

Capital Case

Case No. _____

In the Supreme Court of the United States

CARLOS CUESTA-RODRIGUEZ,
Petitioner,

v.

TOMMY SHARP, Interim Warden,*
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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Capital Case

QUESTIONS PRESENTED

1. By operation of Oklahoma law, indigent defendants in Tulsa and Oklahoma Counties (the State's two most populous counties) are required to be represented both at trial and on direct appeal by the respective county's public defender office. That is not true of capital defendants in any other county in the state. Given this unique set-up, Tulsa and Oklahoma County capital defendants do not receive the benefit of truly independent counsel on direct appeal. With this context, the critical question warranting this Court's review is:

Where a state, through operation of its laws, requires some capital defendants to be represented by the same public defender at both trial and on their first appeal of right, does that system implicate *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), thus providing that ineffective assistance of first post-conviction counsel would constitute cause to overcome the procedural bar imposed when the non-independent direct-appeal counsel fails to raise an ineffective-assistance-of-counsel claim against trial counsel from the same office?

2. Oklahoma juries were once instructed that mitigating circumstances were “those, which in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame.” Oklahoma Uniform Jury Instructions CR(2d) 4-78. Oklahoma prosecutors consistently exploited this instruction in closing arguments to impermissibly narrow the scope of evidence the jury could consider mitigating and argue there had to be a connection between the mitigating circumstances and the crime. Troubled by prosecutors' constant attempts to limit jurors' consideration of mitigating evidence, the Oklahoma Court of Criminal Appeals (OCCA) warned

prosecutors not to argue mitigating circumstances were limited to those that extenuate a defendant's moral culpability or guilt for the capital offense. *Harris v. State*, 164 P.3d 1103, 1113-14 (Okla. Crim. App. 2007). Further, the court referred the matter to the Oklahoma Uniform Jury Instruction Committee "for promulgation of a modified jury instruction defining mitigating circumstances in capital cases." *Id.* at 1114. Mr. Cuesta did not receive the modified instruction and the prosecutor made the same arguments OCCA found "egregious" in *Harris*. *Id.* OCCA reversed itself and found such arguments proper in Mr. Cuesta's case. *Cuesta-Rodriguez v. State*, 241 P.3d 214, 243 (Okla. Crim. App. 2010). With this background in place, the following question warrants this Court's review:

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlos Cuesta-Rodriguez, 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.

OPINIONS BELOW

The opinion of the Tenth Circuit, Case No. 16-6315, denying relief is reported at *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885 (10th Cir. 2019) (Appendix A). The federal district court's denial of the Petition for Writ of Habeas Corpus is found at *Cuesta-Rodriguez v. Royal*, Case No. CIV-11-1142-M, 2016 WL 5485117 (W.D. Okla. Sept. 29, 2016) (unpublished) (Appendix B). The Tenth Circuit's Order denying the Petition for Rehearing dated April 19, 2019, is found at Appendix C. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Cuesta-Rodriguez's direct appeal is reported at *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010), *cert denied Cuesta-Rodriguez v. Oklahoma*, 565 U.S. 885 (2011) (Appendix D). OCCA's opinion denying Mr. Cuesta-Rodriguez's Original Application for Post-Conviction Relief can be found at *Cuesta-Rodriguez v. State*, No. PCD-2007-1191 (Okla. Crim. App. Jan. 31, 2011) (unpublished) (Appendix E). Mr. Cuesta-Rodriguez's Second Application for Post-Conviction Relief was denied in *Cuesta-Rodriguez v. State*, No. PCD-2012-994 (Okla. Crim. App. Feb. 8, 2013) (unpublished) (Appendix F).

JURISDICTION

The Tenth Circuit Court of Appeals rendered its decision denying relief on

February 22, 2019, Case No. 16-6315. After an extension was granted by the Circuit Court, Mr. Cuesta-Rodriguez timely filed a petition for rehearing and rehearing *en banc* on April 8, 2019, which the Tenth Circuit denied on April 19, 2019. An extension of time to file the petition for a writ of certiorari was granted by Justice Sotomayor on July 12, 2019 (No. 19A38), extending the time to September 16, 2019. This petition is timely filed. 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.

Okla. Stat. tit. 21, § 701.10 provides in relevant part:

A. Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is seeking the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.

. . . .

C. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in Section 701.7 et seq. of this title. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim.

Okla. Stat. tit. 21, § 701.11 provides:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

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 9-45 provides:

The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. This evidence is simply another method

of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.

As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.

As it relates to the other sentencing options: You may consider this victim impact evidence in determining the appropriate punishment as warranted under the law and facts in the case.

STATEMENT OF THE CASE

I. Procedural History.

Carlos Cuesta-Rodriguez (Mr. Cuesta) was first brought to trial on May 23, 2005, in Oklahoma County District Court, Case No. CF-2003-3216, before District Judge Ray C. Elliot for one count of murder in the first degree (malice aforethought). O.R. IV 721-26. The trial ended in a mistrial on that date. Tr. 24. Mr. Cuesta was then tried by a jury on June 4-12, 2007, in Oklahoma County District Court before District Judge Virgil C. Black. The jury found him guilty of murder in the first degree as charged. Tr. V 946; O.R. VII 1231-32.

In the penalty phase, the jury found the existence of two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel; and that

Mr. Cuesta constituted a continuing threat. Tr. VII 1319-20; O.R. VII 1226. The jury sentenced Mr. Cuesta to death. Tr. VII 1320; O.R. VII 1230. Mr. Cuesta was formally sentenced on August 15, 2007. Tr. 4-5; O.R. VII 1341-43.

Mr. Cuesta commenced a direct appeal, and his conviction and sentence were affirmed by the Oklahoma Court of Criminal Appeals (OCCA) on October 12, 2010. *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010). Mr. Cuesta filed a petition for rehearing, which was denied by OCCA on January 25, 2011. *Cuesta-Rodriguez v. State*, 247 P.3d 1192 (Okla. Crim. App. 2011), *cert. denied* *Cuesta-Rodriguez v. Oklahoma*, 565 U.S. 885 (2011). Mr. Cuesta also pursued a state post-conviction action during the direct appeal under Case No. PCD-2007-1191. The post-conviction application was denied by order entered January 31, 2011.

During Mr. Cuesta's habeas corpus proceedings, referenced next, he filed a second post-conviction action in state court to exhaust claims omitted or underdeveloped previously. Case No. PCD-2012-994. He also requested an evidentiary hearing. This second state post-conviction action was filed on November 5, 2012, and decided on February 8, 2013, while Mr. Cuesta's habeas proceeding was pending.

Following a request for and appointment of counsel, Mr. Cuesta filed his Petition for A Writ of Habeas Corpus on October 1, 2012. Docs. 2, 17. He sought an evidentiary hearing and discovery. Docs. 29, 27. He replied, which included a response to Respondent's asserted procedural defenses. Doc. 38. On September 29, 2016, the district court denied the Petition and denied an evidentiary hearing. Doc. 41. The

district court denied a Certificate of Appealability on any issue. Doc. 43.

Mr. Cuesta timely appealed to the United States Court of Appeals for the Tenth Circuit, which granted a Certificate of Appealability on several issues, to include the issues raised in this Petition. On February 22, 2019, that court issued an opinion affirming the denial of relief. *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885 (10th Cir. 2019), and on April 19, 2019, the court denied Mr. Cuesta's timely-filed petition for rehearing (including a request for rehearing *en banc*).

II. Facts of the Case.

Put briefly, in the early morning hours on May 31, 2003, Carlos Cuesta shot his domestic partner, Olimpia Fisher, in their home during a heated argument. Mr. Cuesta, who was highly intoxicated at the time of the shooting, suspected that Fisher was having an affair with her co-worker Charlie Davis. Fisher and Davis often worked jobs together at a local moving company, and Fisher had frequently been working late hours. At some point in the argument, Cuesta believed Fisher admitted to cheating on him. The entire shooting incident lasted just seven minutes. In keeping with the foregoing synopsis, OCCA described the incident this way:

Olimpia Fisher, the victim in this case, and her adult daughter Katya Chacon lived with Cuesta-Rodriguez in a home that Fisher and Cuesta-Rodriguez had purchased together. In the year after the couple purchased the home, their relationship had become strained over Fisher's long working hours as a moving company packer and Cuesta-Rodriguez's fears that she was cheating on him. Cuesta-Rodriguez would question Fisher and Chacon whenever they left the home about where they were going and what they would be doing. Eventually, the relationship deteriorated to the point that Cuesta-Rodriguez wanted Fisher to move out and Fisher wanted Cuesta-Rodriguez to move out.

On May 20, 2003, Fisher went to the Santa Fe Station of the Oklahoma City Police Department to make a complaint of domestic abuse. Officer Jeffrey Hauck observed bruising on her right upper arm and stomach. When Fisher found out that Officer Hauck was going to take photographs of the bruising and that Cuesta–Rodriguez would be arrested, she ran out of the station.

On Friday May 31, 2003, Cuesta–Rodriguez tried calling Fisher on her cell phone. She answered and told him she was at work. Cuesta–Rodriguez had gone by her place of work, however, and knew she was not there. Believing she was cheating on him, he went home, drank some tequila, and went to bed.

Katya Chacon came home to a dark house at approximately 10:00 p.m. She saw an empty bottle of tequila and a note next to it. The note, written on the back of an envelope, said “F— you bitches and puntas, goodbye” (Tr. Vol. 2, 381). She thought she was alone in the house, but when she heard Cuesta–Rodriguez cough in the other room, she tried to telephone her mother. Unable to contact Fisher by telephone, Katya left the house and joined her as she was getting off work. They ate a late meal at a McDonald's restaurant, and went home. They initially planned to pack and leave, but decided to remain in the house overnight. Katya slept in her own bedroom and Fisher slept in a third bedroom.

Around 4:30 a.m., Katya woke up and heard Fisher and Cuesta–Rodriguez arguing. Katya went into the bedroom where the two were fighting and persuaded Fisher to come to Katya's bedroom in the hope that Cuesta–Rodriguez would leave them alone. Cuesta–Rodriguez followed the women into Katya's bedroom while continuing to argue loudly with Fisher. Fisher picked up a telephone, but Cuesta–Rodriguez snatched it out of her hand and threw it away. At the same time, he pulled out a double-barreled .45 caliber pistol loaded with two .410 shotgun shells and blasted Fisher in the right eye.^{FN1} With her mother shot, Katya retrieved a baseball bat from under the bed and tried to hit Cuesta–Rodriguez in the hand. Cuesta–Rodriguez grabbed the bat as Katya swung it and threw it to the floor.^{FN2} Katya ran from the house and was able to call 911 from a neighbor's residence. According to Cuesta–Rodriguez's statement to police, Fisher was still alive and conscious after he shot her so he took her to his bedroom where, despite having an eye blown out, Fisher continued to fight and struggle.

^{FN1.} Katya Chacon testified that the gunshot hit the right side of Fisher's face.

FN2. Cuesta-Rodriguez told police that Katya beat him with a baseball bat before he shot Fisher. Cuesta-Rodriguez also told police that the gun went off as Fisher attempted to wrestle it from him. Cuesta-Rodriguez said the shot hit near her eyes, but thought it might have hit near her left eye.

The first police officers arrived on the scene at approximately 4:41 a.m., within two minutes of being dispatched by 911. While one officer took information from Katya near the neighbor's house from where she had called 911, other officers approaching Cuesta-Rodriguez's and Fisher's house could hear Fisher screaming and banging on a bedroom window as if she was trying to escape. The windows and doors to the house were covered with burglar bars that not only prevented her escape, but also prevented entry by police. The officers' first attempt at entry by kicking in the front door failed. While attempting to get through the front door, officers heard a gunshot and Fisher's screams stopped.

Certain that Fisher was no longer alive, and certain that Cuesta-Rodriguez was armed, police summoned their tactical team. In the meantime, a police hostage negotiator attempted to make telephone contact with Cuesta-Rodriguez and used a loudspeaker in an attempt to convince him to come out. Eventually, the tactical team forced their way through the front door burglar bars with some difficulty using a specialized hydraulic tool called a jam-ram. Cuesta-Rodriguez was arrested and taken to the police station. He gave statements to detectives that day and the next day. In both interviews he admitted shooting Fisher, although he claimed the first shot was accidental. Photographs of Fisher's face taken at the scene, and introduced as trial exhibits, showed severe injuries centered on her eyes.^{FN3}

FN3. In addition to being the situs of Fisher's injuries, Fisher's eyes came up in another context. According to the testimony of Fisher's former boyfriend, when Fisher terminated their relationship in favor of Cuesta-Rodriguez, Fisher said that she had "put her eyes on somebody else" (Tr. Vol. 2, 347-348). The ex-boyfriend stated he was familiar with Fisher's use of this unusual phrase because she previously told him that if she put her eyes on somebody else, that meant she was "interested in him" (Tr. Vol. 2, 347-348).

Cuesta-Rodriguez v. State, 241 P.3d at 222-23.

III. Mitigation.

Some mitigation evidence was presented, but by no means did that presentation encompass or present a complete and accurate picture of Mr. Cuesta's life. Mr. Cuesta had come to the United States as part of the Mariel boatlift and suffered throughout that ordeal. He also suffered various brain injuries both while still in Cuba and after arriving to the United States. The jury did not hear much of that evidence. Moreover, what mitigation was presented, the prosecutors manipulated by arguing in their closing arguments, based on the mitigation jury instructions, that under the law as given to them by the judge, the jury had to first consider whether each mitigating circumstance reduced Mr. Cuesta's moral culpability for the crime before they could consider it mitigating.

Although his testimony probably did at least as much harm as good, defense counsel called psychologist James Choca as a mitigation witness. Tr. V 978. He testified Mr. Cuesta has borderline-personality disorder. *Id.* at 995. A custodian of jail records testified Mr. Cuesta had one disciplinary report while incarcerated awaiting trial in this case and was found not guilty. Tr. VI at 1021-22. Mary Marshula testified to her friendship with Mr. Cuesta as a co-worker at Forest Lumber Company and their work on volunteer housing projects. *Id.* at 1026 *et. seq.* Mr. Cuesta's aunt, Ara Rodriguez, testified about her experiences on the Mariel boat lift and her love for him. *Id.* at 1038 *et. seq.* Martha Galvan, another aunt, also testified regarding her contacts with Mr. Cuesta and her desire to maintain those. *Id.* at 1051 *et. seq.* Kay Rote

testified regarding Mr. Cuesta's participation in a wellness program in the jail. *Id.* at 1061 *et. seq.* He was identified for the program because he was taking medications "for mood and for delusions." *Id.* at 1066. Former employer and friend Dan Fiorini testified that he cared about Carlos and wanted to maintain contact with him. *Id.* at 1076 *et. seq.* Sebastian Lantos, a translator who had made numerous trips to Cuba but had no connection to Mr. Cuesta, testified to introduce photographs of Mr. Cuesta's neighborhood in Cuba. *Id.* at 1083 *et. seq.* He also introduced and read a deposition of Mr. Cuesta's mother, *id.* at 1108, as well as the deposition of Mr. Cuesta's sister, *id.* at 1173-84, and the deposition of Mr. Cuesta's wife in Cuba, Rosa Victoria Gonzalez Perez. *Id.* at 1185-88. He introduced Mr. Cuesta's clear criminal record in Cuba and correspondence, including some expressing love for his family. *Id.* at 1188 *et. seq.*; Tr. VII at 1228, *et. seq.* Professor Mark Hamm testified as an expert on the Mariel boat lift. Tr. VI. at 1118 *et. seq.* Mr. Lantos also sponsored video interviews including of Mr. Cuesta's brother, Joaquin, and Mr. Cuesta's son. Tr. VII at 1240, 1242; Defendant's Exhibits 168, 169. He translated video statements of a teacher, Mr. Cuesta's wife Rosa, and his brother, son, mother and sister speaking further to Mr. Cuesta's character and asking his life be spared. 1245-49, Exhibit 171.

Not presented was the far-more persuasive mitigation evidence that Mr. Cuesta suffers from two brain-based mental impairments: organic brain disorder and post-traumatic stress disorder. Additional facts will be developed and addressed in the individual Reasons for Granting the Writ as necessary to support the arguments

therein.

What mitigation was presented, was undermined and dismissed during the state's closing argument where the prosecutors repeatedly argued the jury could not consider it unless it "extenuated or reduced [Mr. Cuesta's] moral culpability for the crime."

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Ruling, Which Declined to Apply This Court's Holdings in *Martinez v. Ryan* and *Trevino v. Thaler*, Is Contrary to Those Rulings and Deprives Capital Defendants in Oklahoma's Two Most Populous Counties of the Full Panoply of Constitutional Rights to Which They Are Entitled. This Court's Review Is Necessary to Clarify the Reach of Those Prior Holdings.

A. Introduction.

Mr. Cuesta raised an ineffective-assistance-of-trial-counsel claim in his Second Application for Post-Conviction Relief in state court. Neither his direct-appeal lawyer (who worked with and shared an office budget¹ with trial counsel at the Oklahoma County Public Defender's Office) nor his first post-conviction lawyer (who worked for the Oklahoma Indigent Defense System, a different agency) raised such a claim. It was not until the federal habeas petition was filed that the Second Application for Post-conviction Relief was filed in state court to exhaust this claim that should have been raised earlier. OCCA found the issue defaulted because it was not raised on direct

¹ The IAC claim that should have been raised involved the failure to call a mental health expert. Trial counsel's request for funding for that expert was denied by office management. Therefore, trial counsel's colleague in the direct-appeal unit of the same office would have had to go back to the same management that initially denied funding for the expert to ask them to approve funding for the same expert to help establish that their initial refusal led to the unreasonable and ineffective representation.

appeal or the first post-conviction application. App. F at 3-4.

Respondent then raised the direct-appeal and first post-conviction defaults as procedural defenses in the district court and on appeal. Doc. 33 at 22-23. The district court ruled these defaults barred federal review. App. B at 43-45. The Tenth Circuit affirmed. *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 903, 905. (10th Cir. 2019).

Whether a state court procedural default matures into a federal procedural bar is, quite naturally, a federal question. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). State procedural defaults do not bar federal review unless they are both adequate and independent. *Lee v. Kemna*, 534 U.S. 362 (2002). A state default may also be overcome by a showing of cause and prejudice. *Martinez v. Ryan*, 566 U.S. 1, 13-14 (2012). In *Martinez*, this Court applied the long-standing cause concept to counsel's failures in state proceedings that provide the first real opportunity to raise a claim trial counsel was ineffective. The Court noted "[t]he rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." *Id.* at 14. "These rules," the Court explained, reflect an equitable judgment that a prisoner who was "impeded or obstructed in complying with the State's established procedures" may be excused from a default. *Id.*

Below, Mr. Cuesta challenged the procedural default on both adequacy and cause and prejudice grounds. Both grounds required an examination of whether Mr. Cuesta was provided separate, independent counsel at trial and on direct appeal. If counsel were not separate, then the bar would be inadequate, and, post-conviction would then

have been his first meaningful opportunity to raise the ineffective-assistance-of-trial-counsel claim. Therefore, under *Martinez* and *Trevino*, ineffective assistance of his first post-conviction counsel would provide cause to excuse the default.

Because the issues are so closely intertwined, Mr. Cuesta will briefly discuss the adequacy analysis as it provides necessary context for the cause argument, although the real issue here involves cause under *Martinez* and *Trevino*.

B. Adequacy and the Oklahoma System.

Oklahoma is unusual in that it has an appellate remand rule that requires ineffective-assistance-of-trial-counsel claims – even those requiring extra-record evidence development – to be presented on direct appeal. Okla. Stat. tit. 22, ch. 18, app., Rules of the Court of Criminal Appeals, Rule 3.11. The Tenth Circuit has examined that rule and found it is inadequate to bar federal review when the same counsel provides representation both at trial and on direct appeal. *English v. Cody*, 146 F.3d 1257,1263-64 (10th Cir. 1998). The court noted the importance this Court placed on an opportunity for an “objective assessment of trial counsel’s performance.” *Id.* at 1261 (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986)). The circuit court held that Oklahoma’s rule was inadequate unless the “*Kimmelman* imperatives” were met. 146 F.3d at 1263.

Further, the circuit court has recognized that counsel from the same defender office may, depending on the circumstances, be conflicted in choosing whether to raise claims of ineffective assistance of counsel against their colleagues from the same office.

Cannon v. Mullin, 383 F.3d 1152, 1173-75 (10th Cir. 2004). The court observed *Kimmelman*'s objective-review requirement "may still have force when distinct lawyers handle the trial and appeal but the two are professionally aligned," holding further:

If a criminal defendant is represented by trial and appellate counsel from the same office, appellate counsel's assessment of trial counsel's performance may be less than completely objective. An understandable, although inappropriate, regard for collegiality may restrain appellate counsel from identifying and arguing trial-attorney error.

Id. at 1173.

In *Cannon*, the court said whether lawyers in the same office are separate counsel for the objective-review requirement turns on specific circumstances. The court noted the inherent problems that exist with challenging a colleague's performance:

Arguing ineffective assistance with respect to a colleague's performance is saying that the performance was not only inferior, but unreasonable. These are indeed bold statements to make about a co-worker. Presenting an ineffective-assistance-of-counsel claim may well damage the reputation of the trial attorney and the office for which both trial and appellate counsel work.

Id.

But the facts here present an even more difficult conflict. Under *Strickland*'s requirements, counsel are required to conduct a thorough investigation, which, especially when mental health issues are involved, requires experts. *See, e.g., Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (finding deficient performance where counsel failed to seek funding to replace expert witness he knew to be inadequate). Thus, the office budget must be tapped for an expert to investigate a colleague's performance. In the instant case, the issue is even more stark. Because trial counsel had sought funding

from office management for an expert and was denied, to raise an ineffectiveness claim on appeal, appellate counsel would have had to go back to the same management that had already denied funding and ask again for funding, in part, to prove the initial denial was unreasonable and led to ineffective assistance.

The Tenth Circuit acknowledges that “Oklahoma’s system for raising ineffective-assistance-of-counsel claims on direct appeal is inadequate when trial and appellate counsel are too closely intertwined.” *Cuesta-Rodriguez*, 916 F.3d at 900. Notwithstanding that acknowledgment, however, the court found no conflict in Mr. Cuesta’s representation in this case.

Oklahoma highlights a number of cases in which appellate counsel at OCPD, including Cuesta-Rodriguez’s appellate counsel, have pursued ineffective-assistance-of-counsel claims In light of those cases, Cuesta-Rodriguez hasn’t explained how and why his trial and direct-appel counsel were problematically interconnected.

Id. at 901-02.

In so holding, the court refused to consider Mr. Cuesta’s argument about the conflict created by appellate counsel’s need to go back to office management for funding to hire the same expert management had previously declined to fund, based on its view that was “a point that doesn’t appear in his briefing.” *Id.* at 902 n.19.² As clearly pointed out in Mr. Cuesta’s Petition for Rehearing, that view was patently incorrect because the argument about funding appeared in numerous places in the briefing. *See Petition for*

² Counsel had discussed the dilemma caused by having to ask office management for already-denied funds during oral argument. The panel mistakenly believed that was the first time the argument had been made.

Rehearing and Request for En Banc Consideration, No. 16-6315 at 4-7 (detailing all the places in the briefing where that argument appears). A full consideration of Mr. Cuesta's arguments leads to the clear conclusion that his trial and direct-appeal counsel were not separate. Because they were not separate, the first application for post-conviction relief was Mr. Cuesta's first real opportunity to raise the ineffective-assistance-of trial-counsel claim. That is where *Martinez* and *Trevino* come in.

C. Cause.

Lack of truly separate counsel on direct appeal means not only that the direct-appeal default is inadequate to bar federal review, but lack of separate counsel also means post-conviction was the first opportunity for Mr. Cuesta, and others similarly situated, to raise trial counsel's ineffectiveness. It therefore follows, under *Martinez*, that ineffectiveness of first post-conviction counsel constitutes cause to excuse the default.

Indeed, Mr. Cuesta argued throughout the proceedings below that post-conviction was the first opportunity to have these ineffective assistance of trial counsel claims presented and that post-conviction counsel's failure to do so constituted cause under *Martinez*, 566 U.S. at 1; *Trevino*, 569 U.S. at 413; and *Maples v. Thomas*, 565 U.S. 266 (2012) (abandonment by counsel "as cause"). *Martinez* and *Trevino* hold that, where post-conviction is the first place to raise trial counsel's ineffective assistance under a state's scheme, ineffective assistance of post-conviction counsel can serve as cause to excuse a failure to raise it then. The district court rejected the *Martinez/Trevino*

argument on the theory that Oklahoma’s Rule 3.11 “allows defendants a meaningful opportunity to raise ineffective-assistance-of-trial-counsel claims.” App. B at 45.

The Tenth Circuit has not properly applied *Martinez* and *Trevino* to the Oklahoma system. Noting that *Martinez* and *Trevino* are directed to “collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial,” *Fairchild v. Trammell*, 784 F.3d 702 (10th Cir. 2015), the circuit court has relied on Rule 3.11 to hold as a blanket rule *Martinez* and *Trevino* do not apply in Oklahoma. *Fairchild*, 784 F.3d at 721. Indeed, in *Fairchild*, the court declined to apply the *Martinez/Trevino* cause doctrine even though appellate counsel filed a disclaimer stating she had not conducted a full investigation of collateral claims. *Id.* at 723.

But this case is not about Rule 3.11 in general; rather, it is about whether capital defendants in Oklahoma and Tulsa Counties get the same constitutional protections as every other capital defendant. And because the issue is presented squarely here, this case presents a good vehicle for this Court to settle the issue.³

Rule 3.11 is no answer here and in other cases where defendants are represented at trial and on direct appeal by the Oklahoma or Tulsa County Public Defender offices. Rule 3.11 is indeed part of the appellate system as it is structured and operates in

³ During oral argument, one of the judges on the panel recognized the significance of this question, and that this case presents a good vehicle to address it:

Why don’t we send it back for an evidentiary hearing? This principle or this question is going to pervade a lot of capital appeals that we have up here. *This seems like a pretty good vehicle to answer that question once and for all.*

Oral Argument at 32:03-32:17, *Cuesta-Rodriguez v. Carpenter*, No. 16-6315 (10th Cir. May 17, 2018) (emphasis added).

Oklahoma. But also part of the system is the provision of likely-conflicted counsel from the same defender office to defendants in Oklahoma's two largest counties. This arrangement for indigent appellate defense exists by statute. Okla. Stat. tit. 19, § 138.9 (providing county indigent defenders in the large counties shall perfect appeals "for those defendants which they represented in the trial court"). This part of the structure and operation of the Oklahoma system means defendants in Oklahoma are not guaranteed full access to Rule 3.11. Those like Mr. Cuesta and Mr. Cannon, who were represented by the county defenders in Oklahoma's two largest counties, face conflicts that preclude or impair use of Rule 3.11.

Martinez is built on a "particular concern" that ineffective-assistance-of-trial-counsel claims, as here, should be heard. 566 U.S. at 12. This Court observed that the right to effective assistance of trial counsel – the right plainly infringed here – "is a bedrock principle in our justice system." *Id.* As the Court noted:

It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). Indeed, the right to counsel is the foundation for our adversary system.

566 U.S. at 12.

The Court in *Martinez* was expressly concerned with situations where "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* That is the situation here. The Court was also concerned with situations where, "as an equitable matter," collateral counsel's

performance “may not have been sufficient to ensure that proper consideration was given to a substantial claim.” *Id.* at 14. That also is the situation here. Finally, the Court was concerned with another situation present here, where “no state court at any level will hear the prisoner’s claim” and where, absent application of the cause doctrine, “no court will review the prisoner’s claims.” *Id.* at 10.

In keeping with these principles and with *Martinez*’s reference to circumstances that “significantly diminish[]” the ability to file such claims, *Trevino* went on to apply the cause doctrine when the structure and design of the state’s system in “actual operation” precludes review of the claim. *Martinez*, 566 U.S. at 13; *Trevino*, 569 U.S. at 429. As in *Trevino*, Oklahoma’s system would “create significant unfairness” were *Martinez* not to apply. *Id.* at 425. As here, the operation of the state system denied Mr. Trevino a “meaningful opportunity” to present the claim. *Id.* at 428.

Of note, *Trevino* arose in the context of a claim of investigative failure in the mitigation of a capital case. *Id.* at 418. There, as here, “a wealth of additional mitigating evidence” and, in particular, that the defendant’s “cognitive abilities were impaired,” would have been revealed had investigative flags been followed. *Id.* at 419-20. As in *Trevino*, significant “practical considerations” – here the fact Mr. Cuesta had effectively the same trial and appellate counsel – made post-conviction the first practical opportunity to raise the claim and thus make a failure at that stage cause. *Id.* at 428. And, there, as here, “failure to consider a lawyer’s ‘ineffectiveness’ during an initial-review collateral proceeding as a potential ‘cause’ for excusing a procedural

default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel-claim.” *Id.*

Where truly separate counsel is not provided by the state to effectuate Rule 3.11, Oklahoma’s scheme implicates *Martinez/Trevino*. The remand rule is the reason Oklahoma is thought to allow development of ineffective assistance claims on direct appeal. But because the remand rule does not perform that function in a class of cases coming from the state’s two largest counties, it follows that *Martinez/Trevino* applies in at least those cases. Post-conviction counsel’s failure to raise the claim serves as cause in the circumstances present here.

In disposing of Mr. Cuesta’s cause arguments, the Tenth Circuit concluded that his “arguments center on Cuesta-Rodriguez’s not having had full access to Rule 3.11 due to conflicted advocates. But we have already concluded that Cuesta-Rodriguez had separate counsel for his trial and direct appeal, so these arguments are foreclosed.” *Cuesta-Rodriguez*, 916 F.3d at 904. This conclusion deprived Mr. Cuesta – and will deprive other similarly-situated capital defendants – of the full protection of the Sixth and Fourteenth Amendments.

D. This Is an Important Question Worthy of this Court’s Review.

As noted, the logical underpinning of this Court’s rulings in *Martinez* and *Trevino* is the importance of allowing capital defendants one full and fair opportunity to have a court consider an ineffective-assistance-of-trial-counsel claim. Mr. Cuesta did not have that opportunity. Neither do other Oklahoma capital defendants from Tulsa or

Oklahoma Counties, especially when the issue involves the refusal of the office to fund needed experts. The failure of the Tenth Circuit to apply *Martinez* and *Trevino* to such circumstances as present in this case deprives capital defendants in Oklahoma’s two most populous counties – which amounts to approximately half of the death sentences imposed in Oklahoma⁴ – of the full panoply of rights guaranteed by the Sixth Amendment. This Court’s intervention is necessary to prevent the continuation of that untenable situation.

II. The Tenth Circuit’s Ruling Undermines This Court’s Clear Eighth Amendment Jurisprudence as Set Forth in *Lockett v. Ohio* and its Progeny. Other Circuits Have Struggled With This Same Issue. This Court’s Guidance Is Needed on This Important Question.

A. History of the Mitigation Instruction in Oklahoma.

Oklahoma statutes rightly provide that evidence can be presented in the punishment phase of a capital trial “as to any mitigating circumstances.” Okla. Stat. tit. 21, §701.10(c). But OCCA’s earliest view of mitigation was a constricted one – only evidence that excused criminal behavior was relevant. In *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980), OCCA held that evidence of 16-year-old Monty Eddings’ severe psychological and emotional disorders and his difficult family circumstances tended to show he knew the difference between right and wrong and thus

⁴ In 2016, the Oklahoma Death Penalty Review Commission issued a report concerning the death penalty in Oklahoma. As part of its review, the Commission examined the 325 death sentences imposed in Oklahoma between 1980 (when the death penalty resumed in Oklahoma) and 2016. Of those 325 death sentences, 158 (or 48.5%) were imposed in Oklahoma and Tulsa Counties. *See The Report of the Oklahoma Death Penalty Review Commission*, at 203-05 (2016), available at <https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf> (last visited September 11, 2019).

was criminally responsible for his actions. While OCCA noted such evidence was “useful in explaining why he behaved the way he did” it was not mitigating because it did not “excuse his behavior.” This Court reversed, concluding the trial court and OCCA “violated the rule in *Lockett*.”⁵ *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

Vestiges of this strained interpretation of mitigating evidence remain, providing no clarifying distinction between mitigating evidence that reduces legal responsibility or guilt of the murder from that which helps explain a defendant’s humanity and worth. For years following *Eddings*, OCCA did not require trial courts to further define mitigating circumstances to assure the jury understood the “full extent of what it might consider in determining Appellant’s sentence.” *Robedaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993). Instead, OCCA continued to endorse the constrictive instruction, leaving the determination of what was mitigating to jurors with only the “moral culpability” instruction to guide them.⁶ *Welch v. State*, 968 P.2d 1231, 1244 (Okla. Crim. App. 1998) (holding that the failure of trial court to direct jury to the

⁵ The *Lockett* Court set the baseline for the precedent that has followed, concluding “the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604 (emphasis in original).

⁶ The instruction at issue, which was given as Instruction No. 9 to Mr. Cuesta’s jury, reads, in pertinent part, as follows:

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.

individual types of mitigating evidence presented did not warrant reversal or modification of the death sentence because jury separately received the “moral culpability” instruction).

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

Multiple challenges followed. Capital defendants argued the “moral culpability” instruction was impermissibly narrowing the characterization of mitigating evidence. Challenges fell on deaf ears and supported ever-increasing arguments by prosecutors that only evidence reducing the defendant’s moral culpability or blame for the actual crime could be considered mitigating by the jury and weighed against the aggravation. *See Johnson v. State*, 928 P.2d 309, 317 (Okla. Crim. App. 1996); *Le v. State*, 947 P.2d 535, 555 (Okla. Crim. App. 1997) (finding prosecutor misstated the law by arguing that for evidence to be mitigating it had to make the defendant less guilty; no reversal was required even though argument was “irrelevant” and “improper as purely personal opinion”); *Patton v. State*, 973 P.2d 270, 298 (Okla. Crim. App. 1998); *Williams v. State*,

22 P.3d 702, 727-28 (Okla. Crim. App. 2001); *Fitzgerald v. State*, 61 P.3d 901, 905 (Okla. Crim. App. 2002); *Rojem v. State*, 130 P.3d 287, 299 (Okla. Crim. App. 2006).

And then came *Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. 2007). In *Harris*, OCCA declined to find the moral culpability instruction erroneous but required it to be modified. *Id.* at 1114. OCCA also declared it was “troubled” by the consistent misuse of the instruction’s language by prosecutors:

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

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

B. The Ruling Below.

The circuit’s holding strikes at the heart of this Court’s jurisprudence concerning how critically important it is for jurors to be allowed to consider and give effect to any and all evidence that mitigates against the death penalty and how a prosecutor’s distortion of the law in argument can render a death sentence unreliable. By improperly

urging the jury to disregard any proffered mitigation evidence that did not “reduce the defendant’s moral culpability for the crime,” the prosecution deprived Mr. Cuesta of the fair sentencing guaranteed to him by this Court’s many cases, including *Lockett* and its progeny.

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

In this case, the Tenth Circuit deferred to OCCA’s adjudication under the AEDPA. This action left this Court’s Eighth Amendment commands in *Lockett* and its progeny without teeth. Capital juries are “not [to] be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604 (emphasis in original).

But the Tenth Circuit has now eliminated the key component that makes capital sentencing schemes constitutional because jurors in Oklahoma, under the decision in this case, *can be precluded* from giving particularized consideration and effect to relevant aspects of the character and record of each convicted defendant before imposing death sentence. *Compare with Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). The circuit discounts the interplay between Eighth Amendment demands and Fourteenth Amendment fair trial guarantees. By dismissing that focus, the court below

has granted permission to prosecutors, even after being cautioned, to continue to deliberately mislead jurors by claiming the mitigation presented does not legally qualify as mitigation under the courts' instructions. *See Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986);⁷ *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding prosecutorial argument distorted jury's understanding of its sentencing responsibility thus rendering its death verdict fundamentally incompatible with the Eighth Amendment's heightened need for reliability).

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

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

It has now been thirty-seven years since this Court told OCCA in no uncertain terms it violated *Lockett* by refusing to permit a capital sentencer to consider a defendant's unhappy upbringing and emotional disturbance as a mitigating factor – something OCCA did because it decided such evidence was not connected to the crime or Mr. Eddings' responsibility for it. *Eddings*, 455 U.S. at 113-14. It is ironic indeed

⁷ Notably in *Boyde v. California*, 494 U.S. 370, 375 (1990), while rejecting appellant's argument that California's "catch-all" mitigation instruction violated *Lockett*, this Court specifically acknowledged that Boyde's prosecutor "never suggested that the background and character evidence could not be considered." Here, prosecutors did more than suggest Mr. Cuesta's mitigating evidence could not be considered; they argued the trial court's instruction forbade such consideration.

that even while this Court was reaffirming *Lockett* and *Eddings* principles, OCCA continued to allow prosecutors to limit mitigating evidence to that which had a connection or a link to the offense. *See Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (finding exclusion of evidence of good behavior in prison “impeded the sentencing jury’s ability to carry out its task of considering all relevant facets of the character and record of the individual offender”); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (*Penry I*) (finding it was not enough for evidence of a defendant’s mental retardation and abused childhood to be presented unless the jury was also able “to consider and give effect to that evidence” for a sentence of less than death). OCCA ignored this Court’s precedent by endorsing a vague and misleading instruction that prosecutors repeatedly exploit at will.

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

This is a lesson OCCA has not learned and is not likely to learn without explicit

direction from this Court. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) provides a clear example of this. In *Bosse*, and many earlier cases, OCCA repeatedly found nothing wrong in the admission of victims’ relatives’ recommendations of death, claiming *Payne v. Tennessee*, 501 U.S. 808 (1991) implicitly overruled *Booth v. Maryland*, 482 U.S. 496 (1987) concerning admission of such statements.⁸ This Court concluded OCCA was “wrong” because *Payne* continued to forbid opinions of the victim’s family “about the crime, the defendant, and the appropriate sentence.” *Bosse*, 137 S. Ct. at 2 (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (internal quotation marks omitted)); *Payne*, 501 U.S. at 833 (O’Connor, J., White, J., and Kennedy, J., concurring). OCCA required a reminder that it is this Court’s “prerogative alone to overrule one of its precedents.” *Hatter*, 532 U.S. at 567.

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

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

Although Oklahoma, in *Eddings*, was among the first death penalty states to wrongly require mitigating evidence to connect to criminal responsibility, it was not the only one. Imposition of a “nexus” requirement has similarly plagued death penalty schemes in Texas, Arizona, California, and other states.

⁸ This continued despite early and consistent Tenth Circuit opinions concluding admission of such statements was unconstitutional. *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998); *Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002) (recognizing the Supreme Court left this “significant” portion of *Booth* untouched); and *Willingham v. Mullin*, 296 F.3d 917 (10th Cir. 2002).

1. Texas.

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

This Court reverses Texas death sentences when, through evidentiary rulings or instructions, juries are prohibited from considering or giving effect to mitigating evidence that was not specifically connected to answers to the special issues. In *Penry I*, this Court held that when a defendant places mitigating evidence (mental retardation and childhood abuse) before the jury, the trial court must give an instruction to allow it to consider and give effect to such evidence in its “moral reasoned” response to whether the defendant should live or die. 492 U.S. at 323. In *Penry II*, this Court held a confusing instruction on the connection between mitigating evidence (psychiatrist’s report) and answers to the special issues did not permit the jury to consider and give effect to the evidence. *Penry v. Johnson*, 532 U.S. 782 (2001). In *Smith v. Texas*, 543 U.S. 37, 44-46 (2004) (per curiam), this Court rejected a requirement there must be a “nexus” between mitigating evidence and the special issue questions, holding that such “nexus” has “never been countenanced.” *Penry II*, 532 U.S. at 789.

The Fifth Circuit initially developed its own analysis for *Penry* claims that required the defendant to show a “nexus” between mitigating evidence and his

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

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

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

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

2. Arizona.

For more than fifteen years Arizona applied a causal-nexus test for non-statutory mitigating evidence, *State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994),⁹ before finally abandoning it. *See State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005) and *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006).¹⁰

Cases arising before abandonment of this requirement arrived in the Ninth Circuit in habeas posture. In 2015, the Circuit held Arizona’s “causal nexus test” was “contrary to” *Eddings*. *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015) (en banc) (finding the Arizona Supreme Court’s failure to consider evidence of defendant’s severe,

⁹ In Arizona, there are five statutory mitigating factors: mental capacity, duress, minor participation, reasonable foreseeability, and age, Ariz. Rev. Stat. §13-751(G)(1)-(5), and a nonstatutory category that is a catchall for other mitigating factors.

¹⁰ Though no longer requiring a causal nexus between the mitigating factors and the crime, the Arizona court continued to find that the failure to establish such a causal connection could be considered in assessing the quality and strength of the mitigating evidence. *Newell*, 132 P.2d at 1045.

prolonged childhood abuse, which resulted in post-traumatic stress disorder (PTSD) as mitigating was an *Eddings* error with “substantial and injurious effect” on McKinney’s sentence). *See also Hedlund v. Ryan*, 854 F.3d 557, 587 (9th Cir. 2017) (finding state court applied an unconstitutional causal-nexus test to evidence of difficult family background, including child abuse, contrary to *Eddings*; error was not harmless); *Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018) (finding state court applied an unconstitutional causal-nexus test to mitigating evidence of troubled childhood and mental health issues contrary to *Eddings*; error was not harmless).

3. California.

California, unlike Oklahoma, has a death penalty statute that specifically requires the jury to consider eleven statutory mitigating factors. It once had a catch-all category that allowed juries to consider and give effect to “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” Cal. Jury Instr. - Crim. 8.84.1 factor (k). When California jurors were given the catch-all instruction, this Court concluded the instruction did not limit the jury’s consideration to only circumstances that extenuate the gravity of the crime. *Boyde*, 494 U.S. at 381. But *Boyde* is essentially the mirror-image of what happened in Mr. Cuesta’s case. Mr. Cuesta did not get the “any other circumstance” instruction. His jury was not told there was specific mitigating evidence it *must* consider. And, unlike the prosecutor in *Boyde*, *id.* at 385, Mr. Cuesta’s prosecutor specifically argued the “law” — the court’s instruction — prevented the jury from considering his mitigating evidence

because such evidence was not connected to the murders. Mr. Cuesta's case is, thus, the opposite of *Boyde*. Here, the prosecutor unleashed an outright assault on key mitigating evidence, stating the jury could only consider it if it was connected to the crime and Mr. Cuesta's moral responsibility for it. There is a reasonable likelihood that Mr. Cuesta's jurors understood the vague instruction and the prosecutor's repeated misstatements of it to prevent them from considering relevant mitigating evidence that was offered for a sentence of less than death. The Constitution does not allow this.

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

E. The Impact in This Nation's Death Penalty States.

The Fifth Circuit ultimately moved its *Penry* precedent in line with that of this Court, as did the Ninth Circuit in the Arizona cases. The Tenth Circuit's precedent has not yet been tested in this Court. This confusion among the circuits amply illustrates why this Court must clarify that courts cannot use the "nexus" requirement to allow instructions and/or prosecutorial arguments to limit jurors from giving meaningful

consideration to relevant mitigating evidence. Without this Court’s intervention, more such death sentences will be upheld. *See Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting from denial of certiorari) (noting nexus requirement should not have been used in prejudice determination for ineffective-assistance-of-counsel claim because this Court has consistently rejected any requirement that mitigating evidence can alter a jury’s recommendation only if it explains or provides some rational for his criminal conduct).

The “nexus” requirement has survived in Oklahoma, as it has in Florida, Alabama, and Indiana.¹¹ In Oklahoma, the “nexus” requirement survived despite this Court’s clear statement thirty-six years ago that it has no place in the calculation of whether the evidence presented can mitigate in favor of a sentence less than death. Now is the time to revisit the *Lockett* and *Eddings* issue and the impact prosecutors’ misstatements of the law on mitigation has on jurors.

¹¹ Other state courts have rescued death sentences despite a sentencing judge’s clear conclusion he did not find evidence of a defendant’s bad childhood to be mitigating because there was no evidence the childhood trauma influenced the commission of the crime, i.e. provided a required nexus. *Phillips v. State*, No. CR-12-0197, 2015 WL 9263812 at *83-85 (Ala. Crim. App. Dec. 18, 2015) (distinguishing *Tennard* and *Smith* by concluding the sentencer considered the evidence but found its *weight* insufficient to be a mitigating factor). *See Hines v. State*, 856 N.E. 2d 1275, 1283 (Ind. Ct. App. 2006) (finding trial judge was not required to afford *any* weight to the defendant’s troubled childhood because the defendant failed to establish his past victimization led to his current behavior); *Lynch v. Sec’y of Corr.*, 897 F.Supp. 2d 1277, 1299 (M.D. Fla. 2012) (concluding finding by Florida Supreme Court that Lynch failed to present any evidence connecting his mental condition to his behavior was an unreasonable determination of fact), *but see Lynch v. Sec’y of Corr.*, 776 F.3d 1209, 1223, 1225 (11th Cir. 2015) (overruling district court and upholding Florida Supreme Court’s finding that “none of Lynch’s experts explained how their diagnosis of brain impairment could be squared with Lynch’s conduct and statements before, during, and after the murders”).

CONCLUSION

The Court should grant certiorari to address the important questions presented, to provide the clarification needed on these important questions, and to ensure capital defendants receive all the constitutional protections to which they are entitled.

Respectfully submitted,

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