No. 17-6405

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER ANTHONY YOUNG,
Petitioner,

v.

LORIE DAVIS,
Respondent.

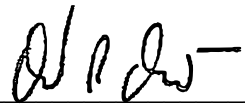
On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I certify that on this November 29, 2017, a copy of this reply was served on Counsel for the Respondent Davis via mail and electronic transmission to: Ari Cuenin, Assistant Solicitor General, Office of the Solicitor General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, ari.cuenin@texasattorneygeneral.gov.

All parties required to be served have been served. I am a member of the Bar of this Court.

Signed,



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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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INTRODUCTION

Because of the critical importance of ensuring reliability in capital sentencing, Mr. Young has asked this Court to grant *certiorari* and schedule this case for briefing and oral argument to remedy the inconsistent application of *Mills v. Maryland*, 486 U.S. 367 (1988), in the federal courts of appeals and provide for a more robust and reliable method of ensuring capital sentencing comports with the Eighth Amendment. In the Respondent's Brief in Opposition ("B.I.O."), the Director contends, among other matters, that the *Mills* issue is not fairly presented because no *Mills* error was present in Mr. Young's case and that any uncertainty in adjudicating *Mills* claims is irrelevant and illusory.[1] B.I.O. at 10-24. These claims are misplaced, because *Mills* error was indeed present in Mr. Young's case and the confusion and inconsistency regarding the proper adjudication of *Mills* claims is present and significant.

I. Respondent is incorrect in arguing that no *Mills* error was present in Mr. Young's case.

A. *Mills* is not categorically inapplicable to the Texas sentencing scheme.

Respondent argues that there was no *Mills* error present in Mr. Young's case because *Mills* is inapplicable to the Texas capital sentencing scheme. B.I.O. at 11. It is true that on several occasions, the Fifth Circuit has examined whether the Texas

[1] In this Reply, Mr. Young addresses only those arguments of Respondent that he deems merit a reply.

sentencing scheme is consistent with *Mills*.[2] However, not a single one of these cases involves the issue raised by Mr. Young. Instead, every previous case involving *Mills* raised a challenge to the Texas so-called "10-12 rule." Under this rule, the jury is instructed that it "may not answer the [special] issue 'no' unless it agrees unanimously and may not answer the [special] issue 'yes' unless 10 or more jurors agree." In these cases the petitioners argued that this instruction violates *Mills* because it misleads the jury by not informing jurors that a single "yes" vote to the mitigation question (or a single "no" vote to the future dangerousness question) results in a life sentence.

Mr. Young did indeed raise a challenge to the 10-12 instruction in earlier proceedings in this case, but he raised it under *Simmons v. South Carolina*, 512 U.S. 154 (1994). His claim under *Mills*, at issue here, has nothing to do with the 10-12 rule; consequently, the Fifth Circuit's decisions finding that the 10-12 rule does not run afoul of *Mills* are irrelevant to Mr. Young's claim.

Specifically, *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir. 1994), is the case most often cited for the proposition that "*Mills* is not applicable to the capital

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[2] *See Davila v. Davis*, No. 15-70013, 2016 WL 3171870 at *8 (5th Cir. May 31, 2016) (unpublished); *Holiday v. Stephens*, 587 F. App'x 767, 789-90 (5th Cir. 2014) (unpublished); *Sprouse v. Stephens*, 748 F.3d 609, 623 (5th Cir. 2014); *Parr v. Thaler*, 481 F. App'x 872, 878 (5th Cir. 2012) (unpublished); *Druery v. Thaler*, 647 F.3d 535, 543 (5th Cir. 2011); *Adams v. Thaler*, 421 F. App'x 322, 335 (5th Cir. 2011) (unpublished); *Greer v. Thaler*, 380 F. App'x 373, 388-89 (5th Cir. 2010) (unpublished); *Anderson v. Quarterman*, 204 F. App'x 402, 409 (5th Cir. 2006) (unpublished); *Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005); *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274 (5th Cir. 2000); *Hughes v. Johnson*, 191 F.3d 607, 625 (5th Cir. 1999); *McBride v. Johnson*, 122 F.3d 1067, 1997 WL 464545 at *9 (5th Cir. 1997); *Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996); *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994); *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992).

sentencing scheme in Texas." *See, e.g.*, B.I.O. at 11. But Jacobs received all the then-mandated statutory instructions. Accordingly, in rejecting Jacobs' *Mills* claim, the Fifth Circuit properly observed that "*Mills* does not require a certain number of jurors to agree to impose the death penalty." *Jacobs*, 31 F.3d at 1329. Unlike Jacobs, Mr. Young does not here argue that the 10-12 rule violates *Mills*. However, it is important to note that when *Jacobs* and its progeny state that "*Mills* is not applicable to the capital sentencing scheme in Texas," they mean that the Texas statute does not run afoul of *Mills* when the statute is administered properly—that is, when the jury is actually charged as the statute requires. *See id.* at 1329; *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir. 2000). The fact that the Fifth Circuit has ruled repeatedly that *Mills* error does not perforce inhere in the Texas statute does not mean *Mills* error cannot occur in Texas. Indeed, these decisions imply precisely the opposite: if the jury is properly instructed, there is no *Mills* error; if the jury is not, *Mills* requires a new sentencing trial.

B. The presence or absence of "holdout" jurors is irrelevant to the question of impermissible juror confusion under *Mills*.

Respondent also contends that no *Mills* error was present because there were no "holdout" jurors in Mr. Young's case and thus there could not have been any confusion as to the need to agree on any mitigating circumstance(s). B.I.O. at 11 n.5. This factor is irrelevant.[3] For one, there was no evidence of holdout jurors or a

[3] And also, for that matter, inaccurate. While it is true no juror in Mr. Young's case held out to the point of causing a hung jury, the juror affidavits Mr. Young seeks to admit conclusively show that the confusion caused by the jury instructions was both present and prevented the jurors from giving effect to the mitigating evidence in Mr. Young's case. Juror Monique Pathaphone "thought that the jurors had to agree on what evidence was

hung jury in *Mills* itself. As was true in *Mills*, the question in this case is simply whether there was a *risk* the jury was confused as to whether the jurors were required to agree on the specific mitigating factors in order to sentence Mr. Young to life in prison, and the fact the jury answered the mitigation question in the negative does nothing to allay that concern. *See Mills*, 486 U.S. at 384 (question is whether jurors "may have thought they were precluded from considering any mitigating evidence unless [they all] agreed on the existence of a particular such circumstance").

Second, not only were Mr. Young's jurors *not* given the statutorily required instruction, which would have had the effect of eliminating the *Mills* error in this case, in addition, they *were* given the so-called 10-12 instruction, pursuant to which they are told that they cannot answer the mitigation question in the affirmative unless ten of the jurors agree to answer the question affirmatively. The 10-12 rule has been consistently upheld and is not at issue here. *See supra*. Yet the major reason the 10-12 rule does not run afoul of *Mills* is because, "the instructions … specifically provide[] that jurors 'need not agree on what particular evidence supports an affirmative finding on' the mitigating special issue"—precisely the instruction missing from Mr. Young's trial. *Allen v. Stephens*, 805 F.3d 617, 632 (5th Cir. 2015). In other words, the existence of the 10-12 instruction makes it imperative that the jurors also receive the instruction they did not receive in Mr.

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mitigating in order to find there was sufficient mitigating circumstances to sentence [Mr. Young] to life instead of death." ROA.511. Juror Jason Olivarri confirmed that this was also true for him and the other jurors; "when we were deliberating punishment, we jurors thought that all of us had to agree about what evidence was mitigating." ROA.509.

Young's case, so that they are aware that in assembling the ten votes needed to answer the mitigation question affirmatively, they do not need to agree among themselves as to which specific evidence warrants that affirmative answer. The mere potential for juror deadlock does not dispel the substantial probability that Mr. Young's jury may well have felt precluded from fully considering his mitigating evidence.

C. It has never been Mr. Young's position that *Mills* affirmatively requires a non-unanimity instruction, nor has it been his position that the sole cause of error in this case was the omission of the instructions required under Texas law.

Respondent argues that Mr. Young's *Mills* claim was properly denied below because there is no decision "affirmatively *requiring* a jury instruction that mitigators need not be found unanimously."[4] B.I.O. at 12. However, it has never been Mr. Young's position that *Mills* requires such instruction, or any specific instructions at all, nor has it ever been Mr. Young's position that the sole cause of the error in his case is the omission of the jury instructions required under Texas law.

In its punishment charge instructing the jury concerning the mitigation special issue, the trial court in Mr. Young's case entirely omitted the statutorily mandated instruction of article 37.071, section 2(f)(3) of the Texas Code of Criminal Procedure, which expressly states that the jurors "need not agree on what particular evidence supports an affirmative finding on the issue" of whether there

[4] Respondent also argues that review is inappropriate because Mr. Young alleges only state-law error, yet this, as well, is a mischaracterization of his claim, for the same reasons as described below.

were sufficient mitigating circumstances to warrant a life sentence and also the mandated instruction under section 2(f)(4), that defines mitigating evidence as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." R.R. Vol. 18: 68-71; C.R. Vol. 1: 311.

Section 2(f)(3), omitted from Mr. Young's punishment charge, was made part of the capital sentencing statute over twenty years ago when the Texas legislature made several amendments to Texas' death penalty statute in response to this Court's opinions related to the consideration of mitigating evidence in capital trials including *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Mills*. *See* Tex. S.B. 880, 72d Leg., R.S. (1991). The statute mandates that the jury be charged accordingly: "the court *shall* charge the jury…." Tex. Code Crim. Proc. art. 37.071, § 2(f) (emphasis added).

Thus, in Mr. Young's case, the guarantee that individual jurors be permitted to give effect to any evidence they, individually, deem mitigating did not occur. The charge given during Mr. Young's trial robbed him of the safeguard of a jury unambiguously aware that they did not need to agree on what particular evidence would support a "yes" answer to the mitigation special issue. It impermissibly limited the jurors' ability not only to consider, but also to give unilateral effect to the mitigation evidence before them, and therefore violated the same principle as did the instructions held to be unconstitutional in *Mills*. However, although the omission of the required instructions had the *effect* of creating *Mills* error, the omission itself is not the error that Mr. Young alleges. Mr. Young has not and does

not argue that *Mills* affirmatively requires these specific instructions, but rather that *Mills* guarantees that jurors not be precluded from individually considering mitigating evidence. Had the instructions been given as required, there would have been no *Mills* error in his case. However, this does not foreclose other potential safeguards against juror confusion on this issue. It is entirely possible that the trial court could have instructed Mr. Young's jury in a way that is consistent with *Mills*, yet still omitted the statutorily required instructions. This, however, did not occur, and it remains that the instructions Mr. Young's jury received led to impermissible confusion over the effect they could assign to mitigating evidence.

II. Respondent's attempt to minimize the significance of the confusion and inconsistency present in the federal courts of appeals in the adjudication of *Mills* claims is unavailing.

Respondent argues that whatever uncertainty may or may not exist over the adjudication of *Mills* claims is overestimated and irrelevant. *See* B.I.O. at 16-17. Specifically, Respondent asserts that whatever difference, if any, exists between "substantial probability" and "reasonable likelihood" has no "practical effect." *Id.* at 17. However, these standards do, indeed, differ, and the distinction is a meaningful one. Although this Court has not clarified their relationship in the context of claims of juror confusion, as argued in Mr. Young's Petition to this Court, this Court has remarked on the difference between these standards in the First Amendment context, noting that "the 'reasonable likelihood' test places a lesser burden on the

defendant than the 'substantial probability' test."[5] *Press-Enterprise Co. v. Sup. Ct. of Cal. for Riverside Cnty.*, 478 U.S. 1, 14 (1986). If this Court were to maintain this view in the context of juror confusion, the difference between the two standards would be significant, as would be the lack of consistency in the lower courts of applying one standard or the other.

In addition to minimizing the difference between the standards of *Mills* and *Boyde v. California*, 494 U.S. 370 (1990), Respondent also makes the claim that *Smith v. Spisak*, 558 U.S. 139 (2010), has created a kind of two-step method to evaluating *Mills* claims, in that "where jury instructions do not contain the flaw present in *Mills*—an affirmative instruction that unanimity is required to find a circumstance mitigating—there is no constitutional violation and no requirement to assess whether there was either a 'substantial probability' or a 'reasonable likelihood' of juror confusion." B.I.O. at 23-24. The language of *Spisak* does not support such an approach. *Spisak* held that there was no *Mills* error because "the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the circumstance that *Mills* found critical, namely, 'a substantial possibility…'" of juror confusion. *Spisak*, 558 U.S. at 148. For one, this contradicts Respondent's claim that an "affirmative instruction" of unanimity is a prerequisite to *Mills* error; *Mills* error can result either through what the instructions and verdict forms "said or…implied." *Id.* In addition, *Spisak* does

[5] *See also United States v. Doe*, 63 F.3d 121, 129-30 (2nd Cir. 1995) (also finding a significant difference between the "substantial probability" and "reasonable likelihood" standards; *In re State-Record Co.*, 917 F.2d 124, 128 (4th Cir. 1990) (same).

indeed assess whether there was a "substantial possibility" of confusion, rather than stopping its analysis after finding the instructions dissimilar to those in *Mills*. *Id.* However, even if *Spisak* does introduce this kind of test, that would provide even more support for Mr. Young's claim of the inconsistency in adjudicating *Mills* claims and the need for establishing a consistent approach.

III. The juror affidavits Mr. Young seeks to admit would establish conclusive evidence that *Mills* error occurred in his case and should not be barred from consideration.

It is inaccurate for the Respondent to assert that the affidavits, regardless of their admissibility issues,[6] nevertheless do not show that *Mills* error has occurred. *Mills* provides that where "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions … and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular

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[6] Respondent's reliance on *Cullen v. Pinholster*, 563 U.S. 170 (2011), to advocate exclusion of the juror affidavits is misplaced. B.I.O. at 26-28. First, this argument has already been adequately addressed in Mr. Young's Petition, but to the extent that Respondent suggests there exists an obligation to seek to admit inadmissible evidence in state court, she has cited no authority to support such a proposition. *See* Petition at 26 n.7.

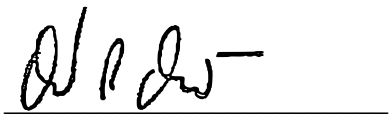
In addition, just because Mr. Young advances in this Court that *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), provides support, regardless of Rule 606(b), for the admissibility of the juror affidavits in this case, does not mean that Mr. Young has "abandoned" his argument below that Rule 606(b) additionally should not apply because the juror affidavits are not being offered to challenge the validity of the verdict. B.I.O. at 24. Mr. Young maintains his position that Rule 606(b) does not apply to this type of inquiry. As this Court has made clear, the rule does not "prohibit the introduction of evidence of deliberations 'for use in determining whether an asserted error affected the jury's verdict.'" *Warger v. Shauers*, 135 S. Ct. 521, 528 (2014). The affidavits at issue here merely illustrate, without the need for speculation, that the harm the Eighth and Fourteenth Amendments were designed to prevent, as articulated in *Mills*, did, in fact, occur. To the extent they are relevant, Mr. Young's additional prior arguments to this effect are incorporated by reference. *See* ROA.712-15; App. for COA, at 25-27.

such circumstance," the sentence must be overturned, because "[t]he possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at 38. The affidavits obtained from members of Mr. Young's jury conclusively show that the jurors felt they were precluded from finding a mitigating circumstance existed in Mr. Young's case unless all the jurors agreed; *Mills* requires only a *substantial probability* that this has occurred, yet here there is certain evidence that the prohibited confusion did, in fact, occur. Juror Monique Pathaphone "thought that the jurors had to agree on what evidence was mitigating in order to find there was sufficient mitigating circumstances to sentence [Mr. Young] to life instead of death." ROA.511. Juror Jason Olivarri confirmed that this was also true for him and the other jurors; "when we were deliberating punishment, we jurors thought that all of us had to agree about what evidence was mitigating." ROA.509. It is wrong for Respondent to claim that this testimony does not demonstrate *Mills* error occurred.

CONCLUSION AND PRAYER FOR RELIEF

Because of the critical importance of ensuring reliability in capital sentencing, this Court should grant *certiorari* and schedule this case for briefing and oral argument to remedy the inconsistent application of *Mills* in the federal courts of appeals and provide for a more robust and reliable method of ensuring capital sentencing comports with the Eighth Amendment.

Respectfully submitted,



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