

05-11287 BREWER V. QUARTERMAN

DECISION BELOW:442 F3d 273

LOWER COURT CASE NUMBER: 04-70034

QUESTIONS PRESENTED:

1. Do the former Texas “special issue” capital sentencing jury instructions — which permit jurors to register only a “yes” or “no” answer to two questions, inquiring whether the defendant killed “deliberately” and probably would constitute a “continuing threat to society” — permit constitutionally adequate consideration of mitigating evidence about a defendant’s mental impairment and childhood mistreatment and deprivation, in light of this Court’s emphatic statement in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those same two questions “had little, if anything, to do with” Smith’s evidence of mental impairment and childhood mistreatment)?
2. Do this Court’s recent opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) (“*Penry II*”) and *Smith*, both of which require instructions that permit jurors to give “full consideration and full effect” to a defendant’s mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions — antedating *Penry II* and *Smith* — that reject *Penry* error whenever the former special issues might have afforded some indirect consideration of the defendant’s mitigating evidence?
3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for “constitutional relevance” that this Court emphatically rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?
4. Where the prosecution, as it did here, repeatedly implores jurors to “follow the law” and “do their duty” by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant’s mitigating evidence?

CERT. GRANTED 10/13/2006

CONSOLIDATED WITH 05-11284 FOR ONE HOUR ORAL ARGUMENT