

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Petitioner,

v.

BILLY RAY NELSON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

1. The court of appeals relied upon language from Justice O'Connor's *dissent* in *Johnson v. Texas*, 509 U.S. 350 (1993), to hold that *Penry v. Lynaugh*, 492 U.S. 302 (1989), required a jury to give *full* consideration and *full* effect to mitigating evidence in a death-penalty trial as of 1994. Yet majority opinions of this Court in *Johnson* and *Graham v. Collins*, 506 U.S. 461 (1993), held exactly the opposite: the Eighth Amendment requires only that a jury be able to give effect to mitigating evidence *in some manner*, not in *every conceivable manner*. Did the lower court err when it held that, by failing to divine a full-effect rule from the majority holdings of this Court as of 1994, the state court unreasonably applied clearly established federal law in adjudicating Respondent Nelson's *Penry* claim?

2. The court below also held that *Penry* error is not subject to a harmless-error analysis, not because it is structural in nature, but because it involves "moral judgment." Did the court of appeals erroneously decide this issue of first impression when it invented a new exception to harmless-error review, especially where the question is currently pending before this Court in *Smith v. Texas*, No. 05-11304?

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OPINION BELOW

The court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ on December 11, 2006. PA:1-47 (*Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*)).¹

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before March 12, 2007. SUP. CT. R. 13.3 (West 2007). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

I. Facts of the Crime

Nelson's guilt is not disputed. The evidence supporting the underlying capital murder conviction was well summarized in a prior opinion:

Nelson murdered Charla M. Wheat and attempted to murder Wheat's roommate Carol Maynard in their home on the night of February 23, 1991. Mrs. Maynard, whose husband was in the armed forces in Saudi Arabia during Desert Storm, was 20 years

¹ "PA" refers to the appendix to the instant petition for certiorari review. "RR" refers to the reporter's record of transcribed trial proceedings. "CR" refers to the clerk's record of pleadings and documents filed in the trial court. "SHCR" refers to the clerk's record of pleadings and documents filed in the state habeas court. All references are preceded by volume number and followed by page references when necessary.

old and 5 months pregnant. Ms. Wheat was 18 years old and single. Nelson lived across the street with his common law wife. In one of his confessions which was introduced into evidence he said he was “skitzing” on cocaine and that he went over to their house in the early morning hours “to get a piece of ass.” When he arrived, Mrs. Maynard had gone to bed but Ms. Wheat was in the living room awaiting a phone call from her boyfriend. He asked to use the phone and Ms. Wheat let him in. As she was bending over to get the phone he grabbed her, pulled out a knife and cut the phone cord. She screamed and he either knocked her to the floor or stabbed her, or both. He went to the bedroom, grabbed Mrs. Maynard and walked her to the living room. He forced the women to disrobe, lie on the floor and perform oral sex on each other. Sometime before this, he said, he made Ms. Wheat lick his testicles. Then, in his confession, he said, “When I saw the girls down on the ground nude, I lost it and I started stabbing the girls.” According to Mrs. Maynard's testimony, after Nelson had stabbed them and was heading for the front door, Ms. Wheat screamed, causing him to return. Mrs. Maynard escaped additional harm by feigning death or unconsciousness. He stabbed Ms. Wheat several more times and she ultimately died from her wounds. Then Nelson went back to his house across the street, disposed of his bloody knife and clothes, took a shower and relaxed under a blanket on the couch.

Nelson v. Dretke, 442 F.3d 282, 310-11 (5th Cir. 2006) (Dennis, J., concurring).

II. Facts Relevant to Punishment

The State produced abundant evidence of Nelson's violent nature and substance abuse. Tony Spence and his ex-girlfriend, Donna Dugger, friends of Nelson's, testified that Nelson drank "quite a bit" and used cocaine and marijuana. 4 RR 589; 5 RR 616-18. Spence stated that Nelson became angry easily when he was under the influence of drugs and that on one occasion Nelson assaulted him for talking during a movie. 4 RR 592; 5 RR 623. Spence, along with Scott Simpson and Babbette Unthank, testified that Nelson also attempted to beat Simpson with a baseball bat because Unthank accused Nelson's brother of child molestation. 4 RR 594-600; 5 RR 603-669. Dugger also stated that she witnessed Nelson assault an individual in a grocery store parking lot. 5 RR 619-620.

Phillip Corbin and Elizabeth Torres, Howard County, Texas jailers, testified that while incarcerated awaiting trial, Nelson locked Corbin in a cell and then challenged him verbally and, on another occasion, evaded a bed check and hid in the hallway. 5 RR 686-690, 704-706. While Nelson claimed he was only playing a practical joke, his true intent appeared to be an escape. *Id.* at 730-731. Makeshift weapons, including wire, broken razor blades, and a piece of tin from a coke can, were found secreted in the hallway where he had been hiding. *Id.* at 718, 722-723.

In his defense, Nelson called psychiatrist John Hickman, who testified that he interviewed Nelson for six hours and a colleague performed psychological testing on Nelson. 6 RR 833-841. Dr. Hickman concluded that Nelson suffered from "borderline personality disorder" but his condition was treatable. *Id.* at 846-47. He explained that Nelson usually acted out his feelings of depression and anxiousness by drinking or using drugs. *Id.* at 845. But Dr. Hickman insisted that, if Nelson received appropriate treatment, his potential for future dangerousness would go "way, way down," if it was not "eliminated." *Id.* at 854,

875.

Nelson's father, Grady Nelson, testified Nelson's mother never accepted him because she wanted a girl, and did not take him to live with her after Nelson's parents divorced. 7 RR 902-904, 906-907. He stated that Nelson played football in high school and worked for a restaurant. *Id.* at 905. Finally, Grady Nelson claimed that Nelson did not use drugs for months before the crime, but on the morning after the murder, Nelson appeared to be "real intoxicated." *Id.* at 910.

III. Direct Appeal and Postconviction Proceedings in State Court

In December 1991, Nelson was convicted of murder during the course of an aggravated sexual assault, a capital offense, and sentenced to death based on the jury's affirmative answers to the deliberateness and future-dangerousness special issues.² CR 2, 48-55, 57-66. Thereafter, Nelson's conviction and sentence were affirmed on direct appeal by the Court of Criminal Appeals of Texas. *Nelson v. State*, 864 S.W.2d 496 (Tex. Crim. App. 1993) (partial publication); *id.*, No. 71,412 (unpublished opinion). The state court specifically rejected Nelson's Eighth Amendment claim based on *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),³ because (1) "[Nelson]'s mother's indifference to him does not rise to the level of extreme physical abuse experienced by Penry at the hands of his mother"; (2) neither drug and alcohol problems nor

² TEX. CODE CRIM. PROC. art. 37.071(b) (West 1989). Although the Texas Legislature amended the Texas capital sentencing statute to include the current mitigation special issue on September 1, 1991, it was not made retroactive to offenses committed prior to that date until September 1, 1993. TEX. CODE CRIM. PROC. art. 37.0711 (West 1993).

³ Nelson did not request a full-effect instruction at trial nor did he argue that one was required on direct appeal. 7 RR 917-18; Appellant's Brief at 10-12.

“difficulties with interpersonal relationships warrant a *Penry* instruction”; and (3) “evidence [Nelson] had a treatable borderline personality disorder is the kind of evidence that may be considered within the [future-dangerousness] issue.” *Nelson v. State*, slip op. at 7-8. This Court then denied certiorari review, and his death sentence became final on March 21, 1994. *Nelson v. Texas*, 510 U.S. 1215 (1994).

Nelson then reasserted his *Penry I* claim in state collateral proceedings. The trial court reviewed this contention and recognized that a jury must be allowed to consider and give effect to all mitigating evidence in answering the Texas special issues. SHCR 482-83 (citing *Penry I*, 492 U.S. 302; *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion); and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)). Nelson did not advance a full-effect argument in his state habeas application; indeed, he did not even suggest what mitigating evidence was beyond the jury’s reach. *Id.* at 30-31, 117-19, 480. Consequently, the trial court recommended denying relief. *Id.* at 484. The Court of Criminal Appeals then adopted the trial court’s recommendation and denied habeas corpus relief. *Ex parte Nelson*, No. 49,886-01 (Tex. Crim. App. 2001) (unpublished order). Additionally, the state court dismissed a second application — which did not involve a *Penry I* claim — as an abuse of the writ under TEX. CODE CRIM. PROC. art. 11.071, § 5(a). *Id.*, No. 49,886-02 (Tex. Crim. App. 2001).

IV. Federal Habeas Corpus Proceedings

Nelson’s federal petition for writ of habeas corpus was denied by the district court on August 23, 2002. *Nelson v. Cockrell*, No. 1:01-CV-196-C (N.D. Tex. 2002) (unpublished order). The lower court then granted a certificate of appealability (COA) in part but ultimately affirmed the denial of relief on August 12, 2003. *Id.*, 77 Fed.Appx. 209 (5th Cir. 2003) (unpublished opinion). This Court, however, granted a writ of certiorari, vacated, and remanded “for further consideration in light of *Tennard v. Dretke*, 542 U.S. 274 [] (2004).” *Nelson v.*

Dretke, 542 U.S. 934 (2004).

A. The panel opinions on remand

On remand, the court below again granted a COA and reaffirmed the denial of habeas relief as to Nelson’s *Penry I* claim on March 1, 2006. *Nelson v. Dretke*, 442 F.3d 282. However, the panel was divided in its reasoning. Chief Judge Jones authored the opinion of the court and recognized first that Nelson’s mitigating evidence was relevant within the meaning of *Tennard*. *Id.* at 285-86.

Chief Judge Jones then explained that “[t]he state court reasonably distinguished Nelson’s [troubled interpersonal relationships and indifferent treatment by his mother] from *Penry*’s evidence of severe physical abuse by his mother.” *Id.* at 286. “The state court’s decision” — that this evidence was “within the reach of the Texas punishment issues” — “is supported by longstanding precedent concerning similar — and more severe — claims of parental abuse and troubled interpersonal relationships.” *Id.* (citing *Graham v. Collins*, 506 U.S. 461, 476 (1993); *Cole v. Dretke*, 418 F.3d 494 (5th Cir. 2005) (holding troubled childhood, including alcoholic parents who deserted the defendant, alcoholic grandparents who did not want to care for the defendant upon taking custody of him, and an isolated childhood punctuated by frequent changes in caretakers could be considered within the special issues), *cert. granted sub nom. Abdul-Kabir v. Quarterman*, 127 S. Ct. 432 (2006); *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 & n.8 (5th Cir. 1998) (traumatic childhood was within the effective reach of the jury under the first special issue, deliberateness); *Drew v. Collins*, 964 F.2d 411, 420 (5th Cir. 1992) (adverse effects of troubled childhood — including testimony that parents fought repeatedly, parents divorced and abandoned petitioner when he was very young, and petitioner was raised by his grandparents — could be considered under the special issues); and *Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) (troubled childhood, including evidence that

petitioner's father abandoned him from age four to age nine, was not *Penry* evidence absent proof these experiences had a psychological effect on the petitioner)).

Chief Judge Jones also explained why the state court was not unreasonable in rejecting Nelson's *Penry I* claim based on his evidence of borderline personality disorder:

Dr. Hickman, Nelson's expert, described Nelson's personality disorder as a psychological condition that caused his moods to go up and down between being normal and being depressed, anxious, and unsure of the reasons for his mood swings. Nelson responded to this condition by consuming alcohol and/or drugs. Significantly, Dr. Hickman testified that Nelson's disorder was treatable with medication and psychotherapy. This court's decisions undermine Nelson's claim that the jury was unable to give mitigating effect to this evidence. In *Coble v. Dretke*, 417 F.3d 508 (5th Cir. 2005), the court reiterated that "mitigating evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission." *Id.* at 524 (citing *Lucas* [], 132 F.3d [at] 1082-83 and *Robison v. Johnson*, 151 F.3d 256, 266 (5th Cir. 1998)). *Coble* also distinguished a condition involving a treatable mental disorder from this court's *Bigby*[⁴] decision, 402 F.3d at 571, in which medication could not control the defendant's schizophrenic behavior and thinking. Nelson's treatable disorder is thus distinct from one that mandates relief under

⁴ *Bigby v. Dretke*, 402 F.3d 551 (5th Cir.), *cert. denied*, 126 S. Ct. 239 (2005).

Penry I.

* * *

Based on the AEDPA standard and the nature of Nelson's proffered evidence, we cannot say that the Court of Criminal Appeals unreasonably applied clearly established federal law in rejecting Nelson's *Penry* claim. Nelson points to no caselaw that the state courts failed to acknowledge, nor to any Supreme Court decisions that the courts unreasonably applied. ... The Court of Criminal Appeals never relied on the now-defunct "constitutional relevance" test or its component parts, nor has our review of the complete record revealed any attempt by that court to place an elevated burden on Nelson for his claims. Equally important, all of Nelson's proffered mitigating evidence could be considered and given effect by the jury at sentencing within the context of the Texas punishment issues.

Nelson v. Dretke, 442 F.3d at 287-88 (footnotes omitted).

Judge Dennis authored a concurring opinion in which he reasoned that the state court "applied [*Penry I*] unreasonably by ruling that the special issues ... allowed the jury to fully consider and fully give effect to all of Nelson's relevant mitigating evidence." *Nelson v. Dretke*, 442 F.3d at 309. However, Judge Dennis agreed with Chief Judge Jones's ultimate opinion that habeas corpus relief was inappropriate because,

Considering the merciless depravity of Nelson's crimes and the lack of poignancy and excusatory effect of his mitigation evidence, I have considerable doubt that the State's failure to enable and allow his jury to give full consideration and full effect to his relevant mitigating evidence had

a “substantial and injurious effect” on the verdict.

Id. at 311 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Judge Stewart concurred in the judgment only. *Id.* at 283 n.1.

B. The *en banc* opinions

But on March 13, 2006, the court of appeals *sua sponte* ordered rehearing *en banc*. *Nelson v. Dretke*, 442 F.3d 912 (5th Cir. 2006). After rehearing, a majority of nine circuit judges — including two of the judges from the original panel — voted to reverse the district court’s judgment and remand with instructions to grant Nelson a writ of habeas corpus. The court below first articulated that clearly established Supreme Court law — at the time Nelson’s death sentence became final in 1994 — required that a capital-sentencing jury not be precluded from “fully considering and giving full effect to all of a defendant’s mitigating evidence.” PA:7-8, 25-26 (citing *Smith v. Texas*, 543 U.S. 37, 38 (2004) (*per curiam*); *Tennard*, 542 U.S. at 288-89; and *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*)).

Despite the fact these cases were decided many years after the state court first adjudicated Nelson’s *Penry I* claim and all but one issued after state postconviction proceedings, the court of appeals explained that “[a]lthough the Court did not expressly use the words ‘full effect’ in *Penry I*, its reasoning makes clear that “full effect” is what it meant.” PA:14-15 (citing *Penry I*, 492 U.S. at 318-19, 323 & 355 (Scalia, J., dissenting)). The majority also concluded that *Tennard*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett* endorsed the full-effect standard despite the fact those words do not appear therein. *Id.* at 21 n.5, 26. Moreover, the court below held that the intervening opinions in *Graham* and *Johnson v. Texas*, 509 U.S. 350 (1993), stood only “for the proposition that youth, which is different in kind and in mitigating effect from Penry’s evidence of mental retardation and abusive childhood, can be fully considered and given effect through the special-issues sentencing scheme.” PA:16-18.

The lower court then held that the state court's denial of relief was unreasonable because the deliberateness and future-dangerousness special issues only allowed the jury to "give *partial* effect" to Nelson's mitigating evidence of borderline personality disorder and maternal abandonment.⁵ PA:30-34 (emphasis in original). With regard to future dangerousness, the court reasoned:

the jury might have concluded that Nelson could be treated, and therefore, it could have given *some* effect to this mitigating evidence within the context of the future-dangerousness special issue. But if the jury concluded that the condition was not treatable or that treatment was improbable, as the State argued, it would necessarily have to answer "yes" to the special issue. Just as in *Penry I* and *Penry II*, it is likely that a juror considering Nelson's evidence of borderline personality disorder would have felt that he could give the evidence only one possible effect via the future-dangerousness issue: Such a juror would have seen the evidence as only aggravating, because Nelson's borderline personality disorder and the difficulty of treating it increase the likelihood that Nelson will act out violently again.

Id. at 33 (emphasis in original). Additionally, the court rejected the idea that a treatable personality disorder could be compared to a transient condition like youth. *Id.* at 34-35. According to the majority, youth is "*sui generis*" because it is "certain to pass," not just likely to "diminish over time." *Id.* at 34-35 & n.6 (citing *Roper v. Simmons*, 453 U.S. 551, 569 (2005); *Johnson*, 509 U.S.

⁵ The court below did not address Nelson's mitigating evidence of troubled interpersonal relationships or drug abuse. PA:28-34. Presumably, this evidence was "unlikely to have any tendency to mitigate [Nelson]'s culpability." *Id.* at 23 (quoting *Tennard*, 542 U.S. at 287).

at 367-68; and *Eddings*, 455 U.S. at 115).

Finally, the court of appeals held that *Penry* error is not subject to harmless-error analysis under *Brecht* because (1) this Court “has *never* applied a harmless-error analysis to a *Penry* claim,” and (2) the “reasoned moral judgment” required by *Eddings* and *Penry I* “differs from those fact-bound judgments ... at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate.” PA:44-47 & n.8 (emphasis in original).

Remarkably, however, the ninth and deciding vote for this holding was provided by Judge Dennis, who *sua sponte* injected the issue of harmless error into Nelson’s case in the first place. *Nelson v. Dretke*, 442 F.3d at 311 (Dennis, J., concurring); *see also Cole v. Dretke*, 443 F.3d 441, 449 (5th Cir. 2006) (suggesting that the *Brecht* harmless-error test applies to *Penry* error) (Dennis, J., dissenting from denial of the motion for rehearing *en banc*); *Tennard v. Dretke*, 442 F.3d 240, 257 (5th Cir. 2006) (same) (Dennis, J., concurring) (opinion on remand). Judge Dennis also inexplicably reversed course and found that “[t]here can be no question that Nelson’s mitigating evidence ... implicates his deathworthiness and his moral culpability,” despite his prior opinion that “the lack of poignancy and excusatory effect of [Nelson’s] mitigation evidence” justified the denial of relief. *Cf.* PA:72-73 and *Nelson v. Dretke*, 442 F.3d at 311 (Dennis, J., concurring).

Chief Judge Jones and six other circuit judges dissented in four separate opinions.⁶ Chief Judge Jones principally objected that “[t]he majority opinion grants habeas relief to Nelson based

⁶ Judge Smith “enthusiastically join[ed]” these dissents. PA:107. His separate dissenting opinion does not address the merits of the case, but rather “highlight[s] the embarrassing procedural tangle” among *Penry* cases currently pending in the court of appeals and the Supreme Court. *Id.* As a result, it will not be discussed further.

on an adjective”: “full” as opposed to “some” effect. PA:87. Noting that neither *Eddings* nor *Lockett* prevent a state from “structuring or giving shape to the jury’s consideration of ... mitigating factors,” and the Court had rejected the notion that any catch-all mitigation instruction was constitutionally required, Chief Judge Jones opined that “it is clear that the Texas special issues ought to be constitutional in the vast majority of cases.” *Id.* at 93 (quoting *Franklin*, 487 U.S. at 179). Indeed, “[t]he fact that the defendant’s evidence might have ‘some arguable relevance’ beyond the special issues” did not invalidate them. *Id.* at 94 (quoting *Graham*, 506 U.S. at 475-76). This is 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 Texas special issues.” *Id.* (quoting *Graham*, 506 U.S. at 476). Moreover, in *Johnson*, the Court held “there is no ... constitutional requirement of unfettered sentencing discretion in the jury.” *Id.* at 95 (quoting *Johnson*, 509 U.S. at 362). In both cases, this some-effect standard prevailed over the full-effect notion urged in “spirited dissents.” *Id.* at 96-97 & n.11.

Thus, as Chief Judge Jones explained, “the ‘clearly established law’ as of 1994 is not, as the majority argue, the *Penry I* ‘full effect’ test, but instead consists of *Penry I* together with *Graham*, *Johnson*, *Franklin*, and *Jurek* [*v. Texas*, 428 U.S. 262 (1976)].” PA:97. “[T]he key under *Penry I* is that the jury be able to ‘consider and *give effect* to [a defendant’s mitigation evidence] in imposing sentence.” *Id.* at 100 (quoting *Smith*, 543 U.S. at 46) (emphasis in *Smith*).

“Giving effect” to mitigating evidence is not the same as allowing a jury to give “full effect.” The latter formulation, in effect, rejects a state’s ability to focus the jury’s consideration of mitigating evidence. Here lies the crux of our difference with today’s majority opinion. Despite its efforts to turn narrow procedural decisions and imprecise

language into a constitutional mandate of “full effect,” the Supreme Court’s case law will not support that conclusion. ... Sadly, for the State of Texas, for certainty and *stare decisis*, and for defendants who deserve to know their fate before the last minute, we seem no further along in understanding the Court’s pronouncements today than we were fifteen years ago when we reheard *Graham en banc*.

Id. at 101 (citing *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (*en banc*)).

Judge Clement dissented separately to discuss *Brown v. Payton*, 544 U.S. 133 (2005), which “supports the proposition that, under AEDPA, federal courts sitting in habeas review of state convictions must defer to reasonable state court determinations regarding the constitutionality of jury instructions.” PA:117. As Judge Clement explained,

Where, as here, there is no directly applicable Supreme Court precedent and the question is so close, a federal court cannot conclude that the state court unreasonably applied Supreme Court precedent. *See Payton*, 544 U.S. at 140 (noting that the Ninth Circuit “cited no precedent of this Court to support” its position that the state court acted contrary to or unreasonably applied Supreme Court precedent). *See also Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) [*per curiam*] (“A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.”).

Though the majority opinion purports to apply AEDPA and not merely disagree with the state habeas court decision, the analysis and conclusion of the majority opinion clearly show otherwise.

The question is not whether there is a reasonable likelihood that the jury was precluded from giving consideration and effect to Nelson's mitigating evidence; rather, the question is whether it was *unreasonable* for the state habeas court to hold that there was *not* a reasonable likelihood that the jury was precluded from giving consideration and effect to the mitigating evidence. This latter question sets a substantially higher bar to relief.

Id. at 117 & n.6 (emphasis in original, citations omitted).

Additionally, Judge Owen authored a dissenting opinion to reemphasize "that, given the state of the law when Nelson's conviction and sentence became final in 1994, the Texas court's application of United States Supreme Court precedent was not 'objectively unreasonable.'" PA:119 (citing *Williams v. Taylor*, 529 U.S. 362, 409 (2000); and *Payton*, 544 U.S. at 147). "It was not objectively unreasonable to conclude that Nelson's mitigating evidence was distinguishable from the mental retardation and low intelligence at issue in *Penry I*, *Tennard v. Dretke*, and *Smith v. Texas*, and was instead more similar to the transient qualities of youth at issue in *Johnson v. Texas* and *Graham v. Collins*. *Id.* at 119-20 (footnotes omitted). "Even if a court might conclude, as the majority in this case does, that the Texas court incorrectly applied federal law, that is not a basis for granting habeas relief." *Id.* at 128. Finally, Judge Owen noted that the "full effect" and "full consideration" language in *Penry II*, appearing in a "see also" citation to a dissenting opinion, "cannot be taken as a retraction of one of *Johnson's* core holdings." *Id.* at 132-33. This is because the Court immediately followed its reference to Justice O'Connor's *Johnson* dissent by holding *Penry I* "requir[es] only 'a vehicle for expressing [a] reasoned moral response to [mitigating] evidence.'" *Id.* at 133 (emphasis in original, internal quotations omitted). This is wholly consistent with *Johnson's* reasoning: "Although Texas might have provided other vehicles for consideration of petitioner's [mitigating evidence], no

additional instruction beyond that given as to future dangerousness was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.” *Id.* (quoting *Johnson*, 509 U.S. at 370).

REASONS FOR GRANTING THE WRIT

Respondent Nelson’s death sentence became final in 1994. In 1993, this Court rejected *Penry*-based claims that the former Texas special issues were constitutionally inadequate for consideration of mitigating evidence of youth and troubled upbringing. The Court explained that, because “virtually *any* mitigating evidence” can be characterized as relevant to culpability outside the scope of the Texas special issues, *Graham*, 506 U.S. at 476 (emphasis in original), the Eighth Amendment requires only “that a jury be able to consider *in some manner* all of a defendant’s relevant mitigating evidence,” not “that a jury be able 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). The Court specifically rejected the converse full-effect argument advanced by Justices O’Connor and Souter in dissent. *Id.* at 375-76, 379-87; *Graham*, 506 U.S. at 515-17 & n.9.

But in 2001 — quoting Justice O’Connor’s *dissent* in *Johnson* — the Court stated for the first time that “a sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances” in assessing capital punishment. *Penry II*, 532 U.S. at 797; *see also Smith*, 543 U.S. at 38, 46. The court below erroneously held that this 2001 shift in terminology — from *some* to *full* — implicitly occurred prior to 1994 and that the state court unreasonably applied *Penry I* to Nelson’s case by not recognizing it. This holding is a clear violation of the deferential standard of 28 U.S.C. § 2254(d)(1), which insulates state court decisions that correctly identify and reasonably apply “the holdings, as opposed to the *dicta*, of this Court’s decisions as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. Indeed, it is clear the court of appeals substituted its

independent judgment concerning the meaning of *Penry I* when it held that, although this Court did not expressly *use* the words “full effect” until 2001, full effect is what it *meant*. PA:14-15. Such a subjective inference is exactly the opposite of what this Court mandated in *Williams*. Even if the court below believed the state court incorrectly interpreted *Penry I* and its progeny, § 2254(d)(1) precludes habeas corpus relief because the state court’s reading of these ambiguous and — at times — contradictory opinions was not *objectively unreasonable*.

Additionally, the lower court announced a novel exception to the general presumption that constitutional error — and jury-charge error specifically — is subject to harmless-error review. Importantly, the court below did not categorize *Penry* error as structural error. Instead, the court of appeals held that “moral judgments” such as those involved in a jury’s assessment of punishment fall outside the ambit of harmless error. The court so held despite the fact that Nelson was represented by counsel, his sentence was rendered by an impartial tribunal, and the grievousness of any error during this process may be easily assessed by weighing the aggravating and mitigating evidence in the record. This decision is in direct contradiction to a number of Supreme Court cases applying harmless-error review to sentencing errors, including capital-sentencing errors. Finally, the lower court’s decision preempts this Court’s opinion in *Smith v. Texas*, No. 05-11304, concerning precisely the same issue.

I. At the Time Nelson’s Death Sentence Became Final, Clearly Established Supreme Court Law Required Only That a Jury Be Able to Consider and Give Effect to Mitigating Evidence *in Some Manner* Within the Scope of the Texas Special Issues.

In *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976), a plurality of the Court explained that a capital-sentencing authority must not be prevented from considering mitigating circumstances. There, the Court found North Carolina’s

mandatory death sentence statute “accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense” in violation of the Eighth Amendment. *Id.* at 304-05. The same plurality found that the former Texas special issues — deliberateness and future dangerousness — “allow consideration of particularized mitigating factors,” *e.g.*, a defendant’s criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse. *Jurek*, 428 U.S. at 272-73, 276.

At the root of these cases are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury’s consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded *as a matter of law* from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings*, 455 U.S. at 111-12; *Lockett*, 438 U.S. at 604 (plurality opinion); *Woodson*, 428 U.S. at 303-04. None of these opinions utilized or implied the full-effect notion endorsed by the majority below. Indeed, the lower court did not pretend otherwise in its discussion of these precedents. *Cf.* PA:8-11.

In *Franklin*, the Court first applied *Eddings* to the Texas special issues and, in so doing, explicitly recognized that the Texas special issues were constitutionally sufficient even where the mitigating evidence had relevance to culpability apart from the concerns embodied in the deliberateness and future-dangerousness questions. 487 U.S. at 177-82. The Court specifically rejected the notion that the forward-looking future-dangerousness inquiry was inadequate for the consideration of backward-looking character evidence. *Id.* at 177-78; *cf. id.* at 189-90 (arguing that good-

character evidence was *not* within the scope of the future-dangerousness issue because it might have relevance to past culpability rather than future conduct) (Stevens, J., dissenting). Commonsense dictates that the individualized-determination doctrine of *Lockett* and *Eddings* yields to the requirement that a capital-sentencing jury receive guidance in its decision-making at some point. Otherwise, *Jurek* is without meaning. As the Court explained:

Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 487 U.S. at 179 (citation omitted); *see also Buchanan v. Angelone*, 522 U.S. 269, 276-77 (1998) (recognizing it is not constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way); *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983) (same).

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was “less able ... to control his impulses or to evaluate the consequences of his conduct,” and unable to “learn from his mistakes,” was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's “two-edged” evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at

315-19. Moreover, as the lower court recognized, *Penry I* “did not expressly use the words ‘full effect.’” PA:14. For more than a decade *Penry I* would be viewed as the narrow exception to *Jurek*.

During its next term, the Court acknowledged the “strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.” *Boyde v. California*, 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* Indeed, “[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.” *Id.* at 380-81. As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded from considering relevant mitigating evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a “reasonable likelihood” that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*; *see also Saffle v. Parks*, 494 U.S. 484, 490-92 (1990) (no Eighth Amendment error where there is no indication that the jury was “altogether prevented” from giving some effect to the evidence).

The Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham*, the Court declined to “read *Penry I* [I] to effect a sea change in the Court’s view of the constitutionality of the ... Texas death penalty statute.” 506 U.S. at 474. As in *Franklin*, the Court found that future dangerousness was a constitutionally adequate vehicle for the consideration of his mitigating evidence of youth, troubled upbringing, and good character. *Graham*, 506 U.S. at 475. This was because the “mitigating significance” of Graham’s evidence did not *compel* affirmative answers to the special issues as did Penry’s evidence, but instead suggested that Graham would *not* be a future danger.

Id. at 475-76.

Thus, the possibility that mitigating evidence might have “*some* arguable relevance beyond the special issues” was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original). Indeed, “virtually *any* mitigating evidence” can be characterized as relevant to culpability but outside the scope of the Texas special issues. *Id.* (emphasis in original). In his dissent, Justice Souter ably demonstrated how to do so. *Id.* at 518-21 (suggesting youth and difficult upbringing, *i.e.*, “his mother’s mental illness and repeated hospitalization, and his shifting custody to one family relation or another” had mitigating relevance outside or aggravating relevance within the future-dangerousness question). But if this idea was followed to its logical conclusion, the Court noted, *Penry I* would have swallowed *Jurek* completely. *Id.* at 476-77. Such reasoning is inconsistent with *Jurek* and *Franklin*.

In *Johnson*, the Court again rejected the notion that a jury could ever view youth “as outside its effective reach in answering the [future-dangerousness] special issue.” 509 U.S. at 368. This is so even if youth could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Again, the Court specifically rejected the notion that mitigating evidence must be allowed relevance in every way imaginable during sentencing. The Court explained that general “personal culpability” is, by its nature, intertwined with the notion of future dangerousness. *Id.* at 369-70. This is because “a Texas capital jury deliberating over the Special Issues is *aware of the consequences* of its answers,” and is understood to “exercise a range of judgment and discretion” and basic “commonsense” in answering those issues. *Id.* at 370 (quoting *Adams v. Texas*, 448 U.S. 38, 46 (1980), and citing *Boyde*, 494 U.S. at 381, and *Franklin*, 487 U.S. at 182 n.12) (emphasis added); *cf. Blystone v. Pennsylvania*, 494 U.S. 299, 322 (1990) (“by focusing on the

deliberateness of the defendant's actions and his future dangerousness, the [Texas capital sentencing] questions compel the jury to make a *moral judgment* about the severity of the crime and the defendant's *culpability*") (Brennan, J., dissenting) (emphasis added).

Further, as the Court explained, any contrary understanding would necessarily overrule *Jurek* and "entail an alteration of the rule of *Lockett* and *Eddings*." *Johnson*, 509 U.S. at 372. "Instead of requiring that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence, the 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). This would constitutionally require the jury "be instructed in a manner that leaves it free to depart from the special issues in every case" and effectively deprive the states of the prerogative "to structure the consideration of mitigating evidence," *id.* at 373, overruling *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), as well. The Court specifically rejected the converse "full effect" argument advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87.

In 1994, when Nelson's death sentence became final, the Court had never endorsed a full-effect standard. In fact, the Court had established a some-effect rule in *Franklin*, *Graham*, and *Johnson*. Thus, a state court ascertaining clearly-established federal law would have understood the following. Pursuant to *Jurek*, the former Texas special issues were facially constitutional. Yet *Lockett* and *Eddings* require that a jury not be prevented from making an individualized sentencing decision based on the available mitigating evidence. *Penry I* held that diminished capacity evidence of a defendant's inability to learn from his mistakes might have only aggravating relevance to future dangerousness and, thereby, lead to a violation of the Eighth Amendment rule of *Eddings*. But the Texas special issues remained constitutionally sufficient so long as the defendant's evidence could find *some* mitigating relevance to culpability

within the special issues, regardless of whether it might have additional mitigating relevance outside those issues. There existed a presumption of constitutionality under most circumstances, even where the defendant could characterize the mitigating evidence as beyond the effective reach of the jury. This is because a Texas jury was presumed to understand the consequences of its actions and the moral judgment required.

The net result was that few types of mitigating evidence would have only aggravating relevance within the special issues and lead to *Penry I* error.

II. *Penry II* Did Not Alter the Court’s *Jurek/Penry I/Johnson* Jurisprudence, Nor Did it Require Reasonable State-court Jurists to Change Their Perceptions of *Penry I*.

In 2001, the Court revisited *Penry I* to decide whether a supplemental instruction given during Penry’s retrial — an instruction not at issue here — “complied with [the Court’s] mandate in *Penry I*.” *Penry II*, 532 U.S. at 786. The Court first reiterated its holding in *Penry I* — that the mitigating evidence presented at Penry’s 1980 trial was “relevant only as an *aggravating* factor” to the special issues — and explained that Penry was retried in 1990, where “the defense again put on extensive evidence regarding Penry’s mental impairments and childhood abuse.” *Id.* at 787-88. The Court then considered whether the Texas court had “unreasonably applied” *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized “two possible ways” to interpret the supplemental instruction. Either it had no effect at all or it rendered the jury charge “internally contradictory” because the jury was instructed to “change one or more truthful ‘yes’ answers to an untruthful ‘no’ answer in order to avoid a death sentence.” *Penry II*, 532 U.S. at 798-799. But “jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a ‘true

verdict,” creating “a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry’s mental retardation and childhood abuse.” *Id.*

Although the “full effect” language of Justice O’Connor’s *Johnson* dissent surfaced in a “*see also*” citation in the *Penry II* majority opinion, 532 U.S. at 797, it had no impact on the Court’s holding because the *Penry I* Court had already reached the conclusion that Penry’s mitigating evidence could not be given sufficient effect within the special issues. As such, it was unnecessary to the result and, thus, *dicta*. There is certainly no possibility a reasonable state court jurist in 2001 would have assumed the *Penry II* majority turned the tables on the Court’s prior opinions in *Graham* and *Johnson*, in which the Court specifically declined to adopt such a standard.

Even though the 2004 *Smith* opinion cited to the *Penry II* full-effect language twice, it also explained that “[i]n *Penry II*, we held that ‘the key under *Penry I* is that the jury be able to consider and *give effect* to [a defendant’s mitigation] evidence in imposing sentence.’” *Smith*, 543 U.S. at 38, 46 (quoting *Penry II*, 532 U.S. at 797) (emphasis in original). Because “full effect” and “give effect” are not logically equivalent, this recitation in itself conclusively establishes that full effect was *not* the holding of *Penry II*, although it arguably may have been the holding of *Smith*. At a minimum, reasonable minds could differ over this distinction. Neither did the *Tennard* Court adopt or endorse full effect. Indeed, the Court did not even mention those words or reach a judgment concerning the ultimate Eighth Amendment claim. In any event, both *Smith* and *Tennard* are inapplicable to Nelson’s case because they were decided three years after the last state court decision and ten years after his death sentence became final. And the state court did not apply the constitutional-relevance test rejected in those opinions.

Finally, although this Court approved of the “clearly

drafted catchall instruction on mitigating evidence” that was adopted by Texas in 1991, it is important to note that the *Penry II* Court avoided holding any such instruction was *necessary*. *Penry II*, 532 U.S. at 803 (citing TEX. CODE CRIM. PROC. art. 37.071(2)(e)(1) (West 1991)); *Blystone*, 494 U.S. at 305. Such a decision would have overruled *Jurek*, *Franklin*, *Graham*, and *Johnson*, which recognized that states are free to structure capital-sentencing schemes as they see fit, within certain reasonable parameters. *See Franklin*, 487 U.S. at 179 (“[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required”). The very idea that a specific instruction is *not* constitutionally necessary implies that most kinds of mitigating evidence do not require special accommodation under *Penry I* and that full effect was not clearly established as of the time of *Penry II*.

III. The Lower Court’s Holding Misapplies the Deferential Standard of 28 U.S.C. § 2254(d)(1) and Errs in Substituting the Independent Judgment of Federal Judges — Based on Hindsight — Rather than Deferring to a Reasonable State Court Decision Premised on a Reasonable Reading of Then Current Supreme Court Law.

In cases like this, § 2254(d)(1) proscribes habeas relief except where a state court unreasonably applies clearly established federal law, as determined by the Supreme Court of the United States. A state court unreasonably applies federal law if it recognizes the governing precedent but unreasonably applies it to the facts of a particular case. *Williams*, 529 U.S. at 407-09. But this inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Id.* at 409-11. Rather, federal habeas relief is only merited where the state court decision is both

incorrect *and* objectively unreasonable, “whether or not [a federal court] would reach the same conclusion.” *Id.* at 411; *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). Clearly established law “refers to the holdings, as opposed to the *dicta*, of this Court’s decisions as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. However, applying general rules like that of *Eddings* to a specific case “can demand a substantial element of judgment” and, “[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

In Nelson’s case, the state court correctly identified *Penry I* as the starting point on both occasions it considered the instant claim. *Nelson v. State*, slip op. at 7-8; SHCR 482-83. The state court then compared Nelson’s evidence of maternal abandonment and borderline personality disorder to Penry’s and attempted to answer the question at hand: whether the jury was able to consider and give effect to Nelson’s mitigating evidence in answering the Texas special issues. *Id.* However, the fact that the state court was not able to infer a full-effect rule from the available Supreme Court case law should come as no surprise in light of the discussion *supra*. A some-effect rule was an equally reasonable — if not *more* reasonable — reading of this Court’s *Franklin*, *Penry I*, *Graham*, and *Johnson* decisions as of 1994. That seven of sixteen circuit judges below (and two of three original panel members) interpreted these same decisions to establish a some-effect standard rather than a full-effect one is indicative of the *reasonableness* of that position, even if it is ultimately deemed incorrect.

Moreover, a reasonable state court jurist would not have read the some-effect language of *Graham* and *Johnson* as restricted to the issue of youth in 1994, as did the lower court. *Cf.* PA:16-18, 34-35 & n.6. The pronouncements of those cases are much broader than that. *See, e.g., Johnson*, 509 U.S. at 372 (“In addition to overruling *Jurek*, accepting petitioner’s arguments would entail an alteration of the rule of *Lockett* and *Eddings*.”

Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the 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"); *Graham*, 506 U.S. 476 ("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 Texas special issues"). And *Graham* went well beyond mere youth in its analysis of the *Penry I* issue. See, e.g., *Graham*, 506 U.S. at 518-21 (discussing Eighth Amendment significance of Graham's evidence of his difficult upbringing, *i.e.*, "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another") (Souter, J., dissenting).

Thus, a bare majority's decision in the court of appeals to reinterpret *Penry I*, ignore the holdings *Graham* and *Johnson* in favor of the logic of *dissenting* opinions, and vitiate reasonable state court attempts to resolve this difficult issue is the quintessential violation of 28 U.S.C. § 2254(d)(1). As Judge Clement noted in her dissent, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." PA:117 (quoting *Esparza*, 540 U.S. at 17). This is especially true where the state court applied the extremely broad Eighth Amendment rule of *Eddings* and *Penry I* to facts unique to the instant case. In such circumstances, the state court's judgment is entitled to maximum leeway under § 2254(d)(1). *Alvarado*, 541 U.S. at 664. As a result, the Court should grant certiorari to reaffirm the deference owed to reasonable state court decisions in federal habeas proceedings.

IV. The Lower Court Erroneously Interpreted this Court’s Decisions When it Held That *Penry* Error Is Not Subject to Harmless-error Analysis, Especially When the Issue Is Currently Pending Before the Court.

The court of appeals misapplied this Court’s precedents when it held that *Penry* error is distinguishable from other jury-charge errors which have been held to be subject to harmless-error review. PA:44-47. *Penry* error is *not* structural error, and the court below appears to concede this point because it does not hold otherwise. PA:45-46; *but see* PA:77-86 (opining that *Penry* error *is* structural) (Dennis J., concurring). Rather, *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.” *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). This 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, 2551-53 (2006) (failure to submit sentencing factor to jury); *Esparza*, 540 U.S. at 16 (instruction omitted an element of offense); *Neder*, 527 U.S. at 8-9 (instruction omitted an element of offense); *Calderon v. Coleman*, 525 U.S. 141, 146-47 (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

contained wrong constitutional standard); *Clark*, 478 U.S. at 579-80 (instruction improperly shifted burden of proof on element of crime).

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." *Fulminante*, 499 U.S. at 309-10. 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 (internal quotations omitted). 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 the 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.

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. *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”). In contrast, the Court has made no such statements or even suggestions with respect to *Penry* error despite its numerous opportunities to do so. For good reason: because *Penry* error, like

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

However, the lower court appears to have carved a new exception out of whole cloth: “moral judgments” are not subject to harmless-error review. PA:46-47 & n.8. This conclusion is not supported by Supreme Court precedent. Indeed, there is no question Nelson had effective counsel and was tried by an impartial adjudicator. At a minimum, therefore, the court of appeals erred by not indulging “a strong presumption” that any error might be harmless. *Neder*, 527 U.S. at 8. The court below does not even mention such a presumption. Moral judgment or not, this is clearly not the kind of error that involves difficult inquiries about the nature of the trial record. Rather, as Judge Dennis explained in his original panel opinion,

Considering the merciless depravity of Nelson’s crimes and the lack of poignancy and excusatory effect of his mitigation evidence, I have considerable doubt that the State’s failure to enable and allow his jury to give full consideration and full effect to his relevant mitigating evidence had a “substantial and injurious effect” on the verdict.

Nelson v. Dretke, 442 F.3d at 311 (quoting *Brecht*, 507 U.S. at 637).

Finally, the applicability of harmless-error review is directly at issue in *Smith v. Texas*, No. 05-11304, and is currently pending before the Court. Should this Court decide that *Smith*, and not the instant case, is the more appropriate vehicle to address the harmlessness of *Penry* error, the Court should grant certiorari, vacate the lower court’s judgment, and remand for further proceedings consistent with *Smith*.

CONCLUSION

For the foregoing reasons, this Court should grant the Director’s petition for writ of certiorari.

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