Capital Case

Case No. _____

In the Supreme Court of the United States

KEVIN RAY UNDERWOOD,
Petitioner,
v.
MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTION PRESENTED

Oklahoma's capital scheme does not permit jurors to *consider* imposing a death sentence on the accused unless, before it unanimously makes the subjective moral determination to impose the ultimate sentence, it finds as a prerequisite that a statutory aggravating circumstance it has found beyond a reasonable doubt outweighs a *finding* of one or more mitigating circumstances. The Tenth Circuit Court of Appeals concluded it was bound by its own precedent which had held Oklahoma juries need not make this critical finding of fact "beyond a reasonable doubt." This presents the following question for this Court's review:

> Whether the Tenth Circuit's decision – that the "beyond the reasonable doubt" standard does not apply to the critical and prerequisite finding by Oklahoma jurors that an aggravating circumstance outweighs any finding of mitigating circumstances – conflicts with the settled precedent of *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584 (2002)?

TABLE OF CONTENTS

Page

INDEX OF APPENDICES

(Attachments are located in a separate volume - Appendix of Attachments)

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

SUPREME COURT CASES

FEDERAL CIRCUIT COURT CASES

FEDERAL DISTRICT COURT CASES

FEDERAL STATUTES

STATE COURT CASES

STATE COURT STATUTES AND AUTHORITIES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Kevin Underwood, respectfully petitions this Court and prays that a writ of certiorari issue to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals denying relief is reported at *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018) (Appendix A). The federal district court's denial of the Petition for Writ of Habeas Corpus is found at *Underwood v. Duckworth*, Case No. CIV-12-111-D, 2016 WL 4059162 (W.D. Okla. July 28, 2016) (unpublished) (Appendix B). The Tenth Circuit's denial of Appellant's Petition for Rehearing on August 17, 2018, is found at (Appendix C). The state court decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Underwood's direct appeal (D-2008-319) on March 25, 2011, is reported at *Underwood v. State*, 252 P.3d 221 (Okla. Crim. App. 201l) (Appendix D). The OCCA's opinion denying Mr. Underwood's Application for Post-Conviction Relief can be found at *Underwood v. State*, No. PCD-2008-604 (Okla. Crim. App. Jan. 17, 2012) (unpublished) (attached as Appendix E).

JURISDICTION

The Tenth Circuit Court of Appeals rendered its decision denying relief on July 2, 2018. Mr. Underwood timely filed a petition for rehearing and rehearing *en banc* on August 6, 2018, which the Tenth Circuit denied on August 17, 2018. An extension of time to file the petition for a writ of certiorari was granted by Justice Sotomayor on November 11, 2018, extending the time to and including January 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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

> A. Upon conviction or adjudication of guilt of a defendant of murder in the first degree, wherein the state is seeking the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. The proceeding shall be conducted by the trial judge before the same trial jury as soon as practicable without presentence investigation.
>
> . . . .
>
> C. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in Section 701.7 et seq. of this title. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. In addition, the state may introduce evidence about the victim and about the impact of the murder on the family of the victim.

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

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

Okla. Stat. tit. 12, § 577.2 provides:

> Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil case or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law. Whenever OUJI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial and free from argument. Counsel for either party or parties shall have a right to request instructions by so requesting in writing.
>
> Each instruction shall be accompanied by a copy, and a copy shall be delivered to opposing counsel. In addition to numbering the copies and indicating who tendered them, the copy shall contain a notation substantially as follows:
>
> "OUJI No. _____" or "OUJI No. _____ Modified" or "Not in OUJI" as the case may be.

OUJI-CR 4-80 provides:

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating **circumstance(s) outweigh(s)** the mitigating **circumstance(s)**, you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

OUJI-CR 9-45 provides:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. This evidence is simply another method of informing you about the specific harm caused by the crime in question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.
>
> As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstance has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances.

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

STATEMENT OF THE CASE

Kevin Underwood was charged with Murder in the First Degree and found guilty by a jury of his peers. O.R. I 8; O.R. VIII 1474. During the penalty phase, the jury found the existence of only one aggravating circumstance – that the murder was especially heinous, atrocious, or cruel. The jury rejected the aggravating circumstance that Mr. Underwood was a continuing threat. O.R. VIII 1508. Mr. Underwood was sentenced to death on April 3, 2008. O.R. VIII 1509,1546-58.

I. Facts of the Case.

Jamie Bolin went missing after school on the afternoon of April 12, 2006. She was last seen leaving school heading to the apartment complex where she lived with her father. Tr. VI 1364-67. Mr. Underwood was a resident of the same complex.

When her father could not find her after coming home from work, authorities began a search of the surrounding areas. Tr. VI 1330-1344. This culminated in a roadblock being placed near the apartment complex. Tr. VI 1429-31. Mr. Underwood and his father, who were driving together, were

stopped at the roadblock and an FBI agent questioned them. Tr. VI 1433-34. After initial questioning, Mr. Underwood agreed to accompany the agent to the Purcell Police Department for a formal interview. Tr. VI 1436-38. The agent drove Mr. Underwood back to his apartment after the interview, but asked Mr. Underwood if he could look around his apartment first before leaving. Mr. Underwood consented. Tr. VI 1452-53. It was during this search that the agent found a plastic tub containing Miss Bolin's body. Tr. VI 1454-57.

Mr. Underwood was taken again to the Purcell Police Department where he was read and invoked his *Miranda* rights. However, after he was told by an unnamed officer it would be helpful for him to talk, Mr. Underwood confessed to the murder. Tr. VIII 1825-29. In that confession, Mr. Underwood detailed not only what he actually did to Miss Bolin, but what he thought about doing to her as well. St. Ex. 154, 155, 162.

As noted, Mr. Underwood was convicted of killing his ten-year-old neighbor. Tr. VIII 1861. She died of asphyxiation; her body mutilated after death. Because guilt was never really disputed, Mr. Underwood's case became one of mitigation versus aggravation and one involving the ultimate moral consideration of whether he should live in prison for life or die by execution.

II. Mitigation.

There was no dispute something has been wrong with Mr. Underwood from birth. His aunt noticed he was not like other children as early as age two. He did not respond to hugs and did not play with other children. Tr. VIII 2065. When he tried to join in play, he would do something inappropriate – making odd noises or gestures. He had an "exaggerated blinking of his eyes" that appeared to be "subconscious." Tr. VIII 2065-66, 2068. He made strange sounds that seemed involuntary. Tr. VIII 1963, 1967, 2004, 2089-90. His signs of developmental problems mirrored those of children diagnosed with developmental disorders. Tr. VIII 2066-68.

Throughout childhood and into early adulthood – Mr. Underwood was 26 years old at the time of the crime – Mr. Underwood remained "odd" and "different;" he was a social outcast who was bullied and had to rely on friends and family to rescue him. Tr. VIII 2004-05, 1960-61, 1966, 1971-72, 1975, 2017, 2076. He was like a "sponge," just sitting there absorbing the bullying; it was not in his nature to fight back. Tr. VIII 1987. Mr. Underwood's only friends were from primary school. Some months before the murder, he told his supervisor the only reason he had a telephone was for his computer because nobody ever called him. Tr. VIII 2033.

Mr. Underwood's relationship with his father was emotionally barren. Not only was "Bo," as Kevin called his father, "cold," he said "jerk" things about Kevin and insulted what friends he had. Tr. VIII 1976, 1991. Bo was hard on Kevin, always telling him to "stop being a whussy." Tr. VIII 2006. Bo could not understand his son; he knew Kevin was depressed and had anxiety attacks, but thought he would grow out of them. Tr. VIII 2116, 2118.[1] Though Kevin's relationship with his mother was better, his mother would get upset and angry, making Kevin very nervous. Tr. VIII 1977, 2011. On one occasion, Kevin cautioned a high school friend to stay in the bedroom where they were hanging out because they heard thumps, screams, and angry shouts coming from Kevin's mother. Tr. VIII 1977. She was known for episodic bouts of extreme violence. Tr. IX 2156.

Though intelligent, Kevin worked a menial job at a fast-food restaurant for over eight years straight, finding himself most comfortable servicing customers through the impersonal drive-through window. Tr. VIII 2020, 2017, St. Ex. 162 at 33-34. Employment advancement came only after his father interceded. And, even then, Kevin was left with the solitary task of stocking grocery shelves at the place his father worked. Tr. VIII 2028; St. Ex.162 at 9.

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[1] A doctor at trial confirmed Kevin experienced emotional abuse from his father. His father feared Kevin was gay, a sissy, not a real man, and that he would never measure up. Tr. IX 2195.

Kevin was a steady worker who kept an unusually strict routine – "almost like an adult [with] autism." Tr. VIII 2030-31. Kevin did not interact with other employees. The employees made fun of him. Tr. VIII 2032. Kevin told his supervisor he left college because he had a "social disorder." Tr. VIII 2033, 2035. Kevin had a scholarship to a college two hours away from home, but was self-conscious about other students thinking he was "weird." He was afraid they would laugh at him. Before withdrawing from college, Underwood would park his car in the school's parking lot, sitting there all day trying to get up the nerve to go inside. Tr. VIII 2070, 2119. His panic attacks and debilitating anxiety prevented him from completing college. Tr. VIII 2134; Tr. IX 2158-59.

Mr. Underwood was treated for depression on and off starting in 2003 and was taking the anti-depressant Lexapro at the time of the crime. Tr. VIII 2056-59. A psychiatrist had diagnosed him with social phobia and recommended group therapy. Tr. VIII 2082. Not much good came from this. Kevin's aunt, a clinical social worker working with severely and persistently mentally ill people, thought group therapy was totally inappropriate for someone like Kevin, who had such severe social anxiety. Tr. VIII 2082-83. Kevin always had difficulty connecting emotionally with people. Tr. VIII 2086.

While Mr. Underwood never did anything to make his family and friends feel uncomfortable about their safety, his mental illness continued to worsen.

Tr. VIII 1963, 1968. What started as an interest in the supernatural and paranormal, descended into darker fantasies. Tr. VIII 1978. Never having had a real girlfriend, Kevin began gathering pornography on his computer. Tr. VIII 1979, 1982, 2009-10. The only significant relationship he had with a female was formed online and continued in that virtual state for eight years. He was in this friend's *physical* company for only a few hours during that entire time. And, this friend ended the relationship abruptly about three months before the crime. Tr. IX 2248. Kevin told his mother he loved this friend and had planned to go to live with her; he did not expect to ever love anybody else. Tr. IX 2389-90.

Kevin's sexual fantasies intensified. Tr. IX 2248. Real sexual experiences for Kevin had been almost nonexistent. St. Ex. 162 at 21-22. So, he began obsessing about virtual ones. In the month before the crime, Kevin appeared bothered. He was very tense and agitated, but clammed up when asked what was wrong. Tr. VIII 1983. Kevin withdrew further into his virtual world and fantasies. He stopped going to his parents' home for his evening meal. He began spending more time on his computer. Tr. VIII 2123. He was possessed by dark and foreboding obsessions. St. Ex. 162 at 20-21, 40-43. His fantasies consumed his thoughts 24 hours a day. Tr. IX 2164.

The jury knew Kevin's compulsions became irresistible to him. In fact, it was not really in dispute that Mr. Underwood suffered from mental illnesses

that fueled the fantasies that led him to kill Jamie Bolin. Even the State's lay witnesses recognized Mr. Underwood's bizarre obsessions and weirdness. Tr. VIII 1932-1935, 1943. Psychologist Robert Prentky concluded Kevin suffers from a severe neurodevelopmental disorder, severe life-long depression, and profound, overwhelming anxiety. He diagnosed Kevin with a type of bipolar disorder that has elements of hypomania as well as recurrent major depressive episodes. Tr. IX 2177-78. Kevin's profound neurodevelopmental disorder was identified as Schizotypal Personality Disorder, a severe disorder similar to Asperger's.[2] Tr. IX 2181. Kevin was also diagnosed as suffering from post-traumatic-stress disorder (PTSD). Tr. IX 2171, 2182.

Psychiatrist Martin Kafka, a specialist in sexual impulsivity disorders, had access to Kevin's writings, which provided significant insight into the flood of extraneous thoughts and feelings he experienced prior to the crime. They showed his struggles with noises inside his head. They revealed his fear the computer was taking over his mind and forcing him to change. He felt he was losing control over himself. Tr. IX 2246. Kevin wished desperately to feel "human." Tr. IX 2251. Kevin was in emotional pain, thought he was a "freak," and believed strangers on the street were laughing at him: "[A]ll I want in life,

[2] On post-conviction, Kevin was diagnosed with Asperger's. *Underwood v. State*, PCD-2008-604, PC Ex. 3 (Okla. Crim. App. May 18, 2010).

[is] to be able to live like a normal person." Tr. IX 2249-50.

Dr. Kafka described Kevin's schizotypal personality disorder as similar to a mild form of schizophrenia with developmental effects. Tr. IX 2252. Kevin's symptoms included misperceiving social cues, having odd eccentric thoughts, experiencing marked problems with interpersonal relationships, being paranoid and suspicious, and having marked social anxiety. Tr. IX 2253. The emotional abuse he suffered in childhood made him particularly vulnerable to the development of this illness. Tr. IX 2254.

Superimposed on the neurodevelopmental disorder was bipolar disease, Type II, another major psychiatric disorder. Tr. IX 2254. He had at least two episodes of major depression, including the one he suffered at the time of the murder. Tr. IX 2260. Kevin experienced multiple episodes of hypomania, in which he was hyped up, "not himself," had intrusive thoughts, became even more isolated, and did things he would not ordinarily do. Tr. IX 2255.

The jury was told about Mr. Underwood's sexual impulsivity disorder. Tr. IX 2257-58. Experts explained how his major brain-based psychiatric disorders held back his development and affected his progressing deviancies. Tr. IX 2257-58. Schizotypal personality disorder, because it affects the executive functioning of the prefrontal lobes, adversely affected Kevin's social judgment, his impulse control, and his ability to know right from wrong and delay gratification. Tr. IX

2257-58, 2263.

The jury was told how treatment for Mr. Underwood's major psychiatric illnesses was available; however, although he was treated for depression with a very low dose of Lexapro, the hypomania part of his illness went undetected, and thus, untreated. Tr. IX 2264-65. Medication could have lessened the effect of his paraphilias and mitigated some of his schizotypal paranoia, reduced his sexual drive, reduced his depression so he felt more socially comfortable, and taken away his obsessional thoughts. Tr. IX 2263-66.

Finally, the jury heard that Kevin had never been in trouble with the law. He had no prior convictions of any kind, much less violent ones. Tr. VIII 1866,1963. And, that while awaiting trial, he was a model prisoner who caused no problems. Tr. VIII 2140-42, 2146. Experts agreed Kevin possessed low potential for committing acts of violence in a prison setting. Tr. IX 2231, 2346.

III. Aggravation.

The prosecution did not ultimately contest the majority of the mitigation case or the diagnoses presented by the defense. Instead, the prosecution overwhelmed the jurors with salacious and captivating details void of relevance. The prosecution drew from what Kevin admitted were his fantasies and intended plans for his victim during his confession, as well as what he did to her after she

already died. St. Ex. 162 at 34-81. The details did not reflect the actual events of that day, but rather, were fantasies Mr. Underwood had *considered* beforehand. In reality, these fantasies and thoughts were a product of his mental illness and developmental disorder and would not have ever been known had the same not disinhibited him from relaying every stray thought during his confession. Nonetheless, the prosecution submitted the same as evidence.

Despite clear constitutional error – of which the prosecutor was warned by the trial court – the prosecution concluded its case with Miss Bolin's parents' recommendations of death. Tr, VIII 1882, 1946-54. *See also Booth v. Maryland*, 482 U.S. 496, 501-02, 507 n.10 (1987); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). The jury found the murder especially heinous, atrocious, and cruel. It was never required to find whether the sole aggravating circumstance[3] outweighed the mitigating circumstances beyond a reasonable doubt.

IV. Oklahoma's Capital Sentencing Scheme.

In Oklahoma, juries decide the accused's punishment for a first-degree-murder conviction: life imprisonment, life imprisonment without the possibility of parole, or death. Okla. Stat. tit. 21, §701.9. The punishment decision is made

[3] The jury found only a single aggravating circumstance and specifically rejected the continuing threat aggravator. O.R. VIII 1508.

in a separate sentencing proceeding immediately following the guilt proceeding. Okla. Stat. tit. 21,§701.10 (A).

During sentencing, a defendant does not become eligible for the death penalty unless a jury first *finds* one or more aggravating circumstances beyond a reasonable doubt *and* the jury makes the *determination* the aggravating circumstance(s) outweigh the finding of one or more mitigating circumstances. Okla. Stat. tit. 21, § 701.11. It is only after these two findings that an Oklahoma jury may proceed to make the ultimate moral decision as to whether to impose death or spare the defendant's life.[4] *See* OUJI-CR 4-80; O.R. VIII 1494; OUJI-CR 9-45; O.R. VIII 1499. *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002); *Duvall v. Reynolds*, 139 F.3d 768, 789-90 (10th Cir. 1998).

Of note with respect to mitigation, Oklahoma has no statutory mitigating circumstances, and jurors are not required to "memorialize specific findings of fact as to which mitigating evidence they considered." *Romano v. State*, 909 P.2d 92, 119 (Okla. Crim. App. 1995). *See also* OUJI-CR 4-81 ("The law does not require you to reduce to writing the mitigating circumstance(s) you find, if any).

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[4] Even if jurors make the "finding" that an aggravating circumstance(s) outweighs the "finding" of mitigation circumstance(s), the jury may still reject the death penalty and impose a sentence of life or life without parole. OUJI-CR 4-80. Any death verdict must be unanimous. Thus, if even one juror disagrees, the trial court will impose a sentence of life imprisonment or life-without-parole.

Instead, the "finding" of mitigating circumstance(s) is left to the jurors. And, the standard used to weigh the aggravation and mitigation "findings" against one another is left to the jurors, without any guidance from the court. *Paxton v. State*, 867 P.2d 1309, 1327 (Okla. Crim. App. 1993). This ambiguous process is in contravention of clearly established federal law.

No where is it clearer that Oklahoma's scheme makes the weighing determination an eligibility requirement than by reference to how jurors are instructed to utilize victim-impact evidence. Such evidence cannot be used on either the side of determining aggravators beyond a reasonable doubt or determining whether the aggravating circumstance(s) outweigh all of the mitigating circumstances found. Victim impact evidence can only be used at the final moral determination stage. OUJI-CR 9-45.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ Because the Tenth Circuit Court of Appeals Will Continue to Interpret *Apprendi* and *Ring* Inconsistent With This Court's Opinions.

The Tenth Circuit Court of Appeals has concluded it is bound by its own precedent holding Oklahoma juries need not make the critical finding of fact – whether statutory aggravating circumstance(s) outweigh a *finding* of one or more mitigating circumstances – beyond a reasonable doubt. *Underwood v.*

Royal, 894 F.3d 1154, 1185-86 (10th Cir. 2018). The Tenth Circuit's decision conflicts with settled precedent of this Court. Specifically, this Court's opinion in *Ring v. Arizona,* 536 U.S. 584, 602 (2002*)* holds that capital juries must make *any* factual finding bearing on capital punishment *beyond a reasonable doubt*. It does not matter what label the jury's required finding is given. *Apprendi v. New Jersey,* 530 U.S. 466, 494 (2000) (noting whether punishment enhancement is a "sentencing factor" or "element" of the offense is irrelevant because "inquiry is one not of form, but of effect").

In *Ring*, this Court held that a finding of Arizona's enumerated aggravating factors "operate[d] *as the* '*functional equivalent* of an element of a greater offense,'" thus requiring "that they be found by a jury." *Ring*, 536 U.S. at 609 (emphasis added). In Oklahoma, the weighing of aggravation against mitigation is a *finding* that must be made *before* the jury may make the final, moral decision of whether to impose death or a lesser sentence. As such, this necessary finding is the functional equivalent of an element of the greater offense, triggering *Ring* and *Apprendi*. However, the Tenth Circuit has not yet come in line with this clearly-established law.

The Tenth Circuit has acknowledged a defendant is entitled to "'a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Underwood*, 894 F.3d at 1184 (citing

Apprendi, 530 U.S. at 476-77). Further, the circuit court will acknowledge "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum' is an element that 'must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id*. at 1184 (citing *Apprendi*, 530 U.S. at 490). Yet, the circuit court rejects the rule that a jury must be instructed to find beyond a reasonable doubt the jury's determination that aggravation outweighs mitigation. The circuit court points to its own precedent for this holding. *Id*. at 1185-86.

In *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009), the Tenth Circuit rejected an *Apprendi/Ring* challenge to Oklahoma's capital sentencing scheme, holding "that the weighing of aggravating and mitigating circumstances under Oklahoma's scheme is not subject to the *Apprendi* rule because it 'is not a finding of fact . . . but a highly subjective, largely moral judgment regarding the punishment that a particular person deserves.'" *Underwood*, 894 F.3d at 1185. Like *Matthews*, other circuit rulings have failed to acknowledge the significance of Oklahoma's scheme, which requires the jury to make the critical finding that aggravating circumstances outweigh mitigating circumstances *before* making the highly subjective, moral judgment of whether death is the appropriate punishment. *Lockett v. Trammell*, 711 F.3d 1218, 1253-54 (10th Cir. 2013) (concluding death eligibility occurs when finding of aggravator is made).

The Tenth Circuit's precedent is premised on faulty grounds.

In *Matthews,* the circuit court relied on *United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) as a basis for its decision. Doc. 53 at 70. In *Barrett*, the circuit court, which was *not* analyzing Oklahoma's death-eligibility scheme, characterized the weighing finding as a "highly subjective, largely moral judgment regarding the punishment that a particular person deserves." 496 F.3d at 1107. However, the *Barrett* panel was construing a scheme that does *not* incorporate the prerequisite finding that aggravating circumstances outweigh mitigating circumstances. Instead, the *Barrett* court was analyzing the federal death-penalty scheme. Under the Federal Death Penalty Act, death eligibility is triggered upon two findings by the jury: 1) the defendant acted with the requisite intent and 2) at least one statutory aggravating factor exists. *See* 18 U.S.C. §§ 3591-92. Thus, when the *Barrett* court characterized the weighing finding as a subjective, moral judgment regarding the punishment a person deserves, it did so because this weighing was indeed a part of the final, subjective death choice reached after *all* eligibility findings had been made.

As detailed, Oklahoma's scheme is not structured this way. The Oklahoma legislature created a process where the initial findings, of which one is the determination that aggravating circumstance(s) outweigh mitigation, lead to the final subjective, moral decision of whether to impose death. To apply

Barrett's reasoning to a death-penalty scheme specifically structured so differently than the federal system's is to ignore the eligibility factors Oklahoma has chosen to implement. Given that *Barrett* is the basis upon which the *Matthews* panel rejected the *Apprendi* rule, and the Tenth Circuit is unwavering in its support of same, this Court's clarification is needed.[5]

That weighing is the method or process the jury uses to reach the critical death-eligibility determination does not change the nature of the determination. Indeed, in *Ring*, Justice Scalia presciently opined that findings "essential to imposition of the level of punishment that the defendant receives –whether the statute calls them elements of the offense, sentencing factors, or Mary Jane –must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). The circuit court acknowledged the eligibility determination – the fact that aggravating circumstances outweigh mitigating circumstances – as a finding of fact here.[6] And, certainly it is not a legal finding. Employing a balancing process to make a critical finding is squarely within the

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[5] The circuit court appears to invite clarification on this issue from this Court. *Underwood*, 894 F.3d at 1185-86 (citing *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.")).

[6] The Tenth Circuit even referenced the weighing as "required findings." *Underwood*, 894 F.3d at 1184.

jury's wheelhouse, as evidenced by other instructions given to Oklahoma juries. O.R. VIII at 1480; OUJI-CR10-1 (You have been given "all the rules of law by which you are *to weigh the evidence and determine the facts* in issue in deciding this case and in reaching a verdict as to punishment") (emphasis added). So, the fact remains this determination – regardless of label – is an eligibility finding necessary to impose death under Oklahoma law, and one requiring proper application of the beyond-a-reasonable-doubt standard.

Oklahoma courts claim it is a moral decision; yet, it is no more a moral decision than the other essential findings. Even if so, the force of *Apprendi* and *Ring* is not limited to only those determinations lacking a moral component. One can argue there is a moral component involved in the determination of aggravating circumstances. Thus, the aggravation versus mitigation weighing decision, like that of the aggravating circumstances in *Ring*, is the "functional equivalent" of an element increasing the maximum penalty, requiring it be found beyond a reasonable doubt. *Ring*, 536 U.S. at 609.

If there is any question as to the scope and application of *Ring* and *Apprendi*, the same has been made clear by *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). In *Hurst*, this Court reaffirmed that a state's capital-sentencing scheme violates the Sixth Amendment if it does not require a jury "to find each fact necessary to impose a sentence of death," and "each element of a crime be proved

to a jury beyond a reasonable doubt." *Id*. at 619-21. The Court reiterated that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Id*. at 621. Citing *Ring*, the Court also noted this principle applies with equal force to the weighing of aggravating circumstances. *Id*. at 620-22.[7]

However, in this case, the Tenth Circuit reasoned that because *Hurst* "post-dates the OCCA's decision," it cannot be treated as clearly established law for the Court's review. *Underwood*, 894 F.3d at 1186. It need not. *Hurst* simply illuminates[8] what *Ring* and *Apprendi* have already made clear. In *Ring*, this Court required that a jury – not a judge – make findings as to sentencing factors beyond a reasonable doubt. *Ring*, 536 U.S. at 602. There, the Court noted that such factors are the "functional equivalent of an element of a greater offense." *Id*. at 609 (citing *Apprendi,* 530 U.S. at 494 n.19). Thus, *Ring* and *Apprendi* have already set the clearly established ground rules requiring juries make fact findings beyond a reasonable doubt for every element of a crime, including the

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[7] In so ruling, the Court overruled its own authority that had upheld the Florida scheme. *Hurst*, 136 S. Ct. at 624 ("Time and subsequent cases have washed away the logic of *Spaziano v. Florida*, 468 U.S. 447 (1984) and *Hildwin v. Florida*, 490 U.S. 638 (1989)").

[8] *Hurst*'s illumination of the *Ring* standard is no different than the Supreme Court's reiteration and clarification of *Strickland v. Washington*, 466 U.S. 668 (1984) in *Williams v. Taylor*, 529 U.S. 362 (2000). *See, e.g., Anderson v. Sirmons*, 476 F.3d 1131, 1146-47 (10th Cir. 2007).

critical weighing finding. This Court should grant the writ to clarify the Tenth Circuit's interpretation and application of *Apprendi* and *Ring*.

II. This Court Should Grant the Writ Because Although *Ring* and *Apprendi* Constitute Clearly Established Federal Law, Lower Courts Are at Odds as to Their Meaning. This Case Presents a Vehicle to Eliminate Confusion.

Both the Oklahoma Court of Criminal Appeals and the Tenth Circuit, as well as many other court, have manufactured distinctions based on questionable authority so as to determine the weighing finding – even when it is clearly a prerequisite to an accused's death eligibility – does not qualify under the *Ring* and *Apprendi* standards. The OCCA first used this Court's statement in *Zant v. Stephens*, 462 U.S. 862 (1983) that "'[s]pecific standards for the balancing of the aggravating and mitigating circumstances are not constitutionally required" as authority for treating the weighing determination different. *Brogie v. State*, 695 P.2d 538, 544 (Okla. Crim. App. 1985).[9] *See also Mitchell v. State*, 884 P.2d 1186, 1206 & n.73 (Okla. Crim. App. 1994) (concluding "[w]hether aggravators outweigh mitigating circumstances is left to the jury's discretion") (citing *Zant*, 462 U.S. at 862); *Allen v. State*, 871 P.2d 79, 101-02 (Okla. Crim. App. 1994)

[9] The question before the Court in *Zant* was not the one presented here. In *Zant*, this Court was answering only "whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid." 462 U.S. at 864.

(concluding again there are no specific constitutional standards for balancing aggravating and mitigating circumstances and that placing any other construction would prohibit the OCCA from "utilizing its authority to reweigh aggravating and mitigating circumstances should one aggravator be found to be invalid").[10] And, indeed, the OCCA followed this line of cases to conclude here that "[t]he jury's consideration of aggravators *versus* mitigators is a balancing process which is not amenable to the 'beyond a reasonable doubt' standard of proof." *Underwood v. State*, 252 P.3d 221, 246 (Okla. Crim. App. 2011).

At other times the OCCA has concluded, citing pre-*Ring* cases, that "the weight to be accorded the aggravating and mitigating circumstances is not a fact." *Warner v. State*, 144 P.3d 838, 882 (Okla. Crim. App. 2006). The Tenth Circuit picked up this "not-a-fact" approach in reviewing the federal death-penalty scheme in *Barrett*, 496 F.3d at 1107 (characterizing weighing finding as a "highly subjective, largely moral judgment regarding the punishment that a particular person deserves") (internal quotations omitted). And, this was the same language employed by the Circuit here in concluding that it could not deviate from its precedent. *Underwood*, 894 F.3d at 1185-86. *See also Matthews,* 577 F.3d at 1195.

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[10] This precise question is before this Court in *Tryon v. Oklahoma*, Case No. 18-6884, *petition for cert. filed* Nov. 26, 2018.

For states where the critical weighing finding was left in the hands of judges, rather than juries, some states corrected their assessment after *Hurst*. *See Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (holding that "the finding that the aggravating factors outweigh the mitigating circumstances" is one of "the critical findings necessary before the trial court may consider imposing a sentence of death"); *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (finding that the Sixth Amendment requires a jury, not a sentencing judge, to unanimously find that aggravating circumstances found to exist outweigh the mitigating circumstances found to exit "beyond a reasonable doubt").

Others did not. *See Ex Parte Bohannon*, 222 So. 3d 525, 529-30 (Ala. 2016) (adopting Eleventh Circuit's pre-*Ring* approach that "relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof," and therefore, it is a determination that can be made by judges) *(*quoting *Ford v. Strickland*, 696 F.2d 804,818 (11th Cir. 1983)). *See also State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018) (concluding *Hurst* did not hold a jury must find beyond a reasonable doubt that aggravating factors outweigh mitigating circumstances).

Still yet, in other states, the death penalty schemes provide that the aggravating factors must outweigh mitigating factors "beyond a reasonable doubt." Ark. Code Ann. §5-4-603 (b)(2) ("The jury shall impose a sentence of life

imprisonment without parole if the jury finds that: . . . [a]ggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist"). *See Willett v. State*, 983 S.W.2d 409 (Ark. 1998) (where like Oklahoma, a single juror can prevent the death penalty. "If one juror determines that the aggravating circumstances do not exceed the mitigating circumstances beyond a reasonable doubt, the death sentence cannot be imposed."). *Id*. at 436. *Cf*. Ohio Rev. Code Ann. §2929.03 (D)(1) ("The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death"). *See State v. Belton*, 74 N.E.3d 319, 337 (Ohio 2016) (upholding defendant's waiver of jury trial and determining that, despite statute, there is no Sixth Amendment right to have a jury determine sentencing because "the weighing process amounts to 'a complex moral judgment' about what penalty to impose upon a defendant who is already death-penalty eligible.").

Guidance is needed to eliminate confusion amongst the lower courts. The Sixth Amendment requires that the weighing determination is a factual determination, akin to the element of an offense, and thus, must be found "beyond a reasonable doubt" for a death sentence to be imposed. The beyond-a-reasonable-doubt standard's connection to the Sixth Amendment right to a jury

trial is long established. Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10-11 (1989). Indeed, some believe the Sixth Amendment's beyond-a-reasonable-doubt standard naturally encompasses the complex moral judgment of whether the death penalty is the appropriate sentence: the final step in Oklahoma's scheme after an accused is deemed eligible for the ultimate punishment. *See* Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 268 (2017) (arguing all determinations necessary for the imposition of the death penalty should be found beyond a reasonable doubt).

Regardless, this Court can answer the question presented here without expanding the clearly established law of *Ring* and *Apprendi*. In states like Oklahoma, all eligibility determinations *and* the ultimate moral decision of whether an accused should live or die, are made by jurors. It is only by a contorted reading of *Ring* and *Apprendi* that courts can conflate the critical weighing finding with the ultimate moral and legal judgment to impose death. The "weighing component" is a critical finding of fact that is necessary to be determined before the moral and legal judgment comes into play. To conclude "it would be pointless to instruct that the jury must, or even that it could, make [the weighing] determination beyond a reasonable doubt," aptly illustrates why this Court should grant certiorari to resolve any confusion in the lower courts.

Jeremias v. State, 412 P.3d 43, 54 (Nev. 2018) (refusing to characterize the weighing determination as a "prerequisite of death eligibility").

This case illustrates the need for consistent imposition of this Court's established standards. Mr. Underwood is a profoundly ill man. The jurors heard the severity of Mr. Underwood's mental-health status and the isolation of his troubled life. Critical evidence of Mr. Underwood's brain-based illnesses was presented, and jurors knew about his obsessive preoccupations, emotional immaturity, poor social judgment, and poor impulse control. The balance between aggravation and mitigation was precarious. The jury specifically rejected the existence of the continuing-threat aggravator,[11] leaving only one aggravator and a wealth of mitigating evidence. Thus, when Mr. Underwood's jury determined the weight of the sole aggravating circumstance it was weighing a single aggravating circumstance against all of the mitigating circumstances presented. Yet, the jury was not held to the constitutional standard of beyond a reasonable doubt in determining the single aggravator outweighed the

[11] The circuit court has characterized a petitioner's potential for continued dangerousness, even if incarcerated, as "perhaps [the] most important aggravating circumstance." *Grant v. Trammell*, 727 F.3d 1006, 1017 (10th Cir. 2013); *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017). This is a case where it is apparent the jury considered the mitigation evidence of his prior history of no violence as well as his good-prisoner evidence because the jurors specifically found he was not a continuing threat, even though in Oklahoma evidence of the crime itself can be sufficient alone to support the aggravator.

mitigating circumstances. Had the jury been instructed that it must make its determination beyond a reasonable doubt, at least one juror may have come to a different weighing determination.

CONCLUSION

Unlike the death-penalty schemes the OCCA and the Tenth Circuit have patterned their decisions after, Oklahoma's capital-punishment scheme elevates the decision of individual jurors. Jurors make all of the prerequisite decisions making an accused eligible for the ultimate penalty: jurors decide whether the accused is guilty of each element of the offense of first-degree murder beyond a reasonable doubt; whether the prosecution has proven the existence of at least one statutory aggravating circumstance beyond a reasonable doubt; and whether the aggravating circumstance(s) outweigh their *finding*s of any and all mitigating circumstance(s). Only if they make all three findings against an accused may jurors go to the next and final step – the ultimate moral decision of whether a death sentence should be imposed.

Oklahoma and the Tenth Circuit will continue to violate *Apprendi* and *Ring* by conflating the Oklahoma scheme with other schemes where the jurors' role in weighing aggravating circumstance(s) against mitigating circumstance(s) is not so critical. No matter what label is applied, the jurors' decision that aggravating circumstance(s) outweigh mitigating circumstance(s) is only the

penultimate step taken *before* jurors enter into the sensitive deliberations of whether imposing death is just in the particular case before them.

Petitioner prays the Court grant his petition and decide that the Sixth Amendment of the United States Constitution requires the prerequisite finding that aggravating circumstance(s) outweigh the jurors' findings of mitigating circumstance(s) be made *beyond a reasonable doubt*. Petitioner, Kevin Underwood, respectfully prays this Court grant the petition for writ of certiorari.

Respectfully submitted,

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