No. 19-697

IN THE

Supreme Court of the United States

JAMES DWIGHT PAVATT,

Petitioner,

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Oklahoma Defense Lawyers Association (OCDLA) is a private, nonprofit public association that represents more than 500 criminal defense attorneys in the state of Oklahoma and surrounding states. The OCDLA is dedicated to preserving the rule of law and individual rights guaranteed by the Oklahoma and Federal Constitution, to resisting any efforts to curtail these rights, to furthering legal educational programs, and to promoting justice and the common good.

The OCDLA submits this brief because the interpretation of Oklahoma's "especially heinous, atrocious, or cruel" death penalty aggravating factor has expanded in recent years beyond the bounds permitted by the U.S. Constitution. The resulting standard is vague, defies objective implementation, focuses on happenstance rather than the moral culpability of the offender, and fails to meaningfully distinguish the circumstances that warrant the death penalty from those present in most murders. The OCDLA has a strong interest in ensuring that the death penalty is not implemented in an unconstitutional manner.

Pavatt explains in the petition why his claim is not procedurally barred. Because Pavatt amply addresses that point, the OCDLA focuses this brief on the underlying flaws in the substantive rule that Oklahoma applies to determine who receives the ultimate penalty.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least 10 days prior to its due date and consented to the filing of this brief.

SUMMARY OF ARGUMENT

1. This case involves critical issues regarding the death penalty that warrant this Court's review. In *Maynard* v. *Cartwright*, this Court held the statutory "especially heinous, atrocious, or cruel" aggravating factor facially unconstitutional absent proper a limiting construction. Oklahoma attempted to comply with *Maynard* by adopted a limiting construction of its "especially heinous, atrocious, or cruel" aggravator that required "torture or serious physical abuse." Over time, however, Oklahoma has steadily expanded its limiting instruction, undermining its very purpose.

This drastic expansion reached new levels in the present case. The Oklahoma Court of Criminal Appeals affirmed the defendant's death sentence simply because the victim could have been (1) conscious for a few seconds or minutes and (2) experienced pain in that time. But these factors are present in almost every homicide that is not instantaneous.

This expanded limiting instruction provides no reasonably reviewable or objective criteria to guide the sentencer. The instruction is disconnected from any objective metric like the defendant's intent, and it requires a factfinder to guess how long a victim was alive and what the victim subjectively experienced. As such, it fails to meaningfully distinguish between the class of murderers who deserve the death penalty and those who do not. This shortfall creates a substantial risk of arbitrary and capricious executions in direct conflict with *Maynard*.

2. The expansive standard also fails to further the primary goals of the death penalty: retribution and deterrence. Whether a victim dies instantly or not often

depends on happenstance. The expansive limiting construction rewards those who are more skilled at killing, and perversely encourages the use of additional force to eliminate the risk of leaving the victim alive. These results completely undermine retributive and deterrent goals of the death penalty and are thus excessive and unconstitutional.

3. A failure to correct this defect would be disastrous. Oklahoma executed almost one-hundred prisoners in a recent fifteen-year period, and Oklahoma courts regularly rely upon the challenged limiting instruction when determining whether the death penalty is warranted. Additionally, this expansion has the potential to subject co-felons to the death penalty if the victim does not die instantly, even if the co-felon did not kill the victim. Thus, a significant number of individuals will be unconstitutionally put to death if this construction stands uncorrected.

The OCDLA therefore encourages this Court to find the expansive limiting construction based on a victim's conscious pain unconstitutional. The instruction risks arbitrary and capricious executions and undermines the goals of the death penalty. It therefore fails to cure Oklahoma's facially unconstitutional aggravating circumstance and violates the Eighth and Fourteenth Amendments of the Constitution.

This Court should also reject any standard that focuses solely on the victim's conscious pain when imposing the most severe of all sentences. Instead, the OCDLA urges this Court to require a standard that evaluates the offender's intent and blameworthiness, as this Court did in *Tison* v. *Arizona* and *Enmund* v. *Florida*.

ARGUMENT

I. OKLAHOMA HAS ABANDONED THE NARROWING CONSTRUCTION ADOPTED IN AN ATTEMPT TO SAVE ITS FACIALLY INVALID AGGRAVATING FACTOR

A. This Court Previously Declared Oklahoma's Aggravating Factor Facially Invalid

A death penalty scheme must not create a substantial risk of arbitrary and capricious execution. *Godfrey* v. *Georgia*, 446 U.S. 420, 427 (1980) ("[T]he penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."). To avoid creating such a risk, a state must give "clear and objective standards that provide specific and detailed guidance." *Arave* v. *Creech*, 507 U.S. 463, 471 (1993). This scheme must adequately channel and limit the sentencer's discretion. *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988) (citations omitted). In so doing, the scheme must provide "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Godfrey*, 446 U.S. at 428.

The aggravating circumstance at issue here has failed this test before. In *Maynard* v. *Cartwright*, this Court held that the "especially heinous, atrocious, or cruel" aggravator facially violates the Eighth Amendment. 486 U.S. at 363-364 (referencing Oklahoma's aggravating circumstance, Okla. Stat. tit. 21, § 701.12(4) (2015)). As this Court explained, this aggravator is overbroad and gives insufficient guidance to the sentencer without proper limiting instructions. *Id.* at 363-364. The Tenth Circuit suggested, and this Court agreed, that a requirement of torture or serious physi-

cal abuse could mend the constitutional defect. *Id.* at 364-365.

B. Oklahoma Attempted To Save Its Unconstitutional Aggravating Factor By Limiting It To Torture Or Serious Physical Abuse

In the wake of the Tenth Circuit's decision in *Maynard*, the Oklahoma Court of Criminal Appeals (OCCA) adopted the recommended limiting instruction, requiring "torture or serious physical abuse" to meet the aggravator. *Stouffer* v. *State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). In the years that followed *Stouffer*, the OCCA construed this limiting instruction narrowly. It emphasized that the death penalty could only be sought when the extreme mental distress was "the result of intentional acts by the defendant." *Berget* v. *State*, 824 P.2d 364, 373 (Okla. Crim. App. 1991). When the OCCA focused on the victim's pain, it required that the suffering be truly torturous. *See*, *e.g.*, *Woodruff* v. *State*, 846 P.2d 1124, 1147 (Okla. Crim. App. 1993) (victim had been bound and beaten with a blunt object, stabbed, and strangled); *Rojem* v. *State*, 753 P.2d 359, 369 (Okla. Crim. App. 1988) (seven-year-old victim had been raped and stabbed).

The OCCA made clear that the aggravator is not satisfied when the defendant simply shoots and kills the victim, an "act which by its very nature is violent." *Cheney* v. *State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995). *Cujdo* v. *State* illustrates as much. There the OCCA found no torture or physical abuse after the defendant shot the victim in the head, even though the victim consciously survived for hours before dying. 925 P.2d 895, 901-902 (Okla. Crim. App. 1996).

In the rare cases where a shooting satisfied the aggravator, the defendant's actions had to be far more

torturous than the typical gunshot murder. *See, e.g.*, *Robinson* v. *State*, 900 P.2 389, 402 (Okla. Crim. App. 1995) (defendant shot at victim's feet to frighten him, shot him as he ran, then calmly walked over and shot him in the chest); *Hale* v. *State*, 750 P.2d 130, 142-143 (Okla. Crim. App. 1988) (victim had been kidnapped before being shot, and was seen bent over, bleeding, calling for help). In these uncommon gunshot cases, the OCCA required strong evidence of substantial suffering, not mere speculation that the victim might have suffered for minutes. *See, e.g.*, *Marquez* v. *State*, 890 P.2d 980, 987 (Okla. Crim. App. 1995) (finding that the aggravator was not satisfied by gunshot wounds that *may* have left the victim alive for a few minutes); *Davis* v. *State*, 888 P.2d 1018, 1021 (Okla. Crim. App. 1995) (same); *Brown* v. *State*, 752 P.2d 908, 912-913 (Okla. Crim. App. 1988) (same).

The Tenth Circuit upheld Oklahoma's aggravating factor because of its limiting construction. *See, e.g.*, *Medlock* v. *Ward*, 200 F.3d 1314, 1319 (10th Cir. 2000) ("Our Circuit has … upheld the facial constitutionality of [the HAC aggravator] as 'narrowed' by the State of Oklahoma, and we are bound by that body of precedent."); *Hatch* v. *Oklahoma*, 58 F.3d 1447, 1468-1469 (10th Cir. 1995).

C. Recent Interpretations Have Expanded The Aggravating Factor Far Beyond Torture Or Serious Physical Abuse

As time went on, the OCCA began to expand the limiting construction, both undermining its purpose and eliminating the distinction between a typical homicide and one that warrants the death penalty. The court began holding that a finding of "conscious physical suffering" was sufficient to meet the aggravator. *See Rob-*

inson, 900 P.2d at 402.[2] Additionally, the court held that the defendant's intent does not need to be considered at all when determining whether the aggravator has been met. *See Hung Thanh Le* v. *State*, 947 P.2d 535, 550-551 (Okla. Crim. App. 1997) ("Evidence of a killer's intent to inflict torture or pitiless attitude may in some cases support the jury's finding of this aggravating circumstance, but that evidence is certainly not required in every case."). This expansion was solidified in *DeRosa* v. *State*, when the OCCA officially added new definitions to the jury instructions introduced in *Stouffer*. 89 P.3d 1124, 1156 (Okla. Crim. App. 2004). In *DeRosa*, the court defined "torture" as the "infliction of great physical anguish or extreme mental cruelty," and "serious physical abuse" as "conscious physical suffering." *Id.* Thus, with this new formulation, defendants could meet the death penalty aggravator so long as the victim remained conscious, for however long, and experienced pain, however slight.

The OCCA's loosening of the standard adopted after *Maynard* accelerated in the case before this Court. The OCCA dubiously reasoned below that the trial court's "[e]vidence that the victim was conscious and aware of the attack [in the moments before death] supports a finding of torture." Pet. App. 372a. The medical examiner testified that the victim died minutes *or even seconds* after two fatal gunshot wounds (i.e., both gunshots hit vital organs and could have resulted in

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[2] Before this, the court had used "conscious physical suffering" as a necessary condition for the aggravator, not a sufficient one. *See Battenfield* v. *State*, 816 P.2d 555, 565 (Okla. Crim. App. 1991) ("Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met.").

immediate death).[3] Tr. 3764; Direct Appeal Br. 47. The only other evidence cited by the OCCA was that the victim clutched at a trash bag minutes or mere seconds after a fatal gunshot wound was inflicted. Tr. 3764; Direct Appeal Br. 47. There was no evidence that the offender had any specific intent to torture the victim in any way. There was no evidence of physical anguish or extreme mental suffering beyond the fact that the victim clutched a trash bag in the few minutes or seconds before death. Nevertheless, the OCCA reasoned that there was evidence of "torture" because "the victim was conscious and aware of the attack" even if only for a few seconds. Pet. App. 372a.

Redefining torture as just a victim's conscious pain runs contrary to commonly accepted definitions of the term "torture." Federal law, the laws of many other States, and common usage all focus on offender culpability by using terms that require intentional or deliberate infliction of severe pain or suffering. *See* Miller, *Defining Torture* 13-15 (2005).

Federal law defines torture as an act "specifically intended to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1) (emphasis added). *See also Implementation of the Convention Against Torture*, 8 C.F.R. § 208.18(a)(5) ("In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering."). This definition requires the offender to act purposefully with the specific intent to inflict severe pain or suffering for a "prolonged" period. 18 U.S.C. § 2340(1)-(2). It thus re-

[3] The medical examiner's testimony was that either of the two wounds could have been fatal. Death occurred in a matter of minutes. The medical examiner could not tell how long Mr. Andrew was conscious. Tr. 3764; Direct Appeal Br. 47.

quires a link (or nexus) between the offender's heightened level of moral culpability and the infliction of severe pain and suffering for an extended period. In contrast, the OCCA's definition of torture entirely eliminates this intent requirement, rendering the *mens rea* needed for the death penalty no different from that found in Oklahoma's first-degree murder statute. *See Maynard*, 486 U.S. at 363-364. This shift is at odds with the federal definition of torture.

Many other states have required a finding of specific intent for torture as well. *See, e.g.*, *People* v. *Pearson*, 266 P.3d 966, 977-978 (Cal. 2012); *Olsen* v. *State*, 67 P.3d 536, 581 (Wyo. 2003); *State* v. *Moeller*, 616 N.W.2d 424, 454 (S.D. 2000); *State* v. *Perry*, 590 A.2d 624, 646 (N.J. 1991); *Domingues* v. *State*, 917 P.2d 1364, 1377-1378 (Nev. 1996); *Commonwealth* v. *Nelson*, 523 A.2d 728, 737-738 (Pa. 1987). As the New Jersey Supreme Court explained, society's concern is to "punish most harshly those who *intend* to inflict pain, harm, and suffering." *Perry*, 590 A.2d at 646 (citing *State* v. *Ramseur*, 524 A.2d 188, 230 (N.J. 1987)) (emphasis in original). An expanded definition of torture to include any conscious pain, irrespective of the defendant's intent, fails to appreciate the societal concern at issue here.

An intent requirement also aligns with common usage of the term "torture." *See Oxford English Dictionary* (2d ed. 1989) (defining "torture" as an infliction of severe pain "for the purpose" of various ends). For many, the term "torture" conjures up an image of a depraved individual purposefully inflicting mental or physical pain to a helpless victim over an extended time. However, Oklahoma's newly created definition does not require a specific intent to cause physical or mental anguish. In fact, Oklahoma's new definition requires no intent beyond that which necessarily accom-

panies the underlying killing. That is a radical expansion of the limiting instruction that Oklahoma adopted in the wake of *Maynard*.

II. OKLAHOMA'S EXPANSIVE INTERPRETATION IS UNCONSTITUTIONAL

Oklahoma's overly broad and ambiguous interpretation of its aggravating factor makes the imposition of the death penalty turn on happenstance rather than heightened offender culpability. It thus fails to "genuinely narrow the class of persons eligible for the death penalty" and to objectively identify a subset of murderers that "reasonably justify the imposition of a more severe sentence." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983).

A. Oklahoma Does Not Provide An Objective Standard To Properly Cabin The Sentencer's Discretion

The state must "channel the sentencer's discretion by *clear and objective standards* that provide specific and detailed guidance" and "make rationally reviewable the process for imposing a sentence of death." *Arave*, 507 U.S. at 471 (emphasis added). The term "serious physical abuse," when defined as (1) victim consciousness and (2) pain, is a vague and overly broad category that can be subjectively applied by the jury to any murder where death is not instantaneous. In other words, this standard allows the sentencer to *subjectively* impose the death penalty based on the happenstance passage of time in which the victim *might* experience pain, even if for only a few seconds.

Consequently, the limiting construction requiring only the victim's conscious pain fails to provide any

"clear and objective standards that provide specific and detailed guidance and make rationally reviewable the death sentencing process." *Lewis* v. *Jeffers*, 497 U.S. 764, 774 (1990). Where an aggravating factor or its limiting construction does not require proof of some fact capable of objective determination, this Court has not hesitated to hold the aggravating factor unconstitutional. *Shell* v. *Mississippi*, 498 U.S. 1 (1990) (invalidating Mississippi's "especially heinous and atrocious" aggravating factor where the state's limiting construction did not require proof of any fact capable of objective determination).

A "catch-all" limiting construction that turns on (1) whether the victim was conscious and (2) experienced pain, however slight, is overly broad, ambiguous, and not objectively determinable by the jury.

B. The Limiting Instruction Does Not Meaningfully Distinguish Cases Where The Death Penalty Is Warranted From Those Where It Is Not

Oklahoma's interpretation also fails to meaningfully distinguish "the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey*, 446 U.S. at 428 (internal quotation marks omitted). It is settled law that the imposition of the death penalty cannot rest on factors that fairly apply to the average case of homicide. *Arave*, 507 U.S. at 474 ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." (emphasis in original)); *see also Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002) (stating that "the culpability of the average murderer is insufficient to justify" the death penalty). In direct conflict with this prec-

edent, the trial court's limiting instruction provides no necessary distinctions between classes of murderers. Importantly, it fails to take into consideration the offender's intent or the severe or heinous nature of the homicide. *See Woodson* v. *North Carolina*, 428 U.S. 280, 309 (1976). Consequently, the limiting construction based on (1) victim consciousness and (2) pain opens the door to subjective application in almost all homicides where the victim does not instantaneously die.

This instruction blurs and distorts any meaningful distinction in murder cases. The phrase "serious physical abuse" most often conjures up an image of an offender purposefully, intentionally, or with a depraved heart inflicting pain—often for an extended period of time. But the Oklahoma trial court used the term "serious physical abuse" to include any degree of physical pain experienced by the victim, regardless of severity or a finding of mental anguish beyond that inherent in most deaths resulting from a gunshot wound. This opens the floodgates and allows sentencers to apply the aggravator to almost any homicide where death is not instantaneous. Thus, the limiting instruction fails to differentiate between average cases of murder in the first degree and murder cases in which the death penalty can be applied.

Without such differentiation, the instruction fails to deliver any meaningful, objective criteria that serve to refine or limit when the death penalty should be imposed. *See McCleskey* v. *Kemp*, 481 U.S. 279 (1987). Reliance upon factors like whether the victim experienced pain after a fatal gunshot wound is reliance on happenstance alone; it fails to guide the sentencer in a principled and rational manner as to which subset of murderers are death penalty worthy. *Maynard,* 486 U.S. at 360. Such an approach renders the limiting con-

struction "too vague to provide any guidance to the sentencer." *See Walton* v. *Arizona*, 497 U.S. 639, 654 (1990). As such, the limiting instruction fails to provide clear, rational, and objective criteria to limit the sentencer's discretion. *See Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976). This shortcoming opens the door to subjective and biased applications. *See Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Simply stated, to focus on victim consciousness and pain, without some meaningful way to distinguish cases like enhanced offender culpability or extreme victim distress, fails "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." *Maynard*, 486 U.S. at 364. This creates an unconstitutional risk that the death penalty will be implemented arbitrarily and capriciously. *Godfrey*, 446 U.S. at 427.

C. Oklahoma's Interpretation Does Not Further Retribution Or Deterrence, And It Is Therefore Excessive And Unconstitutional

The death penalty primarily functions to serve the purposes of retribution and deterrence. *Gregg*, 428 U.S. at 183. If a sentence does not meaningfully serve either goal, then it is "excessive" and unconstitutional. *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977). The OCCA's limiting instruction serves neither goal.

1. Oklahoma's aggravator is not based on culpability and thus fails to further retributive goals

Retribution rests on the notion that the offender's heart was so depraved or malignant that the "just deserts" for his or her crime is death. *Atkins*, 536 U.S at

319.[4] To serve retributive goals, this Court has required a "consciousness materially more depraved than that of any person guilty of murder." *Id.* (citing *Godfrey*, 446 U.S. at 433) (internal quotation marks omitted). Thus, culpability is a primary method of distinguishing the typical cases of homicide from the cases that warrant the death penalty. *Tison* v. *Arizona*, 481 U.S. 137, 180-181 (1987) ("Retribution … has been regarded as a constitutionally valid basis for punishment only when the punishment is consistent with an 'individualized consideration' of the defendant's culpability …."). As this Court held in *Enmund* v. *Florida*, the death penalty is improper if it is not linked to "personal responsibility and moral guilt." 458 U.S. 782, 801 (1982).

Running contrary to this established precedent, the OCCA's limiting instruction disconnects the death penalty from personal culpability. By defining "torture" and "serious physical abuse" as requiring no more than temporary consciousness and pain, the implementation of the death penalty turns entirely on factors separate from culpability. Instead, it rewards good marksmanship, use of a more lethal weapon, and devious plots designed to kill the victim instantaneously. An aggravator that punishes a defendant for failing to plan a murder skillfully is far removed from "moral guilt," and thus far removed from retribution itself. *See Enmund*, 458 U.S. at 801. Rather than give a defendant his or her just deserts for morally culpable conduct, the OC-

[4] This Court has also opined that "when people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Gregg*, 428 U.S. at 183 (quoting *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

CA instruction rewards those who are more skilled at killing. This "entirely frustrates the retributive objectives of the death penalty. *See Enmund*, 458 U.S. at 800 ("As for retribution as a justification for executing [the defendant], we think this very much depends on the degree of [his] culpability—what [his] intentions, expectations, and actions were.").

The OCDLA encourages this Court to apply its holding in *Enmund* v. *Florida* and require a more rationally reviewable and objective standard that evaluates the offender's moral culpability. 458 U.S. at 798. By doing so, this Court will be limiting the discretion of sentencers in a reasonably consistent and objective manner, thus distinguishing the subset of murderers who do and do not deserve the death penalty. This will more properly serve the goals of retribution.

2. Oklahoma's aggravator sets up perverse incentives that actively frustrate the deterrent goals of the death penalty

The deterrence goals of the death penalty seek to prevent murder, and so a death penalty scheme should be struck down if it perversely creates an incentive to kill. *See Kennedy* v. *Louisiana*, 554 U.S. 407, 445-446 (2008) (holding that it is unconstitutional to put a child rapist to death because, in part, this creates an incentive to kill the victim). The OCCA's limiting instruction creates this perverse incentive, thus undermining the goals of deterrence.

The OCCA's broad standard is easily satisfied so long as the victim remains conscious for even a few seconds before death. Tr. 3764; Direct Appeal Br. 47. To avoid meeting this standard, an offender must ensure that the victim dies immediately. The OCCA rule thus

leaves an offender with two choices: leave the victim alive and risk the death penalty, or kill him or her immediately and avoid the death penalty. In other words, the sentencing scheme as it stands incentivizes offenders to *ensure the death* of the victim.

Not all defendants may think in such terms, but this Court has recognized that deterrence arguments are not an all-or-nothing proposition. A rule can serve deterrent goals if it affects some murderers but not others. *Gregg*, 428 U.S. at 185-186 (holding that the death penalty may not deter some, but "for many others, the death penalty undoubtedly is a significant deterrent"). Because the OCCA scheme creates a perverse incentive to kill victims, it does not rationally advance the deterrent purposes of the death penalty.

III. The Constitutionality Of Oklahoma's Interpretation Presents A Question Of Recurring Importance

It is critical that this Court strike down Oklahoma's expansive interpretation of its death penalty aggravator, which flagrantly undermines *Maynard* v. *Cartwright*. 486 U.S. at 363-364. Oklahoma has the highest execution rate per capita of any state. Constitution Project, *Report of the Oklahoma Death Penalty Review Commission* 7 (2017). It put ninety-three people to death between 2000 and 2015, *Id.* at 9, and the aggravator at issue in this case has consistently been used to implement the death penalty. *See, e.g.*, *Harmon* v. *State*, 248 P.3d 918, 942-943 (Okla. Crim. App. 2011); *Mitchell* v. *State*, 235 P.3d 640, 663-664 (Okla. Crim. App. 2010); *Jones* v. *State*, 201 P.3d 869, 889 (Okla. Crim. App. 2009); *Andrew* v. *State*, 164 P.3d 176, 201 (Okla. Crim. App. 2007); *Davis* v. *State*, 103 P.3d 70, 81-82 (Okla. Crim. App. 2004); *Banks* v. *State*, 43 P.3d 390,

400-401 (Okla. Crim. App. 2002); *Black* v. *State*, 21 P.3d 1047, 1074 (Okla. Crim. App. 2001). The OCCA's new interpretation will thus have drastic consequences, and unless this Court steps in, it will lead to the unconstitutional execution of numerous individuals.

The shift will affect not only defendants who pull the trigger, but also defendants charged with felony murder. This Court has affirmed the constitutionality of executions based on felony murder in some instances. *Enmund*, 458 U.S. at 800-801. The OCCA's new interpretation thus opens the door, in cases where a first-degree murder is not instantaneous, for a co-felon who "participated in or instigated" a violent felony likely to result in the loss of human life to be put to death, even if he or she did not ultimately pull the trigger. *See Romano* v. *State*, 909 P.2d 92, 122 (Okla. Crim. App. 1995).

A law that allows co-felons to be put to death simply because the victim does not die instantaneously fails to "genuinely narrow the class of persons eligible for the death penalty" and does not "reasonably justify the imposition of a more severe sentence." *Zant*, 462 U.S. at 877. As such, the overly broad and ambiguous limiting construction violates the Eighth and Fourteenth Amendments of the U.S. Constitution. *Maynard*, 486 U.S. at 363-365.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted. In the alternative, the Court should ensure the important question in this case receives full consideration by, at a minimum, vacating and remanding for the Tenth Circuit to address the merits.

Respectfully submitted.

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