No. 22-6500

In the

SUPREME COURT OF THE UNITED STATES

RICHARD EUGENE GLOSSIP,

***Petitioner*,**

-vs-

THE STATE OF OKLAHOMA,

Respondent.

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXECUTION DATE FEBRUARY 16, 2023

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January 10, 2023

CAPITAL CASE

QUESTION PRESENTED

Whether this Court has jurisdiction over claims procedurally defaulted by adequate and independent state law grounds?

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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 November 17, 2022. *See Glossip v. State*, No. PCD-2022-819 (Okla. Crim. App. Nov. 17, 2022) (unpublished).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-1997-244. In 2004, Petitioner was tried by jury for one count of first degree malice murder for the murder of Barry Van Treese.[1] A bill of particulars was filed alleging two statutory aggravating circumstances: (1) Petitioner committed the murder for remuneration or employed another to commit the murder for remuneration or the promise of remuneration and (2) 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. The jury found Petitioner guilty as charged, found the existence of the murder-for-remuneration aggravating circumstance, and recommended a sentence of death. Petitioner was sentenced accordingly.

The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's conviction and sentence in a published opinion on April 13, 2007. *See Glossip v. State*, 157 P.3d 143 (Okla. Crim. App. 2007). The OCCA denied Petitioner's rehearing petition on June 1, 2007. Order Denying Rehearing and Directing Issuance of

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[1] This was Petitioner's second trial. His first conviction and death sentence were reversed on direct appeal due to ineffective assistance of trial counsel.

Mandate, OCCA No. D-2005-310 (unpublished). This Court denied Petitioner's petition for writ of certiorari. *Glossip v. Oklahoma*, 552 U.S. 1167 (2008).

Petitioner filed an application for state post-conviction relief on October 20, 2006, which was denied by the OCCA on December 6, 2007. Opinion Denying Application for Post-Conviction Relief, OCCA No. PCD-2004-978 (unpublished).

Petitioner unsuccessfully sought a writ of habeas corpus from the United States District Court for the Western District of Oklahoma. *Glossip v. Workman*, No. CIV-08-0326-HE, 2010 WL 2196110 (W.D. Okla. May 26, 2010) (unpublished). The United States Court of Appeals for the Tenth Circuit denied Petitioner's habeas appeal. *Glossip v. Trammell*, 530 F. App'x 708 (10th Cir. July 25, 2013) (unpublished). This Court then denied Petitioner's petition for writ of certiorari. *Glossip v. Trammell*, 134 S. Ct. 2142 (2014).

Thereafter, on the literal eve of his execution, Petitioner filed a second application for post-conviction relief raising various arguments pertaining to the credibility of co-defendant and State's witness Justin Sneed. The OCCA granted a brief stay of execution before denying relief on September 28, 2015. Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing, Motion for Discovery and Emergency Request for a Stay of Execution, OCCA No. PCD-2015-820 (unpublished). The OCCA denied Petitioner's unauthorized petition for rehearing on the following day. Opinion Denying Glossip's Petition for Rehearing, OCCA No. PCd-2015-820 (unpublished). This Court denied Petitioner's application

for a stay of execution and petition for writ of certiorari. *Glossip v. Oklahoma*, 136 S. Ct. 26 (2015).

Petitioner's execution was indefinitely stayed when it was discovered that the State did not possess one of the lethal injection drugs provided for by the State's execution protocol. On July 1, 2022, at the conclusion of lengthy litigation regarding the State's execution protocol, the OCCA scheduled Petitioner's execution for September 22, 2022. That same day, Petitioner filed his third application for post-conviction relief. He alleged, *inter alia*, that he was actually innocent of the murder of Barry Van Treese.

On August 16, 2022, Oklahoma Governor J. Kevin Stitt granted Petitioner a stay of execution until December 8, 2022. On September 22, 2022, Petitioner filed his fourth application for post-conviction relief, in which he raised, *inter alia*, the *Brady*[2] violations he presents in the Petition.

Again, on November 2, 2022, Governor Stitt granted Petitioner a stay of execution until February 16, 2023.

On November 10, 2022, the OCCA denied Petitioner's third application for post-conviction relief, holding that Petitioner had failed to establish his innocence and that Justin Sneed's testimony "was sufficiently corroborated by compelling

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[2] *Brady v. Maryland*, 373 U.S. 83 (1963) (a state violates due process if the prosecution suppresses favorable evidence which is reasonably probable to have affected the outcome of the trial).

evidence."[3] Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing and Motion for Discovery, slip op. at 10, OCCA No. PCD-2022-589 (unpublished).

On November 17, 2022, the OCCA denied Petitioner's fourth application for post-conviction relief because the claims raised therein could have been, and should have been, raised in earlier proceedings. Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing and Motion for Discovery, OCCA No. PCD-2022-819 (unpublished).

On January 3, 2023, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

STATEMENT OF FACTS

The OCCA set forth the relevant facts on direct appeal:

> In January of 1997, Richard Glossip worked as the manager of the Best Budget Inn in Oklahoma City, and he lived on the premises with his girlfriend D–Anna Wood. Justin Sneed, who admitted killing Barry Van Treese, was hired by Glossip to do maintenance work at the motel.
>
> Barry Van Treese, the murder victim, owned this Best Budget Inn and one in Tulsa. He periodically drove from his home in Lawton, Oklahoma to both motels. The Van Treese family had a series of tragedies during the last six months of 1996, so Mr. Van Treese was only able to make overnight visits to the motel four times in that time span. His usual habit was to visit the motel every two weeks to pickup the receipts, inspect the motel, and make payroll.

[3] Per Oklahoma law, claims of factual innocence are not subject to rules of procedural default. Opinion Denying Subsequent Application for Post-Conviction Relief, Motion for Evidentiary Hearing and Motion for Discovery, slip op. at 6, OCCA No. PCD-2022-589 (unpublished).

The State presented testimony about the physical condition, financial condition, and the day to day operations of the motel. At the beginning of 1997, Mr. Van Treese decided to do an audit of both motels after it was determined that there were shortfalls. Before Mr. Van Treese left for Oklahoma City, Donna Van Treese, Barry's wife, calculated Glossip's net pay at $429.33 for the period ending January 5th, 1997, because Glossip had $211.15 in draws.[2] On January 6, 1997, she and Mr. Van Treese reviewed the books and discovered $6,101.92 in shortages for the Oklahoma City motel in 1996. Mrs. Van Treese testified her husband intended to ask Glossip about the shortages.

2 Glossip's salary was $1,500 per month, which was divided twice monthly. The net amount was after other usual deductions.

Sometime in December, Mr. Van Treese told Billye Hooper, the day desk manager, that he knew things needed to be taken care of, and he would take care of them the first of January. Hooper believed Van Treese was referring to Glossip's management of the motel.

Justin Sneed, by all accounts, had placed himself in a position where he was totally dependent on Glossip. Sneed started living at the motel when he came to Oklahoma City with a roofing crew from Texas. Sneed quit the roofing crew and became a maintenance worker at the motel. He made no money for his services, but Glossip provided him with a room and food. Sneed admitted killing Mr. Van Treese because Glossip offered him money to do it. The events leading up to the killing began with Van Treese's arrival at the motel on January 6.

Van Treese arrived at the Best Budget Inn in Oklahoma City on January 6, 1997, around 5:30 p.m. Around 8:00 or 9:00 p.m., Van Treese left Oklahoma City to go to the Tulsa Best Budget Inn to make payroll and collect deposits and receipts. Hooper testified Van Treese was not upset with Glossip and did not say anything to her about shortages before he left for Tulsa. Van Treese did tell Hooper he planned to stay for a week to help remodel rooms.

William Bender, the manager of the Tulsa motel, testified that Mr. Van Treese was very upset. He had never seen him that angry. Van Treese inspected the daily report for the motel, and he checked to see if the daily report matched rooms actually occupied. He told Bender that there were missing registration cards, missing receipts and unregistered occupants at the Oklahoma City motel.

He told Bender that he told Glossip that he had until Van Treese arrived back at Oklahoma City to come up with the missing receipts. Then he was going to give Glossip another week to come up with the missing registration cards and to get the receipts in order. He also told Bender that if Glossip were fired Bender would manage the Oklahoma City motel. Van Treese left the Tulsa motel and arrived back at the Oklahoma City motel at about 2:00 a.m. on January 7.

Sneed, also known as Justin Taylor, testified that in exchange for maintenance work, Glossip let him stay in one of the motel rooms. Sneed said he only met Van Treese a few times, and he saw him at the motel with Glossip on the evening of January 6, 1997. Sneed testified that around 3:00 a.m. on January 7, 1997, Glossip came to his room. Glossip was nervous and jittery. Glossip wanted Sneed to kill Van Treese and he promised him $10,000.00 for killing Van Treese. Sneed testified that Glossip had asked him to kill Van Treese several times in the past and the amount of money kept getting bigger and bigger.

Glossip suggested that Sneed take a baseball bat, go into Van Treese's room (room number 102), and beat him to death while he slept. Glossip said that if Van Treese inspected the rooms in the morning, as he intended to do, he would find that none of the work had been done. Glossip told Sneed that both of them would be out of a job.

Sneed went over to the Sinclair Station next door and bought a soda and possibly a snack. He then went back to his room and retrieved the baseball bat. Sneed said he went to Van Treese's room and entered using a master key that Glossip had given him. Van Treese woke up and Sneed hit him with the bat. Van Treese pushed Sneed, and Sneed fell into the chair and the bat hit and broke the window. When Van Treese tried to get away, Sneed threw him to the floor

and hit him ten or fifteen times. Sneed also said that he pulled out a knife and tried to stab Van Treese a couple of times, but the knife would not penetrate Van Treese. Sneed received a black eye in the fight with Van Treese. He later told others that he fell in the shower and hit his eye.

A long time resident of the motel, John Beavers, was walking outside when heard strange noises coming from room 102. He then heard the glass breaking. Beavers believed there was a fight going on in room 102.

After Sneed killed Van Treese he went to the office and told Glossip he had killed Van Treese. He also told him about the broken window. Sneed said that he and Glossip went to room 102 to make sure Van Treese was dead. Glossip took a $100 bill from Van Treese's wallet.

Glossip told Sneed to drive Van Treese's car to a nearby parking lot, and the money he was looking for would be in an envelope under the seat. Glossip also told him to pick up the glass that had fallen on the sidewalk.

Sneed retrieved the car keys from Van Treese's pants and drove Van Treese's car to the credit union parking lot. He found an envelope with about $4000.00 cash under the seat. He came back and swept up the glass. He put the broken glass in room 102, just inside the door. He said that Glossip took the envelope from him and divided the money with him. He also testified that Glossip helped him put a shower curtain over the window, and he helped him cover Van Treese's body. According to Sneed, Glossip told him, that if anyone asked, two drunks got into a fight, broke the glass, and we ran them off. Sneed testified that Glossip told him to go buy a piece of Plexiglas for the window, and some Muriatic acid, a hacksaw, and some trash bags in order to dispose of Van Treese's body.

D–Anna Wood testified that she and Glossip were awakened at around 4:00 a.m. by Sneed. She testified that Glossip got out of bed and went to the front door. When he returned, Glossip told her that it was Sneed reporting that two drunks got into a fight and broke a window. She testified that Glossip then returned to bed.

Glossip told police during a second interview, that Sneed told him that he killed Van Treese. He denied ever going into room 102, except for assisting with repairing the window. He said he never saw Van Treese's body in the room.

The next morning, Billye Hooper arrived at work and was surprised to see that Glossip was awake. She also noticed that Mr. Van Treese's car was gone. She asked Glossip about the car, and Glossip told her that Mr. Van Treese had left to get supplies for remodeling rooms. A housekeeper testified that Glossip told her to clean the upstairs rooms, and he and Sneed would take care of the downstairs, where room 102 was located.

Later that afternoon, employees found Mr. Van Treese's car in a credit union parking lot near the motel, and a search for Van Treese began. Glossip and D–Anna Wood were at Wal–Mart shopping. They returned to the motel, because Hooper paged them and told them to come back. The police were contacted sometime after Mr. Van Treese's car was found.

Cliff Everhart, who worked security for Mr. Van Treese in exchange for a 1% ownership, was already at the motel. He told Sneed to check all of the rooms. Sneed indicated that he did so. Everhart, Glossip and Wood drove around looking for Van Treese in nearby dumpsters and fields.

Everhart and Oklahoma City Police Sgt. Tim Brown began discussing Glossip's conflicting statements, so they decided to check room 102 on their own. At about 10:00 p.m. they discovered Van Treese's body in his room. Sneed had already left the motel that afternoon, and he was not apprehended until a week later. Glossip was taken into custody that night, questioned and released. The next day, Glossip began selling his possessions. He told people he was leaving town. However, before he could leave town, he was taken into custody again for further questioning.

Subsequent searches revealed that Sneed possessed approximately $1,700.00 in cash, and that Glossip possessed approximately $1,200.00. Glossip claimed this

> money came from his paycheck and proceeds from the sale of vending machines and his furniture.

Glossip, 157 P.3d at 147–50 (paragraph numbers omitted).[4]

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[4] Respondent has an obligation to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." S. CT. R. 15.2. There are many misstatements of fact in the Petition. However, the facts of this case are not particularly relevant given the adequate and independent state law ground applied by the OCCA. Thus, at this point, Petitioner's misstatements do not bear on whether his *Brady* claims would properly be before this Court. Nevertheless, Respondent offers a couple of examples, as they reflect on the credibility of the Petition as a whole.

Petitioner asserts that police "obtained a statement from a guest in the room next to 102 that he had heard a woman's voice amid sounds of the assault." Pet. at 4. The police report provided by Petitioner actually asserts that the witness "believes one of the voices he heard arguing was a male voice and the other voice *he couldn't tell if it was male or female*." Pet. App. 104a (emphasis added).

Petitioner also claims the two attorneys who ultimately represented him during the second trial "had only six months to prepare." Pet. at 16. This is entirely untrue. The two attorneys who represented Petitioner in his 2004 retrial were part of a three-lawyer team and had been involved in the case since at least June 17, 2002 (O.R. 667-68).

There is also one persistent legal misconception throughout the Petition. Indeed, it appears in Petitioner's first question presented. Petitioner repeatedly argues the OCCA's application of its own statutory requirement (of clear and convincing evidence) for permitting relief, on any claim, in a successive post-conviction application contravenes *Brady*. A*ny* adequate and independent state law ground for denial precludes this Court's exercise of jurisdiction, whether that state law ground is procedural *or* substantive. *Coleman*, 501 U.S. at 729. There are two requirements for overcoming a waiver under Oklahoma law: the procedural requirement that claims raised in a successive post-conviction application rely on a previously unavailable legal or factual basis, and the substantive requirement that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense" or sentenced the applicant to death. OKLA. STAT. tit. 22, § 1089(D)(8). Petitioner did not satisfy either. That the OCCA alternatively held that *Brady* was not violated is of no moment. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law"); *cf. Wright v. West*, 506 U.S. 277, 292 (1992) ("the notion that different standards should apply on direct and collateral review runs throughout our recent habeas jurisprudence"); *Brown v. Muniz*, 889 F.3d 661, 675 (9th Cir. 2018) (this Court's "charge [under 28 U.S.C. § 2244(b)'s prohibition on second or successive habeas petitions] is to decide whether [a petitioner's] claim is (1) based on newly discovered evidence and also (2) *establishes that he is actually innocent of the crimes alleged*—not whether [he] merely sustained a prejudicial constitutional injury.") (quotation marks and citation omitted, final alteration adopted, emphasis adopted).

REASONS FOR DENYING THE WRIT

The two *Brady* claims that form the basis of the Petition were raised for the first time in Petitioner's fourth application for state post-conviction relief. With limited exceptions, the OCCA will not consider claims raised in successive post-conviction applications. Thus, the OCCA found Petitioner's claims waived. This Court does not have jurisdiction over a state court decision denying relief based on an adequate and independent state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Accordingly, the Petition should be denied.

PETITIONER'S *BRADY* CLAIMS WERE BARRED IN STATE COURT BY ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

A. Background of Petitioner's Claims.

In his fourth post-conviction application, Petitioner raised five propositions of error, including two claims that the State withheld favorable evidence in violation of *Brady*. In Proposition One, Petitioner argued the State knew before his 2004 retrial that Mr. Sneed wanted to recant his testimony but did not disclose this information to the defense. In Proposition Four, Petitioner claimed the State failed to disclose that the prosecutor induced Mr. Sneed to lie during the second trial about stabbing Mr. Van Treese.

Briefly, Proposition One was based on visits to Mr. Sneed *by Petitioner's own attorneys* before his 2004 retrial in which the attorneys tried to persuade Mr. Sneed not to testify (1/16/2003 Tr. 18; 11/3/2003 Tr. 9). 9/22/2022 Successive Application for Post-Conviction Relief, OCCA No. PCD-2022-819, Appx., Att. 11; 10/10/2022

Respondent's Response to Petitioner's Successive Application for Post-Conviction Relief (OCCA No. PCD-2022-819), Att. 2 at 68. Petitioner now claims Mr. Sneed wanted to "recant" his testimony. However, while Mr. Sneed did not want to testify again, and hoped that he could at least obtain some consideration from the State if he did testify again, he has *never* stated that he was considering testifying contrary to his testimony at the first trial or affirmatively disclaiming that testimony. *See* Respondent's Response to Petitioner's Successive Application for Post-Conviction Relief (OCCA No. PCD-2022-819), Att. 3 at 24 (Mr. Sneed: "I tried to tell them [his family] the only legal way that I ever really seen being able to go home would be if I recanted the story about everything that I already had happened [sic] which is really impossible because I told the truth."); 9/22/2022 Successive Application for Post-Conviction Relief, OCCA No. PCD-2022-819, Appx., Att. 32, ¶ 24 ("During the August 15, and August 26, 2022 interviews [with the Reed Smith law firm], Sneed denied he told an Assistant District Attorney that he wanted to substantively change his testimony regarding Glossip's urging Sneed to murder Barry Van Treese.").

Proposition Four was based on a document within the District Attorney's file, which the Attorney General permitted Petitioner's counsel to inspect, which reflects a conversation between the lead prosecutor in the 2004 retrial and Mr. Sneed's counsel that took place during the trial, before Mr. Sneed took the stand. More specifically, the Medical Examiner testified in 2004 that, in addition to the fatal blunt force injuries, someone may have attempted to stab Mr. Van Treese between 5 and 7 times with a broken pocketknife that was found under Mr. Van Treese's body (2004

Tr. X 86, 127-28; 2004 Tr. XI 22, 45-46, 65, 70-83, 94-99). The pocketknife belonged to Mr. Sneed (2004 Tr. XII 104). Mr. Sneed had previously, in his interview with police, denied "stabbing" Mr. Van Treese (2004 Tr. XIII 14-15). After the Medical Examiner's testimony, the prosecutor sought clarification, through Mr. Sneed's counsel, before Mr. Sneed's testimony. The prosecutor then announced on the record that this conversation had taken place (2004 Tr. XII 107-08). During his direct examination, Mr. Sneed testified that he tried to stab Mr. Van Treese one time (2004 Tr. XII 102). Petitioner's counsel exploited Mr. Sneed's failure to previously admit he attempted to stab Mr. Van Treese, as well as apparent discrepancies between this testimony and that of the Medical Examiner, on cross-examination and in closing argument (2004 Tr. XIII 6-7, 14-15, 35-36, 99; 2004 Tr. XV 141-42).

The OCCA rejected Propositions One and Four as waived under state law. Pet. App. 4a-11a, 13a-15a.

B. This Court Lacks Jurisdiction over the OCCA's Denial of Relief Pursuant to Adequate and Independent State Law Grounds.

With limited exception, the OCCA does not consider claims raised in a successive post-conviction application which could have been raised in earlier proceedings. OKLA. STAT. tit. 22, § 1089(D)(8) (the OCCA "may not" grant relief for claims raised in successive post-conviction applications unless: 1) the legal or factual basis therefore was previously unavailable and 2) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have

rendered the penalty of death"); *see also Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005) ("this Court's rules do not impede the raising of factual innocence *at any stage* of an appeal" (emphasis adopted)). In addition, the OCCA's rules require applicants to raise claims based on any previously unavailable legal or factual bases no more than sixty days after discovery of the new bases. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App.

The OCCA adhered to state law, clearly and expressly applying both § 1089(D)(8) and Rule 9.7(G)(3) to Petitioner's claims.[5] Pet. App. 4a-11a, 13a-15a. In doing so, the OCCA considered, and rejected, Petitioner's arguments that the factual bases for his claims could not have been discovered previously. Pet. App. 9a-11a, 14a.[6] The OCCA also alternatively found no merit to Petitioner's claims. 11a-13a, 15a-18a.

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

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural.

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[5] The State did, indeed, agree to waive any reliance on procedural bars. S*ee* Pet. at 30. However, the OCCA declined to accept the State's offered waiver: "This Court alone will determine whether the rules of this Court should be abandoned." Pet. App. 8a.

[6] Petitioner asserts that, "For the memo [regarding the prosecution's conversation with Mr. Sneed's counsel about the knife], the OCCA rejected the claim only on the merits." Pet. at 31. This is incorrect. In fact, Petitioner later *admits* "the OCCA noted the *claims* could have been raised earlier and were, therefore, waived. App. 9a, 16a." Pet. at 38 (emphasis added). *See* Pet. App. 14a ("Under our rules, this claim is waived."); Pet. App. 15a ("*Were we* to address the claims raised in Propositions Two, Three, and Four, we *would* find that they have no merit.") (emphasis added).

> In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, 501 U.S. at 729 (citations omitted).

Petitioner admits the OCCA refused to consider his claims because they were waived. Pet. at 38. The fact that the OCCA also, alternatively, addressed the claims' merits does not matter. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.") (emphasis adopted).

With one exception (in a footnote), Petitioner does not challenge the adequacy of the State's waiver rules. Indeed, the Tenth Circuit has repeatedly found § 1089(D)(8) to be adequate and independent.[7] *Pavatt v. Carpenter*, 928 F.3d 906, 929 (10th Cir. 2019) (en banc).

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

Petitioner does allege that, as applied to his case, the state law grounds for denial were dependent on federal law. The question of "independence" is one for this Court to determine. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). In *Long*, this Court adopted the following standards for determining independence:

> when . . . 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 face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, [the state law ground is independent so long the court] make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-41. Thus, a state ground is dependent when "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id*. at 1042.

1. Proposition One

Petitioner's alleges, with respect to Proposition One, that when the OCCA determined that Petitioner's claim could have been raised earlier, "that conclusion is 'interwoven' with its view on the merits of the claim . . . ." Pet. at 38. According to Petitioner, the OCCA's finding (pursuant to § 1089(D)(8)(b)(1)) that the factual basis for Petitioner's claim regarding "Sneed's desire to recant" was available as early as

2004 amounts to a holding as to both the "suppression" and "materiality" elements of *Brady*.[8] Pet. at 38. Not so.

The portion of the opinion cited by Petitioner contains the OCCA's discussion of whether his claim was waived or whether the factual basis was not previously available. Pet. App. 9a-11a. The court noted that Petitioner's trial attorneys knew Mr. Sneed did not want to testify and had even visited Mr. Sneed and attempted to convince him that he could refuse to testify at Petitioner's retrial without losing the benefit of his bargain with the State. Pet. App. 9a-10a. The OCCA then held that

> These facts support a conclusion that, first, this issue is one which could have been raised during the second trial, because [Petitioner's] attorneys knew or should have known that Sneed was reluctant to testify. Second, the information that Sneed was reluctant to testify does not qualify as *Brady* evidence, which would have been subject to disclosure by the State.
>
> The facts are that during this second trial, Sneed confirmed that he believed that his plea deal would be void and he would face the death penalty if he did not testify. [Petitioner's] Attorney Burch attempted to rid Sneed of that belief before the trial and tried to convince him that he did not have to testify again. The attorneys representing Glossip at trial were associated with Burch as co-counsel during the time Burch talked to Sneed. They either knew or should have known that Burch approached Sneed and talked to him about testifying. If they did not know before trial, they found out during the evidentiary hearing where Burch was allowed to withdraw from his representation. This is not new evidence under Oklahoma

[8] In reality, this appears to be a thinly veiled disagreement with the OCCA's factual finding that "[t]here is no evidence that Sneed had any desire to recant or change his testimony. His desire was either to get a better deal than his life sentence without parole or to protect himself in his new prison life." Pet. App. 9a. But this Court rarely grants a petition for writ of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. CT. R. 10. Further, the merits of this claim are beyond this Court's jurisdiction.

> law, and this claim could have, and should have, been raised on direct appeal.
>
> Even if this claim overcomes the waiver hurdle, the claim does not rise to the level of a *Brady* violation. [The Court then proceeds to find the evidence not material.]

Pet. App. 10a-11a (footnote omitted).

The OCCA's waiver holding was not intertwined with federal law but was based on whether the factual basis for the claim was previously available. But even if it were, the OCCA's "decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds[.]" *Long*, 463 U.S. at 1041. Thus, this Court "of course, will not undertake to review the decision." *Id*; *see Harris*, 489 U.S. at 264 n.10 ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law.") (emphasis adopted).

Petitioner has failed to show that the state procedural grounds of waiver applied to Proposition I are dependent on federal law.

Petitioner also includes a footnote with an assertion that the state grounds were not adequate. Pet. at 39 n.16. Petitioner appears to be arguing that, because his 2004 trial attorneys did not have access to a letter Mr. Sneed wrote to his attorney (which the State obviously could not possibly have suppressed, as this was a privileged communication not within the State's knowledge), its finding that the factual basis for Proposition One was available in 2004 was arbitrary.

A state law ground is adequate if it is applied even-handedly in the vast majority of cases. As explained above, the Tenth Circuit has repeatedly found § 1089(D)(8) to be adequate. In arguing to the contrary, Petitioner relies on a concurring opinion in which Justice Kennedy wrote that state courts may not "bar review of federal claims by invoking new procedural rules without adequate notice to litigants . . . ." *Beard v. Kindler*, 558 U.S. 53, 63-64 (2009) (Kennedy, J., concurring). The OCCA invoked no novel rule in Petitioner's case.[9] Petitioner simply disagrees with the OCCA's application of that rule in his case, a disagreement which this Court cannot resolve. *See* S. CT. R. 10 ("A petition for 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.").

The legal claim presented in Petitioner's first question presented was denied based on adequate and independent state law grounds. His request for certiorari review should be denied.

2. Proposition Four

Regarding Proposition Four, Petitioner begins by claiming, contrary to his prior admission, that the OCCA did not bar this claim. Pet. at 39. Respondent has shown above that Petitioner's admission that this claim *was* waived is correct. *See* Pet. at 38 ("the OCCA noted the *claims* could have been raised earlier and were,

[9] Petitioner also cites a practice manual which asserts that state courts "should not be allowed to avoid federal claims by deliberately fabricating spurious state grounds for decision." 16B Charles Allen Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Federal Procedure: Jurisdiction* § 4026 (3d ed. Apr. 2022 update). The OCCA did not fabricate a state ground for decision. It applied a rule that has been in place for decades and repeatedly found by the Tenth Circuit to be adequate.

therefore, waived. App. 9a, 16a." (emphasis added)); Pet. App. 14a ("Under our rules, this claim is waived."); Pet. App. 15a ("*Were we* to address the claims raised in Propositions Two, Three, and Four, we *would* find that they have no merit.") (emphasis added).

Petitioner further contends that the OCCA's "denial is entirely premised on the notion that the prosecution's key witness 'could not have been impeached any further than he had already been impeached.' App. 17a. As discussed *supra*, that is a question wrapped up in federal law and confers jurisdiction on this Court." Pet. at 39. Petitioner is again incorrect. He is complaining about the OCCA's alternative merits analysis. But the OCCA is free to both apply a state law ground and "reach a federal question without sacrificing its interests in finality, federalism, and comity." *Harris*, 489 U.S. at 264 n.10. Accordingly, the OCCA's decision was not dependent on federal law.

Petitioner makes a similar argument regarding the OCCA's finding that he was aware of the factual basis for this claim before his 2004 retrial. Pet. at 40. This argument fails for the same reason as Petitioner's argument that the OCCA's finding (pursuant to § 1089(D)(8)(b)(1)) that the factual basis for Petitioner's claim regarding "Sneed's desire to recant" was available as early as 2004 amounts to a holding as to both the "suppression" and "materiality" elements of *Brady*, discussed *supra*. Although he fails to provide a citation, it appears Petitioner is referring to the following paragraph from the OCCA's opinion:

> Glossip relies on a memo from the prosecution files as evidence to show that the prosecution coached Sneed's

> testimony and the evidence of coaching constitutes new evidence. During the trial, however, the prosecution told the trial court that it spoke with Sneed's attorney after the medical examiner testified about numerous marks on Van Treese's body consistent with superficial stab wounds. The fact that the prosecution talked to Sneed or his attorney about other testimony during the trial is not new evidence. There is nothing new in this claim that could not have been raised earlier.

Pet. App. 14a. The OCCA's waiver holding was not intertwined with federal law but was based on whether the factual basis for the claim was previously available. Moreover, even if the OCCA's holding was intertwined with federal law, it also "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds[.]" *Long*, 463 U.S. at 1041. Thus, this Court "of course, will not undertake to review the decision." *Id*; *see Harris*, 489 U.S. at 264 n.10. The claim underlying Petitioner's second question presented was denied based on adequate and independent state law grounds.

Finally, Petitioner requests that this Court hold his petition in abeyance until it decides another case in which a death row inmate has alleged a state's post-conviction procedure is dependent on federal law, *Cruz v. Arizona*, No. 21-846. *Cruz* was argued on November 1, 2022. Petitioner's execution date is February 16, 2023. Petitioner has not requested a stay of his execution, nor could he satisfy the standard therefore with his procedurally defaulted claims. *See Glossip v. Gross*, 576 U.S. 863, 876 (2015) (among the requirements for a stay of execution is a showing by the applicant that his claim is likely to succeed on the merits). Accordingly, unless this Court issues an opinion in *Cruz* very shortly, Petitioner's petition will be mooted.

In any event, it is unlikely this Court's decision in *Cruz* will impact Petitioner's case. Cruz argues the Arizona Supreme Court's application of an Arizona rule of criminal procedure was dependent on federal law because, when the court failed to retroactively apply this Court's decision in *Simmons*[10] to his case in spite of a subsequent ruling by this Court in *Lynch*[11] that *Simmons* applies in Arizona, it violated federal law. 6/13/2022 Brief for Petitioner at 21-23. Cruz also argued the Arizona Supreme Court interpreted this Court's decision in *Lynch* in order to determine whether the state rule of procedure barred his claim. 6/13/2022 Brief for Petitioner at 44-47. Thus, according to *Cruz*, the Arizona Supreme Court's decision was interwoven with federal law. 6/13/2022 Brief for Petitioner at 44-47.

As shown above, the OCCA did not rely on federal law in any way when it determined Petitioner's claims were previously available. *Cruz* will not have any bearing on this case. Respondent respectfully asks this Court not to hold the petition in abeyance.

CONCLUSION

The Petition for Certiorari should be denied.

[10] *Simmons v. South Carolina*, 512 U.S. 154 (1994).
[11] *Lynch v. Arizona*, 578 U.S. 613 (2016).

Respectfully submitted,

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