Case No. 18-8666

IN THE SUPREME COURT OF THE UNITED STATES

TREMANE WOOD,

Petitioner,

v.

MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 22, 2019

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QUESTION PRESENTED

Should this Court grant a writ of certiorari to address Petitioner's disagreement with the Tenth Circuit's conclusion that the Oklahoma Court of Criminal Appeals reasonably denied his ineffective assistance of trial and appellate counsel claims?

No. 18-8666

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SUPREME COURT OF THE UNITED STATES

October Term, 2018

TREMANE WOOD,

Petitioner,

-vs-

MIKE CARPENTER, 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

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on November 1, 2018. *See Wood v. Carpenter*, 907 F.3d 1279 (10th Cir. 2018).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2002-46. In 2004, Petitioner was tried by jury for one count of first degree felony murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; (2) the murder was especially heinous, atrocious, or cruel;

and (3) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* Okla. Stat. tit. 21, § 701.12. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of all three statutory aggravating circumstances, and recommended a death sentence. Petitioner was sentenced accordingly.[1]

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's murder conviction and death sentence in a published opinion filed on April 30, 2007. *See Wood v. State*, 158 P.3d 467 (Okla. Crim. App. 2007). The OCCA denied Petitioner's request for rehearing, and this Court denied Petitioner's petition for writ of certiorari on October 29, 2007. *See Wood v. Oklahoma*, 552 U.S. 999 (2007).

Petitioner filed an amended application for state post-conviction relief on April 25, 2007, which was denied by the OCCA in an unpublished opinion on June 30, 2010. *See Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (unpublished).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on June 30, 2011. Petitioner also filed, on July 6, 2011, a second state post-conviction application. The OCCA denied post-conviction relief on September 30, 2011. *See Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011) (unpublished). On October 30, 2015, the federal district court issued an order denying Petitioner's petition for habeas corpus relief. *See Wood v. Trammell*, No. CIV-10-0829-HE (W.D. Okla. Oct. 30, 2015) (unpublished).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief to the Tenth Circuit. During the pendency of that appeal, Petitioner filed a third application for post-

[1] Petitioner was also convicted of one count of robbery with firearms, for which he was sentenced to life imprisonment, one count of grand larceny, for which he was sentenced to twenty-five years' imprisonment, and one count of conspiracy to commit a felony, for which he was sentenced to life imprisonment.

conviction relief, on June 23, 2017. The OCCA denied post-conviction relief on August 28, 2017. *See Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017) (unpublished). This Court denied Petitioner's petition for a writ of certiorari on January 22, 2019. *See Wood v. Oklahoma*, 139 S. Ct. 938 (2019).

After briefing and oral argument, the Tenth Circuit affirmed the district court's judgment on August 9, 2018. *See Wood v. Carpenter*, 899 F.3d 867 (10th Cir. 2018). Thereafter, on November 1, 2018, the court denied Petitioner's request for rehearing, but issued an amended opinion. *See Wood v. Carpenter*, 907 F.3d 1279 (10th Cir. 2018).

On March 29, 2019, Petitioner's petition for a writ of certiorari was placed on this Court's docket. This Court granted Respondent's motion for an extension of time in which to file a response, until June 3, 2019.

STATEMENT OF FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal:

> Appellant Tremane Wood and three others were involved in and charged with the murder of Ronnie Wipf and the robbery of Arnold Kleinsasser. Clarity requires us to set forth the relationship between these defendants and the outcome of their cases. In addition to Tremane Wood, the defendants include Tremane's older brother Zjaiton Wood, Zjaiton's girlfriend Lanita Bateman, and the mother of one of Tremane's sons, Brandy Warden.[3] Brandy Warden entered into a plea agreement, cooperated with the State and testified against her co-defendants. She pled guilty to Accessory After the Fact and Conspiracy.[4] Zjaiton and Lanita were each found guilty in separate trials of felony murder, robbery with firearms, and conspiracy.[5]
>
> Fn 3 Brandy had previously dated Tremane, but was not in a romantic relationship with him at the time this crime was committed.
>
> Fn 4 The district court sentenced her to 45 years for accessory after the fact and 10 years for conspiracy.

> Fn 5 Zjaiton Wood was sentenced to life imprisonment without the possibility of parole for felony murder and 60 years imprisonment for robbery and conspiracy. This Court affirmed his convictions in *Wood v. State*, Case No. F-2005-246 (Okl.Cr., Dec. 20, 2006)(unpublished opinion). Lanita Bateman was sentenced to life imprisonment for felony murder, 101 years imprisonment for robbery and 10 years imprisonment for conspiracy. This Court affirmed her convictions in *Bateman v. State*, Case No. F-2003-647 (Okl.Cr., April 19, 2004) (unpublished opinion).

On New Years Eve 2001, Ronnie Wipf and Arnold Kleinsasser went to the Bricktown Brewery in Oklahoma City where Zjaiton, Tremane, Lanita and Brandy were celebrating. Near closing time, Wipf and Kleinsasser met Lanita and Brandy believing they were two ordinary girls celebrating the new year together. Lanita and Brandy agreed to accompany Wipf and Kleinsasser to a motel on the pretext of continuing to celebrate the new year. Brandy, Lanita, Tremane, and Zjaiton then made a plan whereby the women would pretend to be prostitutes and the brothers Wood would arrive at the motel later and rob Wipf and Kleinsasser.

Once in their room at a Ramada Inn, Lanita made a telephone call to Zjaiton to let him know where they were, ending her conversation by saying, "Mom, I love you" so the victims would not be suspicious. The call to "Mom" was followed by some general conversation among the four which included a discussion of what each did for a living. Lanita told Kleinsasser that "this" is what she did and he realized that she meant she earned her living by having sex with men. That revelation was followed by a negotiation whereby the two women agreed to have sex with Wipf and Kleinsasser for $210.00. Since neither man had that much money, Brandy drove Kleinsasser to a nearby ATM. He gave her the money he withdrew and they returned to the room.

Back at the motel, the women went into the bathroom together, and shortly after, someone pounded on the door and called out, "Brandy, are you in there? Brandy, are you ready to go home?" Wipf refused to open the door and urgently told Kleinsasser to call the police. Before he could reach the phone, Lanita picked it up and pretended to call the police. Since it was now clear that the women were not going to have sex with them, Wipf demanded the return of their money. After a brief period of pandemonium in the room, Wipf opened the door and the women ran out. Recognizing a white car as the one Zjaiton and Tremane were driving, they got in and waited. Meanwhile, two masked men rushed into the motel

room, a larger man, subsequently identified as Zjaiton Wood, holding a gun and a smaller man, subsequently identified as Tremane Wood, brandishing a knife.[6] Zjaiton pointed the gun at Kleinsasser's head and demanded money. Kleinsasser gave him the rest of the money in his wallet. Zjaiton then joined Tremane in his attack on Wipf. As the three struggled, Kleinsasser heard one of the intruders say, "Just shoot the bastard" and then a gunshot. Tremane then turned his attention to Kleinsasser, demanding more money. Kleinsasser showed him his empty wallet, and Tremane hit him on the head with the knife. Tremane rejoined the struggle with Wipf and the fight moved into the bedroom area. Kleinsasser could see Wipf was bleeding and knew that he was seriously injured. While the two intruders struggled with Wipf, Kleinsasser escaped and sought help from the motel office. Before anyone could unlock the office door and help him, however, Kleinsasser fled to a nearby apartment complex to hide. From his vantage point there, he watched the motel and saw a white car leave the parking lot. He saw people come and go throughout the night, but, with no sense of whom they were, remained in hiding. It was 6:00 a.m. before he returned to the scene of the attack and learned of Wipf's death from a police detective.

> Fn. 6 Kleinsasser could not identify his attackers because they remained masked throughout the entire incident so he described the men's actions distinguishing the men by their size. Zjaiton is the larger of the Wood brothers. According to their mother's estimates, Zjaiton is the taller of the two brothers and outweighs Tremane by some 50 pounds, making him easily distinguishable from Tremane.

The medical examiner concluded that Wipf died as the result of a stab wound to the chest. There was no evidence he had sustained any kind of gunshot wound. Surveillance videotape from the motel's camera showed Brandy and Lanita renting the room with Wipf and Kleinsasser. The motel's phone records showed that three calls were made from the room to Zjaiton's pager and one to the house where Tremane lived. Surveillance videotape from a local Wal–Mart showed Brandy, Lanita, Zjaiton, and Tremane buying ski masks and gloves earlier in the evening.[7] As part of her plea bargain, Brandy testified against Tremane detailing the events of the evening from buying the masks and gloves through their actions the morning after the murder.

> Fn. 7 Prior to going to the Bricktown Brewery, Zjaiton and Tremane robbed a local pizza restaurant and attacked the owner, wearing the masks and gloves they had just

> purchased and using the gun and knife that they later used in the robbery-murder at the Ramada Inn. According to the restaurant owner, the smaller man had the knife and the larger man had the gun.
>
> Zjaiton testified for the defense, against the advice of counsel. He said that it was he who stabbed Wipf, aided in the crime by a man named Alex. Zjaiton claimed that he took the knife from Alex and stabbed Wipf with it. He testified that Tremane was not involved in the crime.

Wood, 158 P.3d at 471-72 (paragraph numbers omitted).[2]

REASONS FOR DENYING THE WRIT

Petitioner has failed to show that the Tenth Circuit has decided an important question of federal law in a way that conflicts with another United States court of appeals or of a state court of last resort. Nor has Petitioner shown that the Tenth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Petitioner presents no compelling reason for this Court to review the Tenth Circuit's decision. This Court should deny Petitioner's request for a writ of certiorari.

PETITIONER'S CHALLENGE TO THE TENTH CIRCUIT'S DENIAL OF HIS INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL CLAIMS AMOUNTS TO NOTHING MORE THAN A DISAGREEMENT WITH THE LOWER COURT'S APPLICATION OF A PROPERLY STATED RULE OF LAW.

[2] Petitioner correctly asserts that his brother and co-defendant, Zjaiton Wood, confessed to stabbing Mr. Wipf. Pet. at 3. However, Zjaiton Wood's testimony was entirely lacking in credibility. Although Zjaiton Wood also testified that Petitioner was not involved in the crime at all. 4/2/04 Tr. 89-92, 95-96), Petitioner now concedes his involvement. Pet. at 3-4. **Error! Main Document Only.**Further, the jury obviously rejected Zjaiton Wood's testimony and the state district court found "portions of [his] testimony at trial incredible and not worthy of belief." 4/6/2006 *Finding[s] of Fact and Conclusions of Law* at 9 (OCCA No. D-2005-171).

I. Petitioner merely disagrees with the Tenth Circuit's denial of his assertions that the OCCA unreasonably denied relief for his claim that trial counsel failed to adequately present mitigating evidence.

A. Petitioner presents no compelling reason for this Court to grant a writ of certiorari.

Petitioner claimed on direct appeal that his trial attorney was ineffective for failing to present mitigating evidence regarding his childhood. *Wood*, 158 P.3d at 479-80. The OCCA remanded for an evidentiary hearing, after which it held that Petitioner had failed to establish that counsel performed deficiently, or that Petitioner was prejudiced by counsel's performance. *Id*. at 480-81.[3] The Tenth Circuit reviewed the OCCA's decision under 28 U.S.C. § 2254(d) ("AEDPA") and concluded that the OCCA's decision was reasonable. *Wood*, 907 F.3d at 1291-94.

Petitioner attempts to make it sound as if the Tenth Circuit's decision conflicts with the decisions of this Court. *Cf.* Sup. Ct. R. 10(c). However, as will be shown, Petitioner simply disagrees with the Tenth Circuit's conclusion that a fairminded jurist could agree with the result reached by the OCCA. Petitioner presents no compelling reason for this Court to review the Tenth Circuit's application of the doubly deferential standards of AEDPA and *Strickland* to his case. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) (describing this Court's review of *Strickland* claims on habeas as "doubly" deferential).

B. The Tenth Circuit indisputably applied a properly stated rule of law.

The Tenth Circuit granted a certificate of appealability on three issues: 1) ineffective assistance of trial counsel during sentencing proceedings; 2) ineffective assistance of appellate counsel in pressing the ineffective assistance of trial counsel claim on direct appeal; and 3) the sufficiency of the evidence to support the especially heinous, atrocious, or cruel aggravating

[3] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984)

circumstance. *Wood*, 907 F.3d at 1288. Petitioner's first question presented challenges the Tenth Circuit's adjudication of his ineffective assistance of trial counsel claim.

The Tenth Circuit began its opinion by reciting the standard of review mandated by AEDPA. *Wood*, 907 F.3d at 1288-90. The court then explained the *Strickland* standard which applies to ineffective assistance of counsel claims. *Id*. at 1290. Petitioner does not argue that the Tenth Circuit failed to properly state these rules of law. Petitioner merely disagrees with the manner in which the Tenth Circuit applied them, and the result the court reached. This alone is sufficient reason for this Court to deny the petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). However, Respondent will show that the Tenth Circuit did not misapply AEDPA or *Strickland*.

C. The Tenth Circuit properly applied AEDPA and Strickland.

Petitioner accuses the Tenth Circuit, and the OCCA, of failing to consider the mitigating evidence—that which was presented at trial and the allegedly omitted mitigating evidence—as a whole. Pet. at 10-12, 26-29. After the evidentiary hearing in state district court, the OCCA concluded that Petitioner's trial attorney had obtained and presented

> [e]vidence of Tremane's chaotic home life and background . . . to the jury through both an expert and lay witness. While other witnesses not called at trial could have provided further detail to support the mitigation evidence that Tremane did well in his juvenile placements, grew up in an abusive home and was negatively influenced by his older brother, credible evidence was presented covering these areas. We find the trial court correctly concluded that the material testimony from those credible witnesses not called at trial was nonetheless presented to the jury. We further find that Tremane has failed to show that the outcome of his case would have been different had the credible evidence developed at the evidentiary hearing been presented during his capital sentencing proceeding.

Wood, 158 P.3d at 481.[4]

Petitioner argued to the Tenth Circuit that the OCCA unreasonably applied *Strickland*. *Wood*, 907 F.3d at 1291-92. Although the OCCA's decision rested on both prongs of *Strickland*, the Tenth Circuit found it necessary to address prejudice only, holding that

> After a careful review of the record, we cannot conclude that 'all fairminded jurists would agree' the OCCA unreasonably applied *Strickland* when it concluded trial counsel's failure to call additional lay witnesses did not prejudice Wood. Indeed, the OCCA properly recognized that the themes developed at the evidentiary hearing were also developed at Wood's sentencing, albeit in less detail. And while some testimony at the hearing could be considered 'new'—such as allegations [Petitioner's father] abused Wood and his brother, not just [Petitioner's mother]—this evidence still related to the same themes counsel developed at trial: Wood's formative years were, as Dr. Hand testified, defined by chaos, and abuse allegations swirled around his home. The testimony developed at the evidentiary hearing was thus cumulative of the evidence trial counsel actually presented during the sentencing stage.
>
> This is not to say Wood's trial counsel offered a textbook mitigation defense. We agree Wood's mitigation case might have been stronger had some of the witnesses from the evidentiary hearing testified during sentencing. But because the evidence and themes developed at the hearing were substantially similar to those developed at trial, the OCCA's conclusion Wood suffered no prejudice was objectively reasonable.

Wood, 907 F.3d at 1291-92 (internal citation omitted).

Petitioner also argued that the OCCA made an unreasonable factual determination when it concluded that counsel had obtained all of Petitioner's relevant juvenile records.[5] *Wood*, 907

[4] Petitioner claims "the OCCA concluded that *none* of the evidence marshalled at the hearing was new[.]" Pet. at 26 (emphasis in original). As set forth above, the OCCA explicitly recognized that "further detail" was presented at the evidentiary hearing. *Wood*, 158 P.3d at 481. The OCCA also recognized that trial counsel had not obtained a portion of Petitioner's juvenile records. *Id*. at 480 n.25. Petitioner's assertion is incorrect.

[5] Petitioner had a certificate of appealability on three sub-claims of ineffective assistance of trial counsel: 1) failing to adequately investigate, select, prepare, and present mitigating evidence through lay witnesses; 2) failing to adequately prepare and present the testimony of psychologist Dr. Ray Hand; and 3) failing to adequately investigate, obtain, and present Petitioner's juvenile records and his mother's medical records. *Wood*, 907 F.3d at 1290-91. It is unclear to Respondent which of these sub-claims Petitioner is pressing in this Court. Petitioner cites to pages 20-24

F.3d at 1293-94. The Tenth Circuit believed Petitioner to be improperly characterizing the OCCA's legal conclusion as to relevance as a factual determination. *Id*. at 1293. Nonetheless, the Tenth Circuit denied relief because

> the OCCA did not base its prejudice conclusion on its finding about what records were relevant. Rather, that conclusion was based on the fact that even if all the 'credible evidence developed at the evidentiary hearing' had 'been presented during [Wood's] capital sentenc[ing] proceeding,' the proceeding's outcome would not have been different. *Wood*, 158 P.3d at 481. In other words, the OCCA based its prejudice conclusion on the strength, weakness, and cumulativeness of the mountain of evidence presented at the evidentiary hearing—namely, the twenty new witnesses who testified and the thousands of documents produced. Its prejudice conclusion did not rest on its finding about whether an exceedingly small subset of that evidence—the CJOC [Central Oklahoma Juvenile Center] records—were relevant. Consequently, the OCCA's decision was not based on its finding that the CJOC records were not 'relevant.'

Wood, 907 F.3d at 1293-94 (first alteration adopted). In so holding, the court rested its decision on 28 U.S.C. § 2254(d)(2) which provides for possible habeas relief when a state court's decision is "based on" an unreasonable determination of the facts. *Id*. at 1293.

Petitioner suggests that the above analysis conflicts with this Court's cases because the OCCA and Tenth Circuit denied relief in spite of the fact that he presented *some* evidence at the hearing which had not been presented at trial. Pet. at 26-29. However, this Court has never held that *Strickland* prejudice is established whenever a habeas petitioner is able to uncover "new" evidence. Rather, the question is whether the "new" evidence is sufficiently weighty so as to

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of the Tenth Circuit's revised opinion, found at his Appendix B, but appears to be actually referring to the discussion on pages 17-18 on which the court recognized that the allegation that Petitioner's father abused him was "new." The discussion on pages 17-18 of the Tenth Circuit's opinion related to sub-claim 1 above, whereas the discussion on pages 20-24 related to sub-claims 2 and 3, as well as Petitioner's ineffective assistance of appellate counsel claim. However, as all of the sub-claims were properly denied by the Tenth Circuit based on the OCCA's reasonable conclusion that the absence from trial of any credible mitigating evidence presented at the evidentiary hearing did not prejudice Petitioner, Respondent will treat Petitioner's challenge as if it is to the Tenth Circuit's resolution of all three sub-claims.

create a substantial likelihood that the jury would have reached a different verdict had it been presented. *Richter*, 562 U.S. at 111-12.

Neither the OCCA nor the Tenth Circuit "disregard[ed] the weight of the evidence." Pet. at 27. Rather, the Tenth Circuit held that the OCCA reasonably found no prejudice based on the credibility of some of the "new" evidence, and the totality of the evidence presented at both the evidentiary hearing and at trial.[6] *See Wood*, 1291-94; *Wood*, 158 P.3d at 479-81. Petitioner has utterly failed to establish that either lower court failed to consider the totality of the evidence.

Petitioner attempts to compare his case to *Wiggins v. Smith*, 539 U.S. 510 (2003), stating that counsel in *Wiggins* failed to present "details" of Wiggins' life. Pet. at 28. In fact, counsel presented "no evidence of Wiggins' life history." *Wiggins*, 539 U.S. at 515. Thus, this Court found prejudice on *de novo* review, reiterating that no evidence similar to that discovered post-trial had been presented at trial. *Id*. at 534-38.

Petitioner also relies upon *Rompilla v. Beard*, 545 U.S. 374 (2005). Pet. at 28-29. In *Rompilla*, as in *Wiggins*, counsel presented almost no mitigating evidence. *Rompilla*, 545 U.S. at 378. This Court concluded that omitted evidence regarding Rompilla's childhood, mental health and alcoholism was sufficient, on *de novo* review, to establish prejudice. *Id*. at 390-93. Specifically, this Court concluded that the omitted evidence "bears no relation to the few naked pleas for mercy actually put before the jury[.]" *Id*. at 393.

[6] As an example, the evidence presented at the evidentiary hearing to support the allegation that Petitioner was abused by his father was not credible. Petitioner's brother Andre Wood testified that Petitioner was "[p]robably" beaten by their father and described one instance of abuse (2/23/06 Tr. 160-61). Zjaiton Wood, whose testimony was not credible, was much more certain that Petitioner was abused on a regular basis (2/27/06 Tr. 331-32). When asked whether Petitioner was abused, Petitioner's mother Linda Wood responded that his father was "more emotionally and mentally abusive to [their children] than he was physically." (2/23/06 Tr. 118). Linda Wood once reported to DHS that Petitioner's father was physically abusing Andre Wood, but DHS found the allegation unfounded (2/23/06 Tr. 130-31). Pet'r Appx. III 42-43. Thus, although there was no evidence presented at trial that Petitioner was abused, the OCCA did not unreasonably conclude that the credible mitigating evidence introduced at the evidentiary hearing had been presented at trial. Further, it appears no one told trial counsel, or Dr. Hand, that Petitioner's father abused him (2/12/03 Tr. 43). *See Strickland*, 466 U.S. at 691 ("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Wiggins and *Rompilla* both reviewed the prejudice prong of *Strickland de novo*, and both concluded that prejudice was shown where virtually no mitigating evidence—and certainly no mitigating evidence that was cumulative of the "new" evidence—was presented at trial.[7] Petitioner's case is much more similar to *Cullen v. Pinholster*, 563 U.S. 170, 200-02 (2011), wherein this Court determined that the state court reasonably found a lack of prejudice because "[t]he 'new' evidence *largely* duplicated the mitigation evidence at trial", new records "*basically* substantiate[d]" testimony presented at trial, new declarations from Pinholster's siblings "support[ed]" his mother's testimony that he was abused[8], and other "new" evidence was "of questionable mitigating value." *Pinholster*, 563 U.S. at 200-02 (emphasis added). This Court described evidence that Pinholster was loathed by his grandparents, was rarely supervised, did not get much love and rarely had appropriate food as "just a few new details about Pinholster's childhood." *Id*. at 201-02.

The Tenth Circuit's decision in Petitioner's case is entirely consistent with *Pinholster*. Petitioner's first question presented amounts to nothing more than disagreement with the Tenth Circuit's application of a properly stated rule of law. Further, as will be shown below, Petitioner's ineffective assistance of counsel claim is without merit. This Court should deny the instant petition.

II. Petitioner mischaracterizes the OCCA's post-conviction opinion in his attempt to make it appear that the Tenth Circuit's decision contradicts *Wilson v. Sellers*.

[7] Petitioner also cites, without discussion, *Porter v. McCollum*, 558 U.S. 30 (2009). Pet. at 29. As in *Wiggins* and *Rompilla*, there was virtually no mitigating evidence adduced at Porter's trial. *Porter*, 558 U.S. at 32. This Court found the state court's denial of Porter's ineffective assistance of trial counsel claim unreasonable where the jury "learned about Porter's turbulent relationship with [the victim], his crimes, and almost nothing else" such as evidence of his "heroic military service" and the effects of that service on Porter, an abusive childhood and a brain abnormality. *Id*. at 40-44.

[8] At trial, Pinholster's mother had testified that his stepfather "was abusive, or nearly so." *Pinholster*, 563 U.S. at 199. Pinholster's siblings apparently provided much stronger evidence indicating that he "was beaten with fists, belts, and even wooden boards." *Id*. at 201. This Court nevertheless concluded the siblings' evidence "largely duplicated the mitigation evidence at trial." *Id*. at 200-01.

A. Petitioner presents no compelling question for this Court's review.

In his second question presented, Petitioner claims the Tenth Circuit's decision is contrary to *Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188 (2018). Petitioner's contention, which is based solely on a mischaracterization of the OCCA's denial of his ineffective assistance of appellate counsel claim, does not present a compelling question for this Court's review. In fact, Petitioner seeks mere error-correction. This Court should deny the instant petition.

B. Petitioner fails to raise a compelling issue based on Wilson.

The question presented in *Wilson* was whether a federal court, faced with a summary merits denial by the highest state court, should "look through" that decision to review the reasoned opinion of a lower state court. *Wilson*, 138 S. Ct. at 1192. *Wilson* has no application to Petitioner's case, wherein the OCCA's decision was not a summary one and there was no lower court opinion on Petitioner's ineffective assistance of appellate counsel claim. Petitioner relies upon a single sentence within this Court's introduction which indicates that, when there is a reasoned opinion by the highest state court, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id*.

This Court did not hold in *Wilson* that a federal court may not affirm a state court decision where the state court reached the correct result, even if one aspect of its reasoning may have been flawed. Petitioner's suggestion to the contrary is in tension with this Court's holding in *Early v. Packer*, 537 U.S. 3, 8 (2002) that a state court need not even be aware of clearly established federal law. Rather, a federal court must affirm under AEDPA so long as "neither the reasoning *nor the result* of the state-court decision contradicts" this Court's decisions. *Packer*, 537 U.S. at 8 (emphasis added).

Respondent cannot find a single case from any federal court of appeals which has decided whether Petitioner's interpretation of *Wilson* is correct. It would be premature for this Court to address this issue. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting "the benefit [this Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"). In spite of the lack of authority for Petitioner's position, he is *not* asking this Court to decide what the isolated sentence he plucks from *Wilson* means. Rather, Petitioner simply asserts that *Wilson* restricts a federal court's review to the state court's express reasons for denying a claim, and asks this Court to reverse based on his belief that the Tenth Circuit disregarded *Wilson*. Petitioner's request for error-correction does not present a compelling question.

Further, Petitioner's case is a particularly poor vehicle for his argument. The parties fully briefed Petitioner's ineffective assistance of appellate counsel claim before this Court's decision in *Wilson*. Thus, Petitioner made this argument for the first time in his petition for rehearing. 8/23/2018 *Appellant Tremane Wood's Petition for Rehearing and Request for En Banc Consideration* at 15-16 (10th Cir. No. 16-6001). The Tenth Circuit did not order a response to the rehearing petition. Thus, Respondent had no opportunity to brief this issue. The Tenth Circuit's revised opinion did not address the issue.

This Court does not decide questions that were not presented or decided below, except in exceptional circumstances. *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2282 (2015) (refusing to consider an issue that was not presented below or in the brief in opposition); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (refusing to consider arguments that were not decided below); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 305-06 (2010) (refusing to consider an issue that was not presented below or in the brief in opposition);

Cutter, 544 U.S. at 718 n.7 (2005) (describing this Court as "a court of review, not of first view"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (this Court reviews questions not presented or passed upon below only in exceptional cases); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (stating that, when directly reviewing state court judgments, this Court "has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below"); *but see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering an issue not presented below because respondent did not object, it was an important, recurring issue and was the subject of another pending petition for certiorari). Petitioner's case presents no exceptional circumstance.

C. Petitioner misreads the lower courts' opinions.

At the evidentiary hearing held on direct appeal, appellate counsel called sociologist Dr. Kate Allen to testify (2/27/06 Tr. 199). The trial court sustained the prosecutor's objection to Dr. Allen's testimony based on her alleged lack of qualifications (2/27/06 Tr. 203, 221). A copy of Dr. Allen's report was made part of the record (2/27/06 Tr. 219-20).

Appellate counsel did not argue in his post-hearing supplemental brief that the trial court erred in excluding Dr. Allen's testimony. 5/1/2006 *Supplemental Brief of Appellant* (OCCA No. D-2005-171). In his first post-conviction application, Petitioner claimed appellate counsel was ineffective. 12/26/2006 *Original Application for Post-Conviction Relief in Death Penalty Case* at 35-39 (OCCA No. PCD-2005-143). Petitioner now claims that "[i]n its prejudice inquiry, the OCCA held that appellate counsel's failure to challenge the exclusion of Dr. Allen's testimony was not prejudicial because they 'did provide [the OCCA] with [her] findings by admitting [her] report below." Pet. at 35 (alterations in original). Petitioner mischaracterizes the OCCA's opinion, the relevant portion of which Respondent quotes in full below:

> Wood contends appellate counsel was ineffective for failing to raise a claim in the supplemental brief about the exclusion of the defense mitigation expert at the evidentiary hearing. Wood concedes that appellate counsel preserved the claim by admitting the expert's report for appeal, but argues he failed to present the claim in his brief and failed to "provide what she [the expert] would have testified had she been allowed.' As noted above, appellate counsel went through the questions the district court considered and addressed the district court's findings and conclusions. Appellate counsel chose to utilize the ten page limit to challenge the trial court's decision that trial counsel was effective with evidence presented at the hearing rather than attack the trial court's decision excluding his expert. This was a reasonable strategy. Furthermore, appellate counsel did provide this Court with the expert's findings by admitting the expert's report below. This claim, like Wood's other claims, must fail, because he can show neither deficient performance nor prejudice.

Wood v. State, No. PCD-2005-143, slip op. at 14 (Okla. Crim. App. June 30, 2010) (unpublished).

Petitioner claims the Tenth Circuit erred when it concluded that the OCCA reasonably found no prejudice because Dr. Allen's proposed testimony was "substantially cumulative" of the evidence presented at trial and the evidentiary hearing. *See Wood*, 907 F.3d at 1295-96. Petitioner reasons that, under *Wilson*, the Tenth Circuit was required to limit its review of the OCCA's prejudice determination to the state court's assertion that appellate counsel had Dr. Allen's report admitted into evidence.

However, the OCCA did not specify whether its mention of counsel's preservation of the potential claim related to its finding with respect to deficient performance or prejudice. The fact that appellate counsel preserved the issue for appeal more naturally informs the deficient performance analysis, as it suggests that counsel did what was necessary at the hearing to raise the issue later but subsequently decided to focus on other matters. In fact, the OCCA was precluded by state law from considering Dr. Allen's report during the direct appeal. *Wood*, 907

F.3d at 1292; *Bland v. State*, 4 P.3d 702, 731 (Okla. Crim. App. 2000) ("If the items are not within the existing record, then only if they are properly introduced at the evidentiary hearing will they be a part of the trial court record on appeal."); *Armstrong v. State*, 811 P.2d 593, 599 (Okla. Crim. App. 1991) ("We will not search the record to find the errors an appellant attempts to raise."). Petitioner's suggestion that the OCCA mistakenly believed, on post-conviction review, that it had reviewed Dr. Allen's report when denying his direct appeal is at odds with state law, and with his admission that "it is uncontested that the report was never considered by the OCCA in ruling on the trial-ineffectiveness claim." Pet. at 37.

In any event, assuming the sentence upon which Petitioner relies was part of the OCCA's prejudice analysis, it is far from clear that the OCCA's prejudice analysis was limited to that single sentence. The OCCA denied Petitioner's separate claim that a supplemental report prepared by Dr. Allen after the direct appeal entitled him to post-conviction relief, finding the report to be merely "a new assessment of previously presented and discovered evidence" and referencing its direct appeal decision. *Wood*, No. PCD-2005-143, slip op. at 7. It is, therefore, clear that the OCCA believed Dr. Allen's information to be cumulative of the evidence presented at both trial and the evidentiary hearing. This is entirely consistent with the Tenth Circuit's analysis.

Petitioner's attempt to read alleged error into the OCCA's decision is inconsistent with AEDPA. *See Johnson v. Williams*, 568 U.S. 289, 300 (2013) ("federal courts have no authority to impose mandatory opinion-writing standards on state courts"); *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (state court decisions must be given the benefit of the doubt on habeas review); *accord Grant v. Royal*, 886 F.3d 874, 905-06 (10th Cir. 2018) ("On habeas review, we properly eschew the role of strict English teacher, finely dissecting every sentence of a state court's ruling

to ensure all is in good order."). Indeed, in *Wilson*, this Court held that the presumption that a summary opinion was based on the reasoning of a lower state court is rebuttable. *Wilson*, 138 S. Ct. at 1196. The presumption may be rebutted where there is "evidence of, for instance, an alternative ground that was argued or that is clear in the record was the likely basis for the decision[.]" *Id*. Although this case does not involve a summary opinion (and, therefore, *Wilson* is inapplicable), the Tenth Circuit was not precluded from affirming based on the evidence presented above which establishes that the cumulative nature of Dr. Allen's testimony was the likely basis for the OCCA's decision.

Finally, Respondent will show below that Petitioner's ineffective assistance of appellate counsel claim is without merit. For all of the above reasons, this Court should deny certiorari review.

III. Petitioner's argument that AEDPA's *limitation* on federal court review of state court decisions entitles him to relief presents no compelling question for this Court's review.

In his final question presented, Petitioner argues that the Tenth Circuit contravened this Court's decision in *Pinholster* when that court declined to hold that the OCCA unreasonably refused to consider evidence that was not before it. Petitioner presents no compelling question for this Court's review. In fact, Petitioner turns *Pinholster* on its head.

Petitioner argued below that the OCCA unreasonably applied *Strickland* when it denied his ineffective assistance of trial counsel claim without considering evidence from Dr. Allen. *Wood*, 907 F.3d at 1292. As explained above, the trial court excluded Dr. Allen's testimony and appellate counsel did not challenge that ruling. Accordingly, the Tenth Circuit held the OCCA could not consider Dr. Allen's report in deciding Petitioner's ineffective assistance of trial counsel claim. *Id.*

Petitioner claims the Tenth Circuit's conclusion that the OCCA did not consider Dr. Allen's report on direct appeal conflicts with its affirmance of the OCCA's denial of his ineffective assistance of appellate counsel claim. As shown above, the OCCA did not hold, on post-conviction, that it had considered Dr. Allen's report on direct appeal. *See* Pet. at 37 ("it is uncontested that the report was never considered by the OCCA in ruling on the trial-ineffectiveness claim"). Nor does the Tenth Circuit's denial of Petitioner's ineffective assistance of appellate counsel claim indicate it believed Dr. Allen's report was before the OCCA on direct appeal for any purpose other than review of (an unraised claim regarding) the trial court's exclusion of her testimony. Put simply, Petitioner has failed to show that the Tenth Circuit's decision is internally conflicted.

It is only through his imaginative reading of the Tenth Circuit's decision that Petitioner reaches the argument he believes is cert-worthy, *i.e.*, that the Tenth Circuit's refusal to require the OCCA to consider evidence not in the record before it conflicts with *Pinholster*. In *Pinholster*, this Court held that AEDPA erects a difficult standard for habeas petitioners to satisfy. *Pinholster*, 563 U.S. at 181. In particular, a federal court may not rely upon evidence that was not before a state court to reverse the state court's decision. *Id*. Petitioner would have this Court turn *Pinholster* into an *avenue* for habeas relief.

Petitioner's arguments do not merit a petition for certiorari. First, as explained above, Petitioner's reading of the lower courts' decisions is inaccurate. Second, Petitioner's question presented calls merely for error-correction. There is no compelling question here. Third, AEDPA (and *Pinholster*'s interpretation thereof) provides a *limit* on relief, not an avenue for finding a state court's decision unreasonable. Finally, as will be shown below, Petitioner's

ineffective assistance of counsel claims fail on *de novo* review. This Court should deny the instant petition.

IV. This Court should deny the petition for writ of certiorari because Petitioner's ineffective assistance of counsel claims fail, even on *de novo* review.

Finally, even assuming Petitioner could avoid the application of AEDPA, his ineffective assistance of counsel claims would fail on *de novo* review. 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). Petitioner's case is not a good vehicle in which to consider his questions presented.

A. The Mitigating Evidence Presented at Trial

Trial counsel presented testimony from Andre Taylor describing that she had known Petitioner and his family for about seven years (4/5/04 Tr. 34). She described Petitioner as her "God son." (4/5/04 Tr. 34). Ms. Taylor testified that Petitioner loved his two children and "would do anything for them." (4/5/04 Tr. 34). Ms. Taylor said she would visit Petitioner in prison and let him know how his sons were doing (4/5/04 Tr. 35). According to Ms. Taylor, the murder occurred two years after Petitioner was released from prison (4/5/04 Tr. 35). Petitioner worked at a restaurant after being released from prison (4/5/04 Tr. 35-36). Ms. Taylor concluded her testimony by saying she loved Petitioner and asking the jury to spare his life (4/5/04 Tr. 37).

The defense next presented testimony from Dr. Hand, a licensed psychologist (4/5/04 Tr. 38). After describing his training and experience, which included work with the juvenile bureau and Department of Human Services ("DHS"), Dr. Hand discussed his preparation for this case

(4/5/04 Tr. 38-40). Dr. Hand testified that he interviewed Petitioner's mother and brother, interviewed Petitioner at the county jail twice and reviewed records[9] (4/5/04 Tr. 40). Dr. Hand administered some psychological tests to Petitioner, including the Minnesota Multiphasic Personality Inventory and the Malone Clinical Multiaxial Inventory. He also obtained a validity indicator profile to ensure that his testing was valid (4/5/04 Tr. 40-41).

Based on the test results, Petitioner "was honest with the testing" and Dr. Hand obtained valid psychological profiles (4/5/04 Tr. 42). Petitioner does not suffer from a major mental disorder like schizophrenia, hallucinations or psychotic episodes, although he has depression and anxiety (4/5/04 Tr. 74, 77).

Dr. Hand described Petitioner's personality as passive-aggressive such that he withholds his frustrations and anxieties rather than acting out (4/5/04 Tr. 42). Petitioner "is kind of immature[, s]elf indulgent" and admitted to having problems in the past with drugs (4/5/04 Tr. 42-43). In reaching conclusions about Petitioner's functioning, Dr. Hand testified that he had "some good information about [Petitioner's] background. Some of the problems that he has had. Some of the successes that he has had. His prison experience. And some of his really, tragic early chaotic family background that . . . just put him in a bad spot to make good judgments." (4/5/04 Tr. 44).

Dr. Hand described for the jury the "red flags" he looks for in assessing an individual's development, including physical abuse and neglect, family violence, psychological maltreatment, drug abuse and alcoholism in the family, loss of a parent, medical and mental health issues, the individual's intelligence and being of a minority race (4/5/04 Tr. 46-47, 49-50; Def. Ex. 1). These are important in psychology because they "create a risk for people" and invoke stress,

[9] Contrary to Petitioner's suggestion, Pet. at 6, trial counsel obtained nearly all of the records from Petitioner's childhood. *See Wood*, 907 F.3d at 1293 (noting the OCCA's factual finding that trial counsel obtained Petitioner's background records, and describing the portion which were not obtained as "an exceedingly small subset").

especially when they happen to a child (4/5/04 Tr. 48, 49). Also, what Dr. Hand described as "weak limit setting" by parents impacts an individual's development because "[i]f you don't develop those habits and you don't get control of problem behaviors, then bigger problems develop." (4/5/04 Tr. 48).

By way of comparison, Dr. Hand presented the jury a list of factors that promotes healthy development or, as trial counsel put it: "a game plan to raise good, adult kids." (4/5/04 Tr. 50). The list includes married parents, involved fathers, emotionally healthy families with a mother present during childhood, minimal shifts in the family group and loving parent figures who discipline their children in a stable residence where substance abuse is discouraged (4/5/04 Tr. 50-51; Def. Ex. 2).

According to Dr. Hand, "[i]t is not necessarily any one or two of these that come together to challenge people and limit a healthy development, but a constellation of these things. Several of these things going at once is sometimes pretty difficult to overcome except in really exceptional circumstances." (4/5/04 Tr. 50). Dr. Hand also mentioned the harmful impact of domestic violence for children "[w]here parents are physically aggressive or verbally aggressive with one another on a continuing basis," noting that it is "hard for kids to manage." (4/5/04 Tr. 51).

Dr. Hand discussed Petitioner's specific risk factors (4/5/04 Tr. 52). Dr. Hand reviewed Petitioner's records from Meadowlake mental health hospital when he was admitted by his father there at age 13 (4/5/04 Tr. 43, 52). In addition, Dr. Hand reviewed Petitioner's Department of Corrections records and the DHS records relating to his stay at a therapeutic foster home at age 14 (4/5/04 Tr. 43-44, 52). Dr. Hand noted that Petitioner did well with the foster family when away from the conflicts with his biological family (4/5/04 Tr. 44) ("During that year, that was

probably one of his very best years where he had a little bit of stability with some folks who were willing to set some limits and be consistent with him. And he was away from his brother"). Dr. Hand likened the structure and consistency of the foster family experience to the experience Petitioner would get in prison (4/5/04 Tr. 44).

Dr. Hand noted the DHS records revealed allegations of aggressive behavior by Petitioner's father, Raymond Gross, starting when Petitioner was 5 years old (4/5/04 Tr. 52). This resulted in a pattern of inconsistent contacts between the children and their parents (4/5/04 Tr. 52). Dr. Hand described how Mr. Gross "came and got the kids, took them to California, and told them that – told the kids that mom was dead. And so that was quite a shock." (4/5/04 Tr. 52). This led to "a really chaotic kind of situation here with allegations going back and forth in really some of the most important developmental times for a child." (4/5/04 Tr. 52-53). Dr. Hand noted that while the kids were living with their father, Linda Wood made allegations against him and vice versa (4/5/04 Tr. 54). Dr. Hand described how "it is hard to know which ones were valid and which ones were invalid" (4/5/04 Tr. 54). He also described how different people were coming and going from the various residences Petitioner lived in during this time (4/5/04 Tr. 53-54).

Dr. Hand explained how this type of chaos could be so detrimental to Petitioner's development, occurring as it did when rules typically are first starting to be imposed on children (4/5/04 Tr. 53). Dr. Hand described this period of Petitioner's life as being "[w]hen the structures of attitudes and behavior get set," and, because of his chaotic circumstances, Petitioner "[d]oesn't know what to expect. Doesn't know who is going to be there for him and doesn't know how he is going to deal with life. Doesn't know who to believe. So that certainly can lead to some suspicion and paranoia over time." (4/5/04 Tr. 53). Dr. Hand questioned whether some

of the paranoia reflected by Petitioner's psychological testing had its roots in his chaotic childhood (4/5/04 Tr. 53).

Dr. Hand described Petitioner's brief stay at Meadowlake mental hospital, noting that his "[d]ad put him in, mom took him out" after only a few days (4/5/04 Tr. 54). Thus, he did not get any treatment there (4/5/04 Tr. 54). Instead of treatment, Petitioner "continued to get into some problem[s]. Have poor discipline. Finally got picked up by the juvenile authorities at 13." (4/5/04 Tr. 54). At that point, Petitioner was placed with a therapeutic foster family which indicated he was "exhibiting some really significant, emotional problems. Not just behavior problems, but emotional kinds of problems." (4/5/04 Tr. 54-55). Petitioner's struggle to adapt began at a young age (4/5/04 Tr. 55).

The specific risk factors during Petitioner's childhood included unpredictability not only regarding which parent would care for him, but also "which parent is going to do what at what point." (4/5/04 Tr. 55). The domestic violence prevalent in Petitioner's home (which Dr. Hand suggested involved "fists hitting bone" between the parents) was traumatizing for him (4/5/04 Tr. 55). Also, Petitioner's gang activity, drug abuse and peer influences presented risk factors to Petitioner's development (4/5/04 Tr. 55). After Petitioner returned from the therapeutic foster home, Dr. Hand testified that Petitioner "gets back into the chaos and things continued to be problematic." (4/5/04 Tr. 55).

Dr. Hand conceded that some people with all these risk factors nonetheless succeed in life (4/5/04 Tr. 56). He told the jury this was "hard to predict" and "depends on a lot of factors." (4/5/04 Tr. 56). According to research, it often comes down to a resilient child finding a mentor somewhere in the community, be it a teacher, a family friend, etc. (4/5/04 Tr. 56). Dr. Hand found no evidence in Petitioner's case of any such mentor (4/5/04 Tr. 56). Instead, as the

youngest sibling, Petitioner "got in the trouble over and over following big brother [Zjaiton]." (4/5/04 Tr. 56-57). Dr. Hand testified that "[a]t times, I think it is safe to say, that there wasn't anybody else to follow except big brother." (4/5/04 Tr. 57).

To close his testimony, Dr. Hand testified to the risk assessment for violence he developed for Petitioner (4/5/04 Tr. 58; Def. Ex. 4). Dr. Hand noted that Petitioner has a rebellious attitude against authority sometimes and is immature but does not suffer from a major mental disorder and does not appear to have antisocial personality disorder or "a psychopathic kind of an attitude or style." (4/5/04 Tr. 58-59, 77). Dr. Hand noted that Petitioner did well in structured environments like prison and the "boot camp" experience he went through as a teenager (4/5/04 Tr. 59). These were situations where Petitioner "managed to be reasonably stable" and "compliant for the most part in programs . . . ." (4/5/04 Tr. 59-60). Dr. Hand also noted that drugs were less widely-available in prison (4/5/04 Tr. 61).

Other protective factors included Petitioner's educational potential and increasing age, as the likelihood of violent behavior decreases after the age of 25 (4/5/04 Tr. 61-62). Taking all of these considerations into account, Dr. Hand opined that "it is likely to highly likely that [Petitioner] could adapt to a prison environment" without engaging in violence (4/5/04 Tr. 62-63). In fact, Dr. Hand believed Petitioner could actually do well in prison (4/5/04 Tr. 63).

Linda Wood was the final defense witness. She described for the jury her love for her son and how hard it was to watch the trial (4/5/04 Tr. 89). She described her marriage to Petitioner's father, noting that Raymond Gross "wasn't around that much. But all of us were afraid of him." (4/5/04 Tr. 90). She said that Mr. Gross did not care about the children and was not around when they were growing up (4/5/04 Tr. 92). She noted for the jury the bi-racial

heritage of her children (4/5/04 Tr. 90).[10] Ms. Wood described for the jury how she went to California with the children to get away from Mr. Gross's abuse and because "no one in Oklahoma would help me because he was a cop." (4/5/04 Tr. 91). Mr. Gross eventually went to California and brought the children back to Oklahoma (4/5/04 Tr. 91).

Linda Wood testified that she "took care of my kids as best I could. I worked two and three jobs to raise my kids." (4/5/04 Tr. 92). She admitted that other people lived in the home with her and that they moved around a lot (4/5/04 Tr. 92). She mentioned the custody battle when Mr. Gross would pick up the children for visitation "and not bring them back." (4/5/04 Tr. 92). Because of her troubled marriage, Petitioner saw "a lot of violence" in the home as a child (4/5/04 Tr. 93). She described Petitioner's stay at the therapeutic foster home for one school year and testified that Petitioner "did do well there" (4/5/04 Tr. 93-94). The defense introduced two photos of Petitioner with his children (4/5/04 Tr. 94-96; Def. Exs. 6-7). Linda Wood discussed Petitioner's love for his children (4/5/04 Tr. 96-97).

Linda Wood testified that she would do her best to show Petitioner what his children had become and asked the jury to spare his life so he could still have some influence on their lives (4/5/04 Tr. 97). Ms. Wood described how she told defense counsel "[t]hat I don't want either one of my sons to die." (4/5/04 Tr. 98). She also testified about Zjaiton's influence on Petitioner, namely, "[t]hat [Petitioner] has not ever gotten in trouble unless he was following behind Zjaiton." (4/5/04 Tr. 98). This is "[b]ecause ever since they were little, Zjaiton has had a lot of influence over [Petitioner]." (4/5/04 Tr. 98). She noted that Petitioner had been out of prison for about two years in 1999 when Zjaiton was released from his own prison sentence (4/5/04 Tr. 98-99). According to Ms. Wood, Petitioner had a job at two restaurants after he got out of prison

[10] Dr. Hand also noted that bi-racial children face some conflict that others do not face (4/5/04 Tr. 81).

and was trying to live a good life (4/5/04 Tr. 99). Once Zjaiton was released from prison, however, Petitioner's attitude changed (4/5/04 Tr. 99). Ms. Wood described for the jury how Petitioner "[s]tarted spending more time with Zjaiton and doing more drugs. And doing and going wherever Zjaiton wanted him to go. And do whatever Zjaiton wanted to do." (4/5/04 Tr. 99-100).

Linda Wood admitted that Petitioner was a grown man who made his own decisions but that Zjaiton had an influence on him nonetheless (4/5/04 Tr. 100). She concluded direct examination by telling the jury she will visit her son in prison and asking the jury to spare his life (4/5/04 Tr. 100).

At the conclusion of Linda Wood's cross-examination, the defense rested its case and there was no rebuttal evidence by the prosecution (4/5/04 Tr. 102-03). As part of the trial court's written instructions, the jury was given Instruction No. 54 which stated:

> Evidence has been introduced as to the following mitigating circumstances:
>
> 1. The Defendant is only 24 years old.
> 2. The Defendant's parents were divorced at a young age.
> 3. The Defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
> 4. The Defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
> 5. The Defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
> 6. The Defendant had no father figure during his childhood, and little support from his natural father.
> 7. The Defendant's mother was absent during most of his childhood and [he] was faced with substitute parenting.
> 8. The Defendant has a moderately severe mental health disorder.
> 9. The Defendant can live in a structured prison environment without hurting anyone.

10. The Defendant's previous felony conviction was non-violent. This is his first violent conviction.
11. With increased age, the Defendant could become a positive influence on others, even in prison.
12. The Defendant has been employed in the past.
13. The Defendant has had prior drug dependencies.
14. The Defendant spent time in foster care.
15. The Defendant took directions from older brother Zjaiton Wood.
16. The Defendant is of educational potential.
17. The Defendant is of average intelligence.

In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

(O.R. IV 634-35).

B. Deficient Performance

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance . . . ." *Burt v. Titlow*, 571 U.S. 12, 24 (2013). Respondent concedes that counsel was not engaging in best practices when he relied heavily upon the investigation which was done by Zjaiton's counsel, and that he "could have done more" (2/27/06 Tr. 251). However, Petitioner must demonstrate that trial counsel performed so deficiently that he "was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[11] *Strickland*, 466 U.S. at 687.

Trial counsel interviewed Petitioner's mother, brothers, godmother and girlfriend, and hired a psychologist who detailed Petitioner's background in an effort to explain his participation

[11] Petitioner claims trial counsel drank on a daily basis during Petitioner's trial. Pet. at 5. Petitioner improperly relies upon evidence that was not before the OCCA on direct appeal, when it decided Petitioner's ineffective assistance of trial counsel claim. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). On direct appeal, there was simply no evidence regarding trial counsel's consumption of alcohol. *See Wood*, 907 F.3d at 1301 (Petitioner's claim on direct appeal did not even relate to trial counsel's alleged abuse of alcohol).

Further, the evidence before the OCCA in post-conviction proceedings established that trial counsel's substance abuse and neglect of his cases began a year after Petitioner's trial. *Wood*, 907 F.3d at 1299 (noting that trial counsel's substance abuse began "about a year *after* Wood's trial and sentencing") (emphasis adopted); *see also id*. at 1300 (finding no evidence that "alcohol interfered in any way with Mr. Albert's representation of Wood."). *Id*. at 1300.

in the murder, and opined that Petitioner would not pose a threat to society in the structured environment of prison (2/27/06 Tr. 243, 249, 253-54).

As demonstrated above, trial counsel presented evidence to support every mitigation theme Petitioner now claims was not presented: domestic violence, neglect, the influence of Zjaiton, that Petitioner did relatively well when not in his home, the impact of Petitioner's race and Petitioner's alleged mental illnesses. Counsel could have presented more witnesses and some additional details of Petitioner's life. Nevertheless, counsel presented a substantial case which included every area of mitigation Petitioner claims was omitted. Petitioner has failed to demonstrate that trial counsel's performance was constitutionally deficient.

As for appellate counsel, he persuaded the OCCA—without evidence from an expert witness—to grant an evidentiary hearing. After the hearing, counsel had ten pages in which to summarize three volumes of transcript and hundreds of pages of exhibits, challenge the trial court's twelve pages of findings and conclusions, and convince the OCCA that Petitioner satisfied his burden under *Strickland*. *See Wood*, 907 F.3d at 1288 (recognizing the ten page limit on the supplemental briefs). It was not unreasonable for counsel to focus on the evidence he *was* able to present, and the trial court's treatment of that evidence. This is particularly true because, as will be shown, Dr. Allen's report was largely cumulative of the other evidence counsel presented at the hearing. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (*per curiam*). Petitioner has failed to overcome that presumption, or establish that appellate counsel's strategic decision was so unreasonable that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at 687.

C. Prejudice

As explained in Section I of this brief, this Court's decision in *Pinholster* confirms that Petitioner cannot demonstrate prejudice because the "new" evidence was cumulative of that presented at trial. In particular, as it pertains to psychological matters, Dr. Allen's report largely echoed Dr. Hand's testimony. For example, Dr. Allen indicated that domestic violence conveys to children that adults are inadequate, "there are no models of how to 'make it' in the world." 12/26/06 *Original Application for Post-Conviction Relief* (OCCA No. PCD-2005-143), App. 1, Ex. 3 ("Allen Report") at 2. In discussing the domestic violence and chaos in Petitioner's family, Dr. Hand described Petitioner as a "[l]ittle bitty kid, five-years-old, who doesn't know what to expect. Doesn't know who is going to be there for him and doesn't know how he is going to deal with life." (4/5/04 Tr. 53).

Similarly, Dr. Allen stated that Zjaiton was Petitioner's closest attachment figure because his parents were not there for him. Allen Report at 3. Dr. Hand testified that, "At times, I think it is safe to say, that there wasn't anybody else to follow except big brother" (4/5/04 Tr. 57). Dr. Allen's opinion that Petitioner does well in structured environments is also cumulative of Dr. Hand's testimony. *Compare* Allen Report at 5 *with* (4/5/04 Tr. 59-60). Further, Dr. Allen's discussion of risk and protective factors is very similar to, and less detailed than, Dr. Hand's testimony on the same subject. *Compare* Allen Report at 7 *with* (4/5/04 Tr. 45-57).

With the exception of attachment disorder, Dr. Allen appears not to have diagnosed Petitioner with any other mental health disorder. Allen Report at 3. Rather, Dr. Allen relied upon records which "documented" mental health problems. Allen Report at 5. Dr. Allen refers to "*documented* depression, dependency, PTSD and generalized anxiety" as well as "neurological immaturity." Allen Report at 5 (emphasis added). Dr. Hand told the jury

Petitioner was immature, depressed, anxious and dependent (4/5/04 Tr. 42-43, 74, 77). It also appears that Dr. Hand diagnosed Petitioner with Post-Traumatic Stress Disorder (4/5/04 Tr. 80). Accordingly, Dr. Allen had little to offer beyond what the jury already knew.

Moreover, much of the evidence that was not presented was not actually mitigating. Petitioner's COJC records were significantly double-edged. For example, a July 31, 1994 report by Dr. Phillip Murphy, a clinical psychologist, reveals that: (1) Petitioner's psychological profile "fit the classic code type of an antisocial personality as an adult"; (2) Petitioner "does show himself to be excessively dominant and aggressive"; (3) "[h]e shows a normal level of conscience development; however, he shows no level of self-discipline at all . . . He does show evidence of normal parenting. Even though he has a normal level of conscience, he does show little remorse over any of his misdeeds." Pet'r Appx. II (b) 534-35.[12]

An October 31, 1995 psychological report describes Petitioner's antisocial behavior as "pronounced, protracted, ingrained and persistent." Pet'r Appx. II (a) 80. The body of the report describes how individuals with Petitioner's psychological profile "have poor treatment records, poor responsiveness to the concerns of others, constant recidivism, and return to former ways" and that "the overall profile is a person that is not afraid of his own hostile impulses, does not attempt to repress them, is not concerned when such are represented. **They are hostile, and don't care who knows it."** Pet'r Appx. II (b) 538 (emphasis added). In a section entitled "Personality Style," the reports states that individuals with Petitioner's psychological profile

> are quite self centered and expect people to recognize their special qualities, and they require constant praise and recognition. They have excessive expectations of entitlement and demand special favors. Grandiose statements of self-importance are readily elicited, and they consider themselves particularly attractive. They appear egocentrically arrogant, haughty, conceited, boastful,

[12] References to "Pet'r Appx." refer to appendices to Petitioner's habeas petition wherein he bound the exhibits that had been admitted at the state court evidentiary hearing.

> snobbish, pretentious, and supercilious. They will exploit people and manipulate them with an air of superiority. While they can be momentarily charming, they have a deficient social conscience and think only of themselves. They show a social imperturbability and are likely to disregard social constraints. They exploit social relationships, are indifferent to the rights of others, relate in an autocratic manner, and expect others to focus on them. While this basic style often alienate[s] other people, they respond with a sense of contempt and indifference, since their inflated sense of self needs no confirmation from other people. They are quite grandiose and arrogant and rarely show signs of self-doubt. If they are humiliated or is [sic] they experience a narcissistic injury, they are prone to develop an affective disorder and perhaps paranoia. Many substance abusers also have a narcissistic personality style.

Pet'r Appx. II (b) 540.

Unlike Dr. Hand, who testified that Petitioner did *not* appear to have Antisocial Personality Disorder ("ASPD") (4/5/04 Tr. 58-59, 77), Dr. Allen acknowledged he does. Allen Report at 5-6. ASPD is defined as "a pervasive pattern of disregard for, and violation of, the rights of others." E. Lea Johnston, *Theorizing Mental Health Courts*, 89 Wash. U.L. Rev. 519, 570 (2012) (quoting Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. rev. 2000) at 701). Petitioner certainly cannot show prejudice from counsel's failure to present evidence of this devastating diagnosis. *See Burger v. Kemp*, 483 U.S. 776, 792 (1987) (concluding, pre-AEDPA, that defense counsel reasonably decided not to call an expert witness who, because he believed the defendant was a psychopath, "would be subjected to cross-examination that might be literally fatal."); *accord Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017) (recognizing that evidence of ASPD has been characterized by courts as the State's strongest possible rebuttal evidence); *Kokal v. Sect'y, Dept. of Corrections*, 623 F.3d 1331, 1349 (11th Cir. 2010) (trial counsel not ineffective for failing to use psychological evidence that was "potentially aggravating" because it suggested petitioner has ASPD "which is a trait most jurors tend to look disfavorably upon" and "is not mitigating but damaging."); *Stevens v. McBride*, 489

F.3d 883, 889 (7th Cir. 2007) (finding counsel's choice to present a witness who testified the defendant had antisocial qualities and was a continuing threat to be "fatal"); *Daniels v. Woodford*, 428 F.3d 1181, 1192-93, 1206, 1209-10 (9th Cir. 2005) (finding counsel ineffective for calling an expert witness who suggested the defendant might be a sociopath); *Powell v. Collins*, 332 F.3d 376, 383 (6th Cir. 2003) (finding counsel ineffective for presenting an expert who diagnosed the defendant with ASPD).

Other juvenile records undermine Petitioner's proposed mitigation strategy. An April 2, 1997 "Placement Worksheet" reports that Petitioner returned home from COJC on August 14, 1996. Although Petitioner "was able to maintainin [sic] his home for the first several months. Since the first of the year [Petitioner] has deteriorated rapidly in his home." Pet'r Appx. II (a) 193. The report goes on to say that Petitioner was suspended from school for cursing and punching the doors at school when he was confronted over an incident. Pet'r Appx. II (a) 193. The report also states that Petitioner "is still active in gang related activity and was rumorred [sic] to be involved in a drive by shooting incident" and that he recently tested positive for marijuana use. Pet'r Appx. II (a) 193. Most importantly, the report states that Zjaiton Wood "returned home from two years in prison early this week" and that it is felt Petitioner will deteriorate *further* now that Zjaiton is back in the picture. Pet'r Appx. II (a) 193. In addition, it was established at the hearing that Zjaiton was incarcerated for the majority of his life from the age of thirteen (2/23/06 Tr. 126; 2/27/06 Tr. 339-40). Finally, Mr. Netherton, who worked closely with Petitioner for more than a year did not notice that Zjaiton had a negative influence (2/23/06 Tr. 90, 95). These facts severely undermine any claim that Petitioner only got in trouble when Zjaiton was around.

The above records reveal Petitioner's aggressive, antisocial and violent tendencies and that these characteristics were at work even when Zjaiton Wood was not part of Petitioner's life. In other words, Petitioner did not need the alleged overbearing influence of his brother Zjaiton in order to engage in gang activity and other violent behavior. Testimony from Andre Wood too undermines the theory that the blame for Petitioner's violent behavior rests squarely with Zjaiton. Andre testified that Zjaiton did not control Petitioner, that if Petitioner did not want to do something, he would simply not do it, and Zjaiton "wasn't like a puppeteer with [Petitioner]. He didn't control what [Petitioner] did." (E.H. Tr. 164).

Thus, the evidence shows Petitioner made a choice to engage in the violent behavior that has marked his life and post-verdict attempts to further blame his antisocial conduct on the overbearing influence of his older brother are weak. Precisely as Zjaiton testified at Petitioner's trial: "He had to grow up and be a man himself . . . I took nothing from my brother. He's his own man. He's got his own mind." (4/2/04 Tr. 107).

Information in the COJC reports would confirm the jury's conclusion that Petitioner was a continuing threat, even if confined to prison for life. *See Pinholster*, 563 U.S. at 201 (new evidence relating to capital murder defendant's family which included more serious substance abuse, mental illness and criminal problems "is . . . by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation."). Further, any additional mitigating evidence does nothing to undermine the jury's finding that Petitioner created a great risk of death to more than one person or that the murder was especially heinous, atrocious, or cruel.

In light of the cumulative nature of the "new" mitigating evidence and the very damaging additional evidence of Petitioner's violent propensities, Petitioner has failed to establish a

substantial likelihood that he would not have been sentenced to death if not for trial counsel's alleged failings, or that the OCCA would have granted relief on direct appeal if not for appellate counsel's alleged failings. *See Richter*, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable.").

CONCLUSION

Petitioner is not entitled to a writ of certiorari for his complaints about the Tenth Circuit's application of the doubly deferential standards of AEDPA and *Strickland* to his ineffective assistance of counsel claims. Petitioner's petition fails to set forth compelling reasons for this Court to review the Tenth Circuit's decision. Further, Petitioner's ineffective assistance of counsel claims are without merit, even when reviewed *de novo*. For all of the foregoing reasons, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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