No. 02-11309

In The

Supreme Court of the United States

ROBERT SMITH,

Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly determined that there is no reasonable likelihood that the jury instructions and special issues submitted during Smith's punishment trial altogether precluded the jury from giving effect to his mitigating evidence.

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BRIEF OF RESPONDENT

Although the State of Texas has recommended to the Texas Board of Pardons and Paroles that Smith's death sentence be commuted to life imprisonment due to a recent diagnosis of mental retardation, *see* n.7, *infra,* this Court should affirm the lower court's decision because Petitioner Robert Smith ("Smith")[1] fails to show the unreasonableness of the state court's ultimate denial of habeas corpus relief. Despite the fact that the Court of Criminal Appeals of Texas mistakenly held that the supplemental mitigation instruction submitted in this case categorically cured any potential error under *Penry v. Lynaugh,* 492 U.S. 302 (1989) ("*Penry I*"), its alternative decision – that Smith's mitigating evidence was not significantly beyond the reach of the jury when it answered the deliberateness and future dangerousness special issues – was not unreasonable pursuant to 28 U.S.C. § 2254(d). The jury could have found that Smith's mitigating evidence rendered him less likely to carefully consider the result of his criminal conduct and the circumstances of the offense indicated that his murder may have been less than deliberate. Additionally, the jury could have found that Smith's disabilities were likely to diminish with age, and that he would not be a future danger if incarcerated for life, based on the testimony of his own expert witness. In either case, the jury could have truthfully answered the punishment phase special issues in such a way that Smith would receive a sentence of life imprisonment. As a result, habeas corpus relief is not available to Smith.

[1] Respondent Doug Dretke will be referred to herein as "the Director."

STATEMENT OF THE CASE

I. Facts of the Crime

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

> [On May 15, 1990, Smith] and his accomplice entered the Fayco Menswear clothing store in Houston fifteen minutes before closing. The two new "customers" wandered throughout the store, [Smith] finally settling upon several high priced goods. Because of his behavior and his failure to try on any of his purchases, the saleslady, Ms. Kim, became suspicious. She signaled a friend at another store that she was in trouble. Ms. Kim also picked up the phone and called the operator for help. Before Ms. Kim could speak to the operator, [Smith] pointed a gun at her head and told her to hang up the phone and to lay on the ground. She complied. Ms. Kim's friend arrived and was maced by [Smith]'s accomplice when he entered.
>
> [Smith], unable to open the cash register, ordered Ms. Kim to stand and retrieve money from the register. When she stood, Ms. Kim moved [Smith]'s car keys which he had placed with his purchases on the counter. [Smith], unaware his keys had been moved, fled the store with money and merchandise along with his accomplice. When they had left, Ms. Kim called the police and also informed the local security guards of the robbery.
>
> [Smith] fled in the direction of a K[m]art two buildings away from Fayco Menswear. As [Smith] approached his car, Mr. Griffith, a K[m]art security supervisor, was approaching his auto.

[Smith] asked Mr. Griffith to call an ambulance because a building was on fire, pointing in the general direction of Fayco Menswear. Mr. Griffith saw no fire and thought it strange an ambulance should be called, nevertheless, he began to get into his car. A few moments later, Mr. Griffith heard [Smith] say, "I can't find the fucking keys. I can't find the fucking keys now." [Smith] and his accomplice then exited their car and fled.

Soon after they had fled, Mr. Griffith was informed of the robbery by one of the local security guards. Mr. Griffith and the security guard got in Mr. Griffith's car and pursued the two robbers. Mr. Griffith and the guard saw [Smith] and his accomplice jump a fence into a nearby abandoned trailer park. They drove to an entrance where a gate had been knocked down. Approximately 12 to 15 seconds elapsed between the time the robbers jumped the fence to the time the pursuers got to the entrance. As they were exiting the car, Mr. Griffith heard a gunshot. Each man ran behind a tree for cover. From behind his tree, Mr. Griffith could hear two frantic voices from inside the park. However, he could only see shadows.

A truck engine started, its lights went on, and the truck began heading in Mr. Griffith's direction. As a warning, Mr. Griffith fired four shots into the air. The truck stopped, and its occupants exited and fled on foot. The police arrived and requested Mr. Griffith and the security guard to return to Kmart to watch the abandoned vehicle. The police then continued the pursuit.

The police brought in a K-9 unit and began tracking the robbers using a Belgian Malinois, a dog similar in appearance to a compact German Shepard. The dog and his handler tracked

> [Smith] into a wooded area where the dog was released. The dog caught up with [Smith], and his handler arrested [Smith] as the dog was attempting to pull [Smith] from some brush.
>
> Another officer approached the abandoned truck. In close proximity to the truck, a tent had partially collapsed. On part of the tent the officer discovered a dead male, subsequently identified as James Wilcox. [Smith] later confessed to the murder of Wilcox.[2]

Smith v. State, 898 S.W.2d 838, 840-41 (Tex. Crim. App. 1995). On January 31, 1992, Smith was convicted of

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[2] [Smith] confessed in part,

> We ran around the [Kmart] building into the woods. We ran into a truck that was parked under a tree. I saw a white man laying down on the ground. The man was on top of a tent. The man jumped up and asked what we were doing. Larry told the man give me your keys and the man said "my front end messed up." Larry hit the man and they started wressling [*sic*]. The man looked over at me and I pulled the gun. I asked him politely to give us the truck. The man grabbed my hand and started to wrestle. The man ran back to the truck where Larry was. As I walked up on the truck telling the man we do not want to hurt you because the police behind us. We just need a ride. By this time the man grabbed my arm again and I got loose. I started backing up and the man started towards his truck that Larry was in. The police pulled up and Larry pulled the truck back up. By this time the man grabbed Larry by the neck. Larry got loose from him. The man grabbed me by the leg and I shot him in the arm. I asked the man four times "is you okay." He stated "yes." I started to run and I throwed [*sic*] the pistol down on the ground. Larry stopped and picked the pistol up and stated "Let's split the money up." As we split the money up we went our separate ways.

murder during the course of a robbery, a capital offense. *Id.* at 840; JA:1; 1 Tr 256.[3]

II. Facts Relating to Punishment

At Smith's sentencing hearing, the State proved that less than a month before the capital murder, Smith was caught on a videotape committing a violent convenience store robbery. 43 SF 227. The prosecution presented the audio-video recording and testimony from the cashier/victim of the aggravated robbery showing Smith slapping, hitting, and kicking the cashier in the vaginal area, as well as yelling, cussing, and holding a box cutter to the cashier's throat as she was screaming hysterically. *Id.* at 73-103, 227. The State also presented evidence that, while on trial for capital murder, Smith was caught smuggling marijuana into the courtroom. *Id.* at 199-200, 213-17; 47 SF at SX91-92. Additionally, the prosecution presented Smith's disciplinary record while incarcerated for a prior aggravated robbery conviction, which included sixty-nine infractions spanning five years. 44 SF 57; 47 SF at SX88, 93. The latest incident report was dated January 24, 1990, one month before Smith was released on parole, and less than five months before his capital murder. 47 SF

[3] "Tr" refers to the transcript of pleadings and documents filed with the court during trial. "SF" refers to the statement of facts. Both references are preceded by volume number and followed by page numbers. "SX" and "DX" refer to the numbered exhibits offered by the State and defense, respectively, and admitted into evidence during trial. "JA" refers to the joint appendix, followed by page numbers. "PA" refers to the appendices to Smith's petition for writ of certiorari, followed by a tab letter and page numbers.

at SX93. Smith also had a prior conviction for auto theft. 43 SF 189; 47 SF at SX 90.

In Smith's defense, trial counsel called the officer who arrested Smith for the instant offense to testify that Smith asked about the victim's condition after the shooting and expressed his belief that the victim was not dead. JA:4-6. The jury also heard from Smith's father, Johnny McBride, who testified that Smith was the youngest of seven children. JA:8-9. Smith was close to his mother, who died from cancer when Smith was fifteen years old. JA:9. Smith was knocked unconscious when a truck backed into him at age six, after which he complained of recurring headaches. JA:10-14; 47 SF at DX2. A physician determined that Smith suffered no neurological damage as a result, but recommended that he take aspirin to relieve any pain. JA:14; 47 SF at DX2. McBride denied any specific knowledge of Smith's IQ, but commented that he was "hard to learn for some reason." JA:14. On cross-examination, McBride admitted that Smith was uncontrollable as a child because he was constantly stealing and using drugs. JA:16. Smith dropped out of school in fourth or fifth grade[4] and eventually ended up in the custody of the Texas Youth Commission because of juvenile offenses. JA:10, 16-22.

Dr. Mary Jumbelic, a forensic pathologist, testified the average person would not expect a gunshot wound to the arm to be fatal. JA:28. Smith then testified in his own defense that he did not intentionally or deliberately kill Wilcox, and that he asked if the victim was okay afterward. JA:42-48; 44 SF 181-87. Smith also admitted that he

[4] Smith himself claimed he completed eighth grade. JA:34.

did not know his IQ score, that he had lost all direction and life meant nothing to him after his mother died, and that he dreamed about his mother. JA:33-35; 44 SF 147-49, 195-96.

Finally, the defense called a psychiatrist, Dr. Fred Fason, to testify that Smith suffered from antisocial personality disorder characterized by rebelliousness and self-centeredness which became more pronounced as a result of his mother's death. JA:54-58. Dr. Fason admitted that treatment was difficult, but that the condition categorically dissipated with age, so that very few individuals remained antisocial beyond age forty. JA:60-62, 84. Dr. Fason also stated that Smith was impulsive and unlikely to weigh or ponder carefully the consequences of his actions and, in the legal sense of the word, unable to act "deliberately." JA:63-65, 96-97. Dr. Fason declined to express an opinion on future dangerousness, but believed that confinement in prison would be an effective solution. JA:66, 82-83, 99; 45 SF 118. On cross-examination, Dr. Fason opined that Smith was above the cutoff for mental retardation based on his IQ scores of 64 and 74 and his adaptive skills. JA:99-100.

The jury was then tasked with answering three special issues concerning deliberateness, future dangerousness, and provocation and was provided with the following supplemental instruction:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any

> aspect of the defendant's character, background, record, emotional instability, intelligence, or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must first decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to that special issue under consideration.

JA:119-20, 123-26; *see also* TEX. CODE CRIM. PROC. art. 37.071 § 2(b) (West 1989). At the conclusion of the punishment phase on February 7, 1992, Smith was sentenced to death. JA:1, 123-26.

III. Direct Appeal and Postconviction Proceedings

On appeal, Smith complained the jury was deprived of an adequate vehicle "to give effect to mitigating evidence outside the context of the special issues" in violation of *Penry I.* Appellant's Brief on Direct Appeal at 38-43. The Court of Criminal Appeals affirmed Smith's conviction and sentence but declined to assess the mitigating effect of Smith's evidence, instead holding that the supplemental instruction cured any potential *Penry I* error. *Smith v. State,* 898 S.W.2d at 853-54 & n.27 (citing *Riddle v. State,* 888 S.W.2d 1, 8 (Tex. Crim. App. 1994), and *Robertson v.*

State, 871 S.W.2d 701, 719 (Tex. Crim. App. 1994)); JA:1. This Court denied certiorari review. *Smith v. Texas,* 516 U.S. 843 (1995); JA:1.

Smith again raised a *Penry I* claim during state habeas proceedings. 1 SHTr 31-37.[5] After considering the claim and noting that it had been raised and rejected on direct appeal, the trial court concluded that "the jury could give effect to [Smith]'s alleged mitigating evidence." 1A SHTr 274-75; JA:1. The Court of Criminal Appeals then adopted the lower court's findings of fact and conclusions of law and denied habeas corpus relief on April 21, 1999. *Ex parte Smith,* No. 40,874-01 (Tex. Crim. App. 1999) (unpublished order); JA:1.

Smith did not seek certiorari review of the state court's denial of habeas relief. Instead, he re-raised his *Penry I* claim in a petition for federal habeas corpus relief. Supplemental Application for Writ of Habeas Corpus at 47-56. Thereafter, the federal district court below held that the supplemental instruction submitted to Smith's jury "was the same as that found insufficient in *Penry* [*v. Johnson,* 532 U.S. 782 (2001) ("*Penry II*")]." PA:B36. As in *Penry II,* the court reasoned that the supplemental instruction "shackled and confined [the mitigating evidence] within the scope of the three special issues," and had "no practical effect" upon the jury's deliberations. PA:B36 (citing *Penry II,* 532 U.S. at 798). Thus, the district court concluded, while the jury was able to give mitigating effect

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

to the circumstances of the crime and Smith's antisocial personality disorder, "the jury could not fully consider" Smith's IQ score in answering the special issues. PA:B37-44. On October 31, 2001, the district court conditionally granted Smith relief from his death sentence.[6] *Smith v. Cockrell,* No. H-99-3923 (S.D. Tex. 2001) (unpublished opinion); PA:B55; JA:1.

The Director subsequently appealed to the Fifth Circuit, and the court of appeals reversed the district court's grant of habeas relief on November 4, 2002. *Smith v. Cockrell,* 311 F.3d 661, 685 (5th Cir. 2002); PA:A685; JA:2. The lower court first noted that Supreme Court precedent validated the Texas death penalty scheme under most circumstances. PA:A679 (citing *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Jurek v. Texas,* 428 U.S. 262 (1976)). However, the court below explained that

> in *Penry* [*I*], the Supreme Court ruled that, in certain cases, the Texas special issues did not permit the jury to give effect to the defendant's mitigating evidence. We have interpreted *Penry I* to say that:
>
> > [W]hen a capital defendant introduces evidence about his background, character, or circumstances that reflects a reduced personal culpability, *and* the jury cannot give effect to the mitigating force of that evidence in response to Texas' special issues, the trial court

[6] The district court also found that Smith was denied constitutionally effective counsel during the punishment phase of trial. *Smith v. Cockrell,* No. H-99-3923, at 22-25, 55.

> must, upon request, provide instructions that allow the jury to consider and give mitigating effect to that evidence.

PA:A679 (quoting *Davis v. Scott,* 51 F.3d 457, 460 (5th Cir. 1995)) (emphasis in *Davis*). However, "merely presenting evidence that a defendant was disadvantaged or has emotional or mental problems is not enough, *per se,* to raise a *Penry* problem." PA:A680. Rather, the evidence must show an involuntary, permanent, and severe disability that is, at least inferentially, causally connected to the crime itself. PA:A680-81 (citing *Davis,* 51 F.3d at 460-61, *Russell v. Collins,* 998 F.2d 1287, 1292 (5th Cir. 1993), and *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*)).

The court of appeals then applied this standard to determine the mitigating significance of Smith's IQ score:[7]

> Smith's expert, Dr. Fason, did not testify that Smith was mentally retarded, let alone that his mental retardation made him unable to appreciate what he had done or learn from his mistakes.

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[7] In conducting its *Penry I* and *II* analysis, the district court considered "four broad categories of mitigating evidence," including "a childhood head injury," the circumstances of the offense, Smith's "antisocial reaction disorder," and low IQ. PA:A678-79. The court below decided that, "[t]he district court in this case found that only the fourth category qualified as *Penry* evidence. Smith has not appealed the district court's conclusions as to the first three categories." PA:A679 (footnote omitted); *see also* P:A679 n.12 (noting Smith listed antisocial personality in his notice of appeal, but did not brief the issue and, thus, waived or abandoned it) (citing *United States v. Reyes,* 300 F.3d 555, 558 n.2 (5th Cir. 2002)). Therefore, the court of appeals declined to review any *Penry* claim based on the remaining three categories of evidence. PA:A679.

To the contrary, Dr. Fason specifically testified that he believed Smith was *not* mentally retarded:

> I felt in talking with him, from the way his mental process worked it's true hew [*sic*] was a slow learner in special education classes but I felt the way he related things to me *that he was above the cutoff line for mental retardation . . . .* But I felt he was above the line but he didn't – to be honest with you, he doesn't have a lot left over or a lot extra upstairs.

Furthermore, Dr. Fason believed that the murder was "attributable to" Smith's antisocial reaction disorder because it prevented him from understanding the effect that his actions had on others; the crux of Smith's mitigation defense was that the disease would likely abate by the time he entered his late thirties or early forties, thereby no longer making him a danger to society. When Dr. Fason addressed Smith's borderline IQ scores, he did so in the context of attempting to demonstrate that Smith was unable to act with the deliberateness required by the first special issue.

In short, the evidence on mental retardation presented during the punishment phase tended to show three things: (1) Smith had a low IQ; (2) Smith had borderline mental abilities; and (3) Dr. Fason did not believe that Smith's mental problems (aside from his antisocial reaction disorder) caused him to commit this crime. This evidence comes far from demonstrating that Smith suffered from a "uniquely severe permanent

> handicap" and that the criminal act was "attributable" to this condition.

PA:A682 (emphasis in original). The Fifth Circuit denied Smith's petitions for panel rehearing and rehearing *en banc* on March 17, 2003. JA:2.

This Court then granted Smith's petition for writ of certiorari on September 30, 2003.[8] *Smith v. Dretke,* 124 S. Ct. 46 (2003); JA:2.

SUMMARY OF THE ARGUMENT

The state court's determination that no *Penry* error occurred during Smith's punishment trial was not an unreasonable application of this Court's *Penry I* or *II* decisions, despite the fact that *Penry II* invalidated the state court's reasoning that the supplemental instruction cured any *Penry I* error. This is because a detailed analysis of Smith's mitigating evidence reveals that it was not the

[8] In the meantime, Smith also filed a second habeas application alleging a violation of *Atkins v. Virginia,* 536 U.S. 304 (2002), in the Court of Criminal Appeals. In an order dated October 8, 2003, the state court found that Smith made a threshold showing of mental retardation and remanded the case to the trial court for an evidentiary hearing. *Ex parte Smith,* No. 40,874-02 (Tex. Crim. App. 2003) (unpublished order). Thereafter, the State retained Dr. George Denkowski, a psychologist experienced in diagnosing mental retardation, to examine Smith and determine whether he is a mentally retarded person. Dr. Denkowski reported that Smith's IQ was validly measured at 63 prior to the age of eighteen and he was deficient in five skill areas used to measure adaptive functioning. As a result, Dr. Denkowski found that Smith was mentally retarded under Texas law. On January 27, 2004, the Harris County District Attorney's Office recommended to the Texas Board of Pardons and Paroles that Smith's death sentence be commuted to life.

kind of double-edged evidence that would be only adversely relevant to the special issues submitted to the jury. Rather, Smith's evidence suggested that his crime was not the product of rational deliberation due to his antisocial personality disorder and low intelligence, and that he could be rehabilitated if institutionalized and, thus, would not be a future danger.

Further, the supplemental instruction found to be inadequate in *Penry II* did not change the way that Smith's mitigating evidence was relevant to the special issues. Nor did *Penry II* abandon this Court's longstanding requirement for a case-specific inquiry into the interrelation between a defendant's proffered mitigating evidence and the special issues. In contrast to the situation presented by *Penry II,* Smith's jury could nevertheless answer the special issues truthfully and assess a life sentence precisely because his evidence had substantial mitigating relevance to deliberateness and future dangerousness. Thus, the supplemental instruction did not invite the jurors to violate their oath, and no constitutional error occurred.

As a result, the Fifth Circuit's application of its own extensive *Penry I* jurisprudence to Smith's claim was not incorrect because whether or not the principal mitigating thrust of Smith's – or any defendant's – evidence was within the reach of the jury as it answered the special issues is the core concern of *Penry I* and its progeny. To negate the legitimate and necessary function that this jurisprudence serves in favor of Smith's unduly formalistic approach of *per se* error would lead to irrational results in cases where defendants present diverse types of mitigating evidence with varying degrees of relevance to the special issue framework. Consequently, the need for

case-specific application of *Penry I* and *Penry II* continues unabated.

Finally, federal habeas relief is precluded in the instant case because Smith's mitigating evidence was not unavoidably aggravating in the context of the special issues. Instead, Smith's jury could have truthfully found that he did not act deliberately and/or would not be a future danger if institutionalized, and could have ethically answered the special issues so that a life sentence would be assessed. Consequently, this Court should affirm the judgment of the court below.

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 2003).

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

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court 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).

Additionally, the AEDPA provides that state court fact findings "shall be presumed to be correct" unless the petitioner carries "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Finally, "in addition to performing any analysis

required by the AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the [S]tate." *Horn v. Banks,* 536 U.S. 266, 272 (2002).

II. The Mere Submission of a Supplemental Instruction Concerning Mitigating Evidence Does Not Amount to *Per Se* Eighth Amendment Error Regardless of the Quality or Quantity of the Mitigating Evidence Presented at Trial.

Smith argues that the trial court's submission of a supplemental mitigation instruction rendered his sentencing trial unconstitutional pursuant to this Court's decision in *Penry II.* Brief of Petitioner ("Brief") at 13-17. However, *Penry II* was only an extension of the rule established in *Penry I,* and Smith must demonstrate error under *Penry I* in order to obtain relief from his death sentence. 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 that both this Court and the Fifth Circuit have repeatedly refused to extend to other types of mitigating evidence.

A. Where the constitutionality of the Texas special issues is challenged, *Jurek, Eddings,* and *Penry I* dictate a case-by-case inquiry into the mitigating significance of the evidence presented.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett,* 438 U.S. at 604 (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; *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501

U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse. 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfeld v. Phelps*, 484 U.S. 231, 245 (1988), and in *Franklin,* 487 U.S. at 182. Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse.[9] 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

[9] Penry's evidence suggested that he was mildly or moderately retarded, may have suffered traumatic damage to his brain at birth or as a result of later injuries, and was frequently beaten about the head and locked in his room as a child. *Penry I,* 492 U.S. at 307-09. The Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19.

to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324.

During its next term, however, the Court held that a mere possibility that the jury was precluded from considering relevant mitigating evidence did not establish Eighth Amendment error. *Boyde v. California,* 494 U.S. 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.* The Court further limited its holding in *Saffle v. Parks,* 494 U.S. 484 (1990), applying *Teague*[10] to preclude relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence. *Id.* at 490-92. Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not solely aggravating when viewed through the lens of the special issues.

For example, in *Graham v. Collins,* the Court imposed a *Teague* bar and declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute." 506 U.S. 461, 474 (1993). Instead, the Court distinguished the thrust of Graham's mitigating evidence – "that his brief spasm of criminal activity . . . was properly viewed, in light of his youth, his

[10] *Teague v. Lane,* 489 U.S. 288 (1989). The Court had previously found that *Teague* did not bar the relief sought in *Penry I,* because Penry merely requested vindication of his Eighth Amendment rights under *Eddings* as required by the evidence presented "*in his particular case.*" *Penry I,* 492 U.S. at 318-19 (emphasis in original). This holding unequivocally did "not 'impos[e] a new obligation' on the State of Texas." *Id.* at 319 (quoting *Teague,* 489 U.S. at 301).

background, and his character, as an aberration that was not likely to be repeated" – from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

The same term, the Court reconsidered a *Graham*-type challenge to the special issues on direct appeal, where it was not bound by *Teague. Johnson v. Texas,* 509 U.S. 350, 352 (1993). In *Johnson,* the Court again concluded that "[i]t strains credulity to suppose that the jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future dangerousness] special issue." *Id.* at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Thus, the Court has clearly engaged in a case-by-case inquiry into the nature of the mitigating evidence presented in Texas cases in order to determine whether there is any reasonable likelihood the jury was prevented from giving effect to that evidence when answering the special issues.

B. *Penry II* did not obviate the need for a case-specific examination of the proffered mitigating evidence, nor did it hold that the supplemental instruction was error in itself.

In *Penry II,* the Court granted certiorari to decide whether the supplemental instruction given during Penry's retrial – the same instruction 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, . . . it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the jury in no better position than was the jury in *Penry I.* As we made clear in *Penry I,* none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to *the evidence of Penry's mental retardation and childhood abuse.* In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was *still "shackled and*

> *confined within the scope of the three special issues.* Thus, because the supplemental instruction had *no practical effect,* the jury instructions at Penry's second sentencing were *not meaningfully different* from the ones we found constitutionally inadequate in *Penry I.*
>
> Alternatively, . . . it is possible to understand the supplemental instruction as informing the jury that it could "simply answer one of the special issues 'no' if it believed that mitigating circumstances made a life sentence . . . appropriate . . . regardless of its initial answers to the questions."

Penry II, 532 U.S. at 798 (emphasis added, internal citations omitted).

While the first interpretation effected no change, the second 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. *Penry II,* 532 U.S. 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.* The Court reasoned:

> Here, . . . it would have been both logically and ethically impossible for a juror to follow [the] instructions. *Because Penry's mitigating evidence did not fit within the scope of the special issues,* answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions.

> Indeed, 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."

Id. at 799-800 (emphasis added, internal citations omitted). This mechanism created "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.* at 800 (internal quotations omitted).

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.

It follows that evidence with *some* mitigating relevance to the special issues, even if it were also aggravating, would not result in *Penry II* error because the jury's "no" answers would not be false. Rather, as the district court recognized, the jury would remain "shackled and

confined" within the scope of the special issues, and its negative answers would reflect a legitimate, reasonable doubt regarding the State's evidence, as before. *See Robertson v. Cockrell,* 325 F.3d 243, 258 (5th Cir.) (*en banc*) (where the "culpability-mitigating evidence is encompassed by the Texas special issues, there is no need to provide an additional vehicle for it"), *cert. denied,* 124 S. Ct. 28 (2003). As the Fifth Circuit explained, "[t]he jury was not forced into the position – as they were in *Penry II* – of falsely answering "no" to the questions of deliberateness or future dangerousness. The most that one could say is that the supplemental instruction was redundant." *Id.* Thus, there can be no *per se* error as a result of the supplemental instruction.[11] Moreover, *Penry II* continued the case-specific analysis mandated in the Court's opinions discussed *supra.* Indeed, there is no way of determining the likelihood of *Penry I* error without examining the nature of the mitigating evidence presented. As the Court explained in *Boyde,* "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." 494 U.S. at 380-81. In Smith's case, because the mitigating evidence presented was not beyond the scope of the special issues, and there was no reasonable likelihood that the jury was precluded from truthfully answering the special issues in order to

[11] In fact, given the Court's reluctance to extend *Penry I* beyond its facts in light of *Teague,* the conclusion that the supplemental instruction created *per se* error would be *Teague*-barred. *See Robertson,* 325 F.3d at 255 (holding that, "[t]hough one might argue . . . that *Penry II* silently modifies *Penry I* and encroaches upon *Jurek,* such an act is expressly forbidden by *Teague*").

give it effect, neither interpretation of the supplemental instruction could result in constitutional error.

C. The state court's ultimate decision – that there was no reasonable likelihood of *Penry I* error – was not objectively unreasonable despite the fact that its underlying rationale was rejected in *Penry II*.

In the wake of *Penry I,* and prior to the creation of the Texas mitigation special issue, numerous Texas juries were provided with similar supplemental instructions designed to cure any potential Eighth Amendment error resulting from evidence that was relevant to the special issues only as an aggravating factor.[12] *See, e.g., Lewis v.*

[12] Contrary to Smith's argument, Brief at 27-28, the submission of a supplemental instruction did not signal that the mitigating evidence was beyond the scope of the special issues as a matter of law. Rather, the instruction was submitted out of an abundance of caution. Indeed, jury instructions beneficial to the defense are often submitted on various matters out of an abundance of caution or where the evidence suggests that a particular issue is in dispute. *See, e.g., Fogle v. State,* 988 S.W.2d 881, 995 (Tex. App. – Fort Worth 1999) (instruction to disregard prosecutor's remark given out of an abundance of caution not because the prosecutor's remark was erroneous); *Jones v. State,* 963 S.W.2d 167, 181 (Tex. App. – Fort Worth 1998) (self-defense instruction submitted to jury out of an abundance of caution even where evidence did not raise self-defense); *Bean v. State,* 816 S.W.2d 115, 120 (Tex. App. – Houston [14th Dist.] 1991) (instruction to disregard prosecutor's voir dire comments given out of abundance of caution not because comments were erroneous); *Robinson v. State,* 851 S.W.2d 216, 230 (Tex. Crim. App. 1991) (instruction on voluntariness of confession given out of an abundance of caution even where no authority presented on the issue); *Crank v. State,* 761 S.W.2d 328, 344 (Tex. Crim. App. 1988) (jury instructed that witness was an accomplice as a matter of law out of an abundance of caution); *Hollis v. State,* 673 S.W.2d 597, 600 (Tex. App. – Tyler 1983) ("Out of an abundance of caution the trial court charged the

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State, 911 S.W.2d 1, 6 (Tex. Crim. App. 1995); *Heiselbetz v. State,* 906 S.W.2d 500, 512-13 (Tex. Crim. App. 1995); *Patrick v. State,* 906 S.W.2d 481, 493-94 (Tex. Crim. App. 1995); *Mason v. State,* 905 S.W.2d 570, 576 (Tex. Crim. App. 1995); *Rodriguez v. State,* 899 S.W.2d 658, 664 (Tex. Crim. App. 1995); *Smith v. State,* 898 S.W.2d at 854; *Hughes v. State,* 897 S.W.2d 285, 298-300 (Tex. Crim. App. 1994); *Riddle,* 888 S.W.2d at 7; *Garcia v. State,* 887 S.W.2d 846, 859-60 (Tex. Crim. App. 1994); *Wheatfall v. State,* 882 S.W.2d 829, 840 (Tex. Crim. App. 1994); *Emery v. State,* 881 S.W.2d 702, 711-12 (Tex. Crim. App. 1994); *Clark v. State,* 881 S.W.2d 682, 700 (Tex. Crim. App. 1994); *Coleman v. State,* 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); *Robertson,* 871 S.W.2d at 710-11; *Fuller v. State,* 829 S.W.2d 191, 209 (Tex. Crim. App. 1992). The supplemental instruction submitted in each of these cases was similar to the instruction in the instant case.

From the beginning, in *Fuller,* and in every case thereafter, the Court of Criminal Appeals declined to "decide whether the evidence proffered by [the] appellant in mitigation was actually relevant to his personal moral culpability in a way not fully contemplated by the statutory punishment questions, []or whether his evidence had mitigating value of some other kind." 829 S.W.2d at 209. Instead, the court merely assumed a worst case scenario – that the special issues were inadequate – and held that the supplemental instruction was "adequate to avoid the

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jury on voluntary manslaughter even though the record shows that the evidence does not raise the issue of voluntary manslaughter"). The mere submission of such instructions also does not indicate that the State concedes any given issue as a matter of law.

constitutional infirmity condemned by *Penry* [*I*]." *Id.* The Fifth Circuit followed suit. *See, e.g., Penry v. Johnson,* 215 F.3d 504, 508-09 (5th Cir. 2000), *rev'd,* 532 U.S. 782 (2001); *Clark v. Johnson,* 202 F.3d 760, 769-70 (5th Cir. 2000); *Miller v. Johnson,* 200 F.3d 274, 289-90 (5th Cir. 2000); *Emery v. Johnson,* 139 F.3d 191, 199-200 (5th Cir. 1998). Significantly, this Court declined to disturb either the Fifth Circuit or the Court of Criminal Appeals decisions in each case except *Penry. Miller v. Johnson,* 531 U.S. 849 (2000); *Clark v. Johnson,* 531 U.S. 831 (2000); *Emery v. Johnson,* 525 U.S. 969 (1998); *Patrick v. Texas,* 517 U.S. 1106 (1996); *Mason v. Texas,* 516 U.S. 1051 (1996); *Rodriguez v. Texas,* 516 U.S. 946 (1995); *Smith v. Texas,* 516 U.S. 843; *Hughes v. Texas,* 514 U.S. 1112 (1995); *Riddle v. Texas,* 514 U.S. 1068 (1995); *Garcia v. Texas,* 514 U.S. 1005 (1995); *Emery v. Texas,* 513 U.S. 1192 (1995); *Clark v. Texas,* 513 U.S. 1156 (1995); *Coleman v. Texas,* 513 U.S. 1096 (1995); *Wheatfall v. Texas,* 513 U.S. 1086 (1995); *Robertson v. Texas,* 513 U.S. 853 (1994); *Fuller v. Texas,* 508 U.S. 941 (1993).[13]

Although the state court did not conduct a case-specific examination of the mitigating evidence presented by Smith during either direct appeal or state habeas review, its disposition of the claim was not objectively unreasonable. It is the state court's ultimate decision that is to be tested for unreasonableness, not its reasoning process or the completeness of its discussion of the evidence.

[13] As the Fifth Circuit has also noted, this Court "has been loathe to disturb [the lower court]'s interpretation of *Penry I*" in at least thirty-nine cases. *Robertson,* 325 F.3d at 256-57 & nn.21-24.

Visciotti, 537 U.S. at 27; *Torres v. Mullin,* 317 F.3d 1145, 1156 (10th Cir.), *cert. denied,* 124 S. Ct. 562 (2003); *Neal v. Puckett,* 286 F.3d 230, 245-47 (5th Cir. 2002) (*en banc*), *cert. denied,* 537 U.S. 1104 (2003); *Hernandez v. Small,* 282 F.3d 1132, 1140 (9th Cir.), *cert. denied,* 537 U.S. 851 (2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied,* 535 U.S. 982 (2002); *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001); *Bell v. Jarvis,* 236 F.3d 149, 159-63 (4th Cir. 2000); *Long v. Humphrey,* 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 891 (3rd Cir. 1999) (*en banc*); *Hennon v. Cooper,* 109 F.3d 330, 334-35 (7th Cir. 1997). In the instant case, the Court of Criminal Appeals correctly identified the controlling precedent as *Penry I* and properly determined that Smith's evidence was not beyond the reach of the jury when it answered the special issues.[14] *Smith v. State,* 898

[14] The lower court explained:

> The state habeas court's conclusion of law stating that "[a]dditionally, the jury could give effect to [Smith]'s alleged mitigating evidence" qualifies as a decision on the merits sufficient to warrant deferential AEDPA review. The Court of Criminal Appeals based its ruling on direct appeal on its conclusion that the nullification instruction was permissible, whether or not Smith had presented *Penry*-type evidence; in fact, that court explicitly declined to reach the *Penry* [*I*] evidence question. Because *Penry II* invalidated the nullification instruction in cases where the defendant presents *Penry* evidence, the Court of Criminal Appeals' findings on direct appeal on this issue are now incorrect. However, it appears that the state habeas court, in considering Smith's state habeas petition (which fully presented the *Penry* evidence question) and in reaching its alternate conclusion in ¶ 4, [1A SHTr 274-75,] actually considered the *Penry* question and determined that Smith's evidence of mental retardation did not qualify for a *Penry* instruction. The Court of Criminal Appeals adopted that finding.

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S.W.2d at 854 & n.27; 1A SHTr 274-75. Therefore, the supplemental instruction did not place Smith's jury in the double-bind that was recognized in *Penry II*. Because Smith would not be entitled to relief under *Penry I* or *II,* the state court's rejection of his claim cannot be said to be unreasonable, and this Court should affirm the Fifth Circuit's denial of habeas relief.

III. The Court below Correctly Determined That Smith's Jury Was Not Altogether Precluded from Giving Mitigating Effect to His Evidence.

Following *Penry I,* death-sentenced inmates in Texas have repeatedly claimed that the former capital sentencing scheme prevented the consideration of various types of mitigating evidence, "including but not limited to subnormal intelligence, youth, troubled or abused childhood, intoxication, substance abuse, head injury, good character, mental illness, antisocial personality disorders, and dyslexia." *Robertson,* 325 F.3d at 249-50 (footnotes omitted). Beginning with its *en banc* opinion in *Graham,* the Fifth Circuit developed a framework within which it considered all subsequent *Penry I* claims. In *Graham,* the court of appeals held "that *Penry* [*I*] does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where *no major mitigating thrust of the*

PA:A678 n.10; *see also Early v. Packer,* 537 U.S. 3, 8 (2002) ("Avoiding [the § 2254(d)] pitfalls does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them") (emphasis in original).

evidence is substantially beyond the scope of all the special issues." 950 F.2d at 1027 (emphasis added).[15] Thus, *Penry I* was "the exception to *Jurek,* not *Jurek* the exception to *Penry* [*I*]." *Id.* at 1028.

As the Fifth Circuit explained:

> We believe that what *Penry* [*I*] represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either *no substantial relevance or only adverse relevance* to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek* – which we cannot conclude has been abandoned – is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* [*I*] the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition,

[15] It is important to note that this Court adopted essentially the same standard in its *Graham* and *Johnson* opinions. *See* ARGUMENT, section II.A., *supra.*

> but of a permanent one; but nonetheless evidence which was strongly mitigating because these characteristics were due to *the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own,* mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* [*I*] did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

Graham, 950 F.2d at 1029-30 (underlined emphasis in original, italicized emphasis added).

In *Jurek, Graham,* and *Johnson,* this Court made abundantly clear that evidence such as youth and good character has its principal mitigating relevance within the context of the future dangerousness special issue. "As to all the other types of mitigating evidence, the pertinent inquiry is and has been, by what principle should the line between *Penry I* and non-*Penry I* evidence be drawn?" *Robertson,* 325 F.3d at 251. As the court below explained, "[f]or ten years, this court has subscribed to a test articulated" in *Graham*, encompassing four principles found in *Penry I:* "Did the defendant acquire his disability voluntarily or involuntarily?[16] Is the disability transient or permanent?[17] Is the

[16] "The principle of voluntariness is found in the Court's insistence on the defendant's constitutional right to a thorough assessment of his 'culpability.' " *Robertson,* 325 F.3d at 251 (citing *Penry I,* 492 U.S. at 319).

[17] "Permanence is derived from the fixed biological character of Penry's evidence [of organic brain damage, caused at birth]." *Robertson,* 325 F.3d at 251 (citing *Penry I,* 492 U.S. at 307-09).

disability trivial or severe?[18] Were the criminal acts a consequence of this disability?[19]" *Robertson,* 325 F.3d at 251. "These principles were and are readily apparent from the Court's opinion in *Penry I.*" *Id.* Moreover, such claims are to be decided "on the facts of the case." *Id.* at 252 (quoting *Penry I,* 492 U.S. at 315).

The court of appeals later applied this test to a wide variety of mitigating evidence and rejected *Penry I* claims precisely because the disabilities were either self-inflicted, impermanent, less than uniquely severe, or unconnected to the crime. *See Robertson,* 325 F.3d at 249-50 & nn.5-14 (cataloging *Penry I* cases). Yet the lower court did grant relief where evidence of "parental abandonment, physical and sexual abuse, minimal brain injury, schizophrenia, and resultant poor impulse control – supported by abundant evidence – satisfied the *Graham* formulation." *Id.* at 253 (citing *Blue v. Cockrell,* 298 F.3d 318, 321-22 (5th Cir. 2002)). To the extent Smith argues that the Fifth Circuit's *Penry I* jurisprudence is overly rigid, Brief at 22-24, it is important to note that most meritorious *Penry I* claims have been vindicated in state court, before reaching federal habeas review. *See, e.g., Rios v. State,* 846 S.W.2d 310, 315-17 (Tex. Crim. App. 1992); *Richard v. State,* 842

[18] "Severity was divined from the objective expert testimony that demonstrated the unique character of the abuse [Penry] suffered, his limited cognitive faculties, and his inability to learn from his mistakes." *Robertson,* 325 F.3d at 251-52 (citing *Penry I,* 492 U.S. at 309-10).

[19] "[A]ttribution [resulted] from the Court's belief that Penry, like other defendants whose 'criminal acts . . . are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Robertson,* 325 F.3d at 252 (quoting *Penry I,* 492 U.S. at 319).

S.W.2d 279, 281-83 (Tex. Crim. App. 1992); *Ex parte Williams,* 833 S.W.2d 150, 151-52 (Tex. Crim. App. 1992); *Ex parte McGee,* 817 S.W.2d 79, 79-80 (Tex. Crim. App. 1991); *Ex parte Goodman,* 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991); *Ramirez v. State,* 815 S.W.2d 636, 654-55 (Tex. Crim. App. 1991); *Gribble v. State,* 808 S.W.2d 65, 75-76 (Tex. Crim. App. 1990). In each of these cases, the mitigating evidence established an involuntary, permanent, and severe disability that was directly connected to the crime.[20]

Contrary to Smith's contention, Brief at 19-22, the Fifth Circuit's extensive *Penry* jurisprudence does not amount to a "bright line rule." Rather, the collective wisdom of these cases represents an attempt to conduct the required case-by-case analysis while recognizing that generic mitigation evidence, "regardless of duration, type, or severity," does not necessarily provide "a strong basis for reduced culpability, while nearly assuring" affirmative jury findings on the special issues, as in *Penry I. Robertson,* 325 F.3d at 253-54. To hold that all mitigating evidence

[20] For example, in *Blue,* the attribution element was satisfied by expert trial testimony that "the combination of Blue's low IQ/mental retardation, paranoid schizophrenia[,] and antisocial personality disorder made it almost inevitable that he would be in conflict with the law." 298 F.3d at 321. In *Richard,* expert testimony established that the defendant's abusive childhood triggered his antisocial personality disorder, which rendered him unable to consider consequences and made it likely that he would engage in criminal behavior. 842 S.W.2d at 281-83. Similarly, in *McGee,* "[t]estimony from expert witnesses . . . indicated that [McGee] suffered severe emotional problems as a result of the abuse." 817 S.W.2d at 79-80. And in all cases involving legitimate evidence of mental retardation, the Court of Criminal Appeals has held that a "nexus" is automatically established. *Earhart v. State,* 877 S.W.2d 759, 765 n.9 (Tex. Crim. App. 1994).

results in *Penry* error where no separate mitigation instruction is submitted would both overrule *Jurek* and upset the state's interest in the finality of its judgments. The four *Robertson* factors of involuntariness, permanence, severity, and causation allow for a fact-specific examination of whether a reasonable likelihood exists that the jury was altogether prevented from giving *some* mitigating effect to the evidence in answering the former Texas special issues.

Additionally, Smith's attack on the nexus requirement, Brief at 24-25, is spurious. As the Court of Criminal Appeals has reasoned, without such a requirement, "a capital jury would be free to arbitrarily extend mere mercy or sympathy, resulting in a system in which there is no meaningful basis for distinguishing the cases in which death is imposed from the cases in which it is not." *Richardson v. State,* 879 S.W.2d 874, 884 n.11 (Tex. Crim. App. 1993); *see also Parks,* 494 U.S. at 493 ("It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary"); *Brown,* 479 U.S. at 542-43 (holding instruction telling the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" during the sentencing phase did not violate the Eighth Amendment). Smith's suggestion that the nexus requirement conflicts with *Apprendi v. New Jersey,* 530 U.S. 466 (2000), Brief at 25, is also meretricious because nexus is not an element of the crime or an aggravating factor that must be proved beyond a reasonable doubt to the jury during trial. Instead, as the lower court explained, nexus merely requires a showing by

the habeas petitioner *on collateral review* that a causal connection may be inferred from the trial evidence. PA:A680-81 (citing *Davis,* 51 F.3d at 460-61, *Russell,* 998 F.2d at 1292, and *Graham,* 950 F.2d at 1029).

Smith's proposed rule – *Penry I* error exists "if there is enough evidence to rationally permit a jury to find that some mitigating factor exists," Brief at 26-27 – begs the question that the Fifth Circuit was attempting to answer in *Robertson* and *Graham, i.e.,* what quality and quantity of evidence actually reduces moral culpability? The rule also runs afoul of *Graham* and *Johnson,* where this Court held that mitigating evidence with "*some* arguable relevance beyond the special issues" does not amount to *Penry I* error 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*). Finally, such a rule would categorically invalidate *Jurek,* in which the Court held that some kinds of mitigating evidence, *e.g.,* a lack of criminal history, youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse, did not require an additional vehicle. 428 U.S. at 272-73. Imposing this new obligation upon the State of Texas and overruling almost thirty years of cases affirming *Jurek*'s validity would most certainly violate *Teague.*

Nevertheless, Smith's low IQ was not beyond the scope of the special issues.[21] As discussed above, Smith presented abundant evidence to suggest that he did not deliberately kill the victim in this case but instead desired to temporarily incapacitate him. Smith's evidence included expert testimony that a reasonable person would not have expected a gunshot wound to the arm to be fatal and that his antisocial personality disorder and low IQ rendered him impulsive and incapable of meaningful deliberation concerning his criminal acts. JA:28, 54-58, 63-65, 96-97; PA:A682. Smith's case is distinct from *Penry I* in this regard because he provided expert opinion on the legal definition of deliberateness and the evidence arguably suggested that Smith acted with a less culpable mental state; thus, the jury could have given effect to the mitigating nature of Smith's evidence in answering the deliberateness special issue. *Cf.* 492 U.S. at 322 (concluding that Penry's mitigating evidence was relevant to deliberateness in only an aggravating way, because it indicated "that he deliberately killed Pamela Carpenter to escape detection"); *see also Lucas v. Johnson,* 132 F.3d 1069, 1082 (5th Cir. 1998) (reasoning that evidence of mental illness showing the defendant was "out of control over his impulses, over his drives" could be given effect in answering the deliberateness special issue); *Davis,* 51 F.3d at 463 (reasoning that defining deliberateness as "careful consideration"

[21] To the extent Smith argues "three potentially mitigating factors" including low IQ, antisocial personality, and head injury, were beyond the reach of the jury, Brief at 29-33, he waived his claims concerning evidence other than low IQ by failing to properly raise them in the lower court. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919).

would allow a jury to consider mitigating evidence of "uncontrollable impulses or lack of evaluation"). Here, the jury was provided with a comprehensive definition of deliberateness through Dr. Fason's testimony, and the evidence showed that Smith was unlikely to weigh or ponder carefully the consequences of his actions. Thus, the jury had an adequate vehicle for giving effect to this mitigating evidence within the scope of the deliberateness special issue.

Smith's mitigating evidence was also cognizable within the future dangerousness special issue. Initially, the expert evidence indicated that Smith's antisocial tendencies would dissipate with age and that the structured environment of prison would most likely be an effective solution. JA:60-62, 66, 82-84, 99; 45 SF 118; PA:A682. Thus, the jury could easily have found that Smith would not be a future danger if incarcerated for life, especially in light of his own testimony that he was concerned with the victim's well-being, did not mean to kill him, and that Smith had lost all direction and structure in his life after his mother died. JA:33-35, 42-48, 54-58; 44 SF 147-49, 181-87, 195-96. While Smith's low IQ, antisocial personality, and troubled upbringing were involuntary in nature, Dr. Fason did not believe that Smith's problems were permanent or so severe that he was incorrigible. PA:A682; *see, e.g., Lucas,* 132 F.3d at 1082-83 (evidence that mentally ill inmate would not be dangerous in an institutional setting could be given effect in determining future dangerousness); *Lackey v. Scott,* 28 F.3d 486, 489-90 (5th Cir. 1994) (evidence of low IQ and child abuse offered to show defendant would not be a future danger was within the scope of the future dangerousness special issue); *Andrews v. Collins,* 21 F.3d 612, 630 (5th Cir. 1994)

(evidence of low IQ not shown to be either permanent or severe enough to be solely aggravating within the context of future dangerousness); *Madden v. Collins,* 18 F.3d 304, 307-08 (5th Cir. 1994) (evidence of personality and learning disorders lacks requisite permanence, severity, or causation to fall outside the scope of the future dangerousness special issue). Thus, Smith's jury also had an adequate vehicle for giving effect to his mitigating evidence when answering the future dangerousness special issue.

In any event, Smith must prove more than "the mere possibility" that the jury was prevented from giving effect to his IQ evidence. *Johnson,* 509 U.S. at 367; *Boyde,* 494 U.S. at 380. Thus, the issue is not whether Smith's low IQ had some relevance outside the special issues *but whether the evidence had some relevance within the special issues. Johnson,* 509 U.S. at 368-69; *Graham,* 506 U.S. at 475-76. Because Smith's mitigating evidence did have such relevance, the state court's ultimate conclusion – that no Eighth Amendment error occurred under *Penry I* – was not unreasonable and the lower court did not err in denying federal habeas relief.

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CONCLUSION

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

Respectfully submitted,

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