No. 23-5375

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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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REPLY BRIEF OF PETITIONER

Mr. Delacruz's Petition amply demonstrated that the Texas Court of Criminal Appeals ("CCA") decided the relevant federal constitutional issues in this case in ways that conflicted with this Court's decisions in the critical area of death penalty jurisprudence. The question presented to the Court for certiorari review explicitly asked whether the Texas death penalty sentencing statute can be reconciled with federal constitutional law. The State of Texas nonetheless claims that Mr. Delacruz has failed to provide a justification for the grant of certiorari because, for example, of "a direct conflict between the state court and this one." Brf. in Opp. at 28. However, the State provides few arguments to address Mr. Delacruz' contention that the current Texas statute's "moral blameworthiness" restriction contravenes "the assurance upon which *Jurek* [*v. Texas*, 428 U.S. 262 (1976)] was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence," *Penry v. Lynaugh*, 492 U.S. 302, 316 (1989) ("*Penry I*"). Instead, the State minimizes the inevitable impact of an instruction that unconstitutionally narrows the scope of the mitigating evidence to which the jury can give effect.

Mr. Delacruz respectfully submits that the Court should grant the petition and summarily reverse the judgment below.

I. THE "MORAL BLAMEWORTHINESS" INSTRUCTION REMOVES MITIGATING EVIDENCE UNRELATED TO THE OFFENSE FROM THE JURY'S CONSIDERATION.

A. This Court Has Never Specifically Addressed, Let Alone Approved, Texas' "Moral Blameworthiness" Instruction.

The State misrepresents this Court's holding in *Penry v. Johnson*, 532 U.S. 782, 803 (2001) (*Penry II*), claiming that the Court has "indicated its approval" of Texas current mandatory mitigation instructions. Brf. in Opp. at 1, 32. The Court in *Penry II,* 532 U.S. at 803, merely indicated that a "clearly drafted catchall instruction . . . *might*" have cured the deficiencies of the Texas statute addressed in *Penry I*. Moreover, *Penry II* did not discuss, or even mention, the "moral blameworthiness" instruction. The then-new mitigation special issue was not the actual focus of that case, which held that a confusing non-statutory jury nullification instruction had not afforded an adequate vehicle for jurors to give effect to the mitigating evidence that had been put before them. *Penry II,* 532 U.S. at 804.

B. The "Moral Blameworthiness" Instruction Excludes Evidence from Consideration, Rather than Acting as a "Catchall."

The State accuses Mr. Delacruz of interpreting the "moral blameworthiness" instruction in a "hairsplitting way." Brf. in Opp. at 37. Mr. Delacruz is not asking the Court to split hairs, but simply to read the plain text of the statute, TEX. CODE CRIM. PROC. Art. 37.071 § 2 (d)(1), (f)(4). That review reveals that while the initial

instruction to consider "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant," could perhaps be considered a "clearly drafted" vehicle for the jury's constitutional consideration of mitigating evidence, *Penry II*, 532 U.S. at 803, the follow-up "moral blameworthiness" instruction explicitly limits what jurors can consider to be mitigating. No "hairsplitting" is required in order to grant this petition.

The State claims that "it is difficult" to reconcile Mr. Delacruz's "reading of the statute with the statute itself." Brf. in Opp. at 31. However, it is not difficult to understand that when a general proposition is given, but then followed by specific language explicitly limiting the scope of that proposition, the words of that subsequent instruction will be given effect. In this case, as in the commonplace canons of statutory interpretation, the "expression of one thing implies the exclusion of others *(expressio unius est exclusio alterius*)," and that exclusion renders the Texas statute unconstitutional.[1]

The State incorrectly suggests that *Penry II* described the special issue itself as a "catchall" provision. Brf. in Opp. at 32; *Penry II,* 532 at 803. A true "catchall" instruction on mitigation would indeed affirm that jurors may consider any and all

[1] *Jennings v. Rodriguez*, ___ U.S. ___, 138 S. Ct. 830, 844 (2018) (discussing A. Scalia & B. Garner, *Reading Law* 107 (2012)).

mitigating evidence properly put before them, as this Court's case law requires. *See, e.g., Penry I*, 492 U.S. at 328. The federal government and other states have enacted such provisions to ensure that a jury does not believe itself to be limited to explicitly identified mitigating factors. *See, e.g.*, 18 U.S.C. § 3592 (a)(8) which, after listing specific factors for consideration adds a true "catchall" of any "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." *See also, e.g.*, FLA. STAT. § 921.141 (7)(h): "The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty"; 42 PA.C.S. § 9711 (e)(8): "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."

However, contrary to the State's urging, in Texas, although the mitigation special issue itself may allow consideration of all evidence – not just "evidence related to the crime," Brf. in Opp. at 32 – the "moral blameworthiness" provision actually negates any "catchall" effect of the special issue itself. Thus, the State's references to *Boyde v. California*, 494 U.S. 370 (1990) and *Ayers v. Belmontes*, 549 U.S. 7 (2006) are inapposite. The California instruction discussed in those cases was a true catchall, given after a list of ten specific factors for the jury's consideration. *Boyde*, 494 U.S. at 373-74; *Belmontes*, 549 U.S. at 9. In Texas the reverse is the case. Texas

jurors – like Henry Ford's customers who could buy a vehicle in "any color they want so long as it is black" – are limited to considering and giving effect to mitigating evidence that evokes a belief in them that the defendant should live *only* if the evidence is "evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. Art. 37.071 § 2 (f)(4).[2] Thus, even if a juror initially considers "all of the evidence" under § 2 (e)(1), the decision as to what evidence actually amounts to a "sufficient mitigating circumstance" is circumscribed by the § 2 (f)(4) definition of mitigating evidence as that evidence which "a juror might regard as reducing the defendant's moral blameworthiness." This is not a catchall, but instead a sieve that strains out any evidence lacking a nexus to the offense. *See* Pet. at 18-25.

C. The Texas Courts Have Not Been as Receptive to Mitigation Evidence as the State Suggests.

The State argues to this Court that "Delacruz was allowed to—and did—present significant character and background evidence during the punishment phase," Brf. in Opp. at 35. That is true. However, the State took the position at trial and in the direct appeal that the instruction in question presents no constitutional problem and it opposed the defense's request to disallow the death penalty or to amend the sentencing

[2]Henry Ford, *My Life and Work*, Doubleday, Page & Co. (1922) at 72.

instructions to the jury. 10 RR 31-34; 74 RR 213-16; State's Brf. on Direct Appeal at 171-74. If the State of Texas was truly willing to have juries act on all the mitigation evidence a defendant presented its opposition to Mr. Delacruz' position, in the trial court and to this day, makes no sense. The State had approved curtailing the jury's consideration of Mr. Delacruz's mitigation case by limiting the definition of mitigating evidence. It is therefore inconsistent for it to suggest that the jury had *carte blanche* to consider and give effect to all the mitigation evidence was proffered. And the CCA's dismissive approach to the exclusion of mitigation evidence demonstrates that the Texas courts are far from as open to mitigation evidence as the State represents.

The State further strains to create the impression that Texas capital murder defendants encounter no obstacles to the receipt, consideration, and use of mitigation evidence at sentencing by pointing out that *Tennard v. Dretke*, 542 U.S. 274 (2004) was tried at a time when the Texas statute contained no mitigation instruction at all, and that the CCA has subsequently noted in *Perry v. State*, 158 S.W.3d 438, 448 (Tex. Crim. App. 2004) that *Tennard* did not criticize the "moral blameworthiness" instruction. Brf. in Opp. at 37-38. But that instruction was not at issue or even mentioned in *Tennard*, which nonetheless upheld the principle that the sentencing jury must be able to consider and give effect to any evidence that 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. 524 U.S. at 288-89.

Regardless of the State's attempts to avoid the issue, Texas cases that hold "that Article 37.071 § 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness," *see, e.g., Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1997) fail to address the reality that the "moral blameworthiness" instruction singles out one type of evidence as mitigating – that which is connected to the action for which the defendant may or may not be considered blameworthy. Pet. at 20-25. The State ignores the reality that this instruction actually forms part of the Texas death penalty sentencing scheme, and that it is presumed that the Texas legislature intended the entire statute to be effective. TEX. GOV'T CODE § 311.021. The State also ignores the reality that, while jurors may not "pars[e] instructions for subtle shades of meaning in the same way lawyers might," *Boyde*, 494 U.S. at 380–81, Brf. in Opp. at 34, the singling out of one type of evidence – that which may reduce blameworthiness – from all others, creates "a reasonable likelihood that the jury . . . applied the . . . instruction in a way that prevents consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 378.

Notably, the State offers no explanation for what the Texas legislature intended to accomplish by including in this critical statute an instruction whose language

mandates that the jury "shall" consider mitigating evidence to be only that perceived as reducing the defendant's moral blameworthiness.

II. THE PREVIOUS ADVERSE STATE COURT RULINGS ON THIS ISSUE DEMONSTRATE THE NEED FOR THIS COURT TO CONSIDER THE QUESTION BEFORE IT ON ITS MERITS.

As the State notes, Brf. in Opp. at 31-32, this issue has been presented numerous times in the CCA and has been routinely rejected.[3] However, the fact that advocates have continued to press the issue despite the Texas court's repeated rejection is no indicator that it is unworthy of certiorari review. The CCA has a long history in its death penalty case law of repeatedly denying legal arguments that ultimately prevail in this Court.

Early in the modern death penalty era, claims that exclusion of jurors unable to swear that the possibility of a death sentence would not affect their deliberations

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[3]The State of Texas refers to the CCA's opinion on direct appeal as citing *Coble v. State*, 330 S.W.3d 253, 296–97 (Tex. Crim. App. 2010); *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) regarding this issue. Brf. in Opp. at 35. In fact, the CCA only cited *Coble* and, of the other cases cited by the State, only *Jenkins* contains discussion of the relevant aspect of the Texas statute. Nonetheless, the CCA has consistently rejected contentions that the "moral blameworthiness" definition of mitigating evidence is unconstitutional. *Cantu v. State*, 939 S.W.2d 627, 649 (Tex. Crim. App. 1997); *Perry v. State*, 158 S.W.3d at 449; *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007).

contravened the Sixth and Fourteenth Amendments were repeatedly rejected by the CCA. This Court decided otherwise in *Adams v. Texas*, 448 U.S. 38, 50-51 (1980). Claims that a defendant must be advised of his right to silence and be afforded the assistance of counsel prior to an interview by a State psychiatrist were likewise rejected by the CCA. This Court upheld those claims in *Estelle v. Smith*, 451 U.S. 454, 473 (1981).[4] The CCA was slow to assimilate the Court's teaching in *Smith*, and further litigation ensued to ensure that *Smith* was honored: *See Satterwhite v. Texas,* 486 U.S. 249 (1988); *Powell v. Texas*, 487 U.S. 1230 (1988); *Powell v. Texas*, 492 U.S. 680, 681-6 (1989) (reversing, noting that CCA had erred in its application of *Satterwhite* and *Smith* even after this Court's earlier remand).

Texas' difficulty in abiding by this Court's jurisprudence concerning the significance of mitigation evidence is demonstrated by the fact that many years after both *Penry I* and *Penry II*, this Court was still dealing with cases presenting claims based on those decisions. *See Smith v. Texas*, 543 U.S. 37, 45 (2004); *Abdul-Kabir*

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[4]Rather than prolong litigation after *Adams* and *Smith*, Texas commuted multiple death sentences to life. *See* James W. Marquart, Sheldon Ekland-Olson, Jonathan R. Sorensen, *The Rope, The Chair, and the Needle: Capital Punishment in Texas, 1923-1990*, University of Texas Press (2010) at 137 (noting over 40 commutations during 1981-83, mostly in response to *Adams* and *Smith*). A similar mass commutation of 28 death row inmates occurred in 2005, after *Roper v. Simmons*, 543 U.S. 551, 578 (2005) barred the execution of those who were juveniles at the time of the crime. Jordan Smith, *Juvenile Offenders Getting Off Death Row in Texas*, The Austin Chronicle, July 15, 2005.

v. Quarterman, 550 U.S. 233, 245 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007). Similarly, *Tennard*, 542 U.S. at 289, was made necessary by the resistance of both the CCA and the Fifth Circuit to allowing a "'broad inquiry' into all 'constitutionally relevant mitigating evidence.'" *Jones v. United States*, 527 U.S. 373, 381 (1999) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998)).

More recently, Texas' obdurate refusal to adhere to this Court's Eighth Amendment jurisprudence was demonstrated in *Moore v. Texas*, __ U.S. ___, 139 S. Ct. 666 (2019) which remedied the CCA's failure to implement an earlier decision in the same case, *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039 (2017), in which this Court addressed Moore's claim that his intellectual disability rendered him ineligible for the death penalty pursuant to *Atkins v. Virginia*, 536 U. S. 304 (2002). This long history of noncompliance with this Court's holdings demonstrates that the CCA's rejection of claims in this area should not deter the Court from considering the merits of the questions presented here. Moreover, despite the State's insinuation, Brf. in Opp. at 31, this Court's previous denials of the writ of certiorari with regard to petitions raising this issue are, of course, of no precedential value.[5]

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[5]"[T]his Court has rigorously insisted that. . . a denial [of a petition for writ of certiorari] carries with no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

CONCLUSION

Mr. Delacruz' petition for writ of certiorari should be granted in order to remedy the constitutional violation that occurred in his case.

Respectfully submitted,

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