No. 19-697

In the Supreme Court of the United States

JAMES DWIGHT PAVATT, PETITIONER

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY
(CAPITAL CASE)

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Unless this Court intervenes, Petitioner James Pavatt will be executed based on an application of state law that, according to the highest federal court to consider the issue, violates the Constitution. The *en banc* Tenth Circuit did not question the correctness of the prior panel's ruling on the merits of Pavatt's Eighth Amendment claim; rather, the *en banc* majority—over a vigorous three-judge dissent—relied on a manifestly flawed procedural ruling. At a minimum, this Court should summarily reverse.

There are strong reasons, however, why the Court should instead grant plenary review to resolve the core constitutional issue presented. Doing so would enable the Court to restore uniformity to the law and provide much-needed guidance to lower courts on a frequently recurring life-and-death issue, the importance of which transcends this case. As *amici* supporting certiorari note, "Oklahoma has the highest execution rate per capita of any state." Members of Okla. Death Penalty Review Comm'n Amicus Br. 7 ("ODPRC Members Br.") (citing *The Report of the Oklahoma Death Penalty Review Commission* 7 (2017) ("*Commission Report*")); Okla. Crim. Def. Lawyers Ass'n Amicus Br. 16 ("OCDLA Br.") (same). And the State's "especially heinous, atrocious, or cruel" aggravator is "commonplace in Oklahoma death-penalty cases." Pet App. 68a (Hartz, J., dissenting, joined by Kelly and Lucero, JJ.).

The State's efforts to salvage the *en banc* Tenth Circuit's deeply flawed procedural ruling fall short. The State incorrectly assumes that this Court's

criteria for granting plenary review equally apply to summary reversals. And nothing in the State's Opposition refutes Pavatt's showing that the *en banc* court's procedural ruling is clearly erroneous.

The State's arguments against plenary review fare no better. While this Court generally will not "decide questions that were not decided below," Opp. 26, the original Tenth Circuit panel *did* decide the constitutional issue presented—in favor of Pavatt—and the original panel's dissenting opinion likewise addressed the merits. There is also an established body of Tenth Circuit law on the issue. This Court therefore would not be writing on a clean slate. Nor is there any serious dispute that this case otherwise squarely presents the constitutional question. Unless this Court steps in now, Oklahoma will likely forge ahead with many executions predicated on an unconstitutional, unprincipled, and unjust application of the "especially heinous, atrocious, or cruel" aggravator.

I. THIS COURT SHOULD SUMMARILY REVERSE THE TENTH CIRCUIT'S MANIFESTLY ERRONEOUS PROCEDURAL RULING.

A. Contrary to the State's supposition, *see* Opp. 8-9, this Court does not apply its Rule 10 criteria for granting plenary review to summary reversals under Rule 16.1. When a lower court has clearly "misapplied settled law," as the *en banc* Tenth Circuit did here, this Court "has not shied away from" granting summary reversal—even in "fact-intensive cases." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016)

(per curiam) (summarily reversing state court post-conviction decision rejecting constitutional claim); *see also Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (summarily reversing court's interpretation of federal law that was "both incorrect and inconsistent with clear instruction in the precedents of this Court"). Indeed, this Court has not hesitated to summarily reverse where a lower court clearly erred. *See, e.g.*, *Smith v. Digmon*, 434 U.S. 332, 333–34 (1978) (per curiam) (summarily reversing lower court's clearly erroneous application of "the exhaustion requirement of 28 U.S.C. § 2254(b)"); *see also Christeson v. Roper*, 135 S. Ct. 891, 892–93 (2015) (per curiam) (summarily reversing district court's erroneous denial of habeas petitioner's motion to substitute counsel); *Wearry*, 136 S. Ct. at 1007 (collecting cases). This case is a perfect candidate for summary reversal.

B. Nothing in the State's Opposition salvages the *en banc* court's plain error.

1. The State *concedes* (at 19) that it "expressly waived exhaustion" in its response to Ground Ten of Pavatt's habeas petition (which explicitly raised an Eighth Amendment claim, *see* Pet. App. 458a), but insists that its waiver applied only to a *different* claim. *See* Opp. 19 ("Respondent expressly waived exhaustion only as to [Petitioner's *Jackson*] claim.").

This argument collapses under scrutiny. *First*, the argument hinges on the State's misguided attempt to disaggregate Pavatt's Eighth Amendment challenge to the Oklahoma Court of Criminal Appeals's ("OCCA") arbitrary and overbroad

application of the aggravator into three supposedly freestanding claims: a "*Cartwright* claim," a "*Godfrey* claim," and a "*Jackson* claim." *See* Opp. 11 (citing *Maynard v. Cartwright*, 486 U.S. 356 (1988), *Godfrey v. Georgia*, 446 U.S. 420 (1980) (plurality op.), and *Lewis v. Jeffers*, 497 U.S. 764 (1990); *see Jackson v. Virginia*, 443 U.S. 307 (1979)).[1] But this misses the point that these interrelated precedents address the same core constitutional issue. Indeed, *Jeffers* itself made clear that it is simply an outgrowth of the earlier cases:

> [I]n *Maynard v. Cartwright*, . . . we applied the teachings of *Godfrey* to hold that the Oklahoma courts had not construed Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment."

Jeffers, 497 U.S. at 776 (citation omitted); *see also Stringer v. Black*, 503 U.S. 222, 228–29 (1992) (recognizing that *Maynard v. Cartwright* simply applied *Godfrey* to the facts and "did not 'brea[k] new ground.'") (brackets in original; citation omitted).

Second, the State ignores the fact that Pavatt's Eighth Amendment arguments are inextricably intertwined. Sufficiency of the evidence under *Jeffers* and *Jackson* necessarily turns on whether there was

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[1] The State equates a "*Jackson* claim" with *Jeffers*, noting that "*Jeffers* borrowed [the] standard of review [for sufficiency of the evidence] from *Jackson*." Opp. 11 n.4.

enough evidence to meet a given substantive standard. And here, *Godfrey* and *Maynard v. Cartwright* establish that governing standard. Both sufficiency of the evidence *and* the requisite constitutional narrowing under the Eighth Amendment were raised in Ground Ten of the habeas petition, as is clear from Pavatt's argument that "for the 'especially heinous, atrocious, or cruel' aggravator to be constitutionally supported, 'the evidence must support anguish that goes beyond that which necessarily accompanies the underlying killing.'" Pet. App. 466a–467a (citations and some internal quotation marks omitted); *see also* Pet. 16-17 (citing excerpts from habeas petition Ground Ten). Indeed, Pavatt left no doubt about his argument, citing *Nuckols v. Reynolds*, 970 F. Supp. 885 (W.D. Okla. 1993) for the proposition that "the federal district court [in that case] found that the evidence did not support *a constitutionally narrowed construction* of the aggravator." Pet. App. 467a (emphasis added). The petitioner in *Nuckols* relied on the Eighth Amendment to argue that "the 'heinous, atrocious, or cruel' aggravating circumstance [was] arbitrar[ily] interpreted and vaguely defined" by the OCCA. 970 F. Supp. at 890. And, as the State's response to Pavatt's habeas petition made clear, that is the argument the State understood Pavatt to be making. *See* Pet. 18-19 & n.4; Opp. 22.

Third, the State's suggestion that Pavatt should have raised separately delineated Eighth Amendment claims—a "*Godfrey* claim," a "*Cartwright* claim," and a "*Jackson* claim"—imposes an unsupported and unworkable pleading standard that,

if accepted, would create perverse incentives for habeas petitioners. Under the State's logic, petitioners would be incentivized to bury federal courts with innumerable duplicative and overlapping claims lest they forfeit a potentially dispositive claim—with potentially fatal consequences. Even in routine civil litigation, this Court has not adopted such a narrow view of issue preservation: "[O]nce a federal claim is properly presented, a party can make *any argument* in support of that claim." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (emphasis added; citation omitted).

As in *Wood v. Milyard*, 566 U.S. 463 (2012)—cited in the Petition (at 19) but ignored by the State's Opposition—the State waived a procedural objection under 28 U.S.C. § 2254(b)(3), and "[t]he Tenth Circuit should have" "reached and decided the merits of the petition." 566 U.S. at 474.[2]

2. As the Petition explained (at 20–22), the *en banc* Tenth Circuit's procedural ruling is manifestly flawed on the independent ground that Pavatt timely exhausted his Eighth Amendment claim.

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[2] The State does not dispute that the *en banc* court's procedural bar based on the asserted lack of a Certificate of Appealability ("COA") simply tracks the court's conclusion that Ground Ten of Pavatt's habeas petition did not present an Eighth Amendment challenge to the OCCA's overbroad and arbitrary application of the aggravator. *See* Opp. 25; *see also* Pet. n.3 (citing COA, which cross-referenced Ground Ten). For the reasons explained in the Petition and above, however, Ground Ten unequivocally raised this claim and was therefore well within the scope of the COA.

While the State quibbles over the precise scope of this Court's holding in *Baldwin v. Reese*, 541 U.S. 27 (2004), *see* Opp. 23, the *Baldwin* Court made clear that a habeas petitioner can sufficiently present a claim simply "by citing in conjunction with the claim the federal source of law . . . or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" 541 U.S. at 32. Pavatt exceeded that baseline requirement here. *First*, he argued that "[t]he evidence does not support the fact that the murder was 'especially' heinous, atrocious or cruel." Pet. App. 479a. *Second*, he cited supporting federal cases, including *Thomas v. Gibson*, 218 F.3d 1213 (10th Cir. 2000). *Id.*

The State complains (at 24) that "Petitioner's citation to *Thomas* did not include a page citation" but identifies no authority for the extraordinary proposition that a habeas petitioner forfeits his challenge in a capital case by failing to include a pin cite with his citation of an on-point federal case. *Thomas* addressed both an Eighth Amendment "argu[ment] that Oklahoma's heinous, atrocious, or cruel aggravating circumstance . . . fails to adequately narrow the class of murders wherein the perpetrator is subject to the death penalty," 218 F.3d at 1226 (citing *Maynard v. Cartwright* and *Godfrey*), and an intertwined sufficiency-of-the-evidence claim. *Id.* (citing *Jeffers*). Moreover, the *Thomas* court expressed concern that the OCCA's application of the aggravator, as in this case, "appears to completely unwind the requirement of conscious suffering in every murder committed with more than one blow."

Id. at 1228 n.17. This was sufficient for Pavatt to alert the OCCA to his Eighth Amendment claim.

Finally, the State's suggestion (at 24) that Pavatt's claim is independently "procedurally barred" by the OCCA's ruling on his "second post-conviction application" fails for the simple reason that the *en banc* court of appeals clearly construed Pavatt's second application as raising a different, *facial* challenge to the aggravator. *See* Pet. App. 33a.

II. ALTERNATIVELY, THE COURT SHOULD GRANT PLENARY REVIEW.

The *constitutional* issue in this case—whether a State's application of an aggravating factor to justify the death penalty violates the Eighth Amendment when it makes punishable by death any homicide where the victim does not die immediately (Pet. i)—is important and recurring, involves a conflict with this Court's precedents and a split of appellate authority, and is squarely presented. That question not only warrants plenary review by this Court under Rule 10; this Court's guidance is urgently needed.

The State responds (at 26) that this Court generally will not "decide questions that were not decided below." But in a detailed and carefully reasoned opinion, the original Tenth Circuit panel *did* decide the issue—in favor of Pavatt. Pet. App. 86a–107a. Judge Briscoe's partial dissent from the panel opinion likewise addressed the merits. *Id.* at 146a–151a. And a body of Tenth Circuit precedent embracing the OCCA's flawed approach (emphasizing the instantaneous versus non-instantaneous nature of the victim's death) has already developed in the

face of a rising chorus of concern expressed by members of that court. *See* Pet. 25–26 (citing Tenth Circuit cases following OCCA), 32–33 (OCCA cases), 33–34 (concerns expressed by members of the Tenth Circuit). Indeed, the State points (at 34 n.18) to "numerous [Tenth Circuit] holdings" that it claims support the OCCA's application of the aggravator. This Court therefore would not be writing on a clean slate. It has the full benefit of the Tenth Circuit's analysis in this case (including the contrary views expressed by Judge Briscoe) and the substantial body of related Tenth Circuit precedent.

The State does not otherwise dispute that this case squarely presents the constitutional issue. Nor could it do so. The State acknowledged below that one of the "crucial points on which this case turns" is whether "the OCCA has indisputably adopted an adequate narrowing construction of the HAC [i.e., the "especially heinous, atrocious, or cruel"] aggravator." Appellee's *En Banc* Reply Br. 12, *Pavatt v. Carpenter*, No. 14-6117 (10th Cir. Jan. 29, 2019).[3]

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[3] For good reason, the State does *not* argue that the OCCA's application of a separate aggravator (murder for remuneration) has any bearing here. The State appropriately "concede[d]" below that "under *Brown v. Sanders*, . . . if HAC was improperly applied, there is constitutional error." Appellee's *En Banc* Supp. Br. 31, *Pavatt v. Carpenter*, No. 14-6117 (10th Cir. Nov. 16, 2018) (citing *Brown v. Sanders*, 546 U.S. 212, 220–21 (2006)). *See Brown*, 546 U.S. at 221 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.") (brackets in original) (quoting *Stringer*, 503 U.S. at 232).

Nor does the State dispute that numerous appellate courts have rejected the OCCA's approach, which the *en banc* Tenth Circuit opinion allows to stand. *See* Pet. 28-31; Opp. 35. Instead, the State argues (at 35) that this conflict can be ignored because the *en banc* court declined to address the original panel's merits holding. But the Tenth Circuit did so only by relying on a manifestly flawed procedural ruling. The State also argues that "almost all of the cases cited by Petitioner involve interpretations of state law," *id.*, yet overlooks that these decisions are all rooted in Eighth Amendment doctrine. *See, e.g.*, *California v. Davenport*, 710 P.2d 861, 871 (Cal. 1986) ("Appellant's proposed interpretation . . . presents significant constitutional questions under *Godfrey*."); *Wade v. Calderon*, 29 F.3d 1312, 1320 (9th Cir. 1994) ("Without the saving construction placed on it by the California Supreme Court, the torture special circumstance would fail to . . . meet the Eighth Amendment standard."), *overruled on other grounds*, *Rohan ex rel. Gates v. Woodford*, 334 F.3d 813 (9th Cir. 2003), *abrogated on other grounds*, *Ryan v. Gonzales*, 568 U.S. 57 (2013); *North Carolina v. Stanley*, 312 S.E.2d 393, 399 (N.C. 1984) ("This case is very nearly controlled by *Godfrey*."); *North Carolina v. Lloyd*, 552 S.E.2d 596, 629–30 (N.C. 2001) (citing *Stanley*); *Connecticut v. Johnson*, 751 A.2d 298, 341–43 (Conn. 2000) (same); *Louisiana v. Monroe*, 397 So. 2d 1258, 1275 (La. 1981) (citing *Louisiana v. Clark*, 387 So. 2d 1124 (La. 1980), in turn, citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

Furthermore, the State tacitly concedes that the OCCA's and Tenth Circuit's approach produces divergent life-and-death outcomes based on the happenstance of where the defendant is sentenced. As the Petition noted, if Pavatt had been sentenced in a court subject to the Ninth Circuit's jurisdiction (or in the States of Connecticut, Louisiana, and North Carolina), he would not face the death penalty based on the fact that his victim did not die instantly. Pet. 31; *see also* ODPRC Members Br. 10 (noting that Oklahoma's rule "promotes disuniformity in capital sentencing[,] . . . making it highly likely that factually indistinguishable cases will be decided differently").

Instead, the bulk of the State's discussion of the constitutional question reduces to the argument that the OCCA was correct on the merits and the original Tenth Circuit panel opinion was wrong. But that is the very question this Court should definitively resolve.

In any event, the authorities cited by the State do not support its conclusion. The State argues that the OCCA undertook the requisite constitutional narrowing because it cited Oklahoma's narrowing construction of the aggravator. *See, e.g.*, Opp. 31 ("There can be no doubt that the OCCA applied its previously approved definition."). But paying lip service to a narrowing construction is not enough. "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement." *Maynard v. Cartwright*, 486 U.S. at 362. For a state court to comply with *Godfrey* and *Maynard v. Cartwright*, it must actually administer its aggravator in a

principled and rational way. *See* Pet. 23–25. Here, as the original panel opinion correctly held, the OCCA did not do so. *See* Pet. App. 103a (OCCA "did not apply the narrowing construction that we previously approved.").

In a last gasp, the State argues (at 37–38) that "there is no recurring constitutional violation in Oklahoma or other states" because (according to the State) the OCCA complied with this Court's precedents. Again, the State puts the cart before the horse. The relevant inquiry is not whether a "constitutional violation" is recurring, but rather whether the issue presented is recurring. Here, as *amici* confirm, and as Judge Hartz noted in the three-judge dissent below (Pet. App. 68a), it unquestionably is. As the State with the highest per-capita execution rate in the nation, Oklahoma put more than ninety people to death within just fifteen years (2000-2015). *See* OCDLA Br. 16 (citing *Commission Report* 7). Thus, "a significant number of individuals will be unconstitutionally put to death if" the OCCA's application of the aggravator "stands uncorrected." *Id.* at 3; *see also* ODPRC Members Br. 4 ("As the Commission's report establishes, the administration of the death penalty in [Oklahoma] raises grave concerns.").

Because the issue's importance transcends this case, this Court's intervention is urgently needed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

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