Case No. 18-8723

IN THE SUPREME COURT OF THE UNITED STATES

MILES STERLING BENCH,

***Petitioner*,**

-vs-

THE STATE OF OKLAHOMA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Although Petitioner does not identify the question or questions presented, what appears to be the question is whether this Court should grant a writ of certiorari to review whether Oklahoma's especially heinous, atrocious, or cruel aggravating circumstance is facially vague where Oklahoma, in requiring a showing of torture or serious physical abuse, applies a narrowing construction that has been repeatedly approved by this Court.

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On Petition for Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Miles Sterling Bench's petition for a writ of certiorari to review the published opinion of the Oklahoma Court of Criminal Appeals ("OCCA") entered in this case on October 4, 2018, *Bench v. State*, 431 P.3d 929, 946 (Okla. Crim. App. 2018), Pet'r Appx. A.[1]

[1] Record references in this brief are abbreviated as follows: citations to Petitioner's trial transcripts will be cited as "Tr." with the volume number; citations to the original record will be cited as "O.R."; and citations to the State's trial exhibits will be cited as "State's Exhibit." *See* Rule 12.7, *Rules of the Supreme Court of the United States*. Citations to Petitioner's Petition for Writ of Certiorari will be cited as "Petition."

STATEMENT OF THE CASE

A. Factual Background

In May 2012, Petitioner, then 21 years old, began working as a cashier in the Tepee Totem convenience store in Velma, Stephens County, Oklahoma (Tr. V 67, 92, 104; Tr. X 17). In early June 2012, Petitioner started working shifts by himself (Tr. V 91). Within a day or so of this, Petitioner approached customer Gina Mercer in the store and sexually assaulted her. *Bench*, 431 P.3d at 960 (citing definition of sexual assault under Oklahoma law). Petitioner reached around Ms. Mercer as she stood at the Tepee Totem soda fountain and grabbed her chest area, touching the underside of her breast (Tr. XII 43-45). Ms. Mercer, an adult woman, turned around and slapped Petitioner away (Tr. XII 44). He responded, "I'm sorry, I thought you were a high school girl." (Tr. XII 45).

On June 5, 2012, 15-year-old B.S. was at the soda fountain when Petitioner lewdly molested her. *Bench*, 431 P.3d at 961 (citing definition of lewd molestation under Oklahoma law). Petitioner came up from behind and reached around B.S., ostensibly to straighten cups on the counter (Tr. XII 57-60). He purposely brushed his body against hers while commenting how pretty she was (Tr. XII 59). Petitioner suggested they go to the back room of the store and exchange life stories, but B.S. declined, noting that her mother was waiting outside in the car (Tr. XII 59).

The evening of June 6, 2012, 16-year-old B.H., the victim in this case, came into the Tepee Totem, where Petitioner was working alone, to buy a soda and some candy (Tr. V 39-43, 60-61, 91; State's Exhibit 4). The evidence suggests that

Petitioner interrupted B.H. as she was filling a cup at the soda fountain (Tr. V 70, 165-67, 197-98; State's Exhibits 22, 23). Petitioner somehow forced B.H. to the back room of the Tepee Totem, where he hit and stomped her to death, leaving a large pool of blood (Tr. V 97; Tr. VIII 17-70; State's Exhibit 27). Petitioner put a plastic bag over B.H.'s head, presumably to contain the blood, and transported her body to her car using a shopping cart (Tr. V 174-75; Tr. X 84; Tr. XI 62-63; State's Exhibits 32, 34, 206, 207). He then drove her car with her body inside to his grandparents' country property, where he was living at the time (Tr. VI 49, 54-56, 86; Tr. IX 5; State's Exhibits 200, 201, 202, 203). At some point, he completely undressed B.H. from the waist down and pulled her jacket, tank top, and sports bra up over her head to expose her breasts (Tr. VI 50, 70-72; State's Exhibit 214). He dragged her body into a muddy field in a fairly secluded part of his grandparents' property (Tr. VI 58, 61, 68-69, 72-73, 108; State's Exhibit 213). Petitioner partially covered B.H.'s body with dirt and vegetation using a hoe (Tr. VI 68, 74; State's Exhibits 209, 210, 215, 216). Petitioner went inside his grandparents' house and collected several items, including clothing, boots, peroxide, a toothbrush, and a wallet, and then left the house driving B.H.'s car (Tr. VI 38-40, 42, 85; Tr. VII 9-32).

Meanwhile, law enforcement was contacted after the Tepee Totem was discovered empty with the pool of blood in the back room (Tr. V 67-72, 75, 88, 94-98, 115-16, 127). The responding officers determined that Petitioner was supposed to be working that evening and traveled to his grandparents' property to look for him

(Tr. V 131-32). In searching the property for Petitioner, the officers discovered B.H.'s dead body (Tr. V 134-36; Tr. VI 49-50).

Around this same time, B.H.'s mother, Renee Henson, was driving around Velma frantically looking for B.H., as she had not returned from what was supposed to be just a quick run into town (Tr. V 47-48). After the unsuccessful search, Ms. Henson contacted a family friend who was in law enforcement to report B.H. missing (Tr. V 49). Because B.H.'s car was equipped with OnStar, OnStar was contacted to track the location of the vehicle (Tr. V 44, 49). Stephens County authorities issued a "be on the lookout" ("BOLO") for B.H.'s car (Tr. VI 114-15). As Petitioner, driving B.H.'s car, drove down Interstate 40 in Custer County, Oklahoma, a Custer County Sheriff's Department patrol sergeant pulled him over based on the BOLO (Tr. VI 115-19). Petitioner was arrested, booked into the Custer County Jail, and eventually handed over to Stephens County authorities (Tr. VI 120-24; Tr. VII 42-43, 49-50, 56).

At trial, Petitioner's account of the murder was admitted through the testimony of defense expert Dr. Curtis Grundy (Tr. X 11-13). Petitioner admitted to struggling with B.H. near the soda fountain in the Tepee Totem and then again in the back room (Tr. X 37-38).

B. Procedural Background

Petitioner was tried by jury for murder in the first degree (malice aforethought) in the District Court of Stephens County, State of Oklahoma, in Case No. CF-2012-172. The State alleged two aggravating circumstances in seeking the

death penalty: (1) the murder was especially heinous, atrocious, or cruel ("HAC"); and (2) the defendant posed a continuing threat to society. *See* OKLA. STAT. tit. 21, § 701.12(4), (7). The jury found Petitioner guilty as charged, found both aggravating circumstances, and recommended a sentence of death. Petitioner was sentenced accordingly.

On direct appeal, the OCCA affirmed Petitioner's conviction and sentence. *Bench*, 431 P.3d at 983. In relevant part, the OCCA rejected Petitioner's facial and sufficiency challenges to HAC:

> In Proposition X, Appellant contends that the [HAC] aggravating circumstance is unconstitutionally vague and overbroad. Similar to many others before him, Appellant argues that this Court's attempts to limit and narrow this aggravating circumstance have been unsuccessful. We have repeatedly rejected this claim. *Martinez v. State*, 2016 OK CR 3, ¶ 67, 371 P.3d 1100, 1116, *cert. denied,* —— U.S. ——, 137 S.Ct. 386, 196 L.Ed.2d 304 (2016); *Postelle v. State*, 2011 OK CR 30, ¶ 84, 267 P.3d 114, 144; *Cole v. State*, 2007 OK CR 27, ¶ 37, 164 P.3d 1089, 1098. The argument and authorities which Appellant presents raise nothing new. We continue to find that the current uniform instructions defining this aggravating circumstance sufficiently narrow its application to pass constitutional muster. *Id.*; *Postelle*, 2011 OK CR 30, ¶ 84, 267 P.3d at 144.
>
> Appellant also challenges the sufficiency of the evidence to show that the murder was especially heinous, atrocious, or cruel. Again, we review a challenge to the sufficiency of the evidence of an aggravating circumstance by taking the evidence in the light most favorable to the State to determine if any rational trier of fact could have found the aggravating circumstance beyond a reasonable doubt. *Id.*; *DeRosa*, 2004 OK CR 19, ¶ 85, 89 P.3d at 1153.
>
> To prove that a murder is especially heinous, atrocious or cruel, the State must show: (1) the victim's death was preceded by torture or serious physical abuse; and (2) that the facts and circumstances of the case establish that the murder was heinous, atrocious, or cruel. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 78, 241 P.3d 214, 238. Torture in the context of this aggravating circumstance may take

any of several forms including the infliction of either great physical anguish or extreme mental cruelty. *Turrentine v. State*, 1998 OK CR 33, ¶ 70, 965 P.2d 955, 976. As to the circumstance of extreme mental cruelty, the torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing. *Id.* Anticipation of death is sufficient to support the mental anguish requirement of the aggravator. *Postelle*, 2011 OK CR 30, ¶ 83, 267 P.3d at 144. The length of time which the victim suffers mental anguish is irrelevant. *Turrentine*, 1998 OK CR 33, ¶ 70, 965 P.2d at 976; *Neill v. State*, 1994 OK CR 69, ¶ 60, 896 P.2d 537, 555; *Berget v. State*, 1991 OK CR 121, ¶ 31, 824 P.2d 364, 373. Instead, the analysis focuses on the acts of the petitioner and the level of tension created. *Id.*

Serious physical abuse is proved by showing that the victim endured conscious physical suffering before dying. *Martinez*, 2016 OK CR 3, ¶ 68, 371 P.3d at 1116. This Court has found sufficient evidence of serious physical abuse where the victim suffered numerous defensive wounds indicating that the victim was conscious and attempted to fight off her attacker. *DeRosa*, 2004 OK CR 19, ¶ 99 n. 166, 89 P.3d at 1157 n. 166; *Cheney v. State*, 1995 OK CR 72, ¶ 18 n. 22, 909 P.2d 74, 81 n. 22; *Romano v. State*, 1993 OK CR 8, ¶¶ 77-80, 847 P.2d 368, 386-87. "[S]o long as the evidence supports a finding that death was preceded by torture or serious physical abuse, the jury is permitted to consider all the circumstances of the case, including the attitude of the killer and the pitiless nature of the crime." *Underwood v. State*, 2011 OK CR 12, ¶ 64, 252 P.3d 221, 247 (quotation and citation omitted).

Appellant argues that the State failed to establish that [B.H.]'s death involved conscious physical suffering. "The crucial aspect of this aggravator is the victim's awareness." *Id.* Both torture and serious physical abuse require evidence of consciousness. *Id.*; *Pavatt v. State*, 2007 OK CR 19, ¶ 75, 159 P.3d 272, 294.

Taking the evidence in the light most favorable to the prosecution in the present case, we find that any rational trier of fact could have found that [B.H.] suffered torture and serious physical abuse prior to her death. Appellant admitted to Dr. Grundy that he attacked [B.H.] at the soda fountain. He struck [B.H.] and strangled her with a choke-hold. Appellant also admitted to attacking [B.H.] a second time on the floor in the stockroom of the store.

The evidence at trial revealed that [B.H.] suffered serious physical abuse. Appellant subjected the teenager to a prolonged,

brutal, and relentless attack. Appellant beat [B.H.] so severely with his hands that they were demonstrably swollen to the law enforcement officers who came into contact with him after his arrest. The medical examiner, Dr. Inas Yacoub, testified that [B.H.] had extensive blunt force trauma to her head, face, scalp, neck, back and upper torso. The trauma was so significant that [B.H.] had bruising behind her sternum and bleeding in the lining of her airways. She had suffered a traumatic brain injury from the trauma to her head. Yacoub indicated that the numerous injuries could not be explained by a single impact.

Yacoub testified that [B.H.] also had bruises on her legs, arms, and hands. Sufficient pressure had been applied to [B.H.]'s neck to cause the fracture of the cricoid cartilage and petechiae in both eyes. [B.H.] also had pattern injuries on her head, neck, arm, and upper back which were consistent with the bottom of Appellant's shoes.

Based on the extensive injuries from the beating, any rational juror would also have recognized that [B.H.] would have been under extreme mental anguish and emotional fear as she realized she was being beaten to death, one of the most agonizing ways a person can die. In addition, Dr. Yacoub's testimony suggested that [B.H.] fought back in an effort to save her own life. Yacoub testified that Appellant had a bruise on his elbow and a bite mark where [B.H.] had fought back. Yacoub noted that the bruises on [B.H.]'s right forearm were defensive in nature. [B.H.] had numerous abrasions and a broken toe nail.

Although Dr. Yacoub could not determine at what exact point [B.H.] became unconscious, she did not see any evidence that [B.H.] was immediately rendered unconscious. She explained that the pattern injury depicted in State's Exhibit Number 504 where Appellant had apparently stomped on [B.H.]'s throat occurred, as with the great majority of the other injuries, while [B.H.] was still alive. She detailed that [B.H.] had injuries to both the inside and outside of her head consistent with her having been dragged across the floor while still alive and conscious. Yacoub related that the blood on [B.H.]'s face indicated that [B.H.] was conscious after Appellant's attack on her torso and coughed out blood from her nose and mouth. She stated that [B.H.] breathed in her own blood and had suffered the painful experience of air hunger as she tried to breathe but could not get air into her fluid filled lungs.

The photographs of [B.H.]'s injuries and the clothing that Appellant wore on the night of her death thoroughly corroborated Dr. Yacoub's account. Appellant did not present any evidence to

> contravene the State's evidence. Therefore, we conclude that, taking the evidence in the light most favorable to the prosecution in the present case, we find that any rational trier of fact could have found that [B.H.]'s murder was especially heinous, atrocious or cruel beyond a reasonable doubt. Proposition X is denied.

Bench, 431 P.3d at 961-63 (paragraph numbering omitted).

On November 7, 2018, the OCCA denied Petitioner's request for rehearing. *Order Denying Petition for Rehearing and Directing Issuance of Mandate*, No. D-2015-462 (Okla. Crim. App. Nov. 7, 2018), Pet'r Appx. B.[2] On April 3, 2019, Petitioner filed a petition for writ of certiorari with this Court seeking review of the OCCA's decision.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE PETITIONER DOES NOT IDENTIFY THE QUESTION OR QUESTIONS PRESENTED, OKLAHOMA'S NARROWING CONSTRUCTION OF THE HAC AGGRAVATOR DOES NOT CONFLICT WITH THIS COURT'S HAC CASES, THIS CASE IS A POOR VEHICLE FOR CONSIDERATION OF WHAT APPEARS TO BE THE QUESTION PRESENTED, AND ANY OTHER CLAIMS HINTED AT BY PETITIONER DO NOT WARRANT FURTHER REVIEW.

[2] Petitioner also has pending in state court an application for post-conviction relief filed on March 15, 2018. In that application, among other claims, Petitioner alleges that he is an Indian, that his crime occurred on the Chickasaw Nation reservation, which he contends has never been disestablished, and that the State of Oklahoma therefore lacked jurisdiction over his crime. *Bench v. State*, No. PCD-2015-698, *Original Application for Post Conviction Relief in a Death Penalty Case* at 1-15 (Okla. Crim. App. Mar. 15, 2018). On March 29, 2019, the OCCA entered an order holding Petitioner's post-conviction proceeding in abeyance until this Court issues its decision in *Carpenter v. Murphy*, No. 17-1107. *Order Holding Case in Abeyance and Directing Attorney General to Provide Status Update*, No. PCD-2015-698 (Okla. Crim. App. Mar. 29, 2019).

A. Petitioner fails to identify the question or questions presented.

Certiorari review should be denied as an initial matter because Petitioner does not identify the question or questions presented. This Court's Rules provide that the petition must contain, on the first page following the cover, "[t]he questions presented for review" in a "short," non-argumentative, and non-repetitive fashion, and that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 14(1)(a), *Rules of the Supreme Court of the United States*. Furthermore, the petition must contain "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Rule 14(1)(h), *Rules of the Supreme Court of the United States* (referencing Rule 10, *Rules of the Supreme Court of the United States*). Finally, "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Rule 14(4), *Rules of the Supreme Court of the United States*.[3]

Here, not only does the petition for a writ of certiorari not comply with Rule 14(1)(a) by failure to identify the question presented, but it is not apparent from the body of the petition what question(s) or claim(s) Petitioner is pressing. Petition at

[3] If Petitioner intends for the third sentence on page four of his petition to serve as the question presented, such is improper, for it is buried within the Statement of the Case and is not on the first page after the cover or on a page by itself. *See* Rule 14(1)(a), *Rules of the Supreme Court of the United States*. Furthermore, by his failure to include a question presented page, Petitioner has failed to include the notation "capital case" on that page that is required by this Court's rules. *See* Rule 14(1)(a), *Rules of the Supreme Court of the United States*.

12-15. In only three pages, Petitioner mentions the OCCA's allegedly inconsistent construction[4] of the HAC aggravator, Oklahoma's supposed failure to properly instruct juries on the limiting construction of HAC, the allegedly vague and overbroad definition of the aggravator, and the OCCA's failure in his case to determine whether the evidence was sufficient to support HAC for purposes of the Eighth Amendment. In addition, there is nothing direct about Petitioner's arguments, and he offers no articulation of why the issues he presents are compelling enough for certiorari review under Rule 10. Petitioner's failure to comply with Rule 14(1)(a), Rule 14(1)(h), and Rule 14(4) is alone sufficient for this Court to deny the petition.

B. Petitioner's facial challenge to HAC does not warrant certiorari review because Oklahoma's narrowing construction is in full compliance with the precedents of this Court and the Tenth Circuit.

Even setting aside Petitioner's noncompliance with Rule 14, the only question properly before this Court is the question that was pressed and passed upon below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (Supreme Court is "a court of review, not of first view"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (the Supreme Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented

[4] It is unclear whether Petitioner is claiming that the OCCA's *construction* or *application* of HAC has been inconsistent. *Compare* Petition at 10 (indicating that the OCCA has not applied its more narrowed construction of HAC in every case), *with* Petition at 12 (stating that the OCCA "neither routinely nor consistently applies" its limiting construction). In any event, below Respondent will demonstrate that neither claim warrants certiorari review.

was not pressed or passed upon below"). Before the OCCA, the only HAC-related claim Petitioner raised that he currently asserts is that HAC is facially vague and overbroad because the OCCA neither requires that Oklahoma juries be properly instructed nor properly narrows on appeal. *Bench v. State*, No. D-2015-462, *Brief of Appellant* at 93-96 (Okla. Crim. App. Feb. 28, 2017) ("Direct Appeal Brief").[5] The OCCA's denial of this claim does not conflict with the precedents of this Court or of the Tenth Circuit. This issue does not warrant certiorari review.

As background, per Oklahoma's aggravating circumstances statute, HAC applies where "[t]he murder was especially heinous, atrocious, or cruel." OKLA. STAT. tit. 21, § 701.12(4). In *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987), following the Tenth Circuit's decision in *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987) (*en banc*), and before this Court's decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), the OCCA adopted a limiting construction requiring that "the death of the victim was preceded by torture of the victim or serious physical abuse." Although the OCCA did not explicitly impose a "conscious physical suffering" requirement, it found the evidence insufficient in *Stouffer* because there was no evidence the victim was conscious after the first gunshot. *Stouffer*, 742 P.2d at 564.

In *Cartwright*, this Court held that the HAC aggravator, as defined in the statute, was facially vague. *Cartwright*, 486 U.S. at 363-64. Nevertheless, this

[5] Besides his facial vagueness claim, Petitioner also raised a sufficiency claim under *Jackson v. Virginia*, 443 U.S. 307 (1979), but he does not appear to press that claim in his petition. Direct Appeal Brief at 96-97. As will be discussed more below, Petitioner did not raise the as-applied vagueness challenge he now appears to present.

Court noted with approval Oklahoma's narrowing construction of requiring torture or serious physical abuse. *See id.* at 365 ("We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable."); *see also Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) ("In *Maynard v. Cartwright*, we expressed approval of a definition that would limit Oklahoma's 'especially heinous, atrocious, or cruel' aggravating circumstance to murders involving 'some kind of torture or physical abuse.'" (quoting *Cartwright*, 486 U.S. at 364-65)).

The OCCA later expressly made "conscious physical suffering" part of the definition of HAC. *See Battenfield v. State*, 816 P.2d 555, 565 (Okla. Crim. App. 1991). The OCCA subsequently adopted a new jury instruction to better inform the jury as to the conscious physical suffering requirement. *See DeRosa v. State*, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004). Here, Petitioner's jury received that revised instruction:

> The State has alleged that the murder was "especially heinous, atrocious, or cruel." This aggravating circumstance is not established unless the State proves beyond a reasonable doubt:
>
> First, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and
>
> Second, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel.
>
> You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or

> "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to death.
>
> In addition, you are instructed that the term "heinous" means extremely wicked or shockingly evil; the term "atrocious" means outrageously wicked and vile; and the term "cruel" means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others.

(O.R. 1438); *see* Oklahoma Uniform Jury Instruction–Criminal 4-73 (Supp. 2005).

Oklahoma's narrowing construction of the HAC aggravator is fully in line with the precedents of this Court and the Tenth Circuit. *Cf.* Rule 10(b), (c), *Rules of the Supreme Court of the United States* (identifying the conflict between a state court's decision and a decision of this Court or of a federal court of appeals as an example of a compelling issue meriting certiorari review). As to this Court, pursuant to *Cartwright* and *Walton*, there can be no question that Oklahoma's HAC aggravator is constitutional. *See Cartwright*, 486 U.S. at 365; *Walton*, 497 U.S. at 654-55. This conclusion is only reinforced by additional precedents of this Court. *See Tuilaepa v. California*, 512 U.S. 967, 973-74 (1994) (stating that vagueness review is "quite deferential" and noting that it has upheld HAC-like aggravators numerous times); *Arave v. Creech*, 507 U.S. 463, 468-78 (1993) (affirming "utter disregard to human life" aggravator as limited to "the cold-blooded, pitiless slayer," distinguishing the aggravator from those containing "pejorative adjectives . . . that describe a crime as a whole," and stating that an aggravator is infirm "[i]f the sentencer fairly could conclude that [it] applies to *every* defendant eligible for the death penalty" (emphasis in original)); *Proffitt v. Florida*, 428 U.S. 242, 255-56

(1976) (affirming similar aggravator as limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim").

As to the Tenth Circuit, Petitioner's claim that "[t]he Tenth Circuit . . . has routinely recognized that Oklahoma is likely applying this aggravator in an unconstitutional manner" is unfounded, as it is based on some dicta, a concurrence, and a panel opinion that has been vacated upon the grant of rehearing *en banc*. Petition at 12-14 (citing *Thomas v. Gibson*, 218 F.3d 1213 (10th Cir. 2000); *Medlock v. Ward*, 200 F.3d 1314 (10th Cir. 2000) (Lucero, J., concurring); *Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2001); *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017) ("*Pavatt I*"), *opinion amended and superseded on denial of reh'g*, 894 F.3d 1115 (10th Cir. 2017) ("*Pavatt II*"), *reh'g en banc granted sub nom. Pavatt v. Carpenter*, 904 F.3d 1195 (10th Cir. 2018)). In *Thomas*, the Tenth Circuit granted habeas relief based on insufficient evidence to show HAC under *Jackson* but noted, *as dicta in a footnote*, that the OCCA's finding of sufficient evidence in that case raised a question as to whether HAC legitimately narrowed the class of death-eligible murderers. *Thomas*, 218 F.3d at 1226-29 & n. 17.[6] In *Medlock*, the panel found

[6] In *Thomas*, the Tenth Circuit concluded there was insufficient evidence to show that the victim, who was beaten and strangled to death and then stabbed post-mortem, was conscious after the first blow. *Thomas*, 218 F.3d at 1226-29. The OCCA had held that there was sufficient evidence because "[i]t is highly improbable that [the victim] would have been beaten, strangled and stabbed if she was rendered immediately unconscious by the first blow." *Thomas v. State*, 811 P.2d 1337, 1349 (Okla. Crim. App. 1991). The Tenth Circuit found this inference to be unreasonable, noting that it "appears to completely unwind the requirement of conscious suffering: in every murder committed with more than one blow an inference would arise that the murder was heinous, atrocious, or cruel because no reasonable murderer would continue beating the victim if she had become unconscious after the first blow." *Thomas*, 218 F.3d at 1226 n. 17. However troubling the Tenth Circuit may have found this inference relied on by the OCCA in *Thomas* to be, Petitioner here does

sufficient evidence of HAC, but Judge Lucero stated in a *concurrence* that, to properly narrow, HAC must not apply "merely on the brief period of conscious suffering necessarily present in virtually all murders."[7] *Medlock*, 200 F.3d at 1324 (Lucero, J., concurring). In *Romano*, the panel agreed there was sufficient evidence of HAC under *Jackson*, noting that the only challenge to the aggravator was "an

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not show that the OCCA has ever again used such an inference or engaged in the "unwinding" of HAC that the Tenth Circuit noted in dicta.

[7] Respectfully, this is not the standard. To narrow, an aggravator must simply not apply to "*every* defendant eligible for the death penalty," *Creech*, 507 U.S. at 474 (emphasis in original), and there are many murders that do not involve conscious suffering, *see, e.g.*, *Simpson v. State*, 230 P.3d 888, 903 (Okla. Crim. App. 2010) (holding evidence insufficient to show HAC where the victim "was not conscious after being shot" and "likely died within seconds"); *Stouffer*, 742 P.2d at 563-64 (holding evidence insufficient to show HAC where there was no evidence the victim was conscious after the first gunshot wound). Indeed, Judge Lucero's concurrence echoed the words of Justice Blackmun's dissent in *Walton*, which this Court rejected. *See Lewis v. Jeffers*, 497 U.S. 764, 778 (1990) (referring to *Walton*, issued the same day as *Jeffers*: "We decline the dissent's apparent invitation to reconsider arguments addressed and rejected in a decision announced only today"). In *Walton*, Justice Blackmun wrote:

> I do not believe that an aggravating factor which requires only that the victim be conscious and aware of his danger for some measurable period before the killing occurs can be said to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."

Walton, 497 U.S. at 698-99 (Blackmun, J., dissenting) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)). In remarkably similar language, Judge Lucero wrote:

> Under the Eighth Amendment, applying the narrowing construction of the aggravating circumstance in a manner that permitted Oklahoma courts to find "torture or serious physical abuse" based merely on the brief period of conscious suffering necessarily present in virtually all murders would fail to narrow the sentencer's discretion as required by *Godfrey* . . . and *Maynard* . . . .

Medlock, 200 F.3d at 1324 (Lucero, J., concurring). Thus, to the extent that Petitioner relies on Judge Lucero's reasoning in *Medlock*, same has already been rejected by this Court. Indeed, this Court in *Walton* approved the state court's narrowing construction that applied where a victim suffered mental anguish by experiencing "uncertainty as to his ultimate fate." *Walton*, 497 U.S. at 654.

evidentiary one," but added—*in dicta*—that "[r]ecent Oklahoma cases . . . have begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of these elements in almost every murder."[8] *Romano*, 239 F.3d at 1176. Finally, as Petitioner concedes, the panel opinion in *Pavatt* has been vacated with the grant of rehearing *en banc*.[9] Petition at 14.

Otherwise, the Tenth Circuit has approved the OCCA's limiting construction of torture or serious physical abuse, *Hatch v. State of Okl.*, 58 F.3d 1447, 1468-69 (10th Cir. 1995), and has for decades repeatedly upheld the aggravator, *see, e.g.*, *Cole v. Trammell*, 755 F.3d 1142, 1166-71 (10th Cir. 2014); *DeRosa v. Workman*, 679 F.3d 1196, 1219-20 (10th Cir. 2012); *Hooker v. Mullin*, 293 F.3d 1232, 1241-42 (10th

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[8] Petitioner's citation to *Romano* illustrates the danger in relying on dicta. To begin with, the dicta in *Romano* that the OCCA was finding the existence of HAC in almost every murder was supported by citation to ***two*** cases. *See Romano*, 239 F.3d at 1176 (citing *Fluke v.* State, 14 P.3d 565 (Okla. Crim. App. 2000); *Washington v. State*, 989 P.2d 960, 974-75 (Okla. Crim. App. 1999)). Moreover, in *Fluke*, the OCCA found that the following facts showed HAC:

> In this case, Fluke attacked Ginger Fluke with a hatchet while she slept. When he hit her on the back of her head, she awoke and began screaming. He continued to hit her with the hatchet as she screamed, leveling at least seven or eight blows to her head and neck. She remained conscious and screaming until Fluke pulled out a gun and shot her in the head.

Fluke, 14 P.3d at 568. Given these facts, it is entirely unreasonable for the Tenth Circuit to point to *Fluke* as an example of the OCCA beginning "to blur the common understanding of the requisite torture and conscious serious physical suffering" required for HAC. Finally, as to *Washington*, the Tenth Circuit has in another case cited *Washington* with approval. *See Robinson v. Gibson*, 35 F. App'x 715, 718 (10th Cir. 2002) (unpublished).

[9] The Tenth Circuit held *en banc* oral argument in *Pavatt v. Carpenter,* Case Number 14-6117, on May 7, 2019, and as of the date of filing of the present brief, an *en banc* decision has not yet been released. In any event, *Pavatt* did not involve a facial challenge to the HAC aggravator—the only challenge that is properly before this Court. *See Pavatt II*, 894 F.3d at 1132 (concluding the OCCA did not apply its narrowing construction "in this case").

Cir. 2002); *Robinson*, 35 F. App'x at 718-19 (unpublished); *Fox v. Ward*, 200 F.3d 1286, 1298-99 (10th Cir. 2000); *Smallwood v. Gibson*, 191 F.3d 1257, 1274 (10th Cir. 1999); *Cooks v. Ward*, 165 F.3d 1283, 1290 (10th Cir. 1998).

Petitioner appears to suggest that Oklahoma does not properly narrow the HAC aggravator because the uniform jury instructions do not "inform the jury that 'extreme mental cruelty' and 'great physical anguish' must last for an appreciable amount of time prior to death, and that 'conscious physical suffering' is supposed to refer to suffering beyond the brief period of conscious suffering that accompanies virtually every homicide." Petition at 9, 12. To begin with, it is irrelevant whether the jury receives the full narrowing instruction because the narrowing can happen on appeal by the OCCA. *See Lambrix v. Singletary*, 520 U.S. 518, 531-32, 537 (1997) ("[E]ven following *Maynard*, a weighing-state death sentence would satisfy the Eighth Amendment so long as the vague aggravator was narrowed at some point in the process."). In any event, Oklahoma's uniform jury instruction defining HAC, which requires a finding of torture or serious physical abuse, fully conforms with the narrowing definition approved by this Court. *See Cartwright*, 486 U.S. at 365; *Walton*, 497 U.S. at 654-55. Finally, the OCCA has held that the revised HAC instruction, promulgated in *DeRosa*, fully informs the jury as to the state-law requirements for HAC, *see DeRosa*, 89 P.3d at 1156-57, and that determination is binding on this Court, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law.").

Petitioner further implies that HAC is not narrowed *enough* in Oklahoma, stating that "[v]irtually any murder in which the victim did not die instantly could qualify for the enhancement . . . if there is a possibility that the act of murder did not immediately render the victim unconscious and the wounds could have caused pain." Petition at 14 (quoting *Pavatt I*, 859 F.3d at 936). Under this Court's precedents, however, an aggravator that applies any time the evidence shows that the victim was not killed instantaneously and suffered pain is constitutional. This construction would clearly not apply to *every* murder, and it provides a principled way to distinguish between those cases in which the death penalty is imposed from the cases in which it is not. *See Godfrey*, 446 U.S. at 433; *see also Creech*, 507 U.S. at 468-78 (affirming "utter disregard to human life" aggravator as limited to "the cold-blooded, pitiless slayer" and stating that an aggravator is infirm "[i]f the sentencer fairly could conclude that [it] applies to *every* defendant eligible for the death penalty" (emphasis in original)); *Walton*, 497 U.S. at 654-56 (stating that aggravating circumstances must "provide *some* guidance to the sentencer" and affirming Arizona's aggravator—which it described as "nearly identical to the construction we approved in *Maynard*"—over the dissent's concerns that "there would appear to be few first-degree murders which the Arizona Supreme Court would *not* define as especially heinous or depraved" and that the court permits the aggravator to be applied any time the victim "is shown to have experienced fear or uncertainty as to his ultimate fate" without regard for the duration of that fear (emphasis in original)). The fact that the OCCA may find HAC satisfied "in a wide

range of circumstances" is neither surprising nor relevant to question of whether it is sufficiently narrow. *Creech*, 507 U.S. at 476-77.

As demonstrated above, there is no genuine conflict between Oklahoma's narrowing of HAC and the precedents of either this Court or the Tenth Circuit. Certiorari review is not warranted.

C. Petitioner's case is a poor vehicle for review of (what appears to be) the question presented.

Petitioner's case is a poor vehicle for resolution of what seems to be the question presented—whether HAC is facially vague. Even if this Court were to reverse and hold that there must be a finding of mental torture or physical suffering of a *particular duration* for HAC to be sufficiently narrowed, the OCCA would undoubtedly make such a finding in this case.

On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821). Thus, this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). As will be shown, Petitioner's death sentence would ultimately stand even if this Court required further narrowing of HAC. Certiorari review should be denied.

As quoted above, the OCCA found that Petitioner "subjected [B.H.] to a prolonged, brutal, and relentless attack" that included both "serious physical abuse"

and "extreme mental anguish." *Bench*, 431 P.3d at 962-63. The record fully supports these findings. Indeed, the evidence was overwhelming that B.H. experienced prolonged conscious physical suffering and mental torture as she realized she was being beaten to death. Most of B.H.'s numerous wounds were inflicted pre-death and could be explained only by repeated blows, and many of her wounds would have been painful, including the abrasions, scrapes, and areas of diffuse hemorrhage (Tr. XII 173-201, 204-05, 209-10). The pressure placed on B.H.'s neck was significant enough to break a bone in her neck and cause petechiae in her eyes (Tr. XII 198-99). Pattern injuries on B.H.'s upper body were consistent with the bottom of Petitioner's shoes (Tr. VIII 53-54, 86, 93). There was movement of B.H.'s brain inside her skull and she suffered a brain injury (Tr. XII 202-04). The medical examiner testified that the assault on B.H. caused bleeding in her airways, such that she suffocated on her own blood and hungered for air, also a painful event (Tr. XII 179, 205). The autopsy also revealed extensive, deep areas of contusions and hemorrhage, indicating the power of the impacts suffered by B.H. (Tr. XII 177-78, 199-200). Later, Petitioner complained to an officer that his hands—which were visibly swollen—hurt (Tr. VI 130-31).[10]

Petitioner states that "there was simply no conclusive evidence to establish that [B.H.] ever consciously suffered pain from [her] injuries." Petition at 6. This is a gross misstatement of the evidence. For starters, the medical examiner testified that the blood in B.H.'s mouth and nose showed that, ***while conscious***, she

[10] It is asinine for Petitioner to suggest that B.H.'s wounds did not hurt when he hit her so hard and so many times that he himself complained of hurting. Petition at 6.

coughed up blood in an effort to clear her airways, ***a reflex she would have lost had she been unconscious*** (Tr. XII 179-82, 197-98). The medical examiner did not see damage to B.H.'s brain stem to support an inference that she went unconscious immediately or quickly (Tr. XII 204). Furthermore, B.H. had at least one defensive wound, and upon his arrest Petitioner appeared to have a bite mark on his wrist (Tr. VI 23; Tr. XII 186-88; State's Exhibits 403, 406).

Furthermore, Petitioner's own account of the killing, offered through Dr. Grundy, further showed prolonged ***conscious*** physical suffering by B.H. Petitioner claimed that he had an initial struggle with B.H. by the soda fountain and then, after he had time to go up to the cash register, he ended up in the back room, where he saw B.H.'s hand reaching out for him, resulting in a "second altercation back there" (Tr. X 37-38, 83-84). Thus, Petitioner himself provided evidence of a lengthy attack with extended consciousness. Further, there is no support in law or logic for Petitioner's suggestion that the State was required to prove "the precise moment when [B.H.] lost consciousness." Petition at 6.

As demonstrated above, even assuming that this Court determines that, to sufficiently narrow, HAC must apply only where the mental torture or physical suffering lasted beyond a brief period and for an appreciable amount of time, Petition at 9, 14, the length of B.H.'s mental and physical suffering would clearly be enough under such a standard. Accordingly, even if this Court were to grant certiorari review and reverse on (what appears to be) the question presented, the

OCCA would still uphold the application of HAC in Petitioner's case. This case presents a poor case for certiorari review, and the petition should be denied.

D. The remaining questions hinted at by Petitioner were neither pressed nor passed upon below and otherwise do not warrant certiorari review.

Petitioner hints at two remaining questions: (1) whether the OCCA has applied inconsistent definitions of HAC; and (2) whether the OCCA in his case failed to decide the Eighth Amendment "component" of his *Jackson* sufficiency claim. Petition at 12, 14. Neither of these issues was pressed or passed upon below, and in any event they do not justify certiorari review for additional reasons.

As to Petitioner's consistency argument, he asserts that, in Oklahoma, there are not "consistent" grounds on which to classify a murder as HAC, the OCCA has not "consistently" required that HAC be limited "to 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" and the OCCA has not "routinely" or "consistently" applied its own limiting construction of HAC on appeal. Petition at 8, 10, 12 (quoting *Nuckols v. State*, 690 P.2d 463, 472 (Okla. Crim. App. 1984)). However, before the OCCA Petitioner offered only a single sentence suggesting a consistency argument: "In Oklahoma, there is no consistent or reasoned basis upon which a murder can confidently be excluded as [HAC]." Direct Appeal Brief at 94.[11] This cursory and passing reference was insufficient under the OCCA's Rules to properly raise a claim that the OCCA was not applying a

[11] While Petitioner's consistency argument is certainly related to his facial vagueness challenge to HAC, it is a distinct argument he did not sufficiently develop below, where the focus of his claim was that HAC was not facially constitutional because it applies to virtually every murder. Direct Appeal Brief at 94-96.

consistent definition of HAC. *See Cuesta-Rodriguez v. State*, 247 P.3d 1192, 1197 (Okla. Crim. App. 2011). Nor did the OCCA pass on any such claim. *See Bench*, 431 P.3d at 961-63. This Court should therefore decline to grant certiorari review of any question of whether the OCCA has applied a consistent definition of HAC. *See Cutter*, 544 U.S. at 718 n. 7; *Sprietsma*, 537 U.S. at 55-56; *Williams*, 504 U.S. at 41.

Petitioner's claim that the OCCA has not applied a consistent construction of HAC in its cases does not warrant certiorari review for an additional reason. In *Sochor v. Florida*, 504 U.S. 527, 536-37 (1992), this Court faced an argument that the Florida courts had not adhered to a single limiting construction of Florida's "heinous, atrocious, or cruel" aggravating circumstance. *See Creech*, 507 U.S. at 477. This Court held: "[H]owever much that may be troubling in the abstract, it need not trouble us here, for our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim." *Sochor*, 504 U.S. at 537. Here, too, research indicates that the OCCA has consistently held that HAC is properly found if the defendant beat a conscious victim. *See, e.g.*, *Gilson v. State*, 8 P.3d 883, 924 (Okla. Crim. App. 2000); *Alverson v. State*, 983 P.2d 498, 515 (Okla. Crim. App. 1999); *Duckett v. State*, 919 P.2d 7, 24 (Okla. Crim. App. 1995); *Powell v. State*, 906 P.2d 765, 782 (Okla. Crim. App. 1995); *Hooks v. State*, 862 P.2d 1273, 1282 (Okla. Crim. App. 1993); *Thomas v. State*, 811 P.2d 1337, 1349 (Okla. Crim. App. 1991); *Foster v. State*, 779 P.2d 591, 593-94 (Okla. Crim. App. 1989); *Nuckols*, 690 P.2d at 472-73; *see also Bench*, 431 P.3d at 963 (noting that "being beaten to death" is "one

of the most agonizing ways a person can die"). Certiorari review is not warranted on the question of whether the OCCA has applied a consistent definition of HAC in its cases.[12]

Petitioner also asserts that the OCCA in his case "failed to determine whether the evidence would support a finding of conscious physical suffering under a definition of that term that satisfied both Oklahoma law and the Eighth Amendment." Petition at 14. Again, this argument, which seems to raise an as-applied vagueness challenge, does not warrant certiorari review because it was neither pressed nor passed upon below. *See Cutter*, 544 U.S. at 718 n. 7; *Sprietsma*, 537 U.S. at 55-56; *Williams*, 504 U.S. at 41. Before the OCCA, Petitioner did not so much as hint at an as-applied vagueness challenge. In his direct appeal brief, Petitioner, in arguing that the evidence of HAC was insufficient under *Jackson*, relied entirely on state cases, other than citations to *Jackson* and *Jeffers* for the standard governing sufficiency challenges to aggravators. Direct Appeal Brief at 96-97. Petitioner never articulated a claim that the evidence in his case, even if sufficient under *Jackson*, did not meet a definition of the aggravator that satisfied the Eighth Amendment. *Compare* Direct Appeal Brief at 96-97, *with* Petition at 14. Following the OCCA's decision, Petitioner's rehearing petition did not even mention the proposition of error challenging HAC, let alone argue that the OCCA had failed

[12] To the extent that Petitioner contends that the OCCA has not consistently *applied* its limiting construction of HAC, as opposed to applying inconsistent *formulations* of its limiting construction, this Court does not engage in "[a] comparative analysis of state court cases" to determine "whether a limiting construction has been *applied* consistently." *Arave*, 507 U.S. at 477 (emphasis in original).

to adjudicate the so-called Eighth Amendment component of his *Jackson* challenge to HAC. *Bench v. State*, No. D-2015-462, *Petition for Rehearing and Motion to Recall Mandate* (OCCA Oct. 24, 2018).

In any event, even if Petitioner had made such an argument, the OCCA was not required to examine whether HAC became overbroad by its application in Petitioner's case:

> [I]f a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the fundamental constitutional requirement of channeling and limiting the sentencer's discretion in imposing the death penalty has been satisfied.

Jeffers, 497 U.S. at 779. Here, the narrowing construction of HAC was applied both by the jury and on appeal by the OCCA (O.R. 1438). *See Bench*, 431 P.3d at 962. The OCCA further held that the evidence was sufficient to meet this construction under *Jackson*. *See id.* at 962-63. Contrary to Petitioner's assertion, Petition at 14, the OCCA was not required to then "determine whether the evidence would support a finding of conscious physical suffering under a definition of that term that satisfied . . . the Eighth Amendment." *See Jeffers*, 497 U.S. at 779; *see also DeRosa*, 89 P.3d at 1155 (recognizing that, under *Jeffers*, "an aggravating circumstance does not itself become 'overly broad' or unconstitutional simply because a state appellate court applies it in a manner with which defendants, or even federal appellate courts, disagree").

To the extent that Petitioner asserts that he is entitled to certiorari review of an as-applied vagueness challenge based on the pending Tenth Circuit *en banc*

review in *Pavatt v. Carpenter*, Petition at 13-14, certiorari review is particularly unwarranted. To begin with, Petitioner cites to the original panel opinion in *Pavatt* that was amended and superseded on denial of panel rehearing. Petition at 13-14 (citing *Pavatt I*, 859 F.3d at 930-38).[13] In fact, *Pavatt II* disavowed the reasoning on which Petitioner now relies.

As background, *Pavatt I* held in granting relief on Pavatt's sufficiency challenge to HAC:

> [W]e have a case controlled by the Supreme Court's holding in *Godfrey*. The State has an aggravator that at one time it had been construing in a constitutionally acceptable manner. But, as in *Godfrey*, that does not immunize its decisions from review of whether *the facts in a particular case can satisfy the aggravator if it is to be given a constitutionally acceptable construction.*

Pavatt I, 859 F.3d at 935 (emphasis added). But, after the State moved for panel and *en banc* rehearing on grounds that, *inter alia*, the panel violated *Jeffers*, *Pavatt II* changed the last sentence of the above-quoted paragraph to read: "But, as in *Godfrey*, that does not immunize its decisions from review of whether *it has departed from that acceptable construction*." *Pavatt II*, 894 F.3d at 1131 (emphasis added). *Pavatt II* further claimed that its revised analysis was distinguishable from *Jeffers* on the following basis: "We are not saying that the OCCA in this case unconstitutionally applied a constitutionally acceptable narrowing construction of the State's HAC aggravator. We are saying that it did not apply the narrowing construction that we previously approved." *Id.* at 1132.

[13] In any event, as previously indicated, *Pavatt II*—the revised panel opinion—was also vacated with the grant of rehearing *en banc*.

Here, Petitioner's as-applied vagueness challenge is not only foreclosed by *Jeffers*, as shown above, but relies on reasoning in *Pavatt I* that was disavowed by *Pavatt II*. Furthermore, even *Pavatt II* repeatedly made clear that its holding and conclusions were limited to "this case," such that its analysis does nothing for Petitioner here. *Pavatt II*, 894 F.3d at 1130-34. Finally, even assuming that *Pavatt* has some application beyond that case, the fact that Oklahoma's HAC aggravator is already under review by the *en banc* Tenth Circuit counsels against granting certiorari review in Petitioner's case. In particular, whatever conflict Petitioner believes there to be between the OCCA and the Tenth Circuit, Petition at 12-14, there is a chance for resolution upon issuance of the *en banc* decision in *Pavatt*. Certiorari review in Petitioner's case is not necessary.

CONCLUSION

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

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