CAPITAL CASE
No. 10-1302

IN THE

Supreme Court of the United States

CARL PUIATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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The issue presented in this case is critical to the fair administration of capital sentencing. Does the Eighth Amendment's guarantee of an individualized capital sentencing determination require that a trial judge sever a joint capital sentencing proceeding or, failing to sever, clearly instruct the jury to consider each defendant's mitigating evidence separately and return different sentences if the evidence so warrants? Two courts of appeals confronting this issue have held that the tension between joinder and individualized sentencing is "inherent," and found that clear jury instructions can sometimes mitigate the inevitable prejudice of a joint capital penalty

phase. The Eleventh Circuit below, by contrast, held that there are *no* Eighth Amendment implications of joint capital sentencing "whatsoever," and sanctioned a jury charge that exacerbated, rather than cured, the prejudice from the joint proceeding.

Although the state downplays the importance of this issue, the significance of the question presented is unmistakable. In Florida alone, there are currently 126 pending joint capital cases involving 389 codefendants. See Br. of Fla. Capital Res. Ctr. as *Amicus Curiae* 3. And there is strong evidence that whether a defendant receives a joint or individual capital sentencing proceeding materially affects the outcome of the proceeding: not only are juries more likely to return the same sentences for both defendants, but also they are more likely to recommend death in a joint proceeding. See Br. of Ctr. for Constitutional Rights et al. as *Amici Curiae* 2-3. One study suggests that jurors are nearly three times more likely (76% to 28%) to recommend the same sentence for all defendants when they are sentenced in joint rather than separate proceedings. *Id.* at 9.

Rather than confront this evidence and the constitutional implications of joint *capital* sentencing proceedings, the state cites cases involving joinder and severance of *non-capital* defendants. These cases, however, do not address the special concerns that this Court has long recognized attend the decision to impose the sentence of death. In the end, nothing in the state's 45-page brief in opposition ("Opp.") provides a compelling reason for this Court to decline to consider this undoubtedly significant issue that has divided the courts of appeals.

I. PUIATTI PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT

The state's contention (Opp. 20) that Puiatti failed to his exhaust his individualized sentencing claim in state court is simply incorrect. Puiatti "fairly presented" the factual and legal basis for his constitutional severance claim on direct appeal to the Florida Supreme Court. Puiatti argued, as he does now, that the joint penalty phase was prejudicial and violated his constitutional rights because, *inter alia*, he and Glock presented mutually antagonistic mitigating cases, Glock's mitigating evidence "added significant weight to the State's case against" him, and the prosecutor's comments and court's jury instructions were prejudicial. See Opp. App. A-8 to A-12.

The Florida Supreme Court denied Puiatti's claim, squarely addressing the issue presented here: "The critical question is whether the jury was able to consider evidence presented by each defendant during the penalty phase and apply the law without being unduly confused or prejudiced. We find that, under the circumstances of this case, the jury could properly apply the facts to the law without confusion or prejudice." *Puiatti v. State*, 495 So. 2d 128, 131 (Fla. 1986).[1]

Puiatti also raised the claim in state collateral proceedings, which the state fails to mention, and

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[1] It is evident that the Florida Supreme Court considered the issue of severance as a matter of federal law because it held that the question was controlled by its earlier decision in *McCray v. State*, 416 So. 2d 804 (Fla. 1982), which derives the applicable "general rules" almost exclusively from a series of federal cases. *Id.* at 806 (citing, *inter alia*, *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976) and *United States v. Herring*, 602 F.2d 1220 (5th Cir. 1979)).

again the Florida Supreme Court denied relief on the merits. His petition for habeas corpus to the Florida Supreme Court argued that "[t]he joint penalty phase of defendants Mr. Puiatti and Mr. Glock significantly undermined the Eighth Amendment's requirement of 'individualization' and simply cannot be allowed to stand if the standards for constitutionally acceptable capital sentencing are to have any meaning at all." Amended Petition for a Writ of Habeas Corpus at 59, *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991) (No. 74, 865). Puiatti argued that the joint penalty phase made it impossible for the jury to give independent weight to Puiatti's mitigating evidence, *id.* at 67, that his ability to present his mitigating evidence was undermined by "a parade of his co-defendant's sentencing witnesses," including Glock himself, *id.* at 64-65, and that the prosecutor repeatedly urged the jury to treat Puiatti and Glock as one unit. *Id.* at 65-66. As here, Puiatti argued that "Capital penalty phase proceedings entail a host of considerations that *are* different from those that govern the run of the mill trial." *Id.* at 64 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Zant v. Stephens*, 462 U.S. 862 (1983)). Puiatti also argued that his appellate counsel was ineffective for failing to cite the Eighth Amendment in advancing that argument on direct appeal. See *id.* at 60.

The Florida Supreme Court denied Puiatti's claim, finding it to be without merit. See *Puiatti v. Dugger*, 589 So. 2d 231, 234 (Fla. 1991). In a special concurrence, then-Justice Barkett, acknowledging that Puiatti had raised his severance claim on direct appeal, stated that "[h]aving recently refocused on the problems associated with joint *penalty* phases, however, [she] would *reconsider* Puiatti's penalty phase claim that he did not receive the individualized

sentencing hearing he is entitled to under the constitution." *Id.* at 236 (Barkett & Kogan, J.J., specially concurring) (second emphasis added).

Accordingly, there can be no question that Puiatti fairly presented this claim to the Florida Supreme Court. And because that court denied relief on the merits, without invoking a state procedural rule, there is no procedural bar to the consideration of this claim on federal habeas. See *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.").

II. THE STATE HAS WAIVED ANY RELIANCE ON *TEAGUE V. LANE*

As this Court has made clear, the retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989), is not "jurisdictional" and thus can be waived. See *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). In particular, as Puiatti noted in his petition, this Court has "held that States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it . . . or by failing to raise it in a timely manner." *Danforth v. Minnesota*, 552 U.S. 264, 289 (2008); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (declining to apply *Teague* because the state did not raise it in the courts below or the petition for certiorari).

The state did not raise a *Teague* objection to Puiatti's penalty-phase severance claim in its response to the habeas petition in district court. The state argued that *Teague* barred several of Puiatti's *other* habeas challenges, but chose not to rely on *Teague* as a bar to relief on Puiatti's penalty-phase

severance claim. Accordingly, the state has waived any reliance on *Teague* as a defense to that claim. Although the state raised a *Teague* objection in the Eleventh Circuit (and Puiatti argued waiver), the Eleventh Circuit declined to address *Teague*, proceeding to the merits of Puiatti's claim. Cf. *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) ("[T]he *Teague* issue should be addressed before considering the merits of a claim.") (internal quotation marks, alteration and citation omitted).

Contrary to the state's contentions (Opp. 32 n.4), it did not "timely" raise *Teague* in moving under Fed. R. Civ. P. 59(e) to alter or amend the district court's judgment granting relief.[2] As this Court has noted, "Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, *or to raise arguments or present evidence that could have been raised prior to the entry of judgment.*" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal quotation marks and citation omitted) (emphasis added); see also *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992) ("Motions to alter or amend should not be used to raise arguments which could, and should, have been made before the judgment was issued."); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999) ("[A]n issue presented for the first time in a motion pursuant to Federal Rule of Civil Procedure 59(e) generally is not

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[2] The state erroneously asserts that the motion was brought under Fed. R. Civ. P. 60(b). See Opp. 32 n.4. Although the district court did not specifically address *Teague*, it denied the state's motion because it neither "asserted an intervening change in controlling law, nor . . . presented newly discovered evidence." Order at 8, *Puiatti v. Sec'y, Florida Dep't of Corrections*, No. 8:92-cv-589 (M.D. Fla.), Doc. No. 116 (Oct. 15, 2009).

timely raised; accordingly, such an issue is not preserved for appellate review."). The state properly should have raised any *Teague* objection to the penalty-phase severance claim in its response to the habeas petition, just as it did with respect to some of Puiatti's other claims. Having failed to do so, the state cannot now assert a *Teague* defense.[3]

III. THE COURTS OF APPEALS ARE DIVIDED ON THIS ISSUE OF EXCEPTIONAL IMPORTANCE

Two courts of appeals have held that the tension between the Eighth Amendment guarantee of individualized sentencing and joint capital penalty phases is "inherent" and present in every case. See *United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996); *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002). By contrast, the Eleventh Circuit below held that there are no Eighth Amendment implications of joint capital sentencing proceedings "whatsoever," and that any tension between joinder and individualized sentencing is, at most, "arguable." Pet. App. 63a, 70a.

The state contends that the decisions of these circuit courts are not in conflict because none overturned a defendant's death sentence. But both the

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[3] In the event this Court considers the state's *Teague* arguments, petitioner notes that his conviction and sentence became final for *Teague* purposes on October 3, 1988, when this court denied certiorari on Puiatti's direct appeal, see *Puiatti v. Florida*, 488 U.S. 871 (1988), and not in 1984 or 1986 as the state suggests (Opp. 21, 32). See *Beard v. Banks*, 542 U.S. 406, 411 (2004) (holding that for *Teague* retroactivity purposes, a conviction becomes final when this Court finally denies certiorari on the direct appeal (or when the time for filing a petition expires)).

Fourth and Fifth Circuits, unlike the Eleventh Circuit below, recognized that capital penalty phases are different from ordinary criminal proceedings: Capital sentencing proceedings, subject to a heightened degree of reliability and concerned with the unique circumstances of the individual defendant, impose additional constraints on the decision to join defendants. The Eleventh Circuit, however, proceeded from a fundamentally different understanding of the nature of the capital sentencing process, discerning no additional constraints at the capital penalty phase: If two defendants properly are joined at the guilt phase, *a fortiori*, no severance is required at penalty.

Although the Fourth and Fifth Circuits have found joint capital sentencing proceedings to be permissible despite the "inherent" prejudice to the defendants, each did so only after finding that the trial courts gave careful, frequent, and detailed jury instructions that reduced the risk of prejudice to "acceptable levels." *Tipton*, 90 F.3d at 892; *Bernard*, 299 F.3d at 476. The Eleventh Circuit, on the other hand, found joinder acceptable even though the jury was *never* instructed that it should consider each defendants' mitigating evidence separately and individually, and was never told that it should—or even could—return different sentences for each defendant.[4]

Ignoring the distinction between joinder of defendants in capital sentencing proceedings and non-capital criminal trials, the state asserts that there is

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[4] Although the state suggests that Puiatti never objected to the instructions, in fact his counsel repeatedly moved to sever the penalty phase, arguing that the prejudice of the joint trial was so great that "no instruction" could cure it. (A-10/2358).

a settled, general preference for joint trials. But the state, like the Eleventh Circuit, focuses nearly exclusively on cases that do not involve joint capital penalty phases, ignoring the Eighth and Fourteenth Amendment concerns that are implicated by a joint capital sentencing. *Zafiro v. United States*, 506 U.S. 534 (1993) and *Richardson v. Marsh*, 481 U.S. 200 (1987) concern severance of defendants in non-capital criminal trials.[5] *Buchanan v. Kentucky*, 483 U.S. 402 (1987) and *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir. 2008), each involve requests by non-capital defendants for separate (guilt-phase) trials from their death-eligible co-defendants.[6]

Properly focused on joint *capital sentencing* proceedings, the importance of the issue presented is undeniable. The fairness and reliability of capital penalty phases, more so than non-capital proceedings, depends on the jury's ability to attend to the unique background and characteristics of the individual defendant before it. Indeed, this Court has stressed that such individualized consideration is a constitutional imperative, central to the fair administration of capital punishment: "[T]he need for individualized consideration [is] a constitutional re-

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[5] *Zafiro*, which is often cited by both the state and the Eleventh Circuit, noted that "it is well settled that defendants are not entitled to severance merely because they may have a better chance of *acquittal* in separate trials." 506 U.S. at 540 (emphasis added). But, of course, the question whether a defendant should be acquitted is not present at the capital *penalty* phase.

[6] *Buchanan* cites the ABA Standards for Criminal Justice 13-2.2 (2d ed. 1980), but that guideline concerns decisions about defendants' guilt or innocence, and does not relate to joinder or severance at the capital penalty phase.

quirement in imposing the death sentence." *Lockett*, 438 U.S. at 605. Whether joint capital sentencing proceedings implicate that core tenet of this Court's death penalty jurisprudence is an issue of exceptional importance meriting this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

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