No. 21-7778

In the Supreme Court of the United States

LESTER ROBERT OCHOA,

Petitioner,

v.

RON DAVIS, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether habeas relief is available under 28 U.S.C. § 2254(d) for petitioner's claim that he was entitled to an instruction specially directing the penalty-phase jury in his capital case to consider jurors' sympathy for his family as a mitigating factor.

DIRECTLY RELATED PROCEEDINGS

Supreme Court of the United States:

> *Ochoa v. California*, No. 98-9953 (order denying petition for certiorari entered October 4, 1999).

United States Court of Appeals for the Ninth Circuit:

> *Ochoa v. Davis*, No. 16-99008 (judgment entered November 1, 2021; petition for rehearing and rehearing en banc denied February 9, 2022).

United States District Court for the Central District of California:

> *Ochoa v. Davis*, No. CV-99-11129-DSF (judgment entered June 30, 2016).

California Supreme Court:

> *In re Ochoa*, No. S109935 (petition for habeas corpus denied March 26, 2003).
>
> *In re Ochoa*, No. S064794 (petition for habeas corpus denied November 5, 1998).
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> *People v. Ochoa*, No. S009522 (judgment entered November 5, 1998).

California Superior Court, Los Angeles County:

> *People v. Ochoa*, No. A885934 (judgment entered March 20, 1989).

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STATEMENT

Petitioner Lester Robert Ochoa was convicted and sentenced to death for kidnapping, raping, and murdering sixteen-year-old Lacy Chandler. Pet. App. D 1. His petition to this Court challenges the lower courts' denial of federal habeas relief on his claim of instructional error.

1. Police discovered Chandler's body on the grounds of a school in Baldwin Park, California, on the morning of June 18, 1987. Pet. App. A 8. Chandler had been stabbed 23 times, and there was semen on her clothing and body. *Id.*; *see also* Pet. App. D 5, 9. Police began investigating petitioner for the attack against Chandler after hearing from another man about an earlier sexual assault that the two men had committed at the same school against a different victim, C.J. Pet. App. A 8. When questioned, Ochoa confessed to raping and killing Chandler and gave police information allowing them to find the knife he had used. *Id.* at 9; Pet. App. D 6-7.

2. a. At the guilt phase of petitioner's trial, the jury convicted him of first-degree murder, forcible rape, and kidnapping for the attack on Chandler. Pet. App. A 11. As special circumstances, the jury found beyond a reasonable doubt that the murder was committed during the course of kidnapping and of rape. *Id.* The jury also convicted petitioner of kidnapping, rape, and other crimes for his attack on C.J. *Id.* at 12. And the jury convicted petitioner of assault with a deadly weapon, assault with intent to rape, and burglary for additional crimes he had committed against his sister-in-law, Y.A. *Id.* at 10-12.

b. At the penalty phase, petitioner presented various types of mitigation evidence. Ochoa's sisters testified that he had been a good boy when he was younger, but that drugs had altered his behavior in his teens and twenties, making him violent. Pet. App. D 48-49. They explained that petitioner was "'mean,' 'belligerent,' uncaring, and impatient when intoxicated, but 'calm,' '[g]entle,' and jocular when not." *Id.* at 48; *see also id.* at 49 (describing testimony that petitioner abused his wife and attacked his father with a knife, but that when he was sober he would show remorse over his drug use and would try to improve himself). Petitioner's wife testified that he had a "Jekyll-and-Hyde personality" and that his drug and alcohol abuse had destroyed their relationship. *Id.* at 49. Petitioner's mother also testified to the negative effect of drugs on Ochoa's life. *Id.* A consultant with experience in the California correctional system testified about the secure environment in which petitioner would be held if sentenced to life in prison, and testified that he could "adjust well" to that setting—although he also admitted on cross-examination that it was possible for inmates to obtain drugs and weapons. *Id.* at 49-50. An expert witness testified about the effects that long-term cocaine use could have had on petitioner's brain. *Id.* at 50. A detective testified that petitioner had expressed remorse when he confessed to killing Chandler, and a sheriff's deputy testified that petitioner had behaved acceptably during part of the time he was held before trial. *Id.*

Petitioner's claim here concerns the trial court's partial denial of a jury instruction request. Petitioner requested that the Court instruct jurors: "'You may take sympathy for the defendant and his family into account in deciding whether to extend mercy to the defendant.'" Pet. App. A 42. The court agreed that the jury should be instructed about its ability to take sympathy for the defendant into account, but concluded that the instruction should not contain the words "and for his family." *Id.* As a result, the jury was instructed: "'You may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant.'" *Id.* at 42-43. The court explained that "the law [wa]s that the defendant should be punished based upon his individual record, his individual background and his individual involvement." *Id.*; *cf.* Pet. App. E 2 (petitioner's counsel's response that that the judge "may be correct" in not knowing of any authority *requiring* an instruction on family sympathy but that she did not believe there was any authority *prohibiting* such an instruction).

Other instructions, however, provided the jury with wide scope to consider mitigation evidence. One instruction stated, "'[M]itigating factors are unlimited. Anything mitigating should be considered. Mitigating factors included in the instructions are merely examples of some of the factors you may take into account in deciding whether or not to impose a death penalty.'" Pet. App. B 5. And another instruction directed the jury to consider, as mitigation, "'[a]ny other circumstance which extenuates the gravity of the

crime even though it is not a legal excuse for the crime[.]'" Pet. App. D 61. The jury returned a verdict of death. *Id.* at 1.

3. The California Supreme Court affirmed petitioner's convictions and sentence. Pet. App. D. With respect to the claim at issue here, the court concluded that the trial court had not violated petitioner's constitutional rights by refusing to list sympathy for petitioner's family as a mitigating factor the jury should consider. *Id.* at 63. The court observed that, notwithstanding the absence of an express instruction, Ochoa was never "forbid[den] to argue to the jurors to take sympathy for his family into account." *Id.* at 61. The court observed that neither it nor this Court had ever decided whether the sentencer in a capital case should consider, as evidence in mitigation, the impact of a death judgment on the defendant's family. *Id.* at 62. The court reasoned that for the sentencer in a capital case "what is ultimately relevant is a defendant's background and character." *Id.* Thus, the court explained, the impact that a death judgment would have on a defendant's family has relevance as "indirect evidence of the defendant's character." *Id.*; *see also id.* at 63 (explaining that evidence of the impact of a defendant's execution on his or her family is admissible so long as it "illuminate[s] some positive quality of the defendant's background or character"). The instruction was proper because the jury's task was to decide "whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." *Id.* at 62.

Petitioner filed a petition for a writ of certiorari, which raised, as one of its claims, the contention that, by denying his requested instruction, the trial court unconstitutionally prevented him from presenting family "impact evidence as a mitigating factor." Pet. for Cert. at 7, *Ochoa v. California*, No. 98-9953. This Court denied certiorari. *Ochoa v. California*, 528 U.S. 862 (1999).

4. Ochoa filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California.[1] The district court denied the petition. Pet. App. B. Among numerous other claims, petitioner again argued that the trial court should have expressly instructed the jury to consider sympathy for his family as mitigation. *Id.* at 4. Applying the restrictions on habeas relief in 28 U.S.C. § 2254(d), the court reasoned that Supreme Court precedent recognized "no clearly established federal law that required the giving of a sympathy for the family instruction." *Id.* at 7 (internal quotation marks omitted). Instead, Supreme Court precedent required only that the jury be "permitted to give 'particularized consideration of relevant aspects of the character and record of each convicted defendant.'" *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 286, 303 (1976)). The instructions in

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[1] Petitioner had earlier filed a state-court petition for collateral review, which the California Supreme Court denied at the same time it affirmed his conviction on direct appeal. *In re Ochoa*, No. S064794. The California Supreme Court denied an additional petition for state collateral review in March 2003. *In re Ochoa*, No. S109935. Neither of those cases involved the issue that petitioner raises here.

petitioner's trial met that requirement: they did not deny petitioner "the ability to have the jury consider any aspect of his character or record and any of the circumstances of the offense." *Id.* (discussing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). "[T]he record demonstrates that the impact on his family was before the jury and the jury was instructed that it could consider 'anything' in mitigation." *Id.*

5. The court of appeals affirmed. Pet. App. A. With respect to the family-sympathy instruction, the court explained that clearly established law as determined by this Court requires that the sentencer be allowed to consider in mitigation the "'character and record of the individual offender and the circumstances of the particular offense.'" *Id*. at 41-42 (quoting *Woodson*, 428 U.S. at 304). In contrast, no Supreme Court holding requires juries to be instructed to consider sympathy for a capital defendant's family. *Id*. at 45. Moreover, the court reasoned, the jury heard evidence about how the trial impacted some of Ochoa's family members, and the court's instructions as a whole allowed the jury to consider as mitigation any evidence the jury chose. *Id*. at 46.

The court of appeals denied petitioner's request for rehearing en banc, without dissent and without any judge requesting a vote. Pet. App. C.

ARGUMENT

Petitioner argues that the courts below erred in denying him federal habeas relief on his claim that his jury should have been expressly instructed to consider sympathy for his family as a mitigating factor. That argument is

incorrect, and petitioner does not identify any other persuasive reason for further review.

As petitioner acknowledges (Pet. 8-9), because the California Supreme Court adjudicated his claim on the merits, federal habeas relief is available only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). It requires Supreme Court precedent that "squarely addresses the issue." *Wright v. Van Patten*, 552 U.S. 120, 125-126 (2008) (per curiam). In contrast, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). As the court of appeals recognized, petitioner's claim that he had a right to a specific instruction on family sympathy falls short of these requirements. Pet. App. A 47-48.

Petitioner primarily relies on *Cullen v. Pinholster*, 563 U.S. 170 (2011). Pet. 8-14. He portrays *Pinholster* as holding "that a family sympathy defense constitutes mitigation in the penalty phase of a capital case," *id*. at 11; that "a jury may rely upon [family sympathy] in reaching a life verdict," *id*. at 13; and

that "the Constitution requires that a trial court give such an instruction" upon request, *id*. at 13. But *Pinholster* cannot provide a basis for habeas relief under Section 2254(d)(1), because it did not exist "as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. The California Supreme Court issued its decision rejecting petitioner's claim in 1998; this Court's *Pinholster* decision came in 2011.

Nor did *Pinholster* establish what petitioner proposes. In *Pinholster*, trial counsel defending a capital case had investigated various mitigation approaches but elected to forego them in favor of attempting to exclude the prosecution's aggravating evidence and (if necessary) pursue a "family sympathy" strategy by calling the defendant's mother to testify. 563 U.S. at 191. The defendant was convicted and sentenced to death, and then claimed that he had received ineffective assistance of counsel. *Id.* at 174, 191. This Court determined that the state court's rejection of Pinholster's claim was not contrary to or an unreasonable application of this Court's precedents, explaining that his "unsympathetic" characteristics "limited the[] feasible mitigation strategies," *id*. at 193, and that attempting to generate sympathy for the family was not uncommon in California capital cases, *id*. at 191. *Pinholster*'s holding was that if it is possible to create sympathy by having a family member *testify*, then it may not necessarily be *ineffective* for counsel to choose that approach in lieu of other attempts at mitigation. That holding says nothing about any entitlement to a specific instruction. Nor is petitioner

correct to argue that such a proposition was implicitly established by *Pinholster* in a way that could support relief under Section 2254(d). Such reasoning does not suffice as a basis for habeas relief under AEDPA. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("[I]t is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.").

Petitioner argues that the denial of his requested instruction also violated the general principle that a State may not "'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.'" Pet. 14 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989)). But it was not unreasonable for the state courts to conclude that the sympathy for the defendant's family is not an aspect of "the *defendant's* background or character" or "the circumstances of the *offense*." *Id.* (emphasis added). Petitioner's argument would require the federal habeas court to "'extend a rationale'" of this Court's prior cases, which Section 2254(d) prohibits. *See White*, 572 U.S. at 426.[2]

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[2] Petitioner's other cited cases likewise concern only the defendant's right to present evidence of "the character and record of the convicted defendant." *Woodson*, 428 U.S. 286, 303-305 (1976); *Lockett*, 438 U.S. 586, 604 (1978) (same); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (similar); *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) (death sentence reversed where sentencing judge refused to consider defendant's violent upbringing as

In any event, as the lower courts explained, the jury instructions did not prohibit the jurors from considering sympathy for petitioner's family. *See* Pet. App. A 46. To the contrary, the instructions stated that "'mitigating factors are unlimited,'" "'[a]nything mitigating should be considered,'" and "'[m]itigating factors included in the instructions are merely examples of some of the factors you may take into account in deciding whether or not to impose a death penalty.'" Pet. App. B 5. And the jury was instructed to consider, as mitigation, "'*[a]ny other circumstance* which extenuates the gravity of the crime.'" Pet. App. D 61 (emphasis added). To whatever extent petitioner might have had some right for his jurors not to be prohibited from considering sympathy for his family, it was not unreasonable for the state court to conclude that that right was satisfied here. "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." Pet. App. A 46.

Petitioner asserts, however, that the prosecutor's argument precluded the jury from considering sympathy for his family. Pet. 20-24. During closing argument at the penalty phase, the prosecutor told the jurors that "sympathy

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mitigating evidence). Indeed, at the trial court, petitioner's counsel stated that she did not believe there was any authority *prohibiting* an instruction on family sympathy, but acknowledged that the judge "may be correct" when he said he was not aware of any authority *requiring* such an instruction. Pet. App. E 2.

for the defendant means exactly that. It does not mean sympathy for his family." Pet. App. A 43. The prosecutor argued that, with respect to mitigation, the jury's job was "to decide what you've heard here and what the defendant has done and what his background is and whether he deserves that consideration." *Id*. at 43-44.

But petitioner did not object to the prosecutor making this point. Pet. App. A 44.[3] And in any event, there is no reason to believe that the jury would have viewed this *argument* by the prosecutor as overriding the judge's *instructions*. *See Boyde v. California*, 494 U.S. 370, 384 (1990) ("[A]rguments of counsel generally carry less weight with a jury than do instructions from the court."). Under these circumstances, it was not unreasonable for the state court to conclude that the prosecutor's argument did not preclude the jury from taking into account sympathy for petitioner's family.

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[3] Petitioner argues that an objection would have been futile in light of the court's denial of his request to have family sympathy expressly mentioned in the jury instruction. Pet. 21. But there is a difference between not explicitly telling the jury to consider a particular factor and prohibiting them from considering it. The court's ruling against petitioner on the former did not mean that the court had decided the latter was required, or that it would have declined to consider a timely objection had petitioner made one. And to whatever extent there was uncertainty about that implication of the court's prior ruling, the matter could have been clarified (and a better record made for later review) if petitioner had objected. The lack of a contemporaneous objection would not necessarily bar this Court from considering the prosecutor's argument as part of the instructional issue. (The California Supreme Court considered and rejected petitioner's contention about the prosecutor's argument. *See* Pet. App. D 62.) But it certainly would make this case a less than ideal vehicle in which to consider the issue.

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007), on which Ochoa relies, does not support his argument. Pet. 25-29. In that case, a habeas petitioner argued that, due to the jury instructions and the prosecutor's arguments, his sentencing jurors would have been unaware of their ability to consider evidence of his abusive upbringing and its psychological consequences as a basis for rejecting a death verdict. *Abdul-Kabir*, 550 U.S. at 239-241. This Court agreed, based on the principle that "before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense." *Id.* at 263-264.

In this case, however, petitioner points to nothing inhibiting the jury from considering petitioner's "moral culpability," his "personal history and characteristics," or "the circumstances of the offense." Instead, petitioner argues that his jury was prevented from considering something else entirely—sympathy for his family—which this Court has never established (let alone clearly established) as a constitutionally required factor in capital sentencing decisions. *See supra* pp. 7-9.

Nor, if there were such a right, would the argument and instructions here have had anything close to the effect of the argument and instructions in *Abdul-Kabir*. In *Abdul-Kabir*, the prosecutor "began his final closing argument with a reminder to the jury that during the voir dire they had

'promised the State that, if it met its burden of proof,' they would answer 'yes' to both special issues," authorizing a death verdict; the trial judge refused to give an instruction "that would have authorized a negative answer to either of the special issues on the basis of 'any evidence which, in [the jury's] opinion, mitigate[d] against the imposition of the Death Penalty, including any aspect of the Defendant's character or record.'" 550 U.S. at 242. Here, in contrast, there were "several" instructions that "made clear that the jury could consider any evidence in mitigation," including "'any sympathetic or other aspect of the defendant's character or record.'" Pet. App. A 46. And "[t]he prosecutor reminded the jurors that their decision was to be guided by the jury instructions, which in turn allowed for consideration of unlimited mitigating factors." *Id.* at 47. *Abdul-Kabir* does not show that the California Supreme Court's decision contradicted or unreasonably applied this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

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