No. 23-7029

CAPITAL CASE

In the

SUPREME COURT OF THE UNITED STATES

BYRON JAMES SHEPARD,
***Petitioner*,**

-vs-

STATE OF OKLAHOMA,
Respondent.

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

BRIEF IN OPPOSITION

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April 18, 2024

CAPITAL CASE
QUESTION PRESENTED

Whether this Court should consider if Oklahoma's statutory continuing threat aggravating circumstance—which Petitioner argues fails to perform its narrowing function because it does not direct Oklahoma juries to consider only whether a defendant is a continuing threat while incarcerated—is constitutional when that issue was neither pressed nor passed upon below and is otherwise uncompelling.

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Respondent respectfully urges this Court to deny Petitioner Byron James Shepard's Petition for a Writ of Certiorari to review the published opinion of the Oklahoma Court of Criminal Appeals ("OCCA") entered in this case on September 21, 2023, *Shepard v. State*, 538 P.3d 518 (Okla. Crim. App. 2023), Pet. Appx. A.[1]

STATEMENT OF THE CASE

A. Factual Background.

The OCCA set forth the relevant facts in its opinion below:

> On March 26, 2017, at approximately 11:30 p.m., Tecumseh police officer Justin Terney was fatally shot by [Shepard] during a traffic stop of a car driven by Brooklyn Williams. The dashcam video from Officer Terney's patrol car was introduced into evidence at [Shepard]'s trial as State's Exhibit 3. This video captured the sights and sounds of the encounter that night between [Shepard] and Officer Terney.
>
> The dashcam video shows that Officer Terney first made contact with Williams who was unable to produce a driver's license. When Officer Terney asked [Shepard], who was sitting in the front passenger seat, for identification, [Shepard] said his driver's license was suspended and was confiscated after an arrest several months earlier. Officer Terney requested the name and date of birth for both Williams and [Shepard]. Williams disclosed her true information. [Shepard], by contrast, told the officer his name was "James Bishop" and then provided a false date of birth.[2] Williams said nothing in response to [Shepard]'s lies.
>
> [2] The record shows James Bishop is the name of [Shepard]'s grandfather. [Shepard]'s actual date of birth is July 17, 1981—not July 17, 1979 as he told Officer Terney.
>
> Before returning to his patrol car, Officer Terney informed Williams that he had stopped her for a defective tag light. Officer Terney

[1] Record references in this brief are abbreviated as follows: citations to the original record will be referred to as "O.R. [Vol.]"; citations to the jury trial will be referred to as "Tr. [Vol.]"; citations to formal sentencing will be referred to as "Sent. Tr."; and citations to any other transcripts will be referred to as "[Date] Tr." *See* Sup. Ct. R. 12.7. References to Petitioner's Petition for Writ of Certiorari will be cited as "Pet.," and references to Petitioner's Appendix will be cited as "Pet. App."

said he would return in a moment and then walked back to his patrol unit where he radioed in the information for both subjects. The dispatcher responded that she had a return on Williams's information and that her driver's license was flagged as suspended. The dispatcher got no return on the name and date of birth provided by [Shepard].

Officer Terney returned to the passenger side of the white Buick and asked [Shepard] to step out of the car. With both men standing outside the car, Officer Terney asked [Shepard] to again provide his name. [Shepard] responded that his name was "James Bishop, Jr." Officer Terney radioed the dispatcher to ask her to check the same name only this time adding "Jr." At one point, the officer requested [Shepard] to remove his hands from his pockets. [Shepard] complied and indicated that he was only holding a lighter. The dispatcher asked for [Shepard]'s middle name. [Shepard] responded "Bunyon." Officer Terney laughed, said "Bunyon? Whatever" then gave the name to the dispatcher. Officer Terney said that he thought [Shepard] was lying to him and asked whether that was the case. [Shepard] denied lying and responded that was his name. When asked whether the license was issued in Oklahoma, [Shepard] responded that his license was from Ohio.

After reporting this information to the dispatcher, Officer Terney stated again that he thought [Shepard] was lying about his identity. The two men spoke casually while the dispatcher ran the information. At one point, [Shepard] asked whether Williams would be getting a ticket. Officer Terney responded she would be receiving a ticket at the least. [Shepard] told Officer Terney he was arrested in Columbus, Ohio, and had only been living in Oklahoma two months. When the dispatcher responded over the radio that the only man with the name given was born in 1939, [Shepard] claimed that was his father. He also offered they should "check again." Officer Terney responded that he needed something with [Shepard]'s name on it for identification.

As these events unfolded, Lieutenant Michael Mallinson of the Tecumseh Police Department was on patrol a few miles away with new officer trainee Alana Colan. Lt. Mallinson monitored the radio traffic for the stop and responded to Officer Terney's location to provide backup. Lt. Mallinson was concerned the male subject in Officer Terney's traffic stop was providing false information. When Lt. Mallinson and Officer Colan arrived on the scene, Williams was still seated in the driver's seat of the white Buick and [Shepard] was standing outside the passenger side of the car with his hands on the rolled down passenger window. Officer Terney was standing a few feet away from [Shepard].

The dashcam video next shows [Shepard] leaning down to the passenger window and asking Williams whether she had anything in the car with his name on it. As if to foreshadow his next move, [Shepard] raised his head twice while talking to Williams and looked across the road in the direction of the tree line. Shortly after Lt. Mallinson's patrol unit came to a full stop behind Officer Terney's vehicle, and after Officer Terney again asked whether [Shepard] was lying to him about his identity, [Shepard] took off running across the road, into the tree line and underbrush separating the roadway from an adjacent field.

Officer Terney gave chase while yelling at [Shepard] to stop and warning that [Shepard] was about to be tased. Officer Terney's flashlight can be seen on the video, in the tree line just off the side of the road, as he deployed his taser and warned that he would tase [Shepard] again. When Officer Terney's flashlight moves out of camera range, the sounds of the dashcam's audio reveal what happened next. A distinctive metallic clicking sound resembling a gun being racked precedes the sound of Officer Terney yelling at [Shepard] to get on the ground. Seconds later, multiple gunshots were fired and sustained screams from both men can be heard on the recording. Officer Terney reported over the radio that he had "been hit" in the leg and had "been shot".

Lt. Mallinson got caught in the top rung of a barbed wire fence separating the field from the road and he had to pull himself off the fence. Free of the wire, Lt. Mallinson made his way through the dense underbrush. Before he could exit the tree line, however, the gunfire erupted. Lt. Mallinson called out to Officer Terney and located him in the darkness, lying on the ground with his head resting on a round hay bale in the middle of the large, open field. [Shepard] was on the ground, roughly four feet away by Lt. Mallinson's recollection, screaming and moaning in pain. [Shepard]'s body was positioned facing Officer Terney.

Lt. Mallinson can be heard on the dashcam video ordering [Shepard] repeatedly to show his hands. When Lt. Mallinson asked Officer Terney whether [Shepard] had a gun, Terney confirmed that [Shepard] had a gun and had shot him in the leg. A Springfield XD 9mm semiautomatic pistol was on the ground just a few feet from [Shepard]. This gun was the one used by [Shepard] to kill Officer Terney. DNA analysis of swabbings taken from the backstrap, grip and trigger of the 9mm pistol confirmed the presence of male-specific YSTR DNA that matched [Shepard]'s known DNA profile, meaning that [Shepard] and all of his male blood relatives could not be excluded as a potential source of this DNA.

Lt. Mallinson kicked away the gun and held [Shepard] at gunpoint while backup officers from surrounding agencies responded to the scene. Officer Terney's Glock 22, .40 caliber semiautomatic pistol was recovered nearby. A short time later, Officer Terney said "Mike, I'm fixing to pass out man." Lt. Mallinson told Terney to "stay with me, brother."

Lt. Mallinson asked Officer Terney whether he got any shots off. Terney responded "Yeah, I shot him." Lt. Mallinson can also be heard on the video yelling more directions at [Shepard] to show his hands and stay down. [Shepard] continued to holler and complain that he "can't breathe". Officer Terney, who by this point was nonresponsive and becoming paler by the minute, had suffered a gunshot wound to the right lower abdomen and to the right thigh. [Shepard] too was shot several times, including in the scrotum, chest, hand and arm. All of [Shepard]'s gunshot wounds were to the front of his body; none of the gunshot wounds were to [Shepard]'s backside. The gunshot wounds to [Shepard]'s chest/rib cage area and arm were located on the left side of his body which is significant because [Shepard] is left-handed. When an officer rolled [Shepard] over to look for injuries, two taser probes were still attached to the blue jeans over [Shepard]'s right buttock, with an insufficient distance between the probes to be incapacitating when the taser probes made contact.[3]

> [3] The State's evidence shows that the effectiveness of a taser correlates to the distance between the probes when they attach to the body. The closer the probes attach on a subject's body, the less effective they are in causing incapacitation because the electrical currents delivered by the taser affect fewer muscle groups. Officer Trevour Story responded to the scene just minutes after the shootout and, in checking [Shepard] for weapons, observed the taser probes still attached to [Shepard]'s buttock. Although he could not give an exact distance, Officer Story testified the taser probes were not located far enough apart on [Shepard]'s body to be incapacitating. Officer Story opined, based on his training and experience, that the taser probes were anchored far enough apart on [Shepard]'s buttock to be painful, and to cause cramping, but not to keep a person from moving. Lt. Mallinson similarly testified that, in his opinion, the taser deployment was not effective.

Both men were transported to OU Medical Center for emergency treatment. [Shepard] survived. Officer Terney, age 22, died from his

injuries. Dr. Eric Pfeiffer, the state's chief medical examiner, observed two separate areas of gunshot injury for Terney.[4] First, a perforating (through-and-through) gunshot wound was observed on the victim's right thigh. Second, a gunshot wound to the victim's lower right abdomen, just above the hip, was also observed and was the cause of death. There was no exit wound for this gunshot injury. The bullet penetrated Terney's handcuff case and duty belt, then entered just below his Kevlar vest. The bullet severed Terney's iliac vein and lodged in his left hip. Terney ultimately bled to death due to this injury. The bullet that caused this injury was recovered internally from Officer Terney's left hip.

> [4] Dr. Pfeiffer did not conduct the autopsy in this case. Dr. Clay Nichols, a pathologist with the state medical examiner's office, conducted the autopsy of Justin Terney and generated a written report. Sometime before [Shepard]'s trial, Dr. Nichols suffered a massive stroke, leaving him one hundred percent debilitated and unavailable to testify. Dr. Pfeiffer testified at trial as a substitute witness concerning the cause and manner of the victim's death. Dr. Pfeiffer examined archive data from his agency's file for the victim's death which included the autopsy photographs, toxicology report and investigator narrative. Dr. Pfeiffer clarified in his testimony that he did not base his opinions on Dr. Nichols's autopsy report.

At the crime scene, investigators found the blast doors for the victim's taser in the dense undergrowth of the tree line, near the roadway. The blast doors fall away when the taser is deployed by pulling the trigger and allows the probes and their wires to deploy. Roughly sixty yards away, in the vast open field, investigators recovered spent shell casings, and a projectile, in the area near two round hay bales where Officer Terney and [Shepard] were found. Four .40 caliber shell casings, two 9mm shell casings and a fired projectile that was consistent with a .40 caliber cartridge were recovered in this area. A photograph of this area showed the .40 caliber shell casings were found a short distance away from the 9mm shell casings, on opposite sides of each other. The projectile was found face-down in the dirt near the 9mm shell casings. No shell casings or projectiles were found anywhere beyond this area of the round hay bales.

Examination and comparison by OSBI ballistics examiner Terrance Higgs revealed the .40 caliber shell casings were fired from Officer Terney's Glock 22, .40 caliber semiautomatic pistol. The 9mm

shell casings were fired from [Shepard]'s Springfield XD 9mm semiautomatic pistol. According to Higgs, the size and weight configuration of the bullet recovered during the autopsy from Officer Terney's left hip was consistent with a 9mm projectile. The projectile found face-down in the dirt was a jacket hollow point bullet that was not fired by the 9mm pistol but instead was consistent with a .40 caliber bullet fired from Officer Terney's gun.

The murder weapon had been stolen from the Tulsa residence of Phillip Pfanstiel in July 2016. On the stand, Pfanstiel matched the serial number on the gun with the serial number from the box of his missing pistol. Pfanstiel does not know [Shepard] and testified there was no reason for [Shepard] to have been in possession of his firearm at the time of Officer Terney's murder. Pfanstiel did not ever give [Shepard] permission to have his gun. The gun turned up missing after Pfanstiel's niece and her boyfriend (who was not [Shepard]) did some landscaping at his home while Pfanstiel was away. Pfanstiel immediately reported it stolen but the gun was never recovered by the police until [Shepard] shot and killed Officer Terney.

When the paramedics cut off [Shepard]'s clothes to look for injuries, Officer Jaime Breedlove recovered from [Shepard]'s person a cell phone, a glass pipe containing burnt methamphetamine residue, a lighter and a plastic bag inside a cigarette box filled with 8.5 grams (gross weight) of methamphetamine. A cell phone for Williams was recovered from inside the white Buick and was also taken into evidence. Police executed a search warrant for [Shepard]'s truck found parked in front of Williams's house. Inside, police found another cell phone belonging to [Shepard], thirteen rounds of 9mm ammunition loaded inside a .40 caliber Springfield XD magazine, recent fast-food receipts, clothes, a billfold and two glass pipes.

Investigators soon discovered [Shepard]'s real identity was Byron James Shepard. [Shepard] was a known fugitive with an active arrest warrant from Okfuskee County for the crime of knowingly concealing stolen property. Investigators with the District 23 Task Force had searched unsuccessfully for [Shepard] at a residence in Pottawatomie County associated with Brooklyn Williams on March 15, 2017, and again on March 22, 2017. Text messages exchanged between [Shepard]'s and Williams's cell phones in the days and hours leading up to the murder reveal not only an awareness that local police were actively searching for [Shepard], but an effort to avoid arrest altogether. Some of the text messages also reveal [Shepard]'s volatile personality and potential for violence on the day of the murder.

On March 19, 2017, Williams's phone sent a message to [Shepard]'s phone indicating that one of the police officers looking for [Shepard] lived down the street, "[s]o I might get a ride somewhere before I met [sic] you just in case they follow." During another exchange about his stolen welding truck, [Shepard] texted "[t]hey made one mistake LOL. Push me too far and jail isn't an option. I can't get them all but I promise the first four or five are mine."

Similar conversations continued the day of the murder. On March 26, 2017, at 1:11 p.m., Williams sent a message to [Shepard]'s phone advising "[t]here is a sheriff at Seminole." A few minutes later, Williams sent two other text messages to [Shepard]'s phone asking why he was not responding and proclaiming "[y]ou're not ever going to learn until they finally get your ass. And when they do, you better not call me[.]" Later, at around 1:30 p.m., after receiving a text message from [Shepard]'s phone that said "[h]eaded back west[,]" Williams replied that "I hate you coming this way. It scars [sic] me right now." Williams also asked in another text, time stamped at 1:33 p.m., why [Shepard] could not avoid "risking coming down here[.]"

Later, at 5:04 p.m., Williams sent [Shepard]'s phone a text message stating, "[t]here was a highway patrol on Highway 9." Just hours before the murder, at 7:52 p.m., a text was sent from [Shepard]'s phone to Williams threatening to "put one between your fucking eyes." Another text message sent from [Shepard]'s phone to Williams at 8:08 p.m. on March 26, 2017, stated Williams was "lucky" he loved her son "or I would kill your fucking ass."

Finally, the State argued at trial that the metallic clicking sound heard on the dashcam recording, right before the victim ordered [Shepard] to get on the ground, was the sound of [Shepard] racking his gun to chamber a bullet before shooting the victim. Lt. Mallinson testified that police officers are trained and taught to carry their semiautomatic pistol loaded with a round in the chamber, ready to fire while on duty. Consistent with this training, Lt. Mallinson testified that he had never carried his service weapon while on duty without it being chamber loaded.[5] Lt. Mallinson further testified that part of his duties as a field training officer was to ask Officers Terney and Colan before their shift that night whether their firearms were chamber loaded and fully topped off with rounds in the magazine. Lt. Mallinson testified that he would always ask the officers, and tell them, to make sure they had their service weapons at full capacity.[6] Additional facts will be presented below as needed.

> [5] Officer Shawn Crowley similarly testified that, during his twenty-four-year career, he had never carried his semiautomatic pistol without it being chamber loaded.
>
> [6] Lt. Mallinson admitted on cross-examination that he did not inspect the victim's gun that night before starting the shift. Defense counsel had Investigator Jason Holasek demonstrate for the jury the sounds made when Officer Terney's taser was unholstered and re-holstered on his duty belt. Defense counsel also had Lt. Mallinson demonstrate the sounds made when he unholstered and re-holstered his gun and taser. Based on this evidence, defense counsel argued that the metallic clicking noise heard on the dashcam recording was the sound of Officer Terney re-holstering his taser—not [Shepard] loading a round in the chamber of the murder weapon.

Shepard, 538 P.3d at 528-532 (paragraph numbering omitted).

B. Procedural Background.

In 2019, Petitioner was tried by a jury for one count of Murder in the First Degree (Malice Aforethought) (Count 1), one count of Knowingly Concealing Stolen Property (Count 2), and one count of Possession of a Controlled Dangerous Substance (Methamphetamine) (Count 3) in the District Court of Pottawatomie County, State of Oklahoma, Case No. CF-2017-176. The State alleged five aggravating circumstances in seeking the death penalty for the murder of Officer Terney: 1) Petitioner was previously convicted of a felony involving the use or threat of violence to another person; 2) Petitioner knowingly created a great risk of death to more than one person; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; 4) there exists a probability that Petitioner will commit criminal acts of violence that will constitute a continuing threat to

society; and 5) the victim, Officer Terney, was a peace officer and was killed while in performance of his official duties. *See* OKLA. STAT. tit. 21, § 701.12(1), (2), (5), (7), (8) (2011).

Prior to trial, Petitioner filed a litany of generic motions, including a request to strike the continuing threat aggravator as factually insufficient and unconstitutional (O.R. III 608-11). In particular, Petitioner argued that the State, in relying mainly on unadjudicated acts, failed to adequately support the aggravator (O.R. III 609). Further, Petitioner argued that the aggravator was of a "highly speculative nature" and did not "sufficiently channel the discretion of the jury" and was therefore "facially unconstitutional" because it was vague and overbroad and had not been construed or applied in a consistent manner in accordance with the Federal and Oklahoma Constitutions (O.R. III 608-10). The State subsequently responded in opposition to this motion and requested that the trial court deny it (O.R. IV 774-75).

At the conclusion of the first stage of trial, the jury found Petitioner guilty on all three counts (Tr. XIII 116-20). As to the non-capital counts, the jury recommended prison terms of five years (and a $500.00 fine) on Count 2 and ten years (and a $5,000.00 fine) on Count 3 (Tr. XIII 116-20). Prior to the opening of second stage, the trial court entered rulings on pending motions for second stage,[2] one of which was Petitioner's request to strike the continuing threat aggravator (Tr. XIV 6). Ultimately, the trial court denied this motion, although it noted that second stage

[2] The State disagrees with Petitioner's assertion that he "renewed" his motion challenging the continuing threat aggravator "at the beginning of the penalty stage of trial." Pet. at 8. *See* Sup. Ct. R. 15(2). Rather, the motion remained outstanding, and the trial court ruled on pending motions prior to the opening of second stage.

"testimony could change that" (Tr. XIV 7). Petitioner did not object to this ruling or later renew his challenge to the continuing threat aggravator. The State went on to read the Bill of Particulars to the jury, including the allegation that Petitioner constituted a continuing threat to society (Tr. XIV 23-25).

During second stage, the State presented overwhelming evidence demonstrating that Petitioner constituted a continuing threat to society. For example, the State presented evidence of Petitioner's violent criminal history. In August 2007, Petitioner pointed a shotgun at a visibly pregnant Amanda Sanders after a verbal altercation among Petitioner's girlfriend, Petitioner, and Ms. Sanders—Petitioner was subsequently convicted of Reckless Handling of a Firearm (a misdemeanor) in Hughes County Case No. CF-2007-68[3] (Tr. XIV 53-58, 63-64). In March 2011, Petitioner lured an unsuspecting Christopher Buxton (who was apparently and unknowingly dating Petitioner's romantic partner, Brittany Swayze) to a house, pepper sprayed him, and brutally beat him with a metal pipe while threatening Mr. Buxton that "the only way you are leaving here is in a body bag"—Petitioner was subsequently convicted of Assault and Battery with a Dangerous Weapon in Okfuskee County Case No. CF-2011-54 (Tr. XIV 137-43, 148-56).

Furthermore, the State presented evidence that Petitioner was extremely violent and abusive toward his various romantic partners, even in the presence of his children or other people. Indeed, Petitioner repeatedly beat, choked (including to the point of unconsciousness at least once), and verbally abused Brandy Tillery—who

[3] As this and other instances prove, Petitioner's violence was not limited to "his partners." *See* Pet. at 4.

mothered two of Petitioner's children—and Ms. Tillery ultimately had to seek a protective order against him (Tr. XIV 70-79). For example, Petitioner once kicked Ms. Tillery in the chest and down a set of steps while she was holding their infant son, and Petitioner's young daughter witnessed this terrifying encounter (Tr. XIV 74-79). Petitioner also repeatedly beat, choked, and verbally abused Ms. Swayze—who mothered of one of his children (Tr. XIV 115, 117-32). Indeed, Petitioner choked Ms. Swayze to the point of unconsciousness at least once and also dragged her by the hair and busted her lip on a separate occasion (Tr. XIV 117-32). Further, at some point, Petitioner also pushed Ms. Swayze's teenage brother—Cody Swayze—and threatened to make Mr. Swayze "suck" Petitioner's penis after a confrontation (Tr. XIV 102-07). Moreover, the text messages between Petitioner and Williams in March 2017 demonstrated that Petitioner was also verbally abusive toward Williams and threatened to kill her at least twice, including a threat to "put one between [he]r fucking eyes." *Shepard*, 538 P.3d at 532.

Finally, the State presented evidence of Petitioner's violent nature and flippant and callous attitude about Officer Terney's death via his calls from the Pottawatomie County Jail. In these calls, Petitioner bragged that he was living the "gangster life" as a celebrity in jail, laughed about his brutal attack on Mr. Buxton, and remarked how "it's always a shame when a cop dies." *Id.*, 538 P.3d at 547, 551. *See Davis v. State*, 268 P.3d 86, 122 (Okla. Crim. App. 2011) (lack of remorse supports the continuing threat aggravator); *Ryder v. State*, 83 P.3d 856, 873 (Okla. Crim. App. 2004) (a defendant's callous attitude can support the continuing threat aggravator

because one who fails to appreciate the gravity of taking a life is more likely to take another life). Ultimately, at the conclusion of the second stage, the jury found the existence of all four aggravating circumstances alleged during the second stage,[4] including the continuing threat aggravator, and recommended a sentence of death on Count 1 (Tr. XVII 101-05). The trial court subsequently sentenced Petitioner in accordance with the jury's recommendations, running Count 3 consecutively to Count 2 and running Counts 2 and 3 concurrently with Count 1 (Sent. Tr. 4-5).

On direct appeal, Petitioner argued, in Proposition XII, that two of the aggravating circumstances found by the jury, including continuing threat, failed to perform the narrowing function required by the Federal and Oklahoma Constitutions. *Shepard v. State*, No. D-2020-8, *Brief of Appellant* at 95-99 (Okla. Crim. App. Sept. 17, 2021) ("Pet.'s OCCA Brief"). With respect to the continuing threat aggravator, while acknowledging the great deal of OCCA precedent against him, Petitioner argued that the OCCA's previous reliance on this Court's opinion in *Jurek v. Texas*, 428 U.S. 262 (1976), to uphold the continuing threat aggravator was no longer legally sound in light of this Court's opinion in *Penry v. Johnson*, 532 U.S. 782 (2001). Pet.'s OCCA Brief at 96-98. Petitioner also pointed to the evolving standards of decency, noted that only a handful of states still embrace continuing threat (or future dangerousness) as an aggravating factor in the selection process (Idaho, Oregon, and Texas), and even fewer states utilize future dangerousness as an

[4] The State dismissed the great risk of death aggravating circumstance prior to closing arguments in first stage, so the jury did not consider this aggravating circumstance in second stage (Tr. XIII Tr. 30-31; Tr. XIV 23-25).

aggravating factor in the eligibility process (Oklahoma and Wyoming) considering the alleged lack of "ability to accurately predict" such future dangerous behavior. Pet.'s OCCA Brief at 98-99.

In responding to Petitioner's Proposition XII, the State—in addition to arguing that Petitioner waived all but plain-error review by failing to properly preserve this claim at the trial level—argued that Petitioner's arguments failed to show error in light of the OCCA's many decisions, including a decision in 2021, upholding the continuing threat aggravator. *Shepard v. State*, No. D-2020-8, *Brief of Appellee* at 97 (Okla. Crim. App. Feb. 14, 2022) (citing *Nolen v. State*, 485 P.3d 829, 859 (Okla. Crim. App. 2021); *Goode v. State*, 236 P.3d 671, 684-85 (Okla. Crim. App. 2010); *Sanchez v. State*, 223 P.3d 980, 1006-11 (Okla. Crim. App. 2009)).

Ultimately, in a published opinion, the OCCA affirmed Petitioner's conviction and sentence on Count 1, reversed Petitioner's conviction and sentence on Count 2 (for insufficient evidence), and affirmed Petitioner's conviction on Count 3 but modified the sentence of imprisonment to a term of five years (and a $5,000.00 fine). *Shepard*, 538 P.3d at 557. In denying relief with respect to Petitioner's challenge to the continuing threat aggravator in Proposition XII, the OCCA referenced its repeated rejection of claims that the continuing threat aggravator is unconstitutionally vague and broad and therefore fails to perform the required narrowing function. *Id.* at 557 (citing *Nolen*, 485 P.3d at 859). The OCCA also pointed out that Petitioner "offer[ed] nothing in his current argument to cause [the OCCA] to question the validity of those previous holdings." *Id.* After the publication of the

OCCA's opinion, Petitioner moved for rehearing and to recall the mandate based upon his *Atkins v. Virginia*, 536 U.S. 304 (2002), claim but did not challenge the OCCA's ruling as to the continuing threat aggravator in Proposition XII. *Shepard v. State*, No. D-2020-8, *Petition for Rehearing and Motion to Recall the Mandate* (Okla. Crim. App. Oct. 11, 2023). The OCCA denied this request for rehearing on October 20, 2023. *Shepard v. State*, No. D-2020-8, *Order Denying Petition for Rehearing* (Okla. Crim. App. Oct. 20, 2023).

On March 15, 2024, Petitioner filed a Petition for Writ of Certiorari with this Court seeking review of the OCCA's decision.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to grant certiorari to consider whether Oklahoma's continuing threat aggravator, as applied by the OCCA, is too vague and broad and therefore fails to perform its required narrowing function in violation of the Constitution. Pet. at 13. In particular, Petitioner argues that Oklahoma's continuing threat aggravator is unconstitutional and does not adequately "narrow the class of homicides eligible" for the death penalty "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*." Pet. at 13 (emphasis in original). Petitioner insists that the instructions in his case were supposed to inform his jury that "it must unanimously and specifically find [Petitioner] is a continuing threat to society while incarcerated beyond a reasonable doubt." Pet. at 13. Finally, Petitioner argues that there is a split among federal courts regarding whether future dangerousness should

be limited solely to a prison setting, and he asks this Court to settle the dispute with an affirmative answer to that question. Pet. at 14-16.

However, a grant of certiorari review to consider this issue is both foreclosed by 28 U.S.C. § 1257(a) and not warranted under Rule 10 of this Court's Rules. As to § 1257(a), the federal-law question Petitioner now attempts to advance, specifically that the continuing threat aggravator must be limited to a prison setting, was neither pressed nor passed upon below. As to Rule 10, Petitioner has not identified a compelling issue worthy of this Court's review, as he has not demonstrated a true split amongst state or federal courts, nor has he demonstrated that the OCCA's ruling in any way conflicts with a decision of this Court. Further, considering the specific facts of this case, Petitioner's case is a poor vehicle for the question presented. Finally, Petitioner's question presented is ultimately without any merit under this Court's precedent. The writ of certiorari should therefore be denied.

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON BELOW, THE QUESTION PRESENTED IS NOT A COMPELLING ONE, PETITIONER'S CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED, AND PETITIONER'S CASE IS WITHOUT MERIT UNDER THIS COURT'S PRECEDENT.

A. Certiorari review should be denied because the question presented was neither pressed nor passed upon below.

Section 1257 of Title 28 provides that this Court may review the decision of a highest state court where, *inter alia*, "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws

of the United States." 28 U.S.C. § 1257(a). However, the constitutional challenge to the statute must have been presented to the state court below. "Under [§ 1257(a)] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)). When the issue presented on certiorari has not been addressed by the state court, this Court presumes "the issue was not properly presented" and places the burden on a petitioner to show "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams*, 520 U.S. at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). Failure to do so precludes this Court from addressing the federal issue a petitioner seeks to be addressed for the first time in this Court. *Id.* at 90.

Refusal to consider claims raised in the first instance to this Court reinforces the role of this Court as a "'court of review, not of first view.'" *Byrd v. United States*, 584 U.S. 395, 404 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Indeed, the longstanding practice of the Court is to refrain from considering a question not pressed or passed upon below. *See, e.g.*, *Cutter*, 544 U.S. at 718 n.7; *Howell*, 543 U.S. at 443 (discussing almost "unfailing[] refus[al] to consider" any issues not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (referencing refusal to consider claims not pressed or passed upon below as this Court's "traditional rule"); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)

(collecting cases) ("The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .").

Strict refusal to consider claims not raised and addressed below furthers the interests of comity and federalism by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds. *Adams*, 520 U.S. at 90; *see also Lucia v. S.E.C.*, 585 U.S. 237, 244 n.1 (2018) (Court will "ordinarily await 'thorough lower court opinions to guide our analysis of the merits'" (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012))); *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983). A further benefit of refusing to consider claims not raised below is a practical one—"the creation of an adequate factual and legal record" developed by the court below to better aid this Court's understanding and determination of the case presented. *Adams*, 520 U.S. at 90-91.

Here, the Petition should be denied because Petitioner's claim that Oklahoma's continuing threat aggravator is unconstitutionally vague and overbroad because it fails to limit a jury's consideration to the prison setting was neither pressed nor passed upon below. As previously described, in Proposition XII on direct appeal, Petitioner's argument was limited to questioning the OCCA's reliance on *Jurek v. Texas* in light of *Penry v. Johnson*, pointing to the evolving standards of decency and the alleged inability to predict future conduct, and discussing the handful of states that continue to utilize continuing threat or future dangerousness in the capital context. Pet.'s OCCA Brief at 96-99. While Petitioner discusses these arguments by way of background, Pet. at 7-12—and therefore unwittingly admits that the question

currently before this Court was not properly presented below—his *actual* question presented deals solely with the issue of whether the continuing threat aggravator is unconstitutional because it is not limited to the prison setting. Pet. at 13-16.

However, as effectively conceded by Petitioner, nowhere in Proposition XII did Petitioner allege that Oklahoma's continuing threat aggravator was insufficient *due to its lack of reference to the prison setting* or its lack of limitation of evidence to the prison setting, nor did he allege that Oklahoma juries should be required to unanimously find, beyond a reasonable doubt, that a defendant is a continuing threat solely *while incarcerated*. Pet. at 13-14. Relatedly, Petitioner did not even cite to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), or *Hurst v. Florida*, 577 U.S. 92 (2016).[5] Pet. at 13-14. Nor did Petitioner marshal any arguments regarding instructions concerning parole ineligibility as set out in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Shafer v. South Carolina*, 532 U.S. 36 (2001), *or* discuss the alleged split between numerous federal courts following *Simmons* that he now references. Pet. at 14-15.

Nevertheless, Petitioner criticizes the OCCA's rejection of his "claim in a single paragraph, with no explanation other than its prior upholding of the aggravator in previous cases." Pet. at 11. However, as discussed above, when the issue presented on certiorari has not been addressed by the state court, this Court presumes "the issue was not properly presented," and a petitioner has the burden to show "that the state court had 'a fair opportunity to address the federal question that is sought to be

[5] As noted *infra*, it is not apparent how these cases specifically relate to the question presented.

presented.'" *Adams*, 520 U.S. at 87 (quoting *Webb*, 451 U.S. at 501). Petitioner does not even attempt to meet this burden—indeed, by his own account, he merely called the OCCA's attention to *Jurek* and *Penry*, discussed the evolving standards of decency, and referenced the handful of states that still utilize continuing threat in the capital context. Pet. at 7-12. Based on the above-cited authority, this Court should refuse to grant certiorari to consider Petitioner's challenge to the constitutionality of Oklahoma's continuing threat aggravator, both under § 1257(a) and this Court's general policy against considering issues in the first instance. *See, e.g.*, *Cutter*, 544 U.S. at 718 n. 7; *Howell*, 543 U.S. at 443; *Adams*, 520 U.S. at 86-88.

B. Certiorari review should be denied because, by pointing to an illusory conflict among courts, Petitioner does not present a compelling federal issue.

"A petition for a writ of certiorari will be granted only for compelling reasons," including, for example, where a state court of last resort's decision on an important federal question conflicts with another state court of last resort or federal court of appeals or this Court, or the federal question is one this Court has not considered but should intervene and settle. Sup. Ct. R. 10(b)-(c). *See Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897) (certiorari review "is a power which will be sparingly exercised," and it will be exercised "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation"). Furthermore, "[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. In other words, this Court *sparingly* grants review on compelling issues and generally does not engage in mere error correction. *See Halbert v. Michigan*, 545 U.S. 605, 605 (2005) (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function").

Here, Petitioner has not presented a compelling issue of the sort contemplated by Rule 10. While Petitioner points to an alleged "conflict" between lower federal courts, federal courts of appeals, and Oklahoma to justify certiorari review,[6] this alleged conflict is illusory. And, in pointing to this illusory conflict, Petitioner essentially compares apples and oranges. Namely, Petitioner utilizes *Simmons v. South Carolina*, and the line of cases following it, to imagine this conflict. In *Simmons*, this Court held that when a capital "defendant's future dangerousness [i]s at issue," he is constitutionally "entitled to inform the jury of his parole ineligibility," if applicable. *Simmons*, 512 U.S. at 171. The prosecution, this Court explained, "may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.*

[6] Petitioner also makes fleeting—and therefore insufficient—references to a conflict between the OCCA's decision and this Court's opinions in *Apprendi*, *Ring*, and *Hurst*. Pet. at 14, 16. However, this alleged conflict, like the other alleged conflicts, is illusory. Nothing about the OCCA's decision in this case, or its approval of the statutory continuing threat aggravator, conflicts with this Court's decisions in *Apprendi*, *Ring*, and *Hurst*. As mandated by this Court's precedent, Oklahoma juries are required to unanimously find at least one aggravating circumstance, including continuing threat, beyond a reasonable doubt. *See Eizember v. State*, 164 P.3d 208, 243 (Okla. Crim. App. 2007). Petitioner's jury was instructed of this requirement (Tr. XVII 20-21, 27).

While Petitioner claims that, following *Simmons*, a mix of lower federal courts and federal courts of appeals have "explicitly split on whether a defendant's future dangerousness must be proved specifically in the context of future life imprisonment," Pet. at 14, the cases he cites do not prove such an assertion. Notably, the cases Petitioner cites are *all* appeals stemming from federal convictions involving the Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591-3599, in which future dangerousness was a non-statutory aggravating factor alleged by the government, and where life imprisonment (without the possibility of release) and death were the *only* potential sentencing options available to the sentencer. Pet. at 14-15 (citing cases). *See United States v. Savage*, 970 F.3d 217, 290 (3d Cir. 2020) (future dangerousness is non-statutory aggravating circumstance for purposes of FDPA); *see also United States v. Peoples*, 74 F. Supp. 2d 930, 932 (W.D. Mo. 1999) ("dangerousness should not be measured in the same manner as if a defendant were to be 'uncaged'; life in prison without parole, a firmly fixed federal requirement, must mean that the focus of dangerousness analysis is on prison conditions").

At most, the "conflict" in those cases was whether, per *Simmons* and the FDPA, instructions, evidence, or arguments concerning the future dangerousness aggravator were required to be explicitly limited to the prison setting *or* whether a general instruction that the defendant was parole ineligible was sufficient. As noted by Petitioner, while some *lower* federal courts have embraced the former opinion, the United States Courts of Appeals for the Fifth, Eighth, and Tenth Circuits have held that the latter is sufficient under *Simmons*. *See, e.g.*, *United States v. Fields*, 516 F.3d

923, 942 (10th Cir. 2008); *United States v. Bernard*, 299 F.3d 467, 482 (5th Cir. 2002); *United States v. Allen*, 247 F.3d 741, 788-89 (8th Cir. 2001), *cert. granted and judgment vacated on other grounds*, 536 U.S. 953 (2002). Thus, while these various federal courts differ in approaches, all agree that the dictates of *Simmons* must be followed, where applicable, and juries must be made aware of the lack of parole eligibility where *Simmons* applies. Considering this, Petitioner has failed to explain how the cases he cites truly *conflict* with respect to a constitutional matter. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (there must be a "real and embarrassing conflict of opinion and authority between" courts).

Moreover, Petitioner has failed to demonstrate how this alleged "conflict" among federal courts relates to the question *currently before this Court* concerning Oklahoma's statutory continuing threat aggravator, or how the OCCA's decision itself conflicts with the federal court opinions concerning the FDPA and the application of *Simmons*. Notably, unlike in the cases cited by Petitioner, capital juries in Oklahoma are instructed to consider three sentencing options: *life imprisonment*, life imprisonment without parole, and death. *See* OKLA. STAT. tit. 21, § 701.9(A) (2021). In other words, *Simmons* does not strictly apply to Oklahoma considering the possibility of parole, and while federal capital juries may be limited to considering future dangerousness as it relates to the prison setting, Oklahoma juries are not. *See Romano v. Gibson*, 239 F.3d 1156, 1178 (10th Cir. 2001) (noting that Oklahoma does not limit "society" to the prison setting, in part, because "one of the sentencing options before the jury [i]s life imprisonment, which admits the possibility" of eventual

parole); *Berget v. State*, 824 P.2d 364, 374 (Okla. Crim. App. 1991) ("society" not limited to prison population). *But see Mollett v. Mullin*, 348 F.3d 902, 915-20 (10th Cir. 2003) (applying *Simmons* to an Oklahoma case where continuing threat aggravator was alleged and trial court gave conflicting instructions concerning jury's questions about parole, including instruction that consideration of parole was beyond jury's purview); *Littlejohn v. State*, 85 P.3d 287, 292-93 (Okla. Crim. App. 2004) (directing trial courts, in order to avoid *Simmons* issues, to refer juries back to instructions if there is any confusion regarding parole eligibility).

Consequently, Petitioner's argument that Oklahoma's "continuing threat aggravator is unconstitutionally unsound" because it conflicts with certain lower federal court cases is nonsensical based on these legal and factual distinctions. Indeed, by comparing this case to *factually and legally distinct federal cases*, Petitioner has compared apples and oranges—it is no surprise that certain federal courts limit consideration of future dangerousness to the prison setting *where release is not an option*. As a result, Petitioner has failed to show anything but an illusory conflict. Certiorari review should be denied.

C. Certiorari review should be denied because Petitioner's case is a poor vehicle for the question presented.

Certiorari review is also unwarranted here because Petitioner's case is a poor vehicle for resolution of the question now presented—whether Oklahoma's statutory continuing threat aggravator is unconstitutionally vague and overbroad because it does not limit "society" to the prison setting. Pet. at 13. In other words, even if this Court granted certiorari review on the question presented, Petitioner's conviction and

death sentence would remain. *See McClung v. Silliman*, 19 U.S. 598, 603 (1821) ("The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." (emphasis in original)); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court only decides "questions of public importance" 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 the issue is posed less abstractly"). This is so for two separate reasons.

First, as previously pointed out, Oklahoma law is distinct from the line of cases applying *Simmons* that Petitioner discusses. Pet. at 14-16. As relevant here, and as Petitioner admits, capital juries in Oklahoma are instructed to consider three sentencing options: *life imprisonment*, life imprisonment without parole, and death. Pet. at 13. *See* OKLA. STAT. tit. 21, § 701.9(A) (2021). Indeed, Petitioner's own jury was instructed on these options, as well as the potential for parole (Tr. XVII 27-28). In other words, limiting the continuing threat aggravator to the prison setting would be incompatible with Oklahoma's statutory scheme—considering the possibility of parole accompanying a life sentence, it would be nonsensical to limit consideration of continuing threat to the prison setting *only*. *See Romano*, 239 F.3d at 1178 (noting that Oklahoma does not limit "society" to the prison setting, in part, because "one of the sentencing options before the jury [i]s life imprisonment, which admits the possibility" of eventual parole); *Berget*, 824 P.2d at 374. Perhaps Petitioner's question

presented would be more compelling if Oklahoma's sentencing options, like the federal system, were limited to death *or* life without parole.

Second, Petitioner's case is a poor vehicle for the question presented considering that the jury found the existence of *three other aggravating circumstances*[7] which Petitioner does not now challenge: 1) that Petitioner murdered Officer Terney to avoid arrest or prosecution; 2) that Petitioner had previously been convicted of a felony involving the use of violence against another; and 3) that Officer Terney was a Tecumseh peace officer and was killed while in performance of his official duties (Tr. XVII 101-05). Thus, *even if* this Court grants certiorari review on the question presented, reverses the continuing threat aggravator, and remands to the OCCA for further consideration, the OCCA could undoubtedly affirm Petitioner's death sentence upon a reweighing analysis and pursuant to harmless-error review.[8] *See McKinney v. Arizona*, 589 U.S. 139, 143-147 (2020); *Brown v. Sanders*, 546 U.S. 212, 220-21 (2006); *Clemons v. Mississippi*, 494 U.S. 738, 745-46, 754 (1990); *Zant v.*

[7] Interestingly, Petitioner omits any mention of these three other aggravators from his Petition.

[8] This Court, in *Brown*, found the reweighing process or harmless-error review unnecessary where "one of the other sentencing factors enable[d] the sentencer to give aggravating weight to the same facts and circumstances." *Brown*, 546 U.S. at 220. *See also Hanson v. State*, 206 P.3d 1020, 1033-34 (Okla. Crim. App. 2009). Arguably, here, some of the evidence presented to support the continuing threat aggravator (such as the attack on Mr. Buxton that also formed the basis of the prior violent felony aggravator) would have been admissible to prove the other alleged aggravating circumstances. However, even if the OCCA were to determine that some of this evidence would not have otherwise been admissible in terms of aggravation, it would go on to reweigh/apply harmless-error review with the remaining aggravating circumstances and mitigating factors. *See Tryon v. State*, 423 P.3d 617, 656-57 (Okla. Crim. App. 2018).

Stephens, 462 U.S. 862, 888-90 (1983). Considering this, certiorari review should be denied. *McClung*, 19 U.S. at 603.

D. Certiorari review should be denied because the question presented lacks merit under this Court's precedent.

As a final and brief matter, certiorari review should be denied considering the meritless nature of Petitioner's question presented—not only does the OCCA's decision here not conflict with this Court's precedent or the Constitution, but it also actually comports with this Court's precedent and the Constitution. As relevant here, this Court has held that in order for an aggravating circumstance to be utilized in the eligibility decision and perform the requisite narrowing function, the circumstance may not be overbroad in that it "appl[ies] to every defendant convicted of a murder," *and* the "circumstance may not be unconstitutionally vague." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (citing *Arave v. Creech*, 507 U.S. 463, 471, 474 (1993); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).[9] Oklahoma's continuing threat aggravator fulfills both requirements.

As to the first requirement, the continuing threat aggravator is not overly or unconstitutionally broad because not every first-degree murderer constitutes a continuing threat to society—as such, this aggravator undoubtedly limits the class of defendants eligible for death in Oklahoma. *See Arave*, 507 U.S. at 476 (although some might consider every first-degree murderer pitiless, not all first-degree murderers are

[9] This Court has held that there are "two different aspects of the capital decision[-]making process: the eligibility decision and the selection decision." *Tuilaepa*, 512 U.S. at 971. There is a separate requirement for the selection decision—an individualized determination of sentencing—that is not at issue here. *Id.* at 972.

"cold-blooded" or lack the ability to feel); *Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005) (rejecting argument that every first-degree murderer is "callous"). As to the second requirement, this Court has explicitly rejected arguments that the question of "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"[10] is unconstitutionally vague. *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) (noting that the "likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty"); *Jurek*, 428 U.S. at 272-75 (1976) (rejecting vagueness challenge as to Texas's continuing threat aggravator); *Nguyen v. Reynolds*, 131 F.3d 1340, 1352-54 (10th Cir. 1997) (applying *Jurek*'s reasoning to Oklahoma's continuing threat aggravator). As both requirements are fulfilled, Oklahoma's continuing threat aggravator performs its constitutional duty to "narrow the class of persons eligible for the death penalty and [] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877.[11] Certiorari review should be denied.

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[10] The language of Oklahoma's continuing threat aggravator is nearly identical to the language from the Texas aggravator in *Jurek* (Tr. XVII 20-22 (continuing threat means "there exists a probability that the Defendant will commit future acts of violence that constitute a continuing threat to society"; jury must find, beyond a reasonable doubt, "that the Defendant's behavior has demonstrated a threat to society" *and* "a probability that this threat will continue to exist in the future")).

[11] The Tenth Circuit and the OCCA have repeatedly determined as much. *See, e.g.*, *Hooks v. Ward*, 184 F.3d 1206, 1238-39 (10th Cir. 1999); *Castro v. Ward*, 138 F.3d 810, 816-17 (10th Cir. 1998); *Nguyen*, 131 F.3d at 1352-54; *Nolen*, 485 P.3d at 859; *Harris v. State*, 164 P.3d 1103, 1112 (Okla. Crim. App. 2007); *Williams v. State*, 22 P.3d 702, 722 (Okla. Crim. App. 2001).

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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