Case No. 19-6101

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND EUGENE JOHNSON,

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

1. **Should this Court grant a writ of certiorari on a question that was neither presented to, nor answered by, the court below?**

2. **Should this Court grant a writ of certiorari to address Petitioner's disagreement with the lower court's application of a properly stated rule of law?**

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2019

RAYMOND EUGENE JOHNSON,

***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 March 19, 2019. *See Johnson v. Carpenter*, 918 F.3d 895 (10th Cir. 2019).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Tulsa County, State of Oklahoma, Case No. CF-2007-3514. In 2009, Petitioner was tried by jury for two counts of first degree murder and one count of first degree arson. A bill of particulars was filed alleging

four statutory aggravating circumstances: (1) Petitioner was previously convicted of a felony involving the use or threat of violence; (2) Petitioner knowingly created a great risk of death to more than one person; (3) the murders were especially heinous, atrocious, or cruel; and (4) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* OKLA. STAT. tit. 21, § 701.12. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of all four statutory aggravating circumstances, and recommended a death sentence for each murder. Petitioner was sentenced accordingly.[1]

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in a published opinion filed on March 2, 2012. *See Johnson v. State*, 272 P.3d 720 (Okla. Crim. App. 2012). Petitioner did not seek rehearing. This Court denied Petitioner's petition for writ of certiorari on October 1, 2012. *See Johnson v. Oklahoma*, 568 U.S. 822 (2012).

Petitioner filed an application for state post-conviction relief on July 25, 2011, which was denied by the OCCA in an unpublished opinion on December 14, 2012. *See Johnson v. State*, No. PCD-2009-1025 (Okla. Crim. App. Dec. 14, 2012) (unpublished).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Northern District of Oklahoma on December 13, 2013. Petitioner subsequently filed a second application for post-conviction relief in the OCCA, on February 7, 2014. The OCCA denied post-conviction relief on

[1] Petitioner was sentenced to life imprisonment for first degree arson.

May 21, 2014. *See Johnson v. State*, No. PCD-2014-123 (Okla. Crim. App. May 21, 2014) (unpublished). On October 11, 2016, the federal district court issued an order denying Petitioner's petition for habeas corpus relief. *See Johnson v. Royal*, No. 13-CV-0016-CVE-FHM (N.D. Okla. Oct. 11, 2016) (unpublished).

Petitioner appealed the Northern 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 March 19, 2019. *See Johnson v. Carpenter*, 918 F.3d 895 (10th Cir. 2019). The Tenth Circuit denied Petitioner's request for rehearing and rehearing *en banc* on April 29, 2019. *See Johnson v. Carpenter*, No. 16-5165 (10th Cir. April 29, 2019) (unpublished).

On July 13, 2018, during the pendency of his appeal to the Tenth Circuit, Petitioner filed a third application for post-conviction relief. That application, which does not contain any claims that are pertinent to the instant petition, remains pending.

On September 26, 2019, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

STATEMENT OF FACTS

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

> Brooke Whitaker lived in a house on East Newton Street in Tulsa with her four children, the youngest of which, [K.W.], was fathered by Appellant. Around February of 2007, Appellant moved in with Brooke and her children. By April of that year, Brooke and Appellant were having problems. Brooke told her mother that Appellant had

threatened to kill her. Because she was frightened, Brooke and her children moved in with her mother for two weeks. During this two week period, Appellant called Brooke's mother and told her that he was going to kill Brooke. Around the first of May, Brooke and Appellant got back together and Appellant moved back in with Brooke.

While Appellant was living with Brooke he was also involved in a relationship with Jennifer Walton who became pregnant by him. Around the first or second week of June 2007, Appellant wanted to move out of Brooke's house and Jennifer arranged for him to stay with a friend of hers, Laura Hendrix. On June 22, 2007, Appellant called Jennifer and asked her to give him a ride. She picked him up from Laura's house at around 10:30 that evening. They drove past the place where Brooke worked to make sure she was at work and they drove past her house to make sure that nobody was there. Jennifer dropped Appellant off on a side street near Brooke's house so that Appellant could walk to the house and retrieve some of his clothes. She left him and drove back to her mother's house. Appellant was going to call another friend to give him a ride to Jennifer's mother's house when he was finished getting his clothes.

At about 1:00 a.m. on June 23, 2007, Appellant called Jennifer and told her that he was at Denny's eating while waiting for Brooke to get home. He called again around 5:00 a.m. to let her know that a friend would bring him home shortly. Appellant called Jennifer two more times around 10:00 a.m. that morning. During these calls he told her that Brooke was dead and that a friend had shot her. Appellant wanted Jennifer to pick him up at a school near Brooke's house. The next time he called he told her that the friend who had killed Brooke was thinking about burning down the house. While Jennifer was waiting for Appellant at the school, Appellant called her again and asked her to pick him up on the street behind the street where Brooke lived. When she arrived at this location, Appellant walked to her car from the driveway of a vacant house. He was carrying two garbage bags which he put in the trunk. When Appellant got into the front passenger

seat of Jennifer's car, she noticed that he smelled like gasoline and had blood on his clothes. As she drove away, Jennifer saw flames pouring out the front window of Brooke's house.

Appellant instructed Jennifer to drive to Laura's house where he retrieved the garbage bags from the trunk of the car before they went inside. Appellant placed the bags on the living room floor and started taking things out of them, including money that had blood on it. He washed the blood off of the money and took a shower. When Jennifer asked more questions about what had happened, Appellant told her that his friend had hit Brooke with a hammer. After Appellant got out of the shower he said that he needed to go back to Brooke's house to look for her cell phone because he had used the phone to call Jennifer and he was concerned that his fingerprints would be on it. When they arrived, the street where Brooke's house was located was blocked off and ambulance, fire trucks and police cars were present. Appellant drove to the street behind Brooke's house and looked to see if he had dropped the phone on the driveway of the vacant house he had walked by earlier. He did not find the phone. Appellant next drove to Warehouse Market so that he could put some money on a prepaid credit card. Then they went to the parking lot across the street where Appellant threw his clothes in the dumpster. After stopping at McDonalds and Quiktrip, they went back to Laura's house where Jennifer stayed with Appellant a while before she left him there and went to her mother's house.

Firefighters were called to Brooke's house on east Newton Street at 11:11 a.m. on June 23, 2007. When they arrived and made entry into the house, the inside was pitch black with smoke. After they ventilated the house and cleared some of the smoke they found [K.W.]'s burned body inside the front door on the living room floor behind the couch. The infant was dead. In a room off the living room, firefighters found Brooke Whitaker on the floor partially underneath a bunk bed. She had extensive burns on her body, was unconscious without a pulse and was not breathing. Paramedics initiated resuscitation efforts and a pulse was reestablished. On the way to the hospital paramedics noticed a lot of blood pooling around her head.

When they looked closer, they observed large depressions, indentations and fractures on her head. Brooke was pronounced dead shortly after she arrived at the hospital and was later determined to have died from blunt trauma to the head and smoke inhalation. Seven month old [K.W.] was determined to have died from thermal injury, the effect of heat and flames.

Investigation of the crime scene revealed numerous items of evidence. A burned gasoline can was recovered from the front yard of the residence and samples of charred debris were collected from the house. The debris was tested and some of it was confirmed to contain gasoline. Additionally, investigators noted blood smears and blood soaked items in numerous places throughout the house. Brooke's cell phone was found on the living room floor and investigators discovered that two calls had been made from this phone to Jennifer Walton shortly before the fire was reported.

Walton was located and interviewed by the police later that same day. She told police about Appellant's involvement in the homicide and she told them that she had taken Appellant to a trash dumpster when he returned from Brooke's house after the fire. When the police went to the dumpster they recovered a white trash bag that contained boots, bloody clothing, Brooke Whitaker's wallet with her driver's license inside and a claw hammer. They also found blood on the passenger side door handle inside Walton's car.

Pursuant to information given to them by Walton, the police went to Laura Hendrix's house in Catoosa to look for Appellant. They set up surveillance and observed him exit the house and walk down the street at around 6:00 p.m. on June 23, 2007. He was arrested at that time on outstanding warrants and was taken to the Tulsa Police Station where he waived his Miranda rights and gave a statement to the police.

Appellant told the police that Jennifer Walton had taken him to Brooke's house to get his stuff the evening of June 22, 2007. When Brook[e] came home in the early morning hours of June 23, 2007, they talked and started arguing

> with each other. During the argument, Brooke pushed him, called him names and got a knife to stab him. He grabbed a hammer and hit her on the head. Brooke fell to the floor and asked Appellant to call 911. Appellant hit her about five more times on the head with the hammer. Despite her injuries, Brooke was conscious and talking. She said that her head hurt and felt like it was going to fall off. Brooke begged Appellant to get help and told him that she wouldn't tell the police what had happened but he wouldn't do it because he didn't want to go to jail. Instead, Appellant went to the shed and got a gasoline can. He doused Brooke and the house, including the room where the baby was, with gasoline. He set Brooke on fire and went out the back door. Appellant admitted that he was trying to kill Brooke.

Johnson, 272 P.3d at 724-26 (paragraph numbers omitted).

Respondent must address some contentions made in Petitioner's statement of the case. *See* SUP. CT. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."). Petitioner claims the sentencing stage of his trial was "rushed by the prosecution and judge[.]" Pet. at 6. There is no evidence that any of counsel's decisions as to what evidence to present, or the trial court's decisions regarding admissibility, were influenced by time. In fact, as will be shown, counsel made strategic decisions based on his client's interests.

Petitioner's assertion that trial counsel was pressured into playing only one thirty-second portion of an audio CD Petitioner made while in prison for manslaughter before he murdered Ms. Whitaker and K.W. is inaccurate: "The trial court instructed counsel to play for the jury 'a portion [of a song] that you think is appropriate.'" R., Vol. Tr. X at 1967. Defense counsel elected to play a thirty-second

excerpt of the quintet singing *Now Behold the Lamb*." *Johnson*, 918 F.3d at 901 (alteration adopted). Petitioner also contends that the number of photographs of Petitioner and his family that defense counsel admitted into evidence was "reduced in stages." Pet. at 8. Counsel initially reduced the list of proposed photographic exhibits down to five because he agreed with the prosecution that some of his exhibits were cumulative (Tr. IX 1892-93). Ultimately, the trial court allowed him to show the jury three of the five photographs (Tr. IX 1893; Def's Exs. 1-3). *Johnson*, 918 F.3d at 901.[2]

Petitioner also claims, with respect to a video of him preaching a sermon during a prior incarceration, that "[u]nder the gun of a trial court rushing for time, the proposed exhibit went from the full 55-minute church service Johnson conducted, to defense counsel pleading to the judge for 'at least' a five-minute clip . . . ." Pet. at 9. Again, this is inaccurate. The prosecutor objected to playing the entire video (which was almost an hour long), and defense counsel understood that objection, so he offered a five-minute clip (Tr. IX 1891). Defense counsel later *voluntarily* edited the clip down even more (Tr. X 1959). There is simply no evidence that the trial court pressured defense counsel into reducing his evidence.

Finally, any claim that Petitioner's direct appeal attorney had a conflict of interest is unexhausted. *See* Pet. at 17-18. Petitioner raised this claim in state court, but only to excuse his procedural default of his ineffective assistance of trial counsel claims, not as a ground for relief. 7/25/2011 *Original Application for Post-Conviction Relief* (OCCA No. PCD-2009-1025) at 3-4. The OCCA declined to decide

[2] Petitioner incorrectly asserts that he was only allowed to use two of the photographs. Pet. at 9.

the issue, instead reviewing the merits of Petitioner's ineffective assistance of trial counsel claims. *Johnson v. State*, No. PCD-2009-1025, slip op. at 3 & n.2 (Okla. Crim. App. Dec. 14, 2012) (unpublished).

Other disagreements with assertions made by Petitioner will be addressed below.

REASONS FOR DENYING THE WRIT

Although not exhaustive, Rule 10 of this Court's rules sets forth examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. In fact, Petitioner's questions presented fall outside of the universe of cases that warrant review by 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." SUP. CT. R. 10.

Petitioner asks this Court to decide whether a standard other than that set forth in *Strickland v. Washington* should apply to claims of ineffective assistance of trial counsel at capital sentencing in states that give the jury discretion to impose a

sentence other than death even if aggravating circumstances outweigh the evidence in mitigation. However, the Tenth Circuit did not address this question because Petitioner did not ask that court to do so. This Court is "a court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Moreover, Petitioner does not allege a split between any lower courts, and he fails to recognize the posture of this case in which this Court cannot announce a new rule of law. For these, and other reasons discussed below, this Court should deny Petitioner's request for a writ of certiorari.

Petitioner also asks this Court to provide guidance to the effect that mitigating evidence does not have to reduce a defendant's culpability for the murder or an aggravating circumstance. This Court has clearly and repeatedly said that it does not. Petitioner fails to recognize the distinction between what evidence a sentencer must be allowed to consider and what evidence a sentencer might determine to be persuasive. The Tenth Circuit determined that Petitioner's jury was not precluded from considering any mitigating evidence. Petitioner's disagreement with that court's application of a properly stated rule of law does not merit a writ of certiorari.

I.

PETITIONER ASKS THIS COURT TO ADDRESS AN ISSUE THAT WAS NOT PRESENTED OR PASSED UPON BELOW.

A. Background of Petitioner's Claim[3]

[3] The Tenth Circuit granted a certificate of appealability on four claims: whether appellate counsel was ineffective for failing to challenge the trial court's exclusion of mitigating evidence

In his first post-conviction application, Petitioner claimed his direct appeal attorney was ineffective for failing to challenge the trial court's exclusion in second stage of two of five photographs of Petitioner with his family members, a video clip of Petitioner preaching a sermon when he was imprisoned for manslaughter before committing the two murders in this case, and an entire CD of Petitioner singing with other inmates (although counsel was permitted to play a relevant portion of the CD). The OCCA held that Petitioner had failed to prove that he was prejudiced by appellate counsel's failure to raise this claim. *Johnson*, No. PCD-2009-1025, slip op. at 8.

In his appeal to the Tenth Circuit following the federal district court's denial of relief, Petitioner did not ask the Tenth Circuit to apply anything other than the well-established *Strickland* standard. *See* Appellant's Opening Br. at 12-36.

B. Relevant Legal Standards

In *Strickland v. Washington*, this Court reviewed a death row inmate's claim that his trial attorney was ineffective at his capital sentencing trial. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court held that the proper standard for

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(two photographs, a clip of a video of Petitioner preaching in prison, and not allowing Petitioner to play an entire CD of Petitioner and other prisoners singing); whether appellate counsel was ineffective for failing to allege that trial counsel was ineffective for failing to call certain witnesses in mitigation; whether appellate counsel was ineffective for failing to raise a prosecutorial misconduct claim; and cumulative error. *Johnson*, 918 F.3d at 897. Petitioner fails to specify which of these claims are implicated by his first question presented. However, the only alleged errors to which he refers are the exclusion by the trial court of mitigating evidence and cumulative error. Pet. at 30-32. Accordingly, Respondent assumes Petitioner is challenging the Tenth Circuit's denial of only these two claims. However, this Court has never recognized a "cumulative error" claim, much less enunciated a standard therefore. For that reason, and because the Tenth Circuit's cumulative error analysis relied solely on the trial court's exclusion of evidence—thus making any cumulative error analysis redundant—Respondent will address only the *Strickland* claim. *See Johnson*, 918 F.3d at 909.

assessing an ineffective assistance of trial counsel claim is whether the lawyer performed deficiently to the prejudice of the client's case. *Id.* at 687-94. Regarding the prejudice determination,

> [w]hen a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.[4] The same standard applies to claims that appellate counsel was ineffective. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). The OCCA applied the *Strickland* standard. *Johnson*, No. PCD-2009-1025, slip op. at 8.

However, Petitioner is not before this Court on direct review of the OCCA's decision. Rather, he challenges the Tenth Circuit's decision affirming the federal district court's denial of habeas relief. Accordingly, Petitioner must demonstrate that no fairminded jurist applying *Strickland* to the facts of his case would have denied relief.[5] *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

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[4] Petitioner claims, without citation, that "[t]he jurors in *Strickland* were not given unfettered discretion in the way they are in Oklahoma and not explicitly told they could impose life even if they found the aggravating circumstances outweighed the mitigating circumstances." Pet. at 29. In Florida, at the time of *Strickland*, a jury returned a sentence recommendation, but the judge was the one who made the ultimate decision. *See Spaziano v. State*, 433 So.2d 508, 510 (Fla. 1983). The jury was not required to recommend, and the judge was not required to impose, death when the aggravating circumstances outweighed the mitigating evidence. *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996) (citing *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975)); *see also Garron v. State*, 528 So.2d 353, 359-60 (Fla. 1988) (reversing for prosecutorial misconduct where the prosecutor told the jury that "when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

[5] Petitioner did not argue below that the OCCA's decision was contrary to clearly established federal law or based on an unreasonable determination of the facts in light of the evidence before that court. *See* 28 U.S.C. § 2254(d).

C. This Court is a Court of Review, Not of First View

This Court does not decide questions that were not presented or decided below, except in exceptional circumstances. *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2282 (2015) (refusing to consider an issue that was not presented below or in the brief in opposition); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (refusing to consider arguments that were not decided below); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 305-06 (2010) (refusing to consider an issue that was not presented below or in the brief in opposition); *Cutter*, 544 U.S. at 718 n.7 (2005) (describing this Court as "a court of review, not of first view"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (this Court reviews questions not presented or passed upon below only in exceptional cases); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (stating that, when directly reviewing state court judgments, this Court "has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below"); *but see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering an issue not presented below because respondent did not object[6], it was an important, recurring issue and was the subject of another pending petition for certiorari).

Unsurprisingly—given Petitioner's failure to ask it to do otherwise—the Tenth Circuit applied *Strickland* and determined that the OCCA "reasonably concluded that two largely cumulative photographs would not have altered Johnson's sentence", "the OCCA was well within the realm of reasonableness to find no 'reasonable probability that at least one juror would have stuck a difference

[6] In this case, Respondent does object.

balance'" had the jury heard the entire audio CD, and "the OCCA reasonably concluded . . . that Johnson's direct-appeal counsel was not ineffective for omitting the issue because viewing the video [of Petitioner preaching] would not have changed the jury's determination." *Johnson*, 918 F.3d at 901-02 (quoting *Hooks v. Workman*, 689 F.3d 1148, 1202 (10th Cir. 2012)). Neither the parties nor the Tenth Circuit considered whether *Strickland*'s prejudice standard was inappropriate. This Court should deny Petitioner's request to "review" the Tenth Circuit's decision on grounds that were not presented to, or decided by, that court.

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

1. Habeas is not the Forum in which to Change the Law

Petitioner asks this Court to overrule one of its most widely used precedents in the area of criminal law. However, Petitioner is only entitled to habeas relief if the OCCA's decision was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d).[7] The OCCA's decision can be measured only by the law that was clearly established by this Court at the time it was issued. *Shoop v. Hill*, ___ U.S. ___, 139 S. Ct. 504, 506 (2019); *28 U.S v. Alvarado*, 541 U.S. 652, 660-61 (2004). It is beyond debate that *Strickland* was, and still is, the clearly established standard for ineffective assistance of counsel claims. *See Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (holding the state court's decision was contrary to clearly established federal law where it failed to apply *Strickland* to an ineffective assistance of counsel claim); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established federal

[7] *See* footnote 5

law, as determined by the Supreme Court of the United States.'"). Thus, the Tenth Circuit would have committed reversible error had it judged the OCCA's decision by any standard other than that set forth in *Strickland*. *See Shoop*, 139 S. Ct. at 506-09. Petitioner's question presented cannot be answered in this case.

2. Petitioner's Claim Proceeds from a Faulty Premise

Petitioner claims that the death penalty scheme involved in *Strickland* left the sentencer with no discretion not to impose a death sentence if the aggravating circumstances outweighed the mitigating circumstances. Petitioner is incorrect. *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996) (citing *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975)); *see also Garron v. State*, 528 So.2d 353, 359-60 (Fla. 1988) (reversing for prosecutorial misconduct where the prosecutor told the jury that "when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty"). Accordingly, Petitioner's argument that *Strickland* requires "recalibrat[ion]" is based on a false premise. Petitioner has failed to present a compelling question for this Court's review. *See* SUP. CT. R. 10.

3. Petitioner Fails to Propose an Alternative Test

Additionally, Petitioner does not indicate what prejudice test he thinks should be applied in cases like his. At one point, Petitioner asserts that use of the reasonable probability standard "is 'extremely speculative or impossible.'" Pet. at 30 (quoting *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)). *Clemons* was not an ineffective assistance of counsel case. Further, in *Clemons*, this Court stated that there may be "some situations" in which "a state appellate court may conclude that

peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible", however, reweighing and harmless error analysis "are constitutionally permissible" and the decision to employ them "is for state appellate courts . . . to make." *Clemons*, 494 U.S. at 754. This Court has already determined that, except where the defendant was effectively without counsel—a standard Petitioner does not attempt to meet—he must demonstrate prejudice. *See Strickland*, 466 U.S. at 692 (prejudice is presumed where the defendant is actually or constructively denied counsel or the state interfered with counsel's ability to assist the defendant). To the extent Petitioner wants this Court to revisit this area of the law, as shown above, this habeas appeal is not the appropriate case in which to do so.

Petitioner also asserts that "no matter the type of error analysis, cases where the predictability is so hazy to begin with should be focused more on diminished reliability." Pet. at 30. This is exactly the inquiry mandated by *Strickland*. *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Petitioner's failure to articulate a test, or prove that *Strickland* is not the appropriate test, compels denial of his petition.

4. Petitioner's Claim is Meritless

Finally, the Tenth Circuit correctly concluded that the OCCA reasonably denied Petitioner's ineffective assistance of appellate counsel claim.[8] Because

[8]For purposes of this brief in opposition, Respondent is addressing this ineffective assistance of appellate counsel claim solely on prejudice, because the OCCA did not address deficient performance and Petitioner's question presented is focused on prejudice. However, Respondent

Petitioner urges this Court to use a "diminished reliability" standard—and setting aside the fact that *Strickland* uses a diminished reliability standard—Respondent will show that Petitioner's sentence was not rendered unreliable by the exclusion of some items of mitigating evidence. Accordingly, this Court should deny the petition. *See The Monrosa v. Carbon Black Export, 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.").

The theme of Petitioner's second stage presentation was that, during a prior incarceration (the significance of which will be discussed below), he sang, preached, assisted with various prison ministries and was very helpful to his fellow inmates (Tr. X 1992-96, 2008-12, 2018-21, 2024-31, 2035-42, 2048-51, 2071-73). *Johnson*, 918 F.3d at 898-99. Petitioner also sought to introduce five photographs of himself and/or members of his family. The trial court asked Petitioner to elect between two pictures of him as a child with his father and sisters, finding them to be cumulative (Tr. X 1957). The court also excluded a photograph of Petitioner as a child with his sisters as cumulative to the other family pictures (Tr. X 1957-58). Over the State's relevance objection, Petitioner was allowed to introduced a photograph of his son, a photograph of himself as a child at the beach with his father and two sisters and a photograph of himself as a child with his mother and two sisters (Tr. IX 1893; Def's Exs. 1-3).

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maintains, as he did below, that appellate counsel's performance was not deficient. Brief of Respondent-Appellee at 36-41.

Petitioner was not prevented from introducing any non-cumulative photographs. *Cf. Tennard v. Dredtke*, 542 U.S. 274, 286 (2004) (recognizing that the gravity of the evidence "has a place in the relevance analysis" of mitigating evidence). Accordingly, the exclusion of the two cumulative photographs, considered in isolation or with the other items to be discussed, can in no way have diminished the reliability of Petitioner's sentence.[9]

Petitioner also wanted to play a recording of a song he performed with a group of men in prison (Tr. IX 1889). The trial court held that Petitioner could play a portion of the song (Tr. X 1966-67). Defense counsel agreed with the trial court that the entire song should not be played (Tr. X 1968). A CD containing the entire song was admitted and the defense played thirty seconds of the song for the jury in open court (Tr. X 1996). The trial court did not limit the defense to only thirty seconds, but to "a portion that you think is appropriate or that you and the defendant would like to share . . . ." (Tr. X 1967).

The song is sung by a group of men. Although there are short solos, there is no way to determine with certainty when Petitioner is singing. The jury heard a portion of the song, which corroborates the testimony of several witnesses that Petitioner sang while in prison (Tr. X 1995, 2009, 2042). It is entirely unclear how Petitioner's sentence was rendered unreliable by the fact that the jury did not hear more of this song.

[9] This is particularly true in light of Petitioner's failure to make the excluded photographs part of the record in state or federal court.

Finally, Petitioner wanted to play a two or three minute portion of a videotaped sermon he gave while in prison (Tr. X 1964). The trial court found the sermon to be cumulative and hearsay (Tr. X 1961, 2044). The Tenth Circuit disagreed that the video was cumulative—although "the jury would not have heard any relevant, new information from the video since witnesses testified that Johnson was a preacher"—because "a video would likely have had a somewhat different effect on the jurors than mere witness testimony[.]" *Johnson*, 918 F.3d at 901. However, the Tenth Circuit did consider the "significant" evidence of Petitioner's prison ministries that was before the jury in finding a lack of prejudice. *Id*. at 902.

Whether considered on its own, or in combination with the photographs and remainder of the song, the exclusion of this evidence did not diminish the reliability of Petitioner's sentences. The evidence of the aggravating circumstances was overwhelming. *Cf. Opinion and Order* dated 10/11/2016, docket number 61 at 30-32 (finding not even a conceivable probability Petitioner would not have been sentenced to death had defense counsel presented more witnesses in light of the aggravating circumstances). The great risk of death aggravator was established by the physical evidence proving that Petitioner poured gasoline on Ms. Whitaker and K.W. and set the house on fire (Tr. VII 1361-64, 1389, 1395-96, 1413-17). *See Jones v. State,* 128 P.3d 521, 550 (Okla. Crim. App. 2006) (holding that the great risk of death aggravator is shown by "acts which created a great risk of death to another person or persons in close proximity to the homicidal acts in terms of time, location, and intent.").

The prior violent felony aggravator was established by Petitioner's conviction for manslaughter (Tr. IX 1937). The defendant fired multiple shots through the closed window of the vehicle Clarence Oliver was driving, striking him four times and killing him (Tr. IX 1905, 1908-14, 1916, 1919-21, 1928-29, 1934-37). Mr. Oliver was trying to drive away from Petitioner but was unable to escape (Tr. IX 1930).

The continuing threat aggravator was established by Petitioner's conviction for killing Mr. Oliver, the fact that Petitioner carried out his prior threats to kill Ms. Whitaker, the brutal beating of Ms. Whitaker (described below), the fact that Petitioner set a seven month old baby on fire, the fact that Petitioner stole from Ms. Whitaker before setting her on fire and Petitioner's demeanor after the murders, which was very matter of fact (Tr. VI 1210; Tr. VII 1469-71; Tr. VIII 1710-52; Tr. IX 1907-37; State's Ex. 120). *See Warner v. State*, 144 P.3d 838, 879 (Okla. Crim. App. 2006) (the continuing threat aggravator must be proven by evidence that the defendant's behavior demonstrated a threat to society and a probability that the threat would continue, including prior criminal acts of violence and the fact that the murder exhibited the calloused nature of the defendant).

The especially heinous, atrocious or cruel aggravating circumstance was established by Petitioner's admission that Ms. Whitaker complained of horrible pain and begged for her life (State's Ex. 120). Further, the medical examiner testified regarding the extent of the beating that Ms. Whitaker endured, but which did not immediately kill her (Tr. VIII 1710-46). Ms. Whitaker also suffered burns to a large portion of her body (Tr. VIII 1704). Blood evidence found at the crime scene

establishes that Ms. Whitaker was conscious and moving after at least some of the blows (Tr. VI 1295-97). In fact, the evidence supports Petitioner's statement that Ms. Whitaker was conscious even after she was set on fire. The fire originated in the living room, behind the couch, where gasoline was poured (Tr. VII 1395-96). Ms. Whitaker was doused with gasoline and burned (Tr. VII 1413-16; Tr. VIII 1704). Yet, Ms. Whitaker's body was found in a bedroom off of the living room, with her head partially under a bed (Tr. VI 1258-60). It is common for people in a fire to try to hide (Tr. VII 1381).

K.W. was not beaten, but she was burned alive (Tr. VIII 1749-52). The medical examiner did not offer an opinion as to how long K.W. may have survived, but she was alive and on fire long enough to have 14% carbon monoxide in her blood (Tr. VIII 1752). The evidence establishes that both victims suffered horrific, painful deaths. *See Eizember v. State*, 164 P.3d 208, 241-42 (Okla. Crim. App. 2007) (to prove the especially heinous, atrocious or cruel aggravator, the State must show that the victim suffered great physical anguish or extreme mental cruelty). Further, Petitioner stole from Ms. Whitaker, gave some of her shoes to his new girlfriend and then went to buy beer shortly after the murders (Tr. VII 1460, 1471-73). *See Le v. State*, 947 P.2d 535, 550 (Okla. Crim. App. 1997) (evidence of a killer's pitiless attitude may support the especially heinous, atrocious or cruel aggravator).

The video of Petitioner preaching stands in stark contrast to his videotaped confession (State's Ex. 120). In his confession, Petitioner referred to Ms. Whitaker as his "wife" and stated that he thinks K.W. was his daughter (State's Ex. 120).

Petitioner then proceeded to explain in detail, and with absolutely no sign of grief or remorse, how he cruelly murdered his "wife" and "daughter." Petitioner showed exceedingly more emotion during the sermon than he did in talking about the murders of two people he supposedly loved.

Petitioner waited at Ms. Whitker's house for at least four hours (Tr. VI 1212; Tr. VII 1443-46; State's Ex. 120). When Ms. Whitaker arrived home, she told Petitioner he was not supposed to be there and that he was going to cause her children to be taken away again (State's Ex. 120). Nevertheless, Petitioner stayed and he and Ms. Whitaker had a lengthy discussion about their relationship (State's Ex. 120). As they argued, Petitioner raised his voice (State's Ex. 120). Ms. Whitaker went into the kitchen and got a knife, asking Petitioner if he was going to hit her again (State's Ex. 120). Ms. Whitaker was afraid of Petitioner, who had previously told her mother that he was going to kill Ms. Whitaker (Tr. VI 1208, 1210; Tr. VII 1523-27).

According to Petitioner, Ms. Whitaker was "pissing me off" and "talking shit to my face." (State's Ex. 120). Ms. Whitaker pushed Petitioner, at which point he grabbed a hammer off the kitchen cabinet and hit her in the head, hard enough to knock her to the floor (State's Ex. 120). Ms. Whitaker was bleeding and begging Petitioner to stop, promising to take him back (State's Ex. 120). Ms. Whitaker asked Petitioner to call 911 and/or her mother to come get K.W. (State's Ex. 120). In response to Ms. Whitaker's pleas, Petitioner replied, "What for, so I can go to jail?" (State's Ex. 120). Ms. Whitaker confirmed that she did intend to send

Petitioner to jail, at which time the defendant hit her approximately five more times with the hammer (State's Ex. 120).

Ms. Whitaker somehow made her way into the living room, where Petitioner asked who she had been "fucking with." (State's Ex. 120). Ms. Whitaker provided Petitioner with names, after which he went into her closet and cut up her clothes (State's Ex. 120). Petitioner returned to the living room and told Ms. Whitaker that she was not going out with anyone else (State's Ex. 120). Ms. Whitaker complained that she could not move or see, and that her head hurt so badly that she was afraid it was going to fall off (State's Ex. 120). Ms. Whitaker asked Petitioner if he intended to sit there and let her die (State's Ex. 120). Petitioner replied, "you deserve to die" and said that he would go to prison if he called for help (State's Ex. 120). Ms. Whitaker told Petitioner he had a decision to make (State's Ex. 120). Petitioner's decision was to go to the shed in the back yard, retrieve a gasoline can, douse Ms. Whitaker and the house with gasoline, light a towel on fire and then throw it on Ms. Whitaker (State's Ex. 120). Ms. Whitaker got up, with her shirt on fire, before Petitioner walked out the back door, leaving her and K.W. inside (State's Ex. 120). Petitioner denied that he intended to kill K.W., who he knew was in the house (State's Ex. 120). Petitioner admitted that he intended to kill Ms. Whitaker and destroy the evidence so that he would not go to jail (State's Ex. 120).

Firefighters responding to the house found K.W. face-down behind the couch in the living room, with her mouth, nose and eyelids melted shut (Tr. VI 1236-37, 1242). Ms. Whitaker was found in a bedroom off of the living room with her head

under a bunk bed (Tr. VI 1258-60). K.W. was pronounced dead at the scene (Tr. VI 1237). Ms. Whitaker was revived, but died later at the hospital (Tr. VI 1273, 1284). The subsequent investigation confirmed the presence of gasoline on the floor of the living room behind the couch, K.W.'s clothing and diaper and Ms. Whitaker's clothing (Tr. VII 1361-64, 1389, 1395-96, 1413-17).

Ms. Whitaker sustained moderate thermal injury to her face, head, torso, arms and left leg (Tr. VIII 1704). In addition, the medical examiner counted twenty-four lacerations on Ms. Whitaker's head that were likely caused by a hammer (Tr. VIII 1710-33). Some of the lacerations had corresponding skull fractures (Tr. VIII 1719-21, 1728-29). Both of Ms. Whitaker's cheekbones were broken, and two of her top teeth were almost knocked out (Tr. VIII 1721). Ms. Whitaker also had broken bones on both hands that appeared to be defensive injuries, and bleeding on the surface of her brain (Tr. VIII 1736-45). The cause of Ms. Whitaker's death was blunt force trauma to the head and smoke inhalation, indicating that she was alive after the fire was started (Tr. VIII 1746-48). Almost all of K.W.'s body was burned (Tr. VIII 1749). Part of K.W.'s scalp was even charred completely away (Tr. VIII 1751). The cause of K.W.'s death was thermal injury (Tr. VIII 1752).

In spite of the absolute horror he inflicted, Petitioner's demeanor during his confession can only be described as chilling. Petitioner recounted the facts of the murders as if he was telling the detective about his day at work. Petitioner showed no emotion as he described the pain and fear he put Ms. Whitaker through, even

blaming her for being manipulative and "pushing his buttons." Petitioner ignored Ms. Whitaker's impassioned pleas and murdered her and the baby.

Any competent prosecutor would have asked the jury to consider the video of Petitioner preaching in light of the video of his confession. Even if the prosecutor had failed to do so, the confession was in evidence and the jurors could not have helped but call it to mind when watching Petitioner preach. The facts of the murders prove that either Petitioner was lying about his faith while he was in prison or that he was quick to throw it away when he felt like someone did him wrong. *See Johnson*, 918 F.3d at 902 ("the video would have been rather weak evidence [of Petitioner's sincerity] since the recording occurred well before the murders—while he was in prison for his first [manslaughter]—calling into question Johnson's later religious sincerity. The subsequent murders also stand in stark contrast to his prison exhortations.").

The jury was aware of Petitioner's experience preaching in between the homicides he committed. They were obviously not persuaded by that fact. There is no possibility that merely seeing Petitioner preach would have caused them to return a different verdict. The evidence overwhelmingly established four aggravating circumstances for both murders. The brutal murders of Ms. Whitaker and K.W. were not Petitioner's first homicide. Petitioner's sentences were not rendered unreliable by the absence of additional evidence that he was a singer and preacher *in between* his homicides. Petitioner's ineffective assistance of appellate

counsel claim is meritless under any standard of review. This Court should deny the petition for writ of certiorari.

II.

PETITIONER'S DISAGREEMENT WITH THE TENTH CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW DOES NOT PRESENT A COMPELLING QUESTION FOR THIS COURT'S REVIEW.

"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." SUP. CT. R. 10. Although Petitioner frames his question as an opportunity for this Court to "clarify" its jurisprudence regarding the definition of mitigating evidence, he admits said jurisprudence is "well entrenched[.]" Pet. at 33. In reality, Petitioner is dissatisfied with the Tenth Circuit's holding that the OCCA reasonably denied his claim that appellate counsel was ineffective for failing to argue that prosecutors prevented the jurors in his case from considering all of his mitigating evidence.[10] For this reason, among others, Petitioner has failed to identify a compelling question for this Court's review.

A. This Court's Jurisprudence Needs no Clarification

Petitioner begins his discussion of his second question presented by characterizing this Court's "position on the requisite scope of capital mitigating evidence [as] both exceptionally broad and well entrenched[.]" Pet. at 33.

[10] Petitioner also argues that the Tenth Circuit misapprehended the nature of his claim that appellate counsel was ineffective for failing to challenge the trial court's exclusion of mitigating evidence. Pet. at 35-36. Respondent will address both claims: that appellate counsel was ineffective for failing to allege prosecutorial misconduct in second stage closing argument, and that appellate counsel was ineffective for failing to challenge the trial court's evidentiary rulings.

Petitioner spends approximately four pages discussing eight of this Court's cases, all of which consistently hold that a sentencer must be allowed to consider any and all relevant mitigating evidence, regardless of whether that mitigating evidence relates to the crime or aggravating circumstances. Pet. at 33, 36-38. Petitioner fails to identify a single case from this Court which disagrees with this principle, or which is unclear. Respondent agrees this is the law, and neither the OCCA nor the Tenth Circuit held to the contrary. As will be shown, Petitioner's true complaints relate to his disagreement with the result reached in his case. Petitioner has failed to present a compelling question for this Court's review.

B. This Court does not Issue Advisory Opinions

Petitioner's true complaint, with respect to the prosecutorial misconduct claim, is that "the message is not getting through to Oklahoma jurors, prosecutors, and judges." Pet. at 33. However, 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)[11]; *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 v. Silliman*, 6

[11] Although *Herb* involved a state court judgment its reasoning applies equally to this case.

[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 is missing the distinction between what evidence the jury (or a reviewing court) may consider *and what weight they choose to give* to that evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence . . . [but] [t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence."). In light of this distinction, Respondent disagrees that participants in Oklahoma's criminal justice system do not understand that a sentencer must be permitted to consider all relevant mitigating evidence. However, assuming they do, Petitioner's case is not before this Court on direct review. Thus, this Court's review is limited to the Tenth Circuit's resolution of Petitioner's challenges to the OCCA's denial of his ineffective assistance of appellate counsel claim.

The OCCA and Tenth Circuit evaluated the claim under *Strickland*, recognized that review of the ineffective assistance of appellate counsel claim required them to consider the merits of the underlying prosecutorial misconduct claim, and the Tenth Circuit expressly applied the standard set forth in *Boyde v. California*, 494 U.S. 370 (1990). *Johnson*, 918 F.3d at 906-09; *Johnson*, No. PCD-2009-1025, slip op. at 4-5, 11-12.[12] The OCCA indisputably understands that jurors

[12] Although the OCCA did not indicate the standard by which it considered the prosecutorial misconduct claim, the OCCA routinely applies a standard consistent with *Boyde*. *See*

may not be precluded from considering all relevant mitigating evidence, which is why that court ordered the use of the jury instruction given to Petitioner's jury which defines mitigating circumstances as those that may reduce a defendant's moral culpability or blame **or** "circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty." (O.R. VI 1076). *Harris*, 164 P.3d at 1114. Respondent disagrees that trial judges and prosecutors fail to understand the law (as opposed to disagreeing about the weight that should be given to mitigating evidence). However, assuming Petitioner is correct, this Court's role is not to send a "message", Pet. at 33, to Oklahoma judges and prosecutors. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343-50 (2006) (rejecting the argument that this Court should suppress a defendant's statements to police as a remedy for the failure of state law enforcement to inform him of his right to consular access under the Vienna Convention in light of this Court's lack of supervisory authority over state courts); *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("It is beyond dispute that we do not hold a supervisory power over the courts of the several States."). This Court can determine only whether the Tenth Circuit correctly concluded that the OCCA reasonably denied Petitioner's ineffective assistance of appellate counsel claim. As Petitioner's request for a writ of certiorari amounts to nothing more than a

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Underwood v. State, 252 P.3d 221, 244-45 (Okla. Crim. App. 2011) (considering the trial as a whole and determining that the jury was not urged to disregard evidence that failed to reduce the defendant's moral culpability); *Harris v. State*, 164 P.3d 1103, 1113 (Okla. Crim. App. 2007) (finding one prosecutor improperly argued that jurors should not consider mitigating evidence that did not reduce the defendant's moral culpability but denying relief in light of the proper jury instruction and the other prosecutor's invitation for jurors to consider all of the mitigating evidence).

disagreement with the Tenth Circuit's application of a properly stated rule of law, it should be denied.

With respect to the exclusion-of-evidence claim, as shown above, the OCCA applied *Strickland* and the Tenth Circuit reviewed under 28 U.S.C. § 2254(d), as it was required to do. Petitioner believes that the Tenth Circuit misunderstood his arguments in two respects.[13] However, Petitioner does not argue that the Tenth Circuit (or the OCCA) misapplied *Strickland* or misunderstood this Court's cases which require states to allow sentencers to consider all relevant mitigating evidence. This Court should not grant the petition to engage in error-correction (particularly where, as has been shown above, there is no error).

C. Petitioner's Claim is Without Merit

As with his first question presented, Petitioner's second question presented is unworthy of certiorari review because his sentences will necessarily be affirmed

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[13] Specifically, Petitioner first asserts that he never argued that the video of his preaching would have rebutted the continuing threat aggravating circumstance. Pet. at 35 (quoting *Johnson*, 918 F.3d at 901). Petitioner cites no law which requires the Tenth Circuit to confine itself to Petitioner's arguments. Evidence that might support a jury finding that a defendant is likely to behave well in prison certainly has the potential to rebut the continuing threat aggravating circumstance. Further, the Tenth Circuit did not misunderstand Petitioner's argument that the excluded mitigating evidence might have caused the jury to return a different sentence even if the aggravating circumstances outweighed the mitigating evidence. *Johnson*, 918 F.3d at 902 ("to the extent that evidence of Johnson's religious sincerity would have moved certain jurors" it was weak).

Petitioner also argues that the Tenth Circuit incorrectly believed that he argued the jury needed to see the video of his sermon "'to confirm Johnson's sincerity.'" Pet. at 36 n.9 (quoting *Johnson*, 918 F.3d at 902). Yet, Petitioner quotes from his opening brief in which he argued that jurors needed to see the video to refute the prosecutor's argument that his "heart was not in his preaching." Pet. at 36 n.9 (quoting Appellant's Opening Br. at 22). The Tenth Circuit did not misunderstand Petitioner's argument. Neither of these arguments are compelling. More importantly, as argued above, Petitioner is merely complaining about the Tenth Circuit's application of *Strickland*.

even if this Court "clarifies" its jurisprudence. Petitioner's jury was instructed that mitigating circumstances are those that may reduce a defendant's moral culpability or blame **or** "circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty." (O.R. VI 1076).

In *Boyde*, this Court rejected a challenge to an instruction that the jury should consider, *inter alia*, any circumstance that extenuates the gravity of the crime although it is not a legal excuse for the crime. *Id*. at 373-74. The defendant claimed the instruction did not allow the jury to consider mitigating evidence of his background and character that was unrelated to the crime. *Id*. at 375. This Court first noted that the validity of a jury instruction must be determined in the context of the jury instructions as a whole. *Id*. This Court held that the standard of review for an ambiguous jury instruction 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."[14] *Id*. at 380. In applying that standard, this Court stated that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id*. at 381. This Court found it unlikely that a reasonable juror would believe that the instruction prevented them from considering the four days of mitigation evidence presented by the defense, all of which related to the defendant's background and character. *Id*. at 383-84. This Court concluded that the instruction

[14] The instruction used in Petitioner's case is in no way ambiguous, and Petitioner is not independently challenging the instruction, as the defendant in *Boyde* had. However, this Court's analysis of the instruction in *Boyde* is instructive.

did not limit the jury's consideration of mitigating evidence. *Id*. at 382; *see also Ayers v. Belmontes*, 549 U.S. 7, 15 (2006) (holding that even the likelihood of *future* good conduct falls within the definition of California's mitigating evidence instruction).

The defendant in *Boyde* further claimed, as Petitioner does, that arguments made by the prosecutor led the jury to believe that they should disregard mitigating evidence. The prosecutor argued that the defendant's mitigating evidence did not "'suggest that [petitioner's] crime is less serious or that the gravity of the crime is any less,'" and that "'[n]othing I have heard lessens the seriousness of this crime.'" *Boyde*, 494 U.S. at 385. This Court held that "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Id*. at 384. This Court found no objectionable argument because the prosecutor did not tell the jury not to consider the mitigating evidence, but urged the jury to find that the defendant was still responsible for his crimes. *Id*. at 386; *see also Eddings*, 455 U.S. at 114-15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence.")

Subsequently, in *Brown v. Payton*, 544 U.S. 133 (2005), this Court considered a case in which the prosecutor did argue that jurors should not consider the defendant's mitigating evidence. This Court found 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 defendant's mitigating evidence was not unreasonable. *Id*. at 144. In so holding, this Court noted that the defense

presented two days of testimony without objection from the prosecution, that defense counsel told the jury they could consider the mitigating evidence, and that the prosecutor also disputed the substance of the defendant's evidence and compared it to the evidence in aggravation. *Id*. at 144-46.

In the present case, the defense presented nine mitigation witnesses. The jury was instructed that it was up to them to determine what circumstances are mitigating (O.R. VI 1076). The jury was further given a list of seven mitigating factors (O.R. VI 1077). As this Court has recognized, the non-crime factors on the list, aside from the fact that Petitioner has family who loves him, can extenuate or reduce the degree of moral culpability or blame. *See Boyde*, 494 U.S. at 381-82 & n.5. Further, the instruction specifically referred to evidence of Petitioner's good qualities and his family's love as "mitigating circumstances." (O.R. VI 1077). Both the prosecutor and defense counsel urged the jury to consider the mitigating evidence (Tr. X 2084, 2089, 2091-92, 2096, 2098-99, 2102, 2105, 2107).

The prosecutor who gave the State's first closing argument repeatedly told the jury to consider the mitigating evidence:

> -"You heard a lot of stuff this morning about the defendant and that's entirely appropriate, and that is entirely appropriate for you to consider." (Tr. X 2081)
>
> -"You heard things this morning about the defendant. It's no surprise. I think we talked about it in jury selection. He is a human being. He has family. He has extended family. There will be people who are hurt if he is sentenced to death. There is no doubt about that. I don't think that is a surprise to anyone. And your question to yourselves, based upon these instructions and the

> evidence, will be what is your sentence going to be?" (Tr. X 2082)
>
> -"You were advised by the judge that the defendant has submitted to you that one of his mitigating circumstances is that he has a baby. . . . You can decide whether or not that's a mitigating circumstance." (Tr. X 2089)
>
> -"The inquiry that you are to make as jurors, the Judge will tell you in the instructions, is one of moral culpability. You are to assess the level of moral culpability that falls upon the shoulders of Raymond Johnson when determining the appropriate punishment. And I submit to you, *the way we do that is by considering all of the evidence you have heard in this stage* as well as looking at what he did . . . ." (Tr. X 2092) (emphasis added).

See also (Tr. X 2084-85, 2091-92). Finally, towards the end of his remarks, the prosecutor read the entire definition of mitigating circumstances to the jury, including "circumstances, which in fairness, sympathy, or mercy maybe you, as jurors, individually or collectively, can decide against imposing the death penalty. That's for you to decide." (Tr. X 2096). The prosecutor then again encouraged the jury to consider the mitigating evidence (Tr. X 2097).

In second closing, the prosecutor discussed the mitigating evidence, and repeatedly told the jury to "consider it", without once referring to moral culpability or blame (Tr. X 2100-02, 2105-07). Neither prosecutor told the jury not to consider Petitioner's mitigating evidence. Rather, both urged the jury to find that the enormity of Petitioner's crimes warranted a punishment of death regardless of the mitigating evidence.

The Tenth Circuit believed (incorrectly, in Respondent's view, but it is unnecessary to address the issue in this brief) that one prosecutor misstated the law, although such statements did not amount to constitutional error. *Johnson*, 918 F.3d at 906-07. In light of the jury instructions as a whole and the "many statements [made by prosecutors] throughout the mitigation stage" that urged the jury to consider the mitigating evidence, the court held that the OCCA reasonably denied Petitioner's ineffective assistance of appellate counsel claim. *Id*. at 907-09.

Neither the OCCA nor the Tenth Circuit indicated that the law requires a "nexus" between a mitigating circumstance and the crime (or aggravating circumstances) before the jury may consider it. Thus, there is no need for clarification. In any event, the jurors were well informed by the court and the prosecutors that they could consider any evidence in mitigation. Petitioner cannot show constitutional error under any standard. This Court should deny the instant petition.

CONCLUSION

Petitioner is not entitled to a writ of certiorari on a question that was not presented to, nor decided by, the Tenth Circuit Court of Appeals. Nor should this Court review the Tenth Circuit's application of *Strickland* to the facts of this case. Petitioner's petition fails to set forth compelling reasons for this Court to review the Tenth Circuit's decision. Finally, Petitioner's claims are without merit, even when reviewed *de novo*. For all of the foregoing reasons, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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