No. 19-5171 (CAPITAL CASE)

IN THE
Supreme Court of the United States

VICTOR HUGO SALDAÑO
Petitioner,
v.
LORI DAVIS, DIRECTOR
Respondent.

On Petition for a Writ of Certiorari
to the United States Courts of Appeals
for the Fifth Circuit

BRIEF OF THE TEXAS CATHOLIC CONFERENCE OF BISHOPS AND CATHOLIC MOBILIZING NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

Victor Saldaño has been on the Texas death row since 1996, after a state psychologist, Dr. Walter Quijano, testified that because he is Hispanic, he had a higher propensity for violent acts. *See Saldaño v. Roach*, 363 F.3d 545, 549 (5th Cir. 2004). When his case finally arrived at this Court the first time, the State Attorney General conceded that the sentencing hearing was unconstitutionally flawed, and confessed error. This Court vacated and remanded the case for further proceedings. *Saldaño v. Texas*, 530 U.S. 1212 (2000); *see also Buck v. Davis*, 137 S.Ct. 759, 769-70 (2017) (discussing the case, the flawed testimony and the State's concession). But the passage of time between that error and the present has been cruel to Mr. Saldaño, who mentally decompensated during the severe conditions of his continued incarceration on death row and, in his new hearing in 2004, he acted out in bizarre ways. Rather than order him confined in a place where his mental condition could be safely addressed, he was again sentenced to death. He has returned to this Court to vindicate his right to

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[1] Counsel of record for all parties received timely notice of TCCB and CMN's intention to file this brief. All parties have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of this Court, TCCB and CMN state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief *amici curiae*. No other person other than TCCB, CMN, or their counsel made a monetary contribution to its preparation or submission.

be free of racial animus in sentencing and to seek a more humane outcome.

Amici support the Petitioner principally for two reasons: His initial sentence indisputably resulted from racial bias; and the subsequent imposition is based on his tenuous mental condition, which was a direct consequence of the prison conditions he endured while wrongfully languishing on death row. The remedy for the violation of his rights cannot be another death sentence, but commutation of the sentence to life imprisonment.

The Texas Catholic Conference of Bishops ("TCCB") is the public policy voice of the Bishops of the State's 15 Roman Catholic dioceses. There are more than 8.5 million Catholics living in Texas, about 30% of the total population. The issues presented here are of particular interest to the TCCB because they relate to the pastoral and social justice teaching of the Church regarding the sanctity of human life and the equality of humans. But the case also demonstrates the bias of racist testimony, another evil about which the Church teaches:

> The equality of men rests essentially on their dignity as persons and the rights that flow from it. "Every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language or religion must be

> curbed and eradicated as incompatible with God's design."[2]

The Catholic Bishops of the United States have clearly taught that "any theory or form whatsoever of racism and racial discrimination is morally unacceptable,"[3] and "racism is not merely one sin among many, it is a radical evil dividing the human family."[4] While the TCCB believes Mr. Saldaño should be punished for his crime if he is competent to stand trial, it does not believe that his punishment should be exacerbated because the State chose to inject race into the sentencing phase of his first trial and because his mental deterioration and the problems that resulted therefrom exhibited in the second hearing are directly traceable to the flawed initial sentence.

In their recent pastoral letter on racism, the United States Conference of Catholic Bishops states, "[T]oo often racism comes in the form of the sin of omission, when individuals, communities, and even churches remain silent and fail to act against racial injustice when it is encountered."[5] The TCCB cannot

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[2] *Catechism of the Catholic Church* (United States Catholic Conference, Inc., 1994), No. 1935, (quoting Vatican II, *Guaudium et Spes,* No. 29).

[3] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (United States Conference of Catholic Bishops, 2007), No. 433.

[4] United States Catholic Bishops, *Brothers and Sisters to Us,* 1979, No. 39.

[5] United States Catholic Bishops, *Open Wide Our Hearts,* p. 4 (2018), *available at* http://www.usccb.org/issues-and-

remain silent in the face of the racial injustice of the sentencing trials which allowed violations of Mr. Saldaño's constitutional rights. The TCCB does not believe the State should derive any benefit from these violations.

Catholic Mobilizing Network (CMN) is the national organization that mobilizes Catholics and other people of goodwill to value life over death, end the use of the death penalty, transform the U.S. criminal justice system from punitive to restorative, and build capacity in U.S. society to engage in restorative practices. CMN works in close collaboration with the United States Conference of Catholic Bishops and lives the Spirit of Unity of its sponsor, the Congregation of St. Joseph.

The case of Victor Saldaño is of particular interest to CMN because the case is representative of many other cases where racial prejudice plays a nefarious role in determining whether someone is given a death sentence. Racism is a life issue and the tentacles of racism are found in the use of the death penalty. The Catholic tradition finds its roots in the Gospel call to uphold the dignity of all human life.

SUMMARY OF ARGUMENT

There is no dispute that Mr. Saldaño's initial death sentence in 1996 was obtained in violation of his constitutional rights. As a result of this constitutional violation, Mr. Saldaño experienced a

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action/human-life-and-dignity/racism/upload/open-wide-our-hearts.pdf (last visited August 13, 2019).

significant mental decline while on death row which is directly related to the unconstitutional imposition of the death sentence in 1996. His mental decline on death row led to a number of disciplinary violations that the State was able to use against him at his 2004 retrial which led to a second death sentence.

Furthermore, the State benefited from his mental decline as a result of his appearance and behavior at trial, factors the State used to bolster its case that Mr. Saldaño was a future danger. This Court has consistently prevented the State from using evidence that was obtained against criminal defendants as a result of a constitutional violation. There are compelling reasons why this Court should apply the same principle in Mr. Saldaño's case.

ARGUMENT

I. Mr. Saldaño's Constitutional Rights Were Violated By The Use Of Racially Biased Testimony, And The State Benefited From This Constitutional Violation At His Second Sentencing Hearing.

At Mr. Saldaño's first death penalty trial, which occurred in 1996, the State of Texas presented the testimony of Dr. Walter Quijano as an expert witness who opined that, because Mr. Saldaño is Hispanic, he was more likely to commit criminal acts of violence in the future. As this Court found in *Buck v. Davis*, 137 S. Ct. 759 (2017), this testimony was "potent evidence" which "said, in effect, that the color of [Saldaño's] skin made him more deserving of execution." *Id.* at 776. By presenting this racially-tinged testimony, the State of Texas violated Mr.

Saldaño's "constitutional right to be sentenced without regard to the color of his skin." *Id.* at 778. Although Mr. Saldaño ultimately received a new sentencing hearing in 2004, the State benefited at this hearing from its constitutional violation at the 1996 trial. At the 2004 trial, rather than present evidence of any prior arrest or prison record of Mr. Saldaño in either the United States or Argentina, the prosecution presented evidence that was obtained between the date of the unconstitutionally obtained death sentence in 1996 and his new sentencing hearing in 2004. During this time, as documented by consular officials of the Argentine government, Mr. Saldaño's mother, and by a comparison of the transcript of the two trials (with no strange conduct occurring in the first trial), Mr. Saldaño's mental state seriously deteriorated in reaction to the harsh conditions of his incarceration—conditions resulting directly from the unconstitutional initial death sentence.

In 1999, sentenced capital prisoners were moved to the Polunsky Unit in Livingston, Texas, a unit now reputed to be one of the harshest death rows in the nation. At Polunsky, individuals awaiting execution are kept in strict solitary confinement. Save for a few minutes in the yard or to shower, which are also spent in isolation, prisoners spend 23 hours of each day in an 6-foot by 9-foot cell, locked behind a steel door. Food is distributed to prisoners through a narrow slot at the bottom of the door. Further deepening prisoners' isolation, contact visits

are not permitted.[6] Even further deepening Mr. Saldaño's isolation is the fact that he does not speak English.

In March 2001, Mr. Saldaño attempted to take his own life. Between March 2001 and April 2009, Mr. Saldaño's psychological distress became so great that he was hospitalized nine times at the Jester IV Unit, which serves as Texas Department of Criminal Justice's psychiatric hospital. His appearance and behavior were radically altered and he demonstrated that decline at a new sentencing hearing in 2004. His drastic mental decline also caused disciplinary infractions, which the prosecution used as aggravating evidence to secure another death sentence.

But for the 1996 constitutional violation, there is a reasonable probability that, given the lack of aggravating evidence, Mr. Saldaño would not have been sentenced to death and, therefore, would not have experienced the same degree of isolation and mental decline that he experienced on death row. There would not have been another sentencing hearing in 2004 and thus no presentation of aggravating evidence, coupled with his bizarre appearance and behavior. Thus, the aggravating evidence which the prosecution obtained as a result of its constitutional violation would not have been available to it.

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[6] *See* Texas Department of Criminal Justice, Offender Orientation Handbook (2017), at 103, *available at* http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (last visited July 30, 2019).

II. The Government Should Not Be Allowed To Benefit From The Violation of Petitioner's Right To Be Free Of Racial Bias in Sentencing.

The second sentencing hearing was intended as a remedy for the unconstitutional error in the first trial. Instead of considering the evidence anew, however, the State was able to rely on behavior that was directly attributable to the conditions to which Mr. Saldaño was unconstitutionally sentenced. The State thus benefited from its unconstitutional act. That result violates the applicable legal norms.

As early as 1914, this Court in *Weeks v. United States* established the principle that evidence obtained after violation of constitutional rights could not be used to obtain a criminal conviction:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

232 U.S. 383, 393 (1914). *See also Rochin v. California*, 342 U.S. 165 (1952) (the shocking methods used by the State to obtain incriminating evidence, which included pumping the defendant's stomach, were held to so offend "a sense of justice" as to require exclusion at a state trial).

Subsequently, in *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court articulated four primary reasons why evidence obtained in violation of the

Constitution could not be used in state trials. First, the Court held that the rule preserves judicial integrity, by insulating the courts from tainted evidence. Second, the rule prevents the government from profiting from its own wrongdoing. Third, the rule is not costly, because it only excludes what should never have been obtained in the first place. Fourth, the rule is necessary to deter misconduct. All four rationales apply to the evidence that the government obtained after violating Mr. Saldaño's rights.

1. The fundamental and original rationale for excluding illegally obtained evidence is the need to preserve judicial integrity. In *Weeks v. United States*, 232 U.S. at 394, this Court stated that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." In *Mapp v. Ohio*, 367 U.S. at 659, this Court said that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the charter of its own existence." The necessity of maintaining judicial integrity has been reaffirmed in more recent cases. "[T]he federal courts [should not] be accomplices," the Court has declared, "in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960). And there can be no doubt that "[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional

imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). It is the "process of inclusion and exclusion," in other words, that reflects judicial "approv[al]" of "conduct [that] comport[s] with constitutional guarantees" and "disapprov[al] of conduct that does not." *Ibid.*

Preserving judicial integrity is, moreover, a matter of real practical importance. As this Court has noted in other contexts, "[t]he judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1666 (2015). That follows from "the place of the judiciary in the government." *Ibid.* Unlike the executive or the legislature, the judiciary "'has no influence over either the sword or the purse'"; its authority flows from its reason and integrity alone. *Ibid.* (quoting The Federalist No. 78, p. 465 (C. Rossister ed. 1961) (A. Hamilton)). And it should go without saying that "public confidence in judicial integrity" requires that justice "'satisfy the appearance of justice.'" *Id.* at 1667 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Permitting the government to profit from its own wrongdoing—allowing it to secure a death sentence on the basis of testimony that all acknowledge was provided unconstitutionally—does self-evident violence to judicial integrity and the appearance of justice. The prosecution's use of race to secure a death sentence was bad enough in its own right. It would add insult to that injury to permit evidence uncovered as a direct consequence of that violation to be used to obtain another death sentence. Concern for judicial integrity therefore weighs strongly in favor of "closing the doors of the federal

courts to any use of evidence unconstitutionally obtained." *Brown v. Illinois*, 422 U.S. 590, 599 (1975) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

2. A second justification for excluding illegally obtained evidence is the restoration of the status quo ante. Restoration of the status quo ante is a fundamental aim of the Anglo-American legal tradition. *See* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante,* 33 WAKE FOREST L. REV. 261, 284 (1998). The exclusionary rule has historically been intended to achieve the same objective: to "restore the situation that would have prevailed if the Government had itself obeyed the law." *Harrison v. United States*, 392 U.S. 219, 224 (1968). It is precisely that consideration that explains the "inevitable discovery" exception to the exclusionary rule: "Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place," but "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceeding." *Nix v. Williams*, 467 U.S. 431, 447 (1984). In the absence of inevitable discovery, however, fairness and equity demand putting the parties in the same position as if the unlawful conduct had never taken place.

The prosecution's evidence was obtained as a direct result of its violation of Mr. Saldaño's rights. This evidence would not have been inevitably

discovered because it never would have existed but for the constitutional violation. Mr. Saldaño would not have been forced to live under the harsh conditions he experienced in the Polunsky unit but for the State's violation of his constitutional rights. Had the government not presented racially-tinged testimony, there is a reasonable probability that, given the lack of aggravating evidence, the jury would not have sentenced Mr. Saldaño to death in 1996. As a result, he would not have experienced the isolation and mental decompensation, which, according to expert testimony, was caused by his being on death row. The disciplinary infractions that were used at the second sentencing hearing in 2004 would likewise not have been available to the government because they, too, were the direct result of his time on death row. Furthermore, his conduct and appearance would not have been available to the State. Therefore, fairness and justice requires that the parties be placed in the same position they would have been in had the prosecution not presented racist testimony to the jury. Mr. Saldaño should receive a new sentencing hearing in which the disciplinary infractions and other aggravating evidence that were caused by his mental decline are excluded from evidence.

3. Moreover, the primary purpose served by excluding illegally obtained evidence "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). In fact, "deterrent value is a 'necessary condition for exclusion.'" *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (quoting *Hudson*

v. Michigan, 547 U.S. 586, 596 (2006)). By allowing Mr. Saldaño's death sentence to stand, the courts would not only become accomplices in the violation of his constitutional right to be sentenced without regard to the color of his skin, but it would also have "the necessary effect of legitimizing the conduct which produced the evidence." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Future prosecutors would have an incentive to commit egregious constitutional violations if they could benefit from this violation. As this Court had made clear, racism has no place in the criminal justice system. It is vital that this Court continue to send the message that racism will not be tolerated by granting certiorari in this case.

4. This Court has held that the deterrent value of exclusion is only the beginning of the analysis. *Hudson v. Michigan*, 547 U.S. 586, 596 (2006). The decision to admit or exclude evidence requires the court to balance the competing costs and benefits: "'[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.'" *Herring v. United States*, 555 U.S. 135, 141 (2009) (quoting *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987); *see also United States v. Calandra*, 414 U.S. 338, 348 (1974) ("application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," entailing a "balancing process").

It is true that precluding the prosecution from using the evidence that it illegally obtained will make it more difficult for the State to obtain a death sentence against Mr. Saldaño. However, the social

costs in the event that Mr. Saldaño is granted a new sentencing hearing or in the event that this Court imposes a life sentence is minimal. He will at a minimum receive a life sentence without possibility of parole and thus spend the rest of his life in prison. Furthermore, suppression will not deprive the prosecution of evidence that it might have obtained by other, legal means. Forbidding the State from using illegally obtained evidence to secure a death sentence simply denies the prosecution an unjustified windfall.

However, suppressing the illegally obtained evidence will have considerable benefits. First, it will help to ensure public confidence in the criminal justice system. This Court's recent decisions have made it clear that racism in the administration of the criminal justice system will not be tolerated. In *Buck v. Davis*, 137 S. Ct. at 776, this Court has already found that the testimony at the heart of Mr. Saldaño's case "appealed to a powerful racial stereotype." In *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), this Court recently rejected repeated attempts by a Mississippi prosecutor to justify the removal of prospective African-American jurors. And in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2016), this Court created an exception to the no impeachment rule—the only exception it has created to date—where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant. "The unmistakable principle underlying these precedents is that discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Id.* at 868. (quoting *Rose v. Mitchell*, 443

U.S. 545, 555 (1979).). Amici share this Court's concerns about the injection of race into criminal proceedings and believes this Court should continue to ensure that race does not impact any criminal proceedings, especially death penalty proceedings in which a human life is at stake.

This Court must continue in its effort to remove racial discrimination in the administration of the criminal justice system. Granting certiorari and vacating Mr. Saldaño's death sentence will contribute to the Court's strong admonition that racial discrimination will not be tolerated in the courtroom. Second, a favorable ruling will have appreciable deterrent value. Prosecutors will know that they will not derive any benefit from the illegal use of race. Third, it sends the message that the State may not profit from the wrongdoing of its agents. Finally, given the fact that Mr. Saldaño is an Argentine national, a decision disallowing the use of the illegally obtained aggravating evidence sends the message that foreign nationals will be treated fairly in the United States criminal justice system.

CONCLUSION

Allowing Mr. Saldaño's death sentence to stand based on evidence that directly resulted from the State's initial unconstitutional act would mean placing a judicial imprimatur on that concededly unlawful conduct. As this Court has stated, racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2016). Mr. Saldaño's petition for a writ of certiorari must be granted and his death sentence overturned.

Respectfully submitted,

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August 15, 2019

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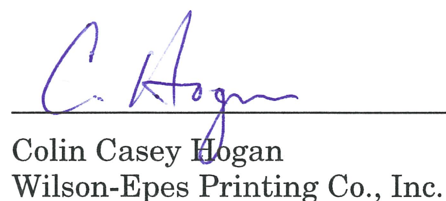
BRIEF OF THE TEXAS CATHOLIC CONFERENCE OF BISHOPS AND CATHOLIC MOBILIZING NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 3,779 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2019.



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v.

LORI DAVIS, DIRECTOR,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on August 15, 2019, three (3) copies of the BRIEF OF THE TEXAS CATHOLIC CONFERENCE OF BISHOPS AND CATHOLIC MOBILIZING NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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Sworn to and subscribed before me this 15th day of August 2019.

COLIN CASEY HOGAN
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My commission expires April 14, 2022.