No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN SUNIGA,
Petitioner
v.
THE STATE OF TEXAS,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

The mitigation evidence offered at Brian Suniga's trial showed that he had grown up in a family fraught with alcohol abuse, violence, sexual trauma and criminality. Despite his own substance abuse problems, Mr. Suniga was affectionate to family members and had looked after his severely-alcoholic father during his final illness. However, the jury at Mr. Suniga's death penalty sentencing trial was limited to considering only such mitigating evidence as might be regarded as reducing his "moral blameworthiness." The jury was also deliberately misled about the impact that a single juror's vote might play in dictating whether he would live or die.

1) *Tennard v. Dretke*, 542 U.S. 274 (2004) disavowed any requirement of a nexus between evidence introduced in mitigation of sentence in a death penalty case and the underlying offense. *Tennard* reaffirmed that relevant mitigation evidence is any "evidence . . . the sentencer could reasonably find warrants a sentence less than death" and that the jury must not be precluded from considering and giving effect to such evidence.

Can the Texas death penalty statute, which instructs the jury to consider "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," but then limits the scope of the evidence that jurors consider mitigating to "evidence that a juror might regard as reducing the defendant's moral blameworthiness," be reconciled with this Court's long-established mitigation jurisprudence?

2) This Court has repeatedly insisted on heightened standards of reliability in death penalty proceedings, including the requirement that a jury must not be misled regarding the role it plays in the sentencing decision.

Can the Texas death penalty statute, which requires the jury to be affirmatively misinformed about the impact of a single juror's vote, and prevents the officers of the court from correcting that misstatement of the law, be reconciled with the Court's teaching?

LIST OF PARTIES

Petitioner BRIAN SUNIGA was the appellant in the court below and is an indigent death-sentenced inmate of the Texas Department of Criminal Justice.

Respondent, THE STATE OF TEXAS, by and through the Lubbock County District Attorney's Office, P.O. Box 10536, Lubbock, Texas 79408, was the appellee in the court below and prosecuted this case in the trial court.

No party is a corporation.

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PETITION FOR WRIT OF CERTIORARI

Brian Suniga respectfully petitions for a writ of certiorari to review a judgment and decision of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The judgment and opinion of the Texas Court of Criminal Appeals originally issued on February 1, 2017. *Brian Suniga v. State*, No. AP-77,041; 2017 Tex. Crim. App. LEXIS 182 (Tex. Crim. App. Feb. 1, 2017) (not designated for publication). A motion for rehearing was filed on March 14, 2017. Rehearing was granted, and a hearing conducted on remand to the trial court on matters unrelated to this petition. The original opinion was withdrawn, and a new opinion issued on March 6, 2019. *Suniga v. State*, AP-77,041, 2019 Tex. Crim. App. Unpub. LEXIS 128, 2019 WL 1051548 (Tex. Crim. App. March 6, 2019) (not designated for publication). That opinion is attached as Appendix A.

JURISDICTION

This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides, in pertinent part that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall ... 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." U.S. CONST. amend. XIV.

The Texas death penalty statute, Texas Code of Criminal Procedure Article 37.071§ 2, is in issue. A copy of that statute is provided as Appendix B.

STATEMENT OF THE CASE

A. Trial Court Proceedings.

Petitioner Brian Suniga was convicted in May 2014 of capital murder arising from the shooting of David Rowser while in the course of the attempted robbery of a pizza restaurant. Mr. Suniga was sentenced to death.

Mr. Suniga's counsel filed pretrial motions asking the court to declare unconstitutional certain statutorily-mandated sentencing instructions given to the jury in Texas death penalty cases, which state that mitigating evidence is "evidence that a juror might regard as reducing the defendant's moral blameworthiness." 1 CR 137-41,119-24. Trial counsel also challenged instructions the jury is given about how many of their number – 10 or 12 – are required to vote on certain special issues in order for a "yes" or a "no" answer to result. The answers to those special issues dictate whether the defendant will be sentenced to death. Trial counsel also challenged a

statutory prohibition on informing the jury of the result – a life sentence – that occurs if the jury cannot agree on the answers to the special issues. These motions were denied. 2 RR 36, 38-39. The defense re-urged the same objections at sentencing, but they were again overruled. 3 CR 2030-37; 3 CR 2038-75; 3 CR 2044-45, 2047-49, 2055-56, 2060, 2067-69; 34 RR 110-14.

At sentencing, the prosecution introduced victim-impact testimony from the victim's parents, 32 RR 15-20; 32 RR 21-26, as well as evidence of prior convictions, 32 RR 158-61; State's Exhibits 706-11, and of an unadjudicated domestic violence incident. 33 RR 22-28; 42-54. There was also evidence of minor disciplinary infractions during Mr. Suniga's pretrial detention. 32 RR 27-36, 37-39, 42-6.

The defense called Mr. Suniga's mother, Rosalinda, his two brothers Eric and Michael, and a few other relatives to testify at the penalty phase. 33 RR 105-277; 34 RR 73-106. The evidence established that Mr. Suniga was born in 1979 to Rosalinda and Augustine Suniga, who were 19 and 20 respectively at the time of their marriage. 33 RR 136-37. Rosalinda's father, an agricultural worker, would drink all weekend and become violent. 33 RR 137, 162, 205. There was a drinking "culture" in the Suniga family, with family get-togethers focusing on alcohol. 34 RR 89, 114. Mr. Suniga's father had served in the Air Force, but was an alcoholic. 33 RR 115, 138, 196-97, 215, 256. All of Rosalinda's brothers drank. 33 RR 163. His aunt Alma and

all of his uncles but one had done prison time. 33 RR 116, 214, 220. They "weren't the greatest of people." 3 RR 124.

Mr. Suniga's parents divorced when he was 3 or 4, and he saw little of his father. 34 RR 81, 143. Rosalinda remarried, and the family moved to Massachusetts. 33 RR 106, 190. The boys' father's behavior was such that Rosalinda was glad to move away – she did not want her children around him. 3 RR 168. Her new husband Albert was "more refined" than the Suniga family, and provided some structure, but he was also rather remote. 34 RR 79, 106-07, 197. The marriage did not last because Rosalinda drank and there were financial "differences." 33 RR 192-94.

Rosalinda and the boys moved back to Texas. 33 RR 108, 129; 34 RR 79-81. She worked, 33 RR 105-09, 217, but struggled to provide food, shelter, and clothing. 34 RR 94-97. She would "party" in her free time, and the boys had no father figure. 33 RR 109-10, 218, 223, 258-59. Sesilio Lopez Sr. ("Sesilio, Sr."), the former husband of Rosalinda's sister Mary, moved in. 33 RR170-2. Sesilio, Sr., had substance abuse issues and dealt drugs, as did many of the other men in the family. 33 RR 120, 221-2, 247-53; 34 RR 101-02. His son, Sesilio Lopez, Jr., would later become Mr. Suniga's codefendant in this case. 33 RR 120.

As a child, Mr. Suniga was largely left in the care of his two older brothers, Eric and Michael, although Eric soon departed for college and then the Navy. 33 RR117;

34 RR 97-99. Both brothers have had problems with alcohol and substance abuse. Eric is an alcoholic. 33 RR 160-61. Michael had dealt marijuana, methamphetamine, cocaine and acid for Sesilio, Sr., had served federal time on drug-related charges, had four DWI arrests and was serving a sentence for DWI at the time he testified. 33 RR 73, 88-89 251; 34 RR 74.

Michael began drinking in high school and fell in with the "wrong crowd," getting into a lot of fights. 34 RR 81-82. There were times when people tried to kick their door down, and an incident where a manhole cover was thrown through Mr. Suniga's window when he was at home. 34 RR 81-82. Michael was eventually sent to live with an aunt, 34 RR 83, the intention being to protect him from the people who were after him. 33 RR 223. He joined the army, but was discharged within a year. He moved back to Fort Worth where his mother was living. 24 RR 83-86. However, a cousin had shot a man over a debt, and that man knew where Michael's family lived. Their house was attacked early in the morning when Michael and Mr. Suniga were home. Loud shots rang out and the house was set on fire. 34 RR 90-94. After that attack, Mr. Suniga, who had been happy-go-lucky as a child, became apprehensive and hyper-vigilant around people. 33 RR 117-18, 259; 34 RR 95-96.

Mr. Suniga dropped out of school at 15. Rosalinda was working nights, and he was not supervised. 33 RR 170. Rosalinda was "distant" and did not provide a lot of

guidance. 33 RR 246. Mr. Suniga developed his own problems with alcohol and drugs, using methamphetamine from age 16 onward. 33 RR 178, 244; 34 RR 96-97.

Despite all this, when Mr. Suniga's father was incapacitated because of the impact of alcohol on his liver, Mr. Suniga moved in to take care of him during his final days. 33 RR 256-7. Mr. Suniga's step-grandmother Maria described him as treating her "real nice," and testified that he had once run after her truck on foot, just to give her a hug. 33 RR 233-34. His cousin Becky's husband Bruce loved Mr. Suniga "like my brother," and said that Mr. Suniga had lacked family support, with "nobody really to go to," and "no one to trust." 33 RR 275.

At Mr. Suniga's trial, the court excluded evidence from Michael about sexual abuse within the Suniga family. 34 RR 101-10. The court also excluded testimony from Rosalinda concerning the impact of alcohol in Eric and Michael's lives, 33 RR 184-186, and testimony from Mr. Suniga's aunt Delores about her father's physical and verbal abuse of her mother, and sexual abuse of her sister, Alma. 33 RR 207-08.

The sentencing instructions given to the jury mirrored the Texas death penalty statute. 3 CR 2079-82; 35 RR 9. The jury answered "yes" to the first two special issues and "no" to the mitigation special issues. 3 CR 2083-85. The trial court sentenced Mr. Suniga to death. 35 RR 44-47, 3 CR 2115-17.

B. Texas Court of Criminal Appeals.

Mr. Suniga's conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals. *See* Appendix A. That court gave no reason for rejecting his assertion that the provisions of the Texas death penalty statute were unconstitutional, other than that it had previously rejected similar arguments. *Id.* at *159-60.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION: THE EVOLUTION OF THE TEXAS DEATH PENALTY SENTENCING STATUTE.

The Texas death penalty statute, TEX. CODE CRIM. PROC. Art. 37.071, was enacted in response to this Court's holding that the state's previous system for imposing capital punishment was unconstitutional. *See Branch v. Texas*, No. 69-5031, decided together with *Furman v. Georgia*, 408 U.S. 238 (1972). As initially enacted, the statute required the jury to decide (1) whether the conduct in question was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (2) whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and (3) if raised by the evidence, whether the killing was an unreasonable response to provocation by the deceased. The jury could answer "yes" – resulting in the death

penalty – only if all 12 members agreed; it could answer "no" if 10 of 12 members agreed.

The post-*Furman* statute was upheld in *Jurek v. Texas*, 428 U.S. 262 (1976), on the basis that it permitted the defense "to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced" and that it would guide and focus "the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U.S. at 274.

At the same time that the Court was deciding *Jurek*, however, it also recognized that "the fundamental respect for humanity underlying the Eighth Amendment, *see Trop v. Dulles*, 356 U.S [86], 100 [1958] (plurality opinion), required consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court noted that "a process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 305; *Lockett v. Ohio*, 438 U.S. 586 (1978) (same).

The states must, therefore, permit the sentencer to consider, and in appropriate cases base a decision to impose a life sentence upon, any relevant mitigating factor. *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (same); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce."). This principle "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *California v. Brown*, 479 U.S. 538, 562 (1987) (Blackmun, J. dissenting).

This Court came to recognize that the three original special issues in the Texas statute failed to provide a sufficient vehicle for the jury to express its "reasoned moral response" to, for example, mitigating evidence of mental retardation or a background of childhood abuse. *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989) ("*Penry I*") (finding that none of the special issues was broad enough to allow the jury to consider and give effect to Penry's mitigating evidence).[1]

The Texas legislature eventually added the following mitigation special issue for jurors to address when the other special issues are answered in the affirmative:

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[1] *Penry I* followed a previous attempt to challenge the Texas sentencing scheme in *Franklin v. Lynaugh*, 487 U.S. 164, 175 (1988) in which the Court found that the special issues had allowed full consideration of the mitigation evidence presented by the petitioner.

> 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 rather than a death sentence be imposed.[2]

TEX. CODE CRIM. PROC. Art. 37.071 § 2 (e)(1).

This mitigation special issue requires unanimity for a "no" vote and 10 or more votes for a finding that would result in a life sentence. TEX. CODE CRIM. PROC. Art. 37.071 § 2 (d)(2). The legislature also, however, added a prohibition: "The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under subsection (c) or (e) of this article." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (a). Additionally, the legislature inserted limiting language that the jury "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM .PROC. Art. 37.071 § 2 (f)(4).

II. THE TEXAS DEATH PENALTY STATUTE IMPROPERLY LIMITS THE SCOPE OF THE EVIDENCE THAT MAY BE CONSIDERED MITIGATING TO THAT WHICH REDUCES THE DEFENDANT'S "MORAL BLAMEWORTHINESS."

A. *Tennard v. Dretke.*

[2]1991 Tex. Gen. Laws 838, 1991 Tex. SB 880 (1991).

As the legislative developments detailed above were taking place, Robert Tennard's case made its way to this Court. *Tennard* contested the imposition of a "nexus" requirement, such as was then being imposed in the Fifth Circuit. *See Tennard v. Cockrell*, 284 F.3d 591, 597 (5th Cir. 2002) (holding defendant must establish that offense was attributable to the evidence offered in mitigation of sentence). At sentencing, Tennard had offered evidence that he had an IQ of 67, and would later argue that the jury had been unable to give mitigating effect to that evidence. A plurality of the Texas Court of Criminal Appeals denied his direct appeal explaining that, "there is no evidence [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or . . . control his impulses . . . ." *Ex parte Tennard*, 960 S.W.2d 57, 62 (Tex. Crim. App. 1997) (*en banc*). The Fifth Circuit similarly rejected Tennard's argument that the jury instructions had not permitted his jury to give effect to his mitigation evidence, stating that his claim must fail because he did not show that the crime he committed was attributable to his low IQ. *Tennard*, 284 F.3d at 596.

In *Tennard v. Dretke*, 542 U.S. 274 (2004) both Texas' and the Fifth Circuit's approaches met with this Court's disapproval. The Court noted emphatically that it had long characterized the relevance standard in the mitigation context "in the most

expansive terms." *Tennard,* 542 U.S. at 284 (invoking *McKoy v. North Carolina,* 494 U.S. 433, 440-41 (1990)). *McKoy* had noted that the basic relevance standard, under both federal and state rules of evidence, is exceedingly broad. *Id.* That standard requires only that proffered evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tennard,* 542 U.S. at 285. This Court rejected the "nexus" test that the Fifth Circuit had used to "screen" mitigation evidence for what it deemed to have "constitutional relevance." *Tennard* re-emphasized that the relevance standard applicable to mitigating evidence in capital cases is simply whether the evidence might serve as a basis for a sentence less than death, regardless of any nexus between the mitigating evidence and the commission of the crime: "[T]he Fifth Circuit's screening test has no basis in our precedents." *Id.* at 284.

Later, in *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court reiterated that the sentencing jury must be able to consider and give effect to mitigating evidence, whether or not a nexus exists. *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 245 (2007) (same); *Brewer v. Quarterman*, 550 U.S. 286 (2007) (same).

B. *Tennard* and TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4) Cannot be Reconciled.

Mr. Suniga's case demonstrates that the Court's review of the Texas death penalty statute in its current form is needed because the instructions mandated by the statute impede jurors' consideration of the full range of potentially mitigating evidence.

A juror deciding the fate of a defendant facing the death penalty is presumed to follow their statute-based instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (cited in *Penry v. Johnson*, 532 U.S 782,799-800(2001)). The Texas juror in a death penalty case is instructed to decide the mitigation special issue after considering "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral *culpability* of the defendant." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (e)(1) (emphasis added). The juror is told to interpret that text by deeming "mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral *blameworthiness*." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4) (emphasis added).[3]

The words "blameworthiness" and "culpability" are virtually synonymous.[4]

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[3]In *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") the Court reviewed an *ad hoc* attempt to graft a jury nullification instruction onto the same special issues found to be constitutionally inadequate in *Penry I*. During oral argument, counsel for Penry indicated that the new mitigation special issue might sufficiently comply with *Penry I*. *Id.* at 803. However, the moral blameworthiness language was not discussed.

[4]*See Webster's Encyclopedic Unabridged Dictionary* 353 (1989); https://www.merriam-webster.com/thesaurus/culpability (last accessed May 3, 2019);

Both "blameworthiness" and "culpability" indicate a causative connection or nexus between a wrongful act and the status of the individual causing that act as being deserving of blame or punishment.[5]

This Court has used the term "moral culpability" in reference to capital sentencing, but its precedents establish that evidence that tends to reduce the defendant's degree of responsibility for the offense is not the only factor that may render someone less worthy of death. There is no denying that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). However, culpability related only to the offense in question is not the only relevant concern. For example, in *Williams v. Taylor*, 529 U.S. 362, 398 (2000)

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https://www.collinsdictionary.com/us/dictionary/english-thesaurus/blameworthiness (last accessed May 3, 2019).

[5]Dictionary definitions of "blameworthiness" include "[r]esponsible for doing wrong or causing undesirable effects; deserving blame," *American Heritage Dictionary of the English Language*, Houghton Mifflin Harcourt (5th ed. 2011), or "[r]esponsible for wrongdoing and deserving of censure or blame." *See* www.oxforddictionaries.com/us/definition/american-english/blameworthy (last visited March 7, 2019). "Culpability" is defined as "deserving to be blamed or considered responsible for something bad." *See* https://dictionary.cambridge.org/us/dictionary/english/culpable (last accessed March 26, 2019) or "meriting condemnation or blame especially as wrong or harmful." https://www.merriam-webster.com/dictionary/culpable (last accessed March 26, 2019).

the Court referred to evidence that "might well have influenced the jury's appraisal of [Williams'] moral culpability" as including testimony that included returning a prison guard's missing wallet during a previous incarceration, helping breaking up a prison drug ring, and good behavior in prison. *See also Porter v. McCollum*, 558 U.S. 30, 41 (2009)(discussing "heroic military service" in Korean War as relevant to moral culpability).

Indeed, as the Court noted in *Tennard*, requiring a demonstration that the criminal act was linked to some factor asserted in mitigation "screen[s] out any positive aspect of a defendant's character, because good character traits are neither 'handicap[s]' nor typically traits to which criminal activity is 'attributable.'" *Tennard*, 542 U.S. at 285. Well before deciding *Tennard*, this Court had made clear that good character evidence may not be excluded from the sentencer's consideration. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (evidence of adaptability to prison life was relevant at capital sentencing). Even though a defendant's good conduct in jail does "not relate specifically to [his] culpability for the crime he committed, there is no question but that such [evidence] would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Lockett*, 438 U.S. at 604 (quoted in *Tennard*, 524 U.S. at 285).

The problem created by the Texas statute – and the gravamen of Mr. Suniga's

concern – is the interaction between the special issue itself and the "moral blameworthiness" instruction. The special issue instructs the jury to consider three categories of evidence, listed in the disjunctive. A juror reading the special issue, without more, would assume that "the circumstances of the offense," the defendant's "character and background," and the defendant's "moral culpability" are all *different* things. This special issue, alone, allows the jury to consider "all of the evidence" concerning the defendant as mitigating. But then the limiting language of Article 37.071 § 2 (f)(4) – restricting "mitigating evidence" only to that which reduces "moral blameworthiness" – eliminates consideration of the defendant's "character and background" as a basis for a "yes" answer to the special issue. This interplay creates the danger that jurors will read "moral blameworthiness" as "blameworthiness" for the crime, since humans are not normally spoken of as "blameworthy" in the abstract, but only with regard to specific acts. Other considerations are necessarily excluded because this supplemental instruction is entirely superfluous if it is not read as limiting the more general instruction.[6] There is no way to read the plain text of this statutorily mandated instruction and miss the fact that it confines, rather than expands, the concept of mitigating evidence and that consequently the jurors will not consider the

[6]In construing a statute, every word and every provision should be given effect. Antonin Scalia & Bryan A. Garner, *Reading Law* (Thomson/West 2012) at 174 n. 5.

defendant's "character and background" as mitigating.

Thus, despite *Tennard*, a "nexus" restriction lives on because the statutory instructions given to all Texas death penalty juries reduce what is considered as mitigation to that which reduces "moral blameworthiness" to the exclusion of the defendant's character and background. As such the instructions, considered together, are unconstitutional under the Eighth Amendment.

No vehicle was therefore available to give effect to Mr. Suniga's evidence that he had nursed a dying parent or was a young man who would spontaneously run after his grandmother's vehicle just to give her a hug. Nor would the statute permit evidence that a defendant had come up with a means to alleviate climate change as was the case in *Jordan v. State*, 518 So. 2d 1186, 1188 (Miss. 1987). In *Jordan*, the defendant offered evidence that he had developed a method for generating electricity from an alternative energy source, "through wind tunnels and things of that nature," and had entered into an agreement with the Tennessee Valley Authority concerning his invention." *See also Boyde v. California*, 494 U.S. 370, 382 n. 5 (1990)(indicating petitioner's choreographic prowess capable of counseling imposition of sentence less than death). There may be instances of evidentiary exclusions that are reasonable even given the "low threshold of relevance" that applies to mitigation. *Tennard*, 542 U.S. at 285 (finding that the frequency of an inmate's showers, at issue in *State v.*

Plath, 313 S.E.2d 619, 627 (S.C. 1984) was irrelevant to the sentencing determination). But that is hardly the fact pattern presented here.

The shortcomings of the "moral blameworthiness" instruction have been repeatedly brought to the notice of the Texas Court of Criminal Appeals. *See, e.g, Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004), *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007). Yet that court denies what is plain: that the statutory language requires a nexus between the mitigating evidence and offense. Instead, the Texas court has claimed that *Tennard* "simply chastised" the Fifth Circuit for requiring a nexus and that no further problem exists because a jury is not "reasonably likely to infer a nexus requirement from the statutory words." *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010).[7]

The Fifth Circuit has likewise repeatedly held that it is permissible to instruct that mitigating evidence is evidence that reduces moral blameworthiness. *See, e.g., Blue v. Thaler*, 665 F.3d 647, 366 (5th Cir. 2011). However, that Court also recently recognized that the Texas court had "erroneously defined the universe of evidence relevant to moral blameworthiness too narrowly, undermining the rule established in

[7]Texas' parsimonious approach to mitigation evidence is further demonstrated by the Court of Criminal Appeals' decision in this case to uphold the trial court's exclusion of mitigation evidence of "intrafamilial sexual abuse, violence, and alcohol abuse," largely on relevance grounds. *Suniga*, No. AP-77,041, slip op. at 50-69; 2019 Tex. Crim. App. LEXIS 128 * 63-87 (Tex. Crim. App. Mar. 6, 2017).

Lockett," when it upheld the exclusion of childhood photographs of the defendant upon finding that there was no relationship between that evidence and his moral culpability for a murder. *Rhoades v. Davis*, 914 F.3d 357, 366-67 (5th Cir. 2019).

The Fifth Circuit held that the photographs were admissible by drawing a distinction "between culpability for the specific crime committed by Rhoades and his moral culpability more generally. In other words, although the photos do not relate to the circumstances of the crime, they go to his character and distinct identity." *Id.* at 367. However, it is difficult to see how Texas jurors, absent explicit clarification of their instructions, are supposed to understand that culpability or blameworthiness for the crime in question, and "general" moral culpability or blameworthiness can both be considered, given that the defendant's character and background are excluded by the Article 37.071 § 2 (f)(4) instruction.

Because some of Mr. Suniga's most humanizing mitigating evidence was placed beyond the jury's power to give it effect, this Court should grant the writ to explain why the Texas statutory definition of mitigating evidence must give way.

III. THE TEXAS DEATH PENALTY STATUTE, WHICH AFFIRMATIVELY MISLEADS JURORS ABOUT THE POWER OF THEIR VOTE, WHILE PREVENTING CORRECTION OF ANY MISAPPREHENSION, CANNOT BE RECONCILED WITH THE PRECEDENTS OF THIS COURT.

A. The Material Misrepresentations and Omissions in the Mandatory Jury Instructions Promote Unreliable Sentencing and Violate the Eighth and Fourteenth Amendments.

The Eighth and Fourteenth Amendments to the United States Constitution demand additional procedural safeguards in capital trials. *See generally, Furman v. Georgia,* 408 U.S. 238 (1972); *Gregg v. Georgia,* 428 U.S. 153 (1976); *see also Woodson,* 428 U.S. at 305 (holding that "death is qualitatively different" from other punishments). The effect of this is that legislatures and courts are obligated to strike a difficult, but constitutionally mandated, balance between the non-arbitrary imposition of the death penalty and the right of each defendant to individualized sentencing. The Texas statute's misleading instructions – whose clarification is prohibited – creates a constitutionally impermissible risk of arbitrariness. *See Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (explaining Eighth Amendment imposes heightened need for reliability in determination that death is the appropriate punishment in a specific case).

B. Texas' Mandatory Jury Instructions Deceive in Critical Ways.

Texas jurors are never explicitly instructed to decide whether the defendant should be given a death sentence or a sentence of life in prison without the possibility of parole; they are only asked to give "yes" or "no" answers to the statutory special issues. TEX. CODE CRIM. PROC. Art. 37.071 §§ 2 (c), (d)(2),(f)(1)-(2).

The statute explains that "If the jury . . . is unable to answer any issue . . . the court shall sentence the defendant to . . . life imprisonment without parole." *Id.* § 2(g). But jurors are not given this information. Nor are they told that being "unable to answer" includes being unable to reach a unanimous verdict because of a single holdout. Instead, the Texas death penalty statute materially deceives jurors by giving false information about the number of votes required to achieve a specific result, requiring the jury to be affirmatively misinformed about the impact of a single juror's vote or any non-unanimous vote.[8] The statute also prevents the officers of the court from correcting that misstatement of the law, imposing a gag rule that prevents the jurors learning the truth about the effect of their responses to the special issues.

1. Texas' Mandatory Jury Instructions Deceive Regarding How Many Jurors Must Agree on the Answers to the Special Issues.

The Texas sentencing statute requires the trial judge to instruct the jury that it "may not answer" the future dangerousness special issue "'yes' unless it agrees unanimously and may not answer any issue 'no' unless 10 or more jurors agree" and, conversely, the jury "may not answer" the mitigation special issue "'no' unless it agrees unanimously and may not answer the issue 'yes' unless 10 or more jurors

[8]This rule, requiring either a unanimous vote for death or a vote of at least ten jurors in order for a life sentence to be entered is colloquially referred to as the "10-12" or "12-10" rule. *See, e.g., Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010) (referring to "10-12" Rule); *Gonzales v. State*, 353 S.W.3d 826, 837 (Tex. Crim. App. 2011) (referring to "12-10" Rule).

agree." TEX. CODE CRIM. PROC. Art. 37.071 §§ 2 (d)(2) & (f)(2). The obvious implication of these confusing instructions is that the law requires a consensus of ten or more jurors to effect a life sentence; that is, the jurors are expressly told that they "may not" answer the issues in any way that would avoid a death sentence unless ten or more jurors agree. But this instruction is at odds with the law. Under Texas law, the effect of a single holdout juror is the same as a consensus of ten jurors:

> If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) *or is unable to answer any issue submitted* under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.

TEX. CODE CRIM. PROC. art. 37.071 § 2 (g) (emphasis added). As the Fifth Circuit has acknowledged, "[a] single juror thus has the power to prevent a death sentence based on his personal view of the mitigation evidence." *Allen v. Stephens*, 805 F.3d 617, 631 (5th Cir. 2015). Yet the mandatory jury instructions lead jurors to believe that they have to convince at least nine other jurors to vote a certain way to avoid sentencing the defendant to death or avoid a mistrial. These beliefs, prompted by the deceptive text, are contrary to the actual law.

2. Texas' Mandatory Jury Instructions Deceive Jurors Through a Material Omission about the Effect of Their Answers.

Instead of giving jurors the information they need to be able to understand the

effect of any deadlock, the statute expressly precludes the jury from hearing the truth about the consequences of a failure to achieve unanimity: "The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) [the special issues]." *Id.* § 2 (a)(1). That is, the statute imposes a "gag rule" that prevents jurors from having critical information relevant to making their own "reasoned moral response" in determining an appropriate sentence. *Penry I*, 492 U.S. at 329.

C. The Mandatory Jury Instructions Enhance the Likelihood of Error in Sentencing.

The Texas statutory sentencing instructions create confusion in the minds of the jurors. Jurors are first told that they "shall" answer "yes" or "no" to each issue presented; they are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another. This necessarily raises the question of what happens if the jury, despite being instructed that it must answer each question, is unable to get the necessary votes to give either answer. The statute clearly provides that in the event of a non-answer, the defendant is to receive the same sentence as when there is an actual verdict in favor of life, but the jury is not given an accurate statement of that operative law.

Moreover, not only does the statute fail to do everything possible to ensure that decisions regarding life and death do not result from this manufactured confusion, but it prohibits clarification by preventing jurors from being informed about the effect of a non-answer. The result is that, because of the misleading instruction concerning the impact of their vote, "a reasonable juror could well have believed that there was no vehicle for expressing the view that [the individual] did not deserve to be sentenced to death based upon his mitigating evidence." *Penry I*, 492 U.S. at 326.

This situation is unique to Texas capital-sentencing juries. During the merits phase of a Texas criminal trial, it is strictly correct to inform the jury that unanimity is required for either a verdict of guilt or acquittal. Although anything short of unanimity will lead to a mistrial, the defendant may still be retried. Under the Texas sentencing scheme, while the legislature might prefer a life sentence that derives from the agreement of ten jurors to one that arrives by default, the result is identical in both situations. *See Padgett v. State,* 717 S.W.2d 55, 58 (Tex. Crim. App. 1986) ("[A] jury's inability to answer a punishment question in a capital murder case has the same sentencing effect as a negative answer").

Mistrials are an inevitable cost associated with the American judicial system. *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Downum v. United States*, 372 U.S. 734, 736 (1963). But the prospect of a mistrial is seen as so onerous that federal

criminal law has long permitted the use of instructions directing jurors to continue to deliberate in good faith in the face of an impasse. *Allen v. United States*, 164 U.S. 492, 501 (1896). Without a clarifying instruction to counter Texas' deceptive statutory instructions, reasonable jurors will believe that failing to come to a verdict will result in a mistrial, which they may see as too heavy a cost for them to incur.

Empirical studies have demonstrated that jurors in death-penalty cases cannot and do not intuit that the result of a failure to agree is a sentence of life in prison without the possibility of parole. *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEXAS L. REV. 605, 670 (1999) ("In every state examined here, capital jurors vastly underestimate the time that convicted first-degree murderers not given the death penalty will stay in prison."); *see also* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68, 71, 72-73 (2003). In fact, jurors often mistakenly believe that they are required by law to impose death.[9] In response to empirical evidence that Texas' deceptive jury instructions have in fact deceived, the American Bar Association has urged Texas to amend its procedures. *See* Am. Bar

[9] *See generally*, Garvey, Stephen P., Sheri Lynn Johnson, and Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627, 635-37 (2000).

Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report – An Analysis of Texas's Death Penalty Laws, Procedures and Practices* at 315-6 (2013).[10]

The jury participating in a capital case likely become keenly aware of the expense, care, and time involved. By the time they deliberate sentencing, the jurors have sat through days or weeks of testimony and argument. In this context, any reasonable juror would be loath to cause a mistrial. When there is only one holdout juror in a capital case, concern over being the person responsible for a mistrial may increase exponentially. But the ability of that one person to stand behind his or her reasoned moral response to the evidence should not be "a game of 'chicken,' in which life or death turns on the . . . happenstance of whether the particular 'life' jurors or 'death' jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors" – *i.e.*, a mistrial. *Jones v. United States*, 527 U.S. 373, 417 (1999) (Ginsburg, J., dissenting).

Thus, instructing the jury that ten or more of them must agree in order for a life sentence to result, regardless of whether the court informs the jury of the effects of a non-answer, is an incorrect statement of the law and injects an impermissible

[10] *Available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf (last accessed May 3, 2019).

extraneous influence into jury deliberations.

Misinforming jurors and forcing them to deliberate without knowledge of what happens in the event of a non-answer presents them with a false dilemma. Because the jury is told that a death sentence follows from one set of answers and a life sentence follows from another, a reasonable juror will conclude that the *only* way to get either of these punishments is to answer the questions posed to them with the number of votes indicated in their instructions. *See Brown,* 479 U.S. at 541 (quoting *Francis v. Franklin,* 471 U.S. 316 (1985) (holding that the constitutional sufficiency of capital sentencing instructions is determined by "what a reasonable juror could have understood the charge as meaning")). This leaves jurors to speculate as to what would occur should they be unable to provide an answer to the issues. While they might, despite the jury charge, correctly guess that a failure to agree will result in a life sentence, they may more likely conclude that a non-answer will lead to a costly retrial or resentencing proceeding or absolute freedom for the defendant. Given that each of the jurors has already found the defendant guilty of a capital offense, none of these options would look desirable to a juror who honestly believes that a life sentence is warranted. Thus, jurors approaching the special issues are left saddled with the false belief that if they are unable to gain unanimity for a death sentence or ten or more votes for a life sentence, an unacceptable third option will result.

1. The Texas Statute Violates the Due Process Clause.

In sanctioning the gag rule, the Texas court has seemingly hung its hat on this Court's holding in *Jones*, 527 U.S. at 381–82, which held that the failure to instruct jurors on the consequences of their deadlock did not violate the Eighth Amendment. *See, e.g., Masterson v. State*, 155 S.W.3d 167, 176 (Tex. Crim. App. 2005). *Jones*, however, affirmed that a jury may not be affirmatively misled, as happens in Texas death penalty cases. 527 U.S. at 381–82. And in *Jones*, involving a challenge under the federal death-penalty statute the jury had specifically rejected as a potential aggravator the proposition that Jones would be a future danger. 527 U.S. at 410 n. 11. Other of this Court's precedents, however, have made clear that where the State argues that the defendant will be a future danger, the defendant is entitled to put before the jury the truth about the sentence that will result should the jury fail to unanimously agree that a death sentence is warranted.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court confirmed a defendant's Due Process Clause entitlement, in a capital case in which the State had argued that the defendant will be a future danger, to an instruction that a "life" sentence means life without parole. In *Simmons*, the trial court refused to instruct the jury in the penalty phase of a capital trial that "under state law the defendant was ineligible for parole." *Id*. at 156. The Court held that, "where the defendant's future

dangerousness is at issue" – as it is in every Texas death-penalty case – and where "state law prohibits the defendant's release on parole" – as is true in every current Texas death-penalty case – then "due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* This holding was based in part on the understanding that most jurors would not appreciate that "life imprisonment" precludes parole since, "[f]or much of our country's history, parole was a mainstay of state and federal sentencing regimes[.]" *Id.* at 169. Thus, failing to tell jurors explicitly that life imprisonment precluded parole had deprived the jurors of highly relevant information. *Id.* at 169-71. The Court also recognized that fears of parole would likely influence jurors to base their sentencing decision on something extraneous to the actual evidence. *Id.*

Inexplicably, the highly applicable holding in *Simmons* has never been fairly applied in Texas. *See* Robert Clary, *Texas's Capital-Sentencing Procedure Has a* Simmons *Problem: Its Gag Statute and 12-10 Rule Distort the Jury's Assessment of the Defendant's "Future Dangerousness,"* 54 AM. CRIM. L. REV. 57, 110–11 (2016) ("[T]he fact that the defendant will automatically receive a sentence of life in prison without possibility of parole if a Texas capital jury fails to achieve the consensus required by the 12-10 Rule is directly relevant to the jury's assessment of the defendant's future dangerousness.").

The misconception sown by Texas' deceptive jury instructions — that the failure to convince at least nine other jurors will result in a mistrial — amounts to an extraneous and improper influence on jury deliberations in the same way that a misconception about the possibility of parole was an improper influence that the Court found intolerable in *Simmons*. Specifically, by misleading jurors as to the result of their failure to reach either a unanimous or ten-vote agreement, the statute improperly coerces jurors to concur in death sentences on the basis of reasoning divorced from the merits. *See also Gardner v. Florida*, 430 U.S. 349, 362 (1977) ("The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'"); *Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994) (holding jury cannot be "affirmatively misled regarding its role in the sentencing process").

Even in the absence of evidence of confusion, the Court has stated unambiguously that the "trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." *Kelly v. South Carolina,* 534 U.S. 246, 256 (2002). The Court in *Kelly* held that, although the jury in that case did not inquire about parole, as the juries in *Simmons* and *Shafer v. South Carolina,* 532 U.S. 36 (2001) had done, common sense was all that was required to know that the jurors

might have been confused. *Id.* at 20. Similarly, common sense is sufficient to conclude that the Texas capital-sentencing statute, and in particular its prohibition on permitting trial judges to give sufficient instructions to explain the law, is unconstitutional. When jury instructions misinform jurors and purposefully prevent clarification, and verdicts are rendered out of such confusion, those instructions "introduce a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980) (overruled on other grounds).

2. The Texas Statute Violates the Eighth Amendment.

While the holding in *Simmons* is based on the Due Process Clause, a sentencing practice that violates the right to due process will, necessarily, also result in unreliable sentencing, contrary to the requirements of the Eighth Amendment. *See Woodson*, 428 U.S. at 305 (1976) (heightened reliability is critical to ensuring compliance with the Eighth Amendment). The Texas court's holdings sanctioning the "gag rule" are also incompatible with other decisions holding that jurors are not to be misled about their roles in the capital-sentencing process, which is supposed to involve heightened reliability. *See Caldwell*, 472 U.S. at 320 (vacating death sentence because the prosecutor had told the jury that the ultimate responsibility for determining the sentence rested with the appellate court, not with the jury, which was an inaccurate

statement of Mississippi law and diminished the jury's sense of sentencing responsibility); *see also Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (holding that Eighth Amendment requires specificity and clarity in guiding juror discretion). In capital cases there must be a sufficient process to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim . . . or mistake." *Eddings,* 455 U.S. at 118 (O'Connor, J., concurring). The Texas statute, however, creates the high probability of mistake or misapprehension on the part of the jury.

D. The Constitutional Infirmity of Instructions Which Fail to Clarify, or Actively Mislead, Jurors Concerning Their Role in Capital Sentencing Has Been Widely Recognized.

1. The Texas Court Has Acknowledged the Shortcomings of the "10-12" Rule.

The Texas Court of Criminal Appeals has acknowledged that the "reliability of the decision to impose death is reduced impermissibly when, among other reasons, jurors are misled into believing that their decision may be less momentous than it really is." *Draughon v. State*, 831 S.W.2d 331, 337 (Tex. Crim. App. 1992). Back in 1992, Texas' highest court recognized "the danger that jurors, unaware of the operation of the law, might mistakenly think a sentence other than death to be impossible unless ten of them agree" as constitutionally suspect. *Id.* In *Draughon*, that court even admitted that it was "past serious dispute" that the 10-12 rule is

"uncommonly enigmatic" because the failure of even one juror to agree with the group would result, not in a hung jury, but in an automatic sentence of life without parole, while acknowledging that Texas capital "jurors don't know this." *Id.* at 337.

Yet, despite these admissions, the court ultimately insisted that, regardless of the "shortcomings of the Texas capital sentencing procedure," that process stimulates jurors "to reach agreement through continued deliberation rather than abandon hope of consensus prematurely." *Id.* The court convinced itself that "at worst" jurors would just "not know the consequences of failing to agree." *Id.* at 338. The court claimed that juror ignorance related to sentencing was different from actively misleading jurors into believing that "the ultimate responsibility for the verdict rests elsewhere." *Id*. Despite recognizing that the language of the statutory instructions is deceptive, the court concluded that "no juror would be misled" into thinking a vote for death should be given unless ten or more jurors agreed to a life sentence. *Id.*

This reasoning was indefensible. But building on *Draughon*, the Texas court has repeatedly and summarily rejected challenges to the "10-12" rule and the gag rule, lumping them together as complaints about "failing to instruct jurors on the effects of their answers." *Allen v. State*, No. AP-74,951, 2006 Tex. Crim. App. LEXIS 2545, 2006 WL 1751227, *8 (Tex. Crim. App. Nov. 12, 2006) (not designated for

publication).[11]

Mr. Suniga's challenge, like that of many before him, is to a sentencing procedure that systematically misleads the jury while prohibiting any attempt by court or counsel to provide jurors with the truth. However, this statutory scheme, built on misinformation has never been reviewed by this Court, while *Draughon*'s indefensible conclusion, that "no juror would be misled" by misleading jury instructions, has been refuted by both empirical and anecdotal evidence.

2. Experience and Empirical Studies Have Demonstrated the Deep Flaws in the Operation of the "10-12" Rule Which Was Questioned During the Recent Texas Legislative Session.

Because jurors are told that each question must be answered, and verdict forms do not include an option for a non-answer, a reasonable juror might believe that a non-answer is not only undesirable, but impermissible. Such a juror might believe that because he or she is unable to secure the ten votes required to give the answer the juror desires, and because some answer either way must be given, that juror must vote

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[11] *Allen* cited the following as examples of the Texas court's routine rejection of challenges to these instructions: *Johnson v. State*, 68 S.W.3d 644, 656 (Tex. Crim. App. 2002); *Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000)); *see also Russeau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005) (noting that the court has "repeatedly upheld the constitutionality of Article 37.071, Section 2 (a)(1), which prohibits informing jurors of the effects of their failure to agree on the special issues."). Other examples include *Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010); *Escamilla v. State,* 143 S.W.3d 814, 828 (Tex. Crim. App. 2004); *Turner v. State*, 87 S.W.3d 111,118 (Tex. Crim. App. 2002); *Shannon v. State*, 942 S.W.2d 591, 600 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W.2d 35, 53-54 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995).

with the others and sentence the defendant to death. Although the law is clear that a death sentence can never be mandatory, and individual jurors are supposed to be free to vote for life, a belief that their options are more constrained reasonably follows from the Texas capital sentencing instructions.

The scant legislative history for Article 37.071, which contains the 10-12 rule and the gag rule, does not reveal an express intention to deceive jurors to increase the likelihood that a death sentence would be obtained. But divining legislative intent begins by "look[ing] first to the language of the statute." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Indisputably, the statute contains a directive to deceive by giving jurors instructions that are contrary to the underlying law and prevent them from learning the truth about the sentence that would result if even one juror disagrees about how to answer one of the special issues. The plain text can only be interpreted as stacking the deck in favor of a death sentence by creating the illusion that a holdout juror bears the additional burden of having to convince nine others to join them in resisting a death sentence or bear the onus of causing a mistrial.

The structure of the death-penalty statute seems to have the effect, at the very least, of creating moral distance between the decision-maker and the decision itself. In a Capital Jury Project interview, one juror admitted that the decision was "easier" than she expected and that she "thought it would be harder than just answering

questions." *See* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1039 (2001). Another Texas juror recounted that:

> [The judge] said that he wanted us to understand that we were not choosing whether somebody should get the death penalty or not as far as being responsible if he ends up dying as a result of getting the death penalty. That it was up to us to answer yes or no to, I think it was three, questions. And based on the way we answered those questions, the death penalty would be assigned or not assigned, according to Texas law. The defense tried to make us feel as though we would be responsible for [the defendant] dying if we gave him the death penalty so I think that the judge maybe took some of that sting away.

Id. at 1040. In live interviews of 153 capital jurors, only 28% of jurors agreed that determining whether the defendant lived or died was "strictly the jury's responsibility and no one else's"—and only 21% of jurors who gave a death sentence agreed with that proposition. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 350, 353 tbl.1 (1996). This empirical research underscores that the plain text of the statutory jury instructions may prevent, rather than promote, individual jurors' ability to give a "reasoned moral response" to the question of whether death is the appropriate sentence, contrary to this Court's directives. Reliance on misinformation whose correction is prohibited by statute and which creates the false specter of a mistrial results in the State of Texas actively deceiving its citizens when it asks them

to shoulder the momentous decision of deciding whether to sentence someone to death.

Additionally, powerful anecdotal evidence supports the conclusion that deceptive jury instructions have in fact deceived. Sven Berger, who served as a juror in Paul Storey's 2008 capital murder trial, spoke out when Storey, who he had helped sentence to death, was facing execution.[12] Berger explained he had taken the jury instructions at face value and believed that he had no choice. *Id.* Berger had not wanted to sentence the defendant to death because of his impression that the defendant would not be "a future danger to society." *Id.* But because a majority of the other jurors had wanted to vote for death, he had acquiesced. *Id.* Believing that he could not sway the other jurors to change their votes, Berger reluctantly assented. Because of the language in the jury instructions, he did not realize that his vote alone could have resulted in a life sentence. *Id*. Berger described being haunted by this experience and, ultimately, he was inspired to speak out.[13]

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[12]*See* Jolie McCullough, *Texas death penalty juror hopes to change law as execution looms*, TEXAS TRIBUNE (March 28, 2017). *Available at* https://www.texastribune.org/2017/03/28/texas-death-penalty-juror-hopes-change-law-execution-looms/ (last accessed May 3, 2019). *See also Ex parte Storey*, No. WR-75,828-02 (Tex. Crim. App. 2017); *Storey v. State*, No. AP-76,018, 2010 Tex. Crim. App. Unpub. LEXIS 602 (Tex. Crim. App. 2010).

[13]In a recent edition of the radio program "This American Life," Mr. Berger explained his experience of being misled about his role as a juror. *See* https://www.thisamericanlife.org/658/transcript (last accessed May 3,2019).

Sven Berger's outreach prompted three Texas legislators to file a bill in the 2017 Legislative Session to change the statute that keeps this critical information from jurors. *See* H.B. No. 3054. The bill died waiting to be placed on the calendar. The Criminal Jurisprudence committee had voted 6 in favor and only 1 against, a noteworthy result from a predominantly conservative, Republican committee. Similar bills were promulgated in the 2019 Legislative Session. *See* Tex. H.B. 1030, 86th Leg., R.S. (2019) and Tex. S.B. 716, 86th Leg., R.S. (2019). H.B. 1030, which would have removed the "10-12" rule, passed the full House by a vote of 133 to 10, but neither bill progressed beyond the committee stage.[14] Thus, it is clear that there is considerable legislative unease concerning the practice of misleading the citizens of Texas about the impact of their service on sentencing juries in death penalty cases.

3. Other States Have Recognized the Importance of Giving Jurors Accurate Information Concerning Their Role in Capital Sentencing.

Several states, recognizing the importance of giving jurors clarity about the effects of their responses on verdict forms in a capital-sentencing proceeding, and the impropriety of withholding accurate information, have declared such practices to violate Eighth Amendment protections. *See, e.g., Louisiana v. Williams*, 392 So.2d

[14] *See* https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1030#vote111 (last accessed May 29, 2019).

619, 634-35 (La. 1980) (holding that "by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action."); *Whalen v. State*, 492 A.2d 552, 562 (Del. 1985) (finding trial court's failure to adequately inform jurors that inability to unanimously agree would lead to life sentence was a "substantial denial of the defendant's constitutional rights"); *State v. Ramseur*, 106 N.J. 123, 309, 524 A.2d 188, 283(1987) (recognizing constitutional imperative exists in a capital case that jurors must understand the ultimate consequences of their decision, and be informed of effect of inability to agree). *See also* Pennsylvania Suggested Standard Jury Instruction 15.2502G (explaining that jury deadlock will result in life imprisonment).

In Florida, after this Court held unconstitutional that state's practice of permitting judges to override a non-unanimous jury and sentence a defendant to death, that state's standard verdict forms now expressly state at each step that a non-unanimous vote will lead to imposition of a life sentence without the possibility of parole. *See In Re: Standard Criminal Jury Instructions In Capital Cases*, No. SC17-583 at "Appendix" (Fla. May 24, 2018).[15] Thus, in other states there is no "hiding the

[15] *Available at* https://www.floridasupremecourt.org/content/download/243479/2145716/sc17-583.pdf (last accessed April 11, 2019).

ball," as there is with Texas' Article 37.071, § 2 (a)(1).

CONCLUSION

Texas' statutory capital jury instructions have, for decades, disseminated misinformation and required trial judges to lie to jurors and withhold material information regarding the effect of the jurors' response to the special issues that determine whether a human life will be forfeited. The instructions also narrow the scope of mitigating evidence that the jury can consider and use as a basis for its decision. The Texas Court of Criminal Appeals has been asked repeatedly to rectify this situation and reject these jury instructions as violating the Eighth Amendment and the Fourteenth Amendment's Due Process Clause, but has failed to do so.

Mr. Suniga's petition for writ of certiorari should be granted to remedy this constitutional violation.

Respectfully submitted,

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