

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 ROBERT JAMES TENNARD, :
4 Petitioner :
5 v. : No. 02-10038
6 DOUG DRETKE, DIRECTOR, TEXAS :
7 DEPARTMENT OF CRIMINAL :
8 JUSTICE, CORRECTIONAL :
9 INSTITUTIONS DIVISION. :
10 - - - - -X
11 Washington, D.C.
12 Monday, March 22, 2004
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.
16 APPEARANCES:
17 ROBERT C. OWEN, ESQ., Austin, Texas; on behalf of the
18 Petitioner.
19 EDWARD L. MARSHALL, ESQ., Assistant Attorney General;
20 Austin, Texas; on behalf of the Respondent.
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-10038, Robert James Tennard v. Doug Dretke.

Mr. Owen.

ORAL ARGUMENT OF ROBERT C. OWEN
ON BEHALF OF THE PETITIONER

MR. OWEN: Mr. Chief Justice, and may it please
the Court:

This case presents the question whether
mitigating evidence of a 67 IQ, of permanent cognitive
impairment, could be given mitigating effect under the old
Texas capital sentencing statute.

QUESTION: Mr. Owen, am I correct in thinking
that Smith's case is no longer before us?

MR. OWEN: That is correct, Your Honor.

QUESTION: Thank you.

MR. OWEN: This Court in Penry held that the
deliberateness question --

QUESTION: May I ask another preliminary
question? I thought that what was at issue is whether the
certificate of appealability was properly denied.

MR. OWEN: That is in the questions presented,
Your Honor, and --

QUESTION: Because you seem to be asking us to

1 grant habeas relief, and I would have thought what we had
2 to consider was the denial of the certificate of
3 appealability. Am I right?

4 MR. OWEN: Yes, Your Honor. I believe that in
5 this case the question of the underlying merits of the
6 constitutional issue before the Court, it -- I don't want
7 to say merges, but it certainly overlaps with the question
8 about the certificate of appealability and --

9 QUESTION: Well, that's -- that's true of all
10 certificate of -- of appealability cases, isn't it?

11 MR. OWEN: Yes, Your Honor. But it was also
12 true in Penry II, which when it came to this Court, came
13 from the Fifth Circuit on a denial of COA, and this Court
14 resolved the merits in that case by examining the merits
15 of the underlying State court decision and reversed the
16 judgment in the case in exactly the same fashion that we
17 are asking the Court to do in our case.

18 QUESTION: Well, as long as we're into these
19 preliminary matters -- and then I'll let you, so far as
20 I'm concerned, proceed the way you wish. It is true that
21 in this case, isn't it, if -- if we say there should be a
22 COA, the Fifth Circuit is just going to follow its -- its
23 earlier panel opinion, and I -- I assume it must on -- on
24 the nexus rule.

25 MR. OWEN: That's exactly right, Your Honor. I

1 think that the -- in fact, in -- within the last couple of
2 years, the Fifth Circuit has taken those rules en banc and
3 has issued an en banc opinion that applies and upholds not
4 just the nexus rule, but the other elaborate sort of
5 framework of the Penry doctrine that we've explained in
6 our brief.

7 So I think you're exactly right, that if the
8 Court grants a COA and returns this case to the Fifth
9 Circuit, it will be back here in 6 months because all the
10 Fifth Circuit panel could do is say it's controlled by the
11 circuit precedent. So I think in -- for that reason as
12 well, Your Honor, if the Court concludes that those rules
13 are, in fact, not consistent with its cases, that the
14 shortest route to resolving the case is to do so at this
15 time.

16 This Court in Penry I held that the
17 deliberateness question was not an adequate vehicle for
18 giving mitigating effect to a defendant's personal moral
19 culpability, and in this case it functioned exactly the
20 same way as it did in Penry. Also, the future
21 dangerousness question, with respect to an IQ of 67, could
22 only give that evidence aggravating effect rather than
23 mitigating effect. And in the entire context of this
24 trial, particularly with respect to the arguments of
25 counsel respecting the evidence and how it might be

1 treated by the jury, really makes clear the existence of
2 the Penry violation.

3 QUESTION: May I ask you, Mr. Owen? You are
4 claiming low IQ. You did not in -- in your papers up till
5 now -- you did not make a claim of retardation, just low
6 IQ. Is that still the -- there is no -- in other words,
7 is no Atkins claim in this case?

8 MR. OWEN: There is no Atkins claim before this
9 Court, Your Honor. That is correct. We have filed a
10 successive application in State Court in order to preserve
11 Mr. Tennard's rights to have a determination of whether
12 he's a person with mental retardation. But the evidence
13 at trial established only his very low IQ, not the other
14 aspects that would have been necessary for a diagnosis of
15 mental retardation. So there's no Atkins claim before
16 this Court in this proceeding.

17 As I was saying, the arguments of counsel sort
18 of highlight the inadequacy of the jury instructions in
19 this case. Defense counsel's argument was effectively a
20 plea for nullification. He asked the jury to take account
21 of the defendant's very low IQ in -- in imposing sentence,
22 but he couldn't provide them any sort of road map to tell
23 them how they could get from the low IQ to a no answer to
24 one of the special issues. For his part, the prosecutor,
25 in replying to that argument, said the low IQ is not even

1 relevant to the second special issue, and those were his
2 words: not relevant.

3 So to some extent the State is trying to have it
4 both ways. At trial, the prosecution argued to the jury
5 that this fact, a 67 IQ, wasn't relevant to the second
6 special issue. Here, however, tracking the opinion of the
7 Texas Court of Criminal Appeals, it's respondent's
8 position that this evidence was sufficiently relevant to
9 the second special issue that the jury could be understood
10 to have given it effect in imposing sentence.

11 QUESTION: But do I understand that the -- that
12 the specific issue that we've got here, assuming we -- we
13 do reach the -- the merits issue as part of the COA
14 problem, is the specific circuit rule that there has got
15 to be a finding of, as I recall, unique severity and a
16 finding of causation. And as I understand what the
17 circuit said was, because those conditions were not
18 satisfied, we ultimately do not even reach the kind of
19 Penry issue that -- that you described as being in the
20 background. Is -- is that a fair statement of what we've
21 got in front of us?

22 MR. OWEN: Yes. Excuse me. Yes, Your Honor.
23 That -- that is a fair statement, and I think that that is
24 exactly what the Fifth Circuit did with this case, was it
25 applied these preliminary doctrines which are effectively

1 threshold tests and they looked at this evidence and said,
2 it's not uniquely severe and there's been no showing that
3 it caused the defendant to commit the crime. And as a
4 result, the Fifth Circuit never got to the question of how
5 does this evidence possibly fit into the special issues.

6 Because this is a habeas case and we want --
7 we're trying to get the Court to -- to ultimately grant
8 relief, we wanted to explain why the underlying State
9 court decision constitutes an unreasonable application of
10 this Court's cases. And the Court of Criminal Appeals
11 relied, on the one hand, on the unique severity idea.
12 They said this IQ score, standing alone, doesn't rise to
13 the level of mental retardation, so Penry is out of the
14 picture. And then it went on to say even if that's --
15 even if it was wrong about that judgment, there's some
16 way for the -- for the jury to have given it effect in
17 answering the second special issue.

18 QUESTION: You say it doesn't have to be related
19 to the -- to the crime at all.

20 MR. OWEN: Yes, Your Honor.

21 QUESTION: I mean, what -- how -- how can that
22 be? I mean, what if they bring in evidence that this
23 person was severely dyslexic?

24 MR. OWEN: I think --

25 QUESTION: I guess that's a great handicap and

1 -- and you must feel sorry for the poor fellow, but what
2 does it have to do with mitigating the fact that he
3 murdered somebody? You know, how -- how does -- how does
4 that have anything to do with mitigating? I mean, what
5 we're looking for here is mitigation. That means somehow
6 it makes the act that he committed less heinous than it
7 otherwise would be. And you say it doesn't matter.
8 Dyslexia should -- should count.

9 MR. OWEN: I think, Your Honor, that the -- the
10 wisdom of this Court's case in Lockett, the wisdom of the
11 Lockett decision is that that judgment, the judgment that
12 you're describing, is this in fact mitigating, does this
13 support a life sentence as opposed to the death penalty --

14 QUESTION: Suppose the defendant is despondent
15 over global warming and -- and that has nothing to do with
16 -- with the case. Does the jury hear that too?

17 MR. OWEN: I think, Your Honor, that -- that the
18 jury is the person --

19 QUESTION: I mean, there are no limits?

20 MR. OWEN: There -- there shouldn't be any
21 limits on admission, Your Honor, or on the jury's ability
22 to give that evidence effect if it chooses to do so. At
23 some level, we are -- we are left to the jury -- to trust
24 the jury's judgment about what --

25 QUESTION: This evidence was admitted, was it

1 not?

2 MR. OWEN: Yes, Your Honor. There -- there
3 is --

4 QUESTION: So we're not talking evidence that
5 was excluded. You're talking about whether -- what use
6 could be made of the evidence once it was in.

7 MR. OWEN: That's correct, Your Honor, although
8 I should point out that to the extent that the lower
9 courts have, from time to time, described these threshold
10 rules, the nexus requirement, the severity requirement, as
11 relevance rules, rules of constitutional relevance, it at
12 least holds out the possibility that in a future case a
13 court might choose to exclude evidence as irrelevant to
14 punishment.

15 QUESTION: Are there -- are there any other
16 areas where -- where we just say, you know, there -- there
17 are no rules at all. The jury -- whatever it likes. The
18 fellow had a limp, and therefore, if you feel sorry for
19 him because he had a limp, that -- you can determine, even
20 though it clearly is not true that this somehow mitigates
21 his guilt for -- for the murder he committed.

22 MR. OWEN: I certainly think, Your Honor, that
23 suggesting that the jury could respond simply out of
24 sympathy or emotion or an unfocused passion is precluded
25 by the Court's cases, and the Court has approved any

1 number of --

2 QUESTION: Right. So -- so what do you tell
3 them in order to prevent that?

4 MR. OWEN: I think that what you tell them --

5 QUESTION: Don't you have to tell them what the
6 Fifth Circuit suggests? You have to find that there's
7 some kind of a connection between this evidence and the
8 crime that he committed, that -- that, you know, it -- it
9 somehow caused it so that he's less guilty than somebody
10 that did not have that affliction would be. Isn't that --
11 isn't that exactly what you're looking for?

12 MR. OWEN: No, Your Honor. I -- I think that
13 what you have to tell the jury is that they are not
14 limited in responding to the evidence and that they should
15 give the evidence their reasoned moral response.

16 QUESTION: Well, are you saying that in -- in
17 most States under Lockett, the trial judge has no
18 discretion to say this is just too far outside the bounds
19 of what mitigation evidence really means?

20 MR. OWEN: I think that the bounds that Lockett
21 sets are clear enough to -- to preclude some facts. I
22 don't -- at this point, I don't have them in mind, but let
23 me say that the rule of Lockett, which is any fact about
24 the defendant's background or character or any of the
25 circumstances of the offense, that is -- I think that is a

1 -- that does provide sufficient guidance.

2 Certainly, Your Honor, every death penalty
3 statute in the country, including now Texas', gives the --
4 the sentencer very broad latitude to consider the facts
5 and --

6 QUESTION: What about -- what about the other --
7 the other factor that you say the Fifth Circuit shouldn't
8 have taken into account, that is, severity of the -- of
9 the factor that the defendant claims mitigates? What --
10 you say that -- that should not come into -- come into
11 consideration either.

12 MR. OWEN: That's correct, Your Honor.

13 QUESTION: So he can -- he can tell the jury,
14 you know, I had a really bad cold that day.

15 MR. OWEN: Let -- let me say, Your Honor, that
16 when -- that when the Court said --

17 QUESTION: Is it seriously we -- we have to let
18 the jury just ponder over that question, whether the fact
19 that he had a really bad cold --

20 MR. OWEN: I think the Court could be
21 confident --

22 QUESTION: -- should mitigate his crime?

23 MR. OWEN: -- the jury would not ponder very
24 long over the question whether a serious cold meaningfully
25 reduced the defendant's culpability in a way that made a

1 life sentence appropriate.

2 QUESTION: No, but by the same token, wouldn't
3 it be fair for the judge to say, no reasonable jury,
4 possessed of reasonable, human sympathy, could possibly
5 find this mitigating? The bad cold could be kept out and
6 there would be no constitutional error. Isn't that
7 correct?

8 MR. OWEN: I think, Your Honor, that if no
9 reasonable juror could possibly accord the evidence any
10 significance to the ultimate sentencing decision, then it
11 would be consistent with Lockett because Lockett does
12 comprehend facts about the --

13 QUESTION: Okay. But you're -- you're worried
14 about the other end of the spectrum.

15 MR. OWEN: Absolutely, Your Honor. This is not
16 a case about a -- a defendant with a bad cold. This is a
17 case about a defendant --

18 QUESTION: The circuit -- isn't --

19 MR. OWEN: I'm sorry, Your Honor.

20 QUESTION: The -- the question about what is a
21 mitigating circumstance would come up under Texas' current
22 instruction 2, the instruction that says that you can
23 consider all the mitigating evidence, consider all the
24 mitigating evidence. What is mitigating evidence? That's
25 a discrete question from the one that's before us.

1 Whatever it is, it's a higher -- something higher than
2 mitigating evidence.

3 MR. OWEN: That's right, Your Honor. The -- the
4 severity test -- we don't know exactly how high it has to
5 be set because in only one case that I'm aware of has the
6 Fifth Circuit found it to be satisfied. So there are --

7 QUESTION: Why is it higher than mitigating
8 evidence? I don't understand. I -- I thought you had
9 just acknowledged in -- in the -- in the exchange with
10 Justice Souter that a cold wouldn't be mitigating because
11 it was not severe enough. Right?

12 MR. OWEN: No. I think -- I think --

13 QUESTION: Oh, that isn't the reason.

14 MR. OWEN: -- not because it was not severe
15 enough, Justice Scalia. No.

16 QUESTION: I see. Well, why -- why did you
17 agree with Justice Souter that a -- that a cold could be
18 excluded?

19 MR. OWEN: Because I do think that -- that
20 Lockett anticipates that there are facts about the
21 defendant's character and background which, according to
22 tradition, according to our understanding of what
23 constitutes an appropriate basis for extending leniency,
24 which does not limit itself to evidence that has a nexus
25 with the crime, that -- that there would be room for a

1 judge to say, in an extreme case -- and I'm not saying
2 this would be a routine judgment. I certainly think
3 Lockett suggests it would be only a very unusual case
4 where a trial court could say the proffered evidence --

5 QUESTION: Do you want to tell me why? All I
6 asked is why. What is -- what is it that brought you to
7 the judgment that a cold could be excluded? You say it is
8 not because it is too insignificant. That doesn't count.
9 And you say it's not because it has no connection to the
10 -- to the criminal act that he committed. What -- what
11 brings you to say that it can be excluded?

12 MR. OWEN: Because I don't think there's any
13 dimension on -- in which it is relevant to whether the
14 defendant deserves a life sentence or the death penalty.

15 QUESTION: It's not relevant because of what?

16 MR. OWEN: It's not relevant because it doesn't
17 reflect any --

18 QUESTION: Because -- because colds don't count
19 or, you know, what?

20 MR. OWEN: No, Your Honor. No. I --

21 QUESTION: I suggest that -- that the reason you
22 feel it's -- it's not relevant is because either it's too
23 insignificant or it has no relation whatever to the act
24 that he committed, one or the other of those. Maybe both.

25 MR. OWEN: Well, I think that -- that if the

1 Court's -- let me back up and say that in any number of
2 cases, this Court has recognized as mitigating
3 circumstances which have no causal connection to the
4 crime. The best example that I can think of off the top
5 of my head being your opinion, Justice Scalia, in
6 Hitchcock where the Court recognized that Mr. Hitchcock's
7 having been a fond and affectionate uncle to the children
8 of his brother was a fact which the sentencer had to be
9 allowed to consider in deciding whether he ought to get
10 the death penalty or some lesser sentence.

11 And so I think that at a minimum, adopting the
12 nexus test or the unique severity test would require the
13 Court to overrule all or part of a number of its cases,
14 going all the way back to Lockett, and that there
15 shouldn't be any basis for doing that since the Lockett
16 rule is working perfectly well in practice. I think
17 again --

18 QUESTION: Mr. -- Mr. Owen, is this position of
19 the -- the severity and the nexus peculiar to the pre-
20 1991 sentences? That is, have any cases come to the Fifth
21 Circuit involving the new law that simply says the jury
22 can consider all mitigating evidence?

23 MR. OWEN: No, Your Honor, and -- and given this
24 Court's very clear approval of the new statute in Penry II
25 where this Court observed in passing that this new statute

1 and its broad opportunity for the jury to consider
2 mitigation was a clearly drafted, catchall provision that
3 complies with Penry I, I don't anticipate that there could
4 be a challenge raised under the new statute.

5 The only universe of cases that we are talking
6 about is the universe of cases that were sentenced prior
7 to 1991 when Texas changed its statute, and -- and that is
8 a -- a small number of -- of cases. Probably 85 to 90
9 percent of the people on Texas' death row were sentenced
10 under the new statute.

11 QUESTION: May I ask you a -- a question about
12 the operation of the Texas rule? Is it your understanding
13 that under the Texas rule, the evidence about how the
14 defendant was nice to his nieces and nephews would be
15 excluded?

16 MR. OWEN: No, Your Honor. That would -- that
17 would come in absolutely.

18 QUESTION: You mean under the Texas rule it
19 would come in?

20 MR. OWEN: Yes, Your Honor, because the nexus --
21 the nexus -- the nexus rule or principle or framework is a
22 -- is a -- an appellate review doctrine. It's not -- it's
23 not a trial doctrine. These rules were developed by the
24 Fifth Circuit and the Court of Criminal Appeals in trying
25 to apply this Court's decision in Penry. Going all the

1 way back to Jurek, it's always been clear that evidence of
2 the kind that you describe, evidence of good behavior,
3 loved his family, was a solid worker, all of that evidence
4 comes in. And it's all -- it can all be given mitigating
5 consideration under the old future dangerousness question.
6 It has much broader consideration now under the new
7 statute, but I don't think it's ever been -- it's never
8 been the case that that -- that that evidence has been
9 excludable.

10 QUESTION: Well, what -- what is wrong with the
11 nexus requirement then if it doesn't keep the evidence
12 out?

13 MR. OWEN: Because it denies the defendant the
14 opportunity to have the jury -- it refuses to -- to allow
15 a new sentencing hearing for a defendant who comes to the
16 appellate court and says, at the time that I was
17 sentenced, I presented evidence that was clearly relevant
18 to my culpability, like a 67 IQ, and yet the jury wasn't
19 instructed in such a way that they could give it effect.
20 And the appellate court says, well, if you didn't show
21 that your 67 IQ caused you to commit the crime, then
22 you're not going to get that jury instruction. So it's --
23 there's no problem with your death sentence. That is the
24 problem.

25 QUESTION: So what's the rationale for the nexus

1 rule? It's a -- a sort of a screening process the Fifth
2 Circuit used to determine harmless error or?

3 MR. OWEN: No, Your Honor. I think that the --
4 the origin of the nexus language is in an attempt to
5 understand what this Court meant in Penry when it said
6 that evidence of a defendant's background and character is
7 relevant to punishment because crimes that are
8 attributable to bad background, mental problems, and so on
9 might deserve a less serious punishment. And it is -- the
10 Fifth Circuit has seized on, focused on that word
11 attributable and from that elaborated this jurisprudence
12 of causal, deterministic relationship.

13 QUESTION: Of course, in this case -- and I
14 guess in all -- all of the cases involving the -- the old
15 Texas instruction, the State court was proceeding not
16 under Penry II, but just under Penry I. And it didn't --
17 Penry II is the case that required full consideration be
18 given to all mitigating circumstances. Penry I didn't
19 require that. It just said there had to be some -- some
20 means of giving consideration to it.

21 MR. OWEN: Actually, Your Honor, Penry I does
22 say full consideration. In the -- in the interim, this
23 Court said in Johnson that the test was not necessarily
24 full consideration but meaningful consideration.

25 And so our position is that at the time the

1 Court of Criminal Appeals decided this case and said that
2 there was no need for an additional instruction, they --
3 at a minimum, the test was Johnson's demand that there be
4 meaningful consideration and that under this set of
5 instructions, there was no way to give meaningful
6 consideration to the fact of a 67 IQ, and that that is the
7 -- that is the way in which the Court of Criminal Appeals
8 went astray.

9 And in fact, that's illustrated well, I think,
10 by the portions of the Court of Criminal Appeals opinion
11 that try to show how a jury, confronted with the future
12 dangerousness question, could figure out a chain of a
13 reasoning that would get you from this guy has a 67 IQ to,
14 therefore, we can answer no to the future dangerousness
15 question.

16 It is based on -- it is -- the -- the chain of
17 inferences that the Court of Criminal Appeals suggests is
18 contrary to the evidence that was presented at trial
19 because it relies on characterizations of Mr. Tennard as a
20 follower which are not in the evidence and aren't
21 supported by the evidence.

22 It is actually contrary to the arguments that
23 were made at trial because the prosecutor told the jury
24 that they wouldn't be allowed to consider what happened or
25 might happen in prison as a way of deciding the answer to

1 the future dangerousness question.

2 And it's contrary to this Court's cases like
3 Boyde and Penry II where the Court says, in deciding
4 whether a jury was able to give effect to mitigating
5 evidence under the charge, you don't just look at the
6 language of the charge, but you look at the evidence, you
7 look at the arguments, you look at the context of the
8 whole trial. The Court of Criminal Appeals effectively
9 covered up the context of the whole trial and said let's
10 see if we can imagine a trial with different evidence and
11 different arguments that might have produced a different
12 result. And that -- it may be many things, but that is
13 not a fair reading of Penry. It is not a -- it is not a
14 fair judgment of whether the jury in this case was able to
15 give meaningful consideration to the fact of Mr. Tennard's
16 67 IQ.

17 QUESTION: May I ask you, how -- how does the
18 Texas nexus rule work with evidence that the defendant had
19 a war record? He was a military hero of some kind, but he
20 doesn't argue that affected his conduct in the trial, but
21 just as a general matter, he's a man who should be given
22 special consideration because of his -- his history?

23 MR. OWEN: That evidence -- I'm sorry, Your
24 Honor.

25 QUESTION: What happens under -- in Texas with

1 kind of evidence?

2 MR. OWEN: I think that what the -- what the
3 court would say is that you don't have to get to the
4 question of whether he showed a nexus because that's the
5 kind of evidence that has a natural home in the future
6 dangerousness question.

7 QUESTION: Why does that have anything to do
8 with future dangerousness? I don't understand that.

9 MR. OWEN: Your Honor, I believe what the -- I
10 believe what Texas would say -- and I'm not saying -- this
11 is my view. But I think what Texas would say is that in
12 the abstract, good character evidence shows a lack of
13 dangerousness, and for that reason, it can be given effect
14 by returning a no answer to the future dangerousness
15 question. I think the --

16 QUESTION: Or -- or that he might revert back to
17 his good character in a way that someone who had never
18 shown it might not.

19 MR. OWEN: That is correct, Your Honor. In --
20 in *Boyde v. California*, Your Honor observed that certain
21 evidence of good character could be understood as showing
22 that the crime is an aberration from otherwise good
23 character.

24 At the same time, Justice Stevens, I think that
25 it was -- it was correctly observed by the concurring

1 opinion in Franklin that there may be more relevance to
2 some of those circumstances than just the fact that it
3 doesn't make you dangerous.

4 But I think we are down the road from that
5 point, and our point is this evidence, the 67 IQ, is
6 evidence that a juror could reasonably conclude makes you
7 more dangerous, and in the absence of some additional
8 instruction, the jury simply had no vehicle for expressing
9 the -- the conclusion that even having killed deliberately
10 and even though this person poses a risk of future danger,
11 because of his reduced culpability as reflected in his 67
12 IQ, a life sentence is the appropriate sentence.

13 QUESTION: Would anything do short of the
14 catchall that Texas has had since 1991? You say the
15 severity and nexus test is no good and you say that the
16 current catchall is okay. Is there anything in between
17 those two that would be constitutionally adequate?

18 MR. OWEN: In Penry, this Court suggested that
19 it might be possible to define the term -- let me back up
20 and say, remember, there's a -- the first special issue
21 asks the jury whether the defendant killed deliberately
22 and with the reasonable expectation that death would
23 result. In Penry, this Court at least held out the
24 possibility that there might be a definition of
25 deliberately which the jury could be provided that would

1 focus their attention directly on the defendant's personal
2 culpability. I am -- I -- I have tried to come up with
3 that definition, but I -- it is hard to hard imagine.

4 I actually think that the best, clearest, most
5 obvious solution is a supplemental question that
6 effectively directs the jury, having decided the
7 deliberateness and future dangerousness questions, to
8 consider all the mitigating evidence and reach an
9 appropriate judgment about the defendant's culpability.

10 QUESTION: I'm -- I'm a little puzzled about why
11 you -- you're not asserting that this defendant was
12 retarded. You're just asserting that he was not -- not
13 too quick. Is that -- is that -- I mean, is that a
14 mitigating factor? He's not retarded. He's just -- he's
15 just not a whiz kid.

16 MR. OWEN: This Court in --

17 QUESTION: And -- and we should -- that has to
18 be taken into account by the jury?

19 MR. OWEN: This Court in Bell v. Ohio, the
20 companion case to Lockett, said that Bell's low average
21 intelligence, or dull, normal intelligence, was a
22 mitigating factor that the sentencer had to be allowed to
23 consider. We know from the briefs in that case that the
24 IQ score for Mr. Bell ranged between 81 to 90, so we know
25 that 90 is something the jury has got to consider.

1 In Burger v. Kemp, the Court observed that Mr.
2 Burger's 82 IQ was a -- was a mitigating circumstance
3 which the jury would have to be instructed to consider,
4 had it been offered by counsel.

5 We know from McKoy v. North Carolina that 74 is
6 an IQ that counts as a mitigating circumstance.

7 I think every reasonable juror would understand,
8 particularly when counsel is urging vigorously this is a
9 very low IQ, as counsel did in this case -- would
10 understand that it does substantially reduce moral
11 culpability.

12 Your Honor, with the Court's permission, I'd
13 like to reserve the balance of my time.

14 QUESTION: Very well, Mr. Owen.

15 Mr. Marshall, we'll hear from you.

16 ORAL ARGUMENT OF EDWARD L. MARSHALL

17 ON BEHALF OF THE RESPONDENT

18 MR. MARSHALL: Mr. Chief Justice, and may it
19 please the Court:

20 This case is squarely controlled by the Court's
21 opinions in Graham v. Collins and Johnson v. Texas in
22 which the Court rejected Penry claims based on youth and
23 troubled upbringing.

24 In fact, Tennard's Penry claim, based on a
25 completely unexplained IQ score, is much weaker than

1 Graham's or Johnson's for two reasons. First, Tennard's
2 claim is governed by the AEDPA, which requires deference
3 to the Texas court's reasoning in its opinion, and second,
4 Tennard's disembodied IQ score has really minimal
5 mitigating or aggravating significance within the special
6 issues here because --

7 QUESTION: Well, it seems to me this -- this is
8 not a case of -- of ineffective assistance of counsel
9 where we're seeing if -- if it was proper to overlook the
10 evidence at all. The evidence was entered, was admitted
11 in the trial court. And the question is whether or not it
12 was given proper consideration.

13 MR. MARSHALL: Your Honor, I -- I believe it was
14 given proper considered. Whether it was considered as --

15 QUESTION: Well, but I mean, that's -- that's
16 quite apart from the fact that, you know, it may be
17 persuasive or not persuasive.

18 MR. MARSHALL: It is apart from that question,
19 Justice Kennedy. However, in this case, if you take a
20 look at counsel's strategy as a whole in -- in defending
21 this case, he basically decided to paint Tennard as the
22 less culpable party among his co-defendants and -- and
23 paint him as a follower in illustrating that he allowed
24 his prior rape victim to escape. In -- in questioning his
25 role in the murders in this case, that was his strategy.

1 Counsel certainly didn't believe, I -- I don't think from
2 the record, that -- that this IQ score had any independent
3 mitigating significance beyond that follower theory
4 because he didn't object to the -- the instructions or the
5 special issues that were given and -- and didn't attempt
6 to argue it outside of that context.

7 Everything that he placed before the jury was
8 the idea that Tennard was a follower in this case and that
9 that made him less culpable. And that is a fact that is
10 mitigating within the context of future dangerousness, as
11 this Court reasoned in Jurek, where they said the duress
12 or domination of co-defendants would be cognizable within
13 that special issue.

14 Here, counsel presented the argument and -- and
15 some evidence to the effect that Tennard was a model
16 prisoner when he was incarcerated in his prior -- for the
17 prior rape conviction. He had no disciplinary
18 infractions. This was clearly counsel's global theory,
19 not that he was -- that he had any kind of diminished
20 capacity to commit this offense.

21 QUESTION: Opposing counsel says, however, we
22 don't even have to get to that argument, that maybe if the
23 Fifth Circuit had considered the case aright, it would
24 agree with you on that point. But it never got to that
25 point. It applied its -- its two factors and therefore

1 never even had to consider what you're presenting to us.
2 It just said no causality and not -- not severe enough.
3 What -- what's your response to that?

4 MR. MARSHALL: Justice Scalia, I -- I would say
5 that the Fifth Circuit was really looking at whether the
6 State court's opinion was reasonable in this case. The --
7 the State court did apply Penry in a way to try to
8 determine -- applied Johnson and Graham and tried to
9 determine whether this evidence was relevant within the
10 special issues as given and as defined.

11 QUESTION: Well, do you -- do you think the
12 Fifth Circuit's uniquely severe, permanent handicap and
13 nexus tests are the proper interpretation of the Penry
14 cases?

15 MR. MARSHALL: I believe, Justice O'Connor, that
16 they are one proper interpretation. They were developed
17 as a screening test of sorts to try to engender some sort
18 of consistency in the many, many, many Penry claims that
19 they --

20 QUESTION: I mean, if we thought that the
21 certificate of appealability should have been granted, I
22 suppose you would then argue, when it went back, that
23 those are the right tests to employ?

24 MR. MARSHALL: That would be one argument we
25 would advance, Justice O'Connor. I -- that's sort of a

1 screening, a -- a prima facie analysis of -- of the Penry
2 claim and it's designed to handle a wide variety of types
3 of evidence offered.

4 QUESTION: I -- I have a lot of trouble seeing
5 how the first uniquely severe, permanent handicap test is
6 -- is proper in light of Penry. That's a pretty low IQ in
7 this case, is it not?

8 MR. MARSHALL: We know now that it's a low IQ.
9 I -- I don't know whether the jury was aware of that fact
10 at the time of trial because it was never explained to
11 them, Your Honor. And it was never contrasted with any
12 other IQ score.

13 However, I think the Fifth Circuit's opinion is
14 illustrative of -- of the difference between the -- the
15 four-part test that's identified in the Fifth Circuit for
16 determining Penry violations and the additional analysis
17 that goes on top of it, which is even aside from this
18 question of whether we have a nexus, whether we have a --
19 whether we have severity or permanence, these other
20 factors, the court invariably ends up looking at whether
21 the jury could consider that evidence within the special
22 issues, whether it was relevant in -- in some way, in some
23 meaningful way. And -- and that's the question the Court
24 identified in Johnson and in Graham that -- that should be
25 -- be the controlling factor in Penry cases.

1 So I think -- I think the Eighth Amendment only
2 requires looking at Johnson and Graham, that -- that the
3 jury be able to give effect in some manner to the evidence
4 introduced, not that it be able -- not that it's required
5 to give effect in every conceivable way. And so the issue
6 isn't really whether Tennard can identify some relevance
7 for this evidence beyond the special issues that were
8 given, but whether he can -- whether we can look at the
9 record and see if it had some relevance within those
10 special issues that was available to the jury.

11 And I think that's exactly what the State court
12 did in this case. They looked at deliberateness and as
13 Tennard has argued in his brief, I think quite eloquently,
14 deliberateness was truly designed to deal with the
15 question of party liability. Whether the defendant had a
16 reasonable expectation that death would occur.

17 And in this case, where a party instruction was
18 given during the guilt/innocence phase, there was that
19 lingering question of whether Tennard was the primary
20 actor here. And so that's exactly how Tennard's counsel
21 argued it to the jury. He suggested that -- that Tennard
22 was a follower. He wasn't the primary here. He may not
23 have even stabbed the victim in this case. It might have
24 been his co-defendant who may be lying or -- or minimizing
25 their own responsibility in order to cover their tracks.

1 And so that's the theory before the jury from counsel's
2 perspective, and that fits squarely within deliberateness
3 here.

4 QUESTION: All right. Could I -- can I -- can I
5 interrupt you there? It seems to me that under the --
6 let's take the first prong of the First Circuit's test,
7 the unique severity requirement, that in fact, if the
8 unique severity requirement is a proper reading of -- of
9 Penry, then it seems to me we've read that evidence, in
10 effect, right out of -- of relevance and admissibility.
11 There are millions of followers in this world. There's no
12 way in the world, I would suppose, on this evidence that
13 -- that one could plausibly argue that this individual's
14 condition was a uniquely severe follower kind of
15 personality, and therefore it would be excluded. So it
16 seems to me that the unique severity requirement would
17 preclude the argument you just made in support of the --
18 the court's position.

19 MR. MARSHALL: Justice Souter, that is not a
20 question of admissibility, though. And -- and here what
21 the court was looking at on appeal --

22 QUESTION: No, but it -- it -- as your brother
23 on the other side said, if it's constitutional relevance,
24 it could be a basis for an admissibility ruling.

25 But let's, as you say, take the case that we've

1 got and -- and on the case that we've got, the -- in
2 effect, the Court is saying there's no need even to get to
3 the argument that counsel for the State of Texas has just
4 made because on -- on no reading of uniquely severe could
5 we say that this is uniquely severe evidence. And
6 therefore, we don't even have to get to the question of
7 whether sufficient consideration could have been given to
8 this under -- under Penry.

9 MR. MARSHALL: Your Honor, it's -- it's a
10 combination question that we're looking at here. It's
11 whether the evidence had -- had mitigating significance
12 and then whether that significance was beyond the scope of
13 the special issues. I think that --

14 QUESTION: But you say -- but as I understand
15 it, the circuit and the Court of Criminal Appeals says we
16 don't even have to deal with the substance of these issues
17 unless the evidence is indicative of something which is
18 uniquely severe, which clearly this is not. So that on
19 the -- as I understand the circuit's position, there would
20 be no need for you to make the argument that you just made
21 to us about the adequacy of consideration that could be
22 given under -- under Penry because on the uniquely severe
23 test, we don't even -- it's not uniquely severe under any
24 reading and therefore we don't even have to get to the
25 question of substance.

1 MR. MARSHALL: Your Honor, that may be true.

2 However --

3 QUESTION: Well, if it's true, it's a violation
4 of Penry, isn't it?

5 MR. MARSHALL: I -- I disagree, Your Honor. I
6 think that -- I think that the uniquely severe, permanent
7 handicap test that was identified in -- in the Fifth
8 Circuit's en banc opinion in Graham is basically a
9 description of Penry's evidence. And so the question
10 is --

11 QUESTION: I think you're wrong about that. If
12 this -- if the Fifth Circuit's test is a misinterpretation
13 of Penry, then I take it you lose this case. And if the
14 Fifth Circuit has misinterpreted Penry's -- what Penry
15 means --

16 MR. MARSHALL: No, Your Honor. The Fifth
17 Circuit's test is not even at issue in this case. It was
18 at issue in the companion case Smith, but here what we're
19 looking at in the denial of COA context under the AEDPA is
20 whether the State court's treatment of the issue was
21 reasonable or not. And I think --

22 QUESTION: It's the same test, isn't it?

23 MR. MARSHALL: Not quite, Your Honor. The --
24 the State court has taken a slightly different tack. They
25 did not address the nexus, severity, uniquely severe test

1 when they addressed Tennard's evidence in this case in Ex
2 parte Tennard, as contained in the joint appendix. They
3 did not apply that test.

4 And in the past, they have taken different
5 approaches over nexus, for example. The -- the State
6 court has always held that nexus is established
7 automatically if a defendant introduces evidence of mental
8 retardation, and they have granted relief in numerous
9 cases on that very point, that there's several cases in my
10 brief at pages 27 and 28 that I've identified where the --
11 I think there are six or seven -- where the State court
12 granted relief saying that we know mental retardation is
13 uniquely severe because not only, as it was described in
14 Penry, but -- but in earlier cases, that -- that it
15 affects the defendant's ability to control their impulses,
16 it affects their ability to learn from their mistakes.
17 These are the things that are mitigating and these have an
18 automatic nexus.

19 So there's a difference between the way the
20 Fifth Circuit has applied it and the way the State court
21 has applied it, and I don't --

22 QUESTION: But what is the State -- I thought
23 that at one point you told us that -- that the Fifth
24 Circuit got the severity and nexus threshold requirements
25 from the State, that the State initiated those

1 requirements. And now you say but in Tennard's case, as
2 distinguished from Smith, the State applied some other
3 test?

4 MR. MARSHALL: Your Honor, the State court
5 initially began by asking -- by identifying more or less
6 four factors, whether the -- whether the evidence was
7 involuntary disability, whether it was permanent in
8 nature, whether it was severe enough, and whether there
9 was at least an inference of nexus from the evidence.
10 Those four factors parallel, more or less, the uniquely
11 severe, permanent handicap language from Graham.

12 And so the two tests have gone in parallel
13 through the years, although the State court has vindicated
14 many more Penry claims than the Fifth Circuit has simply
15 because that's where the meritorious claims were found and
16 that's where they got relief. So the Fifth Circuit has
17 never been faced with the number of cases that the State
18 court was that presented evidence that rose to that level
19 so that I think in retrospect, the Fifth Circuit's test
20 becomes a little bit severe when it is viewed in that
21 vacuum but when it's compared with the way the State court
22 has done it, basically all of the meritorious claims have
23 been vindicated.

24 QUESTION: But you -- you seem to -- what you
25 said were -- you recited four factors, but it sounded like

1 severity was one and nexus was another.

2 MR. MARSHALL: Yes, Justice Ginsburg, that is
3 correct. However, the nexus requirement has been applied
4 differently by the State court.

5 QUESTION: You say it has not been applied as a
6 causation test. Is that it? Association but not
7 causation? Is that a fair --

8 MR. MARSHALL: That is a fair statement of it,
9 Justice Souter. It's -- it's whether the jury could infer
10 a connection.

11 QUESTION: I'm rather mixed up. I mean, I'm
12 taking your brief on pages 10 through 12, and reading your
13 account of it, what I thought happened is that when the
14 defendant, who had been sentenced to death, went to the
15 district court and then to the Fifth Circuit, the Fifth
16 Circuit did not say, just as Justice Souter said -- it did
17 not say this evidence helps to show this person will not
18 commit the crime. Rather, they said, when faced with the
19 argument, this evidence shows he's more dangerous because
20 a mentally retarded person at this level might commit more
21 crimes. They didn't decide that issue.

22 And then reading from your brief, it said the
23 reason is because the evidence comes far from
24 demonstrating that Smith suffered from a, quote, uniquely
25 severe, permanent handicap. End quote. And that the

1 criminal act was attributable to this condition. Am I
2 quoting from the right place?

3 MR. MARSHALL: I think that's the brief in
4 Smith, Your Honor.

5 QUESTION: That's the brief in Smith. All
6 right. So where -- what -- what was the situation in --
7 in this -- Tennard?

8 MR. MARSHALL: Justice Breyer, the -- the
9 evidence is an interesting contrast between the two cases.
10 Smith introduced more than abundant evidence, I think, of
11 -- of -- that were -- that was mitigating, in effect, the
12 fact that he had an antisocial personality disorder, all
13 of these other factors. Tennard's IQ evidence came in on
14 a prison record form with just a sole number 67. The --
15 the parole officer who testified identified the number and
16 then admitted on cross that he had no idea who had given
17 the test, he had no idea what kind of test was given, when
18 it was given. All of these factors were -- were laid out
19 there.

20 QUESTION: When you say no idea what kind of a
21 test, it was recognized it was an IQ test, wasn't it?

22 MR. MARSHALL: That's correct, Your Honor. It
23 was recognized as an IQ test. And -- I -- my point was
24 that it wasn't identified as a short-form test, a full-
25 scale IQ score.

1 QUESTION: Isn't that something the State would
2 know if it were given in a State prison? If the tests
3 were given at a certain period of time in a State prison,
4 that's -- that's something that the State could easily
5 find out what were they giving at the time.

6 MR. MARSHALL: Your Honor, it was not contained
7 on the -- the social and criminal history form that was
8 introduce, and that's at page 63 of the joint appendix.
9 It -- it's -- it's not in that form. And the parole
10 officer who was called as a witness by the defense who
11 brought this form didn't know the answer to that question
12 either.

13 QUESTION: But somebody connected with the State
14 correction system would know, would they not?

15 MR. MARSHALL: Presumably someone would know.
16 The psychologist who administered the test would know.

17 QUESTION: Well, the State could have informed
18 itself fully of what goes on at State prisons with regard
19 to IQ tests.

20 MR. MARSHALL: That's possible, Your Honor,
21 except that it was the defendant's evidence in this case.
22 And I don't think that the State necessarily looked at it
23 as any significant evidence, just like I don't think the
24 defense looked at it as significant evidence.

25 QUESTION: But all of this goes to the weight

1 that the evidence might have, but it -- what -- what does
2 it have to do with whether it is appropriate to erect this
3 threshold test for considering whether it even needs to be
4 considered as -- as an issue on appeal?

5 MR. MARSHALL: Justice Souter, under -- under
6 both Graham and Johnson, we're trying to figure out
7 whether the evidence had some relevance within the special
8 issues, not whether it had every bit of relevance it
9 should have had, but whether it just had some meaningful
10 relevance. And so I think looking at the weight of the
11 evidence is part of that analysis. We have to look and
12 see what the jury would have -- what meaning the jury
13 would have given --

14 QUESTION: No, but it -- it -- you -- you don't
15 -- I take it your argument is not that they couldn't give
16 it any weight at all.

17 MR. MARSHALL: Correct, Your Honor.

18 QUESTION: So the -- the -- what I'm going to
19 call the screening question we have before us is does a
20 Court even have to get into the use that might be made of
21 that evidence, whatever its weight, unless that evidence
22 satisfies these two threshold requirements --

23 MR. MARSHALL: Your Honor, those threshold --

24 QUESTION: -- or the State's equivalent of the
25 two threshold requirements? Isn't that the issue before

1 us?

2 MR. MARSHALL: I believe that is the issue, and
3 I might add that those threshold requirements are
4 questions as to what relevance the evidence had and how it
5 could have fit within the special issues. So when we're
6 looking at severity and nexus, we're looking at how does
7 the evidence mitigate moral culpability, how does it tend
8 to excuse the crime.

9 QUESTION: But the -- the circuit, I take it,
10 would say, all right, given the fact that there may be an
11 argument over the weight to be given, accepting that, we
12 don't have to decide whether enough weight could be given
13 to that evidence for Penry purposes unless that evidence
14 indicates something that is uniquely severe and was the
15 cause of the crime.

16 MR. MARSHALL: Generally speaking, Justice
17 Souter, the evidence that fails to pass that test does
18 have some relevance within the special issues because,
19 generally speaking, it tends to either show that the crime
20 was an aberration -- what we're looking for is something
21 that's -- when we're trying to identify Penry error, we're
22 looking at evidence that's solely aggravating in answering
23 those special issues, not necessarily evidence that just
24 has some relevance outside those special issues, just
25 whether it has only aggravating relevance within them or

1 no relevance within them.

2 And I think that's what the Court was talking
3 about in Graham and Johnson, where we looked at youth and
4 -- and determined that, yes, youth had -- may have some
5 significance outside future dangerousness, but the fact
6 that it has some significance within future dangerousness
7 cures any potential Penry error. And that's exactly what
8 these factors that the Fifth Circuit has identified, and
9 the State court to a lesser extent, are designed to root
10 out, to try to catch those types of evidence and determine
11 whether they indeed had some relevance or not.

12 QUESTION: Can I --

13 QUESTION: You're saying --

14 QUESTION: -- procedurally I -- I see what --
15 what we have in -- in your case is it's -- there's a
16 reference to lower court in your brief, and I'm not sure
17 which it is. I thought that what had happened is the
18 Fifth Circuit had been fairly been clear that their two
19 controversial matters determined this. But the fact is --
20 and I'm trying to get the procedural part right -- is they
21 didn't say anything. And so all we have is the lower --
22 is the lower court opinion. Is that right?

23 Did -- did the -- and the lower court had said,
24 well, one of the reasons that they lose is because the
25 future dangerous part of the Texas test gives effect to

1 this. And that's where we are.

2 MR. MARSHALL: That's correct. The -- the Fifth
3 Circuit --

4 QUESTION: So what you've done is you got rid of
5 the other case which did clearly present it.

6 MR. MARSHALL: Yes, Your Honor.

7 QUESTION: And now what you're saying now is
8 this case doesn't really present the issue that we took it
9 to deal with.

10 MR. MARSHALL: Correct, Your Honor. This case
11 -- the Fifth Circuit looked at the State court
12 adjudication --

13 QUESTION: Now, what do you suggest we do? I
14 mean, suppose I happened to think that -- that the Texas
15 Fifth Circuit is applying two tests that are really
16 erroneous and not a correct interpretation? If I -- if I
17 thought that was a big issue and maybe that was so, have
18 you any suggestion as to how we should proceed?

19 MR. MARSHALL: Well, Your Honor, contrary -- I
20 mean, and in contrast to Penry and the prior cases that
21 came before the Court, this is not here on de novo review.
22 We're now bound by the AEDPA, and we're looking at
23 reasonableness. And so I think the Court is necessarily
24 looking at it from a different angle now, and -- and so
25 whether the Court simply disagrees with the test is not an

1 issue here and really wouldn't be merited --

2 QUESTION: What about saying we've seen in other
3 cases like Smith, for example, that the Fifth Circuit has
4 continuously denied review or reversed or affirmed or
5 whatever on the basis of these two tests? And so we think
6 it's a reasonable assumption that that played a role in
7 their decision here too, particularly since whether this
8 case does fit within Graham and -- and the other one you
9 cited, is certainly open to reasonable argument. Now,
10 what would be wrong with taking that approach?

11 MR. MARSHALL: Your Honor, I think that again,
12 if the Court disagrees with the test that was applied in
13 the Fifth Circuit, the Court is still stuck with -- with
14 determining whether it was the State court's opinion that
15 was reasonable or not. Now, the Court could await another
16 case raising the issue and there are more. By my last
17 count there are approximately 100 and may still -- on
18 death row in Texas who were sentenced under this
19 sentencing scheme, and so I'm sure those claims will
20 arrive again some day.

21 But -- but in this case, I don't think the Court
22 has that option when applying the AEDPA to the State
23 court's opinion. And further, I -- I think what we're
24 really looking at is whether the Fifth Circuit's -- or --
25 or whether the -- the Federal court's application of the

1 AEDPA was debatable. So we're even one step further
2 removed from reasonableness in that sense. I don't think
3 that this is the case for it, and --

4 QUESTION: Could -- could I get back to what you
5 had just said before Justice Breyer asked you the
6 question? You -- you were -- you were describing why it
7 is that these two tests do, indeed, bear upon the Penry
8 determination. You -- you said, as I understand it, if it
9 isn't severe enough, it can be taken into account in the
10 future dangerousness determination. Right? If it's too
11 severe, the only way it can cut is to make him more
12 dangerous in the future, but if it's -- if it's milder, it
13 can be -- it can be -- it can cut both ways.

14 MR. MARSHALL: Generally speaking, yes, Your
15 Honor.

16 QUESTION: Okay. Now, what about the other one?
17 What about the -- the nexus requirement? How does that
18 bear upon the Penry -- the Penry issue?

19 MR. MARSHALL: We're -- in trying to -- in
20 trying to analyze the -- the Penry claim, we're trying to
21 figure out whether -- whether the evidence introduced at
22 trial had -- had significant relevance to moral
23 culpability that was outside the scope of the special
24 issues. And I think it's the combination of those
25 factors, not necessarily each one, one by one, that gets

1 you there, but the nexus requirement basically just asks
2 the question whether it actually has relevance to moral
3 culpability and whether that relevance reaches the level
4 that it placed it outside the special issues.

5 QUESTION: All right. With respect to the
6 first, I can understand why it bears upon the Penry thing.
7 With respect to the second, it seems sensible, but I don't
8 -- I don't see how it has any bearing on the -- on -- on
9 whether you can give that -- that factor some effect under
10 the special issues.

11 MR. MARSHALL: Well, for example, Justice
12 Scalia, I -- I think that the evidence of follower status,
13 for example, that -- that was argued extensively to the
14 jury in this case would have a nexus to the crime because,
15 of course, it involved the circumstances of the crime.
16 And so, therefore, it would fall within the special issue
17 of deliberateness where the jury is asked to resolve the
18 issue of -- of the specific intent required in a party
19 situation like this.

20 QUESTION: Yes, but I mean it -- it accidentally
21 had a nexus to the crime because, you know, he claimed
22 that he was a follower in this crime. What if he
23 introduced the same evidence? He has a low IQ and in all
24 other situations he's a follower, but there's no direct
25 evidence that in this crime -- in this crime he was.

1 MR. MARSHALL: Well, then I think --

2 QUESTION: Why do you need the nexus in order to
3 make it considerable by the jury?

4 MR. MARSHALL: Well, then I would question
5 whether the evidence actually had relevance to moral
6 culpability if it had no connection to the defendant or
7 his crime. And so I think that's the inquiry we're
8 looking at here, is -- is -- and again, it's part of the
9 -- the multi-part test that the Fifth Circuit and the
10 State court have devised.

11 And I think the best explanation occurs in -- in
12 the Fifth Circuit's opinion in Robertson v. Cockrell which
13 was handed down last year. It was an en banc opinion at
14 325 F.3d 243. The court summed up its entire body of
15 Penry jurisprudence there and identified the four factors
16 that are relevant, voluntariness and so on.

17 QUESTION: Would you clarify one thing for me?
18 I may have missed it. The nexus requirement -- does that
19 require a nexus to the crime or a nexus to the likelihood
20 that he'll be dangerous in the future?

21 MR. MARSHALL: It -- it requires a nexus, at
22 least an inferential nexus, to the crime itself, Your
23 Honor.

24 QUESTION: Well, then -- then I take it being a
25 veteran or a war hero or something like that, which

1 clearly had nothing to do with this particular crime --
2 that would not be -- not satisfy the nexus requirement.

3 MR. MARSHALL: It would not, but it -- but --
4 but again, that evidence would be relevant within future
5 dangerousness because it would go to good character. So
6 while good character evidence doesn't necessarily have a
7 nexus to the crime, good character evidence is relevant
8 within the -- the special issues, and the Court held that
9 in Jurek that --

10 QUESTION: All right. What -- what about the --
11 the case of the individual with the -- with the abused
12 childhood? Assume -- assume a case -- I think one of the
13 briefs mentioned this. Assume a case in which the parents
14 didn't teach the child to be a thief or a murderer or to
15 commit crimes. They simply abused the child. It's --
16 it's clear that -- from our cases that that evidence would
17 be admissible. What I don't understand is how that
18 evidence could ever satisfy the nexus test. There's no
19 way you can say as a causal matter that the fact of the
20 abusive childhood caused this crime, which I take it is
21 what the -- the Fifth Circuit would require. Am I -- am I
22 missing something?

23 MR. MARSHALL: The rule is not that strict,
24 Justice Souter. It -- it requires an inference of
25 causation. And I think child abuse is most--

1 QUESTION: Well, I mean, that's -- that's what I
2 mean by cause. How could you ever infer causation?

3 MR. MARSHALL: I think child abuse is -- is
4 truly analogous to youth, for example, which I think the
5 average juror does understand has a connection to moral
6 culpability. And it's -- as youth is something that most
7 people have common --

8 QUESTION: No. But you're -- you're -- I -- I
9 don't mean to be short with you, but I think you're
10 changing the terms of the question. It isn't whether
11 there is an association with moral culpability. The
12 issue, as I understand it, is whether this mitigating
13 evidence is relevant to this crime in the sense that there
14 is a possible causal inference, not some broader
15 association. Am I wrong about that?

16 MR. MARSHALL: No, you're not wrong, Justice
17 Souter. I -- I think that is --

18 QUESTION: Okay. Then how can you draw the
19 causal inference? Why -- why on that -- on that threshold
20 relevance understanding, why -- why ultimately wouldn't we
21 have to say, well, under the Fifth Circuit rule, the
22 abused childhood evidence really is irrelevant? It can
23 never be considered.

24 MR. MARSHALL: If child abuse was the evidence
25 presented in this case, we may have a bigger problem, Your

1 Honor. That is a more difficult topic. However, it's not
2 the case here.

3 QUESTION: But it's utterly inconsistent with
4 our cases, isn't it? I mean, haven't -- isn't it
5 perfectly clear that that evidence is admissible?

6 MR. MARSHALL: It is, of course.

7 QUESTION: And -- and must be given we'll --
8 let's use the term, meaningful consideration, by the jury.
9 And -- and it couldn't be given any consideration on the
10 causation -- if there's a causation requirement.

11 MR. MARSHALL: I don't think that's absolute,
12 Your Honor. I -- I think there may be some causation
13 argument where we're looking at, as I said, common
14 knowledge. Jurors -- jurors know that people who are
15 abused as children turn out a certain way and -- and that
16 it's --

17 QUESTION: Yes. I -- that's what I would say.
18 I -- I don't know why you concede so readily that it has
19 no -- no causal nexus. I -- I think the reason that --
20 that we usually allow that as mitigating evidence is that,
21 you know, you -- you beat a kid cruelly and he turns out
22 to be a cruel kid. I don't know why -- why you -- why you
23 make the concession.

24 Has the Fifth Circuit ever used its nexus
25 requirement to exclude evidence of severe maltreatment as

1 a -- as a child?

2 MR. MARSHALL: Your Honor, I -- I'm not aware of
3 cases that -- that they excluded evidence of severe child
4 abuse. However, in some cases where there was mild or
5 moderate, sketchy evidence of child abuse, they have used
6 that --

7 QUESTION: That's the other factor. That's not
8 the nexus factor. That's the severity factor.

9 MR. MARSHALL: Correct, Your Honor.

10 QUESTION: I -- I guess that gets us -- I guess
11 the difference between your answer to Justice Scalia and
12 your answer to me gets -- gets us to the question, what do
13 they mean by cause? And -- and I thought the Fifth
14 Circuit was requiring something much more than, as you put
15 it, an association with the personality. I thought it was
16 requiring something more specific. But maybe I'm wrong.

17 MR. MARSHALL: I --

18 QUESTION: I mean, your answer to Justice Scalia
19 suggests that I -- that I am wrong, that the circuit isn't
20 requiring what I thought it was.

21 MR. MARSHALL: Your Honor, I think in Robertson,
22 the most recent case in which the Court took up the issue
23 of child abuse -- and I see my red light is on, but I'll
24 finish answering.

25 QUESTION: Thank you, Mr. Marshall.

1 Mr. Owen, you have 5 minutes remaining.

2 REBUTTAL ARGUMENT OF ROBERT C. OWEN

3 ON BEHALF OF THE PETITIONER

4 MR. OWEN: Thank you, Mr. Chief Justice.

5 QUESTION: Mr. Owen, is your understanding the
6 same as Mr. Marshall's that we're talking about a universe
7 of 100 cases?

8 MR. OWEN: I -- I tried to count them myself,
9 Your Honor, and my number was closer to 50. And I don't
10 know on what -- I don't know where or how we disagree, but
11 I think the universe of cases is -- is obviously more than
12 perhaps 40 and -- and I guess by his count fewer than 100.
13 Again, it's only the people who were sentenced -- and
14 again, I think we need to emphasize that a ruling in favor
15 of Mr. Tennard would only affect the sentences of people
16 who introduced mitigating evidence at their trial that had
17 relevance to moral culpability outside the inquiries that
18 the jury received in its instructions. So, again, there
19 would be a subset beyond the number of cases just tried
20 prior to 1991 that would include the cases in which
21 certain kinds of mitigating evidence like the 67 IQ in
22 this case were introduced.

23 Let me address Justice Breyer's question first
24 about the Fifth Circuit's treatment of the claim in this
25 case. Justice Breyer, I'd like to refer you to pages 20

1 to 22 of our brief, and at those pages we described the
2 way in which the Fifth Circuit analyzed the claim in our
3 case. And I think it is -- it is the case that they
4 applied both the unique severity test and the nexus test
5 and found us wanting on both scores. And then ultimately,
6 in the way that the Fifth Circuit has, having reached the
7 merits, it said that we didn't get a COA. So I'm -- I'm
8 not sure. I think -- but that -- they did -- they did
9 apply the test, and so I don't think there would be
10 anything inappropriate about this Court assessing the
11 appropriateness of the test.

12 With respect to the trial record, I do want to
13 emphasize that the word follower does not appear in
14 defense counsel's closing argument. Defense counsel did
15 not make the argument that Mr. Tennard was a follower,
16 that his 67 IQ made him a follower, that he followed other
17 people in committing this crime. There is only one -- one
18 comment from defense counsel, a single sentence in the
19 course of the closing argument which says with respect to
20 an earlier crime that Mr. Tennard was involved in, that he
21 was not the leader. It doesn't say, and he was less
22 culpable than anybody else. He doesn't say, he only got
23 involved in that crime because he was following somebody
24 else.

25 This is not a case that was defended at trial on

1 the theory that Mr. Tennard, because of his 67 IQ, is a
2 follower. It is a case that was defended at trial on the
3 theory that having a 67 IQ is the sort of globally
4 disabling quality that affects everything Mr. Tennard
5 does, every action that he takes, every thought that he
6 has, every judgment that he makes.

7 QUESTION: Was that argument made?

8 MR. OWEN: It is certainly argued, Your Honor,
9 that -- as defense counsel puts it to the jury, he says,
10 you have a man who has an IQ that is that low, and he says
11 to the jury, none of you know what it's like to have a 67
12 IQ.

13 And I think -- and the -- and the prosecutor,
14 for his part, doesn't dispute the lowness of the IQ score.
15 The prosecutor's argument isn't, oh, come now, a 67 IQ
16 isn't that low. The prosecutor's argument is, under these
17 instructions, ladies and gentlemen, you're not asked why
18 Mr. Tennard became a danger. You're being asked whether
19 he's a danger. That's the only thing that the -- that the
20 jury was asked to consider.

21 I think that -- that it's important to keep in
22 mind the quality of this mitigating evidence.

23 It also was suggested that counsel didn't object
24 to the instructions, didn't ask for a special instruction.
25 While he did not ask for a special instruction at the

1 point of the jury charge, there is a pretrial motion filed
2 by defense counsel which complains that the Texas statute
3 does not permit the consideration of mitigating
4 circumstances, which asked for definitions of the key
5 terms in the statute, and that was denied. So it's --
6 it's certainly not a case in which there was -- it was --
7 you know, the people at trial were unaware of this problem
8 with the instructions. That's evident from defense
9 counsel's argument.

10 I think that the -- the one -- one thing I want
11 to emphasize about the nature of this mitigating evidence
12 is the way in which it's -- it's -- it does affect moral
13 culpability. And the quote I found that I liked the best
14 on this actually is from a concurring opinion in Skipper
15 where, in the course of explaining why they felt that
16 evidence of good behavior in jail didn't qualify as Eighth
17 Amendment mitigating evidence, Justice Powell joined,
18 among others, by Chief Justice Rehnquist, said, evidence
19 of a reduced capacity for considered choice bears directly
20 on the fundamental justice of imposing capital punishment.
21 This evidence in our case is evidence of that kind of
22 reduced capacity that the jury had no vehicle for giving
23 that kind of mitigating effect to in imposing sentence.

24 We'd ask the Court to reverse the judgment
25 below.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Owen.
2 The case is submitted.
3 (Whereupon, at 11:02 a.m., the case in the
4 above-entitled matter was submitted.)
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