No. 19-5171
(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

VICTOR HUGO SANDAÑO,
Petitioner

v.

LORI DAVIS, DIRECTOR,
Texas Department of Criminal Justice (Institutional Division),
Respondent

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

Respondent's Brief in Opposition maintains that Petitioner has already received the relief he is entitled to through the Texas Attorney General's confession of error in *Saldaño v. Texas*, 530 U.S. 1212 (2000); *see* Opp. 4. And had Petitioner received a new trial in 2000, after having only spent a few months in the isolation of the State's new death row, the Polunsky Unit, that most likely would have been the case. However the persistence of the Texas Court of Criminal Appeals and the District Attorney in defending the original death sentence meant that after four years on Texas' old death row, Petitioner spent four-and-a-half years at Polunsky before finally receiving a new trial in November 2004. Petitioner suffered severe mental deterioration (which the State does not deny), with the consequence that a jury could no longer constitutionally apply the Texas special issue that it find the defendant 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) (2004). The State produced Petitioner's mental decline through the mandatory solitary confinement Texas now imposes on all its death row prisoners. The Texas special issue became void for vagueness as

applied to Petitioner given the inherent arbitrariness of any examination of him for future dangerousness after severe mental decline from long-term solitary confinement. The original race discrimination by the State could hardly be deemed cured when the jury was faced with a figure of Halloween-like horror instead of the unremarkable figure of eight years before. The case does not present a conflict of authority among circuits or the states, but this Court has often stepped in when failure of the Courts of Appeals to grant a Certificate of Appealability threatens to leave the consequences of racially-biased conduct without adequate judicial consideration. *See e.g.*, *Buck v. Davis*, 137 S.Ct. 759 (2017); *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017); *Tharpe v. Seller*, 138 S.Ct. 545 (2018).

The Respondent's Brief in Opposition presents four principal arguments: 1) that Petitioner fails to present an Eighth Amendment vagueness claim under *Tuilaepa v. California*, 512 U.S. 967 (1994), Opp. 16-18; 2) that the Supreme Court cannot consider what the State describes as "inherent-unfairness" issues because according to the State, those concerns are independent of Petitioner's vagueness as applied claim and the "inherent-unfairness" issues were not raised in Federal habeas, Opp. 23-25; 3) that Petitioner was particularly dangerous and would have found himself in solitary confinement even in an ordinary prison

setting, Opp. 18-20; and 4) that Petitioner's claim is foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989), Opp. 26-29.

I. *Tuilaepa v. California* Supports Petitioner's Vagueness Claim.

Reasonable jurists can apply *Tuilaepa v. California*, 512 U.S. 967 (1994) to find the Texas "future dangerousness" special issue unconstitutionally vague as applied to Petitioner.

Tuilaepa evaluated the constitutionality of California's special circumstances for imposing the death penalty for unconstitutional vagueness under the Eighth Amendment. While the Supreme Court ruled in favor of California's special circumstances, and while the *Tuileapa* decision does not cast doubt on the Texas "future dangerousness" special issue under most circumstances, the decision provides controlling principles for Petitioner's "as applied" attack on the "future dangerousness" special issue in his case. *Tuilaepa* holds that the "controlling objective when we examine eligibility and selection factors for vagueness" is that "[t]he State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision," 512 U.S. at 973. Then the Court notes that while concerns "that a vague propositional factor used in a sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process," *id* at 974, the concern is diminished

when the factor "does not require a yes or no decision to a specific question," *id*. at 975 – which was the situation under the California statute.

The Texas special issue, that the jury find the defendant 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) (2004), requires a specific yes or no response, and a "no" eliminates defendant's eligibility for the death penalty. The yes/no response on a decisive issue makes the special issue a situation where Eighth Amendment vagueness concerns are at their highest, *see Tuilaepa*, 512 U.S. at 975. Petitioner's life depended on the jury viewing him as nonviolent. Yet Petitioner, severely degraded after eight years on death row – with the majority of that time in the severe isolation of the Polunsky Unit – presented an incomprehensible picture for the jury when he masturbated, startled the court with sudden movements, and generally looked and acted strangely. The jury could only act in a biased and capricious fashion given the way the State effectively reduced the Petitioner's ability to present himself as non-violent and the lack of an indication in the special issue that Petitioner was to be evaluated as of some earlier period. In Petitioner's case, a reasonable jurist could easily find that a jury could not reliably apply the Texas special issue.

II. Petitioner's "inherent-unfairness" concerns are fairly included in the question presented and were properly raised in Federal habeas corpus.

What Respondent calls Petitioner's "inherent-unfairness claim," Op. 23, is fairly included within Petitioner's vagueness as applied claim and was explicitly discussed in its own right in Petitioner's federal habeas corpus petition. The claim is a subsidiary issue, fully within the scope of Petitioner's Question Presented.

Supreme Court Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." This includes "[q]uestions not explicitly mentioned but 'essential to analysis' of the decisions below or 'to the correct disposition of the other issues.'" Stephen M. Shapiro, et al., *Supreme Court Practice* 458 (10th ed. 2013) (also gathering the extensive authority for this proposition from the Supreme Court's decisions); *see also City of Sherill, N.Y. v. Oneida Nation of New York*, 544 U.S. 197, 214 n. 8 (2005) (quoting this language from the 8th edition of the same treatise).

Petitioner's Petition for a Writ of Certiorari asserts serious due process concerns when an individual is retried after severe mental decline, Petition 25-26. Given the constitutional concerns the Supreme Court has voiced toward the effect on a defendant's demeanor of the administration of antipsychotic medication,

Riggins v. Nevada, 504 U.S. 127, 137-138 (1992); the constitutional concern the Supreme Court voiced in *Deck v. Missouri* with the impressions that physical restraints on a defendant may have on jurors, 544 U.S. 622, 629 (2005); and the constitutional bar in most circumstances on making a defendant appear before a jury in prison garb, *Estelle v. Williams*, 425 U.S. 501, 504-505 (1976); the Court has already broadly expressed constitutional concerns when the state engages in conduct that causes the demeaning of a defendant before a jury. There is little practical difference between the results of the Petitioner's severe isolation on death row, and the consequences antipsychotic medication, physical restraints (which the Petitioner had to wear during much of his second trial but not at his first), and appearing before the jury in prison garb (which the Petitioner insisted on during his second trial but not during his first).

However, the constitutional implications from the Petitioner's mental decline are much stronger when the second trial does not just consider guilt or innocence or mitigating aspects of the defendant's history, but specifically calls for a verdict on the special issue of whether the defendant is 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) (2004). This special issue becomes vague as applied because the State's conduct has made its application in a reasoned

fashion impossible. The problem seriously affected the Petitioner, but represents a situation that as a practical matter only exists in Texas because of its combination of an extraordinary harsh death row regime of severe isolation and a decisive special issue focused entirely on a jury's perception of future dangerousness.[1]

If the Court examines the record, it will find that Respondent at Opp. 23-24 is simply incorrect in its statement that Petitioner failed to raise a due process claim in Federal habeas corpus based on the inherent unfairness of his retrial given his mental decline. Unfortunately, because the Texas trial court would not allow Petitioner to present his key psychiatric expert without requiring an unconstitutional waiver of 5th and 6th Amendment rights, Claim 1 of the Federal habeas petition had to be framed first in terms of the waiver issue, because expert testimony was important to establishing that in fact Petitioner suffered mental decline, before moving on to the due process consequences of that mental decline, which is what the Petition for Writ of Habeas Corpus focuses on at 50-55, ROA.135-140.

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[1]Oregon is the only other state that has adopted the Texas special issue, OR. REV. STAT. § 163.150 (2015), and Oregon's death row inmates, unlike those in Texas, do not suffer from isolation – they are permitted to interact among themselves and engage in a variety of social activities, *see* General Counsel Office, Office of Governor Kate Brown, *Report to Governor Kate Brown on Capital Punishment in Oregon* 58-61 (October 2016), available at https://olis.leg.state.or.us/liz/2019R1/Downloads/CommitteeMeetingDocument/183518 (last checked on October 28, 2019).

III. The State mischaracterizes Petitioner as inherent dangerousness.

While the State is correct that Petitioner was placed in solitary confinement during several months in 1997 after a fight in the recreation yard, Opp. 19, a period that lasted from June 12, 1997 to August 7, 1997, according to Petitioner's Custody Housing Assignment History, ROA.6150, the State simply ignores Petitioner's record at the Ellis Unit (the death row prior to creation of the Polunsky Unit) when it asserts that the record "strongly indicates that Petitioner's behavior would have resulted in solitary confinement even under a life sentence," Opp. 24. All of Petitioner's housing assignments until October 5, 2004, shortly before his second trial, appear in the Custody Housing Assignment History in the record at ROA.6147-6150, and the only time that Petitioner spent in solitary confinement during the period from September 13, 1996 until March 2, 2000, when he is shown as moved to the Polunsky Unit (listed as TL because it was initially called the Terrell Unit), was during June 12 - August 7, 1997. Thus he was almost never in solitary confinement from September 1996 until his move to Polunsky in March 2000. (The new death row established as the Polunsky Unit lacked a separate solitary confinement section because it consisted exclusively of solitary confinement). Moreover, virtually all of the misconduct that the State points to, and that it pointed to at trial, occurred either at the Polunsky Unit, with

its regime of severe isolation, or, to a limited extent, during Petitioner's three months in solitary in 1997.[2]

IV. *Teague* does not foreclose Petitioner's Claim.

The State fails to note that the *Teague* plurality opinion only applies to new rules of constitutional criminal procedure, 489 U.S. at 310, not substantive constitutional rules. The Supreme Court's recent decision in *Welch v. U.S.*, 136 S.Ct. 1257 (2016) applies the *Teague* distinction between procedural and substantive rules, and Petitioner's constitutional claim falls on the substantive side of *Welch*.

Welch, like Petitioner's claim, involved a void for vagueness challenge to a sentencing statute. The Court held that its decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), in which it held a sentencing enhancement under the Armed Career Criminal Act of 1984, 18 U.S.C § 924(e)(2)(B)(ii) was void for vagueness, was substantive for *Teague* purposes, making the *Teague* bar on retroactive application of new constitutional rules of criminal procedure

[2]The facts of the crime itself, while dreadful as a murder involving an innocent victim, did not inevitably point toward future dangerousness. According to Petitioner's accomplice, at the time of the murder both he and Petitioner had smoked a fistful of crack cocaine, as well as having split some beer, ROA.5810, the robbery was the accomplice's idea, ROA.5811, and they were caught right after the murder because they drove back to the store where they abducted the victim, ROA.5816. The only testimony at trial of a prior crime by Petitioner involved a situation where he allegedly sought to rob a couple at gun point and walked away when they told him they had no money. ROA.5707.

inapposite. 136 S.Ct. at 1265. *Welch* indicates that a statute that changes a sentence when certain criteria are met is substantive, *id*. at 1265. It distinguishes between rules that modify the procedures used to obtain a conviction from the class of persons that the law seeks to punish. *See id*. at 1266. A rule that "deprives the Government of the power to impose the challenged punishment," represents "the clearest instance of substantive rules for which retroactive application is appropriate." *Id*. at 1267 (internal quotations omitted). Likewise, a limiting construction that saves a vague statute is substantive. *Id*. at 1268. Petitioner seeks to have himself excluded from the range of persons to whom the Texas special issue can be applied, because the statute is void for vagueness when applied to him. The law that Petitioner seeks to invalidate as applied to him determines the scope of persons to whom the death penalty may be applied, not the manner of determining who shall receive the death penalty. The statute is therefore substantive for *Teague* purposes, and is at the least an issue regarding which reasonable jurists could debate whether Petitioner is entitled to relief.

The State, in its *Teague* analysis, also implies that Petitioner is seeking a new, broad rule regarding the Texas special issue for individuals that secure a new sentencing trial. Opp. 27. That is false. Petitioner has never asserted more than the vagueness as applied of the Texas special issue in the unique circumstances of

his case – an individual prejudiced by an initial racially-biased proceeding, who suffered severe mental deterioration because of a death row regime of extraordinary isolation. Under those circumstances, a reasonable jurist can find that the Texas "future dangerousness" special issue suffers from unconstitutional vagueness.

CONCLUSION

For the reasons stated above and in Mr. Saldaño's Petition for Writ of Certiorari, this Court should grant certiorari to resolve the Question Presented.

Respectfully submitted,
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WORD COUNT CERTIFICATE

As required by Supreme Court Rule 33.1(h), I certify that the above and forgoing Reply to the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit contains words, excluding 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 October 28, 2019.

/s/ Thomas Scott Smith
By:_____
Thomas Scott Smith