

CASE NO. 19-8927
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

REPLY BRIEF TO BRIEF IN OPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

I. This Court Should Grant the Writ Because Oklahoma's Interpretation and Application of its Heinous, Atrocious, and Cruel Aggravating Circumstance is Unconstitutional.

Despite once being reined in by this Court in *Maynard v. Cartwright*, 486 U.S. 356 (1988), the limiting construction applied by the OCCA to the heinous, atrocious, and cruel aggravating circumstance has regressed to the point of being unconstitutional. Put simply, Oklahoma's HAC aggravator fails to narrow the class of offenders eligible for the death penalty.

- a. The procedural concerns alleged by Respondent do not make Mitchell's case a poor vehicle for certiorari.

In its Brief in Opposition, Respondent argues that Mr. Mitchell's HAC challenge is unexhausted and is otherwise not worthy of certiorari under Rule 10. *See* BIO at 11, 14. Petitioner disagrees with both contentions. With respect to exhaustion, the constitutional challenge to the HAC aggravator has been raised throughout the proceedings below. Respondent doesn't contend otherwise. However, Respondent apparently faults Mr. Mitchell for refining his argument as it passed through the various stages of litigation. *Id.* at 12. Mr. Mitchell's claim remains the same as it has always been – Oklahoma's application of the HAC aggravating factor fails to narrow the class of offenders eligible for the death penalty in violation of the Eighth Amendment. The mere refinement of arguments supporting that *claim* does not render the claim unexhausted. Certainly the Tenth Circuit would not have wasted its breath on a merits

determination had it found Mr. Mitchell failed to first challenge the constitutionality of HAC in Oklahoma's courts. *Mitchell v. Sharp*, 798 Fed. Appx. 183, 191-94 (10th Cir. 2019) (Appeals court reciting litigation history of claim and then engaging in merits analysis). After all, it is claims which require exhaustion, not components thereof. *See, e.g., Vasquez v. Hillary*, 474 U.S. 254, 259 (1986) (finding statistical probability analysis used to support Due Process claim that no African Americans had served on grand jury did not render claim a "wholly different animal," and consequently statistical analysis did not render claim unexhausted).

Petitioner's reliance on *DeRosa v. State*, 89 P.3d 1124 (Okla. Crim. App. 2004) to demonstrate that the Oklahoma Court has abandoned its once constitutional limiting construction is merely a component or argument supporting his underlying claim that Oklahoma's application of HAC violates the Eighth Amendment. Identifying the state court's turning point is merely the natural evolution of the appellate process. *See Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)) ("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'"). As his case moved forward, Mr. Mitchell reasonably focused on winnowed aspects of his already

exhausted claim; that is, his historical analysis of the Oklahoma Court's HAC caselaw simply demonstrates an assertion supporting the exhausted vagueness claim: that the OCCA has swerved from *Maynard v. Cartwright* and is no longer restraining the admittedly vague text of the aggravator. It is undisputed the Eighth Amendment claim was raised in state court and in the federal habeas proceedings below. The fact of *DeRosa* serving as the turning point in the state court's application of HAC to actually narrow those persons eligible for the death penalty, all must agree, is not a freestanding constitutional claim which could sustain relief all on its own. Instead, it is just another argument demonstrating the Eighth Amendment violation. *CF Vasquez*, 474 U.S. at 259.

As shown, Mr. Mitchell's constitutional challenge to the HAC aggravating circumstance has been exhausted and is therefore proper for the Court's grant of certiorari. Assuming *arguendo* the Court disagrees, Mr. Mitchell respectfully requests the Court take Respondent up on its request to remand the matter to the appeals court so it can address exhaustion. BIO at 13 (requesting Court decline to grant writ *or* remand to the Tenth Circuit to address exhaustion).

Second, Respondent complains that the claim presented is not worthy of certiorari pursuant to Rule 10 of this Court. *See* BIO at 14. Respondent attempts to cast Mr. Mitchell's HAC claim as merely a request for error correction. *See id.* at 13-14 (characterizing claim as "complain[t] about properly stated rule of law"

and criticizing Petitioner for failing to identify “any compelling question the Court needs to resolve”). Contrary to Respondent, Mr. Mitchell presents compelling reasons militating in favor of granting the writ. First, this 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 HAC or an equivalent aggravator.” Petition for Writ of Certiorari at 9. And second, certiorari is warranted 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.” *Id.* at 26 (citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). Thus, Mr. Mitchell raises a significant Eighth Amendment claim which should be resolved by this Court.

- b. *Bell v. Cone*, 543 U.S. 447 (2005), does not preclude the Court from granting certiorari because there are multiple affirmative indications that the Oklahoma Court has ceased construing the HAC aggravator in a constitutional manner.

In resolving this claim, the Appeals Court acknowledged that there is a presumption that state court’s construe aggravating circumstances in accordance with constitutional principles. *Mitchell*, 798 F. App’x at 193 (quoting *Bell v. Cone*, 543 U.S. at 455). However that presumption vanishes upon “affirmative

indication” that the state court has shirked its constitutional narrowing obligation. *Cone*, 543 U.S. at 456. Here, there is ample affirmative indication that the Oklahoma Court no longer construes the HAC aggravator in a constitutional manner. See Petition for Writ of Certiorari at 24-26. Respondent argues *Cone* precludes a certiorari grant; however, Respondent does not address all the affirmative indications urged by Mr. Mitchell. BIO at 18-19. Respondent instead relies heavily on the decision below, arguing *DeRosa* does not provide affirmative indication the state court has swayed to an unconstitutional construction of the HAC circumstance. *Id.* at 19. Mr. Mitchell respectfully submits the Tenth Circuit erred in its analysis, and *DeRosa* is exactly the sort of circumstance envisioned by the Court in *Cone*. And if not, Mr. Mitchell presents two more affirmative indications the state court has abandoned its narrowing role: (1) *Simpson v. State*, 230 P.3d 888, 902-03 (Okla. Crim. App. 2010), made explicit what *DeRosa* suggested – the HAC aggravator applies so long as the victim did not die “within seconds of being shot”; and (2) the State of Oklahoma has unabashedly taken the position that an offender is death eligible pursuant to the HAC circumstance so long as the victim was not “rendered unconscious immediately upon receiving the fatal blow.” *Pavatt v. Carpenter*, 928 F.3d 906, 936 (10th Cir. 2019) (*en banc*) (Hartz, J., dissenting) (citing oral argument recording); see also Petition for Writ of Certiorari at 25-26 (discussing three affirmative

indications that the OCCA has deviated from a constitutional application of HAC). Respondent declined to address these two arguments head-on in its Brief in Opposition. This Court should grant certiorari so it may consider all proffered affirmative indicators in its analysis of whether *Cone* provides shelter to the decision below.

Further troubling is that Respondent has now doubled down in the Brief in Opposition on its prior position in *Pavatt* that there is no durational requirement for HAC to apply. BIO at 19-21. In essence, Respondent is urging the Court to condone that HAC may apply to any murder in which the victim does not either die immediately or is rendered unconscious immediately. The problem with Respondent's argument is that the class of non-instantaneous homicides is undoubtedly larger than those in in which instant death/instant unconsciousness occurs. Therefore, Respondent is urging an aggravating circumstance that serves no narrowing function as is required by the Eighth Amendment. Conspicuously absent from the Brief in Opposition is any argument or explanation of how HAC actually serves its Eighth Amendment narrowing purpose. Instead, HAC as presently construed by Respondent and the OCCA actually enlarges the class of offenders eligibly for the death penalty – a result the Constitution will not tolerate.

For the reasons presented in his Petition for Writ of Certiorari and herein, Mr. Mitchell respectfully requests the Court grant certiorari to resolve whether the HAC aggravator is vague and overbroad in violation of the Eighth Amendment.

II. This Court Should Grant Certiorari to Consider Whether Evolving Standards of Decency Now Prohibit the Execution of Those Under 21 at the Time of Their Offense.

Mr. Mitchell stands on the arguments presented in his Petition for Writ of Certiorari as to his contention that the Eighth Amendment now requires extension of *Roper's* categorical prohibition to those under 21. See Petition at 27-31. Petitioner would merely provide that exhaustion poses no impediment to the Court's review for largely the same reasons discussed in his reply to Respondent's exhaustion arguments in Ground I, *supra*. This claim was raised on direct appeal, which the OCCA characterized as "Appellant contends that as he was only two weeks past his eighteenth birthday when he killed the deceased, the proscription against capital punishment of juvenile murderers set forth in *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to him . . ." 235 P.3d 640, 658 (Okla. Crim. App. 2010). *Roper* was relatively new (2005) at the time of the state court decision in 2010, and in the decade since that decision Mr. Mitchell's arguments have naturally evolved, as arguably should be expected with a claim premised upon the "*evolving* standards of decency that mark the

progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (alteration added). While his arguments have evolved, as has society, in the decade following the state court decision, the claim remains the same – whether the Eighth Amendment continues to allow a bright line cutoff of 18 for those subject to the death penalty.

For the reasons presented in his Petition for Writ of Certiorari and herein, Mr. Mitchell respectfully requests the Court grant certiorari to address whether the categorical prohibition must shift again to include youthful offenders who were under 21 at the time of their crime.

CONCLUSION

For the reasons above and those presented in his Petition for Writ of Certiorari, Petitioner Alfred Mitchell respectfully asks this Court to grant certiorari as to both questions presented.

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Respectfully Submitted,

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