IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT JAMES TENNARD, :

Petitioner :

v. : No. 02-10038

DOUG DRETKE, DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION. :

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Washington, D.C.

Monday, March 22, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ROBERT C. OWEN, ESQ., Austin, Texas; on behalf of the Petitioner.

EDWARD L. MARSHALL, ESQ., Assistant Attorney General; Austin, Texas; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-10038, Robert James Tennard v. Doug Dretke.

Mr. Owen.

ORAL ARGUMENT OF ROBERT C. OWEN

ON BEHALF OF THE PETITIONER

MR. OWEN: Mr. Chief Justice, and may it please the Court:

This case presents the question whether mitigating evidence of a 67 IQ, of permanent cognitive impairment, could be given mitigating effect under the old Texas capital sentencing statute.

QUESTION: Mr. Owen, am I correct in thinking that Smith's case is no longer before us?

MR. OWEN: That is correct, Your Honor.

QUESTION: Thank you.

MR. OWEN: This Court in Penry held that the deliberateness question --

QUESTION: May I ask another preliminary question? I thought that what was at issue is whether the certificate of appealability was properly denied.

MR. OWEN: That is in the questions presented, Your Honor, and --

QUESTION: Because you seem to be asking us to

grant habeas relief, and I would have thought what we had to consider was the denial of the certificate of appealability. Am I right?

MR. OWEN: Yes, Your Honor. I believe that in this case the question of the underlying merits of the constitutional issue before the Court, it -- I don't want to say merges, but it certainly overlaps with the question about the certificate of appealability and --

QUESTION: Well, that's -- that's true of all certificate of -- of appealability cases, isn't it?

MR. OWEN: Yes, Your Honor. But it was also true in Penry II, which when it came to this Court, came from the Fifth Circuit on a denial of COA, and this Court resolved the merits in that case by examining the merits of the underlying State court decision and reversed the judgment in the case in exactly the same fashion that we are asking the Court to do in our case.

QUESTION: Well, as long as we're into these preliminary matters -- and then I'll let you, so far as I'm concerned, proceed the way you wish. It is true that in this case, isn't it, if -- if we say there should be a COA, the Fifth Circuit is just going to follow its -- its earlier panel opinion, and I -- I assume it must on -- on the nexus rule.

MR. OWEN: That's exactly right, Your Honor. I

think that the -- in fact, in -- within the last couple of years, the Fifth Circuit has taken those rules en banc and has issued an en banc opinion that applies and upholds not just the nexus rule, but the other elaborate sort of framework of the Penry doctrine that we've explained in our brief.

So I think you're exactly right, that if the Court grants a COA and returns this case to the Fifth Circuit, it will be back here in 6 months because all the Fifth Circuit panel could do is say it's controlled by the circuit precedent. So I think in -- for that reason as well, Your Honor, if the Court concludes that those rules are, in fact, not consistent with its cases, that the shortest route to resolving the case is to do so at this time.

This Court in Penry I held that the deliberateness question was not an adequate vehicle for giving mitigating effect to a defendant's personal moral culpability, and in this case it functioned exactly the same way as it did in Penry. Also, the future dangerousness question, with respect to an IQ of 67, could only give that evidence aggravating effect rather than mitigating effect. And in the entire context of this trial, particularly with respect to the arguments of counsel respecting the evidence and how it might be

treated by the jury, really makes clear the existence of the Penry violation.

QUESTION: May I ask you, Mr. Owen? You are claiming low IQ. You did not in -- in your papers up till now -- you did not make a claim of retardation, just low IQ. Is that still the -- there is no -- in other words, is no Atkins claim in this case?

MR. OWEN: There is no Atkins claim before this Court, Your Honor. That is correct. We have filed a successive application in State Court in order to preserve Mr. Tennard's rights to have a determination of whether he's a person with mental retardation. But the evidence at trial established only his very low IQ, not the other aspects that would have been necessary for a diagnosis of mental retardation. So there's no Atkins claim before this Court in this proceeding.

As I was saying, the arguments of counsel sort of highlight the inadequacy of the jury instructions in this case. Defense counsel's argument was effectively a plea for nullification. He asked the jury to take account of the defendant's very low IQ in -- in imposing sentence, but he couldn't provide them any sort of road map to tell them how they could get from the low IQ to a no answer to one of the special issues. For his part, the prosecutor, in replying to that argument, said the low IQ is not even

relevant to the second special issue, and those were his words: not relevant.

So to some extent the State is trying to have it both ways. At trial, the prosecution argued to the jury that this fact, a 67 IQ, wasn't relevant to the second special issue. Here, however, tracking the opinion of the Texas Court of Criminal Appeals, it's respondent's position that this evidence was sufficiently relevant to the second special issue that the jury could be understood to have given it effect in imposing sentence.

QUESTION: But do I understand that the -- that the specific issue that we've got here, assuming we -- we do reach the -- the merits issue as part of the COA problem, is the specific circuit rule that there has got to be a finding of, as I recall, unique severity and a finding of causation. And as I understand what the circuit said was, because those conditions were not satisfied, we ultimately do not even reach the kind of Penry issue that -- that you described as being in the background. Is -- is that a fair statement of what we've got in front of us?

MR. OWEN: Yes. Excuse me. Yes, Your Honor. That -- that is a fair statement, and I think that that is exactly what the Fifth Circuit did with this case, was it applied these preliminary doctrines which are effectively

threshold tests and they looked at this evidence and said, it's not uniquely severe and there's been no showing that it caused the defendant to commit the crime. And as a result, the Fifth Circuit never got to the question of how does this evidence possibly fit into the special issues.

Because this is a habeas case and we want -- we're trying to get the Court to -- to ultimately grant relief, we wanted to explain why the underlying State court decision constitutes an unreasonable application of this Court's cases. And the Court of Criminal Appeals relied, on the one hand, on the unique severity idea. They said this IQ score, standing alone, doesn't rise to the level of mental retardation, so Penry is out of the picture. And then it went on to say even if that's -- even if it was wrong about that judgment, there is some way for the -- for the jury to have given it effect in answering the second special issue.

QUESTION: You say it doesn't have to be related to the -- to the crime at all.

MR. OWEN: Yes, Your Honor.

QUESTION: I mean, what -- how -- how can that be? I mean, what if they bring in evidence that this person was severely dyslexic?

MR. OWEN: I think --

QUESTION: I guess that's a great handicap and

-- and you must feel sorry for the poor fellow, but what does it have to do with mitigating the fact that he murdered somebody? You know, how -- how does -- how does that have anything to do with mitigating? I mean, what we're looking for here is mitigation. That means somehow it makes the act that he committed less heinous than it otherwise would be. And you say it doesn't matter. Dyslexia should -- should count.

MR. OWEN: I think, Your Honor, that the -- the wisdom of this Court's case in Lockett, the wisdom of the Lockett decision is that that judgment, the judgment that you're describing, is this in fact mitigating, does this support a life sentence as opposed to the death penalty --

QUESTION: Suppose the defendant is despondent over global warming and -- and that has nothing to do with -- with the case. Does the jury hear that too?

MR. OWEN: I think, Your Honor, that -- that the jury is the person --

QUESTION: I mean, there are no limits?

MR. OWEN: There -- there shouldn't be any limits on admission, Your Honor, or on the jury's ability to give that evidence effect if it chooses to do so. At some level, we are -- we are left to the jury -- to trust the jury's judgment about what --

QUESTION: This evidence was admitted, was it

not?

MR. OWEN: Yes, Your Honor. There -- there is --

QUESTION: So we're not talking evidence that was excluded. You're talking about whether -- what use could be made of the evidence once it was in.

MR. OWEN: That's correct, Your Honor, although I should point out that to the extent that the lower courts have, from time to time, described these threshold rules, the nexus requirement, the severity requirement, as relevance rules, rules of constitutional relevance, it at least holds out the possibility that in a future case a court might choose to exclude evidence as irrelevant to punishment.

QUESTION: Are there -- are there any other areas where -- where we just say, you know, there -- there are no rules at all. The jury -- whatever it likes. The fellow had a limp, and therefore, if you feel sorry for him because he had a limp, that -- you can determine, even though it clearly is not true that this somehow mitigates his guilt for -- for the murder he committed.

MR. OWEN: I certainly think, Your Honor, that suggesting that the jury could respond simply out of sympathy or emotion or an unfocused passion is precluded by the Court's cases, and the Court has approved any

number of --

QUESTION: Right. So -- so what do you tell them in order to prevent that?

MR. OWEN: I think that what you tell them --

QUESTION: Don't you have to tell them what the Fifth Circuit suggests? You have to find that there's some kind of a connection between this evidence and the crime that he committed, that -- that, you know, it -- it somehow caused it so that he's less guilty than somebody that did not have that affliction would be. Isn't that -- isn't that exactly what you're looking for?

MR. OWEN: No, Your Honor. I -- I think that what you have to tell the jury is that they are not limited in responding to the evidence and that they should give the evidence their reasoned moral response.

QUESTION: Well, are you saying that in -- in most States under Lockett, the trial judge has no discretion to say this is just too far outside the bounds of what mitigation evidence really means?

MR. OWEN: I think that the bounds that Lockett sets are clear enough to -- to preclude some facts. I don't -- at this point, I don't have them in mind, but let me say that the rule of Lockett, which is any fact about the defendant's background or character or any of the circumstances of the offense, that is -- I think that is a

-- that does provide sufficient guidance.

Certainly, Your Honor, every death penalty statute in the country, including now Texas', gives the -- the sentencer very broad latitude to consider the facts and --

QUESTION: What about -- what about the other -- the other factor that you say the Fifth Circuit shouldn't have taken into account, that is, severity of the -- of the factor that the defendant claims mitigates? What -- you say that -- that should not come into -- come into consideration either.

MR. OWEN: That's correct, Your Honor.

QUESTION: So he can -- he can tell the jury, you know, I had a really bad cold that day.

MR. OWEN: Let -- let me say, Your Honor, that when -- that when the Court said --

QUESTION: Is it seriously we -- we have to let the jury just ponder over that question, whether the fact that he had a really bad cold --

MR. OWEN: I think the Court could be confident --

QUESTION: -- should mitigate his crime?

MR. OWEN: -- the jury would not ponder very long over the question whether a serious cold meaningfully reduced the defendant's culpability in a way that made a

life sentence appropriate.

QUESTION: No, but by the same token, wouldn't it be fair for the judge to say, no reasonable jury, possessed of reasonable, human sympathy, could possibly find this mitigating? The bad cold could be kept out and there would be no constitutional error. Isn't that correct?

MR. OWEN: I think, Your Honor, that if no reasonable juror could possibly accord the evidence any significance to the ultimate sentencing decision, then it would be consistent with Lockett because Lockett does comprehend facts about the --

QUESTION: Okay. But you're -- you're worried about the other end of the spectrum.

MR. OWEN: Absolutely, Your Honor. This is not a case about a -- a defendant with a bad cold. This is a case about a defendant --

QUESTION: The circuit -- isn't --

MR. OWEN: I'm sorry, Your Honor.

QUESTION: The -- the question about what is a mitigating circumstance would come up under Texas' current instruction 2, the instruction that says that you can consider all the mitigating evidence, consider all the mitigating evidence. What is mitigating evidence? That's a discrete question from the one that's before us.

Whatever it is, it's a higher -- something higher than mitigating evidence.

MR. OWEN: That's right, Your Honor. The -- the severity test -- we don't know exactly how high it has to be set because in only one case that I'm aware of has the Fifth Circuit found it to be satisfied. So there are --

QUESTION: Why is it higher than mitigating evidence? I don't understand. I -- I thought you had just acknowledged in -- in the -- in the exchange with Justice Souter that a cold wouldn't be mitigating because it was not severe enough. Right?

MR. OWEN: No. I think -- I think --

QUESTION: Oh, that isn't the reason.

MR. OWEN: -- not because it was not severe enough, Justice Scalia. No.

QUESTION: I see. Well, why -- why did you agree with Justice Souter that a -- that a cold could be excluded?

MR. OWEN: Because I do think that -- that Lockett anticipates that there are facts about the defendant's character and background which, according to tradition, according to our understanding of what constitutes an appropriate basis for extending leniency, which does not limit itself to evidence that has a nexus with the crime, that -- that there would be room for a

judge to say, in an extreme case -- and I'm not saying this would be a routine judgment. I certainly think Lockett suggests it would be only a very unusual case where a trial court could say the proffered evidence --

QUESTION: Do you want to tell me why? All I asked is why. What is -- what is it that brought you to the judgment that a cold could be excluded? You say it is not because it is too insignificant. That doesn't count. And you say it's not because it has no connection to the -- to the criminal act that he committed. What -- what brings you to say that it can be excluded?

MR. OWEN: Because I don't think there's any dimension on -- in which it is relevant to whether the defendant deserves a life sentence or the death penalty.

QUESTION: It's not relevant because of what?

MR. OWEN: It's not relevant because it doesn't reflect any --

QUESTION: Because -- because colds don't count or, you know, what?

MR. OWEN: No, Your Honor. No. I --

QUESTION: I suggest that -- that the reason you feel it's -- it's not relevant is because either it's too insignificant or it has no relation whatever to the act that he committed, one or the other of those. Maybe both.

MR. OWEN: Well, I think that -- that if the

Court's -- let me back up and say that in any number of cases, this Court has recognized as mitigating circumstances which have no causal connection to the crime. The best example that I can think of off the top of my head being your opinion, Justice Scalia, in Hitchcock where the Court recognized that Mr. Hitchcock's having been a fond and affectionate uncle to the children of his brother was a fact which the sentencer had to be allowed to consider in deciding whether he ought to get the death penalty or some lesser sentence.

And so I think that at a minimum, adopting the nexus test or the unique severity test would require the Court to overrule all or part of a number of its cases, going all the way back to Lockett, and that there shouldn't be any basis for doing that since the Lockett rule is working perfectly well in practice. I think again --

QUESTION: Mr. -- Mr. Owen, is this position of the -- the severity and the nexus peculiar to the pre-1991 sentences? That is, have any cases come to the Fifth Circuit involving the new law that simply says the jury can consider all mitigating evidence?

MR. OWEN: No, Your Honor, and -- and given this Court's very clear approval of the new statute in Penry II where this Court observed in passing that this new statute

and its broad opportunity for the jury to consider mitigation was a clearly drafted, catchall provision that complies with Penry I, I don't anticipate that there could be a challenge raised under the new statute.

The only universe of cases that we are talking about is the universe of cases that were sentenced prior to 1991 when Texas changed its statute, and -- and that is a -- a small number of -- of cases. Probably 85 to 90 percent of the people on Texas' death row were sentenced under the new statute.

QUESTION: May I ask you a -- a question about the operation of the Texas rule? Is it your understanding that under the Texas rule, the evidence about how the defendant was nice to his nieces and nephews would be excluded?

MR. OWEN: No, Your Honor. That would -- that would come in absolutely.

QUESTION: You mean under the Texas rule it would come in?

MR. OWEN: Yes, Your Honor, because the nexus -- the nexus -- the nexus rule or principle or framework is a -- is a -- an appellate review doctrine. It's not -- it's not a trial doctrine. These rules were developed by the Fifth Circuit and the Court of Criminal Appeals in trying to apply this Court's decision in Penry. Going all the

way back to Jurek, it's always been clear that evidence of the kind that you describe, evidence of good behavior, loved his family, was a solid worker, all of that evidence comes in. And it's all -- it can all be given mitigating consideration under the old future dangerousness question. It has much broader consideration now under the new statute, but I don't think it's ever been -- it's never been the case that that -- that that evidence has been excludable.

QUESTION: Well, what -- what is wrong with the nexus requirement then if it doesn't keep the evidence out?

MR. OWEN: Because it denies the defendant the opportunity to have the jury -- it refuses to -- to allow a new sentencing hearing for a defendant who comes to the appellate court and says, at the time that I was sentenced, I presented evidence that was clearly relevant to my culpability, like a 67 IQ, and yet the jury wasn't instructed in such a way that they could give it effect. And the appellate court says, well, if you didn't show that your 67 IQ caused you to commit the crime, then you're not going to get that jury instruction. So it's -- there's no problem with your death sentence. That is the problem.

QUESTION: So what's the rationale for the nexus

rule? It's a -- a sort of a screening process the Fifth Circuit used to determine harmless error or?

MR. OWEN: No, Your Honor. I think that the -- the origin of the nexus language is in an attempt to understand what this Court meant in Penry when it said that evidence of a defendant's background and character is relevant to punishment because crimes that are attributable to bad background, mental problems, and so on might deserve a less serious punishment. And it is -- the Fifth Circuit has seized on, focused on that word attributable and from that elaborated this jurisprudence of causal, deterministic relationship.

QUESTION: Of course, in this case -- and I guess in all -- all of the cases involving the -- the old Texas instruction, the State court was proceeding not under Penry II, but just under Penry I. And it didn't -- Penry II is the case that required full consideration be given to all mitigating circumstances. Penry I didn't require that. It just said there had to be some -- some means of giving consideration to it.

MR. OWEN: Actually, Your Honor, Penry I does say full consideration. In the -- in the interim, this Court said in Johnson that the test was not necessarily full consideration but meaningful consideration.

And so our position is that at the time the

Court of Criminal Appeals decided this case and said that there was no need for an additional instruction, they -- at a minimum, the test was Johnson's demand that there be meaningful consideration and that under this set of instructions, there was no way to give meaningful consideration to the fact of a 67 IQ, and that that is the -- that is the way in which the Court of Criminal Appeals went astray.

And in fact, that's illustrated well, I think, by the portions of the Court of Criminal Appeals opinion that try to show how a jury, confronted with the future dangerousness question, could figure out a chain of a reasoning that would get you from this guy has a 67 IQ to, therefore, we can answer no to the future dangerousness question.

It is based on -- it is -- the -- the chain of inferences that the Court of Criminal Appeals suggests is contrary to the evidence that was presented at trial because it relies on characterizations of Mr. Tennard as a follower which are not in the evidence and aren't supported by the evidence.

It is actually contrary to the arguments that were made at trial because the prosecutor told the jury that they wouldn't be allowed to consider what happened or might happen in prison as a way of deciding the answer to

the future dangerousness question.

And it's contrary to this Court's cases like Boyde and Penry II where the Court says, in deciding whether a jury was able to give effect to mitigating evidence under the charge, you don't just look at the language of the charge, but you look at the evidence, you look at the arguments, you look at the context of the whole trial. The Court of Criminal Appeals effectively covered up the context of the whole trial and said let's see if we can imagine a trial with different evidence and different arguments that might have produced a different result. And that -- it may be many things, but that is not a fair reading of Penry. It is not a -- it is not a fair judgment of whether the jury in this case was able to give meaningful consideration to the fact of Mr`. Tennard's 67 IQ.

QUESTION: May I ask you, how -- how does the Texas nexus rule work with evidence that the defendant had a war record? He was a military hero of some kind, but he doesn't argue that affected his conduct in the trial, but just as a general matter, he's a man who should be given special consideration because of his -- his history?

MR. OWEN: That evidence -- I'm sorry, Your Honor.

QUESTION: What happens under -- in Texas with

kind of evidence?

MR. OWEN: I think that what the -- what the court would say is that you don't have to get to the question of whether he showed a nexus because that's the kind of evidence that has a natural home in the future dangerousness question.

QUESTION: Why does that have anything to do with future dangerousness? I don't understand that.

MR. OWEN: Your Honor, I believe what the -- I believe what Texas would say -- and I'm not saying -- this is my view. But I think what Texas would say is that in the abstract, good character evidence shows a lack of dangerousness, and for that reason, it can be given effect by returning a no answer to the future dangerousness question. I think the --

QUESTION: Or -- or that he might revert back to his good character in a way that someone who had never shown it might not.

MR. OWEN: That is correct, Your Honor. In -- in Boyde v. California, Your Honor observed that certain evidence of good character could be understood as showing that the crime is an aberration from otherwise good character.

At the same time, Justice Stevens, I think that it was -- it was correctly observed by the concurring

opinion in Franklin that there may be more relevance to some of those circumstances than just the fact that it doesn't make you dangerous.

But I think we are down the road from that point, and our point is this evidence, the 67 IQ, is evidence that a juror could reasonably conclude makes you more dangerous, and in the absence of some additional instruction, the jury simply had no vehicle for expressing the -- the conclusion that even having killed deliberately and even though this person poses a risk of future danger, because of his reduced culpability as reflected in his 67 IQ, a life sentence is the appropriate sentence.

QUESTION: Would anything do short of the catchall that Texas has had since 1991? You say the severity and nexus test is no good and you say that the current catchall is okay. Is there anything in between those two that would be constitutionally adequate?

MR. OWEN: In Penry, this Court suggested that it might be possible to define the term -- let me back up and say, remember, there's a -- the first special issue asks the jury whether the defendant killed deliberately and with the reasonable expectation that death would result. In Penry, this Court at least held out the possibility that there might be a definition of deliberately which the jury could be provided that would

focus their attention directly on the defendant's personal culpability. I am -- I -- I have tried to come up with that definition, but I -- it is hard to hard imagine.

I actually think that the best, clearest, most obvious solution is a supplemental question that effectively directs the jury, having decided the deliberateness and future dangerousness questions, to consider all the mitigating evidence and reach an appropriate judgment about the defendant's culpability.

QUESTION: I'm -- I'm a little puzzled about why you -- you're not asserting that this defendant was retarded. You're just asserting that he was not -- not too quick. Is that -- is that -- I mean, is that a mitigating factor? He's not retarded. He's just -- he's just not a whiz kid.

MR. OWEN: This Court in --

QUESTION: And -- and we should -- that has to be taken into account by the jury?

MR. OWEN: This Court in Bell v. Ohio, the companion case to Lockett, said that Bell's low average intelligence, or dull, normal intelligence, was a mitigating factor that the sentencer had to be allowed to consider. We know from the briefs in that case that the IQ score for Mr. Bell ranged between 81 to 90, so we know that 90 is something the jury has got to consider.

In Burger v. Kemp, the Court observed that Mr. Burger's 82 IQ was a -- was a mitigating circumstance which the jury would have to be instructed to consider, had it been offered by counsel.

We know from McKoy v. North Carolina that 74 is an IQ that counts as a mitigating circumstance.

I think every reasonable juror would understand, particularly when counsel is urging vigorously this is a very low IQ, as counsel did in this case -- would understand that it does substantially reduce moral culpability.

Your Honor, with the Court's permission, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Owen.

Mr. Marshall, we'll hear from you.

ORAL ARGUMENT OF EDWARD L. MARSHALL

ON BEHALF OF THE RESPONDENT

MR. MARSHALL: Mr. Chief Justice, and may it please the Court:

This case is squarely controlled by the Court's opinions in Graham v. Collins and Johnson v. Texas in which the Court rejected Penry claims based on youth and troubled upbringing.

In fact, Tennard's Penry claim, based on a completely unexplained IQ score, is much weaker than

Graham's or Johnson's for two reasons. First, Tennard's claim is governed by the AEDPA, which requires deference to the Texas court's reasoning in its opinion, and second, Tennard's disembodied IQ score has really minimal mitigating or aggravating significance within the special issues here because --

QUESTION: Well, it seems to me this -- this is not a case of -- of ineffective assistance of counsel where we're seeing if -- if it was proper to overlook the evidence at all. The evidence was entered, was admitted in the trial court. And the question is whether or not it was given proper consideration.

MR. MARSHALL: Your Honor, I -- I believe it was given proper considered. Whether it was considered as --

QUESTION: Well, but I mean, that's -- that's quite apart from the fact that, you know, it may be persuasive or not persuasive.

MR. MARSHALL: It is apart from that question, Justice Kennedy. However, in this case, if you take a look at counsel's strategy as a whole in -- in defending this case, he basically decided to paint Tennard as the less culpable party among his co-defendants and -- and paint him as a follower in illustrating that he allowed his prior rape victim to escape. In -- in questioning his role in the murders in this case, that was his strategy.

Counsel certainly didn't believe, I -- I don't think from the record, that -- that this IQ score had any independent mitigating significance beyond that follower theory because he didn't object to the -- the instructions or the special issues that were given and -- and didn't attempt to argue it outside of that context.

Everything that he placed before the jury was the idea that Tennard was a follower in this case and that that made him less culpable. And that is a fact that is mitigating within the context of future dangerousness, as this Court reasoned in Jurek, where they said the duress or domination of co-defendants would be cognizable within that special issue.

Here, counsel presented the argument and -- and some evidence to the effect that Tennard was a model prisoner when he was incarcerated in his prior -- for the prior rape conviction. He had no disciplinary infractions. This was clearly counsel's global theory, not that he was -- that he had any kind of diminished capacity to commit this offense.

QUESTION: Opposing counsel says, however, we don't even have to get to that argument, that maybe if the Fifth Circuit had considered the case aright, it would agree with you on that point. But it never got to that point. It applied its -- its two factors and therefore

never even had to consider what you're presenting to us. It just said no causality and not -- not severe enough. What -- what's your response to that?

MR. MARSHALL: Justice Scalia, I -- I would say that the Fifth Circuit was really looking at whether the State court's opinion was reasonable in this case. The -- the State court did apply Penry in a way to try to determine -- applied Johnson and Graham and tried to determine whether this evidence was relevant within the special issues as given and as defined.

QUESTION: Well, do you -- do you think the Fifth Circuit's uniquely severe, permanent handicap and nexus tests are the proper interpretation of the Penry cases?

MR. MARSHALL: I believe, Justice O'Connor, that they are one proper interpretation. They were developed as a screening test of sorts to try to engender some sort of consistency in the many, many, many Penry claims that they --

QUESTION: I mean, if we thought that the certificate of appealability should have been granted, I suppose you would then argue, when it went back, that those are the right tests to employ?

MR. MARSHALL: That would be one argument we would advance, Justice O'Connor. I -- that's sort of a

screening, a -- a prima facie analysis of -- of the Penry claim and it's designed to handle a wide variety of types of evidence offered.

QUESTION: I -- I have a lot of trouble seeing how the first uniquely severe, permanent handicap test is -- is proper in light of Penry. That's a pretty low IQ in this case, is it not?

MR. MARSHALL: We know now that it's a low IQ. I -- I don't know whether the jury was aware of that fact at the time of trial because it was never explained to them, Your Honor. And it was never contrasted with any other IQ score.

However, I think the Fifth Circuit's opinion is illustrative of -- of the difference between the -- the four-part test that's identified in the Fifth Circuit for determining Penry violations and the additional analysis that goes on top of it, which is even aside from this question of whether we have a nexus, whether we have a -- whether we have severity or permanence, these other factors, the court invariably ends up looking at whether the jury could consider that evidence within the special issues, whether it was relevant in -- in some way, in some meaningful way. And -- and that's the question the Court identified in Johnson and in Graham that -- that should be -- be the controlling factor in Penry cases.

So I think -- I think the Eighth Amendment only requires looking at Johnson and Graham, that -- that the jury be able to give effect in some manner to the evidence introduced, not that it be able -- not that it's required to give effect in every conceivable way. And so the issue isn't really whether Tennard can identify some relevance for this evidence beyond the special issues that were given, but whether he can -- whether we can look at the record and see if it had some relevance within those special issues that was available to the jury.

And I think that's exactly what the State court did in this case. They looked at deliberateness and as Tennard has argued in his brief, I think quite eloquently, deliberateness was truly designed to deal with the question of party liability. Whether the defendant had a reasonable expectation that death would occur.

And in this case, where a party instruction was given during the guilt/innocence phase, there was that lingering question of whether Tennard was the primary actor here. And so that's exactly how Tennard's counsel argued it to the jury. He suggested that -- that Tennard was a follower. He wasn't the primary here. He may not have even stabbed the victim in this case. It might have been his co-defendant who may be lying or -- or minimizing their own responsibility in order to cover their tracks.

And so that's the theory before the jury from counsel's perspective, and that fits squarely within deliberateness here.

QUESTION: All right. Could I -- can I -- can I interrupt you there? It seems to me that under the -- let's take the first prong of the First Circuit's test, the unique severity requirement, that in fact, if the unique severity requirement is a proper reading of -- of Penry, then it seems to me we've read that evidence, in effect, right out of -- of relevance and admissibility. There are millions of followers in this world. There's no way in the world, I would suppose, on this evidence that -- that one could plausibly argue that this individual's condition was a uniquely severe follower kind of personality, and therefore it would be excluded. So it seems to me that the unique severity requirement would preclude the argument you just made in support of the -- the court's position.

MR. MARSHALL: Justice Souter, that is not a question of admissibility, though. And -- and here what the court was looking at on appeal --

QUESTION: No, but it -- it -- as your brother on the other side said, if it's constitutional relevance, it could be a basis for an admissibility ruling.

But let's, as you say, take the case that we've

got and -- and on the case that we've got, the -- in effect, the Court is saying there's no need even to get to the argument that counsel for the State of Texas has just made because on -- on no reading of uniquely severe could we say that this is uniquely severe evidence. And therefore, we don't even have to get to the question of whether sufficient consideration could have been given to this under -- under Penry.

MR. MARSHALL: Your Honor, it's -- it's a combination question that we're looking at here. It's whether the evidence had -- had mitigating significance and then whether that significance was beyond the scope of the special issues. I think that --

QUESTION: But you say -- but as I understand it, the circuit and the Court of Criminal Appeals says we don't even have to deal with the substance of these issues unless the evidence is indicative of something which is uniquely severe, which clearly this is not. So that on the -- as I understand the circuit's position, there would be no need for you to make the argument that you just made to us about the adequacy of consideration that could be given under -- under Penry because on the uniquely severe test, we don't even -- it's not uniquely severe under any reading and therefore we don't even have to get to the question of substance.

MR. MARSHALL: Your Honor, that may be true. However --

QUESTION: Well, if it's true, it's a violation of Penry, isn't it?

MR. MARSHALL: I -- I disagree, Your Honor. I think that -- I think that the uniquely severe, permanent handicap test that was identified in -- in the Fifth Circuit's en banc opinion in Graham is basically a description of Penry's evidence. And so the question is --

QUESTION: I think you're wrong about that. If this -- if the Fifth Circuit's test is a misinterpretation of Penry, then I take it you lose this case. And if the Fifth Circuit has misinterpreted Penry's -- what Penry means --

MR. MARSHALL: No, Your Honor. The Fifth Circuit's test is not even at issue in this case. It was at issue in the companion case Smith, but here what we're looking at in the denial of COA context under the AEDPA is whether the State court's treatment of the issue was reasonable or not. And I think --

QUESTION: It's the same test, isn't it?

MR. MARSHALL: Not quite, Your Honor. The -- the State court has taken a slightly different tack. They did not address the nexus, severity, uniquely severe test

when they addressed Tennard's evidence in this case in Ex parte Tennard, as contained in the joint appendix. They did not apply that test.

And in the past, they have taken different approaches over nexus, for example. The -- the State court has always held that nexus is established automatically if a defendant introduces evidence of mental retardation, and they have granted relief in numerous cases on that very point, that there's several cases in my brief at pages 27 and 28 that I've identified where the -- I think there are six or seven -- where the State court granted relief saying that we know mental retardation is uniquely severe because not only, as it was described in Penry, but -- but in earlier cases, that -- that it affects the defendant's ability to control their impulses, it affects their ability to learn from their mistakes. These are the things that are mitigating and these have an automatic nexus.

So there's a difference between the way the Fifth Circuit has applied it and the way the State court has applied it, and I don't --

QUESTION: But what is the State -- I thought that at one point you told us that -- that the Fifth Circuit got the severity and nexus threshold requirements from the State, that the State initiated those

requirements. And now you say but in Tennard's case, as distinguished from Smith, the State applied some other test?

MR. MARSHALL: Your Honor, the State court initially began by asking -- by identifying more or less four factors, whether the -- whether the evidence was involuntary disability, whether it was permanent in nature, whether it was severe enough, and whether there was at least an inference of nexus from the evidence. Those four factors parallel, more or less, the uniquely severe, permanent handicap language from Graham.

And so the two tests have gone in parallel through the years, although the State court has vindicated many more Penry claims than the Fifth Circuit has simply because that's where the meritorious claims were found and that's where they got relief. So the Fifth Circuit has never been faced with the number of cases that the State court was that presented evidence that rose to that level so that I think in retrospect, the Fifth Circuit's test becomes a little bit severe when it is viewed in that vacuum but when it's compared with the way the State court has done it, basically all of the meritorious claims have been vindicated.

QUESTION: But you -- you seem to -- what you said were -- you recited four factors, but it sounded like

severity was one and nexus was another.

MR. MARSHALL: Yes, Justice Ginsburg, that is correct. However, the nexus requirement has been applied differently by the State court.

QUESTION: You say it has not been applied as a causation test. Is that it? Association but not causation? Is that a fair --

MR. MARSHALL: That is a fair statement of it, Justice Souter. It's -- it's whether the jury could infer a connection.

QUESTION: I'm rather mixed up. I mean, I'm taking your brief on pages 10 through 12, and reading your account of it, what I thought happened is that when the defendant, who had been sentenced to death, went to the district court and then to the Fifth Circuit, the Fifth Circuit did not say, just as Justice Souter said -- it did not say this evidence helps to show this person will not commit the crime. Rather, they said, when faced with the argument, this evidence shows he's more dangerous because a mentally retarded person at this level might commit more crimes. They didn't decide that issue.

And then reading from your brief, it said the reason is because the evidence comes far from demonstrating that Smith suffered from a, quote, uniquely severe, permanent handicap. End quote. And that the

criminal act was attributable to this condition. Am I quoting from the right place?

MR. MARSHALL: I think that's the brief in Smith, Your Honor.

QUESTION: That's the brief in Smith. All right. So where -- what -- what was the situation in -- in this -- Tennard?

MR. MARSHALL: Justice Breyer, the -- the evidence is an interesting contrast between the two cases. Smith introduced more than abundant evidence, I think, of -- of -- that were -- that was mitigating, in effect, the fact that he had an antisocial personality disorder, all of these other factors. Tennard's IQ evidence came in on a prison record form with just a sole number 67. The -- the parole officer who testified identified the number and then admitted on cross that he had no idea who had given the test, he had no idea what kind of test was given, when it was given. All of these factors were -- were laid out there.

QUESTION: When you say no idea what kind of a test, it was recognized it was an IQ test, wasn't it?

MR. MARSHALL: That's correct, Your Honor. It was recognized as an IQ test. And -- I -- my point was that it wasn't identified as a short-form test, a full-scale IQ score.

QUESTION: Isn't that something the State would know if it were given in a State prison? If the tests were given at a certain period of time in a State prison, that's -- that's something that the State could easily find out what were they giving at the time.

MR. MARSHALL: Your Honor, it was not contained on the -- the social and criminal history form that was introduce, and that's at page 63 of the joint appendix. It -- it's -- it's not in that form. And the parole officer who was called as a witness by the defense who brought this form didn't know the answer to that question either.

QUESTION: But somebody connected with the State correction system would know, would they not?

MR. MARSHALL: Presumably someone would know. The psychologist who administered the test would know.

QUESTION: Well, the State could have informed itself fully of what goes on at State prisons with regard to IQ tests.

MR. MARSHALL: That's possible, Your Honor, except that it was the defendant's evidence in this case. And I don't think that the State necessarily looked at it as any significant evidence, just like I don't think the defense looked at it as significant evidence.

QUESTION: But all of this goes to the weight

that the evidence might have, but it -- what -- what does it have to do with whether it is appropriate to erect this threshold test for considering whether it even needs to be considered as -- as an issue on appeal?

MR. MARSHALL: Justice Souter, under -- under both Graham and Johnson, we're trying to figure out whether the evidence had some relevance within the special issues, not whether it had every bit of relevance it should have had, but whether it just had some meaningful relevance. And so I think looking at the weight of the evidence is part of that analysis. We have to look and see what the jury would have -- what meaning the jury would have given --

QUESTION: No, but it -- it -- you -- you don't -- I take it your argument is not that they couldn't give it any weight at all.

MR. MARSHALL: Correct, Your Honor.

QUESTION: So the -- the -- what I'm going to call the screening question we have before us is does a Court even have to get into the use that might be made of that evidence, whatever its weight, unless that evidence satisfies these two threshold requirements --

MR. MARSHALL: Your Honor, those threshold --

QUESTION: -- or the State's equivalent of the two threshold requirements? Isn't that the issue before

us?

MR. MARSHALL: I believe that is the issue, and I might add that those threshold requirements are questions as to what relevance the evidence had and how it could have fit within the special issues. So when we're looking at severity and nexus, we're looking at how does the evidence mitigate moral culpability, how does it tend to excuse the crime.

QUESTION: But the -- the circuit, I take it, would say, all right, given the fact that there may be an argument over the weight to be given, accepting that, we don't have to decide whether enough weight could be given to that evidence for Penry purposes unless that evidence indicates something that is uniquely severe and was the cause of the crime.

MR. MARSHALL: Generally speaking, Justice Souter, the evidence that fails to pass that test does have some relevance within the special issues because, generally speaking, it tends to either show that the crime was an aberration -- what we're looking for is something that's -- when we're trying to identify Penry error, we're looking at evidence that's solely aggravating in answering those special issues, not necessarily evidence that just has some relevance outside those special issues, just whether it has only aggravating relevance within them or

no relevance within them.

And I think that's what the Court was talking about in Graham and Johnson, where we looked at youth and -- and determined that, yes, youth had -- may have some significance outside future dangerousness, but the fact that it has some significance within future dangerousness cures any potential Penry error. And that's exactly what these factors that the Fifth Circuit has identified, and the State court to a lesser extent, are designed to root out, to try to catch those types of evidence and determine whether they indeed had some relevance or not.

QUESTION: Can I --

QUESTION: You're saying --

QUESTION: -- procedurally I -- I see what -- what we have in -- in your case is it's -- there's a reference to lower court in your brief, and I'm not sure which it is. I thought that what had happened is the Fifth Circuit had been fairly been clear that their two controversial matters determined this. But the fact is -- and I'm trying to get the procedural part right -- is they didn't say anything. And so all we have is the lower -- is the lower court opinion. Is that right?

Did -- did the -- and the lower court had said, well, one of the reasons that they lose is because the future dangerous part of the Texas test gives effect to

this. And that's where we are.

MR. MARSHALL: That's correct. The -- the Fifth Circuit --

QUESTION: So what you've done is you got rid of the other case which did clearly present it.

MR. MARSHALL: Yes, Your Honor.

QUESTION: And now what you're saying now is this case doesn't really present the issue that we took it to deal with.

MR. MARSHALL: Correct, Your Honor. This case -- the Fifth Circuit looked at the State court adjudication --

QUESTION: Now, what do you suggest we do? I mean, suppose I happened to think that -- that the Texas Fifth Circuit is applying two tests that are really erroneous and not a correct interpretation? If I -- if I thought that was a big issue and maybe that was so, have you any suggestion as to how we should proceed?

MR. MARSHALL: Well, Your Honor, contrary -- I mean, and in contrast to Penry and the prior cases that came before the Court, this is not here on de novo review. We're now bound by the AEDPA, and we're looking at reasonableness. And so I think the Court is necessarily looking at it from a different angle now, and -- and so whether the Court simply disagrees with the test is not an

issue here and really wouldn't be merited --

QUESTION: What about saying we've seen in other cases like Smith, for example, that the Fifth Circuit has continuously denied review or reversed or affirmed or whatever on the basis of these two tests? And so we think it's a reasonable assumption that that played a role in their decision here too, particularly since whether this case does fit within Graham and -- and the other one you cited, is certainly open to reasonable argument. Now, what would be wrong with taking that approach?

MR. MARSHALL: Your Honor, I think that again, if the Court disagrees with the test that was applied in the Fifth Circuit, the Court is still stuck with -- with determining whether it was the State court's opinion that was reasonable or not. Now, the Court could await another case raising the issue and there are more. By my last count there are approximately 100 and may still -- on death row in Texas who were sentenced under this sentencing scheme, and so I'm sure those claims will arrive again some day.

But -- but in this case, I don't think the Court has that option when applying the AEDPA to the State court's opinion. And further, I -- I think what we're really looking at is whether the Fifth Circuit's -- or -- or whether the -- the Federal court's application of the

AEDPA was debatable. So we're even one step further removed from reasonableness in that sense. I don't think that this is the case for it, and --

QUESTION: Could -- could I get back to what you had just said before Justice Breyer asked you the question? You -- you were -- you were describing why it is that these two tests do, indeed, bear upon the Penry determination. You -- you said, as I understand it, if it isn't severe enough, it can be taken into account in the future dangerousness determination. Right? If it's too severe, the only way it can cut is to make him more dangerous in the future, but if it's -- if it's milder, it can be -- it can be -- it can cut both ways.

MR. MARSHALL: Generally speaking, yes, Your Honor.

QUESTION: Okay. Now, what about the other one? What about the -- the nexus requirement? How does that bear upon the Penry -- the Penry issue?

MR. MARSHALL: We're -- in trying to -- in trying to analyze the -- the Penry claim, we're trying to figure out whether -- whether the evidence introduced at trial had -- had significant relevance to moral culpability that was outside the scope of the special issues. And I think it's the combination of those factors, not necessarily each one, one by one, that gets

you there, but the nexus requirement basically just asks the question whether it actually has relevance to moral culpability and whether that relevance reaches the level that it placed it outside the special issues.

QUESTION: All right. With respect to the first, I can understand why it bears upon the Penry thing. With respect to the second, it seems sensible, but I don't -- I don't see how it has any bearing on the -- on -- on whether you can give that -- that factor some effect under the special issues.

MR. MARSHALL: Well, for example, Justice Scalia, I -- I think that the evidence of follower status, for example, that -- that was argued extensively to the jury in this case would have a nexus to the crime because, of course, it involved the circumstances of the crime. And so, therefore, it would fall within the special issue of deliberateness where the jury is asked to resolve the issue of -- of the specific intent required in a party situation like this.

QUESTION: Yes, but I mean it -- it accidentally had a nexus to the crime because, you know, he claimed that he was a follower in this crime. What if he introduced the same evidence? He has a low IQ and in all other situations he's a follower, but there's no direct evidence that in this crime -- in this crime he was.

MR. MARSHALL: Well, then I think --

QUESTION: Why do you need the nexus in order to make it considerable by the jury?

MR. MARSHALL: Well, then I would question whether the evidence actually had relevance to moral culpability if it had no connection to the defendant or his crime. And so I think that's the inquiry we're looking at here, is -- is -- and again, it's part of the -- the multi-part test that the Fifth Circuit and the State court have devised.

And I think the best explanation occurs in -- in the Fifth Circuit's opinion in Robertson v. Cockrell which was handed down last year. It was an en banc opinion at 325 F.3d 243. The court summed up its entire body of Penry jurisprudence there and identified the four factors that are relevant, voluntariness and so on.

QUESTION: Would you clarify one thing for me? I may have missed it. The nexus requirement -- does that require a nexus to the crime or a nexus to the likelihood that he'll be dangerous in the future?

MR. MARSHALL: It -- it requires a nexus, at least an inferential nexus, to the crime itself, Your Honor.

QUESTION: Well, then -- then I take it being a veteran or a war hero or something like that, which

clearly had nothing to do with this particular crime -- that would not be -- not satisfy the nexus requirement.

MR. MARSHALL: It would not, but it -- but -- but again, that evidence would be relevant within future dangerousness because it would go to good character. So while good character evidence doesn't necessarily have a nexus to the crime, good character evidence is relevant within the -- the special issues, and the Court held that in Jurek that --

QUESTION: All right. What -- what about the -- the case of the individual with the -- with the abused childhood? Assume -- assume a case -- I think one of the briefs mentioned this. Assume a case in which the parents didn't teach the child to be a thief or a murderer or to commit crimes. They simply abused the child. It's -- it's clear that -- from our cases that that evidence would be admissible. What I don't understand is how that evidence could ever satisfy the nexus test. There's no way you can say as a causal matter that the fact of the abusive childhood caused this crime, which I take it is what the -- the Fifth Circuit would require. Am I -- am I missing something?

MR. MARSHALL: The rule is not that strict, Justice Souter. It -- it requires an inference of causation. And I think child abuse is most--

QUESTION: Well, I mean, that's -- that's what I mean by cause. How could you ever infer causation?

MR. MARSHALL: I think child abuse is -- is truly analogous to youth, for example, which I think the average juror does understand has a connection to moral culpability. And it's -- as youth is something that most people have common --

QUESTION: No. But you're -- you're -- I -- I don't mean to be short with you, but I think you're changing the terms of the question. It isn't whether there is an association with moral culpability. The issue, as I understand it, is whether this mitigating evidence is relevant to this crime in the sense that there is a possible causal inference, not some broader association. Am I wrong about that?

MR. MARSHALL: No, you're not wrong, Justice Souter. I -- I think that is --

QUESTION: Okay. Then how can you draw the causal inference? Why -- why on that -- on that threshold relevance understanding, why -- why ultimately wouldn't we have to say, well, under the Fifth Circuit rule, the abused childhood evidence really is irrelevant? It can never be considered.

MR. MARSHALL: If child abuse was the evidence presented in this case, we may have a bigger problem, Your

Honor. That is a more difficult topic. However, it's not the case here.

QUESTION: But it's utterly inconsistent with our cases, isn't it? I mean, haven't -- isn't it perfectly clear that that evidence is admissible?

MR. MARSHALL: It is, of course.

QUESTION: And -- and must be given we'll -- let's use the term, meaningful consideration, by the jury. And -- and it couldn't be given any consideration on the causation -- if there's a causation requirement.

MR. MARSHALL: I don't think that's absolute, Your Honor. I -- I think there may be some causation argument where we're looking at, as I said, common knowledge. Jurors -- jurors know that people who are abused as children turn out a certain way and -- and that it's --

QUESTION: Yes. I -- that's what I would say. I -- I don't know why you concede so readily that it has no -- no causal nexus. I -- I think the reason that -- that we usually allow that as mitigating evidence is that, you know, you -- you beat a kid cruelly and he turns out to be a cruel kid. I don't know why -- why you -- why you make the concession.

Has the Fifth Circuit ever used its nexus requirement to exclude evidence of severe maltreatment as

a -- as a child?

MR. MARSHALL: Your Honor, I -- I'm not aware of cases that -- that they excluded evidence of severe child abuse. However, in some cases where there was mild or moderate, sketchy evidence of child abuse, they have used that --

QUESTION: That's the other factor. That's not the nexus factor. That's the severity factor.

MR. MARSHALL: Correct, Your Honor.

QUESTION: I -- I guess that gets us -- I guess the difference between your answer to Justice Scalia and your answer to me gets -- gets us to the question, what do they mean by cause? And -- and I thought the Fifth Circuit was requiring something much more than, as you put it, an association with the personality. I thought it was requiring something more specific. But maybe I'm wrong.

MR. MARSHALL: I --

QUESTION: I mean, your answer to Justice Scalia suggests that I -- that I am wrong, that the circuit isn't requiring what I thought it was.

MR. MARSHALL: Your Honor, I think in Robertson, the most recent case in which the Court took up the issue of child abuse -- and I see my red light is on, but I'll finish answering.

QUESTION: Thank you, Mr. Marshall.

Mr. Owen, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT C. OWEN

ON BEHALF OF THE PETITIONER

MR. OWEN: Thank you, Mr. Chief Justice.

QUESTION: Mr. Owen, is your understanding the same as Mr. Marshall's that we're talking about a universe of 100 cases?

MR. OWEN: I -- I tried to count them myself, Your Honor, and my number was closer to 50. And I don't know on what -- I don't know where or how we disagree, but I think the universe of cases is -- is obviously more than perhaps 40 and -- and I guess by his count fewer than 100. Again, it's only the people who were sentenced -- and again, I think we need to emphasize that a ruling in favor of Mr. Tennard would only affect the sentences of people who introduced mitigating evidence at their trial that had relevance to moral culpability outside the inquiries that the jury received in its instructions. So, again, there would be a subset beyond the number of cases just tried prior to 1991 that would include the cases in which certain kinds of mitigating evidence like the 67 IQ in this case were introduced.

Let me address Justice Breyer's question first about the Fifth Circuit's treatment of the claim in this case. Justice Breyer, I'd like to refer you to pages 20

to 22 of our brief, and at those pages we described the way in which the Fifth Circuit analyzed the claim in our case. And I think it is -- it is the case that they applied both the unique severity test and the nexus test and found us wanting on both scores. And then ultimately, in the way that the Fifth Circuit has, having reached the merits, it said that we didn't get a COA. So I'm -- I'm not sure. I think -- but that -- they did -- they did apply the test, and so I don't think there would be anything inappropriate about this Court assessing the appropriateness of the test.

With respect to the trial record, I do want to emphasize that the word follower does not appear in defense counsel's closing argument. Defense counsel did not make the argument that Mr. Tennard was a follower, that his 67 IQ made him a follower, that he followed other people in committing this crime. There is only one -- one comment from defense counsel, a single sentence in the course of the closing argument which says with respect to an earlier crime that Mr. Tennard was involved in, that he was not the leader. It doesn't say, and he was less culpable than anybody else. He doesn't say, he only got involved in that crime because he was following somebody else.

This is not a case that was defended at trial on

the theory that Mr. Tennard, because of his 67 IQ, is a follower. It is a case that was defended at trial on the theory that having a 67 IQ is the sort of globally disabling quality that affects everything Mr. Tennard does, every action that he takes, every thought that he has, every judgment that he makes.

QUESTION: Was that argument made?

MR. OWEN: It is certainly argued, Your Honor, that -- as defense counsel puts it to the jury, he says, you have a man who has an IQ that is that low, and he says to the jury, none of you know what it's like to have a 67 IQ.

And I think -- and the -- and the prosecutor, for his part, doesn't dispute the lowness of the IQ score. The prosecutor's argument isn't, oh, come now, a 67 IQ isn't that low. The prosecutor's argument is, under these instructions, ladies and gentlemen, you're not asked why Mr. Tennard became a danger. You're being asked whether he's a danger. That's the only thing that the -- that the jury was asked to consider.

I think that -- that it's important to keep in mind the quality of this mitigating evidence.

It also was suggested that counsel didn't object to the instructions, didn't ask for a special instruction. While he did not ask for a special instruction at the

point of the jury charge, there is a pretrial motion filed by defense counsel which complains that the Texas statute does not permit the consideration of mitigating circumstances, which asked for definitions of the key terms in the statute, and that was denied. So it's -- it's certainly not a case in which there was -- it was -- you know, the people at trial were unaware of this problem with the instructions. That's evident from defense counsel's argument.

I think that the -- the one -- one thing I want to emphasize about the nature of this mitigating evidence is the way in which it's -- it's -- it does affect moral culpability. And the quote I found that I liked the best on this actually is from a concurring opinion in Skipper where, in the course of explaining why they felt that evidence of good behavior in jail didn't qualify as Eighth Amendment mitigating evidence, Justice Powell joined, among others, by Chief Justice Rehnquist, said, evidence of a reduced capacity for considered choice bears directly on the fundamental justice of imposing capital punishment. This evidence in our case is evidence of that kind of reduced capacity that the jury had no vehicle for giving that kind of mitigating effect to in imposing sentence.

We'd ask the Court to reverse the judgment below.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Owen.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)