

No. 19-8927

In the  
SUPREME COURT OF THE UNITED STATES

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ALFRED BRIAN MITCHELL,

*Petitioner,*

-vs-

TOMMY SHARP, Warden,  
Oklahoma State Penitentiary,

*Respondent.*

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

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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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**CAPITAL CASE  
QUESTIONS PRESENTED**

**1. Should this Court second-guess the Tenth Circuit’s application of a properly stated rule of law to Petitioner’s unexhausted and ever-evolving challenge to Oklahoma’s especially heinous, atrocious, or cruel aggravating circumstance?**

**2. Should this Court review Petitioner’s unexhausted arguments for extending *Roper v. Simmons*, 543 U.S. 551 (2005), which—even if exhausted—cannot form a basis for habeas relief?**

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Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on December 10, 2019. *See Mitchell v. Sharp*, 198 F. App'x 183 (10th Cir. 2019) (unpublished).

### **STATEMENT OF THE CASE**

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-1991-206. In 1992, Petitioner was tried by jury for one count of first degree murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* OKLA. STAT. tit. 21, § 701.12. The jury found Petitioner guilty as charged, found the existence of all three aggravating circumstances, and recommended a sentence of death. Petitioner was sentenced accordingly.<sup>1</sup>

The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Petitioner’s convictions and sentences in a published opinion on October 18, 1994. *Mitchell v. State*, 884 P.2d 1186 (Okla. Crim. App. 1994). The OCCA denied Petitioner’s

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<sup>1</sup> Petitioner was also sentenced to thirty years imprisonment for robbery with a dangerous weapon, twenty years imprisonment for larceny of an automobile, one hundred years imprisonment for first degree rape, and twenty years imprisonment for forcible anal sodomy.

rehearing petition on December 6, 1994. This Court denied Petitioner's petition for writ of certiorari on October 2, 1995. *Mitchell v. Oklahoma*, 516 U.S. 827 (1995).

Petitioner filed an application for state post-conviction relief on July 1, 1996, which was denied by the OCCA on February 25, 1997. *Mitchell v. State*, 934 P.2d 346 (Okla. Crim. App. 1997). This Court denied Petitioner's petition for writ of certiorari on June 23, 1997. *Mitchell v. Oklahoma*, 521 U.S. 1108 (1997).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on August 4, 1997. On August 27, 1999, the federal district court denied habeas relief for Petitioner's murder conviction and death sentence, but reversed his rape and sodomy convictions. *Mitchell v. Ward*, 150 F. Supp. 2d 1194 (W.D. Okla. Aug. 27, 1999), *as corrected* Sept. 3, 1999 (unpublished). On appeal, the Tenth Circuit affirmed Petitioner's murder conviction, but held that the error which required reversal of the rape and sodomy convictions also required reversal of his death sentence. *Mitchell v. Gibson*, 262 F.3d 1036 (10<sup>th</sup> Cir. 2001).

In 2002, Petitioner was again sentenced to death, although the resentencing jury found only two aggravating circumstances: the murder was especially heinous, atrocious, or cruel; and the murder was committed for the purpose of avoiding or preventing lawful arrest or prosecution. On direct appeal, the OCCA found numerous errors and reversed the death sentence. *Mitchell v. State*, 136 P.3d 671 (Okla. Crim. App. 2006).<sup>2</sup>

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<sup>2</sup> Petitioner had filed an application for post-conviction relief, but that was dismissed as moot. *Mitchell v. State*, No. PCD-2003-7 (Okla. Crim. App. June 28, 2006) (unpublished).

In 2007, a third jury sentenced Petitioner to death, finding only that the murder was especially heinous, atrocious, or cruel. The OCCA affirmed this sentence on direct appeal. *Mitchell v. State*, 235 P.3d 640 (Okla. Crim. App. 2010). The OCCA denied Petitioner's request for rehearing. *Mitchell v. State*, No. D-2008-57 (Okla. Crim. App. Aug. 12, 2010) (unpublished). This Court denied Petitioner's petition for writ of certiorari on March 21, 2011. *Mitchell v. Oklahoma*, 562 U.S. 1293 (2011).

Petitioner filed an application for state post-conviction relief on February 16, 2010, which was denied by the OCCA on July 7, 2010. *Mitchell v. State*, No. PCD-2008-356 (Okla. Crim. App. July 7, 2010) (unpublished).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on March 7, 2012. On July 27, 2016, the federal district court denied habeas relief. *Mitchell v. Duckworth*, No. CIV-11-429-F, 2016 WL 4033263 (W.D. Okla. July 27, 2016) (unpublished).

Petitioner appealed the Western District of Oklahoma's denial of habeas relief. After briefing and oral argument, the Tenth Circuit affirmed the denial of habeas relief. *Mitchell v. Sharp*, 798 F. App'x 183 (10<sup>th</sup> Cir. 2019) (unpublished).

On July 1, 2020, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

## **STATEMENT OF FACTS**

The OCCA set forth the relevant facts on direct appeal:

Briefly stated, on January 7, 1991, Alfred Brian Mitchell found Elaine Scott alone at the Pilot Recreation Center in

Oklahoma City. The evidence presented at the resentencing established that Mitchell first attacked Scott near the Center's library, where a spot of blood, one of Scott's earrings, and a sign that she had been hanging were later found on the floor. Scott apparently ran for the innermost room of the Center's staff offices—as she had told her mother she would if she ever found herself in a dangerous situation at the Center—where there was a phone and a door that she could lock behind her. She almost made it. Although the exact sequence of events is unclear, the State established that Scott's clothing was taken off and that a violent struggle ensued, in which Mitchell beat and battered Scott, using his fists, a compass, a golf club (which ended up in pieces), and a wooden coat rack. The forensic evidence—including the condition of Scott's nude, bruised, and bloodied body—established that she was moving throughout the attack, until the final crushing blows with the coat rack, which pierced her skull and ended her life.

Pet. App. C at 124a (quoting *Mitchell*, 136 P.3d at 676-77).

Before proceeding to the reasons the writ should be denied, Respondent must address some of Petitioner's factual assertions. *See* SUP. CT. R. 15.2 (Respondent is required to point out misstatements in the petition). Petitioner claims “DNA testing conclusively demonstrated Mitchell did *not* commit the offenses [of rape and sodomy].” Pet. at 4. Petitioner's DNA was not found inside Ms. Scott. *Mitchell*, 150 F. Supp. 2d at 1225-26. Yet, Petitioner's semen *was* found in Ms. Scott's pubic hair (Tr. IV 870-74; Tr. V 962). Ms. Scott was either stripped of her clothing, or forced to remove it, before she was killed (Tr. V 961-62). There was bruising around Ms. Scott's wrists and above her hips (Tr. V 963-65). Thus, although the State may not have been able to prove beyond a reasonable doubt that Petitioner's penis penetrated Ms. Scott's vagina or anus, no evidence “conclusively demonstrated” he did not commit

those crimes. In any event, the evidence overwhelmingly proves this was a sexually motivated crime.<sup>3</sup>

And Ms. Scott's murder was not Petitioner's first sexual assault. When he was fifteen years old, Petitioner raped a twelve year old girl, holding her wrists like he did to Ms. Scott (Tr. IV 888-96). Petitioner was released by juvenile authorities only two weeks before murdering Ms. Scott. *Mitchell*, 884 P.2d at 1191.

### **REASONS FOR DENYING THE WRIT**

Although not exhaustive, Rule 10 of this Court's rules sets forth examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. Rather, Petitioner's questions presented fall outside of the universe of cases that typically garner review by this Court: "A petition for a writ of certiorari is rarely granted when the asserted error

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<sup>3</sup> The OCCA disagreed with the Tenth Circuit's conclusion that, absent the rape and sodomy charges, "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." *Mitchell*, 136 P.3d at 686-87; *see* Pet. at 4-5 (quoting *Mitchell*, 262 F.3d at 1065). Rather, the OCCA recognized that "[e]ven Mitchell does not allege that the State's actions in the handling of his case are responsible for the fact that Scott was found nude, or the fact that his semen was found in her pubic hair (and on a sheet in which her body was wrapped), or the bruising on various parts of her body." *Mitchell*, 136 P.3d at 687.

consists of erroneous factual findings or the misapplication of a properly stated rule of law.” SUP. CT. R. 10.

Petitioner asks this Court to second-guess the Tenth Circuit’s application of this Court’s cases regarding the facial validity of an aggravating circumstance. Petitioner does not argue that the Tenth Circuit failed to apply the proper standard; only that it reached the wrong result. Further, the argument Petitioner presents to this Court is different than the argument he made in the Tenth Circuit, which was different than the argument he made on direct appeal—rendering it unexhausted. Finally, the Tenth Circuit correctly denied Petitioner’s claim on the merits. Petitioner has not presented a compelling question for this Court’s review.

Petitioner also complains that the Tenth Circuit refused to extend this Court’s holding in *Roper v. Simmons*, 543 U.S. 551 (2005)—which precluded the death penalty for those who were under the age of eighteen at the time of the crime—to the age of twenty-one. Although Petitioner invoked *Roper* in his direct appeal brief, his argument was very different than the one he presents to this Court. In addition, Petitioner did not have a certificate of appealability on this claim. Finally, Respondent will show that the OCCA’s denial of Petitioner’s *Roper* claim cannot be reversed in this habeas case. This Court should deny Petitioner’s request for a writ of certiorari.

## I.

### **PETITIONER ASKS THIS COURT TO SECOND-GUESS THE TENTH CIRCUIT'S APPLICATION OF A PROPERLY-STATED RULE OF LAW TO THE OCCA'S DENIAL OF HIS FACIAL CHALLENGE TO THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.**

#### **A. Background of Petitioner's Claim.**

Petitioner was sentenced to death because he murdered Elaine Scott in an especially heinous, atrocious, or cruel manner. The OCCA long-ago adopted a limiting construction for the statutory terms, *see Maynard v. Cartwright*, 486 U.S. 356 (1988) (finding the statutory terms vague without a limiting construction), requiring that “the death of the victim was preceded by torture of the victim or serious physical abuse.” *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). This narrowing construction was applied in Petitioner's case when he claimed in his second resentencing direct appeal that the evidence was insufficient to support the jury's finding of the aggravator. Pet. App. C at 149a (“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.”). The OCCA also rejected Petitioner's argument that this narrowing construction is unconstitutionally vague and overbroad. Pet. App. C at 147a (“We have repeatedly

rejected the claim that this aggravator, as narrowed by this Court, is unconstitutionally vague.” (quoting *Mitchell*, 136 P.3d at 711)).<sup>4</sup>

Significantly, Petitioner’s facial argument was limited to a single paragraph:

Despite the Court’s attempt at limiting the aggravator, it remains vague and overbroad and is therefore, unconstitutional. Furthermore, the aggravator does not require a finding that Mr. Mitchell was intentionally inflicting gratuitous wounds to Miss Scott rather than acting in rage or watching while some one else performed the fatal beating.<sup>[5]</sup> Therefore, the application of the aggravator to Mr. Mitchell is overbroad and the finding of the aggravator cannot stand.

2/24/2009 Brief for and on Behalf of Alfred Brian Mitchell, Appellant (OCCA No. D-2008-57) (“DA Brief”) at 73 (internal citations and typographical error omitted).

In his habeas petition, Petitioner made an identical claim:

Despite the [OCCA]’s attempt at limiting the aggravator, it remains vague and overbroad and is therefore, unconstitutional. Furthermore, the aggravator does not require a finding that Mr. Mitchell was intentionally inflicting gratuitous wounds to Miss Scott rather than acting in rage or watching while some one else performed the fatal beating. Therefore, the application of the aggravator to Mr. Mitchell is overbroad in violation of the 8<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution.

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<sup>4</sup> Although the OCCA found the claim barred by *res judicata* because it had rejected a similar challenge in the first resentencing direct appeal, Petitioner agreed below that the OCCA made a merits adjudication to which AEDPA applied. 7/16/2018 Supplemental Brief (10<sup>th</sup> Cir. No. 16-6258) at 1-3. *Cf. Cone v. Bell*, 556 U.S. 449, 467 (2009) (when a court invokes *res judicata*, there is “strong evidence that the claim has already been given full consideration by the state courts”); Pet. App. A at 18a-19a n.7 (finding the OCCA denied Petitioner’s constitutional challenge to the aggravator on the merits).

<sup>5</sup> At one point, Petitioner claimed to have merely witnessed someone else commit the murder. *Mitchell*, 136 P.3d at 707.

3/7/2012 Petition for Writ of Habeas Corpus by a Person in State Custody (W.D. Okla. No. CIV-11-429-C) at 80. As on direct appeal, this was the sum total of Petitioner’s argument regarding the alleged unconstitutionality of the aggravator.

In the *Pavatt* litigation, relied on heavily by Petitioner here, after the district court denied relief, a panel of the Tenth Circuit erroneously held that the OCCA’s denial of James Pavatt’s challenge to the sufficiency of the evidence supporting the jury’s finding that the murder he committed was especially heinous, atrocious, or cruel was contrary to, and an unreasonable application of, this Court’s decision in *Godfrey*<sup>6</sup> because, within that sufficiency claim, the OCCA did not consider “whether the definition [of the aggravator] it applied satisfies the Eighth Amendment.” *Pavatt v. Royal*, 859 F.3d 920, 936-37 & n.5 (10<sup>th</sup> Cir. 2017) (“*Pavatt I*”). The panel majority believed the victim in that case died so quickly that the 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 denying Respondent’s petition for rehearing, the panel majority amended its opinion to clarify that—in its opinion—the OCCA “did not apply the narrowing construction that we previously approved.” *Pavatt v. Royal*, 894 F.3d 1115, 1132 (10<sup>th</sup> Cir. 2017) (“*Pavatt II*”). On *en banc* review, the Tenth Circuit found any challenge to the constitutionality of the aggravator was procedurally barred. *Pavatt v. Carpenter*, 928 F.3d 906, 922-30 (10<sup>th</sup> Cir. 2019) (*en banc*).

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<sup>6</sup> *Godfrey v. Georgia*, 446 U.S. 420 (1980).

After *Pavatt I*, Petitioner asked for a certificate of appealability (“COA”) to determine whether that decision invalidated the aggravator only as applied to Pavatt, or found it facially unconstitutional such that Petitioner was also entitled to relief. 8/1/2017 Appellant’s Statement of Issues in Advance of Case Management Conference (10<sup>th</sup> Cir. No. 16-6258) (“Statement”) at 81-82. Petitioner asserted that “the evidence of [Ms.] Scott’s suffering is greater” than the evidence in *Pavatt*, but argued the OCCA “did not conduct its sufficiency determination [in Petitioner’s case] in accordance with Eighth Amendment narrowing jurisprudence.” Statement at 81. The judge who screens capital cases denied the requested COA. 9/20/2017 Order (10<sup>th</sup> Cir. No. 16-6258).

Petitioner then asked the three judge panel assigned to his case for a COA, again arguing that *Pavatt I* left open the question “whether, given the OCCA’s failure to ensure the aggravator casts a narrow shadow, the statute is also facially unconstitutional.” 10/20/2017 Renewed Request for COA (10<sup>th</sup> Cir. No. 16-6258) (“Renewed Request”) at 43. The panel obliged, but ordered Petitioner to clarify whether he was raising a facial challenge, an as-applied challenge, or both. 4/18/2018 Order (10<sup>th</sup> Cir. No. 16-6258) at 3.

In his first brief on the matter—filed before *Pavatt II* was decided—Petitioner refused to categorize his claim as facial or as-applied.<sup>7</sup> 5/14/2018 Opening Supplemental Brief (Corrected) (10<sup>th</sup> Cir. No. 16-6258) (“1<sup>st</sup> Br.”) at 8-17. However,

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<sup>7</sup> Nine days before oral argument Petitioner submitted a letter pursuant to FED. R. APP. P. 28(j) in which he conceded his claim was a facial challenge to the aggravating circumstance. 11/12/2019 Letter under F.R.A.P. 28(j) (10<sup>th</sup> Cir. No. 16-6258).

relying on the analysis in *Pavatt*, Petitioner argued the OCCA had not narrowed the aggravator “consistently enough to satisfy the Eighth Amendment.”<sup>8</sup> 1<sup>st</sup> Br. at 2.

After *Pavatt II*, Petitioner argued that the OCCA had not said enough when it addressed his constitutional claim and that the OCCA had abandoned its limiting construction. 7/16/2018 Supplemental Brief (10<sup>th</sup> Cir. No. 16-6258) (“2<sup>nd</sup> Br.”) at 4-5, 7-8. Petitioner also argued, for the first time, that Ms. Scott did not suffer long enough. 2<sup>nd</sup> Br. at 9-12.

After the *en banc* court’s decision in *Pavatt*, Petitioner urged the panel deciding his case to reach the same conclusion as the *Pavatt* panel majority: there must be a duration limit placed on a victim’s suffering. 9/11/2019 Supplemental Brief in View of *En Banc* Decision in *Pavatt v. Carpenter* (10<sup>th</sup> Cir. No. 16-6258) (“3<sup>rd</sup> Br.”) at 2-6. Petitioner relegated his discussion of this Court’s decision in *Bell v. Cone*, 543 U.S. 447 (2005) (*per curiam*)—the significance of which will be shown below—to three sentences in a footnote, claiming “the OCCA has not consistently narrowed the HAC aggravator.” 3<sup>rd</sup> Br. at 5 n.1 (emphasis adopted).

At oral argument, Petitioner argued that in 2004 the OCCA “expressly rejected” its constitutional narrowing construction in *DeRosa v. State*, 89 P.3d 1124 (Okla. Crim. App. 2004). 11/21/2019 Oral Argument Recording at 2:28-3:51. Not once in the *nine* briefs Petitioner filed in the OCCA, Western District, or Tenth Circuit had Petitioner cited *DeRosa* or argued that the OCCA expressly repudiated its limiting

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<sup>8</sup> See *Arave v. Creech*, 507 U.S. 463, 477 (1993) (“our decisions do not authorize review of state court cases to determine whether a limiting construction has been *applied* consistently”) (emphasis adopted).

construction.<sup>9</sup> This argument is now the centerpiece of Petitioner’s certiorari petition: “The state court specifically abandoned [the formerly approved narrowing] construction of the statute in 2004, six years before Mitchell’s appeal.” Pet. at 7; *see also* Pet. at 5 (referring to *DeRosa* as “a 2004 decision that will play a pivotal role in this petition”). Nor did Petitioner engage in the historical analysis of the OCCA’s decisions applying the aggravator that he presents to this Court. Pet. at 11-14.

**B. This Court should Deny Certiorari Review Because Petitioner’s Claim is Unexhausted.**

Respondent argued in the Tenth Circuit that Petitioner’s argument that the OCCA had abandoned its prior limiting construction was unexhausted. 7/16/2018 Respondent-Appellee’s Second Supplemental Brief (10<sup>th</sup> Cir. No. 16-6258) at 2-3; 11/21/2019 Oral Argument Recording at 29:52-30:53; *see Picard v. Connor*, 404 U.S. 270, 276 (1971) (the question is whether the state court had a “fair opportunity” to rule on the claim presented in federal court). The Tenth Circuit, however, failed to acknowledge Respondent’s exhaustion argument. Respondent has never waived exhaustion and does not do so now. *See* 28 U.S.C. § 2254(b) (a writ of habeas corpus may not be granted on an unexhausted claim and the State will not be deemed to have waived this requirement unless it does so expressly). In light of this threshold question, this case is a poor vehicle for Petitioner’s question presented.

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<sup>9</sup> Petitioner did make this argument in his rehearing petition, but it was too late at that point. 1/23/2020 Petition for Panel and *En-Banc* Rehearing (10<sup>th</sup> Cir. No. 16-6258). *See United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10<sup>th</sup> Cir. 1999) (parties are not permitted to make new arguments in a petition for rehearing); *see also Marks v. Colorado Dep’t of Corr.*, 958 F.3d 1001, 1013 (10<sup>th</sup> Cir. 2020) (“we do not consider arguments newly hatched at oral argument”).

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.” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). As Petitioner’s challenge to his death sentence was not raised in state court, he may not obtain relief. This Court should decline to grant the writ, which will only force this Court to address exhaustion in the first instance, or to remand to the Tenth Circuit to address exhaustion.<sup>10</sup>

**C. Petitioner Merely Complains about the Application of a Properly Stated Rule of Law.**

There are three constitutional requirements for aggravating circumstances. First, a State must define its aggravating circumstance in a manner that narrows its possible application, either by statute or judicial interpretation. *Cartwright*, 486 U.S. 356. Second, the narrowed definition must actually be applied to the case at hand either by jury instruction or on appellate review. *Lambrix v. Singletary*, 520 U.S. 518, 531-32, 537 (1997); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Finally, the evidence presented at trial must be sufficient for a rational trier of fact to find the aggravating

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<sup>10</sup> There is also the fact that the current version of Petitioner’s claim was not the one pressed or passed upon below. As already discussed, raising the claim for the first time at oral argument and in a rehearing petition was too late. Although Petitioner referred to *DeRosa* at oral argument, he did not engage in the historical analysis provided in his certiorari petition. This further confirms that Petitioner’s case is a poor choice for certiorari review. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (this Court is “a court of review, not of first view”); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (this Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (this Court’s traditional rule precludes grant of certiorari where “the question presented was not pressed or passed upon below”).

circumstance proven beyond a reasonable doubt. *Lewis v. Jeffers*, 497 U.S. 764, 781-83 (1990).

The Tenth Circuit expressly applied *Cartwright* and *Godfrey*, as well as *Bell v. Cone*, in denying relief to Petitioner. Pet. App. A at 17a-23a. Petitioner disagrees with the Tenth Circuit’s conclusion that the OCCA’s decision was not contrary to, or an unreasonable application of, this Court’s cases. But Petitioner fails to identify any inter-circuit conflicts the opinion created, or any compelling question this Court needs to resolve.<sup>11</sup> “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” SUP. CT. R. 10. The petition should be denied.

**D. This Court should Deny the Petition Because the Tenth Circuit’s Conclusions are Correct.**

*1. Cone precludes relief.*

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.” *The Monrosa*, 359 U.S. at 184. The Tenth Circuit correctly determined that Petitioner’s facial challenge to the especially heinous, atrocious, or cruel aggravating circumstance was meritless.<sup>12</sup>

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<sup>11</sup> Petitioner claims his case “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 [the especially heinous, atrocious, or cruel aggravator] or an equivalent aggravator?” Pet. at 9. As will be shown, this Court has answered this question numerous times.

<sup>12</sup> This is not intended to be an exhaustive discussion of the merits of Petitioner’s claim, but only an overview which demonstrates the correctness of that ruling.

Petitioner's jury was instructed that the State was required to prove beyond a reasonable doubt that "the murder was preceded by either torture of the victim or serious physical abuse of the victim" and that "serious physical abuse" required a finding "that the victim experienced conscious physical suffering prior to her death." (O.R. VII 1351). The OCCA applied the following definition of the aggravating circumstance on appeal: "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." Pet. App. C at 149a.

The Tenth Circuit recognized that "the *Maynard* Court said that a 'limiting construction' requiring 'torture or serious physical abuse . . . would [make Oklahoma's HAC aggravator] constitutionally acceptable.'" Pet. App. A at 17a (quoting *Cartwright*, 486 U.S. at 365). The court further noted that the OCCA has adopted a torture or serious physical abuse limiting construction which the Tenth Circuit has repeatedly found constitutional. Pet. App. A at 17a-18a. Petitioner concedes these prior holdings were correct, and the OCCA's post-*Cartwright* limiting construction is constitutional. Pet. App. A at 19a; Pet. at 10. Yet, Petitioner claims the OCCA repudiated the constitutional construction in *DeRosa* and (impliedly) in his case.

The Tenth Circuit rejected Petitioner's argument for two reasons. "First, the OCCA applied the previously approved narrowing construction to Mr. Mitchell's appeal from his third sentencing." Pet. App. A at 20a. As shown above, this fact is

indisputable.<sup>13</sup> Petitioner’s claim rests on his speculation that, although the OCCA expressly applied a constitutional limiting construction, it in fact silently used an unconstitutional definition. This flies in the face of the benefit of the doubt to which state courts are entitled. *Holland v. Jackson*, 542 U.S. 649, 655 (2004). Further, as found by the Tenth Circuit (in its second reason for denying relief), Petitioner’s argument is foreclosed by *Cone*. Pet. App. A at 20a-23a.

In *Cone*, 543 U.S. at 449, the state supreme court held that the jury’s finding of the especially heinous, atrocious, or cruel aggravator was supported by sufficient evidence. The state court made only a brief mention of part of its limiting construction of the aggravator, and did not say anything about whether the aggravator was appropriately narrow. *State v. Cone*, 665 S.W.2d 87, 94-95 (Tenn. 1984). In fact, the state court discussed the aggravator only to establish the harmlessness of a different, invalid aggravator. *Id.* Yet, the petitioner’s Eighth Amendment claim was determined by the circuit court to have been exhausted.<sup>14</sup> *Cone*, 543 U.S. at 449-50.

The circuit court then found the state court’s decision contrary to *Godfrey* based on the state court’s failure to “apply, or even mention, any narrowing

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<sup>13</sup> Petitioner argues that “the ‘torture or serious physical abuse’ standard *isn’t* the OCCA’s standard, at least not the complete one” because the OCCA has defined this standard as requiring extreme mental cruelty or conscious physical suffering. Pet. at 22 (emphasis adopted). As shown above, Petitioner’s jury was instructed as to the requirement of mental cruelty or conscious physical suffering, (O.R. VII 1351), and the OCCA found it satisfied in Petitioner’s case, Pet. App. C at 149a.

<sup>14</sup> This Court noted a dispute regarding whether the claim was exhausted, but declined to decide the issue, invoking its authority to deny unexhausted claims. *Cone*, 543 U.S. at 451 n. 3.

interpretation” or cite its own case in which it had adopted a narrowing construction of the aggravator. *Id.* at 455 (quoting *Cone v. Bell*, 359 F.3d 785, 797 (6<sup>th</sup> Cir. 2004)). However, this Court held that “[f]ederal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation.” *Cone*, 543 U.S. at 455.

More importantly, however, we find no basis for the Court of Appeals’ statement that the state court “simply, but explicitly, satisfied itself that the labels ‘heinous, atrocious, or cruel,’ without more, applied” to the murder. The state court’s opinion does not disclaim application of that court’s established construction of the aggravating circumstance; the only thing that it states “explicitly” is that the evidence in this case supported the jury’s finding of the statutory aggravator. As we explain below, the State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; *absent an affirmative indication to the contrary, we must presume that it did the same thing here*. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case.

*Id.* at 455-56 (emphasis added, internal citations omitted).

As shown above, the OCCA expressly applied its narrowing construction in Petitioner’s case. Further, the OCCA has “construed the aggravating circumstance narrowly and ha[s] followed that precedent numerous times.” *See Cone*, 543 U.S. at 456. The OCCA has consistently, since *Cartwright*, affirmed the aggravator when there was evidence of conscious physical suffering and reversed when there was not.<sup>15</sup>

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<sup>15</sup> Petitioner consistently conflates instant unconsciousness with instant death. Pet. at 20, 23, 26. Under the OCCA’s decisions, a victim need not be killed immediately for the

*See, e.g., Simpson v. State*, 230 P.3d 888, 903 (Okla. Crim. App. 2010) (evidence insufficient where the victim “was not conscious after being shot” and “likely died within seconds”); *Smith v. State*, 157 P.3d 1155, 1178 (Okla. Crim. App. 2007) (evidence sufficient where the victim was shot nine times and was likely conscious “for at least a minute or longer”); *Robinson v. State*, 900 P.2d 389, 400-02 (Okla. Crim. App. 1995) (affirming where the victim was conscious for several minutes after being shot four times, and stating the length of consciousness is not dispositive); *Stouffer v. State*, 742 P.2d 562, 563-64 (Okla. Crim. App. 1987) (evidence insufficient where there was no evidence the victim was conscious after the first gunshot wound); *see also Pavatt II*, 894 F.3d at 1150-51 (Briscoe, J., concurring in part, dissenting in part) (collecting cases); *Perry v. State*, 893 P.2d 521, 534 (Okla. Crim. App. 1995) (contrasting cases in which the OCCA has, and has not, found the aggravator satisfied).

Also as in *Cone*, 543 U.S. at 456, the OCCA has “recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case.” *See DeRosa*, 89 P.3d at 1156 (adopting a new jury instruction to better inform the jury as to the conscious physical suffering requirement); *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995) (recognizing its narrowing construction is constitutionally compelled). Given the OCCA’s history of applying a narrowed construction of the aggravator, and the lack of “an affirmative indication” that it was

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aggravator to be inapplicable. Rather, the question is whether there is evidence that the victim experienced conscious physical suffering.

not doing the “same thing” here, the Tenth Circuit was required to presume that the OCCA applied its previously approved construction. *Cone*, 543 U.S. at 456. It did so. Pet. App. A. at 20a-21a.

Regarding Petitioner’s reliance upon *DeRosa* and the panel opinions in *Pavatt*, the Tenth Circuit began with Petitioner’s acknowledgement that “*DeRosa* did not explicitly abandon the OCCA’s constitutional narrowing. [Oral. Arg.] at 3:51-4:02.”<sup>16</sup> Pet. App. A at 21a (alteration adopted). The court further held that, because this Court has forbidden federal courts from examining whether a state court consistently applies a limiting construction, “a misapplication of the HAC aggravator in the OCCA decisions leading to and including *Pavatt* would not establish that the OCCA used an unconstitutional construction in Mr. Mitchell’s case.” Pet. App. A at 21a-23a. Thus, Petitioner had failed to establish that the OCCA’s rejection of his constitutional challenge was contrary to, or an unreasonable application of, clearly established federal law as required by 28 U.S.C. § 2254 (“AEDPA”). Pet. App. A at 23a. The Tenth Circuit properly denied relief.

*2. The constitution imposes no duration requirement.*

The Tenth Circuit’s conclusions were compelled by *Cone* and AEDPA. However, Petitioner’s duration argument fails in its own right.

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 Cone*, 543 U.S. at 457-59 (finding Tennessee’s especially

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<sup>16</sup> Petitioner now suggests otherwise. Pet. at 18-19, 24-26.

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) (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)<sup>17</sup>; *Cartwright*, 486 U.S. at 365 (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); *cf. also Creech*, 507 U.S. at 475-76 (affirming “cold-blooded” limitation on Idaho’s utter disregard aggravating circumstance, reasoning that “a sentencing judge reasonably could find that not all Idaho capital defendants are ‘cold-blooded.’ That is because *some* within the broad class of first-degree murderers *do* exhibit feeling”, and finding it “irrelevant” and “unsurprising” that Idaho courts found the aggravator satisfied “in a wide range of circumstances”) (second alteration adopted).

Petitioner’s attempt to demonstrate that the OCCA’s *limiting construction* (*i.e.*, torture or serious physical abuse) has changed over the years based on its application

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<sup>17</sup> The Tenth Circuit dissenters’ concern about a “sharpshooter bonus”, Pet. at 21, was shared by the dissent in *Walton*, and thus rejected by this Court. *Walton*, 497 U.S. at 696 (Blackmun, J., dissenting); *see Jeffers*, 497 U.S. at 778 (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)).

to particular facts is improper.<sup>18</sup> This Court does not examine the facts of a case in order to determine whether the *definition* of an aggravating circumstance is constitutional. *Jeffers*, 497 U.S. at 778-79 (rejecting the lower court’s holding that an aggravating circumstance can be vague or overbroad in its application to a particular set of facts); *Cartwright*, 486 U.S. at 361-62 (holding that Eighth Amendment vagueness challenges do not permit an examination of the facts of a particular case); *Walton*, 497 U.S. at 692-99 (Blackmun, J., dissenting) (criticizing the majority for concluding an aggravating circumstance was constitutional without examining the facts of cases in which it had been applied).

Petitioner’s claim is foreclosed by this Court’s cases. Petitioner presents no compelling question which warrants this Court’s intervention. Respondent respectfully asks this Court to deny the petition for writ of certiorari.

## II.

### **THE TENTH CIRCUIT WAS PRECLUDED BY AEDPA FROM GRANTING RELIEF BASED ON PETITIONER’S UNEXHAUSTED ARGUMENT FOR AN EXTENSION OF THIS COURT’S CASES.**

Petitioner asks this Court to grant the writ to decide whether individuals who commit murder when they are between the ages of 18 and 21 should be eligible for the death penalty. This claim was not properly exhausted in state court nor did Petitioner have a COA. However, assuming (without waiving exhaustion) that the

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<sup>18</sup> Respondent can also refute Petitioner’s claims that the OCCA and Tenth Circuit once applied a duration requirement, Pet. at 7-8, 11-17, as well as his suggestion that the Tenth Circuit has “conclude[d] that Oklahoma was returning to its pre-*Cartwright*, lax interpretation of the statute”, Pet. at 7-8. However, such is beyond the scope of this cert-stage brief.

claim is properly preserved, the OCCA's rejection of Petitioner's *Roper* claim was entirely consistent with this Court's precedent. The Tenth Circuit was not permitted to grant habeas relief.

**A. Background of Petitioner's Claim.**

Petitioner argues that evolving standards of decency now prohibit the execution of individuals who—like him—commit murder when they are between the ages of 18 and 21. Pet. at 27-31. In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the constitution prohibits the execution of persons who were under the age of 18 at the time of the capital offense.

Petitioner invoked *Roper* on direct appeal, claiming the mitigating evidence presented at his resentencing trial established that, although he was 18 at the time of the murder, the reasoning of *Roper* should exempt him from the death penalty. DA Br. at 56-59. The OCCA held that, “[u]nder the plain language of *Roper*, the prohibition against capital punishment is limited to the execution of an offender for any crime committed before his 18th birthday.” Pet. App. C at 142a.

The Western District held that “Petitioner’s argument for an extension of *Roper* is not a basis for habeas relief.” Pet. App. B at 48a. Petitioner did not have a COA in the Tenth Circuit for any claim based on *Roper*.

**B. This Court should Deny Certiorari Review Because Petitioner's Claim is Unexhausted.**

In his direct appeal brief, Petitioner argued only that the mitigating evidence in his case established that the reasoning in *Roper* applied to him in spite of the fact that he was 18 years old when he committed the murder. DA Br. at 56-59. Petitioner

did not argue that the OCCA should replace the cut-off of 18 with a cut-off of 21. Nor did Petitioner cite to any evidence of evolving standards of decency, such as scientific research or the practices of other jurisdictions. Petitioner's current argument, which does all of those things, is unexhausted. *See Connor*, 404 U.S. at 276 (the question is whether the state court had a "fair opportunity" to rule on the claim presented in federal court). Respondent does not waive exhaustion. *See* 28 U.S.C. § 2254(b) (a writ of habeas corpus may not be granted on an unexhausted claim and the State will not be deemed to have waived this requirement unless it does so expressly). The OCCA would procedurally bar this claim if Petitioner attempted to present it in a successive post-conviction application. 22 OKLA. STAT. tit. 22, § 1089(D)(8); *see Thacker v. Workman*, 678 F.3d 820, 835-36 (10<sup>th</sup> Cir. 2012) (finding Oklahoma's bar of claims raised for the first time in a successive post-conviction application independent and adequate to preclude federal review).

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." *The Monrosa*, 359 U.S. at 184. As Petitioner's current *Roper* claim was not raised in state court, he may not obtain relief. This Court should decline to grant the writ, which will only force this Court to address exhaustion in the first instance, or to remand to the Tenth Circuit to address exhaustion.

**C. This Court should Deny Certiorari Review Because Petitioner did not have a COA.**

A COA is a jurisdictional prerequisite for appellate review of a federal district court’s denial of habeas relief for a state court judgment. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); 28 U.S.C. § 2253(c)(1)(A). A COA must “indicate which specific issue or issues satisfy the showing required by paragraph (2) [a substantial showing of the denial of a constitutional right].” 28 U.S.C. § 2253(3).

In his COA requests to the Tenth Circuit, Petitioner acknowledged that

this habeas court cannot extend *Roper v. Simmons*, 543 U.S. 551 (2005) . . . . But if Mitchell fails to garner relief on the claims presented in this motion, he intends to ask the Supreme Court to extend *Roper*, to bar the death penalty to people who were younger than twenty one when they committed their crime.

Statement at 83; Renewed Request at 43. The Tenth Circuit did not grant a COA. Pet. App. A at 11a n.4.

It is appropriate for a habeas petitioner to ask this Court to review a court of appeals’ denial of a COA. *See Miller-El*, 537 U.S. at 331-48 (concluding a COA should have been granted). However, Petitioner is not asking this Court to review the Tenth Circuit’s refusal to grant a COA. Rather, Petitioner seeks review on the merits.

This Court typically does not grant certiorari to answer questions that were not pressed or passed upon below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) (this Court is “a court of review, not of first view”); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 55-56 (2002) (this Court does not grant certiorari to address arguments not pressed or passed upon below); *United States v. Williams*, 504 U.S. 36,

41 (1992) (this Court’s traditional rule precludes grant of certiorari where “the question presented was not pressed or passed upon below”). For that reason, and because this claim is also unexhausted, this Court should deny the petition.

**D. This Court should Deny the Petition Because Petitioner’s Claim is Meritless.**

Procedural obstacles aside, the OCCA’s refusal to extend *Roper*, Pet. App. C at 140a-142a, cannot form the basis for habeas relief.<sup>19</sup> Pet. App. C at 140a-142a. *See* Pet. App. B at 48a (“Petitioner’s argument for an extension of Roper is not a basis for habeas relief.”).

Petitioner is only entitled to habeas relief if the OCCA’s decision was contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d). The OCCA’s decision can be measured only by the law that was clearly established by this Court at the time it was issued. *Shoop v. Hill*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 504, 506 (2019); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004). This Court indisputably drew a bright line at the age of 18 in *Roper*, and did so with the understanding that a person’s brain does not change overnight on their eighteenth birthday: “Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574. Thus, the Tenth Circuit would have committed reversible error had it held that the OCCA’s decision was contrary to, or an unreasonable application of, *Roper*. *See Shoop*, 139 S.

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<sup>19</sup> As previously indicated, there was a dispute in *Cone* over whether the claim at issue was exhausted. *Cone*, 543 U.S. at 451 n. 3. Nevertheless, this Court applied AEDPA. *Id.* at 452-53. Petitioner has not argued AEDPA does not apply to this claim.

Ct. at 506-09; *see also White v. Woodall*, 572 U.S. 415, 426 (2014) (“Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court’s precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error.” (emphasis in original)).

Petitioner’s question presented cannot be answered in this case.

### **CONCLUSION**

The Petition for Certiorari should be denied.

Respectfully submitted,

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