NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ROBERT SMITH,
Petitioner

v.

JANIE COCKRELL,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
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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QUESTIONS PRESENTED

I.

Did the Court of Appeals misapply *Penry v. Johnson*,532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that a "nullification" instruction was improper?

II.

Did the Court of Appeals err by finding that the Petitioner did not demonstrate ineffective assistance of counsel sufficiently to show that the state habeas finding was unreasonable?

III.

Did the Court of Appeals err by relying on the erroneous waiver doctrine of *Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989), *cert. denied* 494 U.S. 1060 (1989) and a legally erroneous state court finding?

LIST OF ALL PARTIES

1. Robert Smith (Real name: Robert McBride)

2. Janie Cockrell, Director of the Texas Department of Criminal Justice, Institutional Division

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TO THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

COMES NOW the Petitioner, Robert Smith, through the undersigned counsel, and respectfully requests that this Court grant a writ of certiorari to the United States Fifth Circuit Court of Appeals, for reasons set forth as follows.

LOWER COURT'S OPINION

The Court of Appeals reversed the judgment of the United States District Court and ordered judgment in favor of the Respondent on November 4, 2002. *Smith v. Cockrell*, 311 F.3d 661 (5th Cir. 2002). The opinion is enclosed with this petition as Appendix A. The Court of Appeals denied rehearing and reconsideration *en banc* on March 17, 2003. A copy of the order appears in Appendix E.

BASIS FOR JURISDICTION

1. The order denying rehearing was issued on March 17, 2003.

2. The Petitioner asks this Court to review a final judgment of the United States Fifth Circuit Court of Appeals with respect to questions of law arising under the United States Constitution.

3. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

4. Pursuant to SUP. CT. R. 13.1 and SUP. CT. R. 30.1, this petition is timely if filed on or before Monday, June 16, 2003.

CONSTITUTIONAL PROVISIONS RELIED UPON

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitutions provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added).

STATEMENT OF THE CASE

A. Procedural History

The Petitioner was indicted for Capital Murder, under TEX. PENAL CODE §19.03, in a district court of Harris County, Texas. A jury found the Petitioner guilty as charged (CR-256).[1] The jury then gave affirmative answers to special issues submitted under TEX. CODE CRIM. PROC. art. 37.071, which required the trial judge to assess the death penalty.

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[1] The clerk's record of court documents from the trial will be designated "CR." The court reporter's record is designated with "RR" and volume numbers. The record from the State habeas proceedings are designated by "St Hab" and either "CR" or "RR," with volume number.

A divided Texas Court of Criminal Appeals upheld the trial court's judgment in *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995), *cert. denied* 516 U.S. 843 (1995). A state writ application was filed on April 24, 1997. The trial court, with a new judge presiding, conducted an evidentiary hearing relating to one claim (ineffective assistance) on October 23, 1998 and entered findings of fact and conclusions of law, recommending that relief be denied. The Court of Criminal Appeals denied relief in a two-page order on April 21, 1999 (Appendix D).

On November 11, 1999 the Petitioner filed a rudimentary petition under 28 U.S.C. §2254 in the United States District Court for the Southern District of Texas, then later filed an amended petition. This filing established the federal courts' jurisdiction. The Respondent filed a motion for summary judgment. The district court instead entered an order granting relief to the Petitioner on October 31, 2001, based on two issues found in the Petitioner's favor. The district court held that the Petitioner was deprived the effective assistance of counsel at the punishment phase of his trial. (App. B, pp. 10-25). The district court also held, based on *Penry v. Johnson*, 532 U.S. 782 (2001)(hereinafter "*Penry II*"), that the Petitioner was denied fair consideration of mitigating evidence due to the use of a "nullification" instruction (App. B., pp. 25-44). The district court granted summary judgment for the Respondent on other issues. The Petitioner's motion for new trial under

FED.R.CIV.PROC. 59 was denied. Notice of appeal was filed by both parties.

On appeal the Respondent challenged the two findings in favor of the Petitioner. The Petitioner presented three issues by cross-appeal concerning the lack of an instruction on the power of each juror to compel a life sentence. The Petitioner also asked the Court of Appeals to grant relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), which came down in the middle of the briefing period and had not been an issue in the district court.[2]

Argument was presented before a panel of the Fifth Circuit Court of Appeals on the afternoon of November 4, 2002. *The very same day*, the panel reversed the judgment of the district court and ordered the entry of summary judgment for the Respondent. The Petitioner filed a petition for rehearing and a suggestion of reconsideration *en banc*. The petition and suggestion were denied on March 17, 2003 in a short order (Appendix E), relying on the *en banc* Court of Appeals decision in *Robertson v. Cockrell*, 325 F.3d 243(5th Cir. 2003), decided three days earlier.

B. Factual Background

Evidence at the trial showed that the Petitioner and a colleague were fleeing on foot from the commission of a store robbery when they came upon James Wilcox. The Petitioner shot Wilcox in the arm while attempting to steal Wilcox's truck. The

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[2] This issue was not decided on appeal due to lack of exhaustion.

bullet traveled up the arm and into the chest cavity, causing a fatal wound.[3]

At the punishment stage, the State put on evidence of other offenses and of the Petitioner's juvenile confinement. A physician, Mary Jumbelic, testified for the defense that a person would not normally expect that a gunshot wound to the arm, such as suffered by Mr. Wilcox, would cause death. The defense put on testimony by the Petitioner, by his father, and by Fred Fason, M.D., a psychiatrist who said the Petitioner was afflicted by "antisocial reaction" (RR XLV-12). Fason said that the Petitioner's psychiatric affliction would wane with age, such that the Petitioner would be less of a risk when he entered his thirties (RR XLV- 24-25). Fason made some mention of the Petitioner's I.Q., but he asserted that the Petitioner was "above the cutoff" for being classified as mentally retarded (RR XLV-91). Medical records showed I.Q. scores, from testing at various ages, ranging from a low of 52 on a Full Scale I.Q. test to a high of 72 on a Performance I.Q. test.

The Petitioner's father, Johnny McBride,[4] testified that the Petitioner suffered a head injury as a child. A 1974 report from a medical clinic for indigents stated:

> This 6 year, 10 month old black male was in good health until approximately 2 months ago. He was playing with other children in the

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[3] The Court of Appeals' opinion provides a more detailed summary of the events surrounding the offense.

[4] The Petitioner's actual name is Robert McBride. He used the alias of "Smith," and it has stuck with him ever since he was indicted.

> street near his home when he was reportedly backed into by a truck. He was struck in the back of the head and was knocked to the ground. According to a neighbor, he remained unconscious for a period of 10-15 minutes. After he regained consciousness he got up and "staggered" to the house. The patient's father reports that he complained of pain in his head throughout that evening. He also complained of pain in his eyes. He continued to have pain that night and "cried all night with his head." The next morning the patient was taken to the Homestead Clinic by his father. Here he was seen by Dr. Johnson, who reportedly obtained skull x-rays and other studies. The patient's father was told that he had had a "slight brain concussion" and was told to observe the child very carefully over the next few days.

(DX-2 in RR XLVII). The report further stated that the Petitioner was taken back for follow-up visits over a few weeks and a doctor "was apparently satisfied with the patient's progress"(DX-2). A doctor recommended aspirin and a return visit in three months. It does not appear that any neurological examinations were made after that, even though the Petitioner's father was told that "in the long run it could take an effect on him" (RR XLIV-90). The doctor told Mr. McBride that, because the Petitioner was young when he was injured, the Petitioner had something to "build on" (RR XLIV-90).

In the federal district court the Petitioner presented scholarly treatises showing that in fact a juvenile head injury can have long-term consequences, including consequences likely to contribute to criminal or aberrant behavior. There was no current diagnosis of the Petitioner's head injury, but because the Respondent sought summary judgment, the Petitioner asked for funds to further develop such evidence

and a chance to present it. The federal district court instead ruled on the existing evidence.

REASONS FOR REVIEW

REASONS FOR REVIEW OF QUESTION ONE

Did the Court of Appeals misapply *Penry v. Johnson*,532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that a "nullification" instruction was improper?

The Court of Appeals addressed the ineffective assistance issue before addressing the issue concerning the "nullification" instruction. The Petitioner will reverse that order here because the instruction issue also is being presented to this Court in a petition for writ of certiorari in *Robertson*, and because the Fifth Circuit doctrine which the Petitioner is attacking has had, and will continue to have, widespread application. The Petitioner believes this Court should grant certiorari in both *Robertson* and this cause.

All three of the issues presented are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under 28 U.S.C. §2254(d), a federal district court may not grant habeas relief unless a state court's decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; *or*

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(Emphasis added). The emphasized word "or" means that the federal district court was within its authority to grant relief if *either* of the provisions applied. With respect to the first alternative, a state court determination must involve an "objectively unreasonable" application of applicable law as determined by this Court. *Price v. Vincent*, __ U.S. __, 123 S.Ct. 1848, 1853 (2003); *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002).[5]

A.

Penry Doctrine and the Fifth Circuit's Mitigation Test

This Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989)("*Penry I*") held that the then-existing special issues in TEX. CODE CRIM. PROC. art. 37.071, used in Texas Capital Murder trials to determine whether the punishment would be the death penalty or life imprisonment, did not provide an adequate mechanism for the jury to give effect to mitigating factors which could justify a life sentence. *Penry I* rested on the due process clause of U.S. CONST. amend. XIV and the "cruel and unusual punishment" clause of U.S. CONST. amend. VIII. Texas courts crafted

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[5] Although the Court of Appeals focused on that first alternative, the state habeas court decision did include an unreasonable "determination of the facts" regarding ineffective assistance. That will be discussed in Part II.

various *ad hoc* solutions for cases tried after *Penry I* but before the Texas Legislature provided a new special issue to cover mitigation. One attempted solution, used in this cause, in *Robertson*, and in many other cases, was a "nullification" instruction, telling jurors to alter their answer to one of the existing special issues if they believed there were sufficient mitigating considerations.

Though not having the benefit of *Penry II* when he started, the Petitioner argued that the use of a nullification instruction in his trial was an inadequate mechanism for the jury's consideration of mitigating evidence. The Petitioner offered a number of reasons why that was so, but for present purposes it is more important to focus on the analysis in *Penry II*. The majority opinion held that the nullification technique was "confusing" because the instructions, taken as a whole, were susceptible to different readings by the jury. One possible reading "placed law-abiding jurors in an impossible situation," in that "nullifying" for the sake of mitigation would violate jurors' statutory oath. 532 U.S. at 799-800. This Court found that there was at least a "reasonable likelihood" that jurors who believed in their oath would not follow the nullification instruction. *Id.* Even when the explanatory role of attorneys' argument was taken into account, the majority opinion held that "at best, the jury received mixed signals." 532 U.S. at 802. Nothing in the particular

instruction used in the Petitioner's trial distinguished it from that in *Penry II*."

A panel of the Fifth Circuit nevertheless held that the Petitioner was not entitled to anything better than a nullification instruction. In the panel's view, the Petitioner had not brought forward evidence at trial which fit the Circuit's concept of "constitutionally relevant" mitigating evidence. 311 F.3d at 680 (See App. A.). The panel postulated that *Penry II* does not apply unless mitigating evidence meets the test developed by the Court of Appeals in the wake of *Penry I*. That test is whether the mitigating evidence shows "a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own." 311 F.3d at 680. As the panel

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[6] The nullification instruction is this cause was as follows:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the Defendant's character, background, record, emotional instability, intelligence or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and thereafter, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to that special issue under consideration.

(CR-260-261). "Personal culpability" was not defined in the charge.

stated, the Fifth Circuit has "found a *Penry I* problem to exist only where the petitioner presents mitigating evidence relating either to severe mental retardation or to extreme child abuse." 311 F.3d at 680.

The Petitioner argued both to the panel and in a suggestion of *en banc* reconsideration that the "uniquely severe permanent handicap" standard was inappropriate. Reconsideration was delayed while the *en banc* court decided a similar issue in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003). Reconsideration *en banc* was denied in this cause, with a brief order citing *Robertson*, three days after *Robertson* was handed down. This cause thus calls for this Court to examine both the panel opinion's reasoning and the reasoning set forth in *Robertson*.

B.

How the Fifth Circuit Has Misconstrued *Penry I*

The first step in the analysis is to examine whether the "uniquely severe permanent handicap" test was a proper interpretation of *Penry I*. This is an important issue of constitutional law which this Court should address. A grant of the writ of certiorari is justified under SUP. CT. R. 10(c).

The Fifth Circuit's standard was adopted in *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992)(*en banc*), a case where Graham was not claiming a "handicap" at all. Whether the standard was correct in Graham's case became academic after this

Court wrote its own opinion in *Graham v. Collins*, 506 U.S. 461 (1993), not relying on such a characterization of what constitutes mitigating evidence. On this point the Fifth Circuit majority opinion in *Robertson* made a major mistake, asserting that "*Graham*'s logic was sustained – twice – in the Supreme Court's next term. The first instance occurred in the course of the Court's review of *Graham* ..." 325 F.3d at 255. A portion of this Court's *Graham* opinion excerpted by the *Robertson* majority merely said that this Court was "not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests" without undermining prior case law. 506 U.S. at 476. The evidence Graham was relying upon in his case, however, was "good character" evidence rather than evidence of afflictions or handicaps. Thus the *Robertson* majority read far too much into the excerpted statement in *Graham* by treating *Graham* as an endorsement of the "uniquely severe permanent handicap" test.

The *Robertson* majority opinion also claimed that the Court of Appeals' test in *Graham* was endorsed "more emphatically" in *Johnson v. Texas*, 509 U.S. 350 (1993). The claimed mitigation in *Johnson*, as *Robertson* characterized it, was "youth and immaturity." Everyone experiences youth and immaturity. Neither is a "handicap," *i.e.* a long-term problem which is not a part of normal life. Thus *Johnson* also does not provide any basis in this Court's case law for drawing a line between types of handicaps, which is what the Court of Appeals did with the

"uniquely severe permanent handicap" standard.[*] Unfortunately the standard lived on in Fifth Circuit case law after *Graham* because subsequent Fifth Circuit panels considered themselves bound by the *en banc* decision.

There are several problems with reliance on the Fifth Circuit's standard. Probably the most important is the point made in Judge DeMoss' dissent in *Robertson, supra* at 268:

> I think the majority errs in relying on whatever may be "this Court's consistent interpretation of *Penry I* to decide the critical issues in this case." After Congress adopted the AEDPA, it is settled law that on our review under §2254 we look only to the decisions of the United States Supreme Court to determine whether a state court decision was consistent with "clearly established federal law."

The "uniquely severe permanent handicap" language appears nowhere in this Court's jurisprudence. This Court's decision in *Graham* did not adopt the Fifth Circuit standard. A writ of certiorari has been denied in many cases where the Fifth Circuit applied its standard, but denial of the writ of certiorari is not a decision on the merits.

Another major problem with the Court of Appeals' standard is the wording. The words "uniquely severe" cannot literally be accurate, for *Penry* doctrine surely

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[*] *Robertson* also overlooked the point made by Justice O'Connor's dissent in *Johnson v. Texas*, emphasizing that a jury had to be able to give *full* consideration and full effect to mitigating evidence. Placing a very high threshold on what counts as constitutionally relevant evidence significantly undercuts that principle. It is noteworthy that *only* the dissenting opinion from *Johnson v. Texas* was cited in *Penry II*. It is not clear that *Johnson v. Texas* survives *Penry II*.

was not tailor-made for one man or one group. Nor did either *Penry* decision suggest that different "handicaps" are to be compared for "severity" by either a jury or a reviewing court. In fact, such a comparison could not be made by the jury in any one case with any degree of reliability. Furthermore, it is fallacious to limit *Penry* doctrine to a "permanent" handicap, or for that matter, even a long-term one. To see why that is so, the Court need only look to *Penry I, supra* at 318, which specifically said that "circumstances of the offense" could be mitigating evidence. Such circumstances are not a "permanent" characteristic of the actor.[8]

The majority opinion in *Robertson* presented a chilling list of the potentially mitigating afflictions which have been held to fall short of the test, including "subnormal intelligence" and head injuries. *Robertson*, 325 F.3d at 249-250, citing this case. There was nothing in *Penry I*, however, which said particular types of mitigating evidence automatically lacked constitutional significance. In the real world, problems often are significant because of their degree rather than their type. That reality seem to have escaped the Fifth Circuit majority, which effectively has read *Penry I* as defining a very narrow class of handicaps as the universe of what mitigating evidence has "constitutional" significance. In a masterpiece of

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[8] The present statutory mitigation issue in Texas law also treats circumstances of the offense as potentially mitigating evidence.

understatement, a concurring judge in *Robertson* commented that "we have danced close to categorical characterization of evidence of disabilities." 325 F.3d at 259. The Fifth Circuit's test also gives short shrift to the possibility that the combined effect of disabilities or circumstances could be sufficiently mitigating.

In sum, the Fifth Circuit's misreading of *Penry I* needs to be corrected by this Court, since it is clear after *Robertson* that the correction will not be made otherwise.

C.

Inapplicability to *Penry II* Problems

Apart from the inherent shortcomings of the Fifth Circuit's standard, there is a valid question whether it should apply to issues under *Penry II*. As a starting point, the very existence of a nullification instruction in a particular case is an indication that the trial judge thought there was some sort of mitigating evidence. After that threshold determination is made, should not the weight of the evidence be decided by the jury? The "uniquely severe permanent handicap" standard presupposes that no reasonable juror could have found anything less to be mitigating. That demeans the role of the jury. It does so on the type of issue which *most* calls for the collective community wisdom which a jury brings into the courtroom, *i.e.* what circumstances

are mitigating under current community norms."

Once respect for the jury is given its proper place in the calculus, it is easy to see that the "uniquely severe permanent handicap" test should not be superimposed on *Penry II*. With clear instructions, a jury might well find some condition or circumstance outside that test to be sufficiently mitigating. Therefore the evil of "mixed signals" in the jury charge exists whether or not a federal appellate court might agree that a particular defendant's mitigation evidence was adequate. "Mitigation" itself is not what the Constitution protects, at least not under Fourteenth Amendment due process.[10] Rather, it is the right to have a jury hear and consider mitigating evidence that the Constitution protects. Thus the superimposition of the Fifth Circuit's standard on *Penry II* has the effect of severely limiting *Penry II*. That is, of course, what the Respondent wants, but the Petitioner thinks it is not what this Court had in mind in *Penry II*. This is an important constitutional issue which this Court needs to address. SUP. CT. R. 10(c).

" The concurring opinion in *Robertson, supra* at 259 perceived a "sudden tolerance of jury discretion" in this Court's case law. Actually *Penry I* rested in large part on the idea that Capital Murder juries should have discretion with respect to mitigating factors. There would be nothing "sudden" about a repudiation of a Fifth Circuit's doctrine which says, in effect, that jury discretion as to what is "mitigating" should not be protected.

[10] This statement would not be correct under an Eighth Amendment approach to mental retardation in the wake of *Atkins*. Although this Petitioner does in fact have a potential *Atkins* claim in the works, that is not the issue presently before this Court.

D. Section 2254 Procedural Considerations

The Petitioner's suggestion of *en banc* reconsideration also argued that, even if the "uniquely severe permanent handicap" standard remains in place, there was an important procedural question in light of the habeas history of the case. The state habeas court did not have occasion to decide how *Penry II* applied, and it did not attempt to apply the Fifth Circuit's "uniquely severe permanent handicap" standard. In fact, the Court of Appeals relied on a non-specific state habeas finding that "the jury could give effect to the applicant's alleged mitigating evidence." 311 F.3d at 678. (See Appendix C, p. 25.) That was not a specific state habeas finding that the petitioner is not mentally retarded. The foregoing state court finding also did not address whether a "two-edged sword" problem was presented. That is, the state habeas court did not find that the jury could give mitigating effect to retardation evidence (or any other mitigating evidence, for that matter) without the risk that it also could be viewed as suggesting the risk that the petitioner would be unpredictable, incurable, and dangerous in the future. In short, the federal district court judge's discretion as to application of *Penry II* was not hemmed in by any state court determination entitled to deference under Section 2254.

Since the federal district court's analysis did not actually clash with a specific state finding, the real question should have been whether the federal district judge

abused his discretion. There was enough evidence supporting a finding of mental retardation to bring the district court's decision within the realm of discretion. Under an abuse-of-discretion standard, the district court's decision should have been upheld, even if the appellate court did not entirely agree with the district court. The summary disposition by the Court of Appeals on rehearing failed to answer this argument. This procedural aspect of the issue may seem comparatively dry and abstract, without the emotion attached to the substantive issues, but it nevertheless is important within the context of Section 2254 cases. This Court should examine this problem.

E. Mitigating Evidence in This Cause

Inquiries under *Penry II* should focus on the evidence actually presented at trial, but there was enough in the Petitioner's trial to make the risk inherent in a nullification instruction a significant problem. That is, the Petitioner presented enough that the federal district court did not abuse its discretion, even in light of the Fifth Circuit standard, and hence the district court's decision should have stood.

(1) Mental retardation or "subnormal intelligence." As the Court of Appeals acknowledged, and as was shown in habeas proceedings, the Petitioner several times had I.Q. scores in or below the 70-75 range:

> In 1980, a report indicated a verbal I.Q. of 67, a Performance I.Q. of 64, and a Full Scale I.Q. of 63. An evaluation from the Harris County Department of Education from 1982 reported a Verbal I.Q. of 57, a Performance I.Q. of 55, and a Full Scale I.Q. of 52. This report also

of mental

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> characterized Smith as falling within the "[m]entally deficient range of intellectual development." In 1983, the Texas Youth Counsel Child Care System placed Smith's Verbal I.Q. at 60, his Performance I.Q. at 72, and his Full Scale I.Q. at 64, noting that these results put him within the "mild mental retardation" range.

311 F.3d at 673. Unfortunately the defense approach to this evidence was to introduce a bunch of records without much explanation by an expert or discussion in argument.[11] There was still some testimony, however, as Dr. Fason, who had seen the scores, said the Petitioner had "an I.Q. of 64, 74 or whatever it is." Fason made that reference in the context of saying the Petitioner's psychiatric problem "is not a product of just his I.Q." (RR XLV-31). That "not just" phrasing was some evidence, albeit slight, that Fason believed I.Q. *was* a contributing factor. In light of *Atkins*, n.3, either a 64 or a 74 (actually a 72) falls within the range necessary to show one component of the accepted definition of mental retardation. Putting aside the obviously wrong "unique" component of the Fifth Circuit's test, a rational jury could find that either a 64 IQ or a 74 IQ (actually a 72) was a severe permanent handicap.

A clinical diagnosis of mental retardation also requires documentation of functional deficits, manifested before a person is eighteen. There was a little evidence of such deficits, notably records showing abysmal performance in school,

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[11] To the extent the evidence of I.Q. and retardation was not adequately developed before the jury, that was the fault of counsel, as discussed in Part II below.

but the topic was not well developed, as this case was tried long before *Atkins*. It is important to not fall into the trap of trying to determine at this point whether the Petitioner was shown to meet the clinical definition of retardation recognized in *Atkins*. If that test were met, then *Atkins* would solve the problem, and the Petitioner would not need *Penry II*.[12]

The Court of Appeals relied heavily on a comment by Dr. Fason during cross-examination which indicated that Fason thought the petitioner was "above the cutoff line for mental retardation" (RR XLV-91). 311 F.3d at 682. Fason's stated basis for that conclusion, however, was "the way he related things to me," meaning an interview. *Id.* This approach by the Court of Appeals was off base, since Fason was not called by the defense as an expert on retardation, he was not relying on systematic testing to support that remark, and he made the remark as part of a rambling answer to a cross-examination question. Furthermore, as the Court of Appeals admitted, an earlier evaluation *had* stated that the petitioner was "mildly retarded" (RR XLIV-196).[13]

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[12] One of the panel judges posed a question during argument whether *Atkins* indeed vitiates the need for either *Penry I* or *Penry II*. Both sides said no. The question makes some sense, however, if the "uniquely severe permanent handicap" test is superimposed on *Penry* doctrine, given that only mental retardation and extreme childhood abuse have been held by the Fifth Circuit to satisfy that test.

[13] This was hearsay, but hearsay admitted without objection has probative value. TEX. R. EVID. 802.

The Court of Appeals perceived a "vast difference" between the evidence in this cause and the evidence in *Penry II*. 311 F.3d at 681. To the extent that is so, it plainly would be counsel's fault for not developing comparable evidence, but this part of the Court of Appeals' analysis also reveals the underlying fallacy of "categorical characterization," inherent in the Fifth Circuit's standard, that was mentioned in the *Robertson* concurrence. The "vast" difference is mainly one of degree. It is true that there was not a parade of experts to talk about the meaning of low intellect, but finding that to be a critical distinction would give a jury too little credit. It should not take a trained psychiatrist or Ph.D. scientist to understand that a person of very low intellect would (a) be more likely to fail to appreciate the risk of shooting someone in the upper arm, and (b) be more likely to be a failure in life, with life events like those portrayed in the State's punishment evidence.

(2) Head injury. The Court of Appeals declined to consider evidence of the Petitioner's head injury in its *Penry II* analysis, declaring that the issue was not briefed and therefore was waived. 311 F.3d at 679. The district court had found that the head injury evidence, as it stood in the trial court, fell outside the Fifth Circuit's test, so the key question was the applicability of that test. The Petitioner's brief did attack the Fifth Circuit standard as part of the response to the Respondent's point of error. Moreover, the Petitioner attacked the Fifth Circuit standard in oral argument,

but since the opinion was already been written by that point (inasmuch as it issued within two hours after conclusion of argument), there was scant consideration of anything said in argument. In any event, some evidence of a head injury was part of the totality of evidence which formed a backdrop for the evidence of retardation. In that sense it was like the childhood abuse evidence in *Penry I*.

Taken together, those factors could have been considered sufficiently mitigating by a jury which was properly instructed. The same is true of the evidence of mental retardation or "subnormal intelligence," standing alone. The federal district court was correct in holding that *Penry II* applied.

F. The Question of Disposition

Finally, the Petitioner also argued that, even if the Respondent prevailed at the Court of Appeals, the most relief the Respondent should have received was a remand to the federal district court. The Court of Appeals treated the federal district court's disposition as "essentially grant[ing] summary judgment" for the petitioner on two issues. 311 F.3d at 668. The Court of Appeals further reasoned that FED.R. CIV. PROC. 56 must yield, in the event of conflict, to Section 2254.[14] The Petitioner urged reconsideration of that analysis, but to no avail.

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[14] Ironically, it was the Respondent's resort to Rule 56, by filing a motion for summary judgment, which precipitated the federal district court's decision.

It was unfair to treat this cause as one where summary judgment was granted for the Petitioner. There was no such motion by the Petitioner. This is not a situation where the Petitioner, as a summary-judgment movant, presumably put forward all the evidence he believed he needed. On the contrary, the Petitioner tried to show that further evidentiary development is needed, but it would cost thousands of dollars. In particular, a proper evaluation of the effects of the Petitioner's head injury would be very time-consuming and expensive. At the time the state habeas application was filed, the Texas Court of Criminal Appeals was not providing adequate habeas funding. The Petitioner is indigent, and his court-appointed attorneys were not wealthy enough to absorb the cost of testing or to "front" the money. Unless the federal district court paid for an evaluation, it could not be conducted.

The federal district court did not rely explicitly on Rule 56. The district court explicitly relied on Rule 8 of the Rules Governing Section 2254 Cases, specifically on authority under Rule 8 to make "such disposition of the petition as justice shall require" (App. B, p. 53).[15] The district court's ruling cannot fairly be read as a refusal to consider other evidence. It merely indicated that the district court believed it

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[15] An additional indicator is the fact that the district court did not give ten days of advance notice of its intent to grant summary judgment *sua sponte*, as dictated by *NL Industries, Inc. v. GHR Energy Corporation*, 940 F.2d 957, 965 (5th Cir. 1991), *cert. denied* 502 U.S. 1032 (1992). Since this is the same federal district court as in *NL Industries*, the judge surely knew what that case required if he was relying on Rule 56.

already had enough information to make a decision. This procedural distinction matters because, when the Court of Appeals disagreed with what was really a Rule 8 decision, it was effectively making its own decision as to the disposition of the petition which "justice shall require."

The Court of Appeals should have attempted to give effect to both Rule 8 and the statute, to the extent that is possible. Rule 8 can rightly be viewed as introducing an equitable component to the decision when necessary to prevent the application of the statute from being too harsh. Determining "what justice requires" in a given case is a task which depends heavily on the facts. The district court should have had the opportunity to decide the issues in view of what further evidence might be developed.

The Petitioner's request for a chance to further develop the record mainly pertained to the matter of the Petitioner's head injury as a child. In light of the Court of Appeals' holding as to mental retardation, however, there also needed to be factual clarification regarding retardation. Even if this Court is not prepared to jettison the "uniquely severe permanent handicap" gloss which the Fifth Circuit has applied to *Penry* doctrine, the Petitioner still should have his chance to be fully heard in the federal district court. There is not merely an important question of interpreting federal rules, such as to call for this Court's scrutiny, but a question of fairness as well.

II.

Did the Court of Appeals err by finding that the Petitioner did not demonstrate ineffective assistance of counsel sufficiently to show that the state habeas finding was unreasonable?

A. The Breakdown in Defense Preparation

The Court of Appeals also repudiated the federal district court's conclusion that the Petitioner did not receive the effective assistance of counsel at the punishment phase of his trial which is required under U.S. CONST. amend. VI. The two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) governs ineffectiveness claims. The first *Strickland* requirement is that the Petitioner show that counsel's performance was deficient, based on the totality of the representation. Second, he must show that there is a "reasonable probability" that, but for counsel's inadequate performance, the result of the proceeding would have been different. A "reasonable probability" in this context means a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A federal habeas petitioner must show that a state court applied *Strickland* in an objectively unreasonable manner. *Bell v. Cone*, 535 U.S. 685 (2002).

Inadequate defense preparation supports a finding of ineffectiveness on habeas review for two reasons. First, and most obviously, counsel who has not investigated potential evidence is incapable of presenting it to a jury. This Court emphasized the

duty to investigate in *Strickland*, *supra* at 691: "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Second, a lack of preparation offsets the *Strickland* presumption that omissions were due to some "strategy." In *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980), the Texas Court of Criminal Appeals made it clear that adequate preparation must precede *any* chosen defensive strategy:

> A criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance to his client – in or out of the courtroom. [Five citations omitted.] In the seminal decision of *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court recognized that a thorough factual investigation is the foundation upon which effective assistance of counsel is built.

Powell stated that a "thorough-going" factual and legal investigation must be conducted in the period prior to trial. *Id.* at 57.

The federal district court held that the Petitioner's trial counsel failed to develop and present crucial mitigating evidence. That should satisfy both prongs of *Strickland* in a case where the death penalty is assessed. For example, in *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999), trial counsel failed to investigate, develop, and present evidence of Moore's organic brain damage. The Court of Appeals found that there is no conceivable strategy that would explain such a failure by counsel. *Id.* at 618. It also found that the error was harmful. *Moore*, *supra* at 619. Unlike the

petitioner in *Moore*, the Petitioner had to contend with the AEDPA, but the federal district court understood that and conducted its ineffectiveness analysis within the AEDPA framework. *Williams v. Taylor*, 529 U.S. 362 (2000) is an example of a post-AEDPA case where a failure to introduce available mitigating evidence (including borderline retardation) demonstrated ineffective assistance of counsel.

The Petitioner's lead counsel, George Parnham, candidly admitted at the state habeas hearing that there were problems in the preparation for trial. Parnham said attorney Carlos Correa was appointed as second chair, or the "book lawyer."[16] Parnham testified that he believed the case could be settled by a plea, but when that hope waned he "attempted to get Mr. Correa to get involved in the legal aspects of developing the legal issues" (St Hab RR-12). As to factual preparation, Parnham said his own efforts "may have been impacted by my belief that I would be able to convince Mr. Smith to accept a plea bargain" (St Hab RR-15). That slackness in Parnham's preparation was significant because Parnham did not receive the help he expected from his second-chair counsel.

Parnham said Correa "was a nonentity in the defense of Robert Smith. He ... did not participate factually, and he did not participate legally, in the representation

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[16] At the state habeas hearing, counsel was not permitted to put on evidence as to the particular relationship between Correa and the judge who presided at trial. The Petitioner was attempting to show that Correa's appointment had nothing to do with Correa's prowess as a "book lawyer."

of Mr. Smith" (St Hab RR-17).[17] Parnham did not recall Correa rendering any assistance during trial such as taking notes or suggesting possible questions (St Hab RR-19-20). Parnham felt that he had to carry "all of the burden" of representing the Petitioner (St Hab RR-20). He concluded:

> The problem with that representation is that there's so many issues, both factual and legal, that demand the attention and competency, it seems to me, of both counsel at the table; and if one counsel is shackled with the responsibilities that are normally addressed by both counsel, then perhaps things can be overlooked, matters cannot be properly addressed. That was the ultimate impact.

(St Hab RR-21). The Fifth Circuit panel, mincing Parnham's testimony very finely, stated that Parnham did not actually say Correa was the lawyer responsible for development of mitigation evidence. 311 F.3d at 670, n. 5. If not, then that merely means it was Parnham who fell down on the job.

B. Mitigation Evidence Not Presented

Regardless of which lawyer was to blame, the habeas record shows that trial counsel failed to develop and present crucial mitigating evidence relating to the Petitioner's mental retardation and a juvenile head injury he suffered. The particulars are discussed below, but they hardly seemed to matter to the Court of Appeals panel. Instead the panel emphasized the availability of Dr. Fason, as if he were a jack-of-all-

[17] Parnham noted that, during voir dire, Correa came in late, opened his briefcase, pulled out the sports pages of the newspaper, and put his feet up on the table (St Hab RR-18). On another occasion Correa worked on a crossword puzzle (St Hab RR-19).

trades expert on all matters relating to mental problems. 311 F.3d at 671-676. As his testimony indicated, however, Fason was a psychiatrist in the tradition of Freud, whose testimony focused on infantile "narcissism" and arrested emotional development. Fason never held himself out as an expert at diagnosing retardation or diagnosing head injuries. The Court of Appeals' notion that no further investigation by counsel was needed, once Parnham consulted with Fason, missed a critical distinction between subspecialties of medicine.

(1) Mental Retardation. As the Court of Appeals acknowledged, the Petitioner had a history of low I.Q. scores:

> In 1980, a report indicated a verbal I.Q. of 67, a Performance I.Q. of 64, and a Full Scale I.Q. of 63. An evaluation from the Harris County Department of Education from 1982 reported a Verbal I.Q. of 57, a Performance I.Q. of 55, and a Full Scale I.Q. of 52. This report also characterized Smith as falling within the "[m]entally deficient range of intellectual development." In 1983, the Texas Youth Counsel Child Care System placed Smith's Verbal I.Q. at 60, his Performance I.Q. at 72, and his Full Scale I.Q. at 64, noting that these results put him within the "mild mental retardation" range.

311 F.3d at 673. *All* of those tests placed the Petitioner in or near the borderline retardation category.

The concept of I.Q. is an abstract one, and a jury might not have been impressed by I.Q. data alone. An adequate presentation should have included (a) an explanation of how I.Q. relates to retardation classification, and (b) a discussion of

how retardation could provide a "mitigating" explanation for the crime and for other evidence which the State might offer. There was none of that in the Petitioner's defense. Parnham said he was "not sure" what significance "borderline mental retardation" had with respect to defense issues (St Hab RR-28). That deflates the Court of Appeals' hypothesis that Parnham learned all he needed to know from Fason. If he had discussed mental retardation with Fason in any detail, he would not have given the answer that he did.[18]

(2) Head Injury. There was some evidence concerning the Petitioner's head injury, but the jury was given nothing to show the possible effects of that. Parnham said he did not recall what he did with the information concerning the Petitioner's head injury (St Hab RR-31), and he specifically did not recall talking to a specialist about the head injury or trying to obtain a neurological examination, MRI, or CAT scan of the Petitioner (St Hab RR-32). Parnham personally was aware that "head injuries can produce delayed reactions," but he did not pursue any further medical examination to determine whether such was the case with the Petitioner (St Hab RR-

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[18] Ideally, what should have been shown was that the Petitioner not only had a low I.Q. but also had "related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins, supra*. While *Atkins* was not available at the time of trial, *Penry I* was. Any Capital Murder "book lawyer" should have read *Penry I* and grasped that some evidence showing the significance of a low I.Q. should be included in a mitigation defense.

33). As to consultation with Dr. Fason, hypothesized by the Court of Appeals, nothing in Fason's presentation touched on either the occurrence or the significance of the Petitioner's head injury. Furthermore, Fason only saw the Petitioner shortly before trial, and investigation into the brain injury should have commenced much earlier.

Researchers specializing in head injuries know that head injuries can have long-term behavioral consequences, although much remains to be learned in this area. This petition is not the place for a protracted discussion of head injuries, but a few examples of readily available scholarly materials will illustrate the point. Gualtieri, *et al.*, "The Delayed Neurobehavioural Sequelae of Traumatic Brain Injury," 4 BRAIN INJURY 219 (1990), reported that "many post-traumatic problems are long-term in nature, and others are not detected in early examinations despite their likely existence at that time."[19] Bolstering Dr. Gualtieri's view is Kreutzer, *et al.*, "Substance Abuse and Crime Patterns Among Persons with Traumatic Brain Injury Referred for Supported Employment," 5 BRAIN INJURY 177 (April-June 1991), which identified a long-term problem of unemployment following brain injury. Many of the prison disciplinary citations which were admitted as State's evidence at

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[19] As the citation indicates, there is a medical journal dedicated to head injuries, which had existed for several years prior to the Petitioner's trial. It is readily available at the medical library, open seven days a week, in the Texas Medical Center in Houston. There are many other scholarly journals which sometimes have articles dealing with brain injuries.

punishment concerned the Petitioner's failure to participate in work or school assignments, which in the prison milieu is comparable to holding a job.

There also was available scholarly information showing that the Petitioner's age at the time of injury could be significant. Burke, *et al.*, "The Rehabilitation of Adolescents with Traumatic Brain Injury: Outcome and Follow-up," 4 BRAIN INJURY 37, 373 (1990), found that, in a young group studied, 94% of patients demonstrated impulsivity, 65% demonstratred disinhibition, and 76% demonstrated impaired planning and problem-solving abilities. This information could have dovetailed with Fason's observations that an early childhood developmental disability, *i.e.* narcissism, could be aggravated by other events.

Burke's study also observed that "there is a common assumption that children who are brain-injured recover more quickly and more completely than adults." *Id.* at 371.[20] The clinic doctor who passed judgment on the basis of the early examination in 1974 may have been influenced by such "conventional wisdom," having told the Petitioner's father "He's young, he has something to build" (RR XLIV-90). That could explain the lack of follow-up. If, however, Dr. Gualtieri and Dr. Kreutzer are

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[20] A recent study on juvenile head injuries referred to this as the "Kennard principle" and pointed out that the eponymous Dr. Kennard actually recognized that the "infant sparing effect was not universal or absolute and ... that some symptoms could worsen or become manifest with maturation of [sic] the passage of time." Verger *et al.*, "Age Effects on Long-term Neuro-psychological Outcome in Paediatric Traumatic Brain Injury," 14 BRAIN INJURY 495 (2000).

correct, then reliance on the early examination, conducted in 1974, was inadequate, and perhaps even misleading.

Also important are Kreutzer's summary of studies concerning attitude and behavior:

> Brooks *et al.* examined the incidence of aggressive behavior among 42 severely head-injured patients 5 years post-injury. ... *[A]n increase in threats of violence was observed over time, from 15% of the sample at 1 year to 54% at 5 years.* ... Using a similar methodology, Mauss-Clum and Ryan also found a high incidence of irritability, temper outbursts, decreased self-control, verbal abuse and threats of physical violence (emphasis added).

Nothing comparable to the findings discussed by Kreutzer were presented to the jury in the Petitioner's trial, even though it might have cast new light on some of the State's punishment evidence. For example, much of the prison disciplinary material offered by the State related to either verbal abuse or threats. Some of the prison incidents reflected "temper outbursts," just as the studies cited by Kreutzer would predict. The Petitioner's history could be characterized by "decreased self-control." Diminished self-control could help explain why the Petitioner shot the complainant rather pistol-whipping or kicking the complainant, which were two less severe types of force noted by the prosecutor in argument.

Considering what information was available, and what expert testimony could have been developed once counsel had a basic grasp of the potentially mitigating

factors, it is clear that pretrial preparation was deficient. In light of *Powell* and *Duffy*, any belief that Parnham and Correa crafted a constitutionally-protected "strategy" of omitting mitigation evidence would be objectively unreasonable.

The State habeas findings on this issue invoked attorney Parnham's reputable name, but they ignored Parnham's own testimony about the lack of preparation. Nothing in Parnham's habeas hearing testimony indicated that Parnham made a reasoned "strategic" decision that retardation and head injury, as mitigation themes, were unimportant or unlikely to be fruitful. Thus the State habeas findings of effectiveness also were an "unreasonable determination of the facts" with respect to the presentation of mitigation evidence. The State findings also did not essay an elaborate hypothesis of Parnham's reliance on Dr. Fason, as the Court of Appeals did. The Court of Appeals was really just disagreeing with the federal district court as to what inferences to draw from Parnham's testimony, rather than applying the abuse-of-discretion standard to the federal district court's decision.

The Court of Appeals rested its reversal of the district court on the first prong of *Strickland*, deeming it unnecessary to reach the second. 311 F.3d at 677, n.. 9. Since the second prong does need to be reached, however, the Petitioner submits that the federal district court did not abuse its discretion as to the second prong. This was not a question of "deference" to the state habeas judge, whose *entire* conclusion of

law on the second prong was as follows: "The applicant fails to demonstrate deficient performance of defense counsel, much less harm ..." (App. C, p. 25). That was not the kind of analysis deserving deference under the AEDPA. Thus it is not an idle gesture in this cause to review the Court of Appeals' analysis of the first *Strickland* prong.

III.

Did the Court of Appeals err by relying on the erroneous waiver doctrine of *Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989), *cert. denied* 494 U.S. 1060 and a legally erroneous state court finding?

The Petitioner sought a certificate of appealability with respect to his claim that the jury in his trial should have been instructed that, under Texas law, the refusal of any juror to agree to special-issue answers which would lead to the death penalty is enough to compel the trial court to assess punishment at life imprisonment, rather than starting over with a new jury as would occur when a non-capital case stalemates during punishment-phase deliberations.[21] That rule arises from the "unable to answer

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[21] The petitioner's fifth, sixth, and seventh claims in the federal district court stated:

> The jury charge affirmatively misled the jury as to the numerical requirements for a negative answer to special issues which would lead to life imprisonment, vitiating the Sixth Amendment right to trial by jury.
>
> The jury charge affirmatively misled the jury as to the numerical requirements for a negative answer to special issues which would lead to life imprisonment, violating the Eighth Amendment because it undermined the reliability of the verdict.

any issue" provision of what was then TEX. CODE CRIM. PROC. art. 37.071(e) and is now found in TEX. CODE CRIM. PROC. art. 47.071(g).[22] The Court of Appeals denied a certificate of appealability on this issue in the November 4 opinion.

The Petitioner and the Respondent are in substantial disagreement on the merits of the issue. The Court of Appeals panel did not reach the merits, however, because it found that the claim had been procedurally defaulted in the state court due to a failure to object to the jury charge during trial. 311 F.3d at 683-684. The Petitioner urged *en banc* reconsideration, but the order of March 17 did not discuss this issue.

This is not merely an obscure, case-specific procedural point. What has happened here is that, partly due to the earlier error in construing Texas law, and partly due to an incorrect state court conclusion of law, the Fifth Circuit found itself locked into application of a state procedural default, barring habeas review, when in fact such a state procedural default does not exist. This has happened to others before, and the Court of Appeals' refusal to correct its mistake means it will happen in the

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The jury charge affirmatively misled the jury as to the numerical requirements for a negative answer to special issues which would lead to life imprisonment, in violation of the Fourteenth Amendment due process clause.

[22] This is distinct from what is called the "10-12" rule in that the Petitioner is not complaining about the failure of the court to instruct on the mandatory effect of ten jurors agreeing to an answer favorable to the defense. Far more important is the power of *each* juror to prevent the death penalty, which more accurately would be called the "power of one" rule.

future.

The Court of Appeals relied on *Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989), *cert. denied* 494 U.S. 1060 (1990), which declared: "Under Texas law, the failure to object to a jury instruction precludes appellate review of a claimed defect in the charge." That is incorrect. *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1984, Opinion on rehearing) and its progeny establish that failure to object to charge error is *not* an absolute procedural default. Drawing upon Texas statutory law, *Almanza* held that a failure to object merely alters the harm analysis, such that charge error which did not prompt an objection is reversible only if "egregious" harm occurs.[23] The Court of Criminal Appeals and some lower Texas courts have recognized an exception to *Almanza* for "defensive" issues, meaning defenses to culpability. This somewhat confusing state of affairs was discussed recently in *Coleman v. State*, 979 S.W.3d 438 (Tex. App. – Waco 1998):

> Some courts interpret *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998) to require an objection or request to avoid waiver on appeal. We interpret *Posey* to require action only when the charge wholly omits a defensive issue. Ordinarily, charge error cannot be waived by silence. The *Almanza* egregious harm standard still applies.

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[23] This somewhat amorphous standard was explained in *Flores v. State*, 48 S.W.3d 397, 402 (Tex. App. -- Waco 2001):

> Errors that result in egregious harm are those which affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. [Citation to *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).]

Id. at 442. The "power of one" issue in this cause is not a "defensive" issue in that sense, so the general rule in *Almanza* should apply.

The erroneous doctrine in *Fierro v. Lynaugh* may stem from the holding in Fierro's state direct appeal there was an alternative holding that error was waived by the lack of an objection to an instruction regarding mitigation. *Fierro v. Lynaugh, supra* at 1281. In that pre-*Penry I* state decision, however, the Court of Criminal Appeals may have been thinking of mitigation as a "defensive" issue which required no instructional guidance at all. Otherwise, the reasoning could not be squared with *Almanza*. Even if the reasoning was correct in *Fierro*, however, nothing in Fierro's state decision called for expanding a waiver rule beyond "defensive" issues.

The Petitioner also pointed out to the Court of Appeals and the district court (in the motion for new trial) that, at the very least, *Almanza* shows that the "procedural bar" perceived by the Court of Appeals is not a "consistently or regularly applied" rule regarding procedural default. Therefore federal courts are not precluded from disregarding it. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). This Court did not declare in *Johnson* that a federal court *must* disregard a procedural rule which is sporadically and freakishly applied, but in a death penalty case it is unconscionable for habeas courts to rely on an aberrant application of a state procedural rule in order to avoid the substance of an important issue related to the punishment.

prosecutors, who should have known the correct Texas law.

There was an easy solution to the problem, and the Petitioner suggested it. If a federal court has doubt as to Texas law, it can certify the question to the Court of Criminal Appeals. See TEX. R. APP. PROC. 74. The Court of Appeals instead elected to keep the erroneous doctrine from *Fierro* in place. This Court should repudiate *Fierro v. Lynaugh* and remand this cause to the federal district court for consideration of the merits of the underlying issue.

CONCLUSION

Wherefore the Petitioner prays that this Court grant the writ of certiorari as to all three of the questions presented in this petition.

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