



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 27, 2006

Hon. Denise J. McNerney, Merits Cases Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Jalil Abdul-Kabir fka Ted Calvin Cole v. Nathaniel Quarterman*, No. 05-11284
Brent Ray Brewer v. Nathaniel Quarterman, No. 05-11287

Dear Ms. McNerney:

This letter is written to supplement my prior responses in opposition to Petitioners' Motions to Vacate and Remand in the above-styled cases in light of a significant, intervening event. On December 27, 2006, the lower court denied *en banc* rehearing and issued mandate in *Brewer v. Quarterman*, No. 04-70034. In so doing, the court of appeals explicitly stated that its "vote should not be taken as conflicting with or modifying the majority decision in the recent *en banc* case, *Nelson v. Quarterman*." This statement unequivocally confirms the fact that, in the view of the *Nelson* majority, the *Brewer* panel opinion is *entirely consistent* with *Nelson*. In other words, the cases are distinguishable on their facts but not on the law applied.

As in *Abdul-Kabir*, in which *en banc* rehearing was also denied, there is no indication the court below views its *Nelson* opinion as a sweeping, categorical shift in its *Penry* jurisprudence. Nor is there any justification for opposing counsel's view that the panel opinions in *Abdul-Kabir* and *Brewer* no longer represent the lower court's views on the respective *Penry* claims rejected therein. Clearly, a majority of the judges of the court of appeals believes there is no inconsistency between *Nelson* and the instant cases. Further, it appears the court below awaits this Court's judgment in both cases. Therefore, vacating and remanding the instant cases would accomplish nothing but another round of certiorari petitions once the court below reinstated its prior holdings in *Abdul-Kabir* and *Brewer*. Surely, there could be no greater waste of judicial time and resources. This Court should deny the motions to vacate and remand, hear argument, and decide whether these cases were rightly or wrongly decided in due course.

Sincerely,

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ELM/skw

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