No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISIDRO MIGUEL DELACRUZ,
Petitioner
v.
THE STATE OF TEXAS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

The mitigation evidence offered at Isidro Delacruz's trial showed that he had grown up in a home fraught with violence, had struggled at school and was addicted to marijuana and alcohol. Despite his troubles, he had been devoted to his problematic girlfriend's 5-year-old daughter and was viewed as a good and loyal friend and an "awesome" co-worker. However, the jury at Mr. Delacruz's death penalty sentencing trial was instructed to consider only such mitigating evidence as might be regarded as reducing his "moral blameworthiness."

The Question Presented is:

> Can the Texas death penalty statute, which instructs the jury to consider "the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," but then limits the scope of the evidence that jurors consider mitigating to "evidence that a juror might regard as reducing the defendant's moral blameworthiness," be reconciled with this Court's long-established mitigation jurisprudence?

PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

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Appendix B

Texas Code of Criminal Procedure Article 37.071§ 2.

PETITION FOR WRIT OF CERTIORARI

Petitioner Isidro Miguel Delacruz respectfully petitions for a writ of certiorari to review a judgment and decision of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The judgment and opinion of the Texas Court of Criminal Appeals originally issued on March 1, 2023. *Delacruz v. State*, No. AP-77,079, 2023 Tex. Crim. App. Unpub. LEXIS 115, 2023 WL 2290863 (Tex. Crim. App. Mar. 1, 2023) (not designated for publication). Rehearing was denied without opinion on May 17, 2023. *In re Delacruz*, No. AP-77,079, 2023 Tex. Crim. App. LEXIS 333 (Tex. Crim. App. May 17, 2023). The Court of Criminal Appeals' opinion of March 1, 2023, is attached as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides, in pertinent part: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall ... deprive any person of life, liberty or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

The Texas death penalty statute, TEX. CODE CRIM. PROC. Article 37.071§ 2, is in issue. A copy of the statute is provided as Appendix B.

STATEMENT OF THE CASE

A. Trial Court Proceedings.

Petitioner Isidro Miguel Delacruz was charged with one count of capital murder for the "intentional or knowing" murder of Naiya Villegas, a person younger than 10 years of age. TEX. PEN. CODE §19.03 (a)(8); 1 CR 16. On March 29, 2018, the jury returned a verdict finding Mr. Delacruz guilty. 65 RR 73. The sentencing phase commenced on April 2, 2018. 66 RR 16.

At trial it was undisputed that Mr. Delacruz – 23 years old at the time of the offense – was devoted to Naiya, the five-year-old daughter of his "on again, off again" girlfriend, Tanya Bermea, who was ten years his senior. 1 CR 160; 62 RR 24-27, 92-93, 110, 114; 66 RR 81; 75 RR 126-31.

According to multiple witnesses, Mr. Delacruz spent much time with Naiya, treating her and referring to her as his own child. 61 RR 229; 64 RR 103. Following the example of his own father, Juan, who raised his brother Chris even though he was not Juan's child, Mr. Delacruz was likewise committed to caring for Naiya, even

though she was not his daughter. Indeed, he largely remained involved with Bermea out of "care and concern and love" for Naiya. 72 RR 115,118.

In contrast, Mr. Delacruz's relationship with Bermea was described by witnesses as "dysfunctional," "toxic," and "turbulent." 1 CR 160; 62 RR 24-27, 92-93, 110, 114; 66 RR 81; 75 RR 126-31. At the time of the offense, Mr. Delacruz was out on bond after being accused of assaulting Bermea. 62 RR 37; 66 RR 73, 81-85; 69 RR 146-7. He had previously been charged with assaulting her, but there had also been an incident in which the police had determined that she was the aggressor. 66 RR 110-11. In fact, Bermea had a history of hitting Mr. Delacruz, which she claimed was in self-defense. 66 RR 111-12.[1]

Mr. Delacruz's relationship with Bermea troubled friends and family alike. His father had known Bermea for years because she hung around with a niece of his, "partying, hooked on drugs and whatever." 73 RR 129-31. He told Mr. Delacruz "to stay away from her, that she was crazy," and that they should stay away from each other. 73 RR 129-30, 146. Mr. Delacruz's cousin Rigoberto warned him to stay away from her, after a previous incident in which Bermea assaulted Mr. Delacruz, who had come home with a torn shirt. 75 RR 185. When Mr. Delacruz brought Bermea to

[1]Defense counsel attempted to cross-examine Bermea about her history of assaulting partners other than Mr. Delacruz, and about her past interactions with Child Protective Services, but the trial court refused to admit that evidence. 66 RR 116-22.

meet Ruby Cortez, the mother of one of his friends, Ruby's reaction was: "I told him . . . get away from her. She's going to ruin your life." 73 RR 76.

Bermea was a critical prosecution witness at trial. According to her, Mr. Delacruz gave her money from time to time to help support her and Naiya. She wanted to him to do so on the night of the offense, despite a protective order for him to stay away from her. 62 RR 31, 116; 64 RR 79-80; 66 RR 103-04. When Bermea did not meet up with Mr. Delacruz as they had arranged, he told her he would not give her the money. 62 RR 28-32, 115-6. As the evening wore on, they continued to argue, both online and in person. 61 RR 105-127; 62 RR 28-29, 92-93; 64 RR 78-80; State's Exhibit 35. Bermea went to visit a friend, leaving Naiya with her parents. 62 RR 28-30. As she was driving back to her parent's house, she saw Mr. Delacruz in the street and they argued again. 62 RR 30-32. Bermea had smoked marijuana and consumed alcohol that evening; she and Naiya were eventually driven home by her mother, while Mr. Delacruz went to his parents' house and then to drink at a tavern. 57 RR 201; 62 RR 30, 32, 94, 64 RR 81-82; State's Exhibit 27.[2]

At the tavern he ran into an acquaintance, Jeremiah Ramos, and borrowed his phone to call Bermea. 61 RR 35-37, 203-217; 62 RR 29. He asked her to join him

[2]Mr. Delacruz had already been drinking beer throughout the evening. State's Exhibit 27; 61 RR 230.

at the tavern, but she just yelled at him. State's Exhibit 27. After Mr. Delacruz returned the phone, Ramos saw that numerous calls were coming in from a number he did not recognize and which he then blocked. 61 RR 218-20. Ramos gave Mr. Delacruz a ride from the tavern, dropping him off part of the way to Bermea's house; Mr. Delacruz then walked to her house from there. 61 RR 222-23, 235-36.[3]

Even though she claimed to be afraid of Mr. Delacruz, Bermea did not leave her home that night to stay with family or call 911 . 62 RR 96-97, 114. She claimed that she had tried to cut a piece of wood to jam shut her bathroom window and prevent Mr. Delacruz from entering, but no wood was found at the scene. 62 RR 35-43, 97-98; 64 RR 8-10. Bermea testified that Mr. Delacruz broke the window with his hands and somehow entered through a small triangular opening, and that she then ran out of her house, leaving Naiya sleeping there alone. 62 RR 43-46, 85; 64 RR 91. Bermea claimed she ran down the street barefoot, with Mr. Delacruz following her, while she called her mother, who drove to meet her. 62 RR 45-47; 64 RR 99-101. Video

[3]These calls were evidently made by Bermea in an attempt to reach Mr. Delacruz. Bermea testified at trial she had received a phone call from an unknown number. While she denied speaking to Mr. Delacruz, claiming she was afraid of him, phone records showed she attempted to called Ramos' number back 24 times and that two short completed calls took place. 62 RR 35-42, 94-96; 64 RR 43-48, 56-65, 83-6; Defense Exhibit 1. Someone later tried to delete the phone records; Bermea did not tell the police about her attempted calls or that she had called Mr. Delacruz's mother 6 or 7 times that night. 64 RR 62-71.

footage showed that Bermea was in fact walking soon after she left the house, with Mr. Delacruz appearing one and a half minutes later. State's Exhibit 29; 64 RR 96-106.

Bermea and her mother drove back to the house, but when they tried to enter, Mr. Delacruz emerged and assaulted both of them. 62 RR 47-48.[4] According to Bermea, she left her mother lying on the ground and drove to Mr. Delacruz's house to tell his parents what had happened, then returned to her own home. 62 RR 48-51, 69. She said that when she entered the house she saw Naiya on the floor with Mr. Delacruz holding paper towels around her neck, soaking up blood, but she admitted confusion about whether she saw that "the first [or] the second time." 62 RR 52-53.[5] She claimed Mr. Delacruz threw her out of the house as his mother and emergency services arrived. 62 RR 54.

When interviewed by the police, Mr. Delacruz explained that he had gone to Bermea's house and knocked on the door. They had argued about money. He was "pretty drunk," and was concerned that Bermea had also been drinking, rather than looking after Naiya. State's Exhibit 27, 35. Deciding to leave, he went into Naiya's

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[4]Neighbor Kendra Cain described as Bermea "fighting" and "wrestling" with a man in the front yard. 61 RR 7-27; State's Exhibit 23.

[5]Presumably, by "the first time" she meant before she left the house and called her mother.

darkened bedroom to hug and kiss her goodnight. State's Exhibit 27. As he leaned over Naiya's bed, he felt a cut to his arm: "I just felt something sharp on my arm . . . and next thing I know there's blood everywhere." State's Exhibit 27. A cut had been inflicted to the back of his upper left arm, probably made by a knife, and about three to five inches in length. 57 RR 229-3, 250-51; 61 RR 84-85; State's Exhibit 358, 359; Defense Exhibit 3. Bermea "took off" and he followed her outside, not understanding why she rushed off leaving Naiya. He went back to the house to check his wound, and saw a knife which he picked up on his way. Back in the house "there is Naiya . . . so much blood everywhere, so I pick her up and put her in the living room and I try to . . . stop the bleeding." State's Exhibit 27. Bermea and her mother came back and "her mom is yelling what did I do and I'm telling her I didn't do nothing, just get the fuck away from me." Mr. Delacruz then pushed Bermea's mother and slapped Bermea across the face, and while Bermea was outside the house, "threw that knife at her and [asked] her what the fuck is wrong with her." *Id.* He told Officer Marcus Rodriguez that Bermea had slit Naiya's throat. State's Exhibit 24; 57 RR 183-84, 243-44. During a jail visit Mr. Delacruz also described what had happened to Naiya as an accident. State's Exhibit 30; 62 RR 20-21; 63 RR 26-27.

Law enforcement witnesses described seeing blood throughout the house, including in the child's bedroom, the kitchen, living room and bathroom. 57 RR 40-

179.[6] Subsequent DNA analysis revealed that the blood found at the scene, on clothing and on the knife was that of both Mr. Delacruz and Naiya. State's Exhibits 33, 34, 36; 60 RR 34-113, 145-258; 63 RR 91-151, 164-99; 64 RR 7-35. Mr. Delacruz explained that he had moved the child into the living room while trying to tend to her wounds and had rushed all over the house, getting paper towels from the kitchen and looking for gauze to put on her neck. State's Exhibit No. 27.

First responders found Mr. Delacruz administering first aid to Naiya on the floor of the living room. 57 RR 183-84; 58 RR 16. He screamed at them to get help, while Bermea and her mother stayed outside and did not assist the child. State's Exhibit No. 24; 57 RR 184, 194-95, 241-48. Naiya later died from cuts to her throat. 58 RR 122; 61 RR 173. Bermea's fingers were, as she admitted, crusted with blood, although she denied knowing how it got there. 61 RR 88, 94-96; 62 RR 114-15. On March 29, 2018, Mr. Delacruz was found guilty of capital murder. 64 RR 152-164; 65 RR 4-8, 73.

At the penalty phase, the State presented evidence that Mr. Delacruz had prior convictions for drug and alcohol offenses, evading arrest, and assault, and had been

[6]The knife was found across the street. 57 RR 35-48. Mr. Delacruz identified it as one he had given Bermea. State's Exhibit 27.

on probation for criminal mischief. 69 RR 124-37.[7] The jury also heard that he had substance abuse problems, for which he had been in a residential program for approximately one year from October 2012. 66 RR 35; 69 RR 158-60. His compliance was not perfect, but he successfully completed the program. 66 RR 36, 63. Nonetheless, notices of violation had been issued, and a motion to revoke his probation was pending. 69 RR 121-40.

The State also presented evidence that Mr. Delacruz's conduct in jail had been poor: while jail staff described him as a courteous and respectful inmate, he had been found in possession of contraband. 69 RR 203-09, 220, 224-27, 235, 240, 267; 71 RR 13-44, 49-58,147-78, 180-92. He had also damaged jail property, and had accessed an unauthorized area of the jail in which contraband had been found. 69 RR 213-23, 242-278; 71 RR 59-71, 86-115, 116-146.

The defense presented evidence that Mr. Delacruz had a family history of poverty, abuse and neglect. His mother, Lisa, came from a family of 11 siblings. Her family never had enough money, and Child Protective Services ("CPS") had become involved after a report that her mother had abandoned the children. 74 RR 129-31. Lisa's first child, Chris, was the result of her being raped at age 15 by a man named Ringo Garza. 72 RR 113-14; 74 RR 132, 159. She later married Mr. Delacruz's

[7] *See, e.g.,* State's Exhibits 512, 513, 514, 516, 520, 522.

father, Juan, who works in hospital maintenance. 73 RR 105-06.

Lisa's upbringing was turbulent, with "a lot of turmoil and bickering." 73 RR 122-3; 74 RR 86-87; 91-92, 183. There was alcoholism on both sides of her family; Lisa suffered from alcoholism and depression, and had a history of seizures. 73 RR 122; 74 RR 123-24; 75 RR 62-63. A defense psychologist testified that records revealed Lisa as being "messed up," "impulsive," even "explosive." 72 RR 110-11. She was said to have been "sold" to Ringo, an older man, by her own mother, who had "pimped out" her other daughters. 72 RR 112-14. Juan was more stable but not a "very present" father-figure, being preoccupied with work. 72 RR 114-15.

Mr. Delacruz's parents claimed that discipline in their home consisted of spanking and use of a wooden paddle. 73 RR 117-18; 74 RR 135-37. However, records revealed multiple complaints to CPS about the family, and removal of Mr. Delacruz and his brothers from the home on three occasions for as long as six months. 72 RR 94-95; 73 RR 111-13; 74 RR 117-18, 122-23. There had been severe physical abuse "intermittently acknowledged" by Lisa, who spoke of "horrendous things" endured in her own childhood. 72 RR 96. She had tried to break one of her son's arms and had thrown Mr. Delacruz, age nineteen months, against a wall. 72 RR 96-97, 139. Both parents administered "a lot of whoopings, beatings with belts and paddles and electrical cords." 72 RR 98. Juan and Lisa had to do parenting and anger

management classes, and CPS required Juan's mother to live with them to supervise the family. 73 RR 112-14; 74 RR 118-19.

Mr. Delacruz's parents mistreated him and his brother Christopher more than Lorenzo. 74 RR 87-88. However, even Lorenzo described being beaten as a child with a belt and an extension cord, and being deliberately burned on the hand with a curling iron when he was "real young," just for crying. 73 RR 163. Lorenzo had a scar on his head from when his mother threw a can of shaving foam at his father but missed. 73 RR 201. A friend recalled the household as "pretty crazy," with Mr. Delacruz's mother throwing "big old martial arts trophies" at Mr. Delacruz, trying to hit him. 72 RR 20.

His father testified that Mr. Delacruz had been found to have "too much lead in the blood" as a child and had only started walking at around 2 years old. 73 RR 108-09. Mr. Delacruz did poorly at school and "would cry . . . because he couldn't figure out the problems." 73 RR 132-33.

The defense also presented evidence of Mr. Delacruz' learning disabilities and developmental problems. Lisa testified that as a child Mr. Delacruz had a speech defect for which he required treatment, and that he had been held back in school and placed in Special Education classes. 74 RR 126-27. Testing conducted prior to trial revealed that Mr. Delacruz has a full scale IQ of 83, and that his working memory is

significantly impaired. 75 RR 75-76. He had to repeat first grade, "struggled with school," and graduated high school 272nd out of 286. 72 RR 99. A defense neuropsychologist reported "significant concerns" about Mr. Delacruz's frontal lobe functioning, which would affect his judgment, reasoning, and impulse control, especially in "a chaotic situation under the influence of alcohol." 75 RR 78-79. His impairments would have influenced his behavior at the time of the offense, as well as his interactions with people, his reasoning and his judgment. 75 RR 81, 84, 90.

Mr. Delacruz began drinking alcohol at around the age of 11 and used marijuana from age 13. 75 RR 66-68. A defense neurospychologist described Mr. Delacruz's situation as a "perfect storm" of mental health issues and neurodevelopmental brain conditions, as well as mild depression and addiction to alcohol and cannabis. 75 RR 61-62. His learning disabilities included a possible attention deficit hyperactivity disorder ("ADHD"), which caused him difficulty in processing information. 75 RR 62-65. Nonetheless, he had attempted to be gainfully employed. 75 RR 66. Although his employment was sporadic, Mr. Delacruz had worked at different jobs and a former colleague said working with him was "awesome." 69 RR 142-46, 158-60; 72 RR 33-36. He had a great work ethic and was fun to work with. 72 RR 33-36.

At the time of the offense Mr. Delacruz's blood-alcohol level had been around

0.27 – three times the legal limit. 74 RR 57-59. Given evidence of marijuana in Mr. Delacruz's blood at the time of the offense and the synergistic effect of marijuana and alcohol when combined, his ability to think clearly would have been further impaired at the time. 74 RR 63-64, 77-79.

The defense presented further evidence that Mr. Delacruz had positive qualities and was well-liked. Friends and family members described Mr. Delacruz as loving skateboarding and being a great cook. 72 RR 22-23; 73 RR 12, 38-39; 74 RR 101. He got into trouble for car-racing and graffiti, but was loving and protective of people and animals, despite his family background. 72 RR 12-14, 118-19; 73 RR 51, 56-57, 91-92, 96-97,117, 121-25, 172-3; 74 RR 91-92. He was described as a "good" and "loyal" friend who helped others. 73 RR 7-16, 101. Ruby Cortez looked on Mr. Delacruz as being one of her own sons, and had taken him on family vacations. 73 RR 68-75. His best friend Tyler Cooper said Mr. Delacruz could get very emotional, especially when drinking, and they had intimate talks about their childhoods, which were similar, including discussing being a survivor of sexual abuse. 72 RR 17.

Multiple witnesses spoke of Mr. Delacruz's devotion to Naiya. His friend Tyler Cooper described him as happier and "more complete . . . [as though] a hole was filled" when he was with her, choosing to take her to a children's park rather than going skateboarding with his friends. 72 RR 18-19. His cousin Daniel testified that

"if the little girl wanted something, he would walk through glass to get it . . . [h]e always used to tell us . . . she was like one of his own." 73 RR 52-53. His brother Lorenzo said Mr. Delacruz was never very happy around Bermea, but that he seemed happy whenever he talked about Naiya – he "[l]oved the kid." 73 RR 169.

Defense counsel filed pretrial motions requesting that the court declare the statutory definition of mitigating evidence in TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4): "evidence that a juror might regard as reducing the defendant's moral blameworthiness" unconstitutional, 1 CR 191-201, 202-05, 213-218; 10 RR 31-36. Defense counsel also filed written objections to the penalty charge, which were overruled. 14 CR 6341-6381, 6382; 74 RR 213-16. Thus, the sentencing instructions given to the jury essentially mirrored the statute. 14 CR 6386-88.

Two special issues were presented to the jury. The jury answered special issue No. 1 (the "future dangerousness" issue), "Yes" and special issue No. 2 (the mitigation issue), "No." 76 RR 83-85; 14 CR 6386-91. Based on the jury's answers to the special issues, the trial court sentenced Mr. Delacruz to death. 76 RR 87.

B. Texas Court of Criminal Appeals' Opinion on Direct Review.

The Texas Court of Criminal Appeals affirmed Mr. Delacruz's conviction and death sentence on direct appeal. *Delacruz v. State*, No. AP-77,079, 2023 Tex. Crim. App. Unpub. LEXIS 115, 2023 WL 2290863 (Tex. Crim. App. Mar. 1, 2023) (not

designated for publication). The Texas court noted that it had previously rejected similar arguments concerning Art. 37.071 § 2(f)(4), and declined to revisit those issues. *Id*. at 73-74. Rehearing was denied on May 17, 2023.

REASONS FOR GRANTING THE PETITION

Mr. Delacruz's case demonstrates that the Court's review of the Texas death penalty statute in its current form is needed because the instructions mandated by the Texas death penalty statute impede jurors' consideration of the full range of potentially mitigating evidence, contrary to the Court's long-standing precedents.

I. INTRODUCTION: THE EVOLUTION OF THE TEXAS DEATH PENALTY SENTENCING STATUTE.

The Texas death penalty statute, TEX. CODE CRIM. PROC. Art. 37.071, was enacted in response to this Court's holding that the state's previous system for imposing capital punishment was unconstitutional. *See Branch v. Texas*, No. 69-5031, decided together with *Furman v. Georgia*, 408 U.S. 238 (1972). When first enacted, the statute required the jury to decide (1) whether the conduct in question was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (2) whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and (3) if raised by the evidence, whether the killing was an unreasonable response to

provocation by the deceased. The jury could answer "yes" – resulting in the death penalty – only if all 12 members agreed; it could answer "no" if 10 of 12 members agreed.[8]

This post-*Furman* statute was upheld in *Jurek v. Texas*, 428 U.S. 262 (1976), on the basis that it permitted the defense "to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced" and that it would guide and focus "the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U.S. at 274.

At the same time that this Court was deciding *Jurek*, however, it also recognized that "the fundamental respect for humanity underlying the Eighth Amendment [] required consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Court noted that "a process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing

[8]*See* TEX. CODE. CRIM. PROC. Art. 37.0711– Procedure for Capital Case for Offense Committed Before September 1, 1991.

the ultimate punishment . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 305; *Lockett v. Ohio*, 438 U.S. 586 (1978) (same).

The states must, therefore, permit the sentencer to consider, and in appropriate cases base a decision to impose a life sentence upon, any relevant mitigating factor. *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (same); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce."). This principle "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *California v. Brown*, 479 U.S. 538, 562 (1987) (Blackmun, J. dissenting).

This Court came to recognize that the three original special issues in the Texas statute failed to provide a sufficient vehicle for the jury to express its "reasoned moral response" to certain mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989) ("*Penry I*") (finding that none of the special issues was broad enough to allow the jury to consider and give effect to Penry's mitigating evidence of intellectual disability and childhood abuse).

The Texas legislature eventually amended the statute, removing the questions

concerning deliberateness and response to provocation, and adding a mitigation special issue for jurors to address when the other special issues are answered in the affirmative:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[9]

TEX. CODE CRIM. PROC. Art. 37.071 § 2 (e)(1). However, the legislature also included language in the statute defining mitigating evidence as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM .PROC. Art. 37.071 § 2 (f)(4).

II. CONTRARY TO THIS COURT'S DECISION IN *TENNARD V. DRETKE*, THE TEXAS DEATH PENALTY STATUTE IMPROPERLY LIMITS THE SCOPE OF THE EVIDENCE THAT MAY BE CONSIDERED MITIGATING TO THAT WHICH REDUCES THE DEFENDANT'S "MORAL BLAMEWORTHINESS."

A. *Tennard v. Dretke* Clarified That Evidence Is Mitigating if it Might Serve as a Basis for a Sentence less than Death.

As the legislative developments detailed above were taking place, Robert Tennard's case made its way to this Court. *Tennard* contested the imposition of a "nexus" requirement, such as was then being imposed in the Fifth Circuit. *See*

[9]1991 Tex. Gen. Laws 838, 1991 Tex. SB 880 (1991).

Tennard v. Cockrell, 284 F.3d 591, 597 (5th Cir. 2002) (holding defendant must establish that offense was attributable to the evidence offered in mitigation of sentence). At the penalty phase, Tennard had offered evidence that he had an IQ of 67 and would later argue that the jury had been unable to give mitigating effect to that evidence. A plurality of the Texas Court of Criminal Appeals denied his direct appeal explaining that, "there is no evidence [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or . . . control his impulses . . . ." *Ex parte Tennard*, 960 S.W.2d 57, 62 (Tex. Crim. App. 1997) (*en banc*). The Fifth Circuit similarly rejected Tennard's argument, stating that "his claim must fail because he did not show that the crime he committed was attributable" to his low IQ and possible intellectual disability. *Tennard*, 284 F.3d at 596.

In *Tennard v. Dretke*, 542 U.S. 274 (2004) both Texas' and the Fifth Circuit's approaches met with the Court's disapproval. The Court noted emphatically that it had long characterized the relevance standard in the mitigation context "in the most expansive terms." *Tennard,* 542 U.S. at 284 (invoking *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990)). *McKoy* had noted that the basic relevance standard, under both federal and state rules of evidence, is exceedingly broad. *Id.* That standard requires only that proffered evidence have "any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tennard,* 542 U.S. at 285. The Court rejected the "nexus" test that the Fifth Circuit had used to "screen" mitigation evidence for what it deemed to have "constitutional relevance." *Tennard* re-emphasized that the relevance standard applicable to mitigating evidence in capital cases is simply whether the evidence 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: "[T]he Fifth Circuit's screening test has no basis in our precedents." *Id.* at 284.

Later, in *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court reiterated that the sentencing jury must be able to consider and give effect to mitigating evidence, whether or not a nexus exists. *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 245 (2007) (same); *Brewer v. Quarterman*, 550 U.S. 286, 295-96 (2007) (same).

B. *Tennard* and TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4) Cannot Be Reconciled.

A juror deciding the fate of a defendant facing the death penalty is presumed to follow their statute-based instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (cited in *Penry v. Johnson*, 532 U.S 782,799-800 (2001)("*Penry II*")). The Texas juror in a death penalty case is instructed to decide the mitigation special issue

after considering "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral *culpability* of the defendant." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (e)(1) (emphasis added). The juror is told to interpret that text by deeming "mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral *blameworthiness*." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4) (emphasis added).[10]

The words "blameworthiness" and "culpability" are virtually synonymous. Both "blameworthiness" and "culpability" indicate a causative connection or nexus between a wrongful act and the status of the individual causing that act as being deserving of blame or punishment. Dictionary definitions of these terms include the following:

[10]In *Penry II* the Court reviewed an *ad hoc* attempt to graft a jury nullification instruction onto the same special issues found to be constitutionally inadequate in *Penry I*. During oral argument, counsel for Penry indicated that the Texas statute's new mitigation special issue might sufficiently comply with *Penry I*. *Id.* at 803. However, the moral blameworthiness language was not discussed.

CULPABILITY	BLAMEWORTHINESS
"The fact that someone deserves to be blamed or considered responsible for something bad." *Cambridge Dictionary* https://dictionary.cambridge.org/us/dictionary/english/culpability (last accessed July 31, 2023)	**"Having done something wrong."** *Cambridge Dictionary* https://dictionary.cambridge.org/us/dictionary/english/blameworthy (last accessed July 31, 2023)
"Meriting condemnation or blame especially as wrong or harmful." *Merriam-Webster Dictionary* https://www.merriam-webster.com/dictionary/culpable (last accessed July 31, 2023).	**"Being at fault; deserving blame."** *Merriam-Webster Dictionary* https://www.merriam-webster.com/dictionary/blameworthiness (last accessed July 31, 2023).
"Deserving of blame or censure; blameworthy." *American Heritage Dictionary of the English Language* https://www.ahdictionary.com/word/search.html?q=culpability (last accessed July 31, 2023)	**"Responsible for doing wrong or causing undesirable effects; deserving blame."** *American Heritage Dictionary of the English Language* https://www.ahdictionary.com/word/search.html?q=Blameworthiness (last accessed July 31, 2023)
"Responsible for something wrong or bad that has happened." *Collins Dictionary* https://www.collinsdictionary.com/us/dictionary/english/culpable (last accessed July 31, 2023).	**"Deserving to be blamed"** *Collins Dictionary* https://www.collinsdictionary.com/us/dictionary/english/blameworthy (last accessed July 31, 2023).

This Court has used the term "moral culpability" in reference to capital sentencing, but its precedents establish that evidence that tends to reduce the

defendant's degree of responsibility for the offense is not the only factor that may render someone less "morally culpable," i.e., less worthy of a death sentence. There is no denying that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

However, this Court has also held that culpability for the offense in question is not the only relevant concern. For example, in *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) the Court held that evidence of adaptability to prison life was relevant at capital sentencing. Even though a defendant's good conduct in jail does "not relate specifically to [his] culpability for the crime he committed, there is no question but that such [evidence] would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Tennard*, 524 U.S. at 285 (quoting *Lockett*, 438 U.S. at 604); *See also Williams v. Taylor*, 529 U.S. 362, 398 (2000) (evidence that "might well have influenced the jury's appraisal of [Williams'] moral culpability" included good behavior in prison, returning a prison guard's missing wallet during a previous incarceration and helping break up a prison drug ring); *Porter v. McCollum*, 558 U.S.

30, 41 (2009) ("heroic military service" in Korean War was relevant to moral culpability).

Indeed, as the Court noted in *Tennard*, requiring a demonstration that the criminal act was linked to some factor asserted in mitigation "screen[s] out any positive aspect of a defendant's character, because good character traits are neither 'handicap[s]' nor typically traits to which criminal activity is 'attributable.'" *Tennard*, 542 U.S. at 285.

The problem created by the Texas statute – and the gravamen of Mr. Delacruz's concern – is the interaction between the special issue itself and the "moral blameworthiness" instruction. The special issue instructs the jury to consider three categories of evidence, listed in the disjunctive. A juror reading the special issue, without more, would assume that "the circumstances of the offense," the defendant's "character and background," and the defendant's "moral culpability" are all *different* things. This special issue, alone, allows the jury to consider "all of the evidence" concerning the defendant as mitigating. But then the limiting language of Article 37.071 § 2 (f)(4) – restricting "mitigating evidence" only to that which reduces "moral blameworthiness" – eliminates consideration of the defendant's "character and background" as a basis for a "yes" answer to the special issue. This interplay creates the danger that jurors will read "moral blameworthiness" as "blameworthiness" for

the crime, since humans are not normally spoken of as "blameworthy" in the abstract, but only with regard to specific acts. Other considerations are necessarily excluded because this supplemental instruction is entirely superfluous if it is not read as limiting the more general instruction.[11] There is no way to read the plain text of this statutorily mandated instruction and miss the fact that it confines, rather than expands, the concept of mitigating evidence and that consequently the jurors will not consider the defendant's "character and background" as mitigating.

Thus, despite *Tennard*, a "nexus" restriction lives on because the statutory instructions given to all Texas death penalty juries reduce what is considered as mitigating to that which reduces "moral blameworthiness," to the exclusion of the defendant's character and background. Considered according to the standard of *Boyde v. California*, 494 U.S. 370, 382 n. 5 (1990), in Mr. Delacruz's case "there was a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. In *Boyde*, the petitioner's success at a prison dance competition was deemed capable of counseling imposition of sentence less than death and could have been considered by the jury under California's "catch-all" instruction to consider "any

[11]In construing a statute, every word and every provision should be given effect. Antonin Scalia & Bryan A. Garner, *Reading Law* (Thomson/West 2012) at 174 n. 5.

other" extenuating circumstance, even if it is not a legal excuse for the crime. *Id*. at 382. Here, in contrast, no vehicle was available to give effect to evidence that Mr. Delacruz was viewed with affection, or was a good work colleague, or to his strong attachment to Naiya or to the evidence of his dysfunctional and unstable family background. As such the instructions, considered together, are unconstitutional under the Eighth and Fourteenth Amendments. *Penry I*, 492 U.S. at 318.

The Texas statute would not even permit full consideration of evidence such as that a defendant had created a means to alleviate climate change, as was the case in *Jordan v. State*, 518 So. 2d 1186, 1188 (Miss. 1987), where the defendant offered evidence that he had developed a method for generating electricity from an alternative energy source and had entered into an agreement with the Tennessee Valley Authority concerning his invention. There may be instances of evidentiary exclusions that are reasonable even given the "low threshold of relevance" that applies to mitigation. *Tennard*, 542 U.S. at 285 (finding that the frequency of an inmate's showers, at issue in *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984) was irrelevant to the sentencing determination). But that is hardly the fact pattern presented here.

The Texas Court of Criminal Appeals has repeatedly rejected constitutional challenges to the "moral blameworthiness" instruction. *See, e.g, Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004), *Roberts v. State*, 220 S.W.3d 521, 534 (Tex.

Crim. App. 2007). Yet that court denies what is plain: that the statutory language requires a nexus between the mitigating evidence and offense. Instead, the Texas court has claimed that *Tennard* "simply chastised" the Fifth Circuit for requiring a nexus and that no further problem exists because a jury is not "reasonably likely to infer a nexus requirement from the statutory words." *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010).

The Fifth Circuit has likewise repeatedly held that it is permissible to instruct that mitigating evidence is evidence that reduces moral blameworthiness. *See, e.g.*, *Blue v. Thaler*, 665 F.3d 647, 366 (5th Cir. 2011). However, that Court also recently recognized that the Texas court had "erroneously defined the universe of evidence relevant to moral blameworthiness too narrowly, undermining the rule established in *Lockett*," when it upheld the exclusion of childhood photographs of the defendant upon finding that there was no relationship between that evidence and his moral culpability for a murder. *Rhoades v. Davis*, 914 F.3d 357, 366-67 (5th Cir. 2019). The Fifth Circuit held that the photographs were admissible by drawing a distinction "between culpability for the specific crime committed by Rhoades and his moral culpability more generally. In other words, although the photos do not relate to the

circumstances of the crime, they go to his character and distinct identity." *Id.* at 367.[12] However, it is difficult to see how Texas jurors, absent explicit clarification of their instructions, are supposed to understand that culpability or blameworthiness for the crime in question, and "general" moral culpability or blameworthiness can both be considered, given that the defendant's character and background are excluded by the Article 37.071 § 2 (f)(4) instruction.

Rhoades demonstrates that there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevented consideration of constitutionally relevant evidence. *Boyde*, 494 U.S. at 380. If the trial judge in *Rhoades* construed the "moral blameworthiness" instruction to not allow for the admission of what the Fifth Circuit later recognized to be constitutionally relevant mitigating evidence, it is at least as likely that the lay jurors in this case construed this instruction in precisely the same way. In the absence of instructions clearly defining the distinction between culpability or blameworthiness for the crime in question and "general" moral culpability or blameworthiness, it is impossible to see how the jurors could construe this language any differently. Because some of Mr. Delacruz's most humanizing mitigating evidence was placed beyond the jury's power to give it effect, this Court

[12]The Fifth Circuit nonetheless concluded that the exclusion of the photographs was harmless error. *Id*. at 368.

should grant the writ to explain why the Texas statutory definition of mitigating evidence must give way.

CONCLUSION

For the foregoing reasons, the petitioner, Isidro Miguel Delacruz, moves this Honorable Court to grant this petition for certiorari and to remedy the constitutional violations that occurred in the Texas courts.

Respectfully submitted,

/s/ Hilary Sheard

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