IN THE SUPREME COURT OF THE UNITED STATES

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LAROYCE LATHAIR SMITH, :

Petitioner :

v. : No. 05-11304

TEXAS. :

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Washington, D.C.

Wednesday, January 17, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

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R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

GENE C. SCHAERR, ESQ., Washington, D.C.; for California, et al., as amici curiae, supporting the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in 05-11304, Smith versus Texas.

Mr. Steiker.

ORAL ARGUMENT OF JORDAN STEIKER

ON BEHALF OF THE PETITIONER

MR. STEIKER: Mr. Chief Justice, and may it please the Court:

This case is here for the second time. In your summary of reversal, this Court held that Petitioner's mitigating evidence could not be given adequate consideration through the Texas special issues or the nullification instructions. On remand, the CCA found the error harmless by concluding the opposite, that Petitioner's jury could give sufficient consideration to his mitigating evidence, including specifically the evidence of his 78 IQ, learning disabilities and troubled background.

JUSTICE SCALIA: Did they find it could or did they find that it did? I thought our holding was that given the instructions, the jury would not necessarily take into account those mitigating factors, and I thought that what the Texas court held

is, yes, that was a possibility, and we have to see whether that possibility came to pass, which is what harmless error analysis involves.

MR. STEIKER: I think, Justice Scalia, what the --

JUSTICE SCALIA: So they are not contradicting the fact that the jury wasn't required to take it into account, but they are saying nonetheless, in our view, the jury did take it into account, and therefore, the error was harmless. That doesn't contradict our opinion. I mean, you might want to argue against it on the merits, but I don't see how it contradicts our opinion.

MR. STEIKER: I think it does contradict your opinion, Justice Scalia. Your opinion said that Petitioner's mitigating evidence had little or nothing to do with the inquiries of the special issues, and your opinion also said that the nullification instruction, no matter how clearly conveyed or fully understood by the jury, would not solve that problem.

JUSTICE SCALIA: That's right. And that means that the jury was not instructed to take it into account. And I think the Texas court is conceding that. But it's, it's saying, nonetheless,

we don't think that the error made any difference because, in our view, the jury did take it into account.

MR. STEIKER: The matter in which the CCA posited that the jury could take it into account was the fact that on voir dire, the jurors said we can follow a nullification instruction and falsify our answers to the special issues in order to give effect to mitigating evidence. That was the exact same proposition that the CCA had issued in its first opinion that this Court summarily reversed.

JUSTICE SCALIA: Yes, but it seems to me it's one thing to use it for the purpose of saying the instruction was okay. And it's something else to use it for the purpose of saying even though the instruction didn't require that, it was a fuzzy instruction and a juror could very reasonably have understood it not to allow nullification, nonetheless, we have satisfied ourselves that the jury indeed thought it had the nullification power. I don't see how it contradicts our opinion.

MR. STEIKER: I think what's contradictory, Your Honor, is that the notion that the nullification instruction would be an adequate vehicle was what this Court specifically rejected.

JUSTICE SCALIA: They didn't say it was an adequate vehicle. I mean, they acknowledged that that instruction shouldn't be given again because it doesn't require the jury to do what, what you say the jury must do, and I think they accept that. They say, nontheless though it was fuzzy, and didn't require it, we think the jury did indeed think it had the power to nullify.

MR. STEIKER: And I would also add that when you actually look at the voir dire on which the CCA relied in which it said jurors express no discomfort, no hesitation about their willingness to falsify their answers to the special issues, the very first juror in this case, a lawyer, expressed exactly the kinds of discomfort that this Court feared and anticipated with the use of the nullification instruction.

JUSTICE SOUTER: Well, Mr. Steiker, may I interrupt you or interrupt the course of your argument to get to a more preliminary point before you get down to details? Do you concede that harmless error analysis is ever appropriate, is ever open as an option following an, in effect, a finding of this kind of instructional error, Penry I instructional error? Do you concede that?

MR. STEIKER: Justice Souter, we do not concede that, but nor do we rely on that as a basis for relief in this case. We believe that the purported harmless error analysis that the CCA applied was so interwoven with a rejection of the Federal constitutional --

JUSTICE SOUTER: Well, I quite agree. I understand that. Was the, was the issue of the availability of harmless error raised on your side of the case in the proceedings back in Texas?

MR. STEIKER: Yes, it was. It was raised on remand from this Court.

JUSTICE KENNEDY: Also on the same preliminary line of inquiry, are we in as good a position as the State court to conduct harmless error analysis, or can we or must we defer to the State court's harmless error analysis?

MR. STEIKER: I would say ordinarily this Court is not in as good a position as a State court to conduct harmless error analysis. Our belief here is that the, the basis for the State finding the error harmless was a very unusual rejection of the conclusion that this, these instructions would facilitate consideration of mitigating evidence.

CHIEF JUSTICE ROBERTS: You agree that the

application of the harmless error analysis is a question of State law, though, correct?

MR. STEIKER: I do not agree with that. I think that the application of harmless error analysis, when it's predicated on a misunderstanding of Federal constitutional law, is not an independent basis for decision. It's clearly wrapped up in the Federal claim, and I think this Court's cases have clearly so held.

JUSTICE KENNEDY: So that if there is an instruction given to the jury and it violates the Constitution, then we, as a de novo matter, can determine the harmless error, harmless error inquiry?

MR. STEIKER: It's, it's certainly possible. I don't think that that's a usual practice and I wouldn't advocate that here. And this is not a usual case in which the State has conducted an ordinary harmless error analysis. The State has actually in no way disparaged the power and extent of Petitioner's mitigating evidence.

JUSTICE KENNEDY: Well, is the level of harmless error determined as a matter of Federal or State law when there is a Federal right?

MR. STEIKER: Generally speaking, it's a matter of State law with some limitations.

JUSTICE KENNEDY: Really. You mean the State could have something that it has to be harmless beyond a reasonable doubt and we'd be bound by that?

MR. STEIKER: Well, on direct review, Chapman clearly says it's a Federal question what the standard of review may be. And on direct review, it's undoubted that a harmless beyond a reasonable doubt standard is required by Chapman.

This case doesn't present the issue of whether on State post-conviction, a State can have the latitude of requiring greater harm, because on the CCA's own analysis, the standard of harm that's applied on State habeas is identical to the standard of harm that's applied on direct review, the standard of Almanza, which posits Chapman error, harmless beyond a reasonable doubt for preserved error, and egregious harm for unpreserved error.

JUSTICE SCALIA: And, and this was unpreserved error. I mean, they are not saying this for everything. They are saying he did not object to the instructions at the time and therefore our harmless error standard is -- is more rigorous than it would otherwise be. What's unreasonable about that?

MR. STEIKER: And we -- we argue that

there are three independent bases, Federal bases for finding that the application of egregious harm in this case to be violative of Federal rights. And I'd like to turn to the first of those arguments.

Petitioner plainly objected that the special issues and verdict form did not allow for consideration of his mitigating evidence. That was and remains his core argument throughout this case.

JUSTICE SCALIA: Yes, but that's a very generalized argument, and what he won on was a very specific point that, that this instruction in effect required, if they were going to give mitigating effect, required jury nullification. That's a very specific point.

MR. STEIKER: I --

JUSTICE SCALIA: He did not object -- he did not object to that specific problem. Had he objected, the court might have said, you know, there is something to what you say, and I'll give a different instruction. But he didn't.

MR. STEIKER: Everyone at trial understood that the special issues on the verdict form were unalterable, that Texas law required the legislature to specify what was on the special verdict form. What the trial court invited counsel to do was to

alter a different form of nullification in the supplemental instruction that would then interpret the special issues.

This Court's opinion in its summary reversal made plain that the problem with nullification instructions is broad and intractable and applies to all nullification instructions.

JUSTICE BREYER: What you're going to hear in a second, I'm sure, because I read it in the briefs, my understanding of the Texas point is slightly different. It is this. That under Texas law, when you file before the, before the trial, a general objection, unless you make the objection again when the specific, when a specific instruction is given, you've forfeited your rights to appeal. Under Texas law.

And they say that's true of evidence and that's true here, too. And they say that's just Texas law, ordinary Texas law. Now --

MR. STEIKER: There's nothing --

JUSTICE BREYER: That's what you did, you didn't make the right objection. Now you come up here and well, you are out. You can't make any argument. But -- we are very generous, and we will let even people who make every wrong procedural thing

still have a shot, if what they have, if what they are pointing to absolutely egregious. But yours isn't absolutely egregious so you're in the same boat as if you just didn't have any argument because you didn't follow the Texas law. Now, I take it, that's their point. What's your response?

MR. STEIKER: I have several responses, Your Honor. First of all, there were -- the objection to the special verdict form and the special issues was made plain in pretrial motions and that objection was clearly recognized by the trial judge at trial and denied at trial when the instructions were being considered for the purposes of voir dire.

JUSTICE BREYER: Yes, they're the Texas court. We're not. We are following Texas law, they say, and you're wrong. Now, what are we supposed to do about that?

MR. STEIKER: The court, the Court of Criminal Appeals did not invoke this basis for saying that his trial objection was inadequate. They didn't say that it was made at the wrong time, or in the wrong -- what they specifically said --

CHIEF JUSTICE ROBERTS: They applied, they applied a legal standard, the egregious harm standard, that depends upon the failure of an

objection. So I would have thought they, they certainly thought that there was an inadequate objection, or they wouldn't have applied that standard.

MR. STEIKER: No -- yes, Your Honor. I -- I misspoke if I -- I conveyed the impression that they did not suggest that it was inadequate objection. I was merely suggesting that it wasn't inadequate in the sense that it was made at the wrong time, pretrial or at trial.

JUSTICE GINSBURG: The judge, the judge, I thought, told the lawyers what the charge would be, and I think also said: I can't give a separate charge on mitigation because that's a job that only the Texas legislature can do. I am bound by the statute to give these two things.

I think the judge said that, so it was the understanding of everyone.

MR. STEIKER: It was the understanding of everyone. It's reflected in the record in the first State habeas opinion that the Court of Criminal Appeals acknowledges that the verdict form was sacrosanct. That was not going to be altered, so the nature of the CCA's suggested failing of Petitioner was that he did not specifically object to the nullification instruction.

JUSTICE ALITO: It sounds like you're arguing that the Texas court misapplied Texas law, and you want us to reverse their application of their own law about what is an adequate objection.

MR. STEIKER: No, Your Honor. I believe that the CCA misunderstood the Federal law of the relationship between Penry I and Penry II. The failing in this case was a verdict form that made no mention of mitigating evidence. The nullification instruction was the State's flawed defense to that failing.

JUSTICE ALITO: But on the issue of whether there was an adequate -- and I thought you were arguing that, in fact, there was an adequate objection. And if the, if the State court held against you on that point, that's an issue of Texas law, isn't it?

MR. STEIKER: I don't think it is an issue of Texas law, Your Honor, because the basis for the finding that it was inadequate was that he had to separately object to the nullification instruction as opposed to what everyone agreed he object to, was the inadequacy of the verdict form. That was his Federal claim. And our view is that the misunderstanding of the nature of the Federal claim was what led the

Texas court to conclude that his objection was inadequate. I'd also like to --

JUSTICE SOUTER: May I, may I again interrupt you to just get the context of your argument? You said earlier that under Chapman, assuming there is a harmless error issue, that essentially is -- is necessarily a Federal issue. And therefore, I take it, the basis of your point here is, if that is a Federal issue, then the adequacy of actions of counsel to raise it is also a Federal issue. Is that correct?

MR. STEIKER: That is correct.

JUSTICE SOUTER: Do I understand you?

MR. STEIKER: That is correct, Your Honor.

JUSTICE SOUTER: Thank you.

MR. STEIKER: I'd like to make it clear --

JUSTICE SCALIA: Do we make up our own procedural rules, too? I mean, why, why -- why is it just a Federal judgment as to whether it adequately complied with the Texas rule? Presumably we should make up our own rule.

MR. STEIKER: I don't think you need to make up --

JUSTICE SCALIA: Why not? You say it's a Federal question.

MR. STEIKER: It's a Federal question about what the nature of the claim is, and if the State's misunderstanding of the Federal claim was what was intertwined with its conclusion that it was an inadequate objection, that is a misunderstanding of Federal law. We also believe that the procedural, that the application --

JUSTICE SCALIA: That's -- that's a little bit different from your, from your response to Justice Souter. You are making a much narrower argument. You, you don't --

MR. STEIKER: I believe our, I believe our right to be --

JUSTICE SCALIA: You don't assert that in every case when there is a procedural objection -- in a capital case or any case involving Federal law, Federal law will determine whether the procedural objection is adequate?

MR. STEIKER: I agree with that fully, Your Honor.

JUSTICE SOUTER: But you do, but you do take that position with respect to a harmless error?

MR. STEIKER: I think that the question of whether an error can be deemed harmless is always a Federal question. Chapman says as much.

JUSTICE SOUTER: All right. If we assume, for the sake of argument, that there is disagreement on that point, are there any cases of this Court on the matter of adequacy of State procedural bars that would support you, even on the assumption that it's a State, not a Federal issue?

MR. STEIKER: Well, clearly Ake v. Oklahoma holds that if the State invocation of the procedural rule is dependent on a judgment about Federal law, and that judgment is incorrect, it is not an independent basis for decision under the independent adequacy grounds.

JUSTICE SOUTER: What about the case, the name of which I cannot think of, to the effect that requiring procedural action by the defendant which would simply be a useless formality and so on?

MR. STEIKER: That's Flowers.

JUSTICE SOUTER: It's Flowers. All right. Wouldn't, wouldn't that be authority that you would invoke, in the, in the sense, as I understood your earlier argument, that the, that the pretrial motion and the adjudication of that made it plain to everybody what the, what the issue was, and therefore requiring anything more would -- would in effect violate the Flowers rule?

MR. STEIKER: I agree with that, Justice Souter. I think that to apply the default in these circumstances where everyone was plainly aware of his concerns about the inadequacy of the verdict form in special -- and the special issues, would be imposing too high and too excessively burdensome a requirement for the preservation of the Federal right. I do also want to argue that there is a --

CHIEF JUSTICE ROBERTS: Why is that -- just, why is that too burdensome? What's so burdensome about saying I object to that instruction?

MR. STEIKER: Well, he did --

CHIEF JUSTICE ROBERTS: You're saying, there is a difference between saying it would have been futile and saying it's high and burdensome, and I'm just wondering what your specific point is.

MR. STEIKER: Our specific point is once he has made it plain -- and this is all that Texas law itself says is required -- once he has made it plain that he objects to a special verdict form which cannot allow for the consideration of mitigating evidence, and this Court's holding is that that is precisely the error in this case, that no supplemental nullification instruction could correct, he has plainly made clear what his objection was and

there was nothing else he could do.

JUSTICE STEVENS: May I, may I ask this question about your position? Is it your position that they should not have applied any harmless error review, or that they applied the wrong standard? And if it's the latter, what was the standard they should have applied?

MR. STEIKER: We believe it is the latter. That we are assuming that harmless error analysis could apply here without conceding that it necessarily applies, but assuming for the purposes of this case that it does apply, it should have applied the Chapman standard, which is their standard for preserving --

JUSTICE STEVENS: That it would've been the Chapman standard if it was Federal collateral review, would it?

MR. STEIKER: No. It would be under Brecht. It would be a different standard. But Texas law for jury instruction claims clearly states that for preserved error, the standard is Chapman.

JUSTICE SOUTER: It's preserved error on direct review, isn't it? On page 23 of their brief there's a footnote that, the red brief, that at least claims to describe the sort of the structure of Texas

law, and I thought under Texas law you got a Chapman analysis only if you were on direct review and had preserved error. Is that correct?

MR. STEIKER: I think that the CCA's position and Respondent's position is that Almanza applies dually on direct review and post conviction, and that that's their explanation for why the State court didn't impose a procedural default on State habeas. And one of our views is even if you don't agree that under Federal law this objection was inadequate, we believe that the State could not in effect change its mind about the adequacy of his trial objection only after this Court summarily reversed its ruling on the merits. And we think there are --

CHIEF JUSTICE ROBERTS: Well, but it didn't have to reach the harmless error question after it made an erroneous determination that there was no error at all. When the case came up here and the Court determined there was error, then it was necessary to reach it. I don't see that it's changing its position at all.

MR. STEIKER: I think it is changing its position. When four judges signal that this may be a procedural impediment in the case and the court

declines to embrace it, I think that is a signal to this Court that --

CHIEF JUSTICE ROBERTS: Wouldn't it be normal exercise of judicial restraint to say, we don't have to reach out and decide whether this error was harmless if we've already decided there's no error at all?

MR. STEIKER: I think it would not be in the case of State habeas, for this reason. The vast overwhelming number of cases that proceed into State habeas are on their way when they're final into Federal habeas, and the State court was abandoning this argument for Federal habeas. That is, it was removing any procedural impediment to a merits review.

JUSTICE SCALIA: Well, I just don't -- you say whenever, whenever a court decides the case on the merits instead of using an intervening procedural objection, the procedural objection is waived.

MR. STEIKER: No, I do not make that, I do not make that broad argument, Your Honor. I think in the special circumstances of State habeas, where, as this Court knows, 99 percent of cases are on their way to Federal habeas, and the State does not adopt this procedural impediment which would from a

judicial --

JUSTICE SCALIA: Especially in capital cases, courts don't like to say, oh, you know, yes, you may be innocent but there's this procedural objection. I think most courts --

MR. STEIKER: I'm afraid that's not my experience with the Court of Criminal Appeals.

JUSTICE SCALIA: Well, it's my experience with a lot of courts.

CHIEF JUSTICE ROBERTS: And it's a very bad -- I think in the long term in the broad category of cases, it would be a very bad solution for defendants, because what's going to happen, once a court's determined there's no error at all, it's much easier for them to say, oh and by the way if there was it's harmless. And if they did that and then it turns out there was an error, you're going to be back here saying, well, don't be bound by their harmless error decision because they thought there was no error at all, so they didn't focus on it carefully.

I would say the way they approached it in this case is the more desirable way. If you don't think there's an error don't go on and decide whether it's harmless or not in the abstract.

MR. STEIKER: In the vast majority of

cases, Chief Justice Roberts, the courts in Texas take that approach, which is if there is a procedural impediment to the case, they flag that procedural impediment, rule on alternative grounds, and I think that is good evidence that in this case when four justices urged a procedural element --

JUSTICE BREYER: Why, why, why do you say there are a lot of cases where it doesn't matter? I would have thought every case it mattered. Look -- I thought -- isn't it an absolute rule that there's a Federal issue in a case and there's a State ground, the State ground typically is a failure to raise an objection. And a State court says the Federal ground is what we're talking about. They say nothing about the State ground and they decide the Federal ground. The defendant goes to a Federal court and he says, I'm entitled to be released because they got the Federal ground wrong. I thought it's a hundred percent the case, and this is where you'll correct me, that it's now too late for the State to raise the State ground but the State's waived their adequate and independent State ground and that if they try to raise it again the answer is always, not some of the time: I'm very sorry, State; you're out of luck; you should have decided it on the State ground and not reached

the Federal ground.

MR. STEIKER: I think that's exactly right, Justice Breyer.

JUSTICE ALITO: Why wouldn't that be the case? Suppose the --

JUSTICE STEVENS: I'm sorry.

JUSTICE ALITO: Suppose the State --

JUSTICE STEVENS: Isn't there a difference between waiving it as a procedural bar and waiving it as an objection to the proper standard of review?

MR. STEIKER: We don't think it's a difference, Your Honor, because we think the underlying fact, the adequacy of the trial objection, was what obtained. And I'd like to point out --

JUSTICE SCALIA: Who gives the State court the power to, as you say, waive that objection? I can understand when you say the prosecutor didn't object. It's the prosecutor that has the power to forfeit certain arguments on behalf of the people which he chooses not to raise.

MR. STEIKER: I think "waiver" might not be the right word.

JUSTICE SCALIA: Well --

MR. STEIKER: But it's clear that if the State court does not rely on a procedural impediment

when the case goes into Federal habeas that impediment cannot be reintroduced in the case as a separate ground of decision.

CHIEF JUSTICE ROBERTS: But even if it is, logically anterior to consideration of that procedural impediment is a particular ruling on the merits and the State court didn't make that merits. They thought there was no error. It is logically not necessary for them to decide whether an error is harmless if they don't think there's an error, and to say that they waive that, that later ground I would have thought would be very surprising. Why do we remand these cases for further proceedings not inconsistent with our opinion if there's nothing further to be considered?

MR. STEIKER: I think that the concerns for judicial economy in this case would have dictated that if the State court believed that the trial objection was inadequate, it would have rested its decision on that ground to essentially preclude merits review of that Federal constitutional issue.

JUSTICE GINSBURG: Otherwise you have a Supreme Court decision that the State court can say, thanks, thanks, that's very interesting advice, but we -- there was a procedural default here. Although

we bypassed it the first time, we're not going to bypass it after the Supreme Court has told us what the Federal law is.

MR. STEIKER: I think it's a special risk in State habeas when the --

JUSTICE SOUTER: Well, it would be a special risk if you, if you, if you allowed them to raise the bar, allowed a State to raise a bar to consideration of the issue.

But I want to go back to your answer to Justice Stevens' question. You, you say you draw no distinction between the, the procedural failing as a bar to raising the issue and as a basis for determining a standard of harmless error review later. I don't understand why you, you can maintain there is no distinction because if they may not consider it as the basis for their, their standard of harmless error review, assuming we have such a thing, then what are they supposed to use as their standard? Your answer I take it is Chapman, but Chapman as I understand the statement of Federal law would not apply -- State law -- Chapman would not apply in these circumstances. And if you were in a Federal court and this were a Federal conviction Chapman wouldn't apply on collateral review.

So it seems to me that you've either got to accept the distinction between procedural error as bar to issue, procedural error as basis for standard of review, or you have no way to figure out what the, what the standard of review should be.

MR. STEIKER: Well, we would take the CCA at its word that the Almanza standard's appropriate. But if the underlying fact of the adequacy of the trial objection has basically been accepted by the State court, we don't believe that on State habeas it could reintroduce the inadequacy of that.

I'd like to reserve if I may the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Cruz.

ORAL ARGUMENT OF R. TED CRUZ

ON BEHALF OF THE RESPONDENT

MR. CRUZ: Mr. Chief Justice and may it please the Court:

Two postulates govern this case. First, reconciling Jurek and Johnson and Graham on the one hand and Penry II and Tennard and Smith II on the other hand is not an easy task, and State and Federal courts have struggled for two decades to draw the

appropriate lines and to faithfully apply this Court's Penry jurisprudence. Second, the usual default rule in both State and Federal court is that most constitutional errors are subject to harmless error review.

Petitioner suggests that the State habeas --

JUSTICE SOUTER: I take it that is not an issue before us?

MR. CRUZ: It is an issue that on the reply brief Petitioner has essentially conceded. In footnote 5 Petitioner states that he is not seeking reversal on the basis that Penry error is structural error. But that is the issue of what the Court of Criminal Appeals did below.

JUSTICE SOUTER: But the Penry error, even if not structural, is not subject to harmless error review and you could say that that distinction is possible because Penry has a built-in harmless error or a harmful error component. But as I understand it that's not -- that issue is not in this case.

MR. CRUZ: It is not in this case because of Petitioner's concession, but Petitioner's concession has serious consequences because the only ground upon which Petitioner can prevail in this

Court is that the State court's application of harmless error violated the United States Constitution and by giving up his structural error argument he gives up virtually any basis to lay out why that would violate the U.S. Constitution, not simply why it was incorrect but why it is unconstitutional for the State court to apply that doctrine.

JUSTICE BREYER: It's a question of waiver, part of it. I mean, that's -- it's well established that, I guess, I mean, if a State waives an adequate State ground by considering the Federal issue, the Federal courts will go into the Federal ground and they can't later, can they -- is there any case you found anywhere -- I haven't found one -- where say any Federal court considered a State case where the State went into the Federal issue, the State had said nothing about a State ground, and then after the Federal court's decided it somehow the State got a hold of it again and they this time said, oh dear, we forgot, we forgot; in fact, there is the State ground here. And is there any case that you found like that which said that was permissible?

MR. CRUZ: Justice Breyer, I do not disagree with you.

JUSTICE BREYER: Okay, there's no such case and therefore this would be the first.

MR. CRUZ: But that's not what happened here.

JUSTICE BREYER: Right.

MR. CRUZ: I do not disagree with you that if the State court had concluded for Petitioner on a State ground to begin with and after being reversed revisited that conclusion --

JUSTICE BREYER: No, no, no. I'm saying the State typically decides against the defendant. They decide against the defendant on a Federal issue. There's a perfectly adequate State issue. It's called failure to object, and they don't mention it. I'd be repeating myself. Are you following what my, my -- and I'm saying is there any case you found anywhere which says after that occurred that the State when it gets a hold of the case again can say, oh dear, we forgot, there's also this adequate State ground, bad luck? I've never seen such a thing. I doubt that you have.

MR. CRUZ: Justice Breyer, there is no suggestion --

JUSTICE BREYER: And I say this would be the first.

MR. CRUZ: That's not what happened here and so we are not urging that ground to support what the Court of Criminal Appeals did. But as the Chief Justice suggested, the Almanza standard, the State harmless error standard, is a two-step inquiry. Inquiry number one, is there error; and under State law if you conclude no the analysis ends. So the first time the State court considered this it concluded there is no constitutional error and so it never addressed harmless error.

JUSTICE BREYER: I'm making a mistake here. I thought that the reason they bring in the Almanza standard is, as I put it before, a kind of act of charity. That is, since there was no contemporaneous objection or proper one, you don't get any appeal normally. But we'll let you do it if you can show egregious error. I'm wrong about that?

MR. CRUZ: That is not exactly how the State court and State law does it. What the State law does and our position in this case is that Petitioner failed to preserve his objection because he did not object specifically on the grounds --

JUSTICE STEVENS: Yes, but Mr. Cruz, is it not true that if he did fail to preserve the objection then there should have been a procedural

bar to the case going forward?

MR. CRUZ: There is not a procedural bar --

JUSTICE STEVENS: Why?

MR. CRUZ: -- because the State Court of Criminal Appeals has chosen to forgive failure to preserve for purposes of procedural default and subsequent habeas rights.

JUSTICE STEVENS: In other words, they are saying that the failure to object does not constitute -- would constitute a procedural bar if we elected to treat it that way, but we've decided not to, but we're nevertheless going to rely on the failure to object to justify a higher standard of review on harmless error?

MR. CRUZ: That's exactly correct, Justice Stevens.

JUSTICE STEVENS: Is there any precedent for that ambivalent use of a potential procedural bar?

MR. CRUZ: Let me suggest it's not an ambivalent use, but rather what the Court of Criminal Appeals has held, in the Black case it held that Penry I was so novel that the State courts would excuse a failure to preserve for purposes of

procedural bar. So in this regard the State court is more forgiving to defendants than the Federal courts are.

JUSTICE GINSBURG: General Cruz, none of this went on in the opinion and there were four judges of that court who said there's a procedural bar here, end of case. The majority never explained why they weren't going along with that. I didn't see anything in the majority opinion that said, well, never mind that there's a procedural bar here, we're going to deal with the Federal question.

MR. CRUZ: Justice Ginsburg, you're right that in Smith I, the Court of Criminal Appeals, the majority did not explain why there wasn't a procedural bar. But there had been a long line of cases where the CCA had decided Penry errors were not going to bar access to the courthouse, and just last week in another decision that was decided after briefing in the case, in the In Re Hood case, the Court of Criminal Appeals made clear that in its judgment Penry II was also so novel that for purposes of successive writs, it would excuse a failure to preserve.

CHIEF JUSTICE ROBERTS: The simple question is the procedural objection, as the four

judges suggested, could have precluded consideration of the Federal claim at all.

MR. CRUZ: Correct.

CHIEF JUSTICE ROBERTS: And the court said we're going to go ahead and consider it, and then when it turns out that they got it wrong and there was error they had to apply harmless error review. In Texas law, harmless error review turns on the standard whether there was an objection or not, and they went back and said there was no objection. The contrary assertions assumes that when they let the claim go forward, that they were waiving any reliance on objection for any purposes, not consideration on the merits, but also for any eventual later consideration on harmless error pursuant to the established State standard.

JUSTICE STEVENS: Mr. Cruz, would you clarify one thing for me? Did the Texas Court of Appeals say in effect, there is a procedural bar but we're going to waive it, or did they just not address the issue?

MR. CRUZ: In Black they said exactly what you say.

JUSTICE STEVENS: I mean in this case.

MR. CRUZ: In this case they didn't --

they didn't say because longstanding CCA precedent made clear that --

JUSTICE STEVENS: Well, you're assuming that's longstanding precedent. It is also at least conceivable that at the time they thought the objection was properly preserved.

MR. CRUZ: It is conceivable, but I would suggest the more reasonable inference is they followed their long line of precedents that said we're not going to interpose, as the Chief Justice suggests, a total bar to raising these claims. So for procedural default and for successive writs, we're not going to penalize Petitioners for failing to make objections. Just because the State court decides to be more lenient than the Federal courts in that respect does not mean that they also need to apply the lesser standard of --

JUSTICE STEVENS: But you're assuming that they decided to be more lenient rather than assuming that they may have actually decided and rejected the procedural bar.

MR. CRUZ: Well --

JUSTICE STEVENS: That's at least possible on this record, is it not?

MR. CRUZ: They did not say one way or the

other the first time.

JUSTICE SOUTER: No. But isn't the implausibility of the argument that you are making something like this: You say the Texas rule is not that failure to object is a procedural bar but that failure to object determines the standard of harmless error review if in fact there is a later appeal. The implausibility, though, I guess of the position is that as I understand it, four members of the Texas Criminal Court of Appeals did not understand that to be the case at all. Four of them said it is a procedural bar. The four did not understand that there was this rule that you invoke, and when the four said there is a procedural bar, the majority of the court never came out and said no, there isn't.

MR. CRUZ: The most reasonable explanation for that, Justice Souter, I would suggest is at the time of Smith III the court had not decided Hood, which means it had not concluded that Penry II was also so novel that it would forgive failure to raise it.

JUSTICE SOUTER: Isn't the consequence of that, though, that for purposes of this case there was no clear State bar at the time in question and therefore, they cannot apply it now? Maybe they can

apply it in cases down the road. I'll assume for the sake of argument that they can. But not in your case, because the bar was not established at the relevant time in your case.

MR. CRUZ: That would arguably be the case if on remand the Court of Criminal Appeals had applied procedural default and refused to consider the case -- the claim, but it's not what it did.

JUSTICE SOUTER: Okay. But what it is doing is in effect saying there was a kind of default which is subsumed in what the four dissenting justices said the first time around. And so we're going to, we're going to sort of call it a half-loaf procedural default, but we never said so the first time around.

MR. CRUZ: Respectfully, they are altogether separate concepts. A procedural default is a total bar to the courthouse.

JUSTICE SOUTER: I can understand that they would be separate concepts if there were a rule or if there had been a rule in place at the time he was going through his State habeas that so said. But we don't seem to have such a rule because as you said, there was disagreement within the court, and Hood had not been decided, and therefore --

MR. CRUZ: But Black had.
JUSTICE SOUTER: Pardon me?
MR. CRUZ: Black had and Almanza had.
JUSTICE SOUTER: Black being -- help me out, Black?
MR. CRUZ: Black is what excused the failure to raise Penry I for novelty. And so it was clearly established State law at the time of this trial --
JUSTICE SOUTER: But that goes to Penry I, and this is then an objection both to Penry I and based on Penry II.
MR. CRUZ: But the --
JUSTICE SOUTER: So it's --
MR. CRUZ: But the Hood -- the Hood decision with respect to Penry II is being forgiving to criminal defendants. It's not a bar. It's forgiving a bar. That does not mean that the Almanza standard which had been present for -- has been present in State law for over 20 years is suddenly inadequate.
JUSTICE SOUTER: Right.
JUSTICE STEVENS: But did they cite that case in this case, in this opinion in this case?
MR. CRUZ: They absolutely cited Almanza.

JUSTICE BREYER: Speaking of that case, can you give me any citation? And just give me a citation, and here there may not be one, but you give me a citation where Texas previously said that a defendant who raised an objection before trial to the application of the statute to his client, he said it's unconstitutional as applied to my client, give me one example in Texas law where that was raised and the State appeals court of any -- at any level said, I'm very sorry, you can't really appeal that because you should have said it again during the trial.

MR. CRUZ: Respectfully, Justice Breyer, that is not what we are urging, and I'm very glad you asked that question because I'd like to clarify what we are urging in our brief. That is not why we think Smith is not defaulted.

JUSTICE BREYER: In other words, there's no case, there's no case in Texas law which says what I just said?

MR. CRUZ: I don't know if there is or not but our --

JUSTICE BREYER: You can't say.

MR. CRUZ: Our argument is not based on the timing of the objection, so it has nothing to do with when he did or didn't raise his objection. And

so --

JUSTICE BREYER: I thought it was because he didn't raise it again in the trial.

MR. CRUZ: That is not the basis --

JUSTICE BREYER: What is the argument?

MR. CRUZ: The argument is that he made a different objection, a substantively different objection, because what he filed was an argument that the Texas death penalty was unconstitutional on its face across the board and as applied to him, and he made a conscious strategic choice which is, when the judge presented the charge to the counsel and said do you have any objections, do you have any suggestions, is there any way I can change it, he could have done what Penry's counsel did. Penry's counsel twice asked the judge, please instruct the jury on deliberateness so they can consider my mitigating evidence for deliberateness. Penry I said that would solve the Penry problem.

JUSTICE KENNEDY: No. But in this case the counsel for the defendant did one other thing, and it said to the judge, you don't have authority under State law to add to these supplemental instructions. And I was going to ask you, he was right about that, wasn't he?

MR. CRUZ: Justice Kennedy, he was categorically wrong about that, and that fundamentally --

JUSTICE KENNEDY: Really?

MR. CRUZ: Yes. For two reasons. Number one, because Penry I, which has already been decided, this Court has said the way to correct a Penry error is to give an instruction. And the Court of Criminal Appeals following Penry had already squarely held the way to correct a Penry error is to give an instruction.

JUSTICE GINSBURG: What instruction? I haven't seen one. I haven't seen --

JUSTICE KENNEDY: Wasn't it the nullification instruction?

MR. CRUZ: That's what the Court of Criminal Appeals has said Penry I said, a deliberateness instruction or a catchall instruction. So -- but in both cases, both this Court and the State court have said judges can give an instruction. And Penry I's counsel made --

JUSTICE GINSBURG: Is your instruction -- I think this is of some importance. My understanding in this case is that the judge as well as counsel thought that the judge couldn't say in essence what

became the Texas law because the legislature put it in, which is: Jury, is it two special issues, but you can consider all the mitigating evidence and it's up to you if you think that mitigating evidence is enough to have a life rather than a death sentence. That I thought the judge couldn't do. I have not seen a prelegislative change, charge in Texas that says what the legislature provided.

MR. CRUZ: Justice Ginsburg, that is in fact what the judge did here. What the judge could do clearly under Texas law is give any reasonable instruction to cure the error. What the judge couldn't do is submit a third special issue. It couldn't ask the jury, check, is there enough mitigating evidence to sentence to death. So it couldn't change the output from the jury. It couldn't add a new special issue but it could give any instruction possible to correct the error. That was Texas law, that you could give instructions, but the special issues are set by statute.

JUSTICE GINSBURG: And so the jury, what they take into the jury room is something that says these are the two questions that you must answer.

MR. CRUZ: But they also have a written charge, so they get a written charge with the

instruction.

JUSTICE GINSBURG: Which tells them that the only way that they can give effect to mitigating evidence is if they answer one of those questions falsely.

MR. CRUZ: But this Court said in both Penry I and Penry II that if the trial judge defined deliberateness appropriately, even under the old special issues, that it could solve the problem.

JUSTICE KENNEDY: But in this case the judge said I'm going to give the nullification instruction, and the attorney said, and I think quite properly, he said that won't work.

MR. CRUZ: But what the attorney -- the attorney didn't say that won't work because it puts jurors in an ethical quandary, it causes them to violate the oath. What the attorney said is, you can give no instructions. And the reason for that strategic choice is that Smith's counsel made the judgment, I want it to be impossible for my client to be subject to the death penalty.

Had Smith's counsel made the same objection that Penry made, had he read Penry right in front of him and asked, give me a deliberateness instruction, it would have cured the error. But the

reason I would suggest that Smith's counsel didn't is that the quantum of mitigating evidence in this case was so slight compared to the pervious cases that he made a very conscious strategic choice, I'd rather go all or nothing. I would rather make an argument that there is --

JUSTICE GINSBURG: General Cruz, how can you make that assumption when the kind of mitigating evidence that has been considered possible within these special questions, the -- the -- in the Graham case where the reputation of this young man, he was sweet, gentle, kind, God-fearing, and so the murder that he committed was an aberration. And youth. Those are the two things that I know that we have recognized fall within that. The evidence in this case is surely not that we are dealing with a sweet and kind person. We are dealing with somebody who has been abused as a child and who has a mental disorder.

MR. CRUZ: Respectfully, Justice Ginsburg, the evidence was precisely that he had been sweet and kind. Over 97 percent of the evidence that defense counsel relied on in closing was the 15 character witnesses to show that he was a big lovable Teddy bear and went to church, and was sweet and kind, and

he had overcome these obstacles, and this was a momentary aberration. That was the central theme of defense's arguments. And in fact when the court --

JUSTICE SOUTER: When you say 90 percent, you're talking about argument time, aren't you?

MR. CRUZ: I'm talking --

JUSTICE SOUTER: Their answer to that is, there were several hundred pages of records from school and the testing that went on in school that indicated there was something seriously wrong with this guy.

MR. CRUZ: Well -- and it's interesting. The several hundred pages they talk about, there are three IQ tests that Smith has gotten. When he was 7 years old he tested at 87; when he was 10 years old he tested at 87; when he was 13 he tested at 78. They -- and they introduced all three. These were the school records. There weren't competing experts. It's interesting in closing arguments --

JUSTICE SOUTER: All right. Maybe -- but the fact is that we're talking right now about sort of quantum of evidence. Was there something serious there for the jury to consider which in effect is the basis for all of this argument? And it seems to me it's not fairly characterized by saying, well, 90

percent of the mitigation case was that he was sweet and loving there. Whether you find it -- whether you find it persuasive or not, there was a substantial amount of evidence of -- going to his mental capacity and to his abuse.

MR. CRUZ: Justice Souter, not only was it a very small part of the presentation, but in closing argument defense counsel explicitly pointed out to the jury that -- and let me read from defense counsel's closing: "I think it speaks well for both sides, the State and the defense to be quite honest, that we didn't bring you some hired gun, some psychiatrist that gets paid to get up here and say oh well, these are all family problems." And that is at 33, volume 33 of the record, page 59.

He affirmatively -- in Penry the whole argument was there's IQ problems, there's serious abuse. There's no abuse in this case, Justice Ginsburg, no allegation of abuse whatsoever. And he affirmatively said to the jury, look, we're not relying on some psychiatrist saying there are all these family problems. Our story is that this is a good person who led a good life and this is an aberration.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Cruz.

Mr. Schaerr.

ORAL ARGUMENT OF GENE C. SCHAERR

ON BEHALF OF CALIFORNIA, ET AL.,

AS AMICI CURIAE SUPPORTING RESPONDENT

MR. SCHAERR: Mr. Chief Justice and may it please the Court:

I represent California and 20 other States who are concerned about the implications of Petitioner's arguments for their ability to apply their own varied harmless error standards in their own State habeas proceedings, and thereby to strike what they believe to be the right balance between the two competing concerns that this Court identified in Calderon. One being the significant social costs of retrial or resentencing, and the other the desire to ensure that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged.

And with those concerns in mind, I'd like to address three specific points. The first is the whole question of whether States have the ability under our Federal Constitution to choose their own harmless error standards even when they are addressing Federal error. Petitioner appears to

concede as a general matter that States do have that authority, but let me just briefly indicate why that concession is well founded.

First of all, as this Court has held in Pennsylvania versus Finley --

JUSTICE STEVENS: May I just ask this? Are you talking about both collateral review and direct review, or just collateral review?

MR. SCHAERR: I'm just talking about collateral review right now.

As this Court has held in Pennsylvania versus Finley, the States are under no obligation to provide collateral review at all, and so it would be extraordinary if they take the step of deciding that they will provide such review, for this Court to say, well, if you're going to do that you have to apply a Federal standard on State habeas review rather than the standard that you choose.

Secondly, to the extent the States decide to provide habeas review or any other kind of postconviction review, the authority by which they do that derives from State law, not from the Federal Constitution or any other Federal law, and this Court obviously does not have general supervisory authority over, over State courts as it does Federal courts.

And third, unlike the situation with direct review, this Court could not as a practical matter impose a Federal standard on State habeas proceedings without being highly intrusive. I mean --

JUSTICE BREYER: In, in this case -- suppose the following circumstance. Suppose a Federal court has decided in the case of this defendant --

MR. SCHAERR: Right.

JUSTICE BREYER: -- there was an error of Federal constitutional law, search and seizure or confessions or something, and now we send it back. And let's suppose further the State has no independent State ground, they are not trying to make the argument, whether or not they're trying to make it here. There's no independent State ground, no objection to problem, nothing. Now, I have read that one standard that could be applied is this structural error standard. A second is a harmless error standard. But I've never seen a case, but that's perhaps my ignorance -- that's what I want you to show me -- where it's definitively established by a Federal court anyway that there was a serious Federal error, I've never seen a case where this Court said, or I can't recall one, that the State applied yet

some third kind of standard, such as, well, I know there was a very important error, I know it was Federal and constitutional, but nonetheless we're not going to give them any remedy unless it's absolutely egregious harm. I've never seen that in the law.

Now, can you point to me in the law where, which will correct my lacuna?

MR. SCHAERR: I'm not aware that the Court has expressly addressed that precise question, which I think is --

JUSTICE BREYER: Have you ever seen it in a State? Have you ever seen a State which gets a case back from --

MR. SCHAERR: Yes.

JUSTICE BREYER: Where? Where should I look on that?

MR. SCHAERR: Well, our amicus brief, Your Honor, cites, cites dozens of cases in which, in which States have addressed Federal error --

JUSTICE BREYER: No, no. I'm not talking about that because obviously they can do what they want, I think, in the State courts, but they might violate Federal law if they do it. And now so what's happened is somebody has gone into Federal court or this Court and Federal court or this Court has said:

Here's a Federal error, of course you're free to apply harmless error or whatever, you don't have to let the person have a new trial or let him out.

But I've never seen an instance I can think of where, that having happened, the State then applied yet some third standard like absolutely egregious horrible harm or not totally wonderful harm or something like that. I've never seen that. That's what I'm looking for. Is there such an instance?

CHIEF JUSTICE ROBERTS: Or plain error, as applied in the Federal cases under Alano.

JUSTICE BREYER: Yes, that's possible.

JUSTICE SCALIA: Is there some reason, Mr. Schaerr, why that would be more egregious when the Federal constitutional question has been answered by a Federal district court than it is when the Federal constitutional question has been answered by the State supreme court? Wouldn't it be just as bad when the State supreme court has said the Federal Constitution has been violated and then the case goes back to the lower State court and the lower State court applies some standard for plain error which is, which is simply different from what is, what is being urged here today? I'm sure that happens all the

time.

MR. SCHAERR: I'm sure it does.

JUSTICE SCALIA: And I don't know why it's any worse, any worse when you do it to a Federal district court's determination of what the Federal Constitution says than when you do it to the State supreme court's determination of what the Federal Constitution says.

MR. SCHAERR: That's right.

JUSTICE BREYER: I guess the reason would be that there is a problem with enforcing Federal constitutional standards. I have not heard of a State that says, suppose the jury was chosen in a racially discriminatory way, suppose there are all kinds of things, the State says, well, we admit, we admit that there is this violation, but we're just not going to apply a harmless error standard. We're going to apply a tough one. I guess that would be the reason. That's why I don't think I've ever seen it.

MR. SCHAERR: Right, and the question is whether the State is free in that circumstance to apply a State harmless error standard or if it has to be required to apply a Federal harmless error standard. And our -- and the fact is that on the

ground the States are routinely applying State harmless error standards in those situations. And so it would be a sea change if this Court were to now hold that, no, when a State court is reviewing the effect of a Federal error that the State court has to apply a Federal standard rather than the State standard.

JUSTICE ALITO: Is there any special Federal harmless error standard that applies to unpreserved error?

MR. SCHAERR: I think it's the Alano standard, at least in the Federal --

JUSTICE ALITO: Well, that's for Federal, that's in the Federal courts. But there isn't one that's applicable to the State courts, is there?

MR. SCHAERR: No, no. There isn't.

JUSTICE SOUTER: Well, we've never had the issue before us, have we? That's why you're here.

MR. SCHAERR: That's why I'm here, that's right.

JUSTICE STEVENS: But isn't the question a little different. If you have two harmless error standards in a given State, do they have to apply them consistently?

MR. SCHAERR: Well, then the question

would be is there some Federal law reason why they have to. I mean, they may under State law have to apply them --

JUSTICE STEVENS: In other words, if for example the higher standard only applies to unpreserved error and the record clearly establishes and the several State judges confirm there was no unpreserved error, then would there not be a duty to apply the lower standard?

MR. SCHAERR: There may be under State law, but it's not clear why that would raise a Federal issue.

JUSTICE STEVENS: And if the State follows the rule in just one exceptional case before the court, can the Federal court say, hey, you're not following your regular rule?

MR. SCHAERR: Well, there may be a due process objection to that, but here the only objection --

JUSTICE KENNEDY: Is there no Federal interest in ensuring that there is a full and fair implementation of a Federal right? And if the State higher standard is erroneously applied, doesn't that prejudice the Federal right?

MR. SCHAERR: Well, that may be one reason

why we have Federal habeas proceedings.

JUSTICE SCALIA: Well, that reason would apply equally, however, to determinations of Federal rights by State courts.

MR. SCHAERR: That's correct.

JUSTICE SCALIA: And I think everybody understands that State courts do this all the time, and indeed a good way to do an end run around what, what, what the other side in this case seems to want is simply for the State supreme court to find a violation of Federal law so that it doesn't get to a Federal court and then have the State lower court apply whatever harmless error standard it wishes, which would be a crazy system.

MR. SCHAERR: That's right.

JUSTICE SCALIA: So if you're going to adopt this rule, this rule would have to be adopted not only for references back to the State court from a Federal decision, but you would surely have to apply it to all State determinations of Federal law, and I don't really know what authority we would have to require lower State courts to do that.

MR. SCHAERR: Well, that's, that's exactly right and especially in the habeas context it would be, it would be extremely intrusive and invasive for

this Court to attempt to do that. It's one thing on direct review of a State criminal conviction to say as a matter of Federal constitutional law we think there was an error here and we're going to nullify the conviction, which is what the Constitution gives this Court the power to do. But it's quite another, after the conviction is final and the defendant is already incarcerated, then on a State habeas proceeding for the issue to come, to come back to this Court, it would be extraordinary for this Court to say, well, you have to apply Federal standards or Federally dictated procedures in that circumstance.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Steiker, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JORDAN STEIKER
ON BEHALF OF THE PETITIONER

MR. STEIKER: I'd like to return to the record in this case because I think once it's clarified what the nature of the evidence was in this case, it's clear that this Court could find that the error was harmful under any standard, including the egregious harm standard. We had in this case over 200 pages of exhibits documenting a lifelong

disability. This evidence was first introduced in the guilt-innocence phase of the trial. It was argued at the guilt-innocence closing argument, in which trial counsel said, this is a 19-year-old ninth grader who has been charged with this crime, and argued that that was the basis for considering him less culpable than his college-educated co-defendant.

During the punishment phase, it's clear that the single most important witness, the one whose testimony was the most central, the most time-consuming, was Alberta Pingle, who brought in all of the school records showing from at the time the Petitioner was in school he had been diagnosed as a learning disabled, possibly organic in nature, 78 IQ. And his counsel emphasized this as the central basis for withholding a death sentence. He said, this man has a 78 IQ, 8 points from being mentally retarded, lifelong learning disabilities, possibly organic in nature.

And the argument that there was no evidence of abuse in this case is belied by the fact that the evidence showed that Petitioner's father chased him with a butcher knife in order to steal the family's car in order to support his crack habit. If that's not evidence of abuse and evidence that could

show reduced culpability for this defendant, coupled especially with his impairment which made him less capable of responding to that role model and avoiding dangerous behavior --

CHIEF JUSTICE ROBERTS: What about General, Mr. Cruz's comments that this was a minor point in counsel's summation before the jury?

MR. STEIKER: It is true that this evidence was presented as only one page of his closing argument, but that was because of the problem in this case. As this Court noted in its summary reversal, the prosecutor got up right before defense counsel and said: You promised us on voir dire you would answer the special issues honestly and that if the evidence supported a yes answer to deliberateness and dangerousness you would give us yes answers. Basically, right before he spoke the prosecutor gave an anti-nullification instruction which said this evidence isn't relevant to the special issues of deliberateness and dangerousness.

In that posture, he was left to argue that the evidence showed he wasn't dangerous, that the evidence showed he didn't act deliberately, and just hope that the jury would be willing to lie on the special verdict form.

CHIEF JUSTICE ROBERTS: Is this argument an assertion that the Texas State court was wrong in its determination of this question of Texas State law?

MR. STEIKER: His argument --

CHIEF JUSTICE ROBERTS: No, your argument right now.

MR. STEIKER: I'm sorry. I don't understand.

CHIEF JUSTICE ROBERTS: Is your argument an argument that the Texas State court was wrong on its ruling under Texas State law harmless error.

MR. STEIKER: No. Our argument is that when you take out the clearly impermissible Federal conclusion that the jury could give effect to this evidence, which was exactly what this Court said to the contrary in its summary reversal -- this Court said this evidence couldn't be considered. The State court said he has extensive evidence, he has powerful evidence, powerfully presented, dramatically presented, but we think, unlike the Supreme Court, that a carefully crafted nullification instruction will facilitate the jurors' consideration of it.

So if you take away the impermissible Federal conclusion, this Court could clearly

conceive, conclude, on the basis of the State court's own characterization of this evidence, which departs tremendously from the Respondent's view, that this was powerful mitigating evidence. The Court of Criminal Appeals' error was to conclude that this could be taken into account after this Court said exactly the opposite.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)

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