No. 19-5171

In the Supreme Court of the United States

VICTOR HUGO SALDAÑO, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
(INSTITUTIONAL DIVISION)
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fifth Circuit contravene this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), when it denied a certificate of appealability on Petitioner's claim that Texas's "future dangerousness" special issue is vague as applied to him?

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The Solicitor General of Texas, on behalf of Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, respectfully files this response in opposition to Petitioner Victor Hugo Saldaño's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

The judgment of the court of appeals, denying the certificate of appealability at issue here, was entered on June 28, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT

1. In November 1995, Petitioner and his accomplice, Jorge Chavez, kidnapped Paul King as he entered a grocery store in Plano, Texas. King, a "very passive" man in his late forties, worked at a Best Buy store in Plano. ROA.5599.[1] King had volunteered to drive to the grocery store to purchase food for a Thanksgiving lunch for his fellow Best Buy employees. ROA.5600–01. Before he could enter the grocery store, Petitioner and Chavez ordered King into his own car at gunpoint. ROA.5602–04. After they drove King to a nearby lake, Chavez remained with the car while Petitioner walked King into a wooded area. Petitioner shot King a total of five times—once in the left hand, three times in the chest and abdomen, and finally at close range behind the ear. ROA.5696–88.

[1] "ROA" refers to the record on appeal in the Fifth Circuit.

Chavez testified that he watched Petitioner walk King into the woods, heard the gunshots, then heard the sound of Petitioner "laughing like crazy." ROA.5792. Police officers apprehended Petitioner half an hour later, with the murder weapon still in his pocket. ROA.5771–73. Petitioner confessed to the crime and continued to look amused, according to police. ROA.5682.

Following a jury trial in a Texas court, Petitioner was convicted of capital murder and sentenced to death on July 15, 1996. ROA.441. The sentencing evidence included testimony from Dr. Walter Quijano, a clinical psychologist, who testified that the defendant's race was a statistically relevant marker for future violence. The jury found that the defendant was likely to "commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). The Texas Court of Criminal Appeals affirmed the conviction and sentence. ROA.441. This Court reversed and remanded for further proceedings, relying on the State's confession of error in the use of racially biased testimony to establish future dangerousness. *Saldaño v. Texas*, 530 U.S. 1212 (2000). On remand, the Texas Court of Criminal Appeals again affirmed both the conviction and sentence. *Saldaño v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).

2. Petitioner timely filed a petition for federal habeas relief. In the district court, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, waived procedural default and conceded that reliance on race to determine future dangerousness violated Saldaño's equal-protection and due-process rights. *Saldaño v. Cockrell*, 267 F. Supp. 2d 635, 642 (E.D. Tex. 2003). The district court granted habeas relief and ordered a new punishment trial. *Id.* at 645. The district attorney, whose motion to intervene had been denied by the district court, appealed the denial of that motion and the district court's grant of habeas relief. *See Saldaño v. Roach*, 363 F.3d 545, 550 (5th Cir. 2004). The Director did not appeal the judgment but filed a brief in opposition to the district attorney's appeal. *Ibid.* The Fifth Circuit affirmed the order denying the district attorney's motion to intervene and dismissed the appeal. *Id.* at 556.

3. Petitioner received a new punishment trial in November 2004. To prove future dangerousness, the State submitted evidence of an attempted robbery five days before Petitioner murdered King and evidence of Petitioner's consistently violent, ROA.5700–01, and aggressive behavior while in prison. *See generally* ROA.448-52. For example, Petitioner set fire to his mattress, stabbed another prisoner with a homemade shank, assaulted

guards, threw excrement and urine at guards and other inmates, refused to wear his clothes, and walked around his cell masturbating. The jury observed Petitioner's behavior first hand at his second punishment trial, during which Petitioner insisted on wearing his prison uniform, masturbated in court (even while restrained), laughed during testimony, read magazines, and repeatedly stood up unexpectedly in the jury's presence.

During the second sentencing trial, the judge had numerous discussions with Petitioner and stated that he had no reason to question Petitioner's competency to stand trial. ROA.499. Petitioner was examined for competency three times and found to be competent each time. ROA.497.[2] The court asked two bailiffs to testify about their observations of Petitioner's conduct outside of court. In a hearing outside of the jury's presence, both

[2] Mental health professionals disagreed about the cause of Petitioner's decline in mental health, but no one thought he was incompetent to stand trial. One psychiatrist who treated Petitioner at the Jester IV Psychiatric Facility of the Texas Department of Criminal Justice (TDJC) diagnosed him with depression accompanied by "psychotic ideations, hallucinations, and delusions." Other TDJC doctors diagnosed him with forms of psychosis, and still other TDJC doctors diagnosed him with antisocial personality disorder, finding that Petitioner would fabricate mental issues in order to obtain drugs. ROA.493–94 (discussing the various prison medical records before the trial judge).

bailiffs testified that Petitioner acted normally outside of court and was coherent and competent. ROA.498.

Petitioner's counsel argued that the jury should not be permitted to consider evidence of Petitioner's actions in prison because Petitioner's mental state had deteriorated while in State custody. In other words, the State should not derive evidentiary benefits from behaviors it had caused. The State agreed that Petitioner could present expert testimony explaining that his mental health had deteriorated, on the condition that the State's expert could examine Petitioner pursuant to *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997). Petitioner declined to submit to the State's examination on Fifth Amendment grounds and did not pursue the mental-deterioration theory before the jury. *See Saldaño v. State*, 232 S.W.3d 77, 83–88 (Tex. Crim. App. 2007)

The jury found that Petitioner posed a threat of future danger to society, and the trial court sentenced Petitioner to death. *See id.* at 82. The Texas Court of Criminal Appeals affirmed the sentence on appeal. *Ibid.*

Petitioner then filed a state habeas application raising eight grounds for relief. ROA.9852-84. Among other claims, Petitioner asserted that his execution would violate

the Eighth and Fourteenth Amendments because of his mental illness, ROA.9869-70, that he was incompetent at the time of his second punishment trial, ROA.9875, and that his trial counsel rendered ineffective assistance by failing to request a competency hearing, ROA.9877. Petitioner's application did not include claims that the future-dangerousness special issue was unconstitutionally vague or fundamentally unfair as applied to him.

The state trial court entered findings of fact and conclusions of law recommending denial of habeas relief on all claims. ROA.11101-96. The Texas Court of Criminal Appeals adopted the trial court's findings and recommendations, with the exception of six findings regarding Petitioner's alleged forfeiture of his competency claim, ROA.11156-57, and denied relief. *Ex parte Saldaño*, No. WR-41,313-04, 2008 WL 4727540 (Tex. Crim. App. Oct. 29, 2008) (per curiam).

4. Petitioner timely applied for federal habeas relief. Petitioner raised fifteen claims, including the claim he presents here: that the future dangerousness statute was unconstitutionally vague as applied to him. The district court denied relief on all grounds and declined to issue a certificate of appealability on any of Petitioner's claims. *Saldaño v. Dir., TDCJ-CID*, No. 4:08-cv-193, 2016 WL 3883443, at *1 (E.D. Tex. July 18, 2016).

The court rejected Petitioner's claim that the future dangerousness requirement was unconstitutionally vague as applied to him. Texas Code of Criminal Procedure Article 37.071 section 2(b)(1) provides that the death penalty requires a jury finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The court rejected Petitioner's argument that the statute is unconstitutionally vague because it does not identify the relevant period of time for future dangerousness. The court found that the "statute is abundantly clear." *Saldaño*, 2016 WL 3883443, at *25.

Further, the court rejected Petitioner's argument that the State's mistake caused the deterioration of his mental health, in turn causing him to be a different person in 2004 than he was at the first trial in 1996. It was therefore not unfair for the jury to consider the conduct of the person on trial in 2004. The court concluded that the jury is free "to consider a myriad of factors to determine whether death is the appropriate punishment." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (citations omitted). *See also Jurek v. Texas*, 428 U.S. 262, 275-76 (1976) (assessing Texas's capital punishment framework and

finding that "[t]he task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice").

Petitioner then sought a certificate of appealability (COA) on eight issues from the United States Court of Appeals for the Fifth Circuit. The court granted a COA on two issues. *Saldaño v. Davis*, 701 F. App'x 302, 304 (5th Cir. 2017) (per curiam). It found that reasonable jurists could disagree with the state court's decision that Petitioner was competent and with the state court's decision that trial counsel did not render ineffective assistance by failing to request a competency hearing. *Id.* at 315-16. The Fifth Circuit denied a COA on all remaining claims. *Id.* at 316.

Petitioner's request for a COA also included three distinct claims challenging the Texas future-dangerousness special issue. In his fourth issue, Petitioner claimed that the State "violate[d] basic notions of fairness" by subjecting him to a second capital sentencing procedure. *Id.* at 311. The Fifth Circuit denied a COA on procedural grounds because Petitioner forfeited the claim by failing to raise it in the district court. *Ibid.* It also denied

a COA on substantive grounds because Petitioner failed to cite any applicable law in support of the claim, instead relying on analogies to dissimilar due process violations such as "the forced administration of antipsychotic drugs." *Ibid.* The court concluded that his attempt to preclude a punishment retrial "flies in the face of the well-established rule that the government may retry persons whose convictions have been overturned due to constitutional error in prior proceedings." *Ibid.*

The sixth issue in Petitioner's COA request made "a fruit of the poisonous tree argument": He claimed that the Fourteenth Amendment prohibited the State from introducing evidence of his conduct on death row to show future dangerousness because his original capital sentence was unconstitutionally obtained, so the resulting evidence "was obtained through the State's own misconduct." *Ibid*. The Fifth Circuit held that this claim was procedurally barred and that, in any event, reasonable jurists would not debate that the claim failed on the merits because Petitioner identified "no court that has extended the exclusionary rule to this context." *Id.* at 311–12.

The fifth issue in Petitioner's COA request raised the claim presented to this Court: that the Texas future-dangerousness special inquiry is unconstitutionally vague as applied

to him. The Fifth Circuit held that the merits of this claim were not reasonably debatable because Texas's future-dangerousness special issue had been upheld repeatedly against facial attacks. *Id.* at 311; *see Scheanette v. Quarterman*, 482 F.3d 815, 827–28 (5th Cir. 2007); *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005). And noting that Petitioner's claim focused on fairness rather than vagueness, the Fifth Circuit agreed with the district court that "whether it was fair for the jury to consider [evidence of bad acts on death row] has nothing to do with whether the statute is unconstitutionally vague." 701 F. App'x at 311.

Petitioner filed a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner embraces the fact that he seeks nothing more than fact-bound error correction. Indeed, his own formulation of the question presented focuses on the fact-bound application of settled law. *See* Pet i. But there is no error; the decision below is correct. And even if the judgment below were infirm, no split or conflict in authority warrants this Court's involvement.

I. Petitioner Seeks to Correct a Perceived Error Rather than to Resolve a Conflict of Authority.

Petitioner presents a single question in his petition for a writ of certiorari:

> Did the Fifth Circuit contravene this Court's precedent in *Buck* when it denied a certificate of appealability on whether the Texas future-dangerousness special issue fails on vagueness grounds as applied to Mr. Saldaño, as a statute incapable of reasoned application to him in an unbiased and principled manner?

Pet. i. Petitioner does not identify a conflict of authority on either the standard for granting a COA or the constitutionality of the future-dangerousness special issue. Instead, he merely contends that the Fifth Circuit was wrong to deny a COA on his vagueness claim. This kind of splitless error correction does not justify this Court's review. *See* Sup. Ct. R. 10; Stephen M. Shapiro, et al., Supreme Court Practice 352 (10th ed. 2013).

The Fifth Circuit applied the correct standard to evaluate his request for a COA. It observed that "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Saldaño*, 701 F. App'x at 308 (quoting *Buck*, 137 S.

Ct. at 773). Petitioner concedes that the Fifth Circuit applied the correct standard to evaluate his request for a COA. *See* Pet. 31. As a result, he cannot show that the Fifth Circuit's decision "contravenes" *Buck*.

His only complaint, then, is that the Fifth Circuit's application of the correct standard led to an incorrect result. That complaint is also baseless and splitless, and it likewise does not warrant review by this Court.

To the extent Petitioner suggests that *Buck* established a different standard for evaluating COA requests in cases involving racial bias, he is mistaken. *Buck* did not alter the standard for a COA. To the contrary, the Court reiterated its longstanding rule that a court's examination of claims at the COA stage should be limited "to a threshold inquiry into the underlying merit of [the] claims" but should not extend to "ultimate merits determinations." 137 S. Ct. at 774. That question is not presented here. As Petitioner concedes, the Fifth Circuit's COA decision "correctly quotes *Buck v. Davis*" for the governing standard. Pet. 31.

This Court's holding in *Buck* that the petitioner was entitled to relief has no bearing on the COA standard or the result in this case. In *Buck*, the petitioner sought a COA to

reopen the judgment and vacate his death sentence. Petitioner has already received that relief through the Attorney General's confession of error. *See, e.g.*, *Buck*, 137 S. Ct. at 769-70.

Petitioner also fails to identify a conflict of authority on his claim that Texas's future-dangerousness special issue is unconstitutionally vague. That failure is unsurprising. Every Texas court and every federal court to address the issue has unequivocally held that the Texas future-dangerousness issue is not vague. *See*, *e.g.*, *Scheanette*, 482 F.3d at 827–28; *Jurek*, 428 U.S. at 274-75. This Court has held that the issues posed in sentencing proceedings in Texas are not vague since they have a "common-sense core of meaning." *Pulley v. Harris*, 465 U.S. 37, 49 n.10 (1984). Further it has held that the "Texas capital-sentencing procedures . . . do not violate the Eighth and Fourteenth Amendments. . . . Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution." *Jurek*, 428 U.S. at 276 (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). Petitioner's vagueness claim does not justify review by this Court.

II. The Fifth Circuit Correctly Applied the Governing Standard to Deny a Certificate of Appealability to Certain Claims.

Even if an erroneous application of the correct legal standard could support certiorari review, the Fifth Circuit correctly denied a COA on Petitioner's claim that the future dangerousness statute is unconstitutionally vague.

Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217 (AEDPA), a court may issue a COA only "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet that standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quotations omitted).

Here, the Fifth Circuit correctly denied a COA on an issue where Petitioner did not satisfy his burden to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented

are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 327). Petitioner cannot show that the Fifth Circuit incorrectly applied the correct standard. No reasonable jurist would think the statute is vague, whether on its face or as applied to him, let alone that the state court's rejection of the vagueness claim on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]." *See* 28 U.S.C. § 2254(d)(1).

A. The Fifth Circuit correctly found that the future-dangerousness issue is not vague.

Petitioner's attempt to secure fact-bound error correction fails on its own terms because reasonable jurists would agree that his vagueness claim lacks merit and that the state court's adjudication of that claim was not contrary to and did not involve an unreasonable application of this Court's precedent.

This Court rejected a similar claim in *Tuilaepa*. There, petitioners alleged that California's sentencing factors were flawed because they merely listed possible factors for the sentencer to consider. 512 U.S. at 978-79. But this Court held that "the sentencer may be

given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Id.* at 979–80 (quoting *Zant v. Stephens*, 462 U.S. 862, 875 (1983)). It explained that "[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Id.* at 979.

Petitioner's complaint is functionally identical. He claims that Texas law is unconstitutionally vague because it requires jurors to assess his future dangerousness but "fails to guide jurors when it offers no direction on the hypothetical place and hypothetical dangers they must consider." Pet. 15. That argument ignores *Tuilaepa* entirely.

Petitioner's claim that the future-dangerousness issue was simply too vague for the jury to apply contradicts settled law. When this Court addressed the jury's responsibility to determine future dangerousness in *Jurek*, it recognized that juries are competent to make that decision. The Court noted that "the fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Jurek*, 428 U.S. at 274–75. Juries routinely judge the risk of future harm.

Requiring the jury to decide beyond a reasonable doubt whether Petitioner posed a threat of future dangerousness was a weighty task. But no reasonable jurist could conclude that the question itself is vague. This Court's precedent clearly establishes that it is not.

The record in this case, moreover, conclusively undermines any suggestion that the future-dangerousness question was vague as applied to Petitioner. The jury heard evidence that Petitioner engaged in a continuing pattern of disturbing and violent behavior after he murdered the victim with a point-blank shot to the head. In his statement to police, Petitioner's accomplice Jorge Chavez said that Petitioner was "laughing like crazy" when he emerged from the woods after the murder. ROA.5792. When he was arrested, Petitioner seemed bemused and refused to cooperate with officers. ROA.445. The jury heard testimony that when Petitioner was taken to jail, he "was laughing, cutting up, basically having a pretty good time." ROA.5656, 5777, 5779.

During his post-arrest interview, Petitioner continued his lighthearted display. When an officer opened the door to check on him, Petitioner "flipped [him] off" and laughed. ROA.5669. The interviewing officer had to tell Petitioner to take the situation seriously and stop laughing. ROA.5786. The lead detective got the impression that "[i]t was just a

joke to him. He had no remorse whatsoever." ROA.5791. Asked why he committed the murder, Petitioner said, "you see all these rich people driving expensive cars or vehicles, and living in expensive homes . . . it just makes you want to take it from 'em." ROA.5682.

Petitioner's pattern of violent behavior continued in pretrial detention. During voir dire, he destroyed the television set in his cell by removing it from its mounting bracket and smashing it on the ground, injuring his hand in the process. ROA.5753.

Petitioner's behavior did not improve after his conviction. In 1997, he was placed in solitary confinement after a fight in the recreation yard, in which another inmate was stabbed. ROA.2979–80; ROA.5515. The same year, Petitioner head-butted a corrections officer and threatened to kill him. He later threatened to kill a different officer and threw a food tray at him. ROA.5751. On another occasion, when an officer instructed Petitioner to sit on his bunk to receive his food, Petitioner threatened to kill the officer if he did not give him his tray. ROA.5718. Petitioner also made a habit of assaulting correctional officers by "chunking" feces and urine at them. *See* ROA.450-51. The jury also heard testimony that Petitioner frequently started fires in prison. ROA.5737–38. On one such occasion,

when officers removed him from his cell so it could be cleaned, Petitioner kneed an officer in the thigh. ROA.5733.

Finally, Petitioner's attempted analogy to due-process cases does not change the calculus. He relies, for example, on *Riggins v. Nevada*, 504 U.S. 127 (1992), in which a prisoner claimed that the State's forcible administration of antipsychotic medication violated his right to due process because, in addition to their general "effect on his demeanor and mental state during trial," the drugs would prevent him from supporting his insanity defense by showing the jury his "true mental state," *id.* at 130.

But *Riggins* and the other cases Petitioner cites are inapposite because they deal with violations of due process during trial—involuntary administration of antipsychotic drugs, forced wearing of prison garb, unnecessary wearing of physical restraints. *See id.* at 138; *Sell v. United States*, 539 U.S. 166, 185 (2003); *Deck v. Missouri*, 544 U.S. 622, 629 (2005). Here, the State did not force Petitioner to wear prison garb (he refused to change) or read magazines during trial (he refused to stop). And Petitioner was placed in restraints because he refused to stop masturbating in front of the jury.

Even if Petitioner were correct that the State caused his mental illness in some way, *e.g.*, Pet. 35, that is not the type of deliberate restraint at trial that the due-process cases address, nor does it threaten the same harm. The essence of a due-process claim is that an involuntary restraint imposed by the State undermines the fairness of trial by distorting the jury's perception of the defendant. In *Deck*, for example, this Court explained that forcing a defendant to appear in shackles during the penalty phase of a capital trial "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking." 544 U.S. at 633; *see also Riggins*, 504 U.S. at 130 (referring to the defendant's interest in presenting his "true mental state"); *Sell*, 539 U.S. at 179 (explaining that the permissibility of forced antipsychotic medication depends in part on the likelihood of "side effects that may undermine the fairness of the trial").

But Petitioner is not concerned that the jury got an inaccurate view of his condition. He argues, to the contrary, that the jury should not have seen his true condition at all because it was inherently prejudicial. That concern is logical; this Court has recognized

that a defendant's mental impairment can support a finding of future dangerousness. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that intellectually disabled prisoners are ineligible for the death penalty because evidence of intellectual disability "may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," thereby creating "a special risk of wrongful execution"). But that does not show that the Texas future-dangerous special issue is unconstitutionally vague. If anything, it undermines that claim by presuming that Petitioner's behavior in the courtroom and in prison would naturally lead a rational jury to infer that he posed a threat of future danger.

That the jury in fact drew that inference does not indicate that the future-dangerousness issue was vague as applied to Petitioner. The question whether a prisoner poses a risk of future danger is straightforward and well within a jury's competence to answer. That question is not vague on its face, and it was not vague as applied to Petitioner. The Fifth Circuit correctly denied a COA on Petitioner's vagueness claim.

B. Petitioner's inherent-unfairness claim is not fairly included in the question presented and does not justify review in any event.

While the question presented is confined to the COA standard and vagueness, Petitioner seems to argue that the jury never should have been permitted to consider future dangerousness because he never should have been subjected to a second capital sentencing trial. *See, e.g.*, Pet. 35 (complaining of "the inherent arbitrariness of allowing the State to make someone mentally ill and then put him to death for being mentally ill"). Indeed, he states that the question presented in his petition "combines Issues 4 and 5" from his COA application. Pet. 12. But that additional claim is not fairly included in the question presented—whether the future-dangerousness issue is unconstitutionally vague—which corresponds solely to issue five in his COA application. Accordingly, it is not properly before the Court. *See* Sup. Ct. R. 14(1)(a).

Even if it were properly presented, Petitioner has forfeited his claim that application of the future-dangerousness special issue was unfair. The Fifth Circuit correctly found that Petitioner failed to raise this claim before the district court. *Saldaño*, 701 F. App'x at 311 (citing *Johnson v. Quarterman*, 483 F.3d 278, 288 (5th Cir. 2007)). Petitioner argues

that he raised the claim in his amended habeas petition, *see* Pet. 18 n.6, but the cited portion of his petition is directed to the trial court's application of the *Lagrone* decision. ROA.112; ROA.135-40. It is far from clear that Petitioner intended to present the claim he now attempts to raise, particularly since he included a separate claim that evolving standards of decency prohibited his execution based on his incompetence and mental illness. ROA.182-86. The Fifth Circuit correctly found that this claim was forfeited.

But even if it were properly presented and not forfeited, Petitioner's claim of inherent unfairness would not warrant this Court's consideration. Petitioner offers no support for the proposition that the defendant's mental illness, whatever the source, precludes a State from conducting a second capital sentencing trial. *See Saldaño*, 701 F. App'x at 311 ("On the merits, we note that Saldaño cites no applicable law in support of his fourth claim."). And Petitioner's argument that his mental decline resulted from solitary confinement, and that his solitary confinement resulted solely from his original capital sentence, is not supported by the record, which strongly indicates that Petitioner's behavior would have resulted in solitary confinement even under a life sentence. *See, e.g.*, ROA.2979-80; ROA.5515; *see also Saldaño*, 232 S.W.3d at 82 (noting that since his initial trial, Petitioner

"has committed numerous acts of misconduct that resulted in him being placed in the most restricted and isolated level of death row"). And to the extent Petitioner's inherent-unfairness claim is an attempt to repackage his claim that he was not competent to stand trial, *see* Pet. 10-12, that claim has been rejected on the merits by the Fifth Circuit, and Petitioner has not raised it here.

The Fifth Circuit correctly denied a COA on Petitioner's inherent-unfairness claim, holding that his argument "flies in the face of the well-established rule that the government may retry persons whose convictions have been overturned due to constitutional error in prior proceedings." 701 F. App'x at 311 (citing *United States v. Tateo*, 377 U.S. 463, 468 (1964)). Petitioner does not identify any conflict of authority on this question. And the Fifth Circuit correctly held that this claim did not make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). There is no question that Petitioner committed capital murder when he kidnapped a complete stranger and killed him for no reason. Reasonable jurists could not dispute that under clearly established law, the State has a right to seek the death penalty. "Corresponding to the right of an accused to

be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *Tateo*, 377 U.S. at 466.

III. Petitioner Seeks a New Constitutional Rule, Making this Case an Inappropriate Vehicle to Answer the Question Presented.

Even if the question presented otherwise warranted this Court's review, Petitioner's case would be an inappropriate vehicle to resolve it because his claim would require the Court to announce a new constitutional rule. Because Petitioner could not benefit from that rule under this Court's precedent, seeking certiorari here amounts to a request for an advisory opinion. *Teague v. Lane*, 489 U.S. 288, 316 (1989) (plurality op.).

The possible retroactive application of a decision by this Court is "a threshold question." *Id.* at 300. And at the threshold, it is clear that Petitioner seeks a new constitutional rule that would not apply retroactively to habeas petitioners like him. Under *Teague*, "a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of two narrow exceptions." *Saffle v. Parks*, 494 U.S. 484, 486 (1990). That restriction applies to capital cases, as well. *Graham v. Collins*, 506 U.S. 461, 467 (1993).

There can be no doubt that granting the relief Petitioner seeks would require this Court to announce a new rule of constitutional law. *See, e.g.*, *Saffle*, 494 U.S. at 486 (explaining that a rule is new for purposes of *Teague* if it "is not dictated by [this Court's] prior cases and, were it to be adopted, it would contravene well-considered precedents"). Under the question he actually presented, he asks for a rule that the Texas special issue statute is vague as applied to someone who secured a new sentencing trial. Under the question he did not present, but discusses anyway, he asks for a rule that if racial bias exists in the original sentencing trial, or if incarceration has made the defendant mentally ill, the State cannot seek the death penalty again in a subsequent trial. Neither of those rules is "compelled by existing caselaw." *Wright v. West*, 505 U.S. 277, 310 (1992) (quotation omitted).

And neither rule would satisfy either of the exceptions to *Teague*. The first exception permits a new rule that places a new class of private conduct beyond the power of the State to proscribe. *Graham*, 506 U.S. at 477. The second exception permits federal courts to announce "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495 (quoting *Teague*,

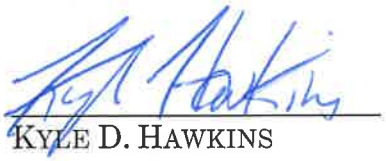
489 U.S. at 311). Neither exception applies here. Petitioner does not seek a rule that makes formerly criminal behavior lawful or that places a certain punishment off-limits for an entire class of people, and his proposed new rule would not qualify as a watershed rule implicating "fundamental fairness and accuracy of the criminal proceeding." *Ibid.*

Teague applies here; its exceptions do not. Accordingly, Petitioner could not benefit from any new rule this Court might announce. The petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



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