

NO. _____

IN THE
Supreme Court of the United States

CEDRIC ALLEN RICKS,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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DEATH PENALTY CASE

CAPITAL CASE – DEATH PENALTY

QUESTIONS PRESENTED

I. Unlawful search and seizure

Whether it is a violation of the Fourth and Fourteenth Amendments to the United States Constitution to make a warrantless entry into a residence and search for and seize evidence that had been observed during an earlier “emergency protective sweep?”

A. When the justification for an “emergency protective sweep has ended, may the police in advance of the issuance of a warrant, re-enter the residence and conduct crime scene investigation, search and seizure of evidence?

II. Improper placement of mitigation burden of proof

Whether the placement of the burden of proof on a capital defendant to prove a mitigation issue violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution?

A. Does the right to a jury trial under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution prohibit placement of the burden of proof (as opposed to the burden of production) on any issue that would result in a death sentence on the capital defendant?

B. Should this Court revisit the opinion of *Walton v. Arizona* 497 U.S. 639 (1990) in light of the death penalty schemes in a number of States requiring the State to prove there is no sufficient mitigation to outweigh the death penalty aggravators? *Kansas v. Marsh*, 548 U.S. 163 (2006).

C. Should the Constitution be interpreted to require a presumption against the death penalty for a convicted capital defendant and thus create a presumption that mitigation is sufficient to warrant a sentence of life? Does a scheme that places the burden of proof regarding mitigation on a capital defendant create a presumption that death is the appropriate sentence?

D. Does Texas' mitigation question provide an unconstitutionally unguided inquiry that requires no traditional weighing?

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OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 2017 WL 4401589 and is an unpublished opinion. The opinion is reproduced in Appendix A.

JURISDICTION

The Texas Court of Criminal Appeals entered judgment on October 4, 2017. On January 4, 2018, Justice Alito granted Petitioner's application to extend time for filing a petition for writ of certiorari to an including February 1, 2018. The petition is due on February 1, 2018.

This Court has jurisdiction under 28 U.S.C. § 1257

CONSTITUTION AND STATUTES INVOLVED

Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

Amendment IV to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

Amendment VIII to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the United States Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 37.071(b) TEXAS CODE OF CRIMINAL PROCEDURE

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society

ARTICLE 37.071(c) & (d) TEXAS CODE OF CRIMINAL PROCEDURE

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

ARTICLE 37.071(e) TEXAS CODE OF CRIMINAL PROCEDURE

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

ARTICLE 37.071(f) TEXAS CODE OF CRIMINAL PROCEDURE

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

- (1) shall answer the issue "yes" or "no";
- (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;
- (3) need not agree on what particular evidence supports an affirmative finding on the issue; and
- (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

STATEMENT OF FACTS RELATED TO UNLAWFUL SEARCH

1. Cedric Allen Ricks killed Anthony Figueroa and Roxann Sanchez during the same criminal episode. An indictment was issued charging him with the offense of Capital Murder. Before his trial, Ricks filed a Motion to Suppress Evidence that was seized from his apartment alleging violations of his rights to be free from unlawful search and seizure under the Fourth and Fourteenth Amendments to the United States Constitution. (CR. I, 284-299; CR. II, 409).¹

2. An evidentiary hearing was held on Rick's Motion to Suppress. At that hearing, it was established that police were dispatched in response to 911 call that Petitioner had claimed to have killed his girlfriend and her two sons at their apartment. One of the sons had survived and called 911 from inside the apartment advising that there were two people in the apartment that were dead (mom and brother) and that Petitioner was the actor and had fled the scene. The police arrived

¹ CR (clerks record) is used to designate the records of the District Clerk which includes all papers filed with the trial Court.

and did a protective sweep in the apartment and saw the two bodies, a weapon and another small child who was unharmed in a crib. Crime scene officers later arrived and were advised of what had been seen during the protective sweep. The crime scene investigators entered the apartment and began taking photos and video. Items were collected including a knife. Medical examiner employees entered the apartment and not only recovered the two deceased persons, but conducted a search for the weapon used. A search warrant issued more than twelve hours later.

3. Ricks argued following an evidentiary hearing on his motion, that the search and seizure of evidence from his apartment was conducted without a warrant and at the time of the seizure was without any existing exigent circumstances. Ricks argued that earlier exigent circumstances that warranted an emergency protective sweep had terminated and that the crime scene search and seizures conducted following the end of the exigent circumstances were unlawful. (RR. VI, 74-117, 231-41)².

4. The trial court denied Rick's motion. (CR. II, 409).

5. The Texas Court of Criminal Appeals rejected Rick's argument that the reentry of the police after the expiration of the exigency to conduct crime scene investigation and seizures without a warrant violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The Texas Court of Criminal Appeals reasoned that since the officers had a previous right to be present and made plain view observations, there is no harm in permitting their reentry to engage in seizure of evidence, photography and other Constitutional intrusions

² RR (reporters record) refers to the record of the official court reporter.

absent a warrant. *Ricks v. State*, 2017 WL 4401589 at 8-11 (Tex. Crim. App. Oct. 4, 2017).

6. This petition followed.

STATEMENT OF FACTS RELATED TO BURDEN OF PROOF ON MITIGATION

1. In Texas, following a verdict of guilty to the offense of capital murder, the sentencing phase consists of a separate evidentiary proceeding at the conclusion of which, the jury that found the defendant guilty of capital murder is presented two questions, the answers to which determine whether a sentence of death or a sentence of confinement for life is imposed. Article 37.071 Tex. Code Crim. Proc.

2. One of the questions asks about the probability that the defendant will continue to commit criminal acts of violence in the future. On that question, the burden of proof is laid on the government to prove a “yes” answer beyond a reasonable doubt. Article 37.071 (b) and (c) Texas Code Crim. Proc.

3. On the second question, frequently referred to as the mitigation question, the burden shift to the defendant to establish, not only that mitigation exists, but that it exists to the extent that it warrants a sentence of life imprisonment rather than a death sentence.³ Article 37.071 (e) Texas Code Crim. Proc.

³ Unlike the death penalty scheme in many states, Texas provides no guidance on how the jury is to make this determination regarding whether it “warrants” life. They are not asked to engage in any “weighing” analysis. They just engage in an unguided “sufficiency” evaluation.

4. Petitioner challenged this scheme by filing a pretrial motion to the trial court which was presented and heard. The trial court overruled Petitioner's complaint that this statutory scheme was unconstitutional for shifting the burden of proof onto the defense and failing to instead place the burden of proof upon the government on this issue. (CR. I, 142-146; RR. V, 68). Petitioner argued that this scheme violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United State Constitution.

5. The Texas Court of Criminal Appeals rejected Petitioner's arguments on appeal. The Court simply stated they had rejected these arguments in previous cases and declined to reconsider those holdings. *Rick* at 13.

6. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY LIMITATIONS ON THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

The Texas Court of Criminal Appeals Decision departs from the decisions of this Court and other Courts in permitting the exigent circumstance of a "protective sweep" to allow a full blown search and seizure when the exigency has concluded.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586, (1980). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Id.* at 590.

Under the protective-sweep exception, when an officer arrives at a residence in response to a reported emergency and has an objectively reasonable belief, based on specific and articulable facts, that there may be a person inside the residence who poses a danger to the officer or to others in the area, the officer may perform a "protective sweep" of the residence without a warrant or consent. *Maryland v. Buie*, 494 U.S. 325, 327 (1990). In the instant case, such a circumstance existed on the arrival of law enforcement officers on the reports of deceased and injured persons inside the subject residence. Officers appropriately entered the home and discovered deceased persons and two persons not deceased, but in need of aid. Petitioner makes no complaint about this initial entry to accomplish the objectives under the protective sweep exception to the warrant requirement.

The complaint begins when, after the exigency had concluded and the injured persons were retrieved and assisted, officers re-entered the residence and essentially began conducting crime scene evidence gathering, including photography. Ultimately, a probable cause search warrant was obtained authorizing the search of the residence several hours later. During this impending wait, there was no risk that evidence would be lost or destroyed as the crime scene was totally in the control of the police. The reasonableness of the observations of items in plain view must still be within the reasons that justified the protective sweep to begin with. On reentry into the residence there were no specific or articulable facts that there was anyone inside who posed a danger or who was injured. "Of course, there could always be a dangerous person concealed within a structure. But that in itself cannot justify a

protective sweep, unless such sweeps are simply to be permitted as a matter of course, a result hardly indicated by the Supreme Court in Buie.” United States v. Carter, 360 F.3d 1235, 1242–43 (10th Cir. 2004).

The Court below sought to justify the reentry and search under the theory that since the police had already seen the items seized, that there was no harm in the reentry following expiration of the exigency to conduct the collection and seizure of those items. Of course, this ignores the risk, and in this instance, indeed the likelihood that the police are not restrained to collect and seize those items initially observed and will conduct a search beyond the original perimeters of the exigency authorized observations. That is in fact what happened in this case. The officer went through closed drawers recovering evidence.⁴

A fair reading of the trial record and hearing on the Motion to Suppress evidence shows that once the police had engaged in the protective sweep, any Fourth Amendment protections or right enjoyed by Petitioner literally vanished. Law enforcement officers essentially engaged in ordinary crime scene search, seizure and processing completely oblivious of any Fourth Amendment concerns. This included photography of the crime scene, a search by the representative of the Medical Examiner in the kitchen of the residence where he observed a possible murder weapon, a knife that was in a drawer. Notably in Defendant’s exhibit #4 is a crime scene technician’s report describing the extensive search conducted without a

⁴ The trial court actually suppressed this evidence that was searched for and seized during the post-exigency entry as being violative of Petitioner’s Fourth Amendment rights as these items were not observed in plain view. This fact of course identified the actual scope of the post-exigency entry conducted by law enforcement agent.

warrant. In its fourteen pages, the technician describes taking a total of 349 photographs and having searched for and seized 47 evidentiary items from inside the apartment long before the warrant was secured.

A police officer's reasonable belief that a person within the home is in need of immediate aid is one example of an exigent circumstance that justifies a warrantless entry into a home. Mincey v. Arizona, 437 U.S. 385, 392 (1978). Once inside the home, the police may search of the area to see if there are other victims or if a killer is still on the premises. *Id.* During this sweep, the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. Michigan v. Tyler, 436 U.S. 499, 509 (1978). However, the investigators can stay too long and thus will need a warrant for further entry. *Id.* at 511, 512. This is particularly true when there is time, using modern methods to secure a warrant. Missouri v. McNeely, 569 U.S. 141 (2013).

The search conducted after the exigency had ended was exhaustive and intrusive. Mincey v. Arizona at 389. "The police may seize any evidence that is in plain view during the course of their legitimate emergency activities." Mincey v. Arizona, 437 U.S. 385 (1978). "Warrants are generally required to search a person's home or his person unless the 'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. McDonald v. United States, 335 U.S. 451; Johnson v. United States, 333 U.S. 10, 14–15." Mincey at 393, 394. A murder scene exception to the warrant requirement was rejected in Mincey.

It is a cardinal principle that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357; see also South Dakota v. Opperman, 428 U.S. 364, 381 (POWELL, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 481; Vale v. Louisiana, 399 U.S. 30, 34; Terry v. Ohio, 392 U.S. 1, 20; Trupiano v. United States, 334 U.S. 699, 705.

This Petition should be granted to clarify the lines drawn after an exigency has clearly ended.

II. THIS COURT SHOULD REVISIT THE OPINION OF WALTON V. ARIZONA 497 U.S. 639 (1990) IN LIGHT OF THE UNGUIDED MITIGATION QUERY AND IN LIGHT OF DEATH PENALTY SCHEMES IN OTHER STATES THAT PROVIDE GUIDANCE IN REQUIRING A “WEIGHING” PROCESS.

The Texas Court of Criminal Appeals has said in regard to the mitigation issue:

We concede that the Texas legislature has not assigned a burden of proof regarding mitigating evidence. We also concede that the burden is implicitly placed upon appellant to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case.

Barnes v. State, 876 S.W.2d 316, 330 (Tex.Crim.App.), cert. denied, 513 U.S. 861, (1995).

The Texas death penalty scheme places the burden of proof upon the defendant to establish, not only that mitigation exists, but it sets up a presumption that such mitigation is insufficient to warrant a life sentence unless the defendant additionally establishes that the mitigation so established is also “sufficient” to warrant a life sentence. This scheme provides no guidance as to how a Texas jury is to go about this

calculation of life. Not only did Petitioner have the burden of production to establish that mitigation existed, but also was saddled with an additional burden of proof.

This burden of proof imposed by the Texas scheme gives zero guidance as to what criteria a jury is to use to make this calculation. In many death penalty states, including the Federal death penalty scheme, there is a weighing process and the jury is so directed. In Texas, there is no weighing process, there is no definition of the term "sufficient." There is no definition of "warrants." It is more or less a question no more guided than asking the jury if they want to order the execution of the defendant for what he has done. Surely such a scheme does not comport with Constitutional requirements of due process of law and protections against cruel and unusual punishment.

Death penalty cases are required to be subjected to greater Constitutional protections than those applied to non-death penalty cases (death is different). Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Simmons v. South Carolina, 512 U.S. 154 (1994). In the Texas scheme presented here, the death penalty is imposed in a wanton haphazard manner in violation of Petitioner's rights to due process and protection from cruel and unusual punishment. The scheme requires at least ten (10) of the jurors who have already determined that Petitioner is guilty of capital murder to agree that the mitigation is "sufficient" to save his life. This is no more an inquiry than simply asking them if 10 agree that he should live.

In many other States, the death penalty scheme at least imposes a burden of proof on the government to prove that the mitigation established does NOT outweigh (imposition of a weighing process) the aggravating factors established beyond a reasonable doubt. *Kansas v. Marsh*, 548 U.S. 163 (2006). In these schemes, the government must disprove the relative weighing question beyond a reasonable doubt. In Texas, there is not even a standard of proof or convincing on the mitigation question.

This Petition should be granted to reexamine the Texas death penalty scheme and its process which places the burden of proof on Petitioner to establish unguided and undefined "sufficiency" to save his life.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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