of the District Court granting habeas corpus relief.

Respectfully submitted,

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