IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05-11287

BRENT RAY BREWER,

Petitioner,

v.

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

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Motion to Vacate Judgment Below and Remand
For Further Consideration in Light of
***Nelson v. Quarterman*, F.3d , 2006 WL 3592953**
(5th Cir., December 12, 2006) (*en banc*)

Petitioner BRENT RAY BREWER ("Mr. Brewer") respectfully moves the Court to vacate the judgment below and remand for further consideration in light of *Nelson v. Quarterman*, ___ F.3d___, 2006 WL 3592953 (5th Cir., December 12, 2006) (*en banc*). In support of which motion, Mr. Brewer would show the Court as follows.

Introduction

Mr. Brewer, sentenced to death under the pre-1991 version of Texas' capital sentencing statute, is before this Court challenging his death sentence under *Penry v. Lynaugh*, 492 U.S. 302 (1989). In seeking certiorari, Mr. Brewer argued that the Fifth Circuit had consistently and seriously misread *Penry* and its progeny, especially in light of this Court's decisions in Penry v. Johnson, 532 U.S. 782 (2001); *Tennard v. Dretke*, 542 U.S. 274 (2004) and *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam). *See* Petition for Writ of Certiorari at 14-24. Mr. Brewer acknowledged that the *en banc* Court of Appeals was considering similar *Penry* issues in a pending case, but urged this Court to intervene because there was little reason to expect that the *en banc* Court of Appeals would depart from the Fifth Circuit's longstanding view of *Penry*. *Id.* at 32-33.

This week, the Fifth Circuit announced its decision in the *en banc* case. *Nelson v. Quarterman*, ___ F.3d___, 2006 WL 3592953 (5th Cir., December 12, 2006) (slip op.). As we show below, the *en banc* court in *Nelson* has decisively changed course, rejecting the prior, stunted Fifth Circuit readings of *Penry* in favor of this Court's own approach in post-*Penry* cases. In so doing, the *en banc* Court repudiated the restrictive view of *Penry* that had governed the panel's review of Mr. Brewer's *Penry* claim and dictated the panel's rejection of the claim. Under these circumstances, it is appropriate for this Court to resolve both Mr. Brewer's case and its companion case, *Abdul-Kabir v. Quarterman*, No. 05-11284, by vacating the judgments in both cases and remanding for further consideration in light of the Fifth Circuit's *en banc* decision in *Nelson*.

1. **Because the tension between this Court's *Penry* decisions and the approach previously taken by the Fifth Circuit has been resolved, this Court's intervention is no longer necessary to resolve a conflict or to clarify the appropriate implementation of *Penry*.**

The *en banc* decision in *Nelson* explicitly disavows both the general premise and specific aspects of the panel's decision rejecting Mr. Brewer's *Penry* claim.

The general premise of the Fifth Circuit panel decision in Mr. Brewer's case was an application of the sweeping, unexamined but unrelenting assumption long established by Fifth Circuit precedent, that evidence of *any* type of arguably non-permanent or potentially treatable mental impairment or mental illness could be given mitigating effect under Texas's pre-1991 "future dangerousness" inquiry. *See* Brief for Petitioner at 29-31 (discussing the Fifth Circuit's view that Mr. Brewer's mental impairment and abused childhood, being "treatable," could be given mitigating effect in the jury's answer to the future dangerousness issue). The *en banc* opinion in Nelson correctly rejects this notion, recognizing that even if jurors might have viewed a defendant's mental impairment as "treatable," they may well not have been able to give such evidence meaningful consideration in predicting the defendant's future dangerousness. *See Nelson*, slip op. at 31, 36. *Nelson* forcefully disavows the Fifth Circuit's "past cases [that] failed to account for the jury's ability to give effect to the impact of mitigating evidence [of a "treatable" mental disorder] on a defendant's moral culpability via the special issues." *Id.* at 41.

Nelson also undermines aspects of the panel's *Penry* analysis specific to Mr. Brewer's case. For example, the Fifth Circuit panel in *Brewer* attempted to create a "constitutional distinction" between abuse suffered as an adolescent and the same treatment suffered as a young child. *See* Brief

for Petitioner at 23-26. While the *en banc* opinion in *Nelson* does not discuss the mitigating evidence of Nelson's deprived background separately from his evidence of borderline personality disorder, it correctly recognizes that any analysis attempting to draw fine distinctions between such varieties of abuse would simply resurrect the "severity" condition for *Penry* relief struck down by this Court in *Tennard*. *See Nelson*, slip op. at 42 (weighing the strength of the mitigating evidence would "run[] afoul of the low relevance standard ... emphasized in *Tennard*," and "come[] perilously close to applying a heightened-relevance test similar to the one ... struck down in *Tennard*").

2. The need for this Court's intervention no longer exists because, by embracing *Penry II*, *Tennard*, and *Smith*, the *en banc* Fifth Circuit in *Nelson* has erased any inconsistency between the Circuit's earlier view of *Penry* and this Court's own.

Mr. Brewer sought review to resolve the conflict between the Fifth Circuit's mechanistic, category-based approach to *Penry* claims and this Court's insistence on a textured consideration of whether, in the full context of trial, jurors were precluded from giving meaningful consideration to a defendant's mitigating evidence. *See* Brief for Petitioner at 24 ("[A]s a result of its reliance [on] categorical analysis in the *Penry* context, the Fifth Circuit has consistently failed to consider how a defendant's mitigating evidence was actually presented and argued at trial"). In short, the Fifth Circuit prior to *Nelson* treated certain kinds of evidence – indeed, virtually *all* kinds of mitigating evidence apart from mental retardation conjoined with severe child abuse, *see* JA 224 n.16 – as inherently addressable through the pre-1991 special issues. *See* Brief for Petitioner at 28-31. In so doing, the Court of Appeals reflexively rejected the possibility of *Penry* error in case after case without ever examining factors such as the arguments of counsel, statements during voir dire, questions from jurors, and the nature of the evidence itself. *Id.* Mr. Brewer has argued that the Fifth

Circuit's categorical approach to *Penry*, much like the threshold screening tests rejected by this Court in *Tennard*, has supplanted the proper analysis under *Boyde v. California*, 494 U.S. 370 (1990). *See* Brief for Petitioner at 23, 31-32. Under *Boyde*, such factors deserve close attention because they illuminate the ultimate inquiry, *i.e.*, whether it is reasonably likely that jurors interpreted their instructions as precluding them from meaningfully considering the defendant's mitigating evidence. *Id.* at 32 (discussing this Court's application of *Boyde* in *Ayers v. Belmontes*, ___ U.S.___, 127 S. Ct. 469, 473-80 (2006)).

The *en banc* opinion in *Nelson* recognizes that *Penry* and *Boyde* do not permit the mechanical application of categorical rules like the ones employed to deny relief in Mr. Brewer's case. Instead, in *Nelson* the *en banc* Fifth Circuit, following this Court's lead in *Tennard* and *Smith*, focuses instead on whether, in the context of Nelson's trial, jurors could have given meaningful mitigating effect to Nelson's evidence of mental impairment. For example, in *Nelson* the *en banc* court considered the impact of the prosecution's closing argument, which "emphasized the strong possibility that Nelson would not receive the treatment he needed to keep his borderline personality disorder in check, and even if he did ..., there were no guarantees that the therapy would ... prevent future violence." *Nelson*, slip op. at 31. In these respects, the *en banc* opinion of the Court of Appeals has conclusively repudiated the errant reasoning of the panel decision in Mr. Brewer's case.

3. A straightforward application by the Court of Appeals of the reasoning of its *en banc* decision in *Nelson* will entitle Mr. Brewer to the relief he seeks.

The *en banc* opinion in *Nelson* makes plain that the Fifth Circuit no longer adheres to a view of *Penry* that departs intolerably from this Court's decisions. On the contrary, *Nelson* demonstrates that the Court of Appeals has recognized and embraced the settled principles of this Court's

jurisprudence. Applying *Nelson* to Mr. Brewer's case should result in relief from his death sentence. *Nelson* thus makes it unnecessary for this Court to devote further resources at the present time to modeling the correct application of the uncontroversial Eighth Amendment principles that govern this case, particularly in the context of an idiosyncratic capital sentencing statute Texas itself abandoned fifteen years ago. The responsibility for applying those tenets to Mr. Brewer's case can sensibly be entrusted to the Court of Appeals on remand. [1]

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[1] A dissenting Judge of the *en banc* Court of Appeals in *Nelson* states that Mr. Brewer sought review in this Court while a petition for rehearing *en banc* was still pending and inaccurately stated in his Petition for Writ of Certiorari that the Court of Appeals had denied that petition. *Nelson*, slip op. at 137-38 (Smith, J., dissenting). The dissenting judge further suggests that, as a result, Mr. Brewer's case is not final in the Court of Appeals. *Id.* (noting that "there is no jurisdictional bar to Supreme Court review of non-final cases from the courts of appeals, but it is unusual," citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 75-78 (8th ed. 2002)). We would like to clarify the record on this point.

The Fifth Circuit panel in Mr. Brewer's case issued its original opinion denying relief on May 31, 2005. JA 4. Mr. Brewer filed a petition for rehearing *en banc* but did not seek panel rehearing. JA 5. That petition pended for several months, until on March 1, 2006, the panel took three actions. It withdrew its original opinion of May 31, 2005; it denied *panel* rehearing; and it issued a *new* opinion denying relief. JA 5. The new opinion rendered judgment for Respondent. *See* JA 229 ("The judgment is REVERSED, and judgment is RENDERED denying the petition"); *see also* JA 5 (separately noting entry of judgment on March 1, 2006).

Under Fifth Circuit practice, "a petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition [for panel rehearing] is filed." Fifth Circuit Internal Operating Procedures following Fed. R. App. P. 35 ("Handling of Petition by Judges"). Under these circumstances, undersigned counsel regarded the denial of panel rehearing as a rejection of the petition for en banc review.

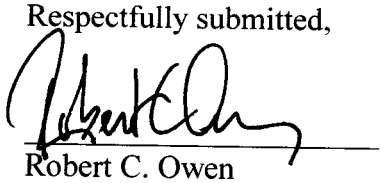
In view of the panel's withdrawal of its original panel opinion and issuance of a new opinion and entry of a new judgment, counsel believed that the petition for rehearing *en banc*, directed as it was to the opinion of May 31, 2005, was in any event rendered moot as of March 1, 2006. Moreover, the entry of a new judgment, irrespective of the fact that the Court of Appeals had not issued its mandate, started the time clock for Mr. Brewer to file yet another petition for rehearing in the Court of Appeals or seek certiorari review in this Court. Counsel chose to seek certiorari.

In light of the denial of panel rehearing and entry of a new judgment, undersigned counsel believed, and represented to this Court in Mr. Brewer's Petition for Writ of Certiorari, that rehearing *en banc* had been denied. Counsel regrets any resulting confusion. More important, there is no question that this Court properly exercised jurisdiction over Mr. Brewer's case and continues to have jurisdiction to decide it. The dissenting judge's citation to STERN, ET. AL., is inapposite because the cited pages of SUPREME COURT PRACTICE (75-78) address "Certiorari Jurisdiction *Before Rendition of Judgment Below*." *Id.* at 75 (emphasis added). As noted,

Prayer for relief

WHEREFORE, Petitioner BRENT RAY BREWER prays that the Court vacate the judgment below in his case and remand to the Court of Appeals for further consideration in light of *Nelson v. Quarterman*, ___ F.3d___, 2006 WL 3592353 (5th Cir., December 12, 2006) (*en banc*), or grant such other relief as justice requires.

Respectfully submitted,



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judgment was entered against Mr. Brewer on March 1, 2006, and he filed for certiorari in this Court on May 30, 2006. Notwithstanding the suggestion to the contrary in the opinion of the dissenting judge, this is not a case where this Court was asked to take, or needed to take, the unusual step of granting certiorari prior to judgment.

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CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

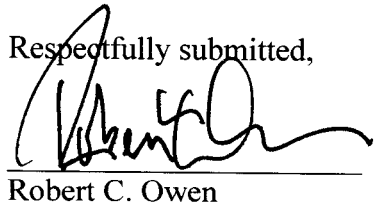
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Petitioner's **Motion to Vacate Judgment Below and Remand For Further Consideration in Light of *Nelson v. Quarterman*** has been served upon counsel for Respondent by sending same via first-class U.S. Mail to:

AAG Edward Marshall
Post-Conviction Litigation Division
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711

on the 14th day of December, 2006. All parties required to be served have been served. I am a member of the Bar of this Court.

Respectfully submitted,



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