Case No. 18-6713

IN THE SUPREME COURT OF THE UNITED STATES

Donald Anthony Grant,

Petitioner,

v.

Mike Carpenter, Interim Warden,
Oklahoma State Penitentiary,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Donald Anthony Grant's petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on March 30, 2018, *Grant v. Royal*, 886 F.3d 874 (10th Cir. 2018), Pet'r Appx. A.[1]

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[1] Record references in this brief are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari will be cited as "Petition"; citations to Petitioner's trial transcripts will be cited as "Tr." with the volume number; and citations to the original record will be cited as "O.R." *See* Rule 12.7, *Rules of the Supreme Court of the United States*.

STATEMENT OF THE CASE

An Oklahoma jury convicted Petitioner Donald Anthony Grant of two counts of First Degree Murder and two counts of Robbery with Firearms. The jury sentenced Petitioner to death for the murder of Brenda McElyea (Count 1) and to death for the murder of Suzette Smith (Count 2), finding the following aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; (2) the murders were committed for the purpose of avoiding arrest or prosecution; (3) the murders were committed while Petitioner was serving a sentence of imprisonment on conviction of a felony; (4) Petitioner was a continuing threat to society; and (5) (as to Count 2 only) the murder was especially heinous, atrocious, or cruel. *See* Okla. Stat. tit. 21, § 701-12(2), (4), (5), (6), & (7). The jury sentenced Petitioner to life imprisonment for both robbery convictions.

On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the relevant facts in its published opinion. *Grant v. State*, 205 P.3d 1, 7 (Okla. Crim. App. 2009), *cert denied. Grant v. Oklahoma*, 558 U.S. 951 (2009), Pet'r Appx. D. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:[2]

> The essential facts of the crimes are not disputed. On July 18, 2001, Appellant entered a LaQuinta Inn in Del City, ostensibly to fill out an employment application. In reality, Appellant had planned to rob the hotel in order to obtain money to post bond for a girlfriend, Shlonda Gatewood (who was in the Oklahoma County Jail at the time), and was prepared to kill any witnesses to the crime. Appellant may have been

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[2] Petitioner is referred to as "Appellant" in the OCCA's discussion of the facts.

motivated to strike this particular business because another girlfriend of his, Cheryl Tubbs, had been fired from employment there a few months before; in any event, Appellant was familiar with the layout of the property and the location of video surveillance equipment.

When Appellant saw the hotel manager, Brenda McElyea, he approached her with a pistol in his hand and ordered her to walk to a storage room, where he fatally shot her once in the head, and slashed her neck and back with a box knife to make sure the knife was sharp enough to use on his next victim. Appellant then left the storage room and approached another employee, Suzette Smith, in the break room. Appellant ordered Smith at gunpoint to give him the money from the hotel register, which she did. Appellant then ordered Smith to walk back to the manager's office, where he shot her three times in the face. Smith continued to struggle to escape, so Appellant brutally beat her and cut her numerous times with his knife. He hit Smith in the head with his pistol, attempted to break her neck, and threw a computer monitor on her head in an effort to stop her struggling. Eventually, Smith succumbed to her wounds and died in the office. Before leaving the office, Appellant took personal property from Smith's purse.

Appellant then left the hotel and walked to a nearby discount store, where he abandoned his pistol and some traveler's checks he had taken in the robbery.[3] He then called a cab to take him to the home of Cheryl Tubbs. Later that day, Appellant used money from the robbery to pay Shlonda Gatewood's bond, which was about $200. Appellant and Gatewood then used a stolen car to drive from Oklahoma City to New York City, where Appellant had family. About a month after the murders, Appellant was arrested in New York and returned to Oklahoma.[4]

[3] A few weeks after the crimes, the surveillance video that Appellant had removed from the hotel's recorder was found in a wooded area between the hotel and the discount store.

[4] Incriminating details of Appellant's motive, preparation, and execution of these crimes were presented in the guilt stage of the trial through the testimony of Gatewood, who related what Appellant had told her. A similar account was presented in the punishment stage of trial, through a letter that Appellant had written a few

> weeks before trial. Appellant also offered additional details when he elected to testify in the punishment stage.

Grant, 205 P.3d at 7 (paragraph numbering omitted).

The OCCA affirmed Petitioner's convictions and sentences, *id.* at 25, and subsequently denied rehearing. On appeal, in relevant part, Petitioner challenged an instruction informing the jury that "'[m]itigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame.'"[3] *Grant*, 886 F.3d at 931. The OCCA rejected Petitioner's claim that this instruction, "coupled with the prosecutors' closing arguments, improperly limited the jury's consideration of evidence presented in mitigation of the death sentence." *Grant*, 205 P.3d at 20-21.[4] Thereafter, the OCCA denied Petitioner's application for post-conviction relief in an unpublished decision. *Grant v. State*, No. PCD-2006-615, slip op. (Okla. Crim. App. Jan. 27, 2010) (unpublished).

The federal district court denied Petitioner's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in an unpublished memorandum opinion. *Grant v. Trammell*, No. 5:10-cv-171-F, slip op. (W.D. Okla. May 16, 2014); Pet'r Appx. C. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Grant*, 886 F.3d at 886. The Tenth Circuit also denied panel and *en banc* rehearing. *Grant v. Royal*, No. 14-

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[3] Consistent with the Tenth Circuit's opinion, Respondent refers to this instruction throughout as the "moral-culpability text."

[4] As will be discussed more later, prior to the disposition of Petitioner's appeal, but subsequent to his trial, the OCCA revised the instruction containing the moral-culpability text.

6131, *Order* (10th Cir. June 22, 2018) (unpublished); Pet'r Appx. B. On November 13, 2018, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

In pertinent part, the Tenth Circuit, in an expansive discussion spanning more than seventeen pages, concluded that the OCCA's decision rejecting Petitioner's claim that the jury was improperly limited in its consideration of mitigating evidence based on the moral-culpability text and related prosecutorial arguments was neither contrary to, or an unreasonable application of, clearly established federal law nor based on an unreasonable determination of fact. *Grant*, 886 F.3d at 930-48. In particular, the Tenth Circuit concluded that the OCCA was not unreasonable in determining there was no reasonable likelihood that the jury was precluded by the prosecution's closing arguments from considering all of Petitioner's mitigation evidence in light of the total record, including the jury instructions as a whole, other unchallenged aspects of the prosecution's closing arguments, and the closing arguments of the defense. *Id.* at 945. Among other things, the Tenth Circuit reasoned that the moral-culpability text was constitutional; that, although the prosecution's rebuttal closing argument included "plausibly" improper comments, "[t]he prosecutor handling the opening closing argument . . . spent the lion's share of her time casting doubt on the veracity, credibility, and weight of the evidence supporting the mitigating circumstances . . . [and] [a]t no point . . . assert[ed] that the jury was not free under the law to consider all of the mitigating factors"; and that Petitioner could not "point to even one case

where the Supreme Court has approved of a grant of habeas relief under circumstances like those here." *Id.* at 933-35, 942-43, 945.

Additional facts will be discussed below as they become pertinent to Respondent's argument.[5]

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because Petitioner has not presented this Court with a compelling, unresolved issue warranting certiorari review. To begin with, he merely disagrees with the Tenth Circuit's application of a properly stated rule. Furthermore, he has shown no conflict between the Tenth Circuit's decision and any decision of this Court or any other court. Although he alleges a split in authority

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[5] Petitioner's "STATEMENT OF THE CASE" is improper in multiple respects, as it is argumentative and repeatedly alleges facts not relevant to the issue for which certiorari review is requested. Petition at 5-20; *see* Rule 14(1)(g), *Rules of the Supreme Court of the United States* ("A petition for a writ of certiorari shall contain . . . [a] concise statement of the case setting out the facts material to consideration of the questions presented . . . ."). Moreover, Petitioner's factual background section contains zero citations. Petition at 5-12. While this Court's rules do not expressly require citations to the record in certiorari petitions, Petitioner's failure to include any citations makes it much more difficult for Respondent to fulfill his obligation to "address any perceived misstatement of fact . . . in the petition . . . ." Rule 15(2), *Rules of the Supreme Court of the United States*. In any event, many of Petitioner's assertions relate to his alleged incompetency to stand trial, Petition at 6-9, which the Tenth Circuit thoroughly discussed and found to be without support in rejecting Petitioner's claim that his trial counsel rendered ineffective assistance in failing to monitor his competency in the months leading up to trial, *see Grant*, 886 F.3d at 906-17.

In addition to the above-noted violations of this Court's rules, Petitioner's Question Presented section violates Rule 14(1)(a), *Rules of the Supreme Court of the United States*, which provides that the question presented "should be short and should not be argumentative or repetitive" and "shall be set out on the first page . . . [with] no other information . . . on that page." Petitioner improperly includes more than a page of argumentative "background" preceding his question presented. Petition at 1-2.

among lower courts concerning this issue, the case law is not in conflict and the split he alleges is illusory. He has further failed to show that the OCCA has endorsed an unconstitutional jury instruction regarding mitigation, or has allowed continued prosecutorial exploitation of said instruction, such that this Court's intervention is required.

I.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER PRESENTS A MERE DISAGREEMENT WITH THE APPLICATION OF A PROPERLY STATED RULE, HAS SHOWN NO CONFLICT IN THE LAW, HAS NOT DEMONSTRATED THAT THE OCCA REQUIRES "CORRECTION," AND PRESSES A MERITLESS CLAIM.

Petitioner seeks this Court's review of a claim that was denied by the Tenth Circuit based on the application of a properly stated rule. He has shown no conflict in the law or split in authority. Petitioner's assertion that the OCCA requires "correction" by this Court is unfounded. His underlying substantive claim is, in any event, meritless. For all of these reasons, this case does not involve a compelling, unresolved issue, and this Court should deny Petitioner's request for a writ of certiorari.

A. Petitioner Simply Disagrees with the Tenth Circuit's Application of a Properly Stated Rule.

Petitioner suggests that this Court should grant certiorari review because the prosecution precluded his jury from considering his mitigating evidence and the Tenth Circuit's deference to the OCCA's decision denying relief thereby sanctioned a violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Petition at 20-26. Although

Petitioner attempts to paint the Tenth Circuit's opinion as conflicting with this Court's precedent, he in fact merely disagrees with the Tenth Circuit's application of a properly stated rule. Such does not present this Court with a compelling, unresolved issue worthy of certiorari review.

Rule 10, *Rules of the Supreme Court of the United States*, provides in pertinent part the following:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> > (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, Petitioner complains that "the Tenth Circuit did not dispute that the prosecutor . . . misstated the law on mitigating evidence" and instead "questioned

'whether the jury believed those repeated misstatements.'" Petition at 20 (quoting *Grant*, 886 F.3d at 960 (Moritz, J., dissenting)). However, this was exactly the analysis the Tenth Circuit was required to employ under this Court's precedent. This Court held in *Boyde v. California*, and reaffirmed in *Brown v. Payton*, that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also Brown v. Payton*, 544 U.S. 133, 143 (2005). Indeed, in *Brown*, this Court reversed the grant of habeas relief where the prosecutor argued that the jury *should not consider* the petitioner's mitigation evidence based on a "narrow interpretation" of the challenged jury instruction "that neither party accept[ed] as correct" on appeal. *Brown*, 544 U.S. at 146. Therefore, in the instant case, the Tenth Circuit correctly identified the relevant inquiry:

> [W]hether those prosecution arguments (improper or not) had the effect of violating Mr. Grant's Eighth Amendment rights under *Lockett* and its progeny. The test of constitutional error under *Lockett* is not (as relevant here) whether the prosecution's arguments were improper, but rather whether there is a reasonable likelihood that they had the effect of precluding the jury from considering mitigating evidence.

Grant, 886 F.3d at 938. The Tenth Circuit properly applied the test from *Boyde* and *Brown*, and Petitioner has shown no error in its refusal to rest its holding on whether the prosecution's arguments were improper.[6]

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[6] In his "Statement of the Case," Petitioner hints that the Tenth Circuit applied the wrong test in allegedly requiring him to prove that his jury was precluded from (continued...)

Petitioner suggests that the Tenth Circuit's refusal to recognize the alleged impropriety of the prosecution's arguments in this case sanctioned continuing "misconduct" by Oklahoma prosecutors that precludes capital juries from considering relevant mitigating evidence. Petition at 22-24. For starters, this assertion is again just a disagreement with the Tenth Circuit's conclusion that, based on all of the circumstances, the OCCA was not unreasonable in finding no reasonable likelihood that the jury was precluded from considering Petitioner's mitigating evidence. Moreover, to the extent that Petitioner suggests that the Tenth Circuit should have used his case to send a message to Oklahoma prosecutors, the Tenth Circuit "has no such supervisory authority over Oklahoma courts." *English v. Cody*, 146 F.3d 1257,

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[6](...continued)
considering "all" of his mitigation evidence to warrant relief. Petition at 19-20. Petitioner takes words of the Tenth Circuit's opinion out of context. The Tenth Circuit properly, and repeatedly, cited the test from *Boyde*. *See, e.g.*, *Grant*, 886 F.3d at 933, 936, 938. In the challenged statement, the Tenth Circuit stated in full:

> Put another way, even if we were to accept that the prosecution's rebuttal arguments here were improper, that would not necessarily mean that the OCCA was *unreasonable* in concluding that there was no *Lockett* error because there was no reasonable likelihood that the jury was precluded by those arguments from considering *all* of Mr. Grant's mitigating evidence—including the evidence that did *not* extenuate or reduce his moral culpability or blame.

Id. at 938 (emphasis in original). The Tenth Circuit's point was simply that the jury was not precluded from considering any of Petitioner's mitigating evidence, *i.e.*, they were able to consider "all" of it, even that evidence that did not reduce his moral culpability or blame. *Cf. id.* at 936 ("[W]e conclude that the OCCA did not act unreasonably when it concluded that 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.").

1262 (10th Cir. 1998); *see also Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that [federal courts] do not hold a supervisory power over the courts of the several States."). Rather, the only question that was properly before the Tenth Circuit was whether *Petitioner's* death sentences were obtained in violation of the Constitution. *See* 28 U.S.C. § 2254(a) (a federal court may entertain a petition for writ of habeas corpus challenging a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."); *cf. also County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 154-55 (1979) ("As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."). The Tenth Circuit applied the proper test to make that determination. This Court's review is not warranted.

B. Petitioner Has Not Shown any Conflict or Split in Authority.

Petitioner asserts that review is required by this Court to resolve a split in authority among the states' highest courts and circuit courts regarding the so-called imposition of a "nexus" requirement for mitigating evidence. Petition at 26-35. Petitioner has not shown that Oklahoma's instructions concerning mitigating evidence have a nexus requirement or run afoul of this Court's precedent or that there is any split in authority requiring this Court's attention.[7]

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[7] In this section, Respondent refers to Oklahoma's instructions concerning mitigating evidence as they existed at the time of Petitioner's trial, demonstrating that (continued...)

To begin with, Oklahoma's definition of mitigating circumstances does not contain a nexus requirement. Petitioner repeatedly suggests that the moral-culpability text limits mitigating evidence to that which is "linked to guilt" or has a "connection to the crime." Petition at 23-25. Petitioner's argument ignores the totality of the instructions Oklahoma capital juries receive, as did his jury, on the definition and consideration of mitigating evidence. In *Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. 2015), which the panel below found to control Petitioner's challenge to the moral-culpability text, the Tenth Circuit rejected the Oklahoma capital petitioner's constitutional challenge to the moral-culpability text based on the totality of the instructions received by the jury:

> The district court noted that some of the other instructions from Hanson's trial concerning mitigating evidence broadened the scope of evidence the jury could consider. *Hanson III*, 2013 WL 3307111, at *28. This is relevant because "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge . . . ." *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190 (citation omitted) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)).
>
> First, Instruction No. 22 also told the jury that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." This statement broadened any potential limitations imposed by the first sentence of the instruction. Second, Instruction No. 23 listed 11 specific mitigating

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[7](...continued)
they contained no nexus requirement. In any event, as discussed more in the following section, Oklahoma has since amended its mitigating evidence instructions to expressly provide that the jury may consider as mitigating *any* circumstance that could lead a juror to choose a sentence of less than death. *See* OUJI-CR 4-78 (Supp. 2008). Therefore, even assuming error in Petitioner's trial, a grant of certiorari here would be only an exercise in error correction, which is not a worthy basis for this Court's review.

> circumstances for the jury to consider, some of which had nothing to do with Hanson's moral culpability. . . . The instruction ended with this sentence: "In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well." Viewing the challenged instruction in the context of all the instructions, we do not think the jury would have felt precluded from considering any mitigating evidence, including the testimony of the four testifying witnesses.

Hanson, 797 F.3d at 851 (record citations omitted). As the panel below rightly observed, the "additional instructions relating to mitigating evidence that [the Tenth Circuit] concluded in *Hanson* broadened the scope of evidence the jury could consider also were present—in all material respects—in Mr. Grant's case." *Grant*, 886 F.3d at 935 (quotation marks omitted).

For example, Petitioner's jury was instructed that "[e]vidence has been introduced as to the following mitigating circumstances:"

1. Donald Grant has been diagnosed as schizophrenic; psychotic symptoms have been reported.

2. Donald Grant has suffered from mental impairments since childhood. These include hyperactivity which was diagnosed when he was in grade school.

3. There are indications of brain damage existing at and before Donald Grant's birth. These indications include his mother's heavy consumption of alcohol during her pregnancy with Donald Grant and the loss of oxygen to him during delivery.

4. A substantial portion of Donald Grant's childhood was spent in a violent and drug-infested neighborhood. This environment inhibited his development as a human being and desensitized him to violence.

5. For extended periods of time, Donald Grant's mother was unable or unwilling to take care of him to the extent that he sometimes was deprived of food and nurturing.

6. Donald Grant was subjected to physical, emotional and psychological abuse.

7. Donald Grant's life will be of value to other persons besides himself.

8. Donald Grant's family and cultural history indicate that he did not receive what most families consider important for their child to have success in the world.

9. Donald Grant periodically became a ward of the government at a young age. He was in foster homes, then juvenile institutions, then in adult institutions.

10. Donald Grant's age was far from advanced at the time the offenses were committed in this case.

In addition you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

(O.R. 2350-51).

Thus, viewed in light of all of the jury instructions, the moral-culpability text does not limit the jury to considering only that mitigating evidence which reduces moral culpability or blame and certainly does not establish a nexus requirement. Indeed, while Petitioner suggests that his jury was limited in its consideration of some of "the most powerful" mitigating evidence a defendant can present—evidence of a "mental defect or mental illness," Petition at 21—as shown above, Petitioner's jury was

in fact *expressly instructed* that his schizophrenia, mental impairments, and brain damage were mitigating circumstances that should be considered.[8]

For all of these reasons, Petitioner's reliance on "nexus" cases is misplaced. *Compare, e.g.*, *Smith v. Texas*, 543 U.S. 37, 45 (2004) (holding that the state court improperly concluded that the petitioner had not presented any relevant mitigating evidence in the absence of "any link or nexus between his troubled childhood or his

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[8] In any event, these are exactly the kind of circumstances that *do* reduce moral culpability or blame. *See Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) (discussing mitigating value of "[d]iagnoses of specific mental illnesses, which are associated with abnormalities of the brain . . . ," given that "the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action" (quotation marks omitted, alterations adopted)); *see also Boyde*, 494 U.S. at 382 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." (emphasis in original, quotation marks omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (recognizing that youth may be mitigating because it represents "a time and condition of life when a person may be most susceptible to influence and to psychological damage"). In fact, all but one of Petitioner's mitigating circumstances ("Donald Grant's life will be of value to other persons besides himself") related to his mental impairments, difficult upbringing, or age, all of which could fairly be said to have the potential of reducing his moral culpability or blame (O.R. 2350-51). Admittedly, the panel below suggested that more than one of the previously quoted mitigating circumstances "did not extenuate or reduce moral culpability or blame," in particular those that "related to Mr. Grant's difficult and turbulent upbringing," *Grant*, 886 F.3d at 940, but Respondent respectfully submits that such circumstances do reduce culpability pursuant to *Boyde*. Moreover, while the prosecutor argued that certain mitigating evidence did not in fact reduce Petitioner's moral culpability or blame (Tr. VIII 79), this is distinct from an argument that the evidence was incapable of reducing, or completely unrelated to, moral culpability or blame. Thus, even accepting Petitioner's restrictive view of the moral-culpability text, it is difficult to imagine that the jurors would believe that they could not consider the mitigating evidence he presented.

limited mental abilities and this capital murder" (quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004))); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime."). Accordingly, Petitioner has shown no conflict between the Tenth Circuit's decision in his case and the "nexus" cases he cites.[9] Certiorari review is unwarranted.

Not only has Petitioner failed to demonstrate a "nexus" requirement in Oklahoma, he likewise has failed to show that such a requirement exists in any other state, such that there is any split in authority requiring this Court's attention. Petitioner cites to cases out of Florida, Alabama, and Indiana, claiming that they endorse a nexus requirement, but he conflates the concept of whether mitigating

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[9] It is therefore unsurprising that Petitioner did not develop this "nexus" argument before the Tenth Circuit. While he asserted that the moral-culpability text was potentially misleading and that the OCCA's revision of the instruction raised an inference of infirmity under *Mills v. Maryland*, 486 U.S. 367 (1988), he never alleged that the instruction created a "nexus" requirement. *Grant v. Trammell*, No. 14-6131, *Appellant's Opening Brief* at 101-03 (10th Cir. Sept. 18, 2015) ("*Opening Brief*"). Petitioner did not cite *Tennard* even once and cited *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Smith* only in passing. *See Opening Brief* at 97-98 ("Nothing should interfere with a defendant's ability to present any and all mitigating evidence in an attempt to save his life. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), overruled on other grounds, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Smith v. Texas*, 550 U.S. 297 (2007)."). As the panel observed, Petitioner did not "meaningfully dispute th[e] conclusion" that the moral-culpability text was constitutional. *Grant*, 886 F.3d at 935. Nor did the panel give any indication that it understood Petitioner to be making an argument that the moral-culpability text created an improper nexus requirement. Petitioner's failure to properly raise this argument below provides another basis for denying certiorari review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or passed upon below").

evidence is *considered* with the finding of the *weight* to give such mitigating evidence. Petition at 34-35 & n. 15. The cases cited by Petitioner state only that a sentencer *may* assign less weight to mitigating evidence that does not help explain or relate to the crime, not that such evidence does not count as mitigating or cannot be considered. *See Phillips v. State*, No. CR-12-0197, 2015 WL 9263812, at *83-84 (Ala. Crim. App. Dec. 18, 2015) (unpublished) (rejecting the defendant's argument that "the trial court improperly required a causal connection between the mitigating circumstances and the offense" because the record showed that the trial court considered all of the evidence but simply found it not to be mitigating); *Stanley v. State*, 143 So.3d 230, 331-32 (Ala. Crim. App. 2011) (same); *Hines v. State*, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) ("We cannot say that the trial court abused its discretion by failing to assign *significant mitigating weight* to Hines's childhood abuse." (emphasis added)); *see also Lynch v. Sec'y, Fla. Dep't of Corr.*, 776 F.3d 1209, 1222-26 (11th Cir. 2015) (concluding that the state court reasonably rejected the petitioner's claim of prejudice from trial counsel's failure to present mental health experts in mitigation on grounds that the petitioner's "experts' generalized testimony (that his brain impairment rendered him unable to control his impulses) could not be squared with the facts of the case"). This is entirely in line with this Court's precedent. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) ("The sentencer, and the [appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").

The conflict in the law alleged by Petitioner is illusory. Certiorari review should be denied.

C. The OCCA Does Not Require "Correction" by this Court.

Petitioner suggests that the OCCA requires "correction" by this Court because it has endorsed a "vague and misleading instruction" and has allowed prosecutors to repeatedly exploit this instruction to limit jurors' consideration of mitigating evidence. Petition at 21, 25. Petitioner has not demonstrated that certiorari review is necessary to "correct" the OCCA.

For starters, as Petitioner concedes, Petition at 16, 21, the OCCA has already recognized the constitutional problem with prosecutors' suggesting that mitigating evidence that does not reduce moral culpability or blame should not be considered and accordingly revised the moral-culpability text. In *Harris v. State*, the OCCA explained that it was troubled by prosecutors' consistently misusing the language of the moral-culpability text to argue that mitigating evidence cannot be considered when it does not go to moral culpability or blame. *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007). Thus, although the OCCA held that the instruction was not legally inaccurate, inadequate, or unconstitutional, and that cases in which the instruction had been used were not subject to reversal on that basis, the OCCA suggested a revision to the instruction's language to discourage improper argument. *Id.* at 1114. As a result, this instruction was amended to provide, in relevant part, that "[m]itigating circumstances are 1) circumstances that may extenuate or reduce the

degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty." OUJI-CR 4-78 (Supp. 2008).[10]

Petitioner's reliance on *Bosse v. Oklahoma* to argue that "the OCCA has not learned" its "lesson" and "is not likely to learn without explicit direction from this Court," Petition at 25, is entirely misplaced. Here, on its own, the OCCA recognized and corrected "the consistent misuse of the [moral-culpability text's] language . . . in the State's closing arguments" with a revised instruction. *Harris*, 164 P.3d at 1114. Moreover, as already shown above, even the prior instruction did not run afoul of any of this Court's precedents. There is nothing for this Court to correct, and *Bosse* is inapposite. *Compare Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("The Oklahoma Court of Criminal Appeals remains bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban.").

D. Petitioner's Claim Fails on the Merits.

As a final matter, besides the fact that Petitioner has not shown a compelling issue warranting certiorari review or a conflict or split in authority warranting this Court's attention, his claim is substantively meritless. The Tenth Circuit held that,

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[10] Petitioner claims that Oklahoma prosecutors continue to make improper arguments even when a defendant receives the revised instruction. Petition at 21 n. 9. Even assuming this is true, his case does not represent an appropriate vehicle for review of the revised instruction and related prosecutorial arguments, as he received the prior instruction.

in light of all of the prosecution and defense arguments and the instructions before the jury, the OCCA did not act unreasonably when it concluded that there was no reasonable likelihood that the jury believed it could not consider Petitioner's mitigating evidence. *See Grant*, 886 F.3d at 936-48.[11] The crux of Petitioner's complaint about this holding is his contention that his case is distinguishable from *Boyde* because he did not receive a "catch all" instruction and because one of his prosecutors suggested to the jury that mitigating evidence could not legally be considered unless it extenuated or reduced his moral culpability or blame. Petition at 23 n. 10, 32-33. Petitioner's arguments are without merit.

To begin with, the instruction found not to violate the Eighth Amendment by this Court in *Boyde* was in fact very similar to the moral-culpability text at issue here.

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[11] Petitioner's fleeting argument that the Tenth Circuit improperly gave AEDPA deference to the OCCA's decision "despite the OCCA's failure to adjudicate the key question on the merits" is unpreserved and unfounded. Petition at 19, 22. Petitioner never argued, in years of federal habeas litigation, that the OCCA failed to adjudicate his claim on the merits. Rather, this argument was raised for the first time by a dissenting opinion in the Tenth Circuit. *See Grant*, 886 F.3d at 931 n. 20, 936 n. 22; *id.* at 961, 967-70 (Moritz, J., dissenting). Moreover, Petitioner entirely fails to challenge the majority's reason for rejecting the dissent's assertion that the OCCA "misunderstood" Petitioner's claim and therefore did not adjudicate it on the merits. *Id.* at 961 (Moritz, J., dissenting). The majority concluded that, contrary to the dissent's focus on a single sentence of the OCCA's opinion, a "comprehensive reading of the OCCA's opinion reveals that the precise nature of Mr. Grant's claim was crystal clear to the OCCA" and the OCCA "fully comprehended" the nature of the constitutional claim. *Id.* at 936. "Indeed, at the outset of its analysis, the OCCA described Mr. Grant's contention this way: 'In Proposition 11, [Mr. Grant] claims that the trial court's instructions, coupled with the prosecutors' closing arguments, *improperly limited the jury's consideration of evidence presented in mitigation of the death sentence*.'" *Id.* (quoting *Grant*, 205 P.3d at 20) (emphasis adopted or added). It is hard to imagine how the OCCA could have more clearly indicated that it understood and was adjudicating Petitioner's claim.

In *Boyde*, the petitioner's jury was instructed to consider a number of statutory mitigating circumstances, most of which focused on the immediate circumstances of the crime itself, as well as—pursuant to the so-called "factor (k)" instruction—"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 373-74 & n. 1, 378. This Court held that there was not a reasonable likelihood that the jury interpreted the factor (k) instruction to prevent consideration of non-crime-related mitigating evidence presented by the petitioner of his background and character. *Id.* at 381. In light of the similarity between the factor (k) instruction and the moral-culpability text at issue here,[12] *Boyde* only reinforces that the Tenth Circuit properly denied habeas relief in this case.[13]

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[12] In addition to the moral-culpability text, Petitioner's jury also received an instruction, previously quoted, that it "may decide that other mitigating circumstances exist, and if so, . . . should consider those circumstances as well" (O.R. 2351).

[13] Petitioner further suggests that the OCCA's adjudication of his claim was based on an unreasonable determination of fact, citing to footnote 34 of the OCCA's decision, where the OCCA incorrectly identified the instruction given in his case. Petition at 17-19. Specifically, the OCCA inadvertently quoted the language of the revised moral-culpability text as the one offered in Petitioner's case. *Grant*, 205 P.3d at 21 n. 34. However, Petitioner's case was tried prior to the issuance of *Harris* in 2007, only after which the revised instruction was promulgated, such that it is clear that the reference to the revised instruction in footnote 34 was merely a scrivener's error. This conclusion is reinforced by footnote 33, in which the OCCA properly recognized that the trial court used the "pre-*Harris*" instruction in this case. *Grant*, 205 P.3d at 20 n. 33. Under AEDPA, the OCCA's decision must be given the benefit of the doubt, *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and the Tenth Circuit rightly concluded that the scrivener's error in footnote 34 was no basis for *de novo* review, *Grant*, 886 F.3d at 948 ("[I]n our view, footnote 34's reference to this reformed instruction is a mere mistake, lacking in decisional or legal significance. It certainly does not suggest that the OCCA's ruling rested on 'an unreasonable determination of the facts in light of the evidence.'" (quoting 28 U.S.C. § 2254(d)(2))).

As to Petitioner's claim that the prosecutor's arguments in his case distinguish his case from *Boyde*, in *Brown* (which also involved the factor (k) instruction) this Court reversed the grant of habeas relief despite the fact that "the prosecutor . . . argued to jurors during his closing that **they should not consider [the petitioner's] mitigation evidence**," "argued to the jury that **it had not heard any evidence of mitigation**," and "characterized [the petitioner's] evidence **as not being evidence of mitigation**." *Brown*, 544 U.S. at 143-45 (emphasis added). This Court reasoned that, in the context of the trial as a whole, the state court's finding that the prosecutor's incorrect argument did not prevent the jury from considering the petitioner's mitigating evidence was not unreasonable. *Id.* at 144-47. Put simply, if the petitioner in *Brown* was not entitled to habeas relief, then Petitioner has certainly not shown that the OCCA unreasonably denied relief in his case.

In addition, the prosecutors in Petitioner's case made extensive comments in closing that encouraged the jury to consider Petitioner's alleged mitigating circumstances. Specifically, although one prosecutor made isolated comments in the final rebuttal that evidence must reduce the moral culpability or blame of the

defendant to be mitigating (Tr. VIII 75, 79-80),[14] the prosecutors also made the following comments encouraging the consideration of all mitigating evidence:

- "I'm going to talk to you just briefly about mitigation and some of the instructions with regard to mitigation. Instruction Number 13 sets out the mitigators that the defendant alleges that you should consider with regard[] to determining whether or not this is mitigation. *These are for you to consider.* You don't have to accept them. *You can talk about them, you can talk about them amongst yourselves*, you can talk about the testimony . . . " (Tr. VIII 31 (emphasis added)).

- "The defendant has alleged the following mitigating circumstances: And I want to talk about them individually. And it's up to you to determine whether or not these mitigators—whether or not these circumstances somehow mitigate what Donald Anthony Grant did . . . ." (Tr. VIII 31-32).

- "And I would submit to you . . . the State . . . has proven beyond a reasonable doubt each of its aggravators and that these items that the defendant offers as mitigation do not mitigate what he did to these victims, do not in any form or fashion" (Tr. VIII 40).

- "I would submit to you each and every aggravator has been proven beyond any doubt at all. *And I would submit to you that when you look at the mitigators, I mean when you think about them and discuss them and talk about them amongst yourselves*, I would submit to you[,] . . . in terms of the evidence and the facts that you have heard, the law that you have received, that it is not a difficult task for you all to complete" (Tr. VIII 88-89 (emphasis added)).

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[14] Petitioner's assertion that these comments were made "in spades" and that the prosecutor "repeatedly argu[ed] that key aspects of Mr. Grant's proffered evidence did not count as mitigating" is not supported by the record. Petition at 12. Instead, as found by the Tenth Circuit, the extent of the "plausibly" improper comments by the prosecutor were the following: "[W]hat the Court tells you and what the law says is that before something can be mitigating it must reduce the moral culpability or blame of the defendant"; "[Y]ou have to look at whether or not it reduces his moral culpability or blame. That is what the law says that you must do"; and "And then ask yourself the question, does it reduce his moral blame for what happened at the La Quinta Inn in July of 2001?" (Tr. VIII 75, 79-80). *See Grant*, 886 F.3d at 938, 943; *see also id.* at 939 (describing the prosecutor's references to the moral-culpability text as "isolated").

In the State's first closing argument, the prosecutor further offered extensive discussion of Petitioner's evidence of mitigating circumstances, spanning more than eight transcript pages (Tr. VIII 31-40). Importantly, nowhere in this discussion did the prosecutor suggest that the circumstances alleged were not mitigating because they did not extenuate or reduce the degree of Petitioner's moral culpability or blame. Rather, she simply encouraged the jury to consider the strength of the evidence supporting each mitigating circumstance (such as whether Petitioner's history and the facts of the crime more strongly pointed to schizophrenia or to antisocial personality disorder) and argued that the circumstances (such as Petitioner's history in juvenile institutions) simply were not that mitigating. And neither prosecutor ever told the jury to disregard Petitioner's proposed mitigation evidence.[15] In sum, the jury would reasonably have inferred from the prosecutor's extensive discussion of the mitigating circumstances alleged by Petitioner, and the other prosecutorial statements above, that they were all proper mitigating circumstances to be considered; otherwise, the prosecutor would have no reason to question the strength of the evidence in support. *Cf. Boyde*, 494 U.S. at 385 ("[T]he prosecutor explicitly assumed that petitioner's

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[15] Petitioner claims, without citation, that the prosecutor in final rebuttal told the "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." Petition at 11 (emphasis in original). The prosecutor never said anything so pointed. Rather, she said that a past "schizophrenic episode" of Petitioner did not reduce his moral culpability or blame for his actions on the day of the murders and then continued, "[Y]ou have to look at whether or not it reduces his moral culpability or blame. That is what the law says that you must do." (Tr. VIII 79).

character evidence was a proper factor in the weighing process, but argued that it was minimal in relation to the aggravating circumstances.").

For all of these reasons, Petitioner has failed to show that the Tenth Circuit improperly held that the OCCA did not unreasonably deny relief in this case, that his jury was precluded from considering his mitigating evidence, or that his case presents a close or compelling issue requiring this Court's attention.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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