No. 19-5968

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS CUESTA-RODRIGUEZ,

***Petitioner*,**

v.

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,

***Respondent*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

STATE RULES

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review Petitioner's claim, which is encumbered by multiple procedural issues, that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), apply in Oklahoma where Oklahoma requires ineffective assistance claims to be brought on direct appeal and appellate attorneys from the public defender's office that represented Petitioner regularly do so?

2. Whether this Court should grant a writ of certiorari to review Petitioner's jury instruction claim where such was not pressed or passed upon in the Tenth Circuit and his properly preserved prosecutorial error claim amounts only to a disagreement with the Tenth Circuit's record-based determination that the prosecution never told the jurors that they should not, or could not, consider mitigating evidence?

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Carlos Cuesta-Rodriguez's (hereinafter, "Petitioner") petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on February 22, 2019, affirming the denial of habeas relief. *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885 (10th Cir. 2019), Pet'r Appx. A.[1]

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[1] References in this brief are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari will be cited as "Petition"; citations to Petitioner's trial transcripts will be cited as "Tr." with the volume number; citations to trial exhibits are cited as "Def. Ex." for the defense's exhibits or "Court's Ex." for the court's exhibits; citations to transcripts of pretrial proceedings will be cited as "[Date] Tr."; and citations to the original record will be cited as "O.R." *See* Rule 12.7, *Rules of the Supreme Court of the United States*.

STATEMENT OF THE CASE

1. Factual background.

On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the relevant facts in its published opinion. *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010), *cert denied*, *Cuesta-Rodriguez v. Oklahoma*, 565 U.S. 885 (2011), Pet'r Appx. D. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:

> 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.[1] 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.[2] 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.

> [1] Katya Chacon testified that the gunshot hit the right side of Fisher's face.

> [2] 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.[3]
>
> > [3] 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, 241 P.3d at 222-23 (paragraph numbering omitted).

In his Facts of the Case, Petitioner asserts that he "was highly intoxicated at the time of the shooting." Petition at 7. However, the evidence suggested that Petitioner was, at most, *slightly* intoxicated when he murdered Ms. Fisher, as discussed by the OCCA in rejecting Petitioner's claim that the trial court should have instructed the jury on voluntary intoxication:

> The evidence in this case showed that Cuesta-Rodriguez did consume some tequila several hours before the murder. Under questioning by police, for example, Cuesta-Rodriguez said that he consumed two or three drinks of tequila, but denied that he consumed enough to make him drunk.[4] Katya Chacon described Cuesta-Rodriguez as "stupid drunk" on the night of the murder, but also testified that he was steady on his feet and talking clearly. Detective Dupy testified that Cuesta-Rodriguez smelled of alcohol at 9:15 a.m., four hours after the shooting, but stated in his report that Cuesta-Rodriguez appeared only slightly intoxicated. This evidence may certainly support an inference that Cuesta-Rodriguez was intoxicated, but it does not rise to the level of making a prima facie showing that Cuesta-Rodriguez was so intoxicated that he was incapable of forming criminal intent. This conclusion is well supported by the fact that Cuesta-Rodriguez remembered events well enough to give police a detailed account of the shooting and the circumstances surrounding it.
>
> [4] In his statement to police, Cuesta-Rodriguez insisted that he acted out of anger toward Fisher as a result of his belief that she was seeing other men, not as a result of having consumed alcohol.

Cuesta-Rodriguez, 241 P.3d at 223-24 (citations and footnote 5 omitted); *see also Cuesta-Rodriguez v. State*, 247 P.3d 1192, 1196-97 (Okla. Crim. App. 2011) (denying rehearing and providing numerous examples of the details Petitioner provided to police regarding the shooting and the circumstances surrounding it, thereby undermining his voluntary intoxication claim).

Further, Petitioner's attempt to downplay his crime by stating that "[t]he entire shooting incident lasted just seven minutes" ignores the suffering endured by Ms. Fisher and her pregnant daughter during this time and the hours of standoff between Petitioner and the police that followed. Petition at 7. As the OCCA found in upholding the sufficiency of the continuing threat aggravator:

> As Fisher attempted to call police for help on the night of her death, Cuesta-Rodriguez snatched the telephone from her hands, threw it against the window, and shot her.
>
> . . . Cuesta-Rodriguez delivered the first gunshot to the right side of Fisher's face as her pregnant eighteen-year-old daughter watched in horror. Then, rather than seeking help, Cuesta-Rodriguez carried Fisher to his bed in another room and several minutes later, after Fisher struggled with him and tried to escape, shot her in the face a second time, all the while ignoring her desperate screams. Furthermore, despite the presence of police officers outside the house who could have assisted Fisher before or after the second gunshot, Cuesta-Rodriguez kept them locked out of the house for another three hours.

Cuesta-Rodriguez, 241 P.3d at 237-38.

2. Procedural background.

An Oklahoma jury convicted Petitioner of Murder in the First Degree (Malice Aforethought). *Id.* at 222. The jury sentenced Petitioner to death, finding the following aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; and (2) at the present time there exists a probability Petitioner will commit criminal acts of violence that would constitute a continuing threat to society. *Id.*; *see* OKLA. STAT. tit. 21, § 701-12(4), (7).

The OCCA affirmed Petitioner's conviction and sentence, *Cuesta-Rodriguez*, 241 P.3d at 222, and subsequently denied rehearing, *Cuesta-Rodriguez*, 247 P.3d at 1194. Thereafter, the OCCA denied Petitioner's first application for post-conviction relief in an unpublished decision. *Cuesta-Rodriguez v. State*, No. PCD-2007-1191, slip op. (Okla. Crim. App. Jan. 31, 2011) (unpublished) ("1st PC Op."), Pet'r Appx. E.

Contemporaneously with the filing of his 28 U.S.C. § 2254 petition that is the subject of this certiorari petition, Petitioner filed a second application for state post-

conviction relief in an attempt to exhaust several claims raised in the § 2254 petition. The OCCA denied Petitioner's second post-conviction application in an unpublished decision. *Cuesta-Rodriguez v. State*, No. PCD-2012-994, slip op. (Okla. Crim. App. Feb. 8, 2013) ("2nd PC Op."), Pet'r Appx. F.

The federal district court then denied Petitioner's § 2254 petition in an unpublished memorandum opinion. *Cuesta-Rodriguez v. Royal*, No. CIV-11-1142-M, slip op. (W.D. Okla. Sept. 29, 2016); Pet'r Appx. B ("District Court's Op."). On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Cuesta-Rodriguez*, 916 F.3d at 889-90, 919. The Tenth Circuit also denied panel and *en banc* rehearing. *Cuesta-Rodriguez v. Carpenter*, No. 16-6315, *Order* (10th Cir. Apr. 19, 2019) (unpublished); Pet'r Appx. B. On September 13, 2019, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

REASONS FOR DENYING THE WRIT

I.

THIS CASE IS A POOR VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED, AND PETITIONER ALLEGES ONLY THE MISAPPLICATION OF A PROPERLY STATED RULE.

1. Background of Petitioner's claim of cause under Martinez/Trevino.

Petitioner alleges he has shown cause under *Martinez*, 566 U.S. 1, and *Trevino v. Thaler*, 569 U.S. 413, for the procedural default of an ineffective assistance of trial counsel claim. Petition at 12-13. In the underlying ineffective

assistance claim, Petitioner alleges that trial counsel rendered ineffective assistance in failing to develop and present evidence of his alleged brain damage and Post-Traumatic Stress Disorder ("PTSD") in second stage mitigation. *Cuesta-Rodriguez v. Royal*, No. 16-6315, *Appellant's Opening Brief* at 13 (10th Cir. Nov. 15, 2017) ("Opening Brief"). However, in state court, Petitioner did not raise this ineffective assistance claim until his second application for post-conviction relief. *Cuesta-Rodriguez v. State*, No. PCD-2012-994, *Verified Second Application for Post-Conviction Relief* at 12-31, 42-44 (OCCA Nov. 5, 2012) ("2nd PC App"); 2nd PC Op. at 3-7. The OCCA therefore held the ineffective assistance claim was waived by Petitioner's failure to raise it on direct appeal or in his first post-conviction application. 2nd PC Op. at 3-5 (citing Okla. Stat. tit. 22, § 1089(D)(4)(b), (D)(8)). Petitioner also raised a claim of ineffective assistance of first post-conviction counsel for failure to raise his ineffective assistance of trial counsel claim, but the OCCA found this claim to be waived as untimely. *Id.* at 6-7; *see* Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012) ("No subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.").

In federal district court, Respondent asserted that the aforementioned claim of ineffective assistance of trial counsel was procedurally barred. *Cuesta-Rodriguez v. Trammell*, No. CIV-11-1142-M, *Response to Petitioner's Petition for Writ of Habeas Corpus* at 22-23 (W.D. Okla. May 14, 2013). Petitioner responded that

direct appeal counsel abandoned him by failing her duty to conduct an extra-record investigation and raise trial counsel ineffective assistance claims on direct appeal, such that post-conviction was his first real opportunity to challenge trial counsel's performance. *Cuesta-Rodriguez v. Workman*, No. CIV-11-1142-M, *Petition for a Writ of Habeas Corpus by a Person in Custody Pursuant to 28 U.S.C. § 2254* at 68, 95-98 (10th Cir. Oct. 1, 2012) ("Habeas Petition"); *Cuesta-Rodriguez v. Trammell*, No. CIV-11-1142-M, *Reply to Response to Petition for a Writ of Habeas Corpus* at 1-3 (W.D. Okla. July 24, 2013) ("Habeas Reply"); District Court's Op. at 44-45. Furthermore, he claimed, first post-conviction counsel was ineffective and this constituted cause under *Martinez*. He admitted *Martinez* arose from a different context—"the scenario where the collateral proceeding was the first opportunity to raise the claim"—but argued that *Martinez* should apply to him anyway because direct appeal counsel abandoned him. Habeas Petition at 96-97; Habeas Reply at 1-3. The district court rejected Petitioner's argument and barred the claim. District Court's Op. at 43-47.

On appeal to the Tenth Circuit, Petitioner transformed his cause argument, now asserting that, under *Martinez* and *Trevino*, post-conviction was his first chance to raise ineffective assistance of trial counsel claims because he did not have separate counsel at trial and on direct appeal and that most defendants in Oklahoma County are similarly situated. Opening Br. at 46-51. Specifically, he claimed that "the structure and operation of the Oklahoma system," which regularly results in indigent defendants in Oklahoma County receiving representation by the

Oklahoma County Public Defender's Office[2] both at trial and on direct appeal, restricts such defendants from "hav[ing] full access to Rule 3.11."[3] Opening Br. at 47-51. Respondent asserted that this argument was forfeited and, alternatively, without merit. *Cuesta-Rodriguez v. Royal*, No. 16-6315, *Respondent-Appellee's Answer Brief* at 33 (10th Cir. Feb. 13, 2018) ("Answer Br.").

The Tenth Circuit began by noting, as to Petitioner's argument that *Martinez* and *Trevino* apply to all defendants in Oklahoma County, "Oklahoma asserts that Cuesta-Rodriguez waived these arguments, so we shouldn't address them. We assume the arguments are properly before us and reach their merits." *Cuesta-Rodriguez*, 916 F.3d at 904 n. 22. The Tenth Circuit then rejected Petitioner's

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[2] Before this Court and the Tenth Circuit, Petitioner also claims that indigent defendants in Tulsa County are in the same circumstance, generally receiving representation from the Tulsa County Public Defender's Office at trial and on direct appeal. However, as Petitioner's case is from Oklahoma County, his case is undeniably not an appropriate vehicle for consideration of whether *Martinez*/*Trevino* should be extended to Tulsa County defendants. Accordingly, Respondent does not discuss Tulsa County defendants further other than to show that Petitioner's reliance on *Cannon v. Mullin*, 383 F.3d 1152 (10th Cir. 2004), Petition at 14-15, 19, is misplaced. In *Cannon*, following an evidentiary hearing, the district court found that Cannon's trial and appellate attorneys were not separate based not on an office-wide policy, but on the *particular* attorneys involved and the lack of ineffective assistance claims filed by Cannon's appellate attorney against his two trial attorneys. *See Cannon v. Trammell*, 796 F.3d 1256, 1261 (10th Cir. 2015); *Cannon v. Sirmons*, No. 99-CV-297, 2007 WL 9612579, at *3 (N.D. Okla. Dec. 6, 2007) (unpublished); *see also Cannon v. Sirmons*, No. 99-CV-297-TCK-PJC, 2007 WL 9624603, at *3 (N.D. Okla. May 30, 2007) (report and recommendation). Thus, *Cannon* does not lend support to Petitioner's suggestion that Tulsa County defendants regularly "face conflicts that preclude or impair" raising claims of ineffective assistance on direct appeal. Petition at 19.

[3] Rule 3.11 is the provision by which Oklahoma defendants may develop extra-record ineffective assistance claims on direct appeal. *See Cuesta-Rodriguez*, 916 F.3d at 901 n. 16, 904 n. 21 (citing Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003)).

Martinez/*Trevino* arguments. First, Petitioner had not shown that his trial counsel and appellate counsel were not separate, as he "[hadn't] explained how and why his trial and direct-appeal counsel were problematically interconnected," while the State had cited "a number of cases in which appellate counsel at [the Oklahoma County Public Defender's Office], including Cuesta-Rodriguez's appellate counsel, have pursued ineffective-assistance-of-counsel claims."[4] *Id.* at 901-03. Second, the Tenth Circuit had previously held that *Martinez* and *Trevino* are inapplicable to Oklahoma because defendants are not precluded from raising ineffective assistance of trial counsel claims on direct appeal, either by law or by a practical consequence of the law. *Id.* at 904 (citing *Fairchild v. Trammell*, 784 F.3d 702, 723 (10th Cir. 2015)). Specifically, Oklahoma requires ineffective assistance of trial counsel claims to be brought on direct appeal and provides a method (*i.e.*, Rule 3.11) of supplementing the record on appeal to support such claims. *See id.* Although Petitioner alleged that "the public-defender system's structure prevents defendants from" raising ineffective assistance claims on direct appeal, he "failed to show that the practical consequence of Oklahoma's set-up denies the average defendant a meaningful opportunity to raise an ineffective-assistance claim." *Id.* at 905 (quotation marks omitted). Finally, Petitioner "also forfeited his right to dispute his first post-conviction counsel's ineffectiveness" because, as the OCCA found, his

[4] Although these points were initially made in the section of the Tenth Circuit's opinion covering the adequacy of the bar, the panel referred back to these points in its discussion of cause. *See Cuesta-Rodriguez*, 916 F.3d at 904.

claim challenging first post-conviction counsel's performance was untimely. *Id.* at 905 n. 23.

2. Petitioner's case is a poor vehicle for resolving the first question presented.

Petitioner's case is a poor vehicle for resolution of the first question presented—whether *Martinez* and *Trevino* apply in Oklahoma. Petition at i. Even assuming that this Court granted certiorari review and reversed on the merits of the first question presented, Petitioner's arguments based on *Martinez* and *Trevino* are barred on procedural grounds.

On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). As will be shown, Petitioner's arguments based on *Martinez* and *Trevino* are encumbered by procedural issues, making this a poor vehicle for consideration of the first question presented. This Court should deny the petition for writ of certiorari.

As shown above, Petitioner's *Martinez*/*Trevino* argument fails on two procedural grounds. First, as the Tenth Circuit noted but declined to resolve, the State asserts that Petitioner forfeited these arguments by failing to raise them in the district court. *Cuesta-Rodriguez*, 916 F.3d at 904 n. 22. Even if this Court were

to reverse on the merits of the *Martinez*/*Trevino* issue, the Tenth Circuit would still need to resolve the forfeiture question.[5] Second, and more importantly, the Tenth Circuit has already found that Petitioner's claim of ineffective assistance of first post-conviction counsel was untimely and therefore procedurally barred.[6] *Id.* at 905 n. 23. Accordingly, this is an exceptionally poor vehicle for the resolution of the *Martinez*/*Trevino* issue.[7]

3. Petitioner's first question presented ultimately alleges the misapplication of a properly stated legal rule, an issue unworthy of certiorari review.

Petitioner contends he has presented this Court with the extraordinary question of whether *Martinez*/*Trevino* should be extended to Oklahoma due to the statutory "provision of likely-conflicted counsel from the same defender office to defendants in Oklahoma's two largest counties," which thereby denies such defendants "full access to Rule 3.11." Petition at 17-22. As shown below, however,

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[5] The Tenth Circuit may affirm the district court's denial of habeas relief on any basis that finds support in the record, including Petitioner's forfeiture of his *Martinez*/*Trevino* argument. *Harmon v. Sharp*, 936 F.3d 1044, 1061 n. 8, 1069 n. 11 (10th Cir. 2019)

[6] Petitioner raises no argument that the Tenth Circuit was incorrect to honor the time-bar applied by the OCCA to his claim of ineffective assistance of post-conviction counsel.

[7] Pointing to oral argument, Petitioner claims "one of the judges on the panel recognized the significance of this question, and that this case presents a good vehicle to address it." Petition at 18 n. 3. Petitioner omits Respondent's answer to the question he references, which explained at length why this case is a poor vehicle to further explore this issue, including in particular the procedural hurdles plaguing the issue (Oral Argument at 32:17-37:16, *Cuesta-Rodriguez v. Carpenter*, No. 16-6315 (10th Cir. May 17, 2018)).

at bottom, Petitioner alleges the misapplication of a properly stated legal rule, an issue that is unworthy of certiorari review.

"A petition for a writ of certiorari will be granted only for compelling reasons," including for example where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c), *Rules of the Supreme Court of the United States*. However, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, *Rules of the Supreme Court of the United States*.

Here, the Tenth Circuit correctly recognized the rules established by *Martinez* and *Trevino* (and Petitioner does not claim otherwise):

> Generally, ineffective assistance of counsel in postconviction proceedings does not establish cause for the procedural default of a claim. . . .
>
> We make an exception when "the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial," because then "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Martinez v. Ryan*, 566 U.S. 1, 11, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). This exception also applies when the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 569 U.S. at 429, 133 S.Ct. 1911. So when a state's scheme makes a post-conviction proceeding the defendant's first opportunity to raise his trial counsel's ineffective assistance, the ineffective assistance of post-conviction counsel can serve as cause to excuse a failure to raise it then.

Cuesta-Rodriguez, 916 F.3d at 903 (select quotation marks omitted).

Furthermore, the Tenth Circuit recognized Petitioner's argument that *Martinez*/*Trevino* should be extended to Oklahoma because "the structure and operation of the Oklahoma system, which regularly results in defendants in Oklahoma . . . Count[y] receiving representation by the" same public defender offices at trial and on direct appeal, "restricts such defendants from having full access to Rule 3.11." *Id.* at 904 (quotation marks omitted, alteration adopted). However, the Tenth Circuit ultimately concluded, Petitioner "failed to show that the practical consequence of Oklahoma's set-up denies the average defendant a meaningful opportunity to raise an ineffective-assistance claim" on direct appeal. *Id.* (quotation marks omitted);[8] *compare Trevino*, 569 U.S. at 428 ("[W]e believe that the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal.").

As shown by the State in district court and on appeal, appellate counsel at the Oklahoma County Public Defender's Office—including Petitioner's appellate attorney, Andrea Digilio Miller—have a history of raising ineffective assistance of counsel claims against trial attorneys from that office—including the two trial attorneys who represented Petitioner, Catherine Hammarsten and Cynthia Viol. *See, e.g.*, *Coddington v. State*, 254 P.3d 684, 692, 713-14 (Okla. Crim. App. 2011)

[8] As the Tenth Circuit correctly implied, Petitioner bears the burden of showing cause and prejudice to overcome the procedural default of his ineffective assistance of trial counsel claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

(ineffective assistance of trial counsel claim based on failure to introduce mitigation evidence during capital penalty phase raised against Ms. Hammarsten by Ms. Miller); *id.* at 692, 697-99, 715-16 (ineffective assistance of trial counsel claim based on Ms. Hammarsten's failure to object when the trial judge allegedly left the bench, a claim based on extra-record evidence that was presented by Ms. Miller); *Jiminez v. State*, 144 P.3d 903, 904-07 (Okla. Crim. App. 2006) (meritorious ineffective assistance of trial counsel claim raised against Ms. Viol by Ms. Miller resulting in remand for an evidentiary hearing and modification of defendant's sentence); *see also, e.g.*, *Frederick v. State*, 400 P.3d 786, 825-32 (Okla. Crim. App. 2017) (ineffective assistance of trial counsel claims, including the filing of a 3.11 application with attachments, based on more than ten alleged failures of trial counsel James Rowan and Tim Wilson raised by Gina Walker); *Davis v. State*, 268 P.3d 86, 97, 129-38 (Okla. Crim. App. 2011) (ineffective assistance of trial counsel claim based on failure to introduce mitigation evidence during capital penalty phase raised against Ms. Viol and Ms. Hammarsten by Kim Baze, which resulted in remand for an evidentiary hearing and an expanded record); *Warner v. State*, 144 P.3d 838, 861, 868, 872-77, 891-96 (Okla. Crim. App. 2006) (numerous ineffective assistance claims and 3.11 application, alleging both first and second stage failings, raised against Tamra Spradlin and Gina Walker by Wendell Sutton, including claim that resulted in a remand to the trial court for an evidentiary hearing); *Jones v. State*, 128 P.3d 521, 545-50 (Okla. Crim. App. 2006) (multiple ineffective assistance of trial counsel claims against David McKenzie, Malcolm Savage, and

Robin McPhail by Mr. Sutton, including claim that was remanded to trial court for an evidentiary hearing based on 3.11 application); *Dodd v. State*, 100 P.3d 1017, 1023, 1050-51 (Okla. Crim. App. 2004) (ineffective assistance of trial counsel claim based on extra-record evidence raised against Ms. Hammarsten by Mr. Sutton); *Patton v. State*, 973 P.2d 270, 278, 303-05 (Okla. Crim. App. 1998) (ineffective assistance of trial counsel claim based on extra-record evidence for failing to present mitigation evidence during capital penalty phase raised against Barry Albert and Ms. Hammarsten by Mr. Sutton).

In response to the above cases, now and before the Tenth Circuit, Petitioner offers only speculative, unsupported allegations, and no evidence, that Oklahoma County defendants receive "likely-conflicted counsel" and are precluded "full access to 3.11." Petition at 19; Opening Br. at 48. Thus, while Petitioner focuses on the legal question of whether *Martinez*/*Trevino* applies in Oklahoma "[w]here truly separate counsel is not provided by the state to effectuate Rule 3.11," Petition at 21, the Tenth Circuit's ultimate rejection of his *Martinez*/*Trevino* argument rested on a more basic factual problem. Specifically, he failed to carry his burden of demonstrating that Oklahoma County defendants are regularly provided "likely-conflicted counsel" and/or denied "full access to Rule 3.11." *See Cuesta-Rodriguez*, 916 F.3d at 905. This failure renders irrelevant the legal question of whether *Martinez*/*Trevino* should be extended to such a scenario.[9] Thus, at worst, the Tenth

[9] Nor is it any answer that Petitioner was denied an evidentiary hearing by the federal district court and the Tenth Circuit. For starters, Petitioner does not raise any argument that the denial of an evidentiary hearing raises a certiorari-worthy issue. Moreover, as the Tenth Circuit concluded, Petitioner needed, at the very

Circuit correctly stated the rules from *Martinez*/*Trevino* but incorrectly found that Petitioner failed to carry his burden to prove the facts underlying his entitlement to the *Martinez*/*Trevino* exception. Accordingly, this case is a poor choice for certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States*; *cf. Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (noting that, under Rule 10, certiorari review is generally not warranted for the "utterly routine" question of whether the "record is just enough or not quite enough to support a grant of summary judgment").[10]

4. Petitioner's underlying ineffective assistance claim is patently without merit.

As a final matter, Petitioner's underlying ineffective assistance claim is patently without merit, such that it would not entitle him to habeas relief even if the merits of the claim were reached via the *Martinez*/*Trevino* exception. This is a further reason Petitioner's case is a poor vehicle for resolution of the first question presented. *See McClung*, 6 [19 U.S.] Wheat. at 603 ("question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed"); *The Monrosa*, 359 U.S. at 184 (this Court decides cases only "in the

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least, to "provide[] specific allegations suggesting that Oklahoma's system was working unfairly" to get an evidentiary hearing, and this he did not do. *Cuesta-Rodriguez*, 916 F.3d at 905.

[10] Relatedly, Petitioner raises no certiorari-worthy issue with his claim that the Tenth Circuit incorrectly found he had waived his 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." Petition at 16. An allegation that the Tenth Circuit misapplied its own law on waiver does not present an extraordinary and compelling issue justifying this Court's review.

context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly").

As previously stated, Petitioner alleges that trial counsel rendered ineffective assistance in failing to investigate and present evidence of brain damage and PTSD in second stage. Opening Br. at 13. To establish constitutionally ineffective counsel, Petitioner must show both (1) that his attorney's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to performance, Petitioner bears the burden of proving that counsel's performance was unreasonable, and this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 687, 689. As to prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 104 (quotation marks omitted).

To begin with, contrary to Petitioner's claim that trial counsel conducted an inadequate mitigation investigation, Opening Br. at 15-25, the record reveals the herculean efforts through which trial counsel investigated and developed Petitioner's mitigation case.

Over the course of a full year, as documented through numerous pre-trial status conferences and filings in the original record, Ms. Hammarsten worked diligently and persistently to secure the necessary continuances, funding, licenses, and other arrangements to travel to Petitioner's home country of Cuba as part of the mitigation investigation (O.R. 25-30, 36, 46, 569-71, 576, 615-17; 11/21/2003 Tr. 3-4; 12/12/2003 Tr.; 02/18/2004 Tr. 3; 03/05/2004 Tr. 2-3; 04/08/2004 Tr. 2; 5/27/2004 Tr. 2-4; 07/09/2004 Tr. 2-3; 11/05/2004 Tr. 2-11, 15-18, 23, 26-27, 32-35). The trip to and investigation in Cuba presented many hurdles for counsel to overcome, such as Cuba's cash-only economy, the communist government, a slew of government rules and regulations impacting the trip, and the securing of an interpreter (02/18/2004 Tr. 3; 11/05/2004 Tr. 10; O.R. 576, 596). As Ms. Hammarsten put it, trial counsel experienced "road block after road block after road block in getting to Cuba" (11/05/2004 Tr. 9-10). The Cuba trip resulted in around twelve hours of taped interviews, much of which had to be translated from Spanish to English (11/05/2004 Tr. 15-16).

Trial counsel further obtained mitigation witnesses from Oklahoma and Florida (*see, e.g.*, Tr. 1038, 1076). Counsel also filed numerous pre-trial motions, more than eighty in total, many dealing with second stage issues (O.R. 57-391, 520-26, 620-26, 864, 1085, 1107; 08/18/04 Tr.).

Trial counsel presented an expansive mitigation case, a review of which easily belies Petitioner's claim in the Tenth Circuit that the mitigation presentation was "woefully inadequate." Opening Br. at 33. Over the course of three days,

Petitioner's jury was presented the live testimony of eight mitigation witnesses as well as multiple videotaped depositions, interviews, and statements from Petitioner's Cuban relatives.

Dr. James Choca, Petitioner's psychological expert, testified concerning Petitioner's childhood, alleged head injuries, alcohol and substance abuse, surrounding mental health issues as an adult, relationship history, and some of his experiences as a Mariel Cuban[11] (Tr. 978-1018). Dr. Choca described Petitioner as having borderline personality disorder, which is characterized by instability in terms of moods and relationships and causes its sufferers to experience dramatic changes in "[t]heir estimation of other people," have a hard time when someone leaves them, and become very upset if they feel like they are about to be abandoned (Tr. 995, 997-1000). Dr. Choca explained how these characteristics were evidenced in Petitioner's relationship with Ms. Fisher and his ultimate killing of her (Tr. 998). Further, Petitioner's borderline personality disorder was exacerbated by his severe depression and substance use around the time of the murder, which would have made him more unstable, impulsive, and emotional (Tr. 1001-02).

A jailer testified to Petitioner's lack of disciplinary write-ups while awaiting trial (Tr. 1021-26). Petitioner's employer, along with co-workers, testified to Petitioner's abilities and work ethic on the job, including the years of volunteer

[11] The phrase "Mariel Cubans" refers to the group of around 120,000 Cubans, including Petitioner, who were permitted to emigrate from Cuba to the United States between April and June 1980, in the "Mariel Boatlift," as a result of an agreement between President Jimmy Carter and Fidel Castro (Tr. 1122-28). The Mariel Cubans earned their name by leaving via boats from a tiny port in the City of Mariel (Tr. 1042-43).

work he had performed in the community (Tr. 1026-37, 1076-82). Testimony and videotaped interviews of family members relating Petitioner's background, including his service in the Cuban military and alleged good qualities and characteristics, were introduced into evidence. As some examples, the aforementioned witnesses described the treachery of the Mariel Boatlift, in which boats designed to carry twenty people held around eighty; the fact that Petitioner had occasionally sent money back to his relatives in Cuba; the bus accident that resulted in Petitioner's fractured skull and hospitalization; and the damage from Hurricane Flora, which hit Petitioner's family's home the same day as the bus accident and flooded their home and destroyed all of their belongings (Tr. 1042-43, 1045, 1049, 1051; Def. Ex. 3/3A). Petitioner's family members also expressed their love for him and asked the jury to spare Petitioner's life by imposing a non-capital sentence (Tr. 1038-61, 1111-17, 1174-88, 1240-49; Def. Exs. 3/3A, 4/4A; 5/5A, 169, 171).

Photographs depicting Petitioner's home, the neighborhood where he grew up, and other areas of Cuba, including Mariel Harbor, were introduced through a Spanish-speaking translator who traveled with defense counsel to Cuba (Tr. 1083-1107; Def.'s Exs. 100-165). The coordinator for a mental health educational program at the county jail testified to Petitioner's participation in the program while awaiting trial (Tr. 1061-75). An Indiana State University professor, Dr. Mark Hamm, testified regarding the Mariel Cuban experience, *i.e.*, the Mariel boatlift, the experience of Mariel Cubans in the United States, the prison riots involving Mariel

Cubans awaiting deportation back to Cuba during the mid-1980s, and the aftermath of these riots that resulted in prisoners like Petitioner being released back into free society in the United States[12] (Tr. 1118-71). In this vein, letters written by Petitioner in the mid-1980s to his Cuban family while he was incarcerated in a federal prison in Atlanta were read to the jury (Tr. 1226-40). Professor Hamm testified that the fact the authorities ultimately released Petitioner from the Atlanta prison directly to a halfway house in Oklahoma City meant that he was deemed a good candidate for integrating safely back into society (Tr. 1155-56).

Based on all of the above, the jury was instructed that evidence had been introduced as to *sixteen* mitigating circumstances (O.R. 1285-88).

In closing, Ms. Hammarsten capitalized on the mental health testimony provided by Dr. Choca to explain the crime—she contended that because of Petitioner's belief that the victim was cheating on him, and his fear of abandonment, a downward spiral of depression and despair resulted in "a perfect storm" being created in the months and days leading to the murder (Tr. 1296-1298). Further, in their opening and closing second stage statements, trial counsel emphasized Petitioner's difficult childhood; his history of hard work; that his hopes of becoming an United States citizen were dashed after he "picked up" a felony but, after his release from prison, he had worked for more than a decade; and since being jailed he had been on medication that stabilized his mood, such that he had not

[12] In 1983, Petitioner was convicted of felony heroin possession in California and imprisoned in Atlanta (Tr. 962, 987-88).

been a disciplinary problem (Tr. 957-61, 1286-1304). Ms. Hammarsten also argued against the application of the aggravating circumstances, in particular continuing threat (Tr. 1300-01).

Given all of the above, it is apparent that trial counsel "fulfill[ed] their obligation to conduct a thorough investigation of [Petitioner's] background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Indeed, both the OCCA and the district court, in denying relief on a non-defaulted ineffective assistance claim related to mitigation, found as much. *See* 1st PC Op. at 7 ("Cuesta-Rodriguez's defense team expended considerable effort by traveling to Cuba to locate family members and obtain similar mitigating evidence to present by the only available means (e.g., written deposition, videotaped statements)."); District Court's Op. at 39-40 (noting that "the Court is confident that trial counsel conducted a reasonable investigation by any prevailing norms"; the great lengths to which trial counsel went "alone distinguish Petitioner's representation from the deficient performance in his cited cases, where attorneys performed little to no investigation"; and "[t]rial counsel conducted a thorough investigation that led to mitigating evidence related to a broad range of topics").

Petitioner's suggestion that the Oklahoma County Public Defender's Office refused "to fund needed experts," Petition at 22, is a misleading oversimplification. Petitioner apparently refers to a September 2004 funding request by Ms. Hammarsten for a neuropsychological evaluation, which contains a handwritten note at the bottom: "denied. raise again after get head inj record in Cuba." Habeas

Petition, Attachment 11. The defense team traveled to Cuba in late October 2004 (04/08/2004 Tr. 2; 11/05/2004 Tr. 26-27). While in Cuba, the defense team visited the hospital where Petitioner was treated following the bus accident and attempted to obtain his medical records, but they were told that medical records are discarded after so many years and are not retained for people, like Petitioner, who leave Cuba (Tr. 1103-04). The record is silent as to whether Ms. Hammarsten resubmitted the funding request after the trip to Cuba. However, the record strongly supports an inference that Ms. Hammarsten reasonably decided against further pursuing brain damage evidence after the Cuba trip and that *her decision was totally unrelated to funding issues*.

Noticeably absent in the Petitioner's Cuban family members' depositions was any indication that Petitioner's behavior, personality, or intellectual capabilities changed after the accident. Petitioner's mother and brother in Cuba reported only that Petitioner suffered from headaches and eyesight problems after the accident (Def. Exs. 4/4A, 169). Indeed, Dr. Choca noted that Petitioner "himself [did] not believe he [was] experiencing any intellectual impairment." Habeas Petition, Attachment 6 at 7.

Given the lack of evidence from the people who knew Petitioner best that he experienced any change in behavior, personality, or intellectual functioning after the accident—combined with Dr. Choca's assessment and the substantial mitigation case Ms. Hammarsten had already marshaled by the end of the Cuba trip—Ms. Hammarsten could reasonably draw the line on investigating further the potential

of brain damage. *See Richter*, 562 U.S. at 107 ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."); *Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (defense lawyers not required "to scour the globe on the off chance something will turn up" and instead "may draw a line when they have good reason to think further investigation would be a waste"); *see also Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) ("The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."). More importantly to the issue at hand, the initial, preliminary denial of the funding request does not prove that Ms. Hammarsten was ever denied a subsequent request, or that the Oklahoma County Public Defender's Office refuses "to fund needed experts" for capital defendants. Petition at 22.[13]

Nor has Petitioner shown prejudice. *See Strickland*, 466 U.S. at 694. Below, Petitioner alleged that both his brain damage and PTSD stem from physical and emotional trauma in his childhood, but this does nothing to explain how these conditions were consistent with the stable time periods in his life. Opening Br. at 15-25. In other words, while Petitioner suggests that he has been severely handicapped by brain damage and PTSD since his youth, there is not a reasonable probability a jury would have accepted this claim in light of Petitioner's stable work history, exemplary performance as an employee, long periods of lawfulness, lack of a

[13] Petitioner's focus on being denied funding betrays a fundamental problem with his *Martinez*/*Trevino* claim. His allegation he was denied funding is plainly a case-specific argument that takes him outside the structural regimes implicated by *Martinez* and *Trevino*. *See Martinez*, 566 U.S. at 11; *Trevino*, 569 U.S. at 429.

prior violent felony, and IQ of 115.[14] The claim of severe and debilitating brain damage would have been further unbelievable to the jury in light of the ample evidence that Petitioner was a prolific writer, writing numerous letters to his family over the years and even love poems to his first wife (Tr. 1187, 1228-36, 1239; Def. Exs. 5/5A, 168).

Petitioner claimed that his alleged brain damage "led *directly*" to the murder, and his habeas expert, neuropsychologist Dr. Antolin Llorente, described Petitioner as being like a semi-truck without proper air brakes and as lacking impulse control. Opening Br. at 20, 34 (emphasis in original); Habeas Petition, Attachment 7 at 21. These claims are belied by the circumstances of Petitioner's crime. Habeas expert Dr. Pablo Stewart, a psychiatrist, offered an equally unpersuasive claim that Petitioner's PTSD rendered him incapable of forming the specific intent to murder. Opening Br. at 24-25; Habeas Petition, Attachment 5 at 34-35.

Petitioner had abused Ms. Fisher in the past (Tr. 339-42). *See Cuesta-Rodriguez*, 241 P.3d at 226 ("[E]vidence of [Petitioner's] prior attack on Fisher was relevant to show motive and intent."). The night of the murder, Petitioner purposely shot Ms. Fisher in the eyes, a calculated and deliberate choice given Petitioner's belief that Ms. Fisher was cheating on him and her known use of the phrase that

[14] Or, if the jury accepted that he did have brain damage, it would not believe that it was significantly affecting him in light of these factors. Put differently, Petitioner offers no explanation for how permanent brain damage sustained in his youth could suddenly cause him to commit murder in his late forties after many years of stability and lawfulness. Borderline personality disorder combined with depression and substance abuse, in contrast, offered an explanation for the inconsistencies in Petitioner's behavior.

she had "put her eyes on somebody else." *Id.* at 222-23 & n. 3. Petitioner waited several minutes between the shots (Tr. 443, 473). Moreover, he admitted that, prior to the first shot, he left the room where he was arguing with Ms. Fisher, went to his bedroom to retrieve the gun from the closet, and then returned to the room where Ms. Fisher was and shot her (State's Exs. 41, 43; Court's Ex. 4 at 2, 5, 14). Petitioner snatched Ms. Fisher's phone from her hand when she picked it up—a deliberate action that the jury could reasonably infer was committed by Petitioner to prevent Ms. Fisher from calling for help—and after shooting Ms. Fisher, deftly prevented Ms. Chacon from hitting him with the baseball bat by grabbing it as she swung without ever connecting with him (Tr. 393-95). *Compare* Habeas Petition, Attachment 5 at 38 (espousing the unbelievable conclusion that Petitioner had "almost non-existent executive functioning at the time of the crime"). After shooting Ms. Fisher the first time, Petitioner said to her, "no se van a burlar de mi," which Ms. Chacon explained meant essentially, *you are not going to get away with cheating on me* (Tr. 395-96). Given the cold and calculated nature of the killing, Petitioner has not shown a reasonable probability that the jury would have found that brain damage and PTSD explained the crime and imposed a sentence of less than death. *See Martinez v. Dretke*, 404 F.3d 878, 889-90 (5th Cir. 2005) (finding no prejudice from trial counsel's failure to present organic brain injury evidence because the State's evidence was "sufficient to belie any 'tragic impulse'" mitigation strategy).

For all these reasons, Petitioner's underlying ineffective assistance claim is entirely without merit, such that this case is a poor choice for certiorari review.

II.

CERTIORARI SHOULD BE DENIED AS TO THE SECOND QUESTION PRESENTED BECAUSE PETITIONER IN PART SEEKS REVIEW OF AN ISSUE THAT WAS NOT PRESSED OR PASSED UPON BELOW, AND IN ANY EVENT, HIS CLAIMS DO NOT PRESENT A COMPELLING QUESTION AND THE SPLIT IN AUTHORITY HE ALLEGES IS ILLUSORY.

1. Background of claim challenging mitigation instruction and prosecutorial argument.

In his second question presented, Petitioner claims that the prosecution in his case, in second stage closing arguments, made improper arguments that unconstitutionally limited the jury's consideration of mitigating evidence. Petition at ii. Specifically, he alleges the prosecution told the jury it could not consider proffered mitigation unless it extenuated or reduced Petitioner's moral culpability for the crime. Petition at 12. In rejecting this claim, the Tenth Circuit held as follows:

> The OCCA's conclusion that the prosecution didn't try to make the jury ignore mitigation evidence wasn't unreasonable. The prosecution didn't tell the jury not to consider Cuesta-Rodriguez's mitigation evidence. Instead, the prosecution argued that the mitigating testimony shouldn't weigh against a sentence of death—and that's permissible. The prosecution can advocate what evidence the jury should value. It just can't tell the jury that it *can't consider* the mitigation evidence unless it speaks to culpability.

Cuesta-Rodriguez, 916 F.3d at 910 (emphasis in original). The OCCA's rejection of this claim was further reasonable because the prosecutors' remaining comments, as

well as the jury instructions on mitigating circumstances on the whole, broadly interpreted and defined mitigating circumstances. *Id.* at 910-12.

2. Petitioner's challenge to the mitigation instruction was neither pressed nor passed upon below.

In second stage, Petitioner's jury was instructed, *inter alia*, that "[m]itigating 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." (O.R. 1284) (hereinafter, "Mitigation Instruction"). Before this Court, in addition to claiming prosecutorial error, Petitioner repeatedly suggests that the Mitigation Instruction, as given in his case and in other Oklahoma capital cases, is constitutionally infirm. Petition 22-24, 29-35. This claim was neither pressed nor passed upon below and is inappropriate for certiorari review.

Both on direct appeal and in Ground Four of his federal habeas petition, Petitioner raised a combined claim that the Mitigation Instruction was faulty and that the prosecutors' arguments impermissibly restricted the jury's consideration of mitigating evidence under *Boyde v. California*, 494 U.S. 370 (1990). *Cuesta-Rodriguez v. State*, No. D-2007-825, *Brief of Appellant* at 81-90 (OCCA Sept. 12, 2008); Habeas Petition at 31-38. However, in the Tenth Circuit, Petitioner was granted a certificate of appealability ("COA") as to only the latter part of this claim—"B. Ground Four, prosecutorial misconduct, limited to whether the prosecutors exploited the jury instruction defining mitigation circumstances to

blunt or eliminate jury consideration of important mitigation evidence."[15] *Cuesta-Rodriguez v. Royal*, No. 16-6315, *Order* at 1 (10th Cir. Apr. 10, 2017). Indeed, in his opening brief before the Tenth Circuit, Petitioner conceded as much:

> This Court has held the [Mitigation Instruction] itself does not violate the Constitution. Mr. Cuesta did not obtain a certificate of appealability on the instruction and is not making an infirm instruction argument here.

Opening Br. at 65 (citation omitted); *see* Answer Br. at 76 n. 21 (noting that Petitioner did not receive a COA on his challenge to the Mitigation Instruction itself).

The Tenth Circuit agreed with the parties that any challenge to the Mitigation Instruction itself was outside the scope of the COA and noted Petitioner's concession that the Mitigation Instruction was constitutional:

> Cuesta-Rodriguez highlights flaws in the instruction while conceding that we have held that the instruction doesn't violate the Constitution. *See Hanson*, 797 F.3d at 849-52. And Cuesta-Rodriguez also concedes that he didn't obtain a COA on the issue.

Cuesta-Rodriguez, 916 F.3d at 910 n. 28.

As shown above, Petitioner's constitutional challenge to the Mitigation Instruction was neither pressed nor passed upon in the Tenth Circuit. Accordingly, certiorari review is not appropriate as to this claim. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (Supreme Court is "a court of review, not of first view"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (the Supreme Court does not grant certiorari to address arguments not pressed or passed upon below); *United*

[15] Thus, Petitioner's assertion that he received a COA on all "issues raised in [his certiorari] Petition," Petition at 7, is incorrect.

States v. Williams, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or passed upon below").

The only issue properly preserved by Petitioner is his claim that the prosecutors improperly exploited the Mitigation Instruction. In any event, as shown below, neither this prosecutorial error claim nor his challenge to the Mitigation Instruction warrants certiorari review.

3. Petitioner at bottom alleges the misapplication of a properly stated rule.

Petitioner suggests that the Tenth Circuit has sanctioned continuing "misconduct" by Oklahoma prosecutors that precludes capital juries from considering relevant mitigating evidence, leaving "*Lockett*[16] and its progeny without teeth." Petition at 25-29. But the problem for Petitioner is that his argument presupposes that the prosecutors in his case told the jury it could not consider mitigating evidence unless it reduced moral culpability or blame. *See* Petition at 25-26 ("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."). He ignores that the Tenth Circuit agreed with the OCCA that "[t]he prosecution didn't tell the jury not to consider Cuesta-Rodriguez's mitigation evidence" or "tell the jury that it *can't consider* the mitigation evidence unless it speaks to culpability." *Cuesta-*

[16] *Lockett v. Ohio*, 438 U.S. 586 (1978).

Rodriguez, 916 F.3d at 910 (emphasis in original). Thus, while Petitioner characterizes the Tenth Circuit's opinion as conflicting with *Lockett*, he in reality disagrees with the Tenth Circuit's agreement with the OCCA's finding that the prosecution did not make any comments telling the jury not to consider mitigating evidence. This is, at bottom, an allegation that the Tenth Circuit misapplied a properly stated rule—a matter that, as previously stated, is unworthy of certiorari review. *See* Rule 10, *Rules of the Supreme Court of the United States*.

To the extent that Petitioner suggests that the Tenth Circuit should have used his case to send a message to Oklahoma prosecutors, Petition at 27, the Tenth Circuit "has no such supervisory authority over Oklahoma courts." *English v. Cody*, 146 F.3d 1257, 1262 (10th Cir. 1998); *see also Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that [federal courts] do not hold a supervisory power over the courts of the several States."). As this Court said in *Darden*, the standard of review for a prosecutorial error claim on habeas "is the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986) (quotation marks omitted). The only question that was properly before the Tenth Circuit was whether *Petitioner's* death sentence was obtained in violation of the Constitution. *See* 28 U.S.C. § 2254(a) (a federal court may entertain a petition for writ of habeas corpus challenging a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); *cf. also County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 154-55 (1979) ("As a general rule, if

there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations."). This Court's review is not warranted.

4. The OCCA does not require a "lesson" from this Court.

Petitioner suggests that this Court must grant certiorari review to teach the OCCA a "lesson" because the OCCA has endorsed a "vague and misleading instruction" and has allowed prosecutors to repeatedly exploit this instruction to limit jurors' consideration of mitigating evidence. Petition at 27-29. Petitioner has not demonstrated that certiorari review is necessary to teach the OCCA a "lesson."

For starters, as Petitioner concedes, Petition at 25-26, the OCCA has already recognized the constitutional problem with prosecutors suggesting that mitigating evidence that does not reduce moral culpability or blame should not be considered and accordingly revised the Mitigation Instruction. In *Harris*, the OCCA explained that it was troubled by prosecutors consistently misusing the language of the Mitigation Instruction to argue that mitigating evidence cannot be considered when it does not go to moral culpability or blame. *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007). Thus, although the OCCA held that the instruction was not legally inaccurate, inadequate, or unconstitutional, and that cases in which the instruction had been used were not subject to reversal on that basis, the OCCA suggested a revision to the instruction's language to discourage improper argument. *Id.* at 1114. As a result, the Mitigation Instruction was amended to provide, in relevant part, that "[m]itigating circumstances are 1) circumstances that may

extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty." OUJI-CR 4-78 (Supp. 2008).

Petitioner's reliance on *Bosse v. Oklahoma* to argue that "the OCCA has not learned" its "lesson" and "is not likely to learn without explicit direction from this Court," Petition at 28-29, is entirely misplaced. Here, on its own, the OCCA recognized and corrected "the consistent misuse of the [Mitigation Instruction's] language . . . in the State's closing arguments" with a revised instruction. *Harris*, 164 P.3d at 1114. There is nothing for this Court to correct, and *Bosse* is inapposite. *Compare Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) ("The Oklahoma Court of Criminal Appeals remains bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban.").

5. Petitioner has not shown any conflict or split in authority.

Petitioner asserts that review is required by this Court to resolve a split in authority among the states' highest courts and circuit courts regarding the so-called imposition of a "nexus" requirement for mitigating evidence. Petition at 29-35. Petitioner has not shown that Oklahoma's instructions concerning mitigating evidence have a nexus requirement or run afoul of this Court's precedent or that there is any split in authority requiring this Court's attention.[17]

[17] In this section, Respondent refers to the Mitigation Instruction as it existed at the time of Petitioner's trial, demonstrating that it contained no nexus requirement. In

To begin with, Oklahoma's definition of mitigating circumstances does not contain a nexus requirement. Petitioner repeatedly suggests that the Mitigation Instruction limits mitigating evidence to that which is connected to the crime. Petition at 28-29, 33-34. Petitioner's argument ignores the totality of the instructions Oklahoma capital juries receive, as did his jury, on the definition and consideration of mitigating evidence. Below, reviewing Petitioner's prosecutorial error claim,[18] the Tenth Circuit found that the prosecution did not tell the jury not to consider mitigating evidence but that, in any event, habeas relief was not warranted given "the ameliorating jury instructions as a whole and prosecution comments interpreting mitigation circumstances more broadly." *Cuesta-Rodriguez*, 916 F.3d at 911. The Tenth Circuit's reasoning applies with equal force to Petitioner's present challenge to the Mitigation Instruction.

As noted by the Tenth Circuit, *Cuesta-Rodriguez*, 916 F.3d at 911, the jury was instructed that evidence had been presented as to sixteen specific mitigating circumstances that mirrored the defense mitigation evidence during penalty phase (O.R. 1285-88). The jury was further told that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances

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any event, as discussed in the previous section, Oklahoma has since amended this instruction to expressly provide that the jury may consider as mitigating *any* circumstance that could lead a juror to choose a sentence of less than death. *See* OUJI-CR 4-78 (Supp. 2008). Therefore, even assuming error in Petitioner's trial, a grant of certiorari here would be only an exercise in error correction, which is not a worthy basis for this Court's review.

[18] It bears repeating that a challenge to the Mitigation Instruction was not pressed or passed upon below.

of this case" (O.R. 1284). *Cuesta-Rodriguez*, 916 F.3d at 912. And the instructions provided that the jury could "consider sympathy or sentiment for the defendant in deciding whether to impose the death penalty" (O.R. 1295). *Cuesta-Rodriguez*, 916 F.3d at 912. In sum the Tenth Circuit reasoned that the jury was correctly instructed under the law regarding mitigating circumstances, the prosecutor made a number of comments encouraging the jurors to consider any and all mitigating evidence they found relevant, and "defense counsel spent substantial time informing the jury of its ability to consider mitigating evidence as well." *Cuesta-Rodriguez*, 916 F.3d at 911-12.

Thus, viewed in light of all of the jury instructions, the Mitigation Instruction did not limit the jury to considering only that mitigating evidence which reduces moral culpability or blame and certainly did not establish a nexus requirement. Petitioner's reliance on "nexus" cases is misplaced. *Compare, e.g.*, *Smith v. Texas*, 543 U.S. 37, 45 (2004) (holding that the state court improperly concluded that the petitioner had not presented any relevant mitigating evidence in the absence of "any link or nexus between his troubled childhood or his limited mental abilities and this capital murder" (quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004))); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime."). Accordingly, Petitioner has

shown no conflict between the Tenth Circuit's decision in his case and the "nexus" cases he cites.[19] Certiorari review is unwarranted.

Not only has Petitioner failed to demonstrate a "nexus" requirement in Oklahoma, he likewise has failed to show that such a requirement exists in any other state, such that there is any split in authority requiring this Court's attention. Petitioner cites to cases out of Florida, Alabama, and Indiana, claiming that they endorse a nexus requirement, but he conflates the concept of whether mitigating evidence is *considered* with the finding of the *weight* to give such mitigating evidence. Petition at 35 & n. 11. The cases cited by Petitioner state only that a

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[19] Petitioner also attempts to distinguish his case from *Boyde*. Petition at 33-34. To begin with, however, the instruction found not to violate the Eighth Amendment by this Court in *Boyde* was in fact very similar to the Mitigation Instruction at issue here. In *Boyde*, the petitioner's jury was instructed to consider a number of statutory mitigating circumstances, most of which focused on the immediate circumstances of the crime itself, as well as—pursuant to the so-called "factor (k)" instruction—"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 373-74 & n. 1, 378. This Court held that there was not a reasonable likelihood that the jury interpreted the factor (k) instruction to prevent consideration of non-crime-related mitigating evidence presented by the petitioner of his background and character. *Id.* at 381. In light of the similarity between the factor (k) instruction and the Mitigation Instruction at issue here, *Boyde* only reinforces that the Tenth Circuit properly denied habeas relief in this case. Furthermore, in *Brown* (which also involved the factor (k) instruction) this Court reversed the grant of habeas relief despite the fact that "the prosecutor . . . argued to jurors during his closing that they should not consider [the petitioner's] mitigation evidence," "argued to the jury that it had not heard any evidence of mitigation," and "characterized [the petitioner's] evidence as not being evidence of mitigation." *Brown v. Payton*, 544 U.S. 133, 143-45 (2005). This Court reasoned that, in the context of the trial as a whole, the state court's finding that the prosecutor's incorrect argument did not prevent the jury from considering the petitioner's mitigating evidence was not unreasonable. *Id.* at 144-47. Put simply, if the petitioner in *Brown* was not entitled to habeas relief, then Petitioner has certainly not shown that the OCCA unreasonably denied relief in his case.

sentencer *may* assign less weight to mitigating evidence that does not help explain or relate to the crime, not that such evidence does not count as mitigating or cannot be considered. *See Phillips v. State*, No. CR-12-0197, 2015 WL 9263812, at *83-84 (Ala. Crim. App. Dec. 18, 2015) (unpublished) (rejecting the defendant's argument that "the trial court improperly required a causal connection between the mitigating circumstances and the offense" because the record showed that the trial court considered all of the evidence but simply found it not to be mitigating); *Hines v. State*, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) ("We cannot say that the trial court abused its discretion by failing to assign *significant mitigating weight* to Hines's childhood abuse." (emphasis added)); *see also Lynch v. Sec'y, Fla. Dep't of Corr.*, 776 F.3d 1209, 1222-26 (11th Cir. 2015) (concluding that the state court reasonably rejected the petitioner's claim of prejudice from trial counsel's failure to present mental health experts in mitigation on grounds that the petitioner's "experts' generalized testimony (that his brain impairment rendered him unable to control his impulses) could not be squared with the facts of the case"). This is entirely in line with this Court's precedent. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) ("The sentencer, and the [appellate court] 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.").

The conflict in the law alleged by Petitioner is illusory. Certiorari review should be denied.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

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