No. ___________

IN THE

Supreme Court of the United States

RAYMOND EUGENE JOHNSON,

Petitioner,

v.

TOMMY SHARP, INTERIM WARDEN,*
OKLAHOMA STATE PENITENTIARY,

Respondent.

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

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* Pursuant to Federal Appellate Procedure 43(c)(2), Tommy Sharp, current Interim Warden of Oklahoma State Penitentiary, is automatically substituted for Mike Carpenter, Warden, as Respondent in this case.

CAPITAL CASE

QUESTIONS PRESENTED

1. **Should the Court recalibrate the frameworks for judging the prejudice or harm of capital sentencing errors in jurisdictions where the factfinder may decline to impose a sentence of death without restriction, for example even if aggravating circumstances outweigh mitigating circumstances?**

2. **Should the Court clarify its *Lockett v. Ohio*, 438 U.S. 586 (1978)-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the crime or its aggravating circumstances?**

List of Parties to the Proceeding

Petitioner Raymond Eugene Johnson and Respondent Warden of Oklahoma State Penitentiary have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Randall Workman, Anita Trammell, Maurice Warrior, Kevin Duckworth, Jerry Chrisman, Terry Royal, Mike Carpenter, and presently Tommy Sharp, Interim Warden.

TABLE OF CONTENTS

Question Presented ii

List of Parties iii

Table of Contents iv

Index of Appendices vi

Table of Authorities vii

Petition for Writ of Certiorari 1

Opinions/Proceedings Below 1

Jurisdiction 2

Statutory Provisions 2

Constitutional Provisions 4

Statement of the Case 5

Reasons the Petition Should Be Granted 21

I. This Court should grant certiorari to recalibrate the frameworks for judging the prejudice or harm of capital sentencing errors in jurisdictions where the factfinder may decline to impose a sentence of death without restriction, for example even if aggravating circumstances outweigh mitigating circumstances 21

A. Introduction 22

B. Capital Sentencing Prejudice and Unreliability 28

II. This Court should grant certiorari to clarify its *Lockett*-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the crime or its aggravating circumstances 33

Conclusion 40

INDEX OF APPENDICES

APPENDIX A: *Johnson v. Carpenter*, 918 F.3d 895 (10th Cir. 2019) Tenth Circuit opinion denying relief (March 19, 2019)

APPENDIX B: *Johnson v. Carpenter*, 10th Cir. No. 16-5165, Order denying petition for rehearing (April 29, 2019)

APPENDIX C: *Johnson v. Royal*, No. CIV-13-0016-CVE-FHM, (N.D. Okla. October 11, 2016) (unpub.) (federal district court opinion denying relief)

APPENDIX D: *Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012) (state court opinion denying direct appeal D-2009-702)

APPENDIX E: *Johnson v. State*, No. PCD-2009-1025 (Okla. Crim. App. Dec. 14, 2012) (unpub.) (state court opinion denying application for post-conviction relief)

APPENDIX F: *Johnson v. State*, No. PCD-2014-123 (Okla. Crim. App. May 21, 2014) (unpub.) (state court opinion denying second application for post-conviction relief)

APPENDIX G: *Johnson v. Carpenter*, Application No. 19A66; Letter granting application for extension of time to file a petition for certiorari

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Blystone v. Pennsylvania,
494 U.S. 299 (1990) 24, 25

Boyde v. California,
494 U.S. 370 (1990) 24, 25

Bullington v. Missouri,
451 U.S. 430 (1981) 22

Burger v. Kemp,
483 U.S. 776 (1987) 40

California v. Ramos,
463 U.S. 992 (1983) 22

Chambers v. Mississippi,
410 U.S. 284 (1973) 11

Clemons v. Mississippi,
494 U.S. 738 (1990) 27, 30

Eddings v. Oklahoma,
455 U.S. 104 (1982) 37, 39, 40

Furman v. Georgia,
408 U.S. 238 (1972) 23

Green v. Georgia,
442 U.S. 95 (1979) 11

Hodge v. Kentucky,
568 U.S. 1056 (2012) 39

Johnson v. Oklahoma,
568 U.S. 822 (2012) 18

Kansas v. Marsh,
548 U.S. 163 (2006) 25

Lockett v. Ohio,
438 U.S. 586 (1978) . . . . ii, 8, 11, 21, 30, 33, 40

McCleskey v. Kemp,
481 U.S. 279 (1987) 24, 33

Payne v. Tennessee,
501 U.S. 808 (1991) 33

Penry v. Johnson,
532 U.S. 782 (2001) (*Penry II*) 38

Penry v. Lynaugh,
492 U.S. 302 (1989) (*Penry I*). 23, 24, 26, 28, 37, 38

Satterwhite v. Texas,
486 U.S. 249 (1988) 22

Skipper v. South Carolina,
476 U.S. 1 (1986) 36, 40

Smith v. Texas,
543 U.S. 37 (2004) 38

Strickland v. Washington,
466 U.S. 668 (1984) 28, 29, 30

Tennard v. Dretke,
542 U.S. 274 (2004) 36, 37, 38

Walton v. Arizona,
497 U.S. 639 (1990) 25

Woodson v. North Carolina,
428 U.S. 280 (1976) 26

FEDERAL CASES

Andrews v. Davis,
866 F.3d 994 (9th Cir. 2017) 39

Bland v. Sirmons,
459 F.3d 999 (10th Cir. 2006) 29

Cuesta-Rodriguez v. Carpenter,
916 F.3d 885 (10th Cir. 2019) 35

Grant v. Royal,
886 F.3d 874 (10th Cir. 2018) 35

Hanson v. Sherrod,
797 F.3d 810 (10th Cir. 2015) 35

Harmon v. Sharp,
___ F.3d ___, 2019 WL 4071870 (10 Cir. Aug. 29, 2019) 35

Hedlund v. Ryan,
854 F.3d 557 (9th Cir. 2017) 39

Holsey v. Warden, Georgia Diagnostic Prison,
694 F.3d 1230 (11th Cir. 2012) 29

Jermyn v. Horn,
266 F.3d 257 (3d Cir. 2001) 29, 30

Johnson v. Carpenter,
918 F.3d 895 (10th Cir. 2019) 1, 6, 20, 21, 32, 34, 35, 36

Le v. Mullin,
311 F.3d 1002 (10th Cir. 2002) 35

Lovitt v. True,
403 F.3d 171 (4th Cir. 2005) 29

McKinney v. Ryan,
813 F.3d 798 (9th Cir. 2015) 39

Poyson v. Ryan,
879 F.3d 875 (9th Cir. 2018) 39

Simpson v. Carpenter,
912 F.3d 542 (10th Cir. 2018) 29, 35

Sonnier v. Quarterman,
476 F.3d 349 (5th Cir. 2007) 29

Underwood v. Royal,
894 F.3d 1154 (10th Cir. 2018) 35

Wackerly v. Workman,
580 F.3d 1171 (10th Cir. 2009) 26

STATE CASES

Glossip v. State,
157 P.3d 143 (Okla. Crim. App. 2007) 29

Grant v. State,
205 P.3d 1 (Okla. Crim. App. 2009) 26, 33

Harris v. State,
164 P.3d 1103 (Okla. Crim. App. 2007) 35

Johnson v. State,
272 P.3d 720 (Okla. Crim. App. 2012) 1, 18

Le v. State,
947 P.2d 535 (Okla. Crim. App. 1997) 27

Mitchell v. State,
136 P.3d 671 (Okla. Crim. App. 2006) 11

State v. Anderson,
111 P.3d 369 (Ariz. 2005) 38

State v. Newell,
132 P.3d 833 (Ariz. 2006) 38

Stouffer v. State,
147 P.3d 245 (Okla. Crim. App. 2006) 29

FEDERAL STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 2254 2

U.S. Const. amend. VI 4

U.S. Const. amend. VIII 5

U.S. Const. amend. XIV 5

STATE STATUTES

Okla. Stat. tit. 12, § 577.2 3

OUJI-CR 4-76 12

OUJI-CR 4-78 . . . . 4, 11, 12, 16, 21, 26, 34

OUJI-CR 4-80 . . . . 3, 16, 27

OUJI-CR 9-45 12

DOCKETED CASES

Johnson v. Carpenter,
Case No. 16-5165 (10th Cir. April 29, 2019) 1

Johnson v. Royal,
Case No. 13-CV-0016-CVE-FHM (N.D. Okla. Oct 11, 2016) 1

Johnson v. State,
Case No. PCD-2009-1025 (December 14, 2012) 2, 18

Johnson v. State,
Case No. PCD-2014-123 (May 21, 2014) 2, 19

OTHER AUTHORITIES

Carter, Linda E. *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125 (1993) 23

Costanzo, Mark & Sally. *Jury Decision Making in the Capital Penalty Phase*, 16 Law & Hum. Behav. 185 (1992) 23

PETITION FOR WRIT OF CERTIORARI

Petitioner Raymond Eugene Johnson respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *Johnson v. Carpenter,* 918 F.3d 895 (10th Cir. 2019).

OPINIONS/PROCEEDINGS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Johnson v. Carpenter,* 918 F.3d 895 (10th Cir. 2019), No. 16-5165 (March 19, 2019). *See* Appendix A. The order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Johnson v. Carpenter*, No. 16-5165 (April 29, 2019). *See* Appendix B. The federal district court decision denying Mr. Johnson's petition for writ of habeas corpus is found at *Johnson v. Royal*, No. 13-CV-0016-CVE-FHM (N.D. Okla. October 11, 2016) (unpublished). *See* Appendix C. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Johnson's state direct appeal is reported at *Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012), No. D-2009-702 (March 2, 2012). *See* Appendix D. The decision of the OCCA denying Mr. Johnson's

first state post-conviction action is found at *Johnson v. State,* Case No. PCD-2009-1025 (December 14, 2012). *See* Appendix E. The decision of the OCCA denying Mr. Johnson's second state post-conviction action is found at *Johnson v. State,* Case No. PCD-2014-123 (May 21, 2014). *See* Appendix F. Mr. Johnson's third state post-conviction before the OCCA, *Johnson v. State*, No. PCD-2018-718, is pending.

JURISDICTION

The Tenth Circuit rendered its opinion denying relief on March 19, 2019. Mr. Johnson filed a timely petition for rehearing and rehearing en banc, which the Tenth Circuit denied on April 29, 2019. *See* Appendix B. Justice Sotomayor extended the time to petition for certiorari until September 26, 2019. *See* Appendix G. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

> Title 28 U.S.C. §2254(d) provides the following:
> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an

> unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Okla. Stat. tit. 12, § 577.2 provides:

> Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil case or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law. Whenever OUJI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial and free from argument. Counsel for either party or parties shall have a right to request instructions by so requesting in writing.
> Each instruction shall be accompanied by a copy, and a copy shall be delivered to opposing counsel. In addition to numbering the copies and indicating who tendered them, the copy shall contain a notation substantially as follows:
>
> "OUJI No. ______" or "OUJI No. ______ Modified"
>
> or "Not in OUJI" as the case may be.

OUJI-CR 4-80 provides:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstance(s)

> outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

OUJI-CR 4-78 provides:

> Mitigating 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. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.
>
> While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

CONSTITUTIONAL 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.

The Eighth Amendment to the United States Constitution provides

the following:

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

U.S. Const. amend. VIII.

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

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

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

The crime at issue in this case was horrific, but there is no crime so bad that a juror might not be persuaded to grant the defendant life in prison over death, particularly under Oklahoma's capital sentencing system. Nor is there a crime so bad that the defendant forfeits his rights to a fair trial and effective assistance of counsel. From the Tenth Circuit opinion:

> Raymond Johnson lived with his girlfriend Brooke Whitaker

> and their infant daughter for several months in 2007. During that time Johnson also became involved with another woman, Jennifer Walton, and he decided to move out of Whitaker's house in June 2007, staying for a time in a homeless shelter. By the time Johnson and Whitaker broke off their relationship, Walton was already pregnant with Johnson's child.
>
> On June 22, 2007, Walton dropped Johnson off at Whitaker's home so he could retrieve some clothing. Instead of picking up his clothes and leaving, Johnson waited at the house until the early morning hours when Whitaker returned from work. The two got into an argument, and according to the information Johnson later gave police, Whitaker got a knife and threatened to stab him. Johnson responded by striking her on the head with a hammer. Whitaker fell to the floor and begged Johnson to call 911. He refused because he did not want to return to prison. He instead delivered at least five more blows to the head with the hammer, went to the outside shed to retrieve a gasoline can, and doused Whitaker and the house in gas—including the room where the baby slept. Johnson then lit Whitaker on fire and fled.

Johnson, 918 F.3d at 897-98.

At trial, defense counsel argued Johnson did not intend to kill Whitaker's infant daughter. Tr. at VI 1201. The jury disagreed, and found Johnson guilty of two counts of First Degree Murder and one count of First Degree Arson. Tr. IX at 1871-1872.

The sentencing stage was rushed by the prosecution and judge, and with his life at stake, Johnson had less than a day for his second-stage

mitigation presentation.[1] In his opening statement, defense counsel advised the jurors Johnson would never suggest anything excused or justified his acts because such would be insulting to the jury and victims' families. Tr. X at 1975. The purpose during second stage was clearly not to present an excuse, or to try to lessen his culpability, but instead to present a *capability*– specifically, that Raymond Johnson, "based upon his conduct when he was previously in prison, is capable of redemption and a life of value." Tr. X at 1976. There was no secondary strategy or even a hint of an argument that Raymond Johnson was less deserving or less culpable.

Raymond Johnson's exhibit list included an entire CD of inspirational praise songs that prison inmates, led by Raymond Johnson, had the wherewithal to create while in prison prior to this crime. Tr. X Ex. 4, Exhibit 4 CD. Rushed and under pressure from the prosecution and trial court, defense counsel limited his request to playing one song (out of eleven tracks), and then, under further pressure, just 30 seconds from one

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[1]The judge was always set on a short schedule for trying Johnson's case. *See*, *e.g.*, 10/22/2007 Tr. at 8; 02/25/2009 Tr. at 13. The trial lasted exactly two weeks, with everything wrapping up on Friday, June 26, 2009.

song. Tr. IX at 1889-90; Tr. X at 1964-67. *Now Behold the Lamb*, featuring Raymond Johnson singing lead and harmony vocals, went from a five minute song to a 30-second snippet. Tr. X at 1967. The jury did not get the "fullest information possible," *Lockett*, 438 U.S. at 603, and in no way heard the full extent of Johnson's talents and abilities in this regard.

Also emblematic of an errant mitigation mind-set is the fact the prosecution and trial court could not allow five family photographs to come into evidence in mitigation. A pattern emerged regarding defense witnesses and exhibits. The evidence was reduced in stages. For example, the original number of photographs was reduced down to five, then reduced again after the prosecution persisted that they were *all* irrelevant and all should be barred. Tr. IX at 1893. The prosecutor showed his completely unconstitutional understanding of mitigation in saying this about the five family photographs:

> I don't believe photographs of a person in life as an adult or life as a child goes to either of those elements [listed in the mitigating circumstances instruction].[2] It doesn't tend to give

[2] "1) [C]ircumstances 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." O.R. VI at 1076.

> them any evidence which would suggest a reason that his moral culpability was lessened.

Tr. X at 1953. The trial court allowed two of the five photographs to be introduced into evidence, over the State's objections. Tr. X at 1958.

Finally, a videotaped demonstration of Johnson's multiple gifts and capability for positivity and good works in a prison setting existed that could have easily persuaded one juror to spare Johnson's life. The trajectory regarding the sermon video was similar to the trial court's exclusion of other mitigating evidence. Under the gun of a trial court rushing for time, the proposed exhibit went from the full 55-minute church service Johnson conducted, to defense counsel pleading to the judge for "at least" a five-minute clip, Tr. IX at 1891, and then some cutting down further still to a two-minute clip. Tr. IX at 1891; Tr. X at 1959-60, 1964.

The full 55-minute video was a multi-dimensional showcase of Raymond Johnson's abilities for helping and ministering to other inmates in a prison setting. He led singing, led prayers, read scripture, preached, exhorted, sang beautiful excerpts from familiar Christian favorites such as *Amazing Grace* and *Just As I Am*, and used his engaging personality

and physicality in making religious points. The full video was appended to Johnson's habeas petition. Doc. 23 Ex. 5.

At trial, counsel made an offer of proof on the video he had been forced to reduce:

> Mr. Graves:[I]t is approximately a two-or-three-minute clip of Mr. Johnson preaching. ... Marty Williams was present when it was filmed; he actually participated in the service. It's about an hour-long service. We have reduced that down to a two-minute clip. Mr. Williams was prepared and capable of sponsoring that. It is simply a small vignette, I guess, to show Mr. Johnson's unique skills as a minister and to provide documentary evidence to establish the mitigators relating to Mr. Johnson's ministry.

Tr. X at 2079. The two-minute clip indeed showed varied and unique skills and a talent for oratory and Christian fellowship. It also exemplified the undeniable, ancient power of a parable relatable to the orator's audience. Johnson's creative parable of a cockroach in a prison cell was made to order for Johnson's prison audience. *See* Defendant's submitted trial ex. 5. Defense counsel rightly called the highly-truncated two-minute video "very persuasive evidence ... giv[ing] an example and a demonstration to the jury of his abilities as a minister." Tr. X at 2044.

Yet the jury was deprived of seeing even a small sliver of this highly distinctive mitigating evidence. Tr. X at 2044. Just as the prosecution

incorrectly thought Johnson's effectiveness as a gospel singer was irrelevant, the trial judge incorrectly believed "How effective a minister he is, I don't think goes towards mitigation." Tr. X at 2044.[3]

Another example of the prosecution and trial court's errant understanding of this Court's *Lockett*-and-progeny jurisprudence was the constant misstatement of the law and exploitation of confusing Oklahoma jury instructions regarding mitigating circumstances. The Oklahoma Uniform Jury Instructions (OUJIs) define mitigating circumstances as follows:

> Mitigating 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); O.R. 1076.

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[3] The trial judge also noted she had hearsay concerns depending upon how the video exhibit was sponsored. Tr. X at 2044-45. This alternative, contingent concern was not the basis of the court's ruling, was unfounded, and would have been unreasonable in any event under clearly established law even if it was the basis of the court's ruling. *See, e.g., Green v. Georgia,* 442 U.S. 95, 97 (1979) (per curiam) (holding hearsay rule may not be applied mechanistically); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *Mitchell v. State,* 136 P.3d 671, 697 (Okla. Crim. App. 2006).

The jurors in Raymond Johnson's trial were not lawyers and in all likelihood had no previous concept of mitigating circumstances or nuanced legal distinctions. Their introduction to the concept of mitigating circumstances was tainted from the start, as the prosecution and judge conflated the two prongs of the mitigating-circumstances definition in a manner that limited the jurors' consideration of mitigating circumstances to the issue of moral culpability only.[4]

For example, the trial judge told the jurors on their first day of voir dire that "[m]itigating circumstances are those which in fairness, sympathy and mercy may extenuate or reduce the degree of moral culpability or blame of the defendant." Tr. I at 8; *see also, e.g.,* Tr. III at

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[4] Over and again an improper theme was presented that there was one inquiry for the jury, and that inquiry was an assessment of moral culpability. However, culpability is only mentioned twice in the jury instructions, and there is no focus or limitation regarding it. Aggravating circumstances are defined as circumstances "which increase the guilt or enormity of the offense." O.R. 1074; OUJI-CR 4-76. Mitigating circumstances are defined in two prongs, one referencing moral culpability and the other referencing fairness, sympathy and mercy; neither prong is granted greater weight than the other. O.R. 1076; OUJI-CR 4-78. As discussed below, properly viewed, mitigating circumstances are *anything* that could lead a juror to decide against imposing the death penalty. The only other instruction referencing culpability is regarding victim impact evidence, which Oklahoma puts in a singular evidentiary category. O.R. 1080; OUJI-CR 9-45.

352-53. The prosecution also planted a limiting definition of mitigation in the minds of the jury from the very beginning. In voir dire, the prosecutor purported to "read" to the jury the instructions that would be given by the judge:

> MR. MUSSEMAN: Now, mitigating circumstances -- I always butcher it, so just let me kind of **read** what I think **you'll be told by the Judge**. Mitigating circumstances are those which in fairness, sympathy and mercy may **extenuate or reduce the degree of moral culpability or blame.** The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case. **In other words**, if you reach the point where you found the defendant guilty beyond a reasonable doubt and you have found the existence of at least one aggravating circumstance beyond a reasonable doubt, you are then to consider any mitigating circumstances that might be present in the case. Those are those circumstances **I read to you** that in fairness, sympathy or mercy **may reduce the degree of moral culpability or blame**. You can consider any that you find in a case.

Tr. III at 386-87 (emphasis added).

The next day, the prosecutor again apparently spoke as if he were reading the law to the jury, as his words (and misinformation) were almost exactly the same:

> Mitigating circumstances are those which in fairness, sympathy, and mercy may extenuate or **reduce the degree of moral culpability or blame**. The determination of what

> circumstances are mitigating is for you to resolve under the facts and circumstances of this case. **In other words**, if you find yourself in a position where you have determined the State has proved the existence of at least [one] aggravating circumstance beyond a reasonable doubt, you are then to look for and consider any mitigating circumstances. And those are those things like I said: That in fairness, sympathy, or mercy may **reduce the degree of moral culpability** on the part of the defendant.

Tr. IV at 698 (emphasis added).

With the false impression firmly planted in voir dire, it was reiterated even more firmly by the prosecution in second-stage closing arguments. Over and again, the theme was that there was one inquiry for the jury, and that inquiry was an assessment of moral culpability. A few of many examples follow:

> The inquiry that you are to make as jurors, the Judge will tell you in the instructions, is one of moral culpability.

Tr. X at 2092.

> What does that say about his moral culpability? Because that's the inquiry.

Tr. X at 2093.

> What does that have to say about moral culpability? I don't deny for one minute there are people that love him and there are good people who will suffer if you sentence him to die. But I submit to you that the question, as the Judge tells you, is an inquiry into moral culpability.

> You can consider what those people say and do, but the Judge tells you the inquiry is about moral culpability: Have the facts of this case–
>
> Mr. Graves: Your Honor, I'm going to object to the repeated statement that the inquiry is limited to moral culpability.
>
> The Court: Overruled. Note your exception.
> Again, ladies and gentlemen, closing argument is for persuasion purposes only. You may continue.
>
> Mr. Musseman: Thank you. **The instruction says this**: **Your consideration must be limited to a moral inquiry as to culpability of the defendant. That's what the law says**.
>
> Mr. Graves: Again, Your Honor, I am going to object. That is not an accurate statement of what the law says, to consider more than aggravators. For the sentence, they consider mitigation.
>
> The Court: Note your exception. **Overruled.**

Tr. X at 2094-95 (emphases added).

After his legally-valid and appropriate objections were overruled twice by the trial court, defense counsel gave up on trying to fight against the deck that had been stacked against him on these pervasive misstatements of law. He also did not adjust his sentencing-stage theme. As he did in opening argument, in closing argument defense counsel told the jury that:

> there can be no excuse, there can be no justification, for the terrible acts, and we offer you no excuse or no justification.
>
> ...
>
> We offer you a man who has an opportunity for redemption .... What we offer is a man who, despite these terrible deeds, can still contribute to society.

Tr. X at 2098-99.

Counsel did not try to remedy the inaccurate statements of law or educate the jurors about the true meaning of OUJI-CR 4-78 and how their inquiry was *not* limited to a moral inquiry as to culpability. In fact, he did not mention OUJI-CR 4-78 at all in his closing argument.

Another crucial Oklahoma jury instruction defense counsel did not draw the jurors' attention to states as follows:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. **Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.**

OUJI-CR 4-80 (O.R. 1078) (emphasis added).

Counsel should have placed great emphasis on this instruction and explained its crucial import. After all, counsel never attempted to

diminish or deny the State's alleged aggravating circumstances,[5] never tried to reduce Johnson's culpability, and certainly never tried to argue or show the mitigating circumstances outweighed the aggravating circumstances. All counsel did in his meager one-and-a-half transcript pages of closing argument was to vaguely plead that "nothing says you must make a decision to execute Raymond Johnson." Tr. X at 2099. The instruction was not mentioned.

Upon deliberation, the jury found all four aggravating circumstances. O.R. 1004. And on the heels of the prosecutor's repeated prompting that their consideration was limited to moral culpability, the jurors assessed Raymond Johnson's moral culpability and sentenced him to death. O.R. 1004-08.

After Johnson was sentenced to death, he was assigned a direct-appeal attorney with a conflict of interest because he was working out of

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[5]The four aggravating circumstances alleged were 1) The defendant, prior to this sentencing proceeding, was convicted of a felony involving the use or threat of violence to the person; 2) During the commission of the murder, the defendant knowingly created a great risk of death to more than one person; 3) The murder was especially heinous, atrocious, or cruel; and 4) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. O.R. 1069.

the same office as trial counsel. He did no extra-record investigation (PCD-2009-1025 APCR Att. 4, ¶2), so he should have been able to focus on the sentencing record in what was by all accounts a "second-stage" case. Trial counsel even sent direct-appeal counsel a memo suggesting the exclusion of the preaching video, the prosecutor's improper comments on mitigation, and other second-stage issues for appeal. Doc. 23, Ex. 2 at ¶¶4-6; Ex. 3. Direct-appeal counsel did not raise any of them however. *Id.* An inexperienced lawyer writing his first capital-appeal brief who was provided no co-counsel for assistance, direct-appeal counsel did not have his brief proofread, used less than half of his allotted page limit, and filed no reply brief or motion for evidentiary hearing. *Id.*

Johnson's direct appeal was denied by the Oklahoma Court of Criminal Appeals (OCCA). *Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012), attached as Appendix D. Certiorari was denied. *Johnson v. Oklahoma*, 568 U.S. 822 (2012).

Johnson filed an application for post-conviction relief (APCR) during the pendency of the direct appeal, as he was required to do. Case No. PCD-2009-1025. It was denied by the OCCA in an order entered

December 14, 2012. Appendix E. Regarding the claim of ineffective assistance of counsel (IAC) on direct appeal for failure to raise the issue of the trial court's exclusion of the aforementioned evidence, the OCCA conclusorily found Johnson had not *proved* prejudice. Appendix E at 8. Regarding appellate IAC for failure to raise the issue of the pervasive prosecutorial misconduct in limiting the scope of mitigation, the OCCA described the issue in three words ("misstated the law"), discussed only one of the prongs (the prejudice prong), and took only one sentence to do it ("Johnson has not shown a reasonable probability that but for appellate counsel's alleged deficient performance in failing to raise these issues on direct appeal the result of the trial and sentencing proceedings would have been different"). Appendix E at 11-12.

Johnson filed his petition for writ of habeas corpus raising the aforesaid issues from post-conviction in the United States District Court for the Northern District of Oklahoma on December 13, 2013. Doc. 23. Shortly thereafter he filed a second APCR. Case No. PCD-2014-123 (APCR II). It was denied by the OCCA on May 21, 2014. Johnson's petition for writ of habeas corpus was denied on October 11, 2016, but the district court granted a certificate of appealability on trial and appellate

counsel IAC claims.

On appeal, the Tenth Circuit affirmed. *Johnson v. Carpenter*, 918 F.3d 895 (10th Cir. 2018). Appendix A. Both panel and *en banc* rehearing were denied. Appendix B. In affirming, the circuit court misunderstood Johnson's claims and Oklahoma's capital sentencing structure, and demonstrated a need for this Court's guidance in multiple ways.

For example, the circuit court completely misapprehended the purpose of the preaching video in the context of Johnson's case, believing it an effort to rebut the State's continuing threat aggravating circumstance. Appendix A; 918 F.3d at 901.

Also missing the point was this contention about the much weaker evidence the jury was allowed to hear:

> The jury ... heard significant testimony that outlined Johnson's religious activities in prison and detailed his efforts to assist others to find religious conviction. *And yet the jury still found that this mitigating evidence did not outweigh the aggravating circumstances*.

Appendix A; 918 F.3d at 902 (emphasis added). This is a non sequitur, as Johnson never argued mitigators outweighed aggravators. He did not need to under Oklahoma's capital sentencing framework, and the type of

evidence he was presenting in mitigation transcends the weighing process.

Regarding the numerous misstatements and misconceptions exhibited regarding mitigating circumstances, the Tenth Circuit confoundingly opined that everything was fine because the jurors were given a "crystal clear explanation of the law" in the form of OUJI-CR 4-78. Appendix A; 918 F.3d at 907. But OUJI-CR 4-78 and this Court's *Lockett*-and-progeny jurisprudence are certainly not crystal clear, as will be discussed in *Reasons the Petition Should Be Granted* II.

Regarding cumulative error, the Tenth Circuit held that "combining the prejudice resulting from these three presumed errors [exclusion of the photographs, audio recording, and video], we are confident that Johnson's sentence would have remained the same." Appendix A, 918 F.3d at 909. This analysis again misses the mark legally, and as discussed in the section below, a review of this case and this Court's jurisprudence reveals such confidence is very much misplaced.

REASONS THE PETITION SHOULD BE GRANTED

I. This Court should grant certiorari to recalibrate the frameworks for judging the prejudice or harm of capital sentencing errors in jurisdictions where the factfinder may decline to impose a sentence of death without

restriction, for example even if aggravating circumstances outweigh mitigating circumstances.

A. Introduction.

This Court has acknowledged that, as compared to an evaluation of guilt-phase harm, the evaluation of the consequences of an error in the sentencing phase of a capital case is "more difficult because of the discretion that is given to the sentencer." *Satterwhite v. Texas,* 486 U.S. 249, 258 (1988). It is more, however, than an uptick in discretion. There is a "fundamental difference between the nature of the guilt/innocence determination ... and the nature of the life/death choice at the penalty phase." *California v. Ramos*, 463 U.S. 992, 1007 (1983). As Justice Powell noted, one is by nature objective, the other is by nature subjective:

> Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. ... In contrast, ... [t]he sentencer's function is not to discover a fact ... there is no objective measure by which the sentencer's decision can be deemed correct or erroneous ....

Bullington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., concurring).

Each capital juror makes highly qualitative and delicate decisions that turn on their own personal interpretations of and reactions to the

evidence presented. *See* Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase,* 16 Law & Hum. Behav. 185, 189-90 (1992). As one commentator noted:

> Each juror can assess [capital sentencing] factors differently in different combinations ... The effect of the variability in the penalty phase decision on the use of the harmless error doctrine cannot be underestimated. ... Unlike the assessment whether a piece of evidence has affected a decision that an element of a crime exists, where one can be more confident of the likely use of the evidence, the use of evidence in the penalty phase is unpredictable. ...

Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 153-156 (1993).

Unpredictability was a focus of Justice Scalia's dissent in *Penry v. Lynaugh,* 492 U.S. 302 (1989). In *Penry*, the Court held that Texas's rigid capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to consider and give effect to mitigating evidence. Texas contended that "to instruct the jury that it could render a discretionary grant of mercy, or say 'no' to the death penalty, based on Penry's mitigating evidence, would be to return to the sort of unbridled discretion that led to *Furman v. Georgia*, 408 U.S. 238 [] (1972)." *Penry*, 492 U.S. at

326. This Court disagreed and said "so long as the class of murderers *subject* to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Id.* at 327 (emphasis added).

In dissent, Justice Scalia said this about the lack of predictability of such a system:

> The Court cannot seriously believe that ... predictability can be achieved, and capriciousness avoided, by "'narrow[ing] a sentencer's discretion to *impose* the death sentence,'" but expanding his discretion "'to *decline to impose* the death sentence,'" *ante*, at 2951, quoting *McCleskey v. Kemp*, 481 U.S. 279, 304 [] (1987) (emphasis in original). The decision whether to impose the death penalty is a unitary one; unguided discretion not to impose is unguided discretion to impose as well.

Id. at 359-60.

The discretion *not* to impose the death penalty need not be completely unguided, as this Court has noted in cases such as *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) and *Boyde v. California*, 494 U.S. 370 (1990). At issue in *Blystone* was the constitutionality of § 9711c(1)(iv) of the Pennsylvania death penalty statute. In pertinent part, that section

provided, "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance ... and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Blystone*, 494 U.S. at 302. Blystone argued that this provision violated the Eighth Amendment's guarantee of individualized sentencing because it mandated a death sentence if no mitigating circumstances are found. The California jury instruction at issue in *Boyde* provided, in pertinent part, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death."*Boyde*, 494 U.S. at 374 (emphasis in original). This Court rejected the Eighth Amendment challenges to both of these statutes. As the Court noted in *Boyde*,

> Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury.

494 U.S. at 377. *See also, e.g., Walton v. Arizona*, 497 U.S. 639 (1990); *Kansas v. Marsh*, 548 U.S. 163 (2006).

The state capital sentencing scheme in Oklahoma is unlike the state capital sentencing schemes described in the cases above. Although there is no constitutional requirement of unfettered discretion, Oklahoma *has* unfettered discretion, indeed far surpassing the type decried by Justice Scalia in *Penry*.

To be sure, in Oklahoma the unbridled discretion and lack of predictability is especially pronounced. For one thing, death sentences in Oklahoma must be unanimous, making the feelings, reactions, and emotions of all twelve individual jurors critically important. *See, e.g., Wackerly v. Workman,* 580 F.3d 1171, 1176 (10th Cir. 2009).[6] Second, in Oklahoma not only does anything sparking the all-encompassing concepts of fairness, sympathy, and mercy qualifies as mitigating, in fact "there is no restriction *whatsoever* on what information might be considered mitigating." *Grant v. State*, 205 P.3d 1, 21 (Okla. Crim. App. 2009) (emphasis added); OUJI-CR 4-78. Finally, and most important for the issue at hand, there is no restriction in Oklahoma that mitigation must

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[6]Every juror is unique, with unique understandings of compassion and the diverse frailties of humankind. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

outweigh aggravation, or that mitigating circumstances must be found to exist at all, such as exists in so many states as exemplified in the cases referenced above.

In Oklahoma, jurors are told "[e]ven if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole." OUJI-CR 4-80; O.R. 1078. This has long been "settled law" in Oklahoma. *Le v. State*, 947 P.2d 535, 554 n.61 (Okla. Crim. App. 1997). Oklahoma jurors have complete discretion *not* to impose the death penalty.

Even in states without such unfettered discretion, judging the effect of capital sentencing error has always been exceedingly difficult. Indeed, the Court has even said "peculiarities" in capital sentencing may make error review "extremely speculative or impossible." *Clemons v. Mississippi,* 494 U.S. 738, 754 (1990).

What resonates varies from juror to juror. In Oklahoma, assessing how *twelve* different jurors from different backgrounds with different experiences will morally, emotionally, and analytically react to (and be

affected by) certain capital sentencing evidence is beyond difficult. Moreover, it is a task that learned jurists, who in contrast to jurors have enormous legal experience and strive greatly to be dispassionate, are ill-equipped to make. This all serves to make Justice Scalia's point about unpredictability in *Penry* resonate even more.

B. Capital Sentencing Prejudice and Unreliability.

Returning to the context of Mr. Johnson's case, the errors at issue are errors of ineffective assistance of counsel. The governing case on ineffective assistance of counsel in this Court is *Strickland v. Washington*, 466 U.S. 668 (1984). The Court noted that questions of prejudice are circumscribed by the standards governing the particular capital determination. *See, e.g.,* 466 U.S. at 687, 695. Under the sentencing scheme at issue in *Strickland*, it was proper for the Court to state "[w]hen a defendant challenges a death sentence *such as the one at issue in this case*, the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695 (emphasis added).

Raymond Johnson's death sentence is different from the one at issue in *Strickland*. The jurors in *Strickland* were not given unfettered discretion in the way they are in Oklahoma and not explicitly told they could impose life even if they found the aggravating circumstances outweighed the mitigating circumstances. The particulars of Oklahoma's scheme makes the prejudice analysis different.

The multitude of Oklahoma capital decisions regarding prejudice that rely on the "balance of aggravating and mitigating circumstances" accordingly miss the mark. *See, e.g., Simpson v. Carpenter*, 912 F.3d 542, 594 (10th Cir. 2018); *Bland v. Sirmons*, 459 F.3d 999, 1030 (10th Cir. 2006); *Glossip v. State*, 157 P.3d 143, 160 (Okla. Crim. App. 2007); *Stouffer v. State*, 147 P.3d 245, 278 (Okla. Crim. App. 2006). Many other circuit courts have had a hard time with this as well, frequently applying a "weighing" type of prejudice analysis in state systems where juries may impose a sentence of less than death for any reason or no reason at all. *See, e.g., Sonnier v. Quarterman*, 476 F.3d 349, 359 (5th Cir. 2007); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1268 (11th Cir. 2012); *Lovitt v. True*, 403 F.3d 171, 181-82 (4th Cir. 2005); *Jermyn v.*

Horn, 266 F.3d 257, 283 (3d Cir. 2001).

Moreover, in Johnson's case, arising out of a state such as Oklahoma where any one juror may employ unbridled discretion to impose life instead of death, employment of *Strickland's* reasonable probability standard is "extremely speculative or impossible." *Clemons*, 494 U.S. at 754. The cumulative error analysis is extremely speculative or impossible as well.

Indeed, no matter the type of error analysis, cases where the predictability is so hazy to begin with should be focused more on diminished reliability. This is in line with core constitutional concepts, one example being that prejudicial errors deprive defendants of trials "whose results are reliable." *Strickland*, 466 U.S. at 687. After all, the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett,* 438 U.S. at 604.

Consider the errors at issue. It is one thing for jurors to hear Raymond Johnson's friends vaguely indicate he had preached sermons. It is another thing entirely for jurors to see Raymond Johnson actually

preach a sermon from prison, to feel the passion, hear the cadence and rhythm, see the connection made between Johnson and his fellow inmates. One juror out of twelve could have gone from a skeptic (understandable given Johnson's murderous criminal record), to a believer (simply put, seeing is believing), when it came to Johnson's preaching abilities and potential for good. One juror out of twelve could easily have felt a shared religious background or connection, or felt a resonance in Johnson's preaching style, and said "I never would have believed it but he can really preach well; I think he can do good; I believe LWOP is the better choice."

Whether an Oklahoma evangelical Christian juror with a fervor for the Great Commission and saving souls from eternal damnation, or a pragmatic atheist finding Johnson's preaching a positive force that would make the rough world of a maximum-security prison a better place, the quality of Johnson's preaching alone is a ***perfectly legitimate reason***[7] to choose a sentence less than death under state and federal law, no matter the strength or heavier weight of aggravating circumstances. The trial court excluded the very best piece of evidence Johnson had for his

[7] *See* Reason the Petition Should Be Granted section II, *infra*.

mitigation case, evidence that could easily have triggered one juror's unfettered discretion not to impose death.

Yet the Tenth Circuit tied its analysis of prejudice to the aggravating circumstances and their outweighing of the mitigating circumstances. Appendix A; 918 F.3d at 901-02. Indeed, the Tenth Circuit unreasonably proceeded as if it did not know of the jurors' unfettered discretion not to impose a death sentence, and the obvious unpredictability such discretion causes. In its cumulative error analysis, for example, the Tenth Circuit appeared unaware of how ill-equipped it was to step into the shoes of twelve unpredictable jurors with unlimited discretion *not* to impose the death penalty, as the circuit court went so far as to express *confidence* that Johnson's sentence would have remained the same. Appendix A; 918 F.3d at 909.

Such confidence is misplaced, and the sentence of death imposed against Raymond Johnson was rendered most unreliable by the exclusion of such persuasive evidence that could easily have triggered one juror's unfettered discretion not to impose death. Change is needed. Petitioner's case presents an important opportunity to take into account unlimited

discretion when assessing capital sentencing error.

II. This Court should grant certiorari to clarify its *Lockett*-and-progeny jurisprudence and lay to rest the persistent misperception that mitigating evidence must connect to the crime or its aggravating circumstances.

The Supreme Court's position on the requisite scope of capital mitigating evidence is both exceptionally broad and well entrenched:

> a State cannot preclude the sentencer from considering "any relevant mitigating evidence" that the defendant proffers in support of a sentence less than death. ... virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.

Payne v. Tennessee, 501 U.S. 808, 822 (1991) (citations omitted);

> States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey v. Kemp, 481 U.S. 279, 306 (1987). As noted, Oklahoma law is in accord because "there is no restriction *whatsoever* on what information might be considered mitigating." *Grant v. State*, 205 P.3d 1, 21 (Okla. Crim. App. 2009) (emphasis added).

Somehow, the message is not getting through to Oklahoma jurors, prosecutors, and judges. Perhaps part of the problem is Oklahoma's

convoluted jury instruction on the subject, OUJI-CR 4-78, referenced above.

The Tenth Circuit errantly called the instruction a "crystal clear explanation of the law." Appendix A; 918 F.3d at 907. Neither the jury instruction nor this Court's jurisprudence on mitigating circumstances are anything close to crystal clear. If they were, the trial judge would not have repeatedly misstated the law and said things like "[h]ow effective a minister he is, I don't think goes toward mitigation." Tr. X at 2044. The prosecutor would not have insisted with great conviction that the quality of Johnson's gospel singing was irrelevant. Tr. IX at 1890. The prosecutor would not have earnestly argued, out of jurors' earshot, that Johnson's submitted photographs were not relevant under either prong of the mitigating circumstances instruction because they did not "suggest a reason that his moral culpability was lessened." Tr. X at 1953. And the prosecutor would not have returned again and again to the argument that the jury's inquiry was one of moral culpability only (*eight* times referenced in the Tenth Circuit opinion, Appendix A, 918 F.3d at 906-07).[8]

[8]Whether the same or similar version of the instruction is given, Oklahoma prosecutors cannot seem to keep from circumscribing

A crystal clear instruction (or a reasonably clear Supreme Court jurisprudence) would have prevented all of this from happening, or at the least caused the trial judge to put a stop to the "egregious misstatement[s] of the law," *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007), rather than endorse them in front of the jury. The law is muddy to many.

The Tenth Circuit cannot seem to keep from connecting mitigating evidence to culpability and aggravating circumstances. For example, the circuit court portrayed Johnson's claim about the improper exclusion of the preaching video as follows:

> Johnson argues here that the video would have helped jurors visualize his dynamic style of preaching and recognize the good he could do for other prison inmates, *thus rebutting the continuing threat aggravator*.

Appendix A; 918 F.3d at 901 (emphasis added). But "thus rebutting the continuing threat aggravator" was decidedly *not* Johnson's argument

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mitigating circumstances in terms of moral culpability only. *See, e.g., Harmon v. Sharp*, ___ F.3d ___, 2019 WL 4071870, *21-24 (10th Cir. August 29, 2019); *Cuesta-Rodriguez v. Carpenter,* 916 F.3d 885, 893-95, 910-15 (10th Cir. 2019); *Simpson v. Carpenter*, 912 F.3d 542, 578-82 (10th Cir. 2018); *Underwood v. Royal*, 894 F.3d 1154, 1171-73 (10th Cir. 2018); *Grant v. Royal*, 886 F.3d 874, 935-38 (10th Cir. 2018); *Hanson v. Sherrod*, 797 F.3d 810, 850–52 (10th Cir. 2015); *Le v. Mullin*, 311 F.3d 1002, 1016-18 (10th Cir. 2002).

about the preaching video.[9]

The circuit's misidentification of the claim represents a surprising vestige of what should be long-discarded thinking about mitigating circumstances – that there must be some sort of nexus between the mitigating evidence and criminal culpability or aggravating circumstances. Regarding Johnson's effectiveness in good works and positive impact while incarcerated, for example, this Court over 30 years ago in *Skipper v. South Carolina*, 476 U.S. 1 (1986) "observed that even though the petitioner's evidence of good conduct in jail did 'not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such [evidence] would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.''" *Tennard*

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[9]Another miscast argument by the circuit was that Johnson argued the jury needed to see the preaching video to "confirm Johnson's sincerity." Appendix A, 918 F.3d at 902. Again, this appears to reflect an almost baked-in need to filter Johnson's claims through the lens of moral culpability and the weighing process. The argument has always been about something else: Johnson's talent and effectiveness. In exploiting the improper exclusion of the video, the prosecutor contended Johnson could mimic his preaching step-father but his heart was not in it, and the prosecutor questioned the effectiveness of Johnson's ministry. Tr. X at 2102. Johnson argued, "[t]he jury needed to see this irreplaceable evidence showing Johnson's uniquely individual talent to know otherwise." Opening Brief at 22. Rightly so.

v. Dretke, 542 U.S. 274, 285 (2004) (citations omitted).

Oklahoma was a pioneer in improperly requiring mitigating evidence to connect to "criminal responsibility." *Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982). As Mr. Johnson's case demonstrates, Oklahoma and the Tenth Circuit are still not immune to the problem of cramping the scope of mitigating circumstances, and neither are many death penalty jurisdictions around the country. 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 was yes, the trial judge automatically imposed 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,* 542 U.S. at 287 (noting jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal "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). Cases arising before abandonment of this requirement arrived in the Ninth Circuit in a 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).

The "nexus" issue continues to confound. *See Andrews v. Davis*, 866 F.3d 994, 1054 n.7 (9th Cir. 2017), *rehearing en banc granted,* 888 F.3d 1020 (9th Cir. 2018) ("The California Supreme Court suggested there was 'no compelling connection' between the un-presented mitigating evidence and the crimes Andrews committed. To the extent the California Supreme Court suggested a causal nexus is required between mitigating evidence and defendant's crimes, the California Supreme Court's decision was contrary to Supreme Court law") (internal citations omitted); *Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting from denial of certiorari) (noting nexus requirement should not have been used in prejudice determination for ineffective-assistance-of-counsel claim because this Court has consistently rejected any requirement that mitigating evidence can alter a jury's recommendation only if it explains or provides some rational for his criminal conduct).

This Court must make crystal clear that mitigating evidence has value and must be considered even if it has no connection to the crime, criminal responsibility, or aggravating circumstances. Courts cannot use a nexus requirement to prevent jurors from giving meaningful consideration to mitigating evidence. Now is the time for the Court to revisit and clarify its rulings in *Lockett*, *Eddings,* and *Skipper*.

CONCLUSION

Petitioner's case presents an important opportunity for clarification, 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). This Court should grant certiorari to address the questions presented, provide the guidance requested, and additionally assure the Constitution is enforced in this capital case and others throughout the country.

Respectfully submitted,

s/Thomas D. Hird

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