No. 05-11304

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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To the Honorable Justices of the Supreme Court of the United States:

A jury convicted petitioner LaRoyce Lathair Smith and sentenced him to death for the torture and murder of Jennifer Soto. In the instant petition for certiorari review, Smith claims that a state habeas court may not use a state harm analysis to deny relief for jury charge error based on *Penry v. Johnson,* 532 U.S. 782 (2001) ("*Penry II*"). Petition at 15-29. He suggests a federal harm analysis would be more appropriate.

There is no compelling reason to grant review in this case because Smith can obtain the federal harm analysis he desires in federal habeas court. This Court also lacks jurisdiction because Smith raises his complaints about the Texas harm standard for the first time in this Court. And because the Texas harm standard is more protective of Smith that the federal harm analysis, it is an adequate and independent state ground that precludes review. Finally, Smith's claims lack merit because the state court's harm analysis was consistent with its prior treatment of his claims and was properly executed under state law. This Court should deny certiorari review.

STATEMENT OF THE CASE

I. Trial Evidence

The following facts are extracted from the Texas Court of Criminal Appeals' ("CCA") opinion on remand:

> The State's evidence showed that Jennifer Soto was a 19-year-old girl who worked at Taco Bell. She was a hard worker and had been promoted to shift manager two weeks before her death. Applicant had worked at Taco Bell with her. On the evening of January 7, 1991, she was "closing manager" and Travis Brown was working with her. He was waiting for her to finish her office paperwork because she was going to give him a ride home.

Meanwhile, Nickles Lewis and two other friends came to applicant's house. Applicant told them that he was going to rob Taco Bell because he needed "some money for court." The four youths left applicant's house on foot, but they were soon picked up by Kevin Shaw and one of Shaw's friends who were riding around in Shaw's car. They stopped at another house so applicant could get a gun, and applicant said, "We're going to hit T.B." Applicant knew Jennifer would be working that night. He told one of his cohorts, "If she sees my face, I will have to kill her."

Kevin Shaw parked the car containing the six youths across the street from the Taco Bell. Applicant, Kevin Shaw, and a third member of the group, Devario Smith, got out of the car and paced outside the Taco Bell, waiting for Jennifer to come out of the back door. They waited 45 minutes, but she did not come out. When "things didn't go right," they all got back into the car and started to leave, but applicant said, "No, man, it got to be done. It got to be done." They turned around and went back.

At about 11:30 p.m., applicant knocked on the front door and asked to use the phone because his car had broken down. Travis, without opening the door, said that the Taco Bell was closed and that applicant could not come in. Applicant then asked to see Jennifer and when she came to the door, he repeated his request. Jennifer opened the door partway and applicant hugged her as he, Kevin, and Devario went inside. She showed applicant the telephone and went back to the office to finish up her paperwork while applicant's two companions stayed in the front with Travis.

After he pretended to finish his telephone call, applicant came back to the front and told Travis that "they were going to rob the place." Kevin told Travis, "If you keep your mouth shut, you'll get a cut of the money." Applicant went back, by himself, into the office where Jennifer was working.

Shortly thereafter, Travis heard yelling. When he went to investigate, he saw applicant holding Jennifer in a headlock. He was "pistol-whipping" her on the head with the butt of a gun. He kept hitting her until the gun's handle fell off. Applicant demanded the combination of the safe, but Jennifer screamed, "Call Tina, call Tina." She did not know the combination. Travis saw applicant step back, point the gun at Jennifer's back and shoot her at point blank range. She cried, "God, please don't let me die."

Applicant then went into the kitchen area, grabbed a butcher knife, and

> came back to Jennifer, continuing to demand the combination. He stabbed her underneath the left breast to make her tell him the combination, but when she did not give him the information he wanted, he stabbed her in the thigh, then the abdomen, then the head. The State characterized these as "torture type wounds." Finally, he sliced her neck, severing the jugular vein. Both the gunshot and the neck wound were fatal.
>
> Applicant, still carrying the bloody knife, walked out to the front. Travis jumped out of the way, saying "Hey, I don't know your face. I've never seen you. I don't know anything." Applicant replied, "Hey, I know your face and I'll kill you." After applicant and his two cohorts left, Travis called 911.

Ex parte Smith, 185 S.W.3d 455, 457-461 (Tex. Crim. App. 2006) (Appendix 1 to Smith's Petition, p. 4-5).

Smith testified on his own behalf. He admitted he knew Jennifer, liked her, and thought that "no one should die the way she died." Smith's Appendix 1, p. 5. According to Smith, all of the State's witnesses lied about the offense, including his friends who were with him that night. He contended that he was a Good Samaritan who tried to save Jennifer by grabbing the knife away from Kevin, the real murderer. Smith's Appendix 1, p. 5.

Smith was convicted of capital murder on June 14, 1991 for murdering Jennifer Soto during the course of committing or attempting to commit robbery. CR 3, 108, 121-22.[1] The following is a summary of the State's punishment evidence:

> [T]e State offered evidence that, two days after murdering Jennifer, applicant had physically assaulted Chris Standmier, the former boyfriend of

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[1] "CR" refers to the Clerk's Record of pleadings and documents filed with the court during trial, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers.

applicant's then-current girlfriend. Chris testified that he was home for the Christmas holidays from Prairie View University. He was standing in his mother's apartment parking lot when two cars pulled up. Applicant got out of one of them, took out a baseball bat and proceeded to beat Chris with it. Applicant hit Chris so hard that the bat broke in two. As Chris lay on the ground, applicant went back to the car, pulled out a Tech 9 pistol from the car, cocked it and told Chris, "N, get back from me. I'm going to kill you. I'll kill you." Chris said, "You got me." Then applicant got back into the car and they drove off. Chris went to the hospital.

The State also offered evidence that two months before the capital murder, officers arrested applicant on outstanding warrants as he was walking down the middle of the street in a high-crime area. While booking him into the jail, officers found ten ziplock baggies of crack cocaine in his underwear.

Several of applicant's teachers testified about applicant's conduct in school. One teacher, who taught applicant economics and math, testified that applicant was "taunting" in class and used abrasive, obscene language. He was sometimes mean and sometimes "docile." This high school teacher said that applicant seemed "threatening"-as if he would hurt the teacher-when he insisted that the teacher give him a passing grade in economics. The teacher was scared, in part because he was positive that applicant had earlier stolen his car's tires and rims.

Applicant's middle school vice-principal testified that he had suspended applicant from school for disruptive behavior in the classroom, possible weapons violations, throwing objects at teachers, and profanity. He had a bad reputation for peaceful and law-abiding activity and for respect toward authority.

A Dallas police officer, a member of the Youth Division at applicant's high school, testified that he found a Tech 9 in a locker shared by applicant and Nickles Lewis. Nickles told the officer that the gun was his, but applicant had five bullets in a bag he was carrying at the time. The officer thought applicant had a gun also, but he was unable to find it.

Smith's Appendix 1, p. 5-6. Smith called nineteen witnesses during his punishment case:

Fifteen of those were character witnesses. Applicant's middle school assistant principal testified that he had "8,000 problems at school, but applicant wasn't one of them," because he did not recall applicant. A pastor said that applicant's family attends church, and applicant always came with

his mother. "He's always been an impressive young man." He showed respect to the people at church and to his mother. When the pastor visited applicant in jail he showed remorse for Jennifer's death: he began to cry and said, "I saw her body." He thought applicant was capable of rehabilitation. The pastor said that he was aware that applicant's father stole from the family to support his crack habit. He said that such things have an adverse effect upon children: "Family troubles definitely affect the children." Although the pastor had never been to applicant's home and had never counseled applicant personally, he did not think that applicant would be a future danger to society.

The custodian of records for the special education department of the Dallas ISD testified that applicant's records showed that he could not read or do numbers in kindergarten. According to his kindergarten teacher, applicant "is a little rough, but enjoys his friends; he must be kept separate from a few because he's easily led into trouble." At the age of ten, applicant was diagnosed as learning disabled with a speech handicap. He was put into a special education reading group and given speech therapy. According to these school records, when he was eleven in 1982, applicant was implicated in numerous thefts at school, particularly of the speech clinician's purse. School contact with the parent indicated that LaRoyce has also been believed to be stealing at home. . . . Family stresses are reported. LaRoyce's behavior in class is exemplary and it has shocked school personnel that LaRoyce has been involved in stealing. He has admitted to theft and has cried when questioned about misbehavior.

At the age of thirteen, his WISC-R I.Q. testing showed a verbal I.Q. of 75, performance I.Q. of 84, and a full scale I.Q. of 78. At the end of 1986, applicant was phased out of the special education reading program because he then performed at grade level.

A high school classmate and football player testified that applicant once came to his rescue when a group from another high school "jumped him" and stabbed him. He thanked applicant, who said, "That's what friends are for."

Applicant's fiancee, the mother of his child, testified that applicant is not violent. Applicant would advise her sisters about doing their homework and not to make mistakes like he did. "Don't do what I did, you know, and slack off." According to her, applicant "just got with the wrong people, that's all." According to the fiancee's mother, applicant acted like a surrogate father to his younger sister. "He appeared to try to guide her and keep her aware of

society, people, boys, and things, and help her select appropriate young men friends." He is "a person who has been taught right from wrong and who respects society and respects people." He has an "average" intelligence and "is a person who has an intelligence capable of understanding and learning."

Applicant's best friend testified that he had not seen applicant be abusive to women. Applicant's brother, Myron, worked for UPS. He testified that when applicant's father went off on his motorcycle and used crack, Myron acted as a father figure to applicant. Applicant's mother brought her VCR, TV, microwave, and Tupperware over to Myron's house so applicant's father couldn't steal them and sell them for drugs. The family problems "affected" applicant, but Myron did not elaborate on the effect of these problems. A friend of applicant's mother testified that the father's drug habits affected the family because his mother had to act as both parents and she had "to pay the bill if we go out to eat like we used to." A legal assistant and student at UT-Arlington thought applicant was "a big loveable teddy bear" who had a lot to contribute to society because "he is willing to help people." A 69-year-old former neighbor testified that applicant "has been a good neighbor" and played with his grandchildren. A woman who had dated applicant's older brother testified that when she had a young baby and no income, applicant invited them to stay at his house. He let her use his bedroom with its queen-sized waterbed while he slept on the living room sofa. Applicant told her that because of his father's drug habit, he had to be the man of the house, so he went out and got a job at age fifteen or sixteen. The mother of one of applicant's former girlfriend's testified that she never had a problem with applicant; he was a fun person, always kidding around. He brought her a corn plant and a couple of ivy plants; he bought her some mirrors. Another friend testified that applicant is a nice young man: "He's the type I wouldn't mind having for a son." He was never disrespectful or violent.

Applicant's mother testified that she thinks applicant still has worth and value as a human being. Applicant "is a good child. He was a slow learner, but he's worthwhile. There's no way [applicant] would have hurt Jennifer. He was too crazy about Jennifer. She was a good and decent child. I'm so sorry for [her] family." Applicant's mother knew that applicant "would never hurt nobody."

In rebuttal, the State called a different middle-school assistant principal who testified that he had received numerous disciplinary referrals about applicant. One of them read, "LaRoyce talks out in class daily. He laughs

> out loud, plays around, and disrupts class daily. I cannot tolerate him." Applicant told a different teacher, "I'm going to kick your ass." Another of applicant's high school teachers testified that he had applicant in his pre-Algebra and physical-science class. "In one class, he called me a mf 7 times in one 55 minute period. On two occasions he tried to kill me. On one occasion he was going to put a bullet in my mf-ing head." Applicant was taken out of this teacher's class after about six weeks: "He would come in with no books, no preparation, never do any work, and sit sideways in the seat and just act like a little portent of evil. . . . He was always a big-time problem. It was a constant conflict."

Smith's Appendix 1, p. 6-7 (footnote omitted).

Smith was sentenced to death based on the jury's answers to two punishment issues. CR 120-23. As discussed previously by this Court, the jury received two questions in the punishment charge regarding deliberateness and future dangerousness. *Smith v. Texas*, 543 U.S. 37, 39 n.1 (2004). Under Texas law, affirmative answers to the two questions would result in a death sentence, and a negative answer to either one of the questions would result in a life sentence. In an attempt to comply with this Court's directive in *Penry v. Texas*, 492 U.S. 302 (1989) ("*Penry I*"), the trial court then gave the jury a supplemental "nullification" instruction. Smith's Appendix 4. The nullification instruction directed the jury to change a "yes" answer to "no" if they heard any mitigating evidence that bore no relationship to the punishment issues yet led them to believe that Smith should not be sentenced to death. *Smith*, 543 U.S. at 40.

II. Voir Dire

Each and every person who served on the jury in this case was told that a death sentence required "yes" answers to all of the special issues and that one "no" answer

would result in a life sentence.[2] During voir dire examination, the lawyers and the trial court went to great lengths at voir dire to explain the nullification instruction to the jurors, calling it an "escape valve" for giving the defendant a life sentence and providing examples of the type of mitigating evidence it contemplated, such as mental retardation, mental illness, an abusive childhood, or a drug or alcohol problem.[3] *Each and every person who served on the jury in this case stated he or she understood how to use the mitigation charge and would change a "yes" answer to "no" if the mitigation evidence warranted a life sentence.*[4] Thus, the jurors knew exactly how to give a life sentence to Smith if they had wanted to do so, and they all agreed they would do it under the appropriate circumstances.

Furthermore, in his closing argument, defense counsel reminded the jury:

> I want to talk to you about mitigating evidence. Mitigating evidence is that evidence that reduces the defendant's personal or moral culpability and may include, but is not limited to, any aspect of his character, record, background, or circumstances of the offense. It may go to one of the special

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[2] *See* 6RR 117-18 (Gary Powell, Juror No. 1); 8RR 102 (Ava Meyer, Juror No. 2); 10RR 106 (Donna Coulter, Juror No. 3); 11RR 48 (Carol Keyte, Juror No. 4); 11RR 141, 160-61 (Thomas Morrison, Juror No. 5); 13RR 31-32 (Dottie Wright, Juror No. 6); 15RR 7 (Teresa Lane, Juror No. 7); 16RR 5 (Steven Dillow, Juror No. 8); 16RR 65 (Janis Zeigler, Juror No. 9); 20RR 176 (Lynn Bartholomew, Juror No. 10); 21RR 43 (Mary Foote, Juror No. 11); 25RR 99 (Derek Fisher, Juror No. 12).

[3] *See, e.g.,* 8RR 129-30; 10RR 117, 131; 11RR 161-62; 13RR 65; 15RR 20-21; 16RR 17, 70-71; 20RR 187-88; 21RR 53; 25RR 105-06.

[4] *See* 6RR 149-53 (Gary Powell, Juror No. 1); 8RR 112-13, 133-34 (Ava Meyer, Juror No. 2); 10RR 118, 136-37 (Donna Coulter, Juror No. 3); 11RR 60 (Carol Keyte, Juror No. 4); 11RR 162-65 (Thomas Morrison, Juror No. 5); 13RR 66-67 (Dottie Wright, Juror No. 6); 15RR 31-32 (Teresa Lane, Juror No. 7); 16RR 18-19 (Steven Dillow, Juror No. 8); 16RR 70-71 (Janis Zeigler, Juror No. 9); 20RR 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); 21RR 53-54 (Mary Foote, Juror No. 11); 25RR 105-07 (Derek Fisher, Juror No. 12).

> issues, it may not, but the Court tells you — and that the State has a burden — *that if you think that he should not die, you are to put "no" in one of the spaces . . . .*

(33RR 55-56) (emphasis added). Defense counsel then identified the mitigation evidence for the jury's consideration, specifically, the evidence of Smith's low intellect and difficult family life that was of special concern to this Court. (33RR 56-58); *Smith*, 543 U.S. at 41. Defense counsel later reminded the jury that the State had to prove beyond a reasonable doubt that the death sentence should be imposed despite mitigation evidence and said, "You shall answer 'no' to one of the issues to give effect to your meaning." (33RR 69). Thus, defense counsel's closing comments reminded the jury how to give mitigating effect to the exact evidence identified in this Court's per curiam opinion.

Accordingly, the theoretical concern expressed by this Court over nullification charges in general is unwarranted in this particular case. The record supports the conclusion that each and every juror knew how to give a life sentence and would have given a life sentence if they believed Smith's mitigation evidence warranted one. Any other conclusion would be based on speculation rather than evidence in the record.

II. Direct Appeal and Postconviction Proceedings

On direct appeal, Smith challenged the Texas death penalty statute on the ground that it provided no effective vehicle for the jury to apply mitigating evidence. State's Appendix 1, p. 29. Holding that the supplemental nullification instruction in the court's charge cured any insufficiency in the statute, the CCA affirmed Smith's conviction and sentence on June 22, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (not designated for publication) (Smith's Appendix 3, p. 10). This Court denied certiorari

review. *Smith v. Texas,* 514 U.S. 1112 (1995).

Smith next sought state collateral review, but his application was dismissed as untimely filed. *Ex parte Smith,* 977 S.W.2d 610 (Tex. Crim. App. 1998); State's Appendix 2. This Court again declined to issue a writ of certiorari. *Smith v. Texas,* 525 U.S. 1148 (1999).

Smith next filed a petition for postconviction relief in the United States District Court for the Northern District of Texas. This proceeding was ultimately dismissed without prejudice so that Smith could return to state court pursuant to newly enacted procedures for untimely applications. *Smith v. Johnson,* No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A (West 1999). Smith's second state habeas application challenged, for the first time, the trial court's charge and the nullification instruction in particular. State's Appendix 3, p. 190. The CCA denied Smith's claim on its merits on April 21, 2004. *Ex parte Smith,* 132 S.W.3d 407 (Tex. Crim. App. 2004) (Smith's Appendix 2, p. 4-10).

This Court granted a writ of certiorari, reversed the CCA's decision per curiam, and remanded the case back to that court. *Smith*, 543 U.S. 37. The CCA carefully applied this Court's *Penry* jurisprudence to Smith's benefit and then presumed the jury could not "fully" consider Smith's evidence under the statutory issues. The CCA then conducted an exhaustive review of the record for harm under state law and denied relief. Smith's Appendix 1. The instant petition for certiorari review followed.

ARGUMENT

I. The Opinions

Smith bases his petition on the incorrect assertion that the CCA's opinion on remand "rejected this Court's [per curiam] conclusion" that the jurors could not give

adequate effect to his mitigating evidence through the statutory punishment issues. Petition, p. 14. This Court's per curiam opinion made no such conclusion. The CCA's analysis on remand was, in fact, authorized by this Court's reversal and properly executed.

A. The CCA's Original Habeas Opinion

The CCA's original habeas opinion contained three alternative holdings that were independently sufficient to deny habeas relief. Smith's Appendix 2. The majority first concluded that (1) Smith did not show evidence of a severe and permanent handicap, not of his own making, which is at least related to the offense (the Fifth Circuit "screening test"), (2) Smith did not show that the disability evidence was beyond the reach of the two special issues, deliberateness and future dangerousness, and (3) the nullification instruction in this case was sufficient to accord full weight to Smith's mitigation evidence. Smith's Appendix 2, p. 4, 6, 9.

B. This Court's Per Curiam Opinion

In its per curiam opinion, this Court first held that the CCA improperly assessed Smith's claim using the Fifth Circuit's screening test, which this Court had recently disavowed in *Tennard v. Dretke*, 542 U.S. 274 (2004). This Court did not address the CCA's holding that the two statutory punishment issues were sufficient vehicles for the jury to give effect to Smith's mitigating evidence. Instead, it Court skipped to the question of whether the nullification instruction in this case could overcome the problems of the nullification instruction it recently struck down in *Penry II. Smith*, 543 U.S. at 45.

This omission in the analysis is evident in the following transition found at the end of section II of the opinion: "Because petitioner's proffered evidence was relevant, the Eighth Amendment required the trial court to empower the jury with a vehicle capable of giving effect to that evidence. Whether the 'nullification instruction' satisfied that charge is the question to which we now turn." *Id.* In light of this language, the Court clearly did not purport to analyze whether the statutory instructions were infirm under *Penry I.* Moreover, a conclusion that the statutory issues were constitutionally deficient was not necessary for this Court to reverse the CCA, since the CCA's reliance on the Fifth Circuit screening test was justification alone for reversal.

To support his argument to the contrary, Smith relies on a single conclusory remark in the per curiam opinion that "Just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith*, 543 U.S. at 48. This remark suggests the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law. *Compare Penry I*, 492 U.S. at 322-26 (discussing whether text of special issues allowed jury to give mitigating effect to Penry's evidence). In *Boyde v. California*, this Court held that the legal standard for reviewing ambiguous jury instructions is whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990).

The Court's remark that the punishment issues had "little, if anything," to do with Smith's evidence does not reference any legal standard, either *Penry I* or *Boyde*. Thus, it appears that this Court left open the possibility—and based on the weak mitigation evidence[5]—the very real probability, that the statutory issues were constitutionally sufficient and that the nullification instruction, though erroneous, was a gratuitous

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[5] Smith exaggerates his mitigation evidence in this case. For example, Smith's conclusion that his age and IQ score place him "clearly on the edge of categorical exclusion from the death penalty altogether" is patently false. Petition, p. 22. Smith was about three months short of his twentieth birthday when he murdered Soto, placing him well above the age of categorical exclusion from the death penalty. *See* State's Trial Ex. 75 (DISD records showing date of birth as 4-23-1971).

Moreover, a score of 78 on the WISC-R represents a "true" IQ of between 73 and 83, given the standard error of measurement that accompanies IQ tests. *See Clark v. Quarterman*, No. 05-70008, slip op. at *7-9, 2006 U.S App. LEXIS 18290 (5th Cir. July 20, 2006) (not yet reported). These scores are well within the range of borderline intellectual functioning, a diagnostic category described in the DSM-IV-TR as having an IQ of 71-84. Borderline intellectual functioning is not considered a mental disorder. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 731, 740 (4th ed. 2000). Further, mental retardation is not assessed based on IQ scores alone. An assessment of adaptive skills is required before a person can claim such a diagnosis. *Ex parte Briseno*, 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004). To date, Smith has made no such claim.

Likewise, Smith's repeated characterization of his family life as "abusive" and his analogy to *Williams v. Taylor* is disingenuous. *Williams v. Taylor*, 529 U.S. 362, 398 (2000); Petition, p. 22, 29. The facts in *Williams* are readily distinguishable.

In *Williams*, the evidence showed a "nightmarish childhood." Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, Williams had been severely and repeatedly beaten by his father, he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody. *Id.* at 415 (O'Connor, J., concurring).

The evidence in this case that Smith's father stole from the family to support a drug habit, forcing Smith to get a part-time job at the age of 15 or 16, hardly rises to the "nightmarish" abuse described in *Williams*. Smith's family situation can be categorized as a "troubled childhood" at best. Smith's Appendix 1, p. 12, n.33.

measure taken by the trial court to be "safe" rather than "sorry" at a time when the law was uncertain.

C. The CCA's Opinion on Remand

Thus, on remand, the CCA was permitted, even obligated, to re-examine the issue of whether Smith's mitigation evidence was fully encompassed within the statutory issues, especially given the fact that it had used the improper screening test in its original opinion. Smith's Appendix 1, p. 10. Relying on factors that Texas courts use to assess the sufficiency of the evidence to support a jury's finding of future dangerousness, the CCA concluded that all of Smith's mitigating evidence was likely relevant to the future dangerousness special issue. Smith's Appendix 1, p. 10-11 (citing *Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987)).[6] Indeed, Smith himself used the "*Keeton* factors" on direct appeal to argue that his mitigating evidence (the same evidence he now contends the jury had no vehicle to consider) rendered the evidence insufficient to support the

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[6] The CCA reasoned that if Smith's mitigating evidence fit within the *Keeton* factors and was relevant to assessing the legal sufficiency of the evidence to support the jury's future dangerousness finding, then it logically followed that such evidence was encompassed under the future dangerousness punishment issue. The *Keeton* factors that Texas considers to be relevant to future dangerousness are:

> (1) the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties;
> (2) the calculated nature of the defendant's acts;
> (3) the forethought and deliberateness exhibited by the crime's execution;
> (4) the existence of a prior criminal record, and the severity of the prior crimes;
> (5) the defendant's age and personal circumstances at the time of the offense;
> (6) whether the defendant was acting under duress or the domination of another at the time of the offense;
> (7) psychiatric evidence; and
> (8) character evidence.

Keeton, 724 S.W.2d at 61.

jury's answer to the future dangerousness issue. State's Appendix 1, p. 23-29. So even Smith believes (at least when it operates to his benefit) that his mitigation evidence fits within the future dangerousness issue.

Nevertheless, the CCA did not rest its judgment on the conclusion that the statutory special issues were sufficient in this case. Given its uncertainty regarding this Court's *Penry II* jurisprudence, the CCA assumed for purposes of argument that some portion of Smith's evidence of limited mental ability was outside the ambit of the special issues.[7] Smith's Appendix 1, p. 12. Having assumed error, the CCA went on to conduct a harmless error review.

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[7] The CCA's uncertainty stems from the issue of whether a charge must allow a jury to give mitigating evidence "full" effect and consideration or "meaningful" effect and consideration. Smith's Appendix 1, p. 12-13, n.36. Smith's assertion that this Court has "repeatedly insisted" the Eighth Amendment requires "full" consideration and effect is not supported in law. Petition, p. 16.

The "*full* consideration" language in this Court's per curiam opinion is quoted directly from Justice O'Connor's dissent in *Johnson,* as quoted in *Penry II. Smith,* 543 U.S. at 38, 46 (quoting *Penry II,* 532 U.S. at 979 (quoting *Johnson v. Texas,* 509 U.S. 350, 381 (1993)). This language is merely *dicta,* because it would otherwise overrule *Jurek,* and this Court previously has held that no such "sea change" occurred in light of *Penry I. Graham v. Collins,* 506 U.S. 461, 474 (1993); *see also Coble v. Dretke,* 444 F.3d 345, 358 (5th Cir. 2006) (quoting *Bigby v. Dretke,* 402 F.3d 551, 570 (5th Cir. 2005)) ("The Supreme Court's rulings in *Penry II* and *Smith* should not be read to disturb its earlier holdings affirming the constitutionality of Texas'[s] statutory death penalty sentencing scheme"); *Tennard v. Dretke,* 442 F.3d 240, 253 n.17 (5th Cir. 2006) (declining to interpret *Smith* and *Tennard* as new rules); *Cole v. Dretke,* 418 F.3d 494, 508 (5th Cir. 2005) ("Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry*"); *In re Kunkle,* 398 F.3d 683, 685 (5th Cir. 2005) (*per curiam*) ("We are not persuaded that the Court intended to undercut *Jurek, Graham,* and *Johnson* without even citing them. Whether ... *Smith* sweep[s] so broadly as to create a conflict with its own *Jurek* or *Graham* decisions is for the Supreme Court").

This Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek,* 428 U.S. at 272-73. The fact that mitigating evidence might have "some arguable relevance beyond the special issues" is immaterial because "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the

The CCA's tentative conclusion that the statutory issues sufficiently embraced Smith's mitigation evidence did not violate any prior holding of this Court. As stated above, this Court's per curiam opinion made no analysis regarding the sufficiency of the statutory issues as a vehicle for the jury's consideration of Smith's evidence. In most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976). Further, the CCA *assumed*, for Smith's benefit, that his evidence was partially outside the ambit of the special issues. Smith's Appendix 1, p. 12. Having assumed the error, the CCA cannot be said to have rejected any holding by this Court.

The CCA went on to conduct a harm analysis that Texas courts regularly employ for jury charge error. *See Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g). Under *Almanza*, the level of harm required for reversal depends on whether a timely objection was made at trial. If a defendant timely objected, he must only show "some harm" for reversal; if he did not, he must show "egregious harm." *Almanza*, 686 S.W.2d at 171. A defendant meets his burden to show "egregious harm" if a review of the record as a whole shows that he did not have "a fair and impartial trial." Smith's

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Texas special issues." *Graham*, 506 U.S. at 476 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 190 (1988) (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson*, 509 U.S. at 367.

Thus, the "full consideration" rule suggested in this Court's per curiam opinion flies in the face of this valid and binding precedent.

Appendix 1, p. 10. Here, after considering voir dire, the evidence adduced at guilt, including Smith's own testimony, and closing arguments, the CCA was unable to conclude that the statutory special issues and the nullification instruction caused Smith egregious harm in their effect on the jury's deliberation. Smith's Appendix 1, p. 17.

II. There is no compelling reason to grant review in this case.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Smith claims this Court must protect its constitutional authority and defend its prior ruling in this case. But Smith no longer contends, as he did in the CCA, that *Penry II* error is structural or that his conviction should be automatically reversed; he only suggests in a footnote this might be the case. Petition, p. 21, n. 14.

Before this Court, he criticizes the "egregious harm" standard regularly used in Texas for unobjected-to charge error. He suggests a "genuine" (i.e., federal) harmless error standard would be more appropriate. Petition, p. 21-22. The proper venue for obtaining the federal harmless error analysis he desires is not this Court, but the federal habeas courts.

On this point, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Thus, federal habeas court is "the more appropriate avenue" for litigation of the instant claims. There is no compelling reason for this Court to grant review at this time.

III. Smith may not raise claims for the first time in a petition for certiorari.

As a general rule, arguments cannot be presented for the first time to this Court on review. *Beck v. Washington*, 369 U.S. 541, 550-554 (1962). This requirement is jurisdictional. *See Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). Smith seeks to present for the first time his argument that the CCA applied the wrong harmless error analysis in this case.

In his brief to the CCA below, Smith argued that this case was not amenable to a harmless error analysis. State's Appendix 4, p. 8-9. He argued that the decisions of this Court, of the Fifth Circuit Court of Appeals, and of the CCA all confirm that *Penry II* error mandates relief without a consideration of harm. He concluded parenthetically, and in the alternative, that he was, in fact, harmed because a jury properly charged "surely could have concluded that he did not deserve to die." State's Appendix 4. In his reply brief on remand, Smith argued against a finding of procedural default and took issue with the State's interpretation of this Court's per curiam reversal. State's Appendix 5.

Nowhere in the record or history of this case, except in the petition for certiorari, does Smith argue that the harmless error standard regularly applied by Texas courts to jury charge error is inappropriate for *Penry II* error. Smith's point on certiorari is clear: he claims the Texas "egregious harm" standard is improper because, unlike the federal

harm standard, it does not seek to determine whether the error affected the jury's *verdict*; it "merely" seeks to determine whether the defendant had a fair and impartial trial. Ironically, the Texas egregious harm standard is less onerous to Smith in this regard than the federal analysis Smith would have this Court apply. In any event, Smith asserts that the *Almanza* egregious harm analysis is merely a rehashing of the constitutional error analysis in disguise and a subversive attempt to apply a rule of procedural default. However unsupportable these positions are in reality, they were never raised before now. Accordingly, Smith's complaints about the Texas harmless error rule are not properly before this Court.

IV. Texas's more protective harm analysis is an adequate and independent state ground that precludes review.

Furthermore, it is at least arguable that the CCA's application of a state harm analysis is an adequate and independent state ground that precludes review by this Court. The CCA considered which harmless error review would apply to unobjected-to constitutional jury charge error. Smith's Appendix 1, p. 13-14, n.38. The CCA considered applying the federal harm analysis in *Chapman v. California*, 386 U.S. 18 (1967), but concluded that *Chapman* requires compliance with the state's procedural rule for preserving error. Smith's Appendix 1, p. 14, n.38; *Chapman*, 386 U.S. at 21. Because Smith did not complain about the nullification instruction in the trial court despite the trial court's express invitation to do so, the CCA concluded that he forfeited a federal harm analysis under *Chapman*. Smith's Appendix 1, p. 7, n.8. Ironically, such failure to object does *not* forfeit a harm analysis under Texas law; it merely determines the level of

harm required for reversal. Smith's Appendix 1, p. 13 (citing *Almanza*, 686 S.W.2d at 171). The CCA concluded therefore, that the appropriate harm analysis would be the "egregious harm" analysis in state law.

In doing so, the CCA did not reject this Court's finding of error—the CCA *assumed* the charge was "constitutionally deficient under *Penry II*." Smith's Appendix 1, p. 12. And the CCA's subsequent harm analysis was more protective of Smith than the federal harm analysis he would have this Court apply. Under these circumstances, the CCA's application of state law did not violate the Constitution, and the CCA's disposal of the case was an independent and adequate state ground that precludes review. *See Doan v. Brigano*, 237 F.3d 722, 728 (6th Cir. 2001) (holding that whether state rule is sufficient to support lower court's judgment depends upon whether the rule conflicts with the Constitution) (citing Erwin Chemerinsky, *Federal Jurisdiction*, § 10.5.2, at 619 (2d ed. 1994)); *see also Connecticut v. Johnson*, 460 U.S. 73, 88 (1983) (Stevens, J., concurring) (noting that federal law does not require a state appellate court to make a harmless-error determination; *Chapman* merely permits it). Accordingly, this Court lacks jurisdiction to review Smith's claims.

V. The CCA's decision to assess the record for harm was proper and properly implemented.

Smith's vilification of the CCA as a renegade court seeking to evade the prior ruling of this Court is unfounded. The CCA's harm analysis in this case was the only proper avenue for the CCA to pursue under the circumstances: automatic reversal would have been improper because *Penry II* error is not structural error.

A. *Penry II* error is amenable to a harmless error review.

Although this Court has yet to speak on the issue, there is no real dispute in *this* case that *Penry II* error is subject to a harm analysis. Smith has modified his position on this point. He argued on remand to the CCA that the error in this case was structural and not amenable to review. State Appendix 4, p. 8-10. He now concedes in a footnote that this Court has suggested such claims are subject to harmless error review, although he notes that this Court "might well conclude" the opposite. Petition, p. 21, n.14.

Penry II charge error is more akin to "an error in the trial process itself," rather than a structural "defect affecting the framework within which the trial proceeds." *See Arizona v. Fulminante*, 499 U.S. 279 310 (1991). It occurs during the presentation of the case to the jury and is amenable to a harmless error analysis because it may be quantitatively assessed in the context of other evidence presented at trial. *See Brecht v. Abramson*, 507 U.S 619, 629 (1993); *see, e.g., Nelson v. Dretke*, 442 F.3d 282, *78-79 (5th Cir. 2006) (Dennis, J., concurring). If a court can easily assess the record for harm, which it can and did in this case, then the error cannot be deemed "structural." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (stating that a conclusion of structural error rests on the difficulty of assessing the effect of the error). This rule should hold true especially on collateral review, which honors the State's interest in the finality of convictions, its sovereign power to punish offers, and its good-faith attempts to honor constitutional rights. *Brecht*, 507 U.S. at 635.

Further, the following authorities all strongly support the notion that *Penry II* error should be reviewed for harm. *Brecht*, 507 U.S. at 638 (holding that habeas relief is warranted only if the constitutional error at issue is structural error or had a "substantial or injurious" effect on the verdict); *Calderon v. Coleman*, 525 U.S. 141, 144, 146 (1998) (holding that jury charge error which potentially prevented the jury's consideration of constitutionally relevant mitigation evidence was subject to *Brecht* harmless error review); *see also Brown v. Payton*, 544 U.S. 133, 166 (2005) (Souter, J., dissenting) (applying *Brecht* harm analysis to *Penry*-like error); *Nelson*, 442 F.3d at *78-79 (Dennis, J., concurring) (applying *Brecht* harmless error standard to *Penry I* error).

The CCA cited and relied on this Court's opinions in *Brown*, *Brecht*, and *Calderon* in its attempt to carry out this Court's apparent intent on remand. Smith's Appendix 1, p. 17, n. 42. Accordingly, the CCA had strong legal authority for conducting a harmless error review.

Moreover, the state harm standard used by the CCA below was more protective of Smith than a federal harm standard would be. The CCA examined the entire record to determine whether Smith suffered actual, not just theoretical, "egregious harm" from the presumed deficiency in the jury charge such that he did not have a "fair and impartial trial." Smith's Appendix 1, p. 10, 14. Under the federal standard in *Brecht*, Smith would have to establish actual prejudice by showing the error had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637. Thus, under the Texas standard, Smith need only show that he did not have a fair and impartial trial.

Under the federal standard, Smith would have to show the error effected the outcome of the proceeding, a conclusion that is hardly ever supported by objective facts in the record. As Smith received the benefit of a more favorable harm analysis, the CCA's decision was proper, and Smith's petition should be denied.

B. The CCA's harm analysis did not contradict this Court's holding that *Penry II* error exists in this case.

Smith insists that the CCA's more lenient "egregious harm" analysis is nothing more than a disagreement with this Court's conclusion of error in this case. Specifically, Smith complains the CCA disagreed with this Court's decision that the jury could not give adequate effect to the mitigating evidence via the "special issues supplemented by the nullification instruction." Petition, p. 18.

First, as noted above, this Court's per curiam opinion did not hold that the statutory punishment issues were an insufficient vehicle for the jury to consider Smith's evidence. The Court held that the nullification instruction was insufficient under *Penry II.* Whether the statutory punishment issues were sufficient was an issue left open for the CCA to re-examine using the proper constitutional relevance test.

Second, the CCA, uncertain as to the state of *Penry II* jurisprudence, assumed error in this case. The CCA assumed that the jury *could not give* "full" effect and consideration to Smith's evidence of limited mental ability. For that reason, the CCA analyzed the entire record to assess whether Smith's trial was nonetheless fair and impartial. Smith's Appendix 1, p. 12.

Third, the CCA's analysis of the entire record could not logically supplant a holding of *Penry I* error even if this Court had made one. An inquiry into whether mitigating evidence is outside the ambit of a jury charge combines a relevance assessment with an examination of the language in the jury charge. *See, e.g., Boyde*, 494 U.S. at 380 (holding the legal standard for reviewing ambiguous jury instructions is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence). It asks the theoretical question: is there a reasonable likelihood that the jury using these instructions could not give "sufficient effect" (however that is defined) to the evidence introduced?

By contrast, an inquiry into egregious harm is not a "reasonable likelihood" or "theoretical" assessment of the charge and the mitigation evidence. It looks at the whole trial, from voir dire to closing argument, to determine whether there is *actual* harm in the sense that the defendant's trial was not fair and impartial. It looks to how well the jurors were educated during voir dire, it compares the strength of the mitigating evidence against the strength of aggravating evidence, it looks to how that evidence was argued by counsel and how well it fit with counsel's theories, and it looks to whether the State emphasized the error in its closing argument. Smith's Appendix 1, p. 13-18. Then, based on the erroneous charge given, it determines whether there was actual harm. Appendix 1, p. 18. This is simply not the same as an "error" inquiry, Smith's contortive arguments to the contrary notwithstanding.

For example, Smith complains at length that the CCA should not have examined the voir dire examination in this case. Petition, p. 18-22. Of course, the voir dire examination is the strongest evidence in this case against Smith's position. It indicates that *every juror who sat in judgment of Smith agreed to use the nullification instruction to change a true "yes" answer to "no" if he or she believed the mitigating evidence warranted a life sentence.*[8] It also shows that defense counsel was not ignorant of the possibility (and therefore could have raised the objection) that jurors might consider using the nullification instruction as "cheating" or violating the oath to render a "true verdict."[9] Thus, the voir dire examination addressed and refuted the theoretical concerns underlying this Court's rejection of nullification instructions in general by actually addressing those concerns in this case. The CCA's consideration of the voir dire record is not a rejection of the conclusion that nullification charges are "reasonably likely" to be inadequate under the Eighth Amendment. Rather, the CCA's analysis acknowledges the harmless error rule—both federal and state—that convictions should not be reversed on

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[8] *See* 6RR 149-53 (Gary Powell, Juror No. 1); 8RR 112-13, 133-34 (Ava Meyer, Juror No. 2); 10RR 118, 136-37 (Donna Coulter, Juror No. 3); 11RR 60 (Carol Keyte, Juror No. 4); 11RR 162-65 (Thomas Morrison, Juror No. 5); 13RR 66-67 (Dottie Wright, Juror No. 6); 15RR 31-32 (Teresa Lane, Juror No. 7); 16RR 18-19 (Steven Dillow, Juror No. 8); 16RR 70-71 (Janis Zeigler, Juror No. 9); 20RR 187-89, 204-06 (Lynn Bartholomew, Juror No. 10); 21RR 53-54 (Mary Foote, Juror No. 11); 25RR 105-07 (Derek Fisher, Juror No. 12).

[9] Defense counsel told one juror specifically that, in following the mitigation instruction, "You're not cheating or not giving a true verdict, you're following the Court's law or the Court's rules." (15RR 32).

habeas review simply because harm is "reasonably likely." Under both federal and state harmless error review, the harm must be actual. *Brecht*, 507 U.S. at 637; Smith's Appendix 1, p. 6, 14. The voir dire record properly supports the CCA's conclusion that, in actuality, Smith was not denied a fair and impartial trial.

Likewise, Smith complains about the CCA's review of the closing arguments in this case. Petition, p. 22-24. Such a review enabled the CCA to determine whether defense counsel used the mitigating evidence to support a defensive theory, whether the defense theory relied on the jury's use of the erroneous charge, and whether the State exaggerated the charge error is some way. For example, the CCA's consideration of closing arguments allowed them to address this Court's concern in *Tennard* as to whether the prosecutor exacerbated the confusion caused by the charge. *See Tennard*, 542 U.S. at 288-89) (holding that reasonable jurist might well have given Tennard's evidence of low IQ aggravating effect because prosecutor told them to do so); Smith's Appendix 1, p. 17 (holding that prosecutor never suggested the jury should ignore Smith's mitigation evidence). So the closing arguments also properly supported the CCA's conclusion that Smith in actuality was not denied a fair and impartial trial.

Thus, after assuming the statutory issues were insufficient in this case because there was a reasonable likelihood that the jury was prevented from considering constitutionally relevant evidence, the harm inquiry conducted by the CCA concluded that, in actuality, Smith was not harmed based on the record as a whole. These are not mutually exclusive positions, as Smith argues. If they are, then every harmless error

conclusion would be improper. Such a result would be contrary to an overwhelming body of existing state and federal jurisprudence.

Admittedly, the CCA's analysis does not speak to whether the mitigating evidence was sufficient to convince one juror to spare Smith's life. This is not the review required by the *Almanza* egregious harm standard. Smith's contention that a "genuine" harm analysis would ask such a question is merely an assertion that the federal *Brecht* standard should apply. Petition, p. 21. Although Smith never argued for the application of this federal standard in the CCA, he may certainly do so now in federal habeas court.

C. The CCA's conclusion that Smith did not object at trial was patently correct and not an attempt to evade this Court's per curiam opinion

Finally, Smith contends that the CCA "twice addressed the merits of his *Penry* claim" prior to this Court's per curiam reversal. Petition, p. 24-25. On both occasions, Smith contends, the CCA declined to find procedural default. He concludes that the use of the "egregious harm" standard of review, which applies when a Texas defendant fails to make a trial objection to the error, constitutes a finding of procedural default and an impermissible attempt to evade the Court's ruling on the merits.

Smith's dramatic claim of the CCA's "bait and switch" tactic belies the fact that the CCA *assumed* error on remand. Petition, p. 17. The CCA assumed the worst case scenario because of its uncertainty regarding this Court's *Penry II* jurisprudence. The CCA assumed that Smith's evidence of limited mental ability was not fully encompassed by the two special issues. Smith's Appendix 1, p. 11-12. The State is at a loss to understand how the CCA's assumption of the very error Smith claims this Court to have

found amounts to an attempt to evade that error. Moreover, as will be demonstrated below, the CCA did not twice reject a procedural default argument by addressing Smith's claims on the merits.

On direct appeal, the CCA had no need to address procedural default because the CCA understood Smith's complaint to be a statutory one that was raised in his pretrial motion and, therefore, obviously preserved for review. State's Appendix 1, p. 29. The CCA held that the deficiency in the Texas statute was corrected by the nullification instruction given. Smith's Appendix 3, pp. 10-11

In its original habeas opinion, the CCA did not address and did not need to address procedural default. This is because Texas law does not generally allow for procedural default of jury charge error when a defendant fails to object at trial. *See Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). As discussed at length above, *Almanza* simply requires a more stringent harm analysis when there is no objection at trial. For this reason, the State did not assert a procedural default argument based on the failure to object at trial when Smith first challenged the nullification instruction on collateral review.[10] Texas law simply did not permit it.[11]

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[10] The State argued instead, and the trial court agreed, that the issue was defaulted because it had been addressed on direct appeal. Petition, p. 9. This is not the "about face" that Smith suggests, for the nullification charge *had* been addressed by the CCA on direct appeal. The CCA held (as it did for all of the twelve-year period between *Penry I* and *Penry II*) that the nullification instruction properly cured the unconstitutionality of the Texas death penalty statute. Smith's Appendix 3, p.11. At the time the State asserted its procedural default argument in September of 2000, *Penry II* had not yet issued and there was no justification for revisiting the CCA's holding on direct appeal.

[11] Judge Hervey's dissenting opinions seem to belie this assertion that jury charge error cannot be

The CCA's failure to address a procedural default argument in its original habeas opinion is not equivalent to considering and rejecting a procedural default argument. And the CCA's conclusion on remand that Smith failed to object and therefore must meet the egregious harm standard for reversal is not akin to a procedural default. In fact, Smith concedes as much in his petition when he states the CCA did not hold Smith's claim procedurally defaulted on remand. Petition, p. 25. Rather, Smith argues that the CCA subversively found "procedural default" by applying a more burdensome harm analysis and erroneously concludes that the CCA therefore did not "strictly or regularly" follow the Texas rules of procedural default. Petition, p. 26-27.

In all stages of this litigation, the CCA did exactly what Texas law requires when analyzing unobjected-to jury charge error. *Jimenez*, 32 S.W.3d at 237. The CCA never considered whether the jury charge complaint was forfeited by Smith's failure to object because that rule does not generally apply to charge error; and it did not conclude otherwise on remand. Smith was treated in a consistent manner throughout the litigation of this case, consistent with the treatment of other capital murder defendants. *E.g. Penry*

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procedurally defaulted. But in fact, the dissenting opinions cite no authority in Texas law permitting such default. Smith's Appendix 1, 18; Smith's Appendix 2, p. 15.

And as Smith points out, the State struggled to persuade the CCA to consider the lack of a trial objection as procedural default on remand using Judge Hervey's dissent. The State argued that a *proper* finding of procedural default could be made on collateral review (as opposed to direct appeal) and provide a *proper* theory for affirming the conviction. Nevertheless, the CCA majority opinion on remand refused to address the State's procedural default argument.

v. State, 178 S.W.3d 782, 788 (Tex. Crim. App. 2005) (reversing Johnny Paul Penry's third death penalty sentence for constitutional jury charge error of a different sort).

But perhaps most importantly, the "egregious harm" standard, despite its name, is not the "exceptionally high" or "daunting" standard of harm Smith would have this Court believe. Petition, pp. i, 28. It seeks merely to assess the record for actual error and determine whether the defendant had a fair and impartial trial. *Jimenez*, 32 S.W.3d at 238. This is less onerous than the verdict-oriented federal analysis that Smith would have this Court apply.

Finally, Smith challenges the CCA's basis for finding he did not assert a trial objection to the charge and argues that his objection to a statute is the equivalent to an objection to the charge. During pretrial proceedings, Smith filed a "Motion to Reveal Mitigation Charge." Smith's Appendix 6. In the motion, defense counsel acknowledged the uncertain state of the law after *Penry I* and revealed that he anticipated presenting *Penry* evidence at trial. Defense counsel asked to see the court's charge on mitigation evidence prior to the commencement of voir dire. Smith's Appendix 6, p. 88-89. The trial judge granted this request. Prior to the commencement of voir dire, the trial judge confirmed that defense counsel had received a copy of the mitigation charge, as requested. Smith's Appendix 8, p. 3. The court then told defense counsel:

> 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.

Smith's Appendix 6, p. 3-4. Despite the trial court's invitation, counsel made no objections or changes to the nullification charge.

Voir dire commenced. As noted above, all the prospective jurors who ultimately served on the jury were carefully questioned as to whether they understood and could apply the nullification charge if the case went to punishment. During the punishment charge conference, defense counsel made lengthy objections to the charge, *none* of which involved the nullification instruction. (32RR 155-67). Later, Smith filed a motion for new trial and an amended motion for new trial, neither of which contained any jury charge complaint. (CR 126, 127).

Smith repeatedly failed to offer a trial objection to the nullification instruction of which he now complains and declined the trial judge's specific pretrial invitation to do so. *Compare Penry II*, 532 U.S. at 803 (noting that Penry offered definitions of "deliberately" which trial court refused to give).

Nor did Smith raise the charge issue on direct appeal. In his sixth point of error, Smith challenged a pretrial ruling rejecting Smith's claim that code of criminal procedure article 37.071 was unconstitutional in that it provided no effective vehicle for a jury to apply mitigating evidence. State's Appendix 1, p. 29-31. Smith's complaint on direct appeal was a statutory one. He did not complain about or even mention the court's charge, perhaps because he believed the charge error was not preserved or because he agreed with Texas law at that time (and for the twelve years following *Penry I*) that the

nullification instruction cured the *Penry* problem. State's Appendix 1; *see Fuller v. State*, 829 S.W.2d 191, 209 (1992).

Smith then filed his first application for writ of habeas corpus, which was dismissed as untimely. It likewise contained no complaint about the nullification charge. State's Appendix 2, p. 3-5.

Nine years after Smith declined the trial judge's invitation to object to the nullification charge, he challenged that charge for the first time on habeas review. State's Appendix 3. He presents no justification for having waited so long, and the delay serves only to frustrate society's interest in the prompt administration of justice. There is no doubt that Smith's attorney was aware of the issue at trial, and by all accounts, approved of the charge. Defense counsel's comments during voir dire that compliance with the nullification instruction is not "cheating" or "not giving a true verdict" clearly indicates he was aware of the issue later raised in *Penry II.* (15RR 32). The fact that *Penry II* had not yet issued is inconsequential: *Penry II* was not new law but only repeated the holding in *Penry I. See Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003) (en banc). Moreover, Smith's habeas application raising the nullification charge complaint did predate *Penry II*, so, in the end, issuance of *Penry II* was inconsequential to Smith's ability to challenge the nullification instruction.

Consequently, the CCA properly concluded that Smith made no objection to the charge at trial. Indeed, Smith made no objection to the charge until his second state writ application, nine years after trial. Moreover, his pretrial motion objecting to the Texas

statute is not the same as an objection to the jury charge, as Smith asserts. The case Smith relies on, *Osborne v. Ohio*, actually supports the State's position on this point.

Osborne challenged the constitutionality of a pornography statute as a violation of due process. *Osborne v. Ohio*, 495 U.S. 103, 122-23 (1990). The Ohio Supreme Court rejected his claim on the ground that the Ohio statutes required the prosecution to prove "lewd exhibition" and scienter. Osborne argued that the jury charge in his case contained no such requirements. The Ohio Supreme Court rejected these contentions because Osborne had failed to object to the jury instructions given. *Osborne*, 495 U.S. at 107-08.

This Court held that Osborne's complaint about the failure to instruct on lewdness was preserved because Osborne challenged the statute in a motion to dismiss and, when it was overruled, *immediately proposed various jury instructions*. *Id.* at 124-25. Under these circumstances, the Court concluded that Osborne adequately pressed the issue to the court and nothing would be gained by requiring a second objection to the charge. *Id.*

The facts of this case are vastly different. Smith requested to look at the jury charge prior to voir dire, and the trial court invited him to suggest changes to make it clearer or better. Unlike Osborne, Smith chose not to do so. Smith's refusal to provide any objection to the charge amounts to an acceptance of the charge. In fact, Smith's actions in requesting the charge and then failing to respond to the judge's request for objections is precisely the type of sandbagging of which Smith accuses the State. Petition, p. 27.

Moreover, this Court further held in *Osborne* that Osborne's second due process complaint (regarding the failure to charge scienter) was *not* preserved by Osborne's pretrial objection to the statute. *Id.* at 123. This Court held that the charge violated state law for failing to include scienter and that the State had an important interest in ensuring that "counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Id.* Thus, Osborne's failure to object specifically to the charge forfeited his complaint, despite his timely challenge to the statute. Smith's reliance on *Osborne* is misplaced: *Osborne* indicates that Smith's failure to object to the charge at trial would, in fact, forfeit his complaint in federal court despite his timely objection to the statute.

Of course, the CCA here did not need to assess the sufficiency of the objection for purposes of procedural default. The CCA needed to decide only whether Smith timely objected to the charge. Clearly, he did not.

The CCA's harmless error analysis was properly conducted under a more lenient standard than federal law would provide. If Smith now prefers a federal harm analysis, his complaint should be made in federal habeas court.

CONCLUSION

For the foregoing reasons, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

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