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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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TENNARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–10038. Argued March 22, 2004—Decided June 24, 2004

During his capital murder trial's penalty phase, petitioner Tennard presented evidence that he had an IQ of 67. The jury was instructed to determine the appropriate punishment by considering two "special issues," which inquired into whether the crime was committed deliberately and whether the defendant posed a risk of future dangerousness. These were materially identical to two special issues found insufficient, in *Penry* v. *Lynaugh,* 492 U. S. 302, for the jury to give effect to Penry's mitigating mental retardation and childhood abuse evidence. Tennard's jury answered both special issues affirmatively and Tennard was sentenced to death. The Federal District Court denied Tennard's federal habeas petition in which he claimed that his death sentence violated the Eighth Amendment as interpreted in *Penry,* and denied a certificate of appealability (COA). The Fifth Circuit agreed that Tennard was not entitled to a COA. It applied a threshold test to Tennard's mitigating evidence, asking whether it met the Fifth Circuit's standard of "constitutional relevance" in *Penry* cases—that is, whether it was evidence of a "uniquely severe permanent handicap" that bore a "nexus" to the crime. The court concluded that (1) low IQ evidence alone does not constitute a uniquely severe condition, and no evidence tied Tennard's IQ to retardation, and (2) even if his low IQ amounted to mental retardation evidence, Tennard did not show that his crime was attributable to it. After this Court vacated the judgment and remanded for further consideration in light of *Atkins* v. *Virginia,* 536 U. S. 304, the Fifth Circuit reinstated its prior opinion.

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Held: Because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack* v. *McDaniel,* 529 U. S. 473, 484, a COA should have issued. Pp. 7–15.

(a) A COA should issue if an applicant has "made a substantial showing of the denial of a constitutional right," 28 U. S. C. §2253(c)(2), by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," 529 U. S., at 484. Relief may not be granted unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. §2254(d)(1). Pp. 7–8.

(b) The Fifth Circuit assessed Tennard's *Penry* claim under an improper standard. Its threshold "constitutional relevance" screening test has no foundation in this Court's decisions. Relevance was not at issue in *Penry*. And this Court spoke in the most expansive terms when addressing the relevance standard directly in *McKoy* v. *North Carolina,* 494 U. S. 433, 440–441, finding applicable the general evidentiary standard that "'"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,"'" *id.,* at 440. Once this low relevance threshold is met, the "Eighth Amendment requires that the jury must be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde* v. *California,* 494 U. S. 370, 377–378. The Fifth Circuit's test is inconsistent with these principles. Thus, neither the "uniquely severe" nor the "nexus" element of the Fifth Circuit's test was a proper reason not to reach the substance of Tennard's *Penry* claims. Pp. 8–13.

(c) Turning to the analysis that the Fifth Circuit should have conducted, reasonable jurists could conclude that Tennard's low IQ evidence was relevant mitigating evidence, and that the Texas Court of Criminal Appeals' application of *Penry* was unreasonable, since the relationship between the special issues and Tennard's low IQ evidence has the same essential features as that between those issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately. A reasonable jurist could conclude that the jury might have given the low IQ evidence aggravating effect in considering Tennard's future dangerousness. Indeed, the prosecutor pressed exactly the most problematic interpretation of the special issues, suggesting that Tennard's low IQ was irrelevant in mitigation, but relevant to future dangerousness. Pp. 13–15.

317 F. 3d 476, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS,

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KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., SCALIA, J., and THOMAS, J., filed dissenting opinions.