

Case No. 18-7442

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN RAY UNDERWOOD,

Petitioner,

v.

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary,

Respondent.

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

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**CAPITAL CASE
QUESTION PRESENTED**

Whether this Court should grant a writ of certiorari to review Petitioner's claim that his jury was required to find aggravating circumstances outweighed mitigating factors beyond a reasonable doubt where Petitioner merely disagrees with the Tenth Circuit's application of AEDPA to a rule of Supreme Court law?

No. 18-7442

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Petitioner,

vs.

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**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Respondent respectfully urges this Court to deny Kevin Ray Underwood'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 July 2, 2018, *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018); Pet'r Appx. A.¹

¹ Record 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; 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

An Oklahoma jury convicted Petitioner of one count of First Degree Murder. The jury sentenced Petitioner to death for the murder of ten-year-old Jamie Bolin after finding the murder was especially heinous, atrocious, or cruel. *See Okla. Stat. tit. 21, § 701.12(4) (2001).*

On direct appeal, the Oklahoma Court of Criminal Appeals (“OCCA”) set forth the relevant facts in its published opinion. *Underwood v. State*, 252 P.3d 221, 230-232 (Okla. Crim. App. 2011), *cert denied*, *Underwood v. Oklahoma*, 565 U.S. 1121 (2012). 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:²

Appellant was charged with murdering ten-year-old Jamie Bolin on April 12, 2006, in Purcell, Oklahoma. Appellant lived alone in the same apartment complex where Jamie lived with her father, Curtis Bolin. Due to her father's work schedule, Jamie was typically home alone for a period of time after school. On the day in question, Jamie played in the school library with a friend for a short time before going home. She was never seen alive again.

Police, firefighters, and a host of citizen volunteers began a search for Jamie. The day after Jamie's disappearance, the Federal Bureau of Investigation added over two dozen people to the effort. On April 14, 2006, two days after Jamie was last seen, police set up several roadblocks around the apartment complex where she lived, seeking leads from local motorists. Around 3:45 p.m. that day, FBI Agent Craig Overby encountered a truck driven by Appellant's father at one of the roadblocks; Appellant was a passenger in the truck. Appellant's father told Overby that they had heard about the disappearance, and that in fact, Appellant was the girl's neighbor. From speaking with other neighbors at the apartment complex, Overby knew that a young man living there may have been the last person to see Jamie. Overby asked

² Petitioner is referred to as “Appellant” in the OCCA’s discussion of the facts.

if Appellant would come to the patrol car to talk for a moment, and Appellant agreed, while his father waited in the truck. In the patrol car, Appellant made statements that piqued Overby's interest.³ Overby asked Appellant if he would come to the police station for additional questioning. Again, Appellant agreed, and Overby assured Appellant's father that he (Overby) would give Appellant a ride home.

^{FN3}At trial, Overby testified: "He told me that he was afraid that he was considered a suspect because he'd been hanging around outside his apartment a lot during the last couple of weeks.... He said he was the last person to see Jamie before she disappeared, and that the media reports of the clothing that she was wearing when she became missing were incorrect."

At the police station, Appellant was interviewed by Agent Overby and Agent Martin Maag. Appellant told them about seeing Jamie on April 12, and discussed his activities on that day and other matters. At the conclusion of this interview, which lasted less than an hour, the agents asked Appellant if they could search his apartment. Appellant agreed. The agents accompanied Appellant to his apartment around 5:00 p.m. While looking around the apartment, Overby saw a large plastic storage tub in Appellant's closet; its lid was sealed with duct tape. Appellant saw Overby looking at the tub, and volunteered that he kept comic books in it; he said that he had taped the lid to keep moisture out. Overby asked if he could look inside the tub, and Appellant agreed. When Overby pulled back a portion of the tape and lifted a corner of the lid, he saw a girl's shirt—and realized that it matched Appellant's description of the shirt Jamie Bolin was wearing on the day she disappeared.⁴ When Overby commented that he saw no comic books in the tub, Appellant interjected, "Go ahead and arrest me." Overby immediately responded, "Where is she?" Appellant replied, "She's in there. I hit her and chopped her up." Appellant then became visibly upset, began hyperventilating, and exclaimed, "I'm going to burn in Hell." He was placed under arrest and escorted out to the agents' vehicle. Agent Overby summoned local authorities to secure the scene.

^{FN4}Overby testified: "[D]uring the earlier interview, Mr. Underwood told me that the media reports about what Jamie was last seen wearing were wrong, that he had actually seen her

wearing a blue shirt. And then I saw the blue shirt inside the box or the tub.”

Back at the police station, Appellant was advised of his right to remain silent, and his right to the assistance of counsel during any questioning, consistent with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because he asked for a lawyer, the interview was concluded. About fifteen minutes later (approximately 5:45 p.m.), police approached Appellant and asked if he would reaffirm, in writing, his original verbal consent to a search of his apartment. Appellant agreed, and spent the next few hours sitting in a police lieutenant's office. He conversed with various officers who were sent to guard him, and made some incriminating statements during that time.

Around 9:30 p.m. that evening, Appellant asked to speak with the two FBI agents he had initially talked to (Overby and Maag). Because Appellant had previously asked for counsel, OSBI Agent Lydia Williams visited with him to determine his intentions. Agent Williams reminded Appellant that he had earlier declined to be questioned, and explained that because of that decision, police could not question him any further. Appellant emphatically replied that he wanted to talk to the agents. Around 10:15 p.m., Agents Overby and Maag interviewed Appellant at the police station. Before questioning began, Overby reminded Appellant of his *Miranda* rights, and Appellant signed a written form acknowledging that he understood them and waived them. When asked if anyone had offered him anything in exchange for agreeing to talk, Appellant replied that one of the officers had predicted things would go better for him if he cooperated. Besides acknowledging his waiver of *Miranda* rights, Appellant also signed another written consent to a search of his apartment. A video recording and transcript of the interview that followed, which lasted about an hour, was presented to the jury at trial and is included in the record on appeal.

In the interview, Appellant describes how he had recently developed a desire to abduct a person, sexually molest them, eat their flesh, and dispose of their remains. He explains in considerable detail how he attempted to carry out this plan on Jamie Bolin, whom he had decided was a convenient victim. Appellant stated that he invited Jamie into his apartment to play with his pet rat. Once Jamie was inside, Appellant hit her on the back of the head several times with a wooden cutting board; she screamed in pain and begged him to stop. Appellant proceeded to suffocate the girl by sitting on her and placing his hand across her face. Appellant told the agents that this was not an easy

task, and that fifteen to twenty minutes passed before she succumbed. Appellant claimed he then attempted to have sexual relations with the girl's body, but was unable to perform. He then moved her body to the bathtub and attempted to decapitate it with a knife, but was unsuccessful at that task as well. Frustrated, Appellant wrapped Jamie's body in plastic sheeting and placed it in a large plastic container which he hid in his closet. Appellant also dismantled Jamie's bicycle and hid it inside his apartment, to make it look as if she had left the apartment complex.

Jamie Bolin's remains were taken to the Medical Examiner's office for an autopsy. The Medical Examiner noted bruises to the back of the girl's head, consistent with Appellant's claim that he hit her forcefully with a cutting board. The examiner also noted petechia in the girl's eyes, and curved marks on her face, consistent with Appellant's description of how he had suffocated her. The most pronounced wound on the body was a very deep incision to Jamie's neck, which was also consistent with the injuries Appellant admitted to inflicting. The Medical Examiner also noted trauma to the girl's genital area, including tearing of the hymen. However, the Medical Examiner could not say that Jamie was alive, or even conscious, when her neck was cut or when she was sexually assaulted. The official cause of death was declared to be asphyxiation.

In the punishment stage of the trial, the State presented brief victim-impact testimony from Jamie Bolin's parents. It incorporated the testimony from the guilt stage to show that the murder was especially heinous, atrocious, or cruel. The defense presented extensive evidence in mitigation of sentence, including the testimony of family, friends, and three experts who had evaluated Appellant's mental health. In rebuttal, the State presented its own mental-health expert, who had reviewed the findings of the defense experts. The State's expert did not disagree with the defense experts' diagnoses, and concurred with many of their findings, but disagreed on some points and explained why, in his opinion, Appellant constituted a continuing threat to society. In the end, the jury rejected the "continuing threat" allegation, but found that the heinous nature of the killing warranted the death sentence.

Underwood, 252 P.3d at 230-232 (paragraph numbering omitted).

The OCCA affirmed Petitioner's conviction and sentence, *id.* at 258-259, and subsequently denied rehearing. On appeal, in relevant part, Petitioner

acknowledged his jury was required to unanimously find the existence of an aggravating circumstance beyond a reasonable doubt before it could consider imposing a death sentence, but challenged that his jury was not required to find the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. *Underwood*, 252 P.3d at 246. Citing to previous state court decisions, the OCCA held it had rejected this argument both before and after this Court's holding in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). *Id.* Thereafter, the OCCA denied Petitioner's application for post-conviction relief in an unpublished decision. *Underwood v. State*, No. PCD-2008-604, slip op. (Okla. Crim. App. Jan. 17, 2012) (unpublished); Pet'r Appx. E.

The federal district court denied Petitioner's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in an unpublished memorandum opinion. *Underwood v. Duckworth*, No. CIV-12-111-D, slip op. (W.D. Okla. July 28, 2016); Pet'r Appx. B. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Underwood*, 894 F.3d at 1187. The Tenth Circuit also denied panel and *en banc* rehearing. *Underwood v. Carpenter*, No. 16-6262, *Order* (10th Cir. Aug. 17, 2018) (unpublished); Pet'r Appx. C. On January 14, 2019, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

In pertinent part, the Tenth Circuit concluded that the OCCA's decision rejecting Petitioner's claim that the jury was improperly instructed in its consideration of weighing the mitigating evidence against the aggravating circumstances was neither contrary to, nor an unreasonable application of, clearly

established federal law. *Underwood*, 894 F.3d at 1184-1186. In particular, the Tenth Circuit concluded that the OCCA was not unreasonable in determining that neither *Apprendi v New Jersey*, 530 U.S. 466 (2000) nor *Ring* requires the jury to find the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *Underwood*, 894 F.3d at 1185-1186.

The Tenth Circuit also recognized Petitioner's reliance on *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016) post-dated the OCCA's decision and could not be relied on for purposes of § 2254(d)(1) review. *Id.* at 1186.

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because Petitioner has not presented this Court with a compelling, unresolved issue warranting certiorari review. To begin with, he merely disagrees with the Tenth Circuit's application of a properly stated rule, i.e., 28 U.S.C. § 2254(d). Furthermore, he has shown no conflict between the Tenth Circuit's decision and any decision of this Court or any other court. Although he alleges a split in authority among lower courts concerning this issue, the case law is not in conflict and the split he alleges is illusory.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER PRESENTS A MERE DISAGREEMENT WITH THE APPLICATION OF A PROPERLY STATED RULE AND HAS SHOWN NO CONFLICT IN THE LAW.

Petitioner seeks this Court's review of a claim that was denied by the Tenth Circuit based on the application of a properly stated rule. He has shown no conflict

in the law or split in authority. This case does not involve a compelling, unresolved issue, and this Court should deny Petitioner's request for a writ of certiorari.

A. Petitioner simply disagrees with the Tenth Circuit's application of AEDPA and *Ring*.

Petitioner suggests that this Court should grant certiorari review because the Tenth Circuit Court of Appeals found the OCCA's decision denying relief did not violate *Ring v. Arizona*. *Underwood*, 894 F.3d at 1185-1186. Petition at 17-18. Petitioner argues there is a conflict between the Tenth Circuit's law and this Court's decision in *Ring v. Arizona*. Petitioner attempts to paint the Tenth Circuit's opinion as conflicting with this Court's precedent, but as clearly shown below, he merely disagrees with the Tenth Circuit's application of AEDPA and *Ring*. Such does not present this Court with a compelling, unresolved issue worthy of certiorari review.

Rule 10, *Rules of the Supreme Court of the United States*, provides in pertinent part the following:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

lower court, as to call for an exercise of this Court's supervisory power; . . .

(c) a state court or 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.

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.

Here, Petitioner complains that “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.” Petition at 17. The Tenth Circuit’s review of this case was pursuant to § 2254(d), thus, the scope of review is a narrow one, determining only if the OCCA’s decision was contrary to, or an unreasonable application of, clearly established Supreme Court law, which is exactly what the Tenth Circuit did.³

Petitioner relies on *Ring v. Arizona*, but attempts to broaden this Court’s holding to require Oklahoma juries find not only the aggravating circumstances beyond a reasonable doubt before a defendant is eligible for the death penalty, but to also require the jury to find the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. This Court held in *Ring v. Arizona* that the Sixth Amendment requires that Arizona's enumerated aggravating

³ Petitioner did not identify, nor did the Tenth Circuit find, any unreasonable determination of the facts underlying the OCCA’s adjudication of this claim pursuant to § 2254(d)(2).

circumstances be found by a jury because such circumstances “operate as ‘the functional equivalent of an element of a greater offense’”. *Ring*, 536 U.S. at 609 (quoting *Apprendi v New Jersey*, 530 U.S. 466, 494, n. 19 (2000)).

Here, pursuant to § 2254(d)(1), the Tenth Circuit reviewed Petitioner’s claim regarding the application of *Ring* to Oklahoma’s weighing process made during the penalty phase of Petitioner’s trial. *Underwood*, 894 F.3d at 1185-1186. Thus, Petitioner’s argument is focused on the Tenth Circuit’s application of § 2254(d), a properly stated rule of law. Clearly, the application of § 2254 (d) to a state court decision is not a good vehicle to determine the scope of *Ring*. See *Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1378, 191 L.Ed.2d 464 (2016) (“Because we consider this case only in the narrow context of federal habeas review, we ‘express no view on the merits of the underlying Sixth Amendment principle.’”) Regardless, nothing in *Ring* clearly establishes that the jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. In fact, this Court noted:

Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment

required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S. Ct. 1441, 108 L.Ed.2d 725 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi*, 530 U.S., at 477, n. 3, 120 S. Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

Ring, 536 U.S. at 597 n. 4. The only question presented to the Court was whether an aggravating factor may be found by the judge, as Arizona law specified, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury. *Ring*, 536 U.S. at 597. Clearly, *Ring*'s holding is not as broad as is argued by the Petitioner. As such, all that matters here is that the Tenth Circuit applied AEDPA and recognized this Court's has never extended *Ring* to the circumstances of this case. *Donald*, 135 S. Ct. at 1378 ("All that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that [*United States v.*] *Cronic*[], 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984)] applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable.").

In Oklahoma, the sentencing decision is committed to a jury, unless waived by the defendant. Pursuant to Oklahoma law, a jury is unanimously required to determine whether the State has proven an aggravating circumstance beyond a

reasonable doubt before the offender is eligible for the death penalty. Okla. Stat. tit. 21, § 701.11 (2001); *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002); *Romano v. State*, 847 P.2d 369, 392 (Okla. Crim. App. 1993). Petitioner was afforded a jury who made such determination and Petitioner does not challenge the jury's finding. *Ring* was satisfied. See also *Tuilaepa v. California*, 512 U.S. 967, 979, 114 S. Ct. 2630, 2638, 129 L.Ed.2d 750 (1994) (“A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.”); *Marsh v. Kansas*, 548 U.S. 163, 174, 126 S. Ct. 2516, 2525, 165 L.Ed.2d 429 (2006) (“[A] State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed”).

As for Petitioner's reliance on *Hurst v. Florida*, because it post-dates the OCCA's decision, *Hurst* is not clearly established law for purposes of examining the OCCA's decision in this case. See *Shoop v. Hill*, __ U.S. __, 139 S. Ct. 504, 507-509 (2019); *Greene v. Fisher*, 565 U.S. 34, 38, 132 S. Ct. 38, 181 L.Ed.2d 336 (2011); *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L.Ed.2d 144 (2003). Therefore, this case is not an appropriate vehicle for examining what effect, if any, *Hurst*, would have on Oklahoma's capital sentencing scheme.

Petitioner's complaint about the application of § 2254 is not worthy of certiorari review. In the instant case, the Tenth Circuit correctly identified the relevant inquiry and properly found the OCCA's decision was not contrary to, or an unreasonable application of, *Ring* and/or *Apprendi*. *Underwood*, 894 F.3d at 1185-1186. Further, the Tenth Circuit properly concluded that *Hurst* could not serve as

clearly established Supreme Court law for purposes of 2254(d)(1) review of Petitioner's claim. *Underwood*, 894 F.3d at 1186.

B. There is not a split in authority because state courts are applying *Hurst* without the restrictions of AEDPA.

The only alleged split Petitioner refers to is post-*Hurst*, and again, *Hurst* is not relevant here because the OCCA's decision was made prior to this Court's *Hurst* decision.⁴ Therefore, this case will not solve any alleged differences in the interpretation of *Hurst* amongst lower courts.

Furthermore, Petitioner's point that some states actually require the aggravating circumstances to outweigh the mitigating factors beyond a reasonable doubt prior to the imposition of the death penalty is irrelevant to the question of what *Ring* establishes. Clearly, states are free to give greater protection than that required by the federal constitution. *Florida v. Powell*, 559 U.S. 50, 58, 130 S. Ct. 1195, 1203, 175 L.Ed.2d 1009 (2010); *Arizona v. Evans*, 514 U.S. 1, 8, 115 S. Ct. 1185, 1190, 131 L.Ed.2d 34 (1995). Such greater protections do not indicate

⁴ Only *Rauf v. State*, 145 A.3d 430 (Del. 2016) has found that *Hurst* requires the mitigating circumstances to be outweighed by the aggravating circumstances using the beyond a reasonable doubt standard. The state court's interpretation of *Hurst* does not create a split among courts as to whether *Ring* clearly establishes that the weighing determination of aggravating and mitigating circumstances must be made beyond a reasonable doubt. A review of Florida's capital sentencing scheme since this Court's holding in *Hurst* shows that now a unanimous jury, rather than a trial court, makes the determination of whether aggravating circumstances have been proven beyond a reasonable doubt. Fla. Stat. § 921.141(2)(a)(2017). After this finding, the jury also performs the weighing function. However, there is no beyond a reasonable doubt standard employed during the actual weighing process. Fla. Stat. § 921.141(2)(b)(2)(2017).

confusion among the lower courts, nor does it show Oklahoma's scheme violates *Ring* and/or *Apprendi*.

Petitioner has not shown that there is any split in authority requiring this Court's attention. The conflict in the law alleged by Petitioner is illusory. Certiorari review should be denied.

For all of these reasons, Petitioner has failed to show that the Tenth Circuit improperly held that the OCCA did not unreasonably deny relief in this case or that his case presents a close or compelling issue requiring this Court's attention.

CONCLUSION

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

Respectfully submitted,

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