

*****CAPITAL CASE*****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONSON BUSH,
Petitioner,

v.

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

Josh Lee
Assistant Federal Public Defender
josh.lee@fd.org
Counsel of Record for Petitioner

633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the “clearly established Federal law” provision of the Antiterrorism and Effective Death Penalty Act renders state court decisions categorically exempt from habeas review for unreasonableness where this Court has articulated general constitutional standards applicable to the petitioner’s claim but has not previously decided a case where the facts were closely related or similar to the facts underlying the petitioner’s claim.
2. Whether reasonable jurists could debate, for the purpose of deciding if a capital habeas petitioner should be permitted to appeal the question, that a State violates the Eighth or Fourteenth Amendment when it deems sufficient to make a defendant eligible for the death penalty the fact that a murder victim did not “become immediately unconscious” when the fatal blows were delivered and therefore consciously endured pain caused by the fatal blows before expiring.

RELATED PROCEEDINGS

- *Bush v. Carpenter*, No. 16-6318, United States Court of Appeals for the Tenth Circuit. Judgment entered June 10, 2019.
- *Bush v. Royal*, No. 5:13-cv-00266, United States District Court for the Western District of Oklahoma. Judgment entered Oct. 17, 2016.
- *Bush v. Oklahoma*, No. 12-8011, Supreme Court of the United States. Judgment entered Mar. 4, 2013.
- *Bush v. Oklahoma*, No. PCD-2010-399, Oklahoma Court of Criminal Appeals. Judgment entered Oct. 1, 2012.
- *Bush v. Oklahoma*, No. DC-2009-1113, Oklahoma Court of Criminal Appeals. Judgment entered June 19, 2012.
- *Oklahoma v. Bush*, No. CF-2008-371, District Court of Grady County, Oklahoma. Judgment entered Nov. 20, 2009.

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PETITION FOR A WRIT OF CERTIORARI

Ronson Bush respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 926 F.3d 644. The opinion of the district court denying Mr. Bush's petition for writ of habeas corpus (App. B) is unreported and unavailable in commercial electronic databases. The opinion of the Oklahoma Court of Criminal Appeals on direct appeal (App. E) is reported at 280 P.3d 337. The opinion of the Oklahoma Court of Criminal Appeals denying post-conviction relief (App. F) is unreported and unavailable in commercial electronic databases.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 10, 2019. App. A. The Tenth Circuit denied a timely filed petition for rehearing on August 29, 2019. App. G. On November 19, 2019, Justice Sotomayor (in case no. 19A451) extended the deadline for Mr. Bush to file a petition for a writ of certiorari to January 27, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

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

Section 1 of the Fourteenth Amendment provides, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

This capital case presents two issues of federal law with wide impact.

First, the Tenth Circuit held in this case that 28 U.S.C. § 2254(d)(1)’s “clearly established Federal law” provision forecloses habeas review altogether unless this Court has previously decided “cases where the facts are at least closely-related or similar to the case *sub judice*.” App. A (quoting *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008)). That’s been the Tenth Circuit’s position across dozens of cases for more than a decade. Certiorari review is warranted because the Tenth Circuit’s persistent imposition of a factual similarity requirement contradicts this Court’s repeated holdings that § 2254(d)(1) imposes no such requirement. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (holding that § 2254(d)(1) “does not” “prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts ‘different from those of the case in which the principle was announced’”) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). This Court’s review is also necessary because the Tenth Circuit’s entrenched misconstruction of § 2254(d)(1) is in irreconcilable conflict with the habeas jurisprudence of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits.

Second, the decision below approved of Oklahoma’s use of its checkered “heinous, atrocious, or cruel” aggravating circumstance based on nothing more than that the “gunshot wounds [suffered by the victim] would be painful” and the victim “would

not have become immediately unconscious” upon being shot. App. E at 15. That decision warrants this Court’s review because Oklahoma’s recurrent and indiscriminate use of its “heinous, atrocious, or cruel” aggravating circumstance contradicts this Court’s mandate that aggravating circumstances “must provide a *principled basis*” for “distinguish[ing] those who deserve capital punishment from those who do not.” *Arave v. Creech*, 507 U.S. 463, 474 (1993) (emphasis added). The Court should intervene in a habeas case in particular because the Tenth Circuit has proven itself unwilling to make sure that Oklahoma reasonably abides by this Court’s precedents and requires admonition that habeas relief does still remain available to “guard against extreme malfunctions in the state criminal justice systems.” *Davis v. Ayala*, 135 S. Ct. 2187, 2202 (2015). The Court’s intervention is also warranted because the Tenth Circuit ruled that Mr. Bush’s challenge to the heinous, atrocious, or cruel aggravator in this case failed even to clear the low threshold required for a certificate of appealability. App. A at 78. Such a ruling evinces an unacceptable non-compliance with this Court’s repeated instructions that a petitioner need only present a *debatable* claim to secure an appeal. *E.g.*, *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).¹

The questions presented arise in the following context.

In 2008, Ronson Bush shot and killed his best friend, Billy Harrington. At the time, Mr. Bush was in the grips of Bipolar Disorder, a severe mental illness that has as a core symptom the profound impairment of judgment. Tr. at 1679–1743; Def.’s Ex. 26. In the days immediately preceding the offense, Mr. Bush became so depressed

¹ This Court has jurisdiction to review, on a petition for a writ of certiorari, the denial of an application for a certificate of appealability. *See Hohn v. United States*, 524 U.S. 236 (1998). Further, upon granting certiorari, this Court may review “the underlying merits” of a question involved in the denial of the certificate of appealability. *Buck*, 137 S. Ct. at 774–75; *see Welch v. United States*, 136 S. Ct. 1257, 1263–68 (2016); *Jimenez v. Quarterman*, 555 U.S. 113, 118–21 (2009); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 245–46 (2007).

and suicidal that he had to be hospitalized. Tr. at 1637–38, 1708; Def.’s Ex. 17A–17C. But rather than providing him with appropriate mood-stabilizing medication, the hospital mistakenly administered a drug known to exacerbate Bipolar Disorder and, indeed, to activate violent manic episodes. Tr. at 1687, 1720–30. Just hours after doctors gave him this destabilizing drug and discharged him from the hospital, Mr. Bush killed his friend. Def.’s Ex. 26 at 11. According to Mr. Bush, Mr. Harrington confessed to sleeping with Mr. Bush’s ex-girlfriend, which caused Mr. Bush to “snap,” impulsively pick up a gun, and suddenly start shooting. App. A at 4. After the shooting, Mr. Bush willingly confessed to what he’d done, *id.* at 5, and became wracked with remorse, Tr. at 1396, 1619, 1677. Against his lawyers’ advice, Mr. Bush pleaded guilty to first-degree murder in an effort to avoid putting the victim’s family through the trauma of a trial, even though he received no benefit from the plea. Tr. at 991

I. The Sentencing Proceeding

During the sentencing trial, the prosecution proposed to present testimony from a self-professed jailhouse informant. App. A at 10. The defense objected, and the trial judge—who was also sitting as the fact-finder and sentencer (*see generally id.* at 69–76)—was forced to acknowledge that the Oklahoma Constitution prohibited the informant from testifying because his testimony was disclosed too late. *Id.* at 10–11. Nevertheless, and even though the testimony was inadmissible regardless of its contents, the judge invited the prosecutor to tell him what the informant had to say. *Id.* at 11. The prosecutor proceeded to tell the fact-finder and sentencer in great detail (ostensibly as an offer of proof) the contents of the would-be informant’s testimony. *Id.* at 11–12. The informant’s story, as recounted by the prosecutor, undermined virtually all of Mr. Bush’s case in mitigation. Among many other damning allegations, the informant claimed that Mr. Bush confided to him how he planned the killing for a week or more, how he taunted and tortured the victim before killing him, and that he was planning an escape attempt and “would kill whomever was necessary to get

away.” *Id.* at 12. The informant also alleged that Mr. Bush “showed no remorse” and “laughed about killing Billy Harrington.” *Id.* Defense counsel tried to object, but the prosecutor and the judge told her that there was nothing she could object to because no evidence had been presented. Tr. at 1317.

As a part of its sentencing case, the prosecution urged that the death penalty was warranted because the killing was “especially heinous, atrocious, or cruel,” which is an aggravating circumstance under Oklahoma law. The Oklahoma state courts had previously held that a showing of “conscious physical suffering” by the victim before death establishes that a killing was “especially heinous, atrocious, or cruel” and that the necessary “conscious physical suffering” is present so long as the fatal blows did not result in an “instantaneous” death, such that the victim may have suffered “for several minutes in a partially conscious state” before dying. *Smith v. State*, 157 P.3d 1155, 1178 (Okla. 2007). In Mr. Bush’s case, the prosecution relied on medical evidence that the gunshot wounds were not “instantly fatal”; that such wounds “would have caused pain and suffering”; and that the victim remained conscious for long enough after being shot inside his residence to walk outside before collapsing. App. A at 42–44.² Emphasizing the breadth of this aggravating circumstance, the prosecution maintained in closing argument that “[t]he heinous, atrocious, and cruel can come from the first time he shoots him and when he starts bleeding out and falling down in his kitchen. . . . If he had just fallen down on the ground and bled [sic] out right there that meets the definition. . . . We don’t have to prove that he lingered [sic] and died.” Tr. at 1859.

² The prosecution’s medical expert could not say one way or the other whether the victim remained alive when, after he collapsed outside the residence, Mr. Bush dragged the victim’s body to the back of the property. Tr. at 1112–13. But there was no evidence at all that the victim remained conscious—or even “in a partially conscious state”—after he collapsed outside the residence.

The judge sentenced Mr. Bush to death, finding that the heinous, atrocious, or cruel aggravator and two others were present and that the aggravating circumstances outweighed the mitigating circumstances. App. A at 61–63.

II. The State Direct Appeal

On direct appeal to the Oklahoma Court of Criminal Appeals, Mr. Bush claimed that the prosecutor’s wholly unnecessary recitation of the informant’s inadmissible allegations violated his federal constitutional rights “under the . . . Eighth[] and Fourteenth Amendments to the United States Constitution.” App. H at 46–53.³ In particular, Mr. Bush maintained that the informant’s story “was far too inflammatory for the trial judge to disregard” and that the supposed offer of proof violated Mr. Bush’s federal constitutional rights “to a fair and reliable sentencing, free of arbitrary and prejudicial factors.” *Id.* at 49, 53.

Mr. Bush also challenged the State’s use of the “heinous, atrocious, or cruel” aggravating circumstance as a violation of the Eighth and Fourteenth Amendments. He maintained that the evidence showed nothing more than that the victim “did not die immediately” and “that being shot is painful”; that this was constitutionally insufficient evidence to support the aggravating circumstance; that a “brief period of conscious suffering . . . accompanies virtually every homicide”; and that applying the aggravating circumstance to cases like Mr. Bush’s rendered it a “catch-all” that “ran afoul of the Eighth Amendment narrowing requirement” exemplified by *Maynard v. Cartwright*, 486 U.S. 356 (1988). App. H at 32–36, 86–88.

The Oklahoma Court of Criminal Appeals denied these claims on the merits. The court upheld the “heinous, atrocious, or cruel” aggravating circumstance based on medical testimony that the “gunshot wounds . . . would be painful” and that the

³ The page numbers given for excerpted documents are those of the original, underlying document—i.e., those centered at the bottom of the page.

victim “would not have become immediately unconscious” upon being shot. App. E at 15. As to Mr. Bush’s challenge to the prosecutor’s recitation of the informant’s allegations, the court rejected the notion that the so-called offer of proof was so prejudicial that it denied him a fair trial. *Id.* at 21. One judge dissented from this latter holding, opining that the informant’s story was “very extensive and prejudicial,” that it was “difficult to believe that this evidence could be ignored,” and that there was a “reasonable probability” that the informant’s story “impact[ed] the trial court’s decision to sentence Bush to death.” *Id.* at 34.

III. The Federal Habeas Proceedings Below

After the state court denied post-conviction relief (over another dissent), App. F, Mr. Bush filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. App. I. Among other claims, Mr. Bush renewed his constitutional challenges to the prosecutor’s airing of the informant’s inadmissible allegations and to the application of the “heinous, atrocious, or cruel” aggravating circumstance. *Id.* at 38–41, 74–77. The district court denied relief on the merits, App. B at 24–30, 63–67, holding that Mr. Bush had failed to overcome the deference prescribed by 28 U.S.C. § 2254(d), which requires the petitioner to show that the state court’s decision was (1) “contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or (2) “based on an unreasonable determination of the facts.” The district court refused to grant a certificate of appealability. App. C; *see generally* 28 U.S.C. § 2553(c) (requiring habeas petitioners to obtain a certificate authorizing an appeal).

Mr. Bush then moved the Tenth Circuit for a certificate of appealability, and that court authorized Mr. Bush to appeal his challenge to the informant’s allegations, but it refused to allow Mr. Bush to appeal his challenge to the heinous, atrocious, or cruel aggravating circumstance. App. A at 78, D at 1–2. As to the latter issue, Mr. Bush had maintained that a certificate of appealability should be granted because his

case was indistinguishable from *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017). *See* App. J. The panel decision in *Pavatt* had granted habeas relief on similar facts under *Maynard v. Cartwright*, but that decision would later be reversed by a divided en banc court in *Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019), *petition for cert. filed*, No. 19-697 (U.S. Nov. 25, 2019). The Tenth Circuit provided no explanation for its refusal to authorize an appeal of Mr. Bush’s challenge to the heinous, atrocious, or cruel aggravator, stating simply, “Bush’s motion to expand the certificate of appealability is DENIED.” App. A at 78.

Mr. Bush’s opening brief argued that habeas relief should be granted based on his challenge to the prosecutor’s recitation of the informant’s inadmissible allegations because the state court’s rejection of that claim unreasonably applied clearly established federal law as set forth in Supreme Court precedent. App. K at 21 (citing 28 U.S.C. § 2254(d)(1)). Among other precedents, Mr. Bush pointed to two lines of due process cases from this Court. First, this Court has recognized that courtroom misconduct by the prosecutor violates due process if it is “of sufficient magnitude to result in the denial of a defendant’s right to a fair trial.” App. K at 22 (quoting *Greer v. Miller*, 483 U.S. 756, 765 (1987)). Second, this Court has recognized that “state-sponsored courtroom practices” may be “so inherently prejudicial that [they] deprive[] a defendant of a fair trial.” App. K at 21 (quoting *Carey v. Musladin*, 549 U.S. 70, 76 (2006)). Mr. Bush acknowledged that “[n]o Supreme Court case specifically addresses prejudicial ‘offers of proof’” but nevertheless maintained that relief should be granted based on this Court’s due process precedents because “a general standard may be applied in an unreasonable manner” (quoting *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)) and because “Section 2254(d)(1) permits a federal court to grant relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced” (quoting *Lockyer v. Andrade*, 538 U.S. 53, 76 (2003)). App. K at 21.

The Tenth Circuit denied relief based on a rejection of Mr. Bush’s reading of § 2254(d)(1). The Tenth Circuit held that § 2254(d)(1)’s specification that habeas claims must be based on “clearly established Federal law” foreclosed habeas review at the threshold unless the petitioner could point to an “on-point holding” in a Supreme Court case “where the facts [we]re at least closely-related or similar to the case *sub judice*.” App. A at 20 (quoting *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008)). The Tenth Circuit reasoned that this was fatal to Mr. Bush’s claim because the cases cited by Mr. Bush articulated “very broad principles of due process” and did not “involve[] facts remotely similar to the facts at issue in his case, i.e., a trial judge who selected and imposed a death sentence after considering an offer of proof of inadmissible aggravating evidence.” App. A at 21. Because there was, in the Tenth Circuit’s view, an “absence of clearly established federal law” to apply, the Tenth Circuit refused to consider one way or the other whether the state court’s decision was an “unreasonable application” of the due process standards identified by Mr. Bush—deeming the absence of factually similar precedents alone “dispositive under § 2254(d)(1).” App. at 21.⁴

This petition follows.

⁴ Along with the due process claim described in this Petition, which was duly presented in state court, Mr. Bush’s Tenth Circuit appeal raised additional arguments related to the informant’s inadmissible allegations. The Tenth Circuit held that these additional arguments—which Mr. Bush’s does not rely on in this Court—had not been raised in state court and were therefore barred by the doctrine of procedural default. App. A at 17–18. The claim presented here, however, was denied by the Tenth Circuit solely on the basis of § 2254(d)(1), and not on procedural grounds *Id.* at 19–21.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Persistently Imposes a Factual Similarity Requirement That Contradicts this Court's Repeated Holdings That § 2254(d)(1) Contains No Such Requirement.

The Tenth Circuit's holding in this case that § 2254(d)(1) forbids relief absent prior Supreme Court decisions on similar facts exemplifies a longstanding jurisprudence in that court that is overwhelmingly focused on the presence or absence of such factual similarity. That jurisprudence contradicts this Court's holdings in *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007), and other cases that § 2254(d)(1) contains no such factual similarity requirement. Certiorari is warranted to bring the Tenth Circuit's habeas jurisprudence into compliance with this Court's precedent.

The Tenth Circuit's factual similarity gloss on § 2254(d)(1)'s "clearly established Federal law" provision first arose in *House v. Hatch*, 527 F.3d 1010 (10th Cir. 2008). There, the Tenth Circuit explicated its view that "clearly established federal law" "must be construed narrowly and consist only of something akin to on-point holdings"; that "federal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts"; and that no review for unreasonableness may be conducted unless the petitioner first points to prior Supreme Court cases decided under "facts [that] are at least closely-related or similar to the case *sub judice*." *Id.* at 1015–16, n.5. The court in *House* deployed this construction of § 2254(d)(1) to deny at the threshold the petitioner's claim that the state violated the Equal Protection Clause by changing the venue of the trial for the purpose of eliminating Native Americans from the jury pool. Despite acknowledging that a "long line of Supreme Court cases . . . stand for the proposition that a state may not purposefully discriminate on the basis of race in jury selection procedures," the Tenth Circuit held that § 2254(d)(1)'s "clearly established Federal law" provision required the petitioner to "do more than identify a general legal principle," and it denied relief without inquiring into the reasonableness of the state court's decision because "the

Supreme Court has never addressed a claim that a state-initiated transfer of venue denied a defendant equal protection.” *Id.* at 1021–22.

The supposed requirement of factually similar Supreme Court cases, as well as the supposed ban on reviewing state court decisions based on “a general legal principle,” have been ever-present in the Tenth Circuit’s habeas jurisprudence ever since. The Tenth Circuit’s cramped interpretation of § 2254(d)(1)’s “clearly established Federal law” provision has been deployed, in addition to in Mr. Bush’s case and the *House* case, in the following illustrative cases (among others):

- *Mitchell v. Sharp*, ___ F. App’x ___, 2019 WL 6713382, at *5, *11–*13, No. 16-6258 (10th Cir. Dec. 10, 2019) (unpublished) (denying a due process claim predicated on *Hicks v. Oklahoma*, 447 U.S. 343 (1980), without reviewing for unreasonableness, because the facts of *Hicks* were not similar to those underlying the petitioner’s claim);
- *Borden v. Bryant*, 786 F. App’x 843, 846 (10th Cir. 2019) (unpublished) (denying a fair notice claim predicated on *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), without reviewing for unreasonableness, because the facts of *Cole* were not similar to those underlying the petitioner’s claim);
- *Holland v. Allbaugh*, 824 F.3d 1222, 1229 (10th Cir. 2016) (denying at the threshold a claim predicated on *Payne v. Tennessee*, 501 U.S. 808 (1991), reasoning that *Payne*’s holding that the due process clause authorizes relief when “evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair” arose in a “factually distinct context” and therefore did not constitute clearly established federal law);
- *Gilbert v. Morgan County Dist. Court*, 589 F. App’x 902, 907 (10th Cir. 2014) (unpublished) (denying a confrontation clause claim predicated on *Davis v. Alaska*, 415 U.S. 308 (1974), without reviewing for unreasonableness, because the facts of *Davis* were different from those underlying the petitioner’s claim);
- *Littlejohn v. Trammell*, 704 F.3d 817, 853–54 (10th Cir. 2013) (denying a prosecutorial misconduct claim, without reviewing for unreasonableness, on the ground that this Court’s cases barring prosecutorial misconduct were decided under different facts: “The cases upon which [Littlejohn] relies may well be viewed as articulating principles of fundamental fairness, but the Supreme Court articulated those principles in distinct factual contexts that do not resemble the one before us. . . . Accordingly, those cases cannot supply clearly established federal law”);

- *Higgins v. Addison*, 395 F. App'x 516, 519 (10th Cir. 2010) (unpublished) (rejecting at the threshold, without reviewing for unreasonableness, the petitioner's claim that forcing him to wear a visible ankle monitor during trial violated *Deck v. Missouri*, 544 U.S. 622 (2005), because "Higgins has not identified any Supreme Court holding expressly extending the general prohibition on restraining a criminal defendant with visible shackles to the factual situation presented here").

All of this contradicts this Court's own construction of § 2254(d)(1). As noted, § 2254(d)(1) authorizes relief if the state court's decision was *either* "contrary to" *or* "an unreasonable application of" Supreme Court precedent. And in *Williams v. Taylor*, this Court held that, although the "contrary to" prong of § 2254(d)(1) requires "a set of facts that are materially indistinguishable from a decision of this Court," the "unreasonable application" prong, by contrast, allows the petitioner to obtain review for unreasonableness based on any "governing legal principle from this Court's decisions" or "law of this Court"—whether or not developed under similar facts. 529 U.S. 362, 406–09 (2000). Then, in *Lockyer v. Andrade*, this Court made the point explicitly: "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle *to a set of facts different from those of the case in which the principle was announced.*" 538 U.S. 63, 76 (2003) (emphasis added); *accord Wiggins v. Smith*, 539 U.S. 510, 520 (2003) ("[A] federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" (quoting *Andrade*); *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (rejecting any requirement that the facts of prior cases be "fundamentally similar" or "materially similar" in order for the law articulated in those cases to qualify as "clearly established" for purposes of determining whether officers can face damages under 28 U.S.C. § 1983).

The Court elaborated in *Panetti*:

That [a] standard is stated in general terms does not mean the application was reasonable. AEDPA [i.e., § 2254(d)(1)] does not require state

and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.

551 U.S. at 953 (internal citations and quotation marks omitted); *accord White v. Woodall*, 572 U.S. 415, 427 (2014) (“This is not to say that § 2254(d)(1) requires an identical factual pattern before a legal rule must be applied. To the contrary, state courts must reasonably apply the rules squarely established by this Court’s holdings to the facts of each case. . . . [C]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.”) (internal citations and quotation marks omitted); *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (per curiam) (holding that a court of appeals “concluded (correctly) . . . that the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since ‘a general standard’ from this Court’s cases can supply such law”).

The particular circumstances of *Panetti* are significant. The Court there found that the Texas state courts unreasonably applied very broad principles of due process articulated by the controlling opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), even though the facts of *Panetti* were fundamentally different from the facts under which *Ford*’s due process principles were announced. In *Ford*, the controlling opinion held that prisoners claiming that they are too insane for execution have a due process right to a “fair hearing” in accord with “fundamental fairness” and that the State violated this right by placing the sanity decision in the hands of an executive officer who had a “publicly announced policy” of excluding evidence presented by the prisoner from consideration. 477 U.S. at 423–27 (Powell, J., concurring). In *Panetti*, by contrast, the State had placed the sanity decision in the hands of a state court that “stood ready and willing to consider any evidence that Panetti wished to submit.”

Panetti, 551 U.S. at 973 (Thomas, J., dissenting). Nevertheless, the majority in *Panetti* deemed *Ford*'s broad "fair hearing" requirement to be clearly established federal law applicable to *Panetti*'s claim that the state court failed to provide him with adequate notice of the effective deadline for submitting expert evidence—a fairness complaint founded on entirely different facts from those at issue in *Ford*. *Panetti*, 551 U.S. at 951–92; *see also Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (broad standard for evaluating ineffective assistance of counsel claims constituted clearly established federal law as to factual circumstances never before considered by this Court).

The Tenth Circuit's entrenched view that § 2254(d)(1)'s clearly established federal law provision demands not only an applicable legal rule but a legal rule articulated in "closely-related or similar" *factual* circumstances, *e.g.*, App. A at 20, contradicts this Court's repeated admonition that a legal standard may constitute clearly established federal law even for a habeas claim that "involves a set of facts *different from*" the Supreme Court case in which the standard was announced, *e.g.*, *Andrade*, 538 U.S. at 76 (emphasis added). Further, the Tenth Circuit's entrenched view that clearly established federal law cannot be found in "a general legal principle," *House*, 527 F.3d at 1021–22, such as "broad principles of due process," App. A at 21, contradicts this Court's repeated admonition that "a general standard' from this Court's cases can supply" clearly established federal law, *e.g.*, *Rodgers*, 569 U.S. at 62, as well as this Court's holding in *Panetti* that the broad principles of due process articulated in *Ford* qualified as clearly established federal law. *See also Parker v. Matthews*, 567 U.S. 37, 45, 48 (2012) ("very general" standard from *Darden v. Wainwright*, 477 U.S. 168 (1986), that prosecutorial misconduct violates the constitution if it "so infect[s]

the trial with unfairness as to make the resulting conviction a denial of due process,” sufficed to constitute “clearly established Federal law” under § 2254(d)(1)).⁵

The Tenth Circuit believes that its ban on general standards and requirement of factual similarity are supported by this Court’s decision in *Carey v. Musladin*. See App. A at 20–21; *House*, 527 F.3d at 1015–16. That is not so. In *Musladin*, the petitioner claimed that he was unfairly prejudiced by private spectator courtroom conduct, and this Court held that it was not unreasonable for the state courts to decline to grant relief under Supreme Court precedents governing prejudicial state-sponsored courtroom practices. 549 U.S. at 78. *Musladin* could not possibly support denying relief here because the prejudicial conduct in Mr. Bush’s case was not *private* but *state-sponsored*; it was explicitly invited by the trial judge and perpetrated by the prosecutor. More importantly, though, nothing in *Musladin* says or even suggests that § 2254(d)(1)’s “clearly established Federal law” provision by its own force bans reliance on general standards or requires the petitioner to point to factually similar Supreme Court cases before a state court decision can even be reviewed for unreasonableness. Regardless, even if *Musladin* otherwise might have been read to implicitly impose a factual similarity requirement, any such reading is plainly foreclosed by this Court’s post-*Musladin* decision in *Panetti*, which deemed broad standards of due process to be clearly established federal law and explicitly rejected any factual similarity requirement. Thus, the Tenth Circuit’s departure from this Court’s explicit instructions regarding the application of § 2254(d)(1) cannot be justified based on *Musladin*.

⁵ That this Court has rejected the Tenth Circuit’s reading of § 2254(d)(1) is unsurprising, inasmuch as the Tenth Circuit’s approach would produce truly absurd results. Under the Tenth Circuit’s approach, for example, a judge could force a defendant to stand trial in the nude, yet because this Court has never addressed a nudity issue, a habeas court could not grant relief on a claim that the trial was fundamentally unfair. This Court’s reading of § 2254(d)(1), by contrast, recognizes that blatant due process violations do not become acceptable by virtue of their creativity.

As detailed above, what happened in Mr. Bush’s case is the furthest thing from a one-off error. The Tenth Circuit’s interpretation of § 2254(d)(1) has, for more than a decade, sharply diverged from that required by this Court’s precedents. The Tenth Circuit’s misinterpretation of § 2254(d)(1) has affected and continues to affect a wide swath of capital and non-capital habeas corpus cases across that court’s docket. Certiorari should be granted to redress the Tenth Circuit’s entrenched deviation from the decisions of this Court.

II. The Tenth Circuit’s Imposition of a Factual Similarity Requirement Conflicts With Other Circuits’ Interpretations of § 2254(d)(1).

Certiorari should also be granted because the Tenth Circuit’s interpretation of § 2254(d)(1)’s clearly established federal law provision is in irreconcilable conflict with the post-*Musladin* decisions of other circuits. Even if the Tenth Circuit’s interpretation of § 2254(d)(1) were not a contradiction of this Court’s existing precedent, certiorari would be warranted to resolve the circuit split over whether § 2254(d)(1) permits habeas courts to apply broad standards from this Court’s cases to habeas claims founded on materially different facts.

The First Circuit, for example, recognizes that an established “broad” principle from this Court’s cases can constitute clearly established federal law for “a kaleidoscopic array of fact patterns.” *E.g., Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir. 2010). Thus, in *Housen v. Gelb*, 744 F.3d 221, 227–28 (1st Cir. 2014), that court deemed a generic “due process right to a fair trial” to be clearly established federal law and then evaluated for unreasonableness a state court’s decision rejecting a factually novel claim that the prosecution violated that right by prosecuting accomplices on materially inconsistent theories of guilt. Similarly, in *Lyons v. Brady*, 666 F.3d 51, 56 (1st Cir. 2012), the court held that, absent Supreme Court decisions specifically governing when the admission of inflammatory autopsy photographs might violate due process, “the broader fair-trial principle” articulated by this Court supplied clearly established

federal law against which the state court’s decision approving the admission of those photographs could be evaluated for unreasonableness.

The Second Circuit likewise deems “very broad principles of due process” like those brushed off by the decision below, App. A at 21, to constitute clearly established federal law as to habeas claims founded on very different factual scenarios from the cases in which the standards were articulated. *See, e.g., Jackson v. Conway*, 763 F.3d 115, 143–46 (2d Cir. 2014); *Harris v. Alexander*, 548 F.3d 200, 203–06 (2d Cir. 2008). In *Harris*, the Second Circuit held that the very general standard of whether a claimed error “so infected the entire trial that [the] resulting conviction violate[d] due process,” from *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), was clearly established federal law. Significantly, *Harris* applied *Cupp*’s generic due process principle in the context of a claim materially different from the one in *Cupp*. The defendant in *Harris* claimed that a state court violated due process by refusing to instruct the jury on his theory of defense. In *Cupp*, by contrast, this Court considered the entirely different question of whether an instruction that the trial court *did* give—that “[e]very witness is presumed to speak the truth”—undermined the presumption of innocence. 414 U.S. at 142, 147–49. Nevertheless, the Second Circuit held in *Harris* that the state appellate court’s affirmance of the trial court’s refusal to instruct on the petitioner’s theory of defense unreasonably applied *Cupp*—even though neither *Cupp* nor any other case of this Court has considered when a trial court’s refusal to instruct on a defendant’s theory of the case might violate due process.

The Third Circuit, too, has squarely rejected a factual similarity requirement. It takes the position that a general standard articulated by this Court may constitute clearly established federal law as to “seemingly limitless combinations of acts and omissions.” *Jamison v. Klem*, 544 F.3d 266, 271–74 (3d Cir. 2008) (holding that a state court unreasonably applied the general standard requiring that guilty pleas be

knowing and voluntary by rejecting the defendant’s complaint that he was not advised of an applicable mandatory minimum sentence—despite the fact that this Court has never held that a defendant must be advised of an applicable mandatory minimum sentence). Indeed, in *Glenn v. Wynder*, 743 F.3d 402 (3d Cir. 2014), the court found clearly established federal law to apply to a claim similar to that raised by Mr. Bush below. There, the Third Circuit deemed “broader principles of due process” drawn from *Riggins v. Nevada*, 504 U.S. 127, 149 (1992)—i.e., that a defendant may not be “deprived of ‘fundamental elements of fairness in [his] criminal trial’”—to constitute clearly established federal law applicable to a petitioner’s due process challenge to the fact-finder hearing testimony that was later stricken from the record. *Glenn*, 743 F.3d at 407–09, n.6. The court in *Glenn* found that *Riggins*’s “broad[] principles of due process” qualified as clearly established federal law even though the claim at issue in *Riggins* was completely different: that the state violated due process by forcing him to take antipsychotic drugs during trial over his objection. *Riggins*, 504 U.S. at 129; *contra Littlejohn*, 704 F.3d at 853–54 (10th Cir.) (“principles of fundamental fairness,” “articulated . . . in distinct factual contexts that do not resemble the one before us,” “cannot supply clearly established federal law”).

The Fourth Circuit likewise recognizes that a general standard can constitute clearly established federal law as to “myriad factual circumstances.” *Barnes v. Joyner*, 751 F.3d 229, 246 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2643 (2015). That court rejects the notion that such standards cannot supply clearly established federal law where “the Supreme Court decisions [announcing the standard] involved different factual circumstances.” *Id.* In *Barnes*, the Fourth Circuit granted habeas relief as to a claim that a juror committed misconduct by consulting with her pastor during death penalty deliberations, despite the absence of a Supreme Court case dealing with jurors seeking spiritual guidance during death penalty deliberations.

Also irreconcilable with the Tenth Circuit’s habeas jurisprudence are the Fifth Circuit’s decisions in *Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010), and *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), *cert. denied*, 555 U.S. 827 (2008). In those cases, the Fifth Circuit deemed the generalized “fair hearing” standard articulated in *Ford* (the insanity case discussed above) to constitute clearly established federal law as to a novel issue: the petitioners’ contentions that they were denied a fair hearing in state court on their claims that they suffered from an intellectual disability that rendered them ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Although *Ford* articulated its due process holding in the context of an insanity claim, the Fifth Circuit held that the state courts unreasonably applied *Ford*’s general legal principles in the distinct factual context of an *Atkins* intellectual disability claim. *See Wiley*, 625 F.3d at 213; *Rivera*, 505 F.3d at 357–58; *contra House*, 527 F.3d at 1016 n.5 (10th Cir.) (“[F]ederal courts may no longer extract clearly established law from the general legal principles developed in factually distinct contexts.”).

The Sixth Circuit also recognizes that general principles of due process may constitute clearly established federal law for claims founded on facts different from those of the cases in which those principles were announced. *See, e.g., Blackmon v. Booker*, 696 F.3d 536, 550–52 (6th Cir. 2012); *Franklin v. Bradshaw*, 695 F.3d 439, 456–57 (6th Cir. 2012). Thus, in *Blackmon*, 696 F.3d at 550–52, the Sixth Circuit deemed the general “fundamental fairness” standard developed in distinct factual contexts to constitute clearly established law applicable to the petitioner’s claim that the state violated his due process rights by admitting evidence of his gang affiliation. And in *Franklin*, 695 F.3d at 456–57, the court deemed “the general due-process standard” of “a fair trial” to be clearly established law against which to evaluate the petitioner’s challenge to a trial judge’s admission of gruesome autopsy photographs—a claim founded on facts not previously considered by this Court.

As exemplified by *Owens v. Duncan*, 781 F.3d 360 (7th Cir. 2015), the Seventh Circuit’s habeas jurisprudence is, likewise, impossible to square with that of the Tenth Circuit. *Owens* granted relief under § 2254(d)(1) in a truly novel factual scenario. The petitioner in that case claimed “that the state trial judge who convicted him [in a bench trial] based his decision on evidence that did not exist, thus denying him due process.” *Id.* at 362. The fact-finder had described his guilty verdict in the murder trial as being based on evidence that the defendant “knew [the victim] was a drug dealer” and “wanted to knock him off”—which was “nonsense” because “[n]o evidence had been presented that [the defendant] knew that [the victim] was a drug dealer or that he wanted to kill him . . . , or even knew him.” *Id.* at 363. The Seventh Circuit acknowledged that there was “no case” from the Supreme Court addressing when “a verdict based on groundless conjecture” would violate due process, but it nevertheless held that, in affirming the conviction, the state courts had unreasonably applied the general “right to have one’s guilt or innocence adjudicated on the basis of evidence introduced at trial.” *Id.* at 365.

The *Owens* court found this broad principle to be clearly established federal law for purposes of § 2254(d)(1) based on generalities articulated in *Holbrook v. Flynn*, 475 U.S. 560 (1986), *Taylor v. Kentucky*, 436 U.S. 478 (1978), and *Estelle v. Williams*, 425 U.S. 501 (1976). But those cases involved entirely different facts. In *Flynn*, the claim was that the presence of armed guards sitting in the first row of the spectator section violated the defendant’s right to a fair trial. In *Taylor*, the claim was that the trial judge erred by refusing to give a presumption-of-innocence instruction. And in *Williams*, the claim was that the state violated due process by forcing the defendant to wear identifiable prison garb during trial. Even though those cases involved completely different facts, the Seventh Circuit held—contrary to the decision below—that it could extract clearly established federal law from general principles

articulated in *Flynn*, *Taylor*, and *Williams*. See *Owens*, 781 F.3d at 365.⁶ See also *Whatley v. Zatecky*, 833 F.3d 762 (7th Cir. 2016) (holding that a state supreme court unreasonably applied clearly established federal law in refusing to hold unconstitutionally vague the phrase “on a regular basis,” in a statute criminalizing selling drugs near a facility that provides youth services on a regular basis, based on broad due process principles, and despite the absence of any factually similar Supreme Court cases).

The Ninth Circuit also recognizes that, under § 2254(d)(1), a “broad rule” may qualify as clearly established federal law that “must be applied” in “many different factual situations.” *E.g.*, *Musladin v. Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009) (quoting *Carver v. Straub*, 349 F.3d 340, 350 n.7 (6th Cir. 2003)). Thus, in *Parle v. Runnels*, the Ninth Circuit found clearly established federal law in the principle that “the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair.” 505 F.3d 922, 925, 927–35

⁶ This Court initially granted certiorari to conduct plenary review of the Seventh Circuit’s *Owens* decision, *Duncan v. Owens*, 136 S. Ct. 27 (2015) (mem.), but then dismissed the State’s petition as improvidently granted, *Duncan v. Owens*, 136 S. Ct. 651 (2016) (mem.). The summary dismissal followed an oral argument at which certain ambiguities about the facts appeared to trouble the Court. See Steve Vladeck, *Argument analysis: A confusing search for “clearly established” law*, SCOTUSblog (Jan. 13, 2016), www.scotusblog.com/2016/01/argument-analysis-a-confusing-search-for-clearly-established-law. Although the ambiguous facts in *Owens* may have made it a poor vehicle, the Court’s initial interest in the case suggests that the underlying question of whether clearly established federal law may be found in general principles articulated in factually dissimilar cases is worthy of review. *Cf.* Steve Vladeck, *Argument preview: How specific must “clearly established” law be to support federal habeas relief?*, SCOTUSblog (Jan. 5, 2016), www.scotusblog.com/2016/01/argument-preview-how-specific-must-clearly-established-law-be-to-support-federal-habeas-relief (opining that *Owens* was “not your routine habeas case” but, instead, presented the question of “just how specific the Supreme Court’s ‘clearly established’ law must be to provide the basis for post-conviction relief,” which was a question with “significant implications for *all* federal habeas review”).

(9th Cir. 2007). And *Parle* held that the state court unreasonably applied that principle when it failed to grant relief based on evidentiary errors that arose from various circumstances never previously considered by this Court, such as a state court violating a defendant’s “psychotherapist-patient privilege” and “[i]mproperly admitt[ing] character evidence.” *Id.*

All of this is contrary to the Tenth Circuit’s narrow understanding of what constitutes clearly established federal law and its requirement that the petitioner point to Supreme Court cases decided under similar facts before review for unreasonableness can be had. In other words, the interpretation of § 2254(d)(1) adopted by the Tenth Circuit conflicts with that adopted by the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits. As demonstrated above, the problem is not just that other circuits use different verbal formulae to describe the clearly established federal law inquiry but, more concretely, that functionally identical cases in different circuits are coming out differently. Whether or not the Tenth Circuit’s interpretation of § 2254(d)(1) is contrary to the existing precedent of this Court, certiorari review should be granted to bring uniformity to the lower courts’ understanding of what constitutes clearly established federal law.

III. In Upholding Oklahoma’s Use of the Heinous, Atrocious, or Cruel Aggravator in this Case, the Tenth Circuit Approved That State’s Longstanding and Continuing Failure to Comply with the Decisions of This Court.

In *Maynard v. Cartwright*, this Court held that Oklahoma’s “heinous, atrocious, or cruel” aggravating circumstance, absent an appropriate narrowing construction by Oklahoma’s state courts, violated the Eighth Amendment because it provided “no principled way to distinguish” a case “in which the death penalty was imposed[] from the many cases in which it was not.” 486 U.S. 356, 363–64 (1988) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)). Thereafter, the Oklahoma courts announced that that aggravating circumstance would henceforth be limited to certain

identified factual situations, one of which was that the victim experienced “conscious physical suffering . . . prior to death.” *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995). The Tenth Circuit approved that construction. *See Medlock v. Ward*, 200 F.3d 1314, 1321 (10th Cir. 2000).

In Mr. Bush’s case, the state courts upheld the “heinous, atrocious, or cruel” aggravating circumstance because “gunshot wounds . . . would be painful,” and the victim “would not have become immediately unconscious” upon being shot. App. E at 15. Mr. Bush’s case illustrates that, despite a purported narrowing construction, the aggravating circumstance remains a catch-all that could apply to virtually every murder case—and, to the extent that it could not, separates capital and non-capital cases along wholly arbitrary lines. *See Pavatt v. Carpenter*, 928 F.3d 906, 936 (10th Cir. 2019) (en banc) (Hartz, J., dissenting) (explaining that “the very act of committing the murder” triggers the aggravating circumstance “unless the victim was rendered unconscious immediately upon receiving the fatal blow,” meaning that the aggravator “provides what could be described as a ‘sharpshooter bonus’”: “[i]f the perpetrator has the skill to render an immediately fatal blow, he or she escapes the death penalty”).

To use such an overbroad and unprincipled aggravating circumstance is to flout this Court’s longstanding precedent that “an aggravating circumstance *must genuinely narrow the class* of persons eligible for the death penalty *and must reasonably justify* the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *E.g., Zant v. Stephens*, 462 U.S. 862, 877 (1983) (emphasis added); *see Pavatt v. Carpenter*, 928 F.3d at 936 (Hartz, J., dissenting) (“[N]o fairminded jurist could think that th[e] [conscious physical suffering] requirement distinguishes in a *principled* manner those deserving the death penalty from the many first-degree murderers who do not.”). And to apply the heinous, atrocious, or cruel aggravating circumstance on the facts of Mr. Bush’s case—where there was in-

sufficient evidence to support a constitutionally acceptable construction of the aggravating circumstance—is to violate Mr. Bush’s clearly established Fourteenth Amendment rights under *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Pavatt v. Royal*, 859 F.3d 920, 929–37 (10th Cir. 2017), *rev’d en banc*, 928 F.3d 906 (10th Cir. 2019).

Oklahoma’s refusal to limit its heinous, atrocious, or cruel aggravating circumstance in a manner that comports with this Court’s precedents is of longstanding duration and affects a wide swath of cases beyond Mr. Bush’s. *See generally Pavatt v. Carpenter*, 928 F.3d at 936 (Hartz, J., dissenting) (“At oral argument before the en banc court, counsel for the State acknowledged what is apparent from the [state court] opinion in this case: a defendant ‘qualifies for the [heinous, atrocious, or cruel] aggravator if the victim was conscious for some period of time (a couple minutes) after receiving the fatal blow and experienced some pain during that time.’”). To give just a few examples, the State has applied the aggravator in the following cases: *Bench v. State*, 431 P.3d 929, 963 (Okla. 2018) (“Although [the medical examiner] could not determine at what exact point [the victim] became unconscious, she did not see any evidence that [the victim] was immediately rendered unconscious.”); *Tyron v. State*, 423 P.3d 617, 651 (Okla. 2018) (“the victim’s death was not instantaneous” and “unconsciousness was not immediate”); *Jones v. State*, 201 P.3d 869, 889 (Okla. 2009) (“The evidence shows [that the victim] received five gunshot wounds, none of which would have caused instantaneous death.”); *Cole v. State*, 164 P.3d 1089, 1099 (Okla. 2007) (victim “was probably conscious for no more than 30 seconds” after the fatal injury was inflicted and “probably died within two or three minutes”); *Pavatt v. State*, 159 P.3d 272, 294 (Okla. 2007) (“death was not instantaneous”); *Smith*, 157 P.3d at 1178 (“due to the nature of the internal injuries caused by the gunshot, death would not have been instantaneous and [the victim] could have survived at least for several minutes in a partially conscious state”).

Even though Oklahoma’s overbroad and unprincipled construction of its heinous, atrocious, or cruel aggravating circumstance is incompatible with this Court’s decisions in *Godfrey*, *Maynard*, and similar cases, the Tenth Circuit has repeatedly approved its use. *See, e.g., Mitchell*, ___ F. App’x ___, 2019 WL 6713382, at *7–*10; *Pavatt v. Carpenter*, 928 F.3d at 917–30; *Simpson v. Carpenter*, 912 F.3d 542, 588–93 (10th Cir. 2018); *Wood v. Carpenter*, 907 F.3d 1279, 1305–1309 (10th Cir. 2018); *Hancock v. Trammell*, 798 F.3d 1002, 1030–31 (10th Cir. 2015); *Cole v. Trammell*, 755 F.3d 1142, 1166–71 (10th Cir. 2015); *Welch v. Workman*, 639 F.3d 980, 1006 (10th Cir. 2011); *Wilson v. Sirmons*, 536 F.3d 1064, 1108 (10th Cir. 2008) (“The Tenth Circuit has routinely upheld the constitutionality of the heinous, atrocious, or cruel aggravator”); *Workman v. Mullin*, 342 F.3d 1100, 1115 (10th Cir. 2003) (“We have repeatedly held that Oklahoma’s current definition of [the] ‘especially heinous, atrocious or cruel’ aggravating circumstance is not unconstitutionally vague.”).

Certiorari should be granted to redress Oklahoma’s non-compliance with this Court’s precedent and to vindicate the authority of this Court. *Cf. Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam) (granting certiorari in the absence of a circuit split because Oklahoma was refusing to abide by the limits on victim impact testimony imposed by this Court). Certiorari should be granted in the habeas context in particular because the Tenth Circuit has demonstrated that it requires admonition that § 2254(d)(1) does not justify abdication; that habeas relief remains available to redress “extreme malfunctions in the state criminal justice systems,” *Davis*, 135 S. Ct. at 2202; and that flouting this Court’s precedent qualifies as just such a malfunction. Further, while a case arising from direct appeal might ordinarily provide a superior vehicle for considering the constitutionality of a state’s aggravating circumstance, the unconstitutionality of the current iteration of Oklahoma’s heinous, atrocious, and cruel aggravating circumstance is so far beyond doubt that the restrictions of

§ 2254(d)(1) could not possibly present any obstacle to this Court reaching the question on the merits.

IV. The Tenth Circuit’s Denial of a Certificate of Appealability for Mr. Bush’s Challenge to the Overbroad Aggravator Evinces Non-Compliance With This Court’s Precedent That a Petitioner With a Debatable Claim Must Be Allowed to Appeal.

Certiorari is also warranted because the Tenth Circuit’s refusal even to allow Mr. Bush to appeal his challenge to the heinous, atrocious, and cruel aggravating circumstance disregards this Court’s recurrent holdings that certificates of appealability should be liberally granted.

Lower courts have bucked this Court’s insistence that the threshold for obtaining a certificate of appealability under 28 U.S.C. § 2253 is low. As a result, this Court has been required to repeatedly instruct the lower courts that they *must* grant such a certificate so long as the petitioner has a claim the validity of which “reasonable jurists could debate,” *Buck v. Davis*, 137 S. Ct. 759, 773–75 (2017)—and, conversely, that they can deny an appeal *only if* the necessity of rejecting the petitioner’s claim is so obvious that “reasonable jurists would consider that conclusion to be beyond all debate,” *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). *See Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018); *Tennard v. Dretke*, 542 U.S. 274, 282–89 (2004); *Banks v. Dretke*, 540 U.S. 668, 703–705 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 335–48 (2003).

The Tenth Circuit failed to heed those instructions here. As demonstrated in the previous section, Mr. Bush’s claim readily satisfies the standard for a certificate of appealability. Significantly, in *Pavatt v. Carpenter*—issued after Mr. Bush was denied a certificate of appealability—three federal appellate judges expressed the view that a claim just like Mr. Bush’s is not only debatable but should ultimately prevail. 928 F.3d at 935–39 (Hartz, J., dissenting). Unless Judges Hartz, Kelly, and Lucero fail to qualify as “reasonable jurists,” Mr. Bush should have been granted a

certificate of appealability. The applicable standard is objective and does not permit Mr. Bush to be deprived of an appeal based on the happenstance that none of those three judges sat on the panel that decided Mr. Bush's request for a certificate of appealability.

Just as this Court routinely intervenes to compel obedience to the established limitations on habeas corpus relief, it should intervene in this case to compel obedience to the established standards for the issuance of a certificate of appealability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

Josh Lee
Assistant Federal Public Defender
josh.lee@fd.org
Counsel of Record for Petitioner

633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-11922