Case No. 20-7357

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND EUGENE JOHNSON,

***Petitioner*,**

v.

STATE OF OKLAHOMA,

***Respondent*.**

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

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April 6, 2021 ***Counsel of record**

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Should this Court grant a writ of certiorari to review a state court decision which rested on an adequate and independent state procedural ground?

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the Oklahoma Court of Criminal Appeals entered on October 8, 2020. *See Johnson v. State*, No. PCD-2018-718 (Okla. Crim. App. Oct. 8, 2020) (unpublished).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Tulsa County, State of Oklahoma, Case No. CF-2007-3514. In 2009, Petitioner was tried by jury for two counts of first degree murder and one count of first degree arson. A bill of particulars was filed alleging four statutory aggravating circumstances: (1) Petitioner was previously convicted of a felony involving the use or threat of violence; (2) Petitioner knowingly created a great risk of death to more than one person; (3) the murders were especially heinous, atrocious, or cruel; and (4) 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. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of all four statutory aggravating circumstances, and recommended a death sentence for each murder. Petitioner was sentenced accordingly.[1]

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's convictions and sentences in a published opinion filed on March 2, 2012. *Johnson v.*

[1] Petitioner was sentenced to life imprisonment for first degree arson.

State, 272 P.3d 720 (Okla. Crim. App. 2012). Petitioner did not seek rehearing. This Court denied Petitioner's petition for writ of certiorari on October 1, 2012. *Johnson v. Oklahoma*, 568 U.S. 822 (2012) (Mem.).

Petitioner filed an application for state post-conviction relief on July 25, 2011, which was denied by the OCCA in an unpublished opinion on December 14, 2012. *Johnson v. State*, No. PCD-2009-1025 (Okla. Crim. App. Dec. 14, 2012) (unpublished).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Northern District of Oklahoma on December 13, 2013. Petitioner subsequently filed a second application for post-conviction relief in the OCCA, on February 7, 2014. The OCCA denied post-conviction relief on May 21, 2014. *Johnson v. State*, No. PCD-2014-123 (Okla. Crim. App. May 21, 2014) (unpublished). On October 11, 2016, the federal district court issued an order denying Petitioner's petition for habeas corpus relief. *Johnson v. Royal*, No. 13-CV-0016-CVE-FHM (N.D. Okla. Oct. 11, 2016) (unpublished).

Petitioner appealed the Northern District of Oklahoma's denial of habeas relief to the Tenth Circuit. After briefing and oral argument, the Tenth Circuit affirmed the district court's judgment on March 19, 2019. *See Johnson v. Carpenter*, 918 F.3d 895 (10th Cir. 2019). The Tenth Circuit denied Petitioner's request for rehearing and rehearing *en banc* on April 29, 2019. *Johnson v. Carpenter*, No. 16-5165 (10th Cir. April 29, 2019) (unpublished). This Court denied Petitioner's petition for a writ of certiorari on November 25, 2019. *Johnson v. Sharp*, 140 S. Ct. 559 (Mem.).

On July 13, 2018, during the pendency of his appeal to the Tenth Circuit, Petitioner filed a third application for post-conviction relief. That application, which is the subject of the instant petition, was denied by the OCCA in an unpublished decision. *Johnson v. State*, No. PCD-2018-718 (Okla. Crim. App. Oct. 8, 2020) ("Pet. App'x A").

STATEMENT OF FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal:

> Brooke Whitaker lived in a house on East Newton Street in Tulsa with her four children, the youngest of which, [K.W.], was fathered by Appellant. Around February of 2007, Appellant moved in with Brooke and her children. By April of that year, Brooke and Appellant were having problems. Brooke told her mother that Appellant had threatened to kill her. Because she was frightened, Brooke and her children moved in with her mother for two weeks. During this two week period, Appellant called Brooke's mother and told her that he was going to kill Brooke. Around the first of May, Brooke and Appellant got back together and Appellant moved back in with Brooke.
>
> While Appellant was living with Brooke he was also involved in a relationship with Jennifer Walton who became pregnant by him. Around the first or second week of June 2007, Appellant wanted to move out of Brooke's house and Jennifer arranged for him to stay with a friend of hers, Laura Hendrix. On June 22, 2007, Appellant called Jennifer and asked her to give him a ride. She picked him up from Laura's house at around 10:30 that evening. They drove past the place where Brooke worked to make sure she was at work and they drove past her house to make sure that nobody was there. Jennifer dropped Appellant off on a side street near Brooke's house so that Appellant could walk to the house and retrieve some of his clothes. She left him and drove back to her mother's house. Appellant was going to call another friend to give him a ride to Jennifer's mother's house when he was finished getting his clothes.

At about 1:00 a.m. on June 23, 2007, Appellant called Jennifer and told her that he was at Denny's eating while waiting for Brooke to get home. He called again around 5:00 a.m. to let her know that a friend would bring him home shortly. Appellant called Jennifer two more times around 10:00 a.m. that morning. During these calls he told her that Brooke was dead and that a friend had shot her. Appellant wanted Jennifer to pick him up at a school near Brooke's house. The next time he called he told her that the friend who had killed Brooke was thinking about burning down the house. While Jennifer was waiting for Appellant at the school, Appellant called her again and asked her to pick him up on the street behind the street where Brooke lived. When she arrived at this location, Appellant walked to her car from the driveway of a vacant house. He was carrying two garbage bags which he put in the trunk. When Appellant got into the front passenger seat of Jennifer's car, she noticed that he smelled like gasoline and had blood on his clothes. As she drove away, Jennifer saw flames pouring out the front window of Brooke's house.

Appellant instructed Jennifer to drive to Laura's house where he retrieved the garbage bags from the trunk of the car before they went inside. Appellant placed the bags on the living room floor and started taking things out of them, including money that had blood on it. He washed the blood off of the money and took a shower. When Jennifer asked more questions about what had happened, Appellant told her that his friend had hit Brooke with a hammer. After Appellant got out of the shower he said that he needed to go back to Brooke's house to look for her cell phone because he had used the phone to call Jennifer and he was concerned that his fingerprints would be on it. When they arrived, the street where Brooke's house was located was blocked off and ambulance, fire trucks and police cars were present. Appellant drove to the street behind Brooke's house and looked to see if he had dropped the phone on the driveway of the vacant house he had walked by earlier. He did not find the phone. Appellant next drove to Warehouse Market so that he could put some money on a prepaid credit card. Then they went to the parking lot across the street where Appellant threw his clothes in the dumpster. After stopping at McDonalds and Quiktrip, they went back

to Laura's house where Jennifer stayed with Appellant a while before she left him there and went to her mother's house.

Firefighters were called to Brooke's house on east Newton Street at 11:11 a.m. on June 23, 2007. When they arrived and made entry into the house, the inside was pitch black with smoke. After they ventilated the house and cleared some of the smoke they found [K.W.]'s burned body inside the front door on the living room floor behind the couch. The infant was dead. In a room off the living room, firefighters found Brooke Whitaker on the floor partially underneath a bunk bed. She had extensive burns on her body, was unconscious without a pulse and was not breathing. Paramedics initiated resuscitation efforts and a pulse was reestablished. On the way to the hospital paramedics noticed a lot of blood pooling around her head. When they looked closer, they observed large depressions, indentations and fractures on her head. Brooke was pronounced dead shortly after she arrived at the hospital and was later determined to have died from blunt trauma to the head and smoke inhalation. Seven month old [K.W.] was determined to have died from thermal injury, the effect of heat and flames.

Investigation of the crime scene revealed numerous items of evidence. A burned gasoline can was recovered from the front yard of the residence and samples of charred debris were collected from the house. The debris was tested and some of it was confirmed to contain gasoline. Additionally, investigators noted blood smears and blood soaked items in numerous places throughout the house. Brooke's cell phone was found on the living room floor and investigators discovered that two calls had been made from this phone to Jennifer Walton shortly before the fire was reported.

Walton was located and interviewed by the police later that same day. She told police about Appellant's involvement in the homicide and she told them that she had taken Appellant to a trash dumpster when he returned from Brooke's house after the fire. When the police went to the dumpster they recovered a white trash bag that contained boots, bloody clothing, Brooke Whitaker's wallet with her driver's license inside and a claw hammer. They also found

> blood on the passenger side door handle inside Walton's car.
>
> Pursuant to information given to them by Walton, the police went to Laura Hendrix's house in Catoosa to look for Appellant. They set up surveillance and observed him exit the house and walk down the street at around 6:00 p.m. on June 23, 2007. He was arrested at that time on outstanding warrants and was taken to the Tulsa Police Station where he waived his Miranda rights and gave a statement to the police.
>
> Appellant told the police that Jennifer Walton had taken him to Brooke's house to get his stuff the evening of June 22, 2007. When Brook[e] came home in the early morning hours of June 23, 2007, they talked and started arguing with each other. During the argument, Brooke pushed him, called him names and got a knife to stab him. He grabbed a hammer and hit her on the head. Brooke fell to the floor and asked Appellant to call 911. Appellant hit her about five more times on the head with the hammer. Despite her injuries, Brooke was conscious and talking. She said that her head hurt and felt like it was going to fall off. Brooke begged Appellant to get help and told him that she wouldn't tell the police what had happened but he wouldn't do it because he didn't want to go to jail. Instead, Appellant went to the shed and got a gasoline can. He doused Brooke and the house, including the room where the baby was, with gasoline. He set Brooke on fire and went out the back door. Appellant admitted that he was trying to kill Brooke.

Johnson, 272 P.3d at 724-26 (paragraph numbers omitted).

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—as potentially relevant here—a conflict between state courts of last resort, a conflict between a state court of last resort and a United States court of appeals, an opinion by a state court that decides an important federal question in a way that conflicts with relevant

decisions of this Court, and an opinion by a state court that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings. Indeed, as will be shown, this Court lacks jurisdiction over the OCCA's decision.

Petitioner claims trial counsel conceded his guilt over his objection, in violation of *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). The OCCA procedurally barred the claim when it was raised in Petitioner's third post-conviction application, filed eleven years after his sentence was imposed. Thus, this Court lacks jurisdiction. In addition, Petitioner has failed to show that the OCCA has decided an important question of federal law in a way that conflicts with another state court of last resort or of a United States court of appeals. Nor has Petitioner shown that the OCCA decided an important question of federal law that has not been, but should be, settled by this Court. Petitioner presents no compelling reason for this Court to review the OCCA's decision. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). This Court should deny the petition for writ of certiorari.

PETITIONER'S CHALLENGE TO THE OCCA'S APPLICATION OF A PROCEDURAL BAR TO A CLAIM NOT RAISED UNTIL HIS THIRD STATE POST-CONVICTION APPLICATION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner seeks this Court's review of a claim that was procedurally barred in state court. Petitioner's complaints about the OCCA's alternative holdings that *McCoy* is not retroactive, and that counsel did not concede his guilt, cannot overcome

this Court's lack of jurisdiction over this procedurally barred claim. Alternatively, there is no conflict whatsoever between courts on the question of whether *McCoy* is retroactive. Indeed, the few courts that have weighed in—primarily lower state and federal courts—are unanimous in holding *McCoy* is not retroactive. This Court should permit more courts of last resort to address the retroactivity question. Finally, the OCCA's retroactivity holding was not determinative. Rather, the OCCA also found *McCoy* inapplicable to the facts of Petitioner's case. This fact-based argument is one for which this Court "rarely" grants review. SUP. CT. R. 10. For all of the foregoing reasons, this Court should deny the instant petition.

A. This Court Lacks Jurisdiction to Review the OCCA's Application of a Procedural Bar.

This Court does not have jurisdiction to directly review the judgment of a state court which rests on an adequate and independent state ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The Oklahoma Court of Criminal Appeals found Petitioner's *McCoy* claim barred because it could have been raised on direct appeal or in a prior post-conviction proceeding. Pet. App'x A at 3-8 (citing Okla. Stat. tit. 22, § 1089(C), (D)). The Tenth Circuit has repeatedly found Oklahoma's bar of claims raised in a subsequent post-conviction application to be adequate and independent. *Pavatt v. Carpenter*, 928 F.3d 906, 929-30 (10th Cir. 2019) (en banc). Petitioner does not argue otherwise.

Indeed, Petitioner's sole acknowledgement of the procedural bar is as follows:

> On its way to concluding Johnson's claim was barred because it could have been raised on direct appeal, the OCCA necessarily concluded *McCoy* was not a 'new' rule

> and merely 'extended' and 'clarif[ied] the boundary of trial counsel's strategic decision making authority to concede his or her client's guilt' under *Nixon*. Appendix A at 7-8. However, *McCoy* may be seen to represent a 'newly discovered fundamental right.' *McCoy*, 138 S. Ct. at 1512 (Alito, J, dissenting).

Pet. at 9-10. The above-quoted language is part of Petitioner's merits argument. Petitioner makes no attempt to show that this Court has jurisdiction over the decision he asks this Court to review. For this reason, the petition must be denied.

However, in an attempt to forestall any belated arguments Petitioner might raise in his reply brief, Respondent will show the OCCA's procedural bar ruling was not interwoven with federal law. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (this Court may review state court decisions where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion"). The OCCA denied relief for three reasons. First, the claim was barred because "*McCoy* is not new law subject to collateral review"; rather, "the legal basis of Johnson's claim here could have been reasonably formulated from [*Florida v.*] *Nixon*[, 543 U.S. 175 (2004)] and raised on direct appeal. Johnson's claim is thus barred by the doctrines of *res judicata* and waiver." Pet. App'x A at 7-8. Second, the court applied *Teague v. Lane*, 489 U.S. 288 (1989) to determine whether *McCoy* should be applied retroactively such that Petitioner's claim would fall within an exception to the prohibition on successive post-conviction applications. Pet. App'x at 8-11. Finally, the court found *McCoy* inapplicable to Petitioner's case. Pet. App'x at 11.

Per Oklahoma law, a claim may be considered in a subsequent post-conviction application if it relies on a legal basis that was previously unavailable. Okla. Stat. tit. 22, § 1089(D)(8). "[A] legal basis of a claim is unavailable" if it "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of" Oklahoma, or "is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date." Okla. Stat. tit. 22, § 1089(D)(9).

The OCCA's first ground for denying relief—that *McCoy* was not "new law, for purposes of 22 O.S.2011, § 1089(D)(9)" rested entirely upon state law. Pet. App'x A at 5. The OCCA concluded that Petitioner's claim was barred because it "could have been reasonably formulated" before *McCoy*. Pet. App'x A at 8. This finding is based on Oklahoma law, Okla. Stat. tit. 22, § 1089(D)(9)(a), not federal law. Thus, although the OCCA's two alternative bases for denying relief—that *McCoy* is not retroactive under *Teague* and that Petitioner's case is distinguishable from *McCoy*—are interwoven with federal law, there is an adequate and independent state law basis for the court's decision. This Court does not have jurisdiction. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Long*, 463 U.S. at 1040-41) (this Court will not review a state court's decision which alternatively addresses a federal question so long as it also clearly and expressly relies on state law). The petition for writ of certiorari should be denied.

B. There is no Compelling Reason for this Court to Review the OCCA's Alternative Determination that *McCoy* is not Retroactive.

Petitioner asks this Court to grant a writ of certiorari to determine whether *McCoy* applies retroactively to cases on collateral review pursuant to *Teague*. Pet. at 10-15. Petitioner is correct that "[c]ourts around the country are considering *McCoy*'s retroactivity." Pet. at 14. It is for this very reason that this Court should not weigh in at this point.

First, it bears repeating that Petitioner complains about an alternative holding; the resolution of his question presented will have no bearing on his convictions or sentences. This Court has long stated that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)); *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *Williams v. Norris*, 12 [25 U.S.] Wheat. 117, 120 (1827)). On appellate review, "[t]he question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed." *McClung v. Silliman*, 6 [19 U.S.] Wheat. 598, 603 (1821). Thus, 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 Exp., Inc.*, 359 U.S. 180, 184 (1959). Thus, this Court should wait for a case in which the retroactivity of *McCoy* matters.

Second, Petitioner does not cite, and Respondent has not found, a single case in which any court has held that *McCoy* applies retroactively. *See, e.g., Smith v.*

Stein, 982 F.3d 229, 233-35 (4th Cir. 2020) (holding that, even if *McCoy* announced a new rule, it does not apply retroactively); *Elmore v. Shoop*, No. 1:07-CV-776, 2020 WL 3410764, at *12 (S.D. Ohio June 22, 2020) (unpublished) (denying objection to magistrate judge's determination that *McCoy* is not retroactive); *Johnson v. Ryan*, No. CV-18-00889-PHX-DWL, 2019 WL 1227179, at *2 (D. Ariz. Mar. 15, 2019) (unpublished) ("*McCoy* didn't announce a watershed rule of criminal procedure, so it doesn't apply retroactively"); *In re Smith*, 49 Cal. App. 5th 377, 390-92, 263 Cal. Rptr. 3d 63, 73-74 (2020), *review filed* (July 1, 2020) (holding *McCoy* is not new, and, therefore, is not retroactive); *Commonwealth v. Traub*, 236 A.3d 1112 (Pa. Super. Ct. 2020) ("appellant has failed to establish that the ***McCoy*** decision applies retroactively to cases on collateral review"). Thus, the OCCA's decision does not conflict with that of any other court. *See* SUP. CT. R. 10(b). And Respondent has found only one court of last resort—the Fourth Circuit in *Smith*, *supra*—which has ruled on this question. For these reasons, this Court should allow further percolation of this issue in the lower courts. *See California v. Carney*, 471 U.S. 386, 400-01 & n.11 (1985) (Stevens, J., dissenting) (discussing the importance of allowing lower courts "to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law").

Furthermore, the OCCA's decision in this case is unpublished and, therefore, non-binding. *See* Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2019) ("In all instances, an unpublished decision is not binding on this Court."). Accordingly, while the retroactivity of *McCoy* may present "an

important federal question" which has not been decided by this Court, it has also not been definitively decided in Oklahoma (or any other state). *See* SUP. CT. R. 10(c). There is no compelling reason for this Court to address the retroactivity of *McCoy* in this case, or at this time. The petition should be denied.

C. Petitioner's Disagreement with the OCCA's Alternative Conclusion that Counsel did not Concede Guilt is Merely a Complaint about the Application of a Properly Stated Rule of Law.

Petitioner's third, and final, argument is that this Court should resolve differences of opinion among lower courts regarding the particular facts to which *McCoy* may apply. Pet. at 16-24. "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. This case should be no exception.

Again, it bears repeating that Petitioner complains about an alternative holding; the resolution of his question presented will have no bearing on his convictions or sentences. *See Rooney*, 483 U.S. at 311; *The Monrosa*, 359 U.S. at 184; *McClung*, 6 [19 U.S.] Wheat. at 603. Accordingly, the petition should be denied.

In any event, while Petitioner attempts to make this case about categories ("what elements of a charged offense must be conceded, whether *McCoy* applies to individual elements, . . . how overt the concessions of guilt must be" and "the kind of opprobrium that matters under the Sixth Amendment"), Pet. at 16-24, the reality is that the OCCA did not draw any such lines in this unpublished decision. The OCCA merely applied *McCoy* to the facts of Petitioner's case, and determined that counsel

did not concede his guilt. Thus, any perceived disagreements in other jurisdictions regarding the application of *McCoy* are not at issue.

That Petitioner seeks mere error-correction is made plain by the discussion on pages 21-22 of the petition regarding his disagreement with the OCCA's application of *McCoy*.[2] For all of the reasons herein, Petitioner's case should not be the rare case in which this Court decides whether a state court has properly applied the law.

CONCLUSION

In light of the OCCA's application of an adequate and independent state procedural bar, this Court lacks jurisdiction. Further, Petitioner presents no compelling reason for this Court to review the OCCA's decision. For all of the foregoing reasons, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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[2] To be clear, the State in no way agrees that counsel conceded Petitioner's guilt over his objection, as required by *McCoy*. However, the merits of Petitioner's claim are beyond the scope of his request for certiorari review.