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 OF RESPONDENT

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General for Criminal Justice

**Counsel of Record*

GENA BUNN
Chief, Postconviction Litigation Division

**EDWARD L. MARSHALL
Deputy Chief, Postconviction Litigation Division

CARLA E. ELDRED
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR RESPONDENT

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Was Brewer's mitigating evidence of a troubled adolescence and a single psychiatric hospitalization for drug abuse and depression sufficiently within the jury's effective reach when it answered the pre-1991 Texas capital-sentencing special issues, which required the jury to determine whether the defendant's murderous conduct was deliberate and whether there was a probability he would commit further acts of criminal violence?

2. Did this Court's opinions in *Penry v. Johnson,* 532 U.S. 782 (2001), and *Smith v. Texas,* 543 U.S. 37 (2004), overrule *Jurek v. Texas,* 428 U.S. 262 (1976), *Graham v. Collins,* 506 U.S. 461 (1993), and *Johnson v. Texas,* 509 U.S. 350 (1993), and their Fifth Circuit progeny, which held that most types of mitigating evidence will find sufficient effect within the former special issues?

3. Does the lower court's holding—that treatable mental problems are within the effective reach of a sentencing jury in answering the pre-1991 special issues—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 implored jurors to "follow the law" and "do their duty" in answering the former Texas special issues, is there "a reasonable probability that the jury has applied the . . . [special-issue] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California,* 494 U.S. 370, 380 (1990)?

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This Court should affirm the lower court's judgment denying habeas corpus relief. The Court of Criminal Appeals of Texas identified the correct federal authority—divined from this Court's opinions as of January 2001—and reasonably applied it to Petitioner Brent Ray Brewer's[1] claim under *Penry v. Lynaugh,* 492 U.S. 302 (1989) (*Penry I*), during direct appeal and state habeas corpus proceedings. Moreover, assuming *arguendo* the state court decision was unreasonable, Brewer fails to demonstrate a reasonable likelihood that his sentencing jury was unable to give sufficient mitigating effect to his evidence of a difficult adolescence—in which he fought violently with his father on several occasions—and a single psychiatric hospitalization for drug abuse and depression—during which he met his co-defendant and girlfriend—in answering the former Texas special issues. This evidence was presented by defense counsel in order to show the jury that Brewer's violent tendencies were influenced by his father and girlfriend and, if sentenced to life imprisonment, he would not be exposed to such bad influences and would remain pacific. There is no possibility Brewer's jury, armed with a commonsense understanding of its ability to exercise reasoned moral judgment in answering the future-dangerousness question, would have been precluded from giving constitutionally-sufficient effect to his mitigating evidence. Nothing in this Court's opinions in *Smith v. Texas,* 543 U.S. 37 (2004), *Tennard v.*

[1] Respondent Nathaniel Quarterman will be referred to herein as "the Director." "JA" refers to the Joint Appendix, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "DX" refer to the numbered exhibits offered by the defense and admitted into evidence at trial.

Dretke, 542 U.S. 274 (2004), or *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*), dictates a different result. As a result, habeas corpus relief is not available to Brewer.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas succinctly summarized the evidence proving Brewer's guilt in its direct appeal opinion:

> The evidence adduced at trial shows that on April 26, 1990[, Brewer] and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. [Brewer] rode in the back seat. After traveling approximately one block, [Brewer] stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, [Brewer] stated to Skee Callan [*sic*] that he had killed a man for $140—the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, [Brewer]'s and Nystrom's roommate, testified that neither [Brewer] nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas.

JA:124 (*Brewer v. State,* No. 71,307 (Tex. Crim. App. 1994) (unpublished opinion)).

In addition, an FBI forensic serologist determined that DNA from blood found on the steering wheel of the victim's truck was consistent with Brewer's DNA. 16 RR 342-60. More importantly, a bloodstained butterfly knife was found just outside the front passenger door of the victim's truck. 15 RR 24, 81, 135-38, 167, 170-71. DNA from blood found on the knife matched both Brewer and the victim. 16 RR 359-60. An FBI fingerprint expert also determined that Brewer's fingerprints and palm print were found on the right rear outside door handle as well as the right rear door frame of the victim's truck. 16 RR 400-03, 419-20. Brewer's bloody fingerprint was also found on the butterfly knife. 16 RR 408-09. Brewer was seen after the murders with a cut on his hand. 16 RR 433-34, 440-41; 17 RR 456-57. Finally, both Brewer and Nystrom were seen soaked with blood the night of the murder. 16 RR 433-35; 17 RR 454-55.

II. Facts Relating to Punishment

Brewer's father, Albert, and his mother, Karon, separated before Brewer was born. JA:44. Albert first saw his son when he was five months old, while on a thirty-day leave before reporting for military duty in Vietnam. *Id.* at 45. Albert did not see Brewer again until a funeral four years later. *Id.* By this time, Brewer's mother had divorced Albert and was remarried to Don Bartlett. *Id.* at 45-46, 64. Brewer's stepfather "treated him really well" at first, but in later years payed more attention to Brewer's half-sister, Billie Ann Bartlett. *Id.* at 65-66. Brewer performed well in school until he had back surgery in the fifth grade; nonetheless, he was a starting player for his championship football and basketball teams, played baseball, and was

popular with his classmates. *Id.* at 66. During junior high school, however, Brewer began to abuse marijuana. *Id.*

Kathleen Bailey, the former assistant principal of Brewer's middle school in Cedar Hill, Texas, testified that Brewer was sent to an alternative school on more than one occasion for threatening another child with a knife and for other violent, injurious behavior. 18 RR 637-38, 640-42, 644. Bailey also indicated that Brewer's intelligence quotient (IQ) was 115. *Id.* at 652.

Brewer saw his father again at age fifteen. JA:46, 63. Sometime after this, Albert and Karon remarried and moved the family to Hamilton, Mississippi. *Id.* at 47-48. Amy Forrester, who dated Brewer at Hamilton High School in 1988, testified that eighteen-year-old Brewer picked her up and shoved her against the edge of a metal locker. 18 RR 592-96, 602. Forrester, who weighed only 108 pounds, sustained nerve damage that paralyzed her right arm for nearly two years as a result. *Id.* at 596-97, 609. Brewer also threatened to hurt her and kill her new boyfriend. *Id.* at 597. Cecil Beasley, the former principal of Hamilton High School, observed Forrester and Brewer arguing in the hallway at school on a different occasion. *Id.* at 611, 620. Brewer was very angry, struck a locker with his fist, and threatened to kill Forrester. *Id.* at 611-13, 622. Beasley noted Brewer had anger management problems, but could control his temper when he made an effort. *Id.* at 633-34.

Albert admitted that he verbally and physically abused Brewer and his mother during the time they lived together in Mississippi, a fact Karon confirmed. JA:49-50, 65. Albert struck Brewer on separate occasions with the butt of a pistol, a flashlight, and his fist. *Id.* at 65. Albert

related that he once threatened to kill Brewer when Brewer attempted to break up a fight between his mother and father. *Id.* at 50. Albert also testified that he was an alcoholic, recovering heroin addict, and suffered from posttraumatic stress disorder. *Id.* at 47, 52-53.

Deputy sheriff Richard Lepicier testified for the State that he responded to a domestic disturbance call at Brewer's Mississippi home in 1989. JA:6-7. Brewer's father was hospitalized after nineteen-year-old Brewer broke up an argument between his parents by brutally assaulting Albert with a broom handle. *Id.* at 7-9. Dr. Walter Echman, a neurosurgeon in Tupelo, Mississippi, testified that he treated Albert Brewer for multiple facial fractures and a compound, depressed skull fracture which lacerated his brain, damaging his speech abilities and right-side motor function. *Id.* at 22-26. Brewer moved away while Albert was recovering in the hospital. *Id.* at 57-58.

Police officer Ronald Mosher testified that, in 1989, he twice encountered Brewer in Naples, Florida during the early morning hours in a neighborhood known for drug activity. 18 RR 658-60. On one occasion, Brewer was arrested for carrying a concealed knife with a seven-inch blade. *Id.* at 660-61.

Brewer called Howard County Justice of the Peace China Long to testify that, in 1990, she signed an order committing Brewer to Big Spring State Hospital for psychiatric treatment. JA:32-35; DX 5. Brewer's family sought the commitment order because of a suicide note. JA:39. After fourteen days, Brewer voluntarily requested that his treatment be extended. *Id.* at 35. It was during his stay in this rehabilitation facility that Brewer met his co-defendant, Kristie Nystrom, a twenty-two-year-old

topless dancer. *Id.* at 71-72, 74-75. According to his mother and other witnesses, Nystrom had undue influence over Brewer and caused him to abandon his plans to stop using marijuana and crack and to "help other kids get off of drugs." *Id.* at 71-72; 18 RR 798, 815-16, 838.

A significant portion of Brewer's punishment case consisted of a residual doubt defense presented through the testimony of friends Carol Burks, DeDe Bishop, and Michelle Francis. Each witness, in turn, implicated either Nystrom or a third person known only as "James." 18 RR 798, 809-10, 812-13. However, the State called fellow county jail inmate Kevin Lewis, who overheard Brewer claim that he stabbed a man who begged, "Please, boy, don't kill me. Please, boy, don't kill me." *Id.* at 710-11. Lewis also testified Brewer threatened to stab Lewis in the eye with a pencil during a card game. *Id.* at 706-07.

Neither the State nor the defense presented expert testimony from a mental health professional who evaluated Brewer. The State called Dr. Richard Coons, a psychiatrist, who testified based on a hypothetical fact pattern that there was a probability that Brewer would commit criminal acts of violence that would represent a continuing danger to society, including prison society. 18 RR 728-32. Dr. Randall Price, a clinical psychologist, testified for the defense that such hypothetical opinions on future dangerousness were unreliable and, in fact, were wrong two-thirds of the time. 18 RR 839, 843-44. The only expert opinion in evidence was the cursory diagnosis made as a prerequisite to commitment proceedings: "major

depression, single episode, without psychotic features, polysubstance abuse."[2] JA:35, 37; DX 5.

The jury was then charged with answering the two special issues submitted in all Texas capital prosecutions prior to 1991. JA:88-93, 120-21; *see also* TEX. CODE CRIM. PROC. Art. 37.071(b) (West 1989). The "deliberateness" special issue asked if "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 would result?" JA:120. "Deliberately" was defined as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision." *Id.* at 90. The "future dangerousness" special issue queried the jury whether there was "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 121.

During closing argument, defense counsel stressed Brewer's lack of felony convictions and violent behavior as an adult. JA:103-04, 111-12. Counsel discounted much of the State's future-dangerousness evidence as "little-boy stuff" and youthful indiscretion. *Id.* at 104-06. Brewer's attorney also explained that "[l]ife in prison will make sure that [Brewer] will not be around wom[e]n that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get him away." *Id.* at 106. In response, the State argued

[2] As the Court of Criminal Appeals of Texas later noted, Brewer "chose not to enter the records from Big Spring State Hospital into evidence." JA:140 n.10.

that Brewer was a dangerous, cold-blooded predator and that, even if imprisoned for life, "someone else will get hurt." *Id.* at 117-18. On June 1, 1991, the jury answered both special issues "yes" and the trial court assessed a sentence of death. *Id.* at 120-21.

III. Direct Appeal and Postconviction Proceedings in State Court

On direct appeal, the Court of Criminal Appeals applied the appropriate Supreme Court authority available in 1994 to determine "whether the [deliberateness and future-dangerousness] issues provided a vehicle for the jury to give effect to [Brewer's mitigating] evidence." JA:137-41 (citing *Penry I, Franklin v. Lynaugh,* 487 U.S. 164 (1988) (plurality opinion), *Eddings v. Oklahoma,* 455 U.S. 104 (1982), *Lockett v. Ohio,* 438 U.S. 586 (1978) (plurality opinion), and *Jurek v. Texas,* 428 U.S. 262 (1976) (plurality opinion)).

The state court first summarized Brewer's three categories of mitigating evidence: (1) he was committed and later voluntarily admitted to Big Spring State Hospital for "major depression, single episode, without psychotic features, polysubstance abuse" based on a suicide note he wrote to his mother; (2) he came from an abused background and did not have a relationship or live with his real father until after he was fifteen-years old; and (3) he smoked marijuana as a teenager. JA:140. The state court concluded that the future-dangerousness special issue provided an adequate vehicle for the jurors to give effect to Brewer's mitigating evidence. *Id.* at 141. This Court denied certiorari review concerning Brewer's *Penry I* claim. *Brewer v. Texas,* 514 U.S. 1020 (1995).

Brewer's habeas corpus application in state court was denied—based, *inter alia,* on the trial court's conclusion that the sentencing special issues "were an adequate vehicle for the jury's consideration of [Brewer's] mitigating evidence"—on January 31, 2001.[3] JA:172-78 (*Ex parte Brewer,* 50 S.W.3d 492 (Tex. Crim. App. 2001) (*per curiam* order)). This Court declined to review Brewer's *Penry I* claim for a second time on October 9, 2001. *Brewer v. Texas,* 534 U.S. 955 (2001).

IV. Federal Habeas Corpus Proceedings

Brewer filed a habeas corpus petition in the federal district court on May 7, 2001 and, ultimately, after the district court requested additional briefing concerning *Tennard,* relief was partially granted on August 2, 2004. JA:1-2, 186-96 (*Brewer v. Dretke,* No. 2:01-CV-112-J, 2004 WL 1732312, *1-5 (N.D. Tex. 2004) (unpublished order)). The Director appealed and a panel of the United States Court of Appeals for the Fifth Circuit unanimously reversed, holding that the state court correctly determined Brewer's mitigating evidence was *not* beyond the effective reach of the jury when it answered the former Texas special issues. *Id.* at 3-5, 214-29 (*Brewer v. Dretke,* 442 F.3d 273 (5th Cir. 2006)).

The court of appeals first noted that, "although some relevant evidence may receive constitutionally insufficient

[3] Brewer's initial attempt to obtain postconviction relief occurred in federal district court, where he unsuccessfully requested federal funding to exhaust his state court remedies. After the federal courts declined to intervene, the proceedings were dismissed without prejudice. *Brewer v. Johnson,* No. 96-11188 (5th Cir. 1996) (unpublished order); *Brewer v. Scott,* No. 2:95-CV-125 (N.D. Tex. 1997) (same); *Brewer v. Johnson,* 139 F.3d 491 (5th Cir. 1998).

mitigating effect under the standard Texas special issues (*e.g.,* evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology." JA:221. "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Id.* at 222. "To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether 'there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence].'" *Id.* at 223 (quoting *Johnson v. Texas,* 509 U.S. 350, 368 (1993)).

The lower court held that Brewer's "evidence of one hospitalization for a single episode of non-psychotic major depression" was not beyond the reach of the jury because it was not "chronic and/or immutable." JA:224-25 (citing *Bigby v. Dretke,* 402 F.3d 551, 571 (5th Cir.) (holding Bigby's "chronic and severe" schizophrenia, which "cannot be adequately controlled or treated," made him unable "to conform his behavior" or "avoid criminal behavior" and, thus, was beyond the scope of the special issues), *cert. denied,* 126 S. Ct. 239 (2005)). The court of appeals also held that Brewer's evidence of a "troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction." *Id.* at 223-24 n.16 (citing *Graham v. Collins,* 506 U.S. 461, 475-76 (1993)). Finally, the court below explained that "a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus." *Id.* at 228.

The lower court denied panel rehearing on March 1, 2006[4] and *en banc* rehearing on December 27, 2006. JA:214; *see* Appendix to Brief of Respondent (Appendix). This Court granted a writ of certiorari to review Brewer's *Penry I* claim—the third time the claim was raised in this Court—on October 13, 2006. *Id.* at 230 (*Brewer v. Quarterman,* 127 S. Ct. 433 (2006)).

SUMMARY OF THE ARGUMENT

The court below properly denied federal habeas corpus relief because the state court did not unreasonably apply clearly-established federal law as of 1994 and 2001 each time it denied state postconviction relief to Brewer. This well-established Supreme Court precedent demands a case-by-case inquiry into whether the sentencing jury was able to give sufficient effect to a defendant's mitigating evidence in answering the former Texas special issues concerning deliberateness and future dangerousness. Moreover, this Court has made it abundantly clear that almost all types of mitigating evidence may be sufficiently considered under the special issue scheme and that *Penry I* is the notable exception to the rule. This is true even where mitigating evidence—such as Brewer's evidence of a troubled adolescence and a single psychiatric hospitalization for drug abuse and depression—may have some arguable relevance outside the special issues as well. All the Eighth Amendment requires is that a jury be able to consider Brewer's mitigating evidence *in some manner.*

[4] On this date, the court of appeals withdrew its earlier opinion, *Brewer v. Dretke,* 410 F.3d 773 (5th Cir. 2005), and substituted the current opinion in its place. JA:214.

There is no principled distinction between Brewer's evidence of a troubled and violent relationship with his father late in adolescence and the evidence of a difficult childhood considered by this Court in *Graham*. There is also no meaningful similarity between Brewer's teenage troubles and the severe abuse and deprivation which occurred in *Penry I*. Similarly, Brewer's single episode of depression does not bear any real resemblance to the permanent mental retardation and brain damage in *Penry I*. Indeed, Brewer had an IQ of 115. In any event, the jury heard testimony and argument that Brewer would not be dangerous if sentenced to life imprisonment. Thus, his mitigating evidence had no *aggravating* relevance within the future-dangerousness special issue. In short, the relationship between the special issues and Brewer's mitigating evidence completely lacks the same essential features as the relationship between the special issues and evidence such as mental retardation or low IQ. Any contrary holding would make *Penry I* the rule rather than the exception. As a result, the lower court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

This proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2006).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). Here, where the state court correctly identified the controlling Supreme Court precedent, the unreasonable application test of § 2254(d)(1) applies. *Id.* at 406-08. A state court "unreasonably applies" clearly established federal law if it recognizes the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach

the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002). As this Court explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Here, where the state court applied the broad Eighth Amendment rule of *Penry I* to the unique mitigating evidence in Brewer's case, that court's judgment is entitled to maximum leeway under the AEDPA.

Finally, it is the state court's ultimate decision denying relief that is to be tested for unreasonableness, not its reasoning. *Saiz v. Ortiz,* 392 F.3d 1166, 1176 (10th Cir. 2004), *cert. denied,* 125 S. Ct. 2976 (2005); *Wright v. Dep't of Corr.,* 278 F.3d 1245, 1255 (11th Cir. 2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001); *Long v. Humphrey,* 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v. Superintendent,* 171 F.3d 877, 891 (3d Cir. 1999) (*en banc*); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and

not on whether the state court considered and discussed every angle of the evidence").

II. *Penry I* and Its Progeny Demand a Case-by-Case Inquiry into the Mitigating Significance of the Evidence Presented and Whether the Jury Was Able to Give Sufficient Effect to That Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues—deliberateness and future dangerousness—allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise. Indeed, the successor cases in this Court have demonstrated one crucial principle: *Penry I* remains the rare exception to the general rule of *Jurek.*

A. *Jurek* to *Penry I* to *Johnson*: almost all types of mitigating evidence may be sufficiently considered in answering the former Texas special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to

adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded *as a matter of law* from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Buchanan v. Angelone,* 522 U.S. 269, 276-77 (1998); *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of

the crime, duress and mental or emotional disturbance, and remorse. 428 U.S. at 272-73. Jurek's mitigating evidence of good character, youth, and intoxication was sufficiently within the ambit of the future-dangerousness special issue to satisfy the "individualized sentencing determination" required by *Woodson*. *Id.* at 271-73. And, in *Franklin,* the Court first recognized that the special issues were constitutionally sufficient even where the mitigating evidence had relevance to culpability apart from the concerns embodied in the deliberateness and future-dangerousness questions. 487 U.S. at 177-82. The Court specifically rejected the notion that the forward-looking future-dangerousness inquiry was inadequate for the consideration of backward-looking character evidence. *Id.* at 177-78; *cf. id.* at 189-90 (arguing that good-character evidence was *not* within the scope of the future-dangerousness issue because it might have relevance to past culpability rather than future conduct) (Stevens, J., dissenting). Commonsense dictates that the individualized-determination doctrine of *Lockett* and *Eddings* must yield to the requirement that a capital-sentencing jury receive guidance in its decision-making at some point. Otherwise, *Jurek* is without meaning. As the Court explained:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 487 U.S. at 179 (citation omitted).

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able . . . to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19. For more than a decade *Penry I* would be viewed as the narrow exception to *Jurek*.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California,* 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* Indeed, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 380-81. As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded from considering relevant mitigating

evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*; *see also Saffle v. Parks,* 494 U.S. 484, 490-92 (1990) (no Eighth Amendment error where there is no indication that the jury was "altogether prevented" from giving some effect to the evidence).

The Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham,* the Court declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute."[5] 506 U.S. at 474. As in *Franklin,* the Court found that future dangerousness was a constitutionally adequate vehicle for the consideration of his mitigating evidence of youth, troubled upbringing, and good character.[6] *Graham,* 506 U.S. at 475. This

[5] Brewer avers that *Penry I* was not at issue in *Graham* because it merely applied the retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), in order to determine the state of the law in 1984, presumably when Graham's sentence became final. Petitioner's Brief (Brief) at 25 & n.13. This is nonsense. In *Penry I,* the Court held that relief was dictated by *Lockett* and *Eddings,* decided in 1978 and 1982, respectively. 492 U.S. at 318-19. *Graham* decided that *Lockett* and *Eddings* did not dictate relief *on the facts of Graham's case,* and that *Penry I* was distinguishable *on its facts.* 506 U.S. at 472-77.

[6] Brewer also asserts that "*Graham* did not involve evidence of a 'troubled childhood.' " Brief at 25-26. Yet the four dissenting justices clearly believed it did, but employed the term "difficult upbringing" instead. *Graham,* 506 U.S. at 520 (Souter, J., dissenting). The two phrases are undoubtedly synonymous. Indeed, the Fifth Circuit had previously described it as "difficult childhood." *Graham v. Collins,* 950

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was because the "mitigating significance" of Graham's evidence did not *compel* affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76.

Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original). Indeed, "virtually *any* mitigating evidence" can be characterized as relevant to culpability but outside the scope of the Texas special issues. *Id.* (emphasis in original). In his dissent, Justice Souter ably demonstrated how to do so. *Id.* at 518-21 (suggesting youth and difficult upbringing, *i.e.*, "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another" had mitigating relevance outside or aggravating relevance within the future-dangerousness question). But if this idea was followed to its logical conclusion, the Court noted, *Penry I* would have swallowed *Jurek* completely. *Id.* at 476-77. Such reasoning is inconsistent with *Jurek* and *Franklin.*

In *Johnson,* the Court again rejected the notion that a jury could ever view youth "as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is so even if youth could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Again, the Court specifically rejected

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F.2d 1009, 1013 (5th Cir. 1992) (*en banc*) (quoting *Graham v. Collins,* 896 F.2d 893, 897 (5th Cir. 1990)).

the notion that mitigating evidence must be allowed relevance in every way imaginable during sentencing. The Court explained that general "personal culpability" is, by its nature, intertwined with the notion of future dangerousness. *Id.* at 369-70. This is because "a Texas capital jury deliberating over the Special Issues is *aware of the consequences* of its answers," and is understood to "exercise a range of judgment and discretion" and basic "commonsense" in answering those issues. *Id.* at 370 (quoting *Adams v. Texas,* 448 U.S. 38, 46 (1980), and citing *Boyde,* 494 U.S. at 381, and *Franklin,* 487 U.S. at 182 n.12) (emphasis added); *cf. Blystone v. Pennsylvania,* 494 U.S. 299, 322 (1990) ("by focusing on the deliberateness of the defendant's actions and his future dangerousness, the [Texas capital sentencing] questions compel the jury to make a *moral judgment* about the severity of the crime and the defendant's *culpability*") (Brennan, J., dissenting) (emphasis added).

Further, as the Court explained, any contrary understanding would necessarily overrule *Jurek* and "entail an alteration of the rule of *Lockett* and *Eddings*." *Johnson,* 509 U.S. at 372. "Instead of requiring that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner* in which the evidence might be relevant." *Id.* (emphasis added). This would constitutionally require the jury "be instructed in a manner that leaves it free to depart from the special issues in every case" and effectively deprive the states of the prerogative "to structure the consideration of mitigating evidence, *id.* at 373, overruling *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), as well. The Court specifically rejected the converse "full effect" argument

advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87.

In 1994 and again in early 2001, when the state court decided Brewer's *Penry I* claim, this Court had been silent on the *Penry I* issue for quite some time. Notably, however, the Court continued to endorse *Jurek* and *Johnson. See, e.g., Ayers v. Belmontes,* 127 S. Ct. 469, 480 (2006); *Tuilaepa v. California,* 512 U.S. 967, 972-75 (1994); *Buchanan,* 522 U.S. at 276-77. Thus, a state court ascertaining clearly-established federal law would have understood the following. Pursuant to *Jurek,* the former Texas special issues were facially constitutional. Yet *Lockett* and *Eddings* require that a jury not be prevented from making an individualized sentencing decision based on the available mitigating evidence. Although *Penry I* held that diminished capacity evidence of a defendant's inability to learn from his mistakes might have only aggravating relevance to future dangerousness and, thereby, lead to a violation of the Eighth Amendment rule of *Eddings,* the Texas special issues remained constitutionally sufficient so long as the defendant's evidence could find *some* mitigating relevance to culpability within the special issues, regardless of whether it might have aggravating relevance as well. There existed a presumption of constitutionality under most circumstances, even where the defendant could characterize—and re-characterize as necessary throughout successive appeals—the mitigating evidence as beyond the effective reach of the jury. This is because a Texas jury was presumed to understand the consequences of its actions and the moral judgment required.

The net result was that few types of mitigating evidence would have only aggravating relevance within the special issues and lead to *Penry I* error.

B. *Penry II* did not alter the Court's *Jurek*/*Penry I*/*Johnson* jurisprudence, nor did it justify a change in perception among the lower courts.

In June 2001, the Court revisited *Penry I* to decide whether a supplemental instruction given during Penry's retrial—an instruction not at issue here—"complied with [the Court's] mandate in *Penry I*." *Penry II,* 532 U.S. at 786. The Court first reiterated its holding in *Penry I*—that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues—and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction. First, the instruction "had no practical effect" because it merely told "the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue." *Penry II,* 532 U.S. at 798. Alternatively, it rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Id.* at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* But "jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to

violate their oath to render a 'true verdict,'" creating "a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.*

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I*. The first left the jury in the same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

Although the "full effect" language of Justice O'Connor's *Johnson* dissent surfaced in the *Penry II* majority opinion, 532 U.S. at 797, it had nothing to do with the supplemental-instruction issue because the *Penry I* Court had already reached the conclusion that Penry's mitigating evidence could not be given sufficient effect within the special issues. There is certainly no possibility a reasonable state court jurist would have assumed the *Penry II* majority turned the tables on the Court's prior opinion in *Johnson,* in which the Court specifically declined to adopt such a standard.

Although this Court approved of the "clearly drafted catchall instruction on mitigating evidence" that was adopted by Texas in 1991, it is important to note that the Court avoided holding any such instruction was *necessary.* *Penry II,* 532 U.S. at 803 (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(e)(1) (West 1991)); *Belmontes,* 127 S. Ct. at 480; *Blystone,* 494 U.S. at 305. Such a decision would have overruled *Jurek, Franklin, Graham,* and *Johnson,* which recognized that states are free to structure capital-sentencing schemes as they see fit, within certain reasonable parameters. *See Franklin,* 487 U.S. at 179 ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"). The very idea that a catchall instruction is *not* constitutionally necessary implies that most kinds of mitigating evidence do not require special accommodation under *Penry I.* Brewer's evidence is no different.

C. *Tennard, Smith,* and the new standard of constitutional relevance

In the wake of *Penry II,* the floodgates seemingly opened. After eight years of silence, the Court granted certiorari in six *Penry* cases in five years.[7] In *Tennard,* the

[7] During this same time period, however, the Court *denied* certiorari in several *Penry* cases in which the evidence was not dissimilar to Brewer's. *See, e.g., Newton v. Dretke,* 371 F.3d 250, 256-57 (5th Cir.) (mitigating evidence of difficult upbringing within the scope of the special issues), *cert. denied,* 543 U.S. 964 (2004); *Robertson v. Cockrell,* 325 F.3d 243, 245-46 (5th Cir.) (*en banc*) (childhood abuse at the hands of his alcoholic father as well as drug abuse), *cert. denied,* 539 U.S. 979 (2003); *Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir. 2002) (alcoholism), *cert. denied,* 540 U.S. 1218 (2004); *Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir.) (treatable, chronic schizophrenia), *cert. denied,* 534

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Court confronted a *Penry I* claim based on an IQ score of sixty-seven. 542 U.S. at 277. In adjudicating the claim, the lower court applied its "constitutional relevance" test,[8] developed during the nine-year interim since *Graham* and *Johnson*. *Tennard,* 542 U.S. at 281, 283-84. But this Court reversed, holding that constitutional relevance was an "improper legal standard" with "no basis in [Supreme Court] precedents," and that the correct standard to be applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Id.* at 287-88. Without actually determining that Tennard's low IQ was beyond the scope of the special issues, the Court merely remanded for further review. *Id.* at 288-89. The Court did not adopt or endorse the "full effect" language mentioned in *Penry II* and Justice O'Connor's *Johnson* dissent. Nor did the Court even mention *Jurek* or *Johnson,* much less overrule those precedents.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*"—constitutional relevance—as a screening test. *Tennard,* 542 U.S. at 283. The Court explained that:

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other

U.S. 1043 (2001). "[W]hile it is inappropriate to ascribe undue significance to denials of certiorari," this Court has certainly sent mixed signals to the court below in recent years. *See Robertson,* 325 F.3d at 256-57 & nn.21-24 (collecting cases in which certiorari was denied).

[8] "To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell,* 284 F.3d 491, 595 (5th Cir. 2002) (internal quotations omitted).

> context, and thus the general evidentiary standard—"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"—applies.

Id. at 284 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

Although the Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability," it is clear that most types of mitigating evidence will meet the *Tennard* relevance standard. 542 U.S. at 286 (citation omitted). The Director assumes for the sake of argument that Brewer's mitigating evidence of childhood mistreatment and a single psychiatric hospitalization is relevant within the meaning of *Tennard.* As previously noted in the Director's brief in opposition to certiorari review, Brewer's evidence that his girlfriend was the dominant partner in their relationship is *not* constitutionally relevant, because it is "unlikely to have any tendency to mitigate [his] culpability." *Tennard,* 542 U.S. at 286.

The Court's opinion in *Smith v. Texas* the next term noted its ruling in *Tennard* but focused on an entirely different issue: a supplemental instruction similar to the one addressed in *Penry II.* As in *Penry II,* this instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith,* 543

U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796). Importantly, no *Penry II* instruction was submitted in the instant case. In this sense, *Smith* and *Penry II* are not directly on point.

In addition, the *Smith* Court reiterated its disapproval of the constitutional-relevance standard rejected in *Tennard. Smith,* 543 U.S. at 45. The state court in *Smith* had adopted that standard for the first time only two months prior to the issuance of *Tennard. Smith,* 543 U.S. at 43-45; *see also Ex parte Smith,* 132 S.W.3d 407, 413-14 (Tex. Crim. App. 2004) (citing *Robertson,* 325 F.3d at 251, and *Graham,* 950 F.2d at 1029). Of course, that standard was not employed by the court below. Beyond that, the *Smith* Court did not adjudicate the issue of whether Smith's evidence was beyond the effective reach of the jury in answering the former Texas special issues. Thus, *Smith* adds little to the *Jurek*/*Penry I*/*Johnson* story other than to reinforce the tangential opinions in *Penry II* and *Tennard.*

D. The current state of *Penry I* jurisprudence

When *Jurek, Penry I,* and the litany of cases that follow in the wake of those opinions are viewed as a whole, the following Eighth Amendment inquiry may be gleaned: a court must determine (1) whether the mitigating evidence has met the "low threshold for relevance" established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *Coble v. Dretke,* 444 F.3d 345, 358 (5th Cir. 2006); *Bigby,* 402 F.3d at 564-65; *Madden v. Collins,* 18 F.3d 304, 308 (5th Cir. 1994). As the court below explained, "[f]or the mitigating evidence to be

within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." JA:222; *Cole v. Dretke,* 418 F.3d 494, 499 (5th Cir. 2005), *cert. granted sub nom. Abdul-Kabir v. Quarterman,* 127 S. Ct. 432 (2006); *see also Tennard v. Dretke,* 442 F.3d 240, 257 (5th Cir. 2006) ("The key inquiry . . . is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (opinion on remand) (emphasis in original); *Bigby,* 402 F.3d at 564 (special issues must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender); *Graham,* 506 U.S. at 468 (same). Of course, this objective inquiry is subject to the deferential standard of 28 U.S.C. § 2254(d)(1). *Tennard,* 542 U.S. at 288-89; *Coble,* 444 F.3d at 349-50; *Tennard,* 442 F.3d at 254.

As discussed above, this Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek,* 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham,* 506 U.S. at 476 (citing *Franklin,* 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson,* 509 U.S. at 367; *see also Cole,* 418 F.3d at 507 n.54 ("[A] jury can not give mitigating effect to evidence that can be seen as *aggravating*

only") (emphasis in original). Instead, Brewer must show a reasonable likelihood the jury could not consider his mitigating evidence. *Boyde,* 494 U.S. at 380.

It is crucial to reiterate why the reasonable-likelihood standard exists: during repeated appeals brought by successive lawyers over the course of a decade or more, the trial record is embellished, exaggerated, and rehashed so much that what the jury listened to at trial bears no resemblance to the evidence described in a habeas corpus petition. Hyperbole is human nature. However, these subjective tendencies must be quelled in favor of an objective viewpoint if a jury verdict is ever to become final. Put another way, just because Brewer can imagine a way the evidence might be relevant to his culpability outside the scope of the future-dangerousness special issue does not mean that a jury would deem that evidence to be beyond its grasp. This is mere speculation and is forbidden by *Boyde.* 494 U.S. at 380.

III. The Court Below Properly Rejected Brewer's *Penry I* Claim.

When Brewer's mitigating evidence is considered objectively, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue.[9] Initially, the court below

[9] Brewer does challenge the lower court' s decision with regard to his mitigating evidence of drug use. Nonetheless, a reasonable jury could easily conclude that Brewer did not act deliberately due to intoxication, or would not be a future danger in prison without access to drugs. *Harris,* 313 F.3d at 242; *James v. Collins,* 987 F.2d 1116, 1121

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correctly held that Brewer's evidence of a troubled childhood was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense. JA:223-27 & n.16 (citing *Graham,* 506 U.S. at 475, *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994), and *Cole,* 418 F.3d at 507); JA:102, 106-07; *cf. Clark v. Collins,* 19 F.3d 959, 963 (5th Cir. 1994) (applying *Johnson*—not constitutional relevance—to hold child abuse within the scope of future dangerousness especially where possibility of rehabilitation exists).

The evidence indicates Brewer could not have been physically abused at all until after the age of fifteen, when he first reestablished a relationship with his father. JA:46, 63. To that point, Brewer experienced a reasonably idyllic childhood. Although Brewer's father abandoned the family at an early age, his mother remarried into a seemingly-stable home. *Id.* at 44-46, 64. During this time, Brewer excelled in school and sports and was popular with his classmates. *Id.* at 66. His successes were no doubt due to his high intelligence and stable home life. 18 RR 652. During adolescence, however, Brewer began to dabble in marijuana. JA:66. There is no indication whether this drug use was due to peer pressure or merely boredom, but it is most likely the root cause of the disruptive behavior he began to engage in during middle school/junior high school. 18 RR 637-38, 640-42, 644.

Brewer's life began to become more complicated after 1985, when his mother remarried his father and moved the family to Mississippi. JA:47-48. At this point, the

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(5th Cir. 1993). Thus, such evidence was within the purview of the special issues.

record falls silent for some time. The lone documented physical confrontation between Brewer and his father occurred in 1989, when Brewer was nineteen-years old, and followed closely on the heels of his violent assault on Amy Forrester. JA:6-9; 18 RR 592-96, 602. Although Brewer's father confessed to striking Brewer with various objects,[10] an objective analysis of the evidence suggests that Brewer was routinely the aggressor by this time in his life. JA:65. This aggressive behavior resulted in his father's hospitalization with serious, life-threatening injuries and culminated in murder. JA:22-26.

The late—if detrimental—influence of Brewer's father on his life stands in marked contrast to *Penry I* and *II,* where frequent child abuse and neglect occurred at an early age. *See, e.g., Penry I,* 492 U.S. at 308-10 (expert testimony concerning "beatings and multiple injuries to the brain at an early age," as well as social and emotional deprivation; sibling's testimony that "mother had frequently beaten him over the head with a belt when he was a child," and "routinely locked [him] in his room without access to a toilet for long periods of time"). Moreover, there was no evidence that any of Brewer's unfortunate experiences "in any way impaired his cognitive abilities." JA:215 n.3; *cf. Penry I,* 492 U.S. at 308-09 (Penry's brain damage "resulted in poor impulse control and an inability to learn from experience" or "to appreciate the wrongfulness of his

[10] Brewer repeatedly refers to evidence of "extensive physical abuse" or "violent abuse." Brief at 3, 9, 37, 42. Yet Brewer's mother reported only three instances and no serious injuries. JA:65. Brewer's father stated that he "threatened him with physical [harm]" and, on at least one occasion, was physically violent. *Id.* at 49-51. It is certainly a stretch to characterize these events as "large in extent, range, or amount." THE AMERICAN HERITAGE COLLEGE DICTIONARY 484 (3d ed. 2000).

conduct or to conform his conduct to the law"). To the contrary, Brewer's high intelligence and proper upbringing would have led the jury to the opposite conclusion. An intelligent individual like Brewer is *objectively* more able to adapt to and overcome hardship, especially when experienced late in adolescence and only briefly. This is just commonsense.

Nevertheless, the evidence was certainly not *aggravating* within the scope of the future-dangerousness issue. There was no testimony that Brewer was unable to control his impulses or learn from his mistakes. *Cf.* 492 U.S. at 322-23 (explaining that it was Penry's lack of impulse control and inability to learn from his mistakes that gave rise to error). Brewer's evidence of childhood troubles—especially the minimal amount of abuse suffered—is, without a doubt, within the scope of future dangerousness when viewed objectively. It is certainly much more akin to the troubled childhood evidence at issue in *Graham* than anything else.

The lower court has rejected Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt . . . has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott,* 31 F.3d [at] 1327 [ ] (citing *Graham v. Collins,* 506 U.S. 461 [ ]). In *Jacobs,* we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I. Id.* Jacobs argued that:
>
> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with

> strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.

Id. Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse.[11] Coble's evidence is distinguishable from that in *Penry* [*I*].

Coble, 444 F.3d at 362.

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[11] Graham produced evidence of a difficult childhood. As this Court explained:

> we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character 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.

Graham, 506 U.S. at 475.

As in *Coble, Jacobs,* and *Graham,* Brewer's childhood troubles—a neglectful and briefly abusive father—were well within the reach of the jury in answering the future-dangerousness special issue. Indeed, it is very likely that the vast majority of death-eligible criminals had such negative childhood experiences. But the overwhelming number of such inmates who were tried prior to 1991 in Texas are not entitled to *Penry I* relief. If this were the case, *Penry I* would cease to be the exception to *Jurek*. Instead, *Jurek* would be the exception to *Penry I*. Thus, it is important to recognize the *exceptional* nature of the mitigating evidence in *Penry I*. 492 U.S. at 308-10. Brewer's case is clearly not so exceptional; rather, it is just a typical death penalty case and Brewer's mitigating evidence does not justify a retrial after fifteen years.

Similarly, the lower court properly reasoned that the evidence Brewer "had a bout with depression three months before the murder" and "was briefly hospitalized for that depression" was well within the scope of the future-dangerousness issue. JA:223-24 & nn.17-18. This can hardly be characterized as a "mental impairment" of the sort discussed in *Penry I*. Brewer's multiple attempts to portray it as such are an irresponsible exaggeration. *See, e.g.,* Brief at 6, 8-9, 11, 14-16, 19, 28 nn.15-16, 29-30, 36, 42. Not only was there no expert testimony *at all* in the record, there was no lay testimony concerning any mental condition, and only the single diagnosis of depression within the commitment documents. DX 5. But even this diagnosis was clearly limited: it reflected a "single episode," there was no signal the depression was chronic in nature, and there was no indication other than the crime itself that Brewer was a danger to anyone but himself. *Id.*; *see also* JA:39 (discussing suicide note). There is no ambiguity here. Any reasonable,

objective juror confronted with this amount and kind of evidence would not consider Brewer to be "mentally ill."

Further, while Brewer argues that he was involuntarily committed, the record reveals that Brewer actually signed "voluntary papers stating that he had signed a request for voluntary admission" to Big Spring State Hospital. *Id.* at 35, 140. The jury was fully aware that the initial "involuntary" commitment was initiated by Brewer's family based upon a suicide note and nothing more. *Id.* at 39. In fact, Brewer's mother testified that he "committed himself" because "he wanted to turn his life around" and "get off of drugs." *Id.* at 71-72. Brewer later checked himself out of Big Spring State Hospital to live with Nystrom in Amarillo. *Id.* Therefore, the record plainly refutes Brewer's effort to characterize his depression as an incurable or untreated mental illness that limited his impulse control. Indeed, Brewer presented no expert opinion on the matter. JA:216, 223-24 n.16.

Nevertheless, Brewer's evidence was plainly within the jury's reach because treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry.[12] But Brewer claims that "[n]o

[12] *See, e.g., Hernandez,* 248 F.3d at 349 (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately).

evidence before the jury indicated that Mr. Brewer's mental illness was treatable" and implies that no such treatment was "available." Brief at 29-30. Yet the jury heard testimony that Brewer *received treatment* during his stay at Big Spring State Hospital, a stay which was initiated to treat his drug problems. JA: 35-36, 70-72. According to Brewer's mother, this treatment was at least a temporary success, because he expressed a willingness to remain sober and "turn his life around." *Id.* at 71-72. A jury applying commonsense to this evidence would clearly understand that Brewer's depression was connected to his drug abuse and that he would not be exposed to such negative influences if imprisoned for life.[13]

The lower court recently held that evidence of a borderline personality disorder was not within the jury's reach in answering the future-dangerousness issue where conflicting expert testimony indicated that successful treatment was unlikely. *Nelson v. Quarterman,* ___ F.3d ___, 2006 WL 3592953, *20 (5th Cir. Dec. 11, 2006) (*en banc*). The court reasoned that

[13] It should also be noted that, unlike in *Penry I,* the term "deliberately" was defined for Brewer's jury as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision." JA:90. Given defense counsel's attempt to create residual doubt during sentencing and to portray Brewer as the puppet of more sophisticated actors (including his girlfriend, Nystrom), the jury's answer to the deliberateness special issue surely reflected a reasoned moral response to the mitigating evidence. *Penry I,* 492 U.S. at 323; *see also Davis v. Scott,* 51 F.3d 457, 462-64 (5th Cir. 1995) (holding far less substantive definition of "deliberateness" cured *Penry I* error), *abrogated on other grounds by Tennard,* 542 U.S. at 283-84; *but see Bigby,* 402 F.3d at 571 n.7 (distinguishing *Davis*).

> a juror considering Nelson's evidence of borderline personality disorder would have felt that he could give the evidence only one possible effect via the future-dangerousness issue: Such a juror would have seen the evidence as *only aggravating,* because Nelson's borderline personality disorder and the difficulty of treating it increase the likelihood that Nelson will act out violently again.

Id. at *21 (emphasis added). While the court of appeals questioned prior circuit authority[14] concerning treatable mental illness, *id.* at *25, it is clear that the *Nelson* court based its holding on the record and the notion that *Penry I* error occurs only where the mitigating evidence has only *aggravating* relevance to the special issues. In Brewer's case, however, there was no conflicting expert testimony concerning whether his brief bout of depression was treatable. In fact, as noted *supra,* the jury heard testimony that Brewer was successfully treated at a hospital. JA: 35-36, 70-72. Therefore, Brewer's depression could not have had *aggravating* relevance within the special issues.

Nelson and other recent Fifth Circuit opinions confirm this reasoning.[15] *See Coble,* 444 F.3d at 361-62 (holding

[14] *See Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue).

[15] As noted above, the *en banc* Fifth Circuit recently denied rehearing in the instant case. *See* Appendix. The court of appeals explicitly stated that its "vote should not be taken as conflicting with or modifying the majority decision in the recent *en banc* case, *Nelson v. Quarterman.*" *Id.* (citation omitted). This statement unequivocally confirms the fact that, in the view of the *Nelson* majority, the panel

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treatable bipolar and posttraumatic stress disorders within scope of future-dangerousness issue); *Cole,* 418 F.3d at 505-07 (holding organic neurological deficiency including diminished impulse control within scope of future-dangerousness issue); *but see Tennard,* 442 F.3d at 256 (finding *Penry I* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby,* 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental disorder or an exceedingly ordinary problem like *a single episode* of drug-induced depression is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. *Cole,* 418 F.3d at 505-07; *cf. Bigby,* 402 F.3d at 571 ("Even after being in the controlled environment of jail for some time, Bigby irrationally tried to take the trial court judge hostage in the presence of armed bailiffs," demonstrating inability to conform conduct with law). The *Nelson* majority did not overrule these opinions and, indeed, did not even mention them.

Brewer argues, Brief at 22-24, that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "severity" and "permanence" elements of the former constitutional-relevance test. Yet this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). Gravity is a synonym for severity,

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opinion below is *entirely consistent* with *Nelson.* In other words, the cases are distinguishable on their facts.

seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). "Trivial" means insignificant or inessential. *Id.* at 1447. Similarly, transient or impermanent characteristics are less likely to mitigate culpability. If this were not the case, then mere intoxication at the time of the offense would be as mitigating as severe mental retardation. This is clearly not so. *See, e.g., Harris,* 313 F.3d at 242 (intoxication within the scope of the special issues for *Penry I* purposes); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993) (same). Either concept certainly bears on whether the likelihood of *Penry I* error is *reasonable.* Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek, Graham,* and *Johnson.*

Moreover, *Tennard* and *Smith* do not support Brewer's argument, because the opinions deal only with the application of severity or permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* [*I*] claims." *Tennard,* 542 U.S. at 282-86. Here, the court of appeals *did* reach the heart of Brewer's *Penry I* claim and discussed each category of the evidence at length. In fact, Brewer reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be judged in the absence of such comparisons. This is especially true where the relative permanence of a mitigating circumstance bears *directly* on the probability of future dangerousness.

Finally, unlike *Tennard,* the prosecutor did not ask the jury to consider Brewer's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State

had carried its burden of proof concerning Brewer's probable future dangerousness.[16] JA:116-19. But the prosecutor based this argument on the *aggravating* evidence presented by the State, not Brewer's mitigating evidence. For example, the State asked the jury, "What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?" *Id.* at 116-17. The prosecuting attorney also pointed out that, "[b]y the time [Brewer] is [fifteen] years of age, from that time on, he carries weapons, he carries knives . . . [t]o hurt people." *Id.* at 117. The State's argument that Brewer would "never change," *id.* at 118, was merely a legitimate response to defense counsel's suggestion that Brewer could be rehabilitated if sentenced to life in prison.[17] *Id.* at 102, 106-07. Importantly, however,

[16] Brewer asserts that the State's argument to the jury to "honor [its] oath" and "answer the special issues honestly according to the evidence" violates *Penry II* and *Smith.* Brief at 19-22. This argument is specious. In both *Smith* and *Penry II*, such an argument was held to be problematic because of the supplemental instruction mechanism which "directed the jury to change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Penry II,* 532 U.S. at 799; *see also Smith,* 543 U.S. at 48 n.5. No such instruction was given in this case. Nor does *Penry I* support Brewer's contention. There, the Court held that a similar prosecutorial argument *failed to alleviate* any Eighth Amendment error. *Penry I,* 492 U.S. at 325-26. Finally, Brewer's claim is illogical because the State was merely arguing it met its burden of proof. The State will make just such an argument *in every case.* But not every death penalty case results in *Penry I* error.

[17] Brewer suggests that "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." Brief at 19, 26-27. But Brewer is wrong. Counsel urged the jury to answer negatively because Brewer was influenced to engage in violent and dangerous behavior by older and more sophisticated persons. JA:105-06. Defense counsel further suggested that "[l]ife in prison will make sure that [Brewer] will not be around wom[e]n that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get

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the prosecutor did not "press[ ] exactly the most problematic interpretation of the special issues, suggesting that [Brewer's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[18] *Cole,* 418 F.3d at 508 (quoting *Tennard,* 542 U.S. at 289).

IV. The State Court Reasonably Rejected Brewer's *Penry I* Claim.

On direct appeal, the Court of Criminal Appeals carefully considered Brewer's *Penry I* claim and reasonably applied the appropriate Supreme Court precedent. Initially, the state court's explication of the Eighth Amendment's evolution from *Jurek* to *Penry I* via *Lockett, Eddings,* and *Franklin* was a proper statement of the law. JA:137-39. The court then correctly explained that, in addressing a *Penry I* claim, it must determine:

> (1) what mitigating evidence was presented to the jury; (2) whether the [deliberateness and future-dangerousness] issues provided a vehicle for

him away." *Id.* at 106. This is a clear suggestion that there was no probability Brewer would commit future acts of violence if sentenced to life imprisonment. It is certainly not a plea for "nullification," as Brewer claims. Brief at 19.

[18] Brewer argues that the State's voir dire invited the jurors to ignore the mitigating evidence in answering the special issues. Brief at 16-18 & n.8. But, as this Court reasoned in *Penry II,* it is doubtful that "jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." 532 U.S. at 801. In Brewer's case, voir dire began more than four weeks before the sentencing phase of trial. Thus, "[t]he comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [Brewer]'s sentence." *Id.* at 802.

> the jury to give effect to that evidence and, if not, (3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence.

Id. at 139-40 (citing *Joiner v. State,* 825 S.W.2d 701, 706 (Tex. Crim. App. 1992)).

The state court also accurately described the mitigating evidence before the jury. JA:140. Finally, the court "conclude[d] the [future-dangerousness] issue provided an adequate vehicle for the jurors to give effect to [Brewer]'s mitigating evidence." *Id.* at 141. The court noted that "a stay in a mental hospital does not evidence a long-term mental illness which would affect [Brewer]'s ability to conform to the requirements of society." *Id.* (internal quotations omitted). The court also held that Brewer's evidence of drug abuse and a troubled childhood was within the scope of the future-dangerousness special issue. *Id.* As explained *supra,* this holding is not contrary to the Court's precedent nor is it an unreasonable application thereof.

Brewer criticizes the state court's reasoning as cursory and ill-founded. Brief at 34-46. However, as explained above, the state court's reasoning is inapposite under the AEDPA. It is only the court's ultimate decision that is to be reviewed. *Saiz,* 392 F.3d at 1176; *Wright,* 278 F.3d at 1255; *Santellan,* 271 F.3d at 193; *Cruz,* 255 F.3d at 86; *Matteo,* 171 F.3d at 891. The state court's decision—that there was no reasonable likelihood Brewer's mitigating evidence was outside the jury's effective reach in answering the special issues—is without question a reasonable application of *Jurek* and *Penry I.* Nonetheless, when the state court contrasted Brewer's single episode of depression with a "long-term mental illness," it did not fail to

"examine the trial record" as Brewer claims. Brief at 36. An examination of the trial record reveals that a single episode of depression is exactly what Brewer was diagnosed with. DX 5. Nor did the state court employ a "severity" or "nexus" analysis to screen out any mitigating evidence, as Brewer suggests. Brief at 38-39. The evidence is set forth, in its totality, in the court's opinion, and neither term appears therein. JA:140-41.

In any event, if the state court's decision was even arguably unreasonable, the lower court was entirely within its authority to consider and reject Brewer's claim *de novo*. Although Brewer suggests otherwise, Brief at 23, habeas corpus relief is precluded except where a person is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution." 28 U.S.C. § 2254(a). The fact that a state court may have conducted an unreasonable analysis of a federal constitutional claim does not entitle Brewer to relief. It only means that a federal habeas court may avoid the deferential standard owed to reasonable state court judgments under § 2254(d) and review a petitioner's claim *de novo*.

Finally, overriding the state court's denial of Brewer's *Penry I* claim at this point would violate the recognized policy interests of comity and finality. As set forth in the STATEMENT OF THE CASE, this Court *twice* declined to review the state court's decisions in this regard in the last twelve years: once in 1995 and once in 2001. The finality of those judgments and the respect owed to them as a matter of federalism would be upset if the Court chose Brewer's *third* certiorari petition as a vehicle to invalidate his death sentence based on precedent that did not exist at the time. The *Teague* question is usually framed as "'whether a state court considering [the defendant's] claim at the time

his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Goeke v. Branch,* 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (internal quotations omitted)). Here, not only would the state court have been compelled by *Johnson* and *Graham* to reject Brewer's *Penry I* claim, it appears this Court agreed.

Any other holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents that the state court relied upon in adjudicating Brewer's *Penry I* claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [either 1994 or 2001] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of the Eighth Amendment" with regard to Brewer's mitigating evidence. *Id.* at 472.

> The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.

Johnson, 509 U.S. at 366-67. Thus, to the extent the relief Brewer requests requires a new rule, both the AEDPA and the non-retroactivity doctrine of *Teague* bar relief.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General
for Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR RESPONDENT

**Counsel of Record*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-70034

BRENT RAY BREWER,

Petitioner-Appellee,

versus

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion 3/1/06, 442 F.3d 273)

(Filed Dec. 27, 2006)

Before JOLLY, SMITH, and GARZA, Circuit Judges.

PER CURIAM:*

A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not

* Judges King, Jolly, Davis, Barksdale, Benavides, Stewart, Dennis, and Clement did not vote.

disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the Petition for Rehearing En Banc filed by appellee Brent Ray Brewer is DENIED.

This order is entered, and the court voted to deny rehearing en banc, solely to resolve any potential question of the judgment's finality in this court and to clarify the Supreme Court's jurisdiction over the case. Further, this court's vote should not be taken as conflicting with or modifying the majority decision in the recent en banc case, *Nelson v. Quarterman,* No. 02-11096, 2006 WL 3592953 (5th Cir. Dec. 11, 2006).

The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
Jerry E. Smith
United States Circuit Judge

DENNIS, Circuit Judge, dissenting from the attempt to exercise jurisdiction:

This case is in an unusual posture, as the Supreme Court granted the petition for certiorari while a petition for rehearing en banc was pending in this court. It is beyond dispute that the Supreme Court had the power and the jurisdiction to grant the writ, irrespective of the posture of the case in this court. Nevertheless, some judges on this court have taken the view that the Court may have granted certiorari under the mistaken impression that the petition for rehearing en banc had been denied by this court. Those judges believe that, unless this court or a minority of its judges now acts on the petition for rehearing, the Supreme Court might dismiss the writ as improvidently granted and decline to decide this case

on the merits. In its haste to attempt to ensure that the Supreme Court keeps the case and reaches the merits, however, the minority of this court's judges attempting to exercise jurisdiction herein have ignored well-established limits on this court's jurisdiction and, in the process, trespassed upon the jurisdiction of the Supreme Court. Because the Supreme Court granted certiorari in this case before this court ruled on the pending petition for rehearing en banc, finalized its judgment, or issued a mandate, the minority of active judges of this circuit who have chosen to vote in this poll do not now have jurisdiction to do any of those things. Accordingly, I disagree with their erroneous and futile effort to exercise jurisdiction by purporting to deny rehearing en banc, make the judgment of this court in this case final, and issue a mandate based on such invalid judgment.

When the Supreme Court granted certiorari, because there was a petition for rehearing pending, there was no final judgment by this court in this case. *See Hibbs v. Winn,* 542 U.S. 88, 97-98 (2004) (explaining that a timely-filed petition for rehearing prevents a court of appeals' judgment from being final under 28 U.S.C. § 2101; "In other words, 'while [a] petition for rehearing is pending,' or while the court is considering, on its own initiative, whether rehearing should be ordered, 'there is no 'judgment' to be reviewed.' ") (quoting *Missouri v. Jenkins,* 495 U.S. 33, 46 (1990)) (alteration in original). Our jurisdiction to perform further judicial acts in this case was, moreover, terminated when the Supreme Court granted certiorari. Also, when the Supreme Court granted certiorari, this court certified the record and transported it to the Supreme Court. Because we have no jurisdiction, no case, and no record upon which to act, the judges casting votes

against granting rehearing en banc in this case act without any authority to do so, and any judgment or mandate based on their votes is invalid. They also clearly lack the authority or ability to advise the Supreme Court or influence what the Supreme Court should do in this case before or after its January oral argument. In sum, no matter what we have done or left undone, the Supreme Court has the power and jurisdiction to grant certiorari and render a decision on the merits in this case, and because the Supreme Court granted certiorari and thereby took the case out of our hands before we had completed our consideration of the case, rendered a final judgment, or issued a mandate based upon that final judgment, even a majority of this court no longer has jurisdiction to perform any of those judicial acts in this case. Any attempt by members of this court to take such actions can only be seen as, at best, a misguided and presumptuous attempt to correct a perceived mistake by the Supreme Court or the parties in that court, or, at worst, an improper trespass and attempt to influence the Supreme Court's future actions in this case.

The general common law rule is that "unless otherwise abrogated or modified by statute, a writ of certiorari takes the record out of the custody of the inferior tribunal, leaving nothing there to be prosecuted or enforced by execution, and operates as a stay of execution." 14 AM. JUR. 2D *Certiorari* 74 (2d ed. 2006). The case law strongly supports this view. In *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.,* 78 F. 659, 662 (C.C. Ky. 1897), the court stated the rule emphatically:

> But it is to be remembered that the writ of certiorari is of itself and proprio vigore a supersedeas. Neither the inferior court nor the officer holding

> the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular, but absolutely void; and the parties doing such acts are trespassers.

Similarly, in *Waskey v. Hammer,* 179 F. 273 (9th Cir. 1910), the Ninth Circuit summarized the common law authorities on this subject and noted that:

> Very many English as well as American authorities are quoted in *Patchin v. Mayo,* etc., 13 Wend. (N.Y.) 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be in effect a supersedeas. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is stated to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it, that the judicial proceedings can proceed no farther in the lower court.

Id. at 274 (quoting *Ewing v. Thompson,* 1862 WL 4971 (Pa. 1862)); *see also Orth v. Steger,* 258 F. 625, 626 (D.C.N.Y. 1919) ("Except where the common-law rule has been changed, a certiorari to a subordinate court or tribunal or an officer operates as a stay of proceedings from the time of its service or of formal notice of its issue, unless the judgment or order complained of has begun to be executed.") (internal quotation marks omitted).

Although these authorities are old, I have found nothing to suggest that they do not remain good law, and a number of more recent authorities also support the view that a court lacks jurisdiction to act once certiorari has

been granted. *See Hermann v. Brownell,* 274 F.2d 842, 843 (9th Cir. 1960) ("When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself. . . .")**; *Ligon v. Bartis,* 561 S.E.2d 831, 833 (Ga. App. 2002) ("[W]hile the actual *granting* of a writ of certiorari by the United States Supreme Court operates as a stay, the mere *filing* of a petition for certiorari does not."); *Owens v. Hewell,* 474 S.E.2d 740, 742 (Ga. App. 1996) (noting same); *see also United States v. Eisner,* 323 F.2d 38, 42 (6th Cir. 1963) (distinguishing *Waskey* and *Orth* on the ground that they dealt with situations in which certiorari was issued); *State v. Kate C.,* No. A-01-958, 2002 WL 31002490, at *6 (Neb. App. Aug. 6, 2002) (noting that "[o]ther courts have specifically held that while the actual *granting* of a writ of certiorari by the U.S. Supreme Court operates as a stay, the mere *filing* of a petition for writ of certiorari does not operate as a stay") (citing *Ligon,* 561 S.E.2d at 833); *cf.* Fed. R. App. P. 41(d)(2)(B) (providing that, where mandate is stayed during the pendency of a petition for certiorari, "the stay continues until the Supreme Court's final disposition").

The Supreme Court's grant of certiorari has the purely jurisdictional effect of staying the court of appeals' ability to perform further judicial acts in the case. The writ's effect does not necessarily extend, however, to other matters outside this jurisdictional context, such as the accrual of forfeitures or the running of time under a statute of limitations. Accordingly, in *McCurry v. Allen,*

** Although the *Hermann* court spoke in terms of appeals, that case actually involved a grant of certiorari by the Supreme Court.

688 F.2d 581, 586 (8th Cir. 1982), the Eighth Circuit held that the Supreme Court's grant of certiorari did not toll a statute of limitations so as to allow the adding of parties in a civil rights case. Unfortunately, the court based its decision in that case only upon a broad statement taken from a Supreme Court practice manual, which, if not read carefully and within proper context, could be misleading. The practice manual states in passing that the grant of certiorari does not "operate[ ] as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 17.10, at 769 (8th ed. 2002). That this statement does not relate to the lower court's power to conduct proceedings in a case that is before the Supreme Court on certiorari is clear from careful attention to its wording, as well as the only direct authority cited, and the context of the statement within the manual. In *St. Regis Paper Co. v. United States,* 365 U.S. 857 (1961), the only case that the authors directly cite in support of their statement, the Court simply granted a stay of the accrual of forfeitures ordered below while the case was pending in the Supreme Court. Further, the section of the manual in which the statement appears is concerned only with stays of preexisting final judgments pending the Supreme Court's disposition of a case, not with the question of an inferior appellate court's authority to continue to act in the case after the Supreme Court has granted certiorari. In sum, the effect of the Supreme Court's grant of certiorari is primarily that of supplanting the court of appeals' inferior jurisdiction with its own superior jurisdiction and of thereby staying the performance of further judicial acts in the case by the court of appeals. The court of appeals no longer has the authority to act upon the case in light of the Supreme Court's exercise of

jurisdiction and complete assumption of the case and its record. Thus, that one court and one practice manual have concluded that the Supreme Court's grant of certiorari does not stay matters other than the court of appeals' judicial acts, such as the running of statutes of limitation and the accrual of forfeitures, should not mislead a court of appeals into thinking it can continue to rehear a case, render judgments and issue mandates after the Supreme Court has granted certiorari, thereby taking the case and the record from the court of appeals' jurisdiction.

For these reasons, I conclude that the Supreme Court's grant of certiorari in this case, which caused the case and its record to be transferred to the Supreme Court, deprives us of any case or record upon which to perform the judicial functions of considering and voting on whether to grant the pending petition for en banc rehearing, deliberating and rendering a final judgment on that petition, or issuing a mandate based on such a final judgment. Consequently, we lack the jurisdiction to take any of the foregoing judicial actions, and any attempt to do so by judges of this court, whether by a majority or a minority, is not only ineffectual but also an improper trespass on the Supreme Court's jurisdiction.