No. 18-9564

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Mr. Suniga's Petition amply demonstrated that the Texas Court of Criminal Appeals ("CCA") decided the relevant federal constitutional issues in this case in ways that conflicted with this Court's decisions in the critical area of death penalty jurisprudence. The two questions presented to the Court for certiorari review explicitly asked whether specific aspects of the Texas death penalty sentencing statute can be reconciled with federal constitutional law. Petition at i. The State of Texas nonetheless claims that Mr. Suniga has failed to provide a justification for the grant of certiorari because, for example, of "a direct conflict between the state court and this one." Resp. Br. at 17-18. However, the State provides few arguments to address Mr. Suniga's contentions that the current Texas statute's "moral blameworthiness" restriction contravenes "the assurance upon which *Jurek* [*v. Texas*, 428 U.S. 262 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence," *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) ("*Penry I*").

The State also fails to address the deception inherent in the Texas statute, which is not merely silent with respect to the indisputable fact that a single juror's vote can result in a sentence of life without parole, but actively misleads the jury into thinking

otherwise, while explicitly forbidding communication of the truth.

The State minimizes the probable impact of instructions that unconstitutionally narrow the scope of the mitigating evidence to which the jury can give effect, while asking the Court to ignore the false information the statute requires jurors to be given about the role of their individual vote in the ultimate sentencing decision.

Mr. Suniga respectfully submits that the Court should grant the petition and summarily reverse the judgment below.

I. THE "MORAL BLAMEWORTHINESS" INSTRUCTION REMOVES MITIGATING EVIDENCE UNRELATED TO THE OFFENSE IN QUESTION FROM THE JURY'S CONSIDERATION.

A. This Court Has Never Specifically Addressed, Let Alone Approved, Texas' "Moral Blameworthiness" Instruction.

The State misrepresents this Court's holding in *Penry v. Johnson*, 532 U.S. 782, 803 (2001) (*Penry II*), claiming that the Court has "indicated its approval" of Texas current mandatory mitigation instructions. Resp. Br. at 1, 21-22. The Court in *Penry II,* 532 U.S. at 803, merely indicated that a "clearly drafted catchall instruction . . . *might*" have cured the deficiencies of the Texas statute addressed in *Penry I*. Moreover, *Penry II* did not discuss, or even mention, the "moral blameworthiness" instruction. The then-new mitigation special issue was not the actual focus of that case, which held that a confusing non-statutory jury nullification instruction had not

afforded an adequate vehicle for jurors to give effect to the mitigating evidence that had been put before them. *Penry II,* 532 U.S. at 804.

B. The "Moral Blameworthiness" Instruction Excludes Evidence from Consideration, Rather than Acting as a "Catchall."

The State accuses Mr. Suniga of interpreting the "moral blameworthiness" instruction in a "hairsplitting way." Resp. Br. at 24. Mr. Suniga is not asking the Court to split hairs, but simply to read the plain text of the Statute, TEX. CODE CRIM. PROC. Art. 37.071 § 2 (d)(1), (f)(4). That review reveals that while the initial instruction to consider "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," could perhaps be considered a "clearly drafted" vehicle for the jury's constitutional consideration of mitigating evidence, *Penry II*, 532 U.S. at 803, the follow-up "moral blameworthiness" instruction explicitly limits what jurors can consider to be mitigating.

The State claims that "it is difficult" to reconcile Mr. Suniga's "reading of the statute with the statute itself." Resp. Br. at 20. However, it is not difficult to understand that when a general proposition is given, but then followed with specific language limiting the scope of that proposition, the words of that subsequent instruction will be given effect. In this case, as in the commonplace canons of

statutory interpretation, the "expression of one thing implies the exclusion of others *(expressio unius est exclusio alterius*)," and that exclusion renders the Texas statute unconstitutional.[1]

The State incorrectly suggests that *Penry II* described the special issue itself as a "catchall" provision. Resp. Brf. At 21; *Penry II,* 532 at 803. A true "catchall" instruction on mitigation would indeed affirm that jurors may consider any and all mitigating evidence properly put before them, as this Court's case law requires. *See, e.g., Penry I*, 492 U.S. at 328. The federal government and other states have enacted such provisions to ensure that a jury does not believe itself to be limited to explicitly identified mitigating factors. *See, e.g.*, 18 U.S.C. § 3592 (a)(8) which, after listing specific factors for consideration adds a true "catchall" of any "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." *See also, e.g.,* FLA. STAT. § 921.141 (7)(h): "The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty"; 42 PA.C.S. § 9711 (e)(8): "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." However, contrary to the State's

[1] *Jennings v. Rodriguez*, ___ U.S. ___, 138 S. Ct. 830, 844 (2018) (discussing A. Scalia & B. Garner, *Reading Law* 107 (2012)).

urging, in Texas, although the mitigation special issue itself may allow consideration of all evidence – not just "evidence related to the crime," Resp. Br. at 21 – the "moral blameworthiness" provision actually negates any "catchall" effect of the special issue itself. Thus, the State's references to *Boyde v. California*, 494 U.S. 370 (1990) and *Ayers v. Belmontes*, 549 U.S. 7 (2006) are inapposite. The California instruction discussed in those cases was a true catchall, given after a list of ten specific factors for the jury's consideration. *Boyde,* 494 U.S. at 373-74; *Belmontes*, 549 U.S. at 9. In Texas the reverse is the case. Texas jurors – like Henry Ford's customers who could buy a vehicle in "any color they want so long as it is black" – are limited to considering and giving effect to mitigating evidence that evokes a belief in them that the defendant should live *only* if the evidence is "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4).[2] Thus, even if a juror initially considers "all of the evidence" under § 2 (e)(1), the decision as to what evidence actually amounts to a "sufficient mitigating circumstance" is circumscribed by the § 2 (f)(4) definition of mitigating evidence as that evidence which "a juror might regard as reducing the defendant's moral blameworthiness." This is not a catchall, but instead a sieve that strains out any evidence lacking a nexus to the offense. *See* Pet. at 12-19.

[2]Henry Ford, *My Life and Work*, Doubleday, Page & Co. (1922) at 72.

C. The Texas Courts Have Not Been as Receptive to Mitigation Evidence as the State Suggests.

The State argues to this Court that "Suniga was allowed to—and did—present significant character and background evidence during the punishment phase," Resp. Brf. at 23. However, at the trial of this case the State successfully moved to exclude mitigating evidence from three witnesses, objecting on the basis of relevance to "(1) [Mr. Suniga's] brother Michael's testimony concerning sexual abuse within the family; (2) his maternal aunt Delores's testimony concerning her father's physical and verbal abuse of her mother and the sexual abuse of her sister Alma; and (3) his mother Rosalinda's testimony 'concerning the problems that alcohol had wrought in the lives of' Appellant's brothers, Michael and Eric." *Suniga v. State*, AP-77,041, 2019 Tex. Crim. App. Unpub. LEXIS 128 * 62-87, 2019 WL 1051548 (Tex. Crim. App. March 6, 2019) (not designated for publication).

The CCA upheld the exclusion of this evidence either as not an abuse of discretion, or as harmless. *Id.* Thus, when the State itself succeeded in curtailing Mr. Suniga's mitigation case, it is inconsistent for it to suggest that he had virtual *carte blanche* to present whatever mitigation evidence he proffered. And the CCA's dismissive approach to the exclusion of mitigation evidence demonstrates that the

Texas courts are far from as open to mitigation evidence as the State represents.[3]

The State further strains to create the impression that Texas capital murder defendants encounter no obstacles to the receipt, consideration, and use of mitigation evidence at sentencing by pointing out that *Tennard v. Dretke*, 542 U.S. 274 (2004) was tried at a time when the Texas statute contained no mitigation instruction at all, and that the CCA has subsequently noted in *Perry v. State*, 158 S.W.3d 438, 448 (Tex. Crim. App. 2004) that *Tennard* did not criticize the "moral blameworthiness" instruction. Resp. Br. at 25-26. But that instruction was not at issue or even mentioned in *Tennard*, which nonetheless upheld the principle that the sentencing jury must be able to consider and give effect to any evidence that 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. 524 U.S. at 288-89.

Regardless of the State's attempts to avoid the issue, Texas cases that hold "that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness," *see, e.g., Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1997) fail to address the reality that the "moral blameworthiness" instruction singles out one type of evidence as mitigating – that

[3]In its factual narrative, the State incorrectly asserts that evidence of "disciplinary infractions in prison" was presented at trial. Resp. Br. at 4. Those few infractions actually occurred in the county jail. 32 RR 29-39, 42-6, 109-11; 33 RR 32, 38–41.

which is connected to the action for which the defendant may or may not be considered blameworthy. Pet. at 13-17. The State ignores the reality that this instruction actually forms part of the Texas death penalty sentencing scheme, and that it is presumed that the Texas legislature intended the entire statute to be effective. TEX. GOV'T CODE § 311.021. The State also ignores the reality that, while jurors may not "pars[e] instructions for subtle shades of meaning in the same way lawyers might," *Boyde*, 494 U.S. at 380–81, Resp. Brf. at 22, the singling out of one type of evidence – that which may reduce blameworthiness – from all others, creates "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.

Notably, the State offers no explanation for what the Texas legislature intended to accomplish by including in this critical statute an instruction whose language mandates that the jury "shall" consider mitigating evidence to be only that perceived as reducing the defendant's moral blameworthiness.

II. THE "10-12" RULE MISLEADS JURORS ABOUT THE EFFECT OF THEIR INDIVIDUAL VOTES ON THE SPECIAL ISSUES AND FORBIDS CORRECTION OF THAT FALSE IMPRESSION.

A. This Court Has Jurisdiction To Grant Certiorari.

The State contends that Mr. Suniga is bringing an as-applied challenge to the statute for the first time in this Court. The State takes this position because the

petition refers to various law review articles and to legislative activity, as well as a publicized instance of a juror's dismay at being misled by the Texas statute's "10-12" rule.[4] Consequently, the State claims, this Court may not have jurisdiction. Resp. Br. at 27-29. That argument is unavailing. The State seems to be confusing "authority" and "evidence." The materials cited in the petition are no different from any other routine citations to scholarship or to legislative developments. Indeed, the Court's own rules require the petition to contain argument "*amplifying* the reasons relied on for allowance of the writ." SUP. CT. R. 14(h) (emphasis added). The fact that Mr. Suniga has provided a fuller picture of the legal landscape than he did in the context of his direct appeal does not mean that he failed to raise the same arguments below that he raises now. The State actually admits elsewhere that these issues were raised. Resp. Br. at 16-17. The assertion that there is some jurisdictional failing here should be viewed as mere clutching at straws.

B. This Court Has Not Given Previous Substantive Consideration to the "10-12" Rule or its "Gag Rule" Counterpart.

The State posits that Mr. Suniga "implicit[ly] suggest[s] that the Court simply

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[4]A similar case is currently before the Texas Court of Criminal Appeals. In *Mark Anthony Gonzalez v. State*, No. AP-77,066, submitted January 30, 2019, a deliberating juror told the court that she did not believe the defendant should be sentenced to death, and that she was afraid that she would cause a mistrial by holding out against other jurors. The trial court refused to instruct her that under Texas law her single vote for life would not result in a mistrial but in an automatic life sentence.

overlooked the constitutional significance of the 12-10 rule in finding that Texas's death penalty process was constitutional on its face" when it decided *Jurek*'s broad challenge to the Texas statute. Resp Br. at 31. The Court did mention the rule in a footnote in *Jurek*, in describing the structure of the statute as it then existed. 428 U.S. at 269, 274–75 n.5. The *Jurek* Court was not asked to specifically address the 10-12 rule. Nor could the Court consider the "gag rule" contained in TEX. CODE CRIM. PROC. Art. 37.071 § 2 (a)(1), since that was not enacted until 1991. *See* 1991 Tex. Gen. Laws 838, 1991 Tex. S.B. 880 (1991). Thus, the State's imputation that this Court has somehow *sub silentio* considered these aspects of the statute and has found that they pass constitutional muster is misleading.

The State also discusses the 10-12 rule as it applies to the "future dangerousness" special issue, pointing to the Court's decision in *Tuilaepa v. California*, 512 U.S. 967, 976-77 (1994) as indicating that a "predictive judgment" of future dangerousness is a constitutionally acceptable aggravating factor. Yet the Court has never addressed the constitutionality of the 10-12 rule in the context of that prediction or otherwise. Should it do so, it might well dismiss the State's glib assertion that the deceptive 10-12 rule cannot cause harm in the context of future dangerousness because the jurors are told they have to be unanimous to move on to the mitigation question. Resp. Br. at 31 n. 4. The focus of Mr. Suniga's complaint is

the impact of the rule on the mitigation special issue. However, he notes that the concern that jurors who have been misled about the power of their single vote will feel pressured by the possibility of a mistrial and will therefore vote with the other 11 jurors when they would not otherwise do so, applies to the "future dangerousness" special issue, just as much as to jurors who feel coerced into voting against their true position when it comes to mitigation. Pet. at 26-27. By bringing up the analogous 10-12 rule concerning future dangerousness, the State exposes a further problem with the Texas statute, rather than allaying concern.

C. Reliance on *Jones v. United States* is Misplaced.

The State suggests that Mr. Suniga's challenge to the 10-12 rule is resolved by *Jones v. United States*, 527 U.S. 373 (1999) (plurality opinion). That attempt is unsound because it obscures some dispositively different facts. In *Jones*, the jurors were not actively deceived about a need to recruit 10 or more jurors to be able to effect a life-without-parole option. In *Jones*, the Court found that the jury had "[i]n no way" been affirmatively misled, *id*. at 382; yet in Texas, *every* jury charged with sentencing someone to death is "'affirmatively misled regarding its role in the sentencing process.'" *Id.* at 381 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)).

See TEX. CODE CRIM. PROC. Art. 37.071 § 2(d)(2), (f)(2).[5] Both the federal death penalty statute and Texas's article 37.071 allow for only two options as a matter of law: death or life without parole; and both allow for the latter in the event of a deadlock. But only the Texas scheme affirmatively misleads jurors, a requirement this Court has condemned as unconstitutional. Additionally, the Court in other death penalty cases has emphasized 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. *See Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (establishing entitlement, under Due Process Clause, to instruction that a "life" sentence means life without parole in capital cases in which the State has argued that a defendant will be a future danger).[6]

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[5]In contrast, the proposed instruction in *Jones* had "no bearing on the jury's role in the sentencing process." *Jones*, 527 U.S. at 382. That can hardly be said of the instructions mandated by the Texas statute which affirmatively misleads the jurors as to the threshold number of votes required to impose a sentence of life and affirmatively bar the court, counsel and the defendant from revealing accurate information to the jurors to dispel this false and misleading impression.

[6]As noted in 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 (2016), where a "life-leaning" juror holds out, all jurors are left to speculate what the sentencing result might be. They might reasonably wonder whether the defendant will receive a new sentencing hearing or even perhaps be sentenced by the court to a lesser punishment allowing for parole, causing the jurors to perceive the defendant as presenting a greater risk of future danger to society

The State all but ignores the awkward fact that in Texas the statutorily mandated instructions given to all jurors in death penalty cases affirmatively lie to them about the actual number of votes required for a life sentence to be imposed while forbidding disclosure of the truth, even when *Simmons* and the Due Process Clause require that information to be imparted. Instead, the State seeks refuge in *Jones*' discussion of the Eighth Amendment in a case where the jury had rejected future dangerousness as an aggravator. Resp. Br. at 34-35*; Jones*, 527 U.S. 373, 410 n. 11. Tellingly, the State does not even mention *Simmons*, let alone dispute that *Simmons* and its progeny mandate that in every case the jury must receive accurate information – and certainly not misinformation – as to how the jurors may choose to impose a sentence of life without possibility of parole.

III. THE PREVIOUS ADVERSE STATE COURT RULINGS ON THESE ISSUES DEMONSTRATE THE NEED FOR THIS COURT TO CONSIDER THE QUESTIONS BEFORE IT ON THEIR MERITS.

These issues have been presented numerous times in the CCA and have been routinely rejected, generally with no analysis. However, the fact that advocates have continued to press these issues despite the Texas court's repeated rejection is no indicator that these issues are unworthy of certiorari review. The CCA has a long history in its death penalty case law of repeatedly denying legal arguments that

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than is actually the case. *Id.* at 79.

ultimately prevail in this Court.

Early in the modern death penalty era, claims that exclusion of jurors unable to swear that the possibility of a death sentence would not affect their deliberations contravened the Sixth and Fourteenth Amendments were repeatedly rejected by the CCA. This Court decided otherwise in *Adams v. Texas*, 448 U.S. 38, 50-51 (1980). Claims that a defendant must be advised of his right to silence and be afforded the assistance of counsel prior to an interview by a State psychiatrist were likewise rejected by the CCA. This Court upheld those claims in *Estelle v. Smith*, 451 U.S. 454, 473 (1981).[7] The CCA was slow to assimilate the Court's teaching in *Smith*, and further litigation ensued to ensure that *Smith* was honored: *See Satterwhite v. Texas,* 486 U.S. 249 (1988); *Powell v. Texas*, 487 U.S. 1230 (1988); *Powell v. Texas*, 492 U.S. 680, 681-6 (1989) (reversing, noting that CCA had erred in its application of *Satterwhite* and *Smith* even after this Court's earlier remand).

Texas' difficulty in abiding by this Court's jurisprudence concerning the significance of mitigation evidence is demonstrated by the fact that many years after

[7]Rather than prolong litigation after *Adams* and *Smith*, Texas commuted multiple death sentences to life. *See* James W. Marquart, Sheldon Ekland-Olson, Jonathan R. Sorensen, *The Rope, The Chair, and the Needle: Capital Punishment in Texas, 1923-1990*, University of Texas Press (2010) at 137 (noting over 40 commutations during 1981-83, mostly in response to *Adams* and *Smith*). A similar mass commutation of 28 death row inmates occurred in 2005, after *Roper v. Simmons*, 543 U.S. 551, 578 (2005) barred the execution of those who were juveniles at the time of the crime. Jordan Smith, *Juvenile Offenders Getting Off Death Row in Texas*, The Austin Chronicle, July 15, 2005.

both *Penry I* and *Penry II*, this Court was still dealing with cases presenting claims based on those decisions. *See Smith v. Texas*, 543 U.S. 37, 45 (2004); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 245 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007). Similarly, *Tennard*, 542 U.S. at 289, was made necessary by the resistance of both the CCA and the Fifth Circuit to allowing a "'broad inquiry' into all 'constitutionally relevant mitigating evidence.'" *Jones v. United States*, 527 U.S. 373, 381 (1999) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998)).

Most recently, Texas' obdurate refusal to adhere to this Court's Eighth Amendment jurisprudence was demonstrated in *Moore v. Texas*, __ U.S. ___, 139 S. Ct. 666 (2019) which remedied the CCA's failure to implement an earlier decision in the same case, *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039 (2017), in which this Court addressed Moore's claim that his intellectual disability rendered him ineligible for the death penalty pursuant to *Atkins v. Virginia*, 536 U. S. 304 (2002). This long history of noncompliance with this Court's holdings demonstrates that the CCA's rejection of claims in this area should not deter the Court from considering the merits of the questions presented here.

CONCLUSION

Mr. Suniga's petition for writ of certiorari should be granted to remedy the constitutional violations in his case.

Respectfully submitted,

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