

No. \_\_\_\_\_

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**In The Supreme Court of the United States**

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ROBERT MITCHELL JENNINGS,  
*Petitioner,*

v.

THE STATE OF TEXAS,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE TEXAS COURT OF CRIMINAL APPEALS

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**PETITION FOR A WRIT OF CERTIORARI**

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**THIS IS A CAPITAL CASE  
(EXECUTION SCHEDULED FOR JANUARY 30, 2019)**

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**CAPITAL CASE  
QUESTIONS PRESENTED**

1. Did the Texas Court of Criminal Appeals deny Jennings equal protection of the law by dismissing on procedural grounds subsequent habeas corpus applications raising a *Penry* claim where it has granted relief to other subsequent habeas applicants on fundamentally indistinguishable claims in death penalty cases?
2. Did the unconstitutional nullification instruction prevent the jury from fully considering and giving effect to mitigating evidence of Jennings' substance abuse and remorse?

## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	1
RELEVANT CONSTITUTIONAL PROVISIONS .....	1
STATEMENT.....	2
A. Procedural History .....	2
B. Summary Of The Issues.....	4
REASONS FOR GRANTING THE PETITION.....	6
A. The Texas Court Of Criminal Appeals Denied Jennings Equal Protection Of The Law By Dismissing On Procedural Grounds Subsequent Habeas Corpus Applications Raising A <i>Penry</i> Claim Where It Has Granted Relief To Other Subsequent Habeas Applicants On Fundamentally Indistinguishable Claims In Death Penalty Cases	6
1. The Mitigating Evidence Presented At Trial.....	6
2. The Unconstitutional Nullification Instruction.....	7
3. The Initial State Habeas Corpus Proceeding .....	8
4. The Federal Habeas Corpus Proceeding .....	10
5. The Subsequent State Habeas Corpus Proceeding .....	10

	<u>Page</u>
6. This Court Should Consider The Merits Because The Texas Court Of Criminal Appeals Has Not Consistently Applied Its Procedural Default Rule To <i>Penry</i> Claims.....	14
B. The Unconstitutional Nullification Instruction Prevented The Jury From Fully Considering And Giving Effect To Mitigating Evidence Of Jennings' Substance Abuse And Remorse .....	16
1. The Mitigating Evidence Of Substance Abuse.....	16
2. The Mitigating Evidence Of Remorse .....	18
CONCLUSION.....	20
 <b>APPENDIX</b>	
Appendix A: Texas Court of Criminal Appeals Opinion May 16, 2018.....	1a
Appendix B: Order denying reconsideration Sept. 19, 2018.....	37a
Appendix C: Dissenting Opinion on reconsideration Sept. 19, 2018.....	38a

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Abdul-Kabir v. Quartermar</i> , 550 U.S. 233 (2007).....	10
<i>Alvarado v. State</i> , 912 S.W.2d 199 (Tex. Crim. App. 1995).....	10, 17
<i>Amos v. Scott</i> , 61 F.3d 333 (5th Cir. 1995).....	15
<i>Barr v. Columbia</i> , 378 U.S. 146 (1964).....	15
<i>Brewer v. Quartermar</i> , 550 U.S. 286 (2007) .....	10
<i>Callins v. Collins</i> , 998 F.2d 269 (5th Cir. 1993) .....	9
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) .....	14
<i>Ex parte Harris</i> , 825 S.W.2d 120 (Tex. Crim. App. 1991).....	8-9
<i>Ex parte Hood</i> , No. WR-41,168-01 (Tex. Crim. App. Apr. 21, 1999) .....	9
<i>Ex parte Hood</i> , 304 S.W.3d 397 (Tex. Crim. App. 2010).....	13
<i>Ex parte Martinez</i> , 233 S.W.3d 319 (Tex. Crim. App. 2007) .....	13, 17
<i>Ex parte Moreno</i> , 245 S.W.3d 419 (Tex. Crim. App. 2008) .....	12
<i>Ex parte Smith</i> , No. WR-42,801-01 (Tex. Crim. App. Sept. 29, 1999) .....	9
<i>Ex parte Smith</i> , 185 S.W.3d 455 (Tex. Crim. App. 2006).....	17
<i>Ex parte Smith</i> , 309 S.W.3d 53 (Tex. Crim. App. 2010).....	13, 17
<i>Ex parte Williams</i> , 2012 WL 2130951 (Tex. Crim. App. June 13, 2012)....	5, 18, 19
<i>Fuller v. State</i> , 829 S.W.2d 191 (Tex. Crim. App. 1992).....	16

	<u>Page</u>
<i>Garcia v. State</i> , 919 S.W.2d 370 (Tex. Crim. App. 1994) .....	17
<i>Hathorn v. Lovorn</i> , 457 U.S. 255 (1982).....	15
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965) .....	14
<i>James v. Collins</i> , 987 F.2d 1116 (5th Cir. 1993) .....	9
<i>Nelson v. Quarterman</i> , 472 F.3d 287 (5th Cir. 2006).....	12
<i>Penry v. Johnson</i> , 532 U.S. 782 (2001) .....	5, 8
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) .....	4
<i>Rosales v. Dretke</i> , 444 F.3d 703 (5th Cir. 2006) .....	15
<i>Smith v. Texas</i> , 543 U.S. 37 (2004) .....	17
<i>Smith v. Texas</i> , 550 U.S. 297 (2007) .....	10, 17
<i>Williams v. Davis</i> , 192 F.Supp.3d 732 (S.D. Tex. 2016).....	5, 11, 18, 19

#### **Constitutional Provisions**

U.S. CONST. amend. VIII .....	1
U.S. CONST. amend. XIV .....	1

#### **Federal Statutory Provision**

28 U.S.C. §1257(a) .....	1
--------------------------	---

#### **State Statutory Provision**

TEX. CRIM. PROC. CODE art. 37.071, § 2(g) (West 2018) .....	20
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<u>Rule</u>	<u>Page</u>
SUP. CT. R. 10(c) .....	16, 18, 20

## **PETITION FOR A WRIT OF CERTIORARI**

Robert Mitchell Jennings respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

### **OPINIONS BELOW**

The opinion of the TCCA (App., *infra*, 1a-36a) is not yet reported but is available at 2018 WL 2247764. The order denying reconsideration (App., *infra*, 37a) and the dissenting opinion on reconsideration (App., *infra*, 38a-39a) are unreported, but the dissenting opinion is available at 2018 WL 4472744.

### **JURISDICTION**

The TCCA dismissed Jennings' subsequent habeas corpus applications on May 16, 2018, and denied reconsideration on September 19, 2018. He will file this petition within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

### **RELEVANT CONSTITUTIONAL PROVISIONS**

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

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "... nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## **STATEMENT**

The trial court submitted special issues at the punishment stage of Jennings' capital murder trial inquiring whether his conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased would result; whether there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society; and, whether his conduct in killing the deceased was unreasonable in response to any provocation. It did not provide a special instruction with regard to any particular mitigating evidence or submit a special issue inquiring whether any mitigating circumstance warrants a sentence of life rather than death. Instead, it instructed the jury, in essence, to return a false answer to a special issue if it wanted to spare his life. After his death sentence was affirmed on appeal, this Court held that the so-called nullification instruction was unconstitutional. The inadequacies in the Texas capital murder sentencing scheme that existed at the time of trial prevented the jury from giving meaningful consideration to evidence of his remorse and substance abuse.

### **A. Procedural History**

Jennings pled not guilty to capital murder in cause number 506814 in the 208th District Court of Harris County. The jury convicted him and answered the

statutory special issues in the affirmative, and the court sentenced him to death on July 13, 1989.

The TCCA affirmed the conviction in an unpublished opinion issued on January 20, 1993. This Court denied certiorari on October 4, 1993. *Jennings v. State*, No. AP-70,911 (Tex. Crim. App. Jan. 20, 1993), *cert. denied*, 510 U.S. 830 (1993) (not designated for publication).

Jennings filed a state habeas corpus application on September 20, 1996 (the -01 application), and supplemented it on June 13, 2001 (the -02 application). The trial court entered findings of fact and conclusions of law recommending that relief be denied on January 22, 2006. The TCCA denied relief on November 26, 2008, and this Court denied certiorari on April 27, 2009. *Ex parte Jennings*, Nos. AP-75,806 and AP-75,807, 2008 WL 5049911 (Tex. Crim. App. 2008), *cert. denied*, 556 U.S. 1209 (2009) (not designated for publication).

Jennings filed a federal habeas corpus petition on January 27, 2009. The district court ordered a new trial on punishment on April 23, 2012. *Jennings v. Thaler*, 2012 WL 1440387 (S.D. Tex. 2012) (not designated for publication). The Fifth Circuit reversed the judgment and dismissed Jennings' cross-point on July 22, 2013, and denied rehearing on August 15, 2013. *Jennings v. Stephens*, 537 Fed. Appx. 326 (5th Cir. 2013). This Court granted certiorari, reversed the judgment with regard to the dismissal of the cross-point, and remanded for consideration of the

merits on January 14, 2015. *Jennings v. Stephens*, 135 S.Ct. 793 (2015). The Fifth Circuit affirmed the denial of relief on the issue raised in the cross-point on July 7, 2015. This Court denied certiorari on January 19, 2016. *Jennings v. Stephens*, 617 Fed. Appx. 315 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 895 (2016).

Jennings filed a subsequent state habeas corpus application (the -03 application) on May 4, 2016, and supplemented it on July 20, 2016 (the -04 application). The TCCA, with two judges dissenting, dismissed the applications on May 16, 2018. *Ex parte Jennings*, \_\_ S.W.3d \_\_, Nos. WR-67,208-03 and WR-67,208-04 (Tex. Crim. App. 2018). Jennings filed a suggestion for reconsideration on May 30, 2018. The TCCA, with one judge dissenting, denied reconsideration on September 19, 2018.

Jennings is scheduled to be executed on January 30, 2019.

## **B. Summary Of The Issues**

Evidence was presented at the punishment stage of Jennings' capital murder trial that he used marijuana and drank alcohol, that he had been drinking before the offense, and that he expressed remorse for the murder in his recorded statement to the police. During his trial, this Court held that a special mitigation instruction is constitutionally required with regard to any evidence that the jury could not consider within the scope of the statutory special issues. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*). The trial court, in an effort to satisfy *Penry I*, instructed the jury,

in essence, to give a false answer to a special issue if it believed that a sentence of life rather than death was appropriate.

Twelve years after Jennings' trial, this Court held that the nullification instruction was an unconstitutional response to *Penry I. Penry v. Johnson*, 532 U.S. 782, 804 (2001) (*Penry II*). Jennings challenged the constitutionality of the nullification instruction in his initial state habeas corpus proceeding. The TCCA denied relief on the basis that the nullification instruction did not result in prejudice because no mitigating evidence was presented that could not be considered within the scope of the special issues.

Thereafter, the law on this issue developed, and the TCCA granted relief to subsequent habeas applicants in death penalty cases who had presented evidence of substance abuse and received the unconstitutional nullification instruction. However, it held that evidence of remorse does not require a mitigation instruction because it can be considered within the scope of the special issues. *Ex parte Williams*, 2012 WL 2130951, \*15 (Tex. Crim. App. June 13, 2012) (not designated for publication). A federal district court thereafter granted Williams relief on this issue. *Williams v. Davis*, 192 F.Supp.3d 732, 768-70 (S.D. Tex. 2016).

Jennings filed two subsequent state habeas corpus applications and a suggestion that the TCCA reconsider a previous application based on these developments in the law. The TCCA dismissed the applications and denied

reconsideration on procedural grounds without attempting to distinguish his case from those in which it granted relief in subsequent habeas proceedings or by reconsidering previous applications.

This Court should grant certiorari and consider the merits because the TCCA has not consistently applied its procedural default rule to *Penry* claims. Additionally, an intractable conflict exists between the decisions of the TCCA and the federal district court in *Williams* regarding whether evidence of remorse is *Penry* evidence that requires a special mitigation instruction.

## **REASONS FOR GRANTING THE PETITION**

### **A. The Texas Court Of Criminal Appeals Denied Jennings Equal Protection Of The Law By Dismissing On Procedural Grounds Subsequent Habeas Corpus Applications Raising A *Penry* Claim Where It Has Granted Relief To Other Subsequent Habeas Applicants On Fundamentally Indistinguishable Claims In Death Penalty Cases.**

#### **1. The Mitigating Evidence Presented At Trial**

The State offered Jennings' post-arrest recorded statement to the police at the punishment stage. He said that he used marijuana and drank alcohol and that he had been drinking before the offense. He was "real upset" because he shot someone and did not know whether that person was dead or alive. An officer asked at the end of the interview whether he wanted to say anything else. He responded, "Remorse in the way I feel about the incident that happened." He elaborated that he had been drinking; that the man ran towards him; that he wished he could "take it all back";

and that he would “face whatever punishment I have coming.” He also cried during portions of the interview.

The only evidence presented by the defense at the punishment stage was the testimony of a jail chaplain that Jennings had changed during the past year and helped counsel other inmates.

## **2. The Unconstitutional Nullification Instruction**

This Court decided *Penry I* during Jennings’ trial. It held that the Texas capital sentencing scheme was unconstitutional because it failed to adequately guide jurors in considering sentencing factors where there was evidence that the defendant was mentally retarded. The Harris County District Attorney, who personally prosecuted Jennings, persuaded defense counsel to request an instruction drafted by an appellate prosecutor in an effort to satisfy *Penry I*. The court instructed the jury as follows in the punishment charge:

When you deliberate about the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant’s character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the special issue under consideration

“No.”

The District Attorney deftly addressed the “nullification” instruction during his closing argument by imploring the jury to return a verdict based on the law and the evidence instead of “paying lip service to the law.” The jury answered the special issues in a manner that resulted in a death sentence.

### **3. The Initial State Habeas Corpus Proceeding**

Jennings alleged in the -01 application that trial counsel were ineffective at the punishment stage in failing to present mitigating evidence of his mental impairment and troubled childhood and in failing to object to an improper argument. While the application was pending in the trial court, this Court held in *Penry II* that the nullification instruction violates the Eighth and Fourteenth amendments because it fails to provide an adequate vehicle for the jury fully to consider and give effect to mitigating evidence that is outside the scope of the special issues. *Penry II*, 532 U.S. at 804.

Nine days after this Court decided *Penry II*, Jennings filed the -02 application challenging the constitutionality of the nullification instruction in general without addressing how it applied to any particular evidence. He did not discuss the evidence of remorse—which the State, rather than defense counsel, introduced through his recorded statement to the police—because the law at that time was well-settled that remorse could be considered within the scope of the special issues. *See Ex parte*

*Harris*, 825 S.W.2d 120, 121-22 (Tex. Crim. App. 1991); *Collins v. Collins*, 998 F.2d 269, 275 (5th Cir. 1993); *James v. Collins*, 987 F.2d 1116, 1122 (5th Cir. 1993). He also did not discuss the evidence of substance abuse—which the State introduced in the same manner—because the law also was well-settled that substance abuse is aggravating and, in any event, could be considered within the scope of the special issues. *See Alvarado v. State*, 912 S.W.2d 199, 209 (Tex. Crim. App. 1995); *Ex parte Hood*, No. WR-41,168-01 (Tex. Crim. App. Apr. 21, 1999) (not designated for publication); *Ex parte Smith*, No. WR-42,801-01 (Tex. Crim. App. Sept. 29, 1999) (not designated for publication).

The trial court found that Jennings told the police that he was drinking before he committed the offense; that defense counsel pointed out during summation that Jennings was crying when he gave his recorded statement to the police; but that the only mitigating evidence offered by the defense was the testimony of the jail chaplain. It concluded that Jennings could not complain about the nullification instruction because his counsel requested it; that evidence of intoxication and remorse could be considered within the scope of the special issues; and that there was no *Penry* evidence before the jury that required a special mitigation instruction.

The TCCA held that the nullification instruction did not prejudice Jennings because the jury could consider his mitigating evidence—the chaplain’s testimony about his behavior and demeanor in jail—within the scope of the special issues. *Ex*

*parte Jennings*, 2008 WL 5049911, \*7-8. It did not mention the evidence of substance abuse and remorse.

#### **4. The Federal Habeas Corpus Proceeding**

Jennings filed a federal habeas corpus petition in 2009. He did not present a freestanding claim regarding the nullification instruction because the TCCA's 2008 opinion was correct, as far as it went, based on the law then in effect—the chaplain's testimony could be considered within the scope of the future dangerousness special issue. Instead, he argued that, had counsel introduced mitigating evidence of his mental impairment and troubled childhood, the unconstitutional nullification instruction would have been prejudicial under *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Smith v. Texas*, 550 U.S. 297 (2007). The district court granted relief in 2012 because counsel were ineffective in failing to present mitigating evidence. *Jennings v. Thaler*, 2012 WL 1440387, at \*7. It observed *in dicta* that Jennings' argument regarding the nullification instruction was not exhausted in state court. *Id.* Ultimately, the Fifth Circuit reversed the district court's judgment.

#### **5. The Subsequent State Habeas Corpus Proceeding**

Jennings filed the -03 application in May 2016 alleging, *inter alia*, that the nullification instruction prevented the jury from fully considering and giving effect to mitigating evidence that he used marijuana and alcohol and had been drinking

before he committed the offense. He did not include the evidence of remorse based on the well-settled caselaw.

A federal district court granted relief to Arthur Lee Williams on June 28, 2016, because evidence of remorse cannot be considered within the scope of the special issues and requires a special mitigation instruction. *Williams v. Davis*, 192 F. Supp.3d at 768-70.<sup>1</sup> This appears to be the first case holding that evidence of remorse could not be considered within the scope of the special issues and requires a special mitigation instruction. Importantly, Texas did not appeal.

Jennings filed the -04 application 22 days after *Williams* was decided. He discussed the evidence of remorse—presented by the State—and argued that he should receive a new trial on punishment for the reasons stated in *Williams*.

The TCCA dismissed the -03 and -04 applications based on procedural default. App., *infra*, 2a-3a. Five judges concurred because the federal district court’s decision in *Williams* is not binding on the TCCA. App., *infra*, 5a-7a, 16a. Two judges dissented on the basis that the TCCA should have reopened the -02 application because it misapplied Supreme Court precedent in failing to consider the evidence of remorse in its 2008 opinion. App., *infra*, 31a-33a.

Jennings filed a suggestion for reconsideration requesting that the TCCA

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<sup>1</sup> Williams, who also murdered a police officer, was sentenced to death in the same trial court as Jennings.

reopen the -02 and, if necessary, the -03 applications and consider whether the unconstitutional nullification instruction was prejudicial under *Penry II* because the jury could not fully consider and give effect to the mitigating evidence of substance abuse and remorse.<sup>2</sup> He asserted that his case was in the same procedural posture as *Ex parte Moreno*, 245 S.W.3d 419 (Tex. Crim. App. 2008). Moreno introduced mitigating evidence at his capital murder trial, but the trial court did not provide a special mitigation instruction. Counsel requested what amounted to a “crude” nullification instruction, which the trial court denied. *Id.* at 423, 430-31. The TCCA denied relief in 2000 based on the law then in effect. *Id.* at 421. Moreno did not raise the issue in his federal habeas petition. *Id.* at 422. Instead, he filed a subsequent application after this Court decided *Abdul-Kabir, Brewer, and Smith*. *Id.* The TCCA was equally divided on whether to consider the issue in a subsequent application. *Id.* He then filed a suggestion for reconsideration of his initial application on the date of his scheduled execution. *Id.* The TCCA stayed the execution and ultimately granted relief. *Id.* at 422, 431.

Jennings pointed out that the TCCA had granted relief to other subsequent habeas applicants and vacated death sentences based on the unconstitutional nullification instruction after this Court decided *Abdul-Kabir, Brewer, and Smith*.

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<sup>2</sup> This Court never has held that a harmless error analysis is required on a *Penry* claim. See *Nelson v. Quartermann*, 472 F.3d 287, 314 (5th Cir. 2006).

*See Ex parte Martinez*, 233 S.W.3d 319, 322-24 (Tex. Crim. App. 2007) (mental illness, alcohol abuse, and troubled childhood); *Ex parte Hood*, 304 S.W.3d 397, 409 (Tex. Crim. App. 2010) (learning disabilities, low IQ, and troubled childhood); *Ex parte Smith*, 309 S.W.3d 53, 62 (Tex. Crim. App. 2010) (drug addiction). He argued that it would violate due process and equal protection of the law to treat him differently than Moreno, who obtained relief by suggesting reconsideration of his initial application after the federal courts denied relief, and to treat him differently than Martinez, Hood, and Smith, who obtained relief on subsequent applications.<sup>3</sup>

Additionally, Jennings argued that it would violate due process and equal protection of the law to treat him differently than Williams, who obtained relief in federal district court. That the TCCA is not bound by a decision of a federal district court is not the issue. What is important is that Texas did not appeal the district court's decision to grant relief to Williams. Thus, it implicitly conceded the correctness of the district court's decision that the TCCA unreasonably applied Supreme Court precedent in holding that evidence of remorse can be considered within the scope of the special issues. Although the district court's opinion is not binding on the TCCA, Texas' acceptance of it should be. Allowing Williams a new trial on punishment, while executing Jennings—where the same flaw exists in both

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<sup>3</sup> Martinez obtained relief even though he did not raise the issue in his initial habeas application (although he raised it on appeal). *Martinez*, 233 S.W.3d at 322.

cases—would violate equal protection of the law, not to mention human dignity.

Finally, Jennings observed that, had he relied on the evidence of substance abuse and remorse in the -02 application in 2001, the TCCA would have denied relief based on the law then in effect. He would have been required to file a subsequent application or a suggestion for reconsideration after the law developed in his favor. Thus, his case would have been in the same procedural posture as it is now. He should not be executed where the law now in effect entitles him to relief, and other subsequent habeas applicants have received the benefit of that law.

The TCCA denied reconsideration. App., *infra*, 37a. Judge Alcala dissented on the basis that the court should consider the merits of the claim regarding remorse. App., *infra*, 38a-39a.

**6. This Court Should Consider The Merits Because The Texas Court Of Criminal Appeals Has Not Consistently Applied Its Procedural Default Rule To *Penry* Claims.**

When a state “opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). When and how a state procedural rule can preclude this Court’s consideration of a federal question “is itself a federal question.” *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). If the enforcement of a state procedural default rule does not serve a legitimate state interest, the rule “ought not be permitted

to bar vindication of important federal rights.” *Id.* at 447-48. “State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.” *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (no independent and adequate state ground barred this Court’s review of federal claim where state supreme court did not uniformly apply rule refusing to consider claim raised for first time on rehearing).

In *Barr v. Columbia*, 378 U.S. 146 (1964), this Court considered the trespass and breach of the peace convictions of “sit-in demonstrators” who refused to leave a lunch counter. The state supreme court refused on procedural grounds to decide whether the breach of the peace statute was unconstitutionally vague and the evidence was legally insufficient. This Court exercised its certiorari jurisdiction, despite the procedural default, because that state court had reversed other convictions for this offense based on insufficient evidence. “We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.” *Id.* at 149. It held that the evidence was legally insufficient and reversed the convictions. *Id.* at 150-51.

This Court must determine whether the TCCA has consistently applied its procedural default rule to *Penry* claims. *See Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995); *Rosales v. Dretke*, 444 F.3d 703, 707 (5th Cir. 2006) (federal habeas review of procedurally defaulted *Batson* claim available because TCCA did not

consistently follow procedural default rule in this context). The TCCA granted relief to subsequent habeas applicants and vacated death sentences based on the unconstitutional nullification instruction in *Martinez*, *Hood*, and *Smith* between 2007 and 2010 and did so based on a suggestion for reconsideration in *Moreno* in 2008. There is no principled basis for the TCCA to consider the merits in those cases but refuse to do so in Jennings' case. This Court should grant certiorari to decide whether the TCCA denied Jennings equal protection of the law by dismissing his subsequent applications raising a *Penry* claim on procedural grounds where it has granted relief to other subsequent habeas applicants on fundamentally indistinguishable claims in death penalty cases. SUP. CT. R. 10(c). Ultimately, this Court should consider the merits of the *Penry* claim or remand to the TCCA with instructions to do so.

**B. The Unconstitutional Nullification Instruction Prevented The Jury From Fully Considering And Giving Effect To Mitigating Evidence Of Jennings' Substance Abuse And Remorse.**

**1. The Mitigating Evidence Of Substance Abuse**

The controlling precedent has changed dramatically since Jennings first challenged the nullification instruction in the -02 application in 2001. The TCCA initially upheld the constitutionality of the nullification instruction in *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992). It considered evidence of substance abuse to be an aggravating factor that would support a finding of future

dangerousness. *See Alvarado v. State*, 912 S.W.2d at 209. It concluded that a nullification instruction was not prejudicial because evidence of substance abuse could be considered within the scope of the special issues. *See Garcia v. State*, 919 S.W.2d 370, 398-99 (Tex. Crim. App. 1994).

Even after this Court confirmed that the nullification instruction violates the Eighth Amendment in *Smith v. Texas*, 543 U.S. 37, 47-48 (2004), the TCCA denied relief on remand because Smith did not object to the instruction and failed to demonstrate egregious harm. *Ex parte Smith*, 185 S.W.3d 455, 472 (Tex. Crim. App. 2006). This Court vacated Smith's death sentence because there was a reasonable probability that the jury interpreted the special issues in a manner that foreclosed adequate consideration of the mitigating evidence. *Smith v. Texas*, 550 U.S. at 316. Thereafter, the TCCA granted relief to subsequent habeas applicants and vacated death sentences based on the unconstitutional nullification instruction in cases involving substance abuse. *See Martinez*, 233 S.W.3d at 322-23; *Smith*, 309 S.W.3d at 62.<sup>4</sup>

When Jennings filed the -02 application in 2001, the TCCA had held that evidence of substance abuse could be considered within the scope of the special issues and did not require a special mitigation instruction. These cases are no longer

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<sup>4</sup> The TCCA granted relief in *Smith* despite the failure to object to the instruction at trial. *Id.* at 63-64.

valid. Thus, this Court should grant certiorari to determine whether the unconstitutional nullification instruction prevented the jury from fully considering and giving effect to mitigating evidence of Jennings' substance abuse. SUP. CT. R. 10(c)

## **2. The Mitigating Evidence Of Remorse**

There is an intractable conflict in the caselaw as to whether evidence of remorse constitutes *Penry* evidence that requires a special mitigation instruction. The TCCA has held that evidence of remorse does not require a special mitigation instruction because it can be considered within the scope of the special issues. *Ex parte Williams*, 2012 WL 2130951, at \*15. The TCCA, with two judges dissenting, maintained this position in Jennings' case. App., *infra*, 5a-7a, 16a.

A federal district court granted Williams relief on this issue in 2016. *Williams v. Davis*, 192 F.Supp.3d at 768-70. He contended that the jury had no vehicle to consider his remorse, which he demonstrated by being “upset and apologetic after the incident.” *Id.* at 767. The jury heard testimony that he cried immediately after the shooting and, hours later, was “really upset” and continued to cry and apologize. *Id.* at 767-68. The district court concluded that the TCCA unreasonably applied Supreme Court precedent in holding that evidence of remorse can be considered within the scope of the special issues. *Id.* at 768-70. Evidence of remorse “might serve as a basis for a sentence less than death.” *Id.* at 769. As a result, it requires a

special mitigation instruction or special issue. *Id.* at 769-70. The special issues submitted enabled the jury to consider remorse only in the context of Williams' future dangerousness, response to provocation, or deliberateness. *Id.* "Remorse may provide insight into humanizing qualities that do not necessarily relate to what an inmate has done or what he may do." *Id.* at 770. It is relevant to moral culpability because it "did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence." *Id.* Thus, the omission of a special mitigation instruction or special issue required a new trial on punishment. *Id.* at 770-71. Texas did not appeal. Thus, it implicitly conceded that the TCCA's decision in *Williams* constituted an unreasonable application of *Penry I*.

Both Williams and Jennings exhibited remorse after killing a police officer in Houston. They were convicted and sentenced to death in the same court. However, they have been treated differently thereafter. Williams was granted a new trial on punishment because the jury was not instructed how to consider the evidence of his remorse. Jennings is scheduled to be executed in two months even though the jury received a nullification instruction, which this Court held in *Penry II* to be an unconstitutional response to *Penry I*. His execution under these circumstances would be constitutionally intolerable. Accordingly, this Court should grant certiorari to determine whether the unconstitutional nullification instruction prevented the jury

from fully considering and giving effect to mitigating evidence of Jennings' remorse. Sup. Ct. R. 10(c).<sup>5</sup>

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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<sup>5</sup> Four TCCA judges concluded in a concurring opinion that Jennings did not express remorse based on their interpretation of his recorded statement. App., *infra*, 7a-10a. One judge concluded in a concurring opinion that a reasonable juror could find that he expressed remorse, but the verdict would have been the same. App., *infra*, 18a. Two judges concluded in a dissenting opinion that he expressed sincere remorse, and the unconstitutional nullification instruction did not provide an adequate vehicle for the jury to give effect to it. App., *infra*, 28a-30a. Whether Jennings expressed remorse, and whether these expressions merit a life sentence, is for a properly instructed jury to determine. Had one juror found that his remorse was sufficiently mitigating and persisted in a negative answer to a special issue, he would have been sentenced to life in prison. See TEX. CRIM. PROC. CODE art. 37.071, § 2(g) (West 2018).