No. 17-6127

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH ANDREW PRYSTASH,
Petitioner,

v.

LORIE DAVIS,
Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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Introduction

Petitioner, Joseph Andrew Prystash, filed his Petition for a Writ of Certiorari ("Pet.") on September 25, 2017. Respondent filed her Brief in Opposition ("BIO") on November 27, 2017. Prystash now files this Reply to Respondent's Brief in Opposition.[1]

1. *Teague* would not bar Prystash from benefitting from the rule he asks this Court to find.

The same day that this Court issued its opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), it also handed down its opinion in *Woodson v. North Carolina*, 428 U.S.

[1] In this Reply, Prystash responds only to those arguments contained in Respondent's Brief in Opposition that he believes to merit a reply.

280 (1976). It was in *Woodson* that this Court first made clear that for a state's death penalty statute to be found not to run afoul of the Eight Amendment's protection against cruel and unusual punishment in the post-*Furman* era, that statute must recognize there is a heightened need for reliability in death penalty cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In another of the five companion cases issued that day, *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court made clear that the sentencing information provided to a jury charged with determining whether a defendant shall live or die must be accurate. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

Throughout the following decade this Court reiterated repeatedly that procedure imposed by a State in a death penalty sentencing trial must be sufficient to ensure the information considered by the jury is accurate. *E.g.*, *California v. Ramos*, 463 U.S. 992, 999 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). By the middle of the 1980s it was firmly established that the Eighth Amendment requires the sentencing information provided to a capital jury be accurate. *Caldwell v. Mississippi*, 472 U.S. 320, 329 & n.2 (1985).

Respondent is correct that, in *Jurek*, this Court held that Texas's statute is constitutional, BIO at 17, but the *Jurek* Court did not address whether a jury's considering evidence of unadjudicated offenses satisfies the Eighth Amendment's heightened reliability requirement. The Court did not address that question in *Jurek* because the version of the statute reviewed by the *Jurek* Court did not include language that expressly allowed for the introduction of this type of evidence.

Compare Tex. Code Crim. Proc. art. 37.071 § 2(a)(1) (the current version of the statute, which explains that the State may introduce such evidence if it gives proper notice) *with* Act of June 14, 1973, 63d Leg., R.S., ch. 426, art. 3, § 1 (the version of the statute at issue in *Jurek*, which states only that the any evidence the court deems to have probative value may be admitted). This Court has yet to address whether the State's use of extraneous, unadjudicated conduct is consistent with the Eighth Amendment's heightened reliability requirement.

Furthermore, were the Court to grant certiorari and subsequently hold that the Eighth Amendment will not permit the State to present evidence of such conduct in the sentencing phase of a death penalty trial because it is inaccurate and unreliable, the retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989), would not bar Prystash from relief under the rule. Such a rule would simply be a recognition that the use of this type of evidence violates the holding of *Gregg* or *Woodson*. Both of these opinions were issued long before Prystash's conviction became final.

The case of Johnny Paul Penry illustrates that Respondent's argument pursuant to *Teague*, BIO at 18, is incorrect. In *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), this Court addressed the question of whether the Texas statute allowed Texas juries to give effect to mitigating evidence offered at Penry's trial. *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989). Over seven years before Penry's conviction became final, this Court issued its opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978). *Penry I*, 492 U.S. at 314-15. In *Lockett*, the Court "held that the Eighth

and Fourteenth Amendments require that the sentence 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Id.* at 317 (*quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). In *Penry I*, the Court held that the rule Penry sought was not new because it was dictated by *Lockett* and *Eddings*. *Penry I*, 492 U.S. at 319. Because the rule was not new, it was not barred by *Teague*.

If this Court were to find in Prystash's case that evidence of extraneous, unadjudicated conduct is inadmissible in a death penalty sentencing trial, the rule would be dictated by *Gregg* and *Woodson*, both of which were issued long before Prystahs's conviction became final and would not be a new rule for *Teague* purposes.

2. Respondent does not dispute that the evidence of unadjudicated conduct at issue in Prystash's case is unreliable.

Respondent's assertion that Prystash was likely sentenced to death solely due to the crime for which his jury convicted him is unpersuasive. While what happened to Ms. Fratta is tragic and while all three of the co-defendants (Prystash, Robert Fratta, and Howard Guidry) share in the guilt, Prystash was the least culpable of the three, his role being limited to being the middleman between Fratta (who paid Guidry to kill Ms. Fratta) and Guidry (who killed Ms. Fratta).

The evidence that the jury almost certainly found to be the most persuasive when considering whether Prystash constituted a future danger (which is the sole

aggravating factor a Texas jury must find[2]) was the testimony that he committed acts of violence. As explained in Prystash's petition, all such testimony either came from a witness that could not identify Prystash, came from a witness who was an immunized accomplice and whose testimony was uncorroborated, or concerned a charge that was subsequently dismissed. Pet. at 17-19.

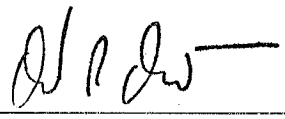
Respondent has made no attempt to argue that this testimony was reliable and therefore satisfies the Eighth Amendment's heightened reliability requirement. Respondent makes no such argument because no good argument exists. Prystash was sentenced to death because of testimony of unadjudicated conduct offered by the State, none of which was reliable. His case is the ideal vehicle through which to answer the question presented.

[2] Respondent's assertion to the contrary, BIO at 18-19, is simply incorrect.

Conclusion and Prayer for Relief

This Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,



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