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Tennard v. Dretke
124 S. Ct. 2562 (2004)

I. Facts

In October of 1986 a Texas jury convicted Robert Tennard of capital murder, finding that the petitioner and two accomplices killed two of Tennard's neighbors.[1] During closing arguments at the penalty phase, defense counsel relied upon evidence that Tennard was a gullible person with an I.Q. of only 67.[2] The prosecution argued that Tennard's I.Q. was irrelevant, and the jury sentenced petitioner to death upon a finding of both deliberateness and future dangerousness.[3] After an unsuccessful direct appeal, petitioner sought postconviction relief.[4] The Texas Court of Criminal Appeals found that Tennard's I.Q. score did not establish mental retardation, and even if it did, petitioner would still not have been entitled to relief.[5]

In Tennard's subsequent request for federal habeas relief, he claimed that the sentencing instructions that guided the jury were inadequate because the two special issues presented to the jury did not allow the sentencer to consider and give effect to Tennard's mitigating evidence of gullibility and a low I.Q.[6] The district court denied the petition, finding both that a low I.Q. score did not establish mental retardation and also that the jury had ample opportunity to consider the mitigating significance of the low score.[7] The district court then denied petitioner a certificate of appealability ("COA").[8]

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1. Tennard v. Dretke, 124 S. Ct. 2562, 2565 (2004).

2. *Id.* at 2566. At the penalty phase, the prosecution introduced evidence of a previous rape conviction on Tennard's record. *Id.* The rape victim testified that she had escaped captivity by exiting through a bathroom window after telling Tennard that she would not attempt to flee if she were allowed to bathe. *Id.*

3. *Id.*; *see* TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon Supp. 1980) (requiring the submission to the jury of the two special issues of deliberateness and future dangerousness).

4. *Tennard*, 124 S. Ct. at 2566.

5. *Id.* at 2567; Penry v. Lynaugh, 492 U.S. 302, 319–28 (1989). In *Penry*, the Supreme Court concluded that because the jury was not informed that it could consider and give effect to the defendant's evidence of mental retardation as a mitigating factor, the imposition of a death sentence offended the Eighth and Fourteenth Amendments. *Penry*, 492 U.S. at 328. The Supreme Court had previously found that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

6. *Tennard*, 124 S. Ct. at 2566–68.

7. *Id.* at 2568.

8. *Id.*

The United States Court of Appeals for the Fifth Circuit agreed with the district court's conclusion.[9] Tennard's claim that the jury was unable to give mitigating effect to evidence presented because instructions that limited the jury's consideration to the two special issues of deliberateness and future dangerousness were identical to those found unconstitutional in a 1989 case, *Penry v. Lynaugh*.[10] In applying its own two-step "constitutional relevance" test for such *Penry* claims, the Fifth Circuit examined whether the petitioner produced evidence of a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own" and whether the petitioner presented evidence that " 'the criminal act was attributable to this severe permanent condition.' "[11] The court first held that evidence of a low I.Q. score did not amount to a "uniquely severe" condition and that the defense did not produce evidence of mental retardation, as opposed to simply a low I.Q. score.[12] Second, the Fifth Circuit held that had the evidence proved that Tennard was mentally retarded, the defense still failed to prove that the crime itself was a result of the low I.Q. score.[13]

The United States Supreme Court granted Tennard's petition for a writ of certiorari, vacated the Fifth Circuit's judgment, and remanded the case for reconsideration in light of *Atkins v. Virginia*.[14] After considering the substantive *Atkins* claim, the Fifth Circuit reinstated its prior decision because petitioner did not claim that the Eighth Amendment prohibited his execution as a mentally retarded person.[15] Again, the Supreme Court granted Tennard's petition for writ of certiorari.[16]

II. *Holding*

The Supreme Court reversed the judgment of the Fifth Circuit.[17] The Court found: (1) that evidence is relevant as mitigating evidence in capital cases if it "is of such a character that it 'might serve as a basis for a sentence less than death' ";

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9. *Id.*

10. *Id.* at 2567; *see Penry*, 492 U.S. at 319–28 (finding that "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense").

11. *Tennard*, 124 S. Ct. at 2568 (quoting Tennard v. Cockrell, 284 F.3d 591, 595 (5th Cir. 2002)).

12. *Id.*

13. *Id.*

14. *Id.*; *see* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded defendants constitutes cruel and unusual punishment under the Eighth Amendment).

15. *Tennard*, 124 S. Ct. at 2568; *see* Tennard v. Cockrell, 317 F.3d 476, 477 (5th Cir. 2003) (holding that because Tennard did not raise an Eighth Amendment issue, the claim was not properly before the Fifth Circuit).

16. *Tennard*, 124 S. Ct. at 2568.

17. *Id.* at 2573.

and (2) that evidence of a low I.Q. is relevant mitigating evidence in capital cases, regardless of whether the defendant established a nexus between his mental capacity and the crime.[18] Ultimately, the Court found that Tennard was entitled to a COA on his assertion that the jury instructions of the Texas capital sentencing scheme denied him the opportunity to have the jury consider and give mitigating effect to his low I.Q.[19]

III. Analysis

A. Legal Background

In 1978 the Supreme Court decided *Lockett v. Ohio*,[20] in which the petitioner argued that the Ohio death penalty statute was unconstitutional for its failure to provide the sentencing judge an opportunity to consider any but a narrow range of mitigating circumstances.[21] The Court sustained Lockett's challenge, holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[22] The Court added that "an individualized decision is essential in capital cases" because a death sentence is such an extreme penalty without the corrective mechanisms that are available with other forms of punishment.[23]

The Court subsequently applied the *Lockett* rule to Texas's death penalty statute in *Penry*.[24] Texas statutory law limited the sentencing jury to consideration of specific special issues: whether the commission of the crime was deliberate and whether the defendant constitutes a continuing threat to society.[25] The jury then was to "return a special verdict of 'yes' or 'no' on each issue submitted."[26] If the jury answered "yes" to each of the special issues, the court was required to

18. *Id.* at 2571–72 (quoting Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (internal quotations omitted)).

19. *Id.* at 2572–73.

20. 438 U.S. 586 (1978).

21. *Lockett*, 438 U.S. at 597.

22. *Id.* at 604.

23. *Id.* at 605.

24. *Penry*, 492 U.S. at 318.

25. *See* TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon Supp. 1980) (requiring a jury upon instruction to consider both "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 would constitute a continuing threat to society" and also "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

26. TEX. CRIM. PROC. CODE ANN. § 37.071(c).

sentence the defendant to death.[27] Penry argued that his evidence of mental retardation and childhood abuse was directly relevant to his moral culpability and that the Texas death penalty statute was unconstitutional for its failure to inform the jury that such evidence could be given mitigating effect.[28] The Supreme Court agreed with Penry and concluded that "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."[29]

Although Texas amended its sentencing statute to accommodate the problem identified in *Penry*, a slew of pre-*Penry* cases continued to work their way through the Texas state and federal courts. As these cases reached the Fifth Circuit, that court developed its own highly restrictive interpretation of "constitutional relevance" under *Penry*.[30] According to the Fifth Circuit, "[t]o grant relief on a *Penry* claim, we must determine (1) that the proffered evidence was *constitutionally relevant mitigating evidence*, and, if so, (2) that the proffered evidence was beyond the 'effective reach' of the jurors."[31] The court found evidence constitutionally relevant if it showed "(1) a 'uniquely severe permanent handicap [ ] with which the defendant was burdened through no fault of his own,' . . . and (2) that the criminal act was attributable to this severe permanent condition."[32] Although no precedent existed for the "constitutional relevance" test, the Fifth Circuit consistently relied upon its new gloss on *Penry* claims for the next ten years.[33]

B. Entitlement to a COA and Habeas Review

The Supreme Court first addressed the standards for issuing a COA and for granting federal habeas relief.[34] The pertinent federal habeas statute provides that "[a] certificate of appealability may issue . . . only if the applicant has made a

27. TEX. CRIM. PROC. CODE ANN. § 37.071(e).

28. *Penry*, 492 U.S. at 320–22.

29. *Id.* at 327–28.

30. *See* Madden v. Collins, 18 F.3d 304, 308 (5th Cir. 1994) (finding that the petitioner's "reliance on his personality disorder, his learning disability, and his troubled childhood as mitigation in support of his *Penry* claim, [was] misplaced").

31. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 372 (1993)).

32. Davis v. Scott, 51 F.3d 457, 460–61 (5th Cir. 1995) (quoting Graham v. Collins, 950 F.2d 1009, 1029 (5th Cir. 1982) (en banc)).

33. *See, e.g.*, Bigby v. Cockrell, 340 F.3d 259, 275 (5th Cir. 2003) (finding that evidence of a petitioner's schizophrenia was constitutionally mitigating evidence); Robertson v. Cockrell, 325 F.3d 243, 253 (5th Cir. 2003) (en banc) (holding that without constitutionally mitigating evidence, a supplemental jury instruction that failed to cure the defective Texas statutory instructions did not constitute error); Smith v. Cockrell, 311 F.3d 661, 680–81 (5th Cir. 2002) (applying the constitutionally relevant prong of a two-part test to determine if evidence requires a special instruction).

34. *Tennard*, 124 S. Ct. at 2569.

substantial showing of the denial of a constitutional right."[35] Furthermore, in *Slack v. McDaniel*,[36] the Court held that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[37]

A federal court may only grant federal habeas relief on a claim that has been decided on the merits by a state court if "the state court adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' "[38] The Court confirmed that Tennard properly preserved his claim for habeas review because defense counsel had unsuccessfully raised the *Penry* claim in a pretrial motion and because the state courts had decided the issue on the merits.[39]

C. The Fifth Circuit's COA Determination

Both 28 U.S.C. § 2253(c)(2) and *Slack* provide clear standards for issuance of a COA.[40] However, because the Fifth Circuit applied its independent "constitutional relevance" screening test when evaluating *Penry* claims, the petitioner was inappropriately required to hurdle an additional obstacle to " 'demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' "[41] Consequently, because Tennard failed to produce evidence that the crime was attributable to his low I.Q., the appellate court concluded that he did not have an meritorious *Penry* claim.[42] The Supreme Court, however, determined that the Fifth Circuit's "constitutional relevance" test was inappropriate because the Court had never "screened mitigating evidence . . . before considering whether the jury instructions comported with the Eighth Amendment."[43]

Contrary to the Fifth Circuit's restrictive test, "the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital

35. 28 U.S.C. § 2253(c)(2) (2000).

36. 529 U.S. 473 (2000).

37. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

38. *Tennard*, 124 S. Ct. at 2569 (quoting 28 U.S.C. § 2254(d)(1) (2000)); *see* 28 U.S.C. § 2254(d)(1) (limiting federal courts' authority to issue writs of habeas corpus regarding state court adjudications; part of AEDPA).

39. *Tennard*, 124 S. Ct. at 2569.

40. *Id.* at 2569–70.

41. *Id.* (quoting *Slack*, 529 U.S. at 484); *see id.* at 2568 (stating that defendant must present evidence of both a "uniquely severe permanent handicap" and also that the crime was "attributable to this severe permanent condition").

42. *Tennard*, 124 S. Ct. at 2570.

43. *Id.*

sentencing proceeding' than in any other context."[44] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[45] Therefore, it follows that " '[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' "[46] If evidence could persuade a reasonable jurist to institute a sentence less than death, a state cannot preclude the sentencer from considering it.[47]

One of the Court's primary concerns with the Fifth Circuit's screening test was that it effectively excluded all good-character evidence because a defendant's positive attributes can be considered neither handicaps nor explanations for a crime.[48] Such an exclusion directly contradicted the principle that "good-character evidence can be evidence that . . . 'may not be excluded from the sentencer's consideration.' "[49] For example, although a defendant's behavior while incarcerated is unrelated to the defendant's guilt of capital murder, the Court held in *Skipper* that " 'a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is . . . by its nature relevant to the sentencing determination.' "[50] The Fifth Circuit's test, however, incorrectly bars such evidence as constitutionally irrelevant.[51] Instead, the Supreme Court concluded that "the question is simply whether the evidence is of such a character that it 'might serve as a basis for a sentence less than death.' "[52]

The Supreme Court further held that the Fifth Circuit should not have declined Tennard's *Penry* claim solely because Tennard did not produce evidence that the crime was a result of his low I.Q.[53] Citing *Atkins*, the Court stated that "impaired intellectual functioning is inherently mitigating."[54] Because the Court in *Atkins* did not require a nexus between petitioner's mental retardation and the

44. *Id.* (quoting McKoy v. North Carolina, 494 U.S. 433, 440 (1990)).

45. FED. R. EVID. 401.

46. *Tennard*, 124 S. Ct. at 2570 (quoting *McKoy*, 494 U.S. at 440).

47. *Id.*; *see* Payne v. Tennessee, 501 U.S. 808, 822 (1991) (stating that "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death").

48. *Tennard*, 124 S. Ct. at 2570.

49. *Id.* (quoting *Skipper*, 476 U.S. at 5).

50. *Id.* at 2570–71 (quoting *Skipper*, 476 U.S. at 7).

51. *Id.* at 2571.

52. *Id.* (quoting *Skipper*, 476 U.S. at 5) (internal quotations omitted).

53. *Id.*

54. *Tennard*, 124 S. Ct. at 2571; *see Atkins*, 536 U.S. at 316 (finding that "today our society views mentally retarded offenders as categorically less culpable than the average criminal").

crime, the Court in *Tennard* refused to require such a connection to allow the introduction of a low I.Q. as mitigating evidence during sentencing.[55]

D. Issuance of a COA

In discussing the appropriate test for issuing a COA, the Court posed the appropriate inquiry: "has Tennard 'demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong'?"[56] Because a low I.Q. demonstrated Tennard's reduced mental capacity, a reasonable jurist could have found it relevant mitigating evidence that weighed in favor of a sentence other than death.[57] The Supreme Court also found that the Texas Court of Criminal Appeals misapplied *Penry* in rejecting Tennard's *Penry* claim.[58] Specifically, both the evidence and comments from the prosecution suggested that the jury was misled to believe that Tennard's low I.Q. was relevant only as an aggravating factor tending to prove petitioner's future dangerousness.[59] As a result, a reasonable jurist could find that mitigating significance of the evidence had been erroneously excluded from the jury's decision-making.[60]

IV. Application in Virginia

Virginia capital defendants may continue to rely on federal statute and *Slack* as the guiding principles for issuing a COA. Defendants must demonstrate the "denial of a constitutional right" and that a reasonable jurist would find the lower court's "assessment of the constitutional claims debatable or wrong."[61] Habeas petitioners will not be required to overcome additional obstacles, such as the Fifth Circuit's "constitutional relevance" gloss on *Penry* claims, in order to obtain a COA.[62]

Tennard establishes that a heightened relevance standard for mitigating evidence is contrary to Supreme Court precedent and therefore invalid. There is no distinction between the relevance standard for mitigating evidence in the sentencing phase of a capital murder trial and the general evidentiary standard.[63]

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55. *Tennard*, 124 S. Ct. at 2572.

56. *Id.* (quoting *Slack*, 529 U.S. at 484).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 2572–73.

61. *See* 28 U.S.C. § 2253(c)(2) (2000) (stating that a COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right"); *Slack*, 529 U.S. at 484 (holding that "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong").

62. *Tennard*, 124 S. Ct. at 2572.

63. *Id.* at 2570. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

Virginia Code section 19.2-264.4 provides in part that "evidence may be presented as to any matter which the court deems relevant to sentence."[64] *Tennard* establishes that state courts must deem evidence relevant if it passes the minimal relevance requirements such as those contained in the Federal Rules of Evidence, and attorneys should object to the exclusion of any relevant mitigating evidence during the sentencing proceeding of a capital trial, or to jury instructions that obstruct the jury's ability to consider such evidence.[65]

In light of *Penry* and *Atkins*, *Tennard* makes it clear that evidence of a low I.Q. score is appropriate mitigating evidence that can be used in a capital sentencing proceeding. However, because Virginia Code section 19.2-264.4(B) already states in a non-exhaustive list that "the subaverage intellectual functioning of the defendant" may serve as mitigating evidence, *Tennard* does not represent a change in Virginia capital defense law.[66] Instead, capital defense attorneys should continue to take the appropriate steps to protect a client that could potentially be found mentally retarded under Virginia Code section 19.2-264.3:1.1.[67] If a defendant is found not to be mentally retarded at trial and the death penalty is not barred under *Atkins*, an impaired mental capacity such as Tennard's still constitutes mitigating evidence during the sentencing phase of a capital murder trial.[68]

V. Conclusion

The Supreme Court confirmed that 28 U.S.C. § 2253 and *Slack* continue to be the controlling authorities for the issuing of a COA.[69] *Tennard* also established that defendants must meet only a bare relevance standard for introducing mitigating evidence, and any additional requirements violate Supreme Court precedent.[70] The *Tennard* Court restated its position that evidence of an impaired mental capacity is inherently mitigating for use in a capital sentencing

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probable than it would be without the evidence." FED. R. EVID. 401.

64. VA. CODE ANN. § 19.2-264.4(B) (Michie 2004).

65. *See* FED. R. EVID. 401 (stating that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

66. VA. CODE ANN. § 19.2-264.4(B).

67. *See* VA. CODE ANN. § 19.2-264.3:1.1 (Michie 2004) (listing procedures for determining whether a defendant is mentally retarded). For a complete discussion and analysis of *Atkins*, *see generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117 (2002) (analyzing Atkins v. Virginia, 122 S. Ct. 2242 (2002)).

68. *See* VA. CODE ANN. § 19.2-264.4(B) (stating that "the subaverage intellectual functioning of the defendant" may be used as mitigating evidence).

69. *Tennard*, 124 S. Ct. at 2569.

70. *Id.* at 2570.

proceeding.[71] Although *Tennard* did not affect Virginia law, the case served to reinforce the current law regarding general mitigating evidence, the use of subaverage intellectual capacity as mitigating evidence, and the principles for issuing a COA.[72]

For years, the Fifth Circuit dismissed numerous claims for their failure to pass its unique and inappropriate gloss on *Penry*, and the Supreme Court continued to deny certiorari.[73] In late 2003, however, the unflagging efforts of many attorneys for condemned Texas prisoners came to fruition when the Court granted certiorari to examine and ultimately reject the Fifth Circuit's "constitutional relevance" test.[74] *Tennard* serves as a compelling reminder of the importance of perseverance in capital defense.

Mark J. Goldsmith

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71. *Id.* at 2571.

72. *See* VA. CODE ANN. § 19.2-264.4(B) (Michie 2004) (stating that "the subaverage intellectual functioning of the defendant" may be used as mitigating evidence).

73. *See, e.g.*, *Robertson*, 325 F.3d at 253 (rejecting a nexus between evidence of child abuse and the defendant's criminal behavior), *cert. denied*, 539 U.S. 979 (2003); Jones v. Johnson, 171 F.3d 270, 276 (5th Cir. 1999) (rejecting a nexus between evidence of a very low I.Q. and the defendant's criminal behavior), *cert. denied*, 527 U.S. 1059 (1999); Davis v. Scott, 51 F.3d 457, 461–62 (5th Cir. 1995) (rejecting a nexus between paranoid schizophrenia, violent paraphilia, and child abuse and the defendant's criminal behavior), *cert. denied*, 516 U.S. 992 (1995); Allridge v. Scott, 41 F.3d 213, 223 (5th Cir. 1994) (rejecting a nexus between mental illness and the defendant's criminal behavior), *cert. denied*, 514 U.S. 1108 (1995); Lackey v. Scott, 28 F.3d 486, 489–90 (5th Cir. 1994) (rejecting a nexus between child abuse and a very low I.Q. and the defendant's criminal behavior), *cert. denied*, 513 U.S. 1086 (1995); *Madden*, 18 F.3d at 307–08 (rejecting a nexus between avoidant personality disorder, organic brain impairment, and child abuse and the defendant's criminal behavior), *cert. denied*, 513 U.S. 1156 (1995); Barnard v. Collins, 958 F.2d 634, 638 (5th Cir. 1992) (rejecting a nexus between head trauma and troubled childhood and the defendant's criminal behavior), *cert. denied*, 506 U.S. 1057 (1993).

74. *See* Tennard v. Dretke, 124 S. Ct. 383, 383 (2003) (granting a writ of certiorari).

CASE NOTES:

United States Court of Appeals for the Fourth Circuit