No. ___________

IN THE

Supreme Court of the United States

DONALD ANTHONY GRANT,

Petitioner,

v.

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the United States

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CAPITAL CASE

QUESTION PRESENTED

Oklahoma juries were once instructed that mitigating circumstances were "those, which in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." Oklahoma Uniform Jury Instructions -CR(2d) 4-78. Oklahoma prosecutors consistently exploited this instruction in closing arguments to impermissibly narrow the scope of evidence the jury could consider mitigating and argue there had to be a connection between the mitigating circumstances and the crime. Troubled by prosecutors' constant attempts to limit jurors' consideration of mitigating evidence, the Oklahoma Court of Criminal Appeals (OCCA) warned prosecutors not to argue mitigating circumstances were limited to those that extenuate a defendant's moral culpability or guilt for the capital offense. *Harris v. State*, 164 P.3d 1103, 1113-14 (Okla. Crim. App. 2007). Further, the court referred the matter to the Oklahoma Uniform Jury Instruction Committee "for promulgation of a modified jury instruction defining mitigating circumstances in capital cases." *Id.* at 1114. Mr. Grant did not receive the modified instruction and the

prosecutor made the same arguments the OCCA found "egregious" in *Harris*. *Id*. The OCCA reversed itself and found such arguments proper in Mr. Grant's case. With this background in place, the following question warrants this Court's review:

> When a jury instruction defines mitigating circumstances as "those which in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" and prosecutors deliberately and repeatedly rely on such instruction to argue the defendant's evidence *must* reduce the moral culpability or blame of the defendant *for the murder* to be considered mitigating, is a state court's conclusion such prosecutorial argument is proper contrary to *Lockett v. Ohio*, 438 U.S. 586 (1978) and its progeny?

List of Parties

Petitioner, Donald Anthony Grant, and Respondent, Warden of Oklahoma State Penitentiary, have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Anita Trammell, Maurice Warrior, Jerry Chrisman, Terry Royal, and presently Mike Carpenter.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Donald Anthony Grant, respectfully petitions this Court

for a Writ of Certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018). *See* Appendix A. The Order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Grant v. Royal*, No. 14-6131 (June 22, 2018). *See* Appendix B. The federal district court decision denying Mr. Grant's Petition for Writ of Habeas Corpus is found at *Grant v. Trammell*, No. CV- 10-171-F (W.D. Okla., May 16, 2014) (unpublished). *See* Appendix C. The decision of the OCCA denying Mr. Grant's direct appeal is reported at *Grant v. State*, 205 P.3d 1 (Okla. Crim. App. 2009). *See* Appendix D.

JURISDICTION

The Tenth Circuit rendered its opinion denying relief on March 30, 2018. Mr. Grant filed a timely petition for rehearing and rehearing *en banc*, which the Tenth Circuit denied on June 22, 2018. *See* Appendix B.

Justice Sotomayor extended the time to petition for certiorari until November 19, 2018. *See* Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. §2254(1).

STATUTORY PROVISIONS

Title 28 U.S.C. §2254(d) provides the following:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides the following:

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

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution

provides the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Factual Background and Lower Court Proceedings.

The defense never contested Mr. Grant's guilt of the double-murder of a hotel manager and hotel employee that occurred at the LaQuinta Inn in Del City, Oklahoma on July 18, 2001. Similarly, on direct appeal and throughout state and federal proceedings, Mr. Grant never challenged the sufficiency of the evidence to support those convictions.

There is thus no dispute as to the crime facts and Mr. Grant's guilt – his culpability for the murders. Mr. Grant needed money to post bond for his girlfriend – a woman who fled with him to New York but later testified against him. He entered the hotel in broad daylight and filled out an employment application that was found at the hotel, on which he

correctly identified himself. He killed the hotel employees in the course of stealing money from the cash register and from the purse of one of them. The manager, Brenda McElyea, was fatally shot once in the head. Suzette Smith fought for her life but died after Mr. Grant shot, beat, and stabbed her to death.

On August 29, 2001, Oklahoma charged Mr. Grant with two counts of first degree murder and two counts of robbery in Oklahoma County District Court Case No. CF-92-3633. The State announced early it would seek a death sentence and on March 4, 2005, filed a Bill of Particulars giving notice of its intention to seek death based on five statutory aggravating circumstances. Mr. Grant's trial was held November 14-23, 2005. He was convicted and sentenced to life sentences for each robbery count and death on both murder counts.

B. Mitigating Mental Health Evidence and Donald Grant.

It took over four years for Mr. Grant to go to trial for the murders. His competency to stand trial became an immediate concern. Competency evaluations were ordered. Various evaluators weighed in — from the defense, from the state, and from state mental health agencies.

On two occasions the trial judge concluded Mr. Grant was

incompetent and sent him to the Oklahoma Forensic Center to be evaluated, treated, and restored to competency. During the first admission in the spring of 2002, Mr. Grant was medicated with anti-psychotic medications, Haldol and Thorazine. He was discharged on Vistaril, a medication given him for psychotic agitation.

During his second admission in the fall of 2003, Mr. Grant continued to be medicated with Vistaril, but was discharged with additional medications: Risperdal, a treatment for schizophrenia and bipolar disorder, Valporic Acid, a treatment for bipolar mania, and Trazadone, an anti-depressant.

In May 2004, the trial judge took the unusual step of ordering medical staff at the Oklahoma County jail to administer a specific anti-psychotic medication, Zyprexa, and "mood stabilizers" to Mr. Grant. Medical and psychological experts agreed Mr. Grant was mentally ill and that without medication to control his psychotic symptoms and rapidly changing moods he was not competent to stand trial.

A competency jury trial was held in February 2005. At that time experts for both sides agreed Mr. Grant's symptoms were in partial remission and he was competent to stand trial if appropriately and

consistently treated with psychotropic medication and mood stabilizers. The competency jury found Mr. Grant competent to stand trial.

Mr. Grant's jury trial for the crimes did not begin for nine months after the competency determination. There were no further evaluations into his competency or checks on whether he was receiving or taking the medication necessary to maintain his competency. Two months before trial Mr. Grant, unbeknownst to his attorneys, wrote a bizarre letter to the court and a confession letter to the prosecutor. The first letter was convoluted and visually strange with paranoid and unusual statements.[1] The second letter contained horrifying admissions in pursuit of an irrational goal – that somehow by telling his "life story" Mr. Grant would persuade the prosecutor to free a fellow inmate, unknown to Mr. Grant prior to his incarceration, who had pending unrelated drug trafficking charges.

As noted, at the murder trial Mr. Grant's counsel never disputed Mr. Grant was guilty of the murders. In fact he told the jury so in his opening

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[1] Experts were familiar with the "electron" language Mr. Grant used in this letter. Similar statements were made by Mr. Grant while in a florid psychotic state.

statement in the guilt stage of trial and repeated it in closing. The defense focused on the punishment stage and presented evidence of Mr. Grant's mental illnesses, through a competency-to-stand-trial psychologist, as the key component of the mitigation case.[2]

The prosecutor presented no expert in her case-in-chief to dispute Mr. Grant suffered from mental illnesses; after all, her own competency-to-stand-trial expert diagnosed him with Schizophrenia, Paranoid Type. The prosecutor even acknowledged Mr. Grant's punishment-phase testimony was "gibberish" with its references to "Shriners Masons," the "secret society of the lumanaria," and his grandiose belief he authored the Bible.

But the prosecutor did three things to undermine the mitigation and set up her argument that Mr. Grant's mental illness could not be considered mitigating. First, she challenged the defense expert's qualifications to opine on any of the neurological impairments present at the time of the crime. Without a neuro-psychologist or psychiatrist to

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[2] The defense also presented evidence of childhood poverty, abuse, neglect, and abandonment by an alcoholic father and drug-addicted mother through two brothers, a sister, and his mother.

testify about the effects on Mr. Grant's brain from multiple insults he received as a child, the defense presented only lay witnesses.[3] Second, the prosecutor presented law-enforcement lay witnesses who had some dealings with Mr. Grant prior to trial, including during pre-trial incarceration, to say they didn't think Grant was mentally ill. This allowed her to argue that Mr. Grant's mental illnesses, if they existed at all, developed after the crime. Third, in guise of rebuttal the prosecutor presented the sole outlier expert to testify Mr. Grant was faking his mental illnesses.[4]

These calculated actions by the prosecutor set the stage for her

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[3] Donald Grant's mother drank alcohol extensively all during her pregnancy; he was born "blue" with the umbilical cord wrapped around his neck; he was repeatedly subjected to head injuries when his father dropped him on his head on a marble floor when he was an infant and banged his head against metal poles and the head of his younger brother as a form of discipline. Mr. Grant's behavior was difficult to control at a very early age. He was assigned to special education classes but his school attendance was sporadic at best. He received no medical or psychological treatment as a child, whether living in an apartment in the notorious Pink Houses of Brooklyn with 24 other relatives, in welfare hotels and homeless shelters throughout New York City, in foster homes, in group homes, on the streets, or in juvenile prisons.

[4] This competency-to-stand-trial witness from the state hospital did no testing for malingering. All testing done by other experts, including a nationally-renowned malingering expert, ruled it out.

repetitive arguments in the punishment phase of trial telling the jurors that mental health evidence was not mitigating because it did not reduce moral culpability or blame for the crimes and that they could not consider it without violating the trial judge's "law." She expected and received a jury instruction still in operation – the one the OCCA later called to be ameliorated in *Harris* – the one that gave her cover for this improper argument: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." Being the experienced prosecutor that she was, she used the instruction to tell jurors the law required that mental health evidence *must* be linked to Mr. Grant's culpability for the murders if it was to be considered at all.

Defense counsel knew Oklahoma County prosecutors favored this particular improper argument and considered it one that was persuasive and effective in obtaining death sentences. Mr. Grant's counsel tried to derail the improper commentary by filing a motion. However, at the pre-trial hearing the prosecutor convinced the trial court that she was, in her words, "perfectly entitled" to argue that any mitigating factor was not

mitigating unless it "actually" reduced or extenuated moral culpability or blame for the offense. During punishment stage closing arguments the experienced prosecutor brought this presumed "entitlement" home in spades, repeatedly arguing that key aspects of Mr. Grant's proffered evidence did not count as mitigating.

Mr. Grant received two death sentences for the murders. In Oklahoma, if even one juror believed she could not consider or give effect to the mental health evidence presented during Mr. Grant's capital trial, the death verdicts are flawed and rendered unreliable. There was a reasonable likelihood the prosecutor's argument, reinforced by an instruction yet to be ameliorated, precluded at least one juror from meaningfully considering key mitigating evidence presented by the defense.

C. Historical Background of Oklahoma's "Moral Culpability" Instruction and Prosecutors' Exploitation of It.

Oklahoma statutes rightly provide that evidence can be presented in the punishment phase of a capital trial "as to any mitigating circumstances." Okla. Stat. tit. 21, §701.10(c). But OCCA's earliest view of mitigation was a constricted one – only evidence that excused criminal

behavior was relevant. In *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980) the OCCA held that evidence of 16-year-old Monty Eddings' severe psychological and emotional disorders and his difficult family circumstances tended to show he knew the difference between right and wrong and thus was criminally responsible for his actions. While the OCCA noted such evidence was "useful in explaining why he behaved the way he did" it was not mitigating because it did not "excuse his behavior." This Court reversed, concluding the trial court and the OCCA "violated the rule in *Lockett*."[3] *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

Vestiges of this strained interpretation of mitigating evidence remain providing no clarifying distinction between mitigating evidence that reduces legal responsibility or guilt of the murder from that which helps explain a defendant's humanity and worth. For years following *Eddings*, the OCCA did not require trial courts to further define

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[3] The *Lockett* court set the baseline for the precedent that has followed, concluding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *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." *Lockett*, 438 U.S. at 604 (emphasis supplied).

mitigating circumstances to assure the jury understood the "full extent of what it might consider in determining Appellant's sentence." *Robedeaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993). Instead, the OCCA continued to endorse the constrictive instruction, leaving the determination of what was mitigating to jurors with only the "moral culpability" instruction to guide them. *Welch v. State*, 968 P.2d 1231, 1244 (Okla. Crim. App. 1998) (holding failure of trial court to direct jury to the individual types of mitigating evidence presented did not warrant reversal or modification of the death sentence because jury separately received the "moral culpability" instruction).

The OCCA repeatedly affirmed trial courts' exclusion of mitigating evidence deemed not relevant or cumulative. *See Smallwood v. State*, 907 P.2d 217, 232 (Okla. Crim. App. 1995) (cost effectiveness of the death penalty); *Postelle v. State*, 267 P.3d 114, 140 (Okla. Crim. App. 2011) (co-defendant's sentence of life without the possibility of parole and video of defendant as a child); *Fox v. State*, 779 P.2d 562, 572 (Okla. Crim App. 1989) (affidavits from people who were unable to attend trial); and *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010) (expert

testimony of specific effects of Mariel Boatlift and federal detention on the defendant).

Multiple challenges followed. Capital defendants argued the "moral culpability" instruction was impermissibly narrowing the characterization of mitigating evidence. Challenges fell on deaf ears and supported ever-increasing arguments by prosecutors that only evidence reducing the defendant's moral culpability or blame for the actual crime could be considered mitigating by the jury and weighed against the aggravation. *See Johnson v. State*, 928 P.2d 309, 317 (Okla. Crim. App 1996); *Le v. State*, 947 P.2d 535, 555 (Okla. Crim. App. 1997) (finding prosecutor misstated the law by arguing that for evidence to be mitigating it had to make the defendant less guilty; no reversal was required even though argument was "irrelevant" and "improper as a purely personal opinion"); *Patton v. State*, 973 P.2d 270, 298 (Okla. Crim. App. 1998); *Williams v. State*, 22 P.3d 702, 727-28 (Okla. Crim. App 2001); *Fitzgerald v. State,* 61 P.3d 901, 905 (Okla. Crim. App. 2002); *Rojem v. State*, 130 P.3d 287, 299 (Okla. Crim. App. 2006). And then came *Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. 2007).

In *Harris* the OCCA declined to find the moral culpability instruction erroneous but required it to be modified. *Id*. at 1114.[4] The OCCA also declared it was "troubled" by the consistent misuse of the instruction's language by prosecutors:

> One prosecutor did consistently argue in closing that jurors should not consider Harris's second stage evidence as mitigating, since it did not extenuate or reduce his guilt or moral culpability. *This argument improperly told jurors not to consider Harris's mitigating evidence.*

Id. at 1113 (emphasis added). The OCCA said it had not intended to suggest prosecutors could argue that evidence of a defendant's history, characteristics or propensities should not be considered as mitigating simply because it does not go to his moral culpability or to extenuate his guilt, because, according to the OCCA, this "would be an egregious misstatement of the law on mitigating evidence." *Id*. at 1114. But egregious misstatements of the law on mitigating evidence continued unabated, as they did at Mr. Grant's trial. Only this Court can prevent Oklahoma's continued retreat from the well-established rule of *Lockett*.

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[4] Mr. Harris was tried in January 2005 and Mr. Grant in November 2005. The OCCA issued the *Harris* opinion calling for a modified instruction in July 2007. Mr. Grant's direct appeal was decided in March 2009.

D. Lower Courts' Assessment of the Constitutional Claim.

Mr. Grant raised his challenge to the mitigation instruction and the prosecutor's misstatements of the law of mitigation on direct appeal. In deciding this critical constitutional issue, the OCCA wrongly concluded Mr. Grant's jury received the corrected instruction it ordered to be clarified.[5] *Grant*, 205 P.3d at 21 n.34. Having relied on the jury receiving the "anything is mitigating" instruction the OCCA then mischaracterized the prosecutor's arguments deciding "no juror is bound to accept [evidence as mitigating] and the State is free to try to persuade the jury to that end. The prosecutor's arguments did not misstate the law on this point." *Id.* at 21.

Mr. Grant raised the same challenge in his initial habeas petition in the Western District of Oklahoma on January 25, 2011.[6] Mr. Grant

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[5] The modified instruction, had it been given, would have added a provision that "mitigating circumstances are those which in fairness, sympathy or mercy would lead jurors individually or collectively to decide against imposing the death penalty." This is precisely what the OCCA said Mr. Grant's jurors received: "The jurors in this case were properly instructed that anything could be considered mitigating." *Grant*, 205 P.3d at 21. Not so.

[6] The district judge also permitted Mr. Grant's attorneys to file an amended petition after Mr. Grant was evaluated and treated for

challenged the jury instruction defining mitigating circumstances as improperly limiting the scope of relevant mitigating evidence and further argued the Oklahoma County prosecutor eviscerated the jury's consideration of valid mitigating evidence. The district court deferred to the OCCA's decision, finding it was not contrary to or an unreasonable application of *Brown v. Payton*, 544 U.S. 133 (2005) (finding state court was not unreasonable in its determination that jurors did not likely believe that the post-crime mitigation evidence was beyond their reach). The court discounted that the OCCA relied wrongly on Grant's jury receiving the modified instruction – calling it a "scrivener's error" – and concluded the prosecutor was simply attempting to persuade the jury that the petitioner's evidence was not mitigating. Appendix C at 24.

The majority of the Tenth Circuit panel read the OCCA decision as concluding there was "no reasonable likelihood that the jury believed – based on the prosecution's arguments – that it was limited to only considering evidence in mitigation that had the effect of extenuating or reducing Mr. Grant's moral culpability or blame." *Grant*, 886 F.3d at 936.

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competency by the Federal Bureau of Prison and returned to state custody "in a mentally competent condition."

As noted, the OCCA reached no such conclusion and instead concluded the prosecutor's statements had not misstated the law at all – the very *law* Grant's jury did not receive.[7]

In her dissent, Judge Moritz[8] noted the majority erred in concluding the deferential standards of Anti-Terrorism and Effective Death Penalty Act (AEDPA) review applied when the OCCA never adjudicated the core constitutional issue on the merits. *Id.* at 961. (Moritz, J., dissenting). Similarly, the majority, without opining on whether the prosecutor's arguments were improper or misused the moral culpability language, impermissibly narrowed the constitutional inquiry to require Mr. Grant to prove that there was "no reasonable likelihood that the jury was precluded by those arguments from considering *all* of Mr. Grant's mitigating evidence." *Id.* at 938 (emphasis in original). Not *some* of Mr. Grant's mitigating evidence, but *all* of it. This conclusion flipped this

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[7] The majority of the panel adopted the district court's and Respondent's view of the OCCA's misstatement that Mr. Grant received the ameliorative instruction as a "scrivener's error." *Grant*, 886 F.3d at 948.

[8] Judge Moritz was not on the panel at the time of the oral argument of this case. She replaced then-Judge Gorsuch upon his elevation to this Court.

Court's *Lockett* precedent on its head. To Judge Moritz it was "clear" that some jurors likely read the instruction as preventing them as a matter of law from considering Mr. Grant's mitigating evidence in violation of the Eighth and Fourteenth Amendments. *Id.* at 960 (Moritz, J., dissenting). There is no requirement the jury must be prevented from considering *all* of the mitigating evidence in order for Mr. Grant to qualify for sentencing relief. This Court's review is called for.

REASONS FOR GRANTING THE WRIT

A. Introduction.

In a strong dissent, Judge Moritz noted the Tenth Circuit did not dispute that the prosecutor in Mr. Grant's capital trial misstated the law on mitigating evidence. Instead, the majority questioned "whether the jury believed those repeated misstatements" and denied Mr. Grant's habeas appeal despite the misconduct. *Grant,* 886 F.3d at 960 (Moritz, J., dissenting). The Circuit's holding strikes at the heart of this Court's jurisprudence concerning how critically important it is for jurors to be allowed to consider and give effect to any and all evidence that mitigates against the death penalty and how a prosecutor's distortion of the law in

argument can render a death sentence unreliable. The prosecutorial misstatements here targeted the very type of mitigating evidence that has been recognized by the Court as among the most powerful — evidence a defendant suffers from some form of mental defect or mental illness. *Williams v. Taylor,* 529 U.S. 362, 396 (2000) (borderline mental retardation); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (diminished mental capacities); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (organic brain damage, extreme mental disturbance, fetal alcohol syndrome); *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (brain abnormality and cognitive defects); and *Sears v. Upton,* 561 U.S. 945, 946, 949 (2010) (frontal lobe brain damage).

The OCCA finally recognized the Eighth Amendment problem with its jury instruction and prosecutors' continued exploitation of it in 2007 after a decade of challenges. But in the end, the OCCA has repeatedly failed to hold prosecutors accountable and the constitutionally improper arguments have proliferated.[9]

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[9] Oklahoma's prosecutors' misstatements of the law of mitigating evidence have continued whether jurors' receive the supposed clarifying *Harris* instruction or not. *Cuesta-Rodriguez v. Carpenter*, Case No. 16-6315, Appellant's Opening Brief at 55-71 (10th Cir. Nov. 15, 2017);

The Tenth Circuit deferred to the OCCA's adjudication under the AEDPA despite the OCCA's failure to adjudicate the key question on the merits. This action left this Court's Eighth Amendment commands in *Lockett* and its progeny without teeth. Capital juries are "not [to] be precluded from considering, *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." *Lockett*, 438 U.S. at 604 (emphasis in original). But the Tenth Circuit has now eliminated the key component that makes capital sentencing schemes constitutional because jurors in Oklahoma, under the decision in this case, *can be precluded* from giving particularized consideration and effect to relevant aspects of the character and record of each convicted defendant before imposing death sentence. *Compare with Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The Circuit discounts the interplay between Eighth Amendment demands and Fourteenth Amendment fair trial guarantees. By dismissing that focus, the majority of the panel has

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Johnson v. Carpenter, Case No. 16-5165, Appellant's Opening Brief at 36-44 (10th Cir. Feb. 26, 2018); and *Harmon v. Carpenter*, Case No.16-6360, Appellant's Opening Brief at 55-59, n.26 (10th Cir. May 7, 2018).

granted permission to prosecutors, even after being cautioned, to deliberately mislead jurors by claiming the mitigation presented does not legally qualify as mitigation under the courts' instructions. *See Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986);[10] *Caldwell v. Mississippi,* 472 U.S. 320 (1985) (finding prosecutorial argument distorted jury's understanding of its sentencing responsibility thus rendering its death verdict fundamentally incompatible with the Eighth Amendment's heightened need for reliability).

The Tenth Circuit's decision opens the door to continued denigration of critical mitigation by Oklahoma prosecutors. This Court's attention is warranted to assure the reliability of death sentences throughout Oklahoma and in other states where prosecutors similarly exploit mitigation instructions and argue that evidence is not mitigating unless

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[10] Notably in *Boyde v. California*, 494 U.S. 370, 375 (1990), while rejecting Appellant's argument that California's "catch-all" mitigation instruction violated *Lockett*, this Court specifically acknowledged that Boyde's prosecutor "'never suggested that the background and character evidence could not be considered.'" Here, prosecutors did more than suggest Mr. Grant's mitigating evidence could not be considered; they argued the trial court's instruction forbade such consideration.

linked to guilt.

B. The Settled Quality of the *Lockett* Rule Is at Risk if This Court Fails to Consider the Important Question Here.

It has now been thirty-six years since this Court told the OCCA in no uncertain terms it violated *Lockett* by refusing to permit a capital sentencer to consider a defendant's unhappy upbringing and emotional disturbance as a mitigating factor – something the OCCA did because it decided such evidence was not connected to the crime and Mr. Eddings' responsibility for it. *Eddings*, 455 U.S. at 113-14. It is ironic indeed that even while this Court was reaffirming *Lockett* and *Eddings* principles, the OCCA continued to allow prosecutors to limit mitigating evidence to that which had a connection or a link to the offense. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (finding exclusion of evidence of good behavior in prison "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender") and *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*) (finding it was not enough for evidence of a defendant's mental retardation and abused childhood to be presented unless the jury was also able "to consider and give effect to that evidence" for a sentence of less

than death). The OCCA ignored this Court's precedent by endorsing a vague and misleading instruction that prosecutors repeatedly exploit at will.

The OCCA's endorsement continued despite this Court's clear statement over a year before Mr. Grant's trial and three years before the OCCA decided *Harris* that "we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence – and thus that the *Penry* question need not even be asked – *unless the defendant also establishes a nexus to the crime*." *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (emphasis added). Thus, while states are free to structure and shape consideration of mitigating evidence, they cannot do so in a way that prevents jurors from considering and giving effect to mitigating evidence on the false grounds that the defendant was required to, but did not, establish a nexus or connection to the crime itself.

This is a lesson the OCCA has not learned and is not likely to learn without explicit direction from this Court. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) provides a clear example of this. In *Bosse*, and many preceding cases, the OCCA repeatedly found nothing wrong in the admission of

victims' relatives' recommendations of death, claiming *Payne v. Tennessee*, 501 U.S. 808 (1991) *implicitly* overruled *Booth v. Maryland*, 482 U.S. 496 (1987) concerning admission of such statements.[11] This Court concluded the OCCA was "wrong" because *Payne* continued to forbid opinions of the victim's family "about the crime, the defendant, and the appropriate sentence." *Bosse*, 137 S. Ct. at 2 (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (internal quotation marks omitted); *Payne*, 501 U.S. at 833 (O'Connor, J., White, J., and Kennedy, J., concurring). The OCCA required a reminder that it is this Court's "prerogative alone to overrule one of its precedents." *Id.*

The OCCA's recalcitrance is even worse here. Its decision here was a brazen repeat of its error in *Eddings* thirty-six years ago.

C. Inconsistent Approaches by States' Highest Courts and Circuit Courts of Appeal Demand This Court's Consideration To Assure a Unified Approach to *Lockett* and *Eddings.*

Although Oklahoma, in *Eddings,* was among the first death penalty

[11] This continued despite early and consistent Tenth Circuit opinions concluding admission of such statements was unconstitutional. *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998); *Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002) (recognizing the Supreme Court left this "significant" portion of *Booth* untouched); and *Willingham v. Mullin*, 296 F.3d 917 (10th Cir. 2002).

states to wrongly require mitigating evidence to connect to criminal responsibility, it was not the only one. Imposition of a "nexus" requirement has similarly plagued death penalty schemes in Texas, Arizona, California, and other states.

1. Texas.

Texas juries must answer special issues – whether the defendant caused the death deliberately and with the reasonable expectation death would result and whether there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. If the jury's answer to both those questions is yes, the trial judge automatically imposes the death penalty.

This Court reverses Texas death sentences when, through evidentiary rulings or instructions, juries are prohibited from considering or giving effect to mitigating evidence that was not specifically connected to answers to the special issues. In *Penry I*, this Court held that when a defendant places mitigating evidence (mental retardation and childhood abuse) before the jury, the trial court must give an instruction to allow it to consider and give effect to such evidence in its "moral reasoned" response to whether the defendant should live or die. 492 U.S. at 323. In

Penry II this Court held a confusing instruction on the connection between mitigating evidence (psychiatrist's report) and answers to the special issues did not permit the jury to consider and give effect to evidence. *Penry v. Johnson*, 532 U.S. 782 (2001). In *Smith v. Texas*, 543 U.S. 37, 44-46 (2004) (per curiam) this Court rejected a requirement there must be a "nexus" between mitigating evidence and the special issue questions,[12] holding that such "nexus" has "never been countenanced." *Penry II,* at 789.

The Fifth Circuit initially developed its own analysis for *Penry* claims that required the defendant to show a "nexus" between mitigating evidence and his commission of capital murder. *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995). This analysis was ultimately declared "defunct," *Nelson v. Quarterman*, 472 F.3d 287, 291-93 (5th Cir. 2006) (en banc), but only after this Court decided *Tennard* and again specifically held a defendant did not have to establish such a nexus between mitigating evidence and his responsibility for the crime. 542 U.S. at 284, 287.

The "nexus" requirement and prosecutors' arguments misstating

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[12] One of the special issues focuses on the crime and whether the defendant committed it deliberately.

the law concerning mitigating evidence arose again in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 241 (2007). There, the mitigating strength of Abdul-Kabir's evidence (neurological damage and childhood neglect and abandonment) was "its tendency to prove that his violent propensities were caused by factors beyond his control" not to contest the "continuing threat" special issue. Yet, the prosecutor in voir dire and closing argument discouraged jurors from taking such evidence into account to answer the special issue questions, and the trial court refused to give an instruction that would have clarified that mitigating evidence did not have to be connected to the special issues. This Court remanded for further proceedings noting both the prosecution's misstatements and the lack of a clarifying instruction. *Id*. at 264.

This Court recognizes that prosecutorial misconduct infects the sentencing hearing to constitutional proportions when the prosecutor de-emphasizes the mitigating effect of evidence by stressing that jurors must consider such evidence narrowly and only if related to special issues. *Brewer v. Quarterman*, 550 U.S. 286, 291 (2007). In *Brewer*, this Court concluded the Texas court's decision was contrary to *Lockett* under

AEDPA and additionally struck down the Fifth Circuit's conclusion that Brewer's evidence of mental illness could not constitute a *Penry* violation and that his mitigating evidence of "troubled childhood" fell within the ambit of the special issues. These conclusions "fail[ed] to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Id*. at 296. The Tenth Circuit's conclusions have also disregarded this Court's warnings.

2. Arizona.

For more than fifteen years Arizona applied a causal-nexus test for non-statutory mitigating evidence, *State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994),[13] before finally abandoning it. *See State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005) and *State v. Newell*, 132 P.3d 833, 849 (Ariz.

[13] In Arizona there are five statutory mitigating factors: mental capacity, duress, minor participation, reasonable foreseeablity and age. Ariz. Rev. Stat. §13-751(G)(1)-(5), and a nonstatutory category that is a catchall for other mitigating factors.

2006).[14]

Cases arising before abandonment of this requirement arrived in the Ninth Circuit in habeas posture. In 2015 the Circuit held Arizona's "causal nexus test" was "contrary to" *Eddings*. *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015) (en banc) (finding the Arizona Supreme Court's failure to consider evidence of defendant's severe, prolonged childhood abuse, which resulted in post-traumatic stress disorder (PTSD) as mitigating was an *Eddings* error with "substantial and injurious effect" on McKinney's sentence). *See also Hedlund v. Ryan*, 854 F.3d 557, 587 (9th Cir. 2017) (finding state court applied an unconstitutional causal-nexus test to evidence of difficult family background, including child abuse, contrary to *Eddings*; error was not harmless); *Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018) (finding state court applied an unconstitutional causal-nexus test to mitigating evidence of troubled childhood and mental health issues contrary to *Eddings*; error was not harmless).

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[14] Though no longer requiring a causal nexus between the mitigating factors and the crime, the Arizona court continued to find that the failure to establish such a causal connection could be considered in assessing the quality and strength of the mitigating evidence. *Newell*, 132 P.2d at 1045.

3. California.

California, unlike Oklahoma, has a death penalty statute that specifically requires the jury to consider eleven statutory mitigating factors. It once had a catch-all category that allowed juries to consider and give effect to "[a]ny other circumstances which extenuates the gravity of the crime even though it is not an excuse for the crime. Cal. Jury Instr. - Crim. 8.84.1 factor (k). When California jurors were given the catch-all instruction, this Court concluded the instruction did not limit the jury's consideration to only circumstances that extenuate the gravity of the crime. *Boyde*, 494 U.S. at 381.

But *Boyde* is essentially the mirror-image of what happened in Mr. Grant's case. Mr. Grant did not get the "any other circumstance" instruction, even though the OCCA said he did. Mr. Grant's jury was not told there was specific mitigating evidence it *must* consider. And, unlike the prosecutor in *Boyde*, *id*. at 385, Mr. Grant's prosecutor specifically argued the "law" — the court's instruction — prevented the jury from considering his mental illnesses because such evidence was not connected to the murders. Mr. Grant's case is thus the opposite of *Boyde*. Here, the

prosecutor unleashed an outright assault on key mental health mitigating evidence, stating the jury could only consider it if it was connected to the crime and Mr. Grant's moral responsibility for it. Judge Moritz was right: There is a reasonable likelihood that Mr. Grant's jurors understood the vague instruction and the prosecutor's repeated misstatements of it to prevent them from considering relevant mitigating evidence that was offered for a sentence of less than death. This the Constitution does not allow.

The "nexus" issue continues its assault on *Lockett* and *Eddings* principles. *See Andrews v. Davis*, 866 F.3d 994, 1054 n.7 (9th Cir. 2017), *rehearing en banc granted,* 888 F.3d 1020 (9th Cir. 2018) ("The California Supreme Court suggested there was 'no compelling connection' between the un-presented mitigating evidence and the crimes Andrews committed. To the extent the California Supreme Court suggested a causal nexus is required between mitigating evidence and defendant's crimes, the California Supreme Court's decision was contrary to Supreme Court law") (internal citations omitted).

D. Impact in This Nation's Death Penalty States.

The Fifth Circuit ultimately moved its *Penry* precedent in line with that of this Court, as did the Ninth Circuit in the Arizona cases. The Tenth Circuit's precedent has not yet been tested in this Court. This confusion among the circuits amply illustrates why this Court must clarify that courts cannot use the "nexus" requirement to allow instructions and/or prosecutorial arguments to limit jurors from giving meaningful consideration to relevant mitigating evidence. Without this Court's intervention, more such death sentences will be upheld. *See Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting from denial of certiorari) (noting nexus requirement should not have been used in prejudice determination for ineffective-assistance-of-counsel claim because this Court has consistently rejected any requirement that mitigating evidence can alter a jury's recommendation only if it explains or provides some rational for his criminal conduct).

The "nexus" requirement has survived in Oklahoma, as it has in Florida, Alabama, and Indiana.[15] In Oklahoma, the "nexus" requirement

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[15] Other state courts have rescued death sentences despite a sentencing judge's clear finding he did not find evidence of a defendant's

survived despite this Court's clear statement thirty-six years ago that it has no place in the calculation of whether the evidence presented can mitigate in favor of a sentence less than death. Now is the time to revisit the *Lockett* and *Eddings* issue and the impact prosecutor's misstatements of the law on mitigation has on jurors.

CONCLUSION

This Court should grant certiorari to address the question presented, provide the guidance requested, and additionally assure the Constitution

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bad childhood to be mitigating because there was no evidence the childhood trauma influenced the commission of the crime, i.e. provided a required nexus. *Phillips v. State*, No. CR-12-0197, 2015 WL 9263812 at *83-85 (Ala. Crim. App. Dec. 18, 2015) (distinguishing *Tennard* and *Smith* by concluding the sentencer considered the evidence but found its *weight* insufficient to be a mitigating factor). *See Stanley v. State*, 143 So. 3d 230, 330-32 (Ala. Crim. App. 2011) (same); *Hines v. State*, 856 N.E. 2d 1275, 1283 (Ind. Ct. App. 2006) (finding trial judge was not required to afford *any* weight to the defendant's troubled childhood because the defendant failed to establish his past victimization led to his current behavior); *Lynch v. Sec'y of Corr.*, 897 F.Supp. 2d 1277, 1299 (M.D. Fla. 2012) (concluding finding by Florida Supreme Court that Lynch failed to present any evidence connecting his mental condition to his behavior was an unreasonable determination of fact), *but see Lynch v. Sec'y of Corr.*, 776 F.3d 1209, 1223, 1125 (11th Cir. 2015) (overruling district court and upholding Florida Supreme Court's finding that "none of Lynch's experts explained how their diagnoses of brain impairment could be squared with Lynch's conduct and statements before, during, and after the murder").

is enforced in this capital case, and others throughout the country, where prosecutors calculatedly use a vague instruction to tell jurors the law prohibits consideration of mitigating evidence unless it is connected to the defendant's culpability for the crime.

Respectfully submitted,

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