No. 06-1254

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES, continued

Cases **Page**

TABLE OF AUTHORITIES, continued

Cases **Page**

Statutes

TABLE OF AUTHORITIES, continued

Miscellaneous **Page**

In his petition for certiorari review, Petitioner Nathaniel Quarterman[1] questions whether the court of appeals erroneously decided that *Penry I*[2] error is not subject to a *Brecht*[3] harmless-error analysis. Thereafter, in *Smith v. Texas,* Justice Souter opined that "[i]n some later case, we may be required to consider whether harmless error review is ever appropriate in a case with [*Penry*] error." 127 S. Ct. 1686, 1699 (2007) (Souter, J., concurring). This is that case. Contrary to Nelson's arguments in response, BIO:8-9, 15-24, the court below directly decided the issue of harmless error in its majority opinion and did so after holding the Director had not waived it as a defense. Thus, the application of harmless-error review to the instant *Penry I* claim is ripe for consideration by this Court, and certiorari should be granted.

The Director also challenges the lower court's decision to invent and apply a "full-effect" standard to *Penry I* claims adjudicated under 28 U.S.C. § 2254(d)(1) despite the fact that no such language appears in "the holdings, as opposed to the *dicta,* of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412 (2000). Nelson counters that the holding of the court of appeals — *Penry I* requires that a capital-sentencing jury not be precluded from "fully considering and giving full effect to all of the defendant's mitigating evidence," PA:7-8 — is identical to this Court's recent holdings in *Abdul-Kabir v. Quarterman* and *Brewer v.*

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[1] Quarterman will be referred to as "the Director" herein. "PA" refers to the appendix to the Director's petition for certiorari review. "BIO" refers to the brief in opposition to certiorari review filed by Respondent Billy Ray Nelson. Both references are followed by page numbers where necessary.

[2] *Penry v. Lynaugh,* 492 U.S. 302 (1989).

[3] *Brecht v. Abrahamson,* 507 U.S. 619 (1993).

Quarterman, i.e., juries must be able to give "meaningful" consideration and effect to mitigating evidence. 127 S. Ct. 1654, 1664, 1673 (2007); 127 S. Ct. 1706, 1710 (2007); BIO:8, 9-15. Nelson is wrong. The two standards are not synonymous, and "full effect" does not represent clearly established law for AEDPA purposes. At a minimum, this Court should grant certiorari, vacate the lower court's opinion, and remand for further consideration in light of *Abdul-Kabir* and *Brewer.*

I. The Director's Harmless-error Argument Is Properly Presented for Certiorari Review and Is Not Waived.

Initially, Nelson perpetuates a fiction throughout his brief — that the lower court did not produce a binding opinion on the issue of harmless error — based on the most obvious of errors. Nelson counts seventeen judges where there were only sixteen and eight dissenting judges where there were only seven.[4] BIO:8, 16-17 & n.11. This arithmetic error leads him to conclude that the eight-judge opinion of the court on the issue of harmless error was not a controlling opinion because Judge Dennis's concurring vote was necessary to break an illusory eight-to-eight deadlock. As a result, Nelson suggests that the lower court's holding — refusing to find the Director waived harmless error and that harmless error does not apply — is merely *dicta* and is not subject to certiorari review. BIO:17. But the record is clear. Judge Stewart's opinion *is* the majority opinion of the court because it received more votes

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[4] As the lower court's opinion reflects, *sixteen* judges participated in *en banc* review: Chief Judge Jones and Circuit Judges King, Jolly, Higginbotham, Davis, Smith, Wiener, Barksdale, Garza, Demoss, Benavides, Stewart, Dennis, Clement, Prado, and Owen. *Nelson v. Quarterman,* 472 F.3d 287, 289 (5th Cir. 2006) (*en banc*); PA:1. *Seven* of those judges dissented: Chief Judge Jones and Circuit Judges Jolly, Smith, Barksdale, Garza, Clement, and Owen. PA:87, 107, 114, 119. A single judge concurred in the judgment only. *Id.* at 48. Thus, a total of *eight* judges joined the opinion of the court.

than all of the dissenting opinions combined.[5] Thus, Judge Dennis's opinion was superfluous, and Judge Stewart's opinion controls.

More importantly, the Director did not waive his harmless-error argument. Contrary to Nelson's contention, BIO:17 n.13, the lower court did not hold that the defense was waived. Rather, the court below explicitly rejected the argument on its merits. *See* PA:44 ("[W]e reject the State's argument that any *Penry* error in this case is subject to harmless-error analysis"). While the court of appeals noted the issue did not arise until *en banc* review, it also acknowledged the topic was raised *sua sponte* in the prior panel opinion. *Id.* at 44-45. In fact, there is no mention of "waiver" in the court's opinion. Surely, once a court *sua sponte* raises an issue, that issue is alive and well and fair game for both parties and any reviewing court.

In any event, the court found it was "understandable" that harmless error was never argued prior to that point because the application of *Brecht* to *Penry I* error was an entirely novel concept. *Id.* at 45. This Court has held that the novelty of an issue will excuse a habeas litigant's failure to raise it. *Reed v. Ross,* 468 U.S. 1, 16 (1984). This is because "it is safe to assume" a party with "no reasonable basis" upon which to formulate a constitutional argument is not intentionally sandbagging. *Id.* at 14-15. Thus, the introduction of novel legal issues late in a proceeding does not undermine the policy interests embodied in waiver and default rules, *i.e.,* comity, finality, accuracy, efficiency, and fairness. *Id.* And as the court below explained, this Court "has *never* applied a harmless-error analysis to a *Penry* claim or

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[5] Indeed, the court of appeals clearly believed that Judge Stewart's opinion was a *majority* opinion, because all of the dissenting opinions repeatedly and explicitly indicate disagreement with the "majority" opinion. *See, e.g.,* PA:87, 107, 114, 119.

given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence." PA:45 (emphasis in original). Although *Brecht* has been applied in many other jury-charge contexts, *see* Petition at 27-28 (listing cases), the lower court's assessment — that the argument was novel within the context of *Penry I* — was proper. This is presumably the reason the court did *not* find the issue to be waived and went on the address its merits.

It is certainly the reason the Director inadvertently failed to argue that *Penry I* error was harmless prior to the instant appeal. The Director did not deliberately choose not to raise the issue in order to gain any tactical advantage. Instead, it is clear that neither the Director nor any court conceived of the notion until Judge Dennis did so in two concurring opinions that issued on March 1, 2006. *Nelson v. Dretke,* 442 F.3d 282, 311 (5th Cir. 2006); *Tennard v. Dretke,* 442 F.3d 240, 257 (5th Cir. 2006) (opinion on remand).[6] When *en banc* rehearing was ordered on March 13, *Nelson v. Dretke,* 442 F.3d 912 (5th Cir. 2006), the Director argued harmless error at the very first opportunity. *See* Respondent-Appellee's Supplemental Brief on Rehearing *En Banc* at 26-27, filed May 3, 2006.[7] As a result, it cannot be suggested

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[6] Judge Dennis subsequently broached the topic again on March 17, 2006. *Cole v. Dretke,* 443 F.3d 441, 449 (5th Cir. 2006) (Dennis, J., dissenting from denial of the motion for rehearing *en banc*).

[7] Nelson makes much of the brevity of the Director's harmless-error briefing, suggesting it was insubstantial or conclusory. BIO:17-19 & n.13. But exhaustive discussion was not necessary. The aggravating and mitigating evidence was fully addressed in the Director's brief, both in his recitation of the facts and in his argument that there was no reasonable likelihood the jury was precluded from considering Nelson's mitigation case. *See* Respondent-Appellee's Supplemental Brief on Rehearing *En Banc* at 4-7, 19-26 (citing, *inter alia, Boyde v.*

that the Director withheld his harmless-error argument for tactical or other reasons.

Nevertheless, the lower court was well within its authority and did not abuse its discretion in disregarding any waiver and *sua sponte* raising an affirmative defense the Director did not argue in district court.[8] This Court has held on numerous occasions that a federal court may apply an affirmative defense not raised by the state or, alternatively, consider such a defense raised for the first time on appeal, where the interests of finality, comity, and federalism justify doing so. For example, in *Granberry v. Greer,* the Court determined that federal appellate courts have discretion

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California, 494 U.S. 370, 380 (1990)). There is little difference between that reasonable-likelihood inquiry and whether or not any jury-charge error had a "substantial and injurious effect" on the verdict. It is merely a distinction between *potential* prejudice and *actual* prejudice. Thus, a lengthy repetition of the Director's *Boyde* argument under a *Brecht* heading was unnecessary, because the Director asserted no potential harm occurred. This argument presupposes the absence of actual harm. In addition, Judge Dennis himself engaged in a thorough balancing of "the merciless depravity of Nelson's crimes" and "the lack of poignancy and excusatory effect of his mitigation evidence" in his panel concurrence. *Nelson v. Dretke,* 442 F.3d at 310-11. The Director cited and quoted this persuasive opinion in his brief.

[8] Even Judge Dennis's supererogatory concurring opinion admits that the court retains discretion to consider an argument waived by the Director in the lower court. PA:76. However, both Judge Dennis and Nelson rely upon the wrong discretionary standard. *Id.* (citing *United States v. Giovannetti,* 928 F.2d 225, 226-27 (7th Cir. 1991)); BIO:19 (citing *United States v. Ortega,* 184 F.3d 1128, 1136 (10th Cir. 1999)). These cases address federal criminal direct appeals, not habeas proceedings. As shown *infra,* the proper standard is articulated in *Day v. McConough,* 126 S. Ct. 1675, 1684 (2006). Regardless of which standard applies, the *Nelson* majority chose to address the issue notwithstanding any waiver.

to consider the issue of exhaustion despite the State's failure to interpose the defense at the district-court level. 481 U.S. 129, 133 (1987). This is because the exhaustion doctrine reflects a long-standing policy of comity between state and federal courts in which federal courts "will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'" *Id.* at 134 (quoting *Ex parte Hawk,* 321 U.S. 114, 117 (1944)); *see also Keeney v. Tamayo-Reyes,* 504 U.S. 1, 9 (1992); *Rose v. Lundy,* 455 U.S. 509, 518 (1982); *Picard v. Connor,* 404 U.S. 270, 275 (1971). Thus, where comity demands that a state court should be provided the initial opportunity to address a putative constitutional violation, but the State inadvertently failed to allege non-exhaustion in district court, an appellate court may raise the issue *sua sponte.* This holding was later codified in AEDPA, which provides that the State may not waive exhaustion unless it does so expressly. 28 U.S.C. § 2254(b)(3).

Similarly, the Court found that a court may *sua sponte* raise the issue of *Teague*[9] non-retroactivity where the State does not argue it. *Caspari v. Bohlen,* 510 U.S. 383, 389 (1994). In fact, the Court recognized that the State is "entitled to rely on any legal argument in support of the judgment below," even arguments not presented to the lower courts. *Schiro v. Farley,* 510 U.S. 222, 228-29 (1994) (citing *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970)). *Teague* non-retroactivity rests on the same foundation that exhaustion does: the respect owed by federal courts to the finality and integrity of state court judgments based on then-existing constitutional standards. 489 U.S. at 309-10.

Recently, the Court reaffirmed the reasoning of these cases and held that a federal court may *sua sponte* apply the AEDPA

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[9] *Teague v. Lane,* 489 U.S. 288 (1989).

statute of limitations[10] against a habeas petitioner where the State has failed to do so, as long as: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day,* 126 S. Ct. at 1684. Again, the Court explained these interests: "[t]he AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Id.* at 1681 (quoting *Acosta v. Artuz,* 221 F.3d 117, 123 (2nd Cir. 2000)).

And, although this Court has not directly addressed the issue, the courts of appeals have all held that a procedural default may be raised *sua sponte. Trest v. Cain,* 522 U.S. 87, 90 (1997) (citing *Brewer v. Marshall,* 119 F.3d 993, 999 (1st Cir. 1997); *Rosario v. United States,* 164 F.3d 729, 732 (2nd Cir. 1998); *Sweger v. Chesney,* 294 F.3d 506, 520 (3rd Cir. 2002); *Yeatts v. Angelone,* 166 F.3d 255, 261 (4th Cir. 1999); *Magouirk v. Phillips,* 144 F.3d 348, 358 (5th Cir. 1998); *Sowell v. Bradshaw,* 372 F.3d 821, 830 (6th Cir. 2004); *Kurzawa v. Jordan,* 146 F.3d 435, 440 (7th Cir. 1998); *King v. Kemna,* 266 F.3d 816, 822 (8th Cir. 2001) (*en banc*); *Vang v. Nevada,* 329 F.3d 1069, 1073 (9th Cir. 2003); *United States v. Wiseman,* 297 F.3d 975, 979 (10th Cir. 2002); *Moon v. Head,* 285 F.3d 1301, 1315, n. 17 (11th Cir. 2002)). The doctrine of procedural default is also "grounded in concerns of comity and federalism." *Coleman v. Thompson,* 501 U.S. 722, 730-31 (1991).

The *Brecht* harmless-error standard rests on the same policy justifications as exhaustion, non-retroactivity, limitations, and procedural default. Namely, "the State's increased interest in the finality of convictions," comity, and federalism during collateral

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[10] 28 U.S.C. § 2244(d)(1).

review. *Brecht,* 507 U.S. at 635. Thus, a habeas court should be permitted to *sua sponte* raise harmless error in any case in which that court might also raise exhaustion, non-retroactivity, limitations, or procedural default. According to *Day,* this discretion exists when: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day,* 126 S. Ct. at 1684. In the instant case, the parties were provided notice of the *Brecht* issue when Judge Dennis raised it in his panel concurrence. *Nelson v. Dretke,* 442 F.3d at 311. The parties were allowed an opportunity to address *Brecht* when the lower court granted rehearing *en banc* and ordered further briefing. *Id.,* 442 F.3d 912. Further, Nelson has not suggested how he was or might be prejudiced by consideration of *Brecht.* As in *Day,* "nothing in the record suggests that the State 'strategically' withheld the defense or chose to relinquish it." 126 S. Ct. at 1684.

And finally, where *Penry I* error would result in a new sentencing trial after sixteen years, the interests of justice certainly warrant application of *Brecht.* Granting habeas relief after so long merely because there is a *reasonable likelihood* the jury's verdict was negatively affected by a now-repealed sentencing statute "is at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" *Brecht,* 507 U.S. at 637. Such a decision has significant social costs, "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make ... retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'"[11] *Id.* (quoting *United States v.*

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[11] Nelson suggests there is no good reason to consider the *Brecht* issue because *Penry* claimants represent a "dwindling minority" of Texas death-row inmates. BIO:20-21. But as undersigned counsel stated to the Court during oral argument in January 2007, there are forty-

Mechanik, 475 U.S. 66, 72 (1986)). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry I* error had a "substantial and injurious effect" on the verdict.[12] *Id.* And as explained in the Director's petition, because *Penry I* error is mere trial error subject to harmless-error analysis, and because the lower court's reasoning — that "moral judgments" should not fall within *Brecht* — has no support in this Court's precedents, certiorari should be granted.

II. The Lower Court's Holding — That the Rule in *Penry I* Is *Full* Consideration and *Full* Effect — Is at Odds with *Abdul-Kabir* and *Brewer.*

The opinion below interprets *Penry I* to require that a capital-sentencing jury not be precluded from "fully considering and giving full effect to all of the defendant's mitigating evidence." PA:7-8. More importantly, the court of appeals held that the state court unreasonably applied *Penry I* to Nelson's case by not *inferring* this full-effect standard from this Court's opinions, despite the fact that neither this Court nor the Fifth Circuit had done so in the twenty-eight years since *Lockett v. Ohio,* 438 U.S. 586 (1978). But this Court recently explained that, for clearly-established-law purposes under AEDPA, "[a] careful review of our jurisprudence in this area makes clear that well before our decision

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seven Texas inmates on death row who were sentenced under the former statute, and twenty-five currently litigating *Penry* claims in state or federal court. Transcript of Oral Argument at 43, *Abdul-Kabir* (No. 05-11284) and *Brewer* (No. 05-11287). There are fewer *total* inmates on death row in some states. The social costs inherent in disrupting that many state court judgments is certainly a compelling reason to consider the applicability of *Brecht* in such cases.

[12] Additionally, if certiorari review is not granted in this case, future Fifth Circuit panels will be bound by the lower court's decision and the issue will likely never arise again.

in *Penry I,* our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir,* 127 S. Ct. at 1664; *see also Brewer,* 127 S. Ct. at 1710 (" [W]e have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence"). The Court carefully avoided any endorsement of the full-effect language from Justice O'Connor's dissent in *Johnson v. Texas,* 509 U.S. 350, 375-76, 379-87 (1993), even while it acknowledged that the court below had so held. *Abdul-Kabir,* 127 S. Ct. at 1675 n.25 (citing PA:7-26). Indeed, it would be wholly disingenuous to maintain that a reasonable state court should have known this particular wording from this specific dissent represented clearly established federal law.

But if the state courts and lower federal courts that have continually labored to interpret the confusing opinions and mixed signals caused by this Court's inconsistent terminology are to find any real guidance from *Abdul-Kabir* and *Brewer,* this Court must correct the lower court's opinion. *See, e.g., Ex parte Hood,* 211 S.W.3d 767, 794 (Tex. Crim. App. 2007) ("It is to be hoped that, for the sake of certainty, the Court will clarify its jurisprudence in [*Abdul-Kabir* and *Brewer*]") (Cochran, J., dissenting) (quoting PA:87 (Jones, C.J., dissenting)). If not, then those courts will once again dither over whether full effect means something different than meaningful effect. At a minimum, this Court should grant certiorari, vacate the lower court's judgment, and remand for further consideration in light of *Abdul-Kabir* and *Brewer.*

CONCLUSION

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

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