No. _____

IN THE

Supreme Court of the United States

BRANDON DE MCCALL,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Brandon McCall was convicted in Texas state court of capital murder for killing a police officer and sentenced to death. At McCall's trial, the jury was instructed, in accordance with Texas law, that they "shall consider mitigating evidence to be evidence that a juror might regard as reducing [McCall]'s moral blameworthiness."[1]

This Court has repeatedly held that mitigating evidence need not demonstrate any "nexus" to the crime or relate to defendant's "culpability for the crime" to qualify as a legitimate basis for imposing a non-death sentence. *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 37 (2004); *Skipper v. South Carolina*, 476 U.S. 1 (1986).

This case thus presents the following question:

> Where jurors were instructed that they may only consider mitigating evidence to be evidence that "reduces the defendant's moral blameworthiness," and where the record reflects that jurors understood the term "moral blameworthiness" to be synonymous with "culpability," is there a reasonable likelihood that the jury applied the challenged instruction in a way that prevented consideration of constitutionally relevant mitigating evidence?

[1] Charge of the Court at Punishment, Clerk's Record ["CR"] at 687; Tex. Code. Crim. Pro. art. 37.071 §2(f)(4).

PARTIES TO THE PROCEEDINGS BELOW

Brandon De McCall, petitioner here, was the habeas applicant below.

The State of Texas, respondent here, was the respondent below.

LIST OF RELATED PROCEEDINGS

State of Texas v. Brandon De McCall, Cause No. 296-81183-2018 (296th Judicial Dist. Ct. Collin Co., Tex.); judgment entered Feb. 27, 2020.

Brandon De McCall v. State of Texas, No. AP-77,095 (Court of Criminal Appeals of Texas); judgment entered Oct. 25, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Brandon De McCall respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas (TCCA) in his case.

OPINIONS AND ORDERS BELOW

The TCCA's decision affirming Petitioner's conviction and sentence of death is unpublished and reprinted in full in the Appendix at pages 1a–39a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The TCCA entered its judgment affirming Petitioner's conviction and sentence of death on October 25, 2023. On January 19, 2024, Justice Alito extended the time for filing this petition to February 22; on February 15, Justice Sotomayor further extended the time for filing to March 25, 2024. *See McCall v. Texas*, No. 23A663 (U.S. Feb. 15, 2024). This petition is timely pursuant to Supreme Court Rules 13.3 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, provides:

> No State shall … deprive any person of life, liberty, or property without due process of law....

The Texas statute that governs capital trial and sentencing procedure, Tex. Code. Crim. Pro. art. 37.071, is reproduced due to its length in Appendix B.

STATEMENT OF THE CASE

A. The Underlying Incident.

Brandon De McCall was convicted of shooting police officer David Sherrard after he responded to a disturbance call at an apartment complex where McCall lived. 40 RR 40, 46-49.[2] When officers arrived at the apartment complex, they found a person, later identified as Rene Gamez, lying in a pool of blood outside the door of apartment 1235. 40 RR 51-52. Officers forced entry into the apartment, with Officer David Sherrard entering first. Petitioner fired two shots in quick succession, striking Officer Sherrard. 40 RR 58-61. Officers returned fire and escaped the apartment behind a ballistic shield. 40 RR 69. Ultimately, Petitioner came out of the apartment and was taken into custody. 40 RR 75. Officer Sherrard died as a result of his gunshot wound. 41 RR 142.

Petitioner gave a voluntary statement admitting he shot Rene Gamez in the leg with a shotgun, by accident, and that he fired on police officers when they entered the apartment. 41 RR 198, 203; State's Exh. 194-A.

B. Proceedings in the Trial Court.

1. Prior to trial, Petitioner unsuccessfully challenged the "moral blameworthiness" instruction on Eighth Amendment grounds.

Prior to trial, Petitioner filed several motions challenging the jury instruction defining "mitigating evidence" as "evidence that reduces moral blameworthiness" as an unconstitutional restriction on the jury's consideration of constitutionally relevant

[2] We cite the Clerk's Record below as "CR:[page number]" and the Reporter's Record as "[Vol.] RR [page number].

mitigating evidence. CR:324-30 ("Motion to Hold Statutory Definition of Mitigating Evidence Unconstitutional, as Applied to Impose a 'Nexus' Limitation Prohibited by *Tennard v. Dretke*"); *id.* at 137 ("Motion for Jury Instruction on Definition of Mitigating Evidence").

In the motion challenging the constitutionality of the definition of mitigating evidence, CR:324, Petitioner argued that "the Texas definition of mitigating evidence in Article 37.071 §2(e)(l) is unconstitutionally restrictive as it is being interpreted and applied by the Court of Criminal Appeals." *Id.* at 326. Specifically, the defense motion raised the concern that Petitioner's "jury may believe that mitigating evidence, defined as reducing an accused's moral culpability for committing the crime itself, cannot encompass such evidence as a childhood spent in poverty, or racial prejudice, his mental slowness or learning disability, his acts of heroism, charity or kindness, his good behavior in jail or prison after committing the crime, as independent mitigating evidence." CR 1:326. Petitioner argued that the jury instruction, if left uncorrected, would improperly preclude "the jury's effective consideration of … constitutionally relevant mitigating evidence that may not fit the 'nexus' test because it cannot be said to have caused or contributed to his commission of the crime; it does not explain or excuse his commission of the crime." *Id.*

The motion was accompanied by a written request for a jury instruction "in the language of *Tennard v. Dretke,* 124 S.Ct. 2562, 2570 (2004), that the jury must consider and may give effect to, as mitigating, 'any evidence that may serve as a basis for a sentence less than death, regardless of whether the defendant is able to establish

a nexus between the evidence and the commission of the crime.'" CR 1:137. The motion was tabled by the trial court until the charge conference at penalty. 7 RR 5, 8.

At the jury charge conference, defense counsel again objected to the definition contained in the charge. 46 RR 73. The State responded that "the Court of Criminal Appeals has upheld the statutory design of [Article] 37.07(1). Our charge complies with [Article] 37.07(1) and we believe it complies with the law and the Constitutional requirements." *Id.* The trial court overruled the defense objections to the charge in their entirety. *Id.* at 74; *see also* CR 651-66 (Defendant's [Written] Objections to the Charge at Punishment). The jury was charged accordingly. *Id.* at 77.

2. Evidence presented in mitigation.

At trial, in addition to more traditional explanatory evidence regarding Petitioner's mental decline and paranoia in the period leading up to the shooting, a substantial portion of the mitigating evidence included vignettes of Petitioner's "childhood spent in poverty," *see*, *e.g,* 45 RR 160-61; "his mental slowness or learning disability," *id.* at 86; his caring disposition and acts of "charity or kindness," *id.* at 307-08; and his positive relationships with his nieces and his friends' children, *e.g.* 45 RR 244-45, 46 RR 59, *id.* at 232-34. Evidence was also offered that Petitioner showed relatively "good behavior in jail or prison after committing the crime," 46 RR 317, 319; that he was "very polite" and "respectful," an "excellent worker," *id.* at 46, 51; and that he was a good artist. *Id.* at 317.

The defense presented compelling evidence that Petitioner's childhood was marked by homelessness, deprivation, hunger, neglect, and lack of appropriate parental guidance and care. Beginning when Petitioner was three or four years old, the family—Petitioner, his older brother Michael, and their father and mother—were homeless and lived in the family car, a two-door Toyota Supra. 45 RR 160-62, 178. Petitioner's father and mother slept in the front with the seats reclined; Petitioner and his brother slept in the back seat. 45 RR 162. Petitioner and his brother took cold "showers" before school with a water hose at a local church in the morning. 45 RR 166-67. Petitioner's father, an alcoholic who was unable to hold steady employment, taught Petitioner and his brother to shoplift in order to support the family. 45 RR 162-64. After exchanging the shoplifted items at another store for cash or vouchers, Petitioner's father would spend the proceeds on beer and cigarettes. 45 RR 164, 180. The family routinely ate "sandwich meat" for meals, which was eaten in the car. 45 RR 166. When he got older, Petitioner "bounced around" living with friends and occasionally family. 45 RR 74-75. Eventually, Petitioner was the one who found his own father dead on the couch when he passed, which had a big impact on him. 45 RR 64. And while Petitioner cohabitated with a girlfriend for "a very short time," the pair ultimately broke up, which, according to friends also "took a huge toll" on him. *Id.* at 89.

However, witnesses also described Petitioner's positive character and good qualities despite the adversity of his youth. Several of Petitioner's former supervisors in the moving industry testified that he was "very polite" and "always" treated "the

customers and everybody else with respect," that he was an "excellent worker," and that the shooting was out of character. 45 RR 46, 53. Petitioner's friends told the jury about his positive relationships with their young children, describing a "whole-hearted guy, very sweet character," who "was there when [a friend's] daughter was born" and was a part of a lot of their family events given his own "real limited" family. 45 RR 59, 73-74. Petitioner's brother had several children, and Petitioner was described as "very close" with his nieces, "more playful with them than [their father] ever was," "like a father to them," "showed up for all of their birthdays [and] holidays." 45 RR 292, 232; 44 RR 244-45. Finally, Petitioner's aunt described him as "very kind, very considerate, very helpful," someone who would help her plant rose bushes in the yard, and a talented artist. 45 RR 307, 295, 317.

3. Arguments of counsel.

As the defense motion anticipated, during closing argument the State argued to jurors that much of the evidence offered as mitigation was not mitigating because it did not "reduce[] his moral blameworthiness":

> What in the world is sufficiently mitigating? … [H]ow many bodies does he get where it is mitigated, where it reduces his moral blameworthiness? What's the mitigation? Is it that he overcame his childhood to obtain his high school degree? … Is it that he overcame his circumstances to get his college paid for? Is it that his girlfriend broke up with him? You didn't hear sexual abuse. You didn't hear physical abuse. You didn't hear that he has any deficits.

46 RR 88-89.

On the other hand, defense counsel reminded the jury that "Brandon McCall's life sucked," 46 RR 111, that he was severely neglected and "has never had his own place," *id.* at 117, and argued that "[t]here is a lot of mitigation in this case," such as

the fact that he "cares … about his nieces." *Id.* at 120. Nonetheless, the jury answered the mitigation special issue in the negative, and Petitioner was sentenced to death. *Id.* at 150.

C. Petitioner's Eighth Amendment Challenge to the Constitutionality of the "Moral Blameworthiness" Instruction was Rejected on Appeal.

On appeal, Petitioner argued that Article 37.071's definition was unconstitutional, because the state law requirement that mitigation evidence must reduce "moral blameworthiness" creates a nexus between mitigating evidence and the present offense because a typical jury would infer that "blameworthiness" relates to culpability for the crime at hand. The Court of Criminal Appeals made short work of the issue:

> This nexus, [Petitioner] asserts, improperly limits the scope of mitigating evidence and renders the statute unconstitutional under the Eighth Amendment and *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) … We have previously considered and rejected this [sic] same or similar claims. *See Hall v. State*, 663 S.W.3d 15, 43 (Tex. Crim. App. 2021), *cert. denied*, 143 S. Ct. 581 (2023); *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010). Appellant's argument does not persuade us to revisit these holdings. We overrule [this] point of error.

App. 20a-21a (CCA opinion describing and rejecting facial challenge to Article 37.071's definition).

Petitioner also challenged the "moral blameworthiness" definition as applied to him. However, the Court of Criminal Appeals again found no Constitutional violation, declaring "two fundamental problems with [Petitioner]'s as applied challenge":

> First, [Petitioner] relies on voir dire testimony that encompassed only hypothetical applications of Article 37.071. At best, this testimony

> showed how the individual venire persons would approach mitigating evidence. It does not show that the statute itself operated unconstitutionally as applied to [Petitioner]'s facts and circumstances. Second, at its core, the claim presents an attack on the plain language of Article 37.071, Section 2(f)(4). By arguing that venire persons Grese and Johnson would have applied a nexus requirement he believes is inherent in Article 37.071, Section 2(f)(4), [Petitioner] is essentially just reasserting his facial constitutionality arguments that the plain language of the statute creates a nexus requirement in violation of the Eighth Amendment and *Tennard*. …we have previously considered and rejected the same or similar claims.
>
> [Petitioner] fails to show that the statute is unconstitutional as applied to his particular facts and circumstances. We overrule [this] point of error.

App. 22a.

Juror Johnson sat on Petitioner's jury. Following defense counsel's attempts to inquire further into Grese and Johnson's beliefs,[3] explained in more detail *infra*, the trial court sustained prosecutors' objections to additional questions, preventing inquiry on voir dire of any following jurors into their understanding of the application of the state law definition of mitigating evidence and its impact on their deliberations. Nonetheless, Petitioner's claims on appeal were denied. This petition follows.

[3] While the Court of Criminal Appeals dismissed reliance on testimony "that encompassed only hypothetical applications of Article 37.071," counsel in any case are prohibited by the general rule against "stakeout" or "commitment" questions from inquiring into how any particular juror would resolve a factual issue in the instant case.

REASONS FOR GRANTING THE PETITION

A. This Court's Precedents Clearly Establish an Expansive Conception of Mitigating Evidence in Capital Cases.

This Court has held that a sentencer must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." This is a broad and inclusive standard, allowing for a wide range of factors to be considered.

The requirement of a statutory scheme in which sentencers may consider and give weight to an expansive body of relevant mitigation evidence is "a product of the requirement of individualized sentencing." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). This Court has held that because the death penalty is "so profoundly different from all other penalties," the need for an individualized sentencing determination is critical in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). In *Lockett*, the Court found unconstitutional an Ohio statute that limited the number of mitigating factors a sentencer could consider satisfied constitutional requirements. The majority held that any death penalty statute "must not preclude consideration of relevant mitigating factors" and that the Ohio instruction was too restrictive. *Id.* at 608. From *Lockett* comes this Court's initial guidance on the scope of relevant mitigating evidence, which at a minimum must include "any aspect of a defendant's character or record." *Id.*

Petitioner's mitigating evidence included childhood deprivation, poverty, homelessness, and neglect. This Court has expressly recognized that such circumstances can justifiably motivate jurors to impose a life sentence, even though they do not have a direct "nexus" with the crime. Suffering deprivation or mistreatment as a child is mitigating. *Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987) (the "difficult circumstances" of the defendant's upbringing were mitigating, including the fact that he "had been one of seven children in a poor family that earned its living by picking cotton"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (defendant "raised in a neglectful, sometimes even violent, family background).

In addition, Petitioner presented mitigating evidence of his caring disposition, prior acts of kindness, positive relationships with family, and good behavior in jail. Again, this Court has recognized that such evidence is constitutionally mitigating, though it has no relationship to the crime whatsoever. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (evidence that petitioner had been "a well-behaved and well-adjusted prisoner," though "not relate[d] specifically to petitioner's culpability for the crime he committed," was unquestionably "'mitigating' in the sense that they might serve 'as a basis for a sentence less than death'").

In *Tennard v. Dretke*, 542 U.S. 274 (2004), this Court struck down a so-called "threshold 'screening test'" for "constitutional relevance" of mitigating evidence that required a showing, *inter alia*, "that the criminal act was attributable" to the evidence—i.e., that a "nexus" existed between the proffered mitigating evidence and the crime itself. *Id.* at 283-84. This Court struck down the "screening test," holding

that it had "no foundation in the decisions of this Court." *Id.* at 284. The Court held that the "nexus" element of the screening test was "most obviously" inconsistent with Eighth Amendment principles because it "will screen out any positive aspect of a defendant's character, because good character traits" are not "typically traits to which criminal activity is 'attributable.'" *Id.* at 285.

The Texas statute's limitation on what may be considered mitigating evidence—i.e., only evidence that reduces "moral blameworthiness"—cannot withstand the sweeping language of *Tennard*:

> When we addressed directly the relevance standard applicable to mitigating evidence in ... *McKoy v. North Carolina,* 494 U.S. 433, 440-441 (1990), we spoke in the most expansive terms. We established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—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—applies. We quoted approvingly from a dissenting opinion in the state court: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." 494 U.S., at 440 (quoting *State v. McKoy*, 372 S.E.2d 12, 45 (N.C. 1988) (opinion of Exum, C. J.)). Thus, a State cannot bar "the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death."

Tennard, 542 U.S. at 284-85 (internal citations, parallel citations, and internal quotations marks omitted).

Thus, *Tennard* defines mitigating evidence as any evidence a sentencer could reasonably find warrants a sentence less than death, while Art. 37.071, §(2)(f)(4) narrows that definition to only evidence that reduces the defendant's moral blameworthiness. In other words, if there is any evidence that a juror "could

reasonably find warrants a sentence less than death" but which does not *also* "reduc[e] the defendant's moral blameworthiness," Art. 37.071, §(2)(f)(4) excludes that evidence from consideration, violating *Tennard*.

B. Texas Law Upholding the Restrictive Definition of Mitigating Evidence Has Failed to Engage With—and Cannot Withstand—*Tennard*'s Analysis

The Texas Court of Criminal Appeals summarily rejected Petitioner's challenge to the constitutionality of the "moral blameworthiness" instruction, with a conclusory cite to two prior cases—*Hall v. State* and *Coble v. State*[4]—in which it rejected similar claims. *McCall v. State*, No. AP-77,095, 2023 WL 7019159 at 9 (Tex. Crim. App. Oct. 25, 2023) (citing to *Hall* and *Coble*). But *Hall* and *Coble* in turn merely cite other prior decisions of the Court of Criminal Appeals that have rejected the challenge in similarly conclusory fashion. Ultimately this string of cases traces back to *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), a case which was decided seven years before *Tennard*. In short, the Texas Court of Criminal Appeals has never addressed a challenge to the "moral blameworthiness" instruction by reckoning with the implications of this Court's decision in *Tennard*.

In *Coble*, the Court of Criminal Appeals acknowledged that the statutory definition would violate *Tennard* "if the jury would be reasonably likely to infer [such a] requirement." *Coble*, 330 S.W. 3d at 296. However, rather than address the implications of *Tennard* for the "moral blameworthiness" instruction, the Court

[4] *Hall v. State*, S.W.3d 15, 43, (Tex. Crim. App. 2021), *cert. denied*, 143 S.Ct. 581 (2023); *Coble v. State*, 330 S.W.3d 253, 296 (Tex. Crim. App. 2010).

simply cited to its prior decision in *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007).

But *Roberts* did not address *Tennard* either. Instead, the Court simply cited its decision in *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004), which pre-dated *Tennard* by three years. In *Roberts*, the defendant contended that narrowing the scope of mitigation to only evidence that reduces moral blameworthiness violated *Tennard*, but the Court of Criminal Appeals dismissed the claim, reasoning that it had already addressed the issue in *Perry*. *Roberts*, 220 S.W.3d at 534, n.43.

In *Perry*, the defendant argued that the statutory definition effectively instructed jurors to "disregard evidence that [they] do not find to be sufficiently connected to the crime to reduce moral blameworthiness." *Perry*, 158 S.W.3d at 449. The *Perry* Court in turn held that the challenge had already been rejected in *Cantu v. State*, 939 S.W.2d 627, 648−49 (Tex. Crim. App. 1997).

Finally, in *Cantu*—a case that pre-dated *Tennard* by seven years—the defendant contended that it was improper to limit mitigation to evidence reducing the defendant's moral blameworthiness. The Court of Criminal Appeals held that because "the considering and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror ... Article 37.071 section 2(f)(4) does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness as appellant alleges." *Cantu*, 939 S.W.2d at 649. But the Court of Criminal Appeals did not explain how the jurors' consideration of mitigating evidence was "open-ended" when they were instructed to only consider evidence

mitigating if it tended to reduce the defendant's "moral blameworthiness" for the crime.

In sum, rather than engage with the Eighth Amendment issue with the "moral blameworthiness" instruction that is clearly implicated by *Tennard*, the Court of Criminal Appeals has instead routinely cited to a string of cases that pre-date the *Tennard* decision. *Cantu* was decided seven years before *Tennard*, and nothing that the Court of Criminal Appeals said in *Cantu* anticipated *Tennard* or its reasoning. Any defense of the "moral blameworthiness" instruction must at least attempt to reconcile *Tennard*'s rationale with a statute that explicitly limits the definition of mitigating evidence like this one. Simply put, Texas courts have yet to explain how a provision that imposes a substantive limit on what can be considered as mitigating evidence (i.e., only that which arguably reduces "moral blameworthiness")—can survive the sweeping language of *Tennard*, *see supra*, reminding of the expansive nature of constitutionally relevant mitigating evidence.

C. There Is a "Reasonable Likelihood" that Texas Jurors Apply the "Moral Blameworthiness" Instruction "in a Way That Prevents the Consideration of Constitutionally Relevant Evidence."

1. Common usage of the words "blame" and "blameworthiness" suggest that jurors understand the term "moral blameworthiness" to impose a nexus between mitigating evidence and culpability for the act.

Evidence of the common understanding of such language indicates that lay jurors can reasonably be expected to understand the "moral blameworthiness" instruction as excluding the consideration of mitigating evidence unrelated to culpability for the offense. Societal definitions and understanding of the concept of

blame are strongly associated with responsibility. Responsibility is often an element referenced in direct definitions of the word "blame." Blame has been defined as to "say or think someone ... is *responsible* for something bad happening";[5] "to hold *responsible*;"[6] to "consider *responsible* for a misdeed;"[7] to "attribute *responsibility* to."[8] (*emphasis added*). In these instances, blame, by its very definition, is dependent on assessing someone's blame for an action.

Courts, too, consider blameworthiness with responsibility and culpability.[9] Historical understandings of mens rea encompass a "connection between crime and a mental element leading to moral blameworthiness." *Gorham v. United States*, 339 A.2d 401, 430 (D.C. 1975). New Jersey's treatment of moral blameworthiness illustrates the historical relationship between blameworthiness, responsibility, and culpability—and the contrasting role of mitigating evidence in a capital sentencing

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[5] *Blame*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/blame (last visited Mar. 24, 2024).

[6] *Blame*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary /blame (last visited Mar. 24, 2024).

[7] *Blame*, The Free Dictionary, https://www.thefreedictionary. com/blame (last visited Mar. 24, 2024).

[8] *Blame*, vocabulary.com, https://www.vocabulary.com/dictionary/blame (last visited Mar. 24, 2024).

[9] *See e.g. Gray v. State*, 482 So. 2d 1318, 1320 (Ala. Crim. App. 1985) ("diminished responsibility brings
formal guilt more closely into line with moral blameworthiness"); *People v. Hardy,* 825 P.2d 781, 850 (Cal. 1992) (""a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."); *Ault v. Int'l Harvester Co.*, 528 P.2d 1148, 1155 (Cal. 1974) ("[C]ulpable' connotes moral blameworthiness or moral fault …and clearly includes legal blameworthiness and legal fault.").

scheme. When the New Jersey Supreme Court reviewed capital cases on appeal,[10] it employed a proportionality test comparing the subject case to other capital cases. *State v. Loftin*, 724 A.2d 129, 134 (1999). One component of that test required the Court to assess a defendant's culpability. *Id.* at 335, 171. Three distinct factors were examined: (1) moral blameworthiness, (2) degree of victimization, and (3) character of the defendant. *Id.* at 336, 171. Importantly, when evaluating the moral blameworthiness factor, the Court looked at characteristics with a direct link to the crime, like motive, premeditation, justification or excuse, knowledge of helplessness of the victim, and the defendant's involvement in planning the murder. *Id.* Mitigating factors without a nexus to the crime were evaluated separately, under the "character" section. *Id.* at 338, 172.

Both blame and responsibility are closely tied to the legal concept of culpability. The same dictionaries provide definitions of culpable such as: "deserving to be *blamed* or considered *responsible* for something bad;"[11] "meriting condemnation or *blame*;"[12] "*blameworthy*;"[13] "deserving *blame* or censure as being wrong or evil or

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[10] New Jersey abolished the death penalty in 2007. Death Penalty Information Center, *New Jersey*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-jersey (last visited Mar. 24, 2024).

[11] *Culpable*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/ dictionary/ english/culpable (last visited Mar. 24, 2024).

[12] *Culpable*, Merriam-Webster Dictionary, https://dictionary.cambridge.org/us/dictionary/ english/culpable (last visited Mar. 24, 2024).

[13] *Culpable*, The Free Dictionary, https://www.thefreedictionary.com/culpable (last visited Mar. 24, 2024).

injurious."[14] (*emphasis added*). The meaning of the word "blame" is thus inextricably intertwined with the meaning of the words responsibility and culpability.

This understanding of moral blameworthiness as pertaining to responsibility for a specific action violates the "nexus requirement" rejected by this Court in *Tennard*. Because the meaning of "moral blameworthiness" is commonly understood to pertain to responsibility for a specific bad act, jurors can be expected to require a nexus to the crime in order to consider mitigating evidence, a limitation that would violate the defendant's Eighth Amendment right to a jury that will consider any evidence that might merit a sentence less than death.

A jury cannot be expected to intuit a more expansive understanding of mitigating evidence, nor refuse to follow the face of their instruction. Jurors are presumed to follow their instructions. *Penry v. Johnson*, 532 U.S. 782, 799 (2001) (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). And every juror took an oath to follow the law, which included imposing the "moral blameworthiness" nexus limitation on their consideration of mitigating evidence.

2. Jurors in this case were repeatedly instructed that their consideration of mitigating evidence was limited to evidence that reduced "moral blameworthiness" and jurors understood this to mean evidence related to culpability.

This Court has explained that in assessing whether a jury charge precluded the jury from considering or giving effect to a defendant's mitigating evidence, the reviewing court must consider the context of the entire trial. *See, e.g.*, *Boyde*, 494 U.S.

[14] *Culpable*. vocabulary.com, https://www.vocabulary.com/dictionary/culpable (last visited Mar. 24, 2024).

at 380-83. One key part of that context is what the jurors were told, during voir dire and closing argument, about how to reach their decision. Here, the jurors were repeatedly instructed that their consideration of what they might consider to be mitigating was constrained by the "moral blameworthiness" instruction.

During the voir dire process, defense counsel repeatedly attempted to determine whether individual jurors understood the "moral blameworthiness" instruction to preclude consideration of certain types of mitigating evidence, but these efforts were thwarted by prosecutors' objections and rulings of the trial court. For example, defense counsel asked one venireperson:

> DEFENSE: If you sat on the jury and you heard evidence that you believed was mitigating and that you believed required you to make a personal moral judgment that life was the proper verdict, regardless of any definitions that you may have been given, would you vote your conscience and vote for life?
>
> PROSECUTOR: Well, I am going to object to that to the extent it asks this juror's opinion in terms of disregarding the law.
>
> THE COURT: Sustained.
>
> DEFENSE: [One other] question. If the judge gives you a definition of mitigation in the Court's Charge, is that the definition that you will use in making a determination of how to answer Special Issue #1 [sic]?
>
> VENIREPERSON: If the judge instructed the jury this was – I would listen to what the judge said, yes.

19 RR 68-69.

Examining another prospective juror, defense attempted to ask a similar question to determine whether the venireperson would apply the restrictive definition during deliberations:

> DEFENSE: Well, let me ask you if you can follow the law according to this scenario. If you felt that the answer should be yes but you did not believe that whatever you were thinking of reduced the personal moral blameworthiness of a defendant, would you follow the Court's instructions and answer that question no?
>
> PROSECUTOR: Excuse me, Counsel. I am going to have to object. It is an improper commitment question. It also requires this juror to envision a particular set of circumstances where he would answer that in a specific way.
>
> COURT: Overruled.
>
> DEFENSE: And I realize that's a hard thing to ask you and if you don't—if you are not clear on what I am asking you—
>
> VENIREPERSON: Let me see if I understand. You are asking me that if I believe the answer to special issue #2 … should be a life imprisonment rather than death sentence, but the instructions of the court require a different answer, would I—would I vote my belief? Is that the question?

24 RR 78-80.

After clarification from defense counsel, the State's objection was sustained. *Id.* at 80.

When examining seated juror Ryan Johnson, counsel attempted to ascertain whether Juror Johnson would be able to consider all mitigation whatever the court charged:

> DEFENSE: …you may answer yes to the Special Issue #2 based on any evidence you have heard that could serve as a basis for you to think that a sentence of life without parole is more appropriate than death, regardless of any instruction given by the Court as to what the definition of mitigation might be.
>
> PROSECUTOR: Judge, I am going to object to any instruction that – for a juror to disregard the law.
>
> THE COURT: Sustained.

DEFENSE: Okay. But you would be, in your mind, bound by any definition given to you by the Court as to what the definition of mitigating would be?

VENIREPERSON JOHNSON: I would follow the indications [sic] of the Court.

DEFENSE: Okay … [so if] you thought that the answer would be yes but it didn't meet your understanding of reducing the personal moral blameworthiness of the defendant, you would answer no?

PROSECUTOR: Objection, commitment.

…

DEFENSE: The Court is going to give you a definition of mitigation. It is going to say that the definition is something that reduces the person [sic] moral blameworthiness of the defendant, okay? You may think there is something there that says for you, that my answer is yes, based on what I think, but when you look at the Court's instruction, you have to answer no. So what I am asking you is, under that circumstance, would you follow the Court's instruction?

PROSECUTOR: And, Judge, we are going to renew our objection. It is commitment. That –

COURT: All he is asking on that question is can he follow the Court's instruction.

DEFENSE: That's what I am asking.

COURT: … you can answer that question.

VENIREPERSON JOHNSON: Yes.

21 RR 75-77.

Juror Johnson's responses confirmed that he would limit his consideration of mitigating evidence to only that which pertains to the defendant's "moral blameworthiness." After the defense's cause challenge was rejected, Johnson was

seated as a juror. 21 RR 80-81. Thus, the jurors were repeatedly instructed that they could only consider evidence to be mitigating if it "reduced the defendant's moral blameworthiness," and defense counsel were precluded from inquiring how prospective jurors understood the term "moral blameworthiness."

D. Intervention by This Court Is Required to Ensure that Texas Decisionmakers Are Empowered to Consider Capital Defendants' Constitutionally Relevant Mitigating Evidence.

Although the Texas Court of Criminal Appeals has purported to address the constitutional issue raised in *Tennard*, the Texas court's jurisprudence countenancing the "moral blameworthiness" test does not adhere to the lessons of *Tennard*. As described above, the requirement of a nexus between the mitigating evidence and the crime in question—rejected by the *Tennard* Court as unconstitutional—is still imposed by definition and jury instruction in Texas capital cases. Trial courts are failing to allow defense practitioner's to properly probe the effect of this unconstitutional restriction on jurors' application of the instruction. And the Texas courts have failed to clarify or correctly apply *Tennard*, instead dismissing claims like Petitioner's in a conclusory sentence or two, relying on *pre-Tennard cases* rejecting constitutional challenges to the restrictive definition in state law.

The continued acceptance of the nexus requirement recreates the constitutional issue addressed by this Court in *Tennard*, and clarification by this regarding the proper scope of constitutionally relevant evidence is necessary to ensure that courts in Texas are properly observing the Constitution's demands.

The need for clarification and proper application of precedent from this Court in Texas capital cases is not a novel one. The failure by Texas to enforce *Tennard*

occurs in a larger context, against a historical backdrop of Texas courts' reluctance (or refusal) to follow—or continued misapplication of—guidance and requirements of this Court regarding the constitutional parameters surrounding the death penalty. *See, e.g. Penry v. Lynaugh* ("*Penry I*"), 492 U.S. 302 (1989) (finding that Texas's capital sentencing scheme violated the Eighth Amendment because it failed to provide a vehicle by which the sentencer could give mitigating effect to the defendant's proffered evidence); *Penry v. Johnson* ("*Penry II*"), 532 U.S. 782, 802-04 (2001) (Texas's decision to issue a "nullification instruction" in addition to the constitutionally infirm instructional scheme again failed to provide a vehicle for the jury to give mitigating effect to Penry's evidence despite the fact that *Penry I* "provided sufficient guidance as to how the trial court might have drafted the jury charge for Penry's second sentencing hearing to comply with our mandate."); *Moore v. Texas* ("*Moore I*"), 581 U.S. 1, 6 (2017) (finding that, although this Court's 2002 opinion in *Atkins v. Virginia*[15] left the determination of intellectual disability to the states, the Court of Criminal Appeals' judicially-created standards were "[n]ot aligned with the medical community's information," "dr[ew] no strength from [this Court's] precedent," and created "an unacceptable risk that persons with intellectual disability will be executed.'" (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)); *Moore v. Texas* ("*Moore II*"), 139 S.Ct. 666, 670 (2019) (reversing the CCA's determination off remand as "inconsistent with our opinion in *Moore* [*I*]" and finding "too many

[15] 536 U.S. 304 (2002).

instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion.").

Thus, the Texas Court of Criminal Appeals' failure to observe this Court's guidance regarding the proper scope of the Eighth Amendment's demands is not new but instead a variation on a familiar theme. Indeed, the state of Texas law and the rejection of constitutional claims in the years following *Tennard* mirrors the state court's repeated refusal to provide a proper vehicle for the consideration of constitutionally relevant mitigating evidence in the post-*Penry I* years, and it does not differ meaningfully from the 14 years of the Court of Criminal Appeals' unconstitutional approach to the intellectual disability determination finally corrected by this Court in *Moore*. Once again, this Court must intervene, exercising its authority and obligation to interpret and enforce the Constitution against Texas's refusal to observe basic jurisprudential protections in pursuit of the imposition of the death penalty.

Because the issue was litigated here pretrial, the voir dire was restricted, jurors' statements during examination indicated that they would follow the law as instructed, and constitutionally relevant mitigating evidence was presented at trial but excluded from jurors' consideration by Texas's restrictive definition and jury instruction, this case presents a suitable vehicle to take up the issue.

CONCLUSION

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

Respectfully submitted,

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