No. 19-7455

In the

SUPREME COURT OF THE UNITED STATES

RONSON KYLE BUSH,

***Petitioner*,**

-vs-

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1) Whether this Court should grant a writ of certiorari to review the Tenth Circuit's rule for determining the existence of clearly established federal law when that rule is in conflict with neither this Court nor other circuits?

2) Whether this Court should grant a writ of certiorari to review a challenge to an aggravating circumstance that was not pressed or passed upon below and is, in any event, squarely foreclosed by this Court's precedents?

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Respondent respectfully urges this Court to deny Petitioner Ronson Kyle Bush's (hereinafter, "Petitioner") petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on June 10, 2019, affirming the denial of habeas relief. *Bush v. Carpenter*, 926 F.3d 644 (10th Cir. 2019), Pet'r Appx. A.[1]

[1] References in this brief are abbreviated as follows: citations to Petitioner's Petition for Writ of Certiorari are cited as "Petition"; citations to Petitioner's trial transcripts are cited as "Tr."; and citations to the State's trial exhibits are cited as "State's Ex." *See* Sup. Ct. R. 12.7.

STATEMENT OF THE CASE

A. Factual Background

On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") set forth the relevant facts in its published opinion. *Bush v. State*, 280 P.3d 337, 342 (Okla. Crim. App. 2012), Pet'r Appx. E. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2254(e)(1). According to the OCCA:

> On the evening of December 22, 2008, while at Billy Harrington's home, Ronson Bush shot Harrington six times with Harrington's .357 caliber revolver. Harrington made it to the front yard of the home, where he collapsed. Bush then tied Harrington to the back of his pickup and dragged him into a field near the house.
>
> By all accounts, Harrington and Bush had been best friends for a number of years. Harrington did what he could to aid Bush who dealt with addictions, paranoia, and other related mental illnesses. Harrington's final attempts to assist Bush came just days before the shooting. On December 18, Harrington attempted to take Bush to Griffin Memorial Hospital in Norman, Oklahoma but Bush was exceedingly drunk, and the two men fought during the trip. Harrington left Bush in a parking lot in Norman, and drove on to Tulsa for work. Bush hitched a ride back to Harrington's trailer. When Harrington arrived home that evening, accompanied by Jimmy Barrington, they found Bush passed out on the couch with Harrington's firearms purposefully placed around the house.
>
> After calling the sheriff's office to send someone to the house, Harrington again agreed to take Bush back to Griffin Memorial Hospital, where Bush voluntarily admitted himself for treatment. Bush, however, on December 22, checked himself out of the hospital, called Harrington for a ride, and returned to Harrington's home. Bush drank vodka from a pint bottle purchased in Blanchard on the way home. Once home, both men shot guns off the porch and played with Harrington's dog. Harrington also gave Bush a haircut.
>
> Sometime around 7:15 p.m., Harrington was talking on the phone with his girlfriend who could hear Bush in the background.

> Bush took a photograph of Harrington and nothing seemed amiss; minutes later, however, Bush shot and killed Harrington.
>
> Bush explained that things started downhill when he mentioned getting Christmas presents for Stephanie Morgan, an ex-girlfriend, and her son. Bush said that Harrington told him that he should forget about Morgan as she was sleeping with other people. According to Bush, Harrington went on to say that even he had "fucked" her. Bush said he then snapped, picked up the .357 revolver, and started shooting Harrington. Bush kept shooting as Harrington got up, went to the kitchen, collapsed, then got up and walked outside.
>
> At around 7:44 p.m. Harrington's mother, Kathy Harrington, tried to call Harrington's cell phone, but Bush answered. Bush kept putting Mrs. Harrington off, probably because Harrington was already dead. Mrs. Harrington called friends who went to the home and discovered Harrington's body in the field.
>
> Bush, in the mean time, left the trailer in Harrington's truck, bought some beer, and drove to Ms. Morgan's home. Bush kicked in the back door and entered Morgan's unoccupied home. He waited on her to arrive and drank some alcohol from a commemorative bottle she had stored in her bedroom.
>
> Morgan arrived home and was unable to turn on the bedroom lights. She heard Bush say that he heard her come in. Bush was in the bedroom lying on the bed. Morgan tried to get away by walking out and getting in her car. Bush, however, got in the passenger side. Morgan was finally able to let someone know that Bush was there, get him out of the car, and drive away.
>
> Authorities arrived at Morgan's home, and Bush was arrested for violating a protective order Morgan had against him. Bush, at the time of the arrest, confessed to shooting Harrington.

Bush, 280 P.3d at 342-43 (paragraph numbering omitted).

In the penalty phase, the defense's theory that Petitioner received "a drug known to exacerbate Bipolar Disorder and, indeed, to activate violent manic episodes," Petition at 4, was thoroughly discredited. According to the State's expert, Petitioner was given Celexa, a commonly prescribed Selective Serotonin Reuptake

Inhibitor ("SSRI") that had been shown to cause aggression in a very small percentage of patients; "aggression" did not equal homicidal violence, and no study had ever linked Celexa to homicide; and Petitioner had previously taken SSRIs and reported symptoms that were the opposite of aggression, including feeling "out of it" with a lack of emotion (Tr. 1836-48). Petitioner's suggestion that he immediately "confessed . . . and became wracked with remorse," Petition at 4, is likewise inaccurate. Petitioner neglects to mention that he dragged Mr. Harrington's still-alive body across Mr. Harrington's large property with Mr. Harrington's own truck, causing catastrophic blunt force trauma to Mr. Harrington's face and body; taunted Mr. Harrington's frantic mother over the phone about the fate of her son; terrorized his ex-girlfriend, who had a protective order against him and against whom he had previously committed domestic violence; and told multiple, ever-evolving stories about what happened over the course of three police interviews, including claiming at first he did not remember killing Mr. Harrington (Tr. 947-48, 968-76, 1112-13, 1117, 1133-55; State's Exs. 11, 12, 13).

B. Procedural Background

Petitioner entered an *Alford*[2] plea to first degree murder for the death of Billy Harrington and pleaded guilty to one count of possession of a firearm after former conviction of a felony. *Bush*, 280 P.3d at 341. Pursuant to Oklahoma law, the case proceeded to a non-jury sentencing proceeding. *Id.* At the conclusion of the penalty phase, the trial judge imposed a death sentence after finding the existence

[2] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

of three aggravating circumstances: (1) that the murder was especially heinous, atrocious, or cruel ("HAC"); (2) that Petitioner constitutes a continuing threat to society; and (3) that the murder was committed while Petitioner was serving a sentence of imprisonment. *Id.* at 341-42; *see* OKLA. STAT. tit. 21, § 701-12(4), (6), (7).

The OCCA affirmed Petitioner's convictions and sentences, *Bush*, 280 P.3d at 353, and this Court denied certiorari review, *Bush v. Oklahoma*, 568 U.S. 1216 (2013). Thereafter, the OCCA denied Petitioner's application for post-conviction relief in an unpublished decision. *Bush v. State*, No. PCD-2010-399, slip op. (Okla. Crim. App. Oct. 1, 2012) (unpublished), Pet'r Appx. F.

The federal district court denied Petitioner's § 2254 petition in an unpublished memorandum opinion. *Bush v. Royal*, No. CIV-13-266-R, slip op. (W.D. Okla. Oct. 17, 2016); Pet'r Appx. B. On appeal, the Tenth Circuit affirmed the denial of habeas relief. *Bush*, 926 F.3d at 647. Relevant here, the Tenth Circuit rejected, as unsupported by clearly established Supreme Court law, Petitioner's claim that the trial court, in sentencing, improperly considered in aggravation an offer of proof regarding evidence it had declared inadmissible. *Id.* at 651-57. The Tenth Circuit also denied Petitioner's pending motion for expansion of his certificate of appealability ("COA"). *Id.* at 687.

The Tenth Circuit denied panel and *en banc* rehearing. *Bush v. Sharp*, No. 16-6318, *Order* (10th Cir. Aug. 29, 2019) (unpublished); Pet'r Appx. G. On January 24, 2020, Petitioner filed a petition for writ of certiorari with this Court seeking review of the Tenth Circuit's decision.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NOT SHOWN THAT THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS, AND THE CIRCUIT SPLIT HE ALLEGES IS ILLUSORY.

Petitioner's first question presented, challenging the Tenth Circuit's rule for the determination of clearly established federal law, does not warrant certiorari review. The Tenth Circuit's rule, which the circuit announced following *Carey v. Musladin*, 549 U.S. 70 (2006), and *Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam), is fully supported by these cases. Nor is the rule in conflict with any of the other Supreme Court cases cited by Petitioner. Based on the Tenth Circuit's rule, the panel here correctly concluded that Petitioner's claim failed for lack of clearly established law. Furthermore, the circuit split alleged by Petitioner is illusory. The Tenth Circuit's rule is in harmony with a majority of the cases identified by Petitioner. He has shown only some tension between the Tenth Circuit's rule and two Fifth Circuit cases, which amounts to, at most, a shallow circuit split that does not warrant this Court's intervention. Finally, even assuming the existence of clearly established federal law, Petitioner's underlying constitutional claim is totally without merit. Certiorari should be denied.

A. The Tenth Circuit Is Not In Conflict With This Court

Petitioner contends that the Tenth Circuit applies a "factual similarity requirement" to § 2254(d)(1)'s "clearly established Federal law" provision that is in conflict with this Court's cases. Petition at 10-16. "A petition for a writ of certiorari

will be granted only for compelling reasons," including for example where "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Here, however, Petitioner has not shown any conflict between the Tenth Circuit's test for determining clearly established federal law and the precedents of this Court.

1. The Tenth Circuit's House Rule

The AEDPA provides, in pertinent part, that habeas relief may not be granted on a claim decided on the merits by a state court unless the state court's rejection of the claim "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*." 28 U.S.C. § 2254(d)(1) (emphasis added). As Petitioner acknowledges, Petition at 10, the Tenth Circuit announced its rule for the determination of clearly established federal law in *House v. Hatch*, 527 F.3d 1010 (10th Cir. 2008), *cert. denied*, 555 U.S. 1187 (2009). In *House*, in an opinion authored by the Honorable Jerome A. Holmes, the Tenth Circuit analyzed at length this Court's then-recent decision in *Carey v. Musladin*, 549 U.S. 70 (2006), and its effect on the determination of clearly established federal law. *House*, 527 F.3d at 1015-18. In the portion of *House* objected to by Petitioner, the Tenth Circuit concluded as follows: "[I]n the post-*Musladin* analysis, clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*." *House*, 527 F.3d at 1016.

In the present case, the panel determined that *Musladin* and *House* foreclosed relief:

> "[I]n the post-*Musladin* analysis, clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*." [*House*, 527 F.3d] at 1016.
>
> That presents a problem for Bush. None of the Supreme Court cases he has cited in his appellate brief involved 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. Indeed, none of the cases he has cited separately involved either the consideration of an offer of proof of inadmissible evidence in any context, or a capital case. Thus, at best, the cases cited by Bush stand for very broad principles of due process. In light of *Musladin* and *House*, however, that is not sufficient to constitute clearly established federal law for purposes of § 2254(d). And, under *House*, "[t]he absence of clearly established federal law is dispositive under § 2254(d)(1)." 527 F.3d at 1018.

Bush, 926 F.3d at 657.

Petitioner claims that the *House* rule requires "similar facts" and that this is contrary to this Court's precedents. Petitioner attacks a straw man. The Tenth Circuit does not require a similar *fact pattern* to find clearly established Supreme Court law, as Petitioner suggests. *See* Petition at 10 ("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." (emphasis added)). Rather, the Tenth Circuit requires only that clearly established Supreme Court law arise in a similar *context*.

Indeed, the *House* Court made this point clear immediately after the complained-of language: "Although the legal rule at issue need not have had its

genesis in the closely-related or similar *factual context*, the Supreme Court must have expressly extended the legal rule to that *context*." *House*, 527 F.3d at 1016-17 (citing *Wright v. Van Patten*, 552 U.S. 120, 124-25 (2008) (per curiam)) (emphasis added). Footnote 5, placed at the end of this sentence, expounded on this point at length:

> [5] Notably, the *Musladin* Court did not appear to predicate the presence of clearly established federal law upon the existence of Supreme Court holdings involving essentially identical factual circumstances. In other words, the Court did not insist upon exact factual identity between existing Supreme Court cases and the case *sub judice*. For example, the Court did not focus on the precise nature of the privately-initiated courtroom conduct at issue—the wearing of buttons bearing the likeness of the deceased. Rather, in referring to "courtroom conduct of *the kind involved here,*" the Court seemingly distinguished between the allegedly prejudicial effect of government-sponsored, as opposed to privately-initiated, courtroom conduct. Arguably then, had a prior Supreme Court holding involved the prejudicial effect of privately-initiated courtroom conduct—even if that conduct was *unrelated* to the wearing of buttons—the Court would likely have concluded that clearly established federal law existed.
>
> . . . [F]ederal courts may no longer extract clearly established law from the general legal principles developed in *factually distinct contexts*.

House, 527 F.3d at 1016 n. 5 (citations omitted, final emphasis added).

2. The House Rule Is Fully Supported by this Court's Cases

The *House* Court cited *Musladin* and *Van Patten* in support of its requirement of a "similar factual context" for clearly established federal law. *House*, 527 F.3d at 1016-17. A review of *Musladin* and *Van Patten* confirms the

correctness of the *House* rule. In *Musladin*, this Court considered whether this Court's precedents holding that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial" constituted clearly established federal law for purposes of deciding whether "buttons displaying the victim's image worn by the victim's family during respondent's trial . . . den[ied] respondent his right to a fair trial." *Musladin*, 549 U.S. at 72. This Court answered that question in the negative. *Id.* at 77. This Court observed that its two cases that "addressed the effect of courtroom practices on defendants' fair-trial rights"—*Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986)—"dealt with government-sponsored practices." *Musladin*, 549 U.S. at 75. Musladin's claim, on the other hand, involved "private-actor courtroom conduct." *Id.* at 76. This Court had never addressed such a claim or extended the rule from *Williams* and *Flynn* to that context. *Id.* Furthermore, "part of the legal test of *Williams* and *Flynn*—asking whether the practices furthered an essential state interest—suggest[ed] that those cases apply only to state-sponsored practices." *Id.*

Thus, in *Musladin*, this Court looked for a precedent with a similar factual context to determine whether clearly established Supreme Court law existed for Musladin's claim. As *House* expressly recognized, this "Court did not focus on the precise nature of the . . . courtroom conduct at issue," *i.e.*, the wearing of buttons, but instead looked to the broader question of whether the context was the same, *i.e.*, whether the conduct was privately or government-initiated. *House*, 527 F.3d at 1016 n. 5. In other words, while *Musladin* does not require an identical fact

pattern, it does support the requirement of a "similar factual context," as imposed by *House*.

Van Patten also fully supports the *House* rule. In *Van Patten*, the Seventh Circuit granted habeas relief based on its conclusion that *United States v. Cronic*, 466 U.S. 648 (1984), under which prejudice is presumed, applied to Van Patten's claim that counsel rendered ineffective assistance in participating in his plea hearing only over speakerphone. *Van Patten*, 552 U.S. at 121-22. This Court reversed, finding no clearly established federal law required that prejudice be presumed as to Van Patten's claim. *Id.* at 126. This Court reasoned that *Strickland v. Washington*, 466 U.S. 668 (1984), ordinarily applies to claims of ineffective assistance at the plea hearing stage, and "[n]o decision of this Court . . . clearly establishes that *Cronic* should replace *Strickland* in this *novel factual context*." *Van Patten*, 552 U.S. at 125-26 (emphasis added). Thus, *Van Patten* explicitly supports the *House* rule's "similar factual context" requirement.

3. The House Rule Does Not Conflict with any of this Court's Precedents

Petitioner's belief that the *House* rule contradicts this Court's precedent rests on a misreading of cases elucidating the difference between the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) to say something about the meaning of the "clearly established Federal law" provision of that statute. He relies principally on *Panetti v. Quarterman*, 551 U.S. 930 (2007), but also cites to a number of other cases of this Court. Petition at 12-13. However, these cases stand only for the unremarkable proposition that while the "contrary to" clause prohibits

a state court from deciding a case differently than this Court on "materially indistinguishable facts," the "unreasonable application" clause does not require materially identical facts. *See White v. Woodall*, 572 U.S. 415, 427 (2014); *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (per curiam); *Panetti*, 551 U.S. at 953; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *Williams v. Taylor*, 529 U.S. 362, 406 (2000).[3]

Nothing in the above-cited cases says or even suggests that the "unreasonable application" clause allows a federal court to grant relief based on a Supreme Court case that arose in a different *context* than the case at hand. In fact, one case relied on by Petitioner, *Woodall*, found a lack of clearly established federal law based on a difference in context—guilt phase versus penalty phase. Specifically, the *Woodall* Court held that *Carter v. Kentucky*, 450 U.S. 288 (1981)—which requires "at the *guilt* phase" "a no-adverse-inference instruction" based on a defendant's failure to testify—does not clearly establish the same requirement for a capital penalty phase. *Woodall*, 572 U.S. at 420-27 (emphasis in original).

As noted previously, Petitioner relies principally on *Panetti*, claiming that there this Court found an unreasonable application of "*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." Petition at 13. Again, Petitioner confuses *facts* with *context*. Ford brought a claim that he was incompetent to be executed. *See Ford*, 477 U.S. at 403-04. This Court ultimately

[3] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), which discusses qualified immunity for purposes of 42 U.S.C. § 1983, and has nothing to do with § 2254, is inapposite. Petition at 12.

held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10; *see also Panetti*, 551 U.S. at 950-51 (explaining that *Ford* clearly established that a prisoner who makes a substantial showing of incompetence is entitled to a fair hearing, including the right to be heard and submit evidence). Panetti also brought a claim that he was incompetent to be executed. *Panetti*, 551 U.S. at 935. These are identical contexts, and there was no question that *Ford* supplied the clearly established federal law applicable to Panetti's claim.

4. The Tenth Circuit Correctly Concluded that Musladin Does Not Provide Clearly Established Federal Law Applicable to Petitioner's Claim

As before the Tenth Circuit, Petitioner claims that *Musladin* supplies the clearly established federal law applicable to his claim, Petition at 15; *Bush*, 926 F.3d at 656, presumably referring to this Court's discussion of *Williams* and *Flynn*. The Tenth Circuit correctly rejected this argument. For starters, Petitioner fails to appreciate the problem that contributed to the lack of clearly established law both in *Musladin* and in his case. As *Musladin* noted, the test of *Williams* and *Flynn*—"asking whether the practices furthered an essential state interest"—did not fit the context in which Musladin sought to apply the test, as his case involved private conduct and no state interest. *Musladin*, 549 U.S. at 76. Petitioner's case likewise presents a problem of fit. *Williams* and *Flynn* both dealt with "courtroom conduct" or "practices," *id.*, that persisted throughout the trial, specifically, forcing the defendant to stand trial in prison garb, *Williams*, 425 U.S. at 502, and the

placement of "four uniformed state troopers" seated directly behind the defendant at trial, *Flynn*, 475 U.S. at 562. Indeed, as the phrases "conduct" and "practice" connote, *Williams* emphasized how the defendant's jail clothing provided a "constant reminder" to, and "continuing influence" on, the jury. *Williams*, 425 U.S. at 504-05. The factual context of Petitioner's claim, involving the prosecutor's discrete reading of a single offer of proof to the trial judge, can hardly be described as "courtroom conduct" or a "practice."

Further, *Williams* and *Flynn* were both concerned with factors that have no bearing on Petitioner's claim—courtroom practices that undermine the presumption of innocence before a jury, *Williams*, 425 U.S. at 503; *Flynn*, 475 U.S. at 567; whether such practices serve an essential state interest, *Williams*, 425 U.S. at 505; *Flynn*, 475 U.S. at 568; and what inferences *jurors* are likely to draw from such practices, *Williams*, 425 U.S. at 504-05; *Flynn*, 475 U.S. at 569. It is entirely unclear how a test driven by these concerns applies in the present context: "*a trial judge* who selected and imposed a *death sentence* after considering an offer of proof of inadmissible aggravating evidence" during a penalty-phase proceeding following an *Alford* plea. *Bush*, 926 F.3d at 657 (emphasis added); *see also Woodall*, 572 U.S. at 421 ("it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase"). It cannot be said that all fairminded jurists would agree that the test from *Williams* and *Flynn* applies to

Petitioner's claim; thus, the Tenth Circuit properly found that his claim failed for lack of clearly established federal law. *See Woodall*, 572 U.S. at 427.[4]

B. The Circuit Split Petitioner Alleges Is Illusory

Petitioner further contends that certiorari review is warranted "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." Petition at 16. An example of a "compelling reason[]" justifying certiorari review is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ." Sup. Ct. R. 10(a). Here, however, Petitioner has shown no such conflict between the decision below and the other circuit cases he cites.

1. The House Rule Is In Harmony with the Majority of the Cases Cited by Petitioner

To begin with, Petitioner's allegation of a circuit split again rests on his mistaken interpretation of the *House* rule. As shown above, *House* requires not a similar fact pattern, but simply a similar factual context. *See House*, 527 F.3d at 1016-17 & n. 5. Thus, there is no conflict between the Tenth Circuit's rule and the cases cited by Petitioner holding that § 2254(d)(1) does not require nearly identical facts or supports the application of a single test to a variety of fact patterns. *See*

[4] *Williams* is the answer to the hypothetical posed by Petitioner. If a judge forced a defendant to stand trial without clothing, Petition at 15 n. 5, then that is state-sponsored conduct that would fall within the holding of *Williams*, even under the *House* rule. *Cf. House*, 527 F.3d at 1016 n. 5 ("[H]ad a prior Supreme Court holding involved the prejudicial effect of privately-initiated courtroom conduct—even if that conduct was *unrelated* to the wearing of buttons—the Court would likely have concluded that clearly established federal law existed." (emphasis in original)).

Owens v. Duncan, 781 F.3d 360, 365 (7th Cir. 2015) ("It's true that we know of no case identical to this one . . . . But identity can't be required."); *Barnes v. Joyner*, 751 F.3d 229, 246 (4th Cir. 2014) ("There is no requirement under AEDPA that a habeas petitioner present facts identical to those previously considered by the Supreme Court to be entitled to relief."); *Musladin v. Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."); *Jamison v. Klem*, 544 F.3d 266, 273 (3d Cir. 2008) (noting § 2254 does not require finding "a case involving a fact pattern that is identical to the facts underlying a habeas petitioner's claim for federal relief"); *Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir. 2002) (indicating that a "broad" Supreme Court rule may "appl[y] to a kaleidoscopic array of fact patterns").

The circuit split claimed by Petitioner is further illusory because, contrary to his assertion, he has not shown that "functionally identical cases in different circuits are coming out differently." Petition at 22. Rather, he has pointed to a litany of cases arising from widely varying contexts—contexts quite different from the one in which his claim arose—where federal courts applied clearly established federal law to varying fact patterns. In fact, as to multiple of these cases, the Tenth Circuit has also found clearly established federal law applicable to the context at issue. *Compare Whatley v. Zatecky*, 833 F.3d 762, 776-77 (7th Cir. 2016) (analyzing vagueness challenge to state statute under *Kolender v. Lawson*, 461 U.S. 352 (1983)), *with Hopkins v. Workman*, 47 F. App'x 893, 896 (10th Cir. 2002)

(unpublished) (same); *Owens*, 781 F.3d at 365 ("The Supreme Court has made clear in the cases we've cited and quoted from that a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever."), *with Torres v. Lytle*, 461 F.3d 1303, 1313 (10th Cir. 2006) (granting habeas relief on grounds that a jury's "inference must be more than speculation and conjecture to be reasonable" and based on more than "a guess or mere possibility"); *Jackson v. Conway*, 763 F.3d 115, 146-47 (2d Cir. 2014) (applying *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), to claim of prosecutorial misconduct), *with Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013) (same); *Blackmon v. Booker*, 696 F.3d 536, 556-57 (6th Cir. 2012) (reviewing admission of gang affiliation evidence for whether it denied the habeas petitioner fundamental fairness), *with Young v. Attorney Gen. for New Mexico*, 534 F. App'x 707, 710 (10th Cir. 2013) (unpublished) (same); *Lyons v. Brady*, 666 F.3d 51, 55-56 (1st Cir. 2012) (finding claim regarding admission of autopsy photographs to be governed by principle of "fundamental fairness"), *and Franklin v. Bradshaw*, 695 F.3d 439, 456-57 (6th Cir. 2012) (considering whether gruesome photographs "so perniciously affect[ed] the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial" (quotation marks omitted)), *with Cole v. Trammell*, 755 F.3d 1142, 1165 (10th Cir. 2014) (reviewing challenge to admission of gruesome photographs for "fundamental fairness"); *Harris v. Alexander*, 548 F.3d 200, 206 (2d Cir. 2008) (holding refusal to instruct jury on theory of defense violated due process), *with Thomas v. Goodrich*, 750 F. App'x 637,

643 (10th Cir. 2018) (unpublished) (noting that claim regarding refusal to give theory of defense instructions was governed by "fundamental fairness" and warranted relief only if the omission "so infected the entire trial that the resulting conviction violates due process" (quotation marks omitted)); *Parle v. Runnels*, 505 F.3d 922, 927-28 (9th Cir. 2007) (finding cumulative error claim to be supported by clearly established law); *with Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 915 n. 33 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 844 (2020) (rejecting the State's argument that no clearly established law recognized cumulative error theory of relief).

Petitioner also overstates the holdings of some of the cases he cites. In *Housen v. Gelb*, 744 F.3d 221, 227-29 (1st Cir. 2014), for instance, the First Circuit reserved the question of whether clearly established law existed when denying habeas relief on a claim of inconsistent prosecution theories between codefendants. This is entirely consistent with the Tenth Circuit's resolution of an inconsistent-prosecutions claim in *Littlejohn v. Trammell*, 704 F.3d 817, 852-53 (10th Cir. 2013), where the Tenth Circuit expressed skepticism that clearly established law existed but ultimately denied relief on grounds that the Supreme Court case relied on by Littlejohn was decided after his conviction became final.

Petitioner also exaggerates when he claims that, 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" based on *Riggins v. Nevada*, 504 U.S. 127 (1992). Petition at 18. After an eyewitness in Glenn's murder trial offered

grossly inconsistent testimony, the trial judge struck the testimony and repeatedly instructed the jury that it could not be considered. *Glenn*, 743 F.3d at 404-06. Glenn later claimed that the eyewitness's "unreliable testimony rendered his trial fundamentally unfair" and "the trial judge's curative instructions could not purge the record of the taint from this testimony." *Id.* at 407. The Third Circuit did analyze this claim for fundamental fairness, but the court did not appear to even consider whether the claim was actually supported by clearly established law and made no mention whether the State had raised any such argument. *See id.* at 407-09.[5] As far as *Riggins*, where this Court decided whether forced administration of antipsychotic medication during trial is unconstitutional, the Third Circuit did not discuss the facts of that case and in fact cited to language from the *dissent* to that opinion. *See id.* at 407 ("To prevail on his due process claim, Glenn must prove that he was deprived of 'fundamental elements of fairness in [his] criminal trial.'" (quoting *Riggins*, 504 U.S. at 149 (Thomas, J., dissenting))); *but see Williams*, 529 U.S. at 412 (clearly established law refers to the "holdings" of this Court). While Petitioner characterizes *Glenn* as finding "that *Riggins*'s 'broad[] principles of due process' qualified as clearly established federal law even though the claim at issue

[5] Petitioner cites to footnote 6 of that opinion. Petition at 18. But, in footnote 6, the Third Circuit merely concluded that Glenn properly relied on circuit cases as "evidence that the Superior Court unreasonably applied Supreme Court precedent concerning broader principles of due process." *Glenn*, 743 F.3d at 408 n. 6. Footnote 6 involved no analysis of whether relevant *Supreme Court* law existed.

in *Riggins* was completely different," Petition at 18, Glenn can hardly be described thusly given its dearth of analysis.[6]

2. Any Tension Between the House Rule and Two Outlier Fifth Circuit Cases Does Not Create a Sufficient Circuit Split to Warrant this Court's Review

The closest Petitioner comes to showing some tension between the *House* rule and the case law of another circuit is his citation to *Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010), and *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007). Petition at 19. In both *Wiley* and *Rivera*, the Fifth Circuit applied *Panetti*—a case that, as previously discussed, dealt with competency to be executed—to hold that capital defendants who make a prima facie showing of intellectual disability are entitled to the procedures outlined in *Ford*, including a hearing. *Wiley*, 625 F.3d at 207-08; *Rivera*, 505 F.3d at 357-58.

Any tension between the *House* rule—requiring that clearly established law originate in, or have been applied to, the same context as the case at hand—and these two Fifth Circuit cases does not justify certiorari review. First, Petitioner's case does not involve an intellectual disability claim or the Tenth Circuit's refusal to apply *Panetti* to such a claim, so it is not the case "that functionally identical cases in different circuits [have come] out differently." Petition at 22.

Second, respectfully, *Wiley* and *Rivera* are outliers that were wrongly decided and create, at most, a very shallow circuit split. Neither *Wiley* nor *Rivera* cited, let

[6] In addition, *Glenn* involved evidence that was ultimately held to be inadmissible heard by a jury during the guilt stage, whereas Petitioner's claim involves an offer of proof heard by the judge during sentencing. Even if *Glenn* found clearly established law in a reasoned analysis, the context is so different than Petitioner's case that *Glenn* cannot be described as conflicting with the panel's opinion below.

alone discussed, *Musladin*. It is clear based on *Musladin* that it was improper for the Fifth Circuit to take clearly established law from the competency context and import it into the *Atkins* context. *See Musladin*, 549 U.S. at 76. In fact, in *Shoop v. Hill*, 139 S. Ct. 504, 506-07 (2019), this Court considered a state court intellectual disability decision from 2008 and determined that only *Atkins v. Virginia*, 536 U.S. 304 (2002), supplied clearly established law at that time. And this Court has said that *Atkins* "did not provide definitive procedural or substantive guides for determining" intellectual disability. *Bobby v. Bies*, 556 U.S. 825, 831 (2009); *cf. also Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) ("Because we agree that the state court's rejection of Brumfield's request for an *Atkins* hearing was premised on an 'unreasonable determination of the facts' within the meaning of § 2254(d)(2), we need not address whether its refusal to grant him expert funding . . . reflected an 'unreasonable application of clearly established Federal law,' § 2254(d)(1)." (alteration adopted)), *id.* at 2294-95 (Thomas, J., dissenting) ("*Atkins* thus did not imply—let alone hold—that a prisoner is entitled to a hearing on an *Atkins* claim.").

In sum, the *House* rule is overwhelmingly consistent with the law of other circuits. *Wiley* and *Rivera* are both erroneously decided and outliers. This shallow conflict in the law is unworthy of certiorari review. *Cf. Arizona v. Evans*, 514 U.S. 1, 24 n. 1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). Moreover, *Wiley*

and *Rivera* were both decided pre-*Shoop*, and if the Fifth Circuit were to reconsider the issue now, it would likely decide the issue differently. This Court's intervention is unnecessary.

C. Petitioner's Claim Is Entirely Without Merit

Even assuming the existence of clearly established federal law applicable to Petitioner's claim, his claim is entirely without merit and would not entitle him to relief even if reviewed on its merits by the Tenth Circuit. Accordingly, Petitioner's case is a poor vehicle for resolution of the first question presented. *See McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821) ("question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed"); *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court decides cases only "in the context of meaningful litigation," and when the challenged issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly").

During Petitioner's penalty phase bench trial, the State attempted to offer testimony from "a jail-house snitch," Jackie Nash. *Bush*, 280 P.3d at 348. The trial court excluded the testimony under Oklahoma law due to lack of notice to Petitioner that the evidence would be used in aggravation but allowed the prosecutor to make an offer of proof. *Id.* On appeal, the OCCA rejected Petitioner's claim that the offer of proof was so prejudicial that it was impossible to ignore and that it influenced the court's sentencing decision. *Id.* at 348-49. The OCCA held that Petitioner failed to "overcome the presumption that the trial court only considered competent and

admissible evidence in reaching its decision." *Id.* at 348. This decision was eminently reasonable and fully supported by the record.

"When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose." *Williams v. Illinois*, 567 U.S. 50, 69 (2012). Here, even absent such a presumption, the trial court explicitly recognized that the offer of proof was not evidence. Specifically, after the prosecutor gave the offer of proof, trial counsel voiced her concerns that the trial court was sitting in judgment of Petitioner and requested that the trial court consider the proffer "in it's [sic] proper place" (Tr. 1317). In response, the trial court assured trial counsel that "argument or statement by [] counsel is not evidence" (Tr. 1317). In addition, when the trial court announced Petitioner's death sentence, it gave a lengthy discussion of the evidence and aggravating circumstances on which it relied, making no mention of the Nash proffer of proof (Tr. 1874-1880). Given all of the above, the OCCA reasonably rejected Petitioner's claim that the trial court improperly considered the offer of proof. Petitioner's case is a poor choice for certiorari review.

II.

PETITIONER PRESENTS AN ISSUE THAT WAS NEITHER PRESSED NOR PASSED UPON BELOW AND IS, IN ANY EVENT, SQUARELY FORECLOSED BY THIS COURT'S PRECEDENTS.

Petitioner's second question presented primarily seeks certiorari review on whether he should have received a COA on a facial overbreadth challenge to HAC,

though he also briefly hints at a sufficiency-of-the-evidence challenge under *Jackson v. Virginia*, 443 U.S. 307 (1979). Neither issue warrants certiorari review. When the pleadings below are reviewed, as well as the Tenth Circuit cases from the *Pavatt* litigation on which Petitioner relies, it is clear the facial challenge he presently raises was neither pressed nor passed upon below. In any event, his facial challenge is plainly without merit under this Court's well-settled precedent. Furthermore, to the extent Petitioner seeks certiorari review on his sufficiency challenge, this fact-bound issue is unworthy of this Court's review. This Court should deny certiorari review.

A. Background of Petitioner's HAC Claims and *Pavatt*

On direct appeal, Petitioner raised two challenges to the HAC aggravator. First, he claimed the evidence in his case was insufficient to support the aggravator ("sufficiency challenge"). Pet'r Appx. H6-H10. Second, he claimed the HAC aggravator "is unconstitutionally vague and overbroad as it is currently applied" ("facial challenge"). Pet'r Appx. H19-H21. The OCCA denied relief on both claims. *Bush*, 280 P.3d at 345-47.

In his § 2254 petition, filed in December 2013, Petitioner included his sufficiency challenge but did not include his facial challenge. Pet'r Appx. I2-I4. Petitioner did not raise his facial challenge again until his Application for a COA filed in the Tenth Circuit in October 2017, after the district court denied both habeas relief and a COA on all issues raised before it. *Bush v. Royal*, No. 16-6318, *Application for Certificate of Appealability* at 136-39 (10th Cir. Oct. 30, 2017) ("1st

COA App."). Petitioner also raised his sufficiency challenge in his COA Application, relying extensively on a then-recent decision in which the majority in a three-judge panel of the Tenth Circuit held that the OCCA improperly applied the HAC aggravating circumstance to the facts of the petitioner's case. *Id.* at 71-77; *see Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017) (*Pavatt I*),[7] *opinion superseded on denial of rehearing by Pavatt v. Royal*, 894 F.3d 1115 (10th Cir. 2017) (*Pavatt II*), *opinion vacated on rehearing en banc by Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc) (*Pavatt III*), *cert. denied*, *Pavatt v. Sharp*, No. 19-697, 2020 WL 411708 (2020).

Respondent filed a response to Petitioner's COA Application. *Bush v. Royal*, No. 16-6318, *Respondent-Appellee's Response to Petitioner's Application for Certificate of Appealability* (10th Cir. Dec. 28, 2017) ("COA App. Response"). Respondent asserted that, to the extent Petitioner had attempted to transform his sufficiency challenge to rely on *Pavatt I*, any such claim was both unexhausted and forfeited. *Id.* at 30-31. Specifically, Petitioner never raised a claim, to the OCCA or the district court, that HAC was unconstitutionally vague as applied to him. *Id.* As to Petitioner's facial challenge, "Petitioner raised this claim on direct appeal, *Bush*, 280 P.3d at 347, but did not do so in his § 2254 petition, thereby forfeiting it, *see*

[7] In *Pavatt I*, the majority found the OCCA's denial of Petitioner's *Jackson* challenge to HAC to be contrary to, and an unreasonable application of, this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), because, within that sufficiency claim, the OCCA did not consider "whether the definition [of the aggravator] it applied satisfies the Eighth Amendment." *Pavatt I*, 859 F.3d at 936-37 & n. 5. The panel majority believed the victim's murder did not represent "the sort of suffering that could in a 'principled way . . . distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.'" *Id*. at 935 (quoting *Godfrey*, 446 U.S. at 433) (alteration adopted). In other words, *Pavatt I* found HAC to be unconstitutionally vague as applied to Pavatt.

Hancock[*v. Trammell*], 798 F.3d [1002,] 1011 [(10th Cir. 2015)]." COA App. Response at 61.

Petitioner filed a reply to Respondent's response. *Bush v. Royal*, No. 16-6318, *Reply in Support of Certificate of Appealability* (10th Cir. Jan. 12, 2018) ("COA App. Reply"). As to his sufficiency challenge, Petitioner argued emphatically that *Pavatt I* granted relief on a *sufficiency* claim, and thus, his argument based on *Pavatt I* was exhausted. *See id.* at 7-9. As to Petitioner's facial challenge, his reply neither mentioned that challenge nor denied that he had forfeited same.

Following the aforementioned briefing and a case management conference, in February 2018, a judge of the Tenth Circuit denied Petitioner a COA as to both his HAC claims but granted him COAs as to five other issues. *Bush v. Royal*, No. 16-6318, *Order* (10th Cir. Feb. 9, 2018) (unpublished). Petitioner filed a motion to expand the COA, in which he requested an additional COA on a single claim: "whether, in light of *Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017), the evidence was insufficient to support the heinous, atrocious, and cruel aggravating circumstance." Pet'r Appx. J1. Petitioner's motion was referred to the panel.

Meanwhile, during the pendency of Petitioner's appeal, significant changes occurred in the *Pavatt* litigation. In July 2018, following Respondent's Petition for Panel Rehearing or Rehearing En Banc, the Tenth Circuit voted to rehear Pavatt en banc. *Pavatt III*, 928 F.3d at 911. Contemporaneously, the panel issued an amended opinion in response to the rehearing petition, adding the following relevant language: "We are not saying that the OCCA in this case

unconstitutionally applied a constitutionally acceptable narrowing construction of the State's HAC aggravator [as Respondent had argued in the rehearing petition]. We are saying that it did not apply the narrowing construction that we previously approved." *Pavatt II*, 894 F.3d at 1132.

In June 2019, on en banc review, the Tenth Circuit determined that the OCCA reasonably denied Petitioner's *Jackson* claim, *Pavatt III*, 928 F.3d at 917-22; found Petitioner's "as-applied challenge to the HAC aggravator" unexhausted and "subject to an anticipatory procedural bar" as well as outside the scope of the COA, *id.* at 922-26; and "conclude[d] that there is no facial challenge to the HAC aggravator that is properly before" the court, *id.* at 926. The judge who authored *Pavatt I* and *Pavatt II* dissented on grounds that Oklahoma's construction of HAC—which applied "unless the victim was rendered unconscious immediately upon receiving the fatal blow"—did not "distinguish[] in a *principled* manner those deserving the death penalty from the many first-degree murderers who do not." *Id.* at 936 (Hartz, J., joined by Kelly, J., and Lucero, J., dissenting) (emphasis in original).

That same month, the panel denied relief in this case. As to Petitioner's pending motion, the panel noted simply that "Bush's motion to expand the certificate of appealability is DENIED." *Bush*, 926 F.3d at 687.

B. Petitioner's *Pavatt*-Based Facial Challenge to HAC was Neither Pressed Nor Passed Upon Below

Before this Court, Petitioner cites repeatedly to the *Pavatt III* dissent and resurrects his facial challenge to HAC to argue that he should receive certiorari

review on whether that challenge warranted a COA. *See* Petition at 22-27. As shown above, however, in more than six years of federal habeas litigation, Petitioner raised a facial challenge to HAC only once—in his original COA application to the Tenth Circuit. 1st COA App. at 136-39. He did not raise a facial challenge in either his habeas petition, thereby forfeiting any such challenge, or in his motion to expand the COA, meaning the panel never passed upon the request for a COA on that claim. COA App. Response at 61; Pet'r Appx. J1-J15.[8] Indeed, as previously demonstrated, Petitioner was adamant that his *Pavatt*-based claim was a sufficiency-of-the-evidence challenge. COA App. Reply at 7-9. He should not be permitted now to reinvent his claim in light of the changing *Pavatt* opinions and Judge Hartz's ultimate theory for relief in *Pavatt III*.

An issue that was neither pressed nor passed upon in the lower courts is not an appropriate issue for certiorari review. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (Supreme Court is "a court of review, not of first view"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (the Supreme Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court's traditional rule precludes grant of certiorari where "the question presented was not pressed or passed upon below"). Petitioner's raising of a facial challenge once, in a COA application, is not sufficient

[8] Petitioner's suggestion that his facial challenge was debatable because of the *Pavatt III* dissent is thus a red herring. Petition at 26-27. Petitioner's facial challenge was not even before the panel in his motion to expand the COA. And the facial challenge was not debatable when raised in his original COA application because it had been forfeited in the district court. Petitioner's suggestion that the Tenth Circuit applied an overly rigorous standard in denying him a COA on his facial challenge is entirely without support. Petition at 26-27.

to have "pressed" the issue below. Thus, the facial challenge Petitioner presently raises was neither pressed nor passed upon below and is not appropriate for certiorari review.

C. Petitioner's Facial Challenge to HAC is Squarely Foreclosed by this Court's Precedents

Petitioner's second question presented is further unworthy of certiorari review because his challenge to HAC is entirely without merit. Petitioner appears to suggest that Oklahoma's construction of HAC is unconstitutionally overbroad because it applies to any murder where death is non-instantaneous. Petition at 23-24. However, Oklahoma law restricts the HAC aggravating circumstance to instances of torture or serious physical abuse and that limitation was applied in this case. *See Bush*, 280 P.3d at 345. A torture or serious physical abuse limitation has been approved by this Court, as have similar constructions—none of which have included a duration requirement on a victim's suffering. *See Bell v. Cone*, 543 U.S. 447, 457-59 (2005) (per curiam) (finding Tennessee's especially heinous, atrocious or cruel aggravator constitutional where the state court had construed "torture" to mean a non-instantaneous death in which a victim has time to feel fear and try to protect herself); *Walton v. Arizona*, 497 U.S. 639, 654-55, 698-99 (1990) (Blackmun, J., dissenting) (finding Arizona's especially heinous, cruel or depraved aggravator, that is "virtually identical to the construction [the Court] approved in *Maynard*," constitutional, over the dissent's concern that Arizona does not require an extended

duration of suffering)[9]; *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988) (declining to hold "that some kind of torture or serious physical abuse *is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable*" (emphasis added)).

The OCCA found HAC not facially unconstitutional. *Bush*, 280 P.3d at 347. Given the above-cited cases of this Court, that decision is clearly not contrary to, or an unreasonable application of, clearly established federal law. As Petitioner's facial challenge is without merit, this Court should not grant his petition for certiorari review.

D. Petitioner's Sufficiency Challenge is Likewise Unworthy of Certiorari Review

Citing to *Pavatt I*, Petitioner also asserts in conclusory fashion that "to apply the [HAC] aggravating circumstance on the facts of [his] case—where there was insufficient evidence to support a constitutionally acceptable construction of the aggravating circumstance—is to violate [his] clearly established Fourteenth Amendment rights under *Jackson* . . . ." Petition at 22-23.

To the extent that Petitioner claims he should have received a COA on his sufficiency challenge, certiorari review on the fact-bound issue of whether there was

[9] The Tenth Circuit dissenters' concern about a "sharpshooter bonus," Petition at 23, was shared by the dissent in *Walton*, and thus rejected by this Court. *Walton*, 497 U.S. at 696 (Blackmun, J., dissenting); *see Lewis v. Jeffers*, 497 U.S. 764 (1990) (noting this Court rejected Justice Blackmun's arguments in *Walton*). Moreover, this concern focuses on the intent of the killer, which is certainly a proper consideration for an aggravating circumstance, but not the only one. It is also proper to focus on the suffering of the victim. *See Walton*, 497 U.S. at 646 (approving "'a victim's uncertainty as to his ultimate fate'" as an adequate limiting construction) (quoting *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989)).

sufficient evidence of HAC in his case is not warranted. *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1802 n. 2 (2017) (Alito, J., dissenting) ("the question decided is not just narrow, it is the sort of factbound question as to which review is disfavored").

Furthermore, it is not debatable whether the evidence was sufficient to show conscious physical suffering in this case. *See Jeffers*, 497 U.S. at 781-83 (evidence presented at trial must be sufficient for a rational trier of fact to find the aggravating circumstance proven beyond a reasonable doubt). Petitioner admitted Mr. Harrington was in the recliner when he initially shot him and, after the initial shot, Mr. Harrington went to the kitchen, collapsed, got back up, and then staggered outside (State's Ex. 11). Mr. Harrington suffered two gunshot wounds to the back of his body, one in his back and one to his neck (State's Ex. 151). Bloody footprints in the entry way and on the porch show that Mr. Harrington was moving after he sustained at least some of the wounds (State's Ex. 50-51, 90-91). The medical examiner, Dr. Inas Yacoub, testified that the gunshot wound to the back was fatal and was more than likely the ultimate or penultimate shot Mr. Harrington received prior to collapsing. She testified that it was her opinion that the injuries to Mr. Harrington's nose and mouth were pre-mortem wounds and occurred while Mr. Harrington was still alive and being dragged by his own vehicle (Tr. VI 1112-13). Dr. Yacoub also testified that she could not state that any of the wounds would have made Mr. Harrington lose consciousness (Tr. VI 1113-14). Dr. Yacoub testified that certain bones were shattered when Mr. Harrington was shot and that those injuries would be painful. She also discussed the pain associated

with the bullet that pierced Mr. Harrington's lung and would have caused difficulty breathing (Tr. VI 1109-11). The OCCA's decision finding sufficient evidence of HAC, *Bush*, 280 P.3d at 345-47, was not contrary to, or an unreasonable application of, this Court's precedent.

To the extent that Petitioner is hinting at an as-applied vagueness challenge, like that on which relief was granted in *Pavatt I*, same is both unexhausted, as discussed above, and clearly foreclosed by *Jeffers*, 497 U.S. at 779:

> [I]f a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the 'fundamental constitutional requirement' of 'channeling and limiting . . . the sentencer's discretion in imposing the death penalty' . . . has been satisfied."

Petitioner's as-applied vagueness challenge is meritless. As none of Petitioner's challenges to HAC merits relief, this Court should deny the instant petition.

E. Conclusion

Based on the foregoing, certiorari review should be denied as to Petitioner's second question presented.

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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