

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20915

ROBERT JAMES TENNARD,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas

January 3, 2003

ON REMAND FROM THE UNITED STATES SUPREME COURT

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

BENAVIDES, Circuit Judge:

The Supreme Court of the United States, by order in No. 02-5164, *Tennard v. Cockrell*,
123 S.Ct. 70, 71 USLW 3233 (U.S. Oct 07, 2002), granted appellant's petition for a writ of

certiorari, vacated the judgment,¹ and remanded it to us for further consideration in light of *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), which was decided after the issuance of our opinion in this case. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the application of the death penalty to mentally retarded persons. Tennard has never argued that the Eighth Amendment prohibits his execution. Instead, Tennard argued that the jury instructions did not provide a vehicle for giving mitigating effect to his evidence of mental retardation in violation of the Eighth Amendment. Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us. *Cf. Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002) (declining to address *Atkins* claim raised for the first time on appeal); *Smith v. Bowersox*, 311 F.3d 915, 923 (8th Cir. 2002) (declining to address *Atkins* claim because petitioner did not raise an Eighth Amendment claim in his federal habeas petition).

Accordingly, we reinstate our panel opinion and AFFIRM the district court's judgment.

ENDRECORD

¹ *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002).

Dennis, Circuit Judge, dissenting:

Although I agree with the panel majority that Tennard's claim under Atkins v. Virginia, 536 U.S. 304 (2002), is not properly before this court because petitioner did not raise this claim in his district court habeas petition, I continue to dissent from the now restored panel opinion, Tennard v. Cockrell, 284 F.3d 591 (5th Cir. 2002), for the reasons given in my dissent there.