No. 22-____

IN THE SUPREME COURT OF THE UNITED STATES

_____

LESTER ROBERT OCHOA,

Petitioner,

v.

RON DAVIS, Warden of San Quentin State Prison

Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a State court may, consistent with the Right Against Cruel and Unusual Punishment guaranteed by the Eighth Amendment, prohibit jurors from considering sympathy for a defendant's family in the penalty phase of a capital case as mitigation, especially in light of this Court's holding in Cullen v. Pinholster 563 U.S. 170, 193-194 (2011), approving the "family sympathy defense" as a competent defense penalty strategy?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are the Petitioner Lester Robert Ochoa and the Respondent Ron Davis, the Warden of San Quentin Prison.

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No. 22-____

IN THE SUPREME COURT OF THE UNITED STATES

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LESTER ROBERT OCHOA,
Petitioner,
v.
RON DAVIS, Warden of San Quentin
State Prison

Respondent,

Petitioner, Lester Ochoa, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgement of the United States District Court for the Central District of California, denying Petitioner's habeas petition wherein he sought relief from his California conviction of capital murder and his sentence to the death penalty.

OPINION BELOW

The published Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 16 F. 4th 1314 (9th Cir. 2021) and is attached hereto as Appendix A.

JURISDICTION

The Court of Appeals entered its Opinion on November 1, 2021. Appendix A. The Court denied rehearing on February 9, 2022. Appendix C. This Petition is timely. Supreme Court Rule 13(1) and Rule 13(3). This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "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."

California Penal Code section 190.3 provides in pertinent part:

> "Evidence may be presented by both the People and the defendant as to any matter

> relevant to aggravation, mitigation and sentence, including but not limited to the circumstances of the current offense, prior felony convictions or violent crimes, and the defendant's character, background, history, mental condition and physical condition."

California Penal Code section 190.3(k) further provides that an accused my present "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

STATEMENT OF THE CASE

A. Trial And Death Sentence

On March 20, 1989, after a jury trial in the Los Angeles Superior Court in which the jury found true that on June 18, 1987, Petitioner, Lester Ochoa, killed Lacy Chandler during the commission of the crimes of rape and kidnaping, the trial court sentenced Lester Ochoa to death.

In the penalty phase, at the close of the Petitioner's case, the defense requested the trial court instruct the jury that "You may take sympathy for the defendant and his family into account in deciding whether to extend mercy to

the defendant." App. E, at E001-E007, App. A, at A042-A043; App. B, at B004-B005, App. D, at D0061. The jury had heard evidence that Petitioner had at that time two living parents, two sisters, a wife, and two young children.

The trial court denied the request to give the instruction as written. Instead it excised the words "and his family" from the instruction and ruled that the jury could not properly consider sympathy for petitioner's family as a factor in mitigation. App. A, at A042-A043; App. E, at E003-E004.

Taking advantage of the court's ruling, the prosecutor in his closing argument argued to the jury during the penalty trial that the jury could not consider "sympathy for his [petitioner's] family." App. A, at 0043; App. E, at E008-E009. Defense counsel, consistent with the court's ruling, did not object to the prosecutor's argument or argue otherwise to the jury.

B. State Appeal

In the California Supreme Court, Petitioner argued that the trial court erred in prohibiting a family sympathy instruction which could allow the jury to take sympathy for the defendant's family into account as a factor in

mitigation in the penalty phase of a capital trial.

On November 5, 1998, in affirming petitioner's conviction and death sentence, the California Supreme Court stated: "[W]e hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation." People v Ochoa, 19 Cal. 4th 353, 456 (1998); App. D, p. D062. The Court upheld the trial judge's ruling on the ground that permitting a jury to consider sympathy for the defendant in mitigation would not result in an "individualized assessment" of the defendant's character and background in the penalty phase. Ibid. The Court did opine, however, that a family member could testify in mitigation to the effect of an execution on them "if by doing so they illuminate some positive quality of the defendant's background or character." Ibid.

Petitioner attacked that decision of the California Supreme Court by filing in 1999 a Petition for a Writ of Certiorari in this Court. Petitioner argued that this Court should grant Certiorari on the question of whether "an accused be allowed to present family execution impact evidence as a mitigating factor at the Sentencing phase of a capital trial." On October 4, 1999, this Court denied

petitioner's writ of certiorari in Ochoa v. California, 528 U.S. 862 (1999).

C. Federal Habeas

On May 16, 2001, petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court. On December 1, 2007, Petitioner filed a Third Amended Petition which eventually the parties litigated.

In Claim 23 of the Third Amended Petition, Petitioner argued that the trial court had unconstitutionally denied Petitioner his right to an instruction on family sympathy evidence as mitigation and unconstitutionally abridged his right to argue to the jury that such evidence constituted mitigating evidence. Petitioner also argued that the error was magnified by the prosecutor's argument to the jury that the law did not allow it to consider sympathy for a defendant's family as a factor in mitigation of the death penalty.

The District Court after briefing on the merits, denied and dismissed with prejudice the Third Amended Petition on June 30, 2016. App. B, at B008. With respect to Claim 23, the District Court held that "no clearly established federal law required the giving of a 'sympathy

for the family' instruction." App. B, at B007. Furthermore, according to the district court, 'the record demonstrates that the impact on his family was before the jury and the jury was instructed that it could consider 'anything' in mitigation. Ibid.

Petitioner Ochoa filed a Notice of Appeal. The District Court denied a request for a certificate of appealability. On January 12, 2018, however, the Ninth Circuit granted a certificate of appealability on Claim 23 and stayed execution of the death sentence pending the appeal.

D. Appeal to Ninth Circuit

In the Ninth Circuit, Petitioner argued that the District Court erred in denying Claim 23. The Court of Appeals held, however, that no constitutional error occurred because the trial court had instructed the penalty jury that it could consider unlimited evidence in mitigation including sympathy for the defendant and that it could assign whatever weight to it they believed "appropriate." Ochoa v. Davis 16 F.4th 1314, 1341-1342 (9th Cir. 2021), App. A, at A046-047.

The Circuit found that because no specific instruction barred Petitioner's jury from considering sympathy for Mr.

Ochoa's family "there is no reasonable likelihood that the jury would have believed it could not consider Ochoa's family's testimony or sympathy for Ochoa's family as indirect evidence of Ochoa's character or the circumstances of the offense." Ochoa v Davis, supra, at 1341; App. A, at A046.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE FEDERAL CONSTITUTION REQUIRES THAT A JURY IN A CAPITAL CASE MUST BE INSTRUCTED THAT THEY MAY CONSIDER SYMPATHY FOR THE DEFENDANT'S FAMILY AS A FACTOR IN MITIGATION

A. This Court's Decision In *Cullen v. Pinholster* Already Recognized That Family Sympathy Evidence Constitutes Mitigation Evidence

In his federal habeas petition, Petitioner bore the burden of demonstrating the California Supreme Court's decision that he was not entitled to a jury instruction permitting the jury to consider family sympathy as

mitigation was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," at the time the state court adjudicated the claim. 28 U.S.C. § 2254(d)(1). The Ninth Circuit found he had not met this burden, because no "clearly established federal law" required such a jury instruction. Ochoa v. Davis, supra, 16 F.4th 1314, 1341, App. A, at A046. Yet the decision by this Court in Cullen v. Pinholster, 563 U.S. 170 (2011) raises questions as to whether the Ninth Circuit correctly followed "clearly established federal law as determined by the United States Supreme Court" in this area.

In Pinholster, this Court reviewed a 1984 California death penalty trial wherein a jury sentenced Pinholster to death. Pinholter, on federal habeas, claimed he was denied his constitutional right to the effective assistance of counsel because his attorneys failed to present available mitigating evidence on his behalf in the penalty phase. The evidence included the criminal, mental, and substance abuse problems of his family, his medical and mental health history, and expert testimony that he suffered from epilepsy. Cullen v. Pinholster, supra, 563 U.S. at 190.

The Court of Appeals had upheld Pinholter's claims, finding that trial counsel should have investigated and introduced evidence of Pinholster's "excruciating life history" and his "nightmarish childhood." Id. at 195. Justice Sotomeyer, dissenting in Pinholster, agreed that trial counsel should have sought to explain "why Pinholster was the way he was." Id. at 197. But the majority of this Court rejected those contentions.

The Court in Pinholster recognized that Pinholster's counsel confronted a challenging penalty phase with an unsympathetic client, who had taken the stand in the guilt phase and bragged, laughed, smirked and "glorified" as he spoke about his commission of "hundreds of robberies" and his white supremacy "sideline," where he routinely carved swastikas onto property belonging to others. Cullen v. Pinholster, supra, 563 U.S. at 193. In light of such conduct, the Court in Pinholster found that "it certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's family is a better idea because the defendant himself is simply unsympathetic." Id at 197. The Court in Pinholster favorably quoted Court of Appeals Justice Kosinski that: "The current infatuation with

'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it" Id. at 197.

The majority opinion of Justice Thomas in Pinholster then determined that capital trial counsel as matter of trial strategy when representing an unsympathetic client could reasonably forgo presenting childhood mitigating evidence in favor of calling Pinholster's mother as a part of a "family sympathy mitigation defense." Justice Thomas noted that this approach "was known to the defense bar in California at the time and had been used by other attorneys." Cullen v. Pinholster, supra, 563 U.S. at 197. The majority opinion in Pinholster then concluded that given the "impediments" in calling other defense witnesses, trial counsel did not provide ineffective assistance at the penalty phase because "it would have been a reasonable penalty phase strategy to focus on evoking sympathy for Pinholster's mother" by employing the family sympathy defense. Id. at 197.

Pinholster thus holds that a family sympathy defense constitutes mitigation in the penalty phase of a capital

case and that capital trial counsel may reasonably employ a family sympathy defense in an effort to save his client from a death sentence, because a jury may rely upon it in reaching a life verdict. Of course, the "holding" of a case is the "legal principle to be drawn from the opinion." Black's Law Dictionary, 5th Edition (1979). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida 517 U.S. 44, 67. (1996)[1]

In Pinholster, the Court had to resolve whether competent capital trial counsel could reasonably eschew presenting background evidence of a tumultuous childhood and significant physical disorders in favor of simply offering a "family sympathy defense," where jurors might arrive at a life verdict because they sympathized not with the accused, but with his family. By answering this question in the affirmative, the Court endorsed the idea that defense attorneys might reasonably argue for jurors to choose a life verdict based on sympathy for a defendant's family. In

[1] "Dicta," on the other had, refers to matters unnecessary to the Court's decision. Kastigar v. United States, 406 U.S. 441, 545-455 (1972).

other words, the Court endorsed the idea that defense counsel might use family sympathy as mitigation. If the "family sympathy defense" did not constitute a valid approach to mitigation, then Pinholster's claim of ineffective assistance of counsel would have succeeded and his conviction would have been set aside.

Pinholster thus stands for the proposition that since 1984, the "family sympathy defense" has represented a constitutionally valid mitigation defense because reasonable jurors could use it to arrive at a life verdict, just as Willaims v. Taylor 529 U.S. 362, 395 (2000) permits jurors to use evidence of a "nightmarish childhood" to arrive at a life verdict. When, as here, a capital defendant submits an instruction that the jury may consider sympathy for defendant and his family in their penalty phase deliberations as a factor in mititgation, Pinholster stands for the proposition that the Constitution requires that a trial court give such an instruction and forbid the prosecutor from arguing the contrary. Otherwise, a rational juror might conclude he had no authority to vote for life based on sympathy for the defendant's family.

This Court should grant this writ to decide whether its

decision in Pinholster precludes a state from prohibiting a capital jury from considering a "family sympathy defense" as mitigating evidence. By denying Petitioner's request for a jury instruction on the family sympathy defense, the California state court violated Petitioner's constitutional right to have the jury instructed concerning mitigation evidence so that it can "give effect to its consideration in imposing sentence." Penry v Lynaugh, 492 U.S. 302, 321 (1989).

B. A State May Not Constitutionally Bar A Penalty Phase Jury In A Capital Case From Hearing And Considering Mitigating Evidence

The decisions of this Court over the past 45 years have made it clear that a defendant in a capital case has a constitutional right to present mitigating evidence in his effort to avoid a death sentence. On several occasions this Court has stated: "A State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." Penry v Lynaugh, 492 U.S. 302, 318 (1989); Lockett

v Ohio, 438 U.S. 586, 604 (1978); Eddings v Oklahoma, 455 U.S. 104, 113-114 (1982); Skipper v North Carolina, 476 U.S. 1, 4 (1986). These cases require that a State permit the jury to consider sympathy for the defendant's family, just as it allows the jury to consider victim impact evidence, which involves sympathy for the murder victim's family in deciding whether the defendant lives or dies. See, Payne v Tennessee, 501 U.S. 808, 825 (1991)[victim impact evidence case].

In Woodson v. North Carolina, 428 U.S. 280, 303-5 (1976), the United States Supreme Court held that the federal constitution requires an individualized assessment by the jury of the defendant at the penalty phase of a capital case. It reasoned:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. (Id. at 303.)

In Lockett v. Ohio, 438 U.S. 586, 604-605 (1978), this Court similarly held that the Eighth and Fourteenth Amendments required in a death penalty case that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of the 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."

In Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), the defendant offered "evidence of a turbulent family history, of beatings by a harsh father, and severe emotional disturbance." Id. at 115. At the sentencing, when the trial judge imposed a death sentence, the judge stated that by law he could not consider evidence of the defendant's "violent background," and would only consider the single mitigating factor of the 16 year old defendant's youth. Id. at 109. This Court set aside the death sentence, finding that the trial judge had violated the "Lockett" rule which requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Id. at 112. The Court drew an analogy between the actions of

the Judge in refusing to consider a mitigating factor and the giving of a jury instruction prohibiting the consideration of a mitigating factor:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. Id. at 114-115. (Emphasis added.)

In Skipper v South Carolina, 476 U.S. 1 (1986) the Supreme Court extended the doctrine of individualized death sentence determinations in capital cases. During the sentencing phase of his capital trial, Skipper attempted to introduce the testimony of two jailers and one of his visitors that he had "made a good adjustment during his period of confinement." Even though the Supreme Court recognized that this evidence did not bear directly on Skipper's moral culpability for the crime, it held that the

evidence should nonetheless have been admitted because a capital sentencing jury must be allowed to consider any evidence that might provide the basis for a sentence less than death. Skipper v South Carolina, supra, at 4.

Sympathy for the defendant's family, for what they have suffered in the case, and what emotional turmoil they might experience as a result of petitioner's execution, is relevant mitigation evidence within the holdings of Woodson, Lockett, Eddings, and Skipper. Observing the family members of the defendant and hearing them testify concerning the effect of the arrest and prosecution of the defenant on them gives the jury a fuller understanding of the entire circumstances and consequences of the crime. If such accounts engender sympathy, the Woodson, Lockett, Eddings, and Skipper cases, as a matter of federal constitution law, permit the jury to act upon it.

The prosecution is now allowed to introduce victim impact evidence during the penalty trial. This evidence relates to the harm suffered by members of the decedent's family as a result of the crime. This evidence is admissible so that jurors can consider this as a circumstance of the crime and as evidence of the "specific

harm caused by the defendant." Payne v. Tennessee 501 U.S. 808, 825 (1991). This Court decided Payne after Petitioner's trial, but while Petitioner's case was pending on direct appeal to the California Supreme Court.

Payne reasoned "there is nothing unfair about allowing the jury to bear in mind that harm (i.e. the harm to the decedent's family) at the same time as it considers the mitigating evidence introduced by the defendant." Payne v. Tennessee, supra, at 826. The Supreme Court's capital jurisprudence thus contemplates a symmetrical penalty phase, where jurors can, if they wish, consider and act on sympathy for either the decedent's family or the defendant's family.

In view of the above-cited authorities, the California Supreme Court unreasonably construed controlling federal law in ruling that the jury could not consider sympathy for Petitioner's family as mitigation. It was error for the trial court to refuse to instruct the jury that it could consider such evidence in mitigation of the death penalty. It was error to admonish defense counsel that the law did not permit the jury to factor sympathy for the family into its verdict. Finally, it was error for the trial court to permit the prosecutor to argue that the jury could not

consider family sympathy evidence as mitigation. Therefore, the Court should grant certiorari in this case.

C. In Light Of The Trial Judge's Instructions And The Prosecutor's Argument In Petitioner's Case, A Rational Juror May Have Believed That She Could Not Vote For Life Based On Sympathy For Petitioner's Family

The Ninth Circuit Opinion states that "neither the trial court's instructions nor the prosecutor's argument precluded the jury from considering family sympathy evidence as indirect evidence of Ochoa's character or the circumstances of the offenses charged; and the court did not prohibit Ochoa from arguing that family sympathy was relevant." Ochoa v. Davis 16 F.4th 1314, 1338-1339 (9th Cir. 2021), App. A, at A041. The Opinion further states "Ochoa did not object to the prosecutor's argument regarding family sympathy at trial." Ochoa v. Davis, supra, 16 F.4th at 1341, App. A, at A047. None of these statements reflects the true state of the facts of Petitioner's trial.

The trial court never allowed Ochoa to argue family sympathy as a mitigating factor. Ochoa submitted a jury instruction that told the jury that sympathy for his family

could be a basis for returning a verdict less than death. The trial judge struck family sympathy from the instruction, ruling that family sympathy did not amount to a mitigating factor in a death penalty case. App. E, at E001-E007. In reliance on that ruling, the prosecutor argued to the jury that the law did not permit them to consider family sympathy as a reason for not returning a death verdict. App. E, at E008-E009. Petitioner could not object to this argument, since the trial court had already ruled that family sympathy did not constitute a factor in mitigation.

The Opinion further states: "Viewing the instructions collectively, there is no reasonable likelihood that the jury would have believed it could not consider Ochoa's family's testimony or sympathy for Ochoa's family as indirect evidence of Ochoa's character or the circumstances of the offense." Ochoa v. Davis, supra, 16 F.4th at 1341, App. A, at A046. This conclusion lacks any foundation in the record. Nowhere in the jury instructions were the jurors informed that they could consider sympathy for Ochoa's family as indirect evidence of Ochoa's character. This was a theory of admissibility that was raised for the first time long after the trial had concluded, by the

California Supreme Court in its ruling in affirming the death sentence.

The key holding of the California Supreme Court in Ochoa's case is that "[S]ympathy for a defendant's family is not a matter that a capital jury can consider in mitigation." People v Ochoa, 19 Cal. 4th 353, 456 (1998). That statement could not be clearer. In Ochoa's trial, sympathy for the defendant's family could not be considered by the jury as a factor in mitigation of the death penalty. The fact that the California Supreme Court opined that in future death penalty cases a hypothetical jury might consider sympathy for a defendant's family as "indirect" evidence of the defendant's good character, did not cure the constitutional error in Ochoa's case.

Petitioner was prejudiced during his trial by the trial court's ruling which barred the use of family sympathy as a factor in mitigation. At the penalty trial, several of Petitioner's family members were called as witnesses. The jury heard from Elva Ochoa, his wife, Velia Ochoa, his mother, Sharon Ochoa, his sister, and Arlene Cook, another sister.

They testified that as a young boy he was "outgoing,

friendly, respectful, and involved in baseball." People v Ochoa, supra, 19 Cal. 4th at 439. His parents "treated him well and with love." Id. However, as a teenager, he was "plagued by drug abuse," and his drug abuse destroyed his close and loving relationship with his family. Id. His mother tried in vain "to get help for his drug problem," but in the end, "the drugs took him." Id. at 440.

Without a jury instruction advising the jury that it could return a life verdict in Petitioner's case based on sympathy for his family, there was no way for the jury to "give effect to its consideration in imposing sentence." Penry v Lynaugh, 492 U.S. 302, 321 (1989). The Ninth Circuit Court in reviewing Petitioner's case engaged in total speculation when it stated "there is no reasonable likelihood that the jury would have believed it could not consider Ochoa's family's testimony or sympathy for Ochoa's family as indirect evidence of Ochoa's character or the circumstances of the offense." Ochoa v. Davis, supra, 16 F.4th at 1341, App. A, at A046.

The idea that the jury on its own would have come up with this theory for viewing family sympathy evidence, without jury instructions or arguments of counsel to guide

it, is a conclusion that has no support in the record. No rational juror, hearing the instructions coupled with the prosecutor's warning not to consider family sympathy, could believe she could consider family sympathy as mitigation and a reason not to impose the death penalty. The California Supreme Court decision on the family sympathy issue was therefore a decision that was contrary to clearly established federal law and was based on an unreasonable determination of the facts. 28 U.S.C. §2254(d); Abdul-Kabir v Quarterman, 550 U.S. 233, 257-258 (2007).

The record demonstrates that Ochoa requested a jury instruction on family sympathy as a mitigating factor; that his request was denied; that thereafter he was unable, based on that ruling, to argue family sympathy as a mitigating factor; and the prosecutor, aided by the trial court's ruling, was able to argue to the jury that they were legally prohibited from relying upon family sympathy as a reason for returning a verdict less than death. At no time did the court or the prosecutor tell the jury it could "directly" or "indirectly" consider family sympathy as mitigation. The trial court clearly intended to prohibit the defense from arguing family sympathy in any way at all.

Petitioner Ochoa's mitigation arguments appear similar to those made in the case of Abdul-Kabir v Quarterman, 550 U.S. 233 (2007) and adopted by this Court. In Abdul-Kabir, the defendant was convicted of capital murder and sentenced to death. At sentencing, the jury was told that in order to vote a death verdict it had to answer in the affirmative two questions: whether the defendant's conduct was committed deliberately and with the reasonable expectation it would result in his victim's death and whether it was probable he would commit future violent acts constituting a continuing threat to society.

Abdul-Kabir's mitigating evidence included family members' testimony describing his unhappy childhood as well as expert testimony which primarily sought to reduce his moral culpability by explaining his violent propensities as attributable to neurological damage and childhood neglect and abandonment. Id. at 550 U.S. 239-240. The prosecutor in his argument to the jury discouraged jurors from taking these latter considerations into account, advising them instead to answer the special issues based only on the facts of the crime and to disregard any other views as to what might constitute an appropriate punishment for this

particular defendant. Id. at 243.

The trial judge refused to give Abdul-Kabir's requested instructions, which would have authorized a negative answer to either of the special issues on the basis of any evidence the jury perceived as mitigating. The jury answered both questions in the affirmative, and the defendant was sentenced to death. The defendant argued on his State Court appeal that the two questions decided by the jury precluded the jury from properly considering and giving effect to his mitigating evidence. Ibid.

After his State Court appeals were denied, Abdul-Kabir filed a federal habeas petition, asserting that the sentencing jury was unable to consider and give effect to his mitigating evidence in violation of the Constitution. He relied on Penry v. Lynaugh, 492 U.S. 302 (1989) which required that juries be given instructions allowing them to give effect to a defendant's mitigating evidence and to express their reasoned moral response to that evidence in determining whether to recommend death. Both the District Court and the Fifth Circuit denied relief. Abdul-Kabir v. Quarterman, supra, 550 U.S. at 245-246.

This Court granted certiorari and vacated the death

sentence. This Court held that because there appeared a reasonable likelihood that the state trial court's instructions and the prosecutor's closing arguments prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence, the decision of the State Court in denying relief "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by Supreme Court," 28 U.S.C. § 2254(d)(1), and thereby warranted federal habeas relief. Abdul-Kabir v Quarterman, 550 U.S. 233, 257-258 (2007).

In Abdul-Kabir, this Court expressly rejected the approach of the Texas Court of Appeals, which had reviewed the evidence in the record to see whether there was some way in which the jury might have considered the mitigation evidence offered by Abdul-Kabir. This Court held that "the judge's assumption that it would be appropriate to look at 'other testimony in the record' to determine whether the jury could give mitigating effect to the testimony of [Defendant's] mother and aunt is neither reasonable nor supported by the Penry opinion." Id. at 259. The Court found that instead the appropriate test should have been

whether jury instructions allowed the jury to give "meaningful effect" to the mitigating evidence. Id. at 260-264. It found that none did.

In Petitioner's case, the California Supreme Court and the Ninth Circuit both reviewed the trial record and came to the conclusion that despite the trial judge's exclusion of family sympathy from the jury instructions on mitigation and the prosecutor's argument to the jury that family sympathy was not a valid mitigating factor, the jury probably considered family sympathy. People v Ochoa, 19 Cal. 4th 353, 456 (1998); Ochoa v Davis,16 F. 4th 1314, 1341 (9th Cr. 2021). Both Courts concluded that neither the jury instructions nor the prosecutors's argument prevented the jury from considering evidence relevant to Ochoa's character or the circumstances of the offense charged. People v Ochoa, supra, at 456; Ochoa v Davis, supra, at 1341.

This is precisely the same error that occurred in the Abdul-Kabir case. In upholding the death sentence in Petitioner's case, the State court looked to evidence in the record and concluded that the jury probably considered the family mitigation evidence in a way that was never explained to the jury nor argued by counsel. In reaching that

conclusion, the State Court decision in Petitioner's case was in blatant and direct conflict with the Abdul-Kabir and Penry cases. As a result, the decision was contrary to and involved an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts. 28 U.S.C. §2254(d); Davis v Ayala, 576 U.S. 257, 269-270 (2015); Fry v Pliler, 551 U.S. 112, 119 (2007); Harrington v Richter, 562 U.S. 86, 103 (2011); Abdul-Kabir v Quarterman, 550 U.S. 233, 257-258 (2007).

Petitioner is entitled to habeas relief because he has established actual prejudice under the standard set forth in Brecht v Abrahamson, 507 U.S. 619, 627 (1993). Under this standard, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" O'Neal v. McAninch, 513 U.S. 432, 436 (1995); Brecht v Abrahamson, supra, at 627.

In Petitioner's case, the jury that decided whether to impose the death penalty never could consider family sympathy as a mitigating factor before arriving at a death verdict. The trial judge's decision to strike "sympathy for defendant's family" from the jury instruction requested by

Petitioner had two consequential effects. First, Petitioner's counsel was told that sympathy for the Petitioner's family was not a factor in mitigation. Second, in light of that ruling, Petitioner's counsel refrained from arguing family sympathy as a mitigating factor and the prosecutor in his final argument told the jury that they were forbidden from considering family sympathy as a basis for not arriving at a death verdict.

As a result, Petitioner's jury never considered that family sympathy mitigation despite the strong evidence presented at the penalty trial concerning the desperation of his wife, mother, two sisters, and children caused by the possibility of the death penalty. If the jury had been allowed to consider family sympathy as a mitigating factor, "there is a reasonable probability that at least one juror would have struck a different balance," and voted for a life verdict. Wiggins v Smith, 539 U.S. 510, 537 (2003). A death sentence imposed under such circumstances is unconstitutional. Petitioner clearly suffered prejudice and was entitled to federal habeas corpus relief.

CONCLUSION

Therefore, Petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

Dated: May 3, 2022

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JAMES BISNOW
Counsel of Record

_____
JOSEPH F. WALSH
Attorney for Petitioner