

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2008

No. _____

DAVID LEE POWELL,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

Capital Case

Question Presented

Whether it is constitutionally permissible for an appellate court to reverse a death sentence based on the failure to submit an *Apprendi/Ring* element to the jury, keep in place the resulting conviction for non-death-eligible capital murder, and remand solely for a re-sentencing trial on the elements which raise the statutory maximum sentence from life in prison to death?

TABLE OF CONTENTS

Question Presented	i
Table of Authorities	ii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	
A. Course of Prior Proceedings	1
B. Statement of Facts	3
Reasons for Granting the Writ	
A. Introduction	6
B. The Special Issues in the Texas Death Penalty Statute Are Elements of Capital Murder	6
C. When the Jury Does Not Consider an Element of Capital Murder That, Prior to <i>Apprendi</i> and <i>Ring</i> , Was Considered a Sentencing Factor Rather Than an Element, That Error Can No Longer Be Remedied by a New Sentencing Proceeding	11
D. The Fifth Circuit Failed to Apply the Principles of the Double Jeopardy Clause When It Sustained the Court of Criminal Appeals' Remand for Re- Sentencing	19
E. The Omission of the Deliberateness Special Issue from the Second Trial Was Not Harmless	22
Conclusion	26
Appendix 1: <i>Powell v. Quarterman</i> , 536 F.3d 325 (5 th Cir. 2008)	
Appendix 2: Order Denying Rehearing in <i>Powell v. Quarterman</i> , No. 06-70008 (5 th Cir., August 19, 2008)	

Appendix 3: Report and Recommendation of the United States Magistrate, *Powell v. Dretke*, No. A-03-CA-456 LY (W.D.Tx., February 28, 2005)

Appendix 4: Order on Report and Recommendation, *Powell v. Dretke*, No. A-03-CA-456 LY (W.D.Tx., December 27, 2005)

TABLE OF AUTHORITIES

Federal Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	<i>passim</i>
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969)	17
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	20
<i>Brown v. Ohio</i> , 432 U.S. 161 (1977)	17, 18, 19
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	22
<i>In re Nielsen</i> , 131 U.S. 176 (1889)	17
<i>Mitchell v. Esparza</i> , 540 U.S. 12 (2003)	22
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	22, 26
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969)	17
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	8, 25
<i>Powell v. Quarterman</i> , 536 F.3d 325 (5 th Cir. 2008)	20, 21
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	<i>passim</i>
<i>Sattazhan v. Pennsylvania</i> , 537 U.S. 101 (2003)	<i>passim</i>
<i>United States v. Alerta</i> , 96 F.3d 1230 (9th Cir. 1996)	12, 13
<i>United States v. Banuelos</i> , 322 F.3d 700 (9th Cir. 2003)	14
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	16
<i>United States v. Eads</i> , 191 F.3d 1206 (10th Cir. 1999)	12
<i>United States v. Longoria</i> , 298 F.3d 367 (5th Cir. 2002)	16
<i>United States v. Mackins</i> , 315 F.3d 399 (4th Cir. 2003)	15
<i>United States v. Meshack</i> , 225 F.3d 556 (5th Cir. 2000)	15

<i>United States v. Nordby</i> , 225 F.3d 1053 (9th Cir. 2000)	13-14
<i>United States v. Page</i> , 232 F.3d 536 (6th Cir. 2000)	15
<i>United States v. Perez</i> , 97 F.3d 1340 (9th Cir. 1997)	12
<i>United States v. Perez-Ruiz</i> , 353 F.3d 1 (1st Cir. 2003)	15
<i>United States v. Randle</i> , 304 F.3d 373 (5th Cir. 2002)	16
<i>United States v. Slaughter</i> , 238 F.3d 580 (5th Cir. 2001)	22
<i>United States v. Thomas</i> , 355 F.3d 1191 (9th Cir. 2004)	14
<i>United States v. Williams</i> , 400 F.3d 277 (5 th Cir. 2005)	20

State Cases

<i>Powell v. State</i> , 742 S.W.2d 353 (Tex. Crim. App. 1987)	1
<i>Powell v. State (Powell II)</i> , 897 S.W.2d 307 (Tex. Crim. App. 1994)	2, 9, 10

Statutes

Tex. Code Crim. P. art. 37.071	9
18 U.S.C. § 924(c)	11, 12, 13

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published as *Powell v. Quarterman*, 536 F.3d 325 (5th Cir. 2008), and is set out in **Appendix 1**.

JURISDICTION

The Court has jurisdiction to review the decision of the Fifth Circuit pursuant to 28 U.S.C. § 1254(1) and Rule 13.1 of the Rules of the Supreme Court. The decision of the Fifth Circuit affirming the district court decision was entered July 16, 2008. **Appendix 1**. A timely petition for rehearing was filed, and on August 19, 2008, the Fifth Circuit denied rehearing. That order is set forth in **Appendix 2**. The due date for the petition for writ of certiorari November 17, 2008, and it has been filed on that date.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, “nor [shall] cruel and unusual punishments [be] inflicted.” It also involves application of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, which provides “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

STATEMENT OF THE CASE

A. Course of Prior Proceedings

David Powell was first convicted and sentenced to death for the capital murder of Austin police officer Ralph Ablanedo in 1978. The Texas Court of Criminal Appeals affirmed, *Powell v. State*, 742 S.W.2d 353 (Tex. Crim. App. 1987), but the Court vacated his death sentence. *Powell v. Texas*, 492 U.S. 680 (1989).

In 1991, Powell was again tried for capital murder, convicted and sentenced to death.¹ On appeal the Court of Criminal Appeals affirmed the conviction but vacated the sentence and remanded for a new sentencing proceeding, *Powell v. State (Powell II)*, 897 S.W.2d 307 (Tex. Crim. App. 1994), because the trial court failed to instructed the jury to consider the deliberateness special issue. *Id.* at 318.² Powell sought certiorari, alleging that he was entitled to a complete new trial, but certiorari was denied. *Powell v. Texas*, 516 U.S. 808 (1995).

Thereafter, Powell filed a motion in the trial court to set aside his conviction and requested that the trial court order a new trial to determine his guilt or innocence. I CR 111.³ The motion was denied on May 21, 1996. 4 at 4-5. On February 22, 1999, Powell's new sentencing trial began. 33 at 1. The jury answered the special issues on March 6, 1999, and the court sentenced Powell to death. 43 at 18. The Court of Criminal Appeals affirmed, *Powell v. State*, No. 71,399 (Tex. Crim. App. 2002) (unpublished), and the Supreme Court denied certiorari. *Powell v. Texas*, 537 U.S. 1015 (2002).

Thereafter, Powell filed a state habeas application, and the Court of Criminal Appeals denied it on the basis of the trial court's recommendation. A timely federal habeas petition was

¹At that time, Texas law required a retrial of the entire case even if the reversal was only for sentencing error.

²By this time, Texas law had changed, no longer requiring a retrial of the entire case if the reversal was only for sentencing error.

³The clerk's record for the third trial, which includes the relevant filings in the case, is referred to by volume and page number, with "CR" appearing between the volume and page number. Other references to this trial record are as follows: The transcript is referred to by volume number and page number, with "at" referring to the page number. Exhibit volumes are a part of the transcript and are also referred to by volume and exhibit number, using "at" to refer to the exhibit number.

then filed. ROA 41-158 (dkt. 21).⁴ The magistrate judge recommended denial of the petition on February 28, 2005. ROA 439-526 (dkt. 49), attached hereto as **Appendix 3**. Over Powell's objection, on December 27, 2005, the district court adopted in its entirety the magistrate's report and recommendation and entered final judgment against Powell. ROA 559-62 (dkt. 53, 54), attached hereto as **Appendix 4**. The district court denied a certificate of appealability on January 19, 2006. ROA 568-69 (dkt. 56).

On appeal to the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit granted a certificate of appealability on April 16, 2008. *Powell v. Quarterman*, 283 Fed.Appx. 186 (5th Cir. 2008) (unpublished). Thereafter, on July 16, 2008, the Fifth Circuit affirmed the district court's denial of Mr. Powell's habeas petition, *Powell v. Quarterman*, 536 U.S. 325 (5th Cir. 2008) (**Appendix 1**), and rehearing was denied. **Appendix 2**.

B. Statement of Facts

On the night of May 17, 1978, Powell asked his former girlfriend Sheila Meinert to drive him from Austin to Killeen to conduct a drug deal. 39 at 43-44. Meinert knew that Powell had an outstanding arrest warrant and a large quantity of drugs in the car. 39 at 45, 48. Powell had with him a loaded .45 semi-automatic pistol in a holster, a loaded automatic rifle, a hand grenade with tape wrapped around the spoon, and a back pack that contained 2¼ ounces of amphetamines, which had a street value of \$5,000. 35 at 172; 37 at 66-68; 39 at 52; 46 at Ex. 73. There was a small glass pipe with traces of amphetamine powder on it in the car that Powell

⁴“ROA” is the Record on Appeal in the Fifth Circuit. The case in the the district court was styled *Powell v. Dretke*, No. 1:03-cv-00456 (W.D.Tex.). For the convenience of the Court, whenever Mr. Powell refers to the record on appeal, he will also note the docket number of the document in the district court's record.

could have used to inhale some of the speed as Meinert drove. 33 at 239, 241-42.

Austin police officer Ralph Ablanedo was riding alone in his marked patrol car when he saw Meinert driving on East Live Oak without a rear license tag. 33 at 66, 223-24; 38 at 45-46. Meinert pulled over to the curb and got out of the Mustang when she saw Ablanedo flash his lights. 39 at 45-46, 52. Powell did not say anything to her. 39 at 52. Ablanedo checked Powell's driver's license and asked the dispatcher to run a warrant check on him. He gave Meinert a traffic ticket and allowed her to drive off with Powell before the warrant check was completed because the dispatcher told him that her computer system was malfunctioning. 33 at 223-24; 39 at 45-46, 49-50. The dispatcher informed Ablanedo that Powell had a "possible wanted" for misdemeanor theft shortly after the Mustang started driving away. 33 at 223-24. The car only traveled half a block before Ablanedo signaled for Meinert to pull over again. 39 at 50. Powell did not say anything to Meinert when she stopped the car. 39 at 52-53. She did not see him reach for the carrying case where he kept his automatic rifle. 39 at 53.

Meinert claimed that she got out of the Mustang, walked towards Ablanedo's car, then "heard a very, very loud noise." 39 at 51-52. She said that she had the "sense of all hell breaking loose" and "just ran back to the car." 39 at 54. She claimed, "I think I was just screaming and crying and yelling and just scared.... So what did I do was, I think, just go forward in the car and drive." 39 at 54.

As Bobby Bullard happened to drive by Meinert's and Ablanedo's cars, he witnessed the shooting of Ablanedo. 34 at 42-45. He saw Ablanedo get out of his car and walk toward the Mustang. *Id.* He could not see the occupants of the Mustang, but he heard two or three single shots fired from the Mustang and saw Ablanedo fall. 34 at 45. Shortly thereafter, Ablanedo got

up and “a bunch” of shots hit him. 34 at 46. Bullard saw Powell firing these shots from inside the Mustang. 34 at 46. Bullard and others, who heard gunshots but did not see what happened, came to Ablanedo’s aid. Ablanedo told these people that “a girl” shot him and then “a guy ... got [him] with a shotgun.” 33 at 61, 203; 34 at 21, 203. Ablanedo died during surgery. 33 at 89.

After the shooting, Meinert drove away with Powell. 39 at 53-54. Another police officer, Joe Villegas, spotted their car in a parking lot after he heard the report of the Ablanedo shooting. As he pulled into the lot, a burst of automatic weapon fire came from the car. 34 at 80-81. Other officers joined Villegas, and gunfire was exchanged with the occupants of the Mustang, but no bullets hit any of the officers or their cars. 34 at 83, 90-91, 99, 109-113, 118-119, 131-134. Powell was identified as the person who fired some of the shots. 34 at 84, 131-134. During the standoff, Officer Bruce Boardman saw a person he later thought was Powell throw something at the officers. 34 at 118-119. Later, a live grenade was found on the ground about 12 feet from the driver’s door of Villegas’ car. 33 at 134-35.

When the gunfire stopped, Meinert was apprehended in the parking lot. 34 at 111. Powell was apprehended shortly thereafter. 34 at 168-170. Meinert denied shooting Ablanedo, 39 at 53-54, denied that she fired any shots in the exchange of gunfire in the parking lot, 39 at 54, 57, and denied throwing the grenade. 39 at 56-64.

In Mr. Powell’s third trial – solely a re-sentencing proceeding – defense counsel told the jury in his opening statement that Powell was responsible for every aspect of the crime, that Meinert had no part in it, and that because of this, he would not cross-examine most state witnesses. 33 at 39. The defense was that Powell was no longer – in 1999 when the re-sentencing proceeding trial was held – a future danger. The defense presented evidence that

Powell had been a good, law-abiding young person with great promise until he fell into drug usage in college, which then led to chronic and debilitating addiction, drug dealing, a variety of thefts, and increasingly irrational and erratic behavior, between 1970 and 1978. *See generally* 38 at 71-202, 39 at 74-158, 40 at 8-17. The defense also demonstrated that after the first few months Powell was on death row in 1979, until the time of the trial, Powell had become a model prisoner, *see* 40 at 33-113, and had developed positive relationships with a number of Texas citizens. *See* 40 at 128-143, 41 at 9-40.

REASONS FOR GRANTING THE WRIT

A. Introduction

This Court has repeatedly, and unambiguously, held that any facts that increase the penalty for a crime beyond the prescribed statutory maximum are the functional equivalent of elements of a higher grade offense, and, therefore, must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 482-84, 490 (2000); *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Sattazhan v. Pennsylvania*, 537 U.S. 101, 111 (2003). These decisions make plain that where all such facts are not submitted to the jury the judgment cannot stand. The question squarely presented by this case is whether a complete new trial is required where all *Apprendi* elements are not presented to the jury or whether it is constitutionally permissible to empanel a jury for a re-sentencing proceeding only, to determine the existence of only those additional *Apprendi* elements which increase the statutory maximum punishment.

B. The Special Issues in the Texas Death Penalty Statute Are Elements of Capital Murder

Under the reasoning of *Apprendi* and *Ring*, there is no question that the special issues in

the capital sentencing scheme in Texas are elements of the crime of capital murder.

In *Apprendi*, the Court considered a New Jersey statute which permitted a judge to add a hate crime enhancement to the statutorily prescribed sentence for a defendant's crime upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. *Id.* at 469-70. The Court held New Jersey's hate crime enhancement procedure unconstitutional, because it permitted a judge, acting without the jury and using only a preponderance standard, to enhance the punishment for a crime outside the statutorily prescribed range. Because the hate crime enhancement permitted a greater punishment than mere conviction of the underlying crime permitted, the Court found it functioned not merely as a sentencing factor but as an "element of a greater offense than the one covered by the jury's guilt verdict." *Id.* at 494 n. 19.⁵ For this reason, the Court held that *Apprendi*'s sentence violated his right to "a jury determination that [he] is guilty of every element of the crime for which he is charged, beyond a reasonable doubt." *Id.* at 477. The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor": "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis for treating [i]t differently" than a substantive element of the crime. 530 U.S. at 476.

In *Ring*, the Court applied *Apprendi* to the capital sentencing context. The Court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment

⁵The Court cited with approval, *id.*, to Justice Thomas' concurring opinion, in which he explained, "[i]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime." *Id.*, at 501 (Thomas, J., concurring).

contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” *Ring*, 536 U.S. at 602. Finding that the Arizona death penalty statute required additional findings of fact after a defendant was convicted of murder to permit imposition of the death sentence, the Court held the statute unconstitutional because it permitted the judge alone to make the fact findings necessary for the imposition of the death penalty. The Court explained its holding within the framework of *Apprendi*: “Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ *Apprendi*, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.” *Ring*, 536 U.S. at 609.

Apprendi and *Ring* teach that courts must look not to the “form” but the “effect” of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a “sentencing factor,” so long as the sentencing factor served to elevate the maximum punishment beyond that which was permissible upon conviction alone. 536 U.S. at 605. A “sentencing factor” which makes the defendant eligible for a more severe punishment than “the maximum authorized by a guilty verdict standing alone,” *id.*, is “the functional equivalent of an element of a greater offense,” *id.* (quoting *Apprendi*, 530 U.S. at 494 n.19), and must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant’s guilt. *Id.*

In Texas capital proceedings such as Mr. Powell’s, which are governed by the Texas capital sentencing statute as it existed prior to *Penry v. Lynaugh*, 492 U.S. 302 (1989), the statutory special issues concerned with deliberateness and future dangerousness serve the same

role as death-eligible aggravating circumstances in Arizona.⁶ In Texas, as in Arizona, “[b]ased solely on the jury’s verdict [in the guilt phase of trial], the maximum punishment [a capital defendant] could ... receive [i]s life imprisonment.” *Ring*, 536 U.S. at 597. Unless the prosecution proves two additional elements – deliberateness and future dangerousness – during a sentencing hearing following conviction, the sentence is life. *See* Tex. Code Crim. P. art. 37.071, § 3(b)(1),(2) (death is the sentence *only if*, in the trial of an offense committed prior to September 1, 1991, the jury finds *both* that “the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death would result,” *and* that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”).

During Mr. Powell’s second trial, “deliberateness” was not submitted to the jury in the penalty phase of his trial. For this reason, the Texas Court of Criminal Appeals reversed Mr. Powell’s death sentence and remanded to the trial court for a new punishment trial during which both “deliberateness” and “future dangerousness” would be considered. *Powell (II)*, 897 S.W.2d at 318. Upon his return to the trial court, Mr. Powell objected, and argued that he was entitled to a complete retrial, not just a re-sentencing trial. The trial court overruled Mr. Powell’s objection and empaneled a jury in his third trial for the purpose only of re-sentencing, to determine only “deliberateness” and “future dangerousness.”

⁶In the wake of *Penry*, the capital sentencing statute, Tex. Code of Criminal Procedure, art. 37.071, was amended. However, “the legislature . . . specifically mandated that for offenses committed prior to September 1, 1991, the version of art. 37.071 in effect on the date of the offense would apply.” *Powell II*, 897 S.W.2d at 315. The version in effect in May, 1978, when Mr. Powell’s offense was committed, set out deliberateness and future dangerousness as the primary special issues that determined the defendant’s death eligibility. *Id.*

In the direct appeal from this third (and most recent) trial, Mr. Powell presented this issue to the Texas Court of Criminal Appeals. Appellant’s Brief (filed September 28, 2000), at 207-213. The Court of Criminal Appeals denied relief because of its view that the special issues are not elements of the crime of capital murder in Texas. *Powell v. State*, No. 71,399 (Tex. Crim. App. 2002) (unpublished). The Court of Criminal Appeals acknowledged having referred to the deliberateness special issue as an “element” of capital murder in its previous direct opinion in *Powell v. State*, 897 S.W.2d 307, 316 (Tex.Crim.App. 1994) [*Powell II*]. Slip Opinion, at 53. However, it explained,

[b]y using the term ‘element,’ we were not suggesting that ‘deliberateness’ was part of the State’s burden at the guilt/innocence stage. Rather, it was an element of the ‘punishable by death’ portion of the State’s burden.

On this reasoning, the Court of Criminal Appeals denied relief on Mr. Powell’s *Apprendi* claim. *Id.* at 53-54.

The federal district court determined in Mr. Powell’s habeas proceeding that this determination was entitled to no deference under 28 U.S.C. § 2254(d)(1), because, notwithstanding the Court of Criminal Appeals’ “label,” *Apprendi*, 530 U.S. at 476, the Texas special issues function precisely like the hate crime enhancement at issue in *Apprendi* and the aggravating circumstances in the Arizona death penalty statute at issue in *Ring*. ROA 459 (in dkt. 49, Report and Recommendation of the United States Magistrate Judge) (“the Court agrees that the deliberateness special issue is an element of the offense of death-eligible capital murder” (citing *Sattazhan*, 537 U.S. at 111)) (**Appendix 3**).

That a death sentence may be imposed in Texas only in a separate sentencing proceeding in which the special issues must be found is thus determinative of the role special issues play:

Under *Apprendi* and *Ring* they are “the functional equivalent[s] of ... elements of a greater offense,” *Ring*, 536 U.S. at 609, and capital murder “*simpliciter*,” *Sattazhan*, 537 U.S. at 112 – *i.e.*, capital murder without a finding of the special issues – is a “lesser included offense.” *Id.* at 111. The special issues are elements of the greater offense of “capital murder plus special issues.” *See Sattazhan*, 537 U.S. at 111 (referring to “murder plus one or more aggravating circumstances” as the greater offense in a statute that uses aggravating circumstances).

C. When the Jury Does Not Consider an Element of Capital Murder That, Prior to *Apprendi* and *Ring*, Was Considered a Sentencing Factor Rather Than an Element, That Error Can No Longer Be Remedied by a New Sentencing Proceeding

The determination that the special issues in Texas are elements of the aggravated offense, “capital murder plus special issues,” has fundamental consequences. Before *Apprendi* and *Ring*, the failure to consider a special issue, or error in considering a special issue, could, consistent with the Constitution, have been remedied by a new sentencing proceeding. However, with the Court’s recognition in *Apprendi* and *Ring* that factors like special issues are elements of the aggravated crime of “capital murder plus special issues,” the routine practice of vacating the death sentence and remanding for a new sentencing proceeding in such cases has been called into question. The practice that has emerged in connection with post-*Apprendi* cases is instructive.

Prior to *Apprendi*, sentencing enhancement provisions of criminal statutes were rarely treated as elements of crimes. One such provision, however, was treated in this fashion by the Ninth Circuit. Under 18 U.S.C. § 924(c), a person who “uses or carries a firearm” “during and in relation to any crime of violence or drug trafficking crime,” or who “in furtherance of any such crime, possesses a firearm,” is guilty of a separate felony apart from the underlying crime of violence or drug trafficking. The punishment for such a crime is 5 years in addition to the

punishment for the underlying crime. § 924(c)(1)(A)(I). However, if the firearm is “a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon,” the additional punishment is 10 years, § 924(c)(1)(B)(I), and if it is “a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler,” § 924(c)(1)(B)(ii), the additional punishment is 30 years.

In *United States v. Alerta*, 96 F.3d 1230 (9th Cir. 1996), the Ninth Circuit held that the character-of-the firearm provision of § 924(c)(1) is an element of the offense. In previous cases, the court had held that a jury determination of this issue was required “[b]ecause of the immense consequences that follow a determination whether a firearm used in violation of section 924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun....” 96 F.3d at 1235. In *Alerta*, the court held explicitly that the character of the firearm provision “is an element of the crime.” *Id.* The consequence of this holding was that Alerta, who had “appealed both his conviction and his sentence under section 924(c)(1),” *id.* at 1236, “is accordingly entitled to a retrial.” *Id.* Having treated a factor that went only to increasing the sentence as an element of the offense, and the defendant having appealed his conviction, not just his sentence, the court found that Alerta was entitled to a *complete new trial* on the 924(c)(1) count. *Accord United States v. Perez*, 97 F.3d 1340, 1342 (9th Cir. 1997).⁷

Presaging an alternative that most courts would later take in the wake of *Apprendi* error, the *Alerta* court did note a way in which retrial could be avoided:

If the government should, on remand, elect to accept a 5-year sentence on Count 5

⁷Most other circuits, including the Fifth Circuit, disagreed pre-*Apprendi* with the Ninth Circuit’s treatment of this 924(c)(1) factor as an element. *See United States v. Eads*, 191 F.3d 1206, 1213-1214 (10th Cir. 1999) (surveying cases), *cert. denied*, 530 U.S. 1231 (2000).

[(the 924(c)(1) count)], then the district court may reinstate the conviction and 5-year sentence. Otherwise, the government may proceed with a retrial of Count 5.

Id. This alternative was in keeping with the rule that would later lead to *Apprendi*. It rested on the unstated, but implicit, premise that a 5-year sentence was the statutory maximum for a 924(c)(1) violation involving an “ordinary” firearm – which it was, because a jury determination of guilt on a 924(c)(1) charge carried a 5-year sentence unless the court made the findings about the character of the firearm. Since any finding that the defendant actually used a firearm that was not ordinary was a finding, in *Apprendi* terms, that increased the defendant’s sentence beyond the statutory maximum for mere conviction, this finding had to be treated as an element of an aggravated 924(c)(1) crime. In *Alerta* there was no doubt that the evidence was sufficient to sustain *Alerta*’s conviction on the “lesser included” (5-year-sentence) version of the 924(c)(1) charge. *Id.* Thus, no retrial was required unless the government sought to prove the element that would increase the sentence beyond five years.⁸

After *Apprendi*, the guiding principles articulated in *Alerta* concerning the relief required for an *Apprendi*-type violation became the principles that every federal court utilized in deciding the form of *Apprendi* relief.⁹ Thus, in *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000),

⁸After *Apprendi* was decided, the Ninth Circuit recognized that a different portion of *Alerta* had been overruled by *Apprendi*. See *United States v. Nordby*, 225 F.3d 1053,1059 (9th Cir. 2000). In this section of *Alerta*, the court had held that the quantity-of-drug provision of federal drug trafficking statutes “is not an element of the offense but is a sentencing factor to be decided by the judge.” 96 F.3d at 1237. This is the portion of *Alerta* overruled by *Apprendi*. *Nordby*, 225 F.3d at 1059.

⁹In *Apprendi* and likewise in *Ring*, the Court did not address the remedy required. In both cases the Court simply “remanded for further proceedings not inconsistent with this opinion.” *Apprendi*, 530 U.S. at 497; *Ring*, 536 U.S. at 609.

overruled on other grounds by United States v. Buckland, 277 F.3d 1173 (9th Cir. 2002), the Ninth Circuit relied on *Alerta* to decide how to approach the remedy for the *Apprendi* violation there (involving a failure to submit the issue of drug quantity to the jury in counts under 21 U.S.C. §§ 841 and 846). This issue was complicated by the fact that Nordby did not challenge his convictions, only his sentence, on appeal. The court reasoned:

The question then arises as to the appropriate procedure on remand. In comparable cases in which the jury's finding did not support the sentence, and where the conviction as well as the sentence was on appeal, we have allowed the government a brief period of time to elect whether it accepts a resentencing of the defendant to the lesser term permitted by the jury's findings. If the government so elects, the conviction is affirmed and resentencing takes place subject to the lower maximum sentence. If the government does not so elect, a new trial is ordered. [Citing cases, included *Alerta*.] In the present case, however, Nordby has appealed only his sentence; his conviction is not before us. We therefore do not consider ourselves to have the option of ordering a retrial of a conviction that Nordby has accepted as final.

225 F.3d at 1062. In such circumstances, the court decided that the only alternative was the alternative articulated in *Alerta*: to remand “for resentencing subject to the maximum sentence supported by the facts found by the jury beyond a reasonable doubt, consistently with *Apprendi* and this opinion.” *Id.*

This approach to *Apprendi* error has continued in the Ninth Circuit. *See e.g., United States v. Banuelos*, 322 F.3d 700, 706-707 (9th Cir. 2003) (no challenge to conviction, so case remanded for re-sentencing to the maximum sentence supported by the verdict without a finding as to drug quantity, thus eliminating the harm of the *Apprendi* error); *United States v. Thomas*, 355 F.3d 1191, 1201-1202 (9th Cir. 2004) (same). Other circuits have followed the alternative approach originally set out in *Alerta* – choosing not to order retrials, whether or not the appellant challenged his conviction, but instead to remand for re-sentencing to the maximum sentence

authorized by the conviction for the offense without the aggravating element on which *Apprendi* required a jury determination. *See, e.g., United States v. Page*, 232 F.3d 536, 534-545 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001); *United States v. Mackins*, 315 F.3d 399, 409-410 (4th Cir.), *cert. denied*, 538 U.S. 1045 (2003); *United States v. Perez-Ruiz*, 353 F.3d 1, 14-19 (1st Cir. 2003), *cert. denied*, 541 U.S. 1005 (2004).

The Fifth Circuit appeared initially to agree with the Ninth Circuit's approach in *Alerta*. In *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000), *cert. denied sub nom., Parker v. United States*, 531 U.S. 1100 (2001), the court found *Apprendi* error to be harmful for failure of the jury instructions to specify drug quantities in drug trafficking count and possession counts. *Id.* at 564-565, 578. In providing guidance to the district court on remand, the court noted:

[T]he district court could allow retrial of this count or it could resentence Meshack at the lowest statutory drug amount. We think the choice between these two alternatives is best made in the first instance by the district court, which can decide between these two alternatives after (should it so desire) allowing briefing and hearing argument.

Id. at 578 n.20. On rehearing, however, the court revised this aspect of its opinion, opting to take the approach adopted by most other circuits:

We STRIKE footnote 20 in our previous opinion and replace it with the following:

On remand, the district court must resentence Meshack pursuant to 21 U.S.C. § 841(b)(1)(C). Due to his prior convictions, Meshack may be resented to a maximum of 30 years.

United States v. Meshack, 244 F.3d 367 (5th Cir.), *cert. denied*, 534 U.S. 861 (2001). The citation to 21 U.S.C. § 841(b)(1)(C) is to the provision for sentencing where there is no

specification of drug quantity, thus removing the influence of the *Apprendi* error from the case.¹⁰

Thus, the federal courts have uniformly determined that, for *Apprendi* error that is not harmless, the remedy requires *either*, (1) when the defendant challenges his conviction, a complete new trial on the count from which the aggravated sentencing element was omitted, *or*, (2) re-sentencing by the court to no more than the maximum sentence permitted by the statute for the offense without the aggravated sentence finding. Either course is an appropriate remedy for the error. The first course provides the traditional remedy for the omission of an element of the offense from the instructions. The second provides a specific remedy for the *Apprendi* error, assuring that the error has no influence on the sentence.

The remedy offered by the Court of Criminal Appeals for the *Apprendi/Ring* error in Mr. Powell's second trial is not in keeping with either of these remedies. The Court of Criminal Appeals ordered a retrial on sentence only, which in no way remedied the error. It treated the *Apprendi/Ring* error as not tantamount to the omission of an element of the aggravated offense of capital murder – yet that is precisely what such an error is. As the post-*Apprendi* cases demonstrate, the only way to remedy such an error is to require a complete new trial, in which the jury is instructed to consider the element at the appropriate time, or to order that a sentence be imposed for the lesser included offense – which in Mr. Powell's case would have been a life

¹⁰In subsequent cases, the Fifth Circuit determined that an intervening decision by this Court, *United States v. Cotton*, 535 U.S. 625 (2002), had in effect overruled the Fifth Circuit's analysis of the harm accruing from an unpreserved *Apprendi* error, including this aspect of *Meshack*. See *United States v. Randle*, 304 F.3d 373, 377 n.2 (5th Cir. 2002), *cert. denied*, 538 U.S. 962 (2003); *United States v. Longoria*, 298 F.3d 367, 373-374 (5th Cir.), *cert. denied*, 537 U.S. 1038 (2002). However, this aspect of *Meshack* has nothing to do with its determination of the appropriate remedy for *Apprendi* error that is deemed harmful.

sentence.

The reason for this rule is the protection against double jeopardy.¹¹ As the Supreme Court noted in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the guarantee against double jeopardy “consist[s] of three separate constitutional protections.” One of these is: “It protects against a second prosecution for the same offense after conviction.” *Id.* (footnote omitted). The articulation of this aspect of double jeopardy protection goes back to *In re Nielsen*, 131 U.S. 176 (1889). There the Court considered the case of a man who was convicted of unlawfully cohabiting with more than one woman and was thereafter charged and convicted of committing adultery with one of the women with whom he was cohabiting. *Id.* at 177-178. The Court held that, since the adultery offense was “part of and incident to” the cohabitation offense, *id.* at 185, double jeopardy precluded the second prosecution. The Court explained,

[W]here . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

Id. at 188.

Thereafter, in *Brown v. Ohio*, 432 U.S. 161 (1977), the Court further amplified the meaning of the *Nielsen* rule, explaining first that, “Although in this formulation [in *Nielsen*] the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial.” *Id.* at 168. To illustrate this principle, the Court referred again to the *Nielsen* opinion, in which the Court cited with approval the New Jersey Supreme Court’s resolution of a case in which the lesser offense had been tried first. “[T]he [*Nielsen*] Court cited,

¹¹In *Benton v. Maryland*, 395 U.S. 784 (1969), the Court held that the Fifth Amendment guarantee against double jeopardy applies to state prosecutions through the Fourteenth Amendment.

[citation omitted], with approval the decision of *State v. Cooper*, 13 N.J.L. 361 (1833), where the New Jersey Supreme Court held that a conviction for arson barred a subsequent felony-murder indictment based on the death of a man killed in the fire.” *Brown*, 432 U.S. at 168. The Court then restated the constitutional rule: “Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.” *Id.* at 169.

It is of no consequence that the element in an *Apprendi/Ring* case that is the subject of a successive proceeding forbidden by the Double Jeopardy Clause is a matter that, prior to *Apprendi/Ring*, was deemed only a sentencing factor and not an element. As the Court made clear in *Sattazhan*,

We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an ‘offence’ for purposes of the Fifth Amendment's Double Jeopardy Clause. *Cf. Monge v. California*, 524 U.S. 721 (1998) (Scalia, J., dissenting) (‘The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the sentence’ not only ‘delimits the boundaries of ... important constitutional rights, like the Sixth Amendment right to trial by jury,’ but also ‘provides the foundation for our entire double jeopardy jurisprudence’). In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment.

537 U.S. at 111-12.

For these reasons, Mr. Powell submits that the Court of Criminal Appeals was compelled to remand his case for a full new trial, or for imposition of a life sentence, in the wake of the trial court having failed to instruct the jury in Powell’s second trial to consider the deliberateness special issue. Mr. Powell’s conviction in the second trial, without the jury considering the deliberateness issue, amounted to a conviction for the offense of capital murder “*simpliciter*.”

Sattazhan, 537 U.S. at 112. Under the double jeopardy principles articulated in *Nielsen* and *Brown*, once Mr. Powell’s conviction on the lesser offense of non-aggravated capital murder was sustained – as the Court of Criminal Appeals did when it remanded only for a re-sentencing – he *could not be further prosecuted* for the greater offense of capital murder plus special issues. Nevertheless, this is what happened when the Court of Criminal Appeals remanded Mr. Powell’s case for a re-sentencing but not a full retrial. Had Mr. Powell’s *conviction* for capital murder *simpliciter* been reversed in *Powell II* – as the petitioner’s conviction for the lesser offense of murder without-one-or-more-aggravating-circumstances was in *Sattazhan*, 537 U.S. at 112-113 – there would have been no double jeopardy bar. *Sattazhan*, 537 U.S. at 113 (“[t]hus, when petitioner appealed and succeeded in invalidating his conviction of the lesser offense, there was no double-jeopardy bar to Pennsylvania’s retrying petitioner on both the lesser and greater offense; his ‘jeopardy’ never terminated with respect to either”). However, when the Court of Criminal Appeals sustained Mr. Powell’s conviction on the lesser offense of capital murder *simpliciter*, double jeopardy precluded his being subjected to “successive prosecution and cumulative punishment,” *Brown v. Ohio*, 432 U.S. at 169, on the greater offense of capital murder plus special issues.

D. The Fifth Circuit Failed to Apply the Principles of the Double Jeopardy Clause When It Sustained the Court of Criminal Appeals’ Remand for Re-Sentencing

In denying relief on the *Apprendi/Ring* claim, the Fifth Circuit failed to appreciate the fundamental change that *Apprendi* and *Ring* have brought in “what constitutes an ‘offence’ for purposes of the Fifth Amendment’s Double Jeopardy Clause.” *Sattazhan*, 537 U.S. at 111.

In analyzing the claim, the Fifth Circuit excluded from its consideration the double

jeopardy consequences of the reformulation of issues which were previously understood as sentencing factors into elements of a crime. This began when the court recited the following:

At oral argument, however, Powell's counsel clarified that Powell is not making a claim that his constitutional rights under the Double Jeopardy Clause have been violated. Instead, the only remedy he seeks is a complete new trial on both the guilt-innocence and punishment elements. Powell's argument, reduced to its essence, is simply that bifurcated capital murder trials are not permitted unless the same jury that finds the defendant guilty also decides the special issues related to punishment.

Powell v. Quarterman, 536 F.3d at 334. The court was accurate in saying that Mr. Powell is not making a direct claim that his double jeopardy rights were violated. He was, however, arguing, as he has before this Court, that double jeopardy principles inform the remedy that must be provided for an *Apprendi/Ring* error. The Fifth Circuit failed to appreciate this when it re-cast Mr. Powell's argument as, "bifurcated capital murder trials are not permitted unless the same jury that finds the defendant guilty also decides the special issues related to punishment." *Id.* Mr. Powell did not argue that the same jury must determine guilt-innocence and punishment. He argued that guilt-innocence and punishment must be decided *in the same trial proceeding*, taking into account that on rare occasions different juries might decide guilt-innocence and punishment in the same proceeding. *See, e.g., Blakely v. Washington*, 542 U.S. 296, 336 (2004) (Breyer, J., dissenting) (suggesting that separate juries could determine guilt and sentence "to make sentencing guidelines *Apprendi*-compliant"); *United States v. Williams*, 400 F.3d 277, 460 n.9 (5th Cir. 2005) (noting that the Federal Death Penalty Act on rare occasion permits the empaneling of separate juries for the guilt and penalty phases of a federal capital trial).

The same disregard for the role that double jeopardy principles must play in the remedy for *Apprendi/Ring* error was reflected again in the Fifth Circuit's analysis of why there was no

Apprendi/Ring error in Mr. Powell's case:

The Texas court's decision to remand for a new trial only as to punishment, and not as to guilt or innocence, was neither contrary to, nor an unreasonable application of *Apprendi* or *Ring*, because all of the elements of capital murder necessary for the imposition of the death penalty were submitted to a jury and proven beyond a reasonable doubt. As Powell concedes, neither *Apprendi* nor any other Supreme Court decision requires the same jury to determine guilt and punishment.

536 F.3d at 334. The court clearly appreciated the Sixth Amendment (right to jury trial) and Due Process (proof of elements beyond a reasonable doubt) ramifications of *Apprendi* and *Ring*. However, it completely disregarded that there are Fifth Amendment double jeopardy ramifications of *Apprendi* and *Ring* in providing the appropriate remedy for an *Apprendi/Ring* violation. It is not enough for double jeopardy purposes for some jury to decide *Ring* elements beyond a reasonable doubt. Because former sentencing factors are actually now elements of the capital crime, they have defined death-eligible capital crimes as higher offenses that now included the lesser offense of capital murder *simpliciter*. *Sattazhan*, 537 U.S. at 111. Thus, when the Fifth Circuit went on to say,

Powell can cite no authority to support his argument that, in affirming his conviction for capital murder but vacating the death sentence and remanding for a new punishment trial, the Texas Court of Criminal Appeals effectively converted the underlying conviction for capital murder into a lesser-included offense[.]

536 F.3d at 334, it was mistaken. *Sattazhan* reads *Apprendi* and *Ring* as the direct authority for Mr. Powell's argument. The Court of Criminal Appeals' failure to vacate Mr. Powell's conviction for capital murder left him convicted of capital murder *simpliciter*, and that decision removed the ability of the state of Texas to seek an enhanced punishment.

Accordingly, the Fifth Circuit failed to apply the principles of the Double Jeopardy

Clause when it sustained the Texas Court of Criminal Appeals' remand for re-sentencing of Mr. Powell in a proceeding in which death was a possible punishment.

E. The Omission of the Deliberateness Special Issue from the Second Trial Was Not Harmless

In *Neder v. United States*, 527 U.S. 1 (1999), the Court held that “an instruction that omits an element of the offense,” *id.* at 9, is subject to harmless error review. *Id.* at 9-15. The standard of review is the familiar *Chapman v. California*, 386 U.S. 18, 24 (1967), standard: whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” In the context of an instruction omitting an element, the court must determine “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” *Neder*, 527 U.S. at 19. This standard of review has been applied to *Apprendi* error. *See, e.g., United States v. Slaughter*, 238 F.3d 580, 583-584 (5th Cir.), *cert. denied*, 532 U.S. 1045 (2001).¹²

While no court has addressed this issue in Mr. Powell's case, the *Ring* error in his case was not harmless. In Mr. Powell's second trial, there was ample evidence “that could rationally [have] le[d] to a contrary finding with respect to the omitted element,” *Neder*, 527 U.S. at 19, had the jury been instructed to consider the deliberateness special issue. Sheila Meinert, who was driving the car Mr. Powell was in when the shooting of Officer Ablanado occurred, and who had

¹²The Court appears to have approved the Fifth and other Circuits' application of the *Neder/Chapman* harmless error review requirement to *Apprendi* error. *See Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) (per curiam) (it is not “contrary to ... clearly established Federal law” to apply the *Chapman* test to *Apprendi* error).

known and been very close friends with Powell since 1973 or 1974, (24 Tr2 90, 159),¹³ testified that Powell was “very upset” and “slightly hysterical” that night prior to the shooting. (19 Tr2 117, 118). She also testified that she was “surprised” that Powell would shoot a police officer, (19 Tr2 159), and that such a turn of events never crossed her mind that night. (19 Tr2 130). She also testified that by the time of the shooting, Powell had become addicted to drugs and had told her he was going to a doctor for help. (19 Tr2 150). By the time of the shooting, Powell’s behavior was progressively becoming more extreme, (19 Tr2 159), including times that, by his account, he could not drive his car because he was hallucinating. (19 Tr2 160).

Others confirmed that during the two years that preceded the shooting of Officer Ablanedo, Mr. Powell appeared to have a serious drug problem or mental illness. In 1976, an old college friend, David Van Os, saw Mr. Powell and had the impression that he was using speed. (33 Tr2 356). He testified that Powell had an unkempt appearance and a “hyperactive edginess.” (*Id.*) His first thought was that Powell was using speed, because in his experience speed had this effect, causing “paranoia.” (*Id.*) Mr. Powell’s father testified that he saw his son thereafter in 1977 at an energy seminar, and that David looked thin and haggard and had been up all night reading literature from the seminar. (32 Tr2 135). Mr. Powell’s maternal aunt, Frida Malone, testified about an encounter she had with David in July or August, 1977, in which he looked extremely abnormal – his hair was a mess, his eye looked wild, he had no shoes on, (32 Tr2 158), he was very thin, (32 Tr2 159) (he had not eaten in four days, (*id.*)) – and he conversed wildly while shuffling through business cards. (32 Tr2 159). Ms. Malone was so disturbed that she

¹³References to the transcript of testimony in Mr. Powell’s second trial are to the volume, followed by “Tr2,” and then the page number within that volume.

called David's mother and told her he needed to go to a mental hospital. (*Id.*) He disappeared, however, before his mother could get him committed. (32 Tr2 160). Ms. Malone saw David in jail on May 19, 1978, and he looked like a "wild animal" with his hair "a mess." (32 Tr2 161).

Dr. John Luker testified that Mr. Powell was a former patient, whom he had attempted to treat for methamphetamine abuse in late 1977. (32 Tr2 241). Dr. Luker testified that Powell told him he was taking 1000 milligrams of methamphetamine per day. (32 Tr2 242). He noted that Powell was underweight, anxious, and hyperactive. (*Id.*) In December, 1977, Dr. Luker prescribed a drug called Cylert, which is also a central nervous system stimulant but unlike methamphetamine, does not increase blood pressure. (32 Tr2 243).

Two experts testified on Mr. Powell's behalf concerning the effect of his methamphetamine abuse. Dr. Lester Grinspoon, a nationally recognized authority on drug abuse, (32 Tr2 184-188, 194), testified about the effects of amphetamine abuse. Methamphetamine abuse has more serious effects because it is more potent than amphetamine. (32 Tr2 201). People who use the kind of daily quantity of methamphetamine reported to Dr. Luker by Mr. Powell have the worst effects – psychosis, in which someone loses touch with reality, (32 Tr2 199), which often produces paranoia and violent defensive behavior. (32 Tr2 202-209). Dr. Richard Pesikoff, a psychiatrist from Houston, testified about his evaluation of Mr. Powell. (33 Tr2 394, et seq.) Dr. Pesikoff saw in Mr. Powell's gradual deterioration a classic pattern resulting from methamphetamine abuse. (33 Tr2 401-411). By 1977 and 1978, Mr. Powell manifested the symptoms of a methamphetamine abuser: he was skinny, agitated, hypermanic, unable to concentrate, paranoid, incoherent, and shaky. (33 Tr2 411). By the late 1970's Mr. Powell was also experiencing hallucinations and believing that he was going to be attacked. (33

Tr2 412). At the time he shot Officer Ablanedo, Powell was agitated, had impaired judgment, and felt that he was being chased down by an enemy. (33 Tr 436). Mr. Powell was so debilitated at the time of the shooting that Dr. Pesikoff believed he was insane – all due to methamphetamine abuse, the effects of which were worsened by the medication prescribed by Dr. Luker. (33 Tr2 459, 495, 518, 524).

The deliberateness special issue has never been given any definition by the Texas Court of Criminal Appeals. As the Court explained in *Penry v. Lynaugh*, 492 U.S. at 322,

The first special issue asks whether the defendant acted ‘deliberately and with the reasonable expectation that the death of the deceased ... would result.’ Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term ‘deliberately,’ and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood ‘deliberately’ to mean something more than that Penry was guilty of ‘intentionally’ committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.

While the ability of the jury to give effect to mitigating evidence is not at issue in Mr. Powell's case, the elusive meaning of the deliberateness special issue must be taken into account in assessing whether the trial court's failure to instruct the jury to consider this issue was harmless.

Assuming, as the Court did in *Penry*, that this special issue was trying to capture something more than intentional conduct, reasonable jurors could have found that the prosecution failed to establish this element. There can be little doubt that Mr. Powell was a heavy methamphetamine user at the time of the shooting of Officer Ablanedo. Among other effects, his use of methamphetamine made Mr. Powell paranoid and emotionally unstable – Meinert described him as “very upset” and “slightly hysterical” the night of the shooting. Misperceptions of reality – especially paranoid and violently reactive misperceptions – are

common in methamphetamine abusers, and such misperceptions were increasingly common in Mr. Powell. Wild, manic, incoherent behaviors were becoming more frequent for him. In this condition when Mr. Powell faced arrest by Officer Ablanedo, a juror could reasonably have found that Powell did not engage in calm and considered “deliberate” action that night. Reasonable jurors could have found that Powell’s actions were impulsive, reactive, and driven by fear and paranoia – in short a violent, unplanned, and unconsidered reaction to a misperceived threat – rather than calm, considered action. A juror who saw the evidence in this reasonable manner could readily have found that the deliberateness element was not established.

For these reasons, there was ample evidence “that could rationally [have] le[d] to a contrary finding with respect to the omitted evidence,” *Neder*, 527 U.S. at 19, had Mr Powell’s jury been instructed to consider the deliberateness special issue. The *Ring* error was, accordingly, not harmless.

CONCLUSION

For these reasons, Mr. Powell prays that the Court grant certiorari.

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