

CAPITAL CASE

No. 19-8600

IN THE SUPREME COURT OF THE UNITED STATES

MARCO ENRIQUE TORRES,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Susanne Bales
Asst. Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
Phone: (865) 637-7979
Facsimile: (865) 637-7999
Susanne_Bales@fd.org

Counsel of Record for Petitioner Torres

INTRODUCTION

This Court should grant Mr. Torres' petition for certiorari raising several federal constitutional challenges to the referendum process that rolled back the Nebraska Legislature's death penalty reform statute LB 268. Mr. Torres raises significant challenges to the Nebraska referendum process reinstating the death penalty including that it qualified as cruel and unusual punishment, Pet'r's Br. 14-18; denied him due process and equal protection of the laws, Pet'r's Br. 27-28, and qualified as a bill of attainder, Pet'r's Br. 21-27. He noted that in the modern death penalty era, the referendum process was unprecedented. Pet'r's Br. 18-21. He also noted the highly publicized referendum campaign targeted each death row inmate individually. Pet'r's Br. 21, 23-24. Respondent urges this Court to deny review, asserting Mr. Torres misstated the state court record, Opp'n Br. 2; the case does not present a federal question, Opp'n Br. 5; and the case does not present a circuit conflict, Opp'n Br. 7-9. None of Respondent's asserted reasons support the denial of certiorari. This case merits this Court's review.

ARGUMENT

I. Mr. Torres Did Not Misstate the State Court Record.

Mr. Torres did not misstate the state court record. Respondent contends there are "repeated factual misstatements" in Mr. Torres' certiorari petition because he "ignores" the state court's explanations of its referendum process. Opp'n Br. 3. This explanation, Respondent contends, would demonstrate Torres' death sentences were always in place. Opp'n Br. 3. Mr. Torres did not misstate the record. In his certiorari petition, Mr. Torres noted the following:

The state court found the death penalty reform statute was “rolled back by Nebraska’s referendum process before it went in to effect,” Pet’r’s Br. 13;

The state court “found the sentence had always been in place,” Pet’r’s Br. 21; and,

That his constitutional challenges to the referendum process survive even though the state court found Mr. Torres had not “technically been freed from death row.” Pet’r’s Br. 29.

Accordingly, Mr. Torres accurately described the state court proceedings.

II. Mr. Torres Raises Federal Questions in His Petition for Writ of Certiorari.

Mr. Torres’ petition for writ of certiorari raises several federal questions, including whether Nebraska’s referendum process qualified as cruel and unusual punishment, Pet’r’s Br. 14-18, whether the referendum process denies his right to due process of law and equal protection of the laws, Pet’r’s Br. 27-28, and whether the process denies the right to be free from a bill of attainder, Pet’r’s Br. 21-27. Respondent nonetheless contends Mr. Torres has raised no federal question and that the Nebraska Supreme Court is the final arbiter of the Nebraska Constitution and Nebraska state law. Opp’n Br. 5-6. Respondent concludes that because Mr. Torres’ claims challenge an interpretation of state law, “there is no federal question.” Opp’n Br. 6.

Section 1257(a), 28 U.S.C., grants this Court jurisdiction to review claims arising under the federal constitution. Mr. Torres’ petition raises substantial federal question concerning the constitutionality of the referendum process in Nebraska.

He relies upon the Fifth, Eighth, and Fourteenth Amendments, U.S. Constitution. The petition relies upon numerous of this Court's precedent. Pet'r's Br. 14 -15, 16 (citing and quoting *Weems v. United States*, 217 U.S. 349, 370 (1910) (the Eighth Amendment prohibits "superadded" punishment)) ; Pet'r's Br. 16, 18 (citing and quoting *Trop v. Dulles*, 356 U.S. 86 (1958) (punishment must accord with the dignity of man)); Pet'r's Br. 15-16 (citing and quoting *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (same)); Pet'r's Br. 19, 28 (citing *Hicks v. Oklahoma*, 477 U.S. 343 (1980) (where a state affords procedural protections, it may not arbitrarily deprive the accused of those protections)); Pet'r's Br. 20, 28 (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (Due Process and the Eight Amendment require that there be a rational basis for the death penalty)). Respondent finally concedes this case raises federal questions in section 4 of its argument to this Court by urging this Court to permit adjudication of Mr. Torres' "constitutional claims" in his pending federal habeas case. Opp'n Br. 9-10. Of course the petition raises a federal question.

III. Mr. Torres' Case Merits Review Because the Actions Complained of Are Unconstitutional.

Mr. Torres' case merits review despite the absence of a conflict among the circuits. The absence of a circuit conflict does not equate to the absence of a constitutional violation. No other state in the modern death penalty era has legislatively enacted death penalty reform which modified existing death sentences to life sentences only to have the governor initiate and finance referendum proceedings to roll back the statute, and where the referendum targeted specific, named inmates, including Mr. Torres. Mr. Torres' case raises important federal

questions about the constitutionality of the referendum process that unfolded in Nebraska.

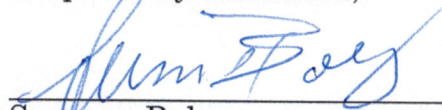
Respondent also contends that this Court's denial of review of the petition for certiorari filed by Nebraska death row inmate Mata raising a due process challenge to the referendum process "is an indication of a lack of conflict among the Circuit Courts, state courts, and this Court on Torres' due process claim." Opp'n Br. 9 (noting the certiorari denial on *Mata v. Nebraska*, No. 19-8045, 2020 WL 3492696, at *1 (Jun. 29, 2020)). A denial of review "imparts no implication or inference concerning this Court's view of the merits" of an issue. *Hughes Tool Co. v. Transworld Airlines Int'l*, 409 U.S. 363, 365 fn. 1 (1973) (citing *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950)). Also, Mr. Torres' case raises several issues that were not raised in Mr. Mata's case, which raised a single due process claim. Accordingly, Respondent's reliance on the *Mata* case is misplaced.

CONCLUSION

This Court should grant review to Mr. Torres' petition for writ of certiorari.

Dated: August 25, 2020.

Respectfully submitted,



Susanne Bales
Asst. Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
Phone: (865) 637-7979
Fax: (865) 637-7999
Susanne_Bales@fd.org

Counsel of Record for Petitioner Torres