

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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SMITH *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 05–11304. Argued January 17, 2007—Decided April 25, 2007

Smith’s trial took place in the interim between *Penry v. Lynaugh*, 492 U. S. 302 (*Penry I*), and *Penry v. Johnson*, 532 U. S. 782 (*Penry II*). At that time, Texas capital juries were still given the special-issue questions found constitutionally inadequate in *Penry I*. Texas courts attempted to cure that inadequacy by instructing the jury that if it felt death should not be imposed but also felt the special issues satisfied, it should falsely answer “no” to one of the special-issue questions, thus nullifying the special issues. This nullification charge was later found inadequate to cure the special issues in *Penry II*. Before his trial, Smith objected to the constitutionality of the special issues, but his challenges were denied. At sentencing, Smith’s jury received the special issues and the nullification charge. The jury sentenced Smith to death. In his appeal and postconviction state proceedings, Smith continued to argue his sentencing was unconstitutional because of the defects in the special issues. At each stage, the argument was either rejected on the merits, or else held procedurally barred because it had already been addressed on direct appeal. The Texas Court of Criminal Appeals (hereinafter appeals court) affirmed the denial of relief, distinguishing Smith’s case from the *Penry* precedents. This Court reversed, *Smith v. Texas*, 543 U. S. 37 (*per curiam*) (*Smith I*), finding there was *Penry* error and that the nullification charge was inadequate under *Penry II*. On remand, the appeals court denied relief once more. Relying on its *Almanza* decision, it held that Smith had not preserved a *Penry II* challenge to the nullification charge, since he only made a *Penry I* challenge at trial; and that this procedural defect required him to show not merely some harm, but egregious harm, a burden he could not meet.

Held:

1. The appeals court made errors of federal law that cannot be the

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predicate for requiring Smith to show egregious harm. *Smith I* confirmed that the special issues did not meet constitutional standards and that the nullification charge did not cure that error. The basis for relief was error caused by the special issues, not some separate error caused by the nullification charge. On remand from *Smith I*, the appeals court mistook this Court's holding as granting relief in light of an error caused by the nullification charge and concluded that Smith had not preserved that claim because he never objected to the nullification charge. Although Smith's second state habeas petition included an argument that the nullification charge itself prevented the jury from considering his mitigating evidence, that was not the only, or even the primary, argument he presented to the appeals court and this Court. The parties' post-trial filings, the state courts' judgments, and *Smith I* make clear that Smith challenged the special issues before trial and did not abandon or transform that claim during lengthy post-trial proceedings. Regardless of how the State now characterizes it, Smith's pretrial claim was treated by the appeals court as a *Penry* challenge to the adequacy of the special issues in his case, that is how this Court treated it in *Smith I*, and that was the error on which this Court granted relief. The appeals court's misinterpretation of federal law on remand from *Smith I* cannot form the basis for the imposition of an adequate and independent state procedural bar. *Ake v. Oklahoma*, 470 U. S. 68, 75. Pp. 15–17.

2. The state courts that reviewed Smith's case did not indicate that he failed to preserve his claim that the special issues were inadequate in his case. Under the appeals court's application of *Almanza*, preserved error is subject only to normal harmless-error review. The appeals court has indicated elsewhere that so long there is a reasonable likelihood the jury believed it was not permitted to consider relevant mitigating evidence, the lower *Almanza* standard is met. Because the state court must defer to this Court's finding of *Penry* error, which is a finding that there is a reasonable likelihood the jury believed it was not permitted to consider Smith's relevant mitigating evidence, *Johnson v. Texas*, 509 U. S. 350, 367, it appears Smith is entitled to relief under the state harmless-error framework. Pp. 18–19.

185 S. W. 3d 455, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.