

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LAROYCE LATHAIR SMITH, :

4 Petitioner :

5 v. : No. 05-11304

6 TEXAS. :

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8 Washington, D.C.

9 Wednesday, January 17, 2007

10

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

14 APPEARANCES:

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16 Petitioner.

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

19 GENE C. SCHAERR, ESQ., Washington, D.C.; for
20 California, et al., as amici curiae, supporting
21 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

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

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

6 JUSTICE SCALIA: So they are not
7 contradicting the fact that the jury wasn't required
8 to take it into account, but they are saying
9 nonetheless, in our view, the jury did take it into
10 account, and therefore, the error was harmless. That
11 doesn't contradict our opinion. I mean, you might
12 want to argue against it on the merits, but I don't
13 think that will contradict our opinion.

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

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

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

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

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

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

1 JUSTICE SCALIA: They didn't say it was an
2 adequate vehicle. I mean, they acknowledged that
3 that instruction shouldn't be given again because it
4 doesn't require the jury to do what, what you say the
5 jury must do, and I think they accept that. They
6 say, oh, no, I thought it was fuzzy, and didn't
7 require -- we think the jury did indeed think it had
8 the power to nullify.

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: You agree that the

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

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

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

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

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

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

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

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

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

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

25 MR. STEIKER: And we -- we argue that

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

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

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

15 MR. STEIKER: On that --

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

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

1 offer a different form of nullification in the
2 supplemental instruction that would then interpret
3 the special issues.

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

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

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

20 MR. STEIKER: There's nothing --

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

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

7 MR. STEIKER: I have special responses,
8 Your Honor. The objection to the special verdict
9 form and the special issues was made plain in
10 pretrial motions and that objection was clearly
11 recognized by the trial judge at trial and denied at
12 trial when the instructions were being considered for
13 the purposes of voir dire.

14 JUSTICE BREYER: Oh, you're there in a
15 Texas court. We're not. We are following Texas law,
16 they say, and you're wrong. Now, what are we
17 supposed to do about that?

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

23 CHIEF JUSTICE ROBERTS: They applied, they
24 applied a legal standard, the egregious harm
25 standard, that depends on failure of an objection.

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

4 MR. STEIKER: Yes, Your Honor. I -- I
5 misspoke if I -- I conveyed the impression that they
6 did not suggest that it was inadequate objection. I
7 was merely suggesting that it wasn't inadequate in
8 the sense that it was made at the wrong time,
9 pretrial or at trial.

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

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

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

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

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

12 JUSTICE ALITO: Yes, but on the issue of
13 whether there was an adequate -- I thought you were
14 arguing that, in fact, there was an adequate
15 objection. And if the, if the State court held
16 against you on that point, that's an issue of Texas
17 law, isn't it?

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

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

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

12 MR. STEIKER: That is correct.

13 JUSTICE SOUTER: Is my understanding --

14 MR. STEIKER: That is correct, Your Honor.

15 JUSTICE SOUTER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. STEIKER: That's Flowers.

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

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

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

12 MR. STEIKER: Well, he did --

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

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

1 there was nothing else he could do.

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

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

15 JUSTICE STEVENS: It wouldn't be
16 preserving the Chapman standard if it was Federal
17 collateral review, would it?

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

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

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

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

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

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

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

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

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

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

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

1 judicial --

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

6 MR. STEIKER: I'm afraid that's not my
7 experience with the court of criminal appeals.

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

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

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

25 MR. STEIKER: In the vast majority of

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

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

1 Federal ground.

2 MR. STEIKER: I think that's exactly
3 right, sir.

4 JUSTICE BREYER: Why wouldn't that be the
5 case? Suppose the --

6 JUSTICE STEVENS: I'm sorry.

7 JUSTICE BREYER: Suppose the State --

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

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

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

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

23 JUSTICE SCALIA: Well --

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

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Cruz.

17 ORAL ARGUMENT OF R. TED CRUZ
18 ON BEHALF OF THE RESPONDENT

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

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

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

6 Petitioner suggests that the State habeas
7 --

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

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

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

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

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

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

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

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

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

5 JUSTICE BREYER: Right.

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

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

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

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

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

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

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

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

1 bar to the case going forward?

2 MR. CRUZ: There is not a procedural bar

3 --

4 JUSTICE STEVENS: Why is that?

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

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

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

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

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

1 procedural bar. So in this regard the State court is
2 more forgiving to defendant than the Federal courts
3 are.

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

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

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

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

3 MR. CRUZ: Correct.

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

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

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

24 JUSTICE STEVENS: How about in this case?

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

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

3 JUSTICE STEVENS: Well, you're assuming
4 there's longstanding precedents. It is also at least
5 conceivable that at the time they thought the
6 objection was properly preserved.

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

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

22 MR. CRUZ: Well --

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

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

1 other the first time.

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

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

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

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

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

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

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

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

1 MR. CRUZ: But Black had.

2 JUSTICE SOUTER: Pardon me?

3 MR. CRUZ: Black had and Almanza had.

4 JUSTICE SOUTER: Black being -- help me
5 out, Black?

6 MR. CRUZ: Black is what excused the
7 failure to raise Penry I for novelty. And so it was
8 clearly established State law at the time of this
9 trial --

10 JUSTICE SOUTER: But that goes to Penry I,
11 and this is then an objection both to Penry I and
12 based on Penry II.

13 MR. CRUZ: But the --

14 JUSTICE SOUTER: So it's --

15 MR. CRUZ: But the Hood -- the Hood
16 decision with respect to Penry II is being forgiving
17 to criminal defendant. It's not a bar. It's
18 forgiving a bar. That does not mean that the Almanza
19 standard which had been present for -- has been
20 present in State law for over 20 years is suddenly
21 inadequate.

22 JUSTICE SOUTER: You're right.

23 JUSTICE STEVENS: But did they cite that
24 case in this case, in this opinion in this case?

25 MR. CRUZ: They absolutely cited Almanza.

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

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

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

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

22 JUSTICE BREYER: You can't say.

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

1 so --

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

4 MR. CRUZ: That is not --

5 JUSTICE BREYER: What is the argument?

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

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

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

4 JUSTICE KENNEDY: Really?

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

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

14 JUSTICE KENNEDY: Was it the nullification
15 instruction?

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

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

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

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

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

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

1 instruction.

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

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

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

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

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

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

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

20 MR. CRUZ: Respectfully, Justice Ginsburg,
21 the evidence was precisely that he had been sweet and
22 kind. Over 90 percent of the evidence that defense
23 counsel relied on in closing was the 15 character
24 witnesses to show that he was a big lovable Teddy
25 bear and went to church, and was sweet and kind, and

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

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

6 MR. CRUZ: I'm talking --

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

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

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

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

6 MR. CRUZ: Justice Souter, not only was it
7 a very small part of the presentation, but in closing
8 argument defense counsel explicitly pointed out to
9 the jury that -- and let me read from defense
10 counsel's closing: "I think it speaks well for both
11 sides, the State and the defense to be quite honest,
12 that we didn't bring you some hired gun, some
13 psychiatrist that gets paid to get up here and say oh
14 well, these are all family problems." And that is at
15 33, volume 33 of the record, page 59.

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Cruz. Mr. Schaerr.

2 ORAL ARGUMENT OF GENE C. SCHAERR

3 ON BEHALF OF CALIFORNIA, ET AL.,

4 AS AMICI CURIAE SUPPORTING RESPONDENT

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

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

19 And with those concerns in mind, I'd like
20 to address three specific points. The first is the
21 whole question of whether States have the ability
22 under our Federal Constitution to choose their own
23 harmless error standards even when they are
24 addressing Federal error. Petitioner appears to
25 concede as a general matter that States do have that

1 authority, but let me just briefly indicate why that
2 concession is well founded.

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

5 JUSTICE STEVENS: Are you talking about
6 both collateral review and direct review, or just
7 collateral review?

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

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

18 Secondly, to the extent the States decide
19 to provide habeas review or any other kind of
20 post-conviction review, the authority by which they
21 do that derives from State law, not from the Federal
22 Constitution or any other Federal law, and this Court
23 obviously does not have general supervisory authority
24 over, over State courts as it does Federal courts.

25 And third, unlike the situation with

1 direct review, this Court could not as a practical
2 matter impose a Federal standard on State habeas
3 proceedings without being highly intrusive. I mean
4 --

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

8 MR. SCHAERR: Right.

9 JUSTICE BREYER: -- there was an error of
10 Federal constitutional law, search and seizure or
11 confessions or something, and now we send it back.
12 And let's suppose further the State has no
13 independent State ground, they are not trying to make
14 the argument, whether or not they're trying to make
15 it here. There's no independent State ground, no
16 objection to problem, nothing. Now, I read that one
17 standard that could be applied is the structural
18 error standard. A second is a harmless error
19 standard. But I've never seen a case, but that's
20 perhaps my ignorance -- -that's they want you to show
21 me -- where it's definitively established by a
22 Federal court anyway that there was a serious Federal
23 error, I've never seen a case where this Court said,
24 or I can't recall one, that the State applied yet
25 some third kind of standard, such as, well, I know

1 there was a very important error, I know it was
2 Federal and constitutional, but nonetheless we're not
3 going to give them any remedy unless it's absolutely
4 egregious harm. I've never seen that in the law.

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

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

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

13 MR. SCHAERR: Yes.

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

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

19 JUSTICE BREYER: No, no. I'm not talking
20 about that because obviously they can do what they
21 want, I think, in the State courts, but they might
22 violate Federal law if they do it. And now so what's
23 happened is somebody has gone into Federal court or
24 this Court and Federal court or this Court has said:
25 Here's a Federal error, of course you're free to

1 apply harmless error or whatever, you don't have to
2 let the person have a new trial or let him out.

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

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

11 JUSTICE BREYER: Yes, that's possible.

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

25 MR. SCHAERR: I'm sure it does.

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

7 MR. SCHAERR: That's right.

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

19 MR. SCHAERR: Right, and the question is
20 whether the State is free in that circumstance to
21 apply a State harmless error standard or if it has to
22 be required to apply a Federal harmless error
23 standard. And our -- and the fact is that on the
24 ground the States are routinely applying State
25 harmless error standards in those situations. And so

1 it would be a sea change if this Court were to now
2 hold that, no, when a State court is reviewing the
3 effect of a Federal error that the State court has to
4 apply a Federal standard rather than the State.

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

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

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

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

14 JUSTICE SCALIA: Well, we haven't had the
15 issue before us, have we? That's why you're here.

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

18 JUSTICE STEVENS: This question is a
19 little different. If you had two harmless errors in
20 a given State, do they have to apply them
21 consistently?

22 MR. SCHAERR: Well, then the question
23 would be is there some Federal law reason why they
24 have to. I mean, they may under State law have to
25 apply them --

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

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

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

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

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

22 MR. SCHAERR: Well, that may be one reason
23 why we have Federal habeas proceedings.

24 JUSTICE SCALIA: Well, that reason would
25 apply equally, however, to determinations of Federal

1 rights by State courts.

2 MR. SCHAERR: That's correct.

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

12 MR. SCHAERR: That's right.

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

20 MR. SCHAERR: Well, that's, that's exactly
21 right and especially in the habeas context it would
22 be, it would be extremely intrusive and invasive for
23 this Court to attempt to do that. It's one thing on
24 direct review of a State criminal conviction to say
25 as a matter of Federal constitutional law we think

1 there was an error here and we're going to nullify
2 the conviction, which is what the Constitution gives
3 this Court the power to do. But it's quite another,
4 after the conviction is final and the defendant is
5 already incarcerated, then on a State habeas
6 proceeding for the issue to come, to come back to
7 this Court, it would be extraordinary for this Court
8 to say, well, you have to apply Federal standards or
9 Federally dictated procedures in that circumstance.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Steiker, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF JORDAN STEIKER

15 ON BEHALF OF THE PETITIONER

16 MR. STEIKER: I'd like to return to the
17 record in this case because I think once it's
18 clarified what the nature of the evidence was in this
19 case it's clear that this Court could find that the
20 error was harmful under any standard, including the
21 egregious harm standard. We have in this case over
22 200 pages of exhibits documenting a lifelong
23 disability. This evidence was first introduced in
24 the guilt-innocence phase of the trial. It was
25 argued at the guilt-innocence closing argument, in

1 which trial counsel said, this is a 19-year-old ninth
2 grader who has been charged with this crime, and
3 argued that that was the basis for considering him
4 less culpable than his college-educated co-defendant.

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

17 And the argument that there was no
18 evidence of abuse in this case is belied by the fact
19 that the evidence showed that Petitioner's father
20 chased him with a butcher knife in order to steal the
21 family's car in order to support his crack habit. If
22 that's not evidence of abuse and evidence that could
23 show reduced culpability for this defendant, coupled
24 especially with his impairment which made him less
25 capable of responding to that role model and avoiding

1 dangerous behavior --

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

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

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

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

1 law?

2 MR. STEIKER: His argument --

3 CHIEF JUSTICE ROBERTS: No, your argument
4 right now.

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

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

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

21 So if you take away the impermissible
22 Federal conclusion, this Court could clearly
23 conceive, conclude, on the basis of the State court's
24 own characterization of this evidence, which departs
25 tremendously from the Respondent's view, that this

1 was powerful mitigating evidence. The Court of
2 Criminal Appeals' error was to conclude that this
3 could be taken into account after this Court said
4 exactly the opposite.

5 Thank you, Your Honor.

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

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

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