No. 22-6538

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

At issue in this case is whether the State of Oklahoma can, consistent with the Fourteenth Amendment's Due Process and Equal Protection Clauses, open its postconviction forum to successor federal claims based on newly-discovered evidence while administering that forum in a two-tiered manner that discriminates against those claims when brought by death-sentenced prisoners solely because of their status among the condemned. Also at stake here is whether the Federal Constitution tolerates the Oklahoma Court of Criminal Appeals' application of this discriminatory postconviction regime—and its imposition of novel procedural requirements placing Mr. Wood in a catch-22—to deny merits review of, and thus give second-class treatment[1] to, Mr. Wood's newly-discovered Sixth Amendment claim.

Under this Court's precedent, these questions should be answered with a resounding no. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); *Pennsylvania v. Finley*, 481 U.S. 551, 557-58

[1] The second-class treatment that Oklahoma's discriminatory postconviction regime affords newly-discovered federal claims brought by capital prisoners is also at issue in Richard Glossip's certiorari petition which is presently pending before this Court. *Compare* Petition for Writ of Certiorari at 32, *Glossip v. Oklahoma*, No. 22-6500 (U.S. Jan. 3, 2023) (Mr. Glossip arguing that the Oklahoma Court of Criminal Appeals ("OCCA") subjected his newly-discovered federal claim under *Brady v. Maryland*, 373 U.S. 83 (1963), to a more onerous standard under Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) when "the Constitution demands far less"), *with* Petition for Writ of Certiorari at 24-25, 29-34, *Wood v. Oklahoma*, No. 22-6538 (U.S. Jan. 12, 2023) (Mr. Wood arguing that the OCCA subjected his newly-discovered Sixth Amendment claim to review under Oklahoma Stat. Ann. tit. 22, § 1089(D)(8)(b) and OCCA Rule 9.7(G), which uniquely prevent him and other capital defendants in Oklahoma from raising newly-discovered federal Constitutional claims that are not "outcome determinative or demonstrate factual innocence by clear and convincing evidence"). Just as Oklahoma's two-tiered postconviction regime discriminated against Mr. Glossip's newly-discovered *Brady* claim, so too has it discriminated against Mr. Wood's newly-discovered Sixth Amendment claim.

(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)); *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."); *see also 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 [a] crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.") (citation omitted); *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[F]undamental fairness entitles indigent defendants to an 'adequate opportunity to present their claims fairly within the adversary system[.]'") (citation omitted).

Just last week, this Court held in *Cruz v. Arizona* that a state court decision that "generates" a "catch-22" by making it "impossible for [a petitioner], and similarly situated capital defendants, to obtain relief" on diligently-pursued federal claims to which a state opens its collateral forum will not constitute an adequate state procedural ground. 598 U.S. —, 2023 WL 2144416, at *7 (Feb. 22, 2023). As in *Cruz*, the OCCA made it impossible for Mr. Wood to obtain merits review of his newly-discovered Sixth Amendment claim that his trial lawyer's impairment by an addiction to cocaine, alcohol, and prescription pills during the period he handled Mr. Wood's capital case establishes that he was denied the effective assistance of counsel. It did so, first, by preventing him from factually developing his federal claim when he

diligently raised it and sought discovery and a hearing to prove its merits in his first postconviction proceeding, then denying it for want of proof. Pet. App. 012a, 026a. And once, despite those obstacles, he came forward with the evidence the OCCA previously prevented him from developing demonstrating his entitlement to relief on his federal claim all along, the OCCA held against him the fact of his prior diligence by invoking the doctrines of res judicata and waiver to shut its doors to merits review of his federal claim. Pet. App. 005a. *Cf. Cruz*, 2023 WL 2144416, at *7 (holding that "[t]he consequences of the interpretation below compound its novelty[]"); *Walker*, 562 U.S. at 320 (a state ground may be found inadequate where a court has exercised discretion in a "surprising or unfair" manner).

The State's Brief in Opposition ("BIO") fails to reckon with the patent unfairness of the decision below which placed Mr. Wood in an impossible catch-22. It also fails to dispute that Oklahoma administers a two-tiered system of postconviction review that discriminates against newly-discovered federal claims brought by death-sentenced prisoners solely on account of their status. (*See generally* BIO at 14-24.) Nor does the State dispute—let alone engage with—Mr. Wood's showing that Oklahoma is an outlier among the jurisdictions that retain capital punishment in so discriminating against the federal rights of the condemned. (*Compare* Pet. at 3-4, 27-28, *with* BIO at 1-25.)

Rather than dispute these facts, the State instead argues that this Court should deny Mr. Wood's Petition because: 1) Mr. Wood did not raise below a Fourteenth Amendment challenge to the OCCA's decision to subject his newly-

discovered Sixth Amendment claim to the onerous provisions of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) thus forfeiting it (BIO at 17-19); 2) the State can devise some rational basis for Oklahoma's discriminatory postconviction regime; and 3) the OCCA's refusal to review the merits of Mr. Wood's newly-discovered federal claim was based on adequate and independent state grounds. (BIO at 15-17.)

Each argument fails upon inspection, as demonstrated herein. But more than that: the State's defense of the concededly-discriminatory postconviction regime that Oklahoma administers, and which gives second-class treatment to the federal rights of those for whom the Eighth Amendment demands heightened—not less—reliability, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), illustrates why this Court's intervention is needed most. *See Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) ("If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal . . . to bar the assertion of [the federal right] even upon local grounds.").

This Court should grant the Petition.

ARGUMENT

I. Oklahoma's clear discrimination against the federal rights of capital defendants violates the Fourteenth Amendment and the State's forfeiture argument misconstrues the adequacy and independence inquiry

The State argues that the Court "should not consider" Mr. Wood's arguments that Oklahoma's discriminatory postconviction regime violates the Fourteenth Amendment's Due Process and Equal Protection guarantees because he "failed to raise the federal question in the state court below." (BIO at 14-15.) But that argument

misses the point: the question whether Oklahoma's postconviction regime and its application by the OCCA below violate the Fourteenth Amendment is part-and-parcel of the adequacy inquiry which Mr. Wood did not have to assert below since that is a purely federal question for this Court alone to decide. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("[T]he adequacy of state procedural bars to the assertion of federal questions, we have recognized, is not within the State's prerogative to finally decide; rather, adequacy is itself a federal question." (cleaned up)).

Indeed, this Court has "repeated[ly] recogni[zed] that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker*, 562 U.S. at 321. Where such discrimination exists, a state procedural rule will rank as inadequate. *See Beard v. Kindler*, 558 U.S. 53, 65 (2009) (Kennedy, J., concurring) (a state procedural ground would be inadequate where there is a "purpose or pattern to evade constitutional guarantees"). Mr. Wood's Petition demonstrates that Oklahoma's discriminatory postconviction regime—facially and as applied by the OCCA below to deny merits review of his newly-discovered Sixth Amendment claim solely because of his status as a death-sentenced prisoner—violates the Constitution's due process and equal protection guarantees rendering the decision below inadequate. (Pet. at 20-29, 34-40.)

In taking aim at the merits of Mr. Wood's Due Process and Equal Protection arguments, the State does not rebut the following dispositive facts: 1) Oklahoma has elected to open the doors of its collateral review process to successor petitions raising

newly-discovered federal Constitutional claims to capital and noncapital petitioners alike; 2) Oklahoma imposes different and significantly more onerous procedural requirements on *capital* defendants seeking to obtain merits review of newly-discovered federal claims than it imposes on *noncapital* defendants seeking the same remedy; 3) Oklahoma law limits the range of newly-discovered federal Constitutional claims a capital petitioner can raise to only those that are outcome determinative or demonstrate factual innocence by clear and convincing evidence, while permitting noncapital petitioners to assert a full range of newly-discovered federal claims; and 4) Oklahoma is an outlier among the jurisdictions that retain capital punishment in maintaining a two-tiered regime of discriminatory postconviction review for newly-discovered federal claims brought by capital and noncapital defendants. (*Compare* Pet. at 23-29, *with* BIO at 15-24.) Under this Court's precedents, the due process error is plain. *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)); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Due Process' emphasizes fairness between the State and the individual dealing with the State[.]"); *Ake*, 470 U.S. at 77 ("[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system[.]"); *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.").

Perhaps recognizing this, the State's response to the merits of Mr. Wood's Fourteenth Amendment challenge to Oklahoma's discriminatory postconviction regime simply points out *additional* discrepancies in Oklahoma's treatment of capital and noncapital postconviction petitioners (BIO at 16-17), and advances reasons that allegedly justify Oklahoma's administration of a two-tiered regime that affords death-sentenced prisoners' federal rights second-class status (BIO at 21-24). Far from refuting Mr. Wood's arguments, the State's responses help illustrate their merits.

First, the State accuses Mr. Wood of "overlook[ing]" the fact that an amendment to Oklahoma's noncapital postconviction statute that took effect on November 1, 2022 imposes a one-year statute of limitations on successor petitions. (BIO at 16.) But Mr. Wood did not overlook this. As even the State acknowledges, this amendment has no bearing on Mr. Wood's case as it "went into effect after the [OCCA's] denial of Wood's fourth post-conviction application." (BIO at 16 n.19.) Moreover, the amendment—even if it were applicable here—does little to help the State defeat Mr. Wood's showing that Oklahoma discriminates against the federal rights of capital prisoners by making it harder for them to vindicate those rights when based on newly-discovered evidence as compared to noncapital prisoners. Whereas the amendment gives noncapital petitioners <u>one-year</u> to file a successor petition asserting federal rights based on newly-discovered evidence, *see* Okla. Stat. Ann. tit. 22, § 1080.1(A)(5), OCCA Rule 9.7(G)(3) still affords capital petitioners just <u>60-days</u> to do the same.

The State acknowledges that capital successor petitioners in Oklahoma are

required to demonstrate 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 would have rendered the penalty of death." (BIO at 7-8); Oka. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). Although it hints at its disagreement with Mr. Wood's characterization of this standard as "more onerous" than that imposed on noncapital petitioners seeking to vindicate newly-discovered federal rights, the State stops short of explicitly disagreeing with Mr. Wood. (BIO at 16.) And rightly so. For even assuming that review under Okla. Stat. Ann. tit. 22, § 1086 requires noncapital petitioners to prove "the existence of a probability that the new discovered evidence, if presented at trial, would have changed the jury's verdict[]" (BIO at 16 n.18 (citing *Smith v. State*, 826 P.2d 615, 617 (Okla. Crim. App. 1992), with the caveat that "the issue appears to be somewhat unsettled under Oklahoma law[]")), the State points to no Oklahoma case, statute, or rule requiring noncapital petitioners to carry that burden *by clear and convincing evidence*.

The State is correct that under Oklahoma's recent amendment to Okla. Stat. Ann. tit. 22, § 1080.1(A)(5), noncapital petitioners are now required to demonstrate diligence in discovering the factual predicate for newly-discovered federal claims. (BIO at 17.) But as already discussed, Oklahoma gives them <u>one-year</u> to return to court with that new evidence, whereas it affords capital petitioners just <u>60-days</u>. And once back in court equipped with that new evidence, noncapital petitioners need only

assert "sufficient reason" for why a ground for relief "was not asserted or was inadequately raised in the prior application[,]" in order to obtain merits review under Okla. Stat. Ann. tit. 22, § 1086. Capital petitioners, by contrast, are *prohibited from obtaining merits review* of their newly-discovered, diligently-pursued federal claims unless they can also establish 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 would have rendered the penalty of death." Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1)-(2) ("[I]f a subsequent application for post-conviction relief is filed after filing an original application, ***the Court of Criminal Appeals may not consider the merits of . . . the untimely original application, unless*** . . ." §§ 1089(D)(8)(b)(1) and (b)(2) are both satisfied (emphasis added)).

The State has no answer for how Oklahoma's blatant discrimination against capital petitioners' federal rights squares with the Fourteenth Amendment's Due Process guarantees.[2] *Cf. Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("States are

[2] The State's accusation that Mr. Wood "grievously misrepresents the non-capital postconviction statutes" in Oklahoma is overzealous given the plain language of the statute. (BIO at 17 n.20.) Mr. Wood's Petition points out that Okla. Stat. Ann. tit. 22, § 1086 allows *noncapital* petitioners in Oklahoma to raise claims in a successor application that were not the subject of a knowing, voluntary, and intelligent waiver, while Okla. Stat. Ann. tit. 22, § 1089(D) affords no such protections for *capital* successor petitioners. (Pet. at 24-25.) *Compare* Okla. Stat. Ann. tit. 22, § 1086 ("Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived . . . 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."), *with* Okla. Stat. Ann. tit. 22, § 1089(D)(2) ("All grounds for relief that were available to the applicant . . . not included in a timely application *shall be deemed waived*." (emphasis added)). In other words, a noncapital successor petitioner who did not knowingly, voluntarily, and intelligently waive a federal claim in a prior proceeding still has a path to merits review of that claim under § 1086. A capital

independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."); *Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right . . . they believe is inconsistent with their local policies.").

II. Oklahoma has no rational basis for singling out capital defendants for discriminatory treatment by erecting unique procedural obstacles to their ability to obtain merits review of newly-discovered federal claims

Nor is the State's retort to Mr. Wood's Equal Protection arguments persuasive. (BIO at 21-24.) At the threshold, the State does not dispute that Oklahoma's two-tiered system of postconviction review singles out capital petitioners for discriminatory treatment by uniquely impeding their ability to obtain merits review of newly-discovered federal claims. *Id.*; *see Hysler v. State of Florida*, 315 U.S. 411, 422-23 (1942) (noting that had petitioner raising equal protection challenge "been singled out for invidious treatment . . . he could properly complain here[]"). Rather it insists that Oklahoma's interest in "carrying out a death sentence in a timely manner[]" supplies a rational basis for the state's discrimination against the federal rights of those it condemns. (BIO at 22.) There are two problems with this argument.

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successor petitioner, by contrast, is categorically deemed under § 1089 to have waived *any* untimely claims, including those that were not the subject of a knowing, voluntary, and intelligent waiver. By pointing out this discrepancy, Mr. Wood has not "grievously misrepresented" anything. (*Cf.* BIO at 17 n.20.)

In any event, crediting the State's reading of the statute makes no difference to the merits of Mr. Wood's due process and equal protection arguments given the unrebutted evidence presented in Mr. Wood's Petition and herein demonstrating the many other ways in which Oklahoma discriminates against the federal rights of the condemned. (Pet. at 20-34.)

First, the State's interests in finality and enforcing a sentence are ones this Court has recognized are attendant to all criminal cases, capital and noncapital alike. *See*, *e.g.*, *Teague v. Lane*, 489 U.S. 288, 310 (1989) (recognizing in the retroactivity context that applying new rules to cases on collateral review implicates state finality concerns in criminal cases generally); *id.* at 314 n.2 ("Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that there will at some point be the certainty that comes with an end to litigation." (internal quotations omitted)); *see also Piper v. Young*, 936 N.W.2d 793, 806-07 (S.D. 2019) ("[T]he need for finality and the effectual administration of the law exists in capital and non-capital cases alike.").

Second, Oklahoma could just as easily advance its interests in finality and enforcing criminal sentences by imposing the *same* limitations on successor petitions in capital and noncapital cases. But rather than do that, Oklahoma has instead "singled out" capital petitioners "for invidious treatment."[3] *Hysler*, 315 U.S. at 422-

[3] The State's claim that capital successor petitioners in Oklahoma, unlike noncapital successor petitioners, "are guaranteed representation" is incorrect. (BIO at 24 (citing Okla. Stat. Ann. tit. 22, § 1089(B).) Section 1089(B) provides that "the Oklahoma Indigent Defense System [OIDS] shall represent all indigent defendants in capital cases seeking post-conviction relief *upon appointment by the appropriate district court*[.]" Okla. Stat. Ann. tit. 22, § 1089(B) (emphasis added). And the state district courts only appoint counsel under § 1089(B) for *initial* capital postconviction proceedings. *See, e.g.,* O.R.1 855 (Oklahoma County district court appointing OIDS to represent Mr. Wood in his initial postconviction proceeding and citing Okla. Stat. Ann. tit. 22, § 1089). Oklahoma does not, as the State claims, "guarantee[] representation" to capital postconviction petitioners "regardless of whether it is the original or successive application." (BIO at 24.) Moreover, Okla. Stat. Ann. tit. 22, § 1355.13A, which the State also cites (BIO at 24 n.24), governs compensation for appointed counsel in capital cases. As already discussed, however, counsel is only appointed to *initial* capital postconviction proceedings under Okla. Stat. Ann. tit. 22, § 1089(B).

It must also be said that Oklahoma's provision of resources to capital defendants for initial postconviction proceedings that it does not also provide noncapital defendants pursuing initial

23. The Court should thus reject as curative of the equal protection problem the State's attempt to dress up Oklahoma's discrimination against capital petitioners' federal rights in finality garb. (BIO at 21-24.) *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

The State next claims that the OCCA did not apply Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2) to Mr. Wood which renders his case a "poor vehicle" for addressing the Constitutional questions his Petition presents. (BIO at 24-25.) Crediting that argument would require this Court to ignore the clear text of the OCCA's decision below. *See* Pet. App. 002a-004a (the OCCA stating that "[o]ur review of post-conviction claims in capital cases is extremely limited under 22 O.S.2011, § 1089" and identifying its provisions, including § 1089(D)(8)(b)(2) and OCCA Rule 9.7(G), as applicable to Mr. Wood's postconviction application). The OCCA not only deemed §1089(D)(8)(b)(2) applicable to Mr. Wood, but it did so despite the State's concession that review under § 1086 was appropriate (Pet. App. 504a) and its failure to dispute Mr. Wood's entitlement to relief.[4] *See generally* Pet. App. 490a-506a.

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postconviction relief merely implements the "heightened reliability" that the Eighth Amendment demands in capital cases. *See Woodson*, 428 U.S. at 305. The Court should reject the State's attempt to use Oklahoma's adherence to the Eighth Amendment's mandate as an excuse for its violation of the Fourteenth Amendment's prohibition against administering its postconviction form in a manner that discriminates against the federal rights of the condemned. (BIO at 23-24.) *See Douglas v. California*, 372 U.S. 352, 356-57 (1963) ("[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination." (internal quotations omitted)).

[4] Despite having failed to dispute below Mr. Wood's entitlement to relief on his newly-discovered Sixth Amendment claim, the State attempts to walk back that failure by arguing in a

Finally, even assuming the State's justifications for Oklahoma's discriminatory postconviction regime withstand rational basis review, such a scheme nonetheless offends the Equal Protection Clause. That is because while "neither the Equal Protection Clause of the Fourteenth Amendment, nor the counterpart equal protection requirement embodied in the Fifth Amendment, guarantees absolute equality or precisely equal advantages, . . . In the context of a criminal proceeding they require [ ] an adequate opportunity to present (one's) claims fairly[.]" *United States v. MacCollom*, 426 U.S. 317, 324 (1976) (cleaned up). The OCCA denied Mr. Wood that adequate opportunity when it subjected his newly-discovered federal claim to review under § 1089 and OCCA Rule 9.7(G), refused to review its merits solely because of his status, and shut its doors to his newly-discovered federal claim after having denied him the ability to factually develop it previously. (Pet. at 20-40.)

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footnote that the Tenth Circuit's denial of habeas relief on a *different* appellate-IAC claim that it was required to review deferentially under 28 U.S.C. § 2254(d) is dispositive of the prejudice inquiry. (BIO at 4 n.7.) But that is obviously wrong, including because the prejudice standard in the context of an appellate-IAC claim examines the probability of a different outcome on appeal, *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000), whereas the prejudice attendant to a trial-IAC claim examines the probability of a different outcome at trial, *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The record in Mr. Wood's case demonstrates the prejudice he suffered as a result of trial counsel's substance-induced failures to subject the State's case against him to meaningful adversarial testing. For example, trial counsel failed to challenge the great-risk-to-others aggravator in Mr. Wood's case—whereas his co-defendant and brother's attorneys successfully struck it from the death calculus—resulting in the jury weighing three aggravators against Mr. Wood's scant mitigation, rather than two aggravators that might have tipped the sentencing scales in favor of a life verdict. (Pet. at 10-13; *id.* at n.6.) What is more, the lone Black juror wavered over Mr. Wood's penalty-phase verdict and later testified that, had trial counsel presented the wealth of mitigation subsequently developed, she would have held her ground for a life sentence. (Pet. at 13; *id.* at n.7.) *Cf. Cruz*, 2023 WL 2144416, at *4 (taking into account jurors' post-sentencing public statements that "they would rather have voted for life without the possibility of parole, but that they were not given that option[]"). And finally, Mr. Wood argued below that his new evidence entitled him to relief not only under *Strickland*, but also under *United States v. Cronic*, 466 U.S. 648 (1984), and that his constructive denial of counsel warranted a presumption of prejudice. Pet. App. 117a-140a.

III. The decision below does not rest on adequate and independent state procedural grounds

The State's attempt to defend the adequacy and independence of the decision below is premised on factual errors and procedural obfuscations so Mr. Wood here sets the record straight. First, the State is wrong in claiming that when Mr. Wood timely raised in his initial application for postconviction relief a Sixth Amendment claim based on newly-discovered evidence of trial counsel Johnny Albert's substance abuse, the OCCA "remanded the matter for an evidentiary hearing." (BIO at 4 (footnote omitted); *id.* at 10.) To be clear: the OCCA did not order an evidentiary hearing on that claim. It did just the opposite and rejected the claim after denying Mr. Wood's requests for discovery and a hearing on the issue. Pet. App. 008a-027a.

It was during Mr. Wood's *earlier direct appeal proceedings* where he raised an altogether *different* ineffective-assistance claim that the OCCA remanded that issue for a hearing under OCCA Rule 3.11. (DA2 Appl. 6/28/05; DA2 Order, 11/16/05; *see also* Pet. at 14-17 (Mr. Wood detailing the procedural history of his case).) That earlier IAC claim had nothing to do with Albert's substance because Albert actively concealed during those proceedings that he was impaired by an addiction to drugs and alcohol during the period he handled Mr. Wood's capital case.[5] (*See generally* Tr.

[5] The State argues that Albert could not have actively concealed his drug use during the pendency of Mr. Wood's direct appeal proceedings because "as found by Oklahoma's two highest courts, Mr. Albert did not have a substance abuse issue during Wood's trial." (BIO at 4 n.6.) The State cites the OCCA's decision denying Mr. Wood's initial postconviction application where Mr. Wood timely raised for the first time a claim based on newly-discovered evidence that Albert's drug impairment violated his Sixth Amendment rights. *Id.* at n.7. However, the OCCA's initial postconviction decision was predicated on a finding that Albert's abuse onset in 2005 and was rendered after denying Mr. Wood the evidentiary hearing on that question to which Oklahoma law entitled him. (Pet. at 2, 15-17.) *See Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009) ("Federal courts may upset

2/27/06 at 240-92.)

The State's justification for the OCCA's refusal to review the merits of Mr. Wood's federal claim under *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), based on the State's view that the claim was not "exceptional" is irrelevant since that is not what *Valdez* requires, as even the State recognizes. (BIO at 11 n.14.) The State also fails to grapple with Mr. Wood's showing that the OCCA "unexpectedly" applied Rule 9.7(G)(3) to Mr. Wood in a "freaskish[]" and unforeseeable manner by transforming its objective test into a subjective one, except to say that the OCCA's novel application of its procedural rule "is [ ] a state law question not for this Court's review." (*Compare* Pet. at 29-31, *with* BIO at 7-8 n.10.) But "the adequacy of state procedural bars to the assertion of federal questions, . . . is itself a federal question." *Lee*, 534 U.S. at 375 (cleaned up). The State's reliance on Tenth Circuit precedent to defend the adequacy and independence of § 1089, Rule 9.7(G), and their application by the OCCA below is misguided (BIO at 11-14) since it is this Court—not the Tenth Circuit—that has the last word over those inherently federal questions. *See id.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."). The new evidence Mr. Wood marshaled and diligently presented in his successor petition below demonstrates that Albert's cocaine and alcohol addiction began much earlier than 2005. Meanwhile, in *State ex rel. Okla. Bar Ass'n v. Albert*, 163 P.3d 527 (Okla. 2007), the court made no findings as to the date of onset of Albert's drug addiction and merely acknowledged in the context of discussing Albert's reinstatement to the practice of law that "[a]ccording to the attorney, in March and April of 2005, his life began to crumble when he started drinking heavily and abusing cocaine." *Albert*, 163 P.3d at 531. In the end, the State's arguments point to a material factual dispute over the onset of Albert's drug addiction which the OCCA should have (and never has) resolved through a hearing.

Respectfully submitted: March 2, 2023.

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