No. 18-6713
(Capital Case)

IN THE

Supreme Court of the United States

DONALD ANTHONY GRANT,

Petitioner,

v.

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

On Reply to the Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY TO BRIEF IN OPPOSITION

I. Introduction.

Respondent admits Mr. Grant presented evidence during the penalty phase of his capital trial — his disadvantaged background, his emotional and mental problems, his organic brain damage — that was "exactly the kind" of evidence that was both compelling and capable of diminishing his *personal* culpability. Brief in Opposition (BIO) at 15 n.8. But Mr. Grant's jurors, like jurors in Texas, Arizona, California, Florida, Alabama, and Indiana, were told by the judge, through instructions, and by the prosecutors, through argument, that such compelling evidence could not be considered because it does not reduce the convicted murderer's legal and moral responsibility for the murders — murders Mr. Grant and his counsel admitted he committed.

Respondent finds nothing wrong in Mr. Grant's jurors, and jurors in other parts of the country, being told compelling mitigating evidence could not and must not be considered. Respondent suggests it was enough for Mr. Grant's jury to hear such evidence. But the Eighth Amendment requires more than that the mitigating evidence simply be admitted.

Jurors must know and understand that they can use what they hear to make the uniquely individual decision of whether to grant or withhold mercy.[1] Thus, despite Respondent recognizing the heightened value of Mr. Grant's mitigating evidence, he nonetheless defends the mixed signals the Oklahoma Court of Criminal Appeals (OCCA) sends Oklahoma jurors, disregarding and diminishing the foundational tenants of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma,* 455 U.S. 104 (1982) in the process.

Eighth Amendment principles are designed to assure death sentences are reliable. Such constitutional reliability depends on the existence of a lawful mechanism for jurors to consider all evidence that mitigates against the death penalty. Oklahoma leads jurors to believe they cannot consider the most compelling evidence that has been offered in making their life-and-death decision. Because other death states impose similar strictures in violation of the Eighth Amendment, this

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[1] In Oklahoma a death verdict must be unanimous. If even one juror would have selected a severe, but lesser penalty, had she known she could consider Mr. Grant's evidence despite that it did not reduce his guilt, the death penalty cannot stand. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *See also* Okla. Stat. tit. 21, §701.9 (listing only sentence possibilities as life, life without parole, and the death penalty).

Court should grant certiorari and settle all permutations of this issue and resolve the ongoing confusion. Here the law from *Lockett* and *Eddings* is "clearly established," but the lower courts are applying it differently. This confusing array of approaches frustrates the purpose behind the "individualized sentencing" requirement of the Eighth Amendment and results in unreliable death sentences.

II. The Certiorari Petition is Proper.

Respondent raises several complaints concerning the form of Mr. Grant's petition. BIO at 6 n.5. Petitioner will address three of them.

First, the question presented defines the outer limits of what this Court will address if it grants certiorari. Petitioner presented a prefatory paragraph to the question presented. This is not uncommon and was meant to provide a factual and procedural background to aid the Court in understanding the significance of the question presented. This is permitted.[2]

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[2] *See, e.g.,* Petition for Certiorari, *Holmes v. South Carolina*, 2005 WL 770655 (March 31, 2005) and Petition for Certiorari, *House v. Bell*, 2005 WL 1527632 (March 3, 2005).

Second, Respondent complains that although this Court's rules do not require citations to the record at this stage, without such citations he experienced undefined difficulties in addressing any perceived misstatement of the facts. Because there are really no disputed facts, this argument is especially puzzling. Petitioner never contested the facts that support Mr. Grant's guilt of the double-murder. Cert. Pet. 5-7. Nor does Mr. Grant's summary of the crime facts conflict in any way with those of the OCCA that Respondent adopted. BIO at 2-4. There can be no "misrepresentations" when there are no discrepancies. The other "facts" — how the jury was instructed and what the prosecutor said — although significant to the question presented have been meticulously cited below by both parties. Respondent's present counsel is well aware of these "facts" as she not only argued the case below but also filed the response to the rehearing petition in which this very question was the only one teed up.

Third, Respondent understandably seeks to divorce the history of Mr. Grant's mental illnesses from the question presented. However, Mr. Grant's mitigating mental-health evidence is keenly relevant to the issue for which certiorari review is requested. The prosecutors centered their

exclusionary attack on the most effective mitigation Mr. Grant presented — that he was seriously mentally ill. They repeatedly argued the "law" prohibited the jury from considering this key aspect of Mr. Grant's proffered evidence because it did not count as mitigating. Indeed, according to the prosecutor, mental-health evidence was completely out of bounds for the jury's consideration. And, the trial court not only did nothing to disabuse the jurors of the prosecutor's view of the "law," but instead, put its imprimatur of approval on it. The critical mental-health evidence provides necessary context to the trial court's instruction and the prosecutor's argument. *See* Cert. Pet. at 6-12.

III. Oklahoma Jurors Fundamentally Misunderstand What They Can Consider as Mitigating.

In his apparent effort to obscure the importance of the question presented throughout states with capital punishment, Respondent claims Oklahoma's "definition" of mitigating circumstances contains no nexus requirement. BIO at 12. This is an oversimplification for three reasons.

First, there is nothing magical about the word "nexus." What is critical is what jurors understand. And in Mr. Grant's case, jurors were told and understood there had to be a connection between the evidence

they heard and the effect such evidence had on Mr. Grant's legal and moral responsibility for the murders. They understood that without that connection, or nexus, the evidence could not be considered to mitigate the penalty of death.

Second, Respondent's view that there is no nexus requirement cannot be squared with polar opposite and unreasonable positions of the OCCA, which have resulted in Oklahoma prosecutors repeatedly exploiting this phantom connection in their arguments. Oklahoma's statute provides no "definition" of mitigation. It only states "evidence may be presented as to any mitigating circumstance." Okla. Stat. tit. 21, §701.10. Respondent nowhere disputes that the OCCA has a history requiring evidence to rise to an "excuse" for behavior or show lack of criminal responsibility to be considered mitigating. *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980). *See* Cert. Pet. at 13-15.

The juxtaposition of Mr. Harris's case, *Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. 2007) and that of Mr. Grant, *Grant v. State*, 205 P.3d 1 (Okla. Crim. App. 2009) aptly illustrates how the OCCA's view of the nexus requirement is inconsistent and confusing, and thus serves as a

reason for this Court to resolve the inconsistency and settle the confusion. The OCCA has consistently allowed prosecutors to argue that the "law" requires such a nexus. In *Harris,* the OCCA, although sending the moral culpability instruction out for repair, dismissed the challenge to the instruction, as it had done repeatedly in the past. Cert. Pet. 12-15. Yet, in the same breath claimed it never intended for prosecutors to 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 extenuate his guilt." *Harris*, 164 P.3d at 1114. Yet, in *Grant*, the court's intention disappeared. Even though Mr. Grant's prosecutor made precisely the same arguments the OCCA considered "egregious" in *Harris*, the OCCA found no error. *Grant*, 205 P.3d at 20-21. [Not just no *harmful* error, *no error whatsoever*.[3]]

[3] Judge Chapel did not see it that way. He disagreed with the majority and concluded that the "moral culpability" instruction and the prosecutor's arguments, that were "strikingly similar" to those in *Harris*, combined to unfairly limit Mr. Grant's jurors' from considering clearly appropriate mitigating evidence. *Grant*, 205 P.3d at 26 (Chapel, J., dissenting).

Third, although the OCCA endorsed the "moral culpability" instruction as proper in *Harris*, it required the instruction to be modified to add the following definition: "Mitigating circumstances are . . . 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty." The OCCA wrongly claimed that Mr. Grant's jurors got the benefit of this ameliorated instruction. They did not. Thus, Mr. Grant's jurors were left with no definition of mitigating evidence other than the "moral culpability" language the prosecutors exploited to require a nexus to the murders.

As with statutes, when instructions do not define words, jurors are understood to rely on common and ordinary meanings. *Taniguchi v. Kan. Pacific Saipan, Ltd.*, 566 U.S. 560, 568 (2012). But the common and ordinary meanings of the words in the "moral culpability" instruction support the prosecutor's argument that evidence is not mitigating unless there is a nexus between the evidence and the defendant's guilt of the murders. The instruction simply reads: "Mitigating circumstances are circumstances that may extenuate or reduce the degree of moral

culpability or blame." The ordinary meaning of the key terms are:

- "Culpability" means "responsibility for wrong doing." https://www.merriam-webster.com/dictionary/culpability, last visited December 19, 2018.

- "Moral" relates to principles of "right and wrong in behavior." https://www.merriam-webster.com/dictionary/moral, last visited December 19, 2018.

- "Blame" means place "responsibility for." https://www.merriam-webster.com/dictionary/blame, last visited December 19, 2018.

- "Extenuate" means "lessen the seriousness of something, as an offense." https://www.merriam-webster.com/dictionary/extenuate, last visited December 19, 2018.

- "Reduce" means "to diminish." https://www.merriam-webster.com/dictionary/reduce, last visited December 19, 2018.

- "Degree" in the law means "a legal measure of guilt." https://www.merriam-webster.com/dictionary/degree, last visited December 19, 2018.

Responsibility, guilt, wrong doing, offense, right and wrong — all terms that in common parlance refer to the crime and a person's legal responsibility for it. Jurors cannot be expected to understand the nuances of these terms in the capital sentencing context, thus making it even more likely that jurors took the prosecutor at her word.

IV. Nothing in Other Instructions or Arguments Could Have Altered Mr. Grant's Jurors' Misunderstandings.

Respondent focuses on other prosecutorial arguments and other instructions to argue what happened in Mr. Grant's case was only "plausibly" erroneous. BIO at 23. In doing so, Respondent fails to credit the trial court's stamp of approval on the prosecutor's far- from-"isolated" drumbeat.

First, the record reflects the prosecutors intended to make this argument from the outset. 10/27/05 M. Tr. 11-16. Presumably, in their experienced view, the argument was both persuasive and effective. *Napue v. Illinois*, 360 U.S. 264, 270 (1959). Respondent does not acknowledge this intentional misconduct.

Second, rather than ameliorate the prosecutor's arguments with other jury instructions, as Respondent claims happened, BIO at 23, the trial court, in ruling on Mr. Grant's objections in back-to-back pronouncements, said the prosecutor was reading directly from the uniform jury instructions — the same instruction exploited by the prosecutor and commonly understood by jurors to require a nexus between the mitigating evidence and the murders. This left the jury with the

erroneous impression that the prosecutor's comments were proper and supported by the jury instructions. *Darden v. Wainwright*, 477 U.S. 168, 196 (1986) (noting trial judge's actions in overruling objection to improper summation might have suggested to jurors that the substance of the summation was "pertinent to their deliberations").

Third, neither the arguments about the list of categories of evidence presented by the defense or the actual instruction listing the evidence in general terms explained to jurors they could consider the evidence to be mitigating even if it was not connected to Mr. Grant's blame-worthiness for the murders. Nowhere does Respondent set forth the arguments that directly attacked Mr. Grant's mental health mitigation evidence. The prosecutor's words tell the tale:

> What does it [the law] say mitigating circumstances are? What does that mean when we say that something may mitigate the murder of these two women, the lives that he took? It says that *mitigating circumstances are those which reduce the moral culpability or blame of the defendant*. That those things, in order to be mitigating, *must reduce his moral culpability or blame*.

[objection overruled Tr. VIII 74.]

> It's not Sandra Elliott telling you that this will make something mitigating, *that's what the law says* . . . . And *the*

> *law says*, not Sandra Elliott, not what the defense attorneys say, but *what 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*.

Tr. VIII at 75.

[After discounting the evidence of schizophrenia at length. Tr. VIII 76-77.]

> And do you believe that somehow the fact that on some other occasion, not July 19th, 2001, but that on some other occasion he may have had a schizophrenic episode that can reduce, in the least, what Donald Grant did that day? *Does it reduce his moral culpability, his moral blame for what he did? And I would submit to you that it does not in any way*.

Tr. VIII at 78-79.

> So, while they may say to you that I'm not offering this [schizophrenia] as an excuse for Mr. Grant's behavior, *you 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.

> So I would submit to you that you look at each and every one of those mitigators. And as you go through them ask yourselves, Number One, do you believe that it actually exists because you do have to make a factual determination whether or not you believe it's true. *And then ask yourself the question, does it reduce his moral blame for what happened at the La Quinta Inn in July of 2001*? And I would submit to you that based on the aggravating circumstances that you all have heard about that *not only does it not extenuate one of them, certainly when they are all combined it does not extenuate or*

reduce his moral culpability or blame in the least.

Tr. VIII 79-80. (Emphasis added).

This rebuttal summation was what was last heard by Mr. Grant's jurors. It was not and could not be ameliorated by the earlier initial closing argument. While the prosecutor who gave the first closing was less direct about mitigating evidence — schizophrenia in particular — needing to be connected to the murders, she likewise argued, after mentioning several of the mitigating circumstances individually, that jurors would have to determine "whether or not these circumstances somehow mitigate what Donald Anthony Grant did with regard to Brenda McElyea and Suzette Smith." Tr. VIII 32. She also stated that in order for schizophrenia to be considered mitigating there would have to be evidence he "was in some type of schizophrenic mode when this crime occurred." Tr. VIII 33.

V. Conclusion.

Respondent offers nothing but the empty argument there is no nexus requirement in Oklahoma in response to Mr. Grant's request that this Court settle the existing confusion and conflicts that exist on this question in other death- penalty states. Indeed, circuit splits have come and gone,

but the confusion has remained. And this Court has not yet fully addressed this situation, where the instruction fails to inform jurors that their consideration of mitigating evidence is not limited, and the prosecutor argues that it is limited because the defense has failed to connect the mitigating circumstance to the defendant's responsibility for the murder.

Respondent recognizes mental health mitigating evidence can be compelling. BIO at 15 n.8. *See Anderson v. Sirmons*, 476 F.3d 1131, 1144 (10th Cir. 2007) (observing behaviors resulting from mental illness can be seen as "meanness" or antisocial behavior absent mental health explanation); *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) ("In my view, evidence 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 added). Respondent seeks to avoid this Court's consideration of whether Oklahoma has placed unconstitutional limitations on such compelling

evidence. This Court should grant certiorari to provide much needed clarity in this area of critical importance.

Respectfully submitted,

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