No. 19-697

In The
Supreme Court of the United States

JAMES DWIGHT PAVATT,

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

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CAPITAL CASE

QUESTIONS PRESENTED

Should this Court second-guess the lower court's case-specific determination that Petitioner's claim was not properly before it?

Should this Court address a claim that was not passed upon below and which is, in any event, foreclosed by this Court's cases?

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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 June 27, 2019. *See Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2001-6189. In 2003, Petitioner was tried by jury for one count of first degree murder and one count of conspiracy to commit first degree murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) the murder was especially heinous, atrocious or cruel; (2) the murder was committed for remuneration or the promise of remuneration; and (3) 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. The jury found Petitioner guilty as charged, found the existence of two aggravating circumstances,[1] and recommended a sentence of death. Petitioner was sentenced accordingly.[2]

[1] The jury did not find Petitioner to be a continuing threat to society.

[2] Petitioner was sentenced to ten years imprisonment for conspiracy to commit first degree murder.

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in a published opinion on May 8, 2007. *Pavatt v. State*, 159 P.3d 272 (Okla. Crim. App. 2007). The OCCA denied Petitioner's rehearing petition on June 26, 2007. This Court denied Petitioner's petition for writ of certiorari on February 19, 2008. *Pavatt v. Oklahoma*, 552 U.S. 1181 (2008).

Petitioner filed an application for state post-conviction relief on April 17, 2006, which was denied by the OCCA on April 11, 2008. *Pavatt v. State*, No. PCD-2004-25 (Okla. Crim. App. Apr. 11, 2008) (unpublished).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on April 1, 2009. Petitioner subsequently filed a second application for post-conviction relief in the OCCA, on September 2, 2009. The OCCA denied post-conviction relief on February 2, 2010. *Pavatt v. State*, No. PCD-2009-777 (Okla. Crim. App. Feb. 2, 2010) (unpublished). On May 1, 2014, the federal district court denied habeas relief. *Pavatt v. Trammell*, No. CIV-08-470-R (W.D. Okla. May 1, 2014) (unpublished).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief. After briefing and oral argument, the majority of a three-judge panel of the Tenth Circuit reversed the district court's judgment on June 9, 2017, believing the OCCA improperly applied Oklahoma's especially heinous, atrocious or cruel

aggravating circumstance to the facts of Petitioner's case. *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017) ("*Pavatt I*"), *opinion superseded on denial of rehearing by Pavatt v. Royal*, 894 F.3d 1115 (10th Cir. 2017) ("*Pavatt II*"), *opinion vacated on rehearing en banc by Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc) ("*Pavatt III*"). The panel majority denied Respondent's request for rehearing, but amended its opinion to clarify that it did not believe the OCCA applied a constitutionally narrow construction of the aggravator to the facts of Petitioner's case. *Pavatt II*, 894 F.3d 1115. The Tenth Circuit then granted rehearing en banc. *Pavatt v. Carpenter*, 904 F.3d 1195 (10th Cir. 2018). On June 27, 2019, the en banc court vacated the panel's opinion and affirmed the district court's denial of habeas relief. *Pavatt III*, 928 F.3d 906.

On December 3, 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 on direct appeal:

> Appellant and his co-defendant, Brenda Andrew, were each charged with conspiracy and first-degree capital murder following the shooting death of Brenda's husband, Robert ("Rob") Andrew, at the Andrews' Oklahoma City home on November 20, 2001. Appellant met the Andrews while attending the same church, and Appellant and Brenda taught a Sunday school

class together. Appellant socialized with the Andrews and their two young children in mid–2001, but eventually began having a sexual relationship with Brenda. Around the same time, Appellant, a life insurance agent, assisted Rob Andrew in setting up a life insurance policy worth approximately $800,000. Appellant divorced his wife in the summer of 2001. In late September, Rob Andrew moved out of the family home, and Brenda Andrew initiated divorce proceedings a short time later.

Janna Larson, Appellant's adult daughter, testified that in late October 2001, Appellant told her that Brenda had asked him to murder Rob Andrew. On the night of October 25–26, 2001, someone severed the brake lines on Rob Andrew's automobile. The next morning, Appellant and Brenda Andrew concocted a false "emergency," apparently in hopes that Rob would have a traffic accident in the process. Appellant persuaded his daughter to call Rob Andrew from an untraceable phone and claim that Brenda was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. The plan failed; Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police.

One contentious issue in the Andrews' divorce was control over the insurance policy on Rob Andrew's life. After his brake lines were severed, Rob Andrew inquired about removing Brenda as beneficiary of his life insurance policy. However, Appellant, who had set up the policy, learned of Rob's intentions and told Rob (falsely) that he had no control over the policy because Brenda was the owner. Rob Andrew spoke with Appellant's supervisor, who assured him that he was still the record owner of the policy. Rob Andrew then related his suspicions about Appellant and Brenda to the supervisor. When Appellant learned of this, he became very angry and threatened to harm Rob for putting his job in jeopardy. At trial, the State presented evidence that in the months preceding the murder, Appellant and Brenda actually attempted to transfer ownership of the insurance policy to Brenda without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.

On the evening of November 20, 2001, Rob Andrew drove to the family home to pick up his children for a scheduled visitation over the Thanksgiving holiday. He spoke with a friend on his cell phone as he waited in his car for Brenda to open the garage door. When she did, Rob ended the call and went inside to get his children. A short time later, neighbors heard gunshots. Brenda Andrew called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he

had suffered extensive blood loss and they were unable to revive him. Brenda Andrew had also suffered a superficial gunshot wound to her arm. The Andrew children were not, in fact, packed and ready to leave when Rob Andrew arrived; they were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

. . .

Rob Andrew was shot twice with a shotgun. A spent shotgun shell found in the garage fit a 16–gauge shotgun, which is a rather unusual gauge. Andrew owned a 16–gauge shotgun, but had told several friends that Brenda refused to let him take it from the home when they separated. Rob Andrew's shotgun was missing from the home when police searched it. One witness testified to seeing Brenda Andrew engaging in target practice at her family's rural Garfield County home about a week before the murder. Several 16–gauge shotgun shells were found at the site.

Brenda told police that her husband was attacked in the garage by two armed, masked men, dressed in black, but gave few other details. Brenda's superficial wound was caused by a .22–caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance as she ran from the garage into the house. About a week before the murder, Appellant purchased a .22–caliber handgun from a local gun

> shop. On the day of the murder, Appellant borrowed his daughter's car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but his daughter found a .22–caliber bullet on the floorboard. In a conversation later that day, Appellant told Larson never to repeat that Brenda had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the bullet she had found in her car.
>
> . . .
>
> At trial, the State also presented a letter purportedly from Appellant to one of the Andrew children, written after Appellant had been arrested. In the letter, Appellant claimed to have enlisted the help of another man to kill Rob Andrew, but claimed that Brenda had nothing to do with the plan. The State presented expert testimony that the handwriting of the letter was consistent in a number of respects with known exemplars of Appellant's handwriting. Appellant did not testify at trial. While defense counsel did not deny that Appellant and Brenda were having an affair, he challenged the State's claim that Appellant wrote the confession letter, and maintained that Appellant was not in any way involved in Rob Andrew's death.

Pavatt, 159 P.3d at 276-78 (paragraph numbers and footnotes omitted).

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. Rather, Petitioner's questions presented fall outside of the universe of cases that typically garner 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 summarily reverse the en banc court's holding that his Eighth Amendment challenge to the application of the especially heinous, atrocious or cruel aggravator to the facts of his case is unexhausted and outside the scope of Petitioner's Certificate of Appealability ("COA").[3] Petitioner complains

[3] Petitioner appears, at times, to be arguing the aggravating circumstance cannot be applied in any case rather than only challenging its application to the murder he committed. However, Petitioner conceded at en banc oral argument that he was challenging only the application of the aggravating circumstance in

only about case-specific rulings, and alleges no conflict between the en banc court's decision and that of any other court. This Court should decline Petitioner's invitation to second-guess the Tenth Circuit's rulings on these procedural matters. In any event, the Tenth Circuit's determinations were correct.

Petitioner also asks this Court to reach a question that was not decided below, *i.e.*, his Eighth Amendment claim. This Court generally does not decide questions that were not passed upon below. Moreover, Petitioner fails in his attempt to show a conflict between courts of last resort. In any event, Petitioner's as-applied Eighth Amendment challenge is foreclosed by this Court's cases. This Court should deny Petitioner's request for a writ of certiorari.

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his case. 5/7/2019 Oral Argument Recording at 19:48-21:05. Accordingly, the facial validity of the aggravator was not before the Tenth Circuit. Thus, unless specifically noted, all references to Petitioner's claim refer to an as-applied Eighth Amendment challenge in which Petitioner claims an otherwise constitutional aggravator cannot be constitutionally applied to the facts of his case.

I. PETITIONER ASKS THIS COURT TO SECOND-GUESS THE EN BANC TENTH CIRCUIT'S HOLDINGS THAT HIS EIGHTH AMENDMENT CLAIM IS UNEXHAUSTED AND OUTSIDE THE SCOPE OF THE CERTIFICATE OF APPEALABILITY.

A. Legal and Procedural Background of Petitioner's Claim

One of the two aggravating circumstances found by the jury in Petitioner's case is that the murder of Rob Andrew was especially heinous, atrocious or cruel. The OCCA has adopted a limiting construction for the statutory terms, *see Maynard v. Cartwright*, 486 U.S. 356 (1988) (finding the statutory terms vague without a limiting construction), requiring that "the death of the victim was preceded by torture of the victim or serious physical abuse." *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). This narrowing construction was applied in Petitioner's case when he claimed on direct appeal that the evidence was insufficient to support the jury's finding of the aggravator. *Pavatt*, 159 P.3d at 294.

In the years since, Petitioner has raised various indeterminate challenges to the especially heinous, atrocious or cruel aggravator. In one sense, the exact nature of Petitioner's claims is irrelevant because his request that this Court second-guess the Tenth Circuit's procedural rulings does not (for reasons that will be expounded upon *infra*) warrant certiorari review. However, as Respondent will alternatively argue that the Tenth Circuit's decision was correct, it is necessary

to explain, to the extent possible, the evolution of Petitioner's arguments.

There are three constitutional requirements for aggravating circumstances. First, a State must define its aggravating circumstance in a manner that narrows its possible application, either by statute or judicial interpretation ("*Cartwright* claim"). *Cartwright*, 486 U.S. 356. Second, the narrowed definition must actually be applied to the case at hand either by jury instruction or on appellate review ("*Godfrey* claim"). *Lambrix v. Singletary*, 520 U.S. 518, 531-32, 537 (1997); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Finally, the evidence presented at trial must be sufficient for a rational trier of fact to find the aggravating circumstance proven beyond a reasonable doubt ("*Jackson* claim"). *Lewis v. Jeffers*, 497 U.S. 764, 781-83 (1990).[4]

Petitioner presented only a *Jackson* claim on direct appeal. Pet. App. 478a-479a. Petitioner's claim was so perfunctory that Respondent quotes it in full:

PROPOSITION XIV

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE.

> There was insufficient evidence to support the heinous, atrocious or cruel aggravating circumstance. *See Thomas v. Gibson*, 218

[4] *Jeffers* borrowed this standard of review from *Jackson v. Virginia*, 443 U.S. 307 (1979).

> F.3d 1213 (10th Cir. 2000) (Evidence was insufficient to support heinous, atrocious or cruel aggravating circumstance); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998); *Jones v. Gibson*, 206 F.3d 946, 953 (10th Cir. 2001) ("We agree with petitioner and the federal district court that the record does not support the Oklahoma Court of Criminal Appeals' finding that the victim pleaded for his life").
>
> The evidence does not support the fact that the murder was "especially" heinous, atrocious or cruel. As defense counsel said during closing argument, "To some degree I suppose all homicides are heinous, atrocious or cruel. I think that's the reason why our legislature has inflicted the term especially to that phrase."
>
> Interestingly, the State attempts to prove the existence of the aggravating circumstance on the basis of the information provided by Brenda Andrew in her 911 call to the police. (Tr. 3763) 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)

Pet. App. 478a-479a.

In his first post-conviction application, Petitioner alleged that appellate counsel insufficiently presented the *Jackson* claim on direct appeal. Pet. App. 472a-476a. In his second post-conviction application, Petitioner argued the jury in his case should have been

instructed, in addition to the requirement of torture or serious physical abuse, that it must find "conscious physical suffering" by Mr. Andrew.[5] 9/2/2009 *Second Application for Post-Conviction Relief-Death Penalty Case* (OCCA No. PCD-2009-777) at 27-31. Petitioner also presented a one-page proposition which purported to be a *Cartwright* claim. Pet. App. 424a-426a. However, Petitioner did not actually challenge the OCCA's construction of the aggravator. Respondent submits that Petitioner was actually presenting a claim that the OCCA has inconsistently applied the aggravator. *See Arave v. Creech*, 507 U.S. 463, 476-77 (1993) ("the question whether state courts properly have applied an aggravating circumstance is separate from the question whether the circumstance, as narrowed, is facially valid"). In any event, the OCCA procedurally barred all three of these claims. Pet. App. 309a-310a, 319a-320a.

Ground Ten of Petitioner's habeas petition alleged that **"Petitioner's sentence does not comport with the Eighth and Fourteenth Amendments to the United States Constitution because there is insufficient evidence to support that the murder was 'especially heinous, atrocious, or cruel.'"** Pet. App. 458a (all caps removed). Within what was clearly a *Jackson* claim, Petitioner stated that the facts of his case did not "comport with the narrowing process that

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[5] Petitioner's jury was instructed, in relevant part, "The phrase 'especially heinous, atrocious, or cruel' is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse." (O.R. XI 1286).

the Constitution requires."[6] Pet. App. 467a. Petitioner did not support this stray sentence with any authority. The district court treated this entirely as a *Jackson* claim. Pet. App. 260a-267a.

Petitioner also alleged, in Ground Eleven, that the jury instruction on the aggravator failed to include "conscious physical suffering", and in Ground Thirteen, Petitioner purported to raise a *Cartwright* claim, but actually repeated his jury instruction claim (as opposed to challenging the OCCA's limiting construction). *Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254* dated 04/01/2009, docket number 42 ("Doc. 42") at 157-62, 172-77. *See Pavatt III*, 928 F.3d at 926 ("In both Ground Eleven and Ground Thirteen of his federal habeas petition, Pavatt referred to the HAC aggravator as being facially vague. Neither Ground Eleven nor Ground Thirteen, however, directly asserted a facial challenge to the HAC aggravator. Instead, Ground Eleven focused on the adequacy of the instructions given to the jury in Pavatt's case regarding the HAC aggravator, and Ground Thirteen asserted that Oklahoma's Uniform

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[6] Petitioner's assertion that "he argued that his capital sentence violated the Eighth Amendment because the OCCA 'applied an incorrect standard of review' when applying its 'especially heinous, atrocious, or cruel' aggravator", Pet. at 8, is completely disingenuous. Petitioner argued that the OCCA applied the *Jackson* standard for its sufficiency review rather than the "reasonable hypothesis" test. Pet. App. 460a. *See Pavatt III*, 928 F.3d at 925 n.8 (the district court interpreted Ground Ten of Pavatt's habeas petition as arguing, in part, "that the OCCA should have applied the reasonable hypothesis test instead of Jackson in reviewing the evidence presented at trial. . . .").

Jury Instruction defining the terms 'heinous,' 'atrocious,' and 'cruel' failed to adhere to the constitutionally narrowing construction that had been adopted by the OCCA. . . .") (citation omitted). The district court found Grounds Eleven and Thirteen procedurally barred and meritless. Pet. App. 276a-279a.

In his opening brief to the Tenth Circuit, Petitioner's first proposition of error was that **"There was Insufficient Evidence to Support the 'Especially Heinous, Atrocious, or Cruel' Aggravating Factor."** 6/18/2015 Appellant's Opening Brief ("Opening Br.") at 20. Within that *Jackson* claim, Petitioner accused the OCCA of retreating from its prior narrowing of the aggravator. Opening Br. at 35-36. However, these statements were not a separate claim, but were provided as "context" for Petitioner's *Jackson* claim. Opening Br. at 21, 36; *see also* 11/9/2015 Appellant's Reply Brief at 7 n.1 ("The claim here is that there was insufficient evidence to support" the aggravator).

A majority of the three-judge panel assigned to Petitioner's case found the OCCA's denial of Petitioner's *Jackson* claim to be contrary to, and an unreasonable application of, this Court's decision in *Godfrey* because, within that sufficiency claim, the OCCA did not consider "whether the definition [of the aggravator] it applied satisfies the Eighth Amendment." *Pavatt I*, 859 F.3d at 936-37 & n.5. The panel majority believed Mr. Andrew's murder did not represent "the sort of suffering that could in a 'principled way . . . distinguish this case, in which the death penalty was imposed, from the

many cases in which it was not.'" *Id*. at 935 (quoting *Godfrey*, 446 U.S. at 433) (alteration adopted).

In denying Respondent's petition for rehearing the panel majority amended its opinion. Perhaps the most significant change in the opinion was the addition of the following language: "We are not saying that the OCCA in this case unconstitutionally applied a constitutionally acceptable narrowing construction of the State's HAC aggravator [as Respondent had argued in the rehearing petition]. We are saying that it did not apply the narrowing construction that we previously approved." *Pavatt II*, 894 F.3d at 1132.

On en banc review, the Tenth Circuit determined that the OCCA reasonably denied Petitioner's *Jackson* claim, *Pavatt III*, 928 F.3d at 917-22; found Petitioner's "as-applied challenge to the HAC aggravator" unexhausted and "subject to an anticipatory procedural bar" as well as outside the scope of the COA, *Pavatt III*, 928 F.3d at 922-26; "conclude[d] that there is no facial challenge to the HAC aggravator that is properly before" the court, *Pavatt III*, 928 F.3d at 926; and found Petitioner's challenge to the jury instruction regarding the aggravator to be both procedurally barred and meritless, *Pavatt III*, 928 F.3d at 926-30.

B. This Court should not Second-Guess the Tenth Circuit's Procedural Rulings

Petitioner asks this Court to review his case in order to determine whether the Tenth Circuit correctly determined that his Eighth Amendment challenge to

the especially heinous, atrocious or cruel aggravating circumstance is unexhausted and outside the scope of the COA. Petitioner raises no compelling question which warrants this Court's review. *Cf. Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (granting certiorari "to resolve several issues concerning the relationship between state procedural defaults and federal habeas review"). Rather, Petitioner insists that the Tenth Circuit misconstrued the pleadings in his case. Such error-correction is "outside the mainstream of th[is] Court's functions." *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)); *see also McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790, 1802 n.2 (2017) (Alito, J., dissenting) ("the question decided is not just narrow, it is the sort of fact-bound question as to which review is disfavored"). This Court should decline Petitioner's invitation to wade through the numerous pleadings in this case to second-guess the Tenth Circuit's reasonable interpretation of Petitioner's opaque arguments.

C. This Court should deny the Petition Because the Tenth Circuit's Conclusions are Correct

This Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*,

359 U.S. 180, 184 (1959). The Tenth Circuit correctly determined that Petitioner's as-applied challenge to the especially heinous, atrocious or cruel aggravating circumstance was unexhausted and outside the scope of the COA.[7]

i. The exhaustion requirement

Before addressing Petitioner's arguments, it is necessary to define exhaustion. The exhaustion requirement is designed to give states the first opportunity to correct constitutional violations. *Picard v. Connor*, 404 U.S. 270, 275 (1971). Thus, a habeas petitioner must "fairly present[]" *the same claim* in state court as the one he presents in federal court. *Id*. at 275-76. The question is whether the state court had a "fair opportunity" to consider the *legal claim* at issue in federal court, regardless of whether the petitioner had relied upon the same facts in state court. *Id*. at 276-78; *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims"). "[M]ere similarity of claims is insufficient to exhaust." *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (a petitioner must refer to "a specific federal constitutional guarantee" and a general appeal to a broad constitutional guarantee is insufficient). A petitioner's citation within a state court

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[7] This is not intended to be an exhaustive discussion of the merits of the Tenth Circuit's procedural rulings.

pleading to a case which discusses constitutional principles is also insufficient. *See Anderson v. Harless*, 459 U.S. 4, 6-8 (1982) (per curiam) (finding claim unexhausted although the petitioner had cited in state court a case in which that defendant had raised claims based on the constitution).

ii. Respondent did not waive exhaustion

First, Petitioner claims Respondent waived exhaustion. According to 28 U.S.C. § 2254(b)(3), any waiver of exhaustion must be express. As explained above, Petitioner's habeas petition raised only a *Jackson* challenge. Respondent expressly waived exhaustion only as to that claim. The response to Ground Ten began as follows:

> **The OCCA's rejection of Petitioner's evidentiary sufficiency challenge to the especially heinous, atrocious or cruel aggravator was wholly reasonable.**
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> In Ground Ten, Petitioner alleges that insufficient evidence was presented at trial to support the jury's finding of the especially heinous, atrocious or cruel aggravator. Doc. 42 at 147-57.
>
> ***A. Exhaustion***
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> This claim was raised on direct appeal and the OCCA rejected it on the merits. *Pavatt*, 159 P.3d at 294-95. It is therefore exhausted for purposes of federal habeas review.

B. Standard of Review

> The OCCA's rejection of this claim rests on substantive, not procedural, grounds. The OCCA recited and applied the standard of review mandated by *Lewis v. Jeffers*, 497 U.S. 764, 781-83 (1990) for evidentiary sufficiency challenges to aggravating circumstances. *Pavatt*, 159 P.3d at 294.

Pet. App. 442a-443a (all caps in proposition heading removed). One must read the admission of exhaustion in context. Respondent began by asserting (correctly) that Petitioner's claim was a sufficiency challenge. Respondent stated that "*this*" claim is exhausted, and argued the OCCA properly rejected "*this*" claim pursuant to the *Jackson* standard adopted for the context of aggravating circumstances by *Jeffers*. Further, Respondent cited only the OCCA's decision on direct appeal, which addressed only a *Jackson* claim. Respondent expressly waived exhaustion only as to Petitioner's *Jackson* claim.

The series of quotes from the habeas petition listed by Petitioner in his attempt to prove that Ground Ten included an as-applied Eighth Amendment challenge do not prove his point. Pet. at 16-17. First, as explained above in footnote 6, Petitioner's reference to the standard of review applied by the OCCA related to his argument that the OCCA should have applied a reasonable hypothesis test, rather than *Jackson*. There is nothing in this argument that should have alerted Respondent or the district court that Petitioner was raising an as-applied Eighth Amendment challenge.

Second, Petitioner expressly challenged the OCCA's denial of his direct appeal which presented only a *Jackson* claim. Pet. App. 458a-460a. Third, Petitioner referred to the "insufficient evidence" in various ways throughout Ground Ten and cited a number of cases in which the Tenth Circuit and the OCCA analyzed *Jackson* claims. Pet. App. 458a-468a. Finally, the pages of the cases Petitioner cited, and his explanations of their holdings, pertained almost exclusively to *Jackson* claims.[8]

Thus, a single stray reference to "the narrowing process" and complaints that Mr. Andrew's murder was not sufficiently egregious were not sufficient to put

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[8] In *Brown*, the OCCA merely recognized that it had adopted a narrowing construction and then proceeded to analyze the sufficiency of the evidence. Pet. App. 466a (citing *Brown v. State*, 753 P.2d 908, 912 (Okla. Crim. App. 1998)). In *Stouffer*, the OCCA analyzed the constitutionality of the aggravator on one of the pages cited by Petitioner. Pet. App. 466a (citing *Stouffer v. State*, 742 P.2d 562, 563-64 (Okla. Crim. App. 1987)). However, that page also contained the beginning of the OCCA's sufficiency analysis. Further, as with every other case he cited, Petitioner's parenthetical discussed only the sufficiency finding. Finally, in *Nuckols*, the court addressed a challenge to the jury instruction on the aggravator before finding the evidence insufficient. Pet. App. 467a (citing *Nuckols v. Reynolds*, 970 F. Supp. 885 (W.D. Okla. 1983)). Petitioner did not provide a page citation for *Nuckols*, but his discussion indicated he cited that case for its sufficiency analysis. The inclusion of the words "constitutionally narrowed construction of the aggravator" in Petitioner's description of *Nuckols* was wholly insufficient. The court first determined the OCCA's construction of the aggravator as in the jury instruction was constitutionally narrow, and then found the evidence sufficient to support the jury's determination that the evidence fell within that "constitutionally narrowed" construction.

Respondent on notice that Petitioner had transformed his sufficiency claim into an as-applied Eighth Amendment challenge. Respondent recognizes that he argued that "[t]o the extent Petitioner suggests" the OCCA's application of the aggravator in his case renders it unconstitutional, he is incorrect. Pet. App. 450a-452a. However, under circuit law, the validity of which Petitioner has not challenged, Respondent's hypervigilance is no indication Petitioner actually raised an Eighth Amendment claim. *Grant v. Royal*, 886 F.3d 874, 899-900 (10th Cir. 2018) (the hypervigilance of others cannot excuse the habeas petitioner's burden of presenting his claims). Much less does Respondent's hypervigilance constitute an *express* waiver of exhaustion. *Cf. Grant*, 886 F.3d at 899 (rejecting the petitioner's argument that the State's alternative merits discussion amounted to a waiver of non-exhaustion). The only express waiver within the response referred explicitly to the sufficiency claim which had been exhausted on direct appeal.

Moreover, Petitioner's argument that his *Jackson* claim and an as-applied challenge "are merely part and parcel of the same Eighth Amendment claim" is foreclosed by this Court's cases, discussed above, establishing that presentation of a similar claim is insufficient.[9]

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[9] Petitioner's reliance upon a First Circuit case, in which the petitioner raised competency claims in both state court and federal court, but changed the nature of his competency claim in federal court, does not establish that the Tenth Circuit erred. Pet. at 17-18 (citing *Pike v. Guarino*, 492 F.3d 61, 72 (1st Cir. 2007)). The First Circuit's cases do not bind the Tenth Circuit. *Fristoe v. Thompson*, 144 F.3d 627, 630 (10th Cir. 1998). Further, Petitioner's direct

The Tenth Circuit correctly determined Respondent did not waive exhaustion.

iii. Petitioner's claim is procedurally barred

Petitioner also argues he exhausted his as-applied claim. Petitioner mischaracterizes *Baldwin v. Reese*, 541 U.S. 27, 33 (2004) as holding that "'citation of any case that might have alerted the court to the alleged federal nature of the claim' is sufficient for fair presentation purposes." Pet. at 20. In *Baldwin*, this Court noted that the petition did not cite a case that might have alerted the state court that he was raising a claim based on federal, rather than state, law. *Baldwin*, 541 U.S. at 33. This Court did not adopt a requirement that a state court must read from beginning to end every case cited by an appellant in order to determine whether he is raising a claim different from that which his brief fairly appears to present. Petitioner's citation to *the sufficiency analysis* within *Thomas* likely was sufficient to alert the OCCA that he was challenging the sufficiency of the evidence on federal constitutional grounds. However, the citation to *Thomas* did not fairly alert the OCCA to any claim that the aggravating circumstance was overbroad as applied to the facts of his case. Although *Thomas* addressed a facial challenge to the especially heinous, atrocious or cruel aggravator,

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appeal claim that no rational trier of fact could have found the especially heinous, atrocious or cruel aggravating circumstance is not the substantial equivalent of his current claim that application of the aggravator to the facts of his case renders it overbroad.

Petitioner's citation to *Thomas* did not include a page citation and the parenthetical said only "(Evidence was insufficient to support heinous, atrocious or cruel aggravating circumstance)". Pet. App. 479a. Petitioner did not fairly present this claim.

Paradoxically, while insisting he exhausted his claim on direct appeal, Petitioner also claims he *could not have* raised the claim on direct appeal.[10] Pet. at 21-22. Petitioner did not present this argument to the federal district court or Tenth Circuit. Rather, it was made for the first time at oral argument by Judge Hartz. 5/7/2019 Oral Argument Recording at 15:30-19:00, 34:05-34:20. Accordingly, this Court should not consider this argument. *See Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2282 (2015) (refusing to consider an issue that was not presented below).

In any event, assuming Petitioner is correct, this claim was procedurally barred in the second post-conviction application.[11] Pet. App. 310a. Petitioner has never challenged the adequacy or independence of this

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[10] Respondent disagrees with Petitioner that he could not have presented his claim in a petition for rehearing. Pet. at 22 n.5. However, Respondent will not, in the limited context of this certiorari petition, explore the contours of the OCCA's rehearing practice. Assuming Petitioner is correct, his claim is still procedurally barred.

[11] Alternatively, if Proposition 5 of Petitioner's second post-conviction application is understood to present a facial challenge to the aggravator rather than an as-applied one, then his current as-applied challenge has never been exhausted.

bar, and does not do so now.[12] Accordingly, assuming *arguendo* the second post-conviction application exhausted Petitioner's current claim, that claim remains procedurally barred. It would be senseless to remand for the Tenth Circuit to apply a procedural bar, as opposed to an anticipatory procedural bar, to Petitioner's claim. This Court should deny Petitioner's request for certiorari review.

iv. Petitioner did not have a COA

As shown above, Petitioner's habeas petition presented only a *Jackson* claim. Further, the COA order granted a COA as to, *inter alia*, "Whether there was sufficient evidence to support the 'especially heinous, atrocious, or cruel' aggravator (raised in Ground 10 of Mr. Pavatt's habeas petition)[.]" *Case Management Order* dated 11/24/2014. The Tenth Circuit properly concluded that the COA did not include an as-applied Eighth Amendment claim. Nor, in light of Petitioner's briefs in the Tenth Circuit, which (as shown above) offered Eighth Amendment cases only as "context" for the *Jackson* claim, can Respondent be said to have waived Petitioner's lack of a COA by failing to assert it.

The Tenth Circuit's procedural rulings are correct. Petitioner presents no compelling question for this Court's review.

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[12] Indeed, Petitioner fails to even acknowledge that the OCCA barred this claim.

II. PETITIONER'S AS-APPLIED CHALLENGE TO THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS NOT PASSED UPON BELOW.

Petitioner accuses the Tenth Circuit of "[f]lout[ing] [t]his Court's [p]recedents" with its non-existent "[h]olding" regarding the constitutionality of the aggravator as applied in this case. Pet. at 23. This question was not passed upon below. In any event, Petitioner's argument is foreclosed by this Court's cases. Petitioner's request for certiorari review should be denied.

A. This Court is a Court of Review, not of First View

As thoroughly discussed above, the Tenth Circuit did not decide whether the application of the especially heinous, atrocious or cruel aggravator to the facts of Petitioner's case violates the Eighth Amendment. This Court does not decide questions that were not decided below, except in exceptional circumstances. *See Brumfield*, 135 S. Ct. at 2282 (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 v. Wilkinson*, 544 U.S. 709, 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); *but see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering an issue not presented below because respondent did not object,[13] it was an important, recurring issue and was the subject of another pending petition for certiorari). Petitioner's as-applied challenge is case-specific. Accordingly, this Court should not make an exception to its general refusal to consider claims not decided below.

B. Petitioner's Claim is Squarely Foreclosed by this Court's Cases

This Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa*, 359 U.S. at 184. Petitioner's claim is that Rob Andrew did not suffer long enough to distinguish his murder from those in which the death penalty is not imposed. Petitioner's claim is without merit.[14]

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[13] In this case, Respondent does object.

[14] This is not intended to be an exhaustive discussion of the merits of Petitioner's Eighth Amendment claim. In particular, for brevity (and because Petitioner's claim fails on *de novo* review), Respondent omits discussion of 28 U.S.C. § 2254(d) although its standards will apply to any merits analysis of Petitioner's claim because he has never argued they should not. *See Bell v. Cone*, 543 U.S. 447, 451-53 (2005) (per curiam) (applying AEDPA in spite of a dispute over whether the claim was exhausted); *Grant*, 886 F.3d at 931 n.20 (refusing to apply *de novo* review where the petitioner had never argued for it).

In *Jeffers*, the Ninth Circuit concluded that Arizona's especially heinous, cruel or depraved aggravating circumstance was not void on its face, but that it was, nevertheless, not constitutionally applied in Jeffers' case. *Jeffers*, 497 U.S. at 773. In particular, the Ninth Circuit did not believe the aggravator could "'be extended to Jeffers' case without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not.'" *Id*. (quoting *Jeffers v. Ricketts*, 832 F.3d 476, 486 (9th Cir. 1987)).

This Court rejected Jeffers' argument that, even assuming Arizona had adopted an adequate narrowing construction and applied that construction in his case, "the aggravating circumstance may nevertheless be vague 'as applied' to him":

> We rejected an identical claim in *Walton*, however, and the conclusion we reached in *Walton* applies with equal force in this case:
>
> > "Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient

> guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we 'lawfully may presume that [Walton's] death sentence was not "wantonly and freakishly" imposed-and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment.' *McCleskey v. Kemp*, 481 U.S. 279, 306, 308 [107 S.Ct. 1756, 1774, 1775, 95 L.Ed.2d 262] (1987); *Pulley v. Harris*, 465 U.S. 37, 43 [104 S.Ct. 871, 875, 79 L.Ed.2d 29] (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion." 497 U.S., at 655-656, 110 S.Ct., at 3058.
>
> Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U.S., at 362, 108 S.Ct., at 1858, has been satisfied.

Jeffers, 497 U.S. at 778-79.

This Court continued:

> Because federal habeas corpus relief does not lie for errors of state law, see, *e.g.*, *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 874, 79 L.Ed.2d 29 (1984); *Rose v. Hodges*, 423 U.S. 19, 21-22, 96 S.Ct. 175, 177-178, 46 L.Ed.2d 162 (1975) (*per curiam*), federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation.

Id. at 780. Thus, when a state court applies a constitutionally narrow construction of an aggravator to the facts of a particular case, its holding violates the constitution only if the evidence does not satisfy *Jackson*. *Id*. at 780-81. Petitioner's as-applied challenge is meritless.

To the extent Petitioner may be arguing the OCCA did not apply an adequate narrowing construction to the facts of his case, this argument is also foreclosed. The OCCA stated, "[t]o establish this aggravator, the State must present evidence from which the jury could find that the victim's death was preceded by either serious physical abuse or torture. Evidence that the victim was conscious and aware of the attack supports a finding of torture." *Pavatt*, 159 F.3d at 294. The OCCA then cited six of its prior cases applying the proper standard (including the "aware of the attack" language) before concluding the "facts tend to show that

Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes."[15] *Id*. There can be no doubt that the OCCA applied its previously approved definition.

In *Bell v. Cone*, 543 U.S. 447, 449 (2005) (per curiam), the state supreme court found its especially heinous, atrocious or cruel aggravator was supported by sufficient evidence. The state court made only a brief mention of part of its limiting construction of the aggravator, and did not say anything about whether the aggravator was appropriately narrow. *State v. Cone*, 665 S.W.2d 87, 94-95 (Tenn. 1984). In fact, the state court discussed the aggravator only to establish the harmlessness of a different, invalid aggravator. *Id*. Yet, the petitioner's Eighth Amendment claim was determined by the circuit court to have been exhausted.[16] *Cone*, 543 U.S. at 449-50. The circuit court then found the state court's decision was contrary to *Godfrey* because it did not believe the state court had applied its narrowing construction. *Id*. at 451-52.

This Court explained its decision in *Godfrey* as having held that the state appellate court failed to

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[15] Petitioner has never rebutted this factual finding by the OCCA that Mr. Andrew suffered for several minutes, as opposed to a "few seconds", Pet. at 4. *See* 28 U.S.C. § 2254(e)(1) (a state court's factual findings are presumed correct unless rebutted by clear and convincing evidence); *see also Pavatt III*, 928 F.3d at 920-22 (discussing the evidence which supports this finding).

[16] This Court noted a dispute regarding whether the claim was exhausted, but declined to decide the issue, invoking its authority to deny unexhausted claims. *Cone*, 543 U.S. at 451 n.3.

apply its limiting construction of the aggravator where "the facts of the case did not resemble those in which the state court had previously applied a narrower construction of the aggravating circumstance[17] and because the state court gave no explanation for its decision other than to say that the verdict was 'factually substantiated.'" *Id*. at 454. This Court called this the "linchpin" of *Godfrey* and stated that it would have rejected the Eighth Amendment challenge if the state court had applied a narrowing construction. *Id*. (citing *Lambrix*, 520 U.S. at 531); *see also Walton v. Arizona*, 497 U.S. 639, 653 (1990) (distinguishing *Cartwright* and *Godfrey* because the state appellate courts did not purport to apply a limiting definition).

The circuit court had found the state court's decision contrary to *Godfrey* based on the state court's failure to "'apply, or even mention, any narrowing interpretation'" or cite its own case in which it had adopted a narrowing construction. *Id*. at 455 (quoting *Cone v. Bell*, 359 F.3d 785, 797 (6th Cir. 2004)). However, "[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation." *Cone*, 543 U.S. at 455.

> More importantly, however, we find no basis for the Court of Appeals' statement that the state court "simply, but explicitly, satisfied

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[17] Federal courts may review state court decisions applying an aggravating circumstance to determine how it has been construed, but not to ensure it has been applied consistently. *Creech*, 507 U.S. at 476-77.

> itself that the labels 'heinous, atrocious, or cruel,' without more, applied" to the murder. The state court's opinion does not disclaim application of that court's established construction of the aggravating circumstance; the only thing that it states "explicitly" is that the evidence in this case supported the jury's finding of the statutory aggravator. As we explain below, the State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; *absent an affirmative indication to the contrary, we must presume that it did the same thing here*. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case.

Id. at 455-56 (emphasis added, internal citations omitted).

As shown above, the OCCA expressly applied its narrowing construction in Petitioner's case. Further, the OCCA has "construed the aggravating circumstance narrowly and ha[s] followed that precedent numerous times." *See Cone*, 543 U.S. at 456. The OCCA has consistently, since *Cartwright*, affirmed the aggravator when there was evidence of conscious physical suffering and reversed when there was not. *See, e.g.*, *Simpson v. State*, 230 P.3d 888, 903 (Okla. Crim. App. 2010) (evidence insufficient where the victim "was not conscious after being shot" and "likely died within

seconds"); *Smith v. State*, 157 P.3d 1155, 1178 (Okla. Crim. App. 2007) (evidence sufficient where the victim was shot nine times and was likely conscious "for at least a minute or longer"); *Robinson v. State*, 900 P.2d 389, 400-02 (Okla. Crim. App. 1995) (affirming where the victim was conscious for several minutes after being shot four times, and stating the length of consciousness is not dispositive); *Stouffer v. State*, 742 P.2d 562, 563-64 (Okla. Crim. App. 1987) (evidence insufficient where there was no evidence the victim was conscious after the first gunshot wound); *see also Pavatt II*, 894 F.3d at 1150-51 (Briscoe, J., concurring in part, dissenting in part) (collecting cases); *Perry v. State*, 893 P.2d 521, 534 (Okla. Crim. App. 1995) (contrasting cases in which the OCCA has, and has not, found the aggravator satisfied).

Also as in *Cone*, 543 U.S. at 456, the OCCA has "recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case." *See DeRosa v. State*, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004) (adopting a new jury instruction to better inform the jury as to the conscious physical suffering requirement); *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995) (recognizing its narrowing construction is constitutionally compelled). Given the OCCA's history of applying a narrowed construction of the aggravator,[18] and the lack of "an affirmative indication" that it

[18] Petitioner's reliance on "snippets of language" from a few Tenth Circuit decisions over the years ignores the numerous

was not doing the "same thing" here, this Court must presume that the OCCA applied its previously approved construction. *Cone*, 543 U.S. at 456. Petitioner's arguments amount to an improper assertion that the OCCA did not *correctly* apply its narrowing construction.

C. There is no Inter-Circuit Conflict

Petitioner argues the Tenth Circuit's "[h]olding [c]onflicts with [o]ther [a]ppellate [d]ecisions." Pet. at 28 (bold removed). However, the Tenth Circuit did not render a holding regarding Petitioner's Eighth Amendment claim. Accordingly, there can be no inter-circuit conflict.

In addition, almost all of the cases cited by Petitioner involve interpretations of state law, not of the constitutional requirements for an aggravating circumstance. Pet. at 28-31 & n.6. Further, the Ninth Circuit's belief that a defendant must intend to cause extreme pain, Pet. at 30 (citing *Wade v. Calderon*, 29 F.3d 1312, 1319-20 (9th Cir. 1994), is contrary to this Court's decision in *Walton*. *See Walton*, 497 U.S. at 698 (Blackmun, J., dissenting) (affirming Arizona's especially heinous,

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holdings by that Court approving the aggravator. Pet. at 33-34. *See Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003) (finding the aggravator constitutional in spite of the petitioner's reliance on "snippets of language" from *Thomas v. Gibson*, 218 F.3d 1213, 1229 n.17 (10th Cir. 2000) and *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring)); *accord Moore v. Gibson*, 195 F.3d 1152, 1175-76 (10th Cir. 1999); *Duvall v. Reynolds*, 139 F.3d 768, 793 (10th Cir. 1998).

cruel or depraved aggravating circumstance over the dissent's objection that there was no requirement that the defendant intended to cause anguish); *see also Jeffers*, 497 U.S. at 778 (noting the Court rejected the dissent's arguments in *Walton*). There is, therefore, no conflict between the Tenth Circuit's affirmance in this case (which, it bears repeating, did not address the issue at hand) and decisions by other courts of appeals or state courts of last resort.[19]

D. Petitioner's Claim is Foreclosed by this Court's Cases

Petitioner's final argument is that his claim squarely presents a recurring issue. Pet. at 31-35. As has been discussed throughout this brief, the instant petition does not squarely present an as-applied Eighth Amendment claim. Further, even if it did, such would be foreclosed by *Jeffers*. Respondent has also shown that the OCCA indisputably applied its narrowing construction in this case. Accordingly, Petitioner cannot show a violation of *Godfrey*. Finally, although Petitioner did not present a facial challenge to the

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[19] Admittedly, the North Carolina Supreme Court relied, in part, on *Godfrey* in *State v. Stanley*, 312 S.E.2d 393, 399-400 (N.C. 1984). However, *Stanley* was reversed for sufficiency grounds. In any event, this Court has made it clear that it did not hold in *Godfrey* that the facts of that case could not satisfy Georgia's aggravator. Rather, the "linchpin" of *Godfrey* was the state court's failure to apply any limiting construction and *this Court would have rejected the Eighth Amendment challenge if the state court had applied a narrowing construction*. *Jeffers*, 497 U.S. at 775-77.

aggravator below, there is no recurring constitutional violation in Oklahoma or other states.

As shown above, Oklahoma law restricts the especially heinous, atrocious or cruel aggravating circumstance to instances of torture or serious physical abuse and that limitation was applied in this case. A torture or serious physical abuse limitation has been approved by this Court, as have similar constructions—none of which have included a duration requirement on a victim's suffering. *See Cone*, 543 U.S. at 457-59 (finding Tennessee's especially heinous, atrocious or cruel aggravator constitutional where the state court had construed "torture" to mean a non-instantaneous death in which a victim has time to feel fear and try to protect herself);[20] *Walton*, 497 U.S. at 654-55, 698-99 (Blackmun, J., dissenting) (finding Arizona's especially heinous, cruel or depraved aggravator, that is "virtually identical to the construction [the Court] approved in *Maynard*", constitutional, over the dissent's concern that Arizona does not require an extended duration of suffering);[21]

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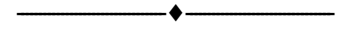
[20] Indeed, Petitioner points to Tennessee as one of the jurisdictions which he believes to be applying an unconstitutional aggravating circumstance without acknowledging that this Court has unanimously approved of that aggravating circumstance. Pet. at 35.

[21] The Tenth Circuit dissenters' concern about a "sharpshooter bonus", Pet. at 5, 27, 31, was shared by the dissent in *Walton*, and thus rejected by this Court. *Walton*, 497 U.S. at 696 (Blackmun, J., dissenting); *see Jeffers*, 497 U.S. at 778 (noting this Court rejected Justice Blackmun's arguments in *Walton*). Moreover, this concern focuses on the intent of the killer, which is certainly a proper consideration for an aggravating circumstance, but not the only one. It is also proper to focus on the suffering of

Cartwright, 486 U.S. at 365 (declining to hold "that some kind of torture or serious physical abuse *is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable*") (emphasis added); *cf. also Creech*, 507 U.S. at 475-76 (affirming "cold-blooded" limitation on Idaho's utter disregard aggravating circumstance, reasoning that "a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded.' That is because *some* within the broad class of first-degree murderers *do* exhibit feeling", and finding it "irrelevant" and "unsurprising" that Idaho courts found the aggravator satisfied "in a wide range of circumstances") (second alteration adopted).

Each of Petitioner's possible theories for relief are foreclosed by this Court's cases. Accordingly, whether this Court remanded Petitioner's case to the Tenth Circuit or conducted plenary review, Petitioner's sentence will ultimately be affirmed. Petitioner presents no compelling question which warrants this Court's intervention. Respondent respectfully asks this Court to deny the petition for writ of certiorari.



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the victim. *See Walton*, 497 U.S. at 646 (approving " 'a victim's uncertainty as to his ultimate fate' " as an adequate limiting construction) (quoting *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989)).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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