No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

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

RESPONDENT'S OPPOSITION TO MOTION TO VACATE AND REMAND

Petitioner Brent Ray Brewer[1] moves the Court to vacate the judgment below and remand for further consideration in light of *Nelson v. Quarterman,* — F.3d —, 2006 WL 3633258 (5th Cir. Dec. 11, 2006) (*en banc*). Generally, Brewer argues that the *Nelson* opinion corrects all that was wrong with Eighth Amendment jurisprudence in the court below, and that there is no longer a need for this Court to review his *Penry*[2] claim. More specifically, he suggests that the United States Court of Appeals for the Fifth Circuit has now abandoned any case-specific analysis of *Penry* claims like his own and that all such claims are now entitled to relief under the holding of *Nelson.*

---

[1] Respondent Nathaniel Quarterman will be referred to as "the Director."

[2] *Penry v. Lynaugh,* 492 U.S. 302 (1989).

Brewer is wrong for four reasons. Initially, the *Nelson* opinion wholly fails to reconcile *Penry* and *Johnson v. Texas,* 509 U.S. 350 (1993), a relationship that remains unexplained in this Court as well. Second, *Nelson* is an opinion limited to its facts, and the mitigating evidence present in Brewer's appeal is nothing like Nelson's. Thus, remanding the instant case to the lower court would most likely ensure the same result and another petition for writ of certiorari from Brewer. Third, the Director anticipates seeking certiorari review in *Nelson* itself. Finally, the *Nelson* opinion purports to decide whether harmless error review applies to *Penry* claims, a question this Court is set to address in *Smith v. Texas,* No. 05-11304, on the same day it hears argument in the present case. No advantage is gained by declining to consider Brewer's appeal at the same time as Smith's. For all of these reasons, it is necessary for this Court to resolve Brewer's claim on its merits, and the Court should deny Brewer's motion and decide the case in its normal course.

I. *Nelson* Fails to Resolve the Core Controversy in this Case.

The *Nelson* court effectively ignores this Court's opinion in *Johnson,* indicating that it stands only for "the proposition that youth ... can be fully considered and given effect through the special-issues sentencing scheme." *Nelson,* 2006 WL 3633258.[3] But the court of appeals disregards the reasoning of *Johnson, i.e.,* that youth may be given "some effect" in answering the "forward-looking" future-dangerousness special issue[4] despite the fact youth might also have backward-looking relevance to personal culpability. 509 U.S. at 369-

[3] No page numbers are available in Westlaw at the present time. The lower court's discussion of *Johnson* appears in section II.B.5 of the majority opinion.

[4] This well-known sentencing inquiry is also at issue in the present case, and asks a Texas capital sentencing jury whether there is "a probability that the defendant ... would commit criminal acts of violence that would constitute a continuing threat to society." JA:121 ("JA" refers to the Joint Appendix on file with the Court in the instant proceeding); TEX. CODE CRIM. PROC. Art. 37.071(b) (West 1989).

70; *see also Ayers v. Belmontes,* 127 S. Ct. 469, 475 (2006) (reaffirming *Johnson* in this regard). The *Johnson* Court specifically reasoned that *Lockett* and *Eddings*[5] require only "that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence," not "that a jury be able to give effect to mitigating evidence *in every conceivable manner* in which the evidence might be relevant." *Johnson,* 509 U.S. at 372 (emphasis added). The Court rejected the converse "full effect" argument advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87. Although this language later surfaced in *Smith v. Texas,* 543 U.S. 37, 38, 46 (2004) (*per curiam*), and *Penry v. Johnson,* 532 U.S. 782, 797 (2001), these cases do not so much as mention the majority holding of *Johnson.* Neither case overrules *Johnson.* Yet the *Nelson* court purports to do so. *See* 2006 WL 3633258 (finding *Penry* error because jury could give "*some* effect" to Nelson's mitigating evidence of borderline personality disorder, but not "full effect") (emphasis in original).[6] This Court should hear argument and use the current case to decide whether *Johnson* remains good law.

II. *Nelson* Is Limited to its Very Different Facts.

Nevertheless, the mitigating evidence at issue in *Nelson* — chiefly borderline personality disorder and maternal abandonment — is nothing like the evidence Brewer relies upon. Although Brewer claims "mental impairment" and "abuse suffered as an adolescent," the record in his case does not support such hyperbole. Unlike Nelson, Brewer did not present expert testimony concerning a mental disorder. Rather, his "mental impairment" consists of a "single episode" of "major depression ... without psychotic features" and nothing more. JA:140. While *Nelson* turns on the conflicting expert testimony concerning

---

[5] *Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978).

[6] The referenced discussion occurs in section II.C.2.b. of the majority opinion.

whether Nelson's personality disorder was treatable, and the likelihood his jury would have found such evidence "only aggravating" within the future-dangerousness special issue, Brewer's lone depression event is not remotely comparable. Similarly, a fair reading of the evidence in Brewer's case indicates he may not have been "abused" until the age of eighteen or nineteen, and that Brewer actually had the upper hand against his father. JA:6-9, 49-50, 65. Thus, even if Brewer's case is returned to the lower court, *Nelson* does not compel relief. There is no doubt that Brewer would seek certiorari review *again*.[7] Contrary to Brewer's suggestion, the most efficient use of judicial resources demands that this Court resolve the merits of Brewer's claim now.

III. *Nelson* Was Wrongly Decided.

As noted *supra, Nelson* fails to recognize the import of *Johnson*. Moreover, as the dissents make clear, the majority fails to honor the Antiterrorism and Effective Death Penalty Act of 1996 and the reasonable expectations of the state court. *See* 2006 WL 3633258 (Jones, C.J., dissenting); *id.* (Clement, J., dissenting); *id.* (Owen, J., dissenting). The contentiousness of the court of appeals and the difficulty of the issue are well illustrated by the *six* different opinions and the fact that the majority opinion received only nine of seventeen votes. The Director intends to seek certiorari review and believes that such review is likely to be granted. In the meantime, it makes no sense to remand the instant case to be re-decided pursuant to an opinion that may not stand. As Chief Judge Jones piquantly observes, the Fifth Circuit is not entitled to "underrule" this Court. *See* 2006 WL 3633258 (Jones, C.J., dissenting). Yet that is precisely and counter-intuitively what Brewer suggests

---

[7] This is the third time Brewer has raised his *Penry* claim in this Court. *Brewer v. Texas,* 514 U.S. 1020 (1995); *id.,* 534 U.S. 955 (2001); *Brewer v. Quarterman,* 127 S. Ct. 433 (2006).

this Court should allow.

IV. The *Nelson* Court's Harmless-error Holding May Be Overruled by this Court's Decision in *Smith*.

The *Nelson* majority cursorily rejects the idea that *Penry* error may be subject to harmless-error analysis, despite the fact that the issue is squarely before the Court at this instant in *Smith v. Texas*. *Nelson,* 2006 WL 3633258.[8] If the Court decides that such review is constitutionally permissible, and the Court finds error in the present appeal, it should remand *at that time.* It would be a tremendous waste of judicial resources to remand Brewer's *Penry* claim now only to find it resubmitted in a *fourth* petition for writ of certiorari in the future.

For the foregoing reasons, the Court should deny Brewer's motion to vacate and remand for further consideration in light of *Nelson.*

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

---

[8] The court of appeals discusses harmless error in section II.C.4 of the opinion. *See also Nelson,* 2006 WL 3633258 (Dennis, J. concurring).

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR RESPONDENT

*Counsel of Record