No. 05-11304

In The Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. In *Smith v. Texas*, 543 U.S. 37 (2004), the Court held that, under its decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), there was constitutional error in the jury charge used in Smith's capital trial and remanded the case to the Texas Court of Criminal Appeals for further proceedings not inconsistent with its opinion. In this state postconviction proceeding, was it consistent with the Court's remand for the Texas Court of Criminal Appeals to apply Texas's established harmless-error analysis to determine whether the constitutional defect in Smith's jury charge was harmful?

2. In this state postconviction proceeding, does the Texas Court of Criminal Appeals's application of Texas's established harmless-error standard constitute an adequate and independent state ground of decision?

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STATEMENT OF THE CASE

Late Monday evening, January 7, 1991, 19-year-old Jennifer Soto was closing up shop as the shift manager at a Taco Bell in Dallas County. She and fellow employee Travis Brown had locked the restaurant and commenced cleaning and filling out paperwork. Around 11:30 pm, Petitioner LaRoyce Lathair Smith knocked on the door, along with several of his friends, asking to use the telephone. Brown wisely refused to let them in, but Jennifer recognized Smith as a former employee and greeted him with a hug. J.A. 135-36.

While Jennifer returned to the back office, Smith lingered, telling Brown that they planned to rob the Taco Bell, J.A. 136, and saying, "[i]f you keep your mouth shut, you'll get a cut of the money," J.A. 271. When Smith walked back to Jennifer's office, Brown testified, he soon heard yelling and found Smith "pistol-whipping" Jennifer on the head with the butt of a gun, continuing the beating until the gun's handle fell off. J.A. 136, 138. Smith wanted the combination to the safe, but Jennifer did not know it and screamed, "Call Tina, call Tina." J.A. 271-72. Brown saw Smith step back and shoot Jennifer in the back at point-blank range. J.A. 136; 27.RR.68-70.[1] Jennifer cried out, "God, please don't let me die." J.A. 272.

Smith then grabbed a knife from the kitchen and proceeded to stab Jennifer four times underneath her left breast, and then again in her thigh, abdomen, and head. J.A. 136; 27.RR.70-78. At trial, the multiple punctures underneath Jennifer's breast were described as "torture" wounds. 27.RR.77. Finally, Smith sliced the knife across Jennifer's neck, severing her jugular vein and killing her. 27.RR.71-73. Smith then just walked out, telling Brown before he left that he would kill him if he talked to the police. J.A. 272.

Smith was tried and convicted of capital murder. In the punishment phase, Smith called twenty witnesses, all but three of whom testified in part about what they

[1] "RR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

described as his generally good character and behavior.[2] Eleven defense witnesses testified nearly exclusively on Smith's perceived positive character traits or conduct,[3] and three more testified primarily concerning the same.[4] One witness testified concerning Smith's diagnosis at an early age of possibly organic learning disabilities, relatively low IQ, and educational background involving special education classes.[5] And four witnesses indicated their awareness that Smith's father had had drug problems, and that his father's bad behavior had affected Smith.[6]

Smith's counsel's closing argument spanned forty pages of trial transcript, thirty-nine of which concerned: (1) trial evidence that counsel urged suggested Kevin Shaw, not Smith, was the ringleader in Jennifer's murder, *see* 33.RR.38-43; (2) discussion of the meaning of "deliberate" in special issue one and argument that although Smith premeditated robbery, he did not premeditate Jennifer's murder, *see* 33.RR.43-45; (3) argument that the evidence showed Smith was not a continuing threat to society, including an exhaustive review of the testimony of Smith's many character witnesses, *see* 33.RR.45-65; (4) general discussion about whether society has progressed to a point where there is an alternative to the death penalty, *see* 33.RR.33-37; and (5)

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[2] Alberta Pingle (custodian of records for the Dallas ISD's special education department) and Charles Linch (an analyst who conducted the test of the handwashings of those with Smith the night of the murder) did not know Smith. The other, Smith's brother Myron Wilson, spoke of the family background. *See infra* fn.6.

[3] *See* 32.RR.50-54 (Jim Stambaugh); 32.RR.54-62 (Fred Cox); 32.RR.62-74 (Kristi Goffney); 32.RR.75-81 (Meg Goffney); 32.RR.82-88 (Robbie Johnson); 32.RR.95-101 (Charlotte Thompson); 32.RR.101-06 (Tracy Reed); 32.RR.106-09 (James Miles); 32.RR.114-21 (Gertha Williams); 32.RR.122-24 (Benny Williams); 32.RR.124-25 (Johnnie Mae Smith).

[4] *See* 32.RR.2-14 (Samuel Nicks); 32.RR.91-94 (Dorothy Faye Ellis); 32.RR.109-14 (LaTonya Kerlin).

[5] *See* 32.RR.14-50 (Alberta Pingle).

[6] *See* 32.RR.10-11 (Samuel Nicks); 32.RR.89-91 (Myron Wilson); 32.RR.92-93 (Dorothy Faye Ellis); 32.RR.113 (LaTonya Kerlin).

discussion concerning the State's burden and the role of the jurors, *see* 33.RR.69-70.

Defense counsel also presented brief argument concerning the potential mitigating effect of Smith's IQ, special education, and neglectful father, which together comprised a single page of the forty-page argument. *See* 33.RR.57-58.

As provided by Texas law at the time, the jury was instructed to answer two special issues during the punishment phase: (1) whether they had determined that Jennifer's murder was "deliberate," and (2) whether Smith posed a continuing danger to others. *Smith v. Texas*, 543 U.S. 37, 39 (2004); J.A. 225-26.[7] Because Smith's trial took place during the two-year period between the Court's decision in *Penry I* and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I*, the trial judge also gave the jury a supplemental so-called "nullification" instruction.[8] *See* J.A. 106-07.

Smith presented motions to the trial court arguing that under Texas law the court could not submit any supplemental instructions to the jury regarding consideration of his mitigating evidence, and that therefore the entire Texas sentencing scheme was unconstitutional as applied to him. *See* J.A. 7-16. Both motions were denied. J.A. 21. The trial court then invited Smith's counsel to suggest modifications or alternative language for the proposed nullification instruction, *see* J.A. 21, but counsel declined to do so.

The jury, after hearing all of the evidence—including all of Smith's proffered mitigating evidence as well as the graphic evidence of his crime, the evidence of his prior history of violent behavior and possession of drugs,[9] and the evidence of

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[7] *See also* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, §1, 1973 Tex.Gen.Laws 1122, 1125-26 (codified at TEX. CODE CRIM. PROC. art. 37.071).

[8] *Smith*'s 1991 trial occurred ten years before the Court disapproved of nullification instructions in *Penry II*. *See Penry II*, 532 U.S., at 798-99.

[9] This evidence included Smith's vicious physical attack on a young man with a baseball bat one year prior to Jennifer's murder. Smith assaulted Chris Standmier with a baseball bat, striking him first in the ribs and then

(Continued on following page)

his prior conviction for misdemeanor assault—sentenced Smith to death.

The Texas Court of Criminal Appeals affirmed Smith's conviction on direct appeal, *Smith v. State*, No. 71,333, slip op. at 10-11 (Tex. Crim. App. June 22, 1994) (not designated for publication); J.A. 135-55, and this Court denied *certiorari*, *Smith v. Texas*, 514 U.S. 1112 (1995). Smith then filed a state habeas corpus petition, which was dismissed as untimely. *Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998). Subsequently, the Court of Criminal Appeals considered Smith's second state habeas petition under newly-enacted procedures for untimely habeas applications. *See Smith*, 543 U.S., at 42-43. In the interim, Smith had filed a petition for postconviction relief in the United States District Court for the Northern District of Texas, but this proceeding was ultimately dismissed without prejudice so that Smith could pursue his state postconviction proceeding. *Smith v. Johnson*, No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. art. 11.071, § 4A.

In his second state habeas petition, Smith alleged for the first time that the trial court's nullification instruction itself, as opposed to Texas's entire capital sentencing statute as applied to him, was unconstitutional under *Penry II*. *Ex parte Smith*, 132 S.W.3d 407, 410 (Tex. Crim. App. 2004) ("*Smith I*"), *rev'd on other grounds sub nom. Smith v. Texas*, 543 U.S. 37 (2004) ("*Smith II*"); J.A. 180-181. In *Smith I*, the Court of Criminal Appeals denied habeas relief. J.A. 177-193. The court held that Smith's mitigating evidence was constitutionally irrelevant, did not extend beyond the two statutory special issues (making the nullification instruction unnecessary), and, in any event, that the trial court's nullification instruction cured any error and was materially different from the instruction disapproved-of by the Court in *Penry II*. *Smith I*, at 408-417; J.A. 177-193.

This Court summarily reversed, *Smith II*, 543 U.S., at 48; J.A. 236, concluding that the Court of Criminal Appeals

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swinging so hard that he broke the bat across Standmier's head. Smith then pulled out a Tech-9 machine gun, pointed it at Standmier's midsection, and said, "Nigger, get back from me, I'll kill you." 31.RR.24-25, 30-33.

had applied an unconstitutional screening test for weighing the relevance of Smith's mitigating evidence, *id.*, at 43-44; J.A. 230-232, and that the nullification instruction in Smith's case was insignificantly distinct from the instruction in *Penry II*, and therefore unconstitutional, *id.*, at 44, 48; J.A. 231, 236. The Court remanded the case to the Court of Criminal Appeals for further proceedings "not inconsistent with this opinion." *Id.*, at 48.

On remand, the Court of Criminal Appeals recognized that this Court had held that Smith's jury charge was "constitutionally deficient under *Penry II*," and so it turned to consider the appropriate remedy for that constitutional error. *Ex parte Smith*, 185 S.W.3d 455, 467 (Tex. Crim. App. 2006) ("*Smith III*"); J.A. 288. Under longstanding Texas law, however, constitutionally deficient jury charges do not necessarily result in the automatic reversal of sentences. Rather, the typical state-court practice, where jury-charge error is found, is to assess first whether that error is harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985).

Like federal harmless-error analysis, state harmless-error analysis is stricter if the defendant has failed to object at trial to the jury charge in question. Here, because the Court of Criminal Appeals determined that Smith had failed to raise his claim of error before the trial court, it applied the *Almanza* "egregious harm" standard, which is to say that reversal is required only if the defendant "'has not had a fair and impartial trial.'" *Id.* (quoting TEX. CODE CRIM. PROC. art. 36.19).

Carefully reviewing "the entire trial record," the court concluded that Smith had failed to establish that the unobjected-to jury nullification instruction caused him egregious harm, and therefore, under well-established state precedent, denied relief. *Smith III*, 185 S.W.3d, at 468, 472; J.A. 289, 298. This appeal followed.

SUMMARY OF ARGUMENT

Petitioner and his *amicus*, like the petitioners in the related *Brewer* and *Abdul-Kabir* cases, endeavor to frame this case as an instance where this Court must act to protect its mandate from lower courts intent on defying the Supreme

Court. Toward that end, the entire narrative they construct is one where the Court of Criminal Appeals and the Fifth Circuit are both engaged in the willful disregard of this Court's authority. Were that the case, the appropriate resolution of these cases would be clear: unanimous reversal, and an unambiguous articulation of this Court's supreme authority, as has been done so many times in decades past.

But Petitioner's narrative is fundamentally false, and not consonant with the good character of the state and federal judges who have attempted for many years to understand and apply the intertwined and evolving standards that govern capital punishment litigation.

Once the rhetoric is put aside, this case presents a routine application of state harmless-error doctrine. Petitioner, of course, cannot argue that the application was erroneous as a matter of state law; rather, his lone substantive claim before this Court is that the U.S. Constitution bars the application of state harmless-error doctrine to *Penry*-type errors. But the Court has never so held. Nor should it now.

On remand from this Court, the Court of Criminal Appeals began with this Court's conclusion that *Penry* error had occurred and, under state precedent, proceeded to assess the remedy for that constitutional error. Because Petitioner's counsel made a strategic trial choice not to object to the specific instruction given the jury—despite being expressly invited by the trial court to do so—the Court of Criminal Appeals properly held that the state-law standard for unpreserved error would apply.

Under any standard of review, the error in this case was harmless. Examining the quantum, weight, and nature of the mitigating evidence at issue, it cannot be said to have had an appreciable impact on the sentence. Indeed, defense counsel placed so little emphasis on the evidence in question that it occupied less than three percent of his time in closing argument.

Because there is no federal constitutional prohibition on the application of state harmless-error doctrine to *Penry* error, and because the state court applied long-standing precedent to resolve this state habeas proceeding, that court's harmless-error ruling constitutes an

adequate and independent state ground that divests this court of appellate jurisdiction.

ARGUMENT

The whole of Petitioner's brief makes two central points, upon which all of his other arguments depend: *first*, that this Court's earlier summary reversal in this case necessarily foreclosed any subsequent application of state harmless-error analysis, and *second*, that the Court of Criminal Appeals "revisited" its earlier conclusion that Smith had not defaulted his *Penry* claim in a naked attempt to avoid this Court's summary reversal. Both points are incorrect.

Once those misstatements are refuted, all that remains is to assess whether there is any federal constitutional bar to the application of state harmless error doctrine in this case. There is no such bar, and so the lower court's dispositive application of that doctrine constitutes an adequate and independent state ground that forecloses federal jurisdiction over this appeal.[10]

I. THERE IS NO GENUINE ISSUE CONCERNING THE APPLICATION OF THE MANDATE FROM THIS COURT'S PRIOR SUMMARY REVERSAL.

The effective functioning of our judicial system—and indeed, the rule of law—requires that lower state and federal courts honor this Court's decisions. This obligation is particularly acute where, as here, those decisions

[10] It should be noted that even if the Court of Criminal Appeals's decision is upheld, Smith could still attempt to pursue federal habeas relief. As noted herein, Smith filed a petition for federal habeas in the Northern District of Texas, but this proceeding was dismissed without prejudice so that Smith could pursue his state postconviction proceeding. *See supra* Statement of the Case. The State has, by written agreements with Smith's counsel, agreed that it will not assert any limitations bar to renewed federal habeas proceedings initiated by Smith in a timely manner following the final resolution of his state habeas application. Of course, the State did not waive its right to assert any other defense to Smith's claims. These agreements are reproduced and bound as an appendix to Respondent's Brief.

attempt to resolve difficult points of constitutional law that affect the life or death of capital defendants. A lower court that fails to respect the Court's judgments, particularly under these circumstances, has acted with "judicial impudence." Charles Fried, *Impudence,* 1992 SUP. CT. REV. 155, 157, 192-93.

Notwithstanding Smith's narrative to the contrary, neither the Court of Criminal Appeals nor the Fifth Circuit has exhibited such impudence. Rather, both courts—and the principled jurists who sit on each—have struggled to understand and to faithfully apply this Court's rulings.

A. The Texas Court of Criminal Appeals and the Texas Legislature Have Consistently Strived to Properly Implement the Court's Evolving Capital Jurisprudence.

Since *Furman v. Georgia*, 408 U.S. 238 (1972), Texas courts and the Texas Legislature have consistently strived to comply with the Court's evolving view of the constitutional parameters applicable to death penalty statutes. The Texas Court of Criminal Appeals has, throughout this period, demonstrated a commitment to properly implementing this Court's decisions.

1. *Furman* to *Jurek*: Texas's modified sentencing system is upheld.

Prior to *Furman*, Texas juries had been given broad discretion to choose between a death sentence and a period of confinement in capital cases. In *Furman*, the Court reviewed a Texas death sentence, as well as two Georgia capital sentences, to determine whether the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S., at 239 (per curiam). Five Justices answered this question affirmatively, each supporting his conclusion in a separate opinion. *Id.*, at 239-374.

The Texas Legislature responded to *Furman* in its next session by, *inter alia*, adopting procedures to guide juries in capital sentencing. Specifically, Texas instituted its three-issue inquiry as part of a separate evidentiary sentencing proceeding following a defendant's conviction for capital murder. In *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262 (1976), the Court of Criminal Appeals upheld the new Texas sentencing scheme, *id.*, at 937-38, concluding that the prescribed three-question inquiry complied with *Furman* by sufficiently directing, guiding, and channeling the jury's consideration of the punishment alternatives, *id.*, at 939.

Thirty-five States, including Texas, enacted death penalty statutes following *Furman*, each attempting to comply with its understanding of the Court's constitutional requirements for capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 179-81 n.23-24 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). In *Gregg* and its companion cases, the Court revisited the death penalty statutes of five States, including Texas. *Gregg* upheld the constitutionality of capital punishment *per se* and the particular capital procedure enacted by Georgia. *Id.*, at 187, 206-07.

Gregg marked the beginning of the Court's struggle to reconcile two competing principles commanded by the Eighth Amendment. The first principle, derived from *Furman*, is that "States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly.'" *Graham v. Collins*, 506 U.S. 461, 468 (1993) (quoting *Furman*, 408 U.S., at 310 (Stewart, J., concurring)). The second principle, first announced in *Woodson*, is that "States must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case.'" *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (plurality opinion)).

In *Jurek v. Texas*, Justices Stewart, Powell and Stevens determined that the death sentence imposed under the newly adopted Texas capital procedures satisfied the competing

constitutional requirements identified in *Furman* and *Woodson*.[11] The first principle was satisfied by the definitional requirements of the Texas capital murder statute, which effectively required a finding of one of five statutory aggravating factors prior to any consideration of a death sentence. *Id.*, at 270-71 (opinion of Stewart, Powell, and Stevens, JJ.).

The Justices concluded that whether the second principle was satisfied, "turn[ed] on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.*, at 272. To answer this question, the Justices focused on the second special issue, which asks whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id*. The Justices concluded that the Court of Criminal Appeals would interpret the future dangerousness question in a manner that allowed the defendant to bring all relevant mitigating evidence to the jury's attention.[12] "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.*, at 276.

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[11] *Jurek*, 428 U.S., at 276-77 (opinion of Stewart, Powell, and Stevens, JJ.); *accord id.*, at 277 (Burger, C.J., concurring in judgment); *id.*, at 277-79 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment); *id.*, at 279 (Blackmun, J., concurring in judgment).

[12] The Justices relied on the Texas Court of Criminal Appeals's *Jurek* opinion, explaining the factors considered in determining the probability of the defendant's future dangerousness:

> [T]he jury could consider whether the defendant had a significant criminal record [and] the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. [*Jurek v. State,*] 522 S.W.2d, at 939-40. *Jurek*, 428 U.S., at 272-73.

With that understanding, the Court upheld the Texas death penalty system. *See supra* fn.11.

2. *Franklin*: Texas's capital sentencing system accommodates the competing concerns of *Furman* and the *Lockett* line of cases.

Two years after *Jurek*, the Court overturned an Ohio death penalty statute that precluded the sentencer from considering certain categories of relevant mitigating evidence. *See Lockett v. Ohio*, 438 U.S. 586, 597-609 (1978) (plurality opinion); *id.*, at 613-27 (concurring opinions). The plurality stated 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." *Id.*, at 604 (plurality opinion) (emphasis omitted).

The *Lockett* plurality observed that the defects in the Ohio statute could "best be understood by comparing it to the statutes upheld in *Gregg*, *Profitt* [*v. Florida*, 428 U.S. 242 (1976)], and *Jurek*." *Id.*, at 606. Thus, the *Lockett* plurality reaffirmed the interpretation of Texas's death penalty scheme set forth by Justices Stewart, Powell, and Stevens in *Jurek*.[13]

The Court next considered a constitutional challenge to the Texas special issues in *Franklin v. Lynaugh*, 487 U.S. 164 (1988). In *Franklin*, the defendant claimed that the Texas capital procedure erroneously precluded consideration of the mitigating circumstances of his good prison disciplinary record. *Id.*, at 170-72 (plurality opinion). The Court rejected this claim in a plurality opinion, concluding that Texas's second special issue provided an adequate vehicle for consideration of defendant's prison record as it related to his character. *Id.*, at 167-83 (White, J., joined by

[13] Four years after *Lockett*, the plurality position was adopted as the holding of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Rehnquist, C.J., and Scalia and Kennedy, JJ.). The plurality further noted that, at that time:

> [T]he Texas scheme has continued to pass constitutional muster, even when the Court laid down its broad rule in *Lockett* concerning the consideration of mitigating evidence. Simply put, we have previously recognized that the Texas Special Issues adequately 'allo[w] the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provid[e] for jury discretion.' We adhere to this prior conclusion. *Id.*, at 182 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988)) (citation omitted).

3. *Penry I*: Texas's capital sentencing procedures do not always accommodate the competing concerns of *Lockett* and *Furman*.

In *Penry I*, a closely divided Court for the first time set aside a capital sentence based on its determination that the Texas special issues did not allow for sufficient consideration of the defendant's mitigating evidence. Johnny Paul Penry was convicted of the brutal rape and murder of Pamela Carpenter. 492 U.S., at 307-11. After presenting mitigating evidence of severe childhood abuse, mental retardation, and a related inability to learn from his experiences or mistakes, Penry was nonetheless sentenced to death. *Id.*, at 311. The Court reversed, holding that Texas's special issues were too limited to allow appropriate consideration of Penry's mitigating evidence. *Id.*, at 328.

Specifically, with regard to the first special issue concerning whether the crime was committed "deliberately," the Court concluded that because neither the statute nor the Court of Criminal Appeals had defined the term, the Court could not be certain that the jury "was able to give effect to the mitigating evidence . . . in answering the first special issue." *Id.*, at 322-23. With regard to Texas's second special issue concerning future dangerousness, the Court

determined that Penry's evidence that his mental retardation made him unable to learn from his mistakes was relevant "only as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.*, at 323 (emphasis in original). Therefore, because the jury could not adequately give effect to Penry's mitigating evidence, the Court found his sentence unconstitutional. *Id.*, at 328.[14]

Following *Penry I*, both the Texas Court of Criminal Appeals and the Texas Legislature took action to comply with the Court's ruling. The Court of Criminal Appeals properly obeyed *Penry I*, expressly holding,

> whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which . . . has a tendency to reduce his moral culpability in a way not exclusively related to [the Texas special issues] . . . the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment. *Gribble v. State*, 808 S.W.2d 65, 75 (Tex. Crim. App. 1990).[15]

And the Court of Criminal Appeals quickly began granting relief in appropriate cases consonant with the Court's *Penry I* decision.[16] Likewise, the Texas Legislature acted swiftly in its next legislative session to place Texas in compliance with *Penry I* by revising the capital sentencing issues. Specifically, the Texas Legislature added a new

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[14] Significantly, the Court stressed that *Penry I* did not constitute a new rule; rather, the Court described its holding as an application of the rules of *Jurek*, *Lockett*, and *Eddings*. *See id.*, at 314-18.

[15] *See also James v. State*, 805 S.W.2d 415, 417 n.3 (Tex. Crim. App. 1990) (citing *Penry I*) ("We now know that if the record contains [*Penry*-type] mitigating evidence, an accused cannot be sentenced to death under our statutory scheme, consonant with the Eighth Amendment, unless [a *Penry*] instruction has been given.").

[16] *See*, *e.g.*, *Ex parte Goodman*, 816 S.W.2d 383, 385-86 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150, 151-52 (Tex. Crim. App. 1992).

mitigating circumstances sentencing issue which a capital jury must now answer before the death penalty may be imposed.[17]

4. *Graham* and *Johnson*: the Court reaffirms that the Texas sentencing system properly accommodates the competing concerns of *Furman* and *Lockett*.

Four years later, the Court considered *Penry* claims arising in two more Texas cases, *Graham v. Collins*, 506 U.S. 461 (1993), and *Johnson v. Texas,* 509 U.S. 350 (1993). Both upheld the pre-1991 Texas sentencing statute.

Graham claimed that his mitigating evidence of youth, troubled family background, and positive character traits could not be adequately considered under the Texas sentencing system. 506 U.S., at 463. In rejecting his claim,[18] the Court observed that *Penry I* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute," *id.*, at 474, and explained that Graham's mitigating evidence was not placed "beyond the jury's effective reach," *id.* Although Penry's evidence of mental retardation and severe childhood abuse mandated an affirmative answer to the Texas "future dangerousness" special issue, the Court observed that Graham's evidence "quite readily could have supported a negative answer" to this special issue, *id.*, at 475-76, and therefore concluded that

[17] The new instruction reads as follows: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Act of May 17, 1991, 72d Leg., R.S., ch. 838, §1, 1991 Tex.Gen.Laws 2898, 2899 (codified at TEX. CODE CRIM. PROC. art. 37.071).

[18] Because the case came before the Court on federal habeas, the Court recognized that it had to determine whether granting relief to the defendant would create a "new rule" of constitutional law subject to the *Teague* doctrine. *Id.*, at 467-68; *see Teague v. Lane*, 489 U.S. 288 (1989).

the habeas relief sought by Graham was not "dictated" by *Penry I* or its predecessors, *id.*, at 476.[19]

Johnson likewise concerned mitigating evidence of youth. 509 U.S., at 352. Rejecting Johnson's claim, the Court reaffirmed the conclusion reached in *Graham* that "there is ample room in the [Texas second special issue's] assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination," *id.*, at 367-68. The Court reasoned that the "ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of [Texas's] second special issue." *Id.*

The *Johnson* Court also relied on the Texas Court of Criminal Appeals's understanding that the future dangerousness inquiry is a "comprehensive inquiry that is more than a question of historical fact." *Id.* The Court observed with approval that "[i]n reviewing death sentences imposed under the former Texas system, [the Court of Criminal Appeals] has consistently looked to a nonexclusive list of eight factors, which includes the defendant's age, in deciding whether there was sufficient evidence to support a 'yes' answer to the second special issue." *Id.* (citations omitted).

The Court reasoned that, in order to find a constitutional defect in Johnson's case, it would have to overrule *Jurek* and change the rule of *Lockett* and *Eddings*. *Id.*, at 372. Johnson's argument would require that *Jurek* be overruled because the "inevitable consequence" of his position was that in virtually

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[19] The Court also stated that it was not persuaded that *Penry I* could be extended to encompass the sorts of mitigating evidence Graham suggested "without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*." *Id.* The Court read *Jurek* to hold that the circumstance of youth was given adequate consideration under Texas's special issues, and "[saw] no reason to regard the circumstances of Graham's family background and positive character traits in a different light." *Id.* The Court further explained, "Graham's evidence of transient upbringing and otherwise non-violent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse." *Id.*

all cases the Texas system would require a supplemental instruction. *Id.* Further, Johnson sought to change the rule of *Lockett* and *Eddings* because "[i]nstead of requiring that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence, [Johnson's] rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant*." *Id.* (emphasis added). The Court refused to accept this rule because it would require that capital juries be instructed in a manner that left them "free to depart from the special issues in every case . . . remov[ing] all power on the part of the States to structure the consideration of mitigating evidence," a result the Court had consistently rejected. *Id.*, at 373 (citing *Boyde v. California*, 494 U.S. 370, 377 (1990); *Saffle v. Parks*, 494 U.S. 484, 493 (1990); *Franklin*, 487 U.S., at 181 (plurality opinion)).[20]

5. *Penry II*: a supplemental jury instruction fails to meet *Penry I*'s requirements.

In *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), the Court again reversed Johnny Paul Penry's death sentence, this time after his second trial. At that second trial, the district court had submitted to the jury a supplemental "nullification" instruction in an attempt to comply with *Penry I*. *See Penry v. State*, 903 S.W.2d 715, 726 (Tex. Crim. App. 1995).

The Court noted two ways to interpret the *Penry II* supplemental instruction, neither of which met the requirements of the Eighth Amendment. First, it could be viewed as an instruction to consider Penry's mitigating evidence in determining a truthful answer to each special

[20] The Court concluded by acknowledging that its capital sentencing jurisprudence sought to reconcile two competing and valid principles from *Furman*: (1) allowing mitigating evidence to be considered, and (2) guiding the discretion of the sentencer. *Id.* The Court reaffirmed that "our holding in *Jurek* reflected the understanding that the Texas sentencing scheme 'accommodates *both* of these concerns.' " *Id.* (quoting *Franklin*, 487 U.S., at 182 (plurality opinion)).

issue. *Id*., at 798. But that placed the jury in no better position than it had been in *Penry I* because the special issues were insufficiently broad to cover Penry's evidence of mental retardation and childhood abuse. *Id*. Alternatively, the instruction could be understood to inform the jurors to answer one of the special issues "no" if they believed the mitigating evidence made a life sentence appropriate. *Id*. However, that made the jury charge internally contradictory and placed the jurors in an impossible situation. *Id*., at 799.

Because "it would have been both logically and ethically impossible for a juror to follow both sets of instructions," *id.*, the Court concluded that the result of the supplemental instruction was to "insert[ ] an element of capriciousness into the sentencing decision" making the instruction "an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence." *Id*., at 800.

Following the Court's decision in *Penry II*, Penry was retried on punishment only. *See Penry v. State*, 178 S.W.3d 782, 784 (Tex. Crim. App. 2005). In addition to the three special issues that had been given twice before, a fourth issue was included asking the jury to include an analysis of Penry's "personal moral culpability" before imposing a death sentence. *Id.*[21]

Penry was once again sentenced to death. *Id*. On direct appeal, Penry argued that the instruction to special issue four precluded the jury from considering Penry's mental impairment as mitigating evidence unless the jury concluded that Penry was mentally retarded. *Id*. The Court of Criminal Appeals held that there was a reasonable likelihood that the instruction precluded the jury from giving effect to mitigating

[21] The fourth issue asked:

> "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, Johnny Paul Penry, that there is a sufficient mitigating circumstance or circumstances to warrant that a . . . sentence of life imprisonment rather than a death sentence be imposed." *Id*., at 792.

evidence of mental impairment that did not amount to mental retardation. *Id*., at 783-84. Finding error, the court turned to the question whether the error in the trial court's charge was harmful, under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g), ultimately determining that it could not find the charge error harmless, and that it required yet another resentencing proceeding. *Id*. Accordingly, the case was reversed and remanded for a new trial on punishment. *Id*., at 789.[22]

B. Just as It Has in All the Previous *Penry* Cases, the Court of Criminal Appeals Fully Complied With the Mandate of This Court's Summary Reversal in *Smith II*.

Taken as a whole, the Court's capital sentencing jurisprudence from *Furman* through the *Penry* line of cases reflects the Court's struggle to define the constitutional

[22] Finally, in its last *Penry*-line decision prior to *Smith*, the Court reviewed and rejected the Fifth Circuit's analytical framework for *Penry* claims in *Tennard v. Dretke*, 542 U.S. 274, 283-87 (2004). Tennard was sentenced to death under the Texas special issues in use prior to *Penry I*. *Id.*, at 278. The Fifth Circuit held that Tennard was not entitled to relief because his low IQ, in and of itself, did not meet the Fifth Circuit's "constitutional relevance" test and he also did not meet the court's "nexus" test by showing that his crime was attributable to his low IQ. *Id.*, at 282. The Court rejected the Fifth Circuit's "constitutional relevance" and "nexus" tests for *Penry* claims. *Id.*, at 284. The Court confirmed that mitigating evidence introduced in a capital sentencing proceeding 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." *Id.* (internal quotation omitted).

The Fifth Circuit has recently issued an en banc decision involving a *Penry* claim in light of the Court's opinions in *Tennard* and *Smith*. *See Nelson v. Quarterman*, 2006 WL 3592953 (CA5 December 11, 2006). In *Nelson*, the Fifth Circuit noted that in *Smith* and *Tennard* the Court had made clear that, when evaluating whether a *Penry* instruction would be required, "the relevant inquiry under its [*Penry*] precedent was whether there was a reasonable likelihood that the jury would interpret the Texas special issues in a manner that precluded it from fully considering and giving full effect to all of the defendant's mitigating evidence," *id.*, at *4, and confirmed that it would apply this standard going forward, *id.*, at 15.

requirements applicable to death penalty statutes. The Texas Court of Criminal Appeals's cases during this period reflect Texas's parallel struggle to meet the Court's evolving capital sentencing standards. Throughout this period, the Texas Court of Criminal Appeals, like the Texas Legislature, has consistently acted in good faith to implement the Court's decisions on capital sentencing.

Just so, in the case sub judice. The basis of the *Smith II* summary reversal was relatively straightforward. Three holdings are central to *Smith II*:

- There can be no heightened "screening test" of "constitutional relevance" that limits what mitigating evidence qualifies as *Penry* evidence. 543 U.S., at 43-44; J.A. 230-32. This conclusion flowed directly from *Tennard v. Dretke*, 542 U.S. 274 (2004)—which had been decided two months *after* the Court of Criminal Appeals opinion had issued in *Smith I*.
- "Nullification" instructions, regardless of their clarity, cannot cure a *Penry* violation. *Smith II*, 543 U.S., at 47-48; J.A. 234-36. The Court of Criminal Appeals had considered the *Smith* nullification instruction to be permissible because it was considerably less ambiguous than was the nullification instruction disapproved in *Penry II*, but this Court concluded that additional clarity could not render the instruction constitutionally sufficient. *Id.*
- Therefore, the sentencing in *Smith* violated *Penry*. *Id.*, at 48-49; J.A. 236.

On remand, in *Smith III* the Court of Criminal Appeals respected and gave force to each of these separate holdings. Specifically, the court began its analysis with the premise—mandated by this Court's summary reversal—that Smith's sentencing had produced *Penry* error, that all the potentially mitigating evidence was subject to *Penry* analysis, and that the nullification instruction had not cured the *Penry* error. *Smith III*, 185 S.W.2d, at 466-67; J.A. 287-88.

From that starting point, the state court then applied its traditional harmless-error analysis to determine whether automatic reversal was required. *See infra* Section III.

Petitioner's implicit argument—which he never comes straight out and says—is that doing so violated, not the letter, but really the *spirit* of the summary reversal. But that contention does not withstand scrutiny.

To be sure, this Court's summary reversal did not say, "the case is remanded to assess whether harmless-error analysis applies to *Penry* error." But neither did it say, "because harmless-error analysis can never apply to *Penry* error, the case is remanded with instructions to order a new trial to resentence Smith." Rather, the Court found *Penry* error, and then remanded for the lower court to determine what next steps were required in Smith's case under Texas state habeas procedures.

The necessary consequence of Smith's interpretation of the "spirit" of *Smith II* would be that every person who was sentenced to death under Texas's pre-1991 special issues and who proffered any quantum of potentially mitigating IQ or parenting evidence must necessarily be resentenced. But that was not the holding of *Smith II*, nor was it compelled by the mandate.

Instead, the Court of Criminal Appeals accepted and carefully followed *Smith II*'s holding that Smith's jury charge was constitutionally defective. Because nothing in *Smith II* suggested that the full panoply of criminal-law doctrines ordinarily applicable in Texas state habeas proceedings would no longer apply, the state court followed those established doctrines in assessing a remedy. Thus, applying Texas's harmless-error doctrine, the court concluded that, in light of the full record, the conceded constitutional error in Smith's charge was not sufficiently harmful to require resentencing. Doing so was unexceptional, an ordinary application of state law on state habeas, and entirely consistent with this Court's mandate.

II. THE COURT OF CRIMINAL APPEALS IN *SMITH III* DID NOT "REVISIT" ITS EARLIER CONCLUSIONS ON PROCEDURAL DEFAULT; RATHER, IT CONTINUED TO CONSIDER THE CASE ON THE MERITS AND SIMPLY APPLIED LONGSTANDING TEXAS HARMLESS-ERROR ANALYSIS.

Another major premise of Petitioner's challenge to the decision of the Court of Criminal Appeals is that the court

improperly "revisited" its prior determination that Smith had adequately preserved error at trial. Pet'r Br. at 13, 40-50. That claim is likewise incorrect.

In making this argument, Petitioner conflates the doctrines of procedural default and harmless error. In *Smith I*, the Court of Criminal Appeals did not deem Smith's challenge to the nullification instruction to be procedurally defaulted, although four of its nine judges would have done so. *Smith I*, 132 S.W.3d, at 423-24 (Hervey, J., concurring); *id*., at 428 (Holcomb, J., concurring); J.A. 205-06, 214. Instead, the court chose to resolve and reject his claim on the merits.

Smith III did not "revisit" that finding. Just as before, the Court of Criminal Appeals in *Smith III* declined to find Smith's *Penry* challenge to be procedurally defaulted. And just as before, the court proceeded to address it on the merits.

Although both procedural default and state harmless error analyses are affected by preservation of error, the two are not identical. Procedural default is a complete bar, and hence a far more serious impediment to relief. Given the degree to which *Penry I* changed the landscape of Texas capital sentencing, and the futility of raising such claims before that decision, the Court of Criminal Appeals long ago made the reasonable determination, post-*Penry I*, to excuse defendants from procedural default in *Penry* claims. *See infra* Section II.B. But, at the same time, the Court of Criminal Appeals continued to hold *Penry* defendants to the well-established state standard for harmless error. *See infra* Section III.A.

Thus, when *Smith I* was decided, the court resolved and rejected his claim on the merits, finding no constitutional violation in the jury charge, which—under applicable state law—obviated the necessity of applying harmless error and evaluating whether the error had been preserved. *See infra* Section II.A. Having never made that evaluation in *Smith I*, there was nothing to "revisit" in *Smith III*.

A. Texas Resolves Issues of Jury Charge Error Through a Two-Step Harmless-Error Analysis Under *Almanza*.

In addressing Smith's claim on the merits, the court followed the longstanding Texas procedure for jury charge error: to subject such claims to the harmless-error analysis required by *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985), and Texas Code of Criminal Procedure art. 36.19.[23] The *Almanza* standard contains two sequential steps: "First, the reviewing court must determine whether the jury charge contains error. Second, the court must determine whether sufficient harm resulted from the error to require reversal." *Id.*

The only difference between *Smith I* and *Smith III* in this regard is that, in *Smith I*, the court found no error, and so never made it past step one of *Almanza*. In *Smith III*, the court began with this Court's finding of error, and so skipped step one entirely and proceeded directly to step two of *Almanza*, assessing harm.

The harm analysis, in turn, contains two different levels of scrutiny, reflecting the Court of Criminal Appeals's conclusion that Article 36.19 "separately contains the standards for both fundamental [charge] error and

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[23] As the Court of Criminal Appeals recently explained, "[o]ur case law is clear that when there is jury-charge error, whether objected to or not objected to, the standard for assessing harm is controlled by *Almanza*. . . ." *Bluitt v. State*, 137 S.W.3d 51, 53 (Tex. Crim. App. 2004). *Almanza* applied Texas Code of Criminal Procedure art. 36.19, which provides:

> Whenever it appears by the record in any criminal action upon appeal that any requirement of Articles 36.14, 36.15, 36.16, 36.17 and 36.18 [each regarding jury charge in criminal trial] has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial.

ordinary reversible [charge] error." *Almanza*, 686 S.W.2d, at 171.[24] As the court explained:

> "If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is 'calculated to injure the rights of defendant,' which means no more than that there must be some harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was 'fundamental,' he will obtain a reversal only if the error is so egregious and created such harm that he 'has not had a fair and impartial trial'—in short 'egregious harm.' " *Id*.

Thus, under *Almanza*, the applicable harm standard turns on whether the accused timely and properly objected to the error, but this only begins the inquiry into harmless error. *See id.*[25]

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[24] On direct appeal, Texas state courts apply the "beyond a reasonable doubt standard" of *Chapman v. California*, 386 U.S. 18, 21 (1967), to constitutional jury-charge errors that have been preserved. *Jimenez v. State*, 32 S.W.3d 233, 237-38 (Tex. Crim. App. 2000). As to all other jury-charge errors—on direct and on habeas, preserved and unpreserved—*Almanza* applies. *See id.*, at 236-38; *see also infra* fn.26.

[25] Notably, Texas's *Almanza* standard is no more onerous to habeas petitioners than the federal habeas standard expressed in *Brecht*, and is less onerous than the federal *Olano* standard. In federal habeas proceedings, constitutional error will generally be considered harmful only if it " 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *Almanza* similarly requires that the habeas petitioner prove by a preponderance of the evidence that the error precluded a fair and impartial trial. *Almanza*, 686 S.W.2d, at 171.

Under *Olano*, in the federal system unpreserved constitutional error may be reviewed by the court of appeals only if it is "plain error," FED. R. CIV. PROC. 52(b). *United States v. Olano*, 507 U.S. 725, 735 (1993). As the Court recently explained, under Rule 52(b) " 'before an

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B. Smith's Assertions That *Almanza* Was Inapplicable Are Inconsistent with Well-Established Texas Law.

When reviewing allegations of unobjected-to constitutional jury charge error in state habeas proceedings, the Court of Criminal Appeals has traditionally applied the *Almanza* standard.[26] Likewise, contrary to Smith's assertion that the Court of Criminal Appeals suddenly and uncharacteristically applied *Almanza* to his *Penry* claim, Pet'r Br., at 47, 47 n.16, for many years prior to its decision in his case the Court of Criminal Appeals regularly and repeatedly applied *Almanza* analysis to *Penry* claims.[27] In short, in state habeas cases like

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appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quoting *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)) (internal quotations omitted). The *Almanza* standard is less onerous than *Olano* in that the federal standard is discretionary—the courts of appeals have discretion whether to reverse—whereas state courts must reverse where *Almanza* is satisfied.

[26] For example, *Almanza* was applied in the habeas context shortly after it was issued in a case that concerned a habeas petition claiming denial of due process due to charge error, but containing almost no factual evidence. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The court dismissed the habeas petition without prejudice because the petitioner had failed to sufficiently allege a constitutional error. *Id*. The court also applied *Almanza* in analyzing jury charge error in the habeas context in *Ex parte Patterson*, 740 S.W.2d 766, 776-77 (Tex. Crim. App. 1987), modified on other grounds, *Ex parte Beck*, 769 S.W.2d 525, 528 (Tex. Crim. App. 1989); *see also Ex parte White*, 726 S.W.2d 149, 150 (Tex. Crim. App. 1987); *Ex parte Tuan Van Truong*, 770 S.W.2d 810, 813 (Tex. Crim. App. 1989).

[27] The following cases illustrate the Court of Criminal Appeals's consistency in applying *Almanza* to *Penry* error. In **1993**, for example, the court applied *Almanza* to appellant's reverse-*Penry* error claim, stating that "[i]n the case of charge error that was properly objected to at trial, reversal is called for unless the error is harmless." *Flores v. State*, 871 S.W.2d 714, 723 (Tex. Crim. App. 1993). In **1994**, the court explicitly applied *Almanza* to appellant's *Penry* claims. *Coleman v. State*, 881 S.W.2d 344, 356-57 (Tex. Crim. App. 1994). Concluding that the appellant

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Smith's, involving unobjected-to constitutional jury charge error, the Texas Court of Criminal Appeals has historically applied the *Almanza* standard.

Smith and his *amicus* attempt to cast the Court of Criminal Appeals's *Almanza* jurisprudence as inconsistent by pointing to a small set of cases issued soon after *Penry I*. Pet'r Br., at 47 n.16; Amicus Br., at 17-19. But none of these cases stands for the proposition that *Almanza* is inapplicable to *Penry* claims.[28] Each of the cases that

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had failed to show error, the court did not reach the harm analysis. In **1995**, the court considered an appellant's unobjected-to *Penry* error claim, and applied the *Almanza* standard, denying relief because egregious harm was not shown. *Chambers v. State*, 903 S.W.2d 21, 34 (Tex. Crim. App. 1995). In **1996**, the Court of Criminal Appeals applied *Almanza* to unobjected-to *Penry* error in *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996). Because the court concluded that the nullification instruction complied with *Penry I*, it held that Goff was not egregiously harmed and denied relief. *Id*., at 551 and n.13. In another **1996** case, the court acknowledged that *Almanza* applies to *Penry* error, citing *Almanza* for its holding that "failure to object to an included charge waives all but egregious error." *Cantu v. State*, 939 S.W.2d 627, 647-48 (Tex. Crim. App. 1996). In **2000**, the court applied *Almanza*'s "some harm" standard to preserved *Penry*-type error. *Ovalle v. State*, 13 S.W.3d 774, 786 (Tex. Crim. App. 2000). In **2002**, the court again applied *Almanza*, denying appellate relief on one of defendant's points of error alleging that charge error prevented the jury from considering his mitigating evidence. *Turner v. State*, 87 S.W.3d 111, 117 (Tex. Crim. App. 2002). In **2004**, after the court agreed that the trial judge had erred in a jury instruction regarding mitigating evidence, the court applied the *Almanza* "egregious harm" standard because the defendant did not object at trial. *Scheanette v. State*, 144 S.W.3d 503, 507 (Tex. Crim. App. 2004).

[28] In *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991), the defendant preserved error by requesting a supplemental instruction, and the court did not need to engage in a harm analysis because, like *Penry*, McGee was mentally retarded (IQ of 66), and therefore "just as in [*Penry I*], [the mitigating evidence] goes beyond the scope of the special issues." *Id*., at 80. Similarly, in *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991), the petitioner timely requested a nullification instruction which was denied by the trial judge, thus preserving error. *Id*., at 385. The court reversed because, as in *Penry* and *Ex parte McGee*, the petitioner's evidence of mental retardation (IQ of 56) was a "double-edged sword." *Id*., at 386. Likewise, in *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992), where the defendant had an IQ of 67, the Court of Criminal Appeals concluded that, in light of *Penry I*, "applicant's evidence

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Petitioner and his *amicus* cite to are cases handed down immediately post-*Penry I* involving defendants whose trials had occurred prior to *Penry I* and who had not alleged *Penry* error until after *Penry I*. The Court of Criminal Appeals, in *Black v. State*, had declared that this particular category of defendants would be treated as if they had preserved *Penry* error at trial. *See Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991); *id.*, at 374 (Campbell, J., concurring). Likewise, the cases cited by Smith to support his assertion that "the CCA has imposed defaults based on the absence of contemporaneous objection in several prior cases, including cases involving alleged *Penry* error," Pet'r Br., at 45, demonstrate precisely the opposite.[29]

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of mental retardation is double-edged, in that it simultaneously ameliorates fault and indicates future dangerousness, and as such we can not be sure that the jury could give it mitigating weight when answering the submitted issues." *Id.*, at 152. Finally, in *Ex parte Baldree*, 810 S.W.2d 213, 217 (Tex. Crim. App. 1991), the Court of Criminal Appeals did not reach a harm analysis because it concluded that the proffered evidence did not exceed the scope of the special issues.

[29] Smith points to *Nichols v. Scott*, 69 F.3d 1255, 1266 (CA5 1995) and *Turner v. Johnson*, 1997 U.S. App. LEXIS 12669 (1997), to support this assertion. On examination, both cases are directly to the contrary. In the underlying state case, *Nichols v. State*, 754 S.W.2d 185, 198 (Tex. Crim. App. 1988), the Court of Criminal Appeals not only did not procedurally default Nichols's charge error claim, it explicitly applied *Almanza* (a test on the merits), explaining:

> The failure to object to the charge waives all but fundamental error. Art. 36.19, V.A.C.C.P.; *Duffy v. State*, 567 S.W.2d 197, 204 (Tex.Cr.App. 1978) *cert. denied*, 439 U.S. 991, 58 L. Ed. 2d 666, 99 S. Ct. 593 (1978). The error, to constitute fundamental proportion, must be egregious and create such harm that it deprives appellant a fair and impartial trial. Art. 36.19, *supra; Almanza v. State*, 686 S.W.2d 157, 171-72 (Tex.Cr.App. 1985). After a careful review of the totality of the record, we find no such error or harm. *Nichols*, 754 S.W.2d, at 198.

Smith's citation to *Turner v. Johnson*, 1997 U.S. App. LEXIS 12669 (1997), for proof that the Court of Criminal Appeals has procedurally defaulted charge error cases is also misleading. Turner claimed on direct appeal that a particular definition in the charge had not been properly defined. *Turner v. State*, 805 S.W.2d 423, 430 (Tex. Crim. App. 1991). After observing that Turner had not objected at trial, the court proceeded

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More fundamentally, the *Almanza* test, by its terms, presupposes that it will be applied to some claims that (1) were not preserved, and (2) were not held to be procedurally defaulted. Because *Almanza* is a merits test, the entire second prong (looking to egregious harm for unpreserved error) *would be utterly superfluous* if every single unpreserved claim were procedurally defaulted before even getting to the merits. But, because state law contemplates some jury-charge errors (like *Penry* errors) will not be defaulted but are nonetheless unpreserved at trial, the *Almanza* egregious harm test has been traditionally applied.

III. THE COURT OF CRIMINAL APPEALS PROPERLY APPLIED HEIGHTENED HARMLESS-ERROR ANALYSIS UNDER *ALMANZA*.

Under any harmless-error standard, even the least searching, Smith's sentence should be upheld. Therefore, there is no basis for Smith to challenge the state court's implementation of state law to assess harmless error. That is, Smith cannot ask this Court to assess if the Texas court properly applied Texas law; Smith can ask only that the demands of the Constitution be enforced. Because the Constitution does not require automatic reversal of *Penry* errors, and because any harmless-error analysis would yield the same result, Smith's challenge should fail.

Nevertheless, the Court of Criminal Appeals carefully applied established Texas law, and correctly concluded that Smith could not satisfy the *Almanza* egregious harm standard.

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to consider the merits of his claim, concluding that there was no reversible error because "[t]he charge . . . limited the definition . . . by applying it to the factual context. . . ." *Id.*, at 431; *see also Turner v. Johnson,* 1997 U.S. App. LEXIS 12669 at *28 (noting that "[o]n direct appeal the Texas Court of Criminal Appeals found no reversible error in the instruction as a matter of state law"). Again, the Court of Criminal Appeals did not procedurally default this claim, but rather rejected it on the merits.

A. The Texas Court of Criminal Appeals Properly Applied *Almanza*'s Egregious Harm Standard Because Smith Did Not Timely Object to the Nullification Instruction.

On remand, the Court of Criminal Appeals began with this Court's holding that there was constitutional error, and so turned to step two of the *Almanza* test, whether that error was harmless. Because Smith chose at trial to attack the constitutionality of Texas's entire sentencing scheme rather than object to the proposed supplemental instruction in his case—or alternatively offer a different instruction—he failed to preserve the objection subsequently raised in his second state habeas proceeding, that the language of the nullification instruction prevented giving effect to his mitigating evidence because it placed the jurors in an unconstitutional ethical quandary.

In order to preserve trial error under Texas law, an appellant's trial objections must have "specifically alerted the trial judge to the alleged error he urges on appeal." *Satterwhite v. State*, 858 S.W.2d 412, 430 (Tex. Crim. App. 1993). And, "[w]here his trial objections do not comport with his arguments on appeal, appellant has failed to preserve error on those issues." *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996); TEX. R. APP. P. 33.1(a). As the Court of Criminal Appeals has observed, "the record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion that . . . stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint." *Goff*, 931 S.W.2d, at 551.[30]

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[30] In the specific context of jury charge error in a criminal case, Article 36.14 of the Texas Code of Criminal Procedure provides in relevant part:

> Before [the] charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. Said objections may embody errors claimed to have been committed in the charge, as

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Penry I made clear that, when a Texas jury could not give meaningful effect to an accused's mitigating evidence through Texas's special issues, the defendant was constitutionally entitled to further instructions "informing the jury that it could consider and give effect" to such evidence "by declining to impose the death penalty." *Penry I*, 492 U.S., at 328; *see also Graham*, 506 U.S., at 474. Indeed, in *Penry II*, the Court observed that in *Penry I* it had described the kinds of supplemental jury instructions that could be given in a Texas capital trial to "comply with our mandate" and "alleviate" the Court's Eighth Amendment concerns. *Penry II*, 532 U.S., at 802-03.[31]

In Smith's trial, which took place two years after *Penry I*, it is undisputed that: (1) the trial court attempted to comply with *Penry I* in Smith's case by preparing a supplemental instruction regarding his mitigating evidence; (2) Smith was provided with the supplemental instruction in writing that the trial court planned to submit to comply with *Penry I*; (3) Smith was also given the express opportunity to object to the content of the

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> well as errors claimed to have been committed by omissions therefrom or in failing to charge upon issues arising from the facts . . . Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof. TEX. CODE CRIM. PROC. art. 36.14.

Additionally, Texas law provides that written requests for special (additional) charges are sufficient to raise the issues in the requested charges, calling the trial court's attention to errors or omissions in the jury charge, and preserving error on those issues. *See* TEX. CODE CRIM. PROC. arts. 36.15-.16.

[31] Specifically, the Court stated in *Penry II* that it had, by way of example, indicated that the trial court could comply with its ruling by "defining the term 'deliberately' in [Texas's] first special issue 'in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability." *Id.*, at 803 (citing *Penry I*, 492 U.S., at 323). The Court noted that it had also indicated that a supplemental "clearly drafted catchall instruction" could have been used to comply with *Penry I*. *Id.* Thus, in *Penry I* the Court expressly directed Texas courts to use supplemental instructions in *Penry* claim cases in order to comply with its mandate.

instruction, or to propose modified or different instructions, *see* J.A. 20-22, and (4) he deliberately chose not to do so. Rather, in contravention of the Court's direction in *Penry I*, Smith took the position at trial and on direct appeal, that the trial court *could never* submit any supplemental instructions consistent with Texas law, and therefore the entire Texas sentencing scheme was unconstitutional as applied to him.[32]

The trial court in Smith's case struggled with the difficult dilemma confronted by Texas courts for the two-year period after *Penry I*. The most direct and logical way to respond to *Penry I* would have been to draft a new special issue to submit to the jury, but doing so required a change in statute, and the Texas Legislature meets only every two years. So after *Penry I* was issued in 1989, two years passed before the legislative response (creating a new special issue) in 1991. In the interim, trial judges were left to try to craft jury instructions that would cure the error. Thus, Smith's trial judge had two basic options in order to try to comply with *Penry I*:

(1) give the jury a supplemental instruction defining the term "deliberately" in special issue one to "clearly direct the jury to consider fully [Smith's] mitigating evidence," *Penry I*, 492 U.S., at 323; or

(2) give a catchall nullification instruction, like the one actually given in Smith's case, which required the jury to "consider any evidence which, in your opinion, is mitigating," J.A. 106, and then answer one of the special issues "no" if the mitigating evidence led them to believe that Smith should not receive a death sentence, even if they would have otherwise answered the special issue "yes," J.A. 107.

[32] *See* J.A. 7-10 (Smith's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional As Applied"), J.A. 11-16 (Smith's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional"), and J.A. 132-34 (Smith's point of error number six on direct appeal).

The trial court picked option two. Today, we know that choice was wrong.[33] In hindsight, had the judge instead picked option one instead, defining "deliberateness," under the terms of *Penry II*, that would have cured the problem. 532 U.S., at 802-03. But, unfortunately, the judge did not.

At the time, unsure of which option was best, the trial judge affirmatively solicited defense counsel's help:

> "If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it." J.A. 21.

Smith's counsel, however, made the deliberate decision to submit nothing at all, and so the court was left with the instruction it had already drafted. Unlike Penry's counsel—who "offered two definitions of 'deliberately' that the trial court refused to give," *Penry II*, 532 U.S., at 803—Smith's counsel did not do anything to urge option one. Instead, Smith's counsel decided, in effect, to go "all or nothing." So he filed two motions, both seeking to declare

[33] Although in *Penry II* the Court stated that giving the jury a "clearly drafted catchall instruction on mitigating evidence" might have sufficed, 532 U.S., at 802-03, in *Smith II* the Court appears to have changed its mind, concluding that drafting the instruction more clearly only "intensified the dilemma faced by ethical juries," *Smith II*, 543 U.S., at 48; J.A. 235. While in some other States (*e.g.* weighing States) a "catchall" instruction is plainly sufficient, the legislatively-drafted special issues in Texas limited the effect of a mere instruction. Presumably, with respect to Texas, the *Penry II* Court was originally contemplating some sort of clear and unambiguous "nullification" instruction when it referred to a "clearly drafted catchall instruction," because—absent the Legislature's drafting a new special issue for the jury to answer, as it did in 1991—a "catchall instruction" would alter only the *input* to the jury and could not alter the *output* from the jury; thus, the only way for a jury to implement the catchall instruction would be to answer "no" to one of the preexisting special issues, which would make it a "nullification" instruction. In any event, in *Smith II*, the Court made clear that any nullification instruction, no matter how clear, is constitutionally infirm.

the Texas death penalty system unconstitutional on *Penry* grounds, J.A. 7-16, and, concurrently, he argued that Texas law prevented the judge from giving any supplemental instructions to the jury whatsoever.[34]

Smith's argument that the trial court lacked authority to submit any curative instructions was simply incorrect. First, the Court in *Penry I* specifically directed that submitting a supplemental instruction to accommodate *Penry* evidence was not only permissible but was required by the Constitution. *Penry I*, 492 U.S., at 328.

Second, although Smith echoes the faulty argument once again before this Court—*see* Pet'r Br., at 48 (asserting that, at the time of trial, it was "well-established in [Texas] state law" that the trial court "lacked power to solve the *Penry* defect by altering or supplementing the legislatively-prescribed special issues")—the Court of Criminal Appeals had repeatedly and explicitly held that supplemental instructions to cure *Penry* error were not only permissible but were required. *See, e.g., James v. State*, 805 S.W.2d 415, 417 n.3 (Tex. Crim. App. 1990) ("We now know that if the record contains such mitigating evidence, an accused cannot be sentenced to death under our statutory scheme, consonant with the Eighth Amendment, unless such an instruction has been given.") (citing *Penry I*); *Gribble v. State*, 808 S.W.2d 65, 75 (Tex. Crim. App. 1990).

Smith's trial decision to facially attack the entire statute but not the nullification instruction itself, despite clear Supreme Court and Texas case law indicating the propriety of such an objection, establishes Smith's failure to preserve the error he raised in state habeas. There is no

[34] Smith's counsel argued that the "exclusive methodology for submission to the jury of special issues with regard to infliction of the death penalty are contained in [the Texas sentencing statute]." J.A. 9. He further asserted that submitting any supplemental instruction to his charge would be to impermissibly "create new law." *Id.* In his view, "For the trial court to create a scheme that would permit the jury to respond to [his] mitigating evidence would contradict the current status of the law." *Id.*

credible reason that Smith should not have objected to the nullification instruction as unconstitutional, other than his counsel's strategic decision to seek a categorical prohibition on the death penalty instead. Thus, Smith's actions invoke the foundational principles underlying the need to specifically present trial objections in a timely manner: "to inform the trial judge of the basis of the objection and afford him to the opportunity to rule on it." *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977). Had Smith, like Penry, objected and asked the trial court to define "deliberateness" instead, the error in this case might have been avoided altogether.

Smith did not attack the constitutionality of the nullification instruction until he commenced his second state habeas proceeding. Given the trial court's express invitation for him to object to the text of that instruction before it was read to the jury, and given his strategic decision to decline that invitation, the Court of Criminal Appeals quite reasonably concluded that, for purposes of *Almanza* harmless-error analysis, Smith had not preserved his challenge to the nullification instruction.

B. Because Smith Received a "Fundamentally Fair" Trial, the Texas Court of Criminal Appeals Correctly Determined That He Did Not Need To Be Resentenced.

1. In order for unobjected-to jury-charge error to support reversal, the entire record must demonstrate that the error caused egregious actual harm to the accused.

Even for unobjected-to error, the Court of Criminal Appeals has established a comprehensive and systematic approach for conducting harm analysis, which was applied in this case. In *Almanza*, the court explained that, in cases involving unobjected-to charge error, a reversal will be proper only "if the error is so egregious and created such harm that [the accused] has not had a fair and impartial trial[.]" *Almanza*, 686 S.W.2d, at 171. Regarding egregious

harm, "[t]he same idea is contained in the occasional statements that a fundamental error must 'go to the very basis of the case,'[ ] deprive the accused of a 'valuable right,'[ ] or 'vitally affect his defensive theory.'[ ] Such a basic framework for analysis is probably all that can be expected of any general definition." *Id*., at 172.

A finding of jury-charge error "begins—not ends—the inquiry; the next step is to make an evidentiary review." *Id*., at 174. In making the determination whether egregious harm has occurred, "the actual degree [of harm] must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole." *Id*.

This evidentiary review inquires as to "the nature of the testimony supporting the verdict" and whether that testimony was "cogent and overwhelming," and also the nature of the testimony alleged to be omitted from the jury's consideration and whether it "was reasonably calculated to destroy the State's case when considered in connection with the other testimony in the case, as well as the charge as a whole." *Id*., at 174. The review then continues, considering "any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused." *Id*. The Court of Criminal Appeals conducted the careful review required by *Almanza* and, as demonstrated in Section III.B.2 *infra*, found that—because there was no egregious harm that denied Smith a fair and impartial trial—the *Penry* error in his sentencing was harmless. *Smith III*, 185 S.W.3d, at 467-72; J.A. 288-98.

2. Under *Almanza*, or indeed any standard of harmless-error review, the *Penry* error in Smith's case was harmless.

In order to determine whether a jury-charge error is harmless, *Almanza*—like the federal equivalent—implicates a quantitative assessment of the evidence in terms of its impact on the trial as a whole. *See Arizona v.*

Fulminante, 499 U.S. 279, 307-08 (1991). With respect to *Penry*-type evidence, three metrics for that assessment present themselves: (1) the quantum of the mitigating evidence, (2) the weight of that evidence, and the (3) degree to which that evidence may be "double-edged." Smith's evidence fares poorly on all three metrics.

(a) Quantum: The jury could fully consider the vast majority of Smith's mitigating evidence, which focused heavily on his positive character traits.

In his trial, Smith presented potential *Penry* mitigating evidence that the Court has characterized as falling into five categories:

> (1) he had been diagnosed with potentially organic learning disabilities and speech handicaps at an early age;
>
> (2) he had a verbal IQ score of 75 and a full score of 78 and, as a result, had been in special education classes throughout most of his time in school;
>
> (3) despite his low IQ and learning disabilities, his behavior at school was often exemplary;
>
> (4) his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction; and
>
> (5) he was only 19 when he committed the crime. *Smith II*, 543 U.S., at 41.

Of those five categories, two fall squarely outside the ambit of *Penry* evidence: numbers three and five. With respect to number three, "exemplary" behavior has long been held by the Court to be fully encompassed by the pre-1991 Texas special issues (because past exemplary behavior goes directly to disproving future dangerousness).[35] *See*

[35] As the Court observed earlier this Term, "the 'forward-looking' future-dangerousness inquiry 'is not independent of an assessment of

(Continued on following page)

Jurek, 428 U.S., at 274-76; *Franklin*, 487 U.S., at 177-80. And, with respect to number five, the Court has twice explicitly held that youth, likewise, was fully encompassed by the Texas special issues. *See Graham*, 506 U.S., at 474-76; *Johnson*, 509 U.S., at 367-68.

Indeed, the vast majority of the mitigating evidence introduced by Smith at the punishment phase focused on category three, attempting to demonstrate good character and behavior—all of which, under *Jurek* and *Franklin*, could be given full effect by the jury. In fact, of the twenty witnesses called by the defense at the punishment phase, all but three spent substantial portions of their testimony discussing Smith's character and behavior. *See supra* fn.2.

And, with respect to category number four, Smith's evidence concerning his troubled father, at least a portion of that evidence was also encompassed by the special issues. In *Graham*, the Court held that the pre-1991 Texas special issues allowed the jury to give full effect to Graham's "transient upbringing," and to his "mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another." 506 U.S., at 476; *id.*, at 520 (Souter, J., dissenting). Although Smith's evidence was not identical, it shared with Graham's an overlapping pattern of parental neglect and instability.[36]

Thus, for purpose of harmless-error analysis, Smith is left with (rearranged for clarity) three categories of mitigating evidence to which the special issues prevented the jury giving full effect:

1) evidence of "potentially organic learning disabilities and speech handicaps" and placement in

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personal culpability.'" *Ayers v. Belmontes*, 127 S.Ct. 469, 475 (2006) (quoting *Johnson*, 509 U.S., at 369).

[36] Moreover, the *Johnson* court held that Texas's special issues only needed to provide the jury a vehicle "to consider *in some manner* all of a defendant's relevant mitigating evidence," and were not required to allow the jury "to give effect to mitigating evidence *in every conceivable manner in which the evidence might be relevant*." *Johnson*, 509 U.S., at 372 (emphasis added).

"special education classes throughout most of his time in school";

2) evidence of relatively low IQ—specifically full score IQ of 78, a verbal IQ score of 75, and a performance IQ of 84; and

3) (to the extent not already covered by *Graham*) evidence that "his father was a drug addict who was involved with gang violence and other criminal activities, and regularly stole money from family members to support a drug addiction." *Smith II*, 543 U.S., at 41; *Smith III*, 185 S.W.3d, at 460; J.A. 280.

There is no disputing, under this Court's precedents, that it was constitutional error for the jury to have been left with only the two special issues to give effect to this evidence, with no sufficient corrective instruction. But, for harmless error purposes, perhaps the best way to measure the quantum of *Penry* mitigating evidence at issue is to examine the degree of importance his counsel placed upon it. In the course of presenting a vigorous defense at sentencing, putting on twenty witnesses and presenting forty pages of closing argument, all of the evidence discussed above comprised only a very small fraction of the total presentation.

The record in Smith's case establishes that the primary focus of the defense's witnesses at the punishment phase was Smith's character. Seventeen of his twenty witnesses testified to things such as the fact that they had never seen him act violently, that he was good with children, and that he could be rehabilitated and did not need to die.

In contrast, only a single Dallas ISD records custodian testified concerning Smith's diagnosis at an early age of possibly organic learning disabilities, relatively low IQ, and educational background involving special education classes. *See supra* fn.5. And the four witnesses who mentioned Smith's father provided very little information beyond a general awareness that he had drug problems and that it had affected Smith in unspecified ways. *See supra* fn.6.

Likewise, Smith's counsel's argument focused nearly entirely on the following points unrelated to his mitigating

evidence of impaired intellectual functioning and difficult childhood:

- General discussion about whether society has progressed to a point where there is an alternative to the death penalty. *See* 33.RR.33-37.
- Discussion of the evidence presented at trial that defense counsel argues suggests Kevin Shaw, not Smith, was the ringleader. *See* 33.RR.38-43.
- Discussion of the meaning of "deliberate" in special issue one and argument that Smith premeditated robbery, but did not premeditate the murder. *See* 33.RR.43-45.
- Discussion of the second special issue and argument that the evidence would show that Smith is not a continuing threat and could be rehabilitated. *See* 33.RR.45-57.
- Discussion of Smith's positive character traits through a review of the testimony of eleven character witnesses. *See* 33.RR.58-65.
- Discussion of the State's burden and the role of the jurors, without addressing mitigating evidence. *See* 33.RR.69-70.

Indeed, in a forty-page transcript, the portion of Smith's counsel's closing argument devoted to the mitigating evidence concerning Smith's IQ, special education, and trouble caused by his father's drug addiction together combine for only approximately *one single page*.[37] *See* 33.RR.57-58.[38]

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[37] Similarly, in Smith's counsel's "Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional As Applied," which was explicitly predicated on *Penry I*, he made no mention at all of IQ, learning disabilities, or a neglectful father; instead, he focused exclusively on his youth, arguing that the jury could not give youth full mitigating effect. J.A. 7-10. Of course, that argument was squarely rejected by *Graham* and *Johnson*.

[38] The block quote on page 30 of Petitioner's Brief in fact recounts defense counsel's *entire discussion* of this evidence in his closing argument. *See* Pet'r Br., at 30; *see also* 33.RR.57-58.

By defense counsel's own measure, the quantum of *Penry*-related evidence was quite small, meriting less than three percent of his closing argument.

(b) Weight and Double-Edged Effect: Smith's evidence compared to Penry's.

To measure the relative weight of Smith's proffered mitigating evidence, a comparison with the evidence in Penry is instructive. *See Penry I*, 492 U.S., at 307-09. Penry had an IQ of 54; Smith's was 78.[39] Penry had "moderate retardation, which resulted in poor impulse control and an inability to learn from experience," *Penry I*, 492 U.S., at 308; Smith is not retarded, but does have learning disabilities and speech handicaps, *see* 32.RR.23-26. Penry was viciously "beaten over the head with a belt when he was a child" and had brain damage that was probably "organic," but that may have been "caused by beatings and multiple injuries," *Penry I*, 492 U.S., at 308-09; Smith had a troubled father who neglected him and whose addictions deprived Smith of material possessions, *see* 32.RR.89-91.

There is no evidence that Smith suffered any physical abuse, much less the horrific beatings that had been inflicted on Penry. There is no indication of mental retardation with Smith, simply evidence of below-average intelligence.[40] And, critically, there is no evidence that Smith has "poor impulse control and an inability to learn from experience."

It was this latter aspect that led the Court to describe Penry's "mental retardation and history of abuse [as] a two-edged sword." 492 U.S., at 324. Because he could not

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[39] The State presented evidence at his trial of another IQ test where Smith's IQ was estimated to be 88. 2 J.A. 138, 145.

[40] Indeed, two witnesses who knew Smith well testified that they perceive him to have average or even *above average intelligence*, *see* 32.RR.74; J.A. 97 (Kristi Goffney); 32.RR.78; J.A. 99 (Meg Goffney), and one witness spoke of Smith's genuine desire to learn, 32.RR.95-101 (Charlotte Thompson). No such evidence was presented in Penry's case.

control his impulses or learn from his mistakes, this evidence was relevant to the second special issue "only as an *aggravating* factor." *Id.*, at 323. In contrast, Smith has no such evidence that can be given effect only as an aggravator. Although, under *Tennard*, Smith's evidence was surely relevant, it was not the sort of "two-edged" evidence that raised the most serious concerns in *Penry*.

By any measure, the *Penry* error in this case was harmless, and *a fortiori*, was not egregious error. There was meager evidence, of limited severity, and defense counsel devoted almost no time to the issue (less than 3 percent of his closing). If this quantum is enough to demonstrate harm, then for all intents and purposes *Penry* error will effectively be structural error. For any defendant who clears the hurdle of demonstrating some *Penry* error will almost by definition have at least as much mitigating evidence as Smith. If having a neglectful father and below-average intelligence—with no abuse, with no retardation, with no inability to learn—is by itself enough to trigger automatic reversal, then very few murderers will be unable to avail themselves of that standard.

IV. *PENRY* ERROR IS NOT STRUCTURAL ERROR EXEMPT FROM HARMLESS-ERROR ANALYSIS.

Because Smith's argument that the state court defied this Court's mandate and improperly "revisited" its prior conclusions has no merit, he is left with only one substantive claim before this Court: that the U.S. Constitution forbids the application of state harmless-error doctrine to his case. That claim, in turn, embodies two possible subclaims: (1) that *Penry* claims are structural errors, never subject to harmless-error analysis, or (2) that although *Penry* claims are amenable to harmless-error analysis generally, the particular harmless-error analysis undertaken by the Court of Criminal Appeals was itself unconstitutional. Neither argument is valid.

Penry error is not structural error. No doubt recognizing the weakness of the argument to the contrary, Petitioner devotes but one footnote of his brief to the argument

that it is. *See* Pet'r Br., at 35 n.12.[41] Under this Court's precedents, *Penry*-error is "trial error," subject to a harm analysis because it "occurred during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Fulminante*, 499 U.S., at 307-08. The Court has held "most constitutional errors can be harmless." *Id.*, at 306; *see also United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2564 (2006). And, as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

Consistent with this principle, most jury charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuenco*, 126 S.Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted an element of offense); *Neder* (instruction omitted an element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (improper sentencing instruction); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction

[41] Although the footnote purports to preserve the argument that *Penry* error is structural error, the accompanying text of the brief *explicitly concedes* that harmless-error analysis is appropriate for *Penry* claims. *See* Pet'r Br., at 35 ("So, for example, if LaRoyce's sole evidence had been that he had average intelligence but had failed a class in third grade, a court might justifiably conclude that such evidence, though outside the jury's effective reach, was *so insubstantial in its mitigating force and so unlikely to add significantly to the case for future dangerousness that it would not likely have affected the jury's ultimate judgment*." (emphasis added)). Thus, Petitioner agrees that harmless error analysis applies, and simply disagrees as to the appropriate evidentiary quantum and weight that qualifies as harmless.

contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime); *but see Nelson*, 2006 WL 3592953, at *27 (Fifth Circuit concludes that *Penry* error is structural error).

The Court's decisions which *Penry I* interpreted and applied also indicate that such error is trial error. In *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987), for example, the Court found constitutional charge error under *Lockett* and *Eddings*, but expressly observed that the "[r]espondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge." Accordingly, the Court concluded that "[i]n the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid."

Indeed, in a highly analogous context, the Court has expressly held that harmless-error analysis is proper. In *Stringer v. Black*, the Court held that for a capital sentencing scheme that requires the jury to weigh specified aggravating factors against the mitigating evidence, when the weighing process is skewed by an invalid factor "*only constitutional harmless-error analysis or reweighing at the trial or appellate level* suffices to guarantee that the defendant received an individualized sentence." 503 U.S. 222, 232 (1992) (emphasis added). This error, categorically giving too much weight to aggravating factors, is the mirror image of *Penry* error, which occurs when the jury is not able to give the mitigating evidence adequate consideration or effect.

Structural defects, on the other hand, are different and exceedingly rare because, with those errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Id.* at 309-10 (1991). Structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S.Ct., at 2564 (quoting *Fulminante*, 499 U.S., at 309-10)) (alterations in original). Thus, structural defects include (1) denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), (2) erroneous denial of the defendant's

counsel of choice, *Gonzalez-Lopez*, 126 S.Ct. at 2564; (3) denial of self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 & n.8 (1984); (4) denial of a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); and (5) denial of trial by jury due to a defective reasonable-doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In contrast to these sorts of broad errors that affect framework of the trial itself, jury charge errors are almost always trial errors. As the Court concluded in another charge error case:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case. *Rose v. Clark*, 478 U.S., at 579-80 & n.7 (1986) (citations omitted).

Furthermore, the Court has been exceedingly clear when it concluded constitutional error was structural.[42] In contrast, the Court has made no such statements or even suggestions with respect to *Penry* error despite its numerous opportunities to do so.[43] For good reason: because

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[42] *See, e.g.*, *Gonzalez-Lopez*, 126 S.Ct., at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.' "); *Sullivan*, 508 U.S., at 281-82 (holding that the denial of a trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as 'structural error' "); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.").

[43] Given the Court's jurisprudence suggesting the contrary, and the Court's prior silence on this specific issue, the Court could not create and apply a new rule in this case that *Penry* error is structural error because such a holding would run afoul of the Court's *Teague* doctrine.

Penry error, like all other trial errors, does not require automatic reversal and is subject to harmless-error review.

V. THE TEXAS COURT OF CRIMINAL APPEALS'S APPLICATION OF *ALMANZA* WAS AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION.

The Court of Criminal Appeals's application of its longstanding harmless-error standard provides an adequate and independent state ground for its decision. The Court has consistently held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Unlike in the federal habeas context, where the adequate and independent state ground doctrine is "grounded in concerns of comity and federalism," when the Court directly reviews state court judgments, the "adequate and independent" rule is jurisdictional. *Coleman*, 501 U.S., at 729-30.[44]

A. The Texas Court of Criminal Appeals's Decision On Remand Was Based On an Adequate and Independent State Ground.

In order to be considered "adequate" to support a state court's judgment, a state procedural ground must (1) be

[44] Just as in cases arising on direct review, this doctrine also applies to review of a state court's denial of state habeas relief. *See Williams v. Kaiser*, 323 U.S. 471, 477 (1945). For example, just last Term the Court upheld the Virginia Supreme Court's denial of habeas relief due to a procedural default based on the petitioner's failure to assert his rights under the Vienna Convention at trial or on direct appeal. *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006). In doing so, the Court observed that "[n]ormally, in our review of state-court judgments, such [state procedural] rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim." *Id.*, at 2682.

based on "firmly established and regularly followed state practice," and (2) further a legitimate state interest. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). State procedural grounds that the Court has deemed "inadequate" typically fall into one of four categories:[45] those that (1) are "not strictly or regularly followed,"[46] (2) are novel,[47] (3) are discretionary,[48] or (4) unjustifiably burden federal rights.[49]

A state court decision is "independent" when the state law ground for the decision is sufficient to support the judgment. *Coleman*, 501 U.S., at 729. In such a case the Court lacks jurisdiction because "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id*.

The Court of Criminal Appeals's application of *Almanza* was "adequate" because it has been the firmly established and regularly followed precedent in Texas for over twenty years in determining whether jury-charge error requires reversal, *see supra* Section II, and because it furthers a legitimate state interest in the finality of convictions and sentences imposed by Texas juries. And it was "independent" because the state ground of decision was sufficient to support the judgment. The court's decision was based entirely on questions of Texas state procedure, specifically whether Smith preserved his objection to the jury charge and whether the already-recognized constitutional defect required resentencing under Texas's applicable "egregious harm" standard. *See supra* Section III.

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[45] *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. LAW REV. 1128, 1137-45 (1986).

[46] *See, e.g., Barr v. Columbia*, 378 U.S. 146, 149 (1964); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982).

[47] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *see also Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

[48] *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969).

[49] *See, e.g.*, *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

B. The Case Law Relied Upon By Smith and His *Amicus* Does Not Support the Argument That The Court of Criminal Appeals's Decision Was Not "Adequate" or "Independent."

Smith and his *amicus*'s argument that the Court of Criminal Appeals's decision was not based on an adequate state-law ground turns on two assertions: (1) that the record shows Smith did in fact preserve his claim; and (2) that the court improperly engaged in a "procedural default" analysis on remand after it had already ruled on Smith's claim on the merits. *See generally* Pet'r Br., at 40-50; Amicus Br., at 14-26. As exhaustively demonstrated in Sections II and III, *supra*, both contentions are false.[50]

For example, Smith's *amicus*'s reliance on *Douglas v. Alabama*, 380 U.S. 415 (1965), *see* Amicus Br., at 16, is misplaced because in that case the state court ruled that the defendant waived his right to confrontation by failing to sufficiently object to the reading of an alleged confession—after, the record showed, the lawyer had already objected three times to the reading, and then moved that the evidence be excluded and moved for a mistrial based on the alleged error. *Id.,* at 420-23. The trial court overruled him every time, and it was "clear" to the Court that any further objections would have been futile, and possibly damaging to his reputation with the jury. *Id.*, at 422-23. But Smith's counsel—unlike the attorney in *Douglas*—failed to make any objection at all to the content of the trial court's supplemental instruction, despite an express invitation to do so. *See* J.A. 20-21; *see also* J.A. 7-16.

Likewise, Smith's situation is markedly different in kind from that presented in *Staub v. City of Baxley*, 355 U.S. 313 (1958), where the Court held that the State's procedural rule that defaulted the appellant's claim was

[50] And the cases Petitioner cites to attack the adequacy and independence of the application of *Almanza* on state habeas are all inapposite. *See supra* Section II.B.

"an arid ritual of meaningless form." *Id.*[51] Here, Smith deprived the trial court and the State of any opportunity at trial to correct the problems he now raises with the supplemental instruction because he argued that no instruction could be given at all. J.A. 7-16. And by any measure it is not an "arbitrary rule" to require a defendant to make a specific objection at trial that allows correction of the charge error in a timely manner.

Nor does *Ford v. Georgia*[52] aid Petitioner. In *Ford*, the Georgia Supreme Court, on remand from this Court following *Batson v. Kentucky*, 476 U.S. 79 (1986), procedurally defaulted petitioner's claims based on a rule it announced years *after* the petitioner could have complied with it. As the Court explained, "[t]o apply [the procedural rule] retroactively . . . would . . . apply a rule unannounced at the time of petitioner's trial and consequently [is] inadequate to serve as an independent state ground. . . ." *Ford*, 498 U.S., at 424. Of course, the Texas rule that jury charge error should be timely and specifically raised at trial was hardly "unannounced" at the time of Smith's trial.[53]

Also inapposite are the *NAACP v. Alabama ex rel Patterson*,[54] cases relied upon by Smith and his *amicus*. *See* Pet'r Br., at 49; Amicus Br., at 13, 21. Those cases stand for the principles that: (1) "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their

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[51] The *Staub* petitioner had challenged all sections of an ordinance because they were "interdependent in their application to one in appellant's position," *Staub*, 355 U.S., at 320, and the state court procedurally defaulted the petitioner's constitutional claim because she failed to list every section that she claimed was unconstitutional, *id*.

[52] 479 U.S. 1075 (1987) and 498 U.S. 411 (1991).

[53] Article 36.19 of the Texas Code of Criminal Procedure, extant at the time of Smith's trial, required—*inter alia*—that "[a]ll objections to the charge and to the refusal of special charges shall be made at the time of the trial." TEX. CODE CRIM. PROC. art. 36.19.

[54] 357 U.S. 449, 467 (1958) and 360 U.S. 240, 244-45 (1960).

federal constitutional rights." *NAACP*, 357 U.S., at 457-58; and (2) a lower court may not reexamine on remand the grounds of this Court's decision. The Court of Criminal Appeals's decision violated neither of these principles.

First, neither the necessity of timely objection to charge error at trial, nor the application of *Almanza* to determine whether charge error was harmful, were "novel" concepts under Texas law. *See supra* Sections II and III. But perhaps even more important, the Court of Criminal Appeals's analysis and decision on remand were driven by its acknowledgment that this Court had reversed its decision and found constitutional error in Smith's charge and, in order to comply with that decision, the court reviewed whether the recognized constitutional charge defect had caused sufficient harm to require resentencing. *See Smith III*, 185 S.W.3d at 467-72; J.A. 288-98.[55]

Attacking the independence of the state ground, Smith's *amicus* primarily compares the Court of Criminal Appeals's decision with that considered in *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See* Amicus Br., at 14, 22. But *Ake* is not on point. *Ake* involved a state court's application of a procedural bar, specifically a waiver rule, that did not apply to fundamental trial error, which the state court had declared included federal constitutional errors. *Id.*, at 74-75. Thus, the Court concluded in *Ake* that "the State has made

[55] The *Yates* cases cited by Smith and his *amicus*, Pet'r Br., at 43 and Amicus Br., at 20 n.12, are also inapplicable here. First, unlike *Yates*, a pre-*Brecht* case in which the state court failed to apply the *Chapman* harmless-error standard and misconstrued the record, *Yates v. Evatt*, 500 U.S. 391, 400 (1991) (*Yates III*), in Smith's case, application of *Chapman* was not necessary and the Court of Criminal Appeals applied its well-established harmless-error test for the type of error at issue. Second, unlike *Yates*, in which the state court concluded that there was constitutional error but denied relief based on a non-retroactivity rule, 500 U.S., at 398-399, the Court of Criminal Appeals in Smith's case denied relief because it concluded that there was no constitutional error. *Smith I*, 132 S.W.3d, at 417. When the Court corrected this conclusion, the Court of Criminal Appeals analyzed the entire record for harm from this error. *Smith III*, 185 S.W.3d, at 467-72.

application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.* Because the state court's decision in *Ake* necessarily involved a ruling on federal law, it was not derived from an "independent" state ground. *Id*.

In Smith's case—unlike *Ake*—the Court of Criminal Appeals's harmless-error analysis turned only on questions governed by Texas state law standards: (1) whether Smith had properly objected to the error at trial; and (2) whether the error had caused Smith "egregious harm" under the *Almanza* standard. Thus, *Ake* provides no support for Smith's argument that the Court of Criminal Appeals's decision did not rest on an independent state law ground.

Finally, Smith's *amicus*'s reliance on *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), is also misplaced. *See* Pet'r Br., at 10, 13-14, 22. In *Harper*, the Court rejected the state court's application of a state non-retroactivity rule to the Court's interpretations of federal constitutional law. *Id.*, at 100. The Court held that a State could not refuse to apply a rule of federal constitutional law retroactively if the Court said as a matter of federal law that the rule applied retroactively. *Id.* Unlike in *Harper*, the starting point of the Court of Criminal Appeals's analysis on remand was that constitutional error existed in Smith's charge. The only question decided on remand was whether that error was harmful and required resentencing—questions that turned on Texas law.

Because the Court of Criminal Appeals's decision on remand concerned only questions of Texas law, specifically whether Smith's charge error was preserved and whether that error was harmless,[56] the decision rests on adequate and independent state grounds that are not appropriate for this Court's review.

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[56] *See Smith III*, 185 S.W.3d, at 467-72; J.A. 288-98.

CONCLUSION

Because the state habeas ruling rests on an adequate and independent state ground, the writ of certiorari should be dismissed for want of jurisdiction. Alternatively, the Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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December 2006

WINSTEAD

August 16, 2004

[Address Information Omitted In Printing]

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VIA FACSIMILE – (512) 320-8132

Ed Marshall, Assistant Attorney General
Office of the Attorney General
Capital Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711

Re: *LaRoyce Smith v. Doug Dretke*; Civil Action No. 3:04-CV-1576-D; pending In the United States District Court for the Northern District of Texas, Dallas Division

STIPULATION

(Filed Sep. 20, 2004)

Dear Mr. Marshall:

Background

On August 10, 1999, Mr. LaRoyce Smith ("Petitioner") and the State of Texas ("Respondent") entered into a joint stipulated dismissal, filed among the papers of the U.S. District Court for the Northern District of Texas, Dallas Division in the matter styled: *LaRoyce Smith v. Gary Johnson*, No. 3:98-CV-1778-G. In this Joint Stipulated Dismissal, Petitioner and Respondent agreed that "if and when Mr. Smith returns to . . . federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244."

On May 12, 2004, Petitioner and Respondent agreed that at the conclusion of the state habeas proceedings, Petitioner would file his federal petition for habeas corpus relief ("federal petition") on or before September 1, 2004 and that Respondent would not raise the statute of limitations defense or assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244. This agreement was memorialized by my May 12, 2004 letter to you.

On July 19, 2004, following the conclusion of the habeas proceedings in state court, the Petitioner filed a petition for a writ of certiorari in *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004).

On July 20, 2004, Petitioner filed a motion to proceed *in forma pauperis* and for appointment of counsel, which was assigned to and granted by Judge Fitzwater on July 23, 2004 in *LaRoyce Lathair Smith v. Doug Drekte*, No. 3:04-CV-1576-D. On August 2, 2004, the Respondent filed its Notice of Appearance of Counsel.

Because *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004) was pending in the Supreme Court, Judge Fitzwater's July 23, 2004 order recited that "[i]f the Supreme Court grants the petition, the parties are excused from complying with this order," but if certiorari is denied, then Petitioner must file a fully supported petition for writ of habeas corpus "[n]o later than 90 days after the Supreme Court denies petitioner's pending petition for a writ of certiorari and motion for leave to proceed in forma pauperis. . . . " Judge Fitzwater also ordered the clerk of court "to close [the case] statistically until the court directs that it be reopened," which in turn hinges on the outcome in the Supreme Court.

If Certiorari is Denied

This letter serves to confirm our stipulation whereby Petitioner and Respondent hereby modify their prior agreements as set forth herein. If the Supreme Court denies certiorari in Smith v. Texas, No. 04-5323 (U.S. July 19, 2004), Respondent agrees that Respondent will not raise the statute of limitations defense, nor contend that Petitioner is subject to the successor provisions of 28 U.S.C. § 2244, so long as Petitioner files his federal petition in accordance with Judge Fitzwater's July 23, 2004 Order, together with any further extension(s) of the filing deadline(s) granted by Judge Fitzwater.

If Certiorari is Granted

On the other hand, if the Supreme Court in Smith v. Texas, No. 04-5323 (U.S. July 19, 2004) grants the petition, and pursuant to Judge Fitzwater's order, the parties are excused from complying with this order, and Mr. Smith's case is remanded to state court, this letter serves to confirm our stipulation whereby Petitioner and Respondent agree that if and when Mr. Smith returns to federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244, provided Mr. Smith files a motion for appointment of counsel with the federal court within 45 days of the denial of relief in the state court, and files his federal habeas petition within 90 days of the appointment of counsel.

Please sign in the space provided below memorializing our stipulation and return it to me via facsimile. We will then file a copy of our stipulation with the Court. In

the event this letter does not accurately memorialize our agreement, please call me as soon as possible so we may revise the wording as necessary.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

/s/ Craig A. Harris
Craig A. Harris

AGREED TO:

/s/ Ed Marshall
Ed Marshall, Assistant
Attorney General
Office of the Attorney General
Capital Litigation Division

CAH/lll

cc: Lydia Brandt, Esq.

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March 28, 2006

The Honorable Sidney Fitzwater
United States District Court Judge
Northern District of Texas, Dallas Division
1100 Commerce Street
Dallas, TX 75242-1003

Re: *Laroyce Smith v. Doug Dretke*, No. 3:04-CV-1576

Re: Texas Court of Criminal Appeals Opinion Following the Supreme Court decision reversing and remanding

Dear Judge Fitzwater:

In our November 17, 2004 letter to you, we agreed that the parties would notify you once the decision of the Texas Court of Criminal Appeals was rendered, as well as the decision of the parties as to how they wish to proceed in the federal habeas proceeding.

This letter is to advise you that the Texas Court of Criminal Appeals rendered the attached published opinion on March 1, 2006, *Ex parte Smith*, ___ S.W.3d ___, 2006 WL 475313, *12 (Tex. Crim. App. 2006) denying relief following remand from the U.S. Supreme Court.

Accordingly, this letter is also to advise you that at present counsel for both parties are attempting to stipulate as to how they wish to proceed in view of the fact Mr. Smith will be filing another petition of writ of certiorari with the U.S. Supreme Court, which, in the interest of judicial economy, could obviate the need to file a petition in federal

court within 90 days. It is anticipated that a joint stipulation will be filed with the Court shortly or, if one can not be agreed to, then the parties will so advise the court.

Nothing in this letter constitutes a waiver of Mr. Smith's rights to vigorously pursue his guilt/innocence claims in federal court even if the Texas Court of Criminal Appeals remands the case for re-sentencing.

Thank you for your consideration of this matter.

Very truly yours,

/s/ Lydia M.V. Brandt
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Enclosure: *Ex parte Smith*, ___ S.W.3d ___, 2006 WL 475313, *12 (Tex. Crim. App. 2006)

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VIA FACSIMILE – (512) 320-8132

Ed Marshall, Assistant Attorney General
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Capital Litigation Division
P. O. Box 12548, Capitol Station
Austin, TX 78711

Re: *LaRoyce Smith v. Doug Dretke*; Civil Action No. 3:04-CV-1576-D; pending In the United States District Court for the Northern District of Texas, Dallas Division

STIPULATION

(Filed Mar. 29, 2006)

Dear Mr. Marshall:

Background

On August 10, 1999, Mr. LaRoyce Smith ("Petitioner") and the State of Texas ("Respondent") entered into a joint stipulated dismissal, filed among the papers of the U.S. District Court for the Northern District of Texas, Dallas Division in the matter styled: *LaRoyce Smith v. Gary Johnson*, No. 3:98-CV-1778-G. In this Joint Stipulated Dismissal, Petitioner and Respondent agreed that "if and when Mr. Smith returns to . . . federal court, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244."

On May 12, 2004, shortly after the Texas Court of Criminal Appeals denied relief on Petitioner's Petition for a Writ of Habeas Corpus, Petitioner and Respondent further agreed that after the resolution of the petition for a writ of certiorari to the Texas Court of Criminal Appeals denial, Petitioner would file his federal petition for habeas corpus relief ("federal petition") on or before September 1, 2004 and that Respondent would not raise the statute of limitations defense or assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244. This agreement was memorialized by my May 12, 2004 letter to you.

On July 19, 2004, Petitioner filed a petition for a writ of certiorari in *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004).

On July 20, 2004, Petitioner filed in the District Court for the Northern District, Dallas Division, a motion to proceed *in forma pauperis* and for appointment of counsel, which was assigned to and granted by Judge Fitzwater on July 23, 2004 in *LaRoyce Lathair Smith v. Doug Dretke*, No. 3:04-CV-1576-D. On August 2, 2004, the Respondent filed its Notice of Appearance of Counsel.

Because *Smith v. Texas*, No. 04-5323 (U.S. July 19, 2004), was pending in the United States Supreme Court, Judge Fitzwater's July 23, 2004 order recited that "[i]f the Supreme Court grants the petition, the parties are excused from complying with this order," but if certiorari is denied, then Petitioner must file a fully supported petition for writ of habeas corpus "[n]o later than 90 days after the Supreme Court denies petitioner's pending petition for a writ of certiorari and motion for leave to proceed in forma pauperis. . . . " Judge Fitzwater also ordered the clerk of court "to close [the case] statistically until the court directs

that it be reopened," which in turn hinges on the outcome in the Supreme Court.

The United States Supreme Court granted Mr. Smith's petition for a writ of certiorari, granted relief, and remanded the case to the Texas Court of Criminal Appeals ("CCA") for further consideration in light of the Supreme Court's opinion. On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion affirming Mr. Smith's death sentence despite the US Supreme Court order granting relief. Thus, Mr. Smith will again file a petition for writ of certiorari with the United States Supreme Court. The petition will be filed on or before May 31, 2006.

If Certiorari is Denied

This letter serves to confirm our stipulation whereby Petitioner and Respondent hereby modify their prior agreements as set forth herein. If the United States Supreme Court denies certiorari on the petition for writ of certiorari Mr. Smith will file on or before May 31, 2006, based on the CCA's March 1, 2006 opinion, Respondent agrees that Respondent will not raise the statute of limitations defense, nor contend that Petitioner is subject to the successor provisions of 28 U.S.C. § 2244, so long as Petitioner thereafter files his federal habeas petition within 90 days of the United States Supreme Court's denial of this petition for writ of certiorari.

If Certiorari is Granted

On the other hand, if the United States Supreme Court grants the petition for writ of certiorari, and Mr. Smith's case is remanded to state court, this letter serves

to confirm our stipulation whereby Petitioner and Respondent agree that if and when Mr. Smith subsequently returns to federal court after the state proceedings are exhausted, if necessary, Respondent shall not raise the statute of limitations defense, and will further not assert that Mr. Smith is subject to the successor provisions of 28 U.S.C. § 2244, provided Mr. Smith thereafter files his federal habeas petition within 90 days of the ultimate resolution of the cert petition by the United States Supreme Court, including any further related state court proceedings.

Please sign in the space provided below memorializing our stipulation and return it to me via facsimile. We will then file a copy of our stipulation with the Court. In the event this letter does not accurately memorialize our agreement, please call me as soon as possible so we may revise the wording as necessary.

Thank you for your courtesy and cooperation in this matter.

Sincerely,

/s/ Craig A. Harris
Craig A. Harris

AGREED TO:

/s/ Ed Marshall
Ed Marshall, Assistant Attorney General
Office of the Attorney General
Capital Litigation Division

CAH/kpm

cc: Lydia Brandt, Esq.