

**05-11304 SMITH V. TEXAS**

DECISION BELOW:185 S.W. 3d 455

LOWER COURT CASE NUMBER: AP-74228

QUESTIONS PRESENTED:

I.

In *Smith v. Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S.302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to petitioner's mitigating evidence notwithstanding this Court's conclusion to the contrary?

II.

Can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that this Court then summarily reversed, impose on remand a daunting standard of harm ("egregious harm") to the constitutional violation found by this Court?

CERT. GRANTED 10/6/2006