No. 20-7252

In the Supreme Court of the United States

JOHN RAYMOND TRAVIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Constitution guarantees a capital defendant the right to have his counsel use the word "mercy" during closing argument.

2. Whether the Constitution requires a trial court to use the word "mercy" when instructing jurors on their responsibility to consider mitigating evidence during the penalty phase of a capital trial.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Silveria & Travis, No. S062417 (Aug. 13, 2020) (this case below).

In re Travis, No. S263455 (habeas petition filed July 20, 2020).

California Superior Court, Santa Clara County:

People v. Silveria & Travis, No. 155731 (June 13, 1997) (judgment of death).

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STATEMENT

1. On January 28, 1991, petitioner John Travis and four others robbed and killed James Madden, who was working as the manager of a craft store in Santa Clara County. Pet. App. A at 2. Petitioner's group waited until the store closed and Madden was alone before surprising Madden as he tried to leave. *Id.* at 3. They forced Madden to open the store's safes and then bound him to a chair with duct tape. *Id.* at 4. Petitioner and one other member of the group, Daniel Silveria, repeatedly stabbed Madden with a knife. *Id.* Another man, Christopher Spencer, slit Madden's throat with a knife. *Id.*

Petitioner and Silveria were arrested together in a parking lot the next day. Pet. App. A at 4. The police found a stun gun, duct tape, and $694 in cash in Silveria's car. *Id.* Petitioner and Silveria each confessed to their involvement in Madden's murder. *Id.* at 2.

2. Petitioner and Silveria were tried jointly to separate juries. Pet. App. A at 1.[1] At the guilt phase, each defendant's confession to the police was played for his jury. *Id.* at 115. The juries convicted petitioner and Silveria of the robbery and murder of Madden and the burglary of the craft store. *Id.* at 1. The juries also found true allegations that petitioner and Silveria had

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[1] Spencer was tried separately and also sentenced to death. *People v. Spencer*, 5 Cal. 5th 642 (2018).

committed the murder during the course of a robbery and burglary and with the personal use of a knife. *Id.*

At the penalty phase, petitioner's and Silveria's juries deadlocked, and the trial court declared mistrials. Pet. App. A at 2. Both were retried, this time before a single jury. *Id.* Before the penalty retrial, petitioner joined Silveria's motion to "'argue mercy.'" *Id.* at 146. The trial court denied the motion, noting that the dictionary definition of mercy "'implies compassion that forebears punishing even when justice demands it.'" *Id.* The trial court explained that mercy "'is forgiveness and forbearance of warranted punishment. The jury's job is not to forgive. The jury's job is to punish with either death or life without parole.'" *Id.* The court further concluded that "[g]ranting mercy would seem to grant an unduly lenient sentence" that would not be "based on the evidence presented" at trial, but rather would be made "in an arbitrary and unpredictable fashion." *Id.* at 147 (quoting *California v. Brown*, 479 U.S. 538, 541 (1987)) (quotation marks omitted).

After the presentation of evidence, the trial court instructed the jury in accordance with California Penal Code section 190.3(k). *See* Pet. App. A at 147. It told the jury to consider "'any . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" *Id.* (quoting CALJIC No.

8.85(k)). It also instructed the jurors that they were "'free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider'" and that they could "'weigh and consider'" any mitigating circumstance they found true. *Id.* at 147-148. The court defined a "mitigating circumstance" as "'any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.'" *Id.* at 148.

The jury returned death verdicts for both petitioner and Silveria. Pet. App. A at 2.

3. The California Supreme Court unanimously affirmed petitioner's and Silveria's convictions and death sentences in the same opinion. Pet. App. A at 2, 189.[2] It rejected petitioner's claim that the trial court erred by prohibiting him from using the word "mercy" during closing argument. *Id.* at 148. The state supreme court noted that it had "previously held that a trial court does not err in directing the parties to refer to 'sympathy, pity, or compassion instead of mercy' in argument." *Id.* (quoting *People v. Ervine*, 47 Cal. 4th 745, 802 (2009)). And it explained that the "use of any of those terms—mercy, sympathy[,] pity, or compassion—during argument properly requests leniency

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[2] Silveria has filed a separate petition for a writ of certiorari. *See* Pet., *Silveria v. California*, No. 20-6684. That petition raises issues distinct from those raised by the instant petition. *See id.* at i. The State's response to that petition was filed on March 22, 2021.

from the jury." *Id.* Because "[t]he trial court's direction in this case permitted the parties to use various terms that conveyed the jury's latitude in considering the evidence and making the profoundly personal and normative penalty decision," the exclusion of the word "mercy" in this case was not erroneous. *Id.*

The California Supreme Court further explained why barring counsel from using the word "mercy" was proper. Pet. App. A at 149-151. It noted that "the word 'mercy,' when not based on the trial evidence, may invite a purely subjective rather than a reasoned moral response." Pet. App. A at 149. That is because "the word mercy 'connote[s] an emotional response to the mitigating evidence instead of a reasoned moral response.'" *Id.* It held that the trial court's ruling that petitioner's attorney could not use the word "mercy" did not violate the Constitution because petitioner's attorney was "accorded broad latitude in marshalling the mitigating evidence and attempting to persuade the jury that this evidence warranted a sympathetic response, and were not limited in this effort by preclusion of the word 'mercy.'" *Id.* at 149, 151; *see id.* at 150-151 (reciting defense counsel's arguments).

The California Supreme Court also rejected petitioner's related claim that the trial court erred by refusing to instruct "'on mercy or a juror's use of mercy.'" Pet. App. A at 146, 151. It noted its prior ruling that the instruction given by the trial court in this case (CALJIC No. 8.85) "'adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy.'" Pet. App. A at 151. And it concluded that

the trial court's additional instructions had properly "informed the jury of its latitude to consider sympathetic and extenuating evidence at trial in determining penalty." *Id.* at 151-152. The "mere exclusion of the word 'mercy' did not undercut these instructions," nor did it create a "'reasonable likelihood the jury was misled as to its ability to grant' defendants leniency based on the mitigating evidence." *Id.* at 152.

ARGUMENT

Petitioner asks this Court to review his claims that the trial court violated his constitutional rights by precluding his counsel from using the word "mercy" during closing argument at his penalty-phase retrial, and by refusing to use the word "mercy" when instructing the jury. The California Supreme Court properly rejected those claims. There is no need for further review.

1. Petitioner's principal claim is that the Constitution requires that defense counsel be allowed to use the word "mercy" during closing argument of the penalty phase of a capital trial. Pet. 10-17. That is incorrect.

This Court has recognized that "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses." *California v. Brown*, 479 U.S. 538, 541 (1987). "The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *Id.* The sentence imposed at the penalty stage "should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere

sympathy or emotion." *Id.* at 545 (O'Connor, J., concurring) (emphasis omitted). As the California Supreme Court concluded, use of the "the word 'mercy'" may have just such an improper effect—at least "when not based on the trial evidence." Pet. App. A at 149. The "unadorned" use of that word may "invite a purely subjective rather than a reasoned moral response" and can lead to "arbitrary or capricious exercise[s] of power rather than reasoned discretion based on particular facts and circumstances." *Id.* (citation, quotation marks, and emphasis omitted). Petitioner cites no authority holding that defense counsel must always be allowed to use "the word 'mercy' during final arguments to a capital sentencing jury." Pet. 12; *see also Herring v. New York*, 422 U.S. 853, 862 (1975) (presiding judges "must be and [are] given great latitude in controlling the duration and limiting the scope of closing summations").

In any event, any error was harmless. The lower courts recognized that "leniency toward the defendant is properly considered at the penalty phase." Pet. App. A at 148-149. And while petitioner's trial counsel was "precluded from using the word 'mercy,'" nothing in the parties' arguments to the jury suggested that the jury "could not consider mercy in determining [the] penalty." *Id.* (citation and quotation mark omitted). On the contrary, defense counsel was "accorded broad latitude in marshalling the mitigating evidence and attempting to persuade the jury that this evidence warranted a

sympathetic response" and was "not meaningfully limited in this effort by preclusion of the word 'mercy.'" *Id.* at 151.

Among other things, the jury was presented with evidence of petitioner's difficult childhood, *id.* at 24-26, 34-36; heard petitioner accept responsibility for the murder and express remorse, *id.* at 31; and heard testimony from other witnesses about petitioner's good behavior while in custody, *id.* at 31-32. And during closing argument, petitioner's counsel urged the jury to

> look within yourself to discover whether there are any feelings of sympathy or compassion for the boy . . . who suffered, the boy whose anger was kindled by shame, fanned by countless humiliations, by a cruel masochistic sexual predator, the boy who experienced all of these things without the protection of family, social agencies or even one good friend.

Id. at 150 (quotation marks omitted). Counsel also told the jury, "I'd like to see you live with the peace that comes not from vengeance, not from anger, not from destruction of human life, but from the forbearance of imposing death." *Id.* at 150-151 (quotation marks omitted). Even assuming that there was some error in this case, there is no reasonable possibility that the result would have been different had counsel been permitted to use the word mercy. *See id.* at 152 (trial court's ruling did not mislead the jury about its ability to grant petitioner leniency).

2. The California Supreme Court also properly rejected petitioner's claim that he was entitled to a jury instruction that included the word "mercy." Pet. App. A. at 151-152. The trial court accurately instructed the jury that it could consider "'any . . . circumstance which extenuates the gravity of the crime even

though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" Pet. App. A at 147 (quoting CALJIC No. 8.85(k)). Even though that instruction did not expressly include "the word 'mercy,'" it "adequately instruct[ed] the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy." *Id.* at 151-152 (citations and quotation marks omitted); *see also People v. Brasure*, 42 Cal. 4th 1037, 1069-1070 (2008) (instructions that explicitly reference mercy are "essentially duplicative of CALJIC No. 8.85").

Petitioner contends he was entitled to an instruction using the word "mercy" because mercy is a "'recognized defense.'" Pet. 18-19. To be sure, the idea of "throwing oneself on the mercy of the court" is a "familiar" one. Pet. 10; *see also Kansas v. Carr*, 577 U.S. 108, 119 (2016) ("[T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy."). But the jury instructions in this case adequately informed the jury of its responsibility to weigh the evidence of mitigating circumstances against the evidence of aggravating circumstances in determining the appropriate penalty for petitioner's crimes. Petitioner presents no authority holding that the Constitution requires the trial court to use the word "mercy" when instructing a jury on how to discharge that duty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 26, 2021

Respectfully submitted

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