No. _____

IN THE
Supreme Court of the United States

TREMANE WOOD,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

In *Case v. Nebraska*, 381 U.S. 336 (1965), this Court granted certiorari to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Id.* at 337. The Court did not reach the question after it was rendered moot. Twenty years later, in *Superintendent v. Hill*, 472 U.S. 445 (1985), this Court took up—but declined to reach—the open question whether the Fourteenth Amendment's Due Process Clause requires some form of state judicial review of state prisoners' federal constitutional claims. *Id.* at 450; *see also Young v. Ragen*, 337 U.S. 235, 239 (1949) (requiring states to give its prisoners "some clearly defined method by which they may raise claims of denial of federal rights[]").

In the nearly 40 years since *Hill* and more than half-century since *Case*, the scope of states' obligation to review the merits of federal constitutional claims brought by state prisoners on collateral review remains "shrouded in so much uncertainty[.]" *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

In the decision below, the Oklahoma Court of Criminal Appeals (OCCA) refused to review Oklahoma death-row prisoner Tremane Wood's concededly-meritorious claim that newly-discovered evidence demonstrates his Sixth, Eighth, and Fourteenth Amendment rights were violated when he was represented at his capital trial by a lawyer who was impaired by a serious addiction to alcohol, cocaine, and prescription pills. The OCCA did so by subjecting Mr. Wood's successor postconviction application to the onerous requirements of Oklahoma's *capital* successor statute, rather than the far less stringent provisions of Oklahoma's *noncapital* successor statute, and by resolving disputed issues of fact against Mr. Wood without a hearing.

This petition presents the following questions:

1. When states open their postconviction forums to federal claims raised in a successor posture based on newly-discovered evidence, do they have to administer those forums evenhandedly, or may they discriminate against newly-discovered federal claims brought by death-sentenced prisoners because of their status?

2. Does the Oklahoma Court of Criminal Appeals' refusal to consider the merits of Mr. Wood's concededly meritorious, newly-discovered federal Constitutional claim discriminate against his federal rights?

PARTIES TO THE PROCEEDING

In the proceedings below, Tremane Wood was the defendant/petitioner and the State of Oklahoma was the plaintiff/respondent.

RELATED PROCEEDINGS

Oklahoma Court of Criminal Appeals:

Wood v. State, 158 P.3d 467 (Okla. Crim. App. Apr. 30, 2007) (No. D-2005-171) (order denying relief on direct appeal)

Wood v. State, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (unreported) (denying initial postconviction application)

Wood v. State, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011) (unreported) (denying second postconviction application)

Wood v. State, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017) (unreported) (denying third postconviction application)

Wood v. State, No. PCD-2022-550 (Okla. Crim. App. Aug. 18, 2022) (unreported) (denying fourth postconviction application)

U.S. District Court for the Western District of Oklahoma:

Wood v. Trammell, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015) (order denying federal habeas petition)

U.S. Court of Appeals for the Tenth Circuit:

Wood v. Carpenter, 899 F.3d 867, *opinion modified and superseded on denial of rehearing*, 909 F.3d 1279 (10th Cir. Aug. 9, 2018) (No. 16-6001) (opinion affirming denial of federal habeas petition)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tremane Wood is an Oklahoma death row prisoner. He respectfully petitions this Court for a writ of certiorari to review the judgment of the Oklahoma Court of Criminal Appeals (OCCA) which denied his fourth application for postconviction relief, along with his requests for discovery and an evidentiary hearing.

INTRODUCTION

Tremane Wood is a Black man of mixed-race heritage who faces execution in the State of Oklahoma for a killing that his older brother and co-defendant, Zjaiton ("Jake") Wood, admitted carrying out during a robbery. Mr. Wood was sentenced to death as a participant in the robbery while Jake—the actual killer—received a life sentence.

The difference between Mr. Wood's and Jake's sentencing outcomes is directly traceable to the vast differences in the quality of the representation they received at their capital trials. Whereas Jake was represented by the state-funded Oklahoma Indigent Defense System which staffed his case with three experienced capital defense lawyers and two investigators who litigated vigorously on his behalf, Mr. Wood was represented by conflict counsel, Johnny Albert, who failed to use an investigator, received ***$10,000 total*** to defend Mr. Wood, did little to no work on Mr. Wood's case outside the courtroom, and actively suffered from an addiction to alcohol, cocaine, and prescription pills during the period he handled Mr. Wood's capital case.

Evidence of Albert's substance addiction resulted in the Oklahoma Court of Criminal Appeals (OCCA) granting relief to two other capital defendants, Keary Littlejohn and James Fisher, whose cases Albert handled during the same period he handled Mr. Wood's. Only Mr. Wood was denied relief, and for two reasons.

First, when Mr. Wood sought to challenge Albert's effectiveness at an evidentiary hearing on appeal, Albert—who was under investigation by the Oklahoma State Bar at the time—actively concealed his substance addiction and how it impaired his representation of Mr. Wood. *Second*, when Mr. Wood came forward with evidence of Albert's substance addiction in his initial postconviction proceeding and asked for discovery and a hearing to further develop this evidence in order to vindicate his Sixth Amendment right to effective trial counsel, the OCCA closed its doors to his federal claim. It did so by resolving disputed issues of fact against Mr. Wood without a hearing, *contra* Okla. Stat. tit. 22, § 1084 (2010) (requiring that where "there exists a material issue of fact, *the court shall* conduct an evidentiary hearing" (emphasis added)), and by concluding that Mr. Wood's evidence of Albert's impairment in Littlejohn's and Fisher's case failed to prove its existence during the precise period Albert represented Mr. Wood.

In 2022, Mr. Wood returned to the OCCA with the evidence from two witnesses who provided sworn statements recounting their firsthand knowledge of Albert's cocaine, alcohol, and prescription pill addiction during the period he handled Mr. Wood's capital case. According to these witnesses, Albert actively used cocaine from

2002 through 2004—during the period he represented Mr. Wood—and fueled his addiction by accepting cocaine as payment for legal fees.

As before, Mr. Wood sought discovery and a hearing. The State recognized the seriousness of the Sixth Amendment issue this new evidence raised, and that the OCCA should review Mr. Wood's claim under Oklahoma's less-stringent noncapital successor statute. Okla. Stat. Ann. tit. 22, §1086. But the OCCA again barred Mr. Wood's federal claim and denied his requests for evidentiary development. It did so by subjecting his successor application to the onerous requirements of Oklahoma's capital successor statute, Okla. Stat. Ann. tit. 22, § 1089(D)(8)—requirements that Mr. Wood argued he also satisfied—and by failing to give him the benefit of *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), which established the OCCA's power to grant a successive postconviction application "when an error complained of has resulted in a miscarriage of justice, *or constitutes a substantial violation of a constitutional or statutory right*." 46 P.3d at 710 (emphasis added).

The decision below—and Oklahoma's clear discrimination against Mr. Wood and other death sentenced prisoners seeking to vindicate federal constitutional rights based on newly-discovered evidence—offends the Constitution's Equal Protection and Due Process guarantees. While this Court's jurisprudence makes it clear that states are under no obligation to entertain postconviction claims, this Court has not hesitated to intervene to ensure that where states provide a postconviction remedy for vindication of a federal right, that remedy is available to all on an equal basis and

the procedure for enforcing it comports with due process. *See Walker v. Martin*, 562 U.S. 307, 321 (2011) ("[F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights."); *id.* (citing cases); *see also* Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 Colum. L. Rev. 1143, 1146 n. 20-21 (1953) (collecting cases).

Oklahoma is one of just five states with capital punishment that make collateral review available for successor federal claims while imposing different requirements on capital and noncapital successor petitioners who seek to vindicate federal constitutional rights. Those states are outliers as most states that retain capital punishment—24 to be exact—and the Federal Government open their collateral review proceedings to successor federal claims brought by capital and noncapital petitioners on an equal basis, and without penalizing death sentenced prisoners seeking to vindicate their federal rights on account of their status as death-row prisoners.

The questions here are narrow: When states open their postconviction forums to federal claims raised in a successor posture based on newly-discovered evidence, do they have to administer those forums evenhandedly, or may they discriminate against newly-discovered federal claims brought by death sentenced prisoners because of their status? And did the OCCA violate the Fourteenth Amendment when it discriminated against Mr. Wood's newly-discovered federal claim by shutting its

doors to merits review under Okla. Stat. Ann. tit. 22, § 1089, and by resolving disputed issues of fact against him without a hearing to which state law entitled him?

This Court should grant the petition.

OPINIONS BELOW

The OCCA's decision denying Mr. Wood's fourth application for postconviction relief and requests for discovery and a hearing is unreported. Pet. App. 001a-007a. The OCCA's decision denying Mr. Wood's initial postconviction application and requests for evidentiary development is also unreported. Pet. App. 008a-027a.

JURISDICTION

The OCCA denied Mr. Wood's successor postconviction application and requests for evidentiary development on August 18, 2022. Pet. App. 001a-007a. The OCCA's rules prohibited Mr. Wood from petitioning for rehearing from that denial. Rule 3.14(E), *Rules of the Oklahoma Court of Criminal Appeals*, Okla. Stat. Ann. tit. 22, Ch. 18, App. (2023) (alternatively "OCCA Rules"); OCCA Rule 5.5 (explaining that once the OCCA has rendered its decision on a postconviction appeal, "the petitioner's state remedies will be deemed exhausted" and "[a] petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State[]").

On November 2, 2022, The Honorable Neil M. Gorsuch, Circuit Justice for the Tenth Circuit, granted Mr. Wood's request for an extension of time to petition for a writ of certiorari pursuant to Rule 13(5) of this Court's Rules, and extended the filing

deadline to January 15, 2023. Pet. App. 028a-030a.

Mr. Wood now timely petitions for a writ of certiorari wherein he seeks this Court's review of the OCCA's August 18, 2022 judgment and order dismissing his successor postconviction application and requests for evidentiary development. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATURORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Const. amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV § 1:

> "No State shall . . . 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."

Okla. Stat. Ann., tit. 22, § 1086:

> ". . . Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application."

Okla. Stat. Ann., tit. 22, § 1089(D)(8):

> ". . . the Court of Criminal Appeals may not consider the merits of or grant relief based on the untimely original application, or a subsequent application, unless: (b)(1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, 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.

STATEMENT

A. Factual & Procedural Background

1) The Crime

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser celebrated New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 14-15, 102, 120-21.)[1] Mr. Wood was 22 years old at the time. While at the brewery, the men met and socialized with Brandy Warden, Mr. Wood's former girlfriend and mother of his eldest son, and Lanita Bateman, the girlfriend of Mr. Wood's older brother Jake.[2] The women agreed to accompany Wipf and Kleinsasser to a motel once the brewery closed (Tr. 3/31/04 at 122-24) and after talking with Mr. Wood and Jake about doing so (Tr. 4/1/04 at 146-50).

Back at the motel room, Wipf and Kleinsasser agreed to pay Bateman and Warden $210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Bateman pretended to call her mother, but instead called Jake. (Tr. 3.31.04 at 129.) Jake and Mr. Wood

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[1] The original trial record is cited as "O.R.1" followed by the page number. Transcripts of the jury trial and Rule 3.11 evidentiary hearing are cited as "Tr." followed by the date of the transcript and the page number. Transcripts of the jury trials pertaining to Mr. Wood's older brother and co-defendant, Zjaiton ("Jake") Wood, and co-defendants Lanita Bateman and Brandy Warden are cited as "Z. Wood Tr.", "Bateman Tr.", and "Warden Tr." respectively, followed by the date of the transcript and the page number. Docket entries from Mr. Wood's second direct appeal proceeding in case number D-2005-171 are cited as "DA2" followed by the docket number, exhibit letter where relevant, and page number. Documents from Mr. Wood's initial postconviction proceeding in case number PCD-2005-143 are cited as "PCR1" followed by the docket number, exhibit number where relevant, and page number. *See* Sup. Ct. R. 12.7 ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court.").

[2] Jake's first name is used throughout this petition to distinguish him from Mr. Wood. Jake was two years older than Mr. Wood at the time of the crime and is now deceased. (*See* Tr. 8/14/02 at 444.)

arrived at the motel room where Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Bateman and Warden ran out of the room while Jake and Mr. Wood ran in. (Tr. 4/1/04 at 168.) Jake initially approached Kleinsasser with a gun, while Mr. Wood approached Wipf with a knife. (Tr. 3/31/04 at 133-36.) A struggle ensued and Jake left Kleinsasser to assist Mr. Wood. (*Id.* at 135.) Mr. Wood left Jake struggling with Wipf to demand more money from Kleinsasser who ultimately fled the room. (*Id.* at 139.) Mr. Wood returned to where Jake struggled with Wipf over the knife and Wipf died of a single stab wound to the chest. (Tr. 4/02/04 at 11-12, 17-18.) Kleinsasser was unable to identify who had stabbed Wipf but Jake later confessed to that fact.[3] (Tr. 3/31/04 at 172-73; Tr. 4/2/04 at 94.)

[3] At Jake's trial, prosecutors argued that Jake—and not Mr. Wood—stabbed Wipf. (Z. Wood Tr. 2/23/05 at 124-25 (prosecutor eliciting testimony from Warden that Jake wrote a letter to her admitting "[t]hat he killed Ronnie Wipf."); *id.* at 205-06 (prosecutors presenting testimony from a detective who described Jake's confession to Wipf's murder at Mr. Wood's trial); Z. Wood Tr. 2/24/05 at 70 (prosecutor stating Jake admitted in a letter to Warden "I killed Wipf."); *id.* at 87 (prosecutor stating Jake "took the stand and he admitted killing Ronnie Wipf just to show Ronnie Wipf he was a force to be reckoned with."); Z. Wood Tr. 3/1/05 at 118 (prosecutor quoting letter authored by Jake stating, "And when I stabbed that dead punk…"); Z. Wood Tr. 3/1/05 at 124 (prosecutor stating, "This defendant testified in his brother's trial, 'I killed him because I wanted him to know I was a force to be reckoned with'"); *id.* at 124 (prosecutor stating that Jake "made choices to murder Ronnie Wipf"); *id.* at 125 (prosecutor stating at Jake's trial, "He murdered Ronnie Wipf with a knife"); *id.* at 134 (prosecutor noting that the jury at Jake's trial had "evidence from this defendant's mouth that was testified to in the first stage of the trial that he did in fact murder Ronnie Wipf" and "some letters where he, himself, said he murdered Ronnie Wipf"); *id.* at 180 (prosecutor referencing Jake's "letter that he enjoyed killing Ronald Wipf" and arguing he thus posed a "continuing threat"); *id.* at 181 (prosecutor stating that Jake "in his letter said, 'I'm a force to be reckoned with' and 'Ronnie Wipf had to die because he was being a bad boy'").) They also argued that, as between Jake and Mr. Wood, "Mr. Zjaiton [Jake] Wood is really the worst of the two of them, considering the evidence that we know about and that but for Mr. Zjaiton Wood, Tremane would not have acted in the manner he did." (Z. Wood Tr. 9/20/04 at 25.)

2) Pretrial Proceedings

Jake, Mr. Wood, Bateman, and Warden were charged with the first-degree felony murder of Ronnie Wipf, robbery with firearms, and conspiracy to commit a felony (robbery). (O.R.1 79, 614-16.) Warden pleaded guilty to accessory after the fact in exchange for testimony against her co-defendants. (*See* Tr. 3/31/2004 at 109.) Jake, Mr. Wood, and Bateman went to trial separately.

The State filed a Bill of Particulars against Jake and Mr. Wood informing them it was seeking the death penalty against them both. The State alleged four aggravating circumstances against Mr. Wood: (1) that during the murder, he knowingly created a great risk of death to more than one person; (2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that he will commit criminal acts of violence that would constitute a continuing threat to society. (O.R.1 72; Tr. 8/14/02 at 442.)

As indigent defendants, Jake and Mr. Wood were both eligible to be represented by the Oklahoma Indigent Defense System (OIDS) which employed experienced capital counsel who represented capital defendants throughout the state. (*See* Tr. 8/14/02 at 442-43.) However, the trial court appointed OIDS to represent Jake only, and appointed conflict counsel, Johnny Albert, to represent Mr. Wood.[4]

[4] The problems with the appointment of conflict counsel to handle capital trials in Oklahoma are well-documented. According to the 2017 Report of the Oklahoma Death Penalty Review Commission—which undertook a careful review of Oklahoma's death penalty process—capital conflict

(Tr. 10/2/02 at 3, 10; O.R.1 at 85.) Oklahoma County paid Albert ***$10,000 total*** to defend Mr. Wood in his capital case.[5] *See* Petition for Writ of Habeas Corpus at Ex. 3 ¶ 8, *Wood v. Workman*, No. 5:10-cv-00829-HE (W.D. Okla. June 30, 2011).

In the end, Jake, as OIDS's client, had three attorneys and two investigators assigned to his case. (Tr. 3/2/06 at 397.) Mr. Wood, by contrast, had no investigator, Albert, and another attorney who did so little work he never even filed a formal notice of appearance. (*See* Tr. 3/2/06 at 428; Tr. 2/27/06 at 241-42.) While Jake's counsel filed numerous motions and argued on Jake's behalf at virtually every pretrial hearing (*e.g.*, Tr. 2/5/03 at 49; Tr. 4/16/03 at 51-55; Tr. 4/30/03 at 3; Tr. 7/16/03 at 11-35; Tr. 9/3/03 at 84-106), Albert joined a motion or two but filed only <u>one</u> independent motion on Mr. Wood's behalf. (O.R.1 at 362-63.) He also rarely made arguments or questioned witnesses on Mr. Wood's behalf during pretrial proceedings. (*E.g.*, 2/5/03 at 62; 3/19/03 at 29-30; 4/16/03 at 61; Tr. 4/30/03 at 31; Tr. 5/28/03 at 4; 7/16/03 at 8, 43; Tr. 9/3/03 at 106, 108.)

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counsel, who are often grossly underpaid, less-qualified, and more under resourced than public defenders, was a leading contributor to unjust death sentences and wrongful convictions. *See* Okla. Death Penalty Review Comm'n, <u>The Report of the Oklahoma Death Penalty Review Commission</u> at 249 (Apr. 25, 2017), https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf (". . . it can be difficult to find qualified lawyers willing to work for the meager compensation provided. The maximum compensation is $20,000 per case for first chair lawyers[] . . . Conflict counsel have to pay their own overhead, including any support staff, and pay for their own benefits."); *id.* at xii (recommending that "[a]dequate compensation should be provided to conflict counsel in capital cases and the existing compensation cap should be lifted.").

[5] By comparison, OIDS spent an average amount of $73,568 on capital cases at the time the Oklahoma Death Penalty Review Commission studied the comparative costs. Okla. Death Penalty Review Comm'n, <u>The Report</u> at 207. First chair conflict counsel in capital cases, meanwhile, were subject to a $20,000 compensation cap. *Id.* at 249.

Rather than visit Mr. Wood at the County Jail pretrial, Albert spoke to Mr. Wood and members of his family only in court. (Tr. 2/27/06 at 252-54 (Albert stating that he did not "like to go" to the jail for visits and admitting that he spoke to Mr. Wood's family only when he saw them in the courtroom).) Albert also never spoke to any of Mr. Wood's friends, foster family, or counselors from Mr. Wood's time in juvenile custody in preparation for the penalty phase. (Tr. 2/27/06 at 254.)

3) Trial Proceedings

Mr. Wood's trial was originally scheduled for March 10, 2003. (Tr. 10/2/02 at 12.) Albert never sought to continue that trial date. (*Id.* at 12; Tr. 2/5/03 at 45, 82-83.) Jake's attorneys, however, sought a several-month continuance based on their need to "adequately prepare for [Jake's] mitigation" phase. (Tr. 2/5/03 at 45, 72; *see also* O.R.1 221-23.) Ultimately, Mr. Wood's case went to trial first. (Tr. 2/27/06 at 247.)

At the guilt phase, the State's case-in-chief lasted three days. (Tr. 3/31/04; Tr. 4/1/04; Tr. 4/2/04.) Albert did not intend to call any witnesses to testify on Mr. Wood's behalf at the first stage. (Tr. 4/2/04 at 60-61 ("I would rest on reasonable doubt, and try to argue reasonable doubt to the jury.").) Albert waived the defense's opening statement in the jury's presence, "since I have just one witness I am calling[.]" (Tr. 4/2/04 at 83, 85.) Jake testified that he and another man named "Alex" committed the crime. (Tr. 4/2/04 at 89, 91-95.) On April 2, 2004, the jury found Mr. Wood guilty of all charges. (Tr. 4/2/04 at 214–15.)

The second stage, which included both the State's presentation of aggravation

and Mr. Wood's presentation of mitigation, began and ended ***in one afternoon***. (Tr. 4/2/04 at 218 (ordering the jury to report at 1:00 p.m. on Monday for the second stage); Tr. 4/5/04 at 159 (noting the jury retired for deliberations at 5:57 p.m.).) The State incorporated all the evidence from the first stage and presented evidence of a robbery of a pizza restaurant committed by Jake, Mr. Wood, Bateman, and Warden, earlier on December 31, 2001. (Tr. 4/5/04 at 17-18, 24-26.) The entire penalty-phase defense consisted of just ***three witnesses***: Mr. Wood's mother Linda Wood, his mother's then-partner Andre Taylor, and psychologist Ray Hand, Ph.D. (O.R.1 at 355-56; Tr. 4/5/04 at 12-13, 33-102.)

The jury found three of the four aggravating circumstances alleged by the State proved, including the great-risk-to-others aggravator that Albert failed to challenge but which Jake's counsel successfully struck from the punishment calculus in Jake's case.[6] (O.R.1 at 617; Z. Wood Tr. 2/28/05 at 23.) It sentenced Mr. Wood to death on the felony-murder count after the sole Black juror wavered over but ultimately endorsed the death verdict under pressure. (Tr. 4/5/04 at 163–65 (juror stating that she "signed the one for death because everyone was waiting on me"); Tr. 3/2/06 at 420.)[7]

[6] The trial judge who presided over both Jake's and Mr. Wood's trials struck the aggravator from Jake's case based on insufficient evidence and specifically noted that Albert failed to ask for its dismissal in Mr. Wood's case. (Z. Wood Tr. 2/28/05 at 11, 23.)

[7] This juror later stated that, had Albert presented at the penalty phase the wealth of mitigation about Mr. Wood's life, character, and background subsequently developed, she would have held her ground for a life sentence. (Tr. 3/2/06 at 416-17, 425.)

At Jake's subsequent trial, the prosecutor recognized that "Mr. Zjaiton [Jake] Wood is really the worst of the two of them, considering the evidence that we know about and that but for Mr. Zjaiton Wood, Termane [sic] Wood would not have acted in the manner he did." (Z. Wood Tr. 9/20/04 at 25.) Nevertheless, Jake was sentenced to life-without-parole (Z. Wood Tr. 3/10/05 at 6) and Mr. Wood was the only one of the four codefendants to receive a death sentence (*see* Bateman Tr. 6/11/03 at 10; Warden Tr. 4/18/03 at 21).

4) Direct Appeal Proceedings

On direct appeal, Mr. Wood's attorneys sought and received an evidentiary hearing pursuant to OCCA Rule 3.11[8] on the issue of Albert's penalty-phase ineffectiveness. (DA2 Appl. 6/28/05; DA2 Order, 11/16/05.)

The evidentiary hearing occurred over three days. (Tr. 2/23/06; Tr. 2/27/06; Tr. 3/2/06.) Albert was among the witnesses who testified. (Tr. 2/27/06 at 240.) He insisted he was effective and, as most relevant here, Albert actively concealed his substance abuse issues during the period he represented Mr. Wood. (*See generally* Tr. 2/27/06 at 240-92.)

The trial court denied relief, concluding that Albert's representation was not deficient or prejudicial to Mr. Wood. (DA2 230-44.) It did so by, in large part, crediting Albert's self-serving testimony about his strategic actions, omissions, and overall

[8] OCCA Rule 3.11 allows defendants to raise ineffective-assistance-of-counsel claims on direct appeal and seek supplementation of the record.

effectiveness in Mr. Wood's case. (DA2 237, 241-42 (trial court finding Albert's actions and omissions were "trial strategy," crediting his "experience in capital murder trials," finding "[t]here was no overall failure by trial counsel to investigate and/or use available mitigation evidence[,]" and that Albert's performance fails to "undermine[] confidence in the outcome of the trial[]").) The OCCA affirmed that denial. *Wood v. State*, 158 P.3d 467, 479 (Okla. Crim. App. 2007).

5) Initial Postconviction Proceeding

Following the conclusion of direct appeal proceedings, Mr. Wood discovered that on March 9, 2006, just *days* after Albert testified at the Rule 3.11 hearing about his professional performance in Mr. Wood's case, a contempt hearing was held in state court concerning Albert's grossly unprofessional conduct in a first-degree murder case. Pet. App. 051a-052a. Mr. Wood also discovered that Albert had been suspended from the practice of law on April 24, 2006—months after his Rule 3.11 testimony—and had been under investigation by the Oklahoma State Bar for gross professional misconduct related to his problems with "alcohol and possibly even drugs[]" at the time he testified about his performance in Mr. Wood's case. *Id.*

Mr. Wood timely presented this evidence to the OCCA in his first application for postconviction relief. Pet. App. 031a-099a. There, he alleged that newly-discovered evidence of Albert's alcohol and drug abuse established that he received ineffective assistance at trial. Pet. App. 050a-054a. In support, he offered two items of proof. First, he presented a transcript of direct contempt proceedings against Albert

regarding his conduct in three other cases. (PCR1 Dkt. 17, Exh. 4.) Second, he presented an affidavit from General Counsel of the Oklahoma Bar Association which explained that Albert was suspended from the practice of law in April 2006. (PCR1 Dkt. 17, Exh. 5.) Mr. Wood also submitted other materials from the 2006 disciplinary proceedings against Albert, including grievances from several of Albert's clients filed with the Oklahoma State Bar between April 2005 and March 2006. (PCR1 Dkt. 32-1.) *See generally State ex rel. Okla. Bar Ass'n v. Albert*, 163 P.3d 527 (Okla. 2007) (confirming retroactive suspension and reinstatement to probation).

Additionally, Mr. Wood presented the findings of fact and conclusions of law from two capital cases that Albert handled at the time he also handled Mr. Wood's capital case. In those cases, the impact of Albert's substance abuse on his performance and the outcomes of those proceedings was in issue. (PCR1 Dkt. 36, 37.) In both cases, the OCCA granted relief on that basis after concluding that Albert rendered ineffective assistance. *See Littlejohn v. State*, 181 P.3d 736, 744-45 (Okla. Crim. App. 2008) (vacating death sentence and remanding for resentencing); *Fisher v. State*, 206 P.3d 607, 607-13 (Okla. Crim. App. 2009) (reversing conviction and death sentence and remanding for new trial).

In the face of this evidence, the OCCA denied Mr. Wood's ineffective assistance claim ("IAC claim") as presented in the first postconviction proceeding and his requests for evidentiary development. Pet. App. 008a-027a. The court predicated its denial on the conclusion that Albert's "client neglect, abuse of drugs and alcohol and

emotional instability, however, appear to have begun—based on the materials provided by Wood—***after*** Wood's death penalty trial had been completed." Pet. App. 012a (emphasis added). The OCCA acknowledged that evidence showed an increase in Albert's alcohol consumption around the time of Mr. Wood's trial. (*Id.*) But rather than afford Mr. Wood a hearing on the question of when Albert's substance abuse began, the OCCA instead relied on Albert's self-serving assertions in *Littlejohn* to conclude that "his substance abuse disorder began in earnest in March 2005, a year after Wood's death penalty trial." Pet. App. 012a-013a, n.5. The OCCA denied Mr. Wood's application, stating that "[w]ithout proof trial counsel was suffering from his addiction ***during Mr. Wood's trial***, evidence of trial counsel's subsequent struggles with substance abuse and other difficulties does not prove or show that he was more likely incapacitated or ineffective during Wood's trial." Pet. App. 012a (emphasis added).

6) Successor Postconviction Proceeding Below

Following Albert's death in 2018, Mr. Wood uncovered the proof that Albert's substance abuse predated and persisted throughout his trial. In April 2022, two witnesses with firsthand knowledge of Albert's substance abuse revealed in sworn statements that his drug addiction began at least as early as the late-1990s.

Benito Bowie, who first became acquainted with Albert in 1998, attests that "[d]uring the almost decade I knew John [Albert], he did cocaine every day. John also drank regularly, probably daily." Pet. App. 304a, ¶¶2,4. In fact, starting in 1999 or

2000, Albert represented all the members of the Playboy Gangsta Crips who regularly supplied him with drugs. Pet. App. 304a, ¶3. Michael Maytubby, who first met Albert in 2001, attests to Albert's use of alcohol, painkillers, and anti-anxiety drugs—including in combination—during the period he knew Albert. Pet. App. 306a, ¶3. He is "sure Johnny was using cocaine in 2002 because [he] would give it to him as payment for legal fees." Pet. App. 306a, ¶4. Maytubby further attests that, "[b]y 2004 to 2005, Johnny's drug and alcohol abuse had gotten so bad that he looked like someone from the streets. I heard Johnny was using 'ice' (crystal meth) by that time." Pet. App. 306a, ¶7.

Within 60 days of uncovering this new evidence, Mr. Wood filed a successor postconviction application in the OCCA wherein he argued that this new evidence constituted prima facie proof that Albert suffered from a serious addiction to multiple substances during the time he handled Mr. Wood's capital murder case. Pet. App. 116a. For the same reason the OCCA granted relief in *Littlejohn* and *Fisher* based on evidence of Albert's substance addiction, Mr. Wood argued this new evidence mandated relief in his case as well. Pet. App. 131a-132a, 137a-138a.

He argued further that this new evidence of Albert's impairment, which contributed to Albert's numerous failures to subject the State's case against Mr. Wood to meaningful adversarial testing at the guilt and penalty phases, gave rise to a colorable claim that he was denied his right to the effective assistance of capital trial counsel under the Sixth, Eighth, and Fourteenth Amendments to the U.S.

Constitution and corresponding provisions of the Oklahoma Constitution. (*Id.* at 16-40.) He also asked for discovery and a hearing. Pet. App. 478a-481a; Pet. App. 482a-484a.

Because Mr. Wood's successor application was governed by Oklahoma's Uniform Post-Conviction Procedure Act and OCCA Rule 9.7(G)'s 60-day statute of limitations for raising claims based on new evidence, he explained why his successor petition was timely and merits review warranted under the statute's noncapital and capital successor provisions and the OCCA's decision in *Valdez v. State*, 46 P.3d 703 (2002).[9] Pet. App. 140a-141a; Pet. App. 546a-547a. *Valdez* clearly established the OCCA's power to grant a successive postconviction application "when an error complained of has resulted in a miscarriage of justice, *or constitutes a substantial violation of a constitutional or statutory right*." 46 P.3d at 710 (emphasis added).

In its response to Mr. Wood's successor application, the State did not dispute that the new evidence Mr. Wood marshaled was both newly discovered and reliable. Nor did the State dispute that the new evidence proved that Albert's substance abuse problem contributed to his numerous failures in Mr. Wood's case. In fact, the State rightly recognized "the seriousness of the issue" and that, with this evidence, Mr. Wood's case is ***indistinguishable*** from James Fisher's and Keary Littlejohn's cases where the "implications [of Albert's substance abuse] warranted death-sentence

[9] Successor petitions brought by noncapital petitioners are governed by Okla. Stat. Ann. tit. 22, § 1086, whereas those brought by capital petitioners are governed by the far more onerous provisions of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b).

relief[.]" Pet. App. 501a. It nevertheless maintained—without rebutting the evidence Mr. Wood presented in support of the timeliness of his application—that Mr. Wood's newly-available Constitutional claim was barred from merits review on res judicata, waiver, and diligence grounds. Pet. App. 496a-487a.

The OCCA denied Mr. Wood's application and requests for evidentiary development in a 7-page order. Pet. App. 001a-007a. Reviewing Mr. Wood's application exclusively under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and OCCA Rule 9.7(G), the OCCA found his Constitutional claim precluded. It resolved disputed issues of fact against Mr. Wood—facts which the State offered no evidence to rebut—without affording him a hearing, and altogether ignored his argument under *Valdez*. Pet. App. 002a-007a. The OCCA's rules barred Mr. Wood from seeking rehearing from the court's denial. *See* OCCA Rule 3.14(E) & Rule 5.5.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. Oklahoma's capital successor postconviction statute and the OCCA's decision below run afoul of this Court's precedents requiring states to evenhandedly administer their collateral review processes

While states are under no obligation to provide defendants with a collateral review process, when they elect to do so the fundamental fairness mandated by the Fourteenth Amendment's Due Process Clause governs their administration. *Pennsylvania v. Finley*, 481 U.S. 551, 557-58 (1987) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act

in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause[.]" (internal quotations omitted)). The due process guarantee "emphasizes fairness between the State and the individual dealing with the State[.]" *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). Justice Marshall distilled this due process right down to perhaps its simplest definition: "[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system[.]" *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (internal quotations omitted).

Whether states provide defendants with an adequate opportunity to fairly present federal claims if merits review of the claim is foreclosed under state law is a question this Court took up in *Case v. Nebraska*. 381 U.S. 336 (1965). There, this Court granted certiorari to decide "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." *Id.* at 337. This Court ultimately declined to reach the question because, during the pendency of certiorari proceedings, Nebraska enacted a statute "providing a postconviction procedure" for state prisoners' enforcement of their federal rights in state court. *Id.*

Justices Clark and Brennan concurred "on a straightforward proposition: the states owe both the people and the federal courts fair procedures by which federal rights may be vindicated in state court." Christopher Flood, *Closing the Circle:* Case v. Nebraska *& the Future of Habeas Reform*, 27 N.Y.U. Rev. L. & Soc. Change 633,

634 (2001-2002). They saw this Court's enforcement of that proposition as rooted in the Fourteenth Amendment's due process guarantee and integral to realizing the goal of the federal habeas statute's exhaustion requirement: to "promote state primacy" in the enforcement of federal guarantees. 381 U.S. at 337-40 (Clark, J., concurring); *id.* at 344 (Brennan, J., concurring) ("The Fourteenth Amendment and the Supremacy Clause make the requirements of fair and just procedures an integral part of [states' administration of their criminal] laws, and state procedures should ideally include adequate administration of these guarantees as well." (footnote omitted)); *id.* at n.7 (""The State should, in my view, welcome the determinations of the Supreme Court that the high standards prescribed by our Federal Constitution are to be taken seriously and should be enforced. . . . When the States do fully meet this responsibility we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government."' (quoting Dean Griswold of Harvard Law School's 1965 address to Cleveland Bar Association)).

Just as a state's administration of its collateral review process is governed by the Due Process Clause's guarantee of fundamental fairness, it is also subject to scrutiny under the Fourteenth Amendment's Equal Protection Clause. "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v.*

Moffitt, 417 U.S. 600, 609 (1974).

While equal protection "does not require absolute equality[,]" it forbids "unreasoned distinctions" between classes of individuals. *Id.* at 612. It also requires "that indigents have an adequate opportunity to present their claims fairly within the adversary system[,]" and prohibits the state from subjecting some defendants to "merely a meaningless ritual" while affording others "meaningful" process. *See id.* (internal quotations omitted).

Oklahoma's capital successor postconviction statute, both on its face and as applied in the decision below, violates the Fourteenth Amendment's Due Process and Equal Protection guarantees.

A. Oklahoma's imposition of more onerous requirements on capital defendants seeking to obtain merits review of newly-available federal claims discriminates against their federal rights

Oklahoma opens the doors of its collateral review process to successor petitions raising newly-discovered federal constitutional issues to capital and noncapital petitioners alike. *See* Okla. Stat. Ann. tit. 22, § 1086 (noncapital successor postconviction statute); Okla. Stat. Ann. tit. 22, § 1089(D)(8) (capital successor postconviction provision). However, it erects significantly higher obstacles in the paths of *capital* defendants seeking to walk through that door and obtain merits review of newly-discovered federal claims than it does for *noncapital* defendants seeking the same remedy.

A noncapital successor petitioner in Oklahoma who seeks to vindicate newly-

discovered federal rights in state court need only assert a "sufficient reason" for why the claim "was not asserted or was inadequately raised in the prior application." Okla. Stat. Ann. tit. 22, § 1086. Oklahoma's noncapital successor statute imposes no limits on the range of federal Constitutional claims a petitioner can bring and prohibits the application of waiver rules to bar merits review of newly-discovered federal issues brought by noncapital petitioners unless those issues were "knowingly, voluntarily, and intelligently waived" previously. *Id.*

A similarly situated capital petitioner in Oklahoma is subject to an altogether different and more draconian procedural regime. Not only does he have just 60 days to file a successor application based on newly discovered evidence, OCCA Rule 9.7(G)(3), but he must also 1) prove he was reasonably diligent in seeking to develop the new evidence; 2) prove by *clear and convincing evidence* that the claim to which the new evidence gives rise would have resulted in different guilty- or penalty-phase outcomes by a reasonable factfinder. Okla. Stat. Ann., tit. 22, § 1089(D)(8)(b); OCCA Rule 9.7(G)(1). In other words, whereas *noncapital* successor petitioners in Oklahoma can raise a full range of federal Constitutional claims so long as they assert a "sufficient reason"[10] for failing to do so previously, *capital* successor petitioners in

[10] The OCCA has found "sufficient reason" for not previously asserting a claim for relief where there has been an intervening change in constitutional law. *Stewart v. State*, 495 P.2d 834 (Okla. Crim. App. 1972). It has also recognized that newly-discovered evidence may constitute a "sufficient reason" under Okla. Stat. Ann. tit. 22, § 1086. *See Rojem v. State*, 925 P.2d 70, 74 (Okla. Crim. App. 1996) (examining "newly discovered evidence" brought in successor postconviction application under § 1086 to assess whether "compulsion of further discovery" in support of claim under *Brady v. Maryland*, 373 U.S. 83 (1963), was warranted); *see also Woodruff v. State*, 910 P.2d 348, 351 (Okla. Crim. App. 1996)

Oklahoma are limited to raising only those newly-discovered federal Constitutional claims that are outcome determinative or demonstrate factual innocence by clear and convincing evidence. So, for example, a Sixth, Eighth, and Fourteenth Amendment claim that new evidence proves racial prejudice tainted the jury is *not cognizable* under Okla. Stat. Ann. tit. 22, § 1089(D)(8) for a *capital* successor petitioner, while the same federal claim *is cognizable* under Okla. Stat. Ann. tit. 22, § 1086 for a *noncapital* successor petitioner. In this most explicit way, Oklahoma's capital successor statute discriminates against capital petitioners' federal rights. *See Walker*, 562 U.S. at 321 ("[F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights.").

Moreover, capital petitioners do not have the benefit of the protections against the application of waiver rules that noncapital petitioners enjoy absent evidence that they knowingly, voluntarily, and intelligently gave up their rights. *Compare* Okla. Stat. Ann. tit. 22, § 1086 (requiring noncapital petitioners' waiver of claims to be made "knowingly, voluntarily and intelligently"), *with* Okla. Stat. Ann. tit. 22, § 1089(D)(2) (deeming capital petitioners' claims waived if they could have been raised previously); *see also* OCCA Rule 9.7(B)(1).

By singling out capital defendants for differential treatment, including by

(noting lower court's consideration of whether newly discovered evidence would show "reasonable probability that, . . . different results would have been reached[]" under § 1086).

limiting the range of newly-discovered federal Constitutional claims they can vindicate in state court; imposing a strict 60-day statute of limitations on their return to court to vindicate their federal rights; and subjecting them to more onerous requirements for raising newly-discovered federal claims in state court, Oklahoma deprives them of "genuine opportunities for testing constitutional issues of the most numerous and important types" solely on account of their status, *Case*, 381 U.S. at 339 (Clark, J., concurring), and offends basic principles of fundamental fairness, *Ake*, 170 U.S. at 77 ("[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system[.]" (citing *Ross*, 417 U.S. at 612). *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court." (internal quotes omitted)).

Even before Oklahoma's enactment of its current capital successor statute in 1995, Oklahoma courts evinced open hostility to capital defendants' vindication of their federal rights on collateral review. In *Castro v. State*, the OCCA affirmed the lower court's denial of a capital postconviction petitioner's request for an extension of time to file his first application for postconviction relief despite the fact that he "set[] forth a plethora of factors" that prevented his timely filing. 880 P.2d 387, 390 (Okla. Crim. App. 1994). Those factors included the Office of the Public Defender's "heavy caseload; the lack of adequate staff, including the loss of experienced attorneys, the

lack of a permanent chief of the capital post-conviction division, and a limited number of investigators; budget cuts resulting in limited resources for client representation; and the time consuming nature of capital appeals." *Id.* In sanctioning the denial of the petitioner's extension request, the OCCA emphasized the "limited" nature of postconviction review in capital cases and determined that "sixty (60) days is a sufficient time in which to prepare an application for post-conviction relief." *Id.* at 391. The OCCA sent the clear and hostile message that postconviction review in Oklahoma for capital defendants was little more than an empty exercise.

That hostility is even clearer in the 1995 amendments which erected a two-tiered system for capital and noncapital defendants seeking to vindicate their federal rights on collateral review.[11] *See Gilbert v. State*, 955 P.2d 727, 730 (Okla. Crim. App. 1998) ("[T]he new Act makes it even more difficult for *capital* post-conviction applicants to avoid procedural bars." (emphasis added)).

In seeming recognition of the Constitution's requirements, the Federal Government and 24 states with capital punishment administer their successor collateral review processes evenhandedly with respect to capital and noncapital petitioners' ability to vindicate federal rights. *See* 28 U.S.C. § 2244(b); Ala. R. Crim.

[11] Oklahoma's hostility towards capital defendants' vindication of their federal rights is also apparent in the unique threat of sanctions OCCA Rule 9.7 carves out for them and their attorneys. *See* OCCA Rule 9.7(C)(3) (allowing the court to "impose an appropriate sanction, including but not limited to assessment of costs and expenses, contempt of court proceedings or dismissal of the application[]" if a postconviction application is found to be filed in violation of Okla. Stat. Ann. tit. 22, § 1088.1, and providing that "[s]uch dismissal shall constitute forfeiture of a petitioner's right to pursue post-conviction proceedings in this Court[]").

P. 32.2(b); Ariz. R. Crim. P. 32.1; Ark. R. Crim. P. 37.2(b); Ga. Code Ann. § 9-14-47.1; Kan. Stat. Ann. § 60-1507(c); Kan. R. Rel. Dist. Ct. 183(d); Ky. R. Crim. P. 11.42; Ky. R. Civ. P. 60.02; La. Code Crim. P. Art. 930.4; Miss. Code Ann. § 99-39-27(9); Mo. Sup. Ct. R. 29.15(l); Mont. Code Ann. § 46-21-105(1)(b); Neb. Rev. Stat. Ann. § 29-3001; Nev. Rev. Stat. Ann. § 34.810(2); N.C. Gen. Stat. Ann. §§ 15A-1415(c), 15A-1419; Ohio Rev. Code § 2953.23; Or. Rev. Stat. § 138.550(3); 42 Pa. Stat. and Const. Stat. §§ 9542-45; S.C. Code § 17-27-90; S.D. Codified Laws § 21-27-5.1; Tenn. Code Ann. §§ 40-26-105, 40-30-117; Tex. Code Crim. P. Arts. 11.071, 11.07; Utah Code §§ 78B-9-104, 78B-9-106; Wyo. Stat. § 7-14-103. Oklahoma is among just five states that single out condemned persons for disparate treatment for vindicating newly-discovered federal claims in state courts. *Compare* Cal. Penal Code § 1509, *with* Cal. Pen. Code § 1473; Fla. R. Crim. P. 3.850(h), *with* Fla. R. Crim. P. 3.851; Idaho Code § 19-2719(5), *with* § 19-4908; Ind. Code Ann. § 35-50-2-9(k), *with* Ind. Code Ann. tit. 35, R. PC 1, § 12.

"The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). Here, Oklahoma has no rational basis for making it *harder* for death-row prisoners to bring successive postconviction claims than those not sentenced to death. *Cf. Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he qualitative difference between death and other penalties calls for *a great degree of reliability* when the death sentence is imposed."). And even if the State could devise some conceivably rational basis for singling out capital defendants for disparate and more onerous treatment in order to

survive scrutiny under the Equal Protection Clause, it nonetheless violates the Due Process Clause by discriminating against the federal rights of capital defendants. *See Finley*, 481 U.S. at 557-58 ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause[.]" (internal quotations omitted)); *see also Murray v. Giarratano*, 492 U.S. 1, 10 (1989) ("[T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases.").

B. The OCCA's decision below denied Mr. Wood an adequate opportunity to present his concededly meritorious, newly-available federal claim

The OCCA assessed Mr. Wood's successor application exclusively under the onerous provisions of Okla. Stat. Ann. tit. 22, § 1089, which the court acknowledged rendered its "review of post-conviction claims *in capital cases* [ ] extremely limited." Pet. App. 002a (emphasis added). The court recognized that Mr. Wood's evidence of Albert's cocaine addiction *during the period he represented Mr. Wood* was "new evidence." Pet. App. 005a. It nonetheless concluded that because Mr. Wood raised in his initial postconviction application a Sixth Amendment claim based on Albert's alcohol addiction *in two other capital cases around the same time he represented Mr. Wood*, his new federal claim was barred "by the doctrines of res judicata and waiver." Pet. App. 004a-005a ("Wood's current claim is, for all intents and purposes, identical to his claim of ineffective assistance raised in his previous post-conviction

application.").

The OCCA shut its doors to merits review of Mr. Wood's claim for an additional reason. It found that Mr. Wood was not sufficiently diligent under Okla. Stat. Ann. tit. 22, § 1089 and OCCA Rule 9.7(G) because he failed to show either that the claim could not have been presented previously, or that he filed his successor application "within sixty days from the date that the information provided by trial counsel's former clients ***could reasonably have been discovered***." Pet. App. 006a (emphasis added). But that was not the test. Under Rule 9.7(G), Mr. Wood needed to show that his newly-discovered federal claim was brought "sixty (60) days from the date the previously unavailable . . . factual basis serving as the basis for a new issue ***is announced or discovered***." OCCA Rule 9.7(G). He made that showing when he presented evidence—which the State failed to rebut—demonstrating that his successor application was filed within 60 days of Bowie and Maytubby executing affidavits attesting to their personal knowledge of Albert's addiction. Pet. App. 140a-141a. In finding Mr. Wood not diligent, the OCCA "unexpectedly" and "freakishly" transformed Rule 9.7(G)'s objective test (i.e., when evidence "is . . . discovered" by a petitioner), into a subjective test (i.e., when evidence "could *reasonably* have been discovered").[12] *Walker*, 562 U.S. at 320. This application of Rule 9.7(G)'s procedural bar in a manner that was unannounced at the time of filing thus does not deprive this

[12] For this same reason, the OCCA's diligence determination is not adequate to support the judgment below.

Court of jurisdiction to entertain this petition. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991) (explaining that application of a "rule unannounced at the time of petitioner's trial" is "inadequate to serve as an independent state ground" sufficient to bar this Court's certiorari jurisdiction).

Moreover, since the State failed to present evidence rebutting Mr. Wood's evidence of his diligence, the OCCA should have remanded for a hearing if it nonetheless found those facts in dispute. *Cf.* Okla. Stat. Ann. tit. 22, § 1084 (providing that where "there exists a material issue of fact, the court ***shall*** conduct an evidentiary hearing") (emphasis added). It failed to do that either, instead resolving issues of fact against Mr. Wood, further short-circuiting his right to adequately present his newly-discovered federal claim and to a fundamentally fair process. *See Ake*, 470 U.S. at 77; *Case*, 381 U.S. at 346-47 (Brennan, J., concurring); *see also Townsend v. Sain*, 372 U.S. 293, 313-14 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) ("There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant."); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.").

The OCCA also entirely ignored the fact that its denial of Mr. Wood's initial postconviction application was predicated on the absence of "proof trial counsel was suffering from his addiction *during Wood's trial*," and on its refusal at that time to

grant Mr. Wood's requests for discovery and a hearing at which he could further develop that proof. Pet. App. 012a (emphasis added); *see also id.* at 026a (denying Mr. Wood's "motions for discovery and an evidentiary hearing").

The OCCA found Mr. Wood's claim waived under Okla. Stat. Ann. tit. 22, § 1089(8)(b)(1). This statutory provision—which applies uniquely to death-sentenced successor petitioners in Oklahoma seeking to air newly-discovered federal claims in state court—is unconstitutional for the reasons discussed *supra*. By invoking the doctrines of res judicata and waiver to bar review of Mr. Wood's Sixth Amendment claim once he finally developed the proof the OCCA previously found wanting, the OCCA placed him in a catch-22: it first prevented him from factually developing the merits of his Sixth Amendment claim when he diligently raised and sought to factually develop it in his first postconviction proceeding, then denied it for want of proof, Pet. App. 012a, 026a.; and when, notwithstanding those obstacles, he came forward with new evidence proving he was entitled to relief all along, the OCCA held against him the fact of his prior diligence. Pet. App. 005a. In this way, the OCCA denied Mr. Wood "an adequate opportunity to present [his] claim[] fairly within the adversary system." *Ake*, 170 U.S. at 77.

In his concurring opinion in *Case*, Justice Brennan catalogued the "desirable attributes" of state collateral review proceedings that "should reduce the necessity" for federal court intervention by ensuring adherence to the Due Process Clause's fundamental fairness requirement:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. . . . it should eschew rigid and technical doctrines of forfeiture, waiver, or default. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings.

381 U.S. at 346-47 (Brennan, J., concurring). Oklahoma eschewed these requirements in Mr. Wood's case.

Had the OCCA reviewed Mr. Wood's successor application under the more lenient noncapital provisions of Okla. Stat. Ann. tit. 22, § 1086—as it used to do before the discriminatory regime ushered in by the 1995 amendments to Oklahoma's postconviction statute, *Rojem v. State*, 888 P.2d 528, 530 (Okla. Crim. App. 1995) ("[W]e must conclude that § 1086 controls subsequent applications for post-conviction relief in capital cases")—it would have asked only whether he asserted "sufficient reason" for not raising, or inadequately raising, his Sixth Amendment claim previously. And in view of the extensive evidence of Mr. Wood's prior diligence in seeking to investigate and develop proof of Albert's substance addiction in his initial postconviction proceeding to vindicate his Sixth Amendment right; Albert's active concealment of his cocaine addiction when he testified about his performance in Mr. Wood's case; the State's recognition of the "seriousness of the issue" raised by Mr. Wood and that, with this new evidence, his case is indistinguishable from Fisher and Littlejohn where the "implications [of Albert's substance abuse] warranted death-sentence relief[,]" Pet. App. 501a, it cannot credibly be argued that Mr. Wood would

not have cleared § 1086's lower bar to merits review.

What is more, before the OCCA deemed his claim "waived," it would have had to first determine whether he "knowingly, voluntarily, and intelligently waived" his Sixth and Eighth Amendment rights to the effective assistance of counsel at his capital murder trial 20 years ago. Okla. Stat. Ann. tit. 22, § 1086. And because the state court record is devoid of *any* evidence that Mr. Wood deliberately forfeited these bedrock Constitutional guarantees, and is instead replete with evidence of his decades-long struggle to vindicate these rights in state and federal court, the OCCA would have had to answer that question negatively and reach the merits of Mr. Wood's federal claim.

That Mr. Wood's status as a death-sentenced prisoner is all that prevented him from obtaining merits review of his federal claim is flagrant discrimination, odious in a civilized society and "repugnant to the Constitution." *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967).

II. The OCCA's denial of Mr. Wood's successor postconviction petition is not adequate and independent

For a state-law ground of decision to preclude this Court's review it must be "adequate" to support the judgment and "independent" of federal law. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The adequacy-and-independence inquiry is itself "a matter of federal law." *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (per curiam); *Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965) ("[T]he adequacy of state

procedural bars to the assertion of federal questions is itself a federal question."). The decision below is not adequate or independent. This Court's exercise of jurisdiction is necessary and appropriate.

A state ground of decision is "adequate" where it is "firmly established and regularly followed by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (internal quotations omitted). It fails this requirement, thus giving this Court jurisdiction to review the judgment, where "discretion has been exercised . . . in a surprising or unfair manner." *Walker v. Martin*, 562 U.S. 307, 320 (2011) (internal quotations omitted); *see also id.* (citing *Prihoda v. McCaughtry*, 910 F.2d 1379, 1383 (7th Cir. 1990) (noting a state ground "applied infrequently, unexpectedly, or freakishly" may "discriminat[e] against the federal rights asserted" and therefore "rank as inadequate" (internal quotations omitted)). Viewed through the lens of these controlling principles, the OCCA's decision below ranks as inadequate.

As already discussed *supra*, the OCCA recognized as "new" the evidence of Albert's drug addiction during the period he handled Mr. Wood's capital case. Pet. App. 004a-005a. But it procedurally barred his federal claim from merits review on res judicata and waiver grounds. *Id.* In so doing, the OCCA actively obstructed Mr. Wood's vindication of his Sixth Amendment right in state court in the following three ways.

First, the OCCA prevented him from factually developing the merits of his

Sixth Amendment claim when he diligently raised and tried to factually develop it in his first postconviction proceeding. *Second*, after having denied Mr. Wood's request for discovery and a hearing in his initial postconviction proceeding so that he could factually develop his Sixth Amendment claim, the OCCA denied it on the merits for lack of proof. Pet. App. 026a. *Third*, once Mr. Wood developed and presented the evidence proving he was entitled to relief all along, the OCCA again shut its doors to merits review of his Sixth Amendment claim because he diligently sought to raise and develop it previously. Pet. App. 005a. It is hard to imagine a more "surprising" and "unfair" exercise of discretion—all to prevent a death-sentenced prisoner from vindicating his bedrock Sixth Amendment right. *Walker*, 562 U.S. at 320.

This exercise of discretion is even more surprising and unfair given what the State failed to contest below. The State did not dispute that Mr. Wood's evidence was new and credible. *See generally* Pet. App. 490a-506a. Nor did it dispute that the new evidence established that Albert's substance-abuse problem contributed to his numerous failures in Mr. Wood's case and constituted clear and convincing evidence that Mr. Wood's trial outcomes would have been different but for Albert's failures. *Id.* Indeed, the State went so far as to acknowledge "the seriousness of the issue" and that, with this evidence, Mr. Wood's case is *indistinguishable* from the two other cases in which the "implications [of Albert's substance abuse] warranted death-sentence relief[.]" Pet. App. 501a. The OCCA did not disagree, opting instead to deny Mr. Wood merits review of his concededly serious Sixth Amendment issue in a patently circular,

"surprising[,]" and fundamentally "unfair manner." *Walker*, 562 U.S at 320.

Even assuming the OCCA's res judicata and waiver determinations are adequate, its refusal to review the merits of Mr. Wood's newly-discovered Sixth Amendment claim under *Valdez* is not.

Valdez clearly established the OCCA's power to look beyond any procedural bars and grant a successor postconviction application brought by a death row prisoner "when an error complained of has resulted in a miscarriage of justice, *or constitutes a substantial violation of a constitutional or statutory right*." 46 P.3d at 710 (emphasis added). As Mr. Wood did below, Valdez filed a successor postconviction application alleging that new mitigation evidence showed his Sixth Amendment right to effective trial counsel was violated when he was saddled with a court-appointed lawyer who "did not have the financial resources available to properly investigate" the case, and who failed to prepare and present relevant mitigation at his capital sentencing proceeding. 46 P.3d at 704-05, 09-10.

The OCCA reached the merits of Valdez's successor penalty-phase IAC claim, granted relief, and remanded for resentencing. *Id.* at 710-11. It did so in the exercise of "its power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Id.* at 710. The court reasoned:

> The case before us today is truly a 'special case' where the interests of justice and due process are genuinely implicated. While this case is not one of actual innocence, by our decision today, the majority finds it

> presents a persuasive claim that had appropriate counsel and assistance been provided, Petitioner might have proven he deserved a lesser punishment than death. The concept of the Rule of Law should not bind this Court so tightly as to require us to advocate the execution of one who has been denied a fundamentally fair sentencing proceeding due to trial counsel's ineffectiveness, particularly when that ineffectiveness is at least in part attributable to State action.

Id. at 711 n.25 (internal citations omitted).

The same reasoning compelled a similar result in Mr. Wood's case. As already discussed, it was undisputed that the new evidence he marshaled in support of his IAC claim was both new and credible. *See generally* Pet. App. 490a-506a. It was also undisputed that his new evidence established that Albert's substance abuse problem existed *during the period he handled Mr. Wood's capital case*. *Id.* And finally, it was undisputed that Mr. Wood's new evidence rendered his case indistinguishable from *Littlejohn* and *Fisher*—where evidence of Albert's alcohol and drug addiction resulted in the OCCA ordering relief in two capital cases Albert handled at the time he also represented Mr. Wood. *Id.* Under *Valdez*, the OCCA should have reviewed the merits of Mr. Wood's IAC claim. Its failure to do so was not only "unfair," but also "unexpected[,]" "freakish[,]" and "discriminat[ed] against [his] federal rights[.]" *Walker*, 562 U.S. at 320 (citing *Prihoda*, 910 F.2d at 1383). The court's decision below "rank[s] as inadequate[.]" *Id.*

The OCCA's decision below is not independent of federal law either. *First*, as already discussed *supra*, the OCCA's application of Okla. Stat. 1089(D)(8)(b) to bar review of Mr. Wood's newly-discovered federal constitutional claim violates the Equal

Protection and Due Process Clauses, discriminates against his federal rights, penalizes him on account of his status, and is thus "interwoven" with important federal questions. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). *Second*, the OCCA's refusal to review the merits of Mr. Wood's newly-discovered Sixth Amendment claim under *Valdez* required the court to look to the "substantiality" of his federal claim in order to conclude that it did not "constitute[] a substantial violation of a constitutional . . . right." 46 P.3d at 710. For the reasons already discussed, the OCCA—looking to the substantiality of Mr. Wood's Sixth Amendment claim—should have granted review of its merits and, at the very least, ordered a hearing. Its failure to do either, particularly where the State did not dispute Mr. Wood's entitlement to relief on the merits and instead insisted the court could not get there, implicates the Fourteenth Amendment's due process and equal protection guarantees, discriminated against Mr. Wood's Sixth Amendment claim solely on account of his status, and supplies this Court with jurisdiction to review the matter. Where a state-law ground of decision "is so interwoven with" a federal-law ground of decision "as not to be an independent matter," this Court's "jurisdiction is plain." *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *see also Ake*, 470 U.S. at 77; *Case*, 381 U.S. at 346-47 (Brennan, J., concurring); *Ford*, 477 U.S. at 411. In that situation, this Court has "jurisdiction and should decide the federal issue," because "if the state courts erred in its understanding of [this Court's] cases," then the Court "should so declare[.]" *Zacchini v. Scripps-Howard Broad Co.*,

433 U.S. 562, 568 (1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted: January 12, 2023.

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