No. ___-_____

In the Supreme Court of the United States

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

ROGER WAYNE MCGOWEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Smith* v. *Texas*, 549 U.S. 948 (2006) (mem.), this Court granted certiorari to decide whether a court can excuse as harmless the Eighth Amendment error that occurs when "the sentencer [is] precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record * * * that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). But the Court disposed of the case without reaching the question presented. See *Smith* v. *Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring).

In the last five years, the importance of the question that the Court found certworthy in *Smith* has increased dramatically. The Fifth Circuit has held that harmless-error analysis is categorically inapplicable to capital-sentencing errors that prevent the jury from considering relevant mitigating evidence. In doing so, it has invoked the "structural error" doctrine to wipe away decades-old state court proceedings and to vacate numerous State-imposed capital sentences — all without finding that anyone suffered prejudice at their original trial. That result creates an outcome-determinative, 7-to-1 split among the federal circuits on the following question:

Whether harmless-error review applies when a capital-sentencing jury is precluded from considering relevant mitigating evidence.

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Petitioner Rick Thaler respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

The doctrine of structural error is strong medicine. It requires automatic reversal without any evidence that an error affected the outcome of a trial. Owing to those draconian consequences — and to this Court's repeated warnings that such findings should be rare — the Fifth Circuit stands alone in finding structural error where a mistake during a capital-sentencing proceeding prevents the jury from properly considering relevant evidence.

It has not always been this way. Both the Sixth and Ninth Circuits previously found structural errors in such circumstances and changed course only after this Court summarily reversed them. See

Mitchell v. *Esparza*, 540 U.S. 12 (2003) (per curiam); *Calderon* v. *Coleman*, 525 U.S. 141 (1998) (per curiam). And the Fifth Circuit created the lopsided split — by affixing the "structural error" label to a relatively common problem in capital-sentencing proceedings — only after this Court "excoriated" it for failing to recognize the problem at all. *Nelson* v. *Quarterman*, 472 F.3d 287, 301 (5th Cir. 2006) (en banc); see also *id.* at 350-351 & n.19 (Smith, J., dissenting).

The Fifth Circuit has overread this Court's decisions, as evidenced by other courts' unanimous rejection of structural error in cases like this one. The Fifth Circuit's judgment cannot stand because it divides the circuits, it is wrong, and it threatens the integrity of long-final state court judgments.

OPINIONS BELOW

The opinion of the Fifth Circuit (App. 1a-42a) is reported at 675 F.3d 482. The opinion of the district court (App. 43a-142a) is reported at 717 F. Supp. 2d 626. The opinion of the Texas Court of Criminal Appeals (App. 143a-183a) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 19, 2012. A petition for rehearing en banc was denied on April 18, 2012. App. 184a-185a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The relitigation bar codified by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 104, 110 Stat. 1218 ("AEDPA"), provides in relevant part that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim * * * 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.

28 U.S.C. § 2254(d)(1).

STATEMENT

A. Legal Background

1. In *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978), a plurality of the Court mandated "individualized decision[s] * * * in capital cases" by "conclud[ing] that the Eighth and Fourteenth Amendments require that the sentencer * * * not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the

defendant proffers as a basis for a sentence less than death." Four years later, a majority of the Court embraced the concept of *Lockett* error in *Eddings* v. *Oklahoma*, 455 U.S. 104, 112-114 (1982), which invalidated a capital sentence on the ground that the sentencer had refused to consider relevant mitigating evidence. See also *Boyde* v. *California*, 494 U.S. 370, 377-378 (1990) (citing *Lockett* and *Eddings* for the proposition that "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner"). The Court subsequently has found *Lockett* errors in capital sentences imposed by the courts of several States. See, *e.g.*, *Hitchcock* v. *Dugger*, 481 U.S. 393, 395-399 (1987) (finding *Lockett* error where sentencer was limited to considering statutorily enumerated mitigating circumstances); *Skipper* v. *South Carolina*, 476 U.S. 1, 4-9 (1986) (finding *Lockett* error where mitigating evidence was excluded from sentencing hearing).

The Court applied *Lockett* to Texas's jury instructions for capital sentencing in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"). The capital-sentencing instructions in that case asked jurors to determine three "special issues." See Tex. Code Crim. Proc. art. 37.071(b) (Vernon 1985) ("Article 37.071"). The Legislature directed a trial court to enter a death sentence if (and only if) the jury answered "yes" to these questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

> deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Penry I, 492 U.S. at 310 (quoting Article 37.071); see App. 4a-5a.

The Court held that Article 37.071 violated *Lockett* as applied to the facts of Penry's case. See 492 U.S. at 319-328. The Court wrote that,

> in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Id. at 328. The Court held that result was "dictated by *Eddings* and *Lockett*." *Id.* at 319.

2. This petition concerns the appropriate remedy for *Lockett* errors. Not every constitutional error requires reversal of a conviction or sentence — indeed, the vast majority do not. See *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991) (citing *Chapman* v. *California*, 386 U.S. 18 (1967)). To determine the proper remedy for a *Lockett* error, the reviewing court must categorize it as either a "trial error" or a "structural error." See, *e.g.*, *Brecht* v.

Abrahamson, 507 U.S. 619, 629-630 (1993); *Fulminante*, 499 U.S. at 306-310.

"Trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht*, 507 U.S. at 629 (alterations and internal quotation marks omitted). Before undoing a conviction or sentence on the basis of a trial error, a reviewing court must apply the appropriate harmless-error standard. Where trial error is found on collateral review, reversal will be warranted if "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 637 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)).[1]

"At the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." *Brecht*, 507 U.S. at 629 (internal quotation marks omitted). A structural error of this kind "requires automatic reversal," without resort to any harmless-error standard. *Id.* at 629-630.

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[1] On direct review, a trial error will be held harmless if the court finds that it was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. *Brecht*'s harmless-error standard — which is "more forgiving" than *Chapman*'s standard, *Fry* v. *Pliler*, 551 U.S. 112, 116 (2007) — reflects "[t]he principle that collateral review is different from direct review," *Brecht*, 507 U.S. at 633, insofar as collateral review implicates "concerns about finality, comity, and federalism," *Fry*, 551 U.S. at 116.

Very few constitutional errors qualify as "structural" and thus trigger automatic reversal. See *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006); *Rose* v. *Clark*, 478 U.S. 570, 578-579 (1986). Contrariwise, the vast majority of constitutional errors are classified as trial errors and are subjected to harmless-error review. See *Fulminante*, 499 U.S. at 306. For example, although it is "axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession," *Jackson* v. *Denno*, 378 U.S. 368, 376 (1964), harmless-error review nonetheless applies to the introduction at trial of a coerced confession, see *Fulminante*, 499 U.S. at 306-312. Apart from a handful of structural errors recognized by the Court,[2] "the general rule [is] that a constitutional error does not automatically require reversal." *Fulminante*, 499 U.S. at 306. This general rule holds true for errors during capital sentencing, see, *e.g.*, *Satterwhite* v. *Texas*, 486 U.S. 249, 257-258 (1988), for errors involving jury instructions, see, *e.g.*, *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60-61 (2008) (per curiam); *Neder* v. *United States*, 527 U.S. 1, 4 (1999), and for errors involving the jury instructions delivered in capital-sentencing proceedings, see, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 752 (1990).

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[2] *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997) ("We have found structural errors only in a very limited class of cases."); see also *Recuenco*, 548 U.S. at 218 n.2 (collecting cases).

B. Factual Background

1. In March 1986, McGowen shot and killed a woman named Marion Pantzer while attempting to rob a bar that she owned in Houston, Texas. He confessed to police, and a jury convicted him of capital murder after a one-day trial.

The punishment hearing was not so brief. Over the course of twelve days, the State called twenty-three witnesses who testified regarding McGowen's life of crime and its ever-escalating pattern of violence.

The central witness at the hearing was Norman Ray Willis, Jr. Willis was thirteen years old and homeless when he met McGowen. 34.RR.86.[3] McGowen took Willis off the streets and put a roof over his head; then, having convinced Willis that "we was like a family," McGowen used Willis as a pawn in a years-long crime spree. *Id.* at 129-130.

McGowen was a professional armed robber, and he forced young Willis to participate in his crimes, often at gunpoint. 34.RR.182. McGowen promised that, if Willis ever refused one of McGowen's orders, he would take the boy on a "gangster ride" — that is, McGowen would lock Willis in the trunk of a car, drive him to a remote location, and kill him. *Id.* at 192; see also *id.* at 130 (similar threats). To make

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[3] "RR" refers to the reporter's record filed in the convicting court, see *Texas* v. *McGowen*, Cause No. 448450 (339th Judicial Dist., Harris County, Texas), preceded by the volume number and followed by page number(s). "SX" refers to the State's trial exhibits, and "CR" refers to the Clerk's Record, in the same cause.

sure Willis got the message, one of McGowen's associates shot the boy in his right foot. *Ibid.*

Over the course of the two-and-a-half years that McGowen provided shelter to Willis, McGowen used the child to commit hundreds of armed robberies. 34.RR.129-130. They committed such robberies one-to-three times per day, four-to-seven days per week, for two-and-a-half years. *Id.* at 95-96. They robbed one business ten separate times. App. 53a. They robbed one drive-in three times in a single day. 34.RR.154.

McGowen picked the robbery targets — he preferred "real, real old" and feeble small-business owners — and "r[an] the show" during the robberies. 34.RR.89, 103, 109, 210; see also *id.* at 206 (during a robbery, McGowen "was telling people what to do, giving orders"). He almost invariably wielded one or more weapons — ranging from a foot-and-a-half-long butcher knife, *id.* at 148; to a .22-caliber pistol, *id.* at 240; a .22-caliber rifle, 35.RR.541; a .38-caliber snub-nose revolver, 34.RR.111; a .45-caliber revolver, *id.* at 128, 161; a pump-action shotgun, *id.* at 107; a sawed-off shotgun, *id.* at 121; and a gun of unknown caliber with "big bullets," *id.* at 159.

In the early days of their life together, McGowen ordered Willis to do the dirty work. For example, McGowen forced Willis to rob "[a]n old China guy [sic], real old, with thick, thick glasses," and, "if the guy tried anything" during the robbery, McGowen ordered the thirteen-year-old boy to shoot the victim. 34.RR.90-91; see also *id.* at 159 (similar orders).

As McGowen's crime spree continued, however, he became increasingly violent himself. For

example, he kidnapped an elderly couple on Christmas Eve, locked them in the trunk of his car, held them at gunpoint until they gave him money, and then fired his .38-caliber revolver as they fled. 34.RR.110-117. During another robbery, McGowen "put the [foot-and-a-half-long butcher] knife up to [an] old guy's throat." *Id.* at 151. Finally, McGowen agreed to rob and kill the owner of a diner in exchange for drugs; McGowen succeeded in shooting the man and stealing his $350 watch and a $10 chain from his neck, but the victim survived his gunshot wound and testified at McGowen's sentencing hearing. *Id.* at 125-126, 139-140, 242-244.

Shortly after McGowen's failed attempt to murder the diner owner, the police arrested both McGowen and his juvenile accomplice. 34.RR.71, 236; SX.67. But McGowen served less than one year in the Harris County Jail, after which he resumed his armed-robbery spree. *E.g.*, SX.55A. The robberies — recounted in harrowing detail by almost two dozen witnesses at McGowen's punishment hearing — continued until March of 1986.

On March 11, 1986, McGowen shot and killed Pantzer while attempting to rob her bar. But even then he did not stop. He committed at least one more armed robbery, on March 29, before police finally caught him, arrested him, and had him charged with capital murder. 35.RR.399.

2. The defense called McGowen's two sisters as its only witnesses at the punishment hearing. The first sister testified that McGowen "was, you know — he was a father-like type to me. He told me all the right things to do, the right things to say, you know. He showed me how to fill out job applications when I

was young." 35.RR.516. When asked to clarify what she meant by "father figure," however, the first sister testified that McGowen "was also [a] father figure" to Willis — the thirteen-year-old boy McGowen had forced to commit hundreds of armed robberies upon pain of death or abandonment. *Id*. at 519, 548.

The second sister also testified that McGowen financially supported her, but confessed that she never asked (and McGowen never told her) "[a]bout his trade." 35.RR.527. She also told the jury that McGowen "is very articulate," well educated, "[i]ntelligent," and "very bright." *Id*. at 526-528. McGowen's own defense counsel appeared to concede in closing that neither sister's testimony could counterbalance the "overwhelming amount" of aggravating evidence presented by the State. *Id*. at 555; see also *id*. at 559 (asking only that the jury "temper [its] verdict with mercy").

Counsel's concession proved prescient. After the judge thrice instructed the jury to consider "all the evidence in the case," CR.177, "all of the evidence submitted to you" at the guilt stage, *id*. at 178, and "all of the evidence" from the sentencing hearing, *ibid*., the jury took approximately two hours to reach a verdict. The jury answered "yes" to each question on the three-question "special issue" form, and, on June 1, 1987, McGowen was sentenced to death. 35.RR.562-563, 592.

C. Procedural Background

1. McGowen argued on direct appeal (as the twenty-second of his twenty-nine points of error) that the trial court erred by failing to instruct the sentencing jury specifically to consider the

mitigating effect, if any, of his sisters' testimony. App. 176a. The Texas Court of Criminal Appeals ("CCA") rejected that claim in light of its precedent interpreting *Lockett* and its progeny not to require a separate mitigation instruction for "the type of evidence" McGowen presented (namely, that he "was like a father-figure to" his sisters and Willis). *Id.* at 177a (citing *Black* v. *State*, 816 S.W.2d 350, 364-365 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 992 (1992)); see also *Black*, 816 S.W.2d at 363-365 (interpreting *Lockett* and its progeny, including *Penry I*, not to require a separate mitigating instruction under all circumstances). This Court denied certiorari. *McGowen* v. *Texas*, 510 U.S. 913 (1993) (mem.).

2. After exhausting numerous unrelated claims in his state postconviction proceedings, McGowen renewed his *Lockett* claim in a federal habeas petition, which he filed in 2006. Although the district court eventually granted that petition, it nevertheless emphasized that the State's punishment case was "strong [and] almost overwhelming." App. 53a. It explained:

> The prosecution brought forth witness after witness who testified about McGowen's lawlessness and violence. The police charged McGowen with aggravated robbery in 1982. Imprisonment did not halt his lawlessness. Thereafter, McGowen sustained himself through stealing. Along with several others, McGowen perpetually was involved in armed robbery, sometimes stealing from the same business repeatedly. McGowen and an accomplice had robbed one establishment

> approximately ten times. McGowen had used both guns and knives while engaging in crime. McGowen had agreed to kill another man in exchange for drugs, but had only robbed and shot him. The prosecution convincingly argued that the only way to stop McGowen's escalating criminality was for the jury to return a death sentence.

Ibid. The district court further recognized — in light of the State's "almost overwhelming" punishment evidence — that "McGowen almost certainly would have received a death sentence even if the trial court had anticipated the *Penry* decision * * * and correctly instructed the jury." *Id.* at 85a. The court nevertheless felt constrained by Fifth Circuit precedent to hold that McGowen's sentencing hearing was infected by a structural error that demanded automatic vacatur of his death sentence. *Id.* at 86a (citing *Nelson* v. *Quarterman*, 472 F.3d 287, 314-315 (5th Cir. 2006) (en banc), *cert. denied*, 551 U.S. 1141 (2007)).

3. The Fifth Circuit affirmed. Like the district court, the court of appeals considered itself obliged to find a constitutional violation under *Lockett* and its progeny because McGowen's sisters provided potential mitigation testimony that the jury could not consider under the trial court's sentencing instructions. App. 23a-25a. And the court concluded that McGowen satisfied AEDPA's relitigation bar, 28 U.S.C. § 2254(d), because the basis for his *Lockett* claim "was 'firmly established' in the Court's jurisprudence 'well before'" the CCA rejected the claim in 1992. App. 14a (quoting *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007)); see also *id.*

at 14a-16a, 21a-25a (applying *Abdul-Kabir*); *Abdul-Kabir*, 550 U.S. at 246-249 & n.10 (explaining that *Lockett* and its progeny clearly established the relevant rule and "dictated" the result).

The court of appeals further held that "we are bound by *Nelson*" to hold that the error at McGowen's sentencing was structural. App. 26a; see also *Nelson*, 472 F.3d at 314-315 (justifying its structural-error holding by observing that this Court "*never* applied * * * harmless-error" review in *Lockett* or its progeny). Accordingly, the court automatically vacated McGowen's death sentence — notwithstanding the virtual certainty that the error was harmless. App. 25a-26a.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Structural-Error Holding Conflicts With The Law Of The Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, And Eleventh Circuits

The Fifth Circuit is on the short side of a 7-1 circuit split. Seven circuits apply harmless-error review when a state court "preclude[s] [the jury] from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (plurality opinion) (emphasis omitted). The Fifth Circuit does the opposite.

1.a. After decades of tumult, it is now settled law in the Ninth Circuit that harmless-error review applies when California's capital-sentencing instructions fall short of the standard enunciated in *Lockett* and its progeny.

The Ninth Circuit originally embraced the opposite result. For example, in *Coleman* v. *Calderon*, 150 F.3d 1105 (9th Cir. 1998), the court found structural error — demanding automatic vacatur of the death sentence — where the trial court's jury instructions overstated the governor's authority to commute Coleman's sentence and to release him on parole. The Ninth Circuit reasoned that the error could cause the jury to discount Coleman's mitigation evidence; it "inappropriately minimize[d] the viability of all sentencing options other than death"; and it "prevent[ed] the jury from deliberating with the guided discretion required by the Eighth Amendment." *Id*. at 1119. And because the instructional error undermined the court's confidence that *the jury* had considered all the "constitutionally relevant evidence," the Ninth Circuit refused to excuse the error as harmless by reviewing that evidence itself. *Ibid.* (internal quotation marks omitted); cf. *Lockett*, 438 U.S. at 604 (plurality opinion) (emphasizing that "the sentencer" must "not be precluded from considering * * * any" relevant mitigating evidence).

This Court summarily reversed. *Coleman*, 525 U.S. 141. Even "assum[ing] that the instruction did not meet constitutional standards," the Court held that errors in capital-sentencing instructions — even those that prevent the jury from considering relevant mitigating evidence — are subject to harmless-error review in federal habeas. *Id*. at 145. The contrary rule would undermine "the 'presumption of finality and legality' that attaches to a conviction at the conclusion of direct review," "the State's sovereign interest in punishing offenders[,] and its 'good-faith

attempts to honor constitutional rights.'" *Id*. at 145-146 (quoting *Brecht*, 507 U.S. at 633, 635). The Court further emphasized that "[t]he social costs of retrial or resentencing are significant," especially "in cases such as this one, where the original sentencing hearing took place * * * some 17 years ago. The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Id*. at 146.

Following this Court's summary reversal in *Coleman*, the Ninth Circuit faithfully has applied harmless-error review in cases involving *Lockett* errors. For example, in *Sims* v. *Brown*, 425 F.3d 560 (9th Cir. 2005), the prosecutor repeatedly argued in closing that the jury should not credit Sims's mitigating evidence in determining whether to sentence him to death. *Id*. at 578-579. The Ninth Circuit held that even if the prosecutor's arguments violated *Lockett* because "the jurors inferred from any of his remarks that he believed Sims's background should be ignored," the error nonetheless was subject to "*Brecht* harmless error analysis." *Id*. at 579-581. The Ninth Circuit then held that the *Lockett* error, if any, was harmless. See *id*. at 581. This Court denied certiorari. *Sims* v. *Ayers*, 549 U.S. 833 (2006) (mem.).

b. The same result obtains in the Eleventh Circuit. In *Hitchcock*, 481 U.S. at 395-399, this Court held unconstitutional Florida's capital-sentencing instructions. Those instructions prohibited the jury from considering certain pieces of petitioner's mitigating evidence — including evidence that he "had the habit of inhaling gasoline

fumes" as a child; that he "had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle." *Id.* at 397. Because those instructions "precluded [the jury] from considering * * * any aspect of a defendant's character or record * * * that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604 (plurality opinion), the Court held that they did not comport with the Eighth Amendment, see *Hitchcock*, 481 U.S. at 399 (citing *Lockett*). And because the State "ha[d] made no attempt to argue that this error was harmless," the Court vacated Hitchcock's death sentence. *Ibid.*

In subsequent cases, however, Florida has argued the harmlessness of *Lockett* errors, and the Eleventh Circuit has accepted those arguments. For example, in *Ferguson* v. *Secretary*, 580 F.3d 1183, 1201-1202 (11th Cir. 2009), the court of appeals held that a Florida trial court violated the Eighth Amendment by instructing the jury at sentencing not to consider as mitigating evidence "that the murders were not premeditated, that at least five of the six murders were performed by one of [Ferguson's] co-defendants, * * * and that [Ferguson] tried to comfort some of the victims." The Eleventh Circuit nevertheless "appl[ied] the harmlessness standard articulated in *Brecht*" and held the error harmless. *Id.* at 1200.

This Court denied certiorari. *Ferguson* v. *McNeil*, 130 S. Ct. 3360 (2010) (mem.).[4]

c. The Sixth Circuit has reached the same result. For example, in *Campbell* v. *Bradshaw*, 674 F.3d 578, 596 (6th Cir. 2012), an Ohio trial court refused to admit — and refused to instruct the jury to consider the mitigating effect of — evidence that Campbell was drunk and suffering from an alcohol-induced "rage reaction" when he committed murder. The court held that Campbell's evidence plainly had mitigating "relevance" under *Lockett*, and thus it violated the Eighth Amendment to preclude the jury from considering it. *Ibid.* The court nevertheless reviewed that error and excused it as harmless under *Brecht*. *Id.* at 596-597.[5]

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[4] See also *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 (11th Cir.) (harmless-error review where jury could not consider mitigating evidence of, *inter alia*, "a childhood head injury which left Horsley suffering from headaches and spasms and made him easier to dominate[] and the fact that Horsley grew up without a father"), *cert. denied*, 516 U.S. 960 (1995); *Bolender* v. *Singletary*, 16 F.3d 1547, 1566-1567 (11th Cir.) (troubled background), *cert. denied*, 513 U.S. 1022 (1994).

[5] The Sixth Circuit has reached the same result where the prosecutor commits egregious misconduct that effectively nullifies the defendant's Eighth Amendment rights under *Lockett*. See, *e.g.*, *Broom* v. *Mitchell*, 441 F.3d 392, 413-414 (6th Cir. 2006) (harmless-error review where prosecutorial misconduct that was "so egregious [it] effectively foreclose[d] the jury's consideration of [petitioner's] mitigating evidence") (internal quotation marks omitted), *cert. denied*, 549 U.S. 1255 (2007); *Lorraine* v. *Coyle*, 291 F.3d 416, 443-444 (6th Cir. 2002) (same), *cert. denied*, 538 U.S. 947 (2003).

d. The Fourth Circuit also reviews *Lockett* errors for harmlessness. For example, in *Green* v. *French*, 143 F.3d 865 (4th Cir. 1998), the state trial court refused to instruct the jury to consider three categories of mitigating evidence: "(1) that Green would continue to adjust well to prison life and become a model prisoner; (2) that Green did not intend to take the life of [his victims]; and (3) that Green did not enter Young's Cleaners with the weapon which was used to take the lives of [his victims]." *Id.* at 893. The state supreme court concluded — and the Fourth Circuit did not disagree — that the trial court's failure to give the requested mitigating instructions "amounted to constitutional error under *Lockett*." *State* v. *Green*, 443 S.E.2d 14, 38 (N.C. 1994). Even so, the Fourth Circuit held that the error was harmless under *Brecht*, and it left the State's death sentence undisturbed. *Green*, 143 F.3d at 893-894. This Court denied certiorari. *Green* v. *French*, 525 U.S. 1090 (1999) (mem.).[6]

e. Likewise, the Tenth Circuit applies harmless-error review to capital-sentencing instructions that preclude juries from considering all relevant mitigating evidence. For example, in *Bryson* v.

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[6] See also *Davis* v. *Branker*, 305 F. App'x 926, 938-939 & n.5 (4th Cir.) (harmless-error review where jury could not consider mitigating evidence of petitioner's remorse and letters to his mother), *cert. denied*, 130 S. Ct. 460 (2009); *Fullwood* v. *Lee*, 290 F.3d 663, 693 (4th Cir. 2002) (petitioner was "very upset" about death of his brother), *cert. denied*, 537 U.S. 1120 (2003); *Boyd* v. *French*, 147 F.3d 319, 327-328 (4th Cir. 1998) (expert testimony that petitioner would not pose future danger), *cert. denied*, 525 U.S. 1150 (1999).

Ward, 187 F.3d 1193 (10th Cir. 1999), the state court violated the Eighth Amendment under *Lockett* and its progeny by precluding the jury from considering the mitigating value of a videotaped confession, which revealed that Bryson murdered his paramour's husband because he was abusing her. The Tenth Circuit excused that violation as "harmless error [under] *Brecht*." *Id.* at 1205-1206. This Court denied certiorari. *Bryson* v. *Gibson*, 529 U.S. 1058 (2000) (mem.).

f. Finally, two circuits have embraced harmless-error review as an alternative holding in *Lockett*-error cases. For example, in *McGehee* v. *Norris*, 588 F.3d 1185, 1191 (8th Cir. 2009), the state court precluded the jury from considering the mitigating value of a "pattern of violence in [McGehee's] family." The Eighth Circuit held that the state court's decision was not contrary to, or an unreasonable application of, *Lockett* and its progeny, including *Penry I*. See *id.* at 1195-1197. The court went on to hold that, "[e]ven if there were any error in the exclusion of [the mitigating evidence], it was harmless." *Id.* at 1197. This Court denied certiorari. *McGehee* v. *Hobbs*, 131 S. Ct. 1474 (2011) (mem.).[7] The Seventh Circuit has adopted the same alternative holding of harmlessness review for *Lockett* errors. See *Williams* v. *Chrans*, 945 F.2d

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[7] See also *Williams* v. *Norris*, 612 F.3d 941, 948 (8th Cir. 2010) (harmless-error review where jury could not consider mitigating evidence of Williams's escape from prison), *cert. denied*, 131 S. Ct. 1677 (2011); *Sweet* v. *Delo*, 125 F.3d 1144, 1158-1159 (8th Cir. 1997) (defendant was photography hobbyist), *cert. denied*, 523 U.S. 1010 (1998).

926, 947-949 (7th Cir. 1991) ("[E]ven if we were to give *Lockett* and its progeny an expansive reading" and find an error, it "would be harmless." (footnote omitted)), *cert. denied*, 505 U.S. 1208 (1992).

g. State courts, too, have applied harmless-error review, recognizing that *Lockett* and its progeny do not define a structural error warranting automatic reversal. See, *e.g.*, *State* v. *Payne*, 199 P.3d 123, 144-145 (Idaho 2008); *State* v. *Thacker*, 164 S.W.3d 208, 224-225 (Tenn.), *cert. denied*, 546 U.S. 940 (2005); *Doorbal* v. *State*, 837 So. 2d 940, 959-960 (Fla.), *cert. denied*, 539 U.S. 962 (2003); *People* v. *Fudge*, 875 P.2d 36, 61-62 (Cal. 1994), *cert. denied*, 514 U.S. 1021 (1995); *Bryson* v. *State*, 876 P.2d 240, 256-257 (Okla. Crim. App. 1994), *cert. denied*, 513 U.S. 1090 (1995); *State* v. *Eaton*, 524 So. 2d 1194, 1205-1206 (La. 1988), *cert. denied*, 488 U.S. 1019 (1989).

2. The Fifth Circuit takes the opposite view. Where capital-sentencing instructions "preclude[] [the jury] from considering * * * any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604 (plurality opinion), the Fifth Circuit finds a structural error and refuses to apply harmless-error review. *E.g.*, *Nelson*, 472 F.3d at 314-315; see also *id.* at 303, 314-315 (observing that the finding of constitutional error is "'dictated by'" *Lockett* and its progeny and holding this to be a structural error (quoting *Penry I*, 492 U.S. at 319)); accord App. 25a-26a. The court of appeals repeatedly has applied that structural-error holding, including in this case, to automatically vacate death sentences without any indication of prejudice. See, *e.g.*, App.

25a-26a (automatically vacating 25-year-old sentence); *Rivers* v. *Thaler*, 389 F. App'x 360, 361-362 (5th Cir. 2010) (automatically vacating 22-year-old sentence); *Brewer* v. *Quarterman*, 512 F.3d 210, 210-211 (5th Cir. 2007) (per curiam) (automatically vacating 18-year-old sentence).

The Fifth Circuit acknowledged the disproportion between the severity of wiping away decades-old state court proceedings without any evidence of prejudice and its slim support for doing so. It divined a structural error in Texas's capital-sentencing instructions with the benefit of "less than a page" of briefing in a case where the State had forfeited the issue. *Nelson*, 472 F.3d at 314; *id.* at 331-332 (Dennis, J., concurring in judgment). And it conceded that this Court never has characterized *Lockett* errors as structural. See *id.* at 314 (majority opinion). Rather, the court of appeals rested its rejection of harmless-error review on what it took as "[i]mplicit" in this Court's decisions — namely, that "where the jury has been precluded from giving effect to a defendant's mitigating evidence" by an erroneous sentencing instruction, its verdict is robbed of any moral significance. *Id.* at 314-315. The court refused to apply harmless-error review because, it believed, to do otherwise would require "an appellate court to substitute its own moral judgment for a moral judgment that the jury was unable to make." *Id.* at 315.

B. The Fifth Circuit's Structural-Error Holding Is Wrong

1. This Court already has held that harmless-error review applies to a capital-sentencing instruction that violates the Eighth Amendment by

"prevent[ing] the jury from giving due effect to [the defendant's] mitigating evidence." *Coleman*, 525 U.S. at 144. In doing so, this Court summarily reversed the Ninth Circuit for reaching the same result, virtually *in haec verba*, as the Fifth Circuit reached here. Compare *ibid.*, with App. 10a-11a (finding structural error where jury instructions "prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty").

The Fifth Circuit's ruling is even less tenable because McGowen's *Lockett* claim — unlike Coleman's — is governed by the AEDPA relitigation bar codified at 28 U.S.C. § 2254(d). See App. 8a-9a. Through another summary reversal, this Court has made clear that the CCA *could* have applied harmless-error review and excused the *Lockett* error underlying McGowen's death sentence, and § 2254(d) would prohibit a federal court from gainsaying that conclusion unless fairminded jurists could not disagree over the error's harmfulness. See *Esparza*, 540 U.S. at 17-19 & n.2; see also *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." (emphasis added)).

It does not matter that the CCA found no *Lockett* error on direct review of McGowen's capital sentence,

and therefore had no occasion to review that (non-existent) error for harmlessness. App. 177a. Principles of collateral attack *require* a federal court to apply harmless-error review "even if the state appellate court has not found * * * that the error was harmless." *Fry* v. *Pliler*, 551 U.S. 112, 116 & n.1 (2007); see also *Brecht*, 507 U.S. at 633 (emphasizing "[t]he principle that collateral review is different from direct review"); *Ferguson*, 580 F.3d at 1200-1201 (applying harmless-error review even where state court did not); *Boyd*, 147 F.3d at 327-328 (same). That is *a fortiori* true for federal habeas petitions, like McGowen's, filed after AEDPA's enactment. See *Fry*, 551 U.S. at 118 (holding AEDPA reinforced *Brecht*'s "weighty reasons" for requiring federal habeas courts to apply harmless-error review even where state court did not); *McGehee*, 588 F.3d at 1195-1197 (applying harmless-error review to post-AEDPA petition even where state court did not).

2. The Fifth Circuit's contrary view rests on four erroneous premises.

a. The Fifth Circuit erroneously believes that "*Penry* error" is some sort of unique species of Eighth Amendment violation and, as such, is not amenable to the harmless-error rules that apply to all other members of the genus. See *Nelson*, 472 F.3d at 315 & n.8. This Court time and again has made clear that "*Penry* error" is nothing more or less than an application of *Lockett* and its progeny to the three-question, special-issue sentencing form that the Texas Legislature required under Article 37.071. Were it otherwise — that is, if *Penry I* had announced the unique rule that the Fifth Circuit

suspects — the retroactivity rules embodied in *Teague* v. *Lane*, 489 U.S. 288 (1989), and AEDPA's relitigation bar would have precluded relief for Penry himself and many others. But see *Penry I*, 492 U.S. at 315, 318-319 (holding that *Teague* did not bar relief because *Lockett* was "rendered before [Penry's] conviction became final," and Penry's relief was "dictated by" *Lockett*); *Abdul-Kabir*, 550 U.S. at 247-253, 260-265 (holding AEDPA did not bar relief to Abdul-Kabir because *Penry I* is nothing more than an application of the clearly established "*Lockett* rule").

And far from suggesting that "*Penry* error" is a *sui generis* and Texas-specific constitutional rule, this Court interchangeably relies on its *Lockett*-line precedents in explaining what the Eighth Amendment requires in Texas and elsewhere. See, *e.g.*, *Boyde*, 494 U.S. at 377-378 (citing *Lockett* and *Penry I* for constitutional standard in reviewing California sentencing instructions); *Johnson* v. *Texas*, 509 U.S. 350, 362, 367, 370 (1993) (quoting *Boyde*, *Lockett*, and *Penry I* for constitutional standard in reviewing Texas sentencing instructions); *Tennard* v. *Dretke*, 542 U.S. 274, 285 (2004) (same); *Penry* v. *Johnson*, 532 U.S. 782, 800 (2001) ("*Penry II*") (quoting *Boyde*); *Smith*, 550 U.S. at 315-316 (same). Thus, the Fifth Circuit's assumption that "*Penry* violations" are somehow unique — and thus not subject to the harmless-error review that this Court has commanded in related contexts — has no legal basis.

b. The Fifth Circuit is equally wrong to conclude that it would be "wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's" by excusing as harmless a

capital-sentencing error. *Nelson*, 472 F.3d at 315. This Court repeatedly has held the opposite.

In the Term immediately preceding *Penry I*, this Court held that the CCA could review and excuse as harmless the constitutionally erroneous introduction of aggravating evidence in capital-sentencing proceedings. *Satterwhite*, 486 U.S. at 257-258. In reaching that result, the Court rejected the notion — embraced by *Satterwhite*'s dissenters — that the moral judgments inherent in juries' capital sentences are not the stuff of harmless-error review:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. Nevertheless, we believe that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury.

Id. at 258; cf. *id*. at 261-262 (Marshall, J., dissenting) (arguing that the "moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer," combined with "[t]he awesome severity of a sentence of death," make "predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record * * * a dangerously speculative enterprise").

And in the Term immediately following *Penry I*, this Court held that nothing in the Eighth Amendment, *Lockett*, or its progeny prohibits

"careful appellate weighing of aggravating against mitigating circumstances" to excuse a capital-sentencing-instruction error. *Clemons*, 494 U.S. at 748 (applying *Lockett*). Relying on *Satterwhite*, the Court held that imposition of the death penalty is not so inherently "a jury[] function" that the Eighth Amendment forbids harmless-error review of the jury's sentencing instructions. *Id.* at 752; see also *id.* at 773 n.23 (Blackmun, J., dissenting) (relying on *Satterwhite* and emphasizing that even the dissenters embrace harmless-error review, which "is almost a routine undertaking of appellate courts").

Finally, this Court has summarily rejected the same moral-authority-of-juries argument that the Fifth Circuit embraced below. In *Esparza*, the Sixth Circuit held that "[f]undamental principles from both the Due Process Clause and the Eighth Amendment" require that juries — not judges — sentence offenders to death. *Esparza* v. *Mitchell*, 310 F.3d 414, 420 (6th Cir. 2002); but see *Spaziano* v. *Florida*, 468 U.S. 447, 457-458 (1984) (holding that trial judge can impose death penalty, notwithstanding jury's contrary recommendation, and notwithstanding "this Court's recognition of the value of the jury's role, particularly in a capital proceeding"). The Sixth Circuit found it inconsistent with those "[f]undamental principles" to uphold a death sentence on the basis of judge-applied harmless-error review and, without citing *Satterwhite* or *Clemons*, it "f[ound] no federal appellate case" countenancing such circumvention of the jury's constitutionally prescribed role. *Esparza*, 310 F.3d at 422. In summarily reversing, this Court held that its harmless-error command applies with full force to

both capital and non-capital cases — notwithstanding the Sixth Circuit's (and now the Fifth's) view that deeming an error harmless transgresses the jury's moral monopoly on death sentences. *Esparza*, 540 U.S. at 16-17; see *Nelson*, 472 F.3d at 315.[8]

c. The Fifth Circuit cannot justify its structural-error holding by observing that this Court "*never*"

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[8] For the same reasons, this Court rejected the Sixth Circuit's (and now the Fifth's) view that applying harmless-error review to capital-sentencing errors is tantamount to "a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case." *Esparza*, 310 F.3d at 421 (relying on *Sullivan* v. *Louisiana,* 508 U.S. 275 (1993)); accord *Nelson*, 472 F.3d at 315 (also relying on *Sullivan*); see *Esparza*, 540 U.S. at 16-17 (holding the analogy to *Sullivan* is misplaced). Harmless-error review applies even where the trial court effectively directs a verdict on an element of an offense. See, *e.g.*, *Neder*, 527 U.S. at 19; *Carella* v. *California*, 491 U.S. 263, 266-267 (1989) (per curiam); *Rose*, 478 U.S. at 579-580; *Bronshtein* v. *Horn*, 404 F.3d 700, 711-712 (3d Cir. 2005) (Alito, J.); see also *Neder*, 527 U.S. at 11-12 (holding that *Sullivan* "cannot be squared with our harmless-error cases" to the extent it suggested a structural error includes anything that "prevents the jury from rendering a 'complete verdict' on *every* element of the offense"). It is irrelevant whether the jury here could render a complete verdict on every element of a capital sentence. *E.g.*, *Esparza*, 540 U.S. at 17 ("[A] number of our harmless-error cases have involved capital defendants.") (citing *Fulminante*, *Clemons*, and *Satterwhite*); *Flamer* v. *Delaware*, 68 F.3d 736, 758-759 & n.27 (3d Cir. 1995) (en banc) (Alito, J.) (applying harmless-error review to instruction that jury need not find additional aggravating factor before imposing death penalty).

applied harmless-error review in *Lockett*, *Eddings*, *Penry I*, *Penry II*, or *Tennard*. See *Nelson*, 472 F.3d at 314. For whatever reason, the State did not argue in any of those cases that the Eighth Amendment errors, if any, should be excused as harmless. There is nothing remarkable about this Court's failure to address that unraised question. Cf. *Hitchcock*, 481 U.S. at 399 (noting State "ha[d] made no attempt to argue that this error is harmless"); Br. of Respondent, *Lockett* v. *Ohio*, No. 76-6997, at 19 (Dec. 29, 1977) (arguing harmless error for one constitutional claim but not for petitioner's Eighth Amendment claim).

Likewise, there is nothing "[c]onspicuous[]" about this Court's *Penry II* decision, which "applied the *Brecht* harmless-error test to Penry's claim that the prosecution's use of a psychiatrist's report violated his Fifth Amendment rights" but did not apply harmless-error review to his Eighth Amendment claim that the jury was precluded from considering relevant mitigating evidence. *Nelson*, 472 F.3d at 314. Again, no one urged this Court to do otherwise. See Br. of Respondent, *Penry* v. *Johnson*, No. 00-6677, at 11-24, 31 (Feb. 15, 2001) (arguing harmless error for Fifth Amendment claim but not for petitioner's Eighth Amendment claim); cf. *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [point] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point.").

d. Finally, the Fifth Circuit is wrong to conclude that its structural-error holding is "implicit" in *Penry I* itself. See *Nelson*, 472 F.3d at 315. If that is true,

the Court took many steps to hide an elephant in a mousehole. Cf. *Whitman* v. *Am. Trucking Assns.*, 531 U.S. 457, 468 (2001).

For example, *Penry I* expressly left undisturbed this Court's decision that Article 37.071 is facially valid under the Eighth Amendment. See *Jurek* v. *Texas*, 428 U.S. 262 (1976); *Penry I*, 492 U.S. at 315. And it expressly left undisturbed the Court's holding that some types of mitigating evidence do not necessitate special sentencing instructions (beyond those required by Article 37.071). See *Franklin* v. *Lynaugh*, 487 U.S. 164, 175 (1988) (plurality opinion); *id.* at 185-186 (O'Connor, J., concurring in judgment); *Penry I*, 492 U.S. at 315.

Penry I held only that the jury instructions required by Article 37.071 did not adequately direct the jury's attention to Penry's mitigating evidence that he was mentally retarded and had experienced abuse. See 492 U.S. at 327-328. To caution against overreading that holding, the Court twice emphasized that it found an Eighth Amendment violation only as applied to "the facts of this case," *id.* at 315, and in "*[t]his particular case*," *id.* at 318.[9]

And subsequent cases have reiterated the decision's narrow focus: "We do not read *Penry* [*I*] as effecting a sea change in this Court's view of the

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[9] Given that *Penry I*'s author (Justice O'Connor) wrote the opinion in such narrow terms, authored the harmless-error holding in *Satterwhite*, joined *Clemons* in full, and did not write separately in *Esparza*, it is particularly untenable for the Fifth Circuit to find hidden in the Court's opinions a sweeping structural-error holding.

constitutionality of [Article 37.071]; it does *not* broadly suggest the invalidity of the special issues framework." *Graham* v. *Collins*, 506 U.S. 461, 474 (1993). To the contrary, this Court repeatedly has determined, on a case-by-case basis, whether Article 37.071 adequately instructed the jury to consider the specific mitigating evidence that a particular defendant presented during sentencing. Compare, *e.g.*, *Johnson*, 509 U.S. at 372-373 (Article 37.071 constitutional as applied to petitioner's mitigating evidence of youth), with *Tennard*, 542 U.S. at 286-287 (Article 37.071 constitutional in some applications but unconstitutional as applied to petitioner's "low IQ" evidence). Thus, this Court has adhered to "a case-by-case approach that is more consistent with our traditional harmless-error inquiry" than with the doctrine of structural error. *Neder*, 527 U.S. at 14.

C. The Fifth Circuit's Structural-Error Holding Creates Incongruous Results, The Elimination Of Which Requires This Court's Immediate Attention

The Fifth Circuit's ruling also creates incongruous results as between different constitutional challenges to capital-sentencing proceedings. For example, a habeas petitioner must demonstrate prejudice where a capital-sentencing jury is altogether precluded from hearing his mitigating evidence due to counsel's ineffectiveness. See *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011); *Rompilla* v. *Beard*, 545 U.S. 374 (2005); *Wiggins* v. *Smith*, 539 U.S. 510 (2003); cf. *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 n.2 (1993) (noting analytical difference between prejudice and harmless-error standards). In those cases, capital-sentencing juries

imposed death sentences without the benefit of evidence that the defendant:

- "was raised in chaos and poverty," "mix[ed] together flour and water in an attempt to get something to eat" as a child, suffered several beatings each week by his stepfather, "including at least once with a two-by-four board," and suffered "a long history of emotional disturbance and neurological problems," *Pinholster*, 131 S. Ct. at 1424 (Sotomayor, J., dissenting);
- "was reared in [a] slum environment," had "schizophrenia and other disorders," and received "test scores showing a third grade level of cognition after nine years of schooling," *Rompilla*, 545 U.S. at 390-391; and
- was raised by "a chronic alcoholic [mother who] frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage" and "had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner," and was "repeatedly molested and raped" by his foster father, *Wiggins*, 539 U.S. at 516-517.

In each of those cases, the jury was robbed of an opportunity "to express its reasoned moral response to" mitigating evidence that it never heard. *Penry I*, 492 U.S. at 322 (internal quotation marks omitted). Even so, this Court held that the prisoners were not entitled to relief if they could not demonstrate

prejudice. See *Pinholster*, 131 S. Ct. at 1408 ("We [must determine prejudice by] 'reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence.'") (quoting *Wiggins*, 539 U.S. at 534); accord *Rompilla*, 545 U.S. at 390.

McGowen, by contrast, does not argue that there is any additional mitigating evidence that his sentencing jury should have heard. Nor does he argue that serving as a "father-like" figure to his sisters and Norman Ray Willis, Jr. has comparable mitigating force to being forced to eat paint chips and garbage, or being repeatedly raped by his foster father. McGowen argues instead that, because the sentencing instructions did not adequately guide the jury's consideration of his evidence, the result is even better for him — in that he does not need to show prejudice — than if he had even more powerful mitigating evidence and the jury never heard it in the first place. The Fifth Circuit's embrace of that incongruous result cannot stand.

D. This Case Is An Ideal Vehicle To Decide The Question Presented

This case provides an ideal vehicle for deciding whether *Lockett* errors must be reviewed for harmlessness in federal habeas. That is so for three reasons.

1. The circuit split is outcome-determinative. The district court concluded, and the Fifth Circuit did not dispute, that "McGowen almost certainly would have received a death sentence even if the trial court had anticipated the *Penry* decision * * * and correctly instructed the jury." App. 85a. In the Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, or

Eleventh Circuits, that harmlessness finding would have been sufficient to excuse the error in McGowen's sentencing instructions and to save the State the burden of a retrial. See, *e.g.*, *Ferguson*, 580 F.3d at 1200-1203; *Campbell*, 674 F.3d at 596-597.

The result is different in the Fifth Circuit. For example, in *Abdul-Kabir*, this Court found an error in Texas's capital-sentencing instructions and remanded for further proceedings without addressing harmlessness. On remand, and without finding that Abdul-Kabir was prejudiced by the instructional error, the Fifth Circuit automatically vacated his death sentence and ordered the State to resentence him or commute his sentence to life imprisonment. *Cole* v. *Dretke*, 265 F. App'x 380 (5th Cir. 2008) (per curiam). Facing the prospect of resentencing Abdul-Kabir with decades-old evidence and missing witnesses, the prosecutor abandoned the effort and consented to a life sentence. See Jennifer Rios, *Convicted Killer Given Life Term*, San Angelo Standard-Times (Texas), June 30, 2010, at A1 (noting that "finding witnesses would be a problem" given "the passage of 22 years since the initial trial").

Absent this Court's intervention, the choice facing McGowen's prosecutors will be even tougher. Given that McGowen's victims of choice were "real, real old" when he robbed and assaulted them thirty years ago, 34.RR.89, many of the crucial witnesses likely are dead by now. The harmless-error doctrine is intended precisely for cases like this one because, without it, the State will shoulder the burden of resentencing McGowen on the basis of stale evidence and dead witnesses — all to cure a mistake that had no effect on his original sentence. See *Coleman*, 525

U.S. at 146 (noting that harmless-error review is particularly appropriate "in cases such as this one, where the original sentencing hearing took place * * * some 17 years ago").

2. While the 7-to-1 circuit split is lopsided, it likely will endure. The Fifth Circuit's structural-error holding is embodied in an en banc decision, which it has refused to reconsider. See App. 26a. And the decision below makes clear that it will continue finding structural errors and wiping away prejudice-free capital sentences until this Court stops it. See *id.* at 21a-22a & nn.40-41 (emphasizing that it has denied structural-error relief to only one *Penry*-era petitioner and suggesting that its decision to do so will not be repeated). The Fifth Circuit has ample fodder for doing so: Texas's death row houses approximately twenty-four men who were sentenced under Article 37.071 and who have potentially unexhausted *Lockett* claims like McGowen's. Moreover, approximately twelve men are awaiting resentencing by district attorneys' offices across the State of Texas on account of such claims. Those cases have placed, and will continue to place, crushing burdens on prosecutors, victims, and victims' families, all of whom will have to forgo the closure that they experienced decades ago to redo dozens of trials — without any evidence that anyone was prejudiced during the first go-round. That result harkens back to the "sporting theory of justice" that Dean Pound decried for "giv[ing] the whole community a false notion of the purpose and end of law." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 406 (1906).

3. Finally, nothing in the Fifth Circuit's structural-error holding is limited to Texas's death row or to capital sentences under Article 37.071. To the contrary, the court's logic would apply to long-final state-court judgments across the country and undermine the principles of finality and comity that *Brecht* and AEDPA were intended to protect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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