No. 18-5246

In the Supreme Court of the United States

WARREN DARRELL RIVERS,

Petitioner,

V.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED (CAPITAL CASE)

The question presented for review is set out in the petition for writ of certiorari as follows:

I. Whether prosecution evidence that a capital defendant has been sentenced to death once before in the same case impermissibly undermines the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, and deprives the defendant of a reasoned, individualized sentencing determination based on his record, personal characteristics, and the circumstances of the crime in violation of the Eighth and Fourteenth Amendments?

II. Whether denying a capital defendant the option of enlarging his sentence and waiving his back-time credit in order to provide the jury with a currently valid sentencing option of life without parole violates the right to be free from cruel and unusual punishment and denies due process of law under the Eighth and Fourteenth Amendment.

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STATEMENT OF THE CASE

The Petitioner was convicted of the capital murder of an 11-year-old boy while in the course of sexually assaulting him on May 3, 1987 (CR – 172) (CR Supp. – 129). He was sentenced to death in 1988 but granted a new punishment hearing in 2010. *Rivers v. Quarterman*, 661 F. Supp. 2d 675 (S.D. Tex. 2009); *Rivers v. Thaler*, 389 Fed. Appx. 360 (5th Cir. 2010). At the conclusion of the most recent punishment hearing, the Petitioner was again sentenced to death, and the Texas Court of Criminal Appeals affirmed that sentence on December 20, 2017. *Rivers v. State*, AP-77,051, 2017 WL 6505792 (Tex. Crim. App. Dec. 20, 2017); (Pet. App. A). This Court returned the first petition, but allowed resubmission, and granted the State until August 16, 2018, to respond.

SUMMARY OF THE REASONS FOR DENYING ISSUANCE OF THE WRIT

The Petitioner has alleged that evidence at trial showed he had been sentenced to death once before in the same case. But the jury did not hear such evidence. The Petitioner also has alleged that the trial court's refusal to allow him the option of life without parole violates his Eighth and Fourteenth Amendment rights to due process and to be free from cruel and unusual punishment. But this Court has repeatedly denied writs for certiorari in cases similar to the present one

where the petitioner wanted the trial court to disregard the applicable sentencing statute. The petitioner has presented no new or compelling arguments on this issue so as to call for this Court's intervention. Finally, the opinion issued by the Texas Court of Criminal Appeals in this case is unpublished and has no precedential value. *See* TEX. R. APP. P. 77.3 ("Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court."). In short, there is no reason for this Court to grant certiorari.

ARGUMENT

The rules of this Court provide that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons to do so. SUP. CT. R. 10. Furthermore, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. In the present case, the Texas Court of Criminal Appeals correctly stated the applicable law and properly affirmed the Petitioner's sentence. The petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction

A. The Petitioner's first question presented bears no relation to the Petitioner's case, where the jury never heard that the Petitioner had previously been sentenced to death.

The Petitioner claims that "the jury [was] explicitly and implicitly informed that [Petitioner] had been sentenced to death by a previous jury…" (Pet. 5). But there was no such conveyance of that information to the jury. The trial court repeatedly reminded the parties not to inform the jurors that the appellant "has been on death row for 27 years." Prior to the testimony of a prison official, the trial court warned the witness:

> Now, the reason I have you in here is an admonishment that I know you probably heard it at least once, if not a hundred times today already, and that is, in this trial you cannot mention the fact that the defendant…has been on death row, or that you've had any contact with him on death row. All right. Polunsky Unit is fine, but you cannot refer to the unit as a DR unit, or death row, or anything like that, or refer to those inmates as DRs, that kind of thing, because that would not be proper for this jury and it would complicate this case.

Nevertheless, when the prosecutor later asked the witness where the Petitioner would be housed if sentenced to death, the official responded, "He would be returned to the Polunsky Unit, which is where those offenders that are sentenced to death are housed, placed back in a single cell, and segregated from the general population." The prosecutor clarified with the witness that the Polunsky Unit housed prisoners from "G1 all the way up to maximum security settings and death row." The official also testified that inmates from the general population could "find themselves in admin segregation housed in solitaire."

After the prison official testified, the Petitioner moved for a mistrial "based on the linkage between the Polunsky Unit, [the Petitioner] being in a single cell, and that that is the nature of housing for individuals on the Polunsky Unit who are on death row." The trial court denied the request, noting that there had been "no evidence or statements that your client has been on death row for the last 27 years." The Petitioner did not disagree with that statement. The trial court later gave a similar admonishment to the Petitioner's own witness after that witness mentioned the Polunsky Unit.

The Petitioner claims that a State's exhibit that was within view of the jury had the words "capital murder" and "death" written in red on the back. (Pet. 5). But the Petitioner did not make a timely objection to this display, and the Petitioner never alerted the trial court that such an alleged viewing constituted violations of his Eighth and Fourteenth Amendment rights to due process and to be free from cruel and unusual punishment. In fact, the Petitioner stated, "we agreed with the Court at that time that it would probably be imprudent and drawing more attention to the jury were this Court then to call out each one of these jurors and ask, A, if they saw it; and B, if they saw it, what impressions, if any, it made on them. And we maintain that we agree with that." It was not until the next day that the Petitioner asked for a mistrial without stating the basis for the objection as required by Texas law. *See Yazdchi v. State*, 428 S.W.3d 831, 844

(Tex. Crim. App. 2014) (stating that, for a party to preserve a complaint for appellate review, he must make a specific objection and obtain a ruling at the earliest possible opportunity); *Peyronel v. State*, 465 S.W.3d 650, 654 (Tex. Crim. App. 2015) ("Appellant had the burden to 'state…the grounds for the ruling...sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.'…Instead, Appellant is now trying to 'raise an abstract claim ... as an afterthought on appeal.'") (citation omitted). Therefore, under state law, the Petitioner's issue was not preserved with regard to the exhibits.

Nevertheless, in the interest of justice, the Texas Court of Criminal Appeals examined the record and found no references to Petitioner's prior death sentence. "The passages cited by [Petitioner] include only discussions that he had already been found guilty and that, if asked to serve on the jury, the veniremen would have to assess only [Petitioner's] punishment." *Rivers*, 2017 WL 6505792, at *5. Thus, there is no constitutional issue to review.

B. The Petitioner's first question presented lacks merit because the ruling by the state court rested on adequate and independent state grounds or has been repeatedly decided against him.

Even if the Petitioner had preserved a claim that had a factual basis in the record, he cannot show that the Texas Court of Criminal Appeals necessarily

affirmed the death sentence based on federal law. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) ("we will not review judgments of state courts that rest on adequate and independent state grounds."). The Texas court stated that "[t]o the extent [Petitioner] is attempting to raise an as-applied constitutional challenge to Texas's death penalty statute, he has inadequately briefed this point of error," and no federal sources were cited by the court in support of that holding. *Rivers*, 2017 WL 6505792, at *5. Thus, the court's ruling was based on state legal briefing requirements rather than on substantive federal law.

Finally, to the extent that the Petitioner is attempting to mount a facial constitutional challenge to Texas's death penalty statute on the grounds that the statute does not permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime, his argument has no merit. *Rivers*, 2017 WL 6505792, at *5. The Texas Court of Criminal Appeals has repeatedly resolved similar issues against the criminal defendant raising it, and this Court has repeatedly refused to grant writs of certiorari in those cases. *See Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1070 (1999); *Williams v. State*, AP-77,053, 2017 WL 4946865 (Tex. Crim. App. Nov. 1, 2017), *cert. denied*, 2018 WL 692261 (U.S. May 14, 2018). The Petitioner has not advanced any new or compelling reason for this Court to

consider this issue in the context of the present case. Therefore, certiorari review of this claim in the present case is unwarranted.

C. The Petitioner had no right to violate the state sentencing statutes that have been repeatedly upheld by this Court, and a review of the issue would contribute little to our jurisprudence.

In his second and final question presented, the Petitioner complains that the trial court violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution when it denied his motion to include life without parole as a sentencing option and instead tried him pursuant to the applicable statutory sentencing provisions. (Pet. 15-24). But this Court has approved Texas's capital murder sentencing scheme, and there is no constitutional requirement that Texas district courts violate that scheme in order to expand the sentencing options.

In *Andrade v. McCotter*, 805 F.2d 1190 (5th Cir. 1986), the Fifth Circuit addressed the question and explained:

> The Texas capital punishment statute passed muster in *Jurek v. Texas*, 428 U.S. 262 (1976). The punishment to be assessed for the offense of capital murder, as for all other state criminal offenses, is a matter for the state legislature. Neither the eighth amendment nor any other provision of the Constitution mandates the enactment of a particular punishment for a particular crime. That determination is left to the exercise of judgment by each "democratically elected legislature." The Texas legislature has established two punishments for capital murder, death and life imprisonment. Neither sentence is constitutionally disproportionate and a constitutional sentencing

> scheme does not require the establishment of the third sentencing option…

Id., 805 F.2d at 1193 (citations omitted). The Texas Court of Criminal Appeals has repeatedly rejected claims that the applicable sentencing scheme is unconstitutional for failing to provide the jury with the sentencing option of life without parole, and this Court has repeatedly refused to grant petitions for certiorari in those cases. *Buntion v. State*, 482 S.W.3d 58, 105 (Tex. Crim. App. 2016), *cert. denied*, 136 S. Ct. 2521 (2016); *Luna v. State*, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008), *cert. denied*, 558 U.S. 833 (2009); *Arnold v. State*, 873 S.W.2d 27, 39–40 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 830 (1994). The decision of the Texas Court of Criminal Appeals is not in conflict with the decisions of this Court or any other court, and this Court should deny the petition for writ of certiorari.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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