No. 22-6538

In the

SUPREME COURT OF THE UNITED STATES

TREMANE WOOD,

***Petitioner*,**

-vs-

THE STATE OF OKLAHOMA,

Respondent.

On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXECUTION DATE PENDING

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CAPITAL CASE
QUESTION PRESENTED

In June of 2022, Petitioner Tremane Wood sought successive post-conviction relief in the Oklahoma Court of Criminal Appeals ("OCCA") under OKLA. STAT. tit. 22, § 1089, arguing that he was entitled to relief due to the alleged ineffective assistance of his trial counsel. Wood's claim was materially identical to one he had previously raised in that same court in 2005. The OCCA denied relief on state law procedural grounds, noting Wood's claim was barred by doctrines of res judicata and waiver.

The questions presented are:

1. **Does this Court have jurisdiction to review claims procedurally defaulted on independent and adequate state law grounds?**
2. **Should this Court review a claim which was not pressed or passed upon in the state court below?**

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INTRODUCTION

Wood was convicted of first-degree felony murder and sentenced to death for stabbing and killing Ronnie Wipf in an attempted robbery at an Oklahoma City motel in the early morning hours of New Year's Day 2001.[1] [2] Mr. Johnny Albert represented Wood at his Spring 2004 jury trial. Following Wood's conviction, other capital defendants claimed Mr. Albert had rendered ineffective assistance in their respective cases. An evidentiary hearing in those cases revealed that Mr. Albert's substance abuse disorder began in March 2005. Wood similarly filed for state post-conviction relief, arguing that Mr. Albert's substance abuse problems began much earlier and endured throughout his own trial. The OCCA denied Wood's claim, noting the evidence failed to show what Wood was arguing. Over fifteen years later, Wood again sought post-conviction relief in the same court alleging the same claim. The OCCA found the claim barred by state procedural law and rules including waiver and res judicata. Wood has presented no valid explanation as to why this Court has jurisdiction to review this decision, given that it is based upon an independent and adequate state law ground.

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[1] Citations to Wood's Petition for Writ of Certiorari will be referenced as "Pet. at ___." Citations to the Petition's Appendix will be referred to as "Pet. Appx. at ___." Citations to any pleadings filed in the proceedings below in the state court will utilize original pagination and will be referred to concisely and logically. *See* Sup. Ct. R. 12.7. When necessary, the State will cite Wood's previous filings and the OCCA's decisions in prior direct and post-conviction proceedings as well as federal cases; those state court pleadings, state opinions, and federal cases will be referenced by the case name and number and include the heading of the document as well as the date of filing.

[2] Wood was also convicted of Robbery with a Firearm (Count 2) and Conspiracy (Count 3), both after former conviction of a felony; he was sentenced to life on each count. *Wood v. State*, 158 P.3d 467, 470 (Okla. Crim. App. 2007) (citing OKLA. STAT. tit. 21, §§ 801, 421).

Recognizing this it seems, Wood attempts to carve out a pathway to this Court's substantive review of his claim by presenting a new issue, one never raised in the state court below: that Oklahoma's successive post-conviction rules run afoul of fundamental fairness and equal protection principles. Wood has forfeited this meritless issue, however, and it should not serve as a pathway to review of his defaulted claim.

This Court should, therefore, deny the petition for writ of certiorari to review the decision of the OCCA.

STATEMENT OF THE CASE

A. Factual Background

After celebrating the new year, Ronnie Wipf and his friend, Arnold Kleinsasser, accompanied two women to an Oklahoma City motel in the early morning hours of January 1, 2001. After some discussion, the women agreed to have sex with the men in exchange for money. Unbeknownst to the two men, this was a setup. The women—Lanita Bateman and Brandy Warden—had arranged with Wood and his older brother[3] to pretend to be prostitutes; Wood and his brother were to then arrive and rob the two men. *Wood v. State*, 158 P.3d 467, 471-72 (Okla. Crim. App. 2007).

Inside the room, Ms. Bateman and Ms. Warden excused themselves to the bathroom. Wood and his brother then pounded on the motel room door. When the door opened, Wood and his brother rushed in and attacked Mr. Wipf and Mr.

[3] Zjaiton Wood is the older brother of Petitioner, Tremane Wood.

Kleinsasser. In the ensuing struggle, Mr. Wipf was stabbed in the chest, but Mr. Kleinsasser escaped.[4] Mr. Wipf died from his wound. *Id*.

B. Proceedings Below

At his trial, in which Mr. Albert represented him, the jury found Wood guilty and sentenced him to death upon the finding of three aggravating circumstances: (1) that Wood knowingly created a great risk of death to more than one person; (2) that the murder was especially heinous, atrocious, or cruel; and (3) that there existed a probability that Wood would commit criminal acts of violence that would pose a continuing threat to society. *Wood*, 158 P.3d at 470, 482; *see* OKLA. STAT. tit. 21, § 701.12.

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[4] Wood claims his brother stabbed Mr. Wipf, Pet. at 8-9, but evidence at trial showed that Wood brandished the knife while his brother wielded a firearm. *Wood*, 158 P.3d at 472 & n.6. The only evidence at Wood's trial indicating that Zjaiton had the knife and stabbed Mr. Wipf came from his own mouth. *Id*. at 472. Zjaiton's testimony also claimed someone named "Alex" committed the crimes with him, as opposed to Wood. *Id*. But Zjaiton's testimony was not credible. Wood's own petition refutes Zjaiton's testimony; Wood admits that he was Zjaiton's accomplice in the crime and more specifically acknowledges that he had the knife at one point. Pet. at 8-9.

Moreover, the State did not argue, as Wood suggests, Pet. at 9 n.3, at Zjaiton's subsequent jury trial that Zjaiton stabbed Mr. Wipf; the OCCA's decision in that case on the issue of Zjaiton's claim of judicial estoppel and the alleged competing theories makes that abundantly clear. *See Wood v. State*, F-2005-246 (Okla. Crim. App. 2006) (unpublished) ("The trial court heard [pretrial] argument and held that the State could introduce Zjaiton's prior voluntary testimony [from his brother's trial], but could not argue that he was the actual killer since the State had taken the position that Tremane was the actual killer during his trial."; "[The prosecutor] emphasized that the State did not have to prove which one of the men actually stabbed Wipf in order for the jury to convict Zjaiton."; "While the prosecutor argued the jury should consider Zjaiton's prior testimony […] she followed the court's ruling and did not argue Zjaiton was the actual killer.").

The OCCA affirmed Wood's convictions and sentences in a published opinion on April 30, 2007. *Wood*, 158 P.3d 467. Thereafter, this Court declined to review the case. *Wood v. Oklahoma*, 552 U.S. 999 (2007).

While his direct appeal was pending, Wood filed in the OCCA his first application for post-conviction relief in April 2007.[5] Pet. Appx. at 031a-099a. In that filing, Wood argued that Mr. Albert rendered ineffective assistance at his trial due to Mr. Albert's alleged substance abuse. *Id.* The OCCA remanded the matter for an evidentiary hearing.[6] On remand, the state district court concluded Wood was not denied the effective assistance of counsel; the OCCA subsequently agreed and denied Wood's claim in June 2010.[7] Pet. Appx. at 008a-027a.

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[5] This filing was an Amended Application for Post-Conviction relief, *see* Pet. Appx. 031a; Wood had filed his original in the OCCA in December 2006.

[6] In his petition, Wood suggests that Mr. "Albert actively concealed his substance abuse issues during the period he represented Mr. Wood." Pet. at 14 (citing Tr. 2/27/06 at 240-92. The record does not indicate that Mr. Albert actively concealed his drug use during the evidentiary hearing in any way. *See* Tr. 2/27/06 at 240-92. This is likely because, as found by Oklahoma's two highest courts, Mr. Albert did not have a substance abuse issue during Wood's trial. *See* Pet. Appx. at 008a-027a; *Wood*, 158 P.3d 467; *State ex rel. Oklahoma Bar Ass'n v. Albert*, 163 P.3d 527 (Okla. Sup. Ct. May 15, 2007)

[7] In doing so, the OCCA found that the evidence showed that Mr. Albert's substance abuse began in March 2005, a year after Wood's jury trial, and peaked in March 2006. Pet. Appx. at 012a-013a n.5. The Oklahoma Supreme Court found similarly in their review of the matter. *Albert*, 163 P.3d at 531 (noting Mr. Albert's substance abuse began in March and April of 2005 and that the Bar Association only began receiving complaints about Mr. Albert's conduct from aggrieved clients in April 2005, with additional complaints coming in through March 2006). The Tenth Circuit noted Mr. Albert's substance abuse issue in Wood's claim of ineffective assistance of appellate counsel for failing to update the appellate record to include disciplinary proceedings against Mr. Albert, but did not make any finding regarding the actual starting date; the circuit court only determined the OCCA reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded Wood suffered no prejudice from the alleged failure of his appellate counsel. *Wood*, 907 F.3d at 1298-1301. The circuit court did note though that "none of [the evidence presented by Wood] is connected in any way to Wood's trial. Indeed, no one claims Mr. Albert drank alcohol before meeting with Wood,

Some twelve years—and two post-conviction applications—later,[8] Wood returned to the OCCA, raising again the claim that Mr. Albert's alleged substance abuse during his trial meant that he was subjected to ineffective assistance of counsel. Pet. Appx. at 100a-477a. Given that the court had already adjudicated Wood's claim, the OCCA found the issue "barred by the doctrines of res judicata and waiver" under state law. Pet. Appx. at 004a. Speaking further, the court noted that Wood's alleged new evidence did "not avoid a finding of procedural bar, namely res judicata." Pet. Appx. at 005a. As for the issue of waiver, the OCCA explained that Wood's claim was waived under both statute, OKLA. STAT. tit. 22, § 1089(8)(b)(1), and the court's rules, Rule 9.7(G)(3), OKLA. STAT. tit. 22, Ch. 18, App., noting that Wood had failed to show that his claim could not have been previously presented in a prior application. Pet. Appx. at 006a. As a result, the OCCA stated it "must, therefore, find that the claim is waived and that we are barred from considering the merits of the claim in this application." *Id*.

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was intoxicated during Wood's trial, or that alcohol interfered in any way with Mr. Albert's representation of Wood." *Id*. at 1300.

[8] Wood filed two additional applications for post-conviction relief in the OCCA, *Wood v. State*, PCD-2011-590 (Okla. Crim. App. 2011) (unpublished); *Wood v. State*, PCD-2017-653 (Okla. Crim. App. 2017) (unpublished), and pursued habeas relief through the federal court system in this intervening period, *Wood v. Trammell*, Case No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015) (unpublished); *Wood v. Carpenter*, 899 F.3d 867 (10th Cir. 2018), *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2748 (2019). Wood was denied relief at every level. *See id*.

On January 17, 2023, Wood's petition for writ of certiorari was placed on this Court's docket.[9]

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Wood presents no such reason. Indeed, the reasons he offers should not even be considered. That is because this Court does not have jurisdiction over a state court decision based on an independent and adequate state law ground. *Coleman v.*

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[9] Respondent has an obligation to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." S. CT. R. 15.2. There are many misstatements of fact in the Petition. However, the facts of this case are not particularly relevant given the independent and adequate state law grounds applied by the OCCA. Thus, at this point, Petitioner's misstatements do not bear on whether his claim of ineffective assistance would properly be before this Court. Nevertheless, Respondent offers the following as examples of misstatements warranting correction.

It must be noted that the State has never conceded the merit of any aspect of Wood's ineffective assistance claim. *See* Pet. at 3, 19, 36 (suggesting the State did not dispute multiple issues: (1) Wood's new evidence was newly discovered and reliable; (2) Mr. Albert's substance abuse contributed to his representation of Wood, and (3) Wood's case was now no less serious or different than those which the OCCA had reversed based upon a finding of Mr. Albert's substance abuse). As to these points, the State never addressed the reliability of the information contained in Wood's affidavits; instead, the State argued that Wood had failed to provide any specific fact establishing the basis for his assertion that his claim could not have been ascertained sooner. Pet. Appx. at 497a, 501a-505a. And given the focus of the State's response was on the procedural shortcomings of Wood's claim, Pet. Appx. at 498a-505a, the State made no specific comment on whether Mr. Albert's substance abuse impacted Mr. Wood's trial. However, the State expressed incredulity at the claim that Wood's alleged new evidence indicated the OCCA had missed the starting point of Mr. Albert's substance abuse issues by *seven* years. Pet. Appx. at 496a-497a, 500a-505a. And finally, the State only noted the "seriousness" of the issue in relation to the two cases where relief was warranted—both of which were tried the year after Wood's trial (Wood suggests to this Court that these three cases were concurrent to one another, Pet. at 2, 16)—to demonstrate the dubious nature of Wood's claim and the inexcusable nature of the delay, Pet. Appx. at 501a; that Wood would wait *seventeen* years to perform the simple task of interviewing other criminal clients of Mr. Albert to uncover factual support for his claim defies logic, indicates Wood's own beliefs about the "seriousness" of his claim, and refutes any inference of diligence on his part.

Thompson, 501 U.S. 722, 729 (1991). Because the OCCA expressly denied Wood's claim on such grounds, the Petition should be denied. Despite this, Wood attempts an end-run around this procedural shortcoming by raising an issue never pressed or passed upon in the OCCA. Wood's blatant attempt to bypass standard appellate procedures should also serve as a rationale for denying the Petition.

I. WOOD'S CLAIM WAS BARRED IN THE STATE COURT ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Foster v. Chatman*, 578 US 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). It matters not "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state law ground is independent of the merits of the federal claim when resolution of the state procedural law question does not "depend[] on a federal constitutional ruling." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). And a state procedural rule constitutes an adequate bar to federal review if it was "firmly established and regularly followed" when applied by the state court. *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

Under Oklahoma law, the OCCA does not consider claims raised in a successive post-conviction application that could have been raised in earlier proceedings. OKLA. STAT. tit. 22, § 1089(D)(8) (the OCCA "may not" grant relief for claims raised in successive post-conviction applications unless: (1) the legal or factual

basis was previously unavailable, and (2) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"). In addition, the OCCA's rules require applicants to raise claims based on any previously unavailable legal or factual bases no more than sixty days after the discovery of the new bases. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App.

Here, the OCCA—in no uncertain terms—procedurally barred Wood's claim on independent and adequate state law grounds, clearly and expressly applying both § 1089(D)(8)(b)(1) and Rule 9.7(G)(3) to Wood's claim. Pet. Appx. at 006a. In doing so, the OCCA considered and rejected the notion that Wood could not have discovered the factual basis allegedly supporting his claim any sooner.[10] Pet. Appx. at 006a. The OCCA did not make any alternative assessment of the merits of Wood's claim.[11] Pet. Appx. at 001a-006a.

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[10] Wood's argument that the OCCA incorrectly interpreted state law by requiring him to file within sixty days of when the evidence reasonably could have discovered, as opposed to when the evidence was discovered, *see* Pet. at 30, is both a state law question not for this Court's review and, to the extent he asserts it affects the bar's adequacy, it is he who is misreading the rule. *See* Rule 9.7(G)(1), OKLA. STAT. tit. 22, Ch. 18, App., ("A subsequent application for post-conviction relief shall not be considered, unless it contains claims which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable…").

[11] Despite its absence in the OCCA's opinion, the state court's foray into such an alternative analysis still would not have warranted review by this Court because "a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment even when the state

The OCCA's application of independent and adequate state law grounds to Wood's claim precludes this Court's review of his questions presented:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729 (citations omitted). Federal courts have routinely found § 1089(D)(8) and its subsections to be independent and adequate state law grounds.[12] *Pavatt v. Carpenter*, 928 F.3d 906, 929-30 (10th Cir. 2019) (en banc).

Wood admits the OCCA refused to consider his claim on state procedural grounds. Pet. at 20, 29. But he contends that Oklahoma's state procedural bars applied to him, in this case, are neither independent nor adequate because the OCCA exercised "discretion" in reaching its conclusion. Pet. at 34-40. Specifically, he

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court also relies on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (emphasis in original).

[12] The Tenth Circuit has never expressly held that Rule 9.7(G)(3) is adequate and independent, but it has applied that rule in an anticipatory fashion, indicating it has no concerns about the rule's adequacy. *See Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 908 n.23 (10th Cir. 2019) (noting the petitioner "also forfeited" his claim on the basis of Rule 9.7(G)(3)); *DeRosa v. Workman*, 679 F.3d 1196, 1235 (10th Cir. 2012) (applying an "anticipatory procedural bar" to an unexhausted claim because the OCCA would apply Rule 9.7(G)(3) if the petitioner returned to state court to exhaust the claim); *cf. Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009) (refusing to apply Rule 9.7(G)(3) because the State failed to defend its adequacy).

contends the OCCA denied him the ability to factually develop the merits of his claim and thereafter held the factually undeveloped nature of his claim against him. Pet. at 35-36.

Contrary to his claim, Wood's framing of his seventeen-year history of all his post-conviction cases before the OCCA as a "'surprising' and 'unfair' exercise of discretion" is anything but.[13] Pet. at 36. Petitioner can only make this argument by ignoring that he received an evidentiary hearing on this very claim during direct appeal. Further, any review by this Court would be limited to what occurred in *this* subsequent post-conviction case. And in this case, the OCCA assessed only whether Wood's claim was identical to his prior claims (it was) and whether the "new" factual basis supporting his claim was previously unavailable (it wasn't). These two flaws were the only aspects of Wood's case that the OCCA considered under § 1089(D)(8)(b)(1) and Rule 9.7(G); this Court may not now venture beyond that limited rationale and interpretation by the state court to grant certiorari review. *See Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from one rendered by the highest court of the State."); *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding that a state court's construction of a statute is "a ruling on a question of state law that is binding on [federal courts] as though the precise words

[13] In making his argument, Wood appears to suggest that the OCCA's rulings in his prior post-conviction applications prohibited him from developing facts to support his claim. Pet. at 36 (noting that the OCCA denied his request for discovery which limited his ability to "factually develop his Sixth Amendment claim"). This is inaccurate. Wood was not precluded from factually developing his claim simply because the OCCA rejected the claim when it was previously considered.

had been written into the statute" (quotation marks omitted)). Thus, this Court is unable to somehow expand, or redefine the contours of Oklahoma's standard for bringing a claim based on newly discovered facts under § 1089(D)(8)(b)(1), no matter how much Wood might wish it were so. There is nothing "unfair" or "surprising" about the application of these long-established rules. *See Pavatt*, 928 F.3d at 929-30; *cf.* 28 U.S.C. § 2244(b) (strictly limiting successive federal habeas corpus petitions with requirements that are very similar to § 1089(D)(8)).

Wood further claims, like many other Oklahoma capital defendants in the past, that the OCCA's decision in *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), served as a basis for the state court to look past his procedural deficiencies. Pet. at 19-20, 36-39.[14]

Wood fails to acknowledge that the Tenth Circuit has explained that "the *Valdez* exception only applies in cases involving an exceptional circumstance, and it is insufficient to overcome Oklahoma's regular and consistent application of its procedural-bar rule in the vast majority of cases." *Williams v. Trammell*, 782 F.3d

[14] In *Valdez*, the OCCA held that it had "power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. *Valdez*, 46 P.3d at 710-11. This so-called "*Valdez* exception" to procedural default is limited to extraordinary classes of cases such as violations of the Vienna Convention's right to consular access or claims of factual innocence. *See Williams v. Trammell*, 782 F.3d 1184, 1213 (10th Cir. 2015) (noting the OCCA has applied *Valdez* in "compelling circumstances" such as a violation of the Vienna Convention or a challenge to Oklahoma's lethal injection protocol, but not to "run-of-the-mill *Strickland* claim[s]."); *see also Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005) ("this Court's rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal") (emphasis in original). The fact that *Williams* was decided in 2015 renders Petitioner's argument that *Valdez* was freakishly applied to his *Strickland* claim, Pet. at 38, wholly without merit.

1184, 1213 (10th Cir. 2015). In this case, Wood's ineffective assistance challenge is far from exceptional: it is a claim that was readily apparent to him several years ago as shown by his prior filings.[15] And while he claims he was unaware of the information from these two affiants until recently, that is not the relevant question. The question under *Valdez* is whether some extraordinary circumstance prevented him from obtaining the evidence in a timely manner. Wood makes no such showing.[16]

Furthermore, the OCCA was not somehow unaware of the *Valdez* exception; Wood cited the case extensively in his reply to the State's response below as a rationale for avoiding the waiver that would ultimately be applied to his claim. Pet. Appx. at 550a. The OCCA still found his claim barred by an independent and adequate state law ground which federal courts have consistently recognized even in light of *Valdez*. *See Pavatt*, 928 F.3d at 929-30; *Williams*, 782 F.3d at 1212 ("[T]he OCCA's ban on successive post-conviction applications is … a firmly established and

[15] Wood's "new" evidence attempts to provide an explanation for what he has always claimed was deficient performance on the part of Mr. Albert. As noted earlier, the Tenth Circuit examined—through the lens of an ineffective assistance of appellate counsel claim—Wood's claim that Mr. Albert's representation at trial deprived him of his constitutional right to counsel. *Wood*, 907 F.3d at 1298-1301. But the Tenth Circuit denied the claim on prejudice grounds. *Id*. at 1301 ("The OCCA disagreed [with Wood], and concluded Mr. Albert did not perform deficiently. And even if he had, it held Wood suffered no prejudice because the extra evidence Wood could have offered would not have affected the proceeding's outcome. *We do not see why allegations of alcohol abuse would have affected this conclusion*." (emphasis added)). Wood's "new" evidence fails to explain how additional proof of Mr. Albert's deficient performance alters any prejudice analysis of his claim.

[16] Wood does complain that he was not given an evidentiary hearing in connection with his first post-conviction application. However, Wood already had one evidentiary hearing on this claim while his direct appeal was pending. Further, he has apparently discovered his two affiants now without any formal court process. Thus, while Wood perhaps *implies* that he could not have discovered this evidence earlier, he fails to actually prove that point.

consistently followed rule."); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012) (same).

Wood also attacks the independence of Oklahoma's § 1089(D)(8)(b). Pet. at 38-40. First, citing this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), Wood claims that the OCCA's decision below penalized him on account of his status and thus was "interwoven" with the federal issue. Pet. at 39. This is a complete misunderstanding of *Long*. The question to be assessed under the rule coming out of *Long* was not whether the state court decision violated federal law, but whether it rested upon or involved an interpretation of federal law. *Long*, 463 at 1040-41 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake review of the decision."). As noted above, the OCCA decision here could not have been any clearer in its language that Wood's claim was procedurally defaulted on state law grounds. Pet. Appx. at 006a.

Second, Wood contends that the OCCA's refusal to review the merits of his claim under *Valdez* by its very nature involved an assessment of its merit. Pet. at 39. But that understanding is inconsistent with other federal cases that have addressed the issue. In *Williams v. Trammell*, 782 F.3d 1184 (10th Cir. 2015), the petitioner raised a similar claim, arguing that "under the *Valdez* exception, a state court is required to consider the merits of a constitutional claim—thereby raising questions of federal law and undermining the very reason we defer to state procedural dismissals." *Id.* at 1214. The Tenth Circuit rejected that reasoning and reaffirmed its

prior cases on the matter. *Id*. (citing *Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (concluding that Oklahoma's procedural bar is independent of federal law, notwithstanding the OCCA's power to excuse default in "extreme cases").

As a result, this Court has no jurisdiction to review Wood's case.

II. WOOD'S FUNDAMENTAL FAIRNESS/EQUAL PROTECTION CLAIM IS FORFEITED AND HIS CASE IS A POOR VEHICLE FOR THE ISSUE, WHICH LACKS ANY MERIT.

A. Wood failed to raise the federal question in the state court below.

It comes as no surprise that this Court considers itself "a court of review, not of first review…." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). It is for that reason that this Court generally holds that issues raised for the first time on appeal will not be reviewed because such practice is "an unacceptable exercise of discretion." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see Johnson v. United States*, 520 U.S. 461, 465 (1997) ("This Rule is simply the embodiment of the 'familiar' principle that a right 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *United States v. Olano*, 507 U.S. 725, 713 (1993))); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) ("The issue was not raised below, so we do not address it.").

More specific to the context here, this Court has rejected on multiple occasions the invitation to decide issues raised for the first time in a petition for writ of certiorari, especially when the new issue is a federal question that was not raised or ruled upon below. *E.g.*, *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*,

462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Cromwell v. Randall*, 10 Pet. 368 (1836) (where Justice Story's survey of cases concluded that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, granted this Court with no jurisdiction unless a federal question was raised and decided in the state court below; "If both of these do not appear on the record, the appellate jurisdiction fails."). This Court should not consider Petitioner's new constitutional arguments.

B. Wood's petition is a poor vehicle for the issue, and ultimately the new federal claim is meritless.

Wood claims that Oklahoma's entire successive post-conviction review scheme, on its face and as applied to his case, runs afoul of the Fourteenth Amendment's fundamental fairness and equal protection principles. Pet. at 20-29. Wood argues that capital defendants are placed at a disadvantage because, as a class, they are subjected to stricter time constraints requiring them to raise their claim within sixty days of their discovery of the factual or legal predicate for their claim; noncapital defendants, on the other hand, according to Wood, are granted seemingly an unlimited amount of time so long as there is "sufficient reason" for why the claim "was not asserted or was inadequately raised in the prior application." Pet. at 23-24 (citing OKLA. STAT. tit. 22, §§ 1086 (noncapital successor statute), 1089(D)(8) (capital successor statute subsection)); Rule 9.7(G)(3),[17] OKLA. STAT. tit. 22, Ch. 18, App. (requiring a capital

[17] This subsection also applies to original applications for post-conviction relief in capital cases that were untimely filed. OKLA. STAT. tit. 22, § 1089(D)(8).

defendant to raise his subsequent application for post-conviction relief within sixty days of the discovery of the factual or legal predicate). Additionally, Wood argues that capital defendants face a higher, "more onerous" standard of proof once they do uncover a legal or factual basis for their claim, noting that capital defendants must prove by "clear and convincing evidence" that the outcome of their case would have been different.[18] Pet. at 24-26.

It must first be noted that in presenting the alleged contrast between capital and noncapital successive applications for post-conviction relief, Wood has overlooked the statute of limitations that applies to noncapital defendants contained in OKLA. STAT. tit. 22, § 1080.1. Section 1080.1 provides that "[a] one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application." *Id.* And pertinent for accurate comparison purposes to the issue in this case, "[t]he limitation period shall run from the latest of[, among other factors,] [t]he date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* at § 1080.1(A)(5).[19]

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[18] Wood does not provide this Court with his understanding of what the less onerous standard is for noncapital defendants. *See* Pet. at 24-26. While the issue appears to be somewhat unsettled under Oklahoma law, capital cases decided prior to the enactment of § 1089 and therefore litigated under § 1086 indicate that "[t]he Petitioner bears the burden of proving the existence of a probability that the new discovered evidence, if presented at trial, would have changed the jury's verdict." *Smith v. State*, 826 P.2d 615, 617 (Okla. Crim. App. 1992). This standard does not appear to be any different from the "outcome determinative" standard applied to capital defendants under § 1089 against which Wood rails. Pet. at 25.

[19] Section 1080.1, which prescribes the one-year statute of limitations, is a new statute that went into effect after the denial of Wood's fourth post-conviction application. OKLA. STAT. tit. 22, § 1080.1

Just by taking into consideration *all* of the applicable statutes that apply to a noncapital successive post-conviction application, Wood's equal protection/fundamental fairness claim is already on much shakier ground. It is not only that a noncapital defendant must assert, as Wood contends, "sufficient reason" for why the claim "was not asserted or was inadequately raised in the prior application." Pet. at 24 (citing OKLA. STAT. tit. 22, § 1086). The noncapital defendant must demonstrate that he too "exercise[d] due diligence" in the discovery of the factual predicate for his claim.[20] *Compare* OKLA. STAT. tit. 22, § 1080.1, *with* OKLA. STAT. tit. 22, § 1089(D)(8)(b)(1) (requiring the applicant to show that "the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence"); *see also Johnson v. State*, 823 P.2d 370, 373 (Okla. Crim. App. 1991) (discussing § 1086 and its required showings and stating, "[a]s is the case in the federal courts, we will not review new claims brought in successive petitions or applications that could have or should have been brought at some previous point in time without proof of adequate grounds to excuse the delay.").

But this argument and its factual support is a federal question that was not raised in the OCCA, the entity best suited to handle the initial review of such a claim,

[20] Wood also grievously misrepresents the non-capital post-conviction statutes. He states that claims raised in noncapital successive post-conviction applications are not considered waived unless there is "evidence that they knowingly, voluntarily, and intelligently gave up their rights." Pet. at 25 (citing OKLA. STAT. tit. 22, § 1086). In reality, the version of § 1086 in effect when Petitioner filed his application provided that, "All grounds for relief *available* to an applicant under this act *must be raised in his original, supplemental or amended application. Any* ground finally adjudicated *or not so raised* or knowingly, voluntarily and intelligently waived … may not be the basis for a subsequent application…." The amended statute which went into effect on November 1, 2022, is the same in all material respects; it simply added that "claims challenging the jurisdiction of the trial court" will be considered waived.

and whose review would be beneficial to any decision ultimately rendered by this Court on the matter. *Cf. Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (J. Ginsberg, dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *California v. Carney*, 471 U.S. 386, 400-01 & n.11 (1985) (Stevens, J., dissenting) (discussing the value of permitting lower courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law"); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

Below, Wood—whose trial representation by Mr. Albert occurred in 2004—presented to the OCCA two affidavits of individuals, Benito Bowie and Michael Maytubby, who claimed to be former criminal clients and/or affiliates of Mr. Albert some seventeen years ago.[21] Pet. Appx. at 303a-307a. Mr. Bowie attested that he first met Mr. Albert in 1998 and in the ten years he knew Mr. Albert, Mr. Bowie claimed that Mr. Albert did cocaine and drank alcohol almost every day. Pet. Appx. at 304a. Mr. Maytubby similarly attested that he knew Mr. Albert regularly used cocaine and

[21] Other Oklahoma state cases acknowledged that Mr. Albert's substance abuse problem was a factor in his representation of some clients but found that the problem began in the Spring of 2005. *See State ex rel. Oklahoma Bar Ass'n v. Albert*, 163 P.3d 527, 531 (Okla. May 15, 2007); *Littlejohn v. State*, 181 P.3d 736, 744 n.7 (Okla. Crim. App. 2008); *Fisher v. State*, 206 P.3d 607, 609-13 (Okla. Crim. App. 2009).

combined pills with his alcoholism, habits that Mr. Maytubby knew were going on since 2001. Pet. Appx. at 306-307a.[22]

Wood only argued below that the affidavits of these two individuals indicated a violation of his constitutional right to counsel and that this "new" evidence complied with the requirements of § 1089(D)(8)(b) and the OCCA's Rule 9.7(G)(3), which warranted a remand to the district court for an evidentiary hearing on the matter. Pet. Appx. at 114a-141a. Nowhere was the alleged discrepancy between the capital and non-capital successor statutes highlighted as a basis for a constitutional equal protection or fundamental fairness claim. *See id*. As it was not raised below, it should not serve as a rationale for granting the petition now. Moreover, Petitioner cannot even show sufficient reason for not obtaining information relevant to Mr. Albert's condition *at the time of his trial* in the years since his conviction.

In addition to the foregoing, Wood's case is a poor vehicle for the issue. The OCCA's ruling did not hinge solely upon a determination that Wood's claim failed to comply with Rule 9.7(G)(3) and § 1089(D)(8)(b)(1); the decision also cited the doctrine

[22] As a side matter, it does not appear that—at least with regard to his "as-applied" challenge to his claim—that it would matter whether Oklahoma's newer § 1080.1 (one-year limitation window), which was enacted after Wood filed his claim, or Rule 9.7(G)(3) (sixty-day limitation window) were to be applied to his claim. Contrary to what he claims in his petition where he espouses the wrong standard, *see* Pet. 33 (arguing that Wood would have met the less stringent "sufficient reason" requirement under § 1086), Wood fails under both § 1080.1 and Rule 9.7(G)(3) standards, and would seemingly fail even if the window were *substantially* longer, such as a decade. Wood took *seventeen years* to develop his current factual predicate, a timeframe that far exceeds any of Oklahoma's statutory or rule-based requirements to hearing his claim. The alleged distinction cited by Wood between capital and non-capital defendants simply did not matter in his case because Wood failed to demonstrate even "sufficient reason" for the delay in bringing his claim. OKLA. STAT. tit. 22, § 1086. And, as will be shown below, his claim was procedurally defaulted on alternative grounds and a favorable resolution of the alleged distinction by this Court would do nothing to save him from that result.

of res judicata as a procedural bar to review of his claim. In other words, the default of his claim did not come down to only his failure to meet the sixty-day timing mechanisms for the discovery of his factual predicate as required under Rule 9.7(G)(3) or his failure to establish that this factual predicate could not have been "ascertain[ed] through the exercise of reasonable diligence" as required under § 1089(D)(8)(b)(1); the default was also attributed to the fact that Wood had raised an identical claim in his original application for post-conviction relief. *Compare* Pet. Appx. at 050a-086a *with* 114a-141a.

The OCCA has routinely applied the procedural bar of res judicata in similar circumstances. *See Coddington v. State*, 259 P.3d 833, 835 (Okla. Crim. App. 2011) (explaining that res judicata and waiver applied in the capital post-conviction context where claims either were, or could have been, previously presented). And the OCCA has consistently explained that the addition of new evidence to a claim does not transform an old issue into a new one in order to bypass res judicata. *Turrentine v. State*, 965 P.2d 985, 989 (Okla. Crim. App. 1998) ("That post-conviction counsel raises the claims in a different posture than that raised [previously to the OCCA] is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel."; *Smallwood v. State*, 937 P.2d 111, 115 (Okla. Crim. App. 1997) (finding the petitioner's ineffective assistance claim was based on facts that were not available at the time he previously raised the issue before the court); *Woodruff v. State*, 910 P.2d 348 350 & n.2 (Okla. Crim. App. 1996) (finding the petitioner's claims which were previously raised but relied upon new evidence were still barred by the

doctrine of res judicata); *Williamson v. State*, 852 P.2d 167, 169 (Okla. Crim. App. 1993) ("[D]efendants may not obtain review of an issue raised previously by presenting it in a slightly different manner on post-conviction."). The fact that the OCCA did, as it has done many times before, apply res judicata to Wood's circumstances means even a favorable resolution of the Rule 9.7(G) and § 1089(D)(8) matters for Wood would have no bearing on the outcome. This Court has expressed its hesitancy to take up such cases that would have no practical effect on the outcome. *See*, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'") (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009)); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (refusing to resolve a split among the Courts of Appeals regarding discovery accrual rules because, *inter alia*, it would not affect the outcome of the case).

Moreover, returning briefly to the potential merit of any decision on Wood's equal protection/fundamental fairness claim, capital defendants have not been found to be a suspect or quasi-suspect class for equal protection purposes,[23] which means the rational basis test would be utilized to assess the alleged distinction between capital and noncapital successive petitioners in this instance. Rational basis scrutiny requires only that the legislative classification rationally promote a legitimate governmental objective to warrant the disparity in treatment. *See Bd. of Trustees of*

[23] Wood does not present this Court with any authority showing otherwise.

Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001) (setting forth the general rational basis standard of review). And this constitutional standard is "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

This Court has recognized "the State's interest in carrying out a death sentence in a timely manner." *Baze v. Rees*, 553 U.S. 35, 61 (2008); *cf. Coleman v. Thompson*, 501 U.S. 722, 747 (1991) (noting the importance of finality to states' criminal litigation in a review of prior cases). "Finality is essential to both the retributive and the deterrent functions of criminal law," and "the State's interests in finality [of its convictions and sentences] are all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 555, 557 (1998). Congress acted to protect that interest; the Antiterrorism and Effective Death Penalty Act was enacted precisely "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases ...." Joint Explanatory Statement of the Committee of Conference, H.Conf.Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944; *see also* 141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (passage of bill that would become AEDPA "will go a long, long way to streamline the lengthy appeals process" in capital cases). Neither the OCCA nor the Oklahoma Legislature can have violated Petitioner's due process or equal protection rights by enacting similar statutes and rules.

A capital prisoner, facing imminent execution of his sentence, does not share the state's interest in streamlined finality. Having typically already exhausted his

claims through the federal habeas system, a successive post-conviction application in the state court is his only way to forestall the imposition of the death sentence. This is the reality that Oklahoma's capital post-conviction scheme has tried to remedy. *See In re: The Setting of Execution Dates in Glossip, et al.*, D-2005-310 (Okla. Crim. App. Jan. 24, 2003) (Lumpkin, J., dissenting) ("[T]he major complaint in the application of the death penalty is the amount of time it takes to complete the carrying out of the sentence to provide finality for the crime victims and their families."). For that reason, the Oklahoma Legislature and the OCCA enacted rules which incentivize capital convicts to raise all claims at the first opportunity and to raise any successive post-conviction claim(s) as quickly as possible. *See* Rule 9.7(G)(3) (requiring the subsequent application be "filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered"); OKLA. STAT. tit. 22, § 1089(D)(8)(b)(1) (prohibiting merits review of claims unless "the application contains sufficient specific facts establishing [the claim could not have been raised sooner] because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence…."). There is no similar incentive for one confined under a non-capital sentence though; any delay on their part means a delay in their release. Thus, there is no reason to usher their claims to the courthouse for their immediate review.

And yet, the timing discrepancy between the two is offset by the resources provided to each. While the OCCA's rules require more alacrity from capital convicts in bringing their claims, they are provided with much more of a support system to

help them investigate, develop, and present those claims. Despite there being no right to counsel in post-conviction proceedings under federal law, *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), under Oklahoma law, capital defendants are guaranteed representation as they seek post-conviction relief, regardless of whether it is the original or successive application, to ensure that their claims receive sufficient legal and factual consideration in the courts.[24] *See* OKLA. STAT. tit. 22, § 1089(B). Non-capital defendants are granted no such assistance, and the vast majority are *pro se*. *Cf. Garza v. Idaho*, 139 S. Ct. 738 749 n.12 (2019) (noting that "researchers have found that over 90% of noncapital federal habeas petitioners procced without counsel"). The extended time period for noncapital defendants in which to bring their claims accounts for this difference in resources. So, while Wood may complain that his status as a capital defendant places a higher burden on him, he has at his disposal far greater resources than those he claims bear a lighter burden. As such, his claim lacks merit, and the petition should be denied.

C. Wood's petition takes aim at state law not applied to him to bar his claim.

Within his claim attacking the capital post-conviction schemes, Wood also argues that OKLA. STAT. tit. 22, §1089(D)(8)(b)(2), which requires the applicant to "establish by clear and convincing evidence" that the alleged error means "no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death," places a higher burden upon him than

[24] This representation includes not only legal counsel in capital cases, but typically "expert and investigation services" as well. OKLA. STAT. tit. 22, § 1355.13A.

any non-capital convict. Pet. at 24, 26. Wood takes issue with the capital successive post-conviction scheme in Oklahoma by arguing that it is a violation of the constitution for capital defendants to bear this additional burden that noncapital litigants are not. Pet. at 24, 26.

But the OCCA did not find Wood's claim procedurally defaulted for failing to meet this subsection's burden; the only subsection of that statute cited by OCCA was the prior one, §1089(D)(8)(b)(1).[25] Pet. Appx. at 006a. Thus, Wood's case once again is shown to be a poor vehicle for the constitutional questions he raises as to Oklahoma's successive post-conviction scheme. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (this Court does not issue advisory opinions, but rather decides "'concrete legal issues, presented in actual cases, not abstractions'") (quoting *United Public Works of American (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)).

CONCLUSION

The Petition for Certiorari should be denied.

[25] As noted earlier, Wood recognizes this basic fact in his petition: "The OCCA found Mr. Wood's claim waived under OKLA. STAT. Ann. tit. 22, § 1089[(D)](8)(b)(1)." Pet. at 32.

Respectfully submitted,

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