No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

Byron James Shepard
Petitioner,
v.
The State of Oklahoma,
Respondent,

On Petition for Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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March 15, 2024

QUESTION PRESENTED

Does Oklahoma's continuing threat aggravating circumstance violate this Court's capital sentencing jurisprudence and the Eighth and Fourteenth Amendments by failing to adequately narrow the jury's discretion as applied by the Oklahoma Court of Criminal Appeals?

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MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Byron James Shepard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Court of Criminal Appeals entered in the above-entitled proceeding on September 21, 2023.

LIST OF PARTIES:

All parties to this action are named in the caption.

OPINIONS BELOW:

The judgment for which certiorari is sought is *Shepard v. State,* 2023 OK CR 15, 538 P.3d 518. The decision in *Shepard* was filed on September 21, 2023. *See* Appendix, Exhibit A. Rehearing was denied on October 20, 2023. *See* Appendix, Exhibit B.

STATEMENT OF JURISDICTION IN THIS COURT:

The Oklahoma Court of Criminal Appeals, the highest Oklahoma court in which Petitioner may obtain relief, issued its decision affirming Petitioner's judgment and death sentence on September 21, 2023 The same Court denied rehearing on October 20, 2023. Pursuant to this Court's Rule 13.5, Petitioner

timely sought from the Honorable Associate Justice Neil M. Gorsuch an extension of time to file a petition for a writ of certiorari. Justice Gorsuch entered an order on January 8, 2024, giving Petitioner up to and including March 18, 2024, to file a petition. This Court's jurisdiction arises pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

Constitutional Provisions:

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oklahoma Statute:

Okla. Stat. tit. 21, § 701.12 (2021) Aggravating Circumstances:

> Aggravating circumstances shall be:
>
> * * *
>
> (7) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society

Oklahoma Uniform Jury Instruction No. 4-74:

> DEATH PENALTY PROCEEDINGS— CONTINUING THREAT TO SOCIETY DEFINED

> The State has alleged that there exists a probability that the defendant will commit future acts of violence that constitute a continuing threat to society. This aggravating circumstance is not established unless the State proved beyond a reasonable doubt:
>
> First, that the defendant's behavior has demonstrated a threat to society; and
>
> Second, a probability that this threat will continue to exist in the future

STATEMENT OF THE CASE:

A. Facts Material to the Question Presented.

Petitioner Shepard was tried by a jury on one count of First-Degree Murder for the death of Justin Terney, one count of Knowingly Concealing Stolen Property, and one count of Possession of a Controlled Dangerous Substance, Methamphetamine. (O.R. 35-36) Following a guilty verdict, the jury heard evidence in aggravation and mitigation and returned a death sentence on the count of First-Degree Murder.

This petition questions whether the "continuing threat" aggravating instruction sufficiently performs the narrowing function required by the Eighth and Fourteenth Amendments in death penalty cases in light of this Court's holdings in *Arave v. Creech*, 507 U.S. 463, 471 (1993) (The State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance . . . and that make rationally reviewable the process for imposing a sentence of death") (internal quotation marks and citations omitted). *See also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("[O]ur cases have insisted that

the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); *Proffitt v. Florida,* 428 U.S. 242, 259-60 (1976) (An aggravating circumstance is constitutional only if the jurisdiction utilizing it applies and interprets it in a "limiting" and "consistent" manner). Specifically, Oklahoma's continuing threat aggravator fails to channel the sentencer's discretion in a constitutionally acceptable manner.

Prior to trial, Mr. Shepard filed a motion to strike the continuing threat circumstance, arguing it was unconstitutional on its face and as applied. (O.R. 608-11) The trial court summarily denied the motion at trial. (Tr. XIV 6-8)

To prove this aggravator at trial, the State relied on prior violent incidents between Mr. Shepard and his partners and a recorded county jail phone call from Mr. Shepard to a friend in its argument to the jury. (Tr. XIV 27-36; Tr. XVII 33, 35-40) Specifically, the State presented evidence from prior partners of Mr. Shepard, including Amanda Sanders, Brandy Armstrong (also known as Brandy Tillery), and Brittany Swayze, regarding incidents of domestic violence between them and Mr. Shepard at different points in their relationships. (Tr. XIV 52-60, 68-101, 116-46)

Initially, Ms. Amanda Sanders told the jury about an incident in which she observed Mr. Shepard and his girlfriend at the time, Jessie, arguing and Mr. Shepard put his hands on Jessie. Ms. Sanders, who was pregnant at the time, told Mr. Shepard he needed to leave. In response, Mr. Shepard grabbed a shotgun from

his car and put it in her face. (Tr. XIV 54, 58)

Ms. Brandy Armstrong testified that she and Mr. Shepard initially got together through using drugs together. (Tr. XIV 70) She recounted incidents of pushing and violent physical abuse, detailing incidents in which Mr. Shepard choked her when she was pregnant with their child; she asserted Mr. Shepard was violent with her only when he was on drugs. (Tr. XIV 71-78) Notably, Ms. Armstrong testified Mr. Shepard was not abusive when he was sober, but only got violent and abusive when he used drugs. (Tr. XIV 73, 80-81) She further testified methamphetamine made Mr. Shepard paranoid. (Tr. XIV 91-92) On cross-examination, Ms. Armstrong revealed that Mr. Shepard's mother, Pam Dodson, introduced Mr. Shepard to methamphetamine by making him learn how to cook methamphetamine when he was about 13 or 14 years old, specifically for her own personal use. (Tr. XIV 84, 93-94) She recalled an instance she witnessed in which law enforcement caught Ms. Dodson with methamphetamine and she tried to blame it on Mr. Shepard, who was not involved with methamphetamine at the time and was staying with his grandparents and trying to stay clean and sober. (Tr. XIV 84-85)

Mr. Cody Swayze, the brother of Brittany Swazye, one of Mr. Shepard's partners, recounted an argument between Mr. Shepard and Ms. Swayze in which Mr. Swayze ended up cutting a tire on Mr. Shepard's vehicle so Mr. Shepard could not leave in it. Mr. Shepard witnessed the slashing of the tires. Then a physical altercation began between him and Mr. Swayze. (Tr. XIV 104) He recounted they

were all using drugs at the time, including Mr. Shepard specifically using methamphetamine. (Tr. XIV 108, 115) The State presented testimony from Ms. Brittany Swayze that Mr. Shepard used methamphetamine and introduced Ms. Swayze to its use. (Tr. XIV 120-21) Ms. Swayze testified to several incidents of violence that erupted from their arguments in which Mr. Shepard would hit her with his fists and at two different times choked her, once until she was unconscious. (Tr. XIV 122-23) Specifically, she recounted a methamphetamine-induced argument and incident where Mr. Shepard would not let Ms. Swayze leave and ended up following, pushing, hitting, and dragging her, to which the police responded. (Tr. XIV 124-26) She recounted a later instance in which Mr. Shepard ended up hitting her with his fist over a dispute about their child. (Tr. XIV 131-32) Notably, Ms. Swayze, like Ms. Armstrong, testified when Mr. Shepard was sober, they argued less and things between them were better. (Tr. XIV 134) Ms. Swayze testified that methamphetamine created aggression and a lack of caring about others in Mr. Shepard; contrary to how he behaved when he was sober. (Tr. XIV 135)

Additionally, testimony revealed Ms. Swayze was having an affair with Christopher Buxton while she and Mr. Shepard were married but separated. (Tr. XIV 136-37) Mr. Buxton testified Mr. Shepard assaulted him after he was texted by cellphone to come to Ms. Swayze's house to see her. Mr. Buxton arrived and was walking through the garage when someone attempted to pepper spray him. Shortly after, Mr. Shepard hit him with a metal pipe or aluminum baseball bat several

times, inflicting injuries. (Tr. XIV 148-51, 155-56; State's Exs. 150-51)

Finally, in support of the continuing threat aggravator, the State admitted a recorded county jail phone call from Mr. Shepard to a friend. The call was a benign conversation between friends, but the State stressed a few comments made by Mr. Shepard during the conversation, such as that he was leading a "gangster life" when watching The Big Bang Theory in jail, a show about nerds and their hobbies, that he was famous due to the this case; and that he asked the friend to ring his step-brother's bell. (State's Ex. 153; Tr. XIV 33-36, 184-85)

Notably, despite acknowledging in closing that society would include wherever Mr. Shepard lives, including in the custody of the Department of Corrections, the State relied on evidence of past violence that was virtually all a product of Mr. Shepard's methamphetamine use and related to incidents involving his female partners. (Tr. XVII 33-38) In addition, the State relied in closing on that single, ultimately benign, jail call with a friend to prove he was a continuing threat to society while incarcerated. (State's Ex. 153; Tr. XVII 38-40)

B. How the Issue Was Raised and Decided Below.

Trial counsel filed a motion to strike the continuing threat aggravating circumstance on two bases. (O.R. 608-11) First, trial counsel argued the State lacked sufficient evidence to meet its burden regarding this aggravating circumstance. Second, the aggravator was and is unconstitutional as applied because it cannot be applied in a consistent manner, it is vague and overbroad, and it fails to adequately channel the sentencer's discretion. (O.R. 608-11) The trial

court summarily overruled the motion when defense counsel renewed it at the beginning of the penalty stage of trial. (Tr. XIV 6-8)

On appeal to the Oklahoma Court of Criminal Appeals (OCCA), Petitioner acknowledged the OCCA's consistent rejection of challenges to the constitutionality of the continuing threat aggravating circumstance but pointed out that in doing so the OCCA has consistently failed to provide substantive analysis explaining the constitutionality of Oklahoma's continuing threat aggravator and merely concluding the aggravator is "specific, not vague, and readily understandable without further definition. *Boyd v. State*, 839 P.2d 1363, 1371 (Okl. Cr. 1992); *Munson v. State*, 758 P.2d 324, 335 (Okl. Cr. 1988); *Fisher v. State*, 736 P.2d 1003, 1010 (Okl. Cr. 1997); *VanWoundenberg v. State*, 720 P.2d 328, 336 (Okl. Cr. 1986); *Liles v. State*, 702 P.2d 1025, 1031 (Okl. Cr. 1985). *But see Boltz v. State*, 806 P.2d 1117, 1126 (Okl. Cr. 1991) (Parks, P.J., specially concurring) (circumstance was valid, but more definitive guidance needed). Petitioner argued developments in capital punishment jurisprudence require the OCCA to reexamine its previous holdings and declare Oklahoma's continuing threat aggravating circumstance unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution.

The OCCA has continued to rely on this Court's decision in *Jurek v. Texas*, 428 U.S. 262 (1976), in upholding Oklahoma's continuing threat aggravator. Petitioner pointed out that despite the similar language between Texas's and Oklahoma's death penalty statutes regarding whether a defendant is a continuing

threat to society, Oklahoma's capital sentencing scheme differs from that of Texas. *See Pickens v. State*, 850 P.2d 328, 340 (Okl. Cr. 1993) ("[C]apital sentencing proceedings in Oklahoma differ from those in Texas . . . .") Unlike Oklahoma, Texas does not resort to a list of statutory aggravating circumstances to strictly define the categories of those who may be eligible for the death sentence. Rather, in Texas, capital homicides are limited to intentional and knowing murders committed under certain enumerated situations. *See* Tex. Penal Code Ann. § 19.03 (West). Thus, Texas's "action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose" as aggravating circumstances. *Jurek*, 428 U.S. at 270. Therefore, Petitioner argued, any comparison by the OCCA of Oklahoma's aggravating circumstances with Texas's death penalty scheme must be with those narrowing factors set forth in Texas's capital murder statute, not with the sentencing considerations contained within Texas's "special issues," of which "continuing threat" is one. *See* Tex. Code Crim. P. Ann. art. 37.071(2)(b) (West). Thus, Petitioner argued, the difference in the states' capital sentencing schemes renders the OCCA's reliance on *Jurek* to uphold Oklahoma's continuing threat aggravator inapposite and fundamentally flawed.

In his Brief, Petitioner identified new developments within this Court in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) that render the OCCA's upholding of Oklahoma's continuing threat aggravating circumstance unconstitutional. This Court reversed Mr. Penry's death sentence precisely because Texas's capital

sentencing scheme did not provide an avenue for the jury to consider mitigating evidence under the "continuing threat" special issue. *Id.* at 802-04. Further, Petitioner emphasized his and this Court's concern that the continuing threat aggravator may simply turn mitigating factors into an aggravating factor, inhibiting the jury from being able to fully and properly consider mitigating factors at play in this case. Further, Petitioner mentioned the near universal rejection of a continuing threat aggravating circumstance in states authorizing capital punishment: at the time Petitioner filed his brief, he maintained that only five states expressly authorize future dangerousness to be considered by the jury for purposes of aggravation. Idaho, Oregon, and Texas permit future dangerousness to be used as an aggravating factor during the selection stage only after a finding of guilt of capital murder. Idaho Code Ann. § 19-25159)(i) (West); Or. Rev. Stat. Ann. § 163.150 (West 2017); Tex. Code Crim. P. Ann. art. 37.071(2)(b) (West). However, the Oregon Legislature removed the continuing threat language as an issue for the trial court to submit to the jury for consideration. Or. Rev. Stat. Ann. § 163.150 (West 2019). Thus, as it stands before this Court now, only four states authorizing capital punishment utilize the continuing threat aggravating circumstance. Of those few states, only Oklahoma and Wyoming authorize continuing threat as a factor in determining a defendant's death penalty eligibility. Okla. Stat. Ann. tit. 21, § 701.12(7) (West); Wyo. Stat. Ann. § 6-2-102(h)(xi) (West).

Finally, Petitioner pointed out that issues touching on the Eighth Amendment must comply with "the evolving standards of decency that mark the

progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Additionally, this Court has observed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Citing the near universal rejection of the continuing threat aggravator by state legislatures authorizing capital punishment, Mr. Shepard posited the OCCA should join the overwhelming majority of jurisdictions that reject the continuing threat aggravator as a manner of narrowing the class of defendants who are eligible for the death penalty. As this Court has acknowledged, even experts in psychiatry are generally unable to predict future behavior. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 916 (1983), *superseded by statute on other grounds, United States v. Monroe*, 974 F.Supp 1472 (N.D. Georgia) (Blackmun, J., dissenting) ("The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three.") Consequently, Oklahoma's use of the continuing threat aggravator no longer comports with the evolving standards of decency as evinced by its rejection in the vast majority of other states authorizing capital punishment as well as the rejection of the predictability of future dangerousness by modern science.

Despite this argument, the Oklahoma Court of Criminal Appeals once again rejected Petitioner's claim in a single paragraph, with no explanation other than its prior upholding of the aggravator in previous cases. *Shepard v. State*, 538 P.3d 518, 556 (Okl. Cr. 2023) (citing *Nolen v. State*, 485 P.3d 829, 859 (Okl. Cr. 2021) and

Bosse v. State, 400 P.3d 834, 859-60 (Okl. Cr. 2017)). It did so without reference to this Court's holding in *Penry II*. *Id.*

REASON THIS COURT SHOULD GRANT THE WRIT:

This Court should grant certiorari because Oklahoma's continuing threat aggravating circumstance violates this Court's capital sentencing jurisprudence and the Eighth and Fourteenth Amendments by failing to adequately narrow the jury's discretion and as applied by the Oklahoma Court of Criminal Appeals.

Oklahoma's continuing threat aggravating circumstance does not pass constitutional muster because it fails to narrow the class of homicides eligible for a death sentence by way of clear, limiting language in the aggravator itself or through the application of any limiting construction in jury instructions or by the appellate courts on appeal. *See, e.g., Arave v. Creech*, 507 U.S. 463, 471; *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); and *Proffitt v. Florida,* 428 U.S. 242, 253 (1976).

The bare language of the aggravator itself is vague and too broad to channel a jury's discretion because it does not clearly convey to the jury that it must find the aggravator beyond a reasonable doubt that a defendant is a continuing threat *while incarcerated*. This is due to Oklahoma's sentencing range options for Murder in the First Degree which include life, life without the possibility of parole, and death. Okla. Stat. Ann. tit. 21, § 701.9 (West). Although the State in closing arguments indicated that society is wherever Petitioner is to be, neither the statute nor the related jury instruction make it clear to the jury that in order to find a sentence of death, it must unanimously and specifically find Mr. Shepard is a continuing threat to society while incarcerated beyond a reasonable doubt. *See* Okla. Stat. Ann. tit. 21 § 701.12 (West); Instruction Nos. 4-72 & 4-74, OUJI-CR

(2d). Without language indicating clearly to the jury it must find Mr. Shepard would be a continuing threat to society while incarcerated, this aggravating circumstance fails to conform to the constitutional requirement that a jury find an aggravating circumstance unanimously and beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 577 U.S. 92, 97-98 (2016) (internal citations omitted).

To this point, under the Due Process clause, capital defendants are entitled to inform a jury of their parole ineligibility when future dangerousness is at issue and the only sentencing option is life imprisonment without the possibility of parole. *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994); *Shafer v. South Carolina*, 532 U.S. 36, 40 (2001).

Federal courts have disagreed on *Simmons*'s application to how the State must prove whether a defendant is a continuing threat in light of a defendant's parole ineligibility. Lower courts have explicitly split on whether a defendant's future dangerousness must be proved specifically in the context of future life imprisonment. Some courts have answered that question affirmatively. *See United States v. Montgomery*, 10 F. Supp. 3d 801 (W.D. Tenn. 2014); *United States v. Llera Plaza*, 179 F. Supp. 2d 464 (E.D. Pa. 2001); *United States v. Gilbert*, 120 F. Supp. 2d 147 (D. Mass. 2000); *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1177 (D. Colo. 2006)); *United States v. Peoples*, 74 F. Supp. 2d 930 (W.D. Mo. 1999); *United States v. Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000).

Within these cases, courts have differed as to whether evidence of future

dangerousness must be limited to only conduct within the prison setting. Where courts restrict future dangerousness to the prison setting, the court in *Montgomery* said that evidence of future dangerousness within a prison setting need not prohibit out of prison conduct. *United States v. Montgomery*, 10 F. Supp. 3d 801, 840 (W.D. Tenn. 2014). The courts in *Llera Plaza* and *Gilbert* limit evidence in support of future dangerousness to that which is relevant in the context of prison life. *United States v. Llera Plaza*, 179 F. Supp. 2d 464, 488 (E.D. Pa. 2001); *United States v. Gilbert*, 120 F. Supp. 2d 147, 155 (D. Mass. 2000). The court in *Concepcion Sablan* promulgates a restrictive and more detailed test for when "non-institutional" incidents may be used in support of dangerousness. *United States. v. Concepcion Sablan*, 555 F. Supp. 2d 1177, 1186 (D. Colo. 2006). Additionally, the court's holding in *Savage* could stand for the assertion that courts should restrict evidence to only conduct while incarcerated, although this is somewhat unclear because the *Savage* court only considered the defendant's conduct while incarcerated, as this conduct alone was sufficient to uphold the aggravator as applied to that defendant. *United States v. Savage*, No. CRIM.A. 07-550-03, 2013 WL 1934531 (E.D. Pa. May 10, 2013).

Other courts have held future dangerousness need not be proved solely in the narrow context of future life imprisonment. *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *United States v. Fields*, 516 F.3d 923 (10th Cir. 2008); *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *cert. granted, judgment vacated*, 536 U.S. 953 (2002); *United States v. Williams*, No. 4:08-CR-00070, 2013 WL 1335599

(M.D. Pa. Mar. 29, 2013).

Consequently, Oklahoma's continuing threat aggravator is constitutionally unsound because evidence of Mr. Shepard's future dangerousness should be limited to only evidence within the context of incarceration. He asks this Court to resolve the lower courts' varying holdings and hold that future dangerousness as an aggravating circumstance can only be adequate and proven within the context of incarceration. Oklahoma's continuing threat aggravator fails to comply with *Apprendi*, *Hurst*, and *Simmons* in this regard,

Because Oklahoma is currently applying the continuing threat aggravator in a constitutionally vague and overly broad manner by failing to limit evidence and the jury's consideration to in-prison conduct and prohibiting juries from giving full effect and consideration to Mr. Shepard's mitigating evidence, Mr. Shepard's death sentence must be vacated.

CONCLUSION

Byron James Shepard respectfully requests this Court grant this petition for certiorari to the Oklahoma Court of Criminal Appeals on the question presented. Petitioner further requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate.

Respectfully submitted,

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