

CASE NO. ____
IN THE SUPREME COURT OF THE UNITED STATES

ALFRED BRIAN MITCHELL,

Petitioner,

v.

TOMMY SHARP, 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

JOHN T. CARLSON
Counsel of Record
Ridley McGreevy & Winocur
303 16th St., Suite 200
Denver, CO 80202
(303) 629-9700
jtcarlson@gmail.com

and

ROBERT S. JACKSON
925 NW 6th Street
Oklahoma City, OK 73106
(405) 232-3450
Email: bob@bobjacksonlaw.com

CAPITAL CASE

QUESTIONS PRESENTED

1. Given this Court's prior ruling that the text of Oklahoma's "heinous, atrocious, or cruel" death-penalty aggravator is unconstitutionally vague, is the state applying a valid narrowing construction to the statute when all murders are subject to the aggravator, save those few in which the victim dies instantly upon the fatal blow?
2. Do shifting attitudes about the death penalty and new science showing the absence of meaningful differences in cognition among young adults below the age of twenty-one compel this Court to bar the execution of those who committed crimes shy of their twenty-first birthday?

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PETITION FOR WRIT OF CERTIORARI

In this capital case, Petitioner Alfred Mitchell seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *Mitchell v. Sharp*, 798 Fed. App'x 183 (10th Cir. 2019).

OPINIONS BELOW

The Tenth Circuit's opinion in *Mitchell v. Sharp*, cited immediately above, is included in the Appendix at App. A. The memorandum opinion of the United States District Court for the Western District of Oklahoma in *Mitchell v. Duckworth*, 2016 WL 4033263 (W.D. Okla. July 27, 2016), is appended as App. B. The opinion on direct appeal of the Oklahoma Court of Criminal Appeals in *Mitchell v. State*, 235 P.3d 640 (Okla. Crim. App. 2010), is appended as App. C.

JURISDICTION

The Tenth Circuit issued its opinion affirming Mitchell's conviction and sentence on December 10, 2019. *See* App. A. The circuit denied Mitchell's timely petition for rehearing on February 3, 2020. *See* App. D. In view of this Court's Order of March 19, 2020, extending the deadline to file any petition for a writ of certiorari to 150 days from the denial of a timely petition for rehearing, Mitchell's petition for certiorari is due on July 2, 2020.

The United States District Court for the Western District of Oklahoma had jurisdiction under 28 U.S.C. § 2254(d). The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII.

2. Title 28 U.S.C. § 2254(d) states:

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.

3. Oklahoma’s statutory list of circumstances making a convicted murderer eligible for the death penalty include: “The murder was especially heinous, atrocious, or cruel.” Okla. Stat. Ann. tit. 21 § 701.12(4).

INTRODUCTION

Just two weeks after he turned eighteen years old, Alfred Mitchell committed a murder for which the State of Oklahoma sentenced him to death. Prosecutors obtained the capital verdict based on a single aggravating circumstance, that the murder “was especially heinous, atrocious, or cruel.” Dubbed HAC, this aggravator is one of eight possible grounds for capital punishment in Oklahoma. *See Okla. Stat. tit. 21, § 701.12(4)*. Like any aggravating circumstance, HAC complies with the Eighth Amendment only if it: (1) “genuinely narrow[s] the class of persons eligible for the death penalty” and (2) “reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983). An aggravator failing to achieve these ends is unconstitutionally vague.

Mitchell seeks *certiorari* review for two reasons: because Oklahoma’s HAC aggravator does not satisfy constitutional requirements, and because the execution of a person barely eighteen years old when he committed the crime also violates the Constitution.

STATEMENT OF THE CASE

Alfred Mitchell turned eighteen years old on December 23, 1990. *See App. E*. Two weeks later, he murdered a woman at a recreation center in Oklahoma

City, Oklahoma. *Mitchell v. State*, 884 P.2d 1186, 1191-93 (Okla. Crim. App. 1994). Besides convicting Mitchell of first-degree murder, the State of Oklahoma also convicted him for one count of vaginal rape and one count of what state law calls sodomy. Mitchell was sentenced to death for the murder and to a lengthy prison term for the sexual assaults. *Id.* at 1191.

On federal habeas review, a district judge in the Western District of Oklahoma overturned the rape and sodomy convictions. Through an evidentiary hearing, he learned that prosecutors and the state's chemist deliberately misled the jury into believing that forensic testing proved Mitchell committed the two rape offenses. The state officials knew that DNA testing conclusively demonstrated Mitchell did *not* commit the offenses, information they concealed from the defense. The district judge declined to set aside Mitchell's death sentence, imposed for the murder conviction. The court viewed the death penalty as unaffected by the false testimony related to the sexual assaults.

Mitchell appealed to the Tenth Circuit, seeking reversal of his death sentence. He argued that prosecutors presented the murder as a premeditated plan to avoid capture for the fabricated rapes, a motive undermined by his exoneration from the sex offenses. The Tenth Circuit agreed. In 2001, it ordered a new sentencing trial in the state courts. "Had the rape and sodomy charges not been before the jury, the state would have been unable to infuse the murder with

prior sexual abuse or to argue that Mr. Mitchell killed the victim in a premeditated plan to avoid arrest and prosecution,” wrote the Tenth Circuit. *Mitchell v. Gibson*, 262 F.3d 1036, 1065 (10th Cir. 2001).

Mitchell’s resentencing trial yielded a second death sentence, but in 2006 the Oklahoma Court of Criminal Appeals (OCCA) reversed for prosecutorial misconduct and a host of evidentiary mistakes. *Mitchell v. State*, 136 P.3d 671 (Okla. Crim. App. 2006).

A second resentencing trial in the state courts ended in still another death sentence, sustained by a single aggravating circumstance, HAC. On direct appeal, as he did in his prior appeal (the 2006 appeal that produced the reversal for prosecutorial misconduct and evidentiary mistakes), Mitchell challenged the constitutionality of the HAC aggravator, calling it excessively vague and criticizing the OCCA’s attempt to curb its capacious reach. The OCCA brushed the claim aside, in 2010. Invoking *res judicata*, the court reprised its dismissal of the same argument in Mitchell’s 2006 appeal, stating: “We have repeatedly rejected the claim that this aggravator, as narrowed by this Court, is unconstitutionally vague.” *Mitchell v. State*, 235 P.3d 640, 662 (Okla. Crim. App. 2010) (quoting *Mitchell v. State*, 136 P.3d at 711). The OCCA’s embrace of HAC in both appeals rested on a 2004 decision that will play a pivotal role in this petition: *DeRosa v. State*, 89 P.3d 1124 (Okla. Crim. App. 2004).

In his 2010 appeal to the OCCA, from which this habeas case arises, Mitchell also argued that he was categorically exempt from the death penalty. He relied on *Roper v. Simmons*, 543 U.S. 551 (2005), which forbids imposition of the death penalty on persons younger than eighteen when they committed their crime. Mitchell claimed *Roper* should preclude his execution as well, given his murder occurred only two weeks after his eighteenth birthday. The OCCA denied relief, stating: “The U.S. Supreme Court has drawn a bright light at eighteen (18) years of age for death eligibility and we therefore reject Appellant’s argument that being two weeks beyond his eighteenth birthday at the time of the murder exempts him from capital punishment.” *Mitchell v. State*, 235 P.3d at 659.

Mitchell filed a second habeas application. Renewing his vagueness attack on Oklahoma’s HAC statute, he accused the OCCA of failing to limit the indeterminate text of the aggravator. He also reasserted the *Roper*-extension claim. The federal district court rebuffed both arguments. *See* App. C. at 47a, 97a. So did the Tenth Circuit. Addressing Mitchell’s HAC claim, the panel held “the OCCA applied the previously approved narrowing construction to Mr. Mitchell’s appeal.” *See Mitchell v. Sharp*, 798 Fed. App’x at 192. By “previously approved,” the panel meant the narrowing construction the Tenth Circuit explicitly, and this Court implicitly, had approved in the past. As for Mitchell’s

Roper-extension claim, the panel noted that he raised the issue solely to preserve it for review in this Court. *Id.* at 188 n.2.

REASONS FOR GRANTING THE PETITION

I. Oklahoma has abandoned the narrowing construction that formerly preserved the constitutionality of its HAC aggravating circumstance.

The Tenth Circuit rejected the claim that Oklahoma's HAC statute is unconstitutional. It believed the OCCA applied a valid limiting construction to the broad statutory text, a restraint the Tenth Circuit had earlier approved. This was wrong. The OCCA did not apply the narrowing construction the Tenth Circuit approved. The state court specifically abandoned that construction of the statute in 2004, six years before Mitchell's appeal.

A. Introduction

Oklahoma's HAC aggravator has long vexed the federal courts, including this Court. In 1987, the Tenth Circuit found the text of the statute unconstitutionally vague. This Court affirmed the decision in a landmark ruling, *Maynard v. Cartwright*, 486 U.S. 356 (1988). For roughly a decade, Oklahoma hewed the constitutional line. Its judiciary established a limiting interpretation of the statutory text; but it was an acquiescence the state courts struggled to maintain.

In the early 2000s, a handful of decisions from the OCCA upholding jury findings of HAC led the Tenth Circuit to conclude that Oklahoma was returning

to its pre-*Cartwright*, lax interpretation of the statute. Over a series of opinions, the federal court of appeals formulated a new limiting construction of the statute. It extracted the constraint from prior decisions of the OCCA itself, rulings immediately after *Cartwright* that acknowledged HAC must rationally differentiate the few murders eligible for the death penalty from the many murders ineligible for the ultimate sanction.

Oklahoma continued to bristle at the restrictions imposed by a federal court, and in 2004 the OCCA formally repudiated the narrowing construction the circuit approved. The predictable and ensuing constitutional struggle appeared to culminate in 2017, when the Tenth Circuit reversed a death sentence predicated on HAC. “Oklahoma has veered off the course forced on it by [*Maynard v.*] *Cartwright*, coming full circle and no longer limiting this clearly vague aggravating circumstance in a manner that minimizes the risk of wholly arbitrary and capricious action,” ruled *Pavatt v. Royal*, 894 F.3d 1115, 1131 (10th Cir. 2017).

Pavatt seized the attention of the full Tenth Circuit, which granted *en-banc* review of the panel’s decision. The *en-banc* court avoided a confrontation with the merits of the constitutional dispute, however. Petitioner Pavatt had procedurally defaulted his vagueness claim by failing to exhaust it in the state courts. *Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (*en banc*). Abated during

the *en-banc* proceedings in *Pavatt*, Mitchell's case came next, and it offered the panel no escape from the merits. It presented the exact question skirted by the *en-banc* court: does Oklahoma's HAC statute comply with the Eighth Amendment? The Tenth Circuit panel answered 'yes,' holding that because the OCCA appropriately limited HAC, its imposition of the aggravator against Mitchell was constitutionally valid.

This Court should grant *certiorari* less to correct that answer than to resolve a dispute that has roiled death-penalty litigation in Oklahoma and elsewhere for decades. It is a dispute springing from twin observations that lie in conflict with one other, even if each is incontestable on its own: (1) every first-degree murder arguably is "heinous, atrocious, or cruel" and hence every murder is eligible for HAC or a HAC-equivalent aggravator; yet (2) no aggravator can satisfy the Eighth Amendment if it applies to every murder. This case surfaces the tension between the two principles, and it poses an important question of federal law that has not been, but should be, settled by this Court: when and under what constitutional constraints can a state impose a death sentence based on HAC or an equivalent aggravator?

B. This Court rules HAC unconstitutional in *Maynard v. Cartwright*

The story of Oklahoma's HAC statute begins with its text, unchanged since enactment in 1976. Among the circumstances aggravating a murder in Oklahoma

“shall be” that it was “especially heinous, atrocious, or cruel,” says Okla. Stat. Ann. tit. 21 § 701.12(4). This Court ruled the statutory language was unconstitutional in *Maynard v. Cartwright*, a seminal opinion issued thirty years ago. Describing the text as furnishing “no more guidance than” an equivalent aggravator assailed in a prior case arising from Georgia, *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court said Oklahoma’s HAC statute was just as vague. *Cartwright*, 486 U.S. at 363-64. Both laws suffered the same flaw: “an ordinary person could honestly believe that every unjustified, intentional taking of human life is ‘especially heinous,’” said the Court. *Id.* at 364. The bare text of Oklahoma’s statute supplied “no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.” *Id.* at 363.

Cartwright suggested a solution: a judicially created limiting construction that would diminish the number of murders subject to the statute. Requiring Oklahoma prosecutors to prove the victim endured pre-mortem “torture or serious physical abuse” would make HAC “constitutionally acceptable,” observed the Court, endorsing an idea first floated by the Tenth Circuit. *Id.* at 486. No surprise, the OCCA adopted the saving construction. In *Stouffer v. State*, decided while *Cartwright* was pending before this Court, Oklahoma restricted HAC’s “application to those murders in which torture or serious physical abuse is present.” 742 P.2d 562, 563 (Okla. Crim. App. 1987).

C. Oklahoma holds that a brief period of conscious suffering bars HAC

On the heels of adopting the “torture or serious physical abuse” standard, Oklahoma clarified that the new test excluded a class of murders from HAC eligibility, namely, those in which the victims experienced a brief period of consciousness between the fatal blow and death. When the victim dies rapidly but not instantly, said the OCCA, the defendant was undeserving of HAC.

The first case to exclude this brief period of conscious suffering from HAC’s grasp was *Brown v. State*, 753 P.2d 908 (Okla. Crim. App. 1988). The OCCA reversed the jury’s HAC finding because the victim survived only “a few minutes” after receiving the fatal shots. *Id.* at 913 (emphasis added). The victim was struck by gunshot while driving her car, which swerved off the road, over a culvert, and into a yard over 150 feet from the road. The assailant pursued on foot and fired several more shots. The victim did not die instantly, surviving a “few” more minutes. HAC was unwarranted, ruled the OCCA. *Id.* at 910-11.

After *Brown*, Oklahoma expressly integrated conscious suffering into the HAC-eligibility criteria. “Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met,” said *Battenfield v. State*, 816 P.2d 555, 565 (Okla. Crim. App. 1991). *Battenfield* continued to exclude from the now reformulated test the short span of pre-mortem consciousness that virtually all murder victims experience after the

fatal blow. Although the victim there lost consciousness “very fast,” she too did not die instantly. *Id.* at 565. So the defendant eluded HAC, an outcome the OCCA attributed to its “obligation to keep the application of aggravating circumstances within constitutional bounds.” *Id.*

Oklahoma’s insistence on broadening the zone of HAC’s temporal exclusion extended next to a case in which the victim drowned, her head forced below water for the final, agonizing minutes of her life. *See Hawkins v. State*, 891 P.2d 586 (Okla. Crim. App. 1994). This hardly inconsequential period of suffering wasn’t enough to qualify as serious physical abuse, nor as conscious physical suffering, nor even physical torture. *Id.* at 596. To merit HAC – a finding the state court ultimately upheld – it took the nearly 24 hours of psychological torture the victim bore, during which she was chained by the ankle and repeatedly raped, finally “dragged [] away [to her death] as she cried ‘goodbye’ to her babies.” *Id.* at 597.

In *Turrentine v. State*, 965 P.2d 955 (Okla. Crim. App. 1998), the period of excluded suffering stretched even further than drowning. Pronounced dead only “later at the hospital,” the victim proved “alert” at the scene of the shooting. He “reached up and grabbed the paramedic’s arm when [the paramedic] tried to put the oxygen mask on him,” and when the victim “was moved from the apartment for transportation to the hospital, he waved his arm and hit the spot where he

had been shot.” *Id.* at 976. Despite this lengthy span of pre-mortem consciousness, the OCCA concluded the evidence remained “insufficient to support a finding of conscious physical suffering.” *Id.*

Other cases from the OCCA similarly demonstrated that the conscious suffering needed to satisfy HAC must exceed the natural consequence of being murdered. The victim’s death must reveal “acts of injury or cruelty beyond the . . . act of killing itself.” *Cudjo v. State*, 925 P.2d 895, 901-02 (Okla. Crim. App. 1996).

It was not for want of attention that Oklahoma maintained this durational brake on HAC. There was at least one dissenter on the OCCA during the formative years of the rule, a judge persuaded state law “has never put a time limit” on conscious physical suffering. *Cheney v. State*, 909 P.2d 74, 92 (Okla. Crim. App. 1995) (Johnson, J., dissenting). The nonconforming judge objected to the majority’s concern for the time span between the start of the murderous attack and the victim’s death, an interval she viewed as irrelevant to whether HAC should apply. *See id.* at 81. The dissenter found herself alone, however, unable to attract even one vote on the five-judge appellate court. Her colleagues in the majority did not just disagree with her refusal to impose a durational requirement on conscious physical suffering; they also ruled that nonphysical,

psychological torture cannot satisfy HAC unless victim was “terrorized for a significant period of time before death.” *Id.*

Cheney therefore stands as an important marker. The majority faced a colleague who contended HAC was untethered to any durational requirement. Four judges on the OCCA rejected her position, not because they doubted the facts of the murder were “horrible” – they clearly were – but because they feared *this* Court would disapprove. “If we extend aggravating circumstances to meet the facts of each murder, then we face the very real prospect that a federal court will overturn our decision or that the Supreme Court will sustain a constitutional challenge to this aggravating circumstance once again,” said *Cheney*. *Id.* at 81-82.

The point is simple. When it decided *Cheney* in 1995, a clear majority of the OCCA believed that both state and federal law obliged it to exclude from HAC the brief period of conscious suffering that attends most murders. HAC demanded suffering greater than an instant.

Cheney would find an important ally five years later.

D. The Tenth Circuit also excludes a brief period of conscious suffering

In a 2000 capital-habeas appeal, a panel of the Tenth Circuit looked back at a decade of OCCA caselaw interpreting HAC. Reprising the debate in *Cheney*, a concurring judge on the panel agreed with the majority sentiment expressed by the OCCA. He found a durational requirement in HAC. “There must be

conscious suffering of more than the brief duration necessarily accompanying virtually all murders,” he wrote, adding:

Under the Eighth Amendment, applying the narrowing construction of the aggravating circumstance in a manner that permitted Oklahoma courts to find ‘torture or serious physical abuse’ based merely on the brief period of conscious suffering necessarily present in virtually all murders would fail to narrow the sentencer’s discretion as required by *Godfrey v. Georgia* and *Maynard v. Cartwright*.

Medlock v. Ward, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring)

(citations omitted). For the concurring judge, Judge Lucero, excluding the “brief period of conscious suffering necessarily present in virtually all murders” wasn’t prudential. It was compelled by the Constitution.

Judge Lucero “set forth the Oklahoma test for conscious suffering we have found to satisfy the requirements of the Eighth Amendment.” *Id.* The test he mined from Oklahoma law was explicitly temporal, and it left no question about the critical inquiry. “[T]o evaluate whether the ‘heinous, atrocious, or cruel’ aggravating circumstance was properly applied,” he wrote, “we must examine the state court’s findings as to the duration of conscious suffering on the part of the victim.” *Id.*

Granted, Judge Lucero was writing for himself. No matter. His view would soon garner the approval of the Tenth Circuit.

One year after *Medlock*, in response to signals the OCCA was loosening the reins on HAC, a unanimous panel of the Tenth Circuit worried the state court had “begun to blur” Eighth Amendment lines. *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001) (brackets omitted). “[M]ore and more often” the OCCA was “finding the existence of the HAC elements in almost every murder,” said *Romano*, triggering “a concern that Oklahoma’s interpretation of its narrowing language could again render this aggravating factor unconstitutional.” *Id.*

To stanch the constitutional backsliding, *Romano* embraced Judge Lucero’s conditioned understanding of HAC. Echoing *Medlock*’s concurrence, the panel bluntly warned, “[I]f Oklahoma permitted capital sentencers to find the HAC aggravator based merely on the brief period of conscious suffering necessarily present in virtually all murders it would fail to narrow the sentencer’s discretion.” *Id.* (parentheses omitted). *Romano* reflects and embodies the bargain the Tenth Circuit struck with Oklahoma: Approval of HAC hinged on excluding the brief interval between the fatal blow and loss of consciousness.

Romano further entrenched its adoption of a durational requirement by summoning a decision issued between *Medlock* and *Romano*. *See id.* That decision, *Thomas v. Gibson*, also sounded an alarm at Oklahoma’s effort to “unwind the requirement of conscious physical suffering”; it questioned whether the “aggravator legitimately narrows the class of those eligible for death.” 218 F.3d

1213, 1229 n.17 (10th Cir. 2000). Still another endorsement of Judge Lucero's approach occurred shortly after *Romano*, in *Miller v. Mullin*, where the circuit court identified the durational inquiry as an indispensable component of the "narrowing function." 354 F.3d 1288, 1300 (10th Cir. 2004).

Lest there be doubt the Tenth Circuit approved a durational constraint on HAC, *Welch v. Workman* settled the matter. 639 F.3d 980 (10th Cir. 2011). *Welch* formally adopted *Medlock*'s concurrence as the measure of an acceptable aggravator. "To evaluate whether the [HAC] aggravating circumstance was properly applied, we must examine the state court's findings as to the duration of conscious suffering on the part of the victim," held *Welch*, quoting Judge Lucero's opinion from *Medlock*. *Id.* at 1006-07. Speaking through *Welch*, the Tenth Circuit insisted that the state court make actual findings, inscribing into the record the time the victim consciously suffered.

Insipient worries about Oklahoma's laxity toward HAC ultimately pushed the Tenth Circuit to approve the aggravator, but only if it excluded the brief period of conscious suffering attendant most murders. The voice of a single judge became the chorus of the circuit.

Meanwhile, Oklahoma was moving in a different direction.

E. Oklahoma reverses course and jettisons the durational requirement

In 2004, the OCCA breached the constitutional bargain. The state court withdrew the durational requirement from HAC. Relying on “cases from the United States Court of Appeals for the Tenth Circuit questioning [the OCCA’s] application of the aggravator,” a death-row defendant named James DeRosa challenged Oklahoma’s “overly broad interpretation of” HAC. *DeRosa v. State*, 89 P.3d at 1155. DeRosa contended the jury at his capital-sentencing trial should have been instructed that conscious physical suffering means “suffering in addition to that brief period of conscious suffering present in virtually all murders.” *Id.*

The OCCA rejected not only DeRosa’s request for a jury instruction but also his “proposed definition of ‘conscious physical suffering.’” *Id.* The state court looked skeptically on the authority he cited, and it questioned whether it was even possible to calculate suffering beyond that attributable to the act of the killing itself. *Id.* & n.160. Keenly aware the Tenth Circuit might disapprove of its ruling, the OCCA delivered a defiant message to its federal counterpart. “[A]n aggravating circumstance does not itself become ‘overly broad’ or unconstitutional simply because a state appellate court applies it in a manner with which defendants, or even federal appellate courts, disagree,” wrote the OCCA. *Id.* at 1155 (emphasis added).

Although *DeRosa* specifically addressed the instructional obligations of HAC, it didn't take long for the OCCA to deepen its abandonment of a durational rule by altering the court's substantive interpretation of the aggravator. In 2007, the OCCA said evidence showing merely that the victim was "aware of the attack" justifies a finding of conscious suffering. *Wood v. State*, 158 P.3d 467, 476 (Okla. Crim. App. 2007). Soon the only murder outside HAC's purview was one in which the victim died instantly, a departure from precedent best illustrated by *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010). Defendant Simpson shot and killed two people. One victim died instantly, the other quickly though not immediately. Denying HAC for the victim who died instantly while imposing it for the one who briefly survived, the OCCA easily distinguished murders featuring instantaneous death from those in which the victims suffer for even a momentary period of time. The *Simpson* court made no effort to quantify the period of conscious suffering by the HAC-eligible victim, still less did it make findings. *Id.* at 902-03.

Now over fifteen years since the OCCA abandoned the durational limit on HAC, lawyers representing the State of Oklahoma stand at lecterns in the Tenth Circuit and declare "the very act of committing [a] murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow." *Pavatt v. Carpenter*, 928 F.3d at 936 (*en banc*) (Hartz, J.,

dissenting) (citing oral argument recording). The only escape from HAC is the victim's instantaneous death. Oklahoma is back where it began, before this Court invalidated the state's HAC statute in *Maynard v. Cartwright*. Virtually every murder is eligible for the aggravator, excluding only those in which the victim dies immediately upon the fatal blow.

Oklahoma's abdication of its constitutional role did not go unnoticed in the Tenth Circuit. It sparked the protracted dispute described above, in *Pavatt v. Carpenter*. The *Pavatt* imbroglio, recall, began when a panel invalidated HAC under the Eighth Amendment's vagueness doctrine; it ended when the *en-banc* court restored the aggravator and its consequent death sentence for the petitioner because he procedurally defaulted his constitutional challenge. *See Pavatt v. Carpenter*, 928 F.3d at 924 (*en banc*).

Three judges dissented from the *en-banc* decision. They believed petitioner Pavatt adequately preserved his vagueness challenge. They also believed that Oklahoma's current HAC regime – authorizing death unless the victim dies instantly rule – is unconstitutional. Tracing the shift in Oklahoma's treatment of HAC, from containing a durational inquiry to jettisoning it, their dissent concluded "the aggravator is being interpreted by the OCCA too broadly to satisfy the Eighth Amendment." *Pavatt v. Carpenter*, 928 F.3d at 936 (Hartz, J.,

dissenting). The dissenters agreed that by excluding only a rare species of murders – those in which the victim dies instantly – the OCCA has come full circle, returning to the unconstitutional perch it occupied before *Maynard v. Cartwright*.

“[N]o fairminded jurist could think” Oklahoma’s HAC aggravator “distinguishes in a *principled* manner those deserving of the death penalty from the many first-degree murders who do not,” wrote the dissenters, depicting the HAC regime as little more than a bonus awarded to trained assassins who can fell their victims instantaneously:

To the extent that it is not merely fortuitous that the victim remains conscious, this test [instant death of the victim or otherwise eligibility for HAC] provides what could be described as a ‘sharpshooter bonus.’ If the perpetrator has the skill to render an immediately fatal blow, he or she escapes the death penalty under this aggravator. Such an arbitrary aggravator is not consistent with the Supreme Court’s narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death.

Id. (internal quotations omitted). To the dissent, Oklahoma has so expanded the definition of conscious suffering that the state’s limiting construction now betrays its only purpose: it doesn’t limit HAC.

F. The OCCA failed to apply the narrowing construction here

Decided six months after *Pavatt*, Mitchell's case forced a confrontation with the merits. Mitchell, all parties agreed, fairly presented his constitutional attack on Oklahoma's HAC statute to the state courts.

A panel of the Tenth Circuit denied relief. It rejected Mitchell's assertion that "Oklahoma has veered off course, returning to its prior, unlawful" enforcement of the HAC aggravator. *See Mitchell v. Sharp*, 798 F. App'x at 192 (quoting brief). The panel simply denied the premise of his argument. It said the OCCA *did* "appl[y] the previously approved narrowing construction to Mr. Mitchell's appeal," contending the state court applied the "very construction" this Court endorsed in *Maynard v. Cartwright*. *Id.* at 192-93. The panel then quoted the OCCA's opinion, which indeed adhered to the *Cartwright* formulation: "To prove the 'especially heinous, atrocious or cruel' aggravator, the State must show that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." *Id.* (quoting OCCA).

Several problems mar the panel's reasoning.

First, the "torture or serious physical abuse" standard *isn't* the OCCA's standard, at least not the complete one. As detailed above, Oklahoma supplemented the standard in the early 1990s with the "conscious physical

suffering” requirement, to prevent HAC from applying to every murder except those rare instances in which the victim dies instantly. It is a point brooking no dispute. “Oklahoma has . . . further refined” the narrowing construction approved in *Cartwright*, the Tenth Circuit has said often, bolstering the torture-or-serious-physical-abuse test with a requirement of conscious physical suffering. See *Romano*, 239 F.3d at 1176. The OCCA has said the same thing: “the required torture or serious physical abuse standard is not met [without] evidence of conscious physical suffering of the victim prior to death.” *Battenfield*, 816 P.2d at 565. So the panel was mistaken at the threshold. Conscious physical suffering is the test for constitutionality, not torture or serious physical abuse.

The second point is more important. The conscious-physical-suffering standard on which HAC depends satisfies the Eighth Amendment if, but only if, it excludes the brief period of consciousness that almost always occurs after the fatal blow. Otherwise, Oklahoma’s HAC amounts to no more than a catch-all aggravator, ensnaring far more murders than it expels. Yet beginning in 2004 with *DeRosa*, Oklahoma spurned the condition on which the Constitution tolerates the conscious-physical-suffering test to which Oklahoma subscribes. After *DeRosa*, the duration of the victim’s suffering lost its former relevance. Now the only escape from HAC rests in the unpredictable, morally neutral happenstance of the victim’s instant demise.

Finally, Oklahoma's disavowal of the approved narrowing construction highlights an even deeper flaw in the panel's reasoning. The OCCA decided Mitchell's appeal in 2010, well after the state court discarded the limiting construction that used to keep HAC inside constitutional guardrails. So the panel was wrong again when it said "the OCCA applied the previously approved narrowing construction to Mr. Mitchell's appeal." The OCCA didn't apply the previously approved construction. It instead applied an improper, overly broad construction, a restraint stripped of the constitutionally required durational rule that the OCCA toppled in *DeRosa*.

DeRosa's preexisting status does something else. It weakens what the Tenth Circuit panel considered an alternate ground for affirmance. The panel believed that "even if there were room for debate as to whether the OCCA applied the constitutional construction . . . we must presume the state court applied the appropriately narrowed construction unless Mr. Mitchell makes an affirmative showing to the contrary." *Mitchell v. Sharp*, 798 F. App'x at 193. "Mr. Mitchell cannot overcome this presumption," held the panel. *Id.*

The presumption of a constitutionally adequate construction originates in *Bell v. Cone*, 543 U.S. 447 (2005), a decision from this Court cited by the Tenth Circuit panel. "Federal courts are not free to presume that a state court did not comply with constitutional dictates," said the panel, drawing directly from *Cone*.

See Mitchell v. Sharp, 798 F. App'x at 193 (quoting *Bell v. Cone*, 543 U.S. at 455).

The *Cone* Court rightly criticized the Sixth Circuit for assuming the Tennessee Supreme Court failed to apply an appropriate limiting construction to the state's HAC aggravator. That assumption was unmerited because in the past the state court had followed the appropriately narrowed construction "numerous times," said *Cone*, explaining, "absent an affirmative indication to the contrary, we must presume that it did the same thing here." *Id.* at 456.

Oklahoma forfeited the presumption Tennessee earned. An "affirmative indication" that it has lost the *Cone* presumption lies in the erosion of HAC's limitations, a process that began with *DeRosa*. Preceding Mitchell's appeal, *DeRosa* did not just represent binding precedent. Nor did it merely reject a request for a jury instruction conditioning HAC on proof the victim consciously suffered longer than the "brief period of conscious suffering present in virtually all murders." *DeRosa v. State*, 89 P.3d at 1155. By questioning whether such a durational inquiry was even feasible, *see id.* n.160, *DeRosa* cleared the pathway for subsequent decisions to instantiate the now controlling, expansive reach of HAC in Oklahoma. Emblematic of the post-*DeRosa* regime is *Simpson v. State*, discussed above, which likewise preceded the ruling in Mitchell's case. *Simpson* serves as another affirmative indication that Oklahoma has retreated from a constitutionally narrowed definition of HAC, for it made explicit what *DeRosa*

strongly suggested: that the only way a murder in Oklahoma evades HAC is if the victim dies instantly. *See Simpson v. State*, 230 P.3d at 902-03. Still one more affirmative indication to overcome the *Cone* presumption can be found in the candor of Oklahoma's Attorney General, whose deputies feel no compunction acknowledging that "the very act of committing [a] murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow." *See Pavatt v. Carpenter*, 928 F.3d at 936 (*en banc*) (Hartz, J., dissenting) (citing oral argument recording).

Taken together, these three elements constitute the affirmative showing needed to surmount any presumption that Oklahoma complied with constitutional dictates when it rejected Mitchell's challenge to HAC.

G. The Tenth Circuit's ruling conflicts with decisions of this Court

A HAC aggravator that applies to every murder except those in which a rare event occurs is not law, certainly not constitutional law. The instantaneous death of the victim is a matter of luck. Or if it's attributable to a personal quality of the defendant or a characteristic of his crime, for instance, that his sharpshooting acumen caused the victim to die instantly, it's not a personal quality or characteristic that has any business deciding life or death.

Granting a writ of *certiorari* is merited to restore lawfulness and clarity to Oklahoma's death-penalty scheme. It is also merited because Oklahoma and the

Tenth Circuit have decided an important federal question – can an aggravating circumstance comply with the Eighth Amendment if it reaches virtually every murder? – in a way that conflicts with decisions of this Court, which have long said aggravating circumstances satisfy the Constitution only if they “genuinely narrow the class of persons eligible for the death penalty.” *Zant*, 462 U.S. at 877. *See also Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (same); *Arave v. Creech*, 507 U.S. 463, 474 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.”)

II. New attitudes about capital punishment and new science about juvenile cognitive development compel the conclusion that the Eighth Amendment no longer tolerates the execution of those younger than twenty-one when they committed their crime.

Mitchell was only two weeks past his eighteenth birthday at the time of his offense. He had just been released from a juvenile prison operated by the State of Oklahoma, called the Rader Detention Center. Now closed, the Rader Center compiled a long and troubled history of abuse, neglect, and violence visited upon its youthful residents.¹

¹ See DOJ Civil Rights Division Letter to Governor Brad Henry (June 8, 2005) (https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/split_rader_fin_dlet_6-15-05.pdf).

It is understood that had Mitchell committed the offense two weeks earlier, he would not be facing execution. Given evolving standards of decency, *see Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), this Court should intervene to spare all young offenders from the death penalty.

Fifteen years ago, in *Roper v. Simmons*, 543 U.S. at 571-73, the Court ruled that the execution of a juvenile offender under the age of eighteen at the time of the offense violates the Eighth Amendment's prohibition on cruel and unusual punishment. Years earlier, the Court had found that national standards of decency precluded the execution of offenders below the age of sixteen at the time of the crime. *Thompson v. Oklahoma*, 487 U.S. 815, 826-30, 838 (1988). The moment has come for the Court to again move the boundary defining eligibility for capital punishment, from eighteen to twenty-one years of age. In the decade and a half since *Roper*, science has shown there is no significant difference between the cognitive development of juveniles and those under twenty-one. The public has responded, sparking a national consensus against executing people younger than twenty-one at the time of their offense.

Roper identified three distinguishing features of youth: "[a] lack of maturity and an underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions"; vulnerability "to influence and to psychological damage"; and a mutable character. *See Roper*, 543 U.S. at

569-570 (citations omitted). Those characteristics undercut the twin justifications for the death penalty: retribution and deterrence. *Roper* explained that the death penalty does not exact a proportional retribution if an offender's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 571. Besides these characteristics of youthful offenders, *Roper* also observed that the "objective indicia of consensus" had changed since the late 1980s, when this Court sanctioned the execution of juvenile offenders as young as sixteen. *Id.* at 574-75. It is now evident that *Roper's* logic should extend to those under twenty-one years at the time of their offense.

Scientific research has shown that the cohort of people under twenty-one share the same traits this Court identified in *Roper* as diminishing culpability and undermining the penological justifications for the death penalty:

On the one hand, their brains are physiologically like those of younger children, unable to fully regulate emotion or evaluate risk. On the other hand, they are experiencing rapid changes in social control, with the end of high school and the beginning of college or employment.

...

In short, people under twenty-one display the same traits that the Court identified in *Atkins*, *Roper*, and *Miller* as diminishing blameworthiness and undermining the case for retributive punishment: compared to adults, young people under twenty-one, like juveniles and people with intellectual disability, have diminished capacities "to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

...

In sum, post-*Roper* scientific research confirms the common-sense notion that people under twenty-one are less morally culpable than their adult counterparts because their brains are physiologically immature at least until the age of twenty-one. Their reduced culpability removes them, as a class, from the group of defendants that can reliably be considered the worst of the worst.

John Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21*, 98 TEXAS L. REV. 921, 933-34 (April 2020) (internal citations and footnotes omitted).

Society treats those under twenty-one differently than it does those over twenty-one. Every state imposes an age restriction of twenty-one for the consumption and purchase of alcohol. Recent federal legislation prohibits the sale of tobacco to persons under twenty-one regardless where they live. Most states allowing recreational marijuana bar its use for those under twenty-one. And federal law has long precluded the sale of handguns and ammunition to customers not yet twenty-one. *See id.* at 935. Private businesses, too, often anchor restrictions at or past the age of twenty-one. Rental-car companies refuse to loan cars to those under twenty-one and often charge additional fees for drivers under twenty-five; and health-insurance providers allow children to remain on their parents' insurance until age twenty-six. *See id.* at 936. Perhaps more relevant is how jurisdictions treat age in matters of crime and punishment: no surprise, many states have youthful-offender provisions offering leniency until the

offender turns twenty-one.

After *Roper*, the number of offenders under twenty-one sentenced to death has declined each year. *Id.* at 939-40. Since then, only 165 death sentences nationwide have been imposed on offenders younger than twenty-one, which comprises slightly over twelve percent of death sentences handed down in that same period. *Id.* at 939. Twenty-eight states and the military have not sentenced a youthful offender (defined as younger than twenty-one) to death since *Roper*, compared to eighteen states that have not sentenced an adult offender. *Id.* at 941. Those death sentences were concentrated in five states and in a few counties. *Id.* at 941-42. The state with the largest number of youthful offenders sentenced to death—California, with 34—recently imposed a statewide moratorium on the death penalty. *Id.* at 941. Accompanying the general downward trend in executions has been a consistent downward trajectory in the number of states sentencing youthful offenders to die. *Id.* at 944. The data reflect a clear and growing trend against the execution of offenders below twenty-one years of age.

This Court should grant certiorari to examine and resolve an important question of constitutional law, one that goes to the heart of the Eighth Amendment: do shifting attitudes about capital punishment and new science since *Roper* suggest it is no longer constitutional to execute those who committed offenses before they turned twenty-one? This case presents the question.

CONCLUSION

For the reasons above, Petitioner Alfred Mitchell respectfully asks this Court to grant his petition for a writ of *certiorari*.

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Respectfully Submitted,

By: /s/John T. Carlson

JOHN T. CARLSON

Counsel of Record

Ridley McGreevy & Winocur

303 16th St., Suite 200

Denver, CO 80202

(303) 629-9700

Email: jtcarlson@gmail.com

and

ROBERT S. JACKSON

Attorney at Law

925 NW 6th Street

Oklahoma City, OK 73106

(405) 232-3450

Email: bob@bobjacksonlaw.com