

IN THE
Supreme Court of the United States

ISIDRO DELACRUZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

A jury found Isidro Delacruz guilty of capital murder of a child younger than ten years of age. During sentencing, Delacruz called seventeen witnesses to testify to his character and background. Then, in closing arguments, the prosecutor and defense counsel reminded the jury to consider all the evidence when answering the mitigation special issue, a catchall instruction on mitigating evidence. Finally, the trial court instructed the jury to consider “all the evidence,” including that of Delacruz’s “character and background.” The jury found insufficient mitigating circumstances to warrant a sentence less than death, and Delacruz was sentenced to death.

The question before the Court is thus:

Does Texas’s mitigation special issue, instructing jurors to consider evidence of “the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant” violate the Eighth Amendment when it also limits the scope of the evidence that jurors consider mitigating to “evidence that a juror might regard as reducing the defendant’s moral blameworthiness?”

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BRIEF IN OPPOSITION

This is an appeal from a Texas Court of Criminal Appeals (CCA) opinion affirming the trial court's judgment. Delacruz petitions this Court for a writ of certiorari based on Texas's mitigation special issue. He complains that the mitigation instruction improperly excludes character and background evidence and limits the scope of the mitigating evidence that jurors may consider to that evidence which might be regarded as reducing a defendant's "moral blameworthiness." Two decades ago, this Court indicated its approval of Texas's mitigation special issue. *See Penry v. Johnson*, 532 U.S. 782, 803 (2001) (*Penry II*). Since then, the CCA and the Fifth Circuit have repeatedly found that the instruction does not limit the scope of mitigation evidence as Delacruz claims. *E.g., Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010); *Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014). And this Court recently denied a petition for writ of certiorari raising this same claim. *See Suniga v. Texas*, 140 S. Ct. 375 (2019). This case confirms the last two decades of precedent: During the sentencing phase of trial, Delacruz presented significant evidence of his troubled upbringing, while highlighting his goodwill throughout. The jury was then instructed by defense counsel, the prosecutor, and the trial court to consider all the evidence. No jury could have interpreted the mitigation special issue to exclude the evidence that it was thrice instructed to consider.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts as follows:

[Delacruz] and Tanya Bermea had an “on again, off again” relationship that was described at trial as turbulent and dysfunctional. On the night of September 1, 2014, Tanya put her five-year-old daughter, N.V., to bed. Tanya later received several phone calls from a number she did not recognize, but she suspected the calls were from [Delacruz]. The two had argued a few hours earlier when [Delacruz] did not give Tanya money that he had promised her. In the early morning hours of September 2, Tanya heard a noise in the back of the house, just outside of the bathroom window, which was partially broken and patched with duct tape. Tanya saw [Delacruz] entering through the bathroom window. She ran out the front door, leaving N.V. asleep in her bed.

Surveillance cameras mounted outside of a business across the street from Tanya’s house captured Tanya after she left the house and headed down the street. The security video was admitted into evidence and played for the jury during Tanya’s testimony. The video shows Tanya passing by on the street and, about a minute and a half later, [Delacruz] following. Then, about four and a half minutes after that, the video shows [Delacruz] running back towards Tanya’s house.

Tanya testified that after she fled the house, she called her mother, Jesusita Bermea, and asked her to pick her up. Jesusita picked Tanya up within minutes and they returned to the house. Tanya testified that when they got back to the house, the front door was locked, but [Delacruz] came out, knocked Jesusita to the ground, and punched Tanya. Jesusita ran down the street and called the police. Dispatch received Jesusita’s call at 2:30 a.m.

In the meantime, Tanya drove to [Delacruz]’s parents’ house down the street to try to persuade them to get [Delacruz] out of Tanya’s house. Tanya returned to her house six to eight minutes later, unsuccessful in recruiting their assistance. Tanya testified that the front door was open when she got back, and she saw N.V. on the living room floor with bloody paper towels on her neck. [Delacruz] shoved Tanya out the door and slammed her to the ground.

A neighbor testified to being awakened around 2:35 a.m. by a woman she later recognized as Tanya banging on the front door of Tanya’s house and yelling to be let in. She then saw Tanya wrestling with a man in the front yard. The neighbor called 911.

Officer Marcus Rodriguez was the first officer to arrive at 2:37 a.m. The security video captures his arrival about fifteen minutes after Tanya initially fled the house and almost ten minutes after [Delacruz] ran back to the house. Rodriguez found N.V. lying on the floor with blood around her neck. Rodriguez asked [Delacruz] what happened, and [Delacruz] responded that “she slit her throat” and he “didn’t do anything.” Other officers arrived and began attending to N.V., who was alive but “barely breathing.” When [Delacruz] became angry and violent with the officers attending to N.V., he was handcuffed and placed in a patrol car. An ambulance and paramedics arrived at 2:45 a.m. N.V. was transported to the hospital where doctors pronounced her dead shortly after her arrival.

Officers found [Delacruz]’s blood throughout Tanya’s house, including around the bathroom window and sill, in the bathtub and sink, on walls, blinds, light switches, doorknobs and doors, closet doors, counters, furniture, and floors.¹ The bloody trail went

¹ There was a three to five inch laceration on the back of [Delacruz]’s left arm. In his statement to police, [Delacruz] suggested that Tanya cut his arm with a knife. The paramedic who treated the injury at the scene testified that the cut was smooth, not jagged, and was consistent with having been caused by glass or by a knife. Detective Carlton Kolbe testified that when he was working on the case, he made an inquiry to “the medical examiner” as to the likely cause of the cut to [Delacruz]’s arm, and received an email reply that the wound was more consistent with being caused by a knife than by glass. It is not clear whether this was the same medical examiner who conducted N.V.’s autopsy. However, the medical examiner who conducted N.V.’s

into N.V.'s bedroom where her bedding was saturated with her own blood. The wall by N.V.'s bed showed two "path[s]" of blood, one originating from N.V. and the other from [Delacruz]. [Delacruz] was wet and bloody, as was the kitchen sink. The blood in and around the kitchen sink was a mixture of [Delacruz]'s and N.V.'s blood. Officers followed a trail of blood from Tanya's driveway across the street to a field where they found a bloody knife. N.V.'s and [Delacruz]'s DNA were recovered from blood on the knife.

The medical evidence showed that N.V. died from two knife wounds to her neck. One of the cuts penetrated (and almost severed) her jugular vein. The other cut nearly reached the floor of her mouth. Bruising and a cut to N.V.'s chin suggested that her head was positioned and held still as her throat was sliced. The medical examiner testified that without medical intervention, N.V. would have died from her injuries within three to seven minutes. With the application of immediate and consistent pressure to the injuries, N.V. might have survived as long as fifteen to twenty minutes.

After his arrest, [Delacruz] gave a video-recorded statement to Detective Carlton Kolbe, an excerpt of which was published to the jury. In the video statement, [Delacruz] said that he went to Tanya's house and she let him in the front door. He said that they had both been drinking and they argued in the living room. He was about to leave but went into N.V.'s room to kiss her goodnight. He said, "I was just going to give a hug and kiss to [N.V.] and the next thing I know I just felt something sharp on my arm and back and the next thing I know there's blood everywhere." He said Tanya then ran from the house and he tried to run after her, but returned to the house "to check myself and see what happened." He said he saw that he had a cut, saw a knife and picked it up, and saw N.V. covered in blood. He carried N.V. to the living room where he tried to stop the bleeding with paper towels. When Tanya and her mother came back and yelled at him, he told them "I didn't do

autopsy testified that the injury to [Delacruz]'s arm could have been caused by a knife, a piece of glass, or "anything sharp." [Delacruz]'s blood was found on the side of the house outside of the bathroom window where he entered and on the floor below the window.

nothing.” He said he pushed Tanya’s mother and slapped Tanya and threw the knife at her and asked her “what the fuck is wrong with her.” He ran back inside to continue trying to stop N.V.’s bleeding. [Delacruz] said that people were blaming him, but he insisted that he “didn’t do nothing.”

When Detective Kolbe reviewed the details of the story with [Delacruz], he asked, “Are you saying Tanya grabbed that knife and cut you with it?” [Delacruz] responded, “I don’t know what she did, all I know is that there’s . . . it’s a knife on [N.V.]’s bed, I’m bleeding. That’s when I turned on the light and I saw all of that.” [Delacruz] said he turned around and saw Tanya running from the house so he chased her, but then went back to the house. He went into N.V.’s room, turned on the light, and saw that “there was so much blood.”

Later, in an interview with a reporter while he was in jail, [Delacruz] said that he had told the police what had happened, that they did not believe him, that they had the evidence, and that “it was all an accident.”

Delacruz v. State, No. AP-77,079, 2023 WL 2290863, at *1–3 (Tex. Crim. App. Mar. 1, 2023), *reh’g denied* (May 17, 2023).

II. Evidence Relating to Punishment

A. The State’s case

The State presented evidence of Delacruz’s juvenile and adult criminal history, including convictions for assault, evading arrest or detention, driving while intoxicated, possession or delivery of drug paraphernalia, possession of marijuana, driving under the influence as a minor, consumption of alcohol as a minor, failure to attend school, and contempt of court. 66 RR 192–94, 198–

203, 208–11, 239–49.² It also presented evidence of an unadjudicated act of domestic violence against Tanya, 66 RR 82–95; Delacruz’s failure to comply with felony and misdemeanor probation requirements, 66 RR 35–46; 69 RR 124–47; and Delacruz’s in-custody contraband possession and disciplinary infractions, 67 RR 202–03, 230; 69 RR 203–04, 213–17, 226–29, 254–60, 280–88; 71 RR 15–17, 22–27, 33–34, 48, 52, 61–62, 67–72, 89–91, 117–18, 149–52.

B. The defense’s case

In opening argument, defense counsel told the jury: “[T]he evidence is going to show you that [Delacruz] was not a model citizen. . . . And when he was locked up, he was not a model prisoner.” 66 RR 22. “I think the evidence is going to show that Mr. Delacruz has -- has some impulse issues, and that he doesn’t function like the rest of us do.” *Id.* at 23. And counsel explained that “[m]itigation . . . is an explanation for who a person is,” “[w]ho they are as a human being[, w]ho [Delacruz] is as a man.” *Id.* Defense counsel then called seventeen witnesses to demonstrate who Delacruz is.

1. Tyler Cooper

Tyler Cooper testified that he went to school with Delacruz. 72 RR 10. They would hang out—mostly skateboard—and Delacruz stuck up for and

² “RR” refers to the Reporter’s Record of transcribed trial court proceedings in cause number B-14-1134-SA. “CR” refers to the Clerk’s Record of pleadings and documents filed with the trial court in cause number B-14-1134-SA. The citations are preceded by volume number and followed by the relevant page numbers.

protected Cooper from bullies. *Id.* at 11–12. One time, Cooper, Delacruz, and another friend went skateboarding; after Delacruz left, he was pulled over by police and arrested for possession of marijuana. *Id.* at 13–14, 28.

Cooper described Delacruz as “hype,” “fun to be around,” and his “best friend.” 72 RR 15–16. But when Delacruz drank, he was “wild,” “out of control,” “belligerent,” and emotional. *Id.* at 16–17. Cooper described that once, at a party, Delacruz almost got into a fight with another man over a girl and Cooper had to intervene. *Id.* at 22. But he and Delacruz also “had very intimate talks . . . about childhood, past things,” because they had experienced similar childhoods. *Id.* at 17. Cooper was a survivor of sexual abuse. *Id.*

Cooper stated that he did not like to go to the Delacruz family’s house because “it gets pretty crazy over there sometimes.” 72 RR 19–20. Once, Cooper saw Delacruz’s mother throw trophies at Delacruz. *Id.* at 20. Cooper testified that Delacruz’s older brother Chris was similar to Delacruz in a lot of ways, but his younger brother Lorenzo was the golden child—he got in less trouble. *Id.* at 20–21, 95. Cooper never met Tanya, but he met N.V. once. *Id.* at 18–19. Cooper described Delacruz as “happier” and “more complete” when N.V. was around. *Id.* at 19.

2. Crystal Bingham

Crystal Bingham met Delacruz while working at Cheddar’s in 2013. 72 RR 32. Delacruz was hired while completing the Substance Abuse Treatment

Facility's work release program; and Bingham described Delacruz as "great," "always there, always happy," and "made it fun to work with." *Id.* at 32–34. Delacruz continued working for Cheddar's after he completed the work release program. *Id.* at 37–38. Bingham never had any complaints while working with Delacruz. *Id.* at 39. She described him as "happy," "a great person . . . [and] friend," and "a good guy all around." *Id.* Sometimes, they would hang out outside of work, and Delacruz drank, but she never saw him intoxicated. *Id.* at 40, 43. Ultimately, Delacruz was fired for buying or selling marijuana, but Bingham was not concerned about his drug or alcohol use. *Id.* at 35–36.

Bingham met Tanya and N.V. when they would visit Delacruz at work. 72 RR 41. She described their interactions as "very good;" she "never saw him angry, mad, nothing." *Id.* at 42–43. But on cross-examination, the State asked Bingham if she remembered telling an investigator that after he completed the work release program, Delacruz gave attitude, got in more fights and arguments with Tanya, and started to show signs of anger and drug use. *Id.* at 46–47. Bingham stated that Delacruz had to behave when he was in the program and when released from the program, "you do whatever you want." *Id.* at 46–50. Bingham also knew Delacruz used marijuana, but she never saw him use anything stronger. *Id.* at 48.

3. Matthew Mendel

Matthew Mendel, a clinical psychologist, met with Delacruz twice before trial. 72 RR 86–89. Dr. Mendel reviewed Delacruz’s school records, medical records, juvenile and adult criminal history, Child Protective Services (“CPS”) reports, counseling records, and probation and substance abuse treatment records. *Id.* at 90. He also reviewed many of the records pertaining to the instant offense and N.V.’s death. *Id.* at 91. When first meeting Delacruz, Dr. Mendel felt like he was speaking with a young child, or someone who had intellectual limitations. *Id.* at 91–92. But Delacruz is not intellectually disabled. *Id.* at 129.

Delacruz described his parents as “pretty perfect.” 72 RR 94. But Dr. Mendel noted that there were multiple complaints and reports made to CPS, and on at least one—but maybe three—occasions, Delacruz and his brothers were taken from their parents and placed in foster care or a group home setting. *Id.* at 95, 133–34. Dr. Mendel testified that the boys were subjected to severe physical abuse. *Id.* at 96. During one incident, their mother attempted to break his brother Chris’s arms. *Id.* During another, she reportedly threw nineteen-month-old Delacruz against a wall, bruising and cutting up his face. *Id.* at 97. There were multiple reports by CPS, and Delacruz confirmed during the interview, that he was subject to a lot of “beatings with belts and paddles and electrical cords.” *Id.* at 98.

Dr. Mendel also learned that while Delacruz downplayed and defended his educational history, he struggled in school. 72 RR 99. Delacruz was diagnosed with a learning disability and was not a good student. *Id.* Dr. Mendel said Delacruz has “reaction formation,” “a very severe defense mechanism” that is common with very young children in which they respond to situations in the opposite or create a “fantasy life.” *Id.* at 102–03.

Dr. Mendel testified that Delacruz had once been sexually abused. 72 RR 108. His cousin’s boyfriend started to undress and touch his little brother, and Delacruz intervened saying “don’t do it to him, do it to me.” *Id.* at 109. The man undressed and started masturbating until the doorbell rang when he quickly dressed and left the room. *Id.* at 109–10. But Dr. Mendel explained that he did not believe “there was a huge amount of sexual abuse” or that this incident “was the major formative influence in [Delacruz’s] life.” *Id.* at 110.

Delacruz’s mother, Lisa, also experienced sexual abuse as a child. 72 RR 111–12. She was “pimped out” by her parents, “sold” to a guy named Ringo, raped, and impregnated with Delacruz’s oldest brother. *Id.* at 112–14. Dr. Mendel described Lisa as a “mercurial, emotional, explosive person.” *Id.* at 115.

On the other hand, Delacruz’s father, Juan, seemed to Dr. Mendel a “pretty sound, pretty stable, decent guy overall.” 72 RR 115. Juan “worked tremendously hard and always was able to provide for them.” *Id.* And he treated Chris, Delacruz’s oldest brother, as his own son, even though he was

not biologically Juan's. *Id.* Dr. Mendel testified that it was important to Delacruz to raise N.V. like she was his biological child, just like Juan raised Chris. *Id.* at 118. There were a lot of problems between Tanya and Delacruz, but Delacruz stayed with Tanya largely because of N.V. *Id.*

4. Felipe Cortez

Felipe Cortez grew up with Delacruz, and Delacruz dated Cortez's sister. 73 RR 10–11, 16. Delacruz was “the best friend,” “loyal,” and always there for Cortez. *Id.* at 13. In high school, Cortez and Delacruz hung out with the “rebels”—the kids who were “not doing much of anything but listening to music.” *Id.* at 14. They got in trouble for pulling pranks, messing with the janitor, and drinking alcohol whenever they could. *Id.* at 15. Sometimes they would skip school together. *Id.* at 28. Towards the end of high school, Delacruz became distant, and they stopped talking and hanging out. *Id.* at 16.

5. Lupe Muniz

Lupe Muniz is the maternal great-grandmother of Delacruz's son. 73 RR 34, 42. Muniz testified that Delacruz was a very talented artist and chef. *Id.* at 38. Muniz stated that she did not know whether Delacruz drank a lot, but Muniz had only seen Delacruz drunk one time. *Id.* at 36. Delacruz showed up to her house belligerent and hard to understand; Muniz tried talking to Delacruz and sat him on the couch. *Id.* at 36–38.

6. Daniel Delacruz

Daniel Delacruz, Delacruz's paternal cousin, hung out with Delacruz almost every day when he moved to San Angelo and lived in the Delacruz's home. 73 RR 47–48. Daniel and Delacruz drank and smoked weed together, and Delacruz was generally the same as normal—happy and carefree. *Id.* at 51–52. He did not believe Delacruz to have a drinking problem, because although they drank often, Delacruz did not usually drink to excess. *Id.* at 56.

Daniel testified that he saw the Delacruz family kill goats at their home by using a sharp knife to sever the goat's jugular vein. 73 RR 62–63. But Daniel testified that Delacruz never killed one of the goats—he wanted to keep one as a pet. *Id.* Daniel also testified that he knew Tanya and N.V. *Id.* at 52. Delacruz "took care of" N.V. and treated her "like one of his own." *Id.* at 52–53.

7. Ruby Cortez

Ruby Cortez testified that Delacruz was friends with her children and became like her son. 73 RR 70. He went on vacations with the Cortez family and even called her "mom." *Id.* at 74. Cortez testified that Delacruz drank, but she did not know him to drink often or too much. 73 RR 75. Once, Delacruz brought Tanya and N.V. over to Cortez's home. 73 RR 76. Delacruz wanted Cortez's opinion about Tanya; and Cortez told him to "get away from her," "[s]he's going to ruin your life." *Id.*

8. Michael Castro

Michael Castro grew up with Delacruz. 73 RR 86–87. Castro would hang out with Delacruz after school and on weekends—they only lived two- or three-minutes walking distance from each other. *Id.* at 88–89. Castro described Delacruz as “[f]un, easygoing, easy to talk to.” *Id.* at 90. Delacruz stuck up for Castro when kids bullied him and taught Castro how to skate. *Id.* at 91–92. Castro described Juan as laid back and Lisa as strict. *Id.* at 94–95.

In high school, Castro and Delacruz got in trouble for graffitiing around the neighborhood—they spray-painted cars and fences. 73 RR 96, 103. The police came, and they went to jail and served time on probation. *Id.* at 96–98. Castro never drank with Delacruz as teenagers, but they smoked weed together. *Id.* at 99. After high school, Castro saw Delacruz drinking but did not know how often or how much because they lost touch. *Id.* at 99–100.

9. Juan Delacruz

Juan, Delacruz’s father, testified that he is married to Elizabeth “Lisa” Delacruz and has four children—Juan Jr., Chris, Isidro, and Lorenzo. 73 RR 108–10. Juan said that Chris, Isidro, and Lorenzo were removed from the home when Delacruz was under two years old and placed together into a foster home for six or seven months. *Id.* at 111. The boys were taken “[o]ver a lie.” *Id.* at 112. Their aunt was upset with Lisa, and Juan was talking to her in the street when she saw Delacruz had a bloodied nose and scraped lip. *Id.* The aunt took

Delacruz to the hospital, where she told hospital staff that she had seen Lisa throw Delacruz against the wall. *Id.* at 112–13. CPS required Juan to attend parenting and anger management classes. *Id.* at 112. And when the boys returned, Juan’s mother lived with them per CPS requirements. *Id.* at 114. The boys were only removed from the home by CPS that one time. *Id.* at 140.

For fun, the Delacruz family went camping, fishing, and to the park. 73 RR 114. Juan barbecued goats; he would cut the goat’s throat with a knife before skinning and barbecuing it overnight. *Id.* at 118–19. Juan remembered Delacruz getting in trouble as a kid for jumping the fence, throwing rocks, spray-painting, and “stuff like that.” *Id.* at 117. If Delacruz “was real bad,” he received a spanking. *Id.* at 118. Once he got older, Delacruz started drinking and smoking marijuana. *Id.* at 121. Juan’s father was an alcoholic, so he knew drinking and smoking weed would get Delacruz in trouble. *Id.* at 122. Juan also knew that Delacruz had gotten in trouble for breaking a young man’s glasses, vandalizing a camera at school, and fighting with Tanya, and that Delacruz had been arrested for possession of marijuana, criminal mischief, and driving while intoxicated. *Id.* at 123–24.

Juan testified that Delacruz was popular with kids in school but did not have very good grades. 73 RR 131–32. Delacruz was very good at skating, cooking, and art. *Id.* at 133. Once Delacruz went through puberty, he wanted to go out partying more and stay out late. *Id.* at 134.

Juan met Tanya before she started dating Delacruz. 73 RR 129. He saw Tanya occasionally, but Delacruz was mostly over at her house. *Id.* at 130. Juan worried about Delacruz dating Tanya because when Juan first met Tanya, she partied and was “hooked on drugs or whatever.” *Id.* at 131. At the beginning of the relationship, Juan said Tanya and Delacruz were not fighting. *Id.* at 130. But towards the end, Juan “told [Delacruz] to stay away from her, that she was crazy.” *Id.* And after Delacruz was released from jail just before N.V.’s death, Juan told Delacruz not to go over to Tanya’s or talk to her and to stay away from her. *Id.* at 146. The night that N.V. died, Tanya banged on the door to Juan’s house in the middle of the night saying that Delacruz was at her house and had pushed her mom. *Id.* at 147. Juan told Tanya to “call the cops. Lock him up.” *Id.*

10. Lorenzo Delacruz

Lorenzo, Delacruz’s brother, testified that Delacruz is his best friend and people considered them twins. 73 RR 154. Their childhood home life “was kind of normal.” *Id.* at 200. As kids, they would “go skateboard, go fishing, go shoot BB guns. . . . Play video games.” *Id.* at 155. They got in trouble in middle school for “jumping” another kid and “his glasses got broke.” *Id.* at 159. They were “arrested at school, taken to the juvenile center,” and “put on probation” for about six months. *Id.* at 160. They got in trouble again in high school for spray-painting, and Lorenzo spent a few weeks in the juvenile detention center which

made a big impact on him. *Id.* at 161–62. But that experience did not have the same impact on Delacruz; he was still “a carefree kid.” *Id.* at 162.

At home, Lisa took care of disciplining the boys. 73 RR 163. They were usually hit with a paddle—sometimes a belt or extension cord—and one time Lorenzo recalled being burned on the hand with a curling iron. *Id.* There were times he was scared to get in trouble, but “most kids get scared when they’re going to get punished.” *Id.* at 197. Lorenzo is closer with Juan and Juan’s family than Lisa because Juan was always there when Lorenzo needed him. *Id.* at 165–66. Lorenzo explained that Delacruz “likes to cook, and [his] mom loves to cook and bake,” so Delacruz “took to [Lisa] more than” Juan. *Id.* at 166.

Lorenzo only met Tanya one time at his twenty-first birthday party. 73 RR 168. He also met N.V. one time when Delacruz came by the house for gas money and N.V. was sitting in his truck. *Id.* at 169. Delacruz did not seem happy while he was with Tanya, but he loved N.V. and always seemed happy when he talked about her. *Id.* at 169.

Lorenzo testified that Delacruz drank a lot and smoked weed, more than Lorenzo. 73 RR 170. Delacruz “didn’t have somebody looking out for him as much” as Lorenzo. *Id.* at 171. Delacruz is emotional, “he gets mad about things that are kind of small,” but he is also a very caring and loving person. *Id.* at 171–73, 175. Delacruz did not plan too much for anything. *Id.* at 174.

On cross-examination, the State asked Lorenzo about a Facebook Messenger conversation he had with Chris the day after N.V.'s death. 73 RR 188–90. In it, Chris said that during a fight Delacruz told Chris that he "would hurt Marilyn," Chris's daughter. *Id.* at 189. Chris told Lorenzo that Delacruz said "he could do something like this that he would have no regrets to and that if he did do it he would want the death penalty." *Id.* at 190. Lorenzo responded to Chris's message saying ". . . [Delacruz] would never have done this unless there was another element involved like drugs." *Id.* at 192. Lorenzo denied remembering the details of that conversation but agreed that it appeared to be the conversation he had with Chris. *Id.* at 188, 190–91.

11. Edith Koen

While Delacruz was in junior high, Edith Koen, an educational diagnostician and certified special education and general education teacher, reviewed his educational diagnostic assessments and compiled a report. 73 RR 205–06, 208–09. Delacruz was assessed for general intelligence using the Wechsler Individual Scale for Children, Fourth Edition ("WISC") and assessed for general functioning using the Wechsler Individual Achievement Test, Second Edition ("WIAT"). *Id.* at 208, 211–13. The two tests are compared to determine if any cognitive weaknesses exist, where the individual needs help building up general functioning skills. *Id.* at 213–14.

Koen's report noted that, in 2005, Delacruz "qualif[ied] as a student with a specific learning disability in the area of written expression." 73 RR 219. On the WISC, he scored "just a little below" the mean. *Id.* at 223. Delacruz had high scores for perceptual and fluid reasoning and for visual processing, an average score for verbal comprehension, and a low score for working memory. *Id.* at 228–31. On the WIAT, Delacruz had "good" scores for the basic reading and comprehension tests and for the calculation and problem-solving math tests, but he scored in the "risk-area" on the writing test. *Id.* at 233–40. Based on these findings, Koen recommended that special education accommodations be made for Delacruz within the general education classroom. *Id.* at 242, 250.

While in the special education program, several manifestation determinations were made for Delacruz's behavioral concerns. 73 RR 255–56. "The manifestations were for vandalism, inappropriate language, cutting class, things like that." *Id.* at 256. Koen determined the manifestations did not constitute a pattern, so the behavioral concerns were not due to Delacruz's learning disability or the school's failure to provide the appropriate services. *Id.* at 256–57. As a result, Delacruz was sent to a disciplinary alternative education program. *Id.* at 257–58.

After three years, a student must be reevaluated. 73 RR 261. In 2008, Delacruz was seventeen years old, so he was assessed on the Wechsler Adult Scale of Intelligence and the WIAT. *Id.* This time, Delacruz had low scores in

both writing and math tests, and the committee recommended Delacruz remain in the general education classroom with the same accommodations and the addition of extra time. *Id.* at 263–64. Eventually, Delacruz completed the required credits to graduate. *Id.* at 267.

12. Tarayla Guthrie

Tarayla Guthrie, an elementary and middle school English teacher, participated in Delacruz’s 2005 evaluation and special education determination. 73 RR 274, 280–81. Delacruz received several accommodations while in Guthrie’s seventh grade English class. *Id.* at 283–87, 291. Guthrie noted that prior to receiving accommodations, Delacruz had difficulty producing written work, staying on task, or following directions, poor attention and concentration, and noncompliance with teacher directives. *Id.* at 289. The accommodations helped Delacruz produce better work. *Id.* at 288, 290.

13. Wilkie Andrew Wilson, Jr.

Wilkie Wilson, Jr. is a neuropharmacologist who studies the effects of drugs on the nervous system and a professor at Duke University. 74 RR 44. Dr. Wilson reviewed all the relevant medical records and met with Delacruz in the county jail before trial. *Id.* at 52–53. Based on Delacruz’s weight, alcoholism, and the times of both the crime and blood draw following his arrest,

Dr. Wilson was able to reverse (or retrograde) extrapolate³ to determine what Delacruz's blood alcohol level was at the time of N.V.'s death. *Id.* at 57–61. He concluded that Delacruz had a blood alcohol level of approximately .27 at the time of the crime, about three times the legal intoxication limit. *Id.* at 58–60. Dr. Wilson also testified that Delacruz's marijuana use might have impaired him, specifically his ability to move or think clearly, but the alcohol is the dominant impairment in this case. *Id.* at 78–79.

14. Renata Hernandez

Renata Hernandez, Delacruz's maternal cousin, spent a lot of time at the Delacruz house when she was a teenager and Delacruz was a child. 74 RR 83, 86. Hernandez's mother and Lisa, who are sisters, do not get along and their family does not get along. *Id.* at 86. Hernandez described Lisa and Juan as loving parents but said that they mistreated Chris and Delacruz and treated Lorenzo much better. *Id.* at 87. She was not aware of any abuse in the Delacruz household and believes Delacruz to be a loving person who was just raised in a chaotic family. *Id.* at 89–92.

³ A reverse extrapolate refers to taking a known blood alcohol level at a certain time and predicting the blood alcohol level at a previous time based on various factors and data points. 74 RR 54–57.

15. Elizabeth “Lisa” Delacruz

Lisa Delacruz, Delacruz’s mother, testified that as a baby, Delacruz was a chubby little kid who was loving, playful, and adventurous. 74 RR 102–03, 120. He frequently got in trouble, and as punishment, the school made him stand by the fence where he could not play with other kids. *Id.* at 120. He continued to get in trouble in middle school for talking or playing rather than paying attention. *Id.* at 120–21. The first time Delacruz got in “big trouble” was in junior high when he got sent to the Juvenile Justice Center for a couple of weeks. *Id.* at 122. And Delacruz was twice sent to the Carver Learning Center.⁴ *Id.* at 124–25.

Lisa testified that Delacruz had trouble in school. 74 RR 126. She referred him to a special education assessment in seventh grade but noticed his learning issues as young as four years old. *Id.* at 126–27. Delacruz was held back because he could not keep up with the schoolwork and ended up in the same grade as Lorenzo. *Id.* at 127–28. Delacruz graduated from high school at twenty years old. *Id.* at 163–64.

When Delacruz was older, he got in trouble for criminal mischief and possession of marijuana, but she did not know whether he had been arrested for driving while intoxicated. 74 RR 133–34. As discipline, Juan spanked the

⁴ Carver Learning Center was the Disciplinary Alternative Education Program. 73 RR 258.

children, and Lisa would usually take things away from them, ground them, and—if there was a good reason—spank them with a paddle. *Id.* at 134–35. Lisa noticed that Delacruz started drinking and smoking marijuana when he was a teenager, but she never saw Delacruz drunk. *Id.* at 142–43.

Lisa testified that when the boys were removed by CPS it was because CPS believed she had abused one of her sons, but she had not. 74 RR 118. She and Juan had to attend parenting classes at a church. *Id.* The boys eventually came home under the condition that another relative live with them, so Juan's mother moved in. *Id.* at 119. CPS came to the Delacruz house another time when Lisa's sister Irene moved in; they had a disagreement, and Lisa called the police to have Irene removed. *Id.* at 122–23. CPS was concerned because Irene and her family were alcoholics, and CPS did not think they should be living in the home with the Delacruz children. *Id.*

Lisa is one of eleven children; CPS came to her childhood home when she was about two years old because one of her siblings reported that their mother had abandoned them. *Id.* at 128–30. Lisa's mother was an alcoholic, and her dad was always working. *Id.* at 131. Lisa described the Delacruz family as a “happy family;” she took care of her children, cleaned, did all the laundry, and cooked. *Id.* at 157. Delacruz did not have a horrible or violent childhood home. *Id.* at 156–57. Lisa further explained that she met Chris's father, Ringo, while

he was helping her move from one house to another, and he “violated” her. 74 RR 158–59. But she denied that anyone sold her to Ringo. *Id.* at 159.

When Delacruz started dating Tanya, he did not bring her around. 74 RR 146. Lisa thought Delacruz and Tanya were bad together; they had a lot of troubles, and Tanya was too old for Delacruz. *Id.* at 147–48. Lisa only met N.V. one time, when she was about four years old. *Id.* Lisa knew that Delacruz was on probation while he was dating Tanya, and that although he was not supposed to be drinking or contacting Tanya, he did. *Id.* at 147–48.

The night that N.V. died, Tanya called to tell Lisa and Juan that Delacruz was calling her from an unknown number. 74 RR 165. Lisa said Delacruz was supposed to be at home in bed, hung up, and turned off the phone because it kept ringing. *Id.* Later, Tanya came to the Delacruz’s house and “basically, said that [Delacruz] had broke into her home and that she -- he had assaulted her and her mother and that she had called the police.” *Id.* at 149. Lisa got dressed, went to Tanya’s, and ran inside; she described the scene as “horrible,” and she yelled, “Isidro, what did you do?” *Id.* at 149–50.

16. Esperanza “Hope” Cline

Hope Cline, Delacruz’s maternal cousin, moved down the street from Delacruz when she was about thirteen years old, and Delacruz was seven or eight. 74 RR 179–80, 182. Delacruz “was nice. Really quiet. He was always skateboarding, bicycling, just -- just an outside kid.” *Id.* Her mom’s side of the

family did not get together often because there was a lot of bickering. *Id.* at 183. Juan was always outside working in the garage, Lisa dealt with the house and the children. *Id.* at 185. Lisa would get aggravated if the boys did not clean their rooms and would yell at them. *Id.* But Hope never saw any physical violence in the Delacruz household, only ugly words. *Id.* at 191.

17. John Fabian

John Fabian, a board-certified forensic psychologist and neuropsychologist, testified that he examined Delacruz before trial to determine “potential mitigating factors that a jury could consider when [they] are deliberating as to punishment.” 75 RR 39, 42, 56–57. Dr. Fabian described mitigation as “looking at the person’s character, background, their history, the nature of -- of the offense, and really looking at . . . moral culpability . . . what penalty is he really worth in this case looking at this person, you know, as a human . . .” *Id.* at 58.

Dr. Fabian met with Delacruz two times, approximately ten or more hours in total. 75 RR 59–60. He met with Lisa, Juan, and one of Delacruz’s brothers. *Id.* at 60. And he reviewed Delacruz’s criminal history, medical, education, mental health, offense reports, and jail records, as well as letters, notes, witness statements, and crime scene pictures. *Id.* at 60–61.

Dr. Fabian testified that Delacruz “has some mental health issues and conditions.” 75 RR 61. He has “some mild depression and a pretty significant

addiction to alcohol and cannabis.” *Id.* at 61–62, 66. And he has “difficulties in reasoning and problem solving.” *Id.* at 62. Some important factors that Dr. Fabian noted about Delacruz’s life include: CPS involvement in early life and removal from the family home, potential abuse by his mother, sexual abuse on at least one or two occasions, paternal detachment, a lack of emotional processing within the family, and learning disabilities. *Id.* at 62–64.

Dr. Fabian testified that Delacruz self-reported using about an ounce of marijuana a week for the three months leading up to N.V.’s death. 75 RR 67. Delacruz developed a high tolerance for alcohol. *Id.* at 67. And he had symptoms of ADHD, mild depressive disorder, PTSD, amnesia, alcohol-use disorder, cannabis-use disorder, and antisocial traits or personality disorder. *Id.* at 69–70, 87–89. Delacruz suffered a concussion around age five, but that may not have had any real impact on him. *Id.* at 70–71. And Delacruz is not intellectually disabled. *Id.* at 95.

Dr. Fabian conducted various cognitive assessments on Delacruz to determine his brain and behavior functioning. 75 RR 72–74. He concluded: Delacruz has “some mild, subtle deficits academically” based on how far he went in school. *Id.* at 74, 88. Delacruz scored an 83 on the full IQ scale, but “his verbal intelligence and comprehension was significantly more deficient than non-verbal.” *Id.* at 75. He has “some attentional executive functioning deficits . . . some problems, really, with working memory.” *Id.* at 76–77. His “[a]uditory

comprehension was severely impaired.” *Id.* at 81. And while “his verbal and memory skills were intact,” he “has significant verbal abstract reasoning skill deficits,” which affect how he interacts with people or how he reasons, judges, and communicates with others. *Id.* at 82–84. Overall, Dr. Fabian concluded that Delacruz has neurodevelopmental disorders that affect “his executive functioning; problem solving, [and] planning, especially in chaotic situations, especially when under the influence of alcohol.” *Id.* at 92. Further, Delacruz “had low self-esteem,” “was not likely in a good place, feeling good and confident and healthy in that relationship with Tanya,” and had “a lack of ability to process emotions.” *Id.* at 92–93. These factors created a “perfect storm” for a “horrific situation.” *Id.* at 94.

Dr. Fabian testified that there were at least two prior domestic violence incidents with Tanya during which the police were called. 75 RR 126–29. During the first, Tanya was the aggressor, Delacruz was the victim; during the second, Delacruz was the aggressor, Tanya was the victim. *Id.* Delacruz was arrested for choking Tanya, a felony in Texas, and was released under a temporary protective order not to have contact with her. *Id.* at 126–28. This was about five days before N.V.’s death. *Id.* at 128–29. But the night before N.V. died, Tanya and Delacruz spoke on the phone. *Id.* at 129. Despite the protective order, they were together over the weekend and “still having difficulties.” *Id.* at 129–30. Dr. Fabian described the relationship as “toxic,

dysfunctional,” and “tumultuous;” both Tanya and Delacruz “perpetrated verbal and physical fights with each other.” *Id.* at 131.

C. The jury’s answers to the special issues

The jury was given the statutory future-dangerousness and mitigating-circumstances special issues. *See Tex. Code Crim. Proc. Art. 37.071 § 2 (b)(1), (d)(1); 76 RR 6–9; 14 CR 6386–88.* From the evidence, the jury found a “probability that [Delacruz] would commit criminal acts of violence that would constitute a continuing threat to society.” 14 CR 6389; 76 RR 83. And that “all of the evidence . . . including . . . [that of Delacruz’s] character and background” did not demonstrate sufficient mitigating circumstances to warrant a sentence other than death. 14 CR 6390; 76 RR 83–84. Based on the jury’s answers to the special issues, the trial court sentenced Delacruz to death. 76 RR 87.

III. Direct Appeal

On direct appeal, Delacruz raised twelve points of error. Relevant to the instant petition, Delacruz asserted that (1) Texas Code of Criminal Procedure Article 37.071 § 2(f)(4) is unconstitutional for limiting the definition of mitigating evidence to that which reduces the defendant’s “moral blameworthiness,” and (2) the statutory definition of mitigating evidence is unconstitutional because it imposes a “nexus” limitation. Br. for Appellant 147–59, *Delacruz v. State*, No. AP-77,079 (Tex. Crim. App. Mar. 29, 2021). He also argued that Article 37.071 § 2 is unconstitutional because (1) the “10-12

Rule” created by subsections 2(d)(2) and 2(f)(2) unconstitutionally misleads and confuses the jury, and correcting that confusion is prohibited by subsection 2(a)(1), and (2) it provides no definition of critical terms. *Id.* at 121–46, 159–76. The CCA rejected these claims, explaining that it had repeatedly considered and rejected such arguments. *Delacruz*, 2023 WL 2290863, at *24–25 (citing *Coble*, 330 S.W.3d at 296–97; *Sorto v. State*, 173 S.W.3d 469, 492 (Tex. Crim. App. 2005); *Camacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993); *Jenkins v. State*, 493 S.W.3d 583, 613–18 (Tex. Crim. App. 2016); *Davis v. State*, 313 S.W.3d 317, 354–55 (Tex. Crim. App. 2010); *Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999)).

REASONS FOR DENYING THE WRIT

I. Delacruz Fails to Justify a Grant of Writ of Certiorari.

At the outset, Delacruz fails to provide justification for granting a writ of certiorari—no allegation of a circuit split, a direct conflict between the state court and this one, or even an issue that is particularly important. *See* Sup. Ct. R. 10(a)–(c). That absence lays bare Delacruz’s true intent—for this Court to correct the CCA’s application of a properly stated rule of law. That, however, is hardly an adequate justification for expending limited judicial resources on a single claim which is not more important today than it has been the last three decades of rejection. *See* Sup. Ct. R. 10 (“A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly

stated rule of law.”). And that is because “[e]rror correction is ‘outside the mainstream of the Court’s functions.’” *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J.) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). Delacruz’s petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h) (a petition for writ of certiorari should contain a “concise argument amplifying the reasons relied on for allowance of the writ”).

II. Texas’s Statutory Mitigation Instruction Is Constitutional.

Delacruz argues the Court should grant his petition to review the constitutionality of Texas’s statutory mitigation instruction, codified in Texas Code of Criminal Procedure Article 37.071 §§ 2(e) and (f). He asserts that the statutory instruction impermissibly restricts the scope of evidence a juror can consider as mitigating to that which reduces the defendant’s moral blameworthiness to the exclusion of evidence of character and background. Pet. Cert. 20–29. He also asserts that the instruction implicitly requires a juror to find a nexus between the mitigating evidence and the capital murder for which the defendant is on trial. Pet. Cert. 25–26. Delacruz’s challenge is primarily a facial challenge to the constitutionality of Article 37.071 §§ 2(e) and (f). But he also makes an as-applied challenge, arguing that his jury was not able to give effect to evidence that he was viewed with affection, was a good work colleague, and had a strong attachment to N.V. or to the evidence of his dysfunctional and unstable family background. Pet. Cert. 26.

A. Texas's statutory mitigation instruction has been repeatedly upheld.

Texas's statutory mitigation instruction was codified in 1991. That instruction, which Delacruz's jury received,⁵ requires a capital jury to decide:

[w]hether, 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 without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. Art. 37.071 § 2(e)(1). The statute then requires that the jury be instructed that it "shall consider 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). The jury is also instructed that jurors "need not agree on what particular evidence supports an affirmative finding on the issue." Tex. Code Crim. Proc. Art. 37.071 § 2(f)(3).

Texas's statutory mitigation instruction has been challenged on numerous occasions, never successfully. *See, e.g., Coble*, 330 S.W.3d at 296. Indeed, the very challenge Delacruz raises—that the statutory mitigation instruction impermissibly limits the scope of evidence considered and that the instruction implies a causal nexus between the capital murder and the mitigating evidence—was rejected by the CCA in *Coble* over a decade ago. *Id.*;

⁵ 76 RR 6–9; 14 CR 6386–88.

see Shannon v. State, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996) (“There is no evidence that must be viewed by a juror as being *per se* mitigating. . . . Because the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, we conclude that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury’s discretion to factors concerning only moral blameworthiness as appellant alleges.”). And at that time, the CCA noted that the challenge had been *repeatedly* rejected. *Coble*, 330 S.W.3d at 296; *see, e.g.*, *Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1997). Furthermore, this Court, even more recently, declined the opportunity to consider the exact issue Delacruz raises. *See* Petition for Writ of Certiorari, *Suniga*, 140 S. Ct. 375 (No. 18-9564).

Nonetheless, Delacruz argues that a juror is likely to interpret the statutory mitigation instruction’s definition of the scope of mitigating evidence to exclude evidence of character and background, because such evidence might not bear on his moral blameworthiness. Pet. Cert. 24–25. But Delacruz identifies no support for his constrained reading of the statute. And it is difficult to reconcile his reading of the statute with the statute itself, which, again, requires the jury to consider “all of the evidence,” including that of “the defendant’s character and background.” Tex. Code Crim. Proc. art. 37.071 § 2(e)(1). Indeed, the CCA has explained that the mitigation instruction does not “force the jury to disregard” the evidence it explicitly instructs the jury to

consider. *See Thuesen v. State*, No. AP-76,375, 2014 WL 792038, at *49–50 (Tex. Crim. App. Feb. 26, 2014) (explaining that the statutory mitigation instruction does not force the jury to disregard good character evidence and evidence of good deeds). The expansive mitigation instruction contained in “[S]ection 2(e) solves any potential narrowing problem in Section 2(f).” *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999). And Section 2(e) provides “the jury with a vehicle to respond to a broader range of mitigating evidence.” *Id.*; *see Cantu*, 939 S.W.2d at 648–49.

Importantly, this Court has indicated its approval of Texas’s current statutory mitigation instruction. *Penry II*, 532 U.S. at 803. In *Penry II*, this Court described the instruction as a “catchall,” which implies—or asserts, even—that the special issue “catches all” mitigating evidence, not just evidence related to the crime. *Id.* It further noted the instruction for its “brevity and clarity.” *Id.* The CCA has also recognized that the current statutory mitigation instruction is simply “a codification of the dictates of *Penry [v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).]” *McFarland v. State*, 928 S.W.2d 482, 525 (Tex. Crim. App. 1996), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998).

Similarly, the Fifth Circuit has held that Texas’s statutory mitigation instruction does not impermissibly limit the scope of mitigating evidence. *Sprouse*, 748 F.3d at 622; *Blue v. Thaler*, 665 F.3d 647, 667–68 (5th Cir. 2011);

Beazley v. Johnson, 242 F.3d 248, 259 (5th Cir. 2001). Delacruz claims that the Fifth Circuit’s decision in *Rhoades* demonstrates that there is a reasonable likelihood that a capital murder jury could apply the challenged statutory mitigation instruction in a way that prevented consideration of constitutionally relevant evidence. *See* Pet. Cert. 27–28 (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); *Rhoades v. Davis*, 914 F.3d 357 (5th Cir. 2019). But Delacruz’s reliance on *Rhoades* is misplaced.

In *Rhoades*, the Fifth Circuit held that a Texas trial court’s exclusion of childhood photographs offered as mitigation evidence was improper, because the trial court too narrowly defined the universe of evidence relevant to moral blameworthiness. *Rhoades*, 914 F.3d at 363–67. The Fifth Circuit explained that although the photos “do not relate specifically to [Rhoades’s] culpability for the crime he committed, they are mitigating in the sense that they might serve as a basis for a sentence less than death.” *Id.* at 366–67 (internal quotation marks omitted). And the court in that case could not “reconcile the mandate that a sentencing court may not preclude the jury from considering, as a mitigating factor, any aspect of the defendant’s character that the defendant proffers as a basis for a sentence less than death with the exclusion of the childhood photos by the trial court.” *Id.* at 367. Ultimately, the Fifth Circuit held that the exclusion of the photos was harmless error. *Id.* at 368.

Notably, the Fifth Circuit found no error with the statutory mitigation instruction, nor did it have occasion to do so. *Rhoades*, 914 F.3d at 368 n.39. Rather, the issue in *Rhoades* was whether certain evidence should have been admitted for the jury to consider, and whether that evidence was, in fact, mitigating. *Id.* at 363–67. Delacruz’s claim that the jury’s possible interpretation of the statutory mitigation instruction too narrowly limits the scope of mitigating evidence that was presented is distinguishable, indeed “qualitatively different.” *Id.* at 368 n.39. Here, Delacruz raises no issue with the mitigating evidence that was or was not presented to his jury, he merely argues that the instruction itself—rather than the trial court—too narrowly defines the scope. But Delacruz fails to identify any constitutional infirmity in the instruction in the face of more than a decade of precedent affirming it.

Moreover, this Court has upheld comparable punishment-phase instructions in other cases. *See, e.g., Boyde*, 494 U.S. at 380; *Ayers v. Belmontes*, 549 U.S. 7, 15–16 (2006). In so doing, it has explained that “[j]urors do not pars[e] instructions for subtle shades of meaning in the same way lawyers might.” *Boyde*, 494 U.S. at 380–81. When it comes to jury instructions, jurors’ “common sense understanding” is likely to “prevail over technical hairsplitting.” *Id.* Considering as much, this Court has declined defendants’ invitations to review a single part of an instruction “in artificial isolation,” and to speculate about possible interpretations that might flow therefrom. *Id.* at

378, 380. Instead, it reviews an instruction in “the context of the overall charge,” and requires a defendant to show “a reasonable likelihood that the jury . . . applied the . . . instruction in a way that prevents consideration of constitutionally relevant evidence.” *Id.* at 378.

Boyde complained that California’s instruction requiring the jury to consider “[a]ny . . . circumstance [that excused] the gravity of the crime” prevented consideration of his background and character, in that it implicitly limited the circumstances to those surrounding the crime. *Boyde*, 494 U.S. at 378. This Court rejected Boyde’s claim. *Id.* at 382. Crucial to its holding was that Boyde was permitted to—and did—present background and character evidence during punishment and that his counsel argued in closing that such evidence warranted a sentence less than death. *Id.* at 383–84.

As in *Boyde*, Delacruz was allowed to—and did—present significant character and background evidence during the punishment phase. Delacruz presented evidence that he was raised in a chaotic home where his father was absent, his mother was abusive, and conflict and substance-abuse issues were prevalent throughout the extended family. *See supra* Statement of the Case Section II(B). Delacruz was taken from his family by CPS and placed in a foster home at a very young age. *Id.* He was subject to at least one sexual abuse incident. *Id.* And he suffered from learning disabilities which affected his performance in school. *Id.* Due to these factors, Delacruz presented evidence

that he developed an addiction to alcohol and marijuana and engaged in criminal activity throughout his life. *Id.* Delacruz also presented evidence that he had mild depressive disorder, ADHD, and PTSD, among other mental health concerns. *Id.* Even considering all of this evidence, Delacruz was described as loving, caring, and a hard worker. *Id.*

Both the prosecutor and the defense assumed this evidence was relevant in their closing arguments. In fact, the prosecutor told the jury more than once that in considering the special issues, it was to “consider all the evidence [they’ve] heard in trial.” 76 RR 13, 14. Delacruz’s counsel “agree[d] with the [State]” and instructed the jury “to go back and consider all that evidence,” the “explanation of who [Delacruz] is.” *Id.* at 17, 19. Defense counsel then argued to the jury that at the time of N.V.’s death, Delacruz was a “young man, with low-functioning intelligence, ADHD and executive function issues, an alcohol addiction, and . . . in a toxic relationship.” *Id.* at 43. While Delacruz was physically and sexually abused, taken away from home at a young age, and experienced intellectual shortcomings, he “still cried for remorse” after N.V.’s death. *Id.* at 45–46. And “while there was a perfect storm of events . . . that happened on that night, [Delacruz] has mourned what happened.” *Id.* at 46. Defense counsel urged the jurors to “sentence [Delacruz] to life without the possibility of parole.” *Id.* at 50. The State rebutted defense counsel’s closing by arguing that Delacruz had plenty of opportunities and resources enabling him

to make better life decisions that should not have resulted in N.V.’s death. *Id.* at 50, 57–58, 61–62, 67–70. And in conclusion, the prosecutor told the jury that whether there is “sufficient mitigation, will be your decision.” *Id.* at 70.

The CCA’s interpretation of the mitigation instruction in this case is the one most consistent with the evidence presented to the jury, the parties’ closing arguments, and the instructions provided by the trial court. *Delacruz*, 2023 WL 2290863, at *25. There is no reasonable likelihood that Delacruz’s jurors interpreted the instruction in the hairsplitting way that he claims. Accordingly, this Court should deny Delacruz’s petition.

B. Texas’s statutory mitigation instruction does not require jurors to give effect only to mitigating evidence that has a nexus to the capital murder.

The CCA has also rejected the argument that the statutory mitigation instruction impermissibly requires a nexus between the capital murder and the mitigating evidence. *Coble*, 330 S.W.3d at 296; *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004). Delacruz offers no valid reason to doubt the CCA’s conclusion that a Texas capital jury need not be instructed that no nexus is required because the jury would not “be reasonably likely to infer a nexus requirement from the statutory words.” *Coble*, 330 S.W.3d at 296.

Delacruz relies heavily on this Court’s opinion in *Tennard v. Dretke*, 542 U.S. 274 (2004), for his proposition that the statutory mitigation instruction impermissibly requires a nexus between the capital murder and the mitigating

evidence. Pet. Cert. 24–26. But this Court’s opinion in *Tennard* addressed Texas’s prior punishment-phase jury instructions, which did not include a mitigation instruction. *See Preyor v. State*, No. AP-75,119, 2008 WL 217974, at *6 (Tex. Crim. App. Jan. 23, 2008) (noting that the court had held “the Supreme Court’s *Tennard* decision—which was decided under another statutory scheme did not include the mitigation special issue”—did not indicate the statutory mitigation instruction impermissibly narrowed the scope of mitigating evidence). Rather, the Court in *Tennard* rejected a *Fifth Circuit* requirement that a federal habeas petitioner establish a nexus between the capital murder and the mitigating evidence to show that he or she was entitled to a mitigation instruction so that the jury could give effect to that evidence. 542 U.S. at 285. The CCA has correctly recognized that *Tennard* does not stand for the proposition that Texas’s current statutory mitigation instruction is constitutionally infirm. *Perry*, 158 S.W.3d at 449. Moreover, the current statutory mitigation instruction does not require any such nexus for a juror to give effect to mitigating evidence. *See Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007) (“[A]ppellant does not explain how the jury instructions that were given prevented the jury from giving effect to any of his alleged mitigating evidence, and we perceive no barrier to the jury doing so.”).

Delacruz asserts that the statutory mitigation instruction did not permit his jury to give full effect to evidence that he was viewed with affection, was a

good work colleague, and had a strong attachment to N.V., or to the evidence of his dysfunctional and unstable family background. Pet. Cert. 26. But he identifies no support for his argument that his jury could not give effect to such evidence. And the CCA has recognized that the statutory mitigation instruction permits a juror to give effect to evidence of a defendant's "good qualities as a father, family member, and worker." *Roberts*, 220 S.W.3d at 534. Under the same impression, the prosecutor and defense counsel in this case repeatedly told the jury to consider as much. 76 RR 13 ("think[] back through all the evidence and decid[e] if you believe there's sufficient mitigation"), 17 ("go back and consider all that evidence"). Delacruz's speculation that a juror might misunderstand the instruction—by disregarding its plain language requiring consideration of "all the evidence . . . including [that of] the defendant's character and background" and by disregarding counsel's closing arguments—is insufficient to substantiate either a facial or as-applied challenge to the statute. *See Jones v. United States*, 527 U.S. 373, 390 (1999) ("We have considered similar claims that allegedly ambiguous instructions caused jury confusion. The proper standard for reviewing such claims is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.") (internal citations and quotation marks omitted). Consequently, Delacruz's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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