IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05-11284

JALIL ABDUL-KABIR,
formerly known as Ted Calvin Cole,

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 JALIL ABDUL-KABIR (referred to hereafter by his former name, "Mr. Cole") 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. Cole would show the Court as follows.

Introduction

Mr.Cole, 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. Cole 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 12-28. Mr. Cole 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 34-35.

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. Cole'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. Cole's case and its companion case, *Brewer v. Quarterman*, No. 05-11287, 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. Cole's *Penry* claim.

The general premise of the Fifth Circuit panel decision in Mr.Cole'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 29-34 (discussing the Fifth Circuit's view that Mr.Cole's mental impairment and deprived childhood, on account of its purportedly "non-permanent" character, 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 non-permanent (*e.g.*, because the condition is "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.Cole's case. For example, the Fifth Circuit panel in *Cole* relied heavily on its view that Mr. Cole's mental impairment

was less severe than Penry's, because the evidence "did not suggest that [Mr. Cole] was unable to learn from his mistakes." *See* Brief for Petitioner at 27-28. The *en banc* opinion in *Nelson* correctly recognizes that any analysis attempting to draw fine distinctions between such varieties of mental impairment 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. Cole 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 26-27 ("Repeatedly, the Fifth Circuit has seized upon these sweeping classifications [of various types of mitigating evidence] as the bases for threshold judgments that obviate the need to explain how the particular evidence in a given case could reasonably have been understood to [fall within the special issues]"). 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 – as inherently addressable through the pre-1991 special issues. *See* Brief for Petitioner at 26-27. 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. Cole 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 27 (the Fifth Circuit's "foreshortened analysis ... derails the analysis called for by ... *Boyde*"). 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 19 (referencing 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. Cole'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. Cole's case.

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

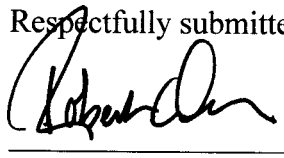
The *en banc* opinion in *Nelson* makes plain that the Fifth Circuit no longer adheres to a view of *Penry* that departs intolerably from this Court's decisions. On the contrary, *Nelson* demonstrates

that the Court of Appeals has recognized and embraced the settled principles of this Court's jurisprudence. Applying *Nelson* to Mr. Cole'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. Cole's case can sensibly be entrusted to the Court of Appeals on remand.

Prayer for relief

WHEREFORE, Petitioner JALIL ABDUL-KABIR 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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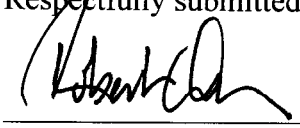
CERTIFICATE OF SERVICE

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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