

No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

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

**Reply in Support of Motion to Vacate Judgment Below
and Remand For Further Consideration**

Respondent does not dispute that the *en banc* Fifth Circuit, in its new decision in *Nelson*, has fundamentally altered its approach to *Penry* claims and rejected the premises on which both Petitioner and the petitioner in the companion case, No. 05-11284, were denied relief by Fifth Circuit panels below. Equally important, the change represented by *Nelson* is a rejection of the categorical, threshold type approach represented by the panel opinions in *Cole* and *Brewer*, and an embrace of the guidance provided by this Court in *Penry v. Johnson*, 532 U.S. 782 (2001), *Tennard v. Dretke*, 524 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004). In such circumstances, there is little gained by this Court's reviewing two panel opinions that no longer represent the views of the Fifth

Circuit.

The primary justification for this Court to grant certiorari in these cases – to address the Fifth Circuit’s continuing efforts to impose its “own restrictive gloss on *Penry I*,” *Tennard*, 524 U.S. at 283 – has disappeared with the *en banc* Fifth Circuit’s blanket repudiation of such approaches. In light of this development, we respectfully suggest that the sensible course at this point is to give the Fifth Circuit an opportunity to apply its new *Penry* jurisprudence to petitioners’ cases, which might well make further action by this Court unnecessary.

Respectfully submitted,

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