No. 18-9564

IN THE
Supreme Court of the United States

BRIAN SUNIGA,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

LISA TANNER
Acting Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JENNIFER MORRIS
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
Jennifer.morris@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

A jury found Brian Suniga guilty of capital murder for killing David Rowser during the course of a robbery or an attempted robbery. In a separate sentencing proceeding, Suniga called eight witnesses to testify to his character and background. Then, in their closing arguments, the prosecutor and defense counsel reminded the jury to consider that evidence when answering the mitigation special issue, a catchall instruction on mitigating evidence. Finally, the trial court instructed the jury to consider "all the evidence," including that of Suniga's "character and background." The jury found insufficient mitigating circumstances to warrant a sentence less than death, and Suniga was sentenced to death.

Suniga now claims that the mitigation special issue improperly excludes consideration of character and background evidence and misleads jurors because it does not inform them of the consequences of deadlock.

The questions before the Court are thus:

1. Does Texas's mitigation special issue, instructing jurors to consider evidence of "the defendant's character and background," violate the Eighth Amendment for its exclusion of same?

2. Does Texas's capital sentencing scheme violate the Eighth Amendment where it, like its constitutionally affirmed federal counterpart, does not instruct jurors on the consequences of deadlock?

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BRIEF IN OPPOSITION

This is an appeal from the Texas Court of Criminal Appeals' (CCA) affirmance of the trial court's judgment. Suniga petitions this Court for a writ of certiorari based on Texas's mitigation special issue. He complains that the mitigation instruction improperly excludes character and background evidence and misleads jurors because it does not inform them of the consequences of deadlock. Two decades ago, this Court rejected the contention that the Eighth Amendment requires jurors to be instructed on the consequences of deadlock on a sentencing issue. *See Jones v. United States*, 527 U.S. 373 (1999). And two years after that, this Court indicated its approval of Texas's mitigation special issue. *See Penry v. Johnson*, 532 U.S. 782, 803 (2001) (*Penry II*). Since then, the CCA and the Fifth Circuit have repeatedly found that the instruction does not limit the scope of mitigation evidence as Suniga claims. *E.g., Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010); *Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014). This case confirms the last two decades of precedent: During the sentencing phase of his trial, Suniga presented significant evidence of his troubled upbringing, while highlighting his goodwill throughout. The jury was then instructed by defense counsel, the prosecutor, and the trial court to consider that evidence. No jury could have interpreted the mitigation special issue to exclude the evidence that it was thrice instructed to consider.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts as follows:

> The record reflects that David [Rowser] and his younger brother, Jonathan [Rowser], both worked at a pizza restaurant in Lubbock. At around 10:00 p.m. on [December 26, 2011], they were preparing to close the restaurant. David was cleaning the bathrooms, while Jonathan was manning the cash register. The last three customers were sitting at a table. Their server was refilling their drinks at a soda fountain near the cash register. Other servers were cleaning the restaurant or talking with Jonathan as they waited for the customers to leave.
>
> Two men entered the restaurant through the front door and approached Jonathan at the cash register. Jonathan and other witnesses believed that the men were there to place a last-minute take-out order until both men pointed guns at Jonathan and shouted at him, demanding money from the cash register. One man was Hispanic, had tattoos on his arms and neck, and was wearing "whiteout" contact lenses that blocked out all the color of his irises. The other man was also Hispanic and had some facial hair as well as a star-shaped tattoo on his face. He was shorter, heavier-set, and darker-complected than the first man. Both men wore "hoodies" and baggy pants.
>
> When Jonathan did not immediately open the cash register, one of the men grabbed the tip jar that was sitting on the counter near the register and both of them headed toward the door. David then emerged from cleaning the men's bathroom. The man wearing the whiteout contacts yelled, "That's what you get," as he shot David three times. David fell to the floor.
>
> Jonathan ran to David, who was bleeding profusely and coughing up blood. David asked Jonathan to help him. Jonathan applied

pressure to two gunshot wounds on David's chest. He yelled at David, trying to keep him awake, but David soon lost consciousness. Jonathan kept David's head and torso elevated, trying to help him breathe until first responders arrived. Paramedics loaded David into an ambulance and took him to University Medical Center. In the ambulance, they suctioned blood from David's lungs and inserted an endotracheal tube to keep his airway open. They placed David on a cardiac monitor, performed chest compressions, and "started an IV." However, David had no breath, pulse, or heart activity. He was pronounced dead in the hospital's trauma care center.

The Lubbock Police Department published descriptions of the suspects based on witness interviews. On the morning of December 27, a woman who worked at the front desk of a motel where [Suniga] and his accomplice Sesilio Lopez, Jr., had been staying, heard a news story about the robbery-murder. Based on the suspects' descriptions, she believed that [Suniga] and Lopez were the culprits. She called the motel manager, who then called the "Crime Line" number and provided police with [Suniga's] and Lopez's names and a description of their vehicle.

Based on this information and details provided in other calls to the "Crime Line," the Lubbock Police Department released a statewide "attempt to locate" bulletin describing the suspects and their vehicle and identifying [Suniga] and Lopez by name. About twenty-four hours after the offense, Taylor County sheriff's deputies stopped [Suniga] and Lopez because their vehicle matched the details provided in the bulletin. Upon confirming their identities and the capital murder warrants from Lubbock County, deputies arrested them and seized the vehicle.

Suniga v. State, No. 77,041, 2019 WL 1051548 (Tex. Crim. App. 2019).

II. Evidence Relating to Punishment

A. The State's case

During the punishment phase of trial, the State presented evidence of Suniga's criminal history, including convictions for possession of a prohibited weapon, unlawful carrying of weapons, assault causing bodily injury, and possession of methamphetamine. 32 RR 158–61; 43 RR. It also presented evidence of an unadjudicated act of domestic violence, 33 RR 23–26,[1] and of Suniga's gang membership, 32 RR 120–21, 141–43, and disciplinary infractions in prison, 32 RR 33–35, 38–39, 43–46, 109–11; 33 RR 32, 38–41.

B. The defense's case in mitigation

In his opening argument, defense counsel told the jury: "[Suniga] is a son. He is a brother. He is a grandson. He is a father. And he's also a husband . . . ." 33 RR 97. "[W]hat I'm asking you to do is give us enough room for you to hear the story about [Suniga]'s life." 33 RR 100. "You will be hearing evidence about his life, about who he is." 33 RR 102. Defense counsel then called eight witnesses to the stand to tell that story.

1. Eric Suniga

Suniga's eldest brother, Eric, testified that Suniga was a happy-go-lucky child. 33 RR 117. But their father, Augustine, was a "chronic alcoholic," 33 RR

[1] *See also* 33 RR 46–52.

115, and their parents divorced when Suniga was about three years old, 33 RR 106. Thereafter, the boys lived with their mother, Rosalinda. 33 RR 106. Rosalinda remarried when Suniga was five or six. 33 RR 106–07. The boys' stepfather, Albert, was a great father figure to them. 33 RR 107–08. But Albert was in the boys' lives for only about four or five years before he separated from their mother. 33 RR 107–09, 124. The boys saw Albert very rarely after that. 33 RR 108–09.

When Albert moved away, the boys continued living with Rosalinda. 3 RR 109. She left them generally unsupervised while she worked long hours and attended GED classes. 33 RR 109, 125. Eric testified that, while he did not pay much attention to Suniga at that time, he noticed that Suniga became more introverted then. 33 RR 118.

When Eric graduated from high school, he moved out of Rosalinda's house, and, around that time, Sesilio Lopez, Sr. moved in. 33 RR 115. Sesilio had issues with drugs and alcohol and made his living from narcotics trafficking. 33 RR 116, 120. Eric testified that he had not seen Suniga much since he moved out. 33 RR 114, 118.

Eric denied being an alcoholic but acknowledged that he liked to drink, saying that he would have a drink before going to bed. 33 RR 115. Eric stated that several of his maternal aunts and uncles had been to the penitentiary; among his uncles, only the youngest, Larry, had avoided prison. 33 RR 116.

Eric recalled that most of his family members' offenses were narcotics-related. 33 RR 117. Eric also testified that his brother Michael had issues with drugs and alcohol. 33 RR 117. At the time of Suniga's trial, Michael was in a correctional facility for a parole violation because of alcohol. 33 RR 117.

During cross-examination, Eric stated that he had been married and had a little girl for whom he helped provide. 33 RR 125–26. Eric stated that Suniga had seven children. 33 RR 126. When the prosecutor asked if Suniga took care of and provided for those children, Eric stated that he did not know specifically, "but [he] would doubt it." 33 RR 126. Eric also acknowledged that his mother had modeled a good work ethic for her sons. 33 RR 125.

2. Rosalinda Davis

Suniga's mother, Rosalinda, testified that her parents moved around a lot in West Texas when she was a child. 33 RR 129–30. Her mother was a homemaker and her father was a farm worker. 33 RR 130. Rosalinda was one of ten children. 33 RR 130. She and her siblings worked on the farms with their father. 33 RR 137. Rosalinda recalled that she married Augustine when she was nineteen and he was twenty. 33 RR 137–38. She gave birth to Brian in Austin, Texas on December 27th, 1979. 33 RR 136, 139. The defense admitted several photographs of Suniga as an infant and a child. 33 RR 131–132. Rosalinda described each photograph to the jury, which included Suniga's first fishing experience as well as family trips to the zoo, lake, and caverns. 33 RR

146–50. Augustine was in the Air Force at the time shown in the photographs. 33 RR 138.

Augustine stayed in the service for twelve years, but when he got out, he became an alcoholic and didn't work anymore. 33 RR 138. Alcohol took over his life. 33 RR 143. Rosalinda recalled that Augustine was not a "mean drunk," but he liked to argue. 33 RR 143. They divorced in 1983, when Suniga was three or four years old. 33 RR 143–44.

Rosalinda further testified that Suniga had seven children. 33 RR 140. The defense admitted several photographs of Suniga with his children, and Rosalinda told the jury about them. 33 RR 153–55. She stated that she spent a lot of time with some of the children but never saw others. 33 RR 141. Suniga's oldest child, Aaron, was autistic and had birth defects. 33 RR 141–42. Rosalinda acknowledged that Suniga neither provided for his children nor fulfilled the role of a father for them. 33 RR 156-57. She stated that he was a good father when he spent time with his children, but he spent very little time with them. 33 RR 158.

Rosalinda testified that she considered Eric to be an alcoholic because he drank every day. 33 RR 159. Eric lived with her periodically, most recently from 2009 to 2011. 33 RR 159–60. Rosalinda also testified that Michael was in prison at the time of trial because of DWIs and a probation revocation. 33 RR

160. Rosalinda confirmed that alcohol had "caused problems for Michael in his life," such as "[j]ail, prison, [and] accidents. 33 RR 160–61.

Rosalinda testified that her father also had issues with alcohol while she was growing up. 33 RR 162. She described him as a "weekend drinker." 33 RR 162. Every Friday when he finished working, her father and the family would drive to Lubbock to get beer. 33 RR 162. They would bring it home and her father would drink all weekend. 33 RR 162. When Rosalinda was a young woman, her father was killed in a card game. 33 RR 163. Rosalinda testified that all of her siblings "drank," but she was not sure if they had "problems" with alcohol because she did not see them very often. 33 RR 163. She acknowledged that many of them had been to prison. 33 RR 164–65. Her brothers had gone to prison for drug offenses, and her sister Alma had gone to prison for shoplifting. 33 RR 164–65.

Rosalinda testified that she met her second husband, Albert, when they worked for the same company in Austin. 33 RR 165. She recalled that he was "a great father to" her children. 33 RR 165. They married in 1986. 33 RR 166. Albert joined the military, and when he was transferred to Massachusetts, the family moved there with him. 33 RR 167. Later, when Albert was transferred to California, Rosalinda and Albert separated. 33 RR 168. Rosalinda moved with her sons to Copperas Cove, Texas. 33 RR 169. Suniga was in the fifth grade then. 33 RR 169. Suniga began skipping school because Rosalinda was

"working nights" and not around to supervise him. 33 RR 170. He stopped going to school altogether when he was fifteen. 33 RR 170. Rosalinda and Albert finally divorced in the late 1990s. 33 RR 192.

Rosalinda acknowledged that Sesilio was a drug dealer who had been married to her sister when he and Rosalinda began having a romantic relationship. 33 RR 171. At the time of trial, Sesilio was in prison for drug dealing. 33 RR 172.

On cross-examination, Rosalinda stated that Suniga had issues with alcohol and drugs. 33 RR 178. She stated that he had a good relationship with his father, Augustine. 33 RR 180. She and Augustine taught Suniga right from wrong. 33 RR 180. Rosalinda acknowledged that, while all three of her sons had alcohol problems, only Suniga had killed someone. 33 RR 177. When the prosecutor asked Rosalinda if she took better care of Suniga's children than he did, she acknowledged that that was true. 33 RR 183.

3. Delores Garcia

Suniga's maternal aunt Delores Garcia testified that when she was growing up, she and her siblings worked in the fields with their father. 33 RR 302–03. Her father treated "the boys and girls" differently. 33 RR 204. Despite being younger than Rosalinda, Delores stated that she took on the role of protector because her father got violent when he drank. 33 RR 204.

Delores identified her siblings in a photograph that defense counsel showed her. 33 RR 211. She stated that four of her brothers had been to the penitentiary for drug offenses or DWIs. 33 RR 218. Her sister Alma also had been to prison, but Delores and her other sisters had not. 33 RR 218. Sesilio had been married to Delores's sister Mary at one time and later moved in with Rosalinda. 33 RR 212. Delores recalled that Rosalinda divorced Augustine over his alcohol abuse. 33 RR 215. After Rosalinda separated from her second husband, Albert, she worked very hard and did not spend time with her sons. 33 RR 218. She had little free time, and she spent any free time that she did have "partying." 33 RR 218. Rosalinda sent Michael to live with Delores in Fort Worth because he was getting into fights at school. 33 RR 223–24. He lived with Delores for a year while he finished high school, and then he "went back to living with Rosa" after Rosalinda and Suniga moved to Fort Worth. 33 RR 217.

4. Michael Suniga

Suniga's brother, Michael, testified that he was serving a prison sentence for his fourth DWI, after his probation was revoked. 34 RR 73. He had also served time for a federal charge of conspiracy to possess marijuana with intent to deliver. 34 RR 74. He recalled that his parents divorced when he was about six years old. 34 RR 76. He testified that his stepfather, Albert, was a good provider and a good man, but he was "hands-off" as a father figure; he did not

play games with the boys and he left their discipline up to their mother. 34 RR 79. The boys did not see Albert after they moved with their mother to Copperas Cove. 34 RR 80. Michael recalled that they did not have much contact with their father Augustine because he "was suffering from his own addiction." 34 RR 80–81.

Michael testified that Rosalinda worked a lot and was not around much when they lived in Copperas Cove. 34 RR 81. Eric then graduated from high school and left home. 34 RR 81. Michael started spending time with the guys who were skipping school and partying on the weekends. 34 RR 81–82. He also "loved women," and his interactions with them led to him getting into fights with other men. 34 RR 82. Suniga witnessed a lot of that conflict. 34 RR 82-83. One time, a group of guys who were mad at Michael threatened the whole family. 34 RR 82. They showed up outside the house, and one of them threw a manhole cover through Suniga's bedroom window. 34 RR 82. Suniga was home when that happened. 34 RR 82.

After the manhole cover incident, Rosalinda sent Michael to live with Delores in Fort Worth. 34 RR 83. Michael graduated from high school in Fort Worth and then joined the Army. 34 RR 84. Nine months later, he was discharged because of his drinking and fraternizing with enlisted women. 34 RR 84. By then, Rosalinda was living in Fort Worth, and Michael moved into her house. 34 RR 85. Suniga still lived with Rosalinda at that time. 34 RR 85.

Sesilio was also spending time there. 34 RR 86. Michael lived there for several months while he looked for work. 34 RR 87. Eventually, he moved to Eldorado, where he worked for a while. 34 RR 87.

Michael further testified that he returned to Fort Worth after he left that job, and he supported himself by selling marijuana. 34 RR 89. He worked for Sesilio, selling methamphetamine, cocaine, or acid. 34 RR 89. Michael stated that he has "always been an alcoholic," and his memory is sketchy as a result. 34 RR 88. He started drinking in high school and was an alcoholic by the time he was fifteen or sixteen. 34 RR 89. Michael testified that his father, uncles, and cousins were also alcoholics. 34 RR 89. He recalled that alcohol was the center of family get-togethers. 34 RR 89. Michael also recalled that Suniga used drugs, including methamphetamine, from around the time he was sixteen years old. 34 RR 89.

Michael testified that, while his mother and Sesilio were living together, one of Sesilio's son's, Jonathan, shot and wounded a family friend who owed Jonathan money. 34 RR 90–92. Jonathan left the area, but Michael feared for Rosalinda's safety because "everyone" associated Rosalinda's house with Jonathan, making it a likely target for retaliation. 34 RR 92. Michael told Rosalinda to leave town for the weekend, and she did. 34 RR 92. Michael was living in his own apartment by then, but he and Suniga armed themselves with guns and spent the night at Rosalinda's house to guard it. 34 RR 92.

Michael testified that while he and Suniga were drinking in the living room that night, their dog growled and they heard gunshots. 34 RR 93. Michael saw "a big ball of flame coming through the hallway enveloping the living room." 34 RR 93. The gunshots kept coming, the windows were shattering, and it sounded like someone was kicking in the front door. "It sounded like a war." 34 RR 94. Michael and Suniga fled to the kitchen and then they moved into the garage. 34 RR 94. They planned to "return fire," but when they opened the garage door, no one was there. 34 RR 94–95. They surveyed the damage and called 9-1-1. 34 RR 95. The police investigation revealed that gasoline had been poured on the front of the house. 34 RR 95. "[T]he gunshot patterns" indicated that there had been five shooters, with "[t]hree firing 12 gauge shotgun[s]," and "[t]wo firing 9mm. There [were] 60 rounds expended from the 9mm." 34 RR 95. Michael testified that, after that incident, Suniga became "much more apprehensive, much more vigilant. Maybe didn't trust people as much." 34 RR 96.

The State cross-examined Michael about prison conditions and his experiences with other inmates. 34 RR 103–04. Michael stated that he had been housed in sixty-man dormitories and that prison is a very violent place. 34 RR 105. He affirmed that prison inmates are not generally aware of other inmates' offenses of conviction. 34 RR 106. At the time of trial, Michael was

housed in an in-prison therapeutic community designed to modify negative behaviors and help him address his "issues." 34 RR 105–06.

5. Albert Trevino

Suniga's stepfather, Albert Trevino, testified he was in Eric's, Michael's, and Suniga's lives in a "day-to-day way" for about four years. 33 RR 193. Although he was not their biological father, he tried to fulfil that role for them. 33 RR 195. Albert described Suniga and his brothers as "fun loving kids" and said that "[n]one had a mean bone in their body." 33 RR 193. He testified that the boys respected him, 35 RR 194, and that their mother was a very "strong factor in their lives." She was "loving, . . . firm, and . . . strict." 33 RR 193.

6. Maria Suniga

Suniga's step grandmother, Maria Suniga, testified that Suniga called her "Abuelita" and "treated her real nice." 33 RR 233. She told the jury about a time a few years back when Suniga chased her van down the street so that he could give her a hug. 33 RR 234.

7. Rebecca Garcia

Suniga's cousin, Rebecca Garcia, testified that she would spend time with Suniga and his family during holiday gatherings that centered around eating and drinking. 33 RR 138, 242, 246. She admitted that she had issues with alcohol and that it had caused her to have a miscarriage. 33 RR 144. She that testified Suniga was not a drinker but struggled with drugs. 33 RR 244–

45. That said, Suniga "would stay away when he was doing [drugs]" because he knew she "didn't like it." 33 RR 245. As Suniga got older, Rebecca noticed that he started "holding everything in" and became "more closed." 33 RR 259.

Rebecca testified that Rosalinda loved Suniga but was "distant with him growing up." 33 RR 246. While Rebecca believed Rosalinda "loved her kids," she did not think Rosalinda was "there a lot of the time when . . . a kid would need their mother." 33 RR 246. When the prosecutor asked Rebecca if Rosalinda had a "work and go out and party" mentality, Rebecca answered, "Yes." 33 RR 259–60.

Rebecca confirmed that Suniga had been "involved in" domestic violence on more than one occasion. 33 RR 256. She also testified that Suniga's father, Augustine, died "from drinking." Rebecca believed that Augustine's liver failed him and described him as "very skinny and weak" before his death. 33 RR 256. She told the jury that Suniga took care of Augustine at the end of his life. 33 RR 257.

8. Bruce Castro

Suniga's friend, Bruce Castro, testified that he met Suniga in 1995 or 1996 through his wife, Rebecca Garcia. 33 RR 270–72. Bruce told the jury that he was "raised by a single mother, . . . never kn[ew] his father, and . . . [had] to fend for [him]self." 33 RR 272. He used drugs and alcohol to cope with his difficulties. 33 RR 272. Bruce and Suniga used drugs together. 33 RR 272. But

when Bruce became depressed and paranoid, he turned to his wife for support and was able to quit using drugs. Bruce testified that he believed drugs led Suniga to a similar place, but Suniga did not have the same family support system he had. 33 RR 274–75.

C. The jury's answers to the special issues

The jury was given the traditional future-dangerousness and mitigating-circumstances special issues. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(1), (d)(1); 35 RR 44; CR 2076–82. From the evidence, the jury found a "probability that Suniga would commit criminal acts of violence that would constitute a continuing threat to society." CR 2083. It further found that "all of the evidence . . . including . . . [that of Suniga's] character and background" did not demonstrate sufficient mitigating circumstances to warrant a sentence other than death. CR 2085. Based on their answers to the special issues, the trial court sentenced Suniga to death. 35 RR 46–47.

III. Direct Appeal

On direct appeal, Suniga challenged the trial court's rulings concerning the constitutionality of Article 37.071. Specifically, he asserted that (1) Article 37.071, §2(f)(4) is unconstitutional for limiting the definition of mitigating evidence to that which reduces the defendant's "moral blameworthiness" and (2) the statutory definition of mitigating evidence is unconstitutional because it imposes a "nexus" limitation. Brief for Appellant at 154–57, *Suniga v. State*,

No. AP-77,041, 2019 WL 1051548. He also challenged that the trial court's ruling on his objection to Texas's "10-12 Rule." He argued that Article 37.071, §§ 2(d)(2) and 2(f)(2) unconstitutionally misled jurors concerning the effect of their failure to agree on a sentence. Brief for Appellant at 157–60, *Suniga v. State*, No. AP-77,041, 2019 WL 1051548. The CCA rejected both claims, explaining that it had previously rejected the same arguments and was not persuaded to revisit the issue. Pet. Appx. A at 44 (citing *Coble*, 330 S.W.3d at 296, and *Prystash v. State*, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999)).

REASONS FOR DENYING THE WRIT

I. Suniga Fails to Justify a Grant of Writ of Certiorari.

At the outset, Suniga fails to provide justification for granting a writ of certiorari—no allegation of a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important. *See* Sup. Ct. R. 10(a)–(c). That absence lays bare Suniga's true request—for this Court to correct the CCA's application of a properly stated rule of law. That, however, is hardly an *adequate* justification for expending limited judicial resources on two ubiquitous claims that are no more important today than they were over the last nearly three decades of rejection. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v.*

Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). Suniga's petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h) (a petition for writ of certiorari should contain a "concise argument *amplifying* the reasons relied on for allowance of the writ" (emphasis added)).

II. Texas's Statutory Mitigation Instruction Is Constitutional.

Suniga argues the Court should grant his petition to review the constitutionality of Texas's statutory mitigation instruction, codified in Texas Code of Criminal Procedure Article 37.071, §§ 2(e)(1) and (f). He asserts that the statutory instruction[2] impermissibly restricts the scope of evidence a juror can consider as mitigating to that which reduces the defendant's moral blameworthiness to the exclusion of evidence of character and background. Pet. Cert. 12–19. He also asserts that the instruction implicitly requires a juror to find a nexus between the mitigating evidence and the capital murder for which the defendant is on trial. Pet. Cert. 17. Suniga's challenge is primarily a facial challenge to the constitutionality of Article 37.071 Section 2(e) and (f). But he also makes an as-applied challenge, arguing that his jury was not able to give effect to evidence that he cared for his sick father and once spontaneously hugged his grandmother. Pet. Cert. 17.

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[2] 3 CR 2076–82; 35 RR 9.

A. Texas's statutory mitigation instruction has been repeatedly upheld.

Texas's statutory mitigation instruction was codified in 1991. That instruction, which Suniga's jury received, requires a capital jury to decide:

> [w]hether, 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.

Tex. Code Crim. Proc. Article 37.071 § 2(e)(1). The statute then requires that the jury be instructed that it "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." Tex. Code Crim. Proc. Article 37.071 § 2(f)(4). The jury is also instructed that jurors "need not agree on what particular evidence supports an affirmative finding on the issue." Tex. Code Crim. Proc. Article 37.071 § 2(f)(3).

Texas's statutory mitigation instruction has been challenged on numerous occasions, none successful. *See, e.g., Coble*, 330 S.W.3d at 296. Indeed, the very challenges Suniga raises—that the statutory mitigation instruction impermissibly limits the scope of evidence and that the instruction implies a causal nexus between the capital murder and the mitigating evidence—were rejected by the CCA in *Coble* almost a decade ago. *Id.*; *see Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996) ("There is no evidence that must be viewed by a juror as being *per se* mitigating. . . . Because

the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges."). And at that time, the court noted that the challenge had been *repeatedly* rejected. *Coble*, 330 S.W.3d at 296. For example, in *Cantu v. State*, the CCA held that the statutory mitigation instruction does not impermissibly limit the scope of mitigating evidence "[b]ecause the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror." 939 S.W.2d 627, 649 (Tex. Crim. App. 1997).

Nonetheless, Suniga argues that a juror is likely to interpret the statutory mitigation instruction's definition of the scope of mitigating evidence to exclude evidence of character and background, because such evidence might not bear on his moral blameworthiness. Pet. Cert. at 16. But Suniga identifies no support for his constrained reading of the statute. And it is difficult to reconcile his reading of the statute with the statute itself, which, again, requires the jury to consider "all of the evidence," including that of "the defendant's character and background." Tex. Code Crim. Proc. Article 37.071 § 2(e)(1). Indeed, the CCA has explained that the mitigation instruction does not "force the jury to disregard" the evidence it explicitly instructs the jury to consider. *See Thuesen v. State*, 2014 WL 792038, at*49–50 (Tex. Crim. App.

2014) (explaining that the statutory mitigation instruction does not force the jury to disregard good character evidence and evidence of good deeds). The expansive mitigation instruction contained in "[S]ection 2(e) solves any potential narrowing problem in Section 2(f)." *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999). And Section 2(e) provides "the jury with a vehicle to respond to a broader range of mitigating evidence." *Id.*; *see Cantu*, 939 S.W.2d at 648–49.

Importantly, this Court has indicated its approval of Texas's current statutory mitigation instruction. *Penry II*, 532 U.S. at 803. In *Penry II*, this Court described the instruction as a "catchall", which implies—or asserts, even—that the special issue "catches all" mitigating evidence, not just evidence related to the crime. It further noted the instruction for its "brevity and clarity." *Id.* The CCA has also recognized that the current statutory mitigation instruction is simply "a codification of the dictates of *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*)]." *McFarland v. State*, 928 S.W.2d 482, 525 (Tex. Crim. App. 1996), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998). Similarly, the Fifth Circuit has held that Texas's statutory mitigation instruction does not impermissibly limit the scope of mitigating evidence. *Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014); *Blue v. Thaler*, 665 F.3d 647, 667–68 (5th Cir. 2011); *Beazley v. Johnson*, 242 F.3d 248, 259 (5th Cir. 2001). Suniga fails to identify any constitutional

infirmity in the mitigation instruction in the face of more than a decade of precedent affirming it.

Moreover, this Court has upheld comparable punishment-phase instructions in other cases. *See, e.g.*, *Boyde v. California*, 494 U.S. 370, 380 (1990), and *Ayers v. Belmontes*, 549 U.S. 7, 15–16 (2006). In so doing, it has explained that "[j]urors do not pars[e] instructions for subtle shades of meaning in the same way lawyers might." 494 U.S. at 380–81. When it comes to jury instructions, jurors' "common sense understanding" is likely to "prevail over technical hairsplitting." *Id.* Considering as much, this Court has declined defendants' invitations review a single part of an instruction "in artificial isolation," *Boyde*, 494 U.S. at 378, and to speculate about possible interpretations that might flow therefrom, *id.* at 380. Instead, it reviews an instruction in "the context of the overall charge," *Boyde*, 494 U.S. at 378, and requires a defendant to show "a reasonable likelihood that the jury . . . applied the . . . instruction in a way that prevents consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 378.

Boyde complained that California's instruction requiring the jury to consider "[a]ny . . . circumstance [that excused] the gravity of the crime" prevented consideration of his background and character, in that it implicitly limited the circumstances to those surrounding the crime. *Id.* This Court rejected Boyd's claim. *Id.* at 382. Crucial to its holding was that Boyd was

permitted to—and did—present background and character evidence during the punishment proceeding and that his counsel argued in closing that such evidence warranted a sentence less than death. *Id.* at 383–84.

As in *Boyde*, Suniga was allowed to—and did—present significant character and background evidence during the punishment phase. 33 RR 105–276; 34 RR 73–102. Suniga presented evidence that his parents divorced at an early age due to his father's alcoholism, and, while his mother remarried, his stepfather was only in his life for a short time. Suniga presented evidence that his mother neglected him and developed a romantic relationship with his drug-dealing uncle. He observed significant conflict and violence that affected him in his adolescence. In that environment, Suniga developed a drug problem but was without support to overcome it. He presented childhood pictures and pictures of him with his children. His step grandmother told the jury about a time when he spontaneously hugged her. And his cousin told the jury about how he cared for his alcoholic father on his deathbed.

Both the prosecutor and the defense assumed this evidence was relevant in their closing arguments. In fact, the prosecutor told the jury that in deciding the mitigation issue, it was to consider "everything [it knew] about" Suniga: "It's about character, it's about upbringing, it's about what we know about his history." 35 RR 16. The prosecutor went on to argue that the evidence showed that Suniga came from a supportive and privileged background and that his

character was bad. 35 RR at 16–18, 37–38. And at the end of his argument, the prosecutor referred the jury back to moral blameworthiness: it's about "moral character, . . . moral trustworthiness and all those things"—to include "remorse, morals, [and] character." 35 RR 38. Along the same lines, Suniga's counsel reiterated to the jury in closing:

> Mitigation is . . . what you think is sufficient. Each of you will make your individual moral judgments. The mitigation does not have to be connected to the crime. . . . This is, in fact, where each juror considers the good, the bad and the ugly.

35 RR 32–33. Defense counsel reminded the jury of the violence, drugs and alcohol, and insecurity that surrounded Suniga as a child and adolescent. 35 RR 19–27, 33–34. He argued that Suniga's upbringing warranted a sentence less than death. 35 RR 34. And when the defense rested, the jury was explicitly instructed to consider "all the evidence" including that relating to Suniga's "character and background." CR 2078.

The CCA's interpretation of the mitigation instruction in this case is the one most consistent with the evidence presented to the jury, the parties' closing arguments, and the instructions provided by the trial court. There is no reasonable likelihood that Suniga's jurors interpreted the instruction in the hairsplitting way that he does today. Accordingly, this Court should deny Suniga's petition.

B. Texas's statutory mitigation instruction does not require jurors to give effect only to mitigating evidence that has a nexus to the capital murder.

The CCA has also rejected the argument that the statutory mitigation instruction impermissibly requires a nexus between the capital murder and the mitigating evidence. *Coble*, 330 S.W.3d at 296; *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004). Suniga proffers no valid reason to doubt the CCA's conclusion that a Texas capital jury need not be instructed that no nexus is required because the jury would not "be reasonably likely to infer a nexus requirement from the statutory words." *Coble*, 330 S.W.3d at 296.

Suniga relies heavily on this Court's opinion in *Tennard v. Dretke*, 549 U.S. 274 (2004), for his proposition that the statutory mitigation instruction impermissibly requires a nexus between the capital murder and the mitigating evidence. Pet. Cert. at 15. But this Court's opinion in *Tennard* addressed Texas's prior punishment-phase jury instructions, which did not include a mitigation instruction. *See Preyor v. State*, 2008 WL 217974, at *6 (Tex. Crim. App. 2008) (noting that the court had held "the Supreme Court's *Tennard* decision—which was decided under another statutory scheme that did not include the mitigation special issue"—did not indicate the statutory mitigation instruction impermissibly narrowed the scope of mitigating evidence). Rather, the Court in *Tennard* rejected the *Fifth Circuit's* requirement that a federal habeas petitioner establish a nexus between the capital murder and the

mitigating evidence to show that he or she was entitled to a mitigation instruction so that the jury could give effect to that evidence. 542 U.S. at 285. The CCA has correctly recognized that *Tennard* does not stand for the proposition that Texas's current statutory mitigation instruction is constitutionally infirm. *Perry*, 158 S.W.3d at 449.

Moreover, the current statutory mitigation instruction does not require any such nexus for a juror to give effect to mitigating evidence. *See Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007) ("[A]ppellant does not explain how the jury instructions that were given prevented the jury from giving effect to any of his alleged mitigating evidence, and we perceive no barrier to the jury doing so."); *Davis v. State*, 2016 WL 6520209, at *48 (Tex. Crim. App. 2016); *cf. Tabler v. State*, 2009 WL 4931882, at *3 (Tex. Crim. App. 2009) (declining to find trial counsel ineffective for failing to object to the prosecutor's closing argument that a nexus must exist between the offense and the mitigating evidence because, *inter alia*, "the mitigation instruction provided by the trial court expressly commanded the jury to consider all of the evidence, including evidence of the defendant's background and character").

Suniga asserts that the statutory mitigation instruction did not permit his jury to give effect to evidence that he cared for his sick father and once spontaneously hugged his grandmother. Pet. Cert. at 17. But he identifies no support for his argument that his jury could not give effect to such evidence.

And the CCA has recognized that the statutory mitigation instruction permits a juror to give effect to evidence of a defendant's "good qualities as a father, family member, and worker." *Roberts*, 220 S.W.3d at 534. Under the same impression, the prosecutor and defense counsel in this case repeatedly told the jury as much. 35 RR 16, 32 ("The mitigation does not have to be connected to the crime."), 33, 38. Suniga's speculation that a juror might misunderstand the instruction—by disregarding its plain language requiring consideration of "all the evidence . . . including [that of] the defendant's character and background" and by disregarding counsel's closing arguments—is insufficient to substantiate either a facial or as-applied challenge to the statute. *See Jones*, 527 U.S. at 390 ("We have considered similar claims that allegedly ambiguous instructions caused jury confusion. The proper standard for reviewing such claims is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.") (internal citations and quotation omitted). Consequently, Suniga's petition should be denied.

III. Texas's "Selection Stage" Jury Instructions Are Not Misleading and Are, in All Things, Constitutional.

Suniga raises an oft-repeated complaint about Texas's "selection stage" jury instructions—that they are misleading because jurors are not told about the effect of a deadlock. Pet. Cert. 19–40. As often as this claim is raised, *id*. at

34 ("Suniga's challenge, like that of many before him"), it is denied because it lacks footing in the Constitution.

A. A good portion of Suniga's argument was not fairly presented to the state court.

This case also presents a poor vehicle for resolution—some of the present argument was not fairly presented in state court. Here, Suniga focuses much of his complaint on *proving* that jurors are confused or coerced by Texas's "selection stage" jury instructions. *See* Cert. Pet. 25–26 (citing several law review articles), 29 (citing a law review article), 34–38 (citing several law review articles, "anecdotal evidence," and legislative activity). Seemingly, Suniga tries to convert a facial challenge into an as-applied one. However, but for a single footnote citing a single law review article, no such argument was made in the court below. Brief for Appellant 167 n.43, *Suniga v. State*, No. AP-77,041, 2019 WL 1051548 (Tex. Crim. App. Feb. 22, 2016) (citing Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquires in Capital Cases*, 85 Cornell L. Rev. 627 (2000)).

The failure to present an argument in a state case, coming to this Court off direct review, implicates jurisdiction. This is because, if Suniga's claim is now an as-applied challenge, it was "'not pressed nor passed upon' in state court." *Illinois v. Gates*, 462 U.S. 213, 219 (1983). And that means it was not part of the "[f]inal judgment[] or decree[] rendered by the highest court of"

Texas necessary to give the Court jurisdiction over the issue. 28 U.S.C. § 1257(a). But even if Suniga's lack of fair presentation is not jurisdictional, *see id.* at 219 (noting a "lack of clarity as to the character of the 'not pressed or passed upon rule'"), "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). To the extent that Suniga has moved from making a facial challenge to using evidence to prove his point, the Court should not consider it either because it cannot or should not.

C. As this Court has already effectively decided, there is nothing misleading about Texas's "selection stage" jury instructions and no constitutional infirmity present.

This Court's death penalty sentencing jurisprudence "address[es] two different aspects of the capital decisionmaking process: the eligibility and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). To be eligible for a death sentence, "the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase." *Id.* at 971–72. Texas accomplishes this feat in the guilt phase by defining capital murder as an intentional or knowing[3] killing *plus* an aggravating factor. Tex. Penal Code § 19.03(a); *see Lowenfield v.*

[3] For the felony murder "aggravator" utilized here, a killing occurring during the course of a robbery, the mens rea for murder is only intentionally, not knowingly. Tex. Penal Code § 19.03(a)(2). For the other "aggravators," both mentes reae apply. *See, e.g.*, *id.* at § 19.03(a)(1), (3)–(9).

Phelps, 484 U.S. 231, 246 (1988) ("The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern.").

To select a death sentence as appropriate punishment, the jury must make an individualized determination accomplished by "consider[ing] relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 972. As discussed above, Texas does this during the sentencing phase of trial by providing the jury a catchall mitigation instruction, Tex. Code Crim. Proc. art. 37.071, § 2(e)(1), one noted for its "brevity and clarity," *Penry II*, 532 U.S. at 803 (citing Tex. Code Crim. Proc. art. 37.071, § 2(e)(1)).

Both these processes were accomplished in Suniga's case via jury instruction. 3.CR.2017–18 (defining capital murder as "intentionally commit[ing a] murder in the course of committing or attempting to commit . . . [a] robbery"), 2078–79 (utilizing the mitigation instruction cited in *Penry*). And both processes have been found facially constitutional. *See Lowenfield*, 484 U.S. at 246; *Jurek v. Texas*, 428 U.S. 262, 273–74 (1976) (plurality op.). Beyond these broad limits, states are permitted wide latitude in structuring their capital sentencing schemes. *See Tuilaepa*, 512 U.S. at 977 ("Both a backward-looking and a forward-looking inquiry are a permissible

part of the sentencing process, however, and States have considerable latitude in determining how to guide the sentencer's decision in this respect.").

Texas has exercised this discretion in a constitutional manner. In 1991, Texas added the "12-10" rule to its capital sentencing scheme.[4] Act of June 16, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Sess. Law Serv. Ch. 838. The process, as relevant to Suniga's challenge, has not substantively changed since. Then, and at the time of Suniga's trial, if a defendant has been found guilty of capital murder and the jury has determined him or her to be a future danger,

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[4] The 12-10 rule also applies to the future dangerousness "aggravator." Tex. Code Crim. Proc. art. 37.071 § 2(d)(2). That was added in 1973, post-*Furman* (and the lesser-known *Branch*). Act of June 14, 1973, 63d Leg., R.S., p. 1125, ch. 426, art. 3, § 1. But this "aggravator" has no constitutional significance in the eligibility process. *See Lowenfield*, 484 U.S. at 246 ("The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process."). Nor does it have constitutional significance in the selection process as that determination is accomplished solely through the mitigation question. *See Tuilaepa*, 512 U.S. at 972. As such, the only constitutional problems arising from aggravator jury instructions is if they utilize vague or overbroad definitions of aggravating circumstances. *See, e.g.*, *id.* at 973–74; *Arave v. Creech*, 507 U.S. 463, 474 (1993). But future dangerousness passes muster under this review. *See Tuilaepa*, 512 U.S. at 976–77. Indeed, the 12-10 rule was specifically mentioned in *Jurek*, wherein the Court found Texas's capital sentencing scheme facially constitutional. *Jurek*, 428 U.S. at 269 n.5, 274–75. Thus, Suniga's implicit suggestion is that the Court simply overlooked the constitutional significance of the 12-10 rule in finding that Texas's death penalty process was constitutional on its face. Nothing supports this argument.

In any event, no confusion or harm arises from the 12-10 rule vis-à-vis the future danger question—the jury must unanimously *agree* on it before moving to the mitigation question. *See* Tex. Code Crim. Proc. art. 37.071 § 2(d)(2). So, if the 12-10 rule is constitutionally problematic, and it is not, it is only in relation to the mitigation question—the constitutionally mandated selection process. Nonetheless, the argument below—that the 12-10 rule is constitutional as it concerns the mitigation question—applies equally to the future danger 12-10 rule.

the jury is then asked to answer whether there are sufficient mitigating circumstances to warrant a sentence less than death. Tex. Code Crim. Proc. art. 37.071 § 2(e)(1). Jurors are told that they are to answer the question either "yes" or "no," that they may not answer "no"—thereby effectively sentencing the defendant to death—unless they agree unanimously, and that they may not answer "yes"—thereby sparing the defendant a death sentence—unless at least ten jurors agree. *Id*. at art. 37.071 § 2(f). Jurors are also told that they "need not agree on what particular evidence supports an affirmative finding on" the mitigation question. *Id*. at art. 37.071 § 2(f)(3).

The component of this scheme that Suniga most vigorously challenges is the fact that jurors are not told that if any one of them cannot agree on a negative mitigation finding—if the jury deadlocks on effectively sentencing a defendant to death—then, by law, a life sentence is imposed. *Id*. at art. 37.071 § 2(g). This challenge is curious.

Jurors are not generally told what happens if they cannot come to agreement on any particular matter, at least as a matter of initial instructions. Indeed, if there are indications of verdict disagreement by jurors, it is normally only then that the consequences of deadlock are explained—an *Allen* charge. *See, e.g.*, *Lowenfield*, 484 U.S. at 237–38. But the problem there is that such a supplemental instruction can be improperly coercive, forcing agreement by browbeating instead of by respectful encouragement. *Id*. at 237. Suniga

provides no legitimate reason for why coercion should be baked into jury instructions at the outset of deliberations, before there is any indication of juror disagreement.

The only difference here is the legal consequence of a deadlock in Texas—it favors Suniga. But that outcome is a state's prerogative, not a constitutional issue. For example, several states permit retrials on sentence if the jury deadlocks on punishment. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-7552(k) ("At the penalty phase, if . . . the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury."); Cal. Penal Code § 190.4(b) ("If the . . . jury . . . has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be."). Do those states violate the Constitution because they do not immediately tell jurors that the failure to agree on punishment will result in another jury deciding the matter? Of course not, the Constitution is not so capricious.

The Court has already effectively decided this matter. Under the Federal Death Penalty Act, the failure of a sentencing jury to unanimously recommend a sentence of death leads to the imposition of a life sentence. *Jones*, 527 U.S. at 380–81. The same is true in Texas. Tex. Code Crim. Proc. art. 37.071 § 2(g). Nonetheless, jurors do not need to "be instructed as to the consequences of their failure to agree." *Jones*, 527 U.S. at 381. This is because all that is

constitutionally required at the selection phase is "a 'broad inquiry' into all 'constitutionally relevant mitigating evidence.'" *Id.* (quoting *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998)). Suniga "does not argue, nor could he, that the [state court's] failure to give [a deadlock] instruction prevented the jury from considering such evidence." *Id.* As explained above, the mitigation instruction provided Suniga's jury fulfilled this constitutional requirement, and jurors were further told they may make individualized determinations as to what evidence constituted mitigation. There is simply no basis to suggest that omission of a deadlock instruction misled Suniga's jurors from considering whatever evidence they thought mitigating.

The only other question, then, is whether the absence of a deadlock instruction "affirmatively misled" Suniga's jury "regarding its role in the sentencing process." *Jones*, 527 U.S. at 381–82 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). Again, the Court has addressed the matter:

> In no way, however, was the jury affirmatively misled by the [state court's] refusal to give [Suniga's deadlock] instruction. The truth of the matter is that the [deadlock] instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation. [Suniga's] argument, although less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. We have never suggested, for example, that the Eighth Amendment requires a jury to be instructed as to the consequences

> of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." We further have recognized that in a capital sentencing proceeding, the [g]overnment has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." We are of the view that a [deadlock] charge to the jury . . . might well have the effect of undermining this strong governmental interest.

Id. at 382 (fourth alteration in original) (footnotes omitted) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896); *Lowenfield*, 484 U.S. at 238). Indeed, the Court has rejected the requirement of a deadlock instruction in federal death penalty cases, where the Court is exercising its supervisory powers. *Id*. at 384. The CCA's decision should be given no less respect. It was a correct decision and Suniga's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

LISA TANNER
Acting Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jennifer Morris
JENNIFER MORRIS
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
Jennifer.morris@oag.texas.gov

Counsel for Respondent