**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 92-2077

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JAMES DEMOUCHETTE,

Petitioner-Appellant,

versus

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

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

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(September 9, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:

James Demouchette, whose execution has been set by the Texas authorities for September 22, 1992, seeks federal habeas relief and a stay of execution. The district court denied the habeas request, denied a certificate of probable cause and recalled its previously issued stay of execution. In his motions for CPC and for a stay of

execution Demouchette urges error under **Penry v. Lynaugh**.[1] Concluding that the disposition of this matter is directed by our recent *en banc* decision in **Graham v. Collins**,[2] we deny both the motion for CPC and the motion for stay of execution.

Background

As detailed by the Texas Court of Criminal Appeals,[3] Demouchette and his brother Chris entered a Pizza Hut restaurant in Houston, Texas around midnight of October 17, 1976, shortly before closing. Manager Geoffrey Hambrick locked up and the Demouchettes joined Hambrick, Scott Sorrell, the assistant manager and an acquaintance of one of the brothers, and Chuck White, a friend of Sorrell's, at a booth and table. After a few minutes of idle conversation Hambrick, hearing White say, "I'd think twice before I pulled that trigger," turned to see Demouchette shoot White in the head with a large caliber revolver. Demouchette then shot Hambrick. The bullet struck him on the side of the head. Hambrick slumped over and pretended to be dead; he retained consciousness. A third shot rang out and Hambrick heard what he presumed to be Sorrell falling.

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[1] 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[2] 950 F.2d 1009 (5th Cir.) (*en banc*), cert. granted, _____ U.S. _____, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992).

[3] **Demouchette v. State**, 731 S.W.2d 75 (Tex.Cr.App. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987).

The Demouchettes ransacked the back room. Returning to the dining room where Sorrell was making gurgling sounds, Demouchette told Chris, "Get the keys." There was another shot and Sorrell's gurgling ceased. The keys were taken from Hambrick and the Demouchettes left. Hambrick called the police.

Sorrell died at the scene; White died shortly thereafter. Hambrick recovered from his wounds. The cash register had been emptied and stereo equipment was missing.

A jury convicted Demouchette of the capital murder of Sorrell under Texas Penal Code § 19.03(a)(2). During the penalty phase of his trial, Demouchette presented expert testimony that he suffered from antisocial personality disorder, a chronic abnormality marked by impulsivity, an inability to learn from experience, and callousness towards others. Although both mental health experts called by Demouchette testified that his acts of violence resulted from impulse rather than plan, the jury answered the first special issue, whether Demouchette had killed deliberately, in the affirmative and likewise answered the second special issue concerning future dangerousness. In accordance with the Texas statute, the judge sentenced Demouchette to death.[4] The Texas

[4] Under Tex. Code Crim. Proc. Ann. Art. 37.071(b) (Vernon 1981), since amended, the jury must answer 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. If the jury unanimously answers "yes" to each issue submitted, the court must

Court of Criminal Appeals affirmed the conviction and sentence.[5]

Demouchette invoked 28 U.S.C. § 2254 and sought habeas relief. The state expressly waived exhaustion of collateral state remedies. The district court conducted an evidentiary hearing at which Demouchette's trial attorney testified about mitigating evidence which he decided not to present because of the structure of the Texas death penalty statute. The district court denied relief, denied a certificate of probable cause, and vacated an earlier granted stay of execution. Demouchette timely sought CPC and a stay of execution.

## Analysis

When a district court denies a certificate of probable cause,

> we lack jurisdiction to decide the appeal unless we first decide to grant one. We may issue a certificate of probable cause only when the petitioner makes a substantial showing of the denial of a federal right. To make a substantial showing, the petitioner must demonstrate that the issues are debatable among jurists of reason.[6]

The issues raised by Demouchette are no longer debatable before this court; they are foreclosed by circuit precedent.

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sentence the defendant to death; otherwise the sentence is life imprisonment. The third special issue was not relevant and was not submitted.

[5] **Demouchette v. State**, supra.

[6] **Cordova v. Collins**, 953 F.2d 167, 169 (5th Cir.) (internal quotations and citations omitted), cert. denied, _____ U.S. _____, 112 S.Ct. 959, 117 L.Ed.2d 125 (1992).

Demouchette's principal argument is that the Texas death penalty statute was unconstitutional as applied to him because the jury was unable, without a special instruction, to give full mitigating effect to his evidence of antisocial personality disorder. Invoking **Penry**, Demouchette contends that his personality disorder had relevance to his moral culpability beyond his propensity to act without deliberation. He further notes that the disorder functioned only as an aggravating factor with respect to the probability of recidivism. Under these circumstances, Demouchette maintains, **Penry** requires the giving of a special instruction, which was denied in his case.

Applying **Penry**'s teachings in **Graham**, sitting *en banc* we stated:

> **Penry** clearly stands for the proposition that merely because the mitigating evidence has <u>any</u> relevance to a negative answer to one of the special issues does not necessarily suffice in all cases to sustain application of the Texas statute. Penry's evidence has <u>some</u> such relevance to the first issue. The more difficult question is whether the Texas statute can operate as written in any case where the mitigating evidence, though all clearly relevant to support a negative answer to one or more of the issues, nevertheless also has <u>any</u> mitigating relevance <u>whatever</u> <u>beyond</u> the scope of the special issues. **Penry** can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, **Penry** can <u>also</u> fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the issues. That, indeed, was the case in **Penry**, where as to the third issue the mitigating evidence was all essentially irrelevant, as to the second issue it was <u>only</u> affirmatively harmful to the defense, and as to the first issue its favorable relevance was essentially minor but its "major thrust" was beyond the scope of the

issue.[7]

In **Graham** we adopted the latter reading of **Penry**, holding that a special instruction was required only if a "major mitigating thrust"[8] of the evidence was substantially beyond the scope of all the special issues.

Here, the jury was able to give mitigating effect to Demouchette's personality disorder evidence in deciding whether he acted deliberately. A "major thrust" of his expert testimony was that an antisocial personality acts on impulse rather than deliberation. Although a reasonable juror might have found that this evidence had independent mitigating value in reducing moral culpability, we cannot say with assurance that a major mitigating thrust of the evidence was substantially beyond the reach of the deliberateness issue. Accordingly, Demouchette's argument that he was entitled to a special jury instruction is foreclosed by **Graham**.

Demouchette further contends that the operation of the Texas death penalty scheme so hampered his trial attorneys in developing a mitigation defense as to deprive him of effective assistance of counsel. To the extent this is a claim of constructive denial of sixth amendment rights, we rejected this argument in **May v. Collins**,[9] explaining that a rule allowing such ineffective

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[7] 950 F.2d at 1026-27 (emphasis in original).

[8] **Id**., 950 F.2d at 1027.

[9] 948 F.2d 162 (5th Cir. 1991), cert. denied, _____ U.S. _____, 112 S.Ct. 907, 116 L.Ed.2d 808 (1992).

assistance claims would be impossible to cabin because tactical decisions concerning the type of evidence to present in sentencing proceedings "are always channelled by the requirements of the statute under which the state proceeds."[10] To the extent the argument would fault trial counsel's decision to forego developing mitigating evidence that might also be hurtful, it offers no more than the eighth amendment contention which likewise is foreclosed.

For these reasons, the application for a certificate of probable cause and the motion for stay of execution are DENIED.

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[10] **May**, 948 F.2d at 167; see also **Black v. Collins**, 962 F.2d 394, 407 (5th Cir.), cert. denied, _____ U.S. _____, 112 S.Ct. 2983 (1992).