Case No. 19-5298

IN THE SUPREME COURT OF THE UNITED STATES

KENDRICK ANTONIO SIMPSON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review Petitioner's claim that the application of double deference to his ineffective assistance of counsel claim by the Tenth Circuit is improper under AEDPA where this Court itself has clearly applied double deference to the prejudice prong?

2. Whether this Court should grant a writ of certiorari on an issue that was never passed upon by the Tenth Circuit Court of Appeals?

3. Whether this Court should grant a writ of certiorari to review Petitioner's claim that his jury was improperly limited in its consideration of mitigating evidence where Petitioner merely disagrees with the Tenth Circuit's application of a properly stated rule of law?

No. 19-5298

IN THE
SUPREME COURT OF THE UNITED STATES

KENDRICK ANTONIO SIMPSON,

***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 Kendrick Antonio Simpson's, (hereinafter referred to as Petitioner), petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on December 27, 2018, *Simpson v. Carpenter*, 912 F.3d 542 (10th Cir. 2018), Pet'r Appx. A.[1]

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

STATEMENT OF THE CASE

An Oklahoma jury convicted Petitioner of two counts of First Degree Murder.[2] The jury sentenced Petitioner to death for both finding the following aggravating circumstances: (1) Petitioner was previously convicted of a felony involving the use or threat of violence; (2) that Petitioner knowingly created a great risk of death to more than one person; (3) the murders were especially heinous, atrocious, or cruel;[3] and (4) that Petitioner was a continuing threat to society. *See* Okla. Stat. tit. 21, § 701-12.

Petitioner's "STATEMENT OF THE CASE" is improper in multiple respects, as it is argumentative and repeatedly alleges facts not relevant to the issue for which certiorari review is requested. Petition at 4-8; *see* Rule 14(1)(g), *Rules of the Supreme Court of the United States* ("A petition for a writ of certiorari shall contain . . . [a] concise statement of the case setting out the facts material to consideration of the questions presented . . . ."). Moreover, Petitioner's factual assertions contain minimal citations to the record. Petition at 4-8. While this Court's rules do not expressly require citations to the record in certiorari petitions, Petitioner's failure to include citations to the majority of his factual assertions makes it much more difficult for

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[2] The jury also found Petitioner guilty one count of Discharging a Firearm with Intent to Kill and Felonious Possession of a Firearm (O.R.584-587, 612). Petitioner was sentenced to life imprisonment on Discharging a Firearm with Intent to Kill and ten years on Felonious Possession of a Firearm (O.R.584-587, 612).

[3] This aggravating circumstance was stricken with regard to the murder of Anthony Jones on appellate review as the jury was improperly instructed. The State of Oklahoma did not allege this aggravating circumstance applied to this murder and no evidence was presented to support same. *Simpson v. State*, 230 P.3d 888, 903 & n.10 (Okla. Crim. App. 2010), *cert denied. Simpson v. Oklahoma*, 562 U.S. 1185 (2011), Pet'r Appx. D.

Respondent to fulfill his obligation to "address any perceived misstatement of fact . . . in the petition . . . ." Rule 15(2), *Rules of the Supreme Court of the United States*. Therefore, Respondent in general disagrees with Petitioner's facts and, instead, would direct this Court to the Oklahoma Court of Criminal Appeals's ("OCCA") factual summary of the case as set forth in its published opinion. *Simpson*, 230 P.3d at 893-894. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:[4]

> On the evening of January 15, 2006, Jonathan Dalton, Latango Robertson and Appellant decided to go to Fritzi's hip hop club in Oklahoma City. Prior to going to the club, the three drove in Dalton's white Monte Carlo to Appellant's house so that Appellant could change clothes. While at his house, Appellant got an assault rifle which he brought with him.[FN3] Before going to Fritzi's, the men first went to a house party where they consumed alcohol and marijuana. When they left the party, Appellant put the assault rifle into the trunk of the Monte Carlo, which could be accessed through the back seat.
>
> FN3. There was testimony that this weapon was an AK-47 or SKS assault rifle.
>
> The three arrived at Fritzi's between midnight and 1:00 a.m. on January 16. Once inside, they went to the bar to get a drink. Appellant and Dalton also took a drug called "Ecstasy." After getting their drinks, Dalton and Robertson sat down at a table while Appellant walked around. When Appellant walked by London Johnson, Anthony Jones and Glen Palmer, one of the three apparently said something to him about the Chicago Cubs baseball cap that he was wearing. Appellant went back to the table and told Dalton and Robertson that some guy had given him a hard time about his cap. At some point, Appellant approached Johnson, Jones and Palmer again. During this encounter, Appellant told them that he was going to "chop" them up.[FN4] After making this threat, Appellant walked away. He returned a short time later and walked up to Palmer. Appellant extended his hand and said, "We cool." Palmer hit Appellant in the mouth knocking him to the floor.

[4] Petitioner is referred to as "Appellant" in the OCCA's discussion of the facts.

Appellant told Dalton and Robertson that he wanted to leave and the three of them left the club.

FN4. Johnson testified at trial that this meant to him that Appellant was going to shoot at them with a "chopper" which was an AK-47.

Out in the parking lot, Appellant, Dalton and Robertson went to Dalton's Monte Carlo. Before leaving, they talked with some girls who had come out of the club and were parked next to them. The girls told the men to follow them to a 7-11 located at NW 23rd Street and Portland. When they arrived at the store, Appellant, Dalton and Robertson backed into a parking space toward the back door and the girls pulled in next to the pumps. While the men were sitting in the Monte Carlo, they saw Johnson, Jones and Palmer drive into the parking lot in Palmer's Chevy Caprice. They recognized Palmer as the person who had hit Appellant at Fritzi's. Dalton told Appellant to "chill out" but Appellant was mad and wanted to retaliate against Palmer. When Palmer drove out of the parking lot onto 23rd Street and merged onto I-44, Appellant told Dalton to follow them.

While they were following the Chevy, Appellant, who was sitting in the front passenger seat, told Robertson, who was sitting in the back seat, to give him the gun. He told Robertson that if he had to get the gun himself, there was going to be trouble. Robertson reached through the back seat into the trunk and retrieved the gun for Appellant. Dalton followed the Chevy as it exited the interstate onto Pennsylvania Avenue. He pulled the Monte Carlo into the left lane beside the Chevy as they drove on Pennsylvania Avenue and Appellant pointed the gun out his open window and started firing at the Chevy.

When the Chevy was hit with bullets, Palmer was driving, Jones was sitting in the front passenger seat and Johnson was in the back seat. Johnson heard about twenty rapid gun shots and got down on the floor of the car. He did not see the shooter but noticed a white vehicle drive up beside them. The Chevy jumped the curb and hit an electric pole and fence before coming to a stop. Palmer and Jones had been shot. Jones had been shot in the side of his head and torso and was unconscious. Palmer had been shot in the chest. He was initially conscious and able to talk but soon lost consciousness when he could no longer breathe. Johnson tried to give both Jones and Palmer CPR but was unsuccessful. He flagged down a car that was driving by and asked the driver to get help. Both Palmer and Jones died at the scene from their gunshot wounds.

> After he fired at the Chevy, Appellant said, ["I'm a monster. I'm a motherfucking monster. Bitches don't want to play with me].[5] Dalton kept driving until they reached a residence in Midwest City where he was staying. They dropped the gun off and switched cars, and then Dalton, Robertson and Appellant went to meet some girls they had talked to at Fritzi's.

Simpson, 230 P.3d at 893-894 (paragraph numbering omitted).

The OCCA affirmed Petitioner's convictions and sentences. *id.* at 907.[6] The OCCA denied Petitioner's application for state post-conviction relief on October 13, 2010 in an unpublished opinion. *See Simpson v. State*, No. PCD-2007-1262, slip op. (Okla. Crim. App. 2010) (unpublished). After filing this Petition for Writ of Habeas Corpus, Petition filed a second application for state post-conviction relief on March 16, 2012. The OCCA denied relief in an unpublished opinion. *See Simpson v. State*, No. PCD-2012-242, slip op. (Okla. Crim. App. 2012).

The federal district court denied Petitioner's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, in an unpublished memorandum opinion. *Simpson v. Duckworth*, No. CIV-11-96-M, slip op. (W.D. Okla. May 25, 2016); Pet'r Appx. B. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Simpson,* 912 F.3d at 604. The Tenth Circuit also denied panel and *en banc* rehearing. *Simpson v. Carpenter*, No. 16-6191, *Order* (10th Cir. Feb. 22, 2019) (unpublished). On July 22,

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[5] Respondent, as did the Tenth Circuit, inserts the defendant's statement as it was testified to at trial in place of the sanitized version the OCCA used in its statement of facts. Tr. IV, 44-46; *Simpson,* 912 F.3d at 574, n. 15.

[6] Rehearing was granted to address an issue omitted from the OCCA's opinion that is not relevant to the issues before this Court. *Simpson v. State*, 239 P.3d 155 (Okla. Crim. App. 2010).

2019, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision. The petition was placed on this Court's docket on July 24, 2019.[7]

REASONS FOR DENYING THE WRIT

Certiorari review should be denied because Petitioner has not presented this Court with any compelling, unresolved issues warranting certiorari review. To begin with, he merely disagrees with the Tenth Circuit's application of a properly stated rule with regard to his first and third questions presented. As far as the second question, this issue was not adjudicated by the Tenth Circuit Court of Appeals. Furthermore, he has shown no conflict between the Tenth Circuit's decision and any decision of this Court or any other court. Although he alleges a split in authority among lower courts concerning the first and third questions, the case law is not in conflict and the split he alleges is illusory. He has completely failed to show this Court's intervention is required.

I.

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

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

[7] Respondent's brief in opposition was originally due to be filed August 23, 2019. This Court granted an extension of time requested by Respondent, making the new due date September 23, 2019.

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

A. Petitioner Simply Disagrees with the Tenth Circuit's Application of a Properly Stated Rule.

Petitioner suggests that this Court should grant certiorari review arguing the Tenth Circuit's deference to the OCCA's decision denying relief on his ineffective assistance of counsel claim added "an extra layer of deference beyond that required by the AEDPA." Petition at 8-11. Although Petitioner attempts to paint the Tenth Circuit's opinion as conflicting with this Court's precedent, the Tenth Circuit applied no more deference than required under this Court's precedent. Thus, at bottom, Petitioner merely disagrees with the Tenth Circuit's application of this Court's precedent. Such does not present this Court with a compelling, unresolved issue worthy of certiorari review.

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

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

> lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

This Court set out a two part test in *Strickland v. Washington*, 466 U.S. 668, 689 (1984) to "ensure that criminal defendants receive a fair trial." In order to succeed on an ineffective assistance of counsel claim, a defendant must establish his counsel's performance is deficient and that he was prejudiced by such performance. *Strickland,* 466 U.S. at 687. A defendant must overcome the presumption that counsel rendered adequate assistance – a showing that counsel failed to act "reasonabl[y] considering all the circumstances." *Id.* at 688. "Surmounting *Strickland's* high bar is never an easy task" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). The task is even more difficult when the claim is being reviewed in a habeas corpus proceeding subject to Section 2254(d). To be entitled to relief, a defendant must show "it was necessarily unreasonable for the [state court] to conclude: (1) that [the defendant] had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the jury's sentence of death." *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011).

This Court, in *Pinholster*, 563 U.S. at 202, reviewing the Ninth Circuit Court of Appeals's adjudication of an ineffective assistance of counsel claim in the habeas corpus context, found the circuit court's reliance on *Williams v. Taylor*, 429 U.S. 362 (2000) and *Rompilla v. Beard*, 545 U.S. 374 (2005), offered no guidance as to whether the state court's decision on the prejudice prong was an unreasonable application of Supreme Court law. The Ninth Circuit found *Williams* and *Rompilla* were materially indistinguishable from *Pinholster* on the question of prejudice and granted habeas corpus relief on an ineffective assistance of counsel claim. This Court determined that those cases were not persuasive in a deference context because "this Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important 'doubly deferential' standard of *Strickland* and AEDPA." *Pinholster*, 563 U.S. at 202.

In this case, the Tenth Circuit had before it four allegations of error that trial counsel was ineffective during the punishment stage proceedings. First, whether trial counsel was ineffective for failing to investigate, prepare and present lay witnesses. Second, whether trial counsel was ineffective for failing to object to alleged improper prosecutorial argument. Third, whether trial counsel was ineffective for failing to object to the mitigating evidence jury instruction. And fourth, whether trial counsel was ineffective for failing to object to the jury being improperly instructed on an aggravating circumstance. Petitioner seems to focus solely on the second allegation, but Respondent will discuss each as the Tenth Circuit's prejudice analysis is more fleshed out in the first allegation and their analysis in whole shows the Tenth

Circuit's conformance with this Court's precedent.[8] The Tenth Circuit applied the following law:

> Claims of ineffective assistance of counsel are evaluated under the two-prong approach established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To establish an ineffective assistance of counsel claim, Mr. Simpson "must show both that his counsel's performance 'fell below an objective standard of reasonableness' *and* that 'the deficient performance prejudiced his defense.'" When evaluating whether counsel's performance was deficient, "[t]he question is whether [the] representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Judicial review under this standard is "highly deferential," and "we strongly presume that an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct *might* have been part of a sound trial strategy[]". Furthermore, [w]e must 'judge the reasonableness of counsel's challenged conduct' on the specific facts of the case 'viewed as of the time of counsel's conduct.'"
>
> Even if counsel performed in a constitutionally deficient manner, Mr. Simpson is not entitled to relief unless he can prove actual prejudice. To demonstrate prejudice, Mr. Simpson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> Review under both AEDPA and *Strickland* is "highly deferential, and when the two apply in tandem, review is 'doubly' so." "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is a reasonable argument that counsel satisfied *Strickland's* deferential standard."

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[8] Petitioner claims the Tenth Circuit improperly analyzed his *Brady v. Maryland*, 373 U.S. 83 (1963) claim in isolation and failed to cumulate prejudice from that claim with his ineffective assistance of counsel claims. First, he cites to absolutely no law from this Court, or any lower court, requiring same. Second, the Tenth Circuit found Petitioner's *Brady* claim was procedurally barred, specifically finding Petitioner could not overcome cause and prejudice. *Simpson*, 912 F.3d at 570-576.

Simpson, 912 F.3d 593-594. (citations to authority omitted). As shown below, Petitioner merely disagrees with the application of clearly established law from this Court.

1. Failure to present lay witnesses.

The Tenth Circuit found the OCCA's analysis assumed deficient performance and denied the claim based on Petitioner not being able to establish prejudice. *Simpson*, 912 F.3d at 595. The Tenth followed the state court's path, and, giving deference to the OCCA's decision, it determined the OCCA's determination was not unreasonable. The Tenth Circuit reviewed the evidence presented at trial, as well as the evidence presented on direct appeal. *Simpson*, 912 F.3d at 595-596. The Tenth Circuit found much of the proffered evidence cumulative, and recognized that the value of the unpresented evidence was "further decreased when considered in light of the prosecution's potential response." *Id*. The Tenth Circuit found that it was "not apparent the jury would have viewed the evidence about Mr. Simpson's upbringing, on a whole, as mitigating.".

> Rather, a reasonable jurist could conclude the evidence would have actually increased the odds of a verdict of death as, by Mr. Simpson's own admission, he, before turning sixteen, had already (1) dropped out of school; (2) impregnated two different women; (3) sold drugs; (4) committed burglaries; and (5) routinely carried a firearm. New and additional evidence from the State on these matters would have reduced any sympathy the jury had for Mr. Simpson because the evidence would not only have painted Mr. Simpson as living a lawless life contrary to the norms and expectations of society, but also would have furthered the State's argument relative to the continuing threat aggravator.

Simpson, 912 F.3d at 595. The Tenth Circuit found Petitioner failed to demonstrate "the OCCA unreasonably applied *Strickland* and its progeny when it concluded Mr. Simpson was not prejudiced by any alleged deficient performance by counsel." *Simpson*, 912 F.3d at 596. Petitioner does not argue this holding is deserving of certiorari review and as shown above, it is not.

2. Failure to Object to Prosecutorial Misconduct.

Petitioner argues it was improper for the Tenth Circuit to apply double deference to the prejudice analysis of his ineffective assistance of trial counsel claim for failing to object to certain instances of prosecutorial misconduct. Petition at 9-10.[9] Petitioner fails to establish the Tenth Circuit's denial of habeas relief on this specific instance of ineffective assistance of counsel claim warrants certiorari review. Here, the Tenth Circuit had already rejected the underlying claim of prosecutorial misconduct relied on to support his ineffective assistance of counsel claim. *Simpson*, 912 F.3d at 585-588. In rejecting the ineffective assistance of counsel claim, the Tenth Circuit quoted part of the OCCA's holding:

> In Proposition VI, we found that none of the alleged improper comments made by the prosecutor could be found to have affected the jury's finding of guilt or assessment of punishment . . . . Most of these alleged failings do not reflect a deficient performance by defense counsel and [Petitioner] has not shown a reasonable probability that,

[9] Petitioner claims the Tenth Circuit found prosecutorial misconduct during second stage proceedings. However, the Tenth Circuit did not find prosecutorial misconduct as it found the OCCA's analysis was not unreasonable because any improper comments did not deprive Petitioner of a fundamentally unfair trial – a necessary component of a prosecutorial misconduct finding. Although the Tenth Circuit may have found some of the prosecutorial arguments improper, it did not find prosecutorial misconduct in the constitutional sense or that the OCCA's denial of the claim was unreasonable. *Simpson*, 912 F.3d at 584-588.

> but for counsel's alleged unprofessional errors, the result of the proceeding would have been different.

Simpson, 912 F.3d at 599 (quoting *Simpson*, 230 P.3d at 904). The Tenth Circuit reviewed the deficient performance prong *de* novo and the prejudice prong "under AEDPA's and *Strickland*'s doubly deferential standard of review." *Id.* The Tenth Circuit's prejudice analysis was as follows:

> As previously concluded, however, the OCCA reasonably determined the misconduct did not deprive Mr. Simpson of a fundamentally fair sentencing trial. Because Mr. Simpson cannot show that he was actually prejudiced by counsel's deficient performance, the OCCA was reasonable in concluding he was not denied effective assistance of counsel.

Id. (citations of authority omitted). This was the extent of the "doubly deferential" review performed by the Tenth Circuit. Petitioner fails to show the Tenth Circuit's review of this claim under AEDPA gave any more deference than this Court has found to be appropriate. *See Pinholster*, 563 U.S. at 202 ("[T]his Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important 'doubly deferential' standard of *Strickland* and AEDPA.") His allegation that this analysis resulted "in a tainted, and incorrect, no-prejudice determination" is completely unfounded and not supported by the Tenth Circuit's opinion. Petition at 9.

Regardless of whether a second layer of deference was proper, Petitioner completely fails to articulate how the Tenth Circuit's holding that he did not overcome deference to the OCCA was wrong. Rather, he argues in conclusory fashion that the prosecutorial arguments "went unchecked" and that this denied Petitioner a

fundamentally unfair trial. Petition at 11-12. This argument in no way supports his request for certiorari review, and seems to be more focused on prosecutorial error than ineffective assistance of counsel. Certiorari review is clearly not warranted.

3. Failure to object to mitigation instruction.

Because the mitigation instruction was properly given to the jury, no lower court found counsel deficient for failing to object to a legally accurate jury instruction. *Simpson*, 230 P.3d at 903-904; *Simpson*, 912 F.3d at 600-601. No prejudice analysis was performed by either court – therefore, this analysis is obviously not pertinent to Petitioner's claim here.

4. Failure to object to improperly given jury instruction.

Petitioner's jury was improperly instructed that it could consider whether the death of both victims was especially heinous, atrocious or cruel.[10] *Simpson*, 230 P.3d at 903 n.10. When considering prejudice, the OCCA found Petitioner failed to satisfy the prejudice prong of *Strickland*. *Simpson*, 230 P.3d at 904. The Tenth Circuit reviewed the claim pursuant to § 2254(d) and found as follows:

> Because the OCCA rejected Mr. Simpson's ineffective assistance of counsel claim on the merits, we afford its decision deference under § 2254(d). We conclude the OCCA did not act unreasonably in rejecting Mr. Simpson's claim. We have already determined that the instruction was a correct statement of Oklahoma law, and the OCCA struck the aggravator as to Mr. Jones. Because there was no evidence introduced solely to support the HAC Aggravator, we cannot conclude that the OCCA's decision that Mr. Simpson was not prejudiced was

[10] The State only alleged the death of Palmer was especially heinous, atrocious or cruel. It did not allege this aggravating circumstance regarding Mr. Jones's death, nor did it present any evidence or make any argument regarding same as to Mr. Jones.

> unreasonable. Accordingly, we deny Mr. Simpson relief on this claim.

Simpson, 912 F.3d at 601-602.

Petitioner argues the Tenth Circuit's above applications of *Strickland* in rejecting his ineffective assistance of counsel claims "tipped the scales toward a no-prejudice determination." However, as shown above, the Tenth Circuit's analysis is in compliance with this Court's precedent. Nothing in its application entitles Petitioner to certiorari review.

He argues that if prejudice were reviewed under "the proper standard" he would be entitled to relief. However, other than a cursory assertion he was denied a fundamentally fair trial, he completely fails to articulate how, in light of the evidence presented against Petitioner during second stage proceedings, the Tenth Circuit's opinion, giving even no deference to the OCCA, could have come to a different conclusion. The state presented evidence to support a total of seven aggravating circumstances related to the death of both victims. The state's case was overwhelming and, as the lower courts found, any additional evidence could have been double edged and further support of the continuing threat aggravator alleged and found in both murders.

The Tenth Circuit properly gave deference to the OCCA's prejudice analysis, just as this Court stated lower courts should do in *Pinholster*. *Pinholster*, 563 U.S. at 202-203. There, the Ninth Circuit Court of Appeals found the California Supreme Court's denial of an ineffective assistance of counsel claim unreasonably applied this Court's precedent and granted federal habeas relief. In doing so, the circuit court, as

stated earlier, relied on *Williams* and *Rompilla*, cases where this Court did not afford AEDPA deference to the state courts when adjudicating the prejudice analysis. *Pinholster*, 563 U.S. at 202-203 ("But this Court did not apply AEDPA deference to the question of prejudice in those cases [*Williams* and *Rompilla*]; each of them lacking the important 'doubly deferential' standard of Strickland and AEPDA."). "Pinholster must demonstrate that it was necessarily unreasonable for the California Supreme Court to conclude: (1) that he had not overcome the strong presumption of competence; and (2) that he had failed to undermine confidence in the *jury's* sentence of death. *Pinholster*, 563 U.S. at 190 (emphasis added).

In *Pinholster*, when analyzing the prejudice prong, this Court considered the aggravating and mitigating evidence presented by the parties, as well as the additional evidence presented in his state habeas proceedings. *Id*. at 198-203. This Court ultimately found:

> Given what little additional mitigating evidence Pinholster presented in state habeas, we cannot say that the California Supreme Court's determination was unreasonable. Having already heard much of what is included in the state habeas record, the *jury* returned a sentence of death. Moreover, some of the new testimony would likely have undercut the mitigating value of the testimony by Pinholster's mother. The new material is thus not so significant that, even assuming Pinholster's trial counsel performed deficiently, it was necessarily unreasonable for the California Supreme Court to conclude that Pinholster had failed to show a "substantial" likelihood of a different sentence.

Pinholster, 563 U.S. at 202-203 (emphasis added). During the analysis, this Court recognized the aggravating evidence was extensive. *Id*. at 198. Here, Petitioner does not contest the fact that the aggravating evidence in his case was overwhelming.

Petition at 8-12. Petitioner stipulated to the fact that he had been charged and pled guilty to armed robbery in 1997 (Tr. Vol. 7, 14-15; Tr. Vol. 8, 37). The victim of that armed robbery testified that Petitioner called him a "bitch", beat him, put him into the closet, and made him kneel and eventually shot at the back of his head (Tr. Vol. 7, 98-101). The evidence also established that Palmer's death satisfied the aggravating circumstance of especially heinous, atrocious or cruel. Testimony established that Palmer's wounds were survivable if he had immediate medical treatment (Tr. Vol. 5, 162). Evidence also established that after he was shot he was fearful the shooter would come back (Tr. Vol. 3, 42-43). Johnson testified that Palmer was talking to him after the shootings, but soon began to gurgle (Tr. Vol. 3, 45). Testimony established the gurgling was Palmer's lungs filling with blood (Tr. Vol. 5, 162-163).

Petitioner created a great risk of death to more than one person when he emptied his AK-47 into a car carrying three people. This, along with Petitioner's prior criminal history and his attempt to try to arrange for the murder of the surviving witness shows the *jury* was correct in finding Petitioner constitutes a continuing threat to society. Evidence that Petitioner committed an armed robbery in which he beat and shot the victim also lends support to the *jury's* verdict that he is a continuing threat to society. Petitioner's crimes were extremely callous and amount to a blatant disregard for the importance of human life. Without any regard for human life, Petitioner fired his AK-47 into the car carrying three young men and then he yelled

"I am monster. I'm a motherfucking monster. Bitches don't want to play with me" (Tr. Vol. 4, 45-46; Tr. Vol. 5, 66-68).

Therefore, in the instant case, the Tenth Circuit properly applied double deference to the OCCA's ineffective assistance of counsel claim – deference to the jury's sentencing determination and deference to the OCCA's adjudication of the claim. This Court's review is not warranted.

B. Petitioner Has Not Shown any Conflict or Split in Authority.

Petitioner asserts that review is required by this Court because there is a lack of uniformity in the application of the "doubly deferential" standard to the prejudice analysis in ineffective assistance of counsel claims reviewed under AEDPA amongst the circuit courts as well as within the circuits themselves. Petition at 12. Although he alleges a split in authority among the lower courts, the case law is not in conflict and the split he alleges is illusory. He has completely failed to show this Court's intervention is required.

First, Petitioner alleges the Ninth and Tenth Circuits are inconsistent within their circuits in their applications of deference to the prejudice prong of *Strickland*. Petition at 12. This Court should leave any alleged intra-circuit court split up to the circuits themselves. *See Joseph v. United States*, __ U.S. __, 135 S. Ct. 705, 707 (2014) (Kagan, J joined by Ginsburg and Breyer, JJ, respecting the denial of certiorari) ("And we usually allow the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of

appeals."); *Jones v. Brock,* 549 U.S. 199, 220 n.9 (2007) (this Court does not concern itself with intra-circuit splits).

Nor has Petitioner shown an inter-circuit split. As to the Ninth Circuit, *Hardy v. Chappell* is a case in which the Circuit Court reviewed an ineffective assistance of counsel claim *de novo*. *See Hardy v. Chappell*, 849 F.3d 803, 819 (9th Cir. 2016) (finding the California Supreme Court applied a standard contrary to *Strickland* and found no deference to the state court decision);[11] *see also Apelt v. Ryan,* 906 F.3d 834 (9th Cir. 2018) (denying *en banc* rehearing in which three judges dissented to the order).

Petitioner's reliance on the dissent in *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) fails to support his assertion of a circuit split. In *Elmore*, the majority found the state court's denial of relief was both contrary to and an unreasonable application of *Strickland*. *Id*. at 871-872. The dissent criticizes the majority for performing what he claimed amounted to a *de novo* review, although it recognized the proper standard of review. *Elmore* does not establish a position on this issue as Petitioner claims it does.

As for *Thomas v. Pfister*, 698 F.3d 976 (7th Cir. 2012), there is simply no discussion of prejudice. There, the circuit court found the state court's decision to defer to counsel's strategic decision not to present a witness was not unreasonable "when considered through the lens of our doubly deferential standard of review. . . ." This case, like *Elmore*, does not establish a position on this issue one way or the other.

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[11] In the alternative, presuming the California Court applied the proper *Strickland* prejudice standard, the Court noted double deference did not apply to that analysis.

Finally, Petitioner cites to a concurrence in *Evans v. Secretary, Department of Corrections*, 703 F.3d 1316 (11th Cir. 2013) wherein Judge Jordan cautions against applying double deference to the prejudice prong of *Strickland* for two primary reasons. First, the concurrence states the prejudice inquiry is a legal one, thus, giving only one layer of AEDPA deference. *Id*. at 1333-1334 (J. Jordan, concurring). Second, the concurrence states that the "doubly deferential" language is likely *dicta* as there is not a viable way to actually apply it. *Id*. at 1334-1336 (J. Jordan, concurring). In the end, the concurrence articulates that the reason for concurring is "to suggest that we should not blindly assume that the concept of doubly deferential review applies to the question of prejudice in habeas cases. If we subject the assumption to rigorous examination now, we will see that it is mistaken, and can then unfetter the analysis of *Strickland* prejudice for the many habeas litigants and courts to come." However, statements in a concurrence are not binding precedent. *See Maryland v. Wilson*, 519 U.S. 408, 412-413 (1997) (statements contained in a concurrence are not binding precedent).

Petitioner points to *Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011) as a circuit case that articulates in its standard of review that double deference applies to both prongs of *Strickland*. This holding is consistent with the Tenth Circuit's holding in the current case. Petitioner presents this Court with, at best, one circuit court that agrees with the Tenth Circuit's *Strickland* prejudice analysis and no other majority holding that conflicts with the Tenth Circuit's analysis. The cited cases, as shown above, do not, as Petitioner argues, support a split in the circuits regarding this issue.

Therefore, his claim of a circuit split is merely illusory. Certiorari review should be denied.

C. Further Percolation among the Lower Courts is Required.

Petitioner presents this Court with only a handful of courts that he alleges have reached this issue. However, as shown above, only the Sixth Circuit has directly addressed the issue and it is in agreement with the Tenth Circuit's holding in this case. This Court generally waits for multiple lower courts to address issues left unanswered in its decisions before granting certiorari review.[12] *See Box v. Planned Parenthood of Ind. and Ky., Inc.*, 587 U.S. ___, ___, 139 S. Ct. 1780, 1782 (2019) (per curiam) (denying review of the second question presented because no other circuit had addressed the question); *Arizona v. Evans*, 514 U.S. 1, 24 n. 1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). In light of only two lower court decisions that have weighed in on this issue, the issue requires further percolation. At this juncture, certiorari review is unwarranted.

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[12] Respondent's position as stated above is that this issue has been addressed in *Pinholster*, 563 U.S. at 190.

D. Petitioner's Case is a Poor Vehicle for Review of the Question Presented.

Petitioner's case is a poor vehicle for resolution of this issue. Even if this Court were to reverse and hold that double deference does not apply to the prejudice analysis in a *Strickland* claim, the Tenth Circuit's application of the prejudice prong would not change.

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 found double deference does not apply to *Strickland*'s prejudice.

As quoted above, the Tenth Circuit's prejudice analysis does not articulate where, in fact, it considered or applied a second level of deference. Instead, it articulated a typical prejudice analysis that expressed only deference to the state court:

> We held in Section III.D, supra, that nearly all of the prosecutorial arguments Mr. Simpson challenges—the Moral Culpability Comments and comments denigrating the evidence in mitigation, comparing the victims' deaths to Mr. Simpson's incarceration, and calling for the death penalty as a civic duty—were improper. Trial counsel made a motion in limine to prohibit prosecutorial argument of this nature, but made no further objection to these improper comments during the sentencing trial. Failing to

> do so "fell below an objective standard of reasonableness," *see Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, and rendered counsel's performance deficient. As we previously concluded, however, the OCCA reasonably determined the misconduct did not deprive Mr. Simpson of a fundamentally fair sentencing trial. Because Mr. Simpson cannot show that he was actually prejudiced by counsel's deficient performance, the OCCA was reasonable in concluding he was not denied effective assistance of counsel. *See Hanson*, 797 F.3d at 837 ("We begin by noting that before [Mr.] Hanson can succeed on his counsel's failure-to-object claims, he must show that the underlying prosecutorial-misconduct claims themselves have merit.").

Simpson, 912 F.3d at 599. Petitioner states this application somehow demonstrates an erroneous second level of deference that tipped the scales so as to improperly deny him relief. Absent from his argument is how. This is likely because, although the Tenth Circuit noted double deference applies to the prejudice prong, it in reality employed no such analysis. Nothing in the above language suggests the Tenth Circuit actually applied a second layer of deference or would have decided this issue differently had it determined that only one layer of deference applied.[13]

As demonstrated above, even assuming that this Court determines that, double deference does not apply to the *Strickland* prejudice analysis, the Tenth Circuit's opinion would not change as it did not apply double deference in any event. Accordingly, even if this Court were to grant certiorari review and reverse on the

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[13] Respondent asserts that although the Tenth Circuit did not perform such analysis, such analysis can be performed when a reviewing court takes into account the jury's verdict as the initial layer of deference. *See Pinholster*, 563 U.S. at 190 ("Pinholster must demonstrate that it was necessarily unreasonable for the California Supreme Court to conclude: 1) that he had not overcome the strong presumption of competence; and 2) that he had failed to undermine confidence in the jury's sentence of death."

question presented, the Tenth Circuit's denial of relief would be the same. This case presents a poor case for certiorari review, and the petition should be denied.

E. Conclusion.

For all of these reasons, Petitioner has failed to show that the Tenth Circuit's denial of relief is in conflict with this Court's precedent. He also fails to present this Court with a circuit split. This case does not present a close or compelling issue requiring this Court's attention.

II.

THIS COURT SHOULD DENY CERTIORARI REVIEW ON THIS CLAIM AS IT WAS NEVER PASSED UPON BY THE TENTH CIRCUIT COURT OF APPEALS.

Petitioner claims this Court should grant review of a claim for which he did not receive a certificate of appeal (COA) and thus which was not adjudicated by the Tenth Circuit Court of Appeals. Specifically, the issue for which Petitioner requests certiorari review is whether the district court rightfully applied AEDPA deference to Petitioner's claim of ineffective assistance of appellate counsel raised in an effort to overcome a state procedural default. However, Petitioner does not argue that he should have received a COA. Furthermore, the argument he does present is without merit. As shown below, this claim does not warrant certiorari review.

A. This Case is a Poor Vehicle for Consideration of this Issue.

As acknowledged by Petitioner, he did not receive a COA on the issue of whether the trial court wrongfully limited certain testimony in mitigation. On post-conviction review, Petitioner argued the trial court erred when it limited certain

testimony from one of his mitigation witnesses. The OCCA found the claim procedurally barred by asserting an independent and adequate state procedural rule that Petitioner does not contest here. Petitioner also argued appellate counsel was ineffective for failing to raise the claim on direct appeal and the OCCA reviewed that claim on the merits. On federal habeas review, Petitioner asserted this ground for relief (limitation of mitigation) and the district court properly upheld the OCCA's procedural bar, finding the OCCA's denial of Petitioner's ineffective assistance of appellate counsel claim as cause to be reasonable. *Simpson v. Duckworth*, 2016 WL 3029966, at *23. The district court denied a COA on this issue and the Tenth Circuit denied Petitioner's motion to expand the COA as the claim did not "deserve encouragement to proceed further." *Simpson*, 912 F.3d at 562 n.7 (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)).

Petitioner now seeks certiorari review on whether AEDPA deference applies to a state court's cause and prejudice determination. Petition at 15-23. As an initial matter, however, this issue was not passed upon by the Tenth Circuit because Petitioner was denied a COA. Thus, Petitioner must show that the Tenth Circuit's denial of a COA presents a compelling issue worthy of certiorari review. But Petitioner never actually alleges that he should have received a COA. Petition at 15-23.

In any event, even if Petitioner is construed to argue that the procedural ruling on his claim was debatable, this ignores the other showing necessary for issuance of a COA. Specifically, "[w]hen the district court denies a habeas petition on procedural

grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Here, Petitioner claims the district court improperly applied AEDPA deference to a finding by the state court that he could not establish cause and prejudice – i.e., here he failed to establish appellate counsel was ineffective for failing to raise the issue. But he marshals no argument that reasonable jurists could debate the merits of his constitutional claim or that he presents a compelling issue, worthy of certiorari review, as to whether reasonable jurists could debate the merits of this claim.

As such, this is a poor case for consideration of the procedural question, given that, irrespective of the debatability of the procedural question, a COA was properly denied absent a showing that jurists could debate the underlying merits of the claim. *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").

B. The Issue Lacks Merit.

As shown above, this issue was not even decided by the Tenth Circuit Court of Appeals. Regardless, even if it had been, there is no merit to the argument. This

Court has held a habeas Petitioner's cause must be exhausted in state court. In *Edwards v. Carpenter,* this Court held:

> The procedural default doctrine and its attendant "cause and prejudice" standard are "grounded in concerns of comity and federalism," *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), and apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack, *Murray v. Carrier*, 477 U.S. 478, 490-492, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S., at 732, 111 S. Ct. 2546. We therefore require a prisoner to demonstrate cause for his state-court default of any federal claim, and prejudice therefrom, before the federal habeas court will consider the merits of that claim. *Id*., at 750, 111 S. Ct. 2546. The one exception to that rule, not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice. *Ibid*.
>
> Although we have not identified with precision exactly what constitutes "cause" to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. *Carrier*, 477 U.S., at 488-489, 106 S. Ct. 2639. Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. *Ibid*. **In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim.** And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine - then as now codified in the federal habeas statute, *see* 28 U.S.C. §§ 2254(b), (c) - require that constitutional claim, like others, to be first raised in state court. "[A] claim of ineffective assistance," we said, generally must "be presented to the state courts as an

> independent claim before it may be used to establish cause for a procedural default." *Carrier*, *supra*, at 489, 106 S. Ct. 2639.

Edwards v. Carpenter, 529 U.S. 446, 451-452 (2000) (emphasis added).

If circuit courts cannot consider the claim of ineffective assistance of appellate counsel as cause pursuant to *Edwards* unless that claim has been exhausted in state court, then it follows that it would review the claim with § 2254(d) deference like any other exhausted claim. As this Court held above, "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim" being reviewed on habeas by a federal court to determine if Petitioner's constitutional rights are being violated. *Id.*

Petitioner relies on *Martinez v. Ryan*, 566 U.S. 1 (2012), in which the petitioner was attempting to establish cause for a state court procedural default by claiming his post-conviction counsel was ineffective. The respondent took the position that 28 U.S.C. § 2254(i), which provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief," barred the petitioner from asserting ineffective assistance of post-conviction counsel as cause. This Court held that "'[c]ause,' however is not synonymous with 'a ground for relief.'" *Martinez*, 566 U.S. at 17. *Martinez* did not address what constitutes a "claim" for purposes of § 2254(d).

Further, although *Martinez* held that ineffective assistance of post-conviction counsel may, under narrow circumstances, excuse a state procedural default, it did not address whether the ineffective assistance of post-conviction counsel claim must

be exhausted and is subject to § 2254(d). Accordingly, *Martinez* does not aid Petitioner.

C. Conclusion.

There is no "compelling reason" to grant a writ of certiorari in this case. Petitioner has not demonstrated that the Tenth Circuit's holding in this case departed from "accepted and usual court of judicial proceedings" as this issue was never before it. Likewise, even if Petitioner had obtained an COA on this issue, as shown above, nothing here suggests this Court's supervisory power should be exercised. Accordingly, this Court should deny Petitioner's request for a writ of certiorari.

III.

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

Petitioner seeks this Court's review of a claim that was denied by the Tenth Circuit based on the application of a properly stated rule. He has shown no conflict between the Tenth Circuit's decision and any precedent of this Court. Petitioner's underlying substantive claim is, in any event, meritless. For all of these reasons, this case does not involve a compelling, unresolved issue, and this Court should deny Petitioner's request for a writ of certiorari.

A. Petitioner Simply Disagrees with the Tenth Circuit's Application of a Properly Stated Rule.

Petitioner suggests that this Court should grant certiorari review because the prosecution precluded his jury from considering his mitigating evidence and the Tenth Circuit's deference to the OCCA's decision denying relief thereby sanctioned a violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Petition at 20-26. Although Petitioner attempts to paint the Tenth Circuit's opinion as conflicting with this Court's precedent, he in fact merely disagrees with the Tenth Circuit's application of a properly stated rule. Such does not present this Court with a compelling, unresolved issue worthy of certiorari review.

Here, Petitioner complains that although the Tenth Circuit found the prosecutor's comments troubling and standing alone might violate federal constitutional law, it was unreasonable for that Court to deny relief. Petition at 26-28. However, the Tenth Circuit analyzed this claim as required under this Court's precedent. This Court held in *Boyde v. California*, and reaffirmed in *Brown v. Payton*, that "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also Brown v. Payton*, 544 U.S. 133, 143 (2005). Indeed, in *Brown*, this Court reversed the grant of habeas relief where the prosecutor argued that the jury *should not consider* the petitioner's mitigation evidence based on a "narrow interpretation" of the challenged jury instruction "that neither party accept[ed] as correct" on appeal.

Brown, 544 U.S. at 146. Therefore, in the instant case, the Tenth Circuit correctly identified the relevant inquiry:

> When evaluating whether a jury was unconstitutionally precluded from considering mitigating evidence, "[t]he proper inquiry is 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

Simpson, 912 F.3d at 577 (quoting *Boyde*, 494 U.S. at 380). The Tenth Circuit properly applied the test from *Boyde* and *Brown*, and Petitioner has shown no error in its refusal to rest its holding on whether the prosecution's arguments were improper. This Court's review is not warranted.

B. Petitioner Has Not Shown Oklahoma has a "Nexus" Requirement.

Petitioner asserts that review is required by this Court to "establish a unified approach to rescue inconsistencies by states' highest courts and circuit courts" regarding the so-called imposition of a "nexus" requirement for mitigating evidence. Petition at 28-32. Petitioner claims Oklahoma imposes a nexus requirement through the following jury instruction given in his case: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame" (hereinafter, "moral-culpability text"). *Simpson*, 912 F.3d at 578 (quoting Tr. Vol. 3, 604). Petitioner has not shown that the moral-culpability text, in light of Oklahoma's instructions concerning mitigating evidence as a whole, imposes a nexus requirement or runs afoul of this Court's precedent.[14] Thus,

[14] Respondent shows that the moral-culpability text given at Petitioner's trial contained no nexus requirement. Notably, however, Oklahoma has since amended this text to expressly provide that the jury may consider as mitigating *any* circumstance that could lead a juror to choose a sentence of less than death. *See*

regardless of any alleged split in authority as to a nexus requirement, Petition at 28-30, this case involves no nexus requirement and is not the appropriate case to resolve any alleged split.

To begin with, while Petitioner focuses on the moral-culpability text, he ignores the totality of the instructions Oklahoma capital juries receive, as did his jury, on the definition and consideration of mitigating evidence. Here, Petitioner's jury was instructed as follows:

> Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.
>
> While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

(O.R. 604; Instruction No. 13). The jury was also instructed as follows:

> Evidence has been introduced as to the following mitigating circumstances:
>
> 1. The defendant's age;
>
> 2. The defendant's mental condition;
>
> 3. The defendant's family support.

OUJI-CR 4-78 (Supp. 2008). Therefore, even assuming error in Petitioner's trial, a grant of certiorari here would be only an exercise in error correction, which is not a worthy basis for this Court's review.

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

(O.R. 605; Instruction No. 14). In addition, other instructions assured that Petitioner's jury would consider the mitigation evidence. The jury was instructed that "[a]ll the testimony and evidence which [] is proper for you to consider has been introduced in this case"..."[e]vidence is the testimony received from witnesses under oath, stipulations made by the attorneys, and the exhibits admitted into evidence during the trial"; [y]ou should consider only the evidence introduced while the Court is in session" (O.R. 533-535: Instruction Nos. 1 and 2).

The jury was also instructed that it must "consider the instructions as a whole and not as a part to the exclusion of the rest." (O.R. 533; Instruction No. 1); that it had to weigh the aggravating circumstances against the mitigating circumstances and that it could not impose the death penalty unless the aggravating circumstances outweighed the mitigating circumstances (O.R. 606; Instruction No. 15); and that although first stage instructions still apply, "in this part of the trial, you may consider sympathy or sentiment for the defendant in deciding whether to impose the death penalty." (O.R. 610; Instruction No. 19).

In *Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. 2015), which the panel below found to control Petitioner's challenge to the moral-culpability text, the Tenth Circuit rejected the Oklahoma capital petitioner's constitutional challenge to the moral-culpability text based on the totality of the instructions received by the jury:

> The district court noted that some of the other instructions from Hanson's trial concerning mitigating evidence broadened the scope of evidence the jury could consider. *Hanson III*, 2013 WL 3307111, at *28.

> This is relevant because "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge . . . ." *Boyde*, 494 U.S. at 378, 110 S.Ct. 1190 (citation omitted) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)).
>
> First, Instruction No. 22 also told the jury that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case." This statement broadened any potential limitations imposed by the first sentence of the instruction. Second, Instruction No. 23 listed 11 specific mitigating circumstances for the jury to consider, some of which had nothing to do with Hanson's moral culpability. . . . The instruction ended with this sentence: "In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well." Viewing the challenged instruction in the context of all the instructions, we do not think the jury would have felt precluded from considering any mitigating evidence, including the testimony of the four testifying witnesses.

Hanson, 797 F.3d at 851 (record citations omitted). As the panel below rightly observed:

> And where, as is true here, the instruction is coupled with another instruction enumerating the defendant's asserted mitigating factors and informing the jury it "may decide that other mitigating circumstances exist, and if so, [it] should consider those circumstances as well," we concluded that there is no reasonable likelihood the jury would have felt precluded from considering any mitigating evidence. *Id.* Mr. Simpson has pointed us to nothing that would permit us to depart from this binding precedent.

Simpson, 912 F.3d at 578.

Thus, viewed in light of all of the jury instructions, the moral-culpability text does not limit the jury to considering only that mitigating evidence which reduces moral culpability or blame and certainly does not establish a nexus requirement.

For all of these reasons, Petitioner's reliance on nexus cases is misplaced. *Compare, e.g.*, *Smith v. Texas*, 543 U.S. 37, 45 (2004) (holding that the state court improperly concluded that the petitioner had not presented any relevant mitigating evidence in the absence of "any link or nexus between his troubled childhood or his limited mental abilities and this capital murder" (quoting *Ex parte Smith*, 132 S.W.3d 407, 414 (Tex. Crim. App. 2004))); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime."). Accordingly, Petitioner has shown no conflict between the Tenth Circuit's decision in his case and the nexus cases he cites.[15] Certiorari review is unwarranted.

C. Petitioner's Claim Fails on the Merits.

As a final matter, besides the fact that Petitioner has not shown a compelling issue warranting certiorari review or a conflict in authority warranting this Court's attention, his claim is substantively meritless. The Tenth Circuit held that, in light

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[15] It is therefore unsurprising that Petitioner did not develop this nexus argument before the Tenth Circuit. While he asserted that the moral-culpability text was potentially misleading, he never alleged that the instruction created a nexus requirement. *Simpson v. Royal*, No. 16-6191, *Appellant's Opening Brief* at 79-86 (10th Cir. May 31, 2017) ("*Opening Brief*"). Petitioner did not cite *Tennard* even once and cited *Penry v. Lynaugh*, 492 U.S. 302 (1989) only in passing. *See Opening Brief* at 79-86 ("In other words, nothing should interfere with a defendant's ability to present mitigating evidence or have the same be considered when attempting to save his life." *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), overruled on other grounds, *Atkins v. Virginia*, 536 U.S. 304 (2002). Nor did the panel give any indication that it understood Petitioner to be making an argument that the moral-culpability text created an improper nexus requirement. Petitioner's failure to properly raise this argument below provides another basis for denying certiorari review. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or passed upon below").

of the jury receiving constitutionally sound jury instructions, "specifically identifying the categories of evidence offered in mitigation – and [Petitioner] offered extensive evidence on each of those topics," it could not "say that no fairminded jurist would agree with the OCCA's conclusion that the jury was not precluded from considering the evidence offered by [Petitioner] in mitigation." *See Simpson*, 912 F.3d at 581-582.

The crux of Petitioner's complaint about this holding is his contention that his case is distinguishable from *Boyde* because he did not receive a "catch all" instruction. Petition at 31. Petitioner's argument is without merit.

To begin with, the instruction found not to violate the Eighth Amendment by this Court in *Boyde* was in fact very similar to the moral-culpability text at issue here. In *Boyde*, the petitioner's jury was instructed to consider a number of statutory mitigating circumstances, most of which focused on the immediate circumstances of the crime itself, as well as—pursuant to the so-called "factor (k)" instruction—"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde*, 494 U.S. at 373-74 & n. 1, 378. This Court held that there was not a reasonable likelihood that the jury interpreted the factor (k) instruction to prevent consideration of non-crime-related mitigating evidence presented by the petitioner of his background and character. *Id.* at 381. In light of the similarity between the factor (k) instruction and the moral-culpability text at issue here, *Boyde* only reinforces that the Tenth Circuit properly denied habeas relief in this case.

As to any suggestion by Petitioner that the prosecutor's arguments in his case distinguish his case from *Boyde*, in *Brown* (which also involved the factor (k) instruction) this Court reversed the grant of habeas relief despite the fact that "the prosecutor . . . argued to jurors during his closing that **they should not consider [the petitioner's] mitigation evidence**," "argued to the jury that **it had not heard any evidence of mitigation**," and "characterized [the petitioner's] evidence **as not being evidence of mitigation**." *Brown*, 544 U.S. at 143-145 (emphasis added). This Court reasoned that, in the context of the trial as a whole, the state court's finding that the prosecutor's incorrect argument did not prevent the jury from considering the petitioner's mitigating evidence was not unreasonable. *Id.* at 144-147. Here, the prosecution never told the jury to disregard Petitioner's proposed mitigation evidence and Petitioner does not argue otherwise. Put simply, if the petitioner in *Brown* was not entitled to habeas relief, then Petitioner has certainly not shown the Tenth Circuit's holding here was wrong.

D. Conclusion.

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

CONCLUSION

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

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