**No. 17-6127**

# In the Supreme Court of the United States

JOSEPH ANDREW PRYSTASH,
*Petitioner-Appellant*,

v.

LORIE DAVIS, Director. Texas Department of Criminal Justice, Correctional Institutions Division,
*Respondent-Appellee*.

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

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

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## QUESTION PRESENTED

**No Supreme Court precedent** holds the Eighth Amendment precludes the consideration of unadjudicated offences **during the sentencing phase of a capital trial.** Does the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), prevent a federal court from considering such a claim now that Petitioner's death sentence has long been final?

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## BRIEF IN OPPPOSITION

Petitioner Joseph Andrew Prystash was found guilty and sentenced to death for his part in the murder-for-hire death of Farah Fratta. Prystash has challenged his conviction in federal and state court and now seeks a writ of certiorari from the Fifth Circuit's denial of a certificate of appealability (COA).

## STATEMENT OF THE CASE

### I. Facts of the Crime

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

> Robert Alan Fratta ("Fratta"), a public safety officer for Missouri City, married the former Farah Baquer ("Farah") in 1983. They had three children. After nearly a decade of marriage, the couple separated and Farah filed for divorce in March 1992. The divorce proceedings became contentious, and Fratta became angry at the prospect of Farah receiving custody of their children or being awarded more child support. A trial on the issue of child custody was set for November 28, 1994.
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> On the evening of November 9, 1994, Fratta took the children to church while Farah got her hair cut. A man approached when Farah returned home and exited her car. The man shot, hitting her one time in the head. After she fell to the ground, the man shot her a second time. Neighbors saw the man wait near the bushes until a silver Nissan picked him up on the street.
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> After police and emergency responders arrived, Farah was taken to a hospital. She was pronounced dead in the emergency room.
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> A. The Police Investigation
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> The police immediately focused their attention on Fratta as a possible suspect in his estranged wife's murder. Several individuals told the police that Fratta had been looking for

someone to kill his wife. Fratta had asked numerous people if they knew of a hit man so that "the police . . . would have so many leads they really wouldn't know where to start and they would possibly think he wouldn't be a suspect, that just because he simply mentioned it that somebody might have took [sic] him serious and took it on themselves to do it."

The police, however, did not make an arrest for several months. Early on, the police suspected Prystash's involvement in the crime. On the night of Farah's murder, Fratta continually went to the church office to check his pager and make phone calls. Individuals in the church's office saw him repeatedly use the church phone between 7:30 and 8:00 p.m. The police subpoenaed the phone records and found that Fratta had called the telephone number of Prystash's girlfriend, Mary Gipp.

Numerous police officers were involved in the investigation into Farah's murder and in the interrogation of suspects: notably, Sergeant Danny Ray Billingsley, Detective George Ronald "Ronnie" Roberts, Detective William Valerio, Detective Larry Davis, and Detective Jim Hoffman. The police interacted with Gipp and Prystash from November 1994 through March 1995. In March 1995, Detective Roberts interviewed Gipp. When the police first interviewed Gipp, she lied and said that she knew nothing about the murder. By the time they returned with a grand jury subpoena, Gipp had hired an attorney. After receiving a promise of immunity, Gipp gave the police crucial information that she had received from Prystash regarding Farah's murder. Prystash had told Gipp that Fratta had enlisted him to kill Farah, and that he in turn recruited their neighbor Howard Paul Guidry to be the shooter.

Guidry was already in police custody. The police had arrested him on March 1, 1995, while he fled the scene of a bank robbery. Police recovered three guns from Guidry's book bag, including a Charter Arms .38 revolver. On March 8, 1995, Guidry provided a written statement in which he claimed only reluctant participation in the murder as the getaway driver. Guidry later revised his written statement and admitted to being the gunman. He also walked through the crime scene with the police. Importantly, Guidry

described the murder-for-hire scheme and how the men carried it out. Guidry's confession would serve as the impetus for the State of Texas to bring three capital prosecutions. Constitutional infractions in the police's interrogation of Guidry ultimately resulted in two convictions being vacated, although each of these individuals were retried and again convicted.

On the same day that Guidry was charged with capital murder in Farah's death, the police obtained a pocket warrant for Prystash's arrest supported by an affidavit from Sergeant Danny Billingsley. Two crucial sources of incriminating information lead to the arrest warrant: (1) "Mary Gipp's . . . details of the offense that were communicated to Billingsley" and (2) "Guidry's statements against penal interest." The police arrested Prystash on March 8, 1995. During his subsequent interrogation with various police officers, Prystash denied knowing anything about the murder. After about three hours, Prystash told officers "he would give [them] a statement about what he knew" if "he be allowed to leave, go home." An Assistant District Attorney informed the officers that giving a statement under that condition could be considered coercion. The police released Prystash from custody.

Sergeant Billingsley later testified in a suppression hearing that "he drove [Prystash] . . . to pick up his car after his release from custody on March 8, 1995 . . . they stopped" and Prystash "said they needed to talk . . . ." Prystash then confessed to Sergeant Billingsley that he "contacted Guidry about the murder; that Fratta supplied the gun and [Farah's] schedule; and, that [Prystash] drove Guidry to the offense and picked him up afterwards." Sergeant Billingsley did not arrest Prystash again at that time. Before leaving, Prystash said that he would come to the police station to give a statement the next day.

When Prystash failed to show up at the station, the police obtained a new warrant on March 10, 1995. "[T]he underlying affidavit contained the information supplied by Sergeant Billingsley about the oral admissions against penal interest [Prystash] made to Billingsley after he was released from custody, as well as Guidry's statements against penal interest." The "major difference in the affidavits in the first and second warrants was the inclusion in the

second affidavit of the oral admissions [Prystash] made to Billingsley . . . ." The affidavits, however, did "not refer to Guidry's confession as being voluntary; instead, the affidavits state that Guidry gave a statement against penal interest after being given his *Miranda* warnings."

On March 13, 1995, Prystash was arrested and gave a written statement, State's Exhibit 73, in which he confessed his involvement in Farah's murder. To summarize, Prystash's statement provided the police a detailed view into the murder-for-hire that ended in Farah's death. Prystash had known "Fratta for about six or seven years from the gym." Prystash explained that "[a]bout a month before Farah Fratta was killed," Fratta asked "do you know anybody that would kill my wife for me." A short time later, Prystash met his neighbor Howard Guidry. "[Guidry] told [Prystash] that he needed to make some money and he didn't care what he did." Prystash asked him if he would kill Farah Fratta. Guidry "told [Prystash] that he was willing. [Prystash] told him that [Fratta] was willing to pay $1,000 and more money later. [Guidry] was interested right from the beginning because he wanted to go buy some cocaine and sell it."

The men "talked about several scenario[s]" for the murder. "About a week before the killing, [Fratta] and [Prystash] met and he told [Prystash] that he was going to be at church the following Wednesday night. [Fratta] said that the following Wednesday night would be . . . perfect because he would have his kids until 9:00 p.m." Fratta later "gave [Prystash] a gun to give to [Guidry]. The gun was a . . . blue Police Bull Dog Special revolver which was probably a four inch barrel."
Prystash described the murder itself as follows:

I took [Guidry] over to the parking lot of the Food City at 1960 East at Timber Forest. We got there about 7:30 p.m. At about 7:35, I got a page from [Fratta]. I called him back with either the store's pay phones or the mobile phone. [Fratta] told me he was at church. I told him that [Guidry] was ready to go. [Fratta] said all right. After I got off the phone with [Fratta], I drove [Guidry] to Farah's house. I dropped him off at a phone, I dropped him off a few houses away

from Farah's house. I knew where to go because of the map [Fratta] gave me. I believe I dropped him off shortly before 8:00 p.m.

After I left [Guidry], I went back to the Food City and waited by the pay phones. [Guidry] called me about 7:55 p.m. He told me that she wasn't home yet. I paged [Fratta] and he called me back. [Fratta] told me, Wait, she'll be there. I told him okay and hung up the phone. Maybe five seconds later I got another call on the mobile phone. [Guidry] told me come and get me fast. He was kind of out of breath. I hung up the phone and drove to Farah's house. [Guidry] was on the side of the garage. He came out and got into the front passenger's side door. I saw that the garage door was opened and that the light was off. I couldn't see inside of the garage. I could see a white car backed into the garage. The car might have had a red emblem on the front. . . . [Guidry] told me that he came up to her by her car on the driver's side of her car and . . . she stepped away from him. He said that she told him, Please, don't kill me. He said that he shot her in the head and she fell down. He said that she was making noise, so he shot her again in the head. He didn't tell me where in the head he shot her.

After we left Farah's house, I drove out of the subdivision and back west on FM 1960 toward my apartment. Shortly after, before or after I got back to my apartment, I got a call from [Fratta]. I told him that his wife had been killed. He told me that he would meet me at the gym at 9:00 p.m. After [Guidry] and I got out of the car, I took the gun from the car. [Guidry] had left it in the car. I picked up the gun and took it into my apartment. I took it into my bedroom and took all of the shells out of it. I put the shells in the kitchen garbage. After that I took the gun over to [Guidry]'s apartment and gave him the gun. I told him that he should get rid of it. [Guidry] told me that he was going to throw it in a lake or something.

After that I went to the President and First Lady in Humble. [Fratta] never showed up. The next night I saw the news and saw why [Fratta] did not show up. I saw that he was going somewhere with the police. The next evening after [Fratta] got out of jail [Fratta] called me. He told me that the police had confiscated the money he was going to pay [Guidry] with. After I talked with

[Fratta] I had to tell [Guidry] that he wasn't going to get his money for awhile.

As time went on [Guidry] got real mad about not getting paid. I told him I would tell him where [Fratta] lived and where he worked out but he never asked for the information. I tried to help [Guidry] get his money a few times. [Fratta] kept putting me off. I wanted to get [Guidry] off my back. [Guidry] and I never got any money from [Fratta].

I've been depressed ever since this happened. I didn't sleep a lot of nights because I felt bad about it. [Fratta] called me several times after it happened to find out if my girlfriend, Mary Gipp, knew anything[.] . . . I was afraid that [Fratta] might hurt Mary by getting her involved. I didn't want Mary to have anything to do with the whole situation.

On May 17, 1996, the State of Texas indicted Prystash. The indictment charged Prystash with "unlawfully, for remuneration and the promise of remuneration from ROBERT ALAN FRATTA, to wit: money, intentionally and knowingly caus[ing] the death of Farah Fratta . . . by shooting [her] with a deadly weapon, namely, a FIREARM."

The parties extensively litigated issues relating to Prystash's confession in state court. Prystash filed a pre-trial motion to suppress his confession claiming that the police neglected to inform him of his rights, refused to honor his invocation of the rights to silence and legal assistance, and coerced his confession. On June 4, 1996, the trial court held a suppression hearing to consider Prystash's objections to his written and oral confessions. The police officers involved in securing his statements testified that they read Prystash his rights, did not coerce his confession, and honored the invocation of his right to counsel until he initiated the discussion that resulted in his written statement. Prystash did not testify in the suppression hearing.

The trial court orally denied Prystash's challenge to both the oral and written statements. The trial court later issued explicit findings of fact and conclusions of law relating to the voluntariness

of Prystash's confession and his oral statements to Sergeant Billingsley. The trial court expressly found that police officers sufficiently informed Prystash of his rights, that Prystash voluntarily gave up those rights, that Prystash initiated the conversations leading to his oral statement, and that "each of the statements were voluntarily made, not induced by force, threats or coercion, nor were any promises made nor was anything done to induce the defendant or cause the defendant to make anything but a knowing and intelligent waiver of his rights and a free and voluntary decision to confess."

B. The Trial of Prystash's Guilt

Trial began in July 1996. Prystash's own words were the lynchpin of the prosecution's case against him. The prosecution put Prystash's written statement before jurors, as well as his incriminating oral statements to Sergeant Billingsley. Still, Prystash's confession was only one part of a detailed case proving Prystash's role in the murder-for-hire.

The prosecution relied heavily on Gipp's confirmation of the murder plot, both through her testimony about what Prystash told her and her observations of him during that time period. Gipp's testimony verified much of Prystash's confession. About six months before the murder, Fratta gave Prystash a gun. A couple of months before the murder, Prystash told Gipp that Fratta "had asked him if he wanted to kill [Farah]." The two men met often, and Prystash told Gipp that they were planning "[t]o have Farah killed." They spoke every day in the week before Farah's murder.

A few days before the killing, Prystash told Gipp that the murder was to happen on November 9 because Fratta "was going to church" with the children. Prystash said that their neighbor Guidry would be the shooter and that they would kill Farah at her house. Prystash reported that "Guidry was going to get a thousand dollars, and [he, Prystash] was going to get a Jeep."

After Gipp arrived at home on November 9, Prystash and Guidry left together, both dressed in black clothing. Prystash took Gipp's telephone with him when he left. Prystash and Guidry returned two hours later. Prystash walked into the bedroom and unloaded

the shells from a gun. When she asked, Prystash told Gipp that Farah had been killed.

Prystash said that he dropped Guidry off at the Fratta home. Guidry was waiting in the garage when Farah arrived. Prystash said that "Farah was shot twice; and that the first time in the head and when she flew back, then [Guidry] shot her again." Prystash then picked Guidry up in his "Silver Nissan."

A short while later, Prystash left to meet Fratta and pick up Guidry's money. When Prystash had left, Gipp "took the bullets out of the garbage and put them in a . . . little sandwich baggie and then [she] went into the bedroom and [she] wrote down the information from the gun . . . and the serial number."

Later that night, Gipp and Prystash saw a newscast describing how the police thought the murderer drove "a silver compact car and that the headlight was out." Prystash "went and purchased a headlight, replaced it." Later, Prystash took the car "and he had it crushed."

Gipp hid the bullets. She later threw them away. Gipp told Prystash to get the gun out of their apartment. Prystash "said he had given it to Guidry and that Guidry threw it in the water."

Police testimony about Guidry's confession also came before the jury, but through the defense not the prosecution. During the cross-examination of a police officer, trial counsel introduced into evidence the pocket warrants for Prystash's arrest, which included the summary of Guidry's confession used to establish probable cause. In the prosecution's later questioning, Sergeant Billingsley testified that Guidry was "cooperative" and gave "a written confession as to his involvement in the murder of Farah Fratta." The prosecution asked him to read the information taken from Guidry's confession which provided a broad outline of the murder-for-hire.

Aside from Prystash's police statement, Gipp's testimony, and the summary of Guidry's confession, other evidence also confirmed key elements of the plot to kill Farah. Phone records confirmed that

> Fratta had contacted Prystash around the time of the murder. A firearms examiner testified that the bullets recovered from Farah's body came from a weapon of the same manufacturer as the revolver the police recovered from Guidry. A check of federal firearms records showed that Robert Fratta had purchased that handgun in 1982. Farah's father described the gun as one owned by Fratta.
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> The defense rested in the guilt/innocence phase without calling any witnesses or presenting any evidence. Trial counsel renewed the attack on the voluntariness of Prystash's confession before the jury. Trial counsel obtained an instruction pursuant to Tex. Code Crim. Pro. art. 38.23, for the jury to disregard Prystash's confession if it believed or had a reasonable doubt that the police violated his constitutional rights in taking his statements.
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> The jury deliberated for only seventeen minutes before finding Prystash guilty of capital murder.

*Prystash v. Stephens*, 2016 U.S. Dist. LEXIS 34798 at *2-18 (S.D. Tex. Mar. 17, 2016) (citations and footnotes omitted).

## II. Punishment Evidence

The State presented the following evidence during the punishment phase of trial to support its position that Prystash should be sentenced to death:

Prystash was charged with three counts of burglary and three counts of grand theft in Florida. 21 RR 918.[2] After his arrest, Prystash gave a written

[2] "RR" refers to the Reporter's Record of the trial proceedings. "CR" is the abbreviation representing the Clerk's Record, the transcript of all the trial filings. "SHCR" is the designation for the Clerk's Record of the state habeas proceedings. *Ex parte Prystash,* No. 58,537-01. "SHCR-02" indicates the clerks record of the second state habeas action. *Ex parte Prystash,* No. 58,537-02. Where relevant the volume numbers precede the designation and the page number(s) follow it.

statement and admitted to two other burglaries. 21 RR 919. Also, on September 15, 1976, Prystash was arrested for the burglary of the Zayre Department Store. 21 RR 924-30. Prystash resisted arrest and a buck knife with an eight-inch blade was recovered from the waistband of his pants. 21 RR 931-36. Prystash's arrest for the department store burglary occurred just days after charges had been filed against Prystash in other cases. 21 RR 937-39.

Rudy Garcia, probation and parole supervisor for State of Florida Department of Corrections, testified that Prystash was twenty years old when Garcia began supervising him in March 1977; that Prystash plead guilty to three counts of burglary of a structure and three counts of grand larceny in felony case no. 76-7623; that Prystash also plead guilty to burglary of a structure. 21 RR 953-60. In June 1977, Prystash requested that his probation be transferred to Ohio; however, Prystash never reported his Ohio residence or work information, so a probation warrant was issued for probation violation.

Lori Young testified that she met Prystash in Houston in 1981, when she was twenty-one years old; that they were married about two years and had a daughter; and, that they were divorced. 21 RR 981-85. Prystash was easily angered, had mood swings, and showed very little conscience and no remorse. 21 RR 994. Young was in fear of Prystash around the time they separated. 21

RR 991. After the divorce, Prystash saw his daughter a couple of times and then never saw her again. 21 RR 993.

Timora Sutton, testified that she was married to Prystash for less than a year in the mid-1980's and that she knew Prystash had previously been married to Young and had a daughter. 21 RR 1016. Prystash was possessive of her, often came home late without saying where he had been, would sometimes just disappear for a while, and had trouble keeping a job. 21 RR 1017-19. Once, Prystash said that he would like to be a mercenary such as in the magazine Soldier of Fortune. 21 RR 1020. Prystash was self-centered, had no conscience, did not show remorse, used other people, and was moody and jealous. 21 RR 1022-24.

The State presented other evidence of Prystash's record and behavior.

In response to this evidence, and in effort to establish that Prystash should be sentenced to life imprisonment instead of the death penalty, the defense presented the following evidence:

Joanne Hambrick, Prystash's aunt, testified that Prystash lived near her in Ohio until he was about six years old. She told the jury that Prystash's father was a workaholic, that Prystash's mother had no patience, liked to party, and drank a lot. She also testified that his mother had no parenting skills, and would verbally and physically abuse Prystash. 22 RR 183-92. Hambrick stated

that Prystash's home was not clean and lacked supervision. 22 RR 1186. She also testified that Prystash's mother died of cancer in 1974. 22 RR 1186-88. Irene Prystash, also his aunt, testified that Prystash's mother was not a good parent that she was cruel to her children and would throw things at them if they did something wrong. 22 RR 1194-95.

Dan Meader, volunteer chaplain in Harris County Jail, testified that he spoke with Prystash weekly, that Prystash never missed church service in jail, that he was honest and sincere, and that he had never been a threat to Meader. 22 RR 1199-1203. Jerry Edens testified that he did a volunteer Bible Study in the Harris County Jail and in the prison. He stated that Prystash had been in his Bible study group for over a year, that he faithfully attend the twice weekly meetings, and that he was very quiet and attentive and interested in learning the Bible. 22 RR 1212-18. Edens also testified that Prystash was a joy to have in the group, that he did not think Prystash was a danger to him, and that Prystash was sincere and impacted the lives of others. 22 RR 1221-24.

Dr. Walter Quijano, who was familiar with the classification process at TDCJ and who had reviewed Prystash's local jail records, testified regarding the details of the prison classification system. In Dr. Quijano's opinion, the prison system had sufficient resources to control inmates' dangerousness. 22 RR 1255.

## III. Course of State and Federal Proceedings

Prystash was charged and convicted of capital murder for intentionally and knowingly causing the death of Farah Fratta for remuneration. 21 CR 445-46. Both Prystash's conviction and sentence were affirmed by the Texas Court of Criminal Appeals (TCCA) on September 15, 1999. *Prystash v. State*, No. 72,572, *cert denied*, 529 U.S. 1102 (2000). Prystash then sought state collateral review, but based upon the trial court's findings and conclusions, his application was denied by the TCCA on April 28, 2004. *Ex parte Prystash*, No. 58,537-01.

Next, Prystash sought federal habeas corpus relief before the district court and raised four unexhausted claims in his federal petition. Pet. ECF No. 15. That court stayed and abated proceedings allowing Prystash to go back to state court to exhaust those claims. Ord. ECF No. 28. The TCCA found three of the claims were defaulted by the abuse-of-the-writ doctrine. *Ex parte Prystash,* No. 58,537-02, Order. But the state court permitted further proceedings on Prystash's claim regarding whether the prosecution suppressed evidence and presented false testimony with respect to the voluntariness of Howard Guidry's confession. Ultimately, the state courts denied relief. *Ex parte Prystash,* Order, WR-58,537-02 (Tex. Crim. App. March 27, 2013) (per curiam). On October, 24, 2013, the district court lifted the stay and briefing

commenced. Ord. ECF No. 35; Ord. ECF No. 47. The district court denied Prystash's bid for federal habeas relief and denied a COA. *Prystash v. Quarterman*, 2006 U.S. Dist. LEXIS 60359 (S.D. Tex. Aug. 25, 2006). Prystash sought COA from the Fifth Circuit. The lower court denied Prystash's request. Now Prystash seeks a writ of certiorari from this Court.

**REASONS FOR DENYING CERTIORARI REVIEW**

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Prystash fails to advance a "compelling reason" for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised in Prystash's federal habeas petition, he was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has

made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Prystash had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. Furthermore, the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the deferential scheme set forth in 28 U.S.C. § 2254(d). *Miller-El*, 537 U.S. at 336 (noting that, in making a COA determination, "[w]e look to *the District Court's application of AEDPA* to petitioner's constitutional claims and ask whether *that* resolution was debatable amongst jurists of reason") (emphasis added). But Prystash did not meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Prystash sought a COA but the circuit court found his claim unworthy of debate among jurists of reason as it was foreclosed by both circuit precedent and *Teague v. Lane*, 489 U.S. 288 (1989). Fundamentally, Prystash cannot show the circuit court's decision to deny COA was in error. Thus, there is no compelling reason for the Court to review this case.

## ARGUMENT

Prystash does not contend that the lower court erred in refusing to grant him a COA. Rather, he asserts that the Court should grant certiorari to determine whether the Eighth Amendment's reliability requirement is satisfied by Texas's capital sentencing system that does not specify what degree of proof must be met before unadjudicated offenses can be offered as aggravating evidence in capital trials. Pet. at 19. But this question is not cleanly before the Court. In addition to the problem that the lower court did not grant a COA, Prystash's claim is barred by *Teague*, 489 U.S. 288. Prystash points to no circuit split that mandates resolution of what he terms this "vexing" problem. Pet. at 1 (citing *Williams v. Lynaugh,* 484 U.S. 935, 937 (1987)(Marshall, J. joined by Brennan, J. dissenting from denial of certiorari)). And, this Court has upheld the Texas capital sentencing statute many times. For these reasons, Prystash's request for certiorari should be denied.

Article 37.071 provides for the admission of any evidence relevant to the jury's determination of the proper sentence. Tex. Code Crim. Proc. art. 37.071 § 2(a)(1). "Extraneous offenses are admissible [during the punishment phase of a capital murder trial] whether adjudicated or unadjudicated, violent or nonviolent." *Kemp v. State*, 846 S.W.2d 289, 307 (Tex. Crim. App. 1992); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987) (stating that a capital jury

is "permitted to consider many factors when determining whether the defendant will pose a continuing threat of violence to society," including character evidence and the existence of a prior criminal record). And the admission of such evidence does not deny the defendant the right to due process. *Id*. Prystash points to no authority indicating that extraneous-offense evidence is inadmissible, much less authority analyzing the Texas special issues. Rather, Prystash complains such evidence is not admissible in Texas non-capital cases. Pet. at 17.

Prystash's arguments that permitting the consideration of unadjudicated offenses violates his Eight Amendment rights is barred by circuit precedent as the lower court held. *Prystash v. Davis*, slip Op. No. 16-70014, at 15 (citing *Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998); *Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996)). This Court has upheld the Texas capital sentencing statute many times before and it continues to withstand constitutional scrutiny. *Jurek v. Texas*, 428 U.S. 262, 272-74 (1976); *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Johnson v. Texas*, 509 U.S. 350, 373 (1993); *see also Scheanette v. Quarterman*, 482 F.3d 815, 827-28 (5th Cir. 2007). Indeed, this Court has already addressed whether evidence of future dangerousness was inherently unreliable in *Barefoot v. Estelle,* 463 U.S. 880

(1983). Prystash's attack may differ in its target but the Court's reasoning remains the same.

Further, to the extent that this Court would find that Prystash's claim has potential merit, it still would require the announcement and retroactive application of a new rule of constitutional law in violation of *Teague,* 489 U.S. 288. Under *Teague*, new rules of constitutional criminal procedure will not be announced on federal habeas review and then retroactively applied unless an exception applies. 489 U.S. at 301. The first exception to *Teague's* retroactivity limitation is for rules that would place primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish in certain ways. *Graham v. Collins,* 506 U.S. 461, 477 (1993). The second *Teague* exception is reserved for bedrock rules of criminal procedure that are necessary to ensure a fundamentally fair trial. *Id*. In Prystash's case, however, he fails to establish that the relief he requests falls under either exception to *Teague's* retroactivity limitation.

Moreover, Prystash's belief that the future dangerousness issue is the only aggravating element is also in error. This Court's jurisprudence distinguishes between a jury's "eligibility decision," in which the jury must convict the defendant of murder and find at least one aggravating circumstance, and its "selection decision," in which the jury must determine

whether a defendant who is eligible for the death penalty should, in fact, receive it. *Tuilaepa v. California*, 512 U.S. 967, 972-73 (1994). The Court further recognized that "separate requirements" apply to each decision. *Id.* at 972. The "eligibility decision" must be made with "maximum transparency" so as to make the process for imposing the death penalty "rationally reviewable." *Id*. at 973. On the other hand, the "selection decision" requires "individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability." *Id*.

In Texas, the "eligibility decision" is made at guilt-innocence where the trier of fact determines whether to convict the defendant of capital murder. *See Woods v. Cockrell*, 307 F.3d 353, 359 (5th Cir. 2002). Once the defendant is convicted, or determined to be "death eligible," the jury then answers the statutory punishment issues and decides whether that defendant receives the death penalty or life imprisonment. During this selection process, the sentencing jury is "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). Indeed, this Court has authorized "unbridled discretion" in the jury's determination of whether to impose the death penalty. *Zant v. Stephens*, 462 U.S. 862, 875 (1983).

Such unfettered discretion assures a capital defendant that the punishment imposed is "an individual determination on the basis of the character of the individual and circumstances of the crime." *See id*. at 879. That is, the jury is free to hear, consider, and give effect to all relevant evidence before assessing such a severe penalty. This selection decision necessarily entails consideration of the heinous offense of which the defendant was convicted and its status as a capital crime. In this case, Prystash was almost certainly sentenced to death for his role in procuring someone to murder a young mother in her home for money.

Finally, it should be noted that not only has the future dangerousness special issue itself been held constitutional, but courts are able to review the sufficiency of the evidence in determining whether the State did meet its burden of proof beyond a reasonable doubt. In *McGinn v. State,* 961 S.W.2d 161 (Tex. Crim. App. 1998), the Court of Criminal Appeals rejected the idea of conducting a factual sufficiency review of the jury's finding of a probability of future dangerousness. *Id*. at 166-68 (citing *Clewis v. State,* 922 S.W.2d 126 (Tex. Crim. App. 1996)). But, the court held that reviewing the legal sufficiency of the issue under *Jackson v. Virginia*[2], "is feasible because that standard views evidence in the light that supports the jury's verdict, and asks only

[2] 443 U.S. 307 (1979)

whether circumstances are present that a rational person somewhere could find proof of a probability of future dangerousness beyond a reasonable doubt." *Id.* at 169.

Texas's capital sentencing scheme permits broad consideration by the jury in whether to impose the death penalty. This Court has upheld the current sentencing scheme many times for many years. Prystash does not present an issue worthy of resolution and does not present his sole issue in a posture where it could be properly considered. Thus, he fails to present a compelling issue for this Court's review. Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the Court should deny Prystash's petition for writ of certiorari.

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