Case No. 21-6196

IN THE SUPREME COURT OF THE UNITED STATES

I.A.,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

BRIEF OF THE STATE OF KANSAS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Kansas Supreme Court correctly held that the Fourteenth Amendment does not require that Petitioner be permitted to bring his direct appeal roughly 19 years late.
2. Whether Petitioner's trial counsel was ineffective.
3. Whether Petitioner's appellate counsel was ineffective.

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The opinion of the Kansas Supreme Court is reported at 491 P.3d 1241 (2021). Pet. App. 1a-9a. The opinion of the Kansas Court of Appeals is reported at 57 Kan. App. 2d 145 (2019). Pet. App. 10a-17a.

JURISDICTION

The Kansas Supreme Court issued its decision on July 23, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

INTRODUCTION

The Kansas Supreme Court rejected Petitioner's argument that he should be permitted to bring a direct appeal of his juvenile matter roughly 19 years late because the Fourteenth Amendment requires that judges inform juveniles of their right to appeal. Petitioner disagrees with the Kansas Supreme Court's decision, but he has not pointed to any decision of this Court or any other court to the contrary. Petitioner's challenge to the Kansas Supreme Court's holding should be denied, just as an identical challenge was earlier this month in Case No. 21-6437. Petitioner also tacks on two other questions presented—neither of which was addressed below, and neither of which is alleged to implicate any conflict of authority. These novel challenges, like Petitioner's other challenge, should be denied.

STATEMENT

This case involves Petitioner's attempt to directly appeal his 1998 juvenile adjudication and sentence roughly 19 years after the statutory deadline for that appeal passed.

1. In 1998, Petitioner and his friends randomly shot BB guns at passing vehicles. Pet. App. 4a. They caused both physical injury and damage to property. R. I, 5, 8-9.[1] Petitioner was nearly 18 at the time. Pet. App. 4a, 13a. Kansas charged Petitioner as a juvenile with one count of aggravated battery. *Id.* at 4a. Kansas later added eight additional charges: four counts each of aggravated assault and criminal damage to property. *Id.*; R. I, 8-9.

Petitioner ultimately pleaded guilty to two counts of reckless aggravated battery. Pet. App. 4a. In exchange, Kansas agreed to dismiss the remaining charges. *Id*. The district court found a factual basis for Petitioner's plea and adjudicated him a juvenile offender. *Id*. at 4a, 13a. At Petitioner's plea hearing, the district court judge informed Petitioner of his rights as required under Kansas law. *Id*. at 4a. Among other things, the district court judge advised Petitioner of his right to a trial, his right against compelled testimony, and the potential sentences he faced. *Id.*; *see* Kan. Stat. Ann. § 38-1633(b) (1998). On November 30, 1998, the district court sentenced Petitioner to serve one year of probation and ordered him to pay $685.55 in restitution. Pet. App. 4a, 13a; R. III, 1-3.

Kansas law afforded Petitioner the right to appeal his adjudication, his sentence, or both "after, but within 10 days of, the entry of the sentence." Kan. Stat. Ann. § 38-1681(b) (1998); *see* Pet. App. 5a. The statutory timeframe for Petitioner to directly appeal his adjudication and sentence thus lapsed in December 1998, 10 days after Petitioner's sentence was entered. R. III, 1-3. Petitioner did not appeal before

[1] References to "R." are to the appellate record below.

that time. Petitioner satisfied the conditions of his probation and paid the required restitution. Pet. App. 4a, 13a. He was granted release from the district court's jurisdiction in November 1999. *Id.* at 4a.

2. Roughly 19 years after his adjudication and sentencing, on August 1, 2017, Petitioner filed a request to directly appeal his adjudication and sentence out of time. *Id.* at 4a, 13a. The substance of Petitioner's challenge is that the district court judge at the time of his adjudication and sentencing did not inform him of his right to a jury trial or obtain a knowing and voluntary waiver of his rights. *Id.* at 4a.

The Kansas Court of Appeals directed the parties to brief why Petitioner's decades-late appeal should not be dismissed for lack of jurisdiction. *Id*. Petitioner, through his appointed appellate counsel, did not dispute that he had not filed his appeal within the 10-day statutory timeframe. Rather, he argued that his belated appeal should nonetheless be permitted because it falls within the first category of permissible late appeals recognized by the Kansas Supreme Court in *State v. Ortiz*, 230 Kan. 733 (1982). Pet. App. 4a. In that case, the Kansas Supreme Court recognized three exceptions for certain adult criminal defendants to the usual rule that an appeal must be brought within the statutory timeframe: (1) when a criminal defendant "was not informed of his or her rights to appeal," (2) when a criminal defendant "was not furnished an attorney to exercise those rights," and (3) when a criminal defendant "was furnished an attorney for that purpose who failed to perfect and complete an appeal." *Ortiz*, 230 Kan. at 736. Petitioner in this case "relie[d] on the first exception" only; he "did not base his arguments on either of" the second or

third exceptions. Pet. App. 4a.

The Kansas Court of Appeals sent the case back to the district court for fact-finding relating to whether the district court judge, at the time of Petitioner's adjudication and sentencing, had informed Petitioner of his right to appeal. *Id.* Because of the poor quality of the cassette tapes used to record Petitioner's plea hearing in 1998, the court reporter was unable to produce a transcript of that hearing. *Id.* The district court held a hearing and found that the district court judge at the time of Petitioner's adjudication and sentencing had not informed Petitioner of his right to appeal. *Id.* The district court also determined that Petitioner's request to file a direct appeal out of time was permitted under the first *Ortiz* exception. *Id.* at 13a.

The Kansas Court of Appeals disagreed and dismissed Petitioner's appeal for lack of jurisdiction. *Id.* at 13a, 17a. The court held that the first *Ortiz* exception did not apply in juvenile proceedings. As the court explained, "the first *Ortiz* exception applies where a defendant's failure to timely appeal was caused by the deprivation of a right to which that defendant was entitled by law." *Id.* at 15a. The court noted that Kansas law entitles certain adult criminal defendants to "specific procedural safeguards of the right to appeal," including a requirement that those defendants be informed by the court of their right to appeal. *Id.* (citation omitted). When those defendants are not informed of their right to appeal, the court reasoned, the first *Ortiz* exception may apply. But the same does not hold true for juveniles. As the court explained, "there is no statutory requirement in the revised Kansas Juvenile Justice

Code that a court advise a juvenile that he or she has the right to appeal from an order of adjudication or sentencing." *Id.* The court concluded that because Petitioner was not deprived of any statutory right when he was not informed of his right to appeal, the first *Ortiz* exception did not apply. *Id.* at 17a.

The Kansas Supreme Court agreed with the Kansas Court of Appeals, affirming its holding and dismissing Petitioner's appeal for lack of jurisdiction. *Id.* at 4a, 9a. The Kansas Supreme Court recognized that the right to appeal is a creature of statute, and Petitioner had not complied with the statutory requirements. *Id.* at 5a. The court then rejected Petitioner's request that it venture into "unplowed ground" and "carve an alternate route" to appeal under the Due Process Clause, "one not yet recognized for juvenile offenders." *Id.* at 5a, 8a. Because "the authorities cited by I.A." and "I.A.'s arguments suggest[ed]" that juvenile proceedings were akin to criminal proceedings, the Kansas Supreme Court tethered its analysis to the standard set forth in *Patterson v. New York*, 432 U.S. 197 (1977), which it explained applies mostly in criminal cases. Pet. App. 5a, 7a. But the court was clear that "if [it] were to apply" the standard set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which it explained applies primarily in civil cases, it "would agree with the Court of Appeals' analysis" and reach the same conclusion. Pet. App. 5a, 8a.

As the Kansas Supreme Court explained, "notifying a juvenile offender of his or her right to appeal" is not "so rooted in the traditions and conscience of our people that it is properly deemed a fundamental right." *Id.* at 7a. The court explained that "[n]o such procedural right is found in either the United States or the Kansas

Constitutions." *Id.* Nor had Petitioner identified any "statute that grants him a procedural right to have the judge inform him of his right to appeal." *Id.* The court explained that granting Petitioner "a right to appeal out of time" would turn the court into "'a rule-making organ for the promulgation of' rules of juvenile offender procedure." *Id.* (quoting *Medina v. California*, 505 U.S. 437, 443 (1992)). Unlike in *Ortiz*—where all the court had done "was enforce a statutory provision" that Ortiz had been denied the benefit of—there was "no comparable statutory provision directing judges to inform offenders of the right to appeal" in Petitioner's case. *Id.* at 7a-8a. And "without specific statutory directives that require a court to inform a juvenile offender of the right to appeal, *Ortiz*'[s] first exception does not apply" and no procedural due process violation has occurred. *Id.* at 8a.

ARGUMENT

This case presents three questions. None is alleged to implicate any split of authority warranting this Court's intervention. The first seeks this Court's correction of a holding that is not erroneous. And the second and third ask this Court to pass in the first instance upon fact-bound questions on an undeveloped record. This Court grants certiorari "only for compelling reasons." Sup. Ct. R. 10. Put simply, no compelling reasons exist here.

I. Petitioner's First Question Presented Does Not Implicate Any Alleged Split And Seeks Correction Of Nonexistent Error.

Petitioner's first question presented asks whether the Fourteenth Amendment requires an exception to the general rule that appeals must be timely when a juvenile offender is not informed by the court of his right to appeal. Pet. i. The Kansas

Supreme Court held that it does not. Petitioner disagrees with that holding, arguing that he must be allowed to appeal his adjudication and sentence roughly 19 years late because he was not informed of his right to appeal at the time of his adjudication and sentencing. But Petitioner has yet to point to any case from any jurisdiction reaching that conclusion. Petitioner's bald disagreement with the holding of the Kansas Supreme Court—which is fully consistent with precedents of this Court—plainly does not merit this Court's review. Indeed, this Court earlier this month denied certiorari in a case raising this same issue. *See* Pet. i, *J.S. v. Kansas*, 2022 WL 89630 (U.S. 2022) (No. 21-6437) (asking whether the juvenile had "a Fourteenth Amendment right to be advised by the Court of his right to appeal"). It should do so again in this case.

1. This Court's review is not warranted because Petitioner has not identified any split of authority. Indeed, no disagreement among jurisdictions on this issue has been identified at any stage of this case. Petitioner, represented by appellate counsel, did not cite a single holding that juveniles have a constitutional right to be informed of the right to appeal in his briefing below. *See generally* I.A. Supp. Br. 2-9, *In re I.A.*, 57 Kan. App. 2d 145 (2019) (No. 118,802). Neither the Kansas Court of Appeals nor the Kansas Supreme Court noted any split of authority. *See generally* Pet. App. 1a-17a. And Petitioner once again in this Court has failed to point to any jurisdiction that has held that the Fourteenth Amendment requires that juveniles be informed by the court of their right to appeal. *See* Pet. 8-11. Absent any identified disagreement in authority, there is simply no need for this Court to step in

and "clarify the law." *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015).

2. This Court's review is further unwarranted because the holding of the Kansas Supreme Court is correct and fully consistent with this Court's precedents. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. There can be "no doubt that the Due Process Clause is applicable in juvenile proceedings." *Schall v. Martin*, 467 U.S. 253, 263 (1984). But it does not give courts free license to become "rule-making organ[s] for the promulgation of state rules" of procedure. *Medina*, 505 U.S. at 443 (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). Rather, courts must "respect the 'informality' and 'flexibility' that characterize juvenile proceedings" at the same time as they "ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." *Schall*, 467 U.S. at 263 (citations omitted).

The precise meaning of "fundamental fairness" in a given context requires courts to "consider[] any relevant precedents and . . . assess[] the several interests that are at stake." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981). In the criminal context, proceedings comport with fundamental fairness if they do not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (citation omitted). This Court has advised that, while "[l]ittle, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal,'" juvenile

proceedings are not "devoid of criminal aspects merely because [they] usually ha[ve] been given the civil label." *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (plurality opinion). Indeed, juvenile proceedings—no less than adult criminal proceedings—implicate the "careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443.

It is thus no surprise that this Court, like the Kansas Supreme Court below, has applied the *Patterson* standard in juvenile proceedings—even if not always by name. In both *In re Winship* and *In re Gault*, this Court recognized that due process guarantees juveniles "rights recognized by the people as core fundamental rights." Pet. App. 7a; *In re Winship*, 397 U.S. 358, 362 (1970) (right to proof of guilt beyond a reasonable doubt was a "fundamental principle[] that [is] deemed essential for the protection of life and liberty" (citation omitted)); *In re Gault*, 387 U.S. 1, 30-57 (1967) (rights to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination were "essentials of due process and fair treatment," "tap the basic stream of religious and political principle," and occupy "great office in mankind's battle for freedom" (citation omitted)). Likewise, in *McKeiver v. Pennsylvania*, this Court recognized that due process does not guarantee juveniles a right that, although enjoyed by adult criminal defendants, was not regarded as "vital to the integrity of the juvenile process" and did not implicate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McKeiver*, 403 U.S. at 546, 548 (plurality opinion) (citation omitted) (right to trial by jury). The Kansas Supreme Court was correct to follow this

Court's lead and apply the *Patterson* standard in the context of juvenile proceedings.

Applying the *Patterson* standard in the adult criminal context, the Kansas Supreme Court has held that an adult criminal defendant is denied due process when he or she is "deprived 'of a right to which he or she was entitled by law.'" *State v. Patton*, 287 Kan. 200, 215 (2008) (quoting *Guillory v. State*, 285 Kan. 223, 228 (2007)). The first *Ortiz* exception is an application of this principle: Because Kansas law requires judges to inform certain adult criminal defendants of their right to appeal, the Kansas Supreme Court reasoned that a judge's failure to so inform a defendant amounts to a denial of due process. *Id.* at 219-20.

The same does not hold true in juvenile proceedings. The right of a juvenile to be informed of his right to appeal is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (citation omitted). Indeed, as Petitioner concedes, the U.S. Constitution does not even "require States to grant juvenile offenders a right to appellate review." Pet. 8; *see Gault*, 387 U.S. at 58 ("This Court has not held that a State is required by the Federal Constitution 'to provide appellate courts or a right to appellate review at all.'" (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion))). If the Constitution does not guarantee the right to appeal, it is hard to see how it would guarantee the right to be informed of the right to appeal.

Furthermore, unlike in *Ortiz*, Kansas law does not entitle juveniles to the right to be informed of their right to appeal. At the time of Petitioner's adjudication and sentencing, the Kansas legislature had granted juvenile offenders the statutory right

to appeal. *See* Kan. Stat. Ann. § 38-1681(b) (1998). But unlike in *Ortiz*, the Kansas legislature had not required that judges inform juvenile offenders of that right. The relevant statute required that juvenile offenders be informed of several specific things, including:

> (1) [t]he nature of the charges in the complaint; (2) the right of the respondent to be presumed innocent of each charge; (3) the right to trial without unnecessary delay and to confront and cross-examine witnesses appearing in support of the allegations of the complaint; (4) the right to subpoena witnesses; (5) the right of the respondent to testify or to decline to testify; and (6) the sentencing alternatives the court may select as the result of the juvenile being adjudged to be a juvenile offender.

Kan. Stat. Ann. § 38-1633(b) (1998). But the Kansas legislature did not include the right to appeal in that list. That "considered legislative judgment[]" should be respected. *Medina*, 505 U.S. at 443. Because Petitioner was not by law entitled to the right to be informed of his right to appeal, and because that right is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Patterson*, 432 U.S. at 202 (citation omitted), the fact that the district court judge did not inform Petitioner of his right to appeal does not amount to a due process violation—and does not justify Petitioner's decades-late appeal.

Petitioner does not dispute that he is unable to satisfy the due process standard set forth in *Patterson* and properly applied by the Kansas Supreme Court below. Rather, he argues that the Kansas Supreme Court should have applied the standard set forth in *Mathews* instead because juvenile proceedings are technically civil—and that, under *Mathews*, the trial court judge's failure to inform Petitioner of his right to appeal entitles Petitioner to his belated appeal. Pet. 10-11. This argument is

wrong and does not warrant this Court's intervention for several reasons.

First, this argument is new. As the Kansas Supreme Court noted, "neither party discusse[d] which framework should apply" below. Pet. App. 5a. Although it could "foresee arguments about why *Mathews* should apply," those arguments were "not made" below. *Id.* at 6a. Indeed, Petitioner's novel argument in favor of the *Mathews* standard cuts against his own persistent argument—including in this Court—that due process permits his appeal because the "due process rights of juveniles correspond closely, if not exactly, to the due process rights that must be afforded adult criminal defendants." I.A. Supp. Br. 8, *I.A.*, 57 Kan. App. 2d 145 (No. 118,802); *see also* Pet. App. 6a ("I.A. argues the juvenile justice system in Kansas mirrors the characteristics of criminal proceedings . . . ."); Pet. 4 (arguing that juvenile proceedings are "akin to an adult prosecution"). Recognizing this, the Kansas Supreme Court applied the *Patterson* framework in part because of "I.A.'s arguments" and "the authorities cited by I.A." Pet. App. 5a, 7a. Having not argued for application of the *Mathews* framework below, Petitioner should not be permitted to do so for the first time in this Court.

Second, the Kansas Supreme Court explained that applying the *Mathews* test would not have changed its decision. In its opinion, the Kansas Supreme Court made clear that "if [it] were to apply *Mathews*, [it] would agree with the Court of Appeals' analysis" and still affirm. *Id.* at 8a. The standard applied—*Mathews* or *Patterson*—would not have changed the Court's holding. *Cf. Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996) (Ginsburg, J., respecting the denial of the petition for a writ of certiorari)

("'[T]his Court,' however, 'reviews judgments, not opinions.'" (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))). And Petitioner does not allege any error in the Kansas Supreme Court's articulation of either the *Mathews* or *Patterson* standards. *See* Sup. Ct. R. 10 (stating that this Court "rarely" grants review where the lower court arguably misapplied "a properly stated rule of law").

Third, for the reasons given above, the Kansas Supreme Court was correct to apply the *Patterson* standard. *See supra* 8-10. Petitioner argues that "*Patterson* partially stems from concepts of federalism and states' rights" that were not at play in the Kansas Supreme Court. Pet. 10. But in this Court, where the judgments of the Kansas legislature would be under consideration, such concepts are in play. And, in any event, the Kansas Supreme Court correctly recognized that the driving force behind this Court's *Patterson* standard were "precepts of separation of powers and judicial restraint." Pet. App. 6a. This Court has cautioned that courts should be careful to avoid "undue interference with . . . considered legislative judgments," *Medina*, 505 U.S. at 443, and should respect the judgments of the people as to what "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Patterson*, 432 U.S. at 202 (citation omitted). The same interests are at play in juvenile proceedings. Indeed, this Court has been particularly "reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young." *McKeiver*, 403 U.S. at 547 (plurality opinion).

Fourth, even if *Mathews* were the proper standard, the Kansas Supreme Court

was correct that Petitioner still would not prevail. The due process standard set forth in *Mathews* requires courts to balance three interests:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Petitioner argues that the first two factors weigh in his favor, as juveniles face the "risk of losing their freedom" and additional criminal consequences in the future. Pet. 10-11. Meanwhile, according to Petitioner, "no Governmental interest exists because no additional fiscal or administrative burdens would be placed on the States." *Id.* at 11.

Petitioner's argument, however, ignores the massive consequences his position would entail. As Petitioner would have it, any juvenile offender who was not informed by the trial court judge of her right to appeal at the time of her adjudication and sentencing and did not appeal would suddenly be allowed to bring a decades-late direct appeal. This would not only flood courts with stale appeals but would also require countless fact-finding efforts to determine whether those juvenile offenders were in fact informed of their right to appeal—based on what limited cassette tapes, documents, or memories may still exist regarding hearings that took place potentially decades ago. Indeed, the sparse record in this case contains no transcript of Petitioner's plea hearing because the old cassette tapes used to record the hearing were too unclear to be understood. Pet. App. 4a, 13a; R. IV, 1-2. Weighed against the fact that a juvenile offender's right to appeal is not constitutional, and the fact that

juvenile offenders have the right to counsel who can independently inform them of the right to appeal, *see Gault*, 387 U.S. at 34-42, these massive administrative and judicial burdens tip the scales against recognizing a novel procedural due process right for juvenile offenders to be informed of their right to appeal.

Petitioner has argued that "if judges must inform adult criminal defendants of the right to appeal, they should inform juveniles." Pet. App. 8a. But as this Court has recognized, since "the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles." *Gault*, 387 U.S. at 14. Indeed, "[i]n practically all jurisdictions, there are rights granted to adults which are withheld from juveniles." *Id.* As the Kansas Supreme Court properly recognized, the determination as to which procedural protections are required in the context of appeals from juvenile proceedings properly rests in the hands of the state legislature. Pet. App. 7a-8a. And here, the Kansas legislature determined that being told by the judge of the right to appeal is not such a protection. Courts should not be permitted to wield the Due Process Clause to "interfere[] with" such "considered legislative judgments." *Medina*, 505 U.S. at 443.

In sum, Petitioner's mere disagreement with the holding of the Kansas Supreme Court—a holding consistent with the precedents of this Court, and not in conflict with any identified holding of any other jurisdiction—does not warrant this Court's review.

II. Petitioner's Other Questions Presented Were Not Addressed Below And Do Not Warrant This Court's Review In The First Instance.

Petitioner's remaining questions presented raise novel issues regarding the effectiveness of his trial and appellate counsel. With his second question presented, Petitioner argues that his trial counsel was ineffective for failing to advise Petitioner of his right to appeal. Pet. i. With his third question presented, Petitioner argues that his appellate counsel was ineffective for failing to argue that his belated appeal was also permissible under the third *Ortiz* exception, *id.*, which applies "where a defendant . . . was furnished an attorney for [appeal] who failed to perfect and complete an appeal," *Ortiz*, 230 Kan. at 736. Neither of these challenges is alleged to implicate a split of authority, and neither was addressed below. This Court should not be the first to address them.

1. With his second question presented, Petitioner argues that his trial attorney "was ineffective for not perfecting an appeal or discussing any appellate rights with [him] after his plea hearing." Pet. 12. Once again, this Court's review is unwarranted. As with Petitioner's first question presented, Petitioner fails to identify any split of authority on this question. But, more importantly, this is the first time Petitioner has raised this issue. Petitioner did not raise any ineffective assistance of trial counsel claim at any stage of the proceedings below, and he does not now suggest otherwise. No Kansas court had the opportunity to address any such claim, and no record on such a claim was developed. This Court typically does "not consider claims that were neither raised nor addressed below." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455 (2007). There is no reason this

case should be exceptional.

2. With his third question presented, Petitioner argues that he "was denied effective counsel on appeal" because his appellate counsel "failed to raise the non-frivolous claim that the third exception to *Ortiz* applied." Pet. 13. Once again, Petitioner fails to allege any split of authority. And once again, Petitioner brings a challenge no court below addressed. Petitioner appears to concede that no court has passed upon his argument. But he states that he raised it in a pro se motion for rehearing or modification that "could not be filed" because the Kansas Supreme Court denied his motion to remove counsel. Pet. 8. "This Court, however, is one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Review in the first instance in this Court—on an undeveloped record—is not the proper avenue for Petitioner to initially challenge the effectiveness of his appellate counsel.

In sum, this case is not an "ideal vehicle" to address Petitioner's second and third questions presented, Pet. 14, and neither of those questions warrants this Court's review in any event. This Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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