Case No. 22-6661

IN THE SUPREME COURT OF THE UNITED STATES

BRENT ALLEN MORRIS,
***Petitioner*,**

v.

THE STATE OF OKLAHOMA,
***Respondent*.**

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 17, 2023

No. 22–6661

QUESTIONS PRESENTED

1. Whether Petitioner's Petition for Writ of Certiorari, which challenges the state court's rejection of one claim on direct appeal, is jurisdictionally barred under Supreme Court Rule 13.1, since the petition was filed more than two years after the judgment was entered on direct appeal and Petitioner has offered no good cause to excuse the delay?

2. Whether this Court should review the Oklahoma Court of Criminal Appeals' rejection of Petitioner's direct appeal challenge to the trial court's decision to conform the jury instruction in one count with the law and the evidence, despite the caption of that crime being previously mislabeled?

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No. 22–6661

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Brent Allen Morris's Petition for Writ of Certiorari to review the unanimous unpublished opinion of the Oklahoma Court of Criminal Appeals ("OCCA"), entered in this case on August 27, 2020. *See Brent Allen Morris v. The State of Oklahoma*, No. F-2018-551, slip op. (Okl. Cr. Aug. 27, 2020) (unpublished). Pet. App'x E.[1]

STATEMENT OF THE CASE

In 2017, a Tulsa County jury convicted Petitioner of eleven state law crimes stemming from various acts of domestic abuse and physical violence against a woman with whom Petitioner was in a dating relationship. *See* Pet. App'x E, at 1–2, 5; Resp. App'x, at 046–053. The State's evidence demonstrated that Petitioner went to the victim's home in the early morning hours of December 9, 2016, argued with her, severely beat her using a kitchen skillet and other household items, inflicted serious head trauma and compound fractures to her fingers, and ultimately left the victim for dead. *See* Pet. App'x E, at 8–9; Resp. App'x, at 049–053. Days later, the victim's father found her gravely wounded, covered in coagulated blood and "glued" to the

[1] Citations to Petitioner's Appendix will be referred to as "Pet. App'x __, at __," using the exhibit letter supplied by Petitioner, as well as original pagination. Citations to Petitioner's petition for writ of certiorari will be referred to as "Petition at __." Contemporaneously filed with this Brief is Respondent's Appendix, which includes materials relevant for this Court's consideration in adjudicating Petitioner's case, including the full briefs of the parties below and additional relevant transcript and record excerpts. Citations to Respondent's Appendix will be referred to as "Resp. App'x, at __." Although not explicitly contemplated by this Court's Rules, Respondent's Appendix is offered because Petitioner's Appendix includes only cherry-picked record and transcript cites, as well as no pleadings from the parties in state court; in that respect, Respondent believes additional context is necessary for this Court's review. *See* SUP. CT. R. 14.1(i)(vi) (permitting inclusion, in a petitioner's appendix, of "any other material . . . essential to understand the petition").

kitchen floor; when paramedics peeled the victim's hair off the linoleum floor, the sound was "like Velcro." Resp. App'x, at 050. The victim's insulin pump had been ripped out of her arm, and at the time of her discovery, the victim was "in and out of consciousness." Resp. App'x, at 050. Petitioner was linked to the crimes through a combination of DNA evidence, including a bite mark to the victim and other forensic evidence at the crime scene, such as a clear stain containing P30 (a protein found in seminal fluid) on the kitchen floor, as well as cell phone data and Petitioner's own admissions describing the skillet attack to another person. *See* Pet. App'x E, at 8–9; Resp. App'x, at 051–053. For his eleven crimes, Petitioner received an aggregate sentence of thirty-four years imprisonment in state custody and various fines. Pet. App'x E, at 2; Resp. App'x, at 044–045. Of these crimes, Petitioner's most serious conviction was on Count One, Assault and Battery by Means or Force Likely to Produce Death, in violation of OKLA. STAT. tit. 21, § 652(C) (2007), for which he received a twenty-five-year prison sentence. Pet. App'x E, at 2; Resp. App'x, at 045.

Petitioner timely brought a direct appeal to the OCCA in Case No. F-2018-551, and through appointed counsel, raised seven propositions of error challenging his convictions and sentences. Pet. App'x E, at 2–3; Resp. App'x, at 001–036. As relevant to the case now at bar, Petitioner's fifth proposition involved an alleged deprivation-of-notice issue resulting from the crime submitted to the jury on Count One. Resp. App'x, at 023–026. The State, by and through undersigned counsel, countered each proposition in written briefing. Resp. App'x, at 037–094. After thorough consideration of each claim of error, the OCCA unanimously affirmed Petitioner's convictions and

sentences in an unpublished summary opinion on August 27, 2020, and the mandate was issued immediately thereafter. Pet. App'x E, at 1, 12. Petitioner did not seek rehearing. Nor did Petitioner timely seek certiorari in this Court following affirmance of his case on direct appeal.

In the meantime, Petitioner hired post-conviction counsel and pursued state post-conviction relief, including multiple times in his underlying criminal case (District Court of Tulsa County Case No. CF-2016-6899), as well as twice on state post-conviction appeal (OCCA Case Nos. PC-2022-327, PC-2023-201).[2] The latest of these cases, OCCA No. PC-2023-201, is still ongoing at the time of this Brief's filing. Petitioner is also seeking federal habeas corpus relief, appearing *pro se*, in the case styled *Brent Allen Morris v. Carrie Bridges, Warden*, United States District Court for the Northern District of Oklahoma Case No. 22-CV-0091-CVE-SH. That habeas case is currently stayed pending resolution of the instant certiorari proceedings.

On October 19, 2022, Petitioner filed a petition for writ of certiorari with this Court seeking review of the OCCA's unanimous decision on direct appeal. As foreshadowed above, Petitioner challenges the OCCA's resolution of his fifth proposition on direct appeal, which dealt with an alleged notice issue stemming from the trial court's decision to conform the jury instruction in Count One, at the close of evidence, with the law and the evidence, despite the caption of that crime being previously mislabeled. Petition at 3–28; Pet. App'x E, at 9–11. Thereafter, on March

[2] Petitioner hired counsel for his initial post-conviction application and post-conviction appeal (in OCCA No. PC-2022-327) but opted to proceed *pro se* in his successive post-conviction appeal (in OCCA No. PC-2023-201).

23, 2023, this Court requested a response from Respondent, due to be filed on or before April 24, 2023. The instant Brief in Opposition is offered in accordance with this Court's directive. For the reasons discussed below, this Court should reject Petitioner's request for certiorari review.

OBJECTION TO JURISDICTION

A respondent may include an objection "to the jurisdiction of the Court to grant a petition for writ of certiorari" in a brief in opposition, even though a separate motion to dismiss is not permitted at the petition-for-certiorari stage. SUP. CT. R. 15.4. Accordingly, Respondent hereby objects. As foreshadowed above, Petitioner's petition, seeking to challenge the OCCA's affirmance on direct appeal, is plainly untimely under this Court's Rules. A petition for writ of certiorari to review the judgment entered by a state court of last resort is generally timely when filed "within 90 days after entry of the judgment." SUP. CT. R. 13.1. *See also* 28 U.S.C. § 2101(d) ("The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court."); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *But see* Miscellaneous Supreme Court Order No. 589 (Mar. 19, 2020) (temporarily extending the deadline to file any petition for writ of certiorari to 150 days from the date of the lower court judgment, in light of the challenges presented by the COVID-19 pandemic).

In the present petition, Petitioner seeks certiorari review of one issue implicated by the OCCA's affirmance on direct appeal. Petition at 3–28. The judgment in that case was entered on August 27, 2020, and the mandate was issued

immediately thereafter. *See* Pet. App'x E, at 1, 12. *See also* Rule 3.15(A), *Rules of the Oklahoma Court of Criminal Appeals*, OKLA. STAT. tit. 22, Ch. 18, App. (2020) (permitting the Court to issue the mandate upon the delivery and filing of the decision on appeal). Given the more lenient 150-day timing in effect at the time the judgment was entered, Petitioner had until Monday, January 25, 2021, within which to file his petition for writ of certiorari. *See* Miscellaneous Supreme Court Order No. 589 (Mar. 19, 2020). Petitioner waited until October 19, 2022, to file the present Petition. Thus, the petition currently before this Court is untimely and should be dismissed.

In that respect, on February 1, 2023, a case analyst from a Clerk of this Court advised Petitioner in a written letter that his certiorari petition was untimely: "The petition for writ of certiorari, sent October 19, 2022, was due November 25, 2020;[3] therefore the petition was filed with a notation as to its untimeliness." Resp. App'x, at 158. Although Petitioner was seemingly unaware of his untimeliness at the time he filed his petition, the case analyst's recent letter subsequently apprised him of that reality. Then, on February 13, 2023, Petitioner acknowledged receipt of that letter in a filing before the federal habeas court, stating the following:

> The Clerk noted that the petition for writ of certiorari was due November 25, 2020, however that would be the due date had Petitioner sought *certiorari* review after his direct appeal. Instead, Petitioner timely sought *certiorari* review after the conclusion of his post-conviction proceedings in the Oklahoma Court of Criminal Appeals (OCCA). As such, Respondent should inform the SCOTUS Clerk in its response that Petitioner's *certiorari* application is, in fact, timely.

[3] It appears the deadline computation in this letter did not account for the more lenient 150-day timing for certiorari petitions during the COVID-19 pandemic. *See* Miscellaneous Supreme Court Order No. 589 (Mar. 19, 2020). If Petitioner was afforded the full 150 days, he would have had until January 25, 2021, as discussed above. Either way, the petition at bar is untimely.

Resp. App'x, at 155. This is not correct. Petitioner has identified no authority supporting the notion that a later-filed state post-conviction application can render timely an otherwise untimely certiorari petition challenging a state court's order on direct appeal. As shown herein, the issue Petitioner has laid before the Court is exclusively a direct appeal issue, inasmuch as his argument challenges the OCCA's rejection of this claim on direct appeal.

Indeed, the claim now pressed was not raised in post-conviction. *See* Resp. App'x, at 097–098, 110–29, 132–37, 139–47. In Case No. PC-2022-327, Petitioner raised various attacks on appellate counsel's effectiveness on direct appeal, including (1) counsel's failure to raise a claim that State jurisdiction over Petitioner's crimes was preempted by the Oklahoma Enabling Act, (2) counsel's failure to argue that Petitioner's multiple convictions ran afoul of federal Double Jeopardy concerns, (3) counsel's failure to consult a medical expert on the diabetic victim's survivability without an insulin pump, since the victim's pump was found ripped out of her arm at the time she was discovered, which would have allegedly helped challenge the sufficiency of the evidence against Petitioner, and (4) counsel's failure to object to the alleged suppression of "raw data" evidence underpinning the DNA evidence at trial. Resp. App'x, at 097–098, 110–29, 132–37.

And in Case No. PC-2023-201, Petitioner claimed that (1) appellate counsel was allegedly ineffective for failing to investigate and raise a challenge to alleged prosecutorial misconduct, (2) appellate counsel was allegedly ineffective for failing to challenge the State's alleged intrusion into Petitioner's attorney-client relationship,

(3) Petitioner was deprived of his counsel of choice, (4) trial counsel was allegedly ineffective for failing to investigate and call certain fact witnesses, (5) the prosecutor allegedly elicited sympathy from the jury at trial, (6) an OCCA Court Rule requiring direct appeal briefs to be submitted by counsel of record is allegedly unconstitutional, and (7) alleged cumulative error. Resp. App'x, at 141–42.

To put it simply, the alleged deprivation-of-notice issue now before this Court was not raised in either post-conviction proceeding. *See* Resp. App'x, at 097–098, 110–29, 132–37, 139–47. For all intents and purposes, therefore, Petitioner's post-conviction cases are not relevant to the certiorari petition now at stake. An unrelated post-conviction filing does not reset the deadline for a certiorari petition challenging a state court's decision on direct appeal.[4]

Having shown that Petitioner's post-conviction does not reset his timing for bringing a direct appeal certiorari, the only remaining question is whether Petitioner can show cause to excuse the untimeliness of his certiorari petition. As stated above, the petition is plainly untimely under this Court's Rule 13.1. Ordinarily, in civil cases,

[4] Of course, a habeas petitioner may be entitled to statutory tolling of the one-year limitations period under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") based on a timely and properly filed collateral attack in state court, such as a post-conviction application. 28 U.S.C. § 2244(d)(2); *Wall v. Kholi*, 562 U.S. 545, 550–51 (2011) ("The limitation period is tolled, however, during the pendency of 'a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim.'" (citation omitted)). But the reason for such tolling makes good sense—a habeas petitioner should fully exhaust his claims in state court, whether by direct appeal or in post-conviction, before presenting all of his claims to the federal court. *See Holland v. Florida*, 560 U.S. 631, 648 (2010) ("A petitioner cannot bring a federal habeas claim without first exhausting state remedies—a process that frequently takes longer than one year. Hence, Congress had to explain how the limitations statute accounts for the time during which such state proceedings are pending." (internal citation omitted)). Here, unlike in habeas, certiorari sounds as a challenge to one particular state court decision—in this case, the OCCA's decision on direct appeal. Put another way, a certiorari petition—challenging only a direct appeal decision—should not receive the benefit of equitable tolling from subsequent, unrelated collateral filings.

the time for filing a certiorari petition is jurisdictional and a litigant's failure to comply with that timing results in an absolute default. *See, e.g.*, *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). However, in criminal cases—such as the one at bar—this Court has recognized a safety valve to excuse untimely petitions: "The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion *when the ends of justice so require*." *Schacht v. United States*, 398 U.S. 58, 64 (1970) (emphasis added). *See also Bowles v. Russell*, 551 U.S. 205, 212 (2007) (reiterating that this Court has "treated the rule-based time limit for criminal cases differently"). This Court has suggested that an untimely criminal petitioner can accompany his certiorari petition with a motion, supported by affidavits, presenting facts "showing that petitioner had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control." *Schacht*, 398 U.S. at 64.

Petitioner has not even come close to doing so. No such motion is offered here. And within the body of his petition itself, Petitioner does not acknowledge his untimeliness. Instead, his petition simply outlines the reasons why he believes this Court should agree to review one aspect of the OCCA's decision on direct appeal, with no regard to his untimeliness and with no respect for principles of finality in judgments. Even giving Petitioner's argument a generous interpretation under the doctrine of liberal construction, Petitioner has completely failed to explain how his untimely petition should still be considered by this Court. *See Haines v. Kerner*, 404

U.S. 519, 520 (1972) (recognizing and reaffirming this Court's general caution that *pro se* pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers"); *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (collecting cases discussing the well-established principle that, despite the doctrine of liberal construction, *pro se* parties are not excused from compliance with the same procedural rules that control all other litigants). In that sense, the requirement of liberal construction does not obligate the courts "to assume the role of advocate for the pro se litigant." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). *See also Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998) ("[W]e will not rewrite a petition to include claims that were never presented."). Thus, as a threshold matter, because this Court does not have jurisdiction over Petitioner's case, Petitioner's petition should be dismissed. SUP. CT. R. 15.4.[5]

REASONS FOR DENYING THE WRIT

Even assuming Petitioner's petition is not unreasonably belated and subject to jurisdictional dismissal, *arguendo*, the petition does not satisfy this Court's criteria for certiorari review. Although not an exclusive list, Supreme Court Rule 10 outlines certain circumstances where the grant of a petition for writ of certiorari may be warranted, as a matter of judicial discretion and "only for compelling reasons." SUP.

[5] Respondent believes the considerable and unjustified untimeliness of the petition is reason enough to warrant dismissal of this case. However, this Court's Rule 15.2 requires alternative grounds opposing certiorari to be articulated in the brief in opposition, or else those reasons may be deemed waived: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." SUP. CT. R. 15.2. In an abundance of caution, therefore, Respondent offers further reasons why this Court should reject certiorari review in this case, in addition to the aforementioned timing issues.

CT. R. 10. These circumstances include a conflict among United States courts of appeals on the same matter of importance, a conflict between a United States court of appeals and a state court of last resort on an important federal question, an instance where a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," or when a state court or a United States court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," *inter alia*. SUP. CT. R. 10(a)–(c). In the same sense, this Court has issued the following caution: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

First and foremost, the petition before the Court raises federal claims not presented on direct appeal. Indeed, the decision below hinged on an interpretation of state statutory law, one which was exceedingly fact-bound and based on matters of state law in the record. In that sense, then, not only is Petitioner's complaint inextricably intertwined in a state-law issue, but his request for this Court's review is also nothing more than an effort to seek error-correction of the state court's decision. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions . . . a federal court is limited to deciding

whether a conviction violated the Constitution, laws, or treaties of the United States."). *See also Thompson v. Lumpkin*, 141 S. Ct. 977 (Mem.) (2021) (Kagan, J., concurring in the denial of certiorari) (in a petition for writ of certiorari brought by a habeas petitioner in state custody, agreeing that certiorari review was not warranted and reaffirming the narrow criteria under Rule 10). Since error-correction is "rarely" a reason for this Court to intervene, and since his claim rests on a determination of state law, Petitioner's case is a poor vehicle for certiorari review. SUP. CT. R. 10.

Furthermore, a portion of Petitioner's claim—that his counsel was allegedly constitutionally ineffective as a result of the alleged state-law notice issue—was not even raised on direct appeal, was not decided in state court, is not exhausted, and is yet another reason why Petitioner's case is inappropriate for certiorari review. SUP. CT. R. 10. For multiple reasons, this Court should deny the petition.

I. This Court's review is not necessary because Petitioner failed to raise his federal claim on direct appeal, the OCCA's decision hinged on an interpretation of state statutory law, and this Court rarely intervenes on matters of error-correction.

For starters, Petitioner case is a poor vehicle for resolution of his claim, because Petitioner failed to raise the federal component to his claim on direct appeal. Rather, the issue hinges on a matter of state law, one which requires an intensive scrutiny of the facts before the OCCA. As noted already, this Court seldom grants certiorari review to resolve an allegation of "erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. And this Court need not intervene to correct a state court decision when the federal premise of Petitioner's current claim

was not even pressed or passed upon by the state court. For various reasons, therefore, Petitioner's case should not warrant certiorari review. SUP. CT. R. 10.

A. Factual background.

For context, Petitioner was originally charged by felony Information on December 23, 2016, with the crime of "Assault and Battery with Intent to Kill," in violation of OKLA. STAT. tit. 21, § 652(C) (2007).[6] Resp. App'x, at 160–63. The State twice amended the Information, but left Petitioner's charge in Count One unchanged. Resp. App'x, at 164–69, 170–75. The prose of Count One in the Information read as follows:

> **BRENT ALLEN MORRIS,** between **12/8/2016** and **12/10/2016**, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of **ASSAULT AND BATTERY WITH INTENT TO KILL**, a Felony, by unlawfully, feloniously, willfully and intentionally, without justifiable or excusable cause, commit an assault and battery upon one Charis Brianne Clopton with a weapon, to wit: a frying pan held in the hand of said defendant and with which he did then and there repeatedly strike the said Charis Brianne Clopton in the head causing life threatening injuries, to wit: subdural hematoma . . . .

Resp. App'x, at 160, 164, 170. A preliminary hearing was held on March 10, 2017, and Petitioner was bound over for the crime of Assault and Battery with Intent to Kill on Count One, *inter alia*. Pet. App'x B. At jury trial, the State read the charging Information to the jury, including the charge of Assault and Battery with Intent to

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[6] The text of this statute establishes the following:

> Any person who commits any assault and battery upon another . . . by means of any deadly weapon, or by such other means or force as is likely to produce death, or in any manner attempts to kill another . . . or in resisting the execution of any legal process, shall upon conviction be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding life.

OKLA. STAT. tit. 21, § 652(C) (2007).

Kill on Count One, which also included language that Petitioner caused life-threatening injuries. Pet. App'x C.

On the last day of trial, after the close of all evidence, the parties convened for an instruction conference outside the hearing of the jury. Resp. App'x, at 176–86. On Count One, the State requested the jury be instructed on the elements of "Assault and Battery by Means or Force Likely to Produce Death," in conformance with the Oklahoma Uniform Jury Instructions. Resp. App'x, at 177. *See also* Instruction No. 4-7, OUJI-CR(2d) (Supp. 2012). The State argued that because the Oklahoma Legislature's 1992 amendment to § 652 removed the intent element from sub-section (C) (and therefore, no specific uniform jury instruction existed for the crime ostensibly captioned "Assault and Battery with Intent to Kill"), and because Petitioner's crime was, from the genesis of the case, situated under § 652(C) (the text of which codified and included the crime of Assault and Battery by Means or Force Likely to Produce Death), the jury should not be instructed on the superseded "intent to kill" element. Resp. App'x, at 180–81. Defense counsel objected and insisted that intent be included as an element, but failed to point to a reasonable alternative instruction. Resp. App'x, at 178–79. Over defense objection, the trial court instructed the jury on Assault and Battery by Means or Force Likely to Produce Death, pursuant to Oklahoma Uniform Jury Instruction 4-7. Resp. App'x, at 185–86, 187–88. The jury convicted Petitioner accordingly. Resp. App'x, at 189.

On direct appeal, Petitioner complained that the instructional issue amounted to a state due process violation since (1) the trial court allegedly lacked jurisdiction

over a crime not originally charged in the Information, and since (2) Petitioner allegedly lacked sufficient notice upon which to defend against this particular charge. Resp. App'x, at 023–026. The State countered each of these arguments in written briefing and asserted that Petitioner's claim did not rise to the level of a due process violation, but was instead tantamount to an alleged notice issue, and that such issue was ameliorated by the entirety of the pre-trial record, which gave Petitioner ample notice of the crime alleged by the State in Count One. Resp. App'x, at 075–086. The State also contended that Petitioner's jurisdictional claim, premised on state law, was meritless. Resp. App'x, at 075–086.

The OCCA, in its direct appeal opinion, rejected Petitioner's jurisdictional and lack-of-notice claims, holding the following:

> **Proposition V.** At the instruction conference, the trial court correctly observed the Count 1 charge was mislabeled in the amended Information as Assault and Battery With Intent to Kill. Title 21 O.S.2011, § 652(C), the subsection cited as authority for the charge, did not authorize prosecution for this crime. Despite the State's charging error, the trial court allowed the State to proceed on Count 1 with the crime of Assault and Battery With Means of [sic] Force Likely to Produce Death. The trial court very reasonably found the supporting facts pled in support of the Count 1 charge were generally consistent with this charge as was the explicit statutory reference for Count 1 found in the amended Information. Further, the supporting facts pled in Count 1 alleged neither an intent to kill nor attempt. The trial court correctly viewed the problem with Count 1 as a simple labeling error that was not fatal to the charge "because it is clear from the allegations of fact what crime is being charged." *Saulmon v. State*, 1980 OK CR 58, ¶ 6, 614 P.2d 83, 85.
>
> Appellant contends on appeal the trial court did not have jurisdiction to try him for the crime of Assault and Battery With Means of [sic] Force Likely to Produce Death. The State aptly responds to this argument with our holding in *Parker v. State*, 1996 OK CR 19, ¶ 21, 917 P.2d 980, 985, that "a trial court's jurisdiction is triggered by the filing of an

> Information alleging the commission of a public offense with appropriate venue" and defects in the Information raise due process concerns but do not undermine the trial court's jurisdiction. *Id.* There is no jurisdictional issue here.
>
> Appellant's claim that his due process rights were violated because he did not have notice of the charge against him also lacks merit. "An accused is entitled to notice of the charge he must be prepared to defend against." *Patterson v. State*, 2002 OK CR 18, ¶ 23, 45 P.3d 925, 931. As discussed above, Appellant was charged, convicted and sentenced under Section 952(C) and he was fully apprised of the charge he faced based on the factual assertions pled in the charge. Defense counsel did not complain below about a lack of notice concerning the charge against which she had to defend. The record also does not show defense counsel was hampered in any way from presenting Appellant's defense due to the State's charging error. Because Appellant was adequately apprised of the charges against him based on the "four corners" of the amended Information together with the materials provided to him at preliminary hearing and through discovery, his due process challenge must be denied. *Parker*, 1996 OK CR 19, ¶ 24, 917 P.2d at 986. Proposition V is denied.

Pet. App'x E, at 9–11.

B. Petitioner failed to raise a federal question below.

It is axiomatic that this Court operates as "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). *See also Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). In that sense, this Court generally declines to review issues raised for the first time on appeal since to do so would be "an unacceptable exercise" of discretion. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). *See also Johnson v. United States*, 520 U.S. 461, 465 (1997) ("This Rule is simply the embodiment of the 'familiar' principle that a right 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (citation omitted)); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 772

n.9 (1994) ("The issue was not raised below, so we do not address it."); *United States v. Williams*, 504 U.S. 36, 41 (1992).

In the petition at bar, Petitioner complains the alleged lack of notice violated his Sixth and Fourteenth Amendment rights to federal notice and due process. *See* Petition at 10–13. But this claim was not raised on direct appeal. Rather, Petitioner's direct appeal was situated *solely* as a matter of state-law notice and jurisdiction. Resp. App'x, at 023–026. Not once did Petitioner signal to the OCCA that his claim was premised on federal notice and due process rights. Petitioner's authority supporting his proposition consisted exclusively of state statutory law and prior decisions from the OCCA. Resp. App'x, at 023–026. Petitioner cited one federal case, but only in a passing effort to establish *de novo* review for his alleged jurisdictional claim. Resp. App'x, at 023.

As this Court has observed, "[t]he Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial," and thus, "errors of state law do not automatically become violations of due process." *Rivera v. Illinois*, 556 U.S. 148, 158, 160 (2009) (internal quotation marks omitted). Instead, a petitioner must present his argument "in a manner sufficient to put the [state] court[] on notice of the federal constitutional claim." *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012).

The necessity for placing a state court on notice of a federal claim is clear. A state court must be given the "initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971)

(internal quotation marks omitted). Indeed, "to hold that vague references to such expansive concepts as due process and fair trial fairly present, and therefore exhaust, federal claims is to eviscerate the exhaustion requirement." *Wilder v. Cockrell*, 274 F.3d 255, 260 (5th Cir. 2001). *See also Prendergast*, 699 F.3d at 1184–85 ("We see nothing in Prendergast's briefing there to alert the state court about a federal constitutional claim."); *Cole v. Zavaras*, No. 09-1293, 349 F. App'x 328, 331 (10th Cir. Oct. 16, 2009) (unpublished)[7] (concluding that some of the habeas petitioner's "claims were not presented to the state courts as *federal* constitutional claims" where state pleading in some instances "state[d] in a conclusory fashion that the alleged error violated [the petitioner's] federal constitutional rights, but [the motion] cite[d] no federal case law to support those claims and [did] little to connect the claim with the rights he alleged were violated" (emphasis in original)).

As relevant here, this Court has repeatedly rejected the invitation to decide issues raised for the first time in a petition for writ of certiorari, especially when the new issue is a federal question that was not pressed or passed upon below. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." (internal citations omitted)); *Illinois v. Gates*, 462 U.S. 213, 218–22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Hill v. California*, 401 U.S. 797, 805–06

[7] Any unpublished federal opinion referred to in this brief is cited for persuasive value. *See* FED. R. APP. P. 32.1(a).

(1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("This Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."). *See also Crowell v. Randell*, 35 U.S. 368, 368 (1836) (recognizing that, unless the federal question was raised and decided in the state court below, "the appellate jurisdiction fails").

Strict refusal to consider claims not raised and addressed below furthers the interests of comity by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds. *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (*per curiam*). *See also Lucia v. S.E.C.*, 138 S. Ct. 2044, 2050 n.1 (2018) (this Court will "ordinarily await 'thorough lower court opinions to guide our analysis of the merits'" (citation omitted); *Gates*, 462 U.S. at 221–22. Moreover, another benefit of refusing to consider new claims is a practical one—"the creation of an adequate factual and legal record" developed by the court below to better aid this Court's understanding and determination of the case presented. *Adams*, 520 U.S. at 90–91.

Petitioner has not shown how the OCCA decided "an important federal question" when the question decided by the OCCA was one of purely state law. SUP. CT. R. 10. As discussed above, Petitioner's claim on direct appeal was premised only on a claim of state law and did not implicate federal constitutional concerns. Simply put, Petitioner's new federal constitutional notice and due process claim—one which was not pressed or passed upon in the proceedings below—makes his case a poor candidate for this Court's certiorari review.

C. Petitioner's present state-law arguments were not made below.

Perhaps worse than his failure to press a federal question below, *see supra*, Petitioner also seeks this Court's review on matters of state law that were not even raised and presented on direct appeal. Specifically, Petitioner claims that the statute he was charged and convicted under, OKLA STAT. tit. 21, § 652, is "vague and overly broad" in an "as-applied" challenge, and that the same statute is "divisible" as a matter of state law. Petition at 16–23. In short, these arguments were not made to the OCCA on direct appeal.[8] Rather, on direct appeal, Petitioner asserted only that (1) the State had no state-law jurisdiction to convict Petitioner for an allegedly different crime than what was charged, and (2) the trial court's decision to allegedly instruct on a different crime than what was charged and presented to the jury deprived him of state-law notice and a chance to defend against that charge. Resp. App'x, at 023–026. As stated above, the OCCA's decision on direct appeal was limited to state-law jurisdiction and notice, since those were the only arguments marshaled by Petitioner. Pet. App'x E, at 9–11.

As explained previously, this Court operates as a court of review, not one that considers issues in the first instance. *See Cutter*, 544 U.S. at 718 n.7. Because

[8] Nor were these claims pressed in Petitioner's post-conviction proceedings either. Of course, for the reasons already discussed at length above, *see supra*, the operative state court opinion now subject to challenge is the OCCA's resolution of this issue on direct appeal, not the OCCA's decision on post-conviction in OCCA No. PC-2022-327. But Respondent mentions the post-conviction proceedings here to again emphasize that Petitioner, despite numerous chances in state court (both on direct appeal when the core notice issue was raised, and later on post-conviction, when these state-law "overbroad" and "divisibility" components to his notice claim could have been raised through the lens of appellate counsel's alleged ineffectiveness for omitting those claims on direct appeal), waited until his certiorari petition to seek review of these claims in the first instance. For the reasons discussed herein, Petitioner's ambush tactics in reserving new claims until the certiorari stage should warrant forfeiture of this Court's review.

Petitioner's current "overbroad" and "divisibility" arguments were not pressed or passed upon in the proceedings below, these new claims make his case improper for certiorari review. *See Heath*, 474 U.S. at 87 (reiterating "the longstanding rule" that this Court will not consider new claims, and that there exists, "at the least, a weighty presumption against review" of such new claims); *Tacon*, 410 U.S. at 352 (refusing to "decide issues raised for the first time here"); *Cardinale*, 394 U.S. at 438. The mere fact that Petitioner disagrees with the *result* on direct appeal does not give him license to extrapolate additional arguments, at the certiorari stage, as to why the OCCA's decision was legally incorrect.[9] For this reason, among the many others already discussed, certiorari is unwarranted. SUP. CT. R. 10.

D. This Court lacks jurisdiction to review questions of state law.

Portions of Petitioner's argument on certiorari—such as his "overbroad" and "divisibility" arguments—are premised on interpretations of state law. Petition at 16–23. Not only were these arguments not made previously (as already explained), but these new arguments are also founded upon questions of state law, which this Court lacks jurisdiction to address on certiorari review. *See McGuire*, 502 U.S. at 67–68 (reaffirming the principle that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," but rather, "a federal

[9] Petitioner also claims that one of the trial prosecutors precipitated a similar alleged due process violation in another (unnamed) case in Tulsa County "the week preceding Petitioner's trial." Petition at 7–8. This argument is entirely devoid of factual, record-based support. *See* Petition at 7 (admitting that "the record fails to reveal" the basis of his complaint). And nothing even close to this claim was raised on direct appeal. Resp App'x, at 023–026. For preservation, Respondent flags this point as a perceived misstatement of fact—one which, apparently, has absolutely no record-based support and is instead founded on Petitioner's own mere conjecture. SUP. CT. R. 15.2 (requiring a respondent to address "any perceived misstatement of fact or law" made in the petition).

court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). Petitioner cannot secure this Court's review to challenge matters of state law (especially when, as already shown, the OCCA never had a chance to address those claims in the first instance). Petitioner's previously unheard arguments—premised on new interpretations of state law—make this case unworthy for this Court's certiorari review. SUP. CT. R. 10.

E. Petitioner seeks error-correction of the OCCA's decision.

Finally, Petitioner's case is a poor vehicle for certiorari review, because Petitioner essentially seeks error-correction of the OCCA's determination on direct appeal. As stated above, certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Although Petitioner's claim is not entirely clear, it appears he takes issue with the OCCA's resolution of his state-law notice claim, based on the facts presented during trial proceedings and preserved in the appellate record.

Specifically, Petitioner cites the charging Information, the preliminary hearing transcript, and the jury instructions administered at trial, in addition to block-quoting, at length, the discussions among the parties and the trial court at the instruction conference. Petition at 4–7, 14–15. Petitioner cites the facts in the record to claim that "the State and Trial Judge bent the rules and the OCCA allowed them to do so by affirming his conviction." Petition at 9. The OCCA closely reviewed this claim, as well as the supporting facts in the record, and concluded that (1) the charging Information and statutory reference contained therein were generally

consistent with the charge submitted to the jury, that (2) the issue was "a simple labeling error that was not fatal to the charge," that (3) under existing state-law precedent there was no jurisdictional issue, and that (4) under state law, Petitioner was "fully apprised of the charge he faced based on the factual assertions pled in the charge," together with the materials provided at preliminary hearing and in discovery, which meant that defense counsel was not "hampered in any way from presenting" Petitioner's defense at trial. Pet. App'x E, at 9–11.

The OCCA carefully reviewed the record and very reasonably held that, as a matter of state law, Petitioner's notice and jurisdictional claim was meritless. Pet. App'x E, at 9–11. In that respect, then, there is no error to correct. *See Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) (stating that the issue not reached by this Court was "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity"). But to the extent that Petitioner seeks this Court's intervention to review the OCCA's factual analysis and application, Petitioner's request for mere error-correction makes his case an inappropriate candidate for certiorari review. SUP. CT. R. 10. This Court should deny the petition.

II. This Court's review is not necessary because a portion of Petitioner's claim on certiorari—that trial counsel was allegedly ineffective on this issue—was not raised below and is completely unexhausted.

As an additional matter, a portion of Petitioner's claim on certiorari consists of an argument that his trial counsel was allegedly ineffective, under *Strickland v. Washington*, 466 U.S. 668 (1984), as a consequence of the alleged notice issue. Petition at 23–28. Petitioner seems to believe that, despite counsel's objection to this

issue below, he was deprived of his right to constitutionally effective assistance of counsel because the trial court's decision effectively tied the hands of the defense. *See* Petition at 23–28. Petitioner's challenge to trial counsel's alleged ineffectiveness on this issue *was not raised* on direct appeal and is therefore an improper matter for certiorari consideration. SUP. CT. R. 10.

As background, Petitioner raised an ineffective-assistance-of-counsel claim on direct appeal in Proposition VI. Resp. App'x, at 027–032. Specifically, Petitioner complained that counsel (1) failed to object to the allegedly improper joinder of his charges in this case (since his criminal acts occurred over a span of months), (2) failed to demur to the allegedly insufficient evidence relating to Petitioner's interference with an emergency call (one of the other crimes charged), and (3) failed to lodge a state law double punishment objection to Petitioner's conviction for multiple counts allegedly stemming from the same temporal transaction. Resp. App'x, at 027–032. His present challenge—related to the alleged deprivation of notice on Count One—was not a basis for faulting trial counsel's effectiveness. Petitioner did not raise this issue on direct appeal, in all likelihood, because trial counsel *did* vigorously object to the trial court's decision to instruct the jury on the "Means or Force" crime in Count One. Resp. App'x, at 178–79, 182–86.

Because Petitioner failed to raise this issue on direct appeal, the OCCA was never given an opportunity to address this aspect of his claim. *See Kurth Ranch*, 511 U.S. at 772 n.9 ("The issue was not raised below, so we do not address it."). As already explained above, this Court will not entertain a federal question (such as, in this

instance, a claim that trial counsel was constitutionally ineffective under the Sixth and Fourteenth Amendments as a result of this alleged notice issue), when that claim was not pressed or passed upon in the proceedings below. *See, e.g.*, *Heath*, 474 U.S. at 87; *Gates*, 462 U.S. at 218–22; *Tacon*, 410 U.S. at 352; *Hill*, 401 U.S. at 805–06. Petitioner's previously unheard claim makes certiorari inappropriate. SUP. CT. R. 10.

Regardless, even if Petitioner had raised this claim on direct appeal, the OCCA would have found the issue meritless. Under the familiar two-part test in *Strickland*, a defendant claiming ineffective assistance of counsel must show that counsel's performance was constitutionally deficient, meaning that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and that counsel's performance prejudiced the defense, meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). A defendant who fails to meet both components is not entitled to relief: "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

As to deficient performance, trial counsel *did* object to the trial court's instruction on "Means or Force." Resp. App'x, at 178–79, 182–86. Counsel cannot perform deficiently for failing to do something when she did, in fact, do that very thing. *Abrego v. Trammell*, No. 11-CV-0195-CVE-TLW, 2014 WL 3939094, at *9 (N.D.

Okla. Aug. 12, 2014) (unpublished) (on habeas, rejecting ineffective assistance claim based on counsel's alleged failure to object to the admission of photographs when counsel did, in fact, raise an objection below). And with respect to prejudice, Petitioner cannot show there "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Indeed, in addressing Petitioner's substantive notice proposition, the OCCA observed the following: "The record also does not show defense counsel was hampered in any way from presenting Appellant's defense due to the State's charging error." Pet. App'x E, at 11.[10] No prejudice to the defense resulted from any alleged shortcomings in counsel's performance, especially since Petitioner was not "hampered in any way" from presenting his trial defense. Pet. App'x E, at 11.

This Court need not intervene in certiorari when the very federal question on which Petitioner now seeks review—that counsel was allegedly ineffective for this specific issue—was not decided by the state court, since Petitioner did not marshal that argument to the OCCA. *See Heath*, 474 U.S. at 87 (identifying "a weighty presumption against review" of claims not pressed or passed upon below); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (this Court issues neither advisory opinions nor "abstractions," but instead decides "concrete legal issues, presented in actual cases" (citation and internal quotation marks omitted)). And this Court need not act in error-

[10] For the sake of argument, if the OCCA's resolution of Petitioner's substantive notice proposition somehow suggested that the OCCA "passed upon" an implied claim that Petitioner's trial counsel was constitutionally ineffective on that issue, *arguendo*, and that Petitioner's present claim of ineffectiveness was therefore implicitly considered below, Petitioner's current claim is still unworthy of this Court's review. As already shown, the OCCA's determination in finding that Petitioner was not hampered in his defense was correct, and thus, any "error" Petitioner now identifies is illusory. This Court need not intervene on certiorari to correct an error when there was no error. SUP. CT. R. 10.

correction, especially when there was no error to correct in the first place. SUP. CT. R. 10. On balance, for the reasons set forth and addressed above, Petitioner's case is a poor choice for certiorari review. This Court should deny the petition.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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