No. 18-9614

IN THE

Supreme Court of the United States

RICK ALLEN RHOADES,
Petitioner,

v.

LORIE DAVIS, DIRECTOR TDCJ-CID,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 1st day of August, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: David R. Dow, University of Houston Law Center, 4604 Calhoun Road, Houston, Texas 77204-6060, ddow@central.uh.edu. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Rick Rhoades was convicted and sentenced to death for the murder of brothers Bradley and Charles Allen. At trial, Rhoades proffered in mitigation childhood photographs of himself, *inter alia*, holding a trophy, fishing, and attending a dance. The trial court denied the admission of the photographs as irrelevant. Rhoades's adoptive parents later testified that when Rhoades was young, he enjoyed sports and fishing, liked animals, and got along well with their other children. In state court, Rhoades unsuccessfully argued the exclusion of the childhood photographs denied him his right to present mitigating evidence. He did not claim in state court that the exclusion of the photographs constituted structural error. He did not claim in federal court—until oral argument in the Fifth Circuit—that the exclusion of the photographs constituted structural error. The Fifth Circuit held that the exclusion of the photographs was harmless. Rhoades now seeks the creation of a new rule that the exclusion of relevant, non-cumulative mitigating evidence constitutes structural error. These facts raise the following question:

> Should the Court grant certiorari where Rhoades's structural-error claim is unexhausted and waived, the rule Rhoades seeks is inapplicable to the facts of his case because the excluded evidence was cumulative, the new rule sought by Rhoades is barred by principles of non-retroactivity, there is no circuit split that requires this Court's attention, and he identifies no precedent from this Court to support the conclusion that the exclusion of relevant mitigating evidence is structural error?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

BRIEF IN OPPOSITION

During the punishment phase of his capital murder trial, Rhoades proffered into evidence several childhood photographs depicting him, *inter alia*, holding a trophy, attending a dance, fishing, petting an animal, and posing with other children. Pet'r's App'x A at a6. The prosecution objected to the admission of the photographs on the ground that they were irrelevant, and the trial court sustained the objection. Pet'r's App'x A at a6. On direct appeal and in his state habeas application, Rhoades argued that the exclusion of the photographs denied him the right to present mitigating evidence. The state court rejected the claim in both instances. *Rhoades v. State*, 934 S.W.2d 113, 125–26 (Tex. Crim. App. 1996); *Ex parte Rhoades,* No. 78,124-01 (Tex. Crim. App. Oct. 1, 2014) (unpublished order); SHCR-01 at 547–97.[1] Rhoades then raised the claim in his federal habeas petition. The district court denied the claim, and the Fifth Circuit later granted a certificate of appealability (COA). Pet'r's App'x C at a45–a46; Pet'r's App'x D at a70–a79.

Following briefing, the Fifth Circuit held oral argument during which Rhoades claimed—for the first time—that the exclusion of the childhood photographs constituted structural error and mandated relief from his sentence. Pet'r's App'x A at a12. The Fifth Circuit held that the trial court's

[1] "SCHR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Rhoades*, No. 78,124-01.

exclusion of the photographs was erroneous under *Lockett v. Ohio*[2] and *Eddings v. Oklahoma*[3] because they could have served as a basis for a sentence less than death. Pet'r's App'x A at a10–a11. Nonetheless, the Fifth Circuit declined to address whether the state court's holding was an unreasonable application of this Court's precedent because Rhoades suffered no harm from the exclusion of the photographs. Pet'r's App'x A at a12. The court rejected Rhoades's tardy argument that the exclusion of relevant mitigating evidence constituted structural error. Pet'r's App'x A at a12–a13. The Fifth Circuit noted the marginal value of the photographs, especially the double-edged nature of the photographs that showed Rhoades had been afforded a loving and supportive adoptive family. Pet'r's App'x A at a13–a14.

Rhoades argues the Fifth Circuit incorrectly concluded his claim was subject to harmless-error analysis. *See generally* Pet. Cert. He argues this Court has never held that a claim challenging the exclusion of relevant, non-cumulative mitigating evidence may be harmless. Pet. Cert. at 9. But he does not present a compelling reason justifying certiorari review, and his case is a particularly inapt vehicle for the question Rhoades presents.

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[2] 438 U.S. 586, 606 (1978).

[3] 455 U.S. 104, 112–14 (1982) ("Just as the State may not by statute preclude the sentence from considering any mitigating factor, neither may the sentence refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original).

First, Rhoades's structural-error claim is unexhausted and waived because he did not raise it until the Fifth Circuit held oral argument. Second, the question Rhoades presents—whether the erroneous exclusion of relevant, *non-cumulative* mitigating evidence constitutes structural error—does not apply to the facts of his case because the excluded photographs were cumulative of the testimony of his adoptive parents. Third, the rule Rhoades seeks to establish is barred by principles of non-retroactivity. Fourth, Rhoades does not identify any circuit split that requires resolution by this Court. Lastly, this Court has clearly indicated—and its precedent conclusively supports the conclusion that—the erroneous exclusion of evidence is a quintessential trial error that is amenable to harmless-error analysis. Consequently, Rhoades's petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts from Trial

A. The capital murder

The district court summarized the facts of the crime as follows:

> On September 13, 1991, a neighbor discovered the bodies of brothers Bradley and Charles Allen in the home they shared. Both men had been beaten and stabbed. For weeks, the police did not have any information about who killed the men.

> A few weeks later, the police arrested Rhoades as he left a school that he had burglarized. Rhoades initially gave the police a false name. While in jail, Rhoades indicated that he wanted to confess to the murder of the two brothers. Rhoades provided the police a statement that served as the backbone of the capital murder prosecution against him.
>
> In his police statement, Rhoades said that he had been released from prison in Huntsville, Texas fewer than twenty-four hours before the murders. Rhoades took a bus to Houston rather than report to his assigned halfway house. Rhoades described how he spent that day wandering around a neighborhood where he once lived, drinking beer and looking for acquaintances. As Rhoades wandered around through the streets in the early morning hours, he saw Charles Allen outside of his home. A verbal confrontation ensued, and Charles entered his house. Thinking that Charles was going to retrieve a gun, Rhoades followed him inside. When the men began fighting, Rhoades hit Charles with a metal bar and stabbed him repeatedly with a knife. When Bradley Allen entered the room and tried to throw punches, Rhoades turned on him. As the two men fought, Rhoades repeatedly stabbed Bradley. Rhoades eventually left the home, stealing clothing and cash. He could hear one of the men gurgling when he left. Rhoades later saw a television news report that both men had died.
>
> . . .
>
> The defense's case focused on self-defense as a justification for the murders. The defense called two witnesses in the guilt/innocence phase. A police officer testified that, because nothing had been disturbed in the victims' house, the killer's motive did not appear to have been burglary. A forensic expert provided testimony about the blood spatter at the crime scene to bolster Rhoades'[s] claim of self-defense. The jury found Rhoades guilty of capital murder.

Pet'r's App'x D at a62–a64.

B. Punishment-phase evidence

The district court summarized the evidence presented during the punishment phase of trial:

> The State presented testimony and evidence in the punishment phase that focused on Rhoades'[s] lengthy history of legal difficulties and incarceration. Rhoades had previously received ninety[-]days hard labor as a result of a Naval court-martial. Rhoades had been imprisoned for burglary three times before. Rhoades had previously been convicted of felony theft of an automobile. After an incident when he had threatened to kill a club bouncer, Rhoades was convicted for possessing a switchblade.
>
> The prosecution also presented testimony that Rhoades had repeatedly performed bad acts and had engaged in numerous unadjudicated offenses. He had committed statutory rape. He had burglarized churches, homes, and farms. He was violent, obscene, and belligerent with others. He had repeatedly fled from the police. During arrests, Rhoades had previously threatened violence on police officers. Rhoades possessed weapons during previous incarcerations. He had given the police false names during prior arrests. He served time under an alias immediately before the murders for which he was convicted. Rhoades'[s] behavior was poor during his incarceration before trial. For example, while in jail Rhoades told a detention officer: "I am going to have to shank me a deputy to get a little respect around here."
>
> An investigator with the special prosecution unit for the Texas prison system testified about the classification of prisoners. During his testimony, the investigator told jurors that a life-sentenced inmate may be eligible to receive a furlough. The prosecution also presented testimony about the effect that the two murders had on the victims' family.
>
> The defense focused its punishment-phase efforts on Rhoades'[s] "nonviolent nature and his ability to do well in a prison society." A neuropsychologist testified that an [electroencephalogram] he ran on Rhoades indicated a major affective disorder, specifically a bipolar depressive disorder. Rhoades'[s] biological mother, Patricia

> Spenny, testified about his early childhood and the abuse he suffered at the hands of his biological father. His biological mother testified that she was tricked into giving him up for adoption while she was incarcerated and that she had not seen him since he was young. Rhoades'[s] adoptive mother, Donna Rhoades, testified about his childhood, describing the beginnings of his lawlessness, and expressed that she would always love him. The defense unsuccessfully tried to introduce into evidence photographs of Rhoades'[s] childhood to accompany his mother's testimony. A person involved in a prison education program testified that, during a prior incarceration, Rhoades was valedictorian of his GED class. She described Rhoades as thriving in prison, suggesting he would not be violent in the future. A psychologist, Dr. Windel Dickerson, gave his professional opinion that Rhoades would behave well in a structured environment. Dr. Dickerson testified that Rhoades'[s] risk for committing violent acts would diminish with age.

Pet'r's App'x D at a64–66.

C. Rhoades's proffer of his childhood photographs

The Fifth Circuit described Rhoades's proffer of his childhood photographs at the punishment phase of trial and the state courts' rulings:

> Before calling Rhoades's adoptive mother, Donna Rhoades, trial counsel sought to introduce photographs of Rhoades as a child from the ages of approximately four to ten. Trial counsel argued that the photographs were admissible to counteract the dehumanizing photographs of Rhoades introduced by the State (e.g., his mugshots), to show the jury the defendant's development through his life and his human side, and to offset the effect of the emotional photos of the deceased victims and their families. The photographs depict typical childhood scenes such as Rhoades holding a trophy, fishing, and attending a dance. The State objected to the admission of the photographs as irrelevant, arguing that everyone was a child at one point, and that the photos did nothing to lessen his moral blameworthiness. The trial court agreed. The [Texas Court of Criminal Appeals] affirmed, holding that the trial court did not abuse its discretion in excluding the photos as

> irrelevant. Specifically, the CCA held that there was no relationship between photos of Rhoades as a child and his moral culpability for the double murder. On habeas review, the state court summarized the testimony of witnesses who testified on Rhoades's behalf during the punishment phase of the trial and determined that trial counsel was able to submit other mitigating evidence that humanized Rhoades. In his state habeas petition, Rhoades focused on the special issue of future-dangerousness, arguing that the photographs showed his ability to adapt to a structured environment. The state habeas court rejected that contention, finding that the "childhood photos are not relevant to the issue of whether the applicant would be a threat to society while living in a structured environment and do not show whether he would or would not commit future acts of violence."

Pet'r's App'x A at a6–a7.

II. Procedural History

Rhoades was convicted and sentenced to death in 1992 for the murders of Bradley Dean Allen and Charles Allen, which were committed during the same criminal transaction. 1 RR 14; 1-A RR 268–81, 290–98;[4] 30 RR 868; 39 RR 99, 101. The CCA upheld Rhoades's conviction and death sentence on direct appeal. *Rhoades*, 934 S.W.2d at 129. Rhoades filed a state application for writ of habeas corpus, which the CCA denied based on the trial court's findings of

[4] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). The Defense exhibits are located in volumes thirty-six thru thirty-eight of the Reporter's Record and will be cited to as "DX." The transcript of pleadings and documents filed in the trial court (including the indictment, jury verdicts, and judgment and sentence), typically referred to as the Clerk's Record, is located within the Reporter's Record volumes "1" and "1-A."

fact and conclusions of law—rejecting one conclusion—and based on its own review. *Ex parte Rhoades,* No. 78,124-01; SHCR-01 at 547–97

Rhoades then filed a federal habeas petition. The district court denied habeas corpus relief and denied a COA. Pet'r's App'x D at a61–a110. Rhoades next filed an application for a COA, which the Fifth Circuit granted. Pet'r's App'x C at a42–a59. Following briefing and oral argument, the Fifth Circuit affirmed the district court's judgment denying relief. Pet'r's App'x A at a2–a37. The Fifth Circuit denied Rhoades's petition for rehearing. Pet'r's App'x B at a39–a40. Rhoades then filed in this Court a petition for a writ of certiorari. The instant Brief in Opposition follows.

ARGUMENT

I. Rhoades's Structural-Error Claim Is Unexhausted and Waived.

Rhoades seeks review in this Court to address a claim he did not raise in state court, the district court, or—in extensive briefing and not until oral argument—the Fifth Circuit. Pet'r's App'x A at a12. He argues that the exclusion of relevant mitigating evidence is not amenable to harmless-error review but instead constitutes structural error. Pet. Cert. at 9–15. Rhoades's failure to raise his structural-error claim in state court renders the claim unexhausted and procedurally defaulted, and his failure to raise it in his briefing in the courts below renders it waived. Pet'r's App'x A at a12. Consequently, his petition should be denied.

A. Rhoades's structural-error claim is unexhausted.

On direct appeal and in his state habeas application, Rhoades raised an Eighth Amendment and due process claim alleging that the trial court's exclusion of his childhood photographs was erroneous because it prevented him from presenting relevant mitigating evidence. Appellant's Br. at 57–58, *Rhoades v. State*, No. 71,595 (Tex. Crim. App. Sept. 7, 1993); SHCR-01 at 30–57.[5] But Rhoades did not raise a structural-error claim on direct appeal or in his state habeas proceedings. Indeed, Rhoades argued on direct appeal—as he did in his briefing in the Fifth Circuit—that he was harmed by the exclusion of the photographs.[6] Rhoades's failure to raise his structural-error claim in the state court renders the claim unexhausted.

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[5] Rhoades's claim in his state habeas application specifically argued that the trial court's exclusion of his childhood photographs prevented him from presenting mitigating evidence showing he would not be a future danger. SHCR-01 at 30–57.

[6] The following constitutes the entirety of Rhoades's argument on direct appeal regarding the alleged harm that resulted from the exclusion of the childhood photographs:

> The harm of this decision is demonstrated by the court's decision to allow the jury to consider similar evidence offered by the State. The jury was not allowed to see evidence which tended to place the defendant in the context of his life, while it saw photographic examples of the lives of the victims of this offense. The trial court's error mandates reversal of the judgment and sentence imposed in this case.

Appellant's Br. at 58, *Rhoades v. State*, No. 71,595. Rhoades argued in his state habeas application that the exclusion of the photographs prevented him from rebutting the prosecution's evidence that he would be a danger to society, specifically arguing he was harmed by the exclusion of the photographs. SHCR-01 at 42–44, 56–57.

The federal courts' exercise of authority in habeas corpus cases arising from state court convictions is limited by comity and statute. *See Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991) ("This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); 28 U.S.C. § 2254(b)(1)(A). To exhaust a federal constitutional claim, a "petitioner must provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (internal quotation marks omitted). Further, a petitioner must have "fairly presented" the "substance" of the claim to the state courts. *Id.*

Rhoades's structural-error claim differs significantly from the Eighth Amendment and due process claim he presented to the state courts, and his failure to assert in state court that the erroneous exclusion of mitigating evidence constitutes structural error renders his current claim unexhausted. This Court has recognized in a similar context that a petitioner may render a due process claim unexhausted by alleging different standards of assessing harm in state court and federal court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). In *Henry*, this Court held the petitioner's federal due process claim was unexhausted where his claim in state court required the court to determine

whether the prejudicial effect of an evidentiary error "outweighed its probative value, not whether it was so inflammatory as to prevent a fair trial." *Id*. The Court held that the two standards of assessing harm were "no more than somewhat similar." *Id*. (quotation marks omitted). The petitioner's failure to allege harm under a federal due process standard rendered his claim unexhausted. *Id*. "[T]he mere similarity of claims is insufficient to exhaust." *Picard v. Connor*, 404 U.S. 270, 278 (1971) (stating that, to exhaust a federal constitutional claim, the claims raised in state and federal court must be the "substantial equivalent").

The harmless-error and structural-error standards are even more distinct than the standards at issue in *Henry*. Indeed, harmless error and structural error lie on the "end[s] of the spectrum of constitutional errors." *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993) (describing the difference between errors that are subject to harmlessness review and structural defects that defy such analysis); *see also Bell v. Cone*, 535 U.S. 687, 697 (2002) (stating that the difference between the standards governing claims of ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Cronic*, 466 U.S. 648 (1984), "is not of degree but of kind").[7]

[7] Notably, ineffective-assistance-of-trial-counsel (IATC) claims under *Strickland* and *Cronic* arise under the Sixth Amendment, but a petitioner's failure to allege in

Consequently, Rhoades's belated structural-error claim is unexhausted and procedurally defaulted. *Henry*, 513 U.S. at 366; *see Coleman*, 501 U.S. at 731–32. While Rhoades's claims in state and federal court arose under the Eighth Amendment, the claim he raises in his petition alleging structural error is fundamentally different than the claim he raised in state court. Therefore, he does not present a compelling reason warranting this Court's attention and his petition should be denied. *Cf. Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) ("Even if the [waiver] rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.").

B. Rhoades's structural-error claim is waived.

Rhoades also failed to raise his structural-error claim in the district court and in the Fifth Circuit in either his application for a COA or his merits brief. In fact, Rhoades argued in his merits briefing in the court below—echoing the harmless-error standard described by this Court in *Brecht*—that it was

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state court a constructive denial of counsel under *Cronic* may render an IATC claim unexhausted in federal court. *See Huntley v. McGrath*, 261 F. App'x 4, 6 (9th Cir. 2007) (holding that petitioner's *Cronic* claim was unexhausted where the petitioner's briefing in state court cited only *Strickland*'s prejudice standard); *cf. Black v. Davis*, 902 F.3d 541, 546–57 (5th Cir. 2018) (holding that the court was without jurisdiction to consider the petitioner's *Cronic* claim because his IATC claim in district court relied on *Strickland* rather than the *Cronic* presumption of prejudice). In the same way, Rhoades's Eighth Amendment claim in state court did not exhaust his fundamentally different structural-error claim.

"impossible to say that the trial court's error in excluding these pictures did not have a substantial effect on the jury when deliberating Rhoades'[s] punishment." Pet'r's Br. at 33, *Rhoades v. Davis*, No. 16-70021 (5th Cir. May 8, 2017). Rhoades did not raise his structural-error claim until the lower court held oral argument. Pet'r's App'x A at a12. Rhoades does not acknowledge his failure to appropriately and timely raise his structural-error claim, which prevented the district court from addressing the claim in the first instance and deprived the Director of the ability to adequately and thoroughly respond to it in the courts below. Consequently, Rhoades has waived his claim that the exclusion of relevant mitigating evidence constitutes structural error.

As this Court has explained, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). But the rule in this Court is "prudential only" in cases arising from federal courts. *Yee*, 503 U.S. at 533. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Concededly, the Fifth Circuit did pass upon the issue of whether the exclusion of Rhoades's childhood photographs constituted structural error. Pet'r's App'x A at a12. However, it did so only after recognizing that Rhoades had failed to properly raise the issue prior to oral argument. Pet'r's App'x A at

a12. Prudential concerns compel the conclusion that—although the Fifth Circuit addressed Rhoades's tardy structural-error claim—litigants should not be incentivized to lay behind the log until the opposing party has little or no ability to respond to a newly-formed claim, especially where that claim forms the *sole* basis on which review is sought in this Court.[8] Moreover, there is nothing exceptional about Rhoades's case that justifies reaching an issue that was not appropriately raised in either the district court or the Fifth Circuit.[9]

Further, this Court in *Hormel* stated that a "rigid and undeviating" application of waiver may be inappropriate where, *inter alia*, doing so would not "promote the ends of justice." 312 U.S. at 557. But as discussed below, the ends of justice do not require the Court to condone Rhoades's unexplained and unjustified failure to raise the sole question he raises in his petition until after extensive briefing was completed in the appellate court because that question is inapplicable to the facts of his case and his claim is plainly meritless. Therefore, Rhoades's petition should be denied.

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[8] *See Smith v. Davis*, ---F.3d ---, 2019 WL 2455734, at *2 (5th Cir. 2019) (noting that counsel asserted for the first time at oral argument that the court lacked jurisdiction).

[9] *See United States v. Rodriguez*, 602 F.3d 346, 360 (5th Cir. 2010); *Martinez v. Mukasey*, 519 F.3d 532, 545–46 (5th Cir. 2008) ("For obvious reasons, we generally do *not* consider contentions raised for the first time at oral argument. . . . In our discretion, because this is a question of statutory construction, we will consider it.") (emphasis in original); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal.") (emphasis in original).

II. Rhoades's Petition Calls on the Court to Issue an Advisory Opinion.

Rhoades's petition presents one question: whether the exclusion of relevant, non-cumulative mitigating evidence during the punishment phase of a capital-murder trial constitutes structural error. Pet. Cert. at i, 16. Rhoades insists that the childhood photographs he proffered at trial "were not cumulative of the evidence the jury was allowed to consider." Pet. Cert. at 1–2, 8. But Rhoades does not acknowledge in any way the testimony that was presented to the jury that described the same material that was conveyed by his childhood photographs. In fact, Rhoades effectively conceded on direct appeal and in his state habeas application that the photographs were cumulative of his adoptive parents' testimony. Appellant's Br. at 57, *Rhoades v. State*, No. 71,595 ("The trial court erred in refusing to admit for the jury's consideration, photographs which depicted appellant in early childhood to corroborate his parent's verbal description of his childhood); SHCR-01 at 42 ("One might say that since the evidence was testified to, the pictures are not necessary."). Consequently, Rhoades's petition falters at the starting gate by proffering a question that is inapplicable to the facts of his case. His petition calls upon the Court to review his case to issue an impermissible advisory opinion. Therefore, his petition should be denied.

Before Donna Rhoades—Rhoades's adoptive mother—testified, trial counsel proffered photographs of Rhoades from the ages of about four to ten years old. 34 RR 735. The photographs depicted Rhoades engaging in normal childhood activities such as holding a trophy, fishing, attending a dance, visiting what appears to be a zoo, and posing with other children. DX 6–16; *see* Pet'r's App'x A at a6. The thrust of the testimony of Rhoades's birth mother and adoptive parents was that he suffered a troubled upbringing during the time he lived with his birth mother. 34 RR 698–722. He was, for example, born to a young mother who married an abusive and absentee alcoholic. 34 RR 700–07. Much of the testimony of Rhoades's adoptive parents focused on the effects of his upbringing and their efforts to get Rhoades the counseling he needed.[10] 34 RR 760. They testified that Rhoades had been malnourished and mistreated before his adoption. 34 RR 753, 902. His adoptive parents also testified that Rhoades began committing crimes at a young age and soon thereafter ran away from home.[11] 34 RR 758, 763.

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[10] A psychologist, Dr. Wendel Dickerson, testified for the defense that Rhoades suffered difficulties caused by his upbringing, had attention-deficit-hyperactivity disorder, and exhibited depression and rage. 34 RR 863, 870, 873. Dr. Dickerson agreed that Rhoades's behavior was consistent with a diagnosis of anti-social personality disorder. 35 RR 990.

[11] Rhoades's adoptive mother testified that he needed to be incarcerated because he needed structure and could not cope on the streets. 34 RR 764.

Nonetheless, Rhoades's adoptive parents also testified regarding some normalcy they were able to provide for him. Donna testified Rhoades attended church with her family. 34 RR 794. She described Rhoades as a "very smart" and "very loveable kid" and said that Rhoades had friends when he was young.[12] 34 RR 784–85, 807. His adoptive father—Ernest Rhoades—testified that Rhoades was loving toward his family and "got along fine" with Ernest's children. 35 RR 905, 915. Ernest explained that Rhoades collected baseball cards and was involved in baseball, flag football, and cross country. 35 RR 912–14. Rhoades participated in track meets and made the varsity team for cross country. 35 RR 914. Ernest also testified that Rhoades was good with animals and enjoyed fishing; he explained Rhoades was calmest when he was fishing. 35 RR 914, 917.

While the testimony of Rhoades's adoptive parents was not explicitly linked to the excluded photographs—because trial counsel did not attempt to admit the photographs through their testimony[13]—the testimony effectively

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[12] The principal of the prison school that Rhoades attended during a previous incarceration testified Rhoades was the valedictorian of his class and was gentle and non-violent. 34 RR 823, 826.

[13] Trial counsel proffered the photographs outside the presence of the jury and before the testimony of Donna Rhoades. 34 RR 735. Trial counsel did not re-offer the photographs during the testimony of Rhoades's adoptive parents. Nor did trial counsel refer to the photographs during the adoptive parents' testimony. So, while the testimony from Donna and Ernest Rhoades did not specifically describe the events depicted in the excluded photographs, their testimony generally described Rhoades's good character and humanized him in the same way the photographs would have.

described the same "humanizing" impact the photographs conveyed. The jury heard that Rhoades enjoyed sports—a photograph showed Rhoades holding a trophy. 35 RR 912–14; DX 7. The jury heard that Rhoades was good with animals and enjoyed fishing—photographs showed Rhoades holding a fish and petting an animal. 35 RR 914, 917; DX 8, 12. The jury heard that Rhoades got along well with other children and had friends when he was young—photographs showed children posing together and showed Rhoades posing for a picture at a dance. 34 RR 784–85, 807; 35 RR 905, 915; DX 9, 10, 11, 14, 15. It simply cannot be said, then, that the good-character testimony of Rhoades's adoptive parents was not cumulative of the excluded childhood photographs. *See Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (discussing "humanizing" evidence presented by trial counsel that was cumulative of the petitioner's post-conviction evidence). Indeed, because trial counsel proffered no context for—and did not even authenticate—the photographs, the testimony of Rhoades's family members was far more humanizing than the photographs. The testimony covered the same ground and provided more context of what

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Appellee's Br. at 39, *Rhoades v. Davis*, No. 16-70021 (5th Cir. June 7, 2017) (noting that trial testimony did not discuss the specific events depicted in the excluded photographs); Oral Argument at 29:00–39:02, *Rhoades v. Davis*, 914 F.3d 357 (5th Cir.) (No. 16-70021), http://www.ca5.uscourts.gov/OralArgRecordings/16/16-70021_12-4-2017.mp3 (discussing the good-character testimony presented by Ernest Rhoades). The prosecutor did not object to the good-character testimony that Ernest and Donna Rhoades provided.

Rhoades was like as a child than the photographs did. Consequently, Rhoades's childhood photographs were plainly cumulative of trial testimony.

As a result, the question Rhodes's petition presents calls on this Court to issue an advisory opinion regarding the effect of the exclusion of non-cumulative mitigating evidence, an opinion that would not apply to the facts of his case. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts.") (quotation marks and citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (same). Consequently, Rhoades's petition should be denied. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) (no justiciable controversy is presented "when the parties are asking for an advisory opinion").

III. Rhoades's Petition Seeks the Creation of a New Rule in Violation of Principles of Non-Retroactivity.

Rhoades's petition asks this Court to hold for the first time that the exclusion of relevant mitigating evidence constitutes structural error. Pet. Cert. at i. But Rhoades's conviction became final decades ago. Consequently, he seeks the retroactive application of a new rule of constitutional law, which is flatly prohibited. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Therefore, his petition should be denied.

Habeas corpus is generally not an appropriate avenue for the creation of new constitutional rights. *Id*. Thus, with few exceptions, new constitutional rules do not apply to convictions final before the new rule was announced. *Id*. This principle of non-retroactivity respects comity "by validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKeller*, 494 U.S. 407, 414 (1990). The *Teague* inquiry includes three steps. First, the date on which the petitioner's conviction became final must be determined. *O'Dell v. Netherland*, 521 U.S. 151, 156–57 (1997). Second, the habeas court determines whether a state court addressing the petitioner's claim at the time the conviction became final would have felt compelled to conclude the rule he sought was constitutionally required. *Id*. If not, then the rule is new. *Id*. If the rule is new, the court must determine whether it falls within one of two exceptions: (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense; or (2) watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id*.

Rhoades's conviction became final in early 1997, when his time for filing a petition for certiorari expired. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). And Rhoades undoubtedly seeks a new constitutional rule. He

identifies no rule clearly establishing that the exclusion of relevant mitigating evidence constitutes structural error. *See Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."). Rhoades seems to concede that no precedent existed at the time his conviction became final that dictated the rule he seeks. Rather, he asserts that "[t]his Court has never held that the harmless error doctrine is applicable to *Lockett* error."[14] Pet. Cert. at 9; *see* Pet. Cert. at 16 (asserting only that "the weight of authority *suggests* error under *Lockett* is structural") (emphasis added).[15] The absence of a rule, or its supposed suggestion in precedent, does not establish that it was dictated by precedent. Indeed, it means the opposite.[16] *See Beard v. Banks*, 542 U.S. 406,

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[14] As discussed further below, this Court has indicated that a claim alleging the erroneous exclusion of mitigating evidence *is* amenable to harmless error analysis. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

[15] If Rhoades's structural-error claim were construed as the same claim he raised in state court and in the courts below, his claim would be meritless for much the same reason. That is, Rhoades cannot show that the state court's rejection of his claim was unreasonable in the absence of any clearly established precedent of this Court showing that the erroneous exclusion of relevant mitigating evidence constitutes structural error. *See White v. Woodall*, 572 U.S. 415, 419 (2014) (stating that clearly established law for purposes of AEDPA includes only the holdings of this Court's decisions).

[16] It is worth noting that, as Rhoades acknowledges, several circuit courts have held that the exclusion of relevant mitigating evidence is amenable to harmless-error analysis. *McKinney v. Ryan*, 813 F.3d 798, 821 (9th Cir. 2015); *Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013); *McGehee v. Norris*, 588 F.3d 1185, 1197–98 (8th Cir. 2009); *United States v. Bernard*, 299 F.3d 467, 487 (5th Cir. 2002); *Bryson v. Ward*, 187 F.3d 1193, 1206–07 (10th Cir. 1999); *Boyd v. French*, 147 F.3d 319, 327 (4th Cir. 1998); *Sweet v. Delo*, 125 F.3d 1144, 1158–59 (8th Cir. 1997); *Bolender v. Singletary*,

414–15 (2004); *Saffle v. Parks*, 494 U.S. 484, 490 (1990) (holding that the new rule the petitioner sought was *Teague*-barred because "*Lockett* and *Eddings* do not speak directly, if at all, to the issue here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy").

Further, the new rule Rhoades seeks does not prohibit the imposition of capital punishment on a class of persons, nor does it seek the creation of a watershed rule of criminal procedure. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (stating that to qualify as a watershed rule of criminal procedure, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction and "alter our understanding of the bedrock elements essential to the fairness of a proceeding"); *Parks*, 494 U.S. at 495. Therefore, Rhoades seeks the creation of a new retroactive rule in violation of *Teague*. *See Tyler v. Cain*, 533 U.S. 656, 666 (2001) ("There is no second case that held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception."), 666 n.7 ("Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements."). His petition should be denied.

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16 F.3d 1547, 1567 (11th Cir. 1994) ("Violations of *Lockett* and *Hitchcock* fall into [the trial type] category" of constitutional errors.). It would strain credulity to suggest that those courts continue to reach that conclusion in the face of a contrary holding of this Court. *See Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring) ("In some later case, we may be required to consider whether harmless-error review is ever appropriate in a case with error as described in *Penry v. Lynaugh*, 492 U.S. 302 [ ] (1989). We do not and need not address that question here.").

IV. Rhoades Does Not Identify a Circuit Split that Requires this Court's Intervention.

Rhoades's petition also fails to warrant this Court's attention because he does not identify any circuit split on the question he presents. Sup. Ct. R. 10(a). Indeed, Rhoades identifies several opinions from the circuit courts holding that the erroneous exclusion of mitigating evidence is amenable to harmless-error analysis. Pet. Cert. at 15. Rhoades asserts that "the Tenth Circuit apparently stands alone as the sole court of appeals to hold that error similar to the error that infected Rhoades'[s] trial is structural." Pet. Cert. at 16 (citing *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999)). But the Tenth Circuit in *Paxton* did not explicitly hold that the erroneous exclusion of mitigating evidence constitutes structural error. Rather, as Rhoades notes, the court granted sentencing relief because relevant mitigating evidence had been excluded *and* the jury was exposed to prejudicial evidence and argument. *Paxton*, 199 F.3d at 1220. In that circumstance, the court concluded that reweighing aggravating and mitigating evidence would "not address the nature of the constitutional violations or fully correct the errors." *Id*. More importantly, the Tenth Circuit has explicitly applied harmless-error analysis to a claim alleging the erroneous exclusion of mitigating evidence. *Bryson*, 187 F.3d at 1205–06. Consequently, Rhoades does not identify a circuit split that requires this Court's attention and his petition should be denied.

V. This Court's Precedent Plainly Shows that the Exclusion of Relevant Mitigating Evidence Is Amenable to Harmless-Error Review.

Even if Rhoades's structural-error claim was exhausted and properly preserved, and even if the rule Rhoades seeks to establish was not *Teague*-barred, Rhoades's petition would be unworthy of this Court's attention because his claim is plainly unsupportable. His request that this Court hold—for the first time—that the exclusion of relevant mitigating evidence constitutes structural error is unfounded in precedent. Consequently, Rhoades's petition should be denied.[17]

First, this Court has indicated that a claim challenging the exclusion of mitigating evidence is amenable to harmless-error analysis. *Skipper*, 476 U.S.

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[17] The Director maintains that the state court's holding that Rhoades's childhood photographs were irrelevant was not contrary to, or an unreasonable application of, this Court's precedent. *See* Pet'r's App'x D at a76–78 (the district court's holding that "[t]he state courts could reasonably conclude that the childhood photographs bore little, or no, relationship to Rhoades'[s] character, record, or circumstances of the offense. The photographs merely showed that Rhoades had once been a child, and possibly a happy one."). Indeed, without any context, the photographs of Rhoades did nothing more than show that he had been photographed holding a trophy, holding a fish, petting an animal, and posing with other children. While the good-character testimony of Rhoades's adoptive parents was mitigating, the photographs—standing alone—were not probative of Rhoades's character. *See* SHCR-01 at 556 (state habeas court's finding that Rhoades was "able to present mitigating evidence and to humanize [Rhoades] through punishment phase testimony concerning his childhood and background, rather than a photo that does not adequately inform the jury of his life"). As this Court has recognized, gravity has a place in the relevance analysis. *Tennard v. Dretke*, 542 U.S. 274, 286 (2004). And one does not need to weigh the sufficiency of Rhoades's childhood photographs to conclude they were irrelevant. *See* Pet'r's App'x A at a11. It simply cannot be said that the fact that Rhoades was photographed holding a trophy and holding a fish could have served as a basis for a sentence less than death. *See Skipper*, 476 U.S. at 5.

at 8. In *Skipper*, the trial court excluded as irrelevant testimony of a jailer showing that the petitioner was well behaved in jail. *Id.* at 4. The State argued that the exclusion of the testimony was harmless because it was cumulative of testimony of the petitioner's ex-wife that his behavior in jail was satisfactory and of the petitioner's testimony that he would use his time in prison productively. *Id.* at 7–8. The Court stated that "characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us." *Id.* at 8. The Court went on to explain why the exclusion of the proffered testimony was not harmless—the testimony of the petitioner and his ex-wife would not be given as much weight as testimony of a disinterested witness like the jailer. *Id.* The Court also found that credible evidence of the petitioner's good conduct in jail may have influenced the jury's deliberations. *Id.* Consequently, the Court concluded "it appear[ed] reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail . . . may have affected the jury's decision to impose the death sentence." *Id.*

Rhoades argues that it is "impossible" to determine from this Court's opinion in *Skipper* "whether this Court meant the *facts* did not demonstrate the excluded evidence was cumulative, or whether it meant it was implausible to characterize relevant excluded evidence as harmless." Pet. Cert. at 12. But his strained reading of this Court's opinion in *Skipper* is contradicted by the opinion's plain language. This Court explicitly addressed whether the

exclusion of relevant mitigating evidence harmed the petitioner; the Court concluded it did. *Skipper*, 476 U.S. at 8. Rhoades states that in *Skipper* the Court "addressed the very issue presented in this case." *Id*. As the Court in *Skipper* subjected the petitioner's claim to harmless-error analysis, Rhoades's reliance on *Skipper* for the assertion that the error is structural is manifestly flawed.

Similarly, this Court in *Hitchcock v. Dugger* indicated the exclusion of relevant mitigating evidence is amenable to harmless error analysis. 481 U.S. 393, 398 (1987). In that case, the advisory jury and sentencing judge did not consider mitigating factors outside those listed by the statute. *Id*. at 398–99. This Court stated that the State "made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." *Id*. at 399 (citing *Skipper*, 476 U.S. at 8). Thus, as the Court did in *Skipper*, the Court subjected the petitioner's claim challenging the exclusion of mitigating evidence to harmless-error analysis.[18]

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[18] Rhoades relies in part on the Fifth Circuit's holding in *Nelson v. Quarterman*, 472 F.3d 287, 314–15 (5th Cir. 2006), that an erroneous jury instruction that prevents a jury from giving effect to a petitioner's mitigating evidence is not amenable to harmless-error analysis. Pet. Cert. at 13–14. But *Nelson* is unhelpful to Rhoades for two reasons. First, the error in *Nelson* involved erroneous jury instructions, not the exclusion of proffered evidence. *See* Pet'r's App'x A at a12–13 n.39. Second, as noted above, this Court has declined to address whether a claim challenging an infirm

Rhoades relies on what he interprets as the absence of a holding by this Court that the exclusion of relevant mitigating evidence is subject to harmless-error review for the proposition that such an error *must* be structural. But the Court has been exceedingly clear when it concluded constitutional error was structural. *See, e.g., United States v. Gonzalez-Lopez,* 548 U.S. 140, 150 (2006) ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); *Sullivan v. Louisiana,* 508 U.S. 275, 281–82 (1993) (holding that the denial of a trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as 'structural error'"); *Vasquez v. Hillery,* 474 U.S. 254, 263–64 (1986) ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"). In contrast, the Court has made no such statements or even suggestions with respect to the exclusion of relevant mitigating evidence despite its numerous opportunities to do so. Indeed, as discussed above, this Court has indicated that such claims are subject to harmless-error review. *Skipper*, 476 U.S. at 8; *Hitchcock*, 481 U.S. at 399.

Moreover, this Court has held "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *see*

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mitigation instruction was subject to harmless-error review. *Smith*, 550 U.S. at 316. Moreover, this Court has "concluded that various forms of instructional error are not structural but instead trial errors subject to harmless-error review." *Hedgpeth v. Pulido*, 555 U.S. 57, 60–61 (2008).

Gonzalez-Lopez, 548 U.S. at 150. And, as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark,* 478 U.S. 570, 579 (1986)). Rhoades cannot overcome that strong presumption by relying on the purported absence of a holding by this Court that the exclusion of relevant mitigating evidence is not amenable to harmless-error analysis.

The conclusion that the erroneous exclusion of mitigating evidence is amenable to harmless error analysis is not—as Rhoades suggests—only compelled by "a single sentence from one or two opinions from this Court," Pet. Cert. at 12, it is compelled by this Court's holding in *Brecht*, which post-dated *Skipper* and *Hitchcock* and firmly establishes that trial error is amenable to harmless-error analysis. Rhoades does not acknowledge this Court's holding in *Brecht*, but it is determinative.

In *Brecht*, the Court addressed the distinction between "trial errors" and structural errors. 507 U.S. at 629–30. Relying on its opinion in *Fulminante*, the Court explained that "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." *Id.* (quoting *Fulminante*, 499 U.S. at

307–08) (alterations omitted). "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." *Id.*

The Court noted that it had long applied harmless-error analysis "in reviewing claims of constitutional error of the trial type." *Id.* at 630. The Court held that a standard lower than "harmless beyond a reasonable doubt" applies to claims of "constitutional error of the trial type" on federal habeas review.[19] *Id.* at 637–38 (explaining that the test is whether the error "had substantial and injurious effect or influence in determining the jury's verdict"). The limited scope of federal habeas relief was a critical factor on which the Court relied in reaching its decision—"it hardly bears repeating that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* at 634 (quotation marks omitted).

Structural defects, on the other hand, are different and exceedingly rare because, with those errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Fulminante,* 499 U.S. at 309–10. Structural defects "defy analysis by harmless-error standards" because they "affect the framework

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[19] The Court noted the possibility that "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. It goes without saying that this case presents no such circumstance.

within which the trial proceeds," and are not "simply an error in the trial process itself." *Gonzalez-Lopez,* 548 U.S. at 148 (alteration and internal quotations omitted). Thus, structural defects include: (1) denial of counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963); (2) erroneous denial of the defendant's counsel of choice, *Gonzalez-Lopez,* 548 U.S. at 150; (3) denial of self-representation, *McKaskle v. Wiggins,* 465 U.S. 168, 177–78 & n.8 (1984); (4) unlawful exclusion of grand jurors of the defendant's race, *Hillery*, 474 U.S. at 263–64; (5) denial of a public trial, *Waller v. Georgia,* 467 U.S. 39, 49 n.9 (1984); (6) lack of an impartial trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); (7) denial of trial by jury due to a defective reasonable-doubt instruction, *Sullivan,* 508 U.S. at 281; and (8) counsel's admission of the defendant's guilt over the defendant's express objection, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). "Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. They serve as "basic protections" without which "no criminal punishment may be regarded as fundamentally fair." *Id*. (quoting *Clark*, 478 U.S. at 577–78).

The Court in *Fulminante* held that the admission of an involuntary confession is an error of the trial type. *Id*. In so holding, the Court explained that an appellate court, in reviewing the erroneous admission of a confession, "simply reviews the remainder of the evidence against the defendant to

determine whether the admission of the confession was harmless." *Id*. As in *Fulminante*, the exclusion of mitigating evidence is manifestly amenable to harmless-error review. The record in this case includes the extensive punishment-phase testimony provided by Rhoades's mother and adoptive parents. 34 RR 745–814; 35 RR 893–943. The record also includes the childhood photographs Rhoades proffered during trial. DX 6–16. An appellate court is doubtlessly capable of determining whether the exclusion of those photographs had a substantial and injurious effect on the jury's verdict. Harmlessness review in this case is not "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

Rhoades's assertion that the effect of the exclusion of the photographs is "too difficult to measure" is simply baseless. Pet. Cert. at 15. Indeed, if Rhoades is correct that the erroneous exclusion of mitigating evidence constitutes structural error because "the effects of the error are too difficult to measure," Pet. Cert. at 14, then it would have to follow that prejudice is presumed where trial counsel deficiently fails to present mitigating evidence to the jury. But, of course, that is not the rule. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003).[20]

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[20] *Cf. United States v. Smith*, 433 F. App'x 847, 851 (11th Cir. 2011) ("It is not impossible, or all that difficult, to assess the effect of the claimed error on the outcome of the trial. A defendant who was persuaded not to testify, or prevented from testifying, can establish the harm he suffered by proffering the testimony that he would have given."); *Palmer v. Hendricks*, 592 F.3d 386, 399 (3d Cir. 2010) ("But it is precisely the fact that the contours of the defendant's probable testimony (as expressed in an affidavit on collateral review) can be assessed in the context of the

As the lower court held, the exclusion of Rhoades's childhood photographs did not infect the entire trial process.[21] Pet'r's App'x A at a12–a13. The exclusion of Rhoades's photographs, if error, was "quintessentially a trial error subject to harmless[-]error review." Pet'r's App'x A at a12. Rhoades was able to present an extensive mitigation case that informed the jury of the same types of information the photographs would have conveyed. And the "marginal" value of the photographs would have been vastly outweighed by the facts of Rhoades's double-murder (committed almost immediately after being released from prison) and his criminal history. Pet'r's App'x A at a13. The photographs would have also cut against the far more powerful mitigating evidence of the difficult upbringing Rhoades suffered and its effect on him, and they would have highlighted the fact that Rhoades grew up an incorrigible criminal despite having been afforded a loving adoptive family. Pet'r's App'x A at a13; Pet'r's App'x D at a77-a78. Consequently, Rhoades does not raise an issue warranting this Court's attention. His petition should be denied.

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evidence as a whole that distinguishes the right-to-testify issue from structural defects, the effects of which are inherently elusive, intangible, and not susceptible to harmless error review.").

[21] Notably, the prosecutors did not argue that Rhoades failed to bring forward any mitigating evidence. Indeed, the prosecutors stated during closing argument, "[trial counsel] has pointed out many mitigating things, and there was mitigating evidence. I would not suggest otherwise." 39 RR 55.

VI. The Court Should Not Hold Rhoades's Petition Pending the Outcome of an Inapposite Case.

Lastly, Rhoades perfunctorily asserts that the Court should hold his petition pending its resolution of *McKinney v. Arizona*, No. 18-1109, or consolidate his case with *McKinney*. But the Court should do neither because *McKinney* is inapposite.

McKinney is a direct appeal from a resentencing conducted by a state supreme court. Petition for Writ of Certiorari, *McKinney*, at 1 (No. 18-1109). The Court granted certiorari in that case on two questions: (1) whether the state supreme court was required to apply current law when it resentenced the petitioner following a grant of sentencing relief; and (2) "whether the correction of error under *Eddings* [ ] requires resentencing." *Id.* at i. The first question has no bearing on Rhoades's case because Rhoades has not been resentenced. The second question has no bearing on Rhoades's case because his is a federal habeas proceeding.

As discussed above, Rhoades's case is governed by, *inter alia*, exhaustion, principles of non-retroactivity, and this Court's application of harmless-error review in federal habeas.[22] *See Brecht*, 507 U.S. at 633–35; *Teague*, 489 U.S. at 302. Rhoades's petition is encumbered by numerous obstacles that are simply

[22] Moreover, as discussed above, Rhoades's structural-error claim is waived. And construed as exhausted, his claim could not meet the standard under AEDPA of showing that the state court unreasonably applied this Court's precedent.

not present in *McKinney*. Additionally, the issue in *McKinney* is not whether the erroneous exclusion of mitigating evidence is amenable to harmless-error analysis or constitutes structural error—the term "structural error" does not appear in the petition.[23] Consequently, this Court's resolution of *McKinney* could have no impact on Rhoades's case. Therefore, Rhoades's request that the Court hold his petition or consolidate it with *McKinney* should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[23] By contrast, in granting federal habeas relief, the Ninth Circuit directly addressed the issue of harmless error, holding that the petitioner's claim did not allege a structural error. *McKinney*, 813 F.3d at 822–24.

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