NO. 21-_____

# In the Supreme Court of the United States

JIMMY MARTIN, WARDEN,

*Petitioner,*

v.

ALONZO CORTEZ JOHNSON,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 13, 2021 *COUNSEL FOR PETITIONER*

## QUESTION PRESENTED

In 2012, an Oklahoma jury convicted Alonzo Cortez Johnson of first-degree murder and conspiracy to commit murder and sentenced him to life in prison in relation to the murder-for-hire plot against Tulsa businessman, Neal Sweeney. On direct appeal, the Oklahoma Court of Criminal Appeals ("OCCA") rejected a cursory two-page claim predicated upon *Batson v. Kentucky*, 476 U.S. 79 (1986), finding that Johnson failed to establish purposeful discrimination on behalf of the State during jury selection.

In 2021, on habeas proceedings, the United States Court of Appeals for the Tenth Circuit reviewed a heavily supplemented version of Johnson's *Batson* claim. Relying upon an argument Johnson never made to the OCCA on direct appeal to reach *de novo* review, and substituting its own judgment for that of the OCCA, the Tenth Circuit reversed and remanded, finding that the OCCA rejected Johnson's *Batson* claim based upon "an unreasonable determination of the facts" and "an unreasonable application of" *Batson*.

THE QUESTON PRESENTED IS:

Whether the Tenth Circuit violated the backward-looking nature of § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 *and* the clear mandates announced by this Court in *Sexton v. Beaudreaux*, 138 S.Ct. 2555, 2560 (2018) (*per curiam*), *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), and *Harrington v. Richter*, 562 U.S. 86, 102 (2011), when it considered—and based its ultimate decision upon—an argument Johnson never made to the OCCA on direct appeal.

## LIST OF PROCEEDINGS

United States Court of Appeals for the Tenth Circuit
Case No. 19-5091
*Johnson v. Martin*
Judgment entered on July 2, 2021

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United States District Court for the Northern District of Oklahoma
Case No. 16-CV-433-JED-FHM
*Johnson v. Martin*
Judgment entered on September 17, 2019

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Oklahoma Court of Criminal Appeals
Case No. PC-2015-923
*Johnson v. State of Oklahoma*
Mandate issued on April 7, 2016

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Tulsa County District Court
Case No. CF-2009-2738
*Johnson v. State of Oklahoma*
Judgment entered on October 6, 2015

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Oklahoma Court of Criminal Appeals
Case No. F-2013-173
*Johnson v. State of Oklahoma*
Mandate issued on July 17, 2014

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Tulsa County District Court
Case No. CF-2009-2738
*State of Oklahoma v. Johnson*
Judgments and Sentences entered January 4, 2013

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# In the Supreme Court of the United States

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## OPINIONS BELOW

The opinion of the court of appeals is published as *Johnson v. Martin*, 3 F.4th 1210 (10th Cir. 2021). App.1a-43a. The order denying rehearing and rehearing *en banc* is unpublished. App.46a-47a. The opinion of the federal district court is unpublished. App.50a-73a. The state court's opinions denying Johnson's *Batson v. Kentucky* claim on direct appeal and post-conviction appeal are unpublished. App.74a-79a, 92a-111a.

## STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit was entered on July 2, 2021. App.1a. The court of appeals denied Petitioner's and Johnson's petitions for rehearing and rehearing *en banc* on September 13, 2021. App. 46a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const., amend. VI**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**U.S. Const., amend. XIV § 1**

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C. § 2254(d)**

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the state court proceeding.

## STATEMENT OF THE CASE

### I. The Successful Plot to Murder Neal Sweeney

In the summer of 2008, Mohammed Aziz—an owner and operator of several gas stations in the Tulsa area—approached a friend and frequent customer, Allen Shields, about seeking revenge on the "gas man" (Tr. IV 709-17, 771-72; C.E. 4 at 20-28).[1] The "gas man" was Neal Sweeney, a local businessman who worked at Retail Fuels Marketing in Tulsa (Tr. II 272-82; Tr. III 304-12; Tr. IV 709-17; C.E. 4 at 27). Aziz owed Neal and Retail Fuels Marketing hundreds of thousands of dollars for unpaid gasoline bills, and Neal had even taken legal action against Aziz (Tr. II 274-84; Tr. III 308-12; Tr. IV 708-14; S.E. 73-74). Due to this, Aziz developed an intense hatred for Neal, was consumed by this hatred, and wished to seek revenge against Neal (Tr. II 276; Tr. IV 713-16, 770). While Aziz originally wanted someone to "beat up" Neal or plant drugs or rattlesnakes in Neal's car, Aziz ultimately decided he wanted Neal *dead* (Tr. IV 716-17, 766-72; C.E. 4 at 24-25).

After Aziz decided he wanted Neal dead, Aziz again approached Allen Shields for help (Tr. IV 716-17; C.E. 24-28). Allen subsequently reached out to

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[1] All fact citations are to the transcripts of Johnson's trial (Tr.), to the State's trial exhibits (S.E.), and to the testimony of Allen Shields admitted at Johnson's trial (C.E. 4), which are available below. *See* Sup. Ct. R. 12.7.

his brother, Fred Shields, and Fred[2] agreed to arrange Neal's murder in exchange for $10,000 (Tr. IV 717-26; C.E. 4 at 18-32). Following the agreement between Aziz and the Shields brothers, Aziz and Allen arranged for Fred to get a good look at Neal when Neal visited one of Aziz's stores (Tr. IV 716-20; C.E. 4 at 33-35). Around that same time, Fred found himself incarcerated at the Osage County Jail on unrelated charges, but while there he met the perfect "crash dummy" to murder Neal—Terrico Bethel (Tr. V 878-79, 893, 955-56; C.E. 4 at 70-71). As a result, after Fred bonded out of jail, he assisted Bethel in bonding out as well so the pair could settle the plans for Neal's murder (Tr. IV 636; Tr. V 955-56; S.E. 72).

At some point, Respondent Alonzo Cortez Johnson —cousin to the Shields brothers—also became involved in the plot to murder Neal and was ultimately *instrumental* in the plot (Tr. V 925; C.E. 4 at 69). On the evening of September 2, 2008, Johnson—who was now involved in the plot to murder Neal despite not knowing Neal or Aziz—and Fred headed to Muskogee in Johnson's white dually truck to find a vehicle to use for the murder (Tr. IV 727, 729-30; C.E. 4 at 42-46). On the way to Muskogee, Johnson called Charles Billingsley; Billingsley was Johnson's friend, owned a motorcycle shop in Muskogee, and worked next to a detail shop (Tr. IV 727; Tr. V 823-26; S.E. 101). Johnson remembered seeing several white commercial vans in front of the detail shop, and he wanted to enlist Billingsley's help in "borrowing" one of those white vans for the murder (Tr. IV 795-99; Tr. V 823-28; S.E. 101). Bil-

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[2] While Petitioner refers to the other co-conspirators by their last names, Petitioner will refer to Allen and Fred Shields by their first names to avoid any confusion.

lingsley thus entered the detail shop after closing, took a key for one of the white vans, went to the local Walmart, and made a copy of the key (Tr. IV 795-99; Tr. V 828-36). After that, Billingsley ultimately assisted Johnson in starting one of the white vans with the copied key (Tr. V 832-36).

The next day, September 3, 2008, Fred was arrested on outstanding and unrelated warrants in Tulsa County (Tr. V 926-28; Tr. VII 1035). This caused quite a complication with respect to the murder plot against Neal. Thus, that day, there were a flurry of desperate calls between Fred and his girlfriend, Meosha Maxwell (Tr. V 931-54; S.E. 75-76, 102). At first, Fred and Maxwell planned to bond Fred out of jail; however, once the pair realized that was not feasible in light of Fred's outstanding warrants in a separate county, the pair worked to connect Johnson with Bethel (Tr. V 929-54; S.E. 76). After a frantic search for Bethel's phone number or address, Maxwell eventually successfully "hooked" Johnson up with Bethel—thereafter, Fred was assured that Johnson had "everything" he needed to assist Bethel with the murder (Tr. V 940-54; S.E. 76). Johnson and Bethel subsequently communicated with each other multiple times that night (Tr. IV 635-36; Tr. V 949-52; S.E. 102).

The next morning, September 4, 2008, Johnson and Bethel communicated multiple times between 6:00 and 8:00 a.m. (S.E. 103). Johnson, in his white dually truck, also visited Allen's house and asked Allen to confirm that Aziz had the funds to pay for the murder (C.E. 4 at 46-50). Bethel was sitting in Johnson's truck at this point, and Johnson told Allen that Johnson and Bethel were about to pick up the white van in order to "get the murder done" (C.E. 4 at 46-52). Thus, Allen,

with Johnson and Bethel following him in Johnson's truck, then went to visit Aziz at one of Aziz's stores and confirmed that Aziz had money for the murder (Tr. IV 728-33; C.E. 4 at 50-54). After receiving confirmation that Aziz had money for the murder, Johnson and Bethel departed to "get the murder done" (C.E. 4 at 46-54).

Subsequently, shortly before 9:30 a.m., Bethel drove to Retail Fuels Marketing in the white van, entered the office, and shot an unsuspecting Neal in the head with a .38 caliber revolver (Tr. II 272, 286-96; Tr. III 313-22; Tr. V 893, 896-99; S.E. 77). Importantly, both Johnson's and Bethel's phone activity ceased around the time of the murder (Tr. IV 684-86; S.E. 103). However, when his phone activity resumed after the murder, Johnson quickly contacted Allen and requested the money from Aziz (C.E. 4 at 62-69; S.E. 103). Also, sometime after the murder, Johnson visited one of Aziz's stores, tapped on the glass around the register, and told Aziz to watch the news (Tr. IV 729-31; C.E. 4 at 65). Unfortunately, Neal ultimately died the next day, on September 5, 2008, as a result of the gunshot wound to his head (Tr. II 298; Tr. VII 1045-52). Thus, the horrible murder plot orchestrated by Aziz, the Shields brothers, Bethel, and Johnson was successful.

## II. State Court Proceedings

After Neal's murder, the State ultimately charged Johnson with Murder in the First Degree and Conspiracy to Commit Murder. App.92a-93a. In 2012, a jury convicted Johnson on both counts and recommended sentences of life imprisonment. App.92a-93a. Throughout his state court proceedings, beginning with

a half-hearted *Batson v. Kentucky* objection[3] during *voir dire* and jury selection at his trial, Johnson claimed that the State violated his rights under the Fourteenth Amendment by exercising its peremptory strikes in a racially discriminatory manner. App.75a, 84a-85a, 95a. However, the state courts consistently rejected Johnson's claim of discrimination.

### A. *Voir Dire* and Jury Selection

In December 2012, following extensive *voir dire* at Johnson's trial, the parties proceeded to jury selection. App.141a. From there, the State exercised its first and second strikes against prospective jurors Tawil and Dickens. App.141a. When the State exercised its second strike against Mr. Dickens, a black prospective juror, the trial court *sua sponte* requested a race-neutral reason. App.141a. The State responded that Mr. Dickens was a "professor of liberal arts," and the State often found such jurors to be "too exacting at times, too liberal." App.141a. The trial court determined the State provided a legitimate race-neutral reason (*i.e.*, *Batson* step three) and noted, "[t]here are other prospective African Americans on the jury." App.141a.

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[3] A claim or objection predicated on *Batson v. Kentucky*, 476 U.S. 79 (1986), involves three steps: 1) a defendant must make a *prima facie* case sufficient to raise an inference of discrimination in the trial court's mind; 2) if the defendant presents a *prima facie* case, the burden shifts to the State to provide race-neutral reasons for the strikes; and 3) following the State's race-neutral explanations, the trial court must determine whether the defendant has proved purposeful discrimination. *Johnson v. California*, 545 U.S. 162, 168 (2005).

Following that, the State used its third, fourth, fifth, and sixth strikes to remove prospective jurors Aramburo de Wassom, Wilson, Carranza, and Martinez App.142a-143a. Upon the State's removal of Ms. Martinez, defense counsel objected and noted that "every peremptory challenge by the State so far except Ms. Wilson has been of a minority, Dr. Tawil, [], Ms. Aramburo de Wassom, Ms. Carranza, and Mr. Dickens. And there's a pattern here, Your Honor, of striking all minorities off this jury." App.143a. In this under-developed *Batson* objection, defense counsel did not provide a record of the races of the alleged minority prospective jurors, nor did he make any argument as to how there was any alleged discrimination by the State. The trial court responded, clearly referring to *Batson* step one,

> *Well, I don't think that this establishes a pattern*. Again, in terms of—Ms. Martinez, I won't state their reasons for them, but Ms. Martinez was patently—she was hardly involved in the process. Ms. Carranza has indicated she has difficulty with English, Ms. Aramburo de Wassom told us the same. So I do not see a pattern here. And we'll note your exception.

App.143a (emphasis added).[4]

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[4] Indeed, the trial court's observations are supported by the record. During the State's *voir dire*, prospective jurors Perez, Aramburo de Wassom, and Carranza noted that English was their second language. App.113a-118a. In fact, the State challenged Ms. Aramburo de Wassom for cause based on her hesitancy regarding the language barrier, but the trial court ultimately did not remove her. App.113a-118a. Additionally, Ms. Martinez, during the State's *voir dire*, expressed frustration at her brother being

Subsequently, the State waived its seventh strike, and on its eighth strike, the State attempted to remove prospective juror Williams, another black prospective juror. App.143a-145a. The State *sua sponte* provided a race-neutral reason to the trial court and noted that Ms. Williams was a pastor, had worked with drug addicts in the past, and showed a "propensity towards treatment" and forgiveness "rather than judgment." App.144a-145a. However, the trial court rejected the State's requested strike, noting, "Well, you would have effectively eliminated all the African Americans and I'm not going to do that." App.145a. Thus, the State exercised its eighth strike on a different prospective juror and waived its ninth strike. App.145a. Later, at Johnson's formal sentencing, the trial court recalled that it "probably made an error during the voir dire" to the State's detriment, because the standard was *not* whether there would be minorities of the same race as Johnson on the jury, but whether "there was either systematic or specific discriminatory practice." App.150a-151a. The trial court also noted that the State's race-neutral reason as to Ms. Williams was legitimate. App.150a-151a.

### B. Direct Appeal

On direct appeal to the Oklahoma Court of Criminal Appeals ("OCCA"), Johnson raised eighteen claims in a brief that spanned fifty pages. Johnson's first claim was a *Batson* claim that spanned approximately two pages and was far from a model of clarity. App.153a-155a. In addition to providing a short sum-

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jailed for drunk driving, and she noted that jail was not the answer. She also explicitly stated she did not want to be on the jury. App.118a-124a.

mary of *voir dire* and the State's strikes, Johnson laid out the *Batson* standard and focused the bulk of the argument on Mr. Dickens (the target of the State's second strike). App.153a-155a. According to Johnson, "[t]he purported 'race-neutral' reason for Dickens' excusal was untenable. Dickens had many qualities which would make him a good juror," and "[a]bsent his race, Mr. Dickens would not have been excused for simply being educated." App.154a. Furthermore, Johnson pointed to the trial court's act of preventing the State from striking Ms. Williams (the target of the State's eighth strike) and argued, "[t]he trial court's statements reflect that the prosecutor was engaging in the systematic removal of minorities . . . ." App.154a.

And, while claiming that the defense provided a *prima facie* showing of discrimination, Johnson again limited his argument to Mr. Dickens. App.153a-155a. In other words, Johnson focused his claim on a particular juror, Mr. Dickens, and seemingly on step three of *Batson*, the step at which the *Batson* challenge as to Mr. Dickens's removal was resolved by the trial court. App.153a-155a. In fact, when discussing the other removed jurors by way of background, Johnson conceded that the trial court found there was no pattern of discrimination and did not argue this was in error. App.153a. Indeed, Johnson *never argued that the trial court erred* during *voir dire* and jury selection, nor did he argue that the trial court erroneously provided its own race-neutral reasons for the State's strikes. App.153a-155a. The OCCA ultimately rejected the *Batson* claim on the merits, reasoning that the "trial court's determination that the State's explanations for excusing each of the

minority jurors," *i.e.*, Mr. Dickens and Ms. Williams, "were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented." App.95a. The OCCA also determined that Johnson "ultimately failed to establish purposeful discrimination on the part of the State . . . ." App.95a.

### C. Post-Conviction Appeal

Following direct appeal, Johnson next sought post-conviction relief from the Tulsa County District Court and, later, the OCCA. In his post-conviction briefing to the trial court and the OCCA, Johnson raised five claims, *all of which had already been raised on direct appeal*. App.75a, 88a. Indeed, Johnson again raised his *Batson* claim in his post-conviction appeal to the trial court and the OCCA. App.160a-165a, 177a-180a. However, his claim *evolved* from direct appeal, and he shifted his focus to the group of jurors as to which the defense lodged a *Batson* objection and added a brand-new argument, predicated on step two of *Batson*: that the trial court erred in seemingly finding a pattern of discrimination but providing the State with race-neutral reasons as to each of its strikes. App.160a-165a, 177a-180a. In other words, Johnson switched from admitting on direct appeal that the trial court found *Batson* step one not satisfied to arguing on post-conviction that the court had found a pattern but improperly proffered its own race-neutral reasons instead of requiring the same from the State. In doing so, Johnson argued that the *Batson* claim was not thoroughly argued on direct appeal by appellate counsel, and he *expressly admitted* that appellate counsel *did not raise* the *Batson* step two argument on direct appeal. App.165a, 178a.

Ultimately, the trial court found the *Batson* claim, as well as Johnson's other claims, to be barred by *res judicata*, as each of Johnson's claims had already been raised and rejected by the OCCA on direct appeal. App.87a-91a. Furthermore, the OCCA later agreed, specifically noting,

> Johnson admits in his application filed in the District Court that each of these claims of error were raised on direct appeal, but argues that the claims were not properly presented, were not presented in a manner in which they have been presented in his post-conviction application, or were decided erroneously by this Court. As an aside, counsel states that each of these errors constitutes ineffective assistance of trial [sic] counsel.
>
> . . . Johnson admits that the claims presented in his application for post-conviction relief were raised on direct appeal, but argues that appellate counsel did not fully develop the issues, failed to reference relevant testimony and bring the same to this Court's attention . . . As indicated above, claims raised and addressed in previous appeals are barred from further consideration. We find nothing in Johnson's alleged claims of error espoused in his application for post-conviction relief that differs substantively from these same arguments which were presented on direct appeal.
>
> As for Johnson's claims of ineffective assistance of appellate counsel . . . *Johnson's supplemental arguments to the issues raised on direct appeal notwithstanding*, we find

> nothing in this record establishing that appellate counsel's performance was deficient or objectively unreasonable.

App.75a-78a (emphasis added). The OCCA ultimately denied Johnson relief. App.78a.

## III. Federal Proceedings

After unsuccessfully seeking direct and post-conviction review in the state courts, Johnson next sought federal habeas corpus relief from the United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit. App.188a-224a. Consistent with his actions in his state post-conviction proceedings, Johnson presented an ever-evolving *Batson* claim to the federal courts, and he scrutinized the OCCA's *direct appeal* decision based upon the step two *Batson* argument he did not raise until his state *post-conviction* proceedings. App.194a-195a, 202a-207a, 209a-213a, 218a-223a. While the Northern District wisely rejected Johnson's *Batson* claim, the Tenth Circuit zeroed in on Johnson's new post-conviction argument within his *Batson* claim, found the OCCA's direct appeal decision unreasonable in light of this new argument, and reviewed Johnson's *Batson* claim *de novo* and unconstrained by AEDPA deference.

### A. District Court

Johnson first sought federal habeas corpus relief from the Northern District of Oklahoma. The first of seven claims raised by Johnson was his ever-evolving *Batson* claim. App.52a-53a, 202a-207a. Indeed, while noting that he raised a *Batson* claim on direct appeal to the OCCA, Johnson also admitted that he "raised the

claim *in more detail* during post-conviction proceedings." App.202a (emphasis added). Even more so than in his post-conviction proceedings, however, Johnson focused his *Batson* claim on the step two argument that he omitted from his direct appeal brief: that the trial court erred in offering its own race-neutral reasons for the State's strikes following the defense's *Batson* objection. App.202a-207a. Indeed, armed with this new step two argument that Johnson did not make to the OCCA on direct appeal, Johnson painted the OCCA as unreasonable for finding—*on direct appeal*—that "the trial court made any determination of the race-neutral reasons of the prosecutors. There were no race-neutral reasons provided by the prosecutors. Any such reasons were provided by the trial court." App.206a.

Ultimately, however, the district court, while properly according the OCCA deference pursuant to AEDPA, rejected Johnson's claims. With respect to Johnson's *Batson* claim, the district court reviewed *voir dire* and jury selection, found the OCCA reasonably applied *Batson* (in particular, *Batson*'s third step), and afforded great deference to the trial court and the OCCA. App.55a-58a. With respect to Johnson's new step two argument, the district court rejected Johnson's ever-evolving version of events, essentially finding that the trial court did not offer its own race-neutral reasons; rather, the trial court rejected Johnson's *Batson* objection at step one:

> Moreover, the Court is not convinced the informal nature of the exchange between defense counsel and the state court justifies relief. Defense counsel objected generally to a pattern, rather than any particular strike. *The*

> *state court disagreed there was a pattern, and defense counsel dropped the matter without seeking further explanations.* (Doc. 13-25 at 179-181). On this record, the Court cannot disturb the OCCA's application of *Batson*, and Ground 1 fails.

App.58a (emphasis added). The district court denied Johnson habeas relief.

**B. Tenth Circuit**

Before the Tenth Circuit, Johnson once again focused his *Batson* claim on the step two argument he did not raise on direct appeal to the OCCA. App. 218a-223a. Indeed, when responding to Johnson's claims before the Tenth Circuit, Petitioner specifically noted that Johnson did not make this specific step two argument to the OCCA on direct appeal and reminded the Tenth Circuit to confine its review to those arguments Johnson made to the OCCA on direct appeal. App.235a-236a.

However, the Tenth Circuit ultimately rejected Petitioner's assertion that it could not consider Johnson's step two argument because Johnson did not raise such an argument on direct appeal, and it *particularly relied* on Johnson's step two argument in granting Johnson partial habeas relief. App.7a-26a. Ultimately, the Tenth Circuit found that the OCCA's decision contained an unreasonable determination of the facts *and* an unreasonable application of *Batson*. App.16a-20a. In particular, the Tenth Circuit determined, in light of Johnson's new step two argument, that the OCCA made an unreasonable determination of the facts when it "purported to approve the trial court's acceptance of the prosecutor's multiple race-neutral

reasons for his strikes—in reality, the trial court accepted only one such reason from the prosecutor and merely speculated as to the other reasons, which it supplied itself." App.17a-18a. Furthermore, the Tenth Circuit also determined, again based on Johnson's new step two argument, that the OCCA unreasonably applied *Batson* when it "considered the trial court's sua sponte speculation about potential race-neutral reasons as part of the *Batson* analysis . . . *Batson* means what it says: the court must ask the prosecutor to provide reasons, rather than merely speculating about what such reasons might be." App.18a. Thus, after finding the OCCA unreasonably applied *Batson* and made unreasonable factual findings, the Tenth Circuit ensured that it could free itself from AEDPA deference and review Johnson's claim *de novo*.

Finding itself unrestrained, the Tenth Circuit then proceeded to review Johnson's *Batson* claim *de novo*, and it determined that partial relief was required. App.20a-26a. In particular, the Tenth Circuit determined that Johnson demonstrated a *prima facie* case of discrimination (*i.e.*, step one of *Batson*) when Johnson's trial counsel raised the vague *Batson* objection to the trial court after the State's sixth peremptory strike. App.20a-24a. The Tenth Circuit based this finding, not on any argument made by Johnson's trial counsel to the trial court, but merely based upon the fact that five out of the State's six strikes were unspecified minorities. App.20a-24a. In doing so, the Tenth Circuit also declined to give deference (per this Court's rulings in *Batson*) to the trial court's determination that Johnson failed to raise an inference of discrimination (*i.e.*, demonstrate a pattern of discrimination). Instead, the Tenth Circuit deter-

mined that the trial court erred by providing its own race-neutral reasons instead of requiring the State to provide the same. App.20a-24a. However, in the end, the Tenth Circuit did not outright grant Johnson habeas relief, as it *could not* hold as a matter of law that Johnson is being held "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). App.24a-27a. Instead, the Tenth Circuit remanded the matter to the *federal* district court—rather than the state courts—to either conduct a *Batson* reconstruction hearing or to determine such a hearing is impossible or unsatisfactory. App.24a-27a. If such a hearing is impossible or unsatisfactory, the Tenth Circuit determined that outright habeas relief—in the form of release from incarceration or a new trial—is warranted.

## REASONS FOR GRANTING THE PETITION

Section 2254(d) of AEDPA requires deference to a state court's decision on a constitutional claim unless the same is "contrary to, or involved an unreasonable application of, clearly established Federal law," or is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2). This congressionally mandated deference reflects the principles underlying AEDPA: "comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Indeed, AEDPA strikes a "delicate balance" in limiting "the scope of federal intrusion into state criminal adjudications and [] safeguard[ing] the States' interest in the integrity of their criminal and collateral proceedings." *Id.* "Section 2254(d) is part of the basic structure of federal

habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). *See also Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (state court proceedings are meant to be "the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing"). This is so because "'[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Richter*, 562 U.S. at 103 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)).

Thus, consistent with the doctrines of federalism, comity, and finality, federal habeas relief is reserved *only* for "extreme malfunctions in the state criminal justice systems," and is not a "substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (citations and quotation marks omitted). In conducting review under § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree . . . ." *Id.* The federal court must focus on what was before the state court at the time it decided the claim, as well as what the state court "knew and did" at the time it rendered its decision. *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011). Federal courts must afford the state courts a great amount of deference, give the state courts "the benefit of the doubt," and presume "state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Finally, federal courts must *refrain* from readily attributing error to the state courts'

opinions, imposing opinion-writing standards on the state courts, mischaracterizing the state courts' opinions, and substituting the state courts' judgment in favor of their own. *Dunn v. Reeves*, 141 S.Ct. 2405, 2407, 2412 (2021) (*per curiam*); *Shinn v. Kayer*, 141 S.Ct. 517, 524-25 (2020) (*per curiam*); *Johnson v. Williams*, 568 U.S. 289, 298-301 (2013); *Visciotti*, 537 U.S. at 22, 24-25; *Coleman v. Thompson*, 501 U.S. 722, 739 (1991).

In this case, the Tenth Circuit flouted the above principles of federalism, comity, and finality and ignored all of the above restrictions established by AEDPA when it reviewed Johnson's *Batson* claim and granted Johnson partial relief. Not only did the Tenth Circuit consider an argument Johnson *never made* to the OCCA on direct appeal in support of his *Batson* claim, a new *Batson* step two argument, but the Tenth Circuit also egregiously mischaracterized the OCCA's decisions on direct appeal and post-conviction appeal, Oklahoma law, and Petitioner's argument in order to find a way to consider that new *Batson* argument. The Tenth Circuit's actions directly conflict with this Court's precedents. *Sexton v. Beaudreaux*, 138 S.Ct. 2555, 2560 (2018) (*per curiam*) (admonishing federal courts against considering "arguments against the state court's decision that [a defendant] never even made" to the state court rather than "considering the 'arguments or theories [that] could have supported' the state court's summary decision . . . ." (quoting *Richter*, 562 U.S. at 102)); *Pinholster*, 563 U.S. at 181-82 (section 2254's "backward-looking language requires an examination of the state-court decision at the time it was made"). It was grossly improper for the Tenth Circuit to find that the OCCA unreason-

ably applied *Batson* and made unreasonable factual determinations when the focus of the *Batson* claim currently before the Tenth Circuit was different than the focus of the *Batson* claim that was before the OCCA. Essentially, the Tenth Circuit, seduced by Johnson's ever-evolving *Batson* claim, improperly expected the OCCA to anticipate and respond to an argument that was never made to it—something federal courts cannot require state courts to do. Had the Tenth Circuit analyzed the OCCA's decision without considering Johnson's new *Batson* step two argument, it would have credited theories and arguments that supported the reasonableness of the OCCA's decision and denied habeas relief.

In granting Johnson partial relief, the Tenth Circuit disregarded the constraints set forth by § 2254 and this Court, and it essentially transformed Johnson's federal habeas proceedings into a second direct appeal. However, this Court must not allow federal courts such as the Tenth Circuit to ignore the mandates of AEDPA and to constantly second-guess state courts unrestrained by any deference. Allowing such review to continue unchecked would require busy state courts to expend precious time and energy on drafting bulletproof decisions that attempt to anticipate new arguments a defendant may raise in later proceedings. This is unacceptable and violates the principles of federalism, comity, and finality. *Williams*, 568 U.S. at 298-301. Furthermore, this Court must also remind federal courts such as the Tenth Circuit that the "state courts are the *principal forum* for asserting constitutional challenges to state convictions," rather than the other way around. *Richter*, 562 U.S. at 103 (emphasis added). In order to protect AEDPA's purpose of

furthering the principles of federalism, comity, and finality, the Tenth Circuit's decision cannot stand. *Certiorari*—if not summary reversal—is thus undoubtedly warranted here.

## I. IN REVIEWING RESPONDENT JOHNSON'S *BATSON V. KENTUCKY* CLAIM *DE NOVO*, THE TENTH CIRCUIT INVERTED THE RULES THIS COURT ESTABLISHED IN *HARRINGTON V. RICHTER*.

### A. The Tenth Circuit Violated the Anti-terrorism and Effective Death Penalty Act of 1996 in Considering an Argument Johnson Never Raised to the State Court on Direct Appeal.

Central to the Tenth Circuit's decision was its conclusion that the OCCA unreasonably applied *Batson* "to the extent that [it] considered the trial court's sua sponte speculation about potential race-neutral reasons as part of the *Batson* analysis." App.18a.[5] But recall that, on direct appeal, Johnson never raised this argument about the trial court. As noted previously, Johnson raised a cursory *Batson* claim on direct appeal that primarily focused on the State's striking of Mr. Dickens. App.153a-155a. While Johnson fleetingly

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[5] This concern regarding "the trial court's sua sponte speculation about potential race-neutral reasons" was also central to the Tenth Circuit's determination that the OCCA's decision was based on an unreasonable determination of the facts under § 2254(d)(2). App.17a-18a (labeling as "factually incorrect" the OCCA's statement that the trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons was not an abuse of discretion—as the Tenth Circuit maintained that the trial court, rather than the prosecutor, provided the race-neutral reasons).

discussed the State's other peremptory strikes by way of background, Johnson never asserted that the trial court erred, nor did Johnson argue that the trial court (in overruling Johnson's *Batson* objection) improperly provided race-neutral reasons for the State's strikes rather than requiring the same from the State. App.153a-155a. The OCCA thereafter denied Johnson's *Batson* claim on the merits, particularly finding that Johnson failed to satisfy *Batson*'s third step. App.95a.

In finding the OCCA's decision was unreasonable, and in stripping away § 2254(d) deference based on an argument not made on direct appeal, the Tenth Circuit disregarded both the clear precedents of this Court *and* Johnson's own admission in post-conviction proceedings, when he first raised this argument, that he was *expanding* his *Batson* claim. As to the former point, it is well-settled that, in conducting § 2254(d) review, a habeas court must determine "what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree . . . ." *Richter*, 562 U.S. at 102-03. A federal court must focus on what was before the state court at the time it decided the claim, as well as what the state court "knew and did" at the time it rendered its decision. *Pinholster*, 563 U.S. at 181-82 (section 2254's "backward-looking language requires an examination of the state-court decision at the time it was made").

Indeed, as recently as this Court's decision in *Sexton v. Beaudreaux*, this Court, consistent with its decision in *Harrington v. Richter*, has specifically and explicitly admonished federal courts to refrain from considering "arguments against the state court's

decision that [a defendant] never even made" to the state court rather than "considering the 'arguments or theories [that] could have supported' the state court's summary decision . . . ." *Beaudreaux*, 138 S.Ct. at 2560 (quoting *Richter*, 562 U.S. at 102). Furthermore, the *same day* the Tenth Circuit issued its opinion in this case, in contravention of *Beaudreaux*, this Court reaffirmed where review pursuant to § 2254 must begin: "We start, as we must, with the case as it came to the [state] court." *Reeves*, 141 S.Ct. at 2411. Clearly, the Tenth Circuit erred and violated AEDPA when it considered an argument Johnson never made to the OCCA on direct appeal, failed to consider Johnson's *Batson* claim as it was *originally* raised to the OCCA on direct appeal, and failed to limit its review to what the OCCA "knew and did" on direct appeal. *Reeves*, 141 S.Ct. at 2411; *Beaudreaux*, 138 S.Ct. at 2561; *Pinholster*, 563 U.S. at 181-82.

The Tenth Circuit also disregarded Johnson's own admissions as to the evolving nature of his *Batson* claim. As noted, during his post-conviction proceedings, Johnson resurrected his *Batson* claim and added a *new* argument based upon step two of *Batson*: that the trial court erred in seemingly finding a pattern of discrimination following Johnson's *Batson* objection but providing the State with race-neutral reasons as to each of its strikes. App.160a-165a, 177a-180a. Moreover, Johnson openly admitted this argument was new from direct appeal: "This is a proposition which was raised, in part, on direct appeal. The improper intervention by the trial judge in the *Batson* 'second step' *was not raised on direct appeal and should have been*. This failure raises an ineffective assistance of trial/appellate counsel issue." App.165a (emphasis

added); App.178a ("This colloquy was not provided in [Johnson]'s Brief in Chief on direct appeal."). While the state trial court and the OCCA declined to review Johnson's supplemented *Batson* claim anew, Johnson arrived to federal court with this new step two argument prominently featured in the briefing on his *Batson* claim. App.76a-77a, 87a-91a, 218a-223a. Thus, the Tenth Circuit not only improperly considered an argument not made on direct appeal, it *also ignored* that Johnson himself had admitted the argument was not made on direct appeal.

Of course, when Johnson raised his new argument to the Tenth Circuit, Petitioner asserted that the argument could not be considered because it was not before the OCCA when it adjudicated Johnson's *Batson* claim on the merits on direct appeal, relying in particular on this Court's decision in *Beaudreaux*. App.235a-236a ("For starters, [Johnson] did not make this argument to the OCCA on direct appeal"; thus, "[a]ccordingly, this Court should not consider this argument now, and to do so would be improper." (*citing Beaudreaux*, 138 S.Ct. at 2560)). The Tenth Circuit, however, rejected Petitioner's position. App.12a-13a. In doing so, the Tenth Circuit mischaracterized Petitioner's *Beaudreaux* argument, the OCCA's decision, and Oklahoma law.

*First*, with respect to Petitioner's *Beaudreaux* argument, the Tenth Circuit reasoned that the State was raising a "procedural-bar" argument, which it rejected because "according to both the state trial court and the OCCA, Johnson *did* raise his *Batson* claim on direct appeal." App.13a. Clearly, the Tenth Circuit misunderstood the difference between an exhausted *claim* and a new *argument* accompanying an exhausted claim.

In doing so, the Tenth Circuit misconstrued Petitioner's position—that the Tenth Circuit could not consider *arguments* not made to the OCCA when it had the opportunity to consider the merits of the *claim*—by finding that Petitioner was instead alleging lack of exhaustion or the procedural bar of waiver. App.12a-13a. But of course Petitioner *never* alleged that Johnson's *Batson* claim was unexhausted, that it had not been raised on direct appeal, or that the Tenth Circuit could not consider Johnson's *Batson claim* itself. *Compare* App.12a ("The State suggests . . . that this court should not consider Johnson's *Batson* claim."), *with* App.235a-236a ("For starters, [Johnson] did not make this argument to the OCCA on direct appeal"; thus, "[a]ccordingly, this Court should not consider this argument now, and to do so would be improper."). Indeed, Petitioner *admitted* Johnson's *Batson* claim was exhausted. App.232a-236a. Clearly, Johnson raised a *Batson* claim on direct appeal and such *claim* is exhausted, as was the claim considered by this Court in *Beaudreaux*. However, Johnson failed to raise his specific *argument* based on *Batson*'s second step on direct appeal—instead choosing to focus specifically on Mr. Dickens and *Batson* step three—and it is this new argument that the Tenth Circuit should have declined to consider.

*Second*, the Tenth Circuit compounded its error in misinterpreting Petitioner's *Beaudreaux* argument by then misinterpreting and mischaracterizing both the OCCA's decision and Oklahoma law. In particular, after wrongly suggesting the State was asserting a procedural bar, the Tenth Circuit concluded, based on tortured logic, that the state courts themselves "determined this particular argument was raised on direct

appeal": "Johnson also raised this claim in his post[-] conviction proceeding[,] but the OCCA, noting the claim had been previously raised and addressed in [Johnson]'s direct appeal, declined to again address the claim as it was barred as res judicata." App.13a (quotation marks and emphases omitted) (alterations in original). In other words, the Tenth Circuit determined that the procedural bar of *res judicata* applied by the state trial court and the OCCA during Johnson's post-conviction proceedings somehow proved—contrary to the wealth of evidence that Johnson *did not* raise his step two *Batson* argument on direct appeal—that Johnson raised this new argument on direct appeal.[6] App.12a-13a. But, contrary to the Tenth Circuit's puzzling conclusion, it is well settled under Oklahoma law that *res judicata* applies where a claim has been previously raised, *even if new arguments are subsequently advanced*. *Turrentine v. State*, 965 P.2d 985, 989 (Okla. Crim. App. 1998) ("The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process."); *Trice v. State*, 912 P.2d 349, 353 (Okla. Crim. App. 1996) ("Post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings.").

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[6] The Tenth Circuit's conclusion that the trial court and the OCCA somehow conceded—in applying the *res judicata* bar—that Johnson raised the argument at issue in his direct appeal is a curious and paradoxical conclusion. Indeed, had Johnson already raised the step two *Batson* argument on direct appeal, it would have been unnecessary for him to even lodge a post-conviction appeal.

And that is exactly what the trial court and the OCCA did here when they declined to revisit Johnson's *Batson* claim in light of, as the OCCA phrased it, "supplemental arguments" advanced by Johnson during his post-conviction proceedings. App.78a. Thus, by applying the doctrine of *res judicata*, in no way did the trial court or the OCCA concede or find that Johnson had previously raised his new *argument* in his original *Batson* claim. Indeed, the OCCA said quite the opposite, specifically referencing Johnson's "supplemental arguments" and his assertion that issues had not been "fully develop[ed]" on direct appeal. App. 75a-78a. And, again, Johnson has repeatedly admitted (in state and federal court) that he *did not raise* the step two *Batson* argument to the OCCA on direct appeal. App.165a, 178a, 202a. Therefore, the Tenth Circuit clearly mischaracterized the OCCA's (and the trial court's) decisions and Oklahoma law in an effort to sidestep *Beaudreaux* and review Johnson's new argument. The Tenth Circuit thereby violated not only *Beaudreaux*, but also this Court's precedents forbidding the mischaracterization of a state court's decision. *See Reeves*, 141 S.Ct. at 359; *Visciotti*, 537 U.S. at 22. The Tenth Circuit's actions in seeking to review Johnson's new argument are undoubtedly indefensible and in violation of AEDPA.

### B. The State Court's Opinion was Reasonable Considering the Arguments Johnson Raised in Support of His *Batson v. Kentucky* Claim on Direct Appeal.

Critically, the Tenth Circuit, in analyzing and finding unreasonable the OCCA's opinion in light of Johnson's new *Batson* step two argument, improperly graded the OCCA's decision against an argument

never made to it on direct appeal (even pointing to the length of the OCCA's decision), mischaracterized the OCCA's decision, readily attributed error to the OCCA, and failed to give the OCCA the benefit of the doubt. App.16a ("Recall, again, that the OCCA's discussion of Johnson's *Batson* claim spanned only three substantive sentences . . . ."). *See Reeves*, 141 S.Ct. at 2407; *Pinholster*, 563 U.S. at 181-82; *Visciotti*, 537 U.S. at 24. But when the OCCA's decision is read, as it should have been, *in light of* the arguments Johnson raised on direct appeal, it is clear that at least one fairminded jurist could agree with the correctness of the OCCA's decision.

Thus, Petitioner starts here where the Tenth Circuit should have: "the case as it came to the" OCCA. *Reeves*, 141 S.Ct. at 2411. As noted, Johnson's *Batson* claim on direct appeal was far from a model of clarity and focused predominantly on Mr. Dickens, and he never claimed that the trial court erred in overruling Johnson's *Batson* objection as to the other jurors or in purportedly providing its own race-neutral reasons for the State's strikes. App.153a-155a. It was in this context that the OCCA, affording appropriate deference to the trial court's perspective and credibility determinations, found that Johnson had not proved purposeful discrimination. App.95a. Moreover, the OCCA's finding that the Tenth Circuit would later find to be unreasonable under § 2254(d)(2)—that the "trial court's determination that the State's explanations for excusing each of the minority jurors were legitimate race-neutral reasons is not clearly against the logic and effects of the facts presented," App.95a—was not unreasonable at all in light of the arguments raised on direct appeal. Johnson's direct appeal

*Batson* claim was focused, again, on Mr. Dickens and also referenced the State's attempt to strike Ms. Williams—both jurors for whom the State proffered race-neutral reasons for striking that the trial court ultimately credited, App.141a, 144a-145a, 150a-151a —so it is no wonder why the OCCA referenced *the State's race-neutral reasons* in its decision. Indeed, it is illogical to suggest the OCCA was referencing the trial court's race-neutral reasons when Johnson himself had not brought that issue up.

Indeed, the OCCA was not required to act as an advocate for Johnson, scrutinize his two-page *Batson* claim for every possible argument, or to anticipate any additional *Batson* arguments available to Johnson. *Cf. Williams*, 568 U.S. at 299 (noting that "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion"). The OCCA was certainly not unreasonable, as the Tenth Circuit later found, to analyze the version of the *Batson* claim Johnson actually raised on direct appeal rather than clairvoyantly address the heavily supplemented claim Johnson would *later* raise. *Cf. Pinholster*, 563 U.S. at 182-83 ("It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."). Moreover, we must remember the greater context. Johnson's *Batson* claim was the first of *eighteen claims*, spanning fifty pages, raised on direct appeal. App.93a-94a, 153a-156a. Thus, it was not unreasonable—contrary to the Tenth Circuit's assertion—for a busy state court such as the OCCA to decline to expend considerable resources on such a cursory claim. This Court has previously recognized that "[t]he caseloads shouldered

by many state appellate courts are very heavy," and federal courts must read the state courts' opinions "with that factor in mind." *Williams*, 568 U.S. at 300 (footnote omitted). This Court has further refused to impose opinion-writing standards on state courts. *Coleman*, 501 U.S. at 739. The Tenth Circuit utterly ignored these considerations and context in scrutinizing the OCCA's opinion.

For all these reasons, the Tenth Circuit's act of mischaracterizing the OCCA's decision, readily attributing error, and grading the OCCA's decision in light of Johnson's new argument was entirely improper and in violation of AEDPA. Essentially, the Tenth Circuit improperly ignored any arguments or theories in support of the OCCA's decision, viewed the OCCA's decision through the lens of Johnson's new argument, and substituted its judgment for that of the OCCA in order to reach *de novo* review. *Beaudreaux*, 138 S.Ct. at 2557-60. Considered in its proper context, the OCCA's decision was neither an unreasonable application of *Batson* nor based on an unreasonable determination of the facts. The Tenth Circuit should have denied habeas relief.

## II. ADDITIONAL COMPELLING REASONS JUSTIFY THIS COURT'S REVIEW.

The errors committed by the Tenth Circuit in this case have effects *beyond* this one case. Respectfully, Petitioner contends that the Tenth Circuit's disregard for the limitations of AEDPA and this Court's precedents; its intrusion into Oklahoma's sovereignty; and its lack of respect for federalism, comity, and finality is neither new nor isolated. Indeed, the State of Oklahoma has argued, and is arguing, that the Tenth Circuit has not faithfully applied AEDPA in

other cases. *See, e.g.*, *Fontenot v. Crow*, 4 F.4th 982, 1055-83 (10th Cir. 2021) (granting outright habeas relief after overcoming time-bar (and reaching merits of underlying claim) by finding that petitioner met the high burden of actual innocence with respect to a decades-old murder; petition for writ of *certiorari* on behalf of Respondent Scott Crow forthcoming and due to be filed by January 2022); *Sharp v. Harris*, Petition for Writ of *Certiorari*, No. 19-1105 (U.S.), *cert. denied*, 141 S.Ct. 124 (2020) (arguing that the Tenth Circuit found the OCCA's entire decision unreasonable in light of an isolated factual finding, resulting in a remand for an evidentiary hearing); *Sharp v. Smith*, Petition for Writ of *Certiorari*, No. 19-1106 (U.S.), *cert. denied*, 141 S.Ct. 186 (2020) (arguing that the Tenth Circuit improperly granted habeas relief after, among other things, *sua sponte* finding that the OCCA failed to make a merits adjudication because its analysis was allegedly too cursory and applying certain Supreme Court law retroactively despite a clear *Teague*[7] bar). This Court's intervention, to ensure fidelity to the limitations of AEDPA and this Court's precedents, is warranted.

Moreover, importantly, this case concerns more than mere error correction, as this case strikes at the heart of AEDPA itself. Indeed, this Court has repeatedly recognized the respect that must be afforded to state courts and to their fidelity to the Constitution. *See, e.g., Kayer*, 141 S.Ct. at 526 ("Under AEDPA, state courts play the leading role in assessing challenges to state sentences based on federal law."); *Richter*, 562 U.S. at 103 (state courts are "the principle forum for

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[7] *Teague v. Lane*, 489 U.S. 288 (1989).

asserting challenges to state convictions"); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (*per curiam*) ("state courts . . . have primary responsibility for supervising defense counsel in state criminal trials"); *Williams*, 529 U.S. at 436-37 ("state judiciaries have the duty and competence to vindicate rights secured by the Constitution").

Truly, the Tenth Circuit violated every principle of AEDPA in this case when it considered an argument Johnson never made to the OCCA on direct appeal, mischaracterized the OCCA's decision and Oklahoma law, failed to give the OCCA the benefit of the doubt, readily attributed error to the OCCA, and failed to consider arguments supporting the OCCA's decision. This significant and unwarranted intrusion into Oklahoma's sovereignty contravenes Congress's commands in AEDPA and must not be allowed to continue.[8] *See Richter*, 562 U.S. at 103 (recognizing that the intrusion

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[8] Johnson may argue that no real harm has come in this case, at least not yet, because all the Tenth Circuit has done is order an evidentiary hearing. However, an evidentiary hearing is a weighty intrusion into state sovereignty, especially where, as here, the evidentiary hearing will be held in *federal* court rather than in state court. And, indeed, this evidentiary hearing—because of the federal courts' continued intrusion—has the potential to lead to the grant of *further* habeas relief to Johnson. The Tenth Circuit has wrongly and improperly held that the OCCA committed egregious errors in this case. *See Bobby v. Dixon*, 565 U.S. 23, 27 (2011) (*per curiam*) (describing the preconditions for relief set forth in 28 U.S.C. § 2254(d) as requiring state courts to commit "egregious errors"). Because of this, the State will expend significant resources in defending a sentence rendered over nine years ago concerning a murder occurring over thirteen years ago. Moreover, the surviving family members of Neal Sweeney will relive their worst nightmare once more.

into state sovereignty posed by the writ of habeas corpus is almost unmatched).

## CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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