

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

PETITIONER'S REPLY BRIEF

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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?

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Respondent,

Petitioner, Lester Ochoa, hereby replies to
California's Brief in Opposition to Petitioner's Writ of
Certiorari.

INTRODUCTION

The California Supreme Court squarely held 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). Yet, Respondent never
acknowledges this direct and erroneous state holding.
Instead, it narrowly characterizes the California Supreme
Court as ruling 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. Res. Br. 4.

By ignoring the California Supreme Court's actual holding, Respondent misses the force of Petitioner's argument. In this Reply, Petitioner asks three questions, all of which it answers in the affirmative: (1) Is family sympathy a factor in mitigation of the death penalty? Yes. Cullen v. Pinholster, 563 U.S. 170, 197 (2011); (2) If so, did Petitioner have a clearly-established constitutional right to have the jury instructed on this factor in mitigation? Yes. 28 U.S.C. §2254(d); Penry v. Lynaugh, 492 U.S. 302, 321 (1989); and (3) Did the California Supreme Court's Opinion incorrectly assume that jurors actually considered family sympathy where the trial court prohibited them from doing so? Yes. Abdul-Kabir v. Quarterman, 550 U.S. 233, 257-258 (2007).

I

PINHOLSTER SUPPORTS PETITIONER'S ENTITLEMENT TO A WRIT BECAUSE IT MAKES PLAIN THAT THE LOCKETT LINE OF CASES HAS ALWAYS INCLUDED THE FAMILY SYMPATHY DEFENSE AS MITIGATING EVIDENCE

In Cullen v. Pinholster, 563 U.S. 170 (2011) this Court

held that trial counsel in a capital case did not provide ineffective assistance at the penalty phase by failing to present Pinholster's newly-discovered drug addiction and mental health records, 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.

Respondent argues that (1) Pinholster provides no basis for habeas relief because it occurred after Petitioner's trial; (2) Pinholster did not hold family sympathy amounted to mitigating evidence, and (3) family sympathy evidence does not amount to mitigating evidence which a capital jury should consider. Resp. Br. 7-9. None of these arguments are true.

First, Petitioner did not rely on Pinholster for his arguments that the federal constitution requires that the trial court instruct the jury that family sympathy evidence forms mitigating evidence which the jury may consider as a basis for a sentence less than death. For that proposition, Petitioner relied on the Lockett, Eddings, and Penry line of cases. See, Lockett v Ohio, 438 U.S. 586, 604 (1978); Eddings v Oklahoma, 455 U.S. 104, 113-114 (1982); Penry v

Lynnaugh, 492 U.S. 302, 318 (1989).

In Lockett v. Ohio, 438 U.S. 586, 604-605 (1978), this Court 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), a capital murder case, the trial judge who imposed a death sentence stated that by law he could not consider "evidence of a turbulent family history, of beatings by a harsh father, and severe emotional disturbance," 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.

In Penry v. Lynnaugh, 492 U.S. 302, 328 (1989) this Court held that juries must 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.

The Court in Penry stated that the requirement that the jury be given instructions on the effect of mitigation evidence in death penalty cases had already been established in several Supreme Court cases and was not a "new rule," for purposes of Teague v Lane, 489 U.S. 288 (1989). The Court then held that in the absence of instructions informing the jury that it could consider and give effect to the accused's mitigating evidence of mental retardation or background of childhood abuse, the imposition of a death sentence on the accused violated the Eighth Amendment's prohibition against cruel and unusual punishments. Penry v Lynaugh, *supra*, at 328.

Petitioner argued his Lockett rule claim at Petitioner's 1988 trial, in the California Supreme Court, in this Court on direct appeal, and then in the federal district court and in the Ninth Circuit. Pinholster, decided in 2011, merely confirmed that which Petitioner had urged all along, namely that family sympathy evidence was recognized mitigation evidence, because, since at least from the time of Pinholster's 1984 trial, competent capital

defense attorneys in California had relied upon it. Cullen v. Pinholster, supra, at 197.

Second, Respondent incorrectly argues that the Pinholster ruling regarding family sympathy evidence amounted to mere dicta. On the contrary, the idea that family sympathy evidence is mitigating evidence lies at the heart of Court's reasoning in Pinholster.

Pinholster claimed his attorneys provided ineffective assistance by not calling lay or expert witnesses to show his cognitive deficits in the 1984 trial, but the majority found the attorneys acted competently by calling only Pinholster's mother and relying upon the "well-known" family sympathy defense. Cullen v. Pinholster, supra, at 197.

Pinholster thus endorsed the family sympathy defense as mitigation, which a competent defense attorney could employ as a defense to the death penalty. If family sympathy was not a mitigating factor, certainly a competent capital defense attorney could not rely upon it.

Third, Respondent claims that family sympathy evidence is not mitigation because it does not fall within the parameters of the "character and record of the individual offender and the circumstances of the particular offense."

Woodson v North Carolina, 428 U.S. 286, 304 (1976). But as Petitioner has demonstrated, the Lockett line of cases requires the courts to admit any and all mitigation evidence and Pinholster affirms that family sympathy evidence is mitigating.

Family sympathy evidence can explain the circumstances of the crime to the extent that it deals with the collateral consequences of the crime to the defendant's family. Just as a trial court may admit victim impact evidence under a theory that it is a circumstance of the crime as evidence of the "specific harm caused by the defendant" Payne v. Tennessee 501 U.S. 808, 825 (1991), trial courts can admit family sympathy evidence to show how the crime has affected the defendant's family members. Jurors can feel sympathy for the defendant's family and rely on that sympathy as a basis for voting for life instead of death.

II

THE TRIAL COURT'S RULING AND THE PROSECUTOR'S ARGUMENT EFFECTIVELY PROHIBITED JURORS FROM CONSIDERING PETITIONER'S FAMILY SYMPATHY DEFENSE

Respondent argues that jurors could have considered

family sympathy evidence as mitigation and that California did not prohibit jurors from doing so. Resp. Br. 10-11. This argument is based on speculation and misconstrues the realities of Petitioner's trial.

At the trial, Petitioner's counsel asked for an instruction that jurors could consider sympathy for the family in mitigation and the trial court denied it, ruling that did not represent the law because it did not form part of Mr. Ochoa's background or character. The court was quite clear on this point, and no responsible trial counsel could contradict the court on this point before the jury in open court, either by arguing that family sympathy did amount to mitigation, or by objecting to the prosecutor's argument to the jury that it could not consider sympathy for Petitioner's family.

By taking either route, defense counsel risked violating court rulings and possibly subjecting herself to contempt proceedings, or at least suffering an admonishment from the trial court and losing credibility in the eyes of the jurors. Experienced trial counsel know that when a trial court has ruled, the court expects the matter has ended and desires no further argument on the issue,

especially in front of the jury. See, Pounders v Watson, 521 U.S. 982 (1997) [Lawyer held in contempt of court for asking a question on topic of punishment, which the trial court had already ruled was inadmissible.]

Respondent's argument, that the jury could nevertheless consider family sympathy, makes no practical sense. Jurors were told by the prosecutor they could not consider family sympathy. Capital jurors do not lightly disregard prosecutor's argument in grisly murder cases. See, Griffin v California, 380 U.S. 609, 610 (1965) [Prosecutor's final argument "made much of the failure of petitioner to testify" and led to a reversal of a murder conviction.]

Jurors heard no contrary argument from defense counsel. Reasonable jurors likely concluded that family sympathy was an exception to the general instruction that they could consider any other circumstance which extenuates the gravity of the crime or any sympathetic or other aspect of the defendant's character or record offered as a basis for a sentence less than death. The trial court thus failed in fulfilling its duty, announced in Penry v. Lynaugh, supra, 492 U.S. at p. 328, that juries must be given practical 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.

Contrary to Respondent's speculation that this case does not present an "ideal" vehicle for this Court to consider his claim (Resp. Br. 11, n. 3), Petitioner believes that this case presents the family sympathy issue squarely for this Court to decide. Petitioner has argued it every step of the process, at trial, on direct appeal, on federal habeas, and now before this Court. This Court should grant certiorari and decide the issue.

III

THIS COURT'S DECISION IN ABDUL-KABIR DEMONSTRATES THE FALLACY OF ASSUMING THAT JURORS CONSIDERED FAMILY SYMPATHY, WHERE THE PROSECUTOR'S ARGUMENT AND THE COURT RULINGS PROHIBITED THEM FROM DOING SO

Respondent contends that Abdul-Kabir v Quarterman, 550 U.S. 233 (2007) does not apply to this case because nothing in Petitioner's case would "have anything close to the effect of the arguments and instructions in Abdul-Kabir."

Resp. Br. 12. Respondent fails to see the clear connection between the facts in the Abdul-Kabir case and Petitioner's case.

In Petitioner's case, the trial court refused to give a family sympathy instruction which Lockett and its progeny required, and the prosecutor argued to the jury that it could not consider family sympathy. The California Supreme Court held that jurors might have considered it anyway. People v Ochoa, 19 Cal. 4th 353, 456 (1998).

In Abdul-Kabir, the trial judge refused to instruct the jury on mitigating evidence and the prosecutor argued to the jury that jurors could not consider such evidence. Yet the Texas District Court and Fifth Circuit found that the jurors might have considered it anyway, and denied relief.

This Court held that the record was clear that the state trial court's refusal to give applicable instructions and the prosecutor's closing arguments prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence. Abdul-Kabir v Quarterman, 550 U.S. 233, 257-258 (2007). The Court reversed the conviction, finding that the Texas State Court decisions were contrary to, and an unreasonable application of Penry v. Lynaugh, 492 U.S.

302, 328 (1989). Abdul-Kabir v Quarterman, 550 U.S. 233, 257-258 (2007).

Abdul-Kabir's reasoning requires that this Court should not blindly accept the California Supreme Court's facile conclusion that the jurors considered the family sympathy evidence. Instead, this Court must take into account both the trial court's ruling which led to the striking of family sympathy from the jury instruction as well as the prosecutor's argument to the jury that it could not consider family sympathy. In such circumstances, the jurors likely never considered family sympathy as a mitigating factor.

Just as in Abdul-Kabir, jurors could not understand they had the power to consider particular mitigation. Had the trial court correctly instructed them on this issue, at least one juror would have voted for life on that basis. Wiggins v Smith, 539 U.S. 510, 537 (2003) [Reversing a death sentence and finding that had the jury consider the excluded mitigation, "there is a reasonable possibility that at least one juror would have struck a different balance."]

CONCLUSION

This Court should grant the writ of certiorari and

consider the issue of whether the Constitution requires that a state court to instruct a capital trial jury that jurors can consider family sympathy as mitigation and that family sympathy can form a basis for a sentence less than death.

Respectfully submitted,

Dated: July 8, 2022

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