Capital Case

Case No. _____

In the Supreme Court of the United States

KENDRICK ANTONIO SIMPSON,
Petitioner,
v.
TOMMY SHARP, INTERIM WARDEN[1],
Oklahoma State Penitentiary,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Dated this 22nd of July, 2019

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[1] On July 15, 2019, Mr. Sharp became Interim Warden of the Oklahoma State Penitentiary. Pursuant Fed. R. Civ. P. 25(d), he is substituted as party respondent in place of Mike Carpenter.

Capital Case

QUESTIONS PRESENTED

1. **Does the AEDPA require federal courts to apply a doubly-deferential standard of review to the prejudice prong of the *Strickland* analysis?**

2. **May a death sentence stand when the district court erroneously applies § 2254(d) deference for the judicially-created "cause and prejudice" standard thus leading to denials of a Certificate of Appealability on a critical *Lockett v. Ohio* issue that would have been meritorious had direct appeal counsel not been ineffective in failing to raise it?**

3. **Is a state court entitled to deference under § 2254(d) when the merits adjudication ignores the fundamental principles of *Lockett v. Ohio* and *Eddings v. Oklahoma* and permits prosecutors to deliberately exploit a jury instruction by arguing a defendant's evidence must reduce his moral culpability or blame for the crime to be considered mitigating?**

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kendrick Simpson, respectfully petitions this Court and prays that a writ of certiorari issue to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit, Case No. 16-6191.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals denying relief is reported in *Simpson v. Carpenter*, 912 F.3d 542 (10th Cir. 2018) (*See* Appendix A). The federal district court's denial of the Petition for Writ of Habeas Corpus is found at *Simpson v. Duckworth*, Case No. CIV-11-96-M, 2016 WL 3029966 (W.D. Okla. May 25, 2016) (unpublished) (*See* Appendix B). The Tenth Circuit's Order denying Petitioner's Petition for Rehearing, dated February 22, 2019, is found at Appendix C. The state court decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Simpson's direct appeal (D-2007-1055) on March 5, 2010 is reported at *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010), *cert. denied*, 562 U.S. 1185 (No. 10-7485 Jan. 18, 2011) (*See* Appendix D). The OCCA's opinion denying Mr. Simpson's Original Application for Post-Conviction Relief can be found at *Simpson v. State*, No. PCD-2007-1262 (Okla. Crim. App. Oct. 13, 2010) (unpublished) (*See* Appendix E). Petitioner's Second Application for Post-Conviction Relief was denied in *Simpson v. State*, No. PCD-2012-242 (Okla. Crim. App. Mar. 8, 2013) (unpub.) (*See* Appendix F).

STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals rendered its decision denying relief on December 27, 2018. Mr. Simpson timely filed a petition for rehearing and rehearing *en banc* on February 11, 2019, which the Tenth Circuit denied on February 22, 2019. An extension of time to file the petition for a writ of certiorari was granted by Justice Sotomayor on May 9, 2019, extending the time to July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides:

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

U.S. Const. amend. XIV, § 1 provides:

> 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.

Title 28, U.S.C. § 2254(d) provides:

> 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.

STATEMENT OF THE CASE

A. The Crime.

On January 15, 2006, Jonathan Dalton, Latango Robertson, and Kendrick Simpson went to a club in Oklahoma City. The men were fairly new to Oklahoma and had not known each other before being displaced by Hurricane Katrina. Tr. IV 208-09; VII 151-52, 154. At the club, Mr. Simpson happened to walk past a group that included London Johnson, Anthony Jones, and Glen Palmer. Someone from that group challenged Mr. Simpson about his red Cincinnati Reds baseball cap. When Mr. Simpson told his friends what had happened, Mr. Dalton theorized that Mr. Simpson's hat color had probably offended some local gang members.[2] Mr. Simpson later returned to the men to make peace, extending his hand and saying "we cool." Mr. Simpson's overture was rejected when Palmer hit him in the mouth, knocking him to the floor. Club security intervened, and Simpson, Dalton, and Robertson left the club. Tr. III 28-32.

Outside in the club's parking lot, Mr. Simpson and his friends visited with some women, and at their invitation, followed them to a nearby 7-11 gas station.

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[2] The victims, Jones, Palmer, and Johnson, openly claimed gang affiliations well known in Oklahoma City. Palmer and Johnson claimed the gang set "Shotgun Crips." Tr. III 99. Crips and Bloods are rival gangs. Tr. III 101, 167. The color blue is associated with Crips. Tr. III 139-40. The color red is associated with Bloods. Tr. III 100, 139-40.

Mr. Dalton parked his car, and the men waited for the women. Unexpectedly, the men from the club – Johnson, Jones, and Palmer – pulled into the same parking lot. Mr. Simpson, Dalton, and Robertson recognized Palmer as the man who had hit Mr. Simpson. When Mr. Simpson saw the men from the club, he "switched." Tr. IV 28-29, 35-36, 39-40, 98-99. He was no longer himself, but instead, was convinced he had been followed. Mr. Simpson had been mellow up until the time the men from the club were spotted. When Mr. Palmer and his group drove out of the parking lot and onto the highway, Mr. Dalton followed.

Dalton pulled up beside Johnson, Jones, and Palmer. Mr. Simpson, who was the front-seat passenger, fired a gun into the other car, which wrecked immediately. Jones and Palmer died at the scene. Mr. Johnson survived.

B. The Trial.

Mr. Simpson's thoughts and reactions the night in question were due in large part to the effects of untreated post-traumatic-stress disorder (PTSD). Only a year or so before this incident, Mr. Simpson was gunned down by a friend in New Orleans because he refused to retaliate against someone for this friend. Mr. Simpson spent months in a coma and in the hospital recovering, having been shot in the abdomen, left flank, head, left chest, and pelvis. By all accounts, Mr. Simpson became *overly* paranoid after this – something from which he never recovered mentally. In fact, as he was still healing from this traumatic event,

Hurricane Katrina hit, ultimately displacing Mr. Simpson to Oklahoma.

Mr. Simpson was not allowed to present evidence of his PTSD at the guilt stage of his trial. OR 516-17, 9/19/07 Tr. Motion Hearing. The trial court concluded that Oklahoma "law does not provide for a diminished capacity defense except for the insanity defense and the intoxication defense." OR 516-17. However, Oklahoma does allow for the Battered Woman Syndrome defense, a subcategory of PTSD, as a way to reduce intent. OR 516-17; *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992).

In the sentencing stage, the jury received only a glimpse of the extensive traumas Mr. Simpson experienced throughout his life. One expert – Dr. Phillip Massad – diagnosed Mr. Simpson with PTSD, but his diagnosis was not explained in terms of the chronic and pervasive trauma Mr. Simpson suffered in childhood, nor was the impact of Hurricane Katrina fully explained. This was due both to defense counsel's failure to investigate and present the realities of Mr. Simpson's childhood and to the trial court's ruling that limited testimony of key mitigation witnesses.

While Mr. Simpson was presented at trial as having had a supportive childhood, in reality he suffered years of neglect and sexual abuse, which precipitated an addiction to drugs and alcohol. The violence that invaded his home and the neighborhoods of his youth – New Orleans's Ninth Ward –

followed him into adulthood. Only Mr. Simpson's mother, grandmother, aunt, and former girlfriend were called to testify about him. And, none of them detailed the multiple traumas to which Mr. Simpson was exposed as a child. Instead, the women were limited to testifying only about their love and support for Mr. Simpson.

Against this incomplete and distorted backdrop, the prosecution's star witness,[3] an experienced jailhouse snitch, painted Mr. Simpson as a continuing threat. He testified that Mr. Simpson was a cold-blooded killer; someone who hunted down three men and riddled their car with bullets; and a monster, callous to the grief of his victims' families, looking to harm them. The prosecution never turned over exculpatory evidence that would have impeached its star witness: The witness was himself a Crip gang member with a motive to bury Mr. Simpson for killing his "homeboy;" he had more criminal convictions than he acknowledged; he had fabricated a similar jailhouse confession story about a defendant in another case; and he was a serial deal-maker who expected prosecutorial assistance for his testimony. Mr. Simpson's jury knew none of this.

[3] Mr. Simpson's co-defendants, Dalton and Robertson, both cut deals with the prosecution in exchange for testifying against Mr. Simpson. They each received concurrent 20-year sentences for accessory to murder. Robertson was released from custody on May 3, 2013, and Dalton on August 30, 2013.

Finally, the prosecutors argued that *all* of Mr. Simpson's mitigation evidence was irrelevant because it did not fit the skewed definition continued in one of Oklahoma's uniform jury instructions – i.e., none of Mr. Simpson's mitigation evidence reduced "his moral culpability" for the crime, and therefore, the jurors were not permitted to consider it.

In the end, Mr. Simpson was presented as a callous killer. His PTSD diagnosis was excluded from first-stage proceedings. His mitigation evidence was scant because of defense counsel's ineffectiveness in investigating and presenting it and because of the trial court's ruling preventing Mr. Simpson's girlfriend from testifying about the personal trauma she and Mr. Simpson suffered in Katrina's deadly wake. And, finally, the minimal mitigation evidence presented was rendered ineffectual by the prosecution's manipulation of a skewed jury instruction.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari on Question One and Unequivocally Clarify that the AEDPA Does Not Require Federal Courts to Apply a Doubly Deferential Standard of Review to the Prejudice Prong of the *Strickland* Analysis.

A. Introduction.

In reviewing whether Mr. Simpson was prejudiced by the acknowledged ineffective assistance of trial counsel at sentencing, the Tenth Circuit imposed

an extra layer of deference beyond that required by the AEDPA. This Court has never applied double deference to the prejudice prong of *Strickland*. However, the Tenth Circuit and other federal courts have allowed the "double deference" notion to bleed over into the all-important prejudice analysis even when, as here, deficiencies in counsel's performance are acknowledged. The only deference appropriate in this analysis comes from the AEDPA and is afforded to the state court that adjudicates *Strickland* prejudice. The Tenth Circuit's reliance on double deference here resulted in a tainted, and incorrect, no-prejudice determination.

B. The Tenth Circuit's Approach Unconstitutionally Tipped the Scales Toward a No-Prejudice Determination.

On review, the Tenth Circuit identified four sentencing-stage errors: 1) prosecutorial misconduct; 2) counsel's deficient performance in failing to investigate and present further mitigation evidence of Mr. Simpson's trauma-filled upbringing; 3) counsel's deficient performance in failing to object to the prosecutorial misconduct; and 4) counsel's deficient performance in failing to object to the heinous, atrocious, or cruel aggravator jury instruction. *Simpson v. Carpenter,* 912 F.3d 542, 603 (10th Cir. 2018). The circuit court concluded that Mr. Simpson was not prejudiced by the individual ineffective-assistance-of-

counsel errors or by their cumulative effect.[4]

In assessing the prejudice prong for counsel's failure to object to the prosecutorial misconduct, the circuit court clearly "review[ed] the OCCA's prejudice determination under AEDPA's and *Strickland*'s doubly deferential standard of review." *Id*. at 599. Double deference with respect to ineffective assistance of counsel claims applies only to the *performance* prong of the analysis. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("Even under *de novo* review, the standard for judging counsel's representation is a most deferential one"); *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (taking "a 'highly deferential' look at counsel's *performance* through the 'deferential' lens of § 2254(d)"). *See also Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's *performance* must be highly deferential.") (emphasis added);

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[4] The Tenth Circuit also exercised its discretion to proceed directly to a prejudice/materiality question regarding a *Brady* claim that affected sentencing. 912 F.3d at 572. The court acknowledged in a separate but related prejudice determination that withheld evidence related to a jailhouse informant, including: his prior gang affiliation with the same gang as the victims; additional criminal convictions; similarities in two jailhouse confession stories; and the informant's expectation of prosecutorial assistance in exchange for his testimony, "could have been used to impeach" the witness's testimony as it related to an aggravating circumstance. *Id*. The court focused solely on the impeachment evidence that was introduced and the strength of the State's aggravating evidence to conclude the withheld evidence was not material, and therefore, not prejudicial. The circuit court analyzed the *Brady* materiality/prejudice claim in isolation, without assessing the cumulative prejudice from the *Brady* and IAC claims.

Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (per curiam) (finding that in assessing *performance* prong, "federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt'") (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). In other words, there is no initial layer of deference given to trial counsel in the prejudice analysis under *Strickland*.

Reviewing prejudice under the proper standard – one free from a doubly deferential review – reveals the resulting harm in this case. "[N]early all of the prosecutorial arguments Mr. Simpson challenges . . . were improper." *Simpson*, 912 F.3d at 599. And, trial counsel's "[f]ailing to [object] 'fell below an objective standard of reasonableness.'" *Id*. (quoting *Strickland*, 466 U.S. at 688). Indeed, three separate instances of counsel's deficient performance are components of the proper prejudice determination.[5] *See Strickland*, 466 U.S. at 695 (noting "a court hearing an ineffectiveness claim" must not simply evaluate prejudice in isolation, but "must consider the totality of the evidence"); *Williams v. Taylor*, 529 U.S. 362, 364 (2000); *Cargle v. Mullin*, 317 F.3d 1196, 1220-21 (10th Cir. 2003). Because these acknowledged improper prosecutorial arguments went unchecked due to counsel's failure to object, Mr. Simpson was denied a

[5] Counsel performed deficiently in failing to object to "the Moral Culpability Comments and comments denigrating the evidence in mitigation, comparing the victims' deaths to Mr. Simpson's incarceration, and calling for the death penalty as a civic duty" – many of which related to the other recognized errors. 912 F.3d at 599.

fundamentally fair sentencing trial, warranting relief.

C. There Is Confusion and Lack of Uniformity in the Circuit Courts on This Question.

The Tenth Circuit expressly stated it was "review[ing] the OCCA's *prejudice* determination under AEDPA's and *Strickland*'s doubly deferential standard of review." *Simpson*, 912 F.3d at 599. This Court's precedent makes clear there is no doubly deferential standard to be applied to the prejudice analysis under *Strickland*. However, the Tenth Circuit, as well as other circuit courts, have deviated from this Court's teachings by applying this doubly deferential standard of review.

Even within the Tenth Circuit, confusion exists. *Cf. Postelle v. Carpenter*, 901 F.3d 1202, 1219 (10th Cir. 2018) (giving the OCCA deference, but not double deference, for its *prejudice* determination); *Simpson*, 912 F.3d at 599; *Hanson v. Sherrod*, 797 F.3d 810, 826 (10th Cir. 2015) (noting *Strickland* review is generally "doubly" deferential, but not clearly separating prejudice from performance and such double deference). Other circuits have struggled similarly.

Like the Tenth Circuit, the Fourth, Seventh, and Ninth Circuits have remained at odds and been inconsistent in their respective approaches. *See*, *e.g.*, *Elmore v. Ozmint,* 661 F.3d 783, 876 (4th Cir. 2011) (finding that because deficient performance and prejudice are related, it is "unsurprising" courts apply

doubly-deferential standard to both performance and prejudice prongs); *Thompkins v. Pfister*, 698 F.3d 976, 988 (7th Cir. 2012) (failing to separate performance and prejudice analyses from "our doubly deferential standard of review"). *But see Hardy v. Chappell*, 849 F.3d 803, 825 (9th Cir. 2017) (noting double deference does not apply to prejudice prong). *Cf. Apelt v. Ryan*, 906 F.3d 834, 840 n.7 (9th Cir. 2018) (mem.) (suggesting review of state court prejudice decision is doubly deferential).

While these circuits have struggled to solidify their approach,[6] the Sixth Circuit has interpreted *Cullen v. Pinholster*, 563 U.S. 170 (2011) as requiring application of the doubly-deferential standard to the prejudice-prong analysis. *Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011). Indeed, the Sixth Circuit has expressly held:

> The combined effect of *Strickland* and § 2254(d) is "doubly deferential" review. *Pinholster*, 131 S.Ct. at 1403 (quoting *Knowles v. Mirzayance*, 556 U.S. 111 (2009)). Put differently, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 131 S.Ct. at 788. . . . We therefore afford double deference to both state-court decisions on both prongs of the *Strickland* test.

655 F.3d at 533-34.

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[6] It has yet to be seen how the Second Circuit will decide the issue. *Waiters v. Lee*, 857 F.3d 466, 477 n.20 (2d Cir. 2017) ("Whether such heightened deference applies to both prongs of a *Strickland* claim, or only to the ineffective assistance prong, remains an open question in this Circuit.")

Juxtaposed with the Sixth Circuit, the Eleventh Circuit has noted that "with respect to [the prejudice] prong there is no underlying deference." *Evans v. Secretary of Department of Corrections*, 703 F.3d 1316, 1334 (11th Cir. 2013) (en banc) (Jordan, J. concurring). The rationale is that "the prejudice question is, in the end, a legal one. There is no 'what' to analyze. There is only the ex post legal determination, by a court based on a hypothetical construct with counsel's errors corrected, as to whether the defendant was or was not prejudiced by his counsel's actions or omissions." *Id*. at 1334. *Evans* went on to warn against the use of a double-deference application in name only. "Unwarranted consequences can result when a 'phrase takes on a life of its own, and before too long . . . starts being applied to situations . . . removed from its intended and proper context.'" *Id*. at 1336. "[T]he erroneous notion that there is another level of deference out there somewhere may tip the scales and work to deny relief to deserving habeas petitioners." *Id*.

This is what happened to Mr. Simpson.

D. This Is a Critical Question.

As evidenced by the circuits' differing approaches, there is confusion and conflict amongst the circuits as to the standard of review to be applied to the prejudice prong of the *Strickland* analysis. Only this Court can clarify its language in *Strickland* and *Pinholster* to give rest and consistency to this issue.

Such clarity should come in the form of unambiguous language dictating that double deference applies only to the performance prong. Otherwise, the circuit courts will continue either deliberately or imprecisely to allow double deference in prejudice determinations.

It is critical that this Court clarify its position on this issue, and Mr. Simpson's case presents the appropriate vehicle because of the acknowledged errors found here. This is a capital case. And, this Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Petitioner respectfully prays this Court grant the petition for a writ of certiorari to make clear that the AEDPA does not require federal courts to apply a doubly-deferential standard of review to the prejudice prong of the *Strickland* analysis.

II. This Court Should Grant Certiorari on Question Two and Clarify that the AEDPA's Deferential Standard Does Not Apply to a "Cause and Prejudice" Determination on Whether a Petitioner Has Overcome a Procedural Default.

A. A Crucial *Lockett* Claim Was Defaulted – Merits Were Never Considered.

Roughly a year before the underlying crime, Mr. Simpson experienced firsthand the devastation of Hurricane Katrina in his native New Orleans. He survived the storm, but not without trauma. Mr. Simpson and his girlfriend, De'Andrea Lagarde, escaped to Oklahoma only after being exposed to trauma as

catastrophic as the hurricane itself.

While a few witnesses testified that Mr. Simpson was relocated to Oklahoma after Hurricane Katrina destroyed much of New Orleans, almost unbelievably, no one testified about the specific traumas Mr. Simpson was subjected to during this infamous storm and its devastating aftermath. Tr. IV 208-09, Tr. VII 105, 141, 152, 218. Instead, prosecutors shamed Mr. Simpson for taking advantage of Oklahoma when Oklahoma had been so "good" to resettle him and his buddies. Tr. VI 70. The prosecution also argued Mr. Simpson was not a "real Hurricane Katrina survivor[]" who could suffer from post-traumatic stress. Tr. VIII 27-28 ("[I]t's an insult to all legitimate people with PTSD. They don't go around killing people.").

Mr. Simpson's girlfriend, Ms. Lagarde, who had survived the storm with Mr. Simpson, was not allowed to provide the firsthand account of the harrowing experiences she and Mr. Simpson endured as "real Hurricane Katrina survivors." Instead, the trial court limited Ms. Lagarde to testifying only "about whether she cares about [Simpson] and will she visit [Simpson] in prison and all of that." Tr. VII 216. The trial court's limitation came after the prosecutors meshed a vague "discovery" violation with arguments that Ms. Lagarde's

testimony would be "cumulative," "irrelevant," and "hearsay." Tr. VII 214-16.[7]

Had Ms. Lagarde been allowed to testify as to these experiences, she would have described how she and Mr. Simpson were caught in the violent storm; how they watched levees fail and flood waters rise; how they were stranded in the notorious Ninth Ward until they were finally rescued by boat; how they were dropped off amongst the masses on the I-10 bridge without food or water; how they tried to find shelter in the chaos of the Convention Center; and how they eventually escaped New Orleans with others on a cramped utility truck. *Simpson v. State,* D-2007-1055, *Application for an Evidentiary Hearing* at 8-9, Ex. A8 (Okla. Crim. App. Oct. 27, 2008) (Affidavit of De'Andrea Lagarde); *Simpson v. State*, PCD-2007-1262, *Original Application for Post Conviction Relief* at 32-38 (Okla. Crim. App. Aug. 12, 2009).

[7] None of these objections were valid. There are no Oklahoma rules justifying the exclusion of this type of evidence. Even if there were such rules, however, state courts cannot mechanistically apply them to infringe on a defendant's constitutional right to present mitigating evidence in a capital case. *See generally Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982). *See also Paxton v. Ward*, 199 F.3d 1197, 1214 (10th Cir. 1999).

These personal experiences of devastation and trauma[8] are the kinds of truths jurors understand in a visceral way – ones that often lead to a sentence less than death. This is the type of information that should have been presented in Mr. Simpson's mitigation case, giving the jurors an understanding of how Mr. Simpson could have overreacted in response to a stressful situation. Ms. Lagarde would have testified that Mr. Simpson's paranoia that there were men out to get him intensified during their flight from the conditions caused by Katrina. *Simpson v. State*, D-2007-1055, *Appl. Evid. Hrg.* at Ex. A8. *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (noting relevance of "intense stress and mental and emotional toll" from "extreme hardship and gruesome conditions"). The exclusion of this mitigation evidence was a cognizable constitutional claim appellate counsel surely should have pursued. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).

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[8] Hurricane Katrina killed over 1,000 people. Experts recognize what layman expected – "mental illness flooded into New Orleans as Katrina's waters receded." Donovan X. Ramsey, *Recovering from PTSD After Hurricane Katrina*, The Atlantic, Sept. 1, 2015, *available at* https:// www.theatlantic.com/health/ archive/2015/09/ptsd-after-hurricane-katrina/403162/. Such expert knowledge existed at the time of Simpson's trial. *See* Mary Alice Mills, et al., *Trauma and Stress Response Among Hurricane Katrina Evacuees*, Am. J. Pub. Health, 2007 Apr., 97 (Suppl 1) S116-S123, available at https://www.ncbi.nlm.nih.gov/pmc/ articles/PMC1854990/.

Due to the ineffective assistance of direct appeal counsel, however, the exclusion of this evidence was not raised until Mr. Simpson's state post-conviction proceedings. Abstaining from adjudicating the claim on the merits, the Oklahoma Court of Criminal Appeals ruled Mr. Simpson waived review of the claim by not raising the issue on direct appeal. *Simpson v. State*, PCD-2007-1262, *Opinion Denying Application for Post-Conviction Relief* at 7 (Okla. Crim. App. Oct. 13, 2010) (*See* Appendix E). The federal district court did not review the claim on the merits either, ruling it procedurally barred. In evaluating whether Mr. Simpson could establish "cause and prejudice" to excuse the default, the district court afforded AEDPA deference to the state court's default finding, citing *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 746 (10th Cir. 2016). *Simpson v. Duckworth*, 2016 WL 3029966 at 23 (*See* Appendix B). A Certificate of Appealability to the Tenth Circuit was denied.

B. When Applying the Judicially-Created "Cause and Prejudice" Standard, No Deference Is Owed to State Court Conclusions.

The doctrine that a petitioner can overcome a state's procedural default by showing "cause" for the default and "prejudice" is a *federal* doctrine predating the enactment of the AEDPA. *Francis v. Henderson*, 425 U.S. 536, 539-40 (1976). The AEDPA, with deference to state-court adjudications on the merits of "claims," did not alter the pre-existing standards for evaluating "cause."

Woodford v. Ngo, 548 U.S. 81, 91 n.2 (2006) (quoting Justice Stevens' dissent at 108 n.5) ("[H]abeas law includes 'the judge-made doctrine of procedural default'"). Thus, because "cause and prejudice" determinations are not "claims" adjudicated on the merits, they are not entitled to deference under the AEDPA. *Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015).

Any question as to whether the procedural default doctrine is subject to the deference principles of § 2254(d) begins with "the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 2254(d) of the AEDPA specifically notes that it applies only to "claims" already "'adjudicated on the merits in State court proceedings.'" *Appel v. Horn*, 250 F.3d 203, 209 (3d Cir. 2001). And, the word "claim" is to be given its "ordinary, contemporary, common meaning," i.e., a *substantive* request for relief. *Bilski v. Kappos*, 561 U.S. 593, 603 (2010).

As noted, at no point has Congress expanded the ordinary meaning of "claim" to encompass a procedural default "cause and prejudice" determination. *Cristin v. Brennan*, 281 F.3d 404, 413 (3d Cir. 2002). *See also Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014); *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999). Had Congress intended for the AEDPA to change the concept of "cause and prejudice" to require deference, it would have specifically made such provisions. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474

U.S. 494, 501 (1986). By not providing as much, however, Congress clearly did not intend deference to be given to such state court decisions.

Here, the federal courts each gave deference to the OCCA's determination that the excluded mitigation evidence claim was procedurally barred, thereby bypassing review on the merits. By deferring to the state court on matters of "cause and prejudice," the federal court's duty to consider the nature of the constitutional claim and how it affected "the calculation of cause and actual prejudice" was eviscerated. *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

C. There Is a Lack of Uniformity in the Circuit Courts.

As evidenced by this case, the Tenth Circuit has expanded the AEDPA to require federal courts to grant deference to state courts for something other than a "claim adjudicated on the merits." *Simpson*, 912 F.3d at 562 n.7. *See also Ryder*, 810 F.3d at 746; *Turrentine v. Mullin*, 390 F.3d 1181, 1201-02 (10th Cir. 2004); *Ellis v. Hargett*, 302 F.3d 1182, 1186-87 (10th Cir. 2002). In doing so, the Tenth Circuit has impermissibly "replace[d] what Congress said with what it thinks Congress ought to have said." *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (Scalia & Souter, JJ., dissenting).

This is not compatible with what this Court has said. In *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), this Court distinguished a "cause" from a "ground for relief," noting that Martinez was relying on the ineffectiveness of his post-

conviction attorney as "cause" to excuse a failure to comply with a state procedural rule.[9] The Court distinguished this from "an independent basis for overturning [the] conviction." *Id.* Appellate counsel's ineffectiveness as "cause" is not a separate "claim" or an "independent basis for overturning [the] conviction." *Id.* Rather, it is a judicially-created mechanism excusing an otherwise procedurally-barred claim from being reviewed on the merits.

Unfortunately, other circuit courts have followed suit alongside the Tenth Circuit in granting deference to this determination. Namely, the Seventh Circuit has aligned itself with the Tenth Circuit while the Third and Sixth Circuits have continued to stay the course in not granting deference. *Richardson v. Lemke*, 745 F.3d 258, 272-73 (7th Cir. 2014) (describing split). *Cf. Fischetti v. Johnson*, 384 F.3d 140, 154-55 (3d Cir. 2004) (holding standard for evaluating a constitutional claim is different than that used in evaluating "cause" to avoid default of another claim); *Hall v. Vasbinder*, 563 F.3d 222, 236-37 (6th Cir. 2009) (holding "an argument that ineffective assistance of counsel should excuse a procedural default" need not satisfy § 2254(d)). Several other circuit courts have acknowledged the circuit split yet have not yet decided the issue. *See Bramble v. Griffin*, 543 F. App'x 1, 4 n.1 (2d Cir. 2013); *Janosky v. St. Amand*, 594 F.3d

[9] Although the *Martinez* Court was addressing a "ground for relief" within the context of §2254(i) rather than a "claim" under § 2254(d), these terms and principles are interchangeable. *Id.*

39, 45 (1st Cir. 2010) (assuming, without deciding, *de novo* review applies); *Visciotti v. Martel*, 862 F.3d 749, 769 n.13 (9th Cir. 2017). The lack of unity on this issue has opened up the possibility for fundamental unfairness.

Were it not for the deference granted the OCCA's "cause and prejudice" determination here, the merits of the clearly meritorious *Lockett* claim would have given way to relief under this Court's clearly-established law. This Court should grant the Writ and settle the circuits' dispute by determining that a "cause" determination is not subject to deferential standards under the AEDPA. This clarity will, in turn, assure the Writ of Habeas Corpus remains the "bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

III. Failure of This Court to Grant Certiorari on Question Three Would Put The Fundamental Principles from *Lockett v. Ohio* at Risk.

A. Continued Manipulation Against Mitigation Consideration.

This Court has made clear that the Eighth and Fourteenth Amendments require that a sentencer in a 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 v. Ohio*, 438 U.S. 586, 604 (1978). In other

words, nothing should interfere with a defendant's ability to present mitigating evidence or have the same be considered when attempting to save a defendant's life. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

For years, Oklahoma instructed its juries to the contrary, limiting mitigating circumstances to those that "may extenuate or reduce the degree of moral culpability or blame" for the crime. OR III 604. While the Oklahoma Court of Criminal Appeals finally acknowledged the years-long disconnect between controlling Supreme Court law and this instruction by directing that the instruction be redrafted, it did so only because of Oklahoma prosecutors' manipulation of the instruction's language. *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007) ("This Court is troubled, however, by the consistent misuse of the language in this instruction in the State's closing arguments."). This manipulation has continued as it did here. *Simpson v. Carpenter*, 912 F.3d 542, 577-81 (10th Cir. 2018); *Grant v. Royal*, 886 F.3d 874, 966 (10th Cir. 2018) (Moritz, J., dissenting) (noting the majority does not dispute the prosecutor's comments were an egregious misstatement of law on mitigating evidence). *See also Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 893-95 (10th Cir. 2019); *Johnson v. Carpenter*, 918 F.3d 895, 906-907 (10th Cir. 2019).

In Mr. Simpson's case, the prosecution made a point of denigrating *each and every* component of Mr. Simpson's mitigation case – his age, mental condition, and family support – by telling jurors the restrictive language in the instruction did not permit their consideration of Mr. Simpson's mitigation.[10] OR

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[10] Attacking Mr. Simpson's **young age**, the prosecution argued: "How in the world does his age reduce his degree of moral culpability or blame for this murder? It doesn't." Tr. VIII 24. Attacking Mr. Simpson's **family support**, the prosecution argued: "How in the world does hiding behind his family support reduce his degree of moral culpability or blame? Of course, they'd go to the penitentiary to see him. Of course they would. You know, they're good people. These victims can't. They can go to the cemetery." Tr. VIII 25. Attacking Mr. Simpson's **mental condition**, the prosecution argued: "Does mitigating circumstance reduce his degree of moral culpability or blame? . . . Not one bit. Not his age, not his family, certainly not them. . . . And his mental condition . . . [t]here's not one bit of evidence that reduces his degree of moral culpability or blame." Tr. VIII 31.

Again manipulating the unconstitutional restriction with respect to mental condition, the prosecution argued: "'Okay. Well, it's a mitigating factor that I've got PTSD.' You get back to the room and you say, 'How in the world does that reduce his degree of moral culpability or blame for this case?' It doesn't. It doesn't." Tr. VIII 32. Continuing the barrage:

> Let's talk about the mitigators. Mitigating circumstances are those which in fairness, sympathy, and mercy may extenuate or reduce the degree of moral culpability or blame. Ask yourselves, does this Defendant have PTSD? If he does, does it reduce the degree of moral culpability or blame? I would submit to you, no way. Not even close. . . . there's no way it reduces the degree of his moral culpability and blame. Tr. VIII 61.

Attacking the whole of Mr. Simpson's mitigating evidence, the prosecution argued: "There is not one bit of mitigating evidence that reduces his degree of moral culpability. That's what the *law* is." Tr. VIII 31.

Again, when asking for death, the prosecution argued:

> Look at his mitigating evidence and ask yourselves, how in the world does that reduce his blame for this incident? It doesn't. It's not even close. That's why I said, the right thing is not easy, but it's

III 605. Limiting consideration of these circumstances to whether they reduced Mr. Simpson's culpability violates *Lockett*, 438 U.S. at 604 (holding sentencers must "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"). *See also Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

On direct appeal, the OCCA concluded the prosecutor's closing argument concerning the mitigating evidence instruction and the mitigating evidence itself did not unfairly limit the jury consideration of the evidence. *Simpson v. State*, 230 P.3d 888, 904 (Okla. Crim. App. 2010). On habeas, the federal district court concluded "Petitioner has failed to show that this decision by the OCCA is contrary to or an unreasonable application of *Lockett*." *Simpson v. Duckworth*, 2016 WL 3029966 at 24 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)) (*See* Appendix B). The Tenth Circuit denied relief "[u]nder AEDPA's deferential standard of review," but not without first citing *Lockett* and acknowledging Mr. Simpson's case "evidences significant and troubling prosecutorial comments that, standing alone, might violate federal constitutional law." *Simpson*, 912

> always the right thing. Any sentence of less than death, which they'd be perfectly happy with, diminishes what he's done, what his actions have done. Tr. VIII 33.

F.3d 542, 581 (10th Cir. 2018). In fact, the Tenth Circuit chastised:

> The prosecution's misuse of the instruction here occurred despite defense counsel's motion for an order in limine prohibiting precisely this type of argument. Furthermore, at the time of the prosecutor's argument, both this court and the OCCA had previously held that such comments are improper and risk erroneously informing the jury that it cannot consider legally relevant mitigating evidence. *See Le v. Mullin*, 311 F.3d 1002, 1017–18 (10th Cir. 2002); *Harris v. State*, 164 P.3d 1103, 1113–14 (Okla. Crim. App. 2007). We find ourselves yet again chastising prosecutors for engaging in the kind of inappropriate behavior that undermines our constitutional protections and "create[s] grave risk of upsetting an otherwise unobjectionable verdict on appeal or on collateral review. It is time to stop." *See Bland v. Sirmons*, 459 F.3d 999, 1028 (10th Cir. 2006). We remind prosecutors they are representatives of the government and "servant[s] of the law." *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Their obligation is not to "win a case, but [to see] that justice shall be done." *Id.* "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one," *id*., and there is no place in the law for those who would do otherwise.

Id. at 582 n.28.

This Court has already made clear how critically important it is for jurors to be allowed to consider and give effect to *any* evidence that mitigates against the death penalty and how a prosecutor's distortion of the law can render a death sentence unreliable. *See also Eddings*, 455 U.S. at 113; *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 (1985) (vacating death sentence after finding prosecutorial argument distorted jury's understanding of its sentencing responsibilities, thus rendering the death verdict incompatible with the Eighth

Amendment's heightened degree of reliability). Yet, many courts are granting deference to decisions precluding the jury's consideration of such evidence. This Court's intervention is needed to protect against further encroachment on a defendant's right to present mitigating evidence and have that evidence considered.

B. This Court Should Establish a Unified Approach to Rescue Inconsistencies by States' Highest Courts and Circuit Courts of Appeals on This Question.

This Court's intervention has been necessary to bring other state and federal courts back in line with this Court's precedent. In fact, although Oklahoma, in *Eddings,* was among the first death penalty states to wrongly require mitigating evidence to connect to criminal responsibility, it has not been the only one. Imposition of a "nexus" requirement has similarly plagued death penalty schemes in Texas, Arizona, and California, among other jurisdictions.

In Texas, juries have had to answer special issues about whether the defendant caused the death deliberately; whether it was done 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 answer is yes, the trial judge automatically imposes the death penalty.

This Court has reversed Texas death sentences where juries are prohibited from considering or giving effect to mitigating evidence not specifically connected to the answers of the special issues. In *Penry I*, this Court held that when a defendant places mitigating evidence before the jury, the trial court must give an instruction to allow the jury to consider and give effect to this evidence in its "reasoned moral" response to whether the defendant should live or die. *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989). In *Penry II*, this Court held a confusing instruction on the connection between mitigating evidence 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, 797 (2001). And, 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. *See also Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (noting jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no casual "nexus" to a defendant's crime).

Like Texas, Arizona has applied a causal-nexus test for non-statutory mitigating evidence, before finally abandoning that practice. *See State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005); *State v. Newell*, 132 P.3d 833, 849

(Ariz. 2006).[11] 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). *See also Hedlund v. Ryan*, 854 F.3d 557, 587 (9th Cir. 2017); *Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018).

Unlike Oklahoma, California has a death penalty statute that specifically requires the jury to consider eleven statutory mitigating factors. When California jurors also were given a catch-all instruction, which allowed jurors to consider and give effect to any other circumstances that extenuated the gravity of the crime even though they were not an excuse for the crime, this Court concluded the instruction did not limit the jury's consideration to only circumstances that extenuated the crime. *Boyde v. California*, 494 U.S. 370, 381-82 (1990).

This Court's ruling in *Boyde* rested on the fact that California jurors were being told they must consider other mitigating factors. Oklahoma does not have such a provision, and in fact, Oklahoma prosecutors are using the language of

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[11] Though no longer requiring a causal nexus between the mitigating factors and the crime, the Arizona court has continued to find that the failure to establish such a causal connection can be considered in assessing the quality and strength of the mitigating evidence. *Newell*, 132 P.2d at 849.

the skewed instruction to argue the law does not permit consideration of other mitigating factors. Like the many other cases coming out of Oklahoma, in Mr. Simpson's case, there is a reasonable likelihood the jurors understood the vague instruction and the prosecutor's repeated misstatements of "the law" to prevent them from considering relevant mitigating evidence that was offered for a sentence of less than death.

This cannot be permitted under the Constitution. Federal courts should not give AEDPA deference on this issue when the lower courts fail to apply *Lockett* and *Eddings* because these lower court rulings are contrary to clearly established Supreme Court law. *De novo* review is appropriate in such circumstances.

The "nexus" issue – in its many forms – will continue its assault on the principles of *Lockett* and *Eddings* without intervention from this Court. In Oklahoma, the "nexus" requirement, which is illustrated not only through skewed jury instructions, but also through their continued manipulation via prosecutorial argument, has survived despite this Court's clear statements 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 prosecutors' misstatements of the law on mitigation has on jurors. This Court should clarify that courts cannot use the

"nexus" requirement to allow instructions or prosecutorial arguments to limit jurors from giving meaningful consideration to relevant mitigating evidence.

CONCLUSION

There were several acknowledged constitutional errors, and a *Brady* claim was determined on materiality grounds without consideration of prejudice from other errors. The circuit court elevated AEDPA principles of deference beyond that called for by Congress. The end result was that Mr. Simpson's death sentence was upheld despite ineffective assistance of counsel and prosecutorial misconduct. The jurors who made the ultimate death decision were prevented from considering certain mitigation evidence (Hurricane Katrina) and were told the law did not allow them to consider the rest of the mitigation evidence because it did not reduce Mr. Simpson's blame for the crime. The death sentence is unreliable, and this Court must cabin the AEDPA to its congressional purpose but not more.

Respectfully submitted,

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