

In The
Supreme Court of the United States

—◆—
LESTER LEROY BOWER, JR.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals**

—◆—
**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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REPLY BRIEF FOR PETITIONER

Mr. Bower’s petition raises serious constitutional issues that deserve this Court’s review. The State attempts to minimize the significance of these issues, even though they bear directly on the legality of Mr. Bower’s scheduled execution and even though the Fifth Circuit itself has acknowledged that its earlier decision in Mr. Bower’s case—a decision following the same approach as that adopted here by the Texas Court of Criminal Appeals—is not consistent with this Court’s rulings in *Penry* and *Abdul-Kabir*. See *Pierce v. Thaler*, 604 F.3d 197, 208-10 & n.9 (5th Cir. 2010). The State also continues to misstate or omit important facts of record, despite repeated corrections of those statements during this litigation. The State’s persistent errors provide no basis for this Court to deny review.

I. Factual Background

Although a reply brief in support of a petition for certiorari is not the place for extensive recitation of facts that are the basis for substantial lingering doubts regarding Mr. Bower’s guilt, some of the State’s more egregious factual errors cannot be left unaddressed.

In its Opposition, the State continues its practice, begun at trial and repeated in post-trial proceedings, of mischaracterizing the evidence. For instance, the State claims that among the trial evidence was a “receipt for a silencer” and “[m]agazine articles * * *

related to the commission of murder.” Opp. i. As to the alleged silencer, Mr. Bower possessed a letter from a company called Catawba thanking him for an unspecified purchase. Catawba did not sell silencers (it would have been illegal to do so). Catawba sold, among other items, tubes that some unspecified purchasers allegedly converted into silencers. But there is no evidence that Mr. Bower purchased such a tube or any parts necessary to create a silencer from a tube. Yet the State repeatedly asserts, as if the matter had been established, that Mr. Bower had a “receipt for a silencer.” As to the alleged magazine articles, Mr. Bower possessed publication catalogues that listed advertisements for scores of books. Among the many titles listed were books on how to kill. There is no evidence whatsoever that Mr. Bower ever possessed any such books or articles. Yet the State persists in its decades-long misrepresentation.

The State also continues its pattern of ignoring key evidence, including the following:

- Based on findings by the State’s own firearms examiner, the Ruger pistol once owned by Mr. Bower could not have been the murder weapon because it had a firing pin different from the one used in the killings and because it was manufactured several years *after* the Ruger that belonged to one of the victims, even though the State’s examiner concluded that, if a Ruger had been used in the killings, it would had to have been one made *before* the victim’s Ruger.

- Mr. Bower’s post-conviction expert concluded that the central tenet of the State’s theory of the case—that a single shooter acting alone killed all four victims (including two former sheriff’s deputies)—is inconsistent with the totality of the evidence.
- Mr. Bower has not one but six witnesses who all corroborate portions of each other’s accounts that one or more specific other individuals, not Mr. Bower, committed the murders as part of a drug deal gone awry.

This is but a portion of the evidence demonstrating a significant lingering doubt regarding guilt or innocence.

II. Certiorari Should Be Granted To Require The Texas Court Of Criminal Appeals To Follow The Decisions Of This Court And The Fifth Circuit Regarding The Application Of The Former Texas Special Issues To Good Character Mitigation Evidence

The Fifth Circuit has explicitly acknowledged that it was incorrect in denying Mr. Bower’s *Penry* claim in his federal habeas proceeding. The State does not dispute this. The state trial court, relying on the Fifth Circuit’s analysis, recommended that Mr. Bower receive a new punishment hearing. But the CCA rejected the trial court’s recommendation and refused to grant such a hearing, thus creating an explicit conflict between the Fifth Circuit and the CCA

regarding not only Mr. Bower's case specifically but also the role of good character mitigation evidence under the former Texas special issues. This Court should grant certiorari to address this issue.

The State suggests that granting certiorari somehow would be improper because this Court previously has denied review in this case; the State even goes so far as to assert that the denial of certiorari constitutes a ruling on the merits. Opp. 1, 24 & n.6. But, of course, that is incorrect. It is well established that the denial of certiorari says nothing about the merits of a case. See *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. The variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value." (citations, quotation marks, and brackets omitted)); *Evans v. Stephens*, 544 U.S. 942, 942 (2005) (Stevens, J., opinion respecting the denial of certiorari) ("[A] denial of certiorari is not a ruling on the merits of any issue raised by the petition."). This rule applies with special force here, given that the conflict between the Fifth Circuit and the CCA did not exist when the Court denied certiorari previously.

The State further argues that the Fifth Circuit cases cited by Mr. Bower regarding good character mitigation evidence, *Pierce* and *McGowen*, are distinguishable because the defendants in those cases also had a troubled upbringing. Opp. 27. This attempted distinction disregards the basis for the Fifth Circuit's rulings. It is true that the defendants in those cases

had a disadvantaged background that Mr. Bower did not have. But, in each case, the Fifth Circuit analyzed the good character evidence independently of the other mitigation evidence and determined that the good character evidence was not fully encompassed by the former special issues. *Pierce*, 604 F.3d at 208-10 (analyzing good character evidence in a separate section of the opinion and concluding that “an additional instruction was required in order for the jury to consider and give effect to *this* mitigating evidence” (emphasis added)); *McGowen v. Thaler*, 675 F.3d 482, 495 (5th Cir. 2012) (relying on *Pierce*). That is why the Fifth Circuit in *Pierce* explicitly acknowledged that its ruling on Mr. Bower’s federal habeas claim predated this Court’s decision in *Abdul-Kabir* and incorrectly failed to recognize that the “some effect” language on which the court of appeals had relied in *Bower* was dicta that had been identified as such in *Abdul-Kabir*. See *Pierce*, 604 F.3d at 210 n.9. As the Fifth Circuit held in *Pierce*, so in this case: “[G]ood character evidence has meaningful relevance to moral culpability, which * * * is not encompassed by the special issues. * * * [A]n additional instruction was required in order for the jury to consider and give effect to this mitigating evidence.” *Id.* at 210.

The CCA and the State fundamentally misunderstand this Court’s *Penry* jurisprudence. For example, the CCA rejected Mr. Bower’s claim in part because his mitigation evidence has no nexus to the crime and is not the kind of “double-edged evidence” at issue in *Penry* (that is, evidence that could serve both to support an affirmative answer to a special issue and

to show mitigation). Pet. App. 4; *Ex parte Bower*, 823 S.W.2d 284, 287 (Tex. Crim. App. 1991). The State points to similar evidence that existed in *Abdul-Kabir* and *Brewer*. Opp. 25. But both the CCA and the State ignore that, although such evidence can be considered in the *Penry* context, *it is not required*. This Court has explicitly rejected the idea that *Penry* claims must be based on double-edged evidence or evidence showing a nexus between the defendant's circumstances and the crime. See *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 n.16 (2007); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004); see also *Smith v. Texas*, 543 U.S. 37, 45 (2004).

The State asserts, and the CCA agrees, that if the mitigation evidence “can be considered” under the special issues, that is sufficient. See Opp. 24; *Bower*, 823 S.W.2d at 287. But this Court has made clear that some consideration is not sufficient—the jury must be able to give “full” consideration and “full” effect to the defendant's mitigation evidence. *Penry v. Johnson (Penry II)*, 532 U.S. 782, 797 (2001) (internal quotation marks omitted); *accord Abdul-Kabir*, 550 U.S. at 255. Thus, where the mitigation evidence is relevant to a special issue but also supports an independent reason for not imposing the death penalty, failing to allow the jury to consider that independent reason is unconstitutional. Mr. Bower's good character evidence is plainly relevant to more than the future dangerousness special issue—it could have allowed the jury to determine that Mr. Bower's life, considered as a whole, was worth sparing. A special

question was required so that the jury could “respond to [the mitigation evidence] in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether [Mr. Bower] is truly deserving of death.” *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007).

The Fifth Circuit and the CCA are diametrically opposed on whether mitigation evidence like that which Mr. Bower presented is fully encompassed within the scope of the former special issues or whether a separate jury question (like the one that Texas has used since 1991) was required. Certiorari should be granted to resolve the conflict on this important constitutional issue.

III. Certiorari Should Be Granted To Require The Texas Court Of Criminal Appeals To Follow This Court’s Decisions Regarding The Withholding Of Favorable, Material Evidence

As with the *Penry* claim, the State suggests that Mr. Bower’s *Brady* claim is improper because this Court previously has denied certiorari. As explained above, the denial of certiorari has no bearing on the merits of a case. The CCA found that Mr. Bower’s *Brady* claim was procedurally appropriate and directed the trial court to investigate and review the claim. *Ex parte Bower*, No. WR-21005-02, 2012 WL 2133701, at *1 (Tex. Crim. App. June 13, 2012) (not designated for publication). This Court has

jurisdiction—and should exercise it—to grant certiorari to review the important due process concerns raised by the State’s withholding of favorable, material evidence and its corresponding use of false evidence to secure Mr. Bower’s conviction.

The thrust of the State’s Opposition argument is that the evidence at issue—involving the availability and uses of the murder ammunition—is unimportant because other evidence supports the conviction. This argument overlooks the importance of the ammunition evidence in the prosecution of this case.

The State assumed, but presented as fact, that the murders were committed, according to the State, with a unique, extremely rare ammunition whose only purpose is to kill—an ammunition that Mr. Bower had once possessed. Evidence that the State withheld until being forced to turn it over in post-trial litigation showed that the ammunition was not nearly as rare as represented and that it had many legitimate, lawful uses. Thus, this portion of the State’s case against Mr. Bower was false.

The closing argument, which the State does not even mention in its Opposition, shows the importance the State placed on the ammunition evidence at trial. The closing argument ammunition references include:

- Mr. Bower possessed “exotic and unique ammunition” that only “eleven people in the State of Texas have bought”;
- Only “twelve or fifteen people * * * in the State of Texas” possessed the “unique and exotic ammunition”;
- The “web of guilt” includes “the unique ammunition”;
- Mr. Bower “knew a whole lot” about the “unique ammunition.”

Pet. App. 132-33. In its punishment phase argument, the State told the jury that “[t]here is no purpose” for the ammunition “other than to kill” and reminded the jury that Mr. Bower “had * * * the bullets.” Pet. App. 133, 138.

This jury argument is wholly inconsistent with how the State, 30 years later, is attempting to characterize the evidence. Indeed, the State now argues that the ammunition was purchased by at least hundreds of people. Nowhere in its Opposition—or anywhere else in the case—does the State even attempt to justify its closing argument in light of the withheld evidence, because it is unjustifiable. This egregious conduct is particularly objectionable in a capital case, where the stakes are life and death. This Court should grant certiorari to address these serious due process concerns.

IV. Certiorari Should Be Granted Because Executing Mr. Bower After More Than 30 Years On Death Row Is Cruel And Unusual

Mr. Bower's cruel and unusual punishment claim is appropriate for certiorari review. The factual basis for the claim increases with each passing day. This is especially true because of the State's decision, for the last 14 years and counting, to hold all Death Row inmates (including Mr. Bower) in solitary confinement.

The State faults Mr. Bower for "relentlessly litigating" his case, Opp. 39, but of course, he is entitled to do so. Mr. Bower has never been found to have filed an abusive or frivolous proceeding. Courts have left him languishing for years at a stretch while requests for relief have been pending—such as when the federal district court took eight years to decide to hold a hearing on Mr. Bower's ineffective assistance of counsel claim. Mr. Bower has been on death row since 1984, and for this entire 30-year span, there have been only 132 days in which Mr. Bower has not had legitimate, meritorious legal claims pending before some court. And all the while, Mr. Bower has been isolated from his friends and family—often in routine administrative segregation—and under the constant mental burden of possible execution. Executing him under these circumstances would constitute cruel and unusual punishment.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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