Case No. 19-5232

IN THE SUPREME COURT OF THE UNITED STATES

RICKY RAY MALONE,

Petitioner,

v.

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court grant a writ of certiorari to answer a question which Petitioner himself has repeatedly referred to as "superfluous"?

Should this Court grant a writ of certiorari to mandate that lower courts write their opinions in a particular manner?

No. 19-5232

In the

SUPREME COURT OF THE UNITED STATES

RICKY RAY MALONE,

***Petitioner*,**

-vs-

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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 December 20, 2018. *See Malone v. Carpenter*, 911 F.3d 1022 (10th Cir. 2018).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Comanche County[1], State of Oklahoma, Case No. CF-2005-147. In 2005, Petitioner was tried by a jury for one count of first degree

[1] Petitioner was originally charged in Cotton County in 2004, but venue was changed to Comanche County.

murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; (2) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society; and (3) the victim was a peace officer killed in the line of duty. *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.

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's murder conviction, but reversed the death sentence in a published opinion filed on August 31, 2007. *See Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007). Petitioner subsequently waived his right to have a jury trial, and was resentenced to death after a bench trial in 2010. The trial court found two aggravating circumstances: (1) the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution"; and (2) the victim was a peace officer killed in the line of duty. The OCCA affirmed Petitioner's sentence in a published opinion filed on January 11, 2013. *See Malone v. State*, 293 P.3d 198 (Okla. Crim. App. 2013). Petitioner failed to timely seek rehearing. This Court denied Petitioner's petition for writ of certiorari on December 5, 2011. *See Malone v. Oklahoma*, 571 U.S. 868 (2013).

Petitioner filed an application for state post-conviction relief on September 14, 2012, which was denied by the OCCA in an unpublished opinion on April 23, 2013. *See Malone v. State*, No. PCD-2011-248 (Okla. Crim. App. Apr. 23, 2013) (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 October 6, 2014. Petitioner then filed a second application for state post-conviction relief on November 13, 2014, which the OCCA denied in an unpublished opinion on January 30, 2015. *See Malone v. State*, No. PCD-2014-969 (Okla. Crim. App. Jan. 30, 2015) (unpublished).

On November 28, 2016, the federal district court issued an order denying Petitioner's petition for habeas corpus relief. *See Malone v. Royal*, No. CIV-13-1115-D, 2016 WL 6956646 (W.D. Okla. Nov. 28, 2016) (unpublished). Petitioner appealed the Western District of Oklahoma's denial of habeas relief to the Tenth Circuit. After briefing and oral argument, the Tenth Circuit affirmed the district court's judgment on December 20, 2018. *See Malone v. Carpenter*, 911 F.3d 1022 (10th Cir. 2018). The Tenth Circuit denied Petitioner's request for rehearing and rehearing *en banc* on February 14, 2019. *See Malone v. Carpenter*, No. 17-6027 (10th Cir. Feb. 14, 2019) (unpublished).

On July 15, 2019, Petitioner's petition for a writ of certiorari was filed in this Court.

STATEMENT OF FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal following Petitioner's first trial:

> Around 6:20 a.m., on December 26, 2003, Abigail Robles was delivering newspapers in rural Cotton County, just east of Devol, Oklahoma. While driving on Booher Road, she came across a parked white car on the side of the dirt road. The white male driver was laying in the front seat, but he was not moving, and his feet were hanging outside the car. Robles thought he might be dead. She drove to the home of Oklahoma Highway Patrol ("OHP") Trooper Nik Green, which was less than a mile away, to ask for his help. Green had been sleeping, but answered the door, listened to Robles's story, told her not to worry about waking him, and reassured her that he would check out the situation for her.
>
> At 6:28 a.m., Trooper Green telephoned OHP dispatch in Lawton and reported what Robles had seen. Green was not scheduled to be on duty that day until 9:00 a.m., but when he learned that the on-duty Cotton County trooper was not available, he volunteered to go check out the situation himself. He went on duty at 6:37 a.m. and informed dispatch shortly thereafter that he had arrived at the scene and discovered a white four-door vehicle and a white male. Green attempted to provide the vehicle tag number, but dispatch could not understand the number, due to radio interference. This was Green's final contact with OHP dispatch. After approximately ten minutes dispatch tried to contact Green with a welfare check ("10–90"), but got no response. After numerous unanswered welfare checks to Green's badge number (# 198) and an unanswered page, dispatch sent various units to Trooper Green's location and contacted the Cotton County Sheriff's Department.
>
> The first person to arrive at the scene was Deputy Charles Thompson of the Cotton County Sheriff's Department. He arrived at 7:15 a.m., wearing pajama bottoms, a t-shirt, and sandals. Trooper Green's patrol car was parked on the right side of the road, with the driver's

side door open and the headlights on. Thompson walked around the area until he discovered his friend's dead body, face down in the ditch, with his arms and legs spread, a few feet to the right and front of his patrol car. It was obvious from the massive head wound to the back of his head that Green had been shot and that he was dead. Thompson immediately called his dispatch, and the investigation of Green's murder began.

What happened on Booher Road from the time of Green's arrival until his death can be largely pieced together from the physical evidence at the scene, statements made by Ricky Ray Malone, and the contents of a videotape recorded by the "Dashcam" video recorder mounted in Green's vehicle. According to statements made by Malone, Trooper Green arrived at the scene and attempted to rouse Malone by talking to him and shining a flashlight in his face. Officers who investigated testified that it was obvious from evidence left at the scene that someone had been manufacturing methamphetamine outside his or her car that night. It would have been obvious to Green as well.

Green apparently informed Malone that he was under arrest and was able to get a handcuff on his right wrist, before Malone decided that he was not going to go quietly back to jail. Malone somehow broke free and a battle ensued between the two men that tore up the grass and dirt in the area and knocked down a barbed wire fence. Malone's John Deere cap ended up in the barbed wire fence, and Green's baton and a Glock 9 mm pistol were left lying in the ditch. The fight resulted in numerous scrapes, cuts, and bruises to both men.

Trooper Green's Dashcam recorder was switched on sometime during the course of this monumental struggle. Because the Dashcam was directed forward, the video shows only the things that appeared immediately in front of Green's vehicle. The video never shows Trooper Green, but the audio on the videotape, though garbled and sometimes hard to understand, contains a poignant and heartbreaking record of the verbal exchanges between Malone and Green during the six minutes preceding Green's death.

The initial sounds on the audio are mostly grunting and unintelligible, as the men seemingly struggle for control. Then Malone appears to gain control and tells Green to lay there and not turn over. Green tells Malone that he didn't have a problem with Malone and that he came to help him. He tells Malone, “Hey, run if you want to go, but leave me.” Green pleads, “Please! Please! I've got children.” Green also tells Malone that he is married and begs Malone not to shoot him. Meanwhile, Malone repeatedly asks Green where “the keys” are, apparently referring to the keys for the handcuff that is on his wrist, and demands that Green stop moving and keep his hands up. Malone threatens to kill Green if he moves, but also promises that he won't shoot him if Green holds still. Malone searches at least one of Green's pockets, but fails to find the keys. When Green suggests that he has another set of keys in his vehicle, Malone responds, “I don't need to know.” Green apparently recognizes the significance of this statement and after a few seconds begins pleading again, “Please don't. For the name of Jesus Christ. He'll deliver. Lord Jesus!” At that moment a shot can be heard, followed by eleven seconds of silence, and then another shot.

Just after the second shot, Malone appears in the videotape, walking in front of Trooper Green's car and behind the open trunk of his white, four-door vehicle. Malone can be seen hurriedly “cleaning up” his makeshift methamphetamine lab—dumping containers of liquid that are sitting on the ground, loading numerous items into the back seat and trunk, throwing and kicking things off the road, and lowering the front hood. Less than two minutes after shooting Green, Malone starts his car to drive away, but the car stalls. After almost thirty seconds, the car starts, and by 6:55 a.m. Malone has left the scene.

During the trial the State presented the testimony of Malone's four meth-making comrades: Tammy Sturdevant (Malone's sister), Tyson Anthony (her boyfriend), and J.C. and Jaime Rosser (who were married). In December of 2003, these four people were living together in Sturdevant's trailer in Lawton and were jointly engaged, along with Malone, in a regular process of

gathering and preparing the ingredients, making or "cooking" methamphetamine, and then using and distributing the methamphetamine. They all testified that they spent much of Christmas Day in 2003 preparing for a "cook" that night and that when Anthony got sick, Malone decided to go ahead. Malone left late that night, in Sturdevant's white Geo Spectrum, to complete the cook on his own.

Tyson Anthony testified that Malone appeared in his bedroom about 8:00 a.m. on the morning of December 26 and said that he had shot someone and needed Anthony to hide his sister's car. Anthony hid the car behind a day care, about 100 yards from their trailer. Anthony testified that he saw Malone again around 5:00 p.m. that night, that Malone had already partially shaved his head, and that he asked Anthony to go get him some bleach to dye his hair, which Anthony did. Later that night Anthony went with Malone to a hotel in Norman, and Malone told him more about what had happened. Malone showed him the gun he had used, which Malone said belonged to "the cop." Anthony testified that Malone also referred to the officer as a "Hi–Po," meaning a highway patrolman. Anthony acknowledged that he himself put the gun in a hotel trash can and covered it up with trash. Anthony left the hotel and went home, but later called Malone, who was still there, and suggested that he might be able to use the gun to frame someone else.

J.C. Rosser testified that when Malone came home on the morning of December 26, 2003, he had a handcuff on his right wrist, bruising on his hands, and some blood on his shirt. Malone told Rosser that he had "killed a cop." Malone asked Rosser to give him a ride to his home in Duncan, which Rosser agreed to do. Rosser testified that he and his wife got in the car and that Malone came out wearing different clothes and carrying a white plastic garbage bag. They stopped at Sturdevant's car, and Malone retrieved a big black case from it. They also stopped at a wooded area on Camel Back Road, where Malone got out and disposed of the white bag. J.C. Rosser testified that on the way to Duncan, Malone told the Rossers that he had killed a state trooper and that he "was real sorry." Rosser testified that he dropped Malone

off on the back side of his Duncan home and that he and Jaime went in through the front. They waited in the garage while Malone got the big black case and a gun out of the car and then waited while Malone got his own handcuff key. Malone showed them a "black Glock," saying it was the one he'd used to kill the trooper. Rosser testified that the gun had blood and grass and hair on it. Malone also told Rosser that he "fucked up" and was "sorry."

Jaime Rosser testified that her husband woke her around 8:30 a.m., on December 26, 2003, and insisted she go with him to Duncan. She waited in the car with her husband until Malone came out with a white garbage bag and got in the back seat. Rosser testified that on the way to Duncan, Malone stated, "I killed him. I killed him. I killed a cop." When she turned to look at him, she saw that he had a handcuff on his right wrist. Rosser testified that Malone said he had shot "a Hi–Po" two times in the head and that on the first shot, "the bone part of the skull stuck to the gun, and so [I] shot it again to get the gun clean." Jaime Rosser testified consistently with her husband regarding Malone disposing of the white bag and their time in his home that morning. She also testified that when she saw Malone back at the trailer that night, he could tell she was upset and told her, "Don't think of it as me killing him; think of him as an animal and I was hunting." Malone also told her that he had gotten everything "cleaned up" and that "there shouldn't be anything left out there to identify [me]." When Rosser asked him, "What about the tape?" referring to the patrol car videotapes often seen on TV, Malone responded, "Oh, fuck."

Tammy Sturdevant, Malone's sister, also testified. She recalled that Malone borrowed Anthony's black handgun before leaving to do the cook on Christmas Night, "just in case there was trouble." She next saw her brother at around 8:00 a.m. the next morning, when he came into her bedroom and said, "I need your help. I need you to call your car in stolen. I—I shot a trooper." Malone then told her and Anthony the details of what had happened. Sturdevant testified that Malone had a handcuff hanging from his right wrist, which was bruised and swollen, and

his hands were cut. Sturdevant acknowledged that she got Malone the white trash bag for his clothes, and later that day she dyed his hair blond and cut it. Sturdevant testified that she, her brother, and all of the occupants of her trailer were heavily into methamphetamine in December of 2003, that methamphetamine distribution was their sole source of income, and that they were all "high all the time," from December 20, 2003, until the morning of the shooting.

By December 29, 2003, investigators had found the car driven by Malone, recovered his clothes on Camel Back Road, and obtained significant information from J.C. Rosser and Tyson Anthony about Malone's involvement in the killing of Trooper Green. In an interview on this date, Malone acknowledged that what Anthony had told investigators—that Malone had killed the trooper, that he shouldn't have done so, and how it happened—was "true" or "probably true." When pressed to take responsibility himself, Malone responded, "I can't—I can't say. If I say anything, I'm going to get the death penalty." Later in the interview Malone stated, "Well, maybe it was an accident."

Malone testified at trial. He provided a history of his involvement with drugs, legal and illegal, beginning with steroids to get bigger when he was a firefighter, including Prozac to combat depression when his marriage was in trouble, and then Lortabs, which began with a football injury but developed into an addiction. Malone testified that he began using methamphetamine in April of 2002, around the time his mother died. He described the effects of the drug and how his usage of methamphetamine, like his usage of pain pills, increased over time. He acknowledged that by October of 2003, his methamphetamine addiction had caused him to be fired from his jobs at the fire department and as an EMT with an ambulance service, and that all of his income was coming from making and selling methamphetamine. Malone claimed that he didn't sleep from December 4 through December 26, 2003, due to being continuously "amped up on meth," and that he was hearing voices and seeing things during this time.

Regarding the night of December 25, 2003, Malone described hearing voices and seeing "people jumping ... around" as he was stealing and transporting the anhydrous ammonia needed for the cook. He testified that while in the middle of the cook, his back started hurting, so he took some Lortabs and then passed out. He described waking up to a gun and a flashlight in his face and testified that he thought he was about to get robbed or killed. Malone repeatedly denied that he knew Green was connected with law enforcement, until after he had killed him. He described finding a gun and the other man begging him not to shoot. Malone testified that the other man kept trying to get up and that the "voices in my head" told him to shoot him, because the man was "going to get me." So he shot him.

Dr. David Smith, a California physician specializing in addiction medicine, testified as an expert witness on Malone's behalf. He provided extensive testimony on his own expertise, particularly regarding methamphetamine, on genetic predisposition to addiction and depression, and on the science of how methamphetamine affects the brain. In particular, Smith explained how when someone is extremely "intoxicated" on methamphetamine, to the point of "amphetamine psychosis," the effect on the person is comparable to paranoid schizophrenia. He explained that like paranoid schizophrenia, amphetamine psychosis can include auditory and visual hallucinations, where an individual will respond to non-existent environmental stimuli or threats. Dr. Smith also described less severe, but still serious methamphetamine effects, including a "rage reaction," where the individual responds to an actual threat, but overreacts.

Dr. Smith testified that he had met with Malone the previous day (a Sunday) and reviewed various materials associated with the case, including the Dashcam video. Smith testified about the substantial history of addiction and depression in Malone's family and the history and extent of Malone's drug abuse, including how much he was using and its effect on his life at the time of the shooting. Smith described the time Malone was convinced he had seen Big Foot, whom Malone thought was after him, which Smith indicated was an example of someone

> experiencing amphetamine psychosis. He also recounted that Malone was smoking methamphetamine "every hour" and was "hearing voices" and "seeing things" on the night before and morning of his encounter with Green. Dr. Smith concluded that Malone was most likely in a state of "amphetamine psychosis" on the morning of the shooting, making him likely to engage in "crazy, irrational violence." He further testified that he did not think Malone could have formed the intent to commit first-degree murder.

Malone, 168 P.3d at 189-95 (paragraph numbers omitted).

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to decide whether the OCCA acted contrary to clearly established federal law when it found that the trial court committed plain error that was harmless in instructing Petitioner's jury. Petitioner repeatedly told the Tenth Circuit that this question was "superfluous." By his own admission, then, Petitioner has failed to raise a compelling question that requires this Court's review. Petitioner also complains that the Tenth Circuit did not expressly assert, in denying his cumulative error claim, that the errors he raised did not have a synergistic effect. Petitioner's pursuit of opinion-writing standards for federal courts of appeal is not worthy of a writ of certiorari. This Court should deny the instant petition.

I

THIS COURT DOES NOT ANSWER "SUPERFLUOUS" QUESTIONS.

A. Background of Petitioner's Claim

As described in the statement of facts, Petitioner murdered a Highway Patrol Trooper who attempted to arrest him as he cooked methamphetamine. Petitioner did not deny that he killed Trooper Green; the Trooper's Dashcam video and Petitioner's numerous admissions to the killing precluded an actual innocence defense. Instead, Petitioner claimed he was too intoxicated—on methamphetamine and Lortab—to form the specific intent to kill necessary for a first degree murder conviction.

The trial court instructed the jury on the defense of voluntary intoxication and the lesser offense of second degree murder. However, the voluntary intoxication instructions admittedly contained errors. The primary error was in Instruction No. 38, which provided:

> The crime of murder in the first degree has [as] an element the specific criminal intent of **Mens Rea**. A person i[s] entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

(O.R. III 524) (emphasis added). The instruction should have specified the "mens rea" to be "malice aforethought." *Malone*, 168 P.3d at 197-98.

The OCCA determined that Petitioner had presented sufficient evidence—*i.e.,* a prima facie case—to entitle him to voluntary intoxication instructions. *Malone*, 168 P.3d at 196. Noting the State's concession that the instructions

contained errors, the OCCA reviewed for plain error in light of trial counsel's failure to object. *Malone*, 168 P.3d at 197.

The OCCA found the instructions to be erroneous, but harmless in light of the arguments of counsel and the evidence that Petitioner intended to kill Trooper Green. *Id*. at 201-03. The federal district court agreed that the evidence of intoxication "pale[d] in comparison" to the evidence of malice and there was "no doubt" Petitioner would have been convicted even with proper instructions. Memorandum Opinion dated 11/28/2016, docket number 73 at 26, 28. The Tenth Circuit held that Petitioner had failed to satisfy the requirements of the Antiterrorism and Effective Death Penalty Act (28 U.S.C. § 2254) ("AEDPA") for two reasons: "[f]irst, despite the incorrect instruction, the jury could not have had any question about what it had to decide. Second, no reasonable jury could have decided otherwise [that Petitioner was incapable of forming malice aforethought] on the evidence at trial." *Malone*, 911 F.3d at 1033. In particular, the Tenth Circuit described the evidence of Petitioner's intent as "extraordinary" and "compelling." *Id*. at 1036.

B. This Court does not Answer "Superfluous" Questions

Petitioner argued below that the OCCA's finding of error that was plain, but harmless, was contrary to *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995) because Oklahoma's test for plain error contains a prejudice element. 8/2/2018 Supplemental Brief of Petitioner ("Supp. Br.") at 6-8. There are many reasons, which will be discussed below, that Petitioner's complaint about the Tenth Circuit's

rejection of this argument does not present a compelling question. However, first and foremost, Petitioner has admitted that his first question presented is not a compelling one.

The Tenth Circuit initially granted a certificate of appealability "limited to whether giving the erroneous voluntary intoxication instructions was harmless error under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)[.]"[2] 6/23/2017 Order. Respondent acknowledged state law error in the jury instructions—and that the OCCA had even found constitutional error—but argued: that the claim failed for lack of clearly established federal law; that (assuming the existence of clearly established federal law) there was no constitutional error; and that (assuming the existence of constitutional error) the OCCA reasonably applied *Chapman v. California*[3] and found the error harmless. 5/22/2018 Brief of Respondent-Appellee at 19-41.

In his reply brief, Petitioner urged the Tenth Circuit to apply *Brecht* and bypass AEDPA review of the OCCA's harmless error determination. 7/20/2018 Reply Brief of Petitioner/Appellant at 9 ("Reply"). Petitioner later argued that Respondent's reliance on a factual finding made by the OCCA which was supportive of its harmless error determination was "superfluous" because it "makes no sense"

[2] Pursuant to *Brecht*, habeas relief may not be granted unless a constitutional error had a substantial and injurious effect on the verdict. *Brecht*, 507 U.S. at 637-38. This Court later clarified that relief may be had where a reviewing court is in grave doubt about whether the error had a substantial and injurious effect on the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995).

[3] *Chapman v. California*, 386 U.S. 18, 24 (1967) (the harmless error standard for constitutional errors brought on direct appeal is whether the error is harmless beyond a reasonable doubt)

to apply AEDPA to the OCCA's *Chapman* analysis where *Brecht* subsumes that "AEDPA/*Chapman*" analysis. Reply at 13 n.8.

The Tenth Circuit subsequently modified the certificate of appealability to include "whether the erroneous voluntary intoxication instructions deprived the appellant of the constitutional right to a fair trial." 7/18/2018 Order. Petitioner then argued, in a supplemental brief, that the OCCA's decision was contrary to *Kyles*. Supp. Br. at 5-8. However, Petitioner noted that his argument "may be largely superfluous for this claim because the *Brecht* test subsumes the reasonableness inquiry of the AEDPA." Supp. Br. at 6 n.5. Petitioner reiterated this theme in his supplemental reply brief: "*Brecht*'s harmless error determination subsumes the reasonableness inquiries of the AEDPA such that a discussion of clearly established federal law is superfluous[.]" 8/23/2018 Supplemental Reply Brief of Petitioner/Appellant ("Supp. Reply Br.") at 2. Petitioner further described his "contrary to" argument as "unnecessary, given *Brecht*'s mechanics in the AEDPA context[.]" Supp. Reply Br. at 4 n2.

"A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Petitioner has repeatedly described his own question presented as "superfluous." There is nothing compelling about a question that is unnecessary to the lower court's judgment. *See* https://thelawdictionary.org/superfluous/ (defining "superfluous" as "Extra to an extent of being not necessary."). In fact, this Court's

> only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And

> [this Court's] power is to correct wrong judgments, not to revise opinions. [This Court is] not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [this Court's] review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945)[4]; *see The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (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."); *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821) (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.").

Petitioner states that, "[a]ssuming certiorari is granted, a likely result would be a remand to the Tenth Circuit Court of Appeals to consider the instructional errors affecting the voluntary intoxication defense de novo and absent AEDPA constraint." Pet. at 18. Yet, as Petitioner readily conceded below[5], *Brecht* subsumes AEDPA review of a state court's application of *Chapman*. *Fry v. Pliler*, 551 U.S. 112, 120 (2007). The Tenth Circuit held that Petitioner had failed to establish that the OCCA's decision was contrary to, or an unreasonable application of, *Chapman*. *Malone*, 911 F.3d at 1031-37. Thus, if this Court were to remand the case for the

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[4] Although *Herb* involved a state court judgment, its reasoning applies equally to certiorari petitions which ask this Court to answer "superfluous" questions in the habeas context.

[5] *See* Reply at 9 ("it is sufficient for [the Tenth Circuit] to apply *Brecht* alone. This is so because *Brecht* and its more stringent substantial and injurious effect standard 'subsumes the limitations imposed by AEDPA.'" (quoting *Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2199 (2015))); *see also* Reply at 13 n.8; Supp. Br. at 6 n.5; Supp. Reply Br. at 2, 3.

Tenth Circuit to review de novo, the Tenth Circuit would be compelled to find the error harmless under *Brecht*.[6] *Cf. Greer v. Miller*, 483 U.S. 756, 765 (1987) (this Court was "convinced" that the state court would have found no due process violation because the state court found the alleged error harmless under the "more demanding" *Chapman* test). Petitioner's request that this Court remand his case so that the Tenth Circuit can again find the error harmless "makes no sense." *See Fry*, 551 U.S. at 120 ("it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former").[7] Petitioner has failed to present a compelling question, and his request for a writ of certiorari should be denied.

C. Petitioner Fails to Present a Compelling Question, Even Absent the Superfluous Nature of His Request

There are additional reasons to reject the petition. First, Petitioner is complaining, almost exclusively, about the OCCA's decision. *See* Pet. at 9-18.

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[6] Indeed, the error in this case would be harmless under any standard. Although a complete discussion of the evidence is unwarranted at this stage of the proceedings, suffice it so say that Petitioner threatened to kill Trooper Green and then shot him twice in the head, with eleven seconds between the shots (State's Ex. 1 (dashcam video on which Petitioner tells Trooper Green that if he does not know where the keys are to the handcuffs attached to one of Petitioner's wrists, "[t]hen you'll die"); 2005 Tr. III 632, 826). Petitioner admitted at trial that he fired the second shot to make sure Trooper Green was dead (2005 Tr. III 718-19). *See Malone*, 911 F.3d at 1036 (characterizing the evidence that Petitioner intended to kill Trooper Green as "extraordinary"). The OCCA also quite reasonably determined that neither Petitioner nor his expert witness were credible when they testified that Petitioner was incapable of forming the intent to kill. *Malone*, 168 P.3d at 202-03.

[7] Although this Court later clarified that, when the state court has found a constitutional error harmless, the restrictive standards of AEDPA still have a role to play, this Court did not overrule *Fry*. *See Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2198 (2015). In fact, this Court quoted *Fry*'s assertion that federal courts are not required to formally apply both *Brecht* and "'AEDPA/*Chapman*'" and reiterated that *Brecht* subsumes "AEDPA/*Chapman*." *Id*.

Petitioner asks this Court to grant the writ "to ensure state courts do not impose a doubly burdensome showing of harm upon defendants who have already established a prejudicial constitutional error." Pet. at 15 (bold and capitalizations removed). Yet, Petitioner is not before this Court on direct review. Petitioner scarcely acknowledges the Tenth Circuit's decision, much less attempts to demonstrate that the Tenth Circuit decided an important question of federal law in a way that conflicts with a decision of this Court. *See* Pet. at 16-18. As will be discussed below, Petitioner relies solely upon one unpublished decision from the OCCA in his attempt to show that the Tenth Circuit erred. For this reason, Petitioner fails to present a compelling federal question that can be resolved by reviewing the Tenth Circuit's decision.

Second, the Tenth Circuit properly applied AEDPA. That court determined that, when the OCCA found plain error, the state court determined that "the error [wa]s plain or obvious."[8] *Malone*, 911 F.3d at 1032 (quoting *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006)). The court concluded that "[i]t makes no sense to say that when the [OCCA] declares that this element is satisfied—that is, there has been a determination that an error was 'plain'—it is necessarily declaring also that the defendant has satisfied the separate requirement that the error affected his substantial rights." *Id.*

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[8] Under Oklahoma law, plain error requires: "1) the existence of an actual error (i.e., deviation from a legal rule); 2) that the error is plain or obvious; and 3) that the error affected [the defendant's] substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 139 P.3d at 923.

In challenging the Tenth Circuit's decision, Petitioner complains that the OCCA did not "specifically limit its finding" to the first prong of the plain error test.[9] Pet. at 17. However, the OCCA also did not indicate that Petitioner had satisfied every prong of the test. The Tenth Circuit, therefore, properly gave the OCCA the benefit of the doubt. *See Lafler v. Cooper*, 566 U.S. 156, 183 (2012) (finding the court of appeals' "readiness to find error" on habeas review to be "'inconsistent with the presumption that state courts know and follow the law'") (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)); *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (*per curiam*) (under AEDPA, federal courts must give state court decisions the benefit of the doubt).

Petitioner attempts to demonstrate that the Tenth Circuit was incorrect by pointing to a single unpublished opinion by the OCCA which he did not cite in his briefing below. Pet. at 17-18. *See* Supp. Br. at 5-8; Supp. Reply Br. at 1-7. However, this case cuts against Petitioner's argument. In *Heathco*, the OCCA expressly found "the error was plain and obvious *and affected a substantial right*. Thus, it constitutes plain error." Pet. App. I at 9 (emphasis added). The OCCA did

[9] Petitioner notes that Respondent did not argue below that the OCCA's finding of plain error was limited to the first prong of the test. Pet. at 16 n.6. Petitioner does not, however, explain the significance of that fact or argue that the Tenth Circuit was somehow precluded from holding as it did. Respondent chose to focus on the glaring absence of constitutional error. *See* 8/16/2018 Supplemental Brief of Respondent-Appellee at 2-15. However, the Tenth Circuit was authorized to affirm the district court's denial of habeas relief on any basis supported by the record. *Newmiller v. Raemisch*, 877 F.3d 1178, 1194 (10th Cir. 2017); *see also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (recognizing "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason'"); *cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) (permitting federal courts of appeal to *sua sponte* raise the statute of limitations).

not explicitly find that the instructional error in Petitioner's case affected a substantial right.[10]

Petitioner has completely failed to demonstrate that the Tenth Circuit was incorrect, much less that it decided an important question of *federal* law in a way that conflicts with a decision by this Court. In fact, the Tenth Circuit's interpretation of the OCCA's decision did not implicate any important question of federal law. This is true as to both: whether the OCCA found only the first prong, or all three prongs, of plain error; and whether, assuming the OCCA did find all three prongs satisfied, the error could be harmless.

As to the first question, whether the OCCA's finding of plain error in Petitioner's case was meant to encompass the entire plain error test or only the "plain error" prong of that test is, quite obviously, not a federal question. As to the second question, Petitioner does not claim to have a federal constitutional right—much less one that it "clearly established", *see* 28 U.S.C. § 2254(d)(1)—to have

[10] It is not clear whether the OCCA further meant, in *Heathco*, that the error affected the outcome of Heathco's trial. True, the third prong of the plain error test is "that the error affected [the appellant's] substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006). Yet, the majority in *Heathco* recited the third prong as only, "the error affected [the appellant's] substantial rights." Pet. App. I at 7. Moreover, when the court found plain error, it did not discuss *at all* the effect the error might have had on the trial's outcome. Rather, the court determined that, "[b]ased on the language of [Oklahoma's] statutes"—which the court determined required a verdict form to provide options of "Not Guilty" and "Not Guilty by reason of insanity"—Heathco's substantial rights were affected when the trial court gave only the option of "Not Guilty by reason of insanity." Pet. App. I at 8-9. The OCCA then found the error harmless because "no rational trier of fact could have returned a simple verdict of acquittal" and "the complained error did not contribute to the jury's verdict." Pet. App. I at 11. This further confirms that the court had not found the entire plain error test satisfied. In any event, as will be discussed further, Petitioner's request for relief is so dependent on the OCCA's interpretation of its own state law plain error standard as to be beyond reach in this habeas proceeding.

errors waived at trial reviewed in state court for plain error, much less under a particular plain error test. Nor does any case from this Court clearly establish that an error which is found by a state court to be a plain error may not also be determined to be harmless.

In *Kyles*, this Court determined that when a habeas petitioner demonstrates that there is a reasonable probability that suppressed evidence could have altered the outcome of trial, the *Brecht* standard for harmless error is necessarily satisfied. This is so because the reasonable probability standard is a greater showing of harm than *Brecht*'s substantial and injurious effect standard. *Kyles*, 514 U.S. at 436.

However, *Kyles* does not clearly establish that a standard for proving error which includes a prejudice component may never be subjected to harmless error review. In fact, even an error which deprives a defendant of a fundamentally fair trial may be harmless under *Chapman*. *See Greer*, 483 U.S. at 765 n.7 (describing *Chapman* as "more demanding than the 'fundamental fairness' inquiry of the Due Process Clause").

Since Petitioner's first direct appeal was decided, the OCCA has made clear that, when an alleged plain error is of constitutional dimension, it applies *Chapman* to determine whether the third prong of its plain error test is satisfied.[11] *Barnard v. State*, 290 P.3d 759, 764 (Okla. Crim. App. 2012); s*ee also Baird v. State*, 400 P.3d 875, 881 (Okla. Crim. App. 2017) ("Because the alleged error [which was waived for all but plain error review] is of constitutional dimension, we review Appellant's

[11] If this is the way the OCCA understood its plain error test at the time of Petitioner's first direct appeal, such confirms the Tenth Circuit's conclusion that, when the OCCA found "plain error" in his case, it meant only that the error was plain or obvious.

claim to determine whether any error was harmless beyond a reasonable doubt."); *Logsdon v. State*, 231 P.3d 1156, 1166 (Okla. Crim. App. 2010) (holding that an error did not affect the outcome of the proceeding, for purposes of plain error review, if the error was harmless).

Admittedly, Respondent has been unable to find a case which pre-dated Petitioner's first direct appeal in which the OCCA made clear that a constitutional error affects substantial rights, for purposes of plain error review, if it is not harmless beyond a reasonable doubt. However, Petitioner bears the burden in this habeas proceeding to establish that the OCCA's application of *Chapman* in his case represented an "extreme malfunction[]" in Oklahoma's criminal justice system. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Petitioner's speculation that the OCCA must have found all three elements of its plain error test satisfied, and must have applied a standard that was more stringent than *Chapman* in doing so, is insufficient to satisfy this burden. *Cf. Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) ("Even if we were to make the unlikely assumption that the jury might have reached a different verdict pursuant to an additional instruction [the omission of which the petitioner claimed was error], that possibility is too speculative to justify the conclusion that constitutional error was committed."). At the very least, the lack of clarity makes this case a very poor vehicle for determining whether "subjecting an acknowledged plain error to a second round of harmlessness review" is contrary to clearly established federal law.

Finally, Petitioner's case is a poor vehicle for his question presented because it is far from clear whether the error about which he complains is subject to redress on habeas. There is no federal constitutional right to a voluntary intoxication defense. *Montana v. Egelhoff*, 518 U.S. 37, 41-61 (1996). The OCCA's decision affirming Petitioner's conviction in spite of state law errors in the voluntary intoxication instructions cannot, therefore, have been contrary to, or an unreasonable application of, clearly established federal law. *See Woods v. Donald*, ___ U.S. ___, 135 S. Ct. 1372, 1374 (2015) (*per curiam*) (reversing a grant of habeas relief because "no decision from this Court clearly establishe[d]" that the petitioner was entitled to relief); *see also Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'") (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)).

Although this Court has reviewed errors in jury instructions to determine whether they deprived a habeas petitioner of due process,[12] this Court has never applied that standard to voluntary intoxication instructions. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006) (finding no clearly established federal law where this Court had never applied the test for State-sponsored courtroom conduct to private-actor conduct). In light of *Egelhoff*'s holding that the due process clause does not require States to recognize a voluntary intoxication defense, it cannot be said that all fairminded jurists would conclude that errors in voluntary intoxication instructions may amount to constitutional error under the federal due process

[12] *See Kibbe*, 431 U.S. at 153-57 (reviewing to determine whether the state court's failure to instruct the jury regarding causation in a second degree murder prosecution so infected the trial as to violate due process).

standard. *See White v. Woodall*, 572 U.S. 415, 427 (2014) ("relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question") (quoting *Richter*, 562 U.S. at 103).

Even assuming Petitioner could clear this "clearly established law" hurdle, he has utterly failed to show constitutional error. "[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief." *McGuire*, 502 U.S. at 71-72. A jury instruction violates due process only if "'there is a reasonable likelihood that the jury ha[d] applied the challenged instruction in a way' that violates the Constitution." (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)) (alteration added). Once again, the instructions in this case cannot have violated the constitution, as Petitioner has no constitutional right to a voluntary intoxication defense. Setting that aside, however, there is no reasonable likelihood the jury applied the instructions in a way that prevented them from considering Petitioner's defense.

Petitioner's jury was instructed that:

> The crime of murder in the first degree has [as] an element the specific criminal intent of **Mens Rea**. A person i[s] entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

(O.R. III 524) (emphasis added).[13] The instruction should have specified the "mens rea" to be "malice aforethought." *Malone*, 168 P.3d at 197-98. Although this instruction was incorrect,

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions *in light of all that has taken place at the trial* likely to prevail over technical hairsplitting.

Boyde, 494 U.S. at 380-81 (emphasis added).

Petitioner's trial attorney made a number of statements, without objection by the State, which more than adequately informed the jury of Petitioner's defense:

- Dr. David Smith (Petitioner's intoxication expert) believed Petitioner "could not have formed the intent with malice aforethought to kill Mr. Green." (2005 Tr. IV 1233).

- Petitioner was "a person who cannot form the intent to commit a murder" and "a person who does not have the intent to kill someone in law enforcement." (2005 Tr. IV 1234).

- "And what does [methamphetamine] do to your brain? Dr. Smith again said that he cannot form -- could not form the intent." (2005 Tr. IV 1245-46)

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[13] In addition, the instructions included a superfluous definition of "Incapable of Forming Special Mental Element" as "the state in which one's mental powers have been overcome through intoxication, rending it impossible to form the special state of mind known as willfully." (O.R. III 527). The OCCA found this error "not significant" as "[t]he phrase 'special mental element' was not otherwise used" in the jury instructions. *Malone*, 168 P.3d at 199 n.63. Petitioner appears to agree as he has now relegated his complaint about this instruction to a footnote. Pet. at 11 n.3.

- "He was a paranoid schizophrenic when he was on that road and he was awakened by Nik Green. He could not form the intent. Murder – malice aforethought means just that. You must intend to kill the person." (2005 Tr. IV 1246).

- "[Petitioner] [w]as not able to form the intent to commit premeditated murder because his brain is on methamphetamine and Lortab. Voluntary intoxication. And you received an instruction about that." (2005 Tr. IV 1248).

- "We would submit to you that Mr. Malone was so intoxicated on methamphetamine and Lortab that he did not and could not have physically formed the thought, whether that be a second before, an hour before, or a day before, to kill Trooper Nik Green." (2005 Tr. IV 1253).

Petitioner has never rebutted the OCCA's factual finding that "despite the inadequacy of the jury instructions, no juror could possibly have been unaware that Malone's defense was voluntary intoxication and that he should prevail on this defense if he could establish that due to his drug-induced intoxication, he did not deliberately intend to kill Green." *Malone*, 168 P.3d at 201; *see* 28 U.S.C. § 2254(e)(1) (a state court's factual findings are presumed to be correct and the habeas petitioner must rebut this presumption by clear and convincing evidence). Accordingly, Petitioner has failed to demonstrate a reasonable likelihood that his jury applied the voluntary intoxication instructions in a way that violated the constitution.

The lack of constitutional error makes Petitioner's case an exceptionally poor vehicle for determining whether a state court may find a plain error harmless. For all of the foregoing reasons, Respondent asks this Court to deny Petitioner's request for a writ of certiorari.

II

THIS COURT'S POWER IS TO CORRECT WRONG JUDGMENTS, NOT TO REVISE OPINIONS

Petitioner's second question presented asks whether federal courts must "consider the synergy amongst acknowledged errors, when such individual errors have failed to satisfy their substantive prejudice components, in assessing whether the cumulative effect of the errors results in a constitutional violation." Pet. at ii. Petitioner seeks merely to have this Court order the Tenth Circuit to rewrite its opinion to state either, that it found no synergy amongst the errors, or that it found any synergy insufficient to warrant habeas relief. Petitioner's attempt to impose opinion-writing standards on federal courts presents no compelling question for this Court's review. Petitioner's case is also a poor vehicle for his question presented, as he simply assumes that federal courts must review state court judgments for cumulative error, and that deficient performance by trial counsel—although not prejudicial—would be included in any such analysis. Petitioner's request for certiorari review should be denied.

A. This Court does not Order Courts that Applied the Proper Analysis to Rewrite Opinions

Petitioner argued below that the "cumulative effect" of the instructional error, as well as errors by counsel, deprived him of a fair trial. *Malone*, 911 F.3d at 1040. The Tenth Circuit denied the claim as follows:

> A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Claims should be included in a cumulative-error analysis even if they have been individually denied for insufficient prejudice. We have awarded relief when the errors had an inherent synergistic effect on the outcome.
>
> On direct appeal to the OCCA, Defendant argued that the accumulation of all the errors at his trial merited relief. The OCCA, however, considered only those errors stemming from Defendant's challenge to the intoxication jury instructions in ruling on Defendant's cumulative-error claim. We therefore choose to apply the *Brecht* harmless-error standard to Defendant's claim.
>
> Under that standard, we hold that the cumulative errors did not have a substantial and injurious effect or influence in determining the jury's verdict. The evidence against Defendant was far too compelling.

Malone, 911 F.3d at 1040 (internal citations and quotation marks omitted).

Petitioner alleges that the Tenth Circuit's "omi[ssion of] a discussion of the errors' combined synergistic effect" places that court in conflict with this Court, other courts of appeal and the Tenth Circuit's own precedent. Pet. at 24.

> [This Court's] power is to correct wrong judgments, not to revise opinions. [This Court is] not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its

> views of federal laws, [this Court's] review could amount to nothing more than an advisory opinion.

Herb, 324 U.S. at 125-26[14]; *see The Monrosa*, 359 U.S. at 184 (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."); *McClung*, 6 [19 U.S.] Wheat. at 603 (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.").

The Tenth Circuit's decision recognized that otherwise harmless errors might "ha[ve] an inherent synergistic effect on the outcome", *Malone*, 911 F.3d at 1040, and then found that Petitioner had failed to show cumulative error. Thus, Petitioner is complaining about the Tenth Circuit's failure to explicitly state that the alleged errors in his trial did not have a synergistic effect, or that any such effect was not substantial and injurious.

Although this Court has supervisory authority over the lower federal courts, *Dickerson v. United States*, 530 U.S. 428, 437 (2000), Petitioner has cited no authority—and Respondent is aware of none—which requires federal courts of appeal to write their opinions in a particular manner. Nor would such a rule make sense. So long as a court applies the proper test, there is nothing to be gained by requiring it to write its opinion in a certain manner. Moreover, such strict supervision would require all of this Court's time and attention.

[14] Although *Herb* involved a state court judgment, its reasoning applies equally to complaints about the failure of a federal court which reached the correct result to use a particular word or phrase.

This Court's power is to correct wrong judgments, not to revise opinions. Petitioner has failed to present a compelling question.[15]

B. Petitioner's Case is a Poor Vehicle for His Question Presented

Petitioner's question presented assumes that federal courts must review state court judgments for so-called "cumulative error". In addition, because Petitioner complains of only one trial court error, along with two allegations of ineffective assistance of trial counsel, his petition presupposes that any such cumulative error claim would include deficient performance by trial counsel that is not prejudicial. As neither of these assumptions are supported by this Court's cases, this Court cannot reach the question presented.

Petitioner argues that three of this Court's cases establish a right to cumulative error review. In *Chambers v. Mississippi*, 410 U.S. 284, 289 (1973), the trial court excluded evidence of a third party's confessions to the crime and refused to allow the defendant to treat the third party, whom he had called as a witness, as hostile and impeach his denial that he committed the crime. This Court found error

[15] Petitioner's allegation of intra- and inter-circuit conflicts is illusory. Petitioner states merely that "many circuits recognize[] and plac[e] heavy emphasis on the synergy" of otherwise harmless errors and includes a string cite of circuits which apply cumulative error review. Pet. at 23-24. Later, Petitioner cites a number of cases in which courts of appeal have discussed the synergistic effect of otherwise harmless errors. Pet. at 26-27. Petitioner then notes that he could not find similar language in opinions from several other circuits, or accuses these other circuits of being inconsistent although he cites none of their cases to prove this point. Pet. at 27. Petitioner fails to show that any court has rejected the "synergy" language he proposes should be mandatory. Much less has Petitioner shown that the Tenth Circuit failed to consider any synergy amongst the errors in his case. As shown above, the Tenth Circuit recognized its own law that errors might operate in a synergistic fashion. That court's denial of relief in Petitioner's case, therefore, indicates it either found no synergy, or that any such synergy did not violate Petitioner's constitutional right—if there is one—to be free from cumulative error. There is no circuit split for this Court to resolve.

in the trial court's refusal to allow the defendant to cross-examine the third party, but declined to decide whether this error alone "would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses." *Chambers*, 410 U.S. at 297-98. This Court concluded that the two errors denied the defendant a fair trial. *Id*. at 303. This Court, however, also stated that its decision "establish[ed] no new principles of constitutional law." *Id*.

In *Taylor v. Kentucky*, 436 U.S. 478, 479 (1978) the question was whether the due process clause requires trial courts to give jury instructions on the presumption of innocence and/or the fact that an indictment lacks evidentiary value. This Court concluded that, in light of arguments made by the prosecutor and the otherwise "skeletal" instructions on the burden of proof, the defendant's due process rights were violated by the trial court's denial of the defendant's requested instruction on the presumption of innocence. *Taylor*, 436 U.S. at 483-90.

Finally, Petitioner cites *Kyles*, in which this Court held that "the state's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government[.]" These cases do not establish a constitutional right to have a federal court combine independent errors, which are individually harmless, to determine whether their collective effect warrants relief.[16]

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[16] As further evidence that this Court has not established a right to cumulative error review, much less one that is clearly established, the Tenth Circuit is inconsistent as to the standard a habeas petitioner must satisfy to obtain relief. *Compare Littlejohn v. Royal*, 875 F.3d 548, 568 (10th Cir. 2017) (reviewing cumulative error claim under *Brecht*) *with Lott v. Trammell*, 705 F.3d

At most, *Chambers* might be read to establish the right to have a court consider two highly related evidentiary issues for a due process violation. However, as noted above, this Court specifically disavowed the notion that *Chambers* was creating any new constitutional rights. *Taylor* merely considered alleged instructional error in the context of the trial as a whole, and *Kyles* dealt with the question of when a prosecutor's obligation to disclose evidence arises. These cases do not establish a constitutional right to have appellate courts combine discrete errors looking for any synergistic effect they might have had. At the very least, Petitioner has not asked this Court to determine whether these cases establish a right to cumulative error review. Accordingly, this Court should not—indeed, cannot—determine what a lower court's opinion denying relief for cumulative error should look like.

Petitioner's assumption that claims of ineffective assistance of counsel would be included in a cumulative error claim is even more lacking in support. This Court has held that a defendant claiming ineffective assistance of counsel does not establish constitutional error unless he shows both that counsel made errors *and* that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution"). Accordingly, there is absolutely no basis in this Court's cases for including non-prejudicial errors made by defense counsel in any cumulative error review. *Cf. Littlejohn*, 704 F.3d at

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1167, 1222-23 (10th Cir. 2013) (reviewing cumulative error claim under a fundamental fairness standard).

868 (only constitutional errors may be considered in a cumulative error analysis).[17] Yet, Petitioner's question presented is dependent upon the inclusion of his ineffective assistance of counsel claims, as he complains of only one trial court error.

If this Court believes it needs to decide whether federal appellate courts must expressly determine whether errors operate in a synergistic fashion, it should await a case in which it can properly reach that question. This is not such a case, as there is no established constitutional right to plain error review.

Finally, this Court should deny review as the alleged errors did not prejudice Petitioner under any standard.[18] As indicated above, the evidence that Petitioner intended to kill Trooper Green was overwhelming, and included Petitioner's admission at trial that he intended to kill the trooper when he fired the second shot. This Court corrects errors in judgments, not opinions. Petitioner's request for certiorari review should be denied.

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[17] In spite of this recognition, the Tenth Circuit does include deficient performance by counsel which was not prejudicial in its cumulative error analysis. *Cargle v. Mullin*, 317 F.3d 1196, 1200 (10th Cir. 2003).

[18] Petitioner's second alleged error is that counsel failed to object to the admitted errors in the voluntary intoxication instructions. It is unclear how this alleged error could add anything to the errors in the instruction itself. Although Petitioner claims defense counsel "solidified the jurors' confusion", Pet. at 19, Respondent showed above that counsel's arguments made it abundantly clear that Petitioner's voluntary intoxication defense depended upon his ability to form the intent to kill. Petitioner's third alleged error involves counsel's failure to have his expert witness meet with Petitioner until after trial began. According to Petitioner, this decision "resulted in new facts coming to light—contrary to those defense counsel had previously provided the expert." Pet. at 20. In fact, what came to light is that Petitioner had been lying all along when he claimed not to remember the murder (2005 Tr. IV 1116-18, 1121-22). As found by the Tenth Circuit, it is likely that the State's efforts to impeach Petitioner and his expert would have been equally as successful had Petitioner's lie been revealed before trial, rather than during trial. *See Malone*, 911 F.3d at 1040. The Tenth Circuit also correctly concluded that in spite of any adjustments in the defense, "the evidence of the crime would have compelled the jury to convict." *Id*.

CONCLUSION

Petitioner has presented no compelling questions for this Court's review. Petitioner's first question presented is, by his own admission, superfluous. Petitioner's second question presented merely complains about the wording of the Tenth Circuit's opinion. For all of the foregoing reasons, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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