No. 12-82

IN THE SUPREME COURT OF THE UNITED STATES

RICK THALER, Director, Texas Dep't of Criminal Justice, Correctional Institutions Division,

Petitioner,

v.

ROGER WAYNE McGOWEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

*****Capital Case*****

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

NOW COMES, Respondent, Roger Wayne McGowen, and files this Motion for Leave to Proceed *In Forma Pauperis*, and would respectfully show the Court as follows:

1. Mr. McGowen is now and has always been eligible to proceed in the federal courts as a pauper.

2. In the proceedings in the United States Court of Appeals for the Fifth Circuit and in the United States District Court for the Southern District of Texas, Houston Division, counsel was appointed for Petitioner in accordance with 18 U.S.C. § 3599 (requiring appointment of counsel in capital habeas corpus proceedings for a person "financially unable

to obtain adequate representation or investigative, expert, or other reasonably necessary services").

WHEREFORE PREMISES CONSIDERED, Respondent, Roger Wayne McGowen, respectfully requests that the Court grant leave for him to proceed *in forma pauperis*.

Respectfully submitted,

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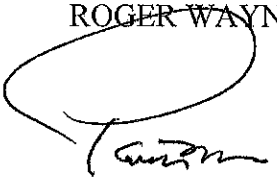

By: Paul E. Mansur

Certificate of Service

I certify that on October 22, 2012, I served, by first class U.S. mail, a true and correct copy of the Motion for Leave to Proceed *In Forma Pauperis*, upon opposing counsel at the following address:

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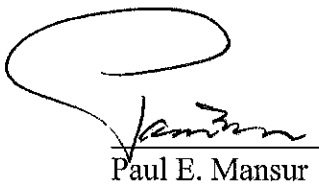

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BRIEF IN OPPOSITION

Respectfully submitted,

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THIS IS A CAPITAL CASE

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BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent, Roger Wayne McGowen ("Mr. McGowen"), respectfully requests that the Court deny Petitioner's request that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Mr. McGowen is dissatisfied with Petitioner's characterization of the factual underpinnings and the legal background of this case. Mr. McGowen provides this brief statement of the case to correct a number of mischaracterizations in the State's petition for writ of certiorari.

A. During the sentencing phase of his 1986 capital trial, Mr. McGowen presented important and compelling mitigation evidence; however, because of flaws in Texas's then capital sentencing scheme, which relied upon three special issues, the jury that sentenced Mr. McGowen to death could not fully consider and fully give effect to this evidence.

Petitioner relies heavily on the testimony of Norman Ray Willis, Jr., characterizing him as the State's "central witness." *Petition for Writ of Certiorari*, p. 8. However, the defense subjected Willis to thorough cross-examination that undercut many of the claims Petitioner makes. Any account of Willis's testimony must consider this impeachment; nevertheless, Petitioner ignores all of it. Though Willis was 13 years old when he found Mr. McGowen, he was hardly harmless. After being kicked out of his father's house, as well as the houses of several foster parents and an aunt, Willis found himself on the streets. *34R. 86-87, 174-75.*[1] A friend of Willis's father introduced him to Mr. McGowen, and Mr. McGowen was generous enough to take him in. *34R. 86-87, 173-74.* At that time, Mr. McGowen was around 17 or 18 years old. Willis also met Melvin Jackson, who was older than both Mr. McGowen and Willis. Petitioner insists that Mr. McGowen picked all the robbery targets and was running the show during the robberies. *Petition for Writ of Certiorari*, p. 9. However, Willis testified that Jackson picked most of the robbery targets, and in at least one case, Willis picked the place because he frequented the establishment. *34R. 97, 101, 119.* In fact, the store owners recognized Willis even though he had a bandana tied around his face. *34R. 122-23.*

---

[1] In this brief in opposition, the reporter's record of the trial proceedings shall be referenced as "R." preceded by the volume number and followed by the page number. The clerk's record in the state court shall be referenced as "C." followed by the page number. The state habeas record shall be referenced as "SHR." followed by the page number. The record on appeal to the Fifth Circuit shall be referenced as "ROA." followed by the page number. All other documents shall be referenced by title, followed by the page number and the docket reference, if any.

Contrary to Petitioner's characterization, Willis was no one's pawn. He admitted that he was not afraid to carry guns and to point them at people during the robberies, and he even carried guns during robberies in which Mr. McGowen was unarmed. *34R. 185.* He also admitted that he committed robberies alone without Mr. McGowen, Jackson, or anyone else. *34R. 177, 181.* At the time he testified, he was serving time in the Texas Department of Criminal Justice for six aggravated robberies and an aggravated assault. *34R. 85.* Willis stated that he meets violence with violence, and he admitted that in prison he had shanked, doused hot water on, stabbed, and sexually assaulted other inmates. *34R. 176-77, 189.* He had been denied parole at least five times. *34R. 176-77.* Initially, he insisted that he agreed to testify against Mr. McGowen in revenge, but he also admitted that the district attorney had agreed to write a letter to the parole board, though he insisted that he had already made up his mind to testify before he received this offer. *34R. 141-46.* Also, he had one pending robbery charge, and the district attorney had agreed to extend him immunity for his testimony. *Id.*

Defense counsel did not seem overly concerned with Willis's testimony. During closing arguments, defense counsel discussed the difficulties Mr. McGowen faced when he was 16 or 17 years old and was living on his own. Defense counsel pointed out, "He's being followed around by the likes of no-account Norman Willis." *35R. 557. See also 35R. 573-74.* Also, George Godwin, second-chair counsel, provided the State an affidavit in state habeas in which he gave his impression of Willis's testimony, particularly after talking to many of the jurors:

> In talking with the jurors after the trial, it was patently apparent to everyone that Willis was lying through his eye-teeth, and that the fact that Willis was lying did not make any difference in the verdict. The jurors all stated that they based their verdict on the other evidence admitted during the trial and not solely on the testimony of Willis.

SHR. 166. Frankly, the facts are not as clear-cut as Petitioner makes them out to be, and Petitioner failed to discuss the extent of Willis's complicity in the litany of robberies and failed to mention Jackson, who took a leading role in much of them, at all.

More importantly, Mr. McGowen's mitigation evidence was not nearly as feeble as Petitioner makes it out to be. The jury heard evidence about his disadvantaged background; the death of his parents; his young age; and his kindness to others, respectfulness, love for his family, and diligence at work. Rhonda T. Edwards was Mr. McGowen's younger sister by about three years. *35R. 513-14.* Including Mr. McGowen, she had nine living siblings; her older brother was deceased at the time of trial. *Id.* Rhonda lived with Mr. McGowen about half her life. *Id.* She and Mr. McGowen had different fathers, and when they were young, they lived for a period with their mother, but later they moved in with their grandmother. *35R. 514, 521.* When Mr. McGowen was in grade school (around the fifth grade), he moved in with his father and lived there for a number of years. *35R. 514.* However, his father died, and when he was about 16 years old, he moved into an apartment on his own. *35R. 514, 521.* Rhonda lived there when she was 12 or 13, along with Mr. McGowen's girlfriend and her two children. *35R. 514-15, 518-19.* Rhonda recalled that Willis lived there, and an uncle occasionally lived there also. *35R. 515.* Rhonda testified that Mr. McGowen took care of her financially when their mother, who was a welfare recipient, was unable to do so. *35R. 516-17.* She stated: "My brother helped us a lot. He always helped us when we needed it and, you know, took care of us." *35R. 517.* He also was a father figure to her, directing her in how to behave appropriately, and he taught her how to fill out job applications. *35R. 516-17.* Mr. McGowen likewise took care of the other people who lived in his apartment, which included his girlfriend and her two children. *Id.*

Rhonda was unaware that Mr. McGowen had been involved in any thefts or robberies. *35R. 520.* She testified that Mr. McGowen and another sister attended a vocational school. *Id.* On February 14, 1986, Mr. McGowen's mother died. Rhonda testified that she was a good person who though she was poor, tried to instill good qualities in her children, including Mr. McGowen. *35R. 521.*

Valerie McGowen was Mr. McGowen's older sister. She had lived with him throughout her childhood, including at his apartment with his girlfriend (who Valerie referred to as Mr. McGowen's wife) and her children. *35R. 522-23.* Valerie testified that Mr. McGowen worked at a restaurant, and he woke up early every day to work and support all the people in his apartment. *35R. 523-24.* For a period, Mr. McGowen was Valerie's sole support. *35R. 524.* On cross-examination, Valerie testified that Mr. McGowen graduated from school. *35R. 526-27.* She stated that he was articulate and intelligent. *35R. 528.*

Petitioner also ignores important aspects of the closing arguments, by both the defense and the State, during the punishment case and instead suggests that the defense simply threw in the towel. *Petition for Writ of Certiorari*, p. 11. Instead, both the district court and the Fifth Circuit found closing arguments crucial to the underlying *Penry* error. Petitioner's brief mention of closing arguments hardly does the issue justice.

Mr. McGowen's defense counsel each argued that their client's life should be spared the death penalty and that he should be punished with the onus of life imprisonment. George Godwin argued that Mr. McGowen's qualities growing up disadvantaged, poor, black, uneducated, and from a broken home tempered his moral culpability in a manner in which other people without such excuse could not expect: "[I]s there any among you who can deny that growing up in Houston black,

poor, uneducated, and from a broken home is a considerably different experience than what most of us are used to?" *35R. 557.* He continued: "Is there any among you who think that Roger Wayne McGowen had the same chance, had the same ability, had the same intelligence to overcome problems confronting him that some of us did?" *Id.* Godwin also pointed out what Mr. McGowen was up against from a very young age:

> He's sixteen or seventeen years old, and he's got an uncle. He's got a wife. He's got a sister. He's being followed by the likes of no-account Norman Willis. He's trying to hold a family together, solve their problems, help get them down the road of life, and he has to take care of himself. You need to consider that. You may reject it, but please consider it. God did not give all of us the same ability to solve our problems.

Id. Lead counsel, Ronald Mock, continued these themes: At age 16 or 17, Mr. McGowen had an apartment, was living on his own, and had to take care of two sisters, his girlfriend and her two children, and himself, burdened as he was with Willis and this uncle that would float in and out of the household. *35R. 573-74.*

The State countered these arguments and in the process limited the jury's ability to consider the evidence within the sole confines of the special issues. The prosecutor pointed out that defense counsel did not talk about the special issues but instead only referred to the evidence in terms of "life and death." *35R. 579.* He asserted that the defense ploy was to take the jury's focus off the special issues and burden the jury with a guilt trip about whether Mr. McGowen deserved to live or die. *Id.* He told the jury to reject the guilt trip and to stay focused on the special issues. *35R. 579-80.* He did this by reframing the issues, particularly the future dangerousness issue, in terms of "self-defense." *35R. 580.* "It's a matter of self-defense. We're talking about survival, folks. Survival. We're talking about future victims. Let's not kid ourselves, they're out there somewhere." *Id.* He

continued this theme and attacked Mr. McGowen's evidence of youth[2] and disadvantaged upbringing as a cop out and a form of putting the blame on someone else. *35R. 581-84.*

> Think about this. Is it a weakness in our society if those of use who are law-abiding cannot and do not have the internal fortitude to make a decision that has to be made? We all know it's a difficult job. Nobody enjoys taking another human life. If you did, we wouldn't have wanted you on the jury. But let's talk about it. *You have to make a very important decision concerning the self-defense of our society.* It was easy for Roger McGowen to go in and take someone's life, *but in Defense counsel's argument, they [sic] trying to plant the seed of self-doubt in you that you may make a mistake.* "I can't be responsible for somebody's life. I can't do that."
>
> I asked each of you before you ended up on this jury if someone were going to kill you, could you take someone else's life. Most of you answered yes. Some of you said you had never thought about it. Well, folks, we're talking about someone who has already taken a human life. He's only killed one person. *After all, the whole idea of this question is to keep someone else from dying down the road.* That's what you have to think about. You've got the responsibility on your shoulders. You're not here as social workers. *Since when has it been an excuse because you're poor or black or whatever you want to blame it on, since when does that or society take the blame?* "He never had a chance. That's why he went and robbed somebody and killed somebody."
>
> That's a cop out.

R. 35R. 583-84 (emphasis added). Through this argument, the State effectively limited the jury's consideration of the future dangerousness issue to the State's notion of self-defense, which according to the State was the "whole idea" behind the issue. The State asked the jury not to consider Mr. McGowen's mitigating evidence in terms of future dangerousness. And the State continued these themes throughout the remainder of its argument and asked the jury to reject notions of mercy and

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[2] During *voir dire*, the State made a point with a number of jurors that Mr. McGowen was a young man. *1R. 25-26; 5R. 35-38; 7R. 92-94; 8R. 43; 13R. 17; 18R. 94-95; 21R. 47.* During these colloquies, the State was able to secure commitments from many of these jurors that they either would not consider age or that age would be a minor consideration, as opposed to other facts and circumstances, in determining whether to impose the death penalty. *Id.* As a result, the State effectively conditioned nearly half of the impaneled jurors in such a way that they could not (or likely would not) give effect to this important mitigation aspect of Mr. McGowen's punishment case.

humanity. *35R. 587-91.* Instead, according to the State, it came down to survival and self-defense. *35R. 589.*

Mr. McGowen's jury was asked to answer three special issues: (1) Whether Mr. McGowen's conduct that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there was a reasonable probability that Mr. McGowen would commit criminal acts of violence that would constitute a continuing threat to society; and (3) whether Mr. McGowen's conduct in killing the deceased was unreasonable in response to any provocation by the deceased. *C. 176-81, 183-86.* Though they made a vigorous plea for Mr. McGowen's life, defense counsel in this case were unable to explain to the jury how they could consider the evidence within the confines of the special issues in the terms of mercy and humanity posited by the defense. Furthermore, their attempts were frustrated by the State's argument telling the jury that any attempt to consider the defense evidence in those terms was contrary to the plain language of the issues and was a "cop out."

B. The Fifth Circuit fully appreciated the scope of the evidence presented at punishment and the constraints placed on the jury to fully consider and fully give effect to all of Mr. McGowen's mitigation evidence.

The Fifth Circuit discussed Mr. McGowen's mitigation evidence and the mitigation themes the defense portrayed to the jury, and the court set out generous sections of closing arguments by both the defense and the State. *McGowen v. Thaler*, 675 F.3d 482, 492-93 (5th Cir. 2012). The court held that the jury was unable to give Mr. McGowen's mitigation evidence meaningful effect within the confines of the special issues.

> As argued by defense counsel in closing, the evidence of McGowen's background "did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence."

> Without an additional instruction, the jury could not give meaningful effect to evidence of McGowen's disadvantaged background.

Id. at 495 (quoting *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 253 n.14 (2007)). The court, however, disagreed with the district court's holding that the *Penry*[3] error only applied to the evidence of Mr. McGowen's disadvantaged background. Citing *Pierce v. Thaler*, 604 F.3d 197, 210 (5th Cir. 2010), the court held that the jury likewise could not give meaningful effect to the evidence that Mr. McGowen demonstrated positive qualities notwithstanding his troubled background. *Id.* Thus, the court believed that the error encompassed the entire mitigating theme that the defense presented to the jury and not just one discreet part of it. Finally, the court disagreed with the district court that the State's closing arguments were not "particularly problematic." Instead, the court concluded that the State's arguments clearly "contributed to the *Penry* concerns." *Id.* at 495-96. The court believed that the closing arguments were flawed in the same manner as the arguments that this Court found contributed to *Penry* error in *Tennard*[4] and *Brewer*.[5] *Id.* at 496.

Petitioner extensively discusses the dicta in the district court's opinion about the apparent lack of harm posed by the *Penry* error. *Petition for Writ of Certiorari*, pp. 12-13. However, as demonstrated by the Fifth Circuit's opinion, the district court did not appreciate the full scope of the *Penry* error. Contrary to Petitioner's protestations otherwise, there is no "virtual certainty that the error was harmless." *Id.* at 14.

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

[4] *Tennard v. Dretke*, 542 U.S. 274, 289 (2004).

[5] *Brewer v. Quarterman*, 550 U.S. 286, 293-94 (2007).

REASONS THE COURT SHOULD DENY REVIEW

I. Summary of the Argument

The perceived error that Petitioner asks this Court to correct is unworthy of this Court's time or expenditure of limited resources. Contrary to Petitioner's assertions, *Penry* error arises from a unique sentencing scheme that the Texas legislature fixed more than two decades ago. Under this scheme, the jury in a death penalty case was asked to answer three special issues relating to deliberateness, future dangerousness, and provocation, and affirmative answers to these issues mandated a death sentence. Absent from the jury instructions and the verdict forms was any vehicle through which the jury could express its belief that based on any mitigation evidence that called for a sentence less than death that a defendant actually did not deserve to die. The unique attributes of this system provides the context in which *Penry* claims must be viewed. Importantly, this flawed system is unlikely to repeat itself in Texas, or anywhere else, in the wake of this Court's extensive *Penry* jurisprudence.

Petitioner and his *amici* greatly exaggerate the potential number of remaining cases that can be litigated in federal court. They put the number between 24 and nearly 40. However, closer analysis reveals that the number of potential cases remaining that are being or could be litigated in federal court is between three and ten. As a result, the *Penry* problem is rapidly vanishing, making this Court's intervention at this point unwarranted.

Furthermore, the unique characteristics of the pre-1991 Texas sentencing scheme provide compelling reasons for not applying harmless error analysis when there is *Penry* error. First, the inflexible nature of the system, which made death mandatory in light of certain answers to the special issues, constrained defense counsel in preparing for and presenting a mitigation case at trial, which

in turn, distorted the trial record upon which a court would have to determine harm. Additionally, in light of the absence of a general verdict, a reviewing court attempting to measure harm would find itself reduced to speculation in trying to reconstruct how a properly instructed jury might have responded to the defendant's evidence. These features of the pre-1991 sentencing created systemic ramifications that ran throughout the entire trial process and affected every part of a capital representation–from the beginnings of the investigation, to development of mitigating themes for presentation at trial, to jury selection, and the presentation of evidence at trial, and finally to closing arguments and the deliberations by the jury once the case was submitted to it. In other words, *Penry* error is not the simple trial error that Petitioner and his *amici* make it out to be.

Additionally, the unique characteristics of the pre-1991 sentencing scheme distinguish it from other Eighth Amendment individualization contexts that Petitioner urges this Court to accept as creating a conflict with the Fifth Circuit. To begin, the Fifth Circuit's holding in *Nelson* was limited to the situation that the court addressed and by its terms did not extend to all Eighth Amendment violations. Furthermore, the contexts that Petitioner presents from the other circuits–exclusion of mitigating evidence, limitation of defense argument, and prosecutorial overreaching in closing argument–are readily distinguishable. In many of these cases, the errors either did not involve potential *Lockett* error, or if they did, only tangentially so. Additionally, the cases addressing charge error are distinguishable because these cases did not address a system like that involved in Texas that had mandatory features and no general verdict form. Petitioner points to no evidence that the Fifth Circuit or any other circuit has evinced an understanding that *Nelson* may be extended in the manner that Petitioner would have this Court believe.

Finally, even if harmless error is applied in this case, as Petitioner urges it must, Mr. McGowen is still entitled to relief. The *Penry* error in this case created a substantial and injurious effect or influence on the jury's verdict. And even if this case is reversed and returned to the lower courts, this litigation will not come to a close. Instead, the district court will have to address the remaining (and largely meritorious) punishment issues that it found moot when it granted *Penry* relief.

II. Argument

A. The question presented has no jurisprudential or practical significance because it concerns a unique capital sentencing statute that was repealed more than two decades ago.

The issue Petitioner urges the Court to accept for review is unworthy of the Court's attention because it has only the narrowest and most fact-specific application, affecting only a handful of cases in Texas. Under the Texas death penalty scheme at the time of Mr. McGowen's trial, a capital jury was instructed to answer three special issues:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[6]

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[6] TEX. CRIM. P. CODE ANN. art. 37.071 (Vernon 1985). Enacted by Acts 1973, 63rd Leg., ch. 426 (H.B. 200), art. 3, § 1, effective June 14, 1973; am. Acts 1981, 67th Leg., ch. 725 (H.B. 1164), § 1, effective August 31, 1981; am. Acts 1985, 69th Leg., ch. 44 (H.B. 8), § 2, effective September 1, 1985.

The jury was provided verdict forms for each special issue, and the jury was required to answer each issue "yes" or "no." "If the jury unanimously answered the issues in the affirmative, a sentence of death was mandatory. Art. 37.071(e). If ten jurors answered any issue in the negative, or if the jury was unable to answer any issue, the defendant was sentenced to life imprisonment." *Earhart v. State*, 877 S.W.2d 759, 761 (Tex.Crim.App. 1994). Under this system, the jury was not asked to weigh aggravating factors and mitigating factors or to provide a general verdict; instead, a sentence of death flowed entirely from the answers to the special issues.

The Texas statute was nearly unique in the United States. The only other death penalty jurisdiction that attempted to employ a quasi-mandatory scheme like Texas's rigid special verdict format was Oregon, which never pursued many death sentences and in any event reformed its statute altogether after *Penry I*. *See State v. Wagner*, 786 P.2d 93, 101 (Ore. 1990) (mandating that special issue questions be supplemented with a broad instruction empowering jurors to give effect to mitigating evidence by imposing a sentence less than death).[7] Importantly, the unique characteristics of the Texas pre-1991 death penalty scheme provide the context in which *Penry* must be viewed, and these characteristics demonstrate that the Fifth Circuit's *Penry* jurisprudence is limited entirely to questions arising under that scheme. This point is lost on Petitioner. Instead, Petitioner equates all *Lockett*[8] error as being basically the same.

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[7] Notably, every single Oregon death sentence imposed prior to 1989 was reversed on the basis of this Court's decision in *Penry I*. *See* William R. Long, *A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's*, 39 WILLAMETTE L. REV. 1, 5 (2003) (describing the "immediate awareness [in Oregon] that *Penry* would require remands, if not retrials, of all twenty-three men on death row in 1989").

[8] *Lockett v. Ohio*, 438 U.S. 586 (1978).

In the wake of *Penry I*, the Texas legislature partially repealed the former special issue scheme and replaced it with one that reliably conformed with the constitutional requirements. *See Penry v. Johnson*, 532 U.S. 782, 803 (2001) (noting the "brevity and clarity" of Texas's "clearly drafted" post-1991 statutory instruction on mitigating evidence). The Legislature deleted the deliberateness and provocation special issues and added a new mitigation special issue that asked the jury:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[9]

Thus, even in Texas, a ruling on the question presented in this case would have no prospective application whatsoever.

Finally, the type of error in question arose only in certain cases tried under the former Texas scheme, where the defendant presented mitigating evidence that had relevance outside the scope of the Texas special issue questions.[10] *See Penry v. Lynaugh*, 492 U.S. at 317-20 (holding that the

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[9] TEX. CRIM. P. CODE ANN. art. 37.071(e) (Vernon 1991). *See* Acts 1991 72nd Leg., ch. 838 (S.B. 880), § 1, effective September 1, 1991.

[10] A defendant's youth is an example of this principle. In *Johnson v. Texas*, the Court rejected a claim that the jury could not give meaningful effect to the defendant's youth within the confines of the future dangerousness special issue. 509 U.S. 530, 368 (1993). Thus, generally, a defendant's youth may be given full consideration and effect as an aspect of future dangerousness. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 260-61 (2007) ("A critical assumption motivating the Court's decision in *Johnson* was that juries would in fact be able to give mitigating effect to the evidence, albeit within the confines of the special issues."). But the Court made clear that this general rule is not without limitation. "Prosecutors in subsequent cases, however, have undermined this assumption, taking pains to convince jurors that the law compels them to disregard the force of the evidence offered in mitigation." *Id.* at 261. *See also id.* at 259 n.21 ("A jury may be precluded from [giving mitigating evidence meaningful effect] not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden."). In this case, the State conditioned at least half the jurors to believe that youth had little, if any, relevance to the special issues, and then in closing arguments, the prosecution forcefully brought this

Texas scheme was not facially unconstitutional, but only defective as applied in certain factual contexts). *See also Jurek v. Texas*, 428 U.S. 262, 272 (1976) (holding that the Texas scheme was not facially unconstitutional but leaving open question of whether statute could be unconstitutional as applied in certain circumstances). Thus, the possible existence of *Penry* error in cases tried under the pre-1991 scheme is limited by the circumstances in each case.

Notwithstanding Petitioner's alarmist rhetoric that the Fifth Circuit's *Penry* jurisprudence will have far reaching effects, it is clear that it is limited by history and context to a discreet claim that few death-sentenced inmates in Texas will have.

B. This Court should not devote its limited resources to reviewing this Texas-specific legal issue because any ruling this Court might make would affect only a vanishingly small number of cases.

This *Penry* jurisprudence is not just limited by history and context; it is limited in fact. In an effort to stampede the Court into granting certiorari, Petitioner and his *amici* greatly exaggerate the number of remaining Texas cases that could even conceivably be subject to the "no harmless error" rule the Fifth Circuit has crafted in response to the unique constitutional problem represented by *Penry* and its progeny. *Amicus* National District Attorneys' Association warns that "[i]n Texas ... *nearly 40 death-row inmates* may have their sentence[s] automatically vacated" unless this Court reverses the Fifth Circuit's rule that *Penry* violations are not subject to harmless error review. *Brief of National District Attorneys' Association as* Amicus Curiae, p. 5 (emphasis supplied). Petitioner himself asserts that there are "approximately twenty-four men who were sentenced under [the pre-

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point home, arguing that Mr. McGowen's mitigation case, which included his youth, had no bearing on the answers to the special issues. Arguably, then, the State effectively pushed even Mr. McGowen's youth outside the confines of the special issues.

1991 version of] Article 37.071" and whose cases contain "potentially unexhausted" *Penry* claims like Mr. McGowen's. *Petition for Writ of Certiorari*, p. 35.[11]

First, it is instructive to note the gulf between Petitioner's representations to this Court and those made by the State of Texas at oral argument in a case *two years ago*, when a Fifth Circuit Judge asked how many such *Penry* cases remained in the system:

> Judge: How many cases do you have left? We always ask this. Surely your fellow lawyers told you one thing they'll want to know is how many of these cases we have left. Do you know?
>
> Texas Assistant Attorney General Thomas M. Jones: I don't think I'm the last. I think there's at least one more.
>
> Judge: At least one more, but we're not looking at 40 more or something like that.
>
> Jones: I wouldn't think 40 more.
>
> Judge: Okay.

Pierce v. Thaler, No. 08-70042, oral argument audio recording at appx. 16:20 (available at http://www.ca5/uscourts.gov/OralArgumentRecordings.aspx) (last visited October 9, 2012). Thus, by Petitioner's own account, in the ensuing two years the number of potential *Penry* claimants (under

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[11] Curiously–in an apparent effort to amplify yet further the purported impact of the present case–Petitioner adds that "approximately twelve men [await] resentencing ... on account of such claims." *Id.* While it may be true that some prisoners who obtained relief under *Penry* await final resolution of their sentences, that does not make the present case more cert-worthy. The judgments reversing those prisoners' unconstitutional death sentences have become final; those men must be re-sentenced no matter what the Court does here. More important, the vast majority of those cases–all but three–involve *Penry* relief that was granted by the Texas Court of Criminal Appeals, not by any federal court. The court already applies a harm test to *Penry* claims. *See, e.g., Ex parte Smith*, 309 S.W.3d 53, 64 n.59 (Tex.Crim.App. 2010) ("declin[ing Smith's] invitation to revisit the propriety of harm analysis in the context of *Penry* error," and maintaining the requirement that the prisoner show "egregious harm" if his *Penry* claim was not preserved at trial). Thus, Petitioner's reference to those additional cases is doubly unhelpful to his cause, as those decisions (1) will not be affected by any ruling this Court might make concerning the Fifth Circuit's approach to *Penry*, and (2) demonstrate that the Fifth Circuit has a relatively smaller role than the Court of Criminal Appeals in clearing up the tiny and dwindling number of potential *Penry* cases, making intervention by this Court unnecessary.

a statute that was removed from the books in 1991!) has somehow dramatically multiplied from just a handful ("at least one more") to "approximately twenty-four." That variance alone would be enough to prompt skepticism of Petitioner's estimate.

To clear up the confusion encouraged by Petitioner and his *amici*, we have undertaken to assess how many death-sentenced Texas prisoners could conceivably raise a *Penry* claim in an initial petition for writ of habeas corpus in federal court that would be subject to the Fifth Circuit's rule that *Penry* error is not subject to harmless-error review. We examined the status of the sixty (60) longest-serving prisoners on Texas' death row, as indicated on the "Offenders on Death Row" page of the website of the Texas Department of Criminal Justice as of October 1, 2012. This produces an extremely conservative calculation, given that Petitioner assured this Court in 2007 that only 47 potential *Penry* claimants remained on Texas' death row at that time.[12]

Our findings regarding these sixty cases are as follows. There is at least one (1) case in which the offender received the post-1991 sentencing charge on mitigation, and thus no *Penry* error is possible. *See* Appendix A.[13] There are eleven (11) cases in which offenders obtained relief from their death sentences under *Penry*, the judgments have become final, and the offenders are awaiting

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[12] *See* Transcript of Oral Argument, *Abdul-Kabir v. Quarterman*, No. 05-11284, at 42-43 (asked by Justice Kennedy how many Texas capital cases remained "pending that were decided before the [Texas] legislature amended the [capital sentencing] instruction[s]," Petitioner's counsel responded that "47" such cases remained in the system).

[13] In all likelihood, a significant number of the other offenders in this study group also received constitutionally adequate jury instructions, as their offenses were committed after September 1, 1991, the effective date of Texas's post-*Penry* statute. *See* note 9, *supra*. However, the order in which prisoners are "received" on death row does not perfectly reflect the chronological order in which they are sentenced. Thus, although offender Rodney Rachal (No. 999056) arrived on Death Row after offender Jamie McCoskey (No. 999055), Rachal had been sentenced under the pre-1991 version of the Texas special issues (*see* Appendix B), while McCoskey had been sentenced under the post-1991 version. *See* Appellant's Brief, *McCoskey v. Thaler*, 2011 WL 4351072 at *4-5 (penalty-phase jury charge). Thus, for many of the offenders listed in Appendices D, E, and F, there was never any possibility of *Penry* error.

re-sentencing in proceedings that will not be marked by *Penry* error. *See* Appendix B. There are seven (7) cases in which offenders obtained relief from their death sentences on account of *Penry* error, and then were re-sentenced to death in a constitutionally conducted sentencing proceeding.[14] *See* Appendix C. There are four (4) cases in which offenders' convictions and/or death sentences were reversed for some other legal error, and who were then re-sentenced to death in a constitutionally conducted sentencing proceeding. *See* Appendix D. There are seventeen (17) cases in which offenders have already been denied federal habeas relief in a final judgment, and thus cannot seek review of any possible *Penry* claim in a successive federal habeas proceeding because of *In re Kunkle*, 398 F.3d 683 (5th Cir. 2005).[15] *See* Appendix E. There are four (4) cases in which the offender is presently litigating a federal habeas proceeding but is not raising a *Penry* claim in federal court, and will be barred from any future attempt to do so by *In re Kunkle*. *See* Appendix F. There are at least four (4) cases in which the offender appears to be presently incompetent to be executed, *see Ford v. Wainwright*, 477 U.S. 399 (1986), and where the offender has been in that condition sufficiently long that a serious question exists whether he will ever seek federal habeas review. *See* Appendix G. There is one (1) case in which the offender has actually been re-sentenced

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[14] The TDCJ website listing "Offenders on Death Row," http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html (last visited October 16, 2012), does not reflect when an offender has been retried and re-sentenced to death. In other words, even though a particular inmate may have been removed from TDCJ custody for the purpose of retrial or re-sentencing, if he returns to TDCJ custody in the same status (*i.e.*, under a death sentence), the TDCJ website will reflect the date he was first received after his original trial (rather than the date he returned to TDCJ custody after retrial or re-sentencing), and he will continue to be identified by his original TDCJ number. This fact may explain some of the gross exaggeration in *amicus* NDAA's estimate of the number of potential *Penry* claimants, as amicus may well have misinterpreted the data available on TDCJ's site and not bothered to check with anyone more knowledgeable.

[15] In *Kunkle*, the Fifth Circuit held that notwithstanding post-2004 developments in this Court, such as *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004), a *Penry* claim does not satisfy the criteria of 28 U.S.C. § 2244(b)(2) for filing a successive application for federal habeas relief. *Kunkle*, 398 F.3d at 684-85.

to life imprisonment after having his death sentenced reversed for a non-*Penry* legal error, but who apparently has not yet been removed from Death Row. *See* Appendix H. There are four (4) cases in which the offender has not yet sought federal habeas review and in which undersigned counsel believes the offender to be presently litigating a *Penry* claim in state court. *See* Appendix I. There are four (4) cases, counting Mr. McGowen's, in which the offender is presently litigating a *Penry* claim in federal court. *See* Appendix J. There were three cases in which the prisoner has not yet sought federal habeas review, and with respect to which undersigned counsel were not able to ascertain the status of any *Penry* litigation.

Thus, putting aside the cases of prisoners who are likely *Ford*-incompetent, the minimum number of *Penry* claims that may yet be reviewed by the Fifth Circuit is **three** (3). *See* Appendix J (four cases presently in federal court, minus Mr. McGowen's own case). The maximum number of *Penry* claims that might yet be reviewed by the Fifth Circuit is **ten** (10). *See* Appendices J and I (four (4) cases presently in federal court, plus four (4) cases where *Penry* claims are presently being litigated in state court, plus three (3) cases whose status is unknown).[16] Given the fact that the Court of Criminal Appeals has granted relief in numerous *Penry* cases, it is highly unlikely that the total will reach ten.

In any event, the foregoing summary makes the overriding point unmistakably clear: the *Penry* problem is rapidly vanishing, because only a handful of pre-1991 cases remain to be adjudicated and Texas has fixed its capital sentencing statute. These circumstances do not call for this Court's intervention.

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[16] Even if one assumes, against all evidence, that the presently *Ford*-incompetent prisoners are restored to competency and pursue *Penry* litigation that ultimately makes it to federal court, that would raise the total only to fourteen cases, far below the numbers claimed by either Petitioner or his amici.

C. The same considerations that render the issue in this case uncertworthy–the unique problems presented by the former Texas statute–also provide compelling support for the view that harmless error analysis is inappropriate for *Penry I* claims.

The same features of Texas's former statute that would limit the applicability of any ruling by this Court on the question presented also explain why harmless error analysis of *Penry* claims is inappropriate. The unique characteristics of this now-defunct system distinguishes it in at least two ways from other death penalty schemes this Court has examined for compliance with the Eighth Amendment individualization requirement. First, the inflexible nature of the pre-1991 Texas scheme severely constrained the development and presentation of the case for life. Second, notwithstanding these constraints, the Texas scheme failed to include a verdict form beyond those required to answer the special issues related to deliberateness, future danger, and provocation; thus, a jury charged under this system lacked any straightforward vehicle to express its global conclusion regarding the appropriate sentence for the defendant. These features exercised a distorting influence over defense counsel's development and presentation of mitigation evidence, and any reviewing court attempting to gauge harm flowing from *Penry* error would find itself reduced to speculation in trying to reconstruct how a properly instructed jury might have responded to that evidence.

Texas lawyers charged with the responsibility of presenting a case in mitigation were aware that the jury would not be authorized to give consideration and effect to much of the traditional mitigating evidence that demonstrated a defendant's reduced moral culpability. *See, e.g., California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. ... Thus, the

sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.") (emphasis in original). *See also Williams v. Taylor*, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."). Lawyers, facing that litigation environment, struggled to decide how much and what type of mitigating evidence to risk presenting, given that–as *Penry I* eventually recognized–much relevant evidence of diminished culpability would also tend to expose the client to a death sentence. In effect, defense lawyers were aware that the jury essentially would have to nullify the verdict form in order to give meaningful effect to this mitigating evidence in order to assess a life sentence. *See May v. Collins*, 904 F.2d 228 (5th Cir. 1990) (Reavley, C.J., and King, C.J., specially concurring) (observing that jurors in Texas capital cases tried before *Penry I* "were prevented from hearing extremely probative evidence on [the defendant's] moral culpability and on the appropriateness of a death sentence," depriving the defendant of the jury's "fully informed judgment of his crime and his character," because the "fixed state of the law" strongly counseled defense attorneys in possession of such double-edged mitigating evidence to withhold it, lest they "do more harm than good by bolstering the state's case [for] future dangerousness.").

As a result of the pressure the former Texas statute placed on reasonable defense counsel not to present "double-edged" mitigating evidence of diminished culpability, pre-*Penry I* capital trials in many cases produced systematically distorted records that fail to reflect accurately the true balance of aggravating and mitigating circumstances. As this Court is aware, assessing the harm from a constitutional violation in a capital sentencing hearing typically involves examining the range of aggravating and mitigating circumstances presented, the strength of the evidence supporting the

existence of those factors, the nature and character of the arguments of counsel, and so on. But those elements of the sentencing record are precisely the ones that were cut to fit the Procrustean bed of the pre-1991 Texas scheme. In the absence of a vehicle to permit the meaningful consideration of mitigating evidence–and in the threatening presence of a mandatory "future dangerousness" inquiry that could turn otherwise powerful mitigating evidence of diminished culpability into support for a death sentence–defense attorneys may well have downplayed mitigating evidence that in a properly functioning scheme would have served as the centerpiece of counsel's case for life. As a result, an attempt to perform harmless-error analysis of the sentencing record in such cases, where every aspect of defense counsel's sentencing presentation was constrained and informed by the unique former Texas statute, would be purely and irreducibly speculative.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Id.* at 22. The Court also recognized, however, that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error ... ." *Id.* at 23. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court attempted to differentiate between those instances in which harmless error analysis applied and those in which it did not. *Id.* at 307-10. Under *Fulminante*, constitutional errors subject to harmless error analysis involve "trial error," which the Court defined as "error which occur[s] during the presentation of the case to the jury, and which may therefore be *quantitatively* assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08 (emphasis added). On the other hand, "structural defects," those errors recognized by *Chapman* to

be so basic to a fair trial that they can never be treated as harmless error, typically "defy analysis by 'harmless-error' standards." *Id.* at 309. The Court held that errors are structural when they affect "the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.* at 310.

However, as this Court has noted, the status of a constitutional violation as "trial error" is not always "the touchstone for the availability of harmless error review." *United States v. Gonzales-Lopez*, 548 U.S. 140, 148-49 & n.4 (2006). Instead, the Court has seen fit to "rest [its] conclusion of structural error upon the difficulty of assessing the effect of the error." *Id.* at 149 n.4. Treating "fundamental unfairness as the sole criterion of structural error" is "inconsistent with the reasoning of [this Court's] precedents," which do not support the "assert[ion] that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural." *Id.* (emphasis in original). *See also McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (holding that the right to self-representation, though likely increasing the odds of an unfavorable trial result, is nevertheless structural given the inherent difficulties in assessing harm). In *Gonzales-Lopez*, the Court held that the defendant's Sixth Amendment right to retain counsel of choice was not amenable to harmless error analysis given the difficulties in assessing how a different attorney may have performed not only in trial but in pretrial preparation, plea negotiations, and so forth. *Gonzales-Lopez*, 548 U.S. at 149-50 ("Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.").

In the context of the pre-1991 Texas sentencing scheme, the special issue format that cabined the answers the jury could provide in its verdict within the confines of deliberateness, future dangerousness, and provocation as well as the mandatory aspect of the scheme once the State

achieved favorable answers to those issues created a structural impediment to the development of the entire range of mitigating possibilities. It affected every aspect of trial, from the investigation of mitigation evidence, development of defensive theories, jury selection, presentation of evidence, and argument. Furthermore, the lack of any general verdict that would allow the jury to express its global conclusion based on all the available evidence concerning the appropriate sentence for the defendant would invariably deprive a reviewing court attempting to assess harm of a starting point for considering how the jury's verdict might have been influenced by the constitutional violation. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993). And in the absence of a verdict, "[a] reviewing court can only engage in pure speculation" about the extent to which the particular constitutional violation may have affected the outcome. *Id.* at 281. Moreover, in such cases, there is an unacceptable risk that the very trial record itself–the locus of the attention in conventional harmless-error analysis–has been distorted by the former statute's tendency to keep vital double-edged mitigating evidence of reduced culpability out of the record, which would require the reviewing court to engage in "difficult inquiries concerning matters that might have been, but were not, placed in evidence." *Rose v. Clark*, 478 U.S. 570, 579-80 & n.7 (1986).

Petitioner essentially recognized these characteristics of the Texas statute and their effect on defense attorneys in developing mitigation themes to present at trial in his response to Mr. McGowen's ineffective assistance of counsel claim. In addition to his *Penry* claim, Mr. McGowen also raised a claim that his trial counsel failed to conduct a reasonable investigation into possible mitigating aspects of his background and family history and that they failed to present compelling mitigation evidence at trial that was readily available. *ROA. 1076-83, 1085-90.* Mr. McGowen's sisters, which included Valerie and Rhonda, who testified at trial, as well as others who defense

counsel failed to contact, described a life of extreme poverty. Drugs and alcohol were rampant in the neighborhood where they grew up, as well as in the McGowen household. Furthermore, Mr. McGowen's mother brought men into the house that physically and sexually assaulted her children, and she was unable to protect her children. It is from this terrible environment that Mr. McGowen escaped as a young child–living first with his father or other relatives and then striking out alone at the age of 16. *Id.*

Petitioner argued, in part, that Mr. McGowen's claim should fail because much of the evidence he identified was double-edged in nature and that it would have done more harm than good. *ROA. 1737.* Petitioner continued these themes in addressing prejudice. "Furthermore, the testimony of the family members was likely to be double-edged."[17] *ROA. 1740.* Thus, according to Petitioner's argument, defense counsel could not have been deficient (and even if they were, Mr. McGowen could not show prejudice) because the very structure of the sentencing scheme precluded the jury from considering potentially double-edged evidence of childhood abuse, exposure to drugs and alcohol, extreme poverty, and living in a rampant criminal environment as mitigating against imposition of the death penalty. As a result, Petitioner has tacitly acknowledged the very real potential the former sentencing scheme had to distort the record and its ability to undermine the

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[17] Petitioner cited the following cases to support his argument: *Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005) (reiterating that counsel may reasonably choose not to present double-edged evidence to the jury); *Harris v. Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002); *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) (noting that "any evidence about [the petitioner's] alleged brain injury, abusive childhood, and drug and alcohol problems is ... 'double edged' ... [so] it could all be read by the jury to support, rather than detract, from his future dangerousness"); *Nobles v. Johnson*, 127 F.3d 409, 423-24 (5th Cir. 1997) ("[Where] the unproffered evidence of [petitioner's] childhood abuse and emotional problems ... could have strengthened the prosecution's argument that [petitioner] posed a continuing threat to society [,] counsel's decision not to offer such evidence did not constitute deficient performance."); *Ransom v. Johnson*, 126 F.3d 716, 723-24 (5th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515, 519-20 (5th Cir. 1996). *See also Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999); *Boyle v. Johnson*, 93 F.3d 180, 187-88 (5th Cir. 1996); *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994).

development and presentation of mitigation evidence at every level of the trial process. Plainly, the harmful effect of the pre-1991 sentencing scheme in this case is not merely hypothetical; it is very real.

D. Because of the unique characteristics of the sentencing scheme that gave rise to *Penry* error, Petitioner overstates any potential circuit split by relying on cases that addressed *Lockett* claims in general.

The unique aspects of the *Penry I* problem–the distortion of the trial record that likely resulted from the preclusive effect of the former Texas scheme, as well as the absence of a verdict form through which the jury could determine the defendant's moral culpability–distinguish *Penry* errors from other Eighth Amendment individualization contexts. Though the Fifth Circuit in *Nelson* noted that this Court had never "given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence," the remainder of the court's discussion was devoted to the unique nature of *Penry* errors. *Nelson v. Quarterman*, 472 F.3d 287, 314-15 5th Cir. 2006). In fact, before this general observation about the lack of Supreme Court precedent discussing harmless error with respect to *Lockett* issues, the court made a specific observation that this Court had "*never* applied a harmless error analysis to a *Penry* claim . . . ." *Id.* at 314 (emphasis in original). And this remains true–of the five cases that have come before this Court in federal habeas, the Court has never indicated that harmless error was appropriate. *See Brewer v. Quarterman*, 550 U.S. at 296 ("For the reasons explained above, as well as in our opinion in *Abdul-Kabir*, [the Fifth Circuit's] conclusions fail to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding

whether a defendant is truly deserving of death."); *Abdul-Kabir v. Quarterman*, 550 U.S. at 264 ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence–because it is forbidden from doing so by statute or a judicial interpretation of a statute–the sentencing process is *fatally flawed.*") (emphasis added); *Tennard v. Dretke*, 542 U.S. at 289; *Penry v. Johnson*, 532 U.S. at 803-04; *Penry v. Lynaugh*, 492 U.S. at 328. In fact, this Court's holding in *Penry I* strongly suggests that this was not mere oversight:

> Our reasoning in *Lockett* and *Eddings* thus *compels a remand for resentencing* so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S., at 605; *Eddings*, 455 U.S., at 119 (O'Connor, J., concurring). "When the choice is between life and death, *that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.*" *Lockett*, *supra*, at 605.

Penry I, 492 U.S. at 328 (emphasis added). Given the manner in which these cases came back to the Fifth Circuit, it is apparent that the court did not believe it was extrapolating from this Court's mere silence a rule of its own concoction that harmless error analysis was inappropriate with respect to *Penry* errors.

The court's remaining discussion about the applicability of harmless error analysis in the *Penry* context demonstrates that the court believed that unique situation posed by the pre-1991 sentencing scheme precluded the ability to measure harm, and the court believed that this context *distinguished Penry* error from other situations involving jury charge error in which harmless error analysis was possible.[18] *Nelson v. Quarterman*, 472 F.3d at 314-15. In fact, the court rejected

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[18] Tellingly, every member of the Fifth Circuit has found this aspect of *Nelson* to be unremarkable. When the *en banc* court decided *Nelson*, not a single judge among the sixteen participating dissented from the conclusion that applying harmless error analysis to *Penry* claims was inappropriate. Mr. McGowen is not aware of a single instance since *Nelson* in which a Fifth Circuit judge has questioned this

Petitioner's argument that *Coleman v. Calderon*, 525 U.S. 141 (1998), dictated the opposite result. The court distinguished the instructional issue involved in *Coleman*, which involved a misleading instruction concerning the governor's commutation power as applied in that case, from the issue posed by *Penry*. *Id.* at 315 n.8. Regardless of whether the court's analysis in *Nelson* ultimately proves right or wrong, it is clear that the court believed that it was dealing with a particular situation, and based on this, Petitioner's assertion that *Nelson* can be extended to the entire range of *Lockett* errors is at best dubious. Simply, *Nelson* is not susceptible to the mischief that Petitioner and his *amici* attribute to it.

Furthermore, the cases from other circuits that Petitioner advances for his proposition that *Nelson* stands alone in refusing to apply harmless error analysis can be distinguished because none of these cases dealt with a situation like that posed by the pre-1991 Texas death penalty scheme. With one exception, the array of cases from the Fourth, Seventh, Eighth, and Tenth Circuits addressed situations in which the trial court refused to allow the presentation of specific evidence that the defendants proffered as part of their mitigation defense. In many of these cases, the evidence was merely cumulative of other evidence the jury heard, and ostensibly the juries in each received jury instructions that allowed them to fully consider and give effect to the defendants' mitigation evidence.[19] Thus, the flaws inherent in the *Penry* situation were absent in these cases. The one case

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holding.

[19] Fourth Circuit: *Davis v. Branker*, 305 F.3d 926, 936-39 (4th Cir. 2009) (holding that letters the defendant had written to his mother expressing remorse were cumulative to other evidence the jury heard from witnesses that the defendant had expressed remorse; no *Lockett* error, but even if there was error, it was harmless); *Fullwood v. Lee*, 290 F.3d 663, 693 (4th Cir. 2002) (holding that exclusion of evidence describing the effect on the defendant of his brother's death could have been presented through clarification, reoffer, or through the defendant's own testimony when he testified; thus any possible error was harmless); *Boyd v. French*, 147 F.3d 319, 327-28 (4th Cir. 1998) (holding that exclusion of expert testimony that the defendant fit a certain profile was cumulative of other evidence the jury heard; error found to be harmless).

that did not address the exclusion of mitigation evidence was *Green v. French*, 143 F.3d 865 (4th Cir. 1998). In that case, the defendant requested specific jury instructions with respect to particular mitigating evidence. *Id.* at 893. However, the jury received a general "catch-all" charge instructing them to consider all mitigating evidence. *Id.* The court concluded that there was no harm in not providing further instruction with respect to each aspect of the defendant's mitigation case. *Id.* at 893-94. Of course, in *Green*, the defendant received what was lacking in Mr. McGowen's case–a general jury charge that allowed the jury to consider all of the mitigation evidence.

The Sixth Circuit cases advanced by Petitioner are likewise distinguishable. Each dealt with aspects of jury argument–either limitation in the defendant's desired argument or instances of prosecutorial overreaching. *See Campbell v. Bradshaw*, 674 F.3d 578, 597 (6th Cir. 2012) (holding that limitation on the defendant's ability to argue voluntary intoxication as a mitigating factor did not prevent the jury from considering the evidence of intoxication that was in the record and giving

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Seventh Circuit: *Williams v. Chrans*, 945 F.2d 926, 949 (7th Cir. 1991) (holding that evidence that death penalty did not have a deterrent effect and that if the defendant were allowed to live, he would make a good study subject for psychologist did not offend *Lockett* because the evidence was not related to the defendant's background, character, or crime; but even if there was error, it was harmless.

Eighth Circuit: *McGehee v. Norris*, 588 F.3d 1185, 1197-98 (8th Cir. 2009) (holding that exclusion of evidence about family's cruelty to a family pet related to a trivial feature of the defendant and did not offend *Lockett*; even if there was error, it was harmless; and also holding that *Penry* was distinguishable because the jury received an instruction that "it could consider anything"); *Williams v. Norris*, 612 F.3d 941, 948 (8th Cir. 2010) (holding that denial of corrections expert to testify about the prison system's negligence in allowing the defendant to escape was cumulative to other evidence the jury heard, the proposed testimony did not relate to the defendant's character, background, or crime, and even if there was error, it was harmless); *Sweet v. Delo*, 125 F.3d 1144, 1158-59 (8th Cir. 1997) (holding that photography album was cumulative to evidence the jury heard that the defendant was a good photographer; any possible error was harmless).

Tenth Circuit: *Bryson v. Ward*, 187 F.3d 1193, 1205-06 (10th Cir. 1999) (holding that exclusion of videotaped confession by defendant was cumulative of other evidence the jury heard; any error was harmless).

it effect under the instructions it received); *Broom v. Mitchell*, 441 F.3d 392, 412-14 (6th Cir. 2006) (holding that prosecutor's comments about aggravating and mitigating aspects of the case were not so egregious as to foreclose the jury's consideration of the mitigating evidence); *Lorraine v. Coyle*, 291 F.3d 416, 443-44 (6th Cir. 2002). The juries in these cases ostensibly had proper jury instructions that instructed them to consider all the defendant's mitigating evidence, which was exactly what was missing in Mr. McGowen's case.

In both of the Ninth Circuit cases, the juries received an instruction that allowed them to consider fully and give full effect to any evidence concerning the defendants' background and character that they proffered for a sentence of less than death. In *Sims v. Brown*, 425 F.3d 560 (9th Cir. 2005), the court believed that the prosecutor's comments about the defendant's mitigation evidence may have interfered with the jury's ability to give it effect under the California "catchall" mitigation provision; however, any error was harmless. *Id.* at 580-81. Nevertheless, the defendant in *Sims* had what was critically missing in this case–a jury instruction that allowed the jury to consider the evidence for any mitigating purpose. Furthermore, as the Fifth Circuit in *Nelson* noted, the situation in *Coleman v. Calderon*, 525 U.S. 141 (1998) was "not at all comparable to cases involving *Penry* violations, where the jury is *precluded* from giving its reasoned moral response to the defendant's mitigating evidence." *Nelson v. Quarterman*, 472 F.3d at 315 n.8 (emphasis in original).

Nor do the Eleventh Circuit cases dealing with error under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), present a similar situation. Contrary to the Texas scheme at issue in *Penry*, the Florida statute addressed in *Hitchcock* expressly directed that the jury return a general sentencing recommendation, based on its weighing of aggravating and mitigating circumstances, expressing its

conclusion "whether the defendant should be sentenced to life (imprisonment) or death," which was precisely the sort of verdict that was completely absent, by design, from the pre-1991 Texas statute. *See Proffitt v. Florida*, 428 U.S. 242, 248 (1976) (describing the Florida statute). *See also Hitchcock*, 481 U.S. at 395-96 (likewise describing sentencing framework).

Petitioner and his *amici* are wrong that the Fifth Circuit's rule regarding the non-applicability of harmless error analysis in the *Penry* context may easily be applied throughout the circuit in potential cases in Mississippi and Louisiana (as well as Texas) for *Lockett* errors of all stripes. Petitioner points to no evidence that the Fifth Circuit is extending *Nelson* beyond the tight limits of *Penry* error. And if Petitioner's litany of cases from other circuits proves anything, the *Nelson* ruling is in no danger of being imported to other circuits.[20] Instead, *Nelson* addressed a particular situation that the Texas legislature fixed more than two decades ago, and given this Court's extensive jurisprudence in the *Penry* line of cases, it is extremely doubtful that this situation will ever arise again. Instead, the perceived error that Petitioner asks this Court to correct is quickly receding into the history books.

E. Even if *Brecht* applies, the *Penry* error in this case created a substantial and injurious effect or influence on the jury's verdict.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court addressed the question of the proper harm standard to be applied to constitutional errors found in federal habeas. *Id.* at 630-31. The Court eschewed the more onerous harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), in favor of the less rigorous standard applied in *Kotteakos v. United States*, 328 U.S. 750

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[20] Again, Petitioner and his *amici* point to not instance in which another circuit court has distinguished or disapproved of *Nelson*, much less mentioned it for the proposition that harmless error does not apply to run of the mill *Lockett* errors.

(1946). *Brecht*, 507 U.S. at 637-38. Under this standard, error requires reversal only if it had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* at 631 (quoting *Kotteakos*, 328 U.S. at 776). In applying this standard, the reviewing court must make a *de novo* examination of the entire trial record in order to determine all the ways in which the error "can infect the course of the trial." *Id.* at 642 (Stevens, J., concurring).

Petitioner places unwarranted emphasis on the district court's dicta concerning the apparent lack of harm. However, as exemplified in the Fifth Circuit opinion, the district court, though finding *Penry* error, did not appreciate the full scope of that error. Contrary to Petitioner's assertions, largely built upon the district court's opinion, the measure of harm in this case cannot be simply reduced to an arithmetic comparison between the State's evidence in aggravation with Mr. McGowen's mitigating evidence. First, Mr. McGowen's defense centered on aspects of his character and background that were relevant to his moral culpability and whether he merited the death penalty that were beyond the reach of the special issues. As a result, Mr. McGowen was denied much of his defense as a result of the error in this case. *See Caldwell v. Bell*, 288 F.3d 838, 843-44 (6th Cir. 2002) (holding that unconstitutional charge error concerning presumption was harmful under *Brecht* because it undercut the defendant's alternative defensive theory). *See also Ex parte (Roy) Smith*, 309 S.W.3d at 63-64 (holding that the defendant showed egregious harm on *Penry* violation because the charge error rendered much of the defendant's defense without effect).[21] Second, the State frustrated

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[21] In Texas, the Court of Criminal Appeals applies its own species of harm analysis for charge error to *Penry* errors. *See Ex parte (LaRoyce) Smith*, 185 S.W.3d 455, 457 (Tex.Crim.App. 2006), *rev'd by Smith v. Texas*, 550 U.S. 297 (2007). In *Almanza v. State*, the court held: "If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be *some* harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless." 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (emphasis in original). When no

the jury's ability to give this evidence the mitigating force through the special issues presented to it. Third, the State presented a weak case for death, at least with respect to the two special issues relating to deliberateness and provocation. As Mr. McGowen argued in his amended petition before the district court, the State's evidence to support the jury's answers to these two issues was legally insufficient and violated his due process rights under *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence at trial demonstrated that both the armed assailant and the victim in this case fired at each other in rapid succession, and the eyewitness could not tell who fired first. Under these circumstances, the State presented an equivocal case that Mr. McGowen deliberately shot Marion Pantzer. Instead, the evidence easily shows that he reacted quickly when she pulled a gun on him. Furthermore, this evidence raises the probability that Mr. McGowen reacted to provocation. Clearly, the State did not present a very compelling case on at least two of the three issues put before the jury. If the jury were presented with a fourth special issue relating to mitigation that would have allowed the jury to consider and give full mitigating effect to all of Mr. McGowen's evidence, it very well could have tipped the balance in Mr. McGowen's favor.

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objection is made to the charge, the defendant must claim that the error is fundamental and will "obtain a reversal only if the error is so egregious and created such harm" that the defendant has been denied a fair and impartial trial. *Almanza v. State*, 686 S.W.2d at 171. Error is egregious under this standard if it strikes at the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Id.* at 172. The Fifth Circuit held that Smith's evidence of poverty and difficult upbringing had only a tenuous connection to his moral culpability and that, therefore, there was no *Penry* error. *Smith v. Dretke*, 422 F.3d 269, 413 (5th Cir. 2005). The Court of Criminal Appeals disagreed, but it applied its egregious harm standard to the error. "His evidence of drug addiction, poverty, and a crime-ridden neighborhood was at the heart of his mitigation theory. While we cannot say what credibility or weight the jurors might have given it, since it went to the heart of the applicant's defensive theory, such mitigating evidence was nonetheless relevant and outside the scope of the special issues." *Id.* at 63-64. The trial court's failure to give a mitigation special issue that would have allowed the jury to give a moral response to this evidence struck at the very heart of the Smith's case and demonstrated egregious harm. *Id.* at 64.

When the entire record in this case are considered as part of the harm analysis, rather than the simple comparison between Mr. McGowen's mitigation evidence and the State's evidence in support of the future dangerousness special issue, the *Penry* error is such that it should undermine the Court's confidence in the outcome, and as a result, it has affected a substantial right of Mr. McGowen not to be sentenced to death absent the sentencer's ability to fully consider and fully give effect to his mitigation evidence. Thus, Mr. McGowen was harmed by the *Penry* error in this case.

F. This Court should decline to review this case, because even if Petitioner prevails, this litigation will not come to an end; instead, the case will have to return to the district court to address the remaining punishment claims, which includes a largely meritorious ineffective assistance of counsel claim.

Amicus National District Attorneys Association is simply wrong in its prediction that summary reversal will bring this litigation to a rapid close, arguing that "there is no question that reversing the Fifth Circuit will lead to affirmance of McGowen's conviction." *Brief of the National District Attorneys Association as* Amicus Curiae, p. 14. The district court held that the *Penry* relief in this case rendered Mr. McGowen's remaining punishment claims moot, and the court declined to address them on the merits. *McGowen v. Thaler*, 717 F. Supp. 2d 626, 648 (S.D. Tex. 2010). However, in a footnote, the court noted that the ineffective assistance of counsel claim was procedurally defaulted. *Id.* at 648 n.11. If this Court reverses the grant of *Penry* relief and remands to the lower courts to address the remaining claims, Mr. McGowen anticipates that he will be able to establish cause and prejudice under this Court's recent opinions in *Maples v. Thomas*, 565 U.S. ___, 131 S. Ct. 1718, and *Martinez v. Ryan*, 565 U.S. ___, 127 S. Ct. 1309 (2012). Ironically, notwithstanding the strong merits of both the claims under *Maples* and *Martinez* and the underlying ineffective assistance of trial counsel claim, Mr. McGowen will face an unfair hurdle to establishing

entitlement to relief because of the very sentencing scheme at issue before the Court now, particularly given the long-standing Fifth Circuit precedent rejecting such claims with double-edged evidence.

CONCLUSION

Because the perceived problem that Petitioner brings before this Court is quickly receding and does not contradict or pose any threat to this Court's Eighth Amendment jurisprudence, this case is not an ideal vehicle for this Court to correct what Petitioner believes is an egregious wrong.

PRAYER

For the foregoing reasons, Respondent, Roger Wayne McGowen, respectfully requests that this Honorable Court deny a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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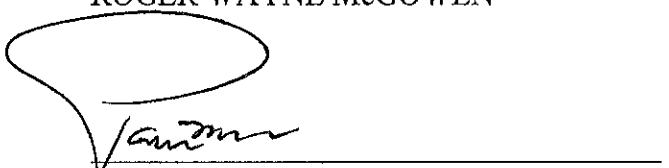

By: Paul E. Mansur

Certificate of Service

I certify that on October 22, 2012, I served by first class U.S. mail a true and correct copy of the Brief in Opposition upon opposing counsel at the following address:

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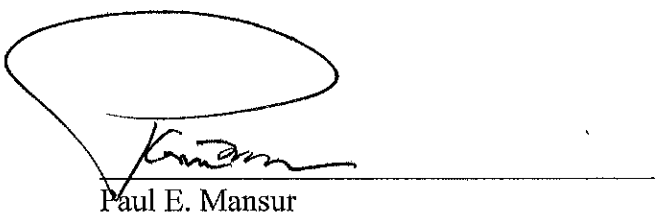

Paul E. Mansur

APPENDIX A

Texas cases in which the offender received the post-1991 sentencing charge on mitigation, and thus no *Penry* error is possible.

Rick Rhoades, No. 999049 (see Appellee's brief, *Rhoades v. State*, No. 71,595 (1994 WL 16057542 at *1-2), reciting that Rhoades' jury received the post-1991 version of the Texas sentencing instructions).

APPENDIX B

Texas cases in which offenders obtained relief from their death sentences in state or federal court under *Penry*, the judgments have become final, and the offenders are awaiting re-sentencing in proceedings that will not be marked by *Penry* error:

Rodney Rachal, No. 999056 (*Ex parte Rachal*, No. AP-76,720 (Tex. Crim. App. February 1, 2012), 2012 WL 333860 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Jose Briseno, No. 999043 (*Ex parte Briseno*, No. AP-76,132 (Tex. Crim. App. June 9, 2010), 2010 WL 2332150 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Randolph Greer, No. 999042 (*Ex parte Greer*, No. AP–76,592 (Tex. Crim. App. June 29, 2011), 2011 WL 2581922 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Kim Lim, No. 999030 (*Ex parte Lim*, No. AP-76,593 (Tex. Crim. App. June 29, 2011) 2011 WL 2581924 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Charles Hood, No. 000982 (*Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010) (granting relief from death sentence on *Penry* grounds)).

Rulford Aldridge, No. 000973 (*Aldridge v. Thaler*, Civ. Action No. 4:05-cv-00608 (S.D. Tex., March 17, 2010) (unpublished order) (granting relief from death sentence on *Penry* grounds)

Guy Alexander, No. 000948 (*Ex parte Alexander*, No. AP–76,818 (Tex. Crim. App. June 13, 2012), 2012 WL 2133738 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Warren Rivers, No. 000928 (*Rivers v. Thaler*, 389 Fed. Appx. 360 (5th Cir. 2010) (affirming federal district court's grant of relief from death sentence on *Penry* grounds)).

David Lewis, No. 000866 (*Ex parte Lewis*, No. AP-76,334 (Tex. Crim. App. April 28, 2010), 2010 WL 1696797 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Kenneth Thomas, No. 000869 (*Ex parte Thomas*, No. AP-76,405 (Tex. Crim. App. August 25, 2010), 2010 WL 3430699 (not designated for publication) (granting relief from death sentence on *Penry* grounds)).

Anthony Pierce, No. 000587 (*Pierce v. Thaler*, 604 F.3d 197 (5th Cir. 2010) (affirming federal district court's grant of relief from death sentence on *Penry* grounds)).

APPENDIX C

Texas cases in which offenders obtained relief from their death sentences on account of *Penry* error, and then were re-sentenced to death in a constitutionally conducted sentencing proceeding:

Raymond Martinez, No. 000768 (*Ex parte Martinez*, 233 S.W.3d 319 (Tex. Crim. App. 2007) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2009: Brian Rogers, "For 3rd time, man condemned in killing of Houston bar owner," Houston Chronicle (March 19, 2009))

Billie Coble, No. 000976 (*Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2008: http://www.kcentv.com/story/14951414/us-supreme-court-declines-review-of (last visited October 4, 2012))

Mark Robertson, No. 000992 (*Ex parte Robertson*, No. AP-74,720 (Tex. Crim. App. March 12, 2008), 2008 WL 748373 (not designated for publication) (granting relief from death sentence on *Penry* grounds)); re-sentenced to death in 2009: Jennifer Emily, "Man sentenced to death for slaying 81-year-old Preston Hollow woman," Dallas Morning News (July 2, 2009))

Carl Buntion, No. 000993 (*Ex parte Buntion*, No. AP-76,236 (Tex. Crim. App. September 30, 2009), 2009 WL 3154909 (not designated for publication) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2012: http://www.khou.com/news/Jury-Cop-killer-Carl-Wayne-Buntion-to-return-to-death-row-141653063.html (last visited October 4, 2012))

James Bigby, No. 000997 (*Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2008: http://www.star-telegram.com/2008/10/08/960670/archive-2006-james-bigby-returns.html (last visited October 2, 2012))

Brent Brewer, No. 999000 (*Brewer v. Quarterman*, 550 U.S. 286 (2007) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2009: http://www.kwtx.com/home/headlines/Texas_Death_Row_Inmates_Sentence_Upheld_134407323.html) (last visited October 4, 2012))

Brian Davis, No. 999036 (*Ex parte Davis*, No. AP-76,263 (Tex. Crim. App. November 18, 2009) 2009 WL 3839065 (not designated for publication) (granting relief from death sentence on *Penry* grounds); re-sentenced to death in 2011: http://mineralwellsindex.com/x740870986/Davis-again-gets-death-in-Houston-case (last visited October 2, 2012))

APPENDIX D

Texas cases where convictions and/or death sentences were reversed for legal error other than *Penry* error, and where the defendant was then re-sentenced to death in a constitutionally conducted sentencing proceeding:

Eugene Broxton, No. 999044 (see *Broxton v. Cockrell*, 278 F.3d 456 (5th Cir. 2002) (noting that federal district court had granted relief from Broxton's death sentence); *Broxton v. State*, No. AP-71,488 (Tex. Crim. App. June 29, 2005) (not designated for publication) (affirming new death sentence).

Gustavo Garcia, No. 999018 (see *Garcia v. State*, No. 71,417 (Tex. Crim. App. November 12, 2003), 2003 WL 22669744 (not designated for publication) (affirming new death sentence, and noting that Garcia had obtained relief from his original death sentence in *Garcia v. Johnson*, Civ. Action No. 1:99-cv-134 (E.D. Tex., September 26, 2000)).

Max Soffar, No. 000685 (see *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) (granting relief from conviction); *Soffar v. State*, No. AP-75,363 (Tex. Crim. App. November 18, 2009), 2009 WL 3839012 (not designated for publication) (affirming new death sentence).

Bobby Moore, No. 000663 (see *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999) (granting relief from death sentence); *Moore v. State*, No. 74,059 (Tex. Crim. App. January 14, 2004), 2004 WL 231323 (not designated for publication) (affirming new death sentence).

APPENDIX E

Texas cases in which the death-sentenced offender has already been denied federal habeas relief in a final judgment and thus cannot seek review of any possible *Penry* claim in a successive federal habeas proceeding due to *In re Kunkle*, 398 F.3d 683, 684-85 (5th Cir. 2005):

Angel Rivera, No. 999102 (*Rivera v. Cockrell*, No. 01-41317 (5th Cir. Nov. 27, 2002) (*per curiam*) (unpublished).

Rickey Lewis, No. 999097 (*Lewis v. Cockrell*, No. 02-40985 (5th Cir. Jan. 22, 2003) (unpublished))

Robert Ramos, No. 999062 (*Ramos v. Cockrell*, No. 00-40633 (5th Cir. 2002) (unpublished)

David Wood, No. 999051 (*Wood v. Quarterman*, 503 F.3d 408 (5th Cir. 2007), cert. denied, 552 U.S. 1314 (2008))

Jamie McCoskey, No. 999053 (*McCoskey v. Thaler*, 2012 WL 1933570 (5th Cir. 2012) (unpublished)).

Tony Ford, No. 999075 (*Ford v. Dretke*, 135 Fed. Appx. 769 (5th Cir. 2005) (unpublished))

Robert Campbell, No. 999032 (*Campbell v. Dretke*, 117 Fed. Appx. 946 (5th Cir. 2004) (unpublished))

Bobby Hines, No. 999025 (*Hines v. Cockrell*, 57 Fed. Appx. 210 (5th Cir. 2002) (unpublished))

Steven Staley, No. 999006 (*Staley v. Dretke*, 126 Fed. Appx. 667, 668 (5th Cir. 2005) (unpublished) (vacating stay of execution entered by district court in anticipation of successive federal habeas petition alleging incompetency to be executed; procedural history notes that Staley was denied federal habeas relief by the federal district court (on claims other than his competency-to-be-executed claim) in September 2003 and apparently did not appeal).

Preston Hughes, No. 000939 (*Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008).

Marlin Nelson, No. 000913 (*Nelson v. Quarterman*, 215 Fed. Appx. 396 (5th Cir. 2007) (unpublished))

Willie Washington, No. 000856 (*Washington v. Thaler*, 464 Fed. Appx. 233 (5th Cir. 2012) (unpublished))

Pedro Sosa, No. 000778 (*Sosa v. Dretke*, 133 Fed. Appx. 114 (5th Cir. 2005) (unpublished))

Lester Bower, No. 000764 (*Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007))

Cesar Fierro, No. 000650 (*Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989))

Harvey Earvin, No. 000577 (*Earvin v. Lynaugh*, 860 F.2d 623 (5th Cir. 1988))

Raymond Riles, No. 000541 (*Riles v. McCotter*, 799 F.2d 947 (5th Cir. 1986))

APPENDIX F

Death-sentenced Texas offenders who are litigating federal habeas proceedings but not raising a *Penry* claim in federal court, and who will be barred from attempting to do so in the future by *In re Kunkle*, 398 F.3d 683 (5th Cir. 2005) **.**

Willie Trottie, No. 999085

George McFarland, No. 999046

Robert Jennings, No. 000956[1]

Steven Butler, No. 000925

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[1] Jennings won relief in federal district court earlier this year on a claim of ineffective assistance of counsel at the penalty phase. *Jennings v. Thaler*, No. H-09-219 (S.D. Tex., April 23, 2012). In that federal habeas proceeding, Jennings did not raise a *Penry* claim based on the mitigating evidence actually presented at trial, and the district court found Jennings' attempt to fashion a novel *Penry*-based constitutional complaint concerning the mitigating evidence he never presented at trial both procedurally defaulted and unexhausted. The State has appealed.

APPENDIX G

Offenders who appear to be presently incompetent to be executed, see *Ford v. Wainwright*, 477 U.S. 399 (1986), and who have been in that condition sufficiently long that there is no immediate prospect of their seeking federal habeas review:

Emanuel Kemp, No. 000909 (see Tony Heinzl, "Fate of Mentally Ill Killer Remains Uncertain," Fort Worth Star-Telegram (May 3, 2002) (quoting State District Judge Don Leonard as saying that he "ha[d] never observed a mental breakdown like Kemp's" and had "ordered periodic mental evaluations of Kemp since 1994;" those evaluations showed that Kemp's mental condition "ha[d] really gotten bad [and] deteriorated while in prison," leaving Judge Leonard with "no reason to believe he's competent [to be executed].")

Clarence Jordan, No. 000609 (see *Ex parte Jordan*, 758 S.W.2d 250 (Tex. Crim. App. 1988) (staying Jordan's execution "until the trial court finds him competent for execution," noting that the trial court had found Jordan incompetent to be executed under *Ford*, and intended periodically to reassess Jordan's mental condition))

Syed Rabbani, No. 000910, is reported by TDCJ to be housed at Jester IV, a psychiatric unit (see http://offender.tdcj.state.tx.us/POSdb2/offenderDetail.action?sid=03641873) (last visited October 8, 2012)

Nelson Mooney, No. 000868, is reported by TDCJ to be housed at Jester IV, a psychiatric unit (see http://offender.tdcj.state.tx.us/POSdb2/offenderDetail.action?sid=03551646) (last visited October 8, 2012)

APPENDIX H

An offender whose death sentence was reversed for some other legal error, and who was then re-sentenced to life as a result of plea negotiations (but who has not yet been physically removed from Death Row):

Delma Banks, No. 000671 (see *Banks v. Thaler*, 583 F.3d 295 (5th Cir. 2009) (affirming grant of relief as to death sentence); see also Brandi Grissom, "Death Row Inmate's Sentence Reduced to Life," Texas Tribune (August 2, 2012) (http://www.texastribune.org/texas-dept-criminal-justice/death-penalty/death-row-inmates-sentence-reduced-life/) (last visited October 8, 2012)

APPENDIX I

Death-sentenced Texas offenders who have not yet sought federal habeas review and are believed to be presently litigating *Penry* claims in state court:

William Mason, No. 999040

Daryl Wheatfall, No. 999020

Hector Garcia, No. 000985

Jack Smith, No. 000615

APPENDIX J

Death-sentenced Texas offenders who are presently litigating *Penry* claims in federal court:

John Matamoros, No. 999077

Shelton Jones, No. 999019

Arturo Aranda, No. 000636

Roger McGowen, No. 000889 (Respondent herein).