

23-5293

No. \_\_\_\_\_

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

JUL 24 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

ALONZO G. DAVISON — PETITIONER  
(Your Name)

vs.

CHRIS RANKINS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS - TENTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALONZO G. DAVISON  
(Your Name)

OK. State Reformatory - P.O. Box 514  
(Address)

Granite, OK 73547-0514  
(City, State, Zip Code)

N/A  
(Phone Number)

**QUESTION(S) PRESENTED**

Whether Petitioner's Appeal Of The Denial Of The Motion To Alter Or Amend Judgment And Sentences Was "Properly Filed" As Required By Section 2244(d)(2).

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 3, 2023

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2241

28 U.S.C. Section 2244

28 U.S.C. Section 2254

28 U.S.C. Section 2253

28 U.S.C. Section 1291

## STATEMENT OF THE CASE

Alonzo G. Davison, an Oklahoma inmate proceeding pro se, brought four claims under 28 U.S.C. section 2241. After determining three claims were untimely, the district court dismissed them with prejudice. Finding the remaining claim was an unauthorized second or successive claim under 28 U.S.C. section 2254, the district court dismissed it without prejudice for lack of jurisdiction. The court then granted a certificate of appealability (COA) as to the claims it dismissed as untimely. On or around 9-21-2022, Petitioner filed a COA with the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). Exercising Jurisdiction under 28 U.S.C. Subsection 1291 and 2253(a), the Tenth Circuit affirmed.

## BACKGROUND

A jury convicted Petitioner in 2002 of one count of lewd molestation (Count 1) and one count of sexually abusing a minor child (Count 2). The State trial court sentenced him to 50 years imprisonment on Count 1 and 75 years of imprisonment on count 2, to be served consecutively. On appeal, the OCCA affirmed the convictions, but modified the sentences to 45 years [see Attachment A at Statement of Case]

## [ ATTACHMENT A ]

### statement of case

of imprisonment on each count, to be served concurrently.

Petitioner was under the impression he would be eligible for parole and earned credits once he had served  $\frac{1}{3}$  of his sentences. See Okla. Stat. tit. 57, section 332.7(B) (2000). In 2017, having served 15 years of the 45-year sentences, he wondered why he had not yet heard about parole. He discovered the ODOC was administering his sentence in Count 1 under the 85% rule, see Okla. Stat. tit. 21, subsections 12.1 and 13.1, meaning he would not be eligible for parole until he had served 85% of his sentence and could not accrue credits that would reduce the sentence to less than 85% of the sentence imposed. In contrast, ODOC was administering the sentence for Count 2 under the  $\frac{1}{3}$  rule. Upon Petitioner's inquiry and request for a correction with regard to Count 1, however, ODOC determined the 85% rule applied to both sentences. While he was grieving the application of the 85% rule, Petitioner also came to believe he was missing earned credits from 2002-2009. ODOC responded that the state auditor had

## [ ATTACHMENT A ]

### Statement of Case

audited his file in 2009 and any discrepancies had been corrected at that time.

Petitioner unsuccessfully pursued relief in state court, then filed his Federal-Court application under section 2241. He asserted four claims: (1) the state was improperly executing his sentence for Count 2 with regard to the percentage of time he was required to serve and the denial of earned credits; (2) the state had improperly denied him earned credits between 2002-2009; (3) the state court "lacked... jurisdiction to impose an 85% sentence [for] Count one," and (4) his "[j]udgment and [s]entences should be amended to say what it is meant to say."

The State responded, not only invoking timeliness and exhaustion, but also arguing claims three and four properly were section 2254 claims and, as such, were barred as unauthorized second or successive claims.

The District Court rejected the state's section 2254 argument as to claim four, but it held that claim three was an unauthorized second or successive section 2254 claim. It

## [ATTACHMENT A] <sup>cont</sup>

### Statement of Case <sup>cont</sup>

also held that claim one, two, and four were barred by the one-year limitations period in 28 U.S.C. section 2244 (d)(1). The District Court later granted a COA as to claims one, two, and four. Petitioner appealed only the dismissal of claim four.

The Tenth Circuit reviewed claim four's timeliness under section 2244(d)(1), "[a] 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of State Court." This limitation applies to applications under section 2241 as well as under section 2254. See *Dulworth v. Evans*, 442 F.3d 1265, 1268 (10th Cir. 2006). The court further opined that the statute provides for tolling to allow a prisoner to exhaust state court remedies: "The time during which a properly filed application for state post-conviction or other collateral review with



## [ ATTACHMENT A ]<sup>cont</sup>

### Statement of Case<sup>cont</sup>

respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection," section 2244 (d)(2).

Mr. Davison challenged the calculation of excludable periods attributable to the motion to alter or amend and motion for an out-of-time appeal. He asserts he did not receive a copy of the state court's September 18, 2019, order denying his motion to alter or amend until December 16, 2019. He points out he filed a notice of intent to appeal on December 23, 2019, and a petition in error on January 21, 2020. Then, after the OCCA dismissed his appeal as untimely on April 30, 2020, he filed his May 11, 2020, motion for an out-of-time appeal. The State trial court never ruled on that motion, forcing Mr. Davison to file a petition for a writ of mandamus with the OCCA on October 5, 2021, which the OCCA denied.

## [ATTACHMENT A]<sup>cont</sup>

### Statement of Case<sup>cont</sup>

(on the merits) on October 15, 2021. Based on those events, Mr. Davison argued that the District Court should have excluded the entire period from June 24, 2019, to October 15, 2021.

The Tenth Circuit opined that the district court correctly declined to do so because the December 2019/January 2020 appeal of the denial of the motion to alter or amend was not "properly filed" as required by section 2244(d)(2).

The Tenth Circuit further noted that Mr. Davison invokes equitable tolling, asserting the state court hindered him in pursuing a timely appeal because it did not promptly mail him a copy of the September 18, 2019, order, and he diligently sought relief. That the district court stated it did not "construe any of Davison's arguments as demonstrating that the

## [ ATTACHMENT A ] <sup>cont</sup>

### statement of Case <sup>cont</sup>

circumstances of this case would support equitable tolling," R at 286. The Tenth Circuit claimed that Mr. Davison does not challenge the District Court's understanding or point to where he made equitable-tolling factual assertions or arguments in the district court. Yet, in the same breath, on page 9 at footnote 6, the court stated:

In his response to the state's motion to dismiss, Mr. Davison stated that he did not receive a copy of the September 18, 2019, order until December 2019. He did not allege the state court failed to promptly mail him a copy.

The Tenth Circuit finalized their opinion on the basis that, "We do not generally consider arguments made for the

# [ATTACHMENT A] <sup>cont</sup>

## Statement of Case <sup>cont</sup>

first time on appeal, see *Harris v. Sharp*, 941 F.3d 962, 975 + n.5 (10<sup>th</sup> Cir. 2019), and we decline to depart from the general rule here.

The Tenth Circuit's holding is erroneous on its face and prejudicial to Petitioner, in that it is an undisputed fact that the Tulsa District Court failed to mail Petitioner the September 18, 2019 order in a timely manner. In fact, the Tulsa District Court Record does not indicate that said order was ever sent to Petitioner, only that he wrote two letters to the Court Clerk on November 1, 2019 and December 13, 2019 seeking the status of said Motion to Alter or Amend [see Petitioner's COA at Exhibits D, C, + E]. Petitioner has provided the OCCA, Respondent, Federal District Court and Tenth Circuit with a copy of the envelope that contained said order. The sender of the September 18, 2019 Order was Tulsa County District Judge,

## [ ATTACHMENT A ] <sup>cont</sup>

### Statement of Case

Clifford J. Smith, and the post mark on the envelope indicated the order was mailed on December 12, 2019, which was 84 days after said order was filed.

No one disputes the above-mentioned facts. How could they? The record is clear that the District Court mailed the order to petitioner egregiously late, yet, none of the above-mentioned officials felt the responsibility to serve justice. Instead, they placed the blame on petitioner, a pro se prisoner claiming that the December 2019/January 2020 appeal of the denial of the motion to alter or amend was not "properly filed" as required by section 2244(d)(2).

Therefore, Petitioner humbly prays that this Court gives him a glimmer of justice and consider the question that Petitioner has presented:

Whether Petitioner's Appeal Of The Denial Of The Motion To Alter or Amend Judgment And Sentences Was "Properly Filed" As Required By Section 2244(d)(2).

## REASONS FOR GRANTING THE PETITION

This Court should grant this petition so that the Tenth Circuit, other Federal Appellate Courts, lower courts and petitioner's will have a clear understanding of the definition of "properly filed" as required by section 2244(d)(2).

This Court has defined the term "properly filed application" as an application that is filed and accepted in accordance with the applicable state rules governing filings. See *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000).

In the instant case, the record establishes the following timeline of events relevant to claim four:

- February 6, 2018: Mr. Davison exhausted his administrative remedies.
- February 7, 2018: the one-year limitations period began.
- June 8, 2018: Mr. Davison filed a state post conviction application.

[continued at Attachment B, "Reasons For Granting The Petition"]

## [ATTACHMENT G]

### Reason For Granting The Petition

- April 8, 2019: the OCCA affirmed the denial of the application.
- June 24, 2019: Mr. Davison filed a Motion to Alter or Amend the judgment.
- September 18, 2019: District Court of Tulsa County denied Mr. Davison's Motion to Alter or Amend Judgment.
- December 23, 2019: Mr. Davison filed a Notice of Intent to Appeal.
- January 21, 2020: Mr. Davison filed a petition in error with the OCCA.
- April 30, 2020: the OCCA declined jurisdiction and dismissed the appeal as untimely.
- May 11, 2020: Mr. Davison filed a state-court motion for an out-of-time appeal.
- October 5, 2021: Mr. Davison filed a mandamus petition seeking an order directing the state trial court to rule on his motion.

cont

[ ATTACHMENT B ]

Reason For Granting The Petition <sup>cont</sup>

- October 19, 2021: the OCCA denied relief on the merits.

The District Court excluded the period between June 8, 2018, and April 8, 2019, while Mr. Davison's state post conviction was pending. As of April 9, 2019, therefore, Mr. Davison had 243 days of the one-year period remaining.

The District Court also excluded time for Mr. Davison's state-court motion to alter or amend. Specifically, it excluded the period from June 24, 2019, when Mr. Davison filed the motion, until October 18, 2019, the date the court determined he failed to perfect an appeal from the state court's denial of the motion. By the District court's calculation, that left 167 days — the 243 days remaining as of April 9, 2019, minus the 76 days between April 9 and June 24. The 167 days ran out before Mr. Davison filed his May 11, 2020, state-court motion for leave to pursue an out-of-time appeal. The District court therefore declined to exclude any dates related to



cont

[ ATTACHMENT B ]

Reason For Granting The Petition <sup>cont</sup>

the motion for an out-of-time appeal.

Mr. Davison challenges the calculation of excludable periods attributable to the motion to alter and amend and the motion for an out-of-time appeal. He asserts he did not receive a copy of the state court's September 18, 2019, order denying his motion to alter or amend until December 16, 2019. He points out he filed a notice of intent to appeal on December 23, 2019, and a petition in error on January 21, 2020. Then, after the OCCA dismissed his appeal as untimely on April 30, 2020, he filed his May 11, 2020, motion for an out-of-time appeal. The state trial court never ruled on that motion, forcing Mr. Davison to file a petition for a writ of mandamus with the OCCA on October 5, 2021, which the OCCA denied (on the merits) on October 15, 2021. Based on these events, Mr. Davison argues the district court should have excluded the entire time period from June 24, 2019, to October 15, 2021.

Cont

[ATTACHMENT B]

Reason For Granting The Petition <sup>cont</sup>

The Tenth Circuit opinioned that the district court correctly declined to do so because the December 2019/January 2020 appeal of the denial of the motion to alter or amend was not "properly filed" as required by section 22 44(d)(2). Because the OCCA declined jurisdiction and dismissed the appeal because it was not timely filed, the district court did not err in declining to exclude time for that appeal.

Petitioner asserts that his Notice of Intent to Appeal filed by the District Court of Tulsa County Court Clerk on December 23, 2019 and Petition in Error filed by the Clerk of the Appellate Courts (OCCA) on January 21, 2020 were properly filed as is defined by the U.S. Supreme Court. Thus the ruling of the Tenth Circuit is in direct conflict with this Court's holding in *Artuz v. Bennett*, 121 S.Ct. 361.

This Court held in *Artuz v. Bennett* at Id that An application is "filed," as that term is commonly

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. See, e.g., *United States v. Lombardo*, 241 U.S. 73, 76, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed") *Black's Law Dictionary* 364 642 (7<sup>th</sup> ed. 1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and requisite filing fee. See e.g., *Habteselassie v. Novak*, 209 F.3d 1208, 1210-1211 (C.A.10 2000).

Under the plain language of section 2244(d)(2), a "properly filed application" for state post conviction review is exactly that: an application that satisfies the state's filing requirements.

## [ ATTACHMENT B ]<sup>cont</sup>

### Reason For Granting The Petition

This rule is both workable and true to the statutory language. Adhering to section 2244(d)(2)'s focus on the filing status of a prisoner's "application," rather than on the eligibility for merits review of individual claims contained within that application, minimizes and simplifies the review a federal court must undertake to determine the timeliness of a habeas petition. This understanding of "properly filed application" poses no legitimate threat to states' interest in expediting post-conviction litigation; it does nothing to lessen non-capital prisoner's incentives to seek speedy resolution of their claims for relief, nor does it deprive the the states of the mechanisms they have long employed to force death-sentenced prisoners to proceed through the capital appeals process.

In the instant case, the Tulsa District Court accepted and filed Petitioner's Notice of Intent to Appeal on December 23, 2019, and did not indicate that it was not properly filed. So, why should the Tenth Circuit be allowed to interpret state

[ATTACHMENT B]  
cont

Reason For Granting The Petition  
cont

Filing requirements, when the state court had no issue with  
Mr. Davidson's Notice of Intent to Appeal.

The Tenth circuit's order forgoes any meaningful analysis of the  
statutory language in favor of a generalized discussion of  
congress' intent to accelerate habeas corpus litigation through  
the AEDPA. But this court has made it clear that "the starting  
point for interpreting a statute is the language of the  
statute itself," and that, "[a]bsent a clearly expressed  
legislative intent to the contrary, that language must  
ordinarily be regarded as conclusive." *Consumer Product  
Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108  
(1980); see also (Michael) *Williams v. Taylor*, 120 S.Ct.  
1479, 1481 (2000) citing *United States v. Ron Pair Enterprises,  
Inc.*, 489 U.S. 835, 241 (1989) ("We start, as always, with the  
language of the statute").

This case turns on the meaning of section 2244(d)(2)'s  
phrase, "properly filed application." "[w]hen construed in the  
relevant context," section 2244(d)(2)'s "properly filed" clause

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

functions as the modifier for "one grammatical subject," the word "application." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 79-80 (1991). Because "words and people are known by their companions," *Gutierrez v. Ada*, 120 S.Ct. 740, 744 (2000), ascertaining the meaning of the modifier "properly filed," requires first that its subject, "application," be defined.

While section 2244(d)(2) does not expressly define "application," other subdivisions of section 2244 provide clear evidence of Congress' understanding of this term. See *Jones v. United States*, 119 S.Ct. 2090, 2102 (1999), ("statutory language must be read in context"); *Tareki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (a word in a statute "gathers meaning from the words around it"). Specifically, section 2244(b)(1) and (2) refer to "[a] claim presented in a ... habeas corpus application," indicating that Congress defines an "application" as a document or pleading "in" which a "claim" is "presented" to a court for collateral review. See also section 2244(b)(4) ("any claim presented in a [n]

## [ ATTACHMENT B ] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

... application"). Because "nothing in the structure or purpose of [section 2244(b) and (d)] suggests a reason for interpreting these adjacent subsections differently." *Barnhill v. Johnson*, 503 U.S. 393, 406 (1992), it is appropriate to apply the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners + Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Applying this rule of statutory construction, "application" as it is used in section 2244(d)(2), refers simply to the document in which a state prisoner sets forth his claims for post conviction relief.

Neither the text of the AEDPA nor its legislative history offer any express indication of when a document — or, in the terms of section 2244(d)(2), an "application" — should be deemed "filed," properly or otherwise. However, "[w]here Congress uses terms that have accumulated settled meaning ... a court must infer ... that Congress means to incorporate the

## [ ATTACHMENT B ] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

established meanings of these terms." *N.L.R.B. v. Amax Coal Co.*, a Division of Amax, Inc, 453 U.S. 322, 329 (1981). Outside of AEDPA, the meaning of the term "filed" is well established. In *United States v. Lombardo*, 241 U.S. 73 (1916), for example, this court held that "[a] paper is filed when it is delivered to the proper official and by him received and filed." *Lombardo*, 241 U.S. at 76 (citations omitted). Numerous lower federal courts and state courts have adopted similar definitions. See, e.g., *Milton v. United States*, 105 F.2d 253, 255 (5th Cir. 1939) ("The word 'filed' ... requires of one filing a suit, merely the depositing of the instrument with the custodian for the purpose of being filed"); *Greeson v. Sherman*, 265 F.Supp. 340, 342 (W.D.Va. 1967) (a pleading is filed when it "is delivered to an officer of the Court who is authorized to receive it").

With the meaning of "filed" in hand, understanding the phrase "properly filed" is straightforward. The adverb



## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition

"properly" is ordinarily understood to describe the doing of an act correctly, or the accomplishment of a task according to expectations. See Webster's Deluxe unabridged Dictionary 1442 (2d ed. 1979) (defining properly, inter alia, as "conforming to an accepted standard or to good usage; correct"); The American Heritage College Dictionary 1096 (3 ed. 1993) (defining proper, inter alia, as "called for by rules or conventions; correct"). When the task to be accomplished is the filing of a document, that task completed "properly" when the established requirements for filing — delivery of the correct document to the designated authority at the right time, see *supra* — have been met. Applying this reasoning to section 2244(d)(2), when the document to be filed is an "application" for state post-conviction relief, that application must be deemed "properly filed" when it has been delivered to the custodian designated to receive it in accordance with the rules governing its acceptance for filing.

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

In denying Mr. Davison relief on his claim that the district court should have excluded the entire time period from June 24, 2019, to October 15, 2021, the Tenth Circuit relies on a general reading of Oklahoma's Procedures For Appealing Final Judgment Under Post-Conviction Procedure Act, which entails:

- (i) The party desiring to appeal from the final order of the District Court under Section V of these Rules MUST file a Notice of Post-Conviction Appeal with the Clerk of the District Court within twenty (20) days from the date the order is filed in the District Court... The Filing of the Notice of Post Conviction Appeal in the District Court is jurisdictional... [omitted].

OK St CR A Rule 5.2(c)(i).

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

The decision as to whether Mr. Davison's Notice of Post Conviction Appeal was properly filed, lies with the District Court of Tulsa County, not with the Tenth Circuit, Federal District Court or OCCA. See OK St CR A Rule 5.2(c)(1).

And the above rule is not adequate [in the instant case] for the Tenth Circuit to determine that Petitioner's Notice was not properly filed, because it is not "firmly established and regularly followed." This Court long ago made held that "state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v. Lavern*, 457 U.S. 255, 263 (1982). Instead, this Court has repeatedly insisted that state procedural rules must be "firmly established and regularly followed" in order to be adequate as a matter of federal law.

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

Beard v. Kindler, 130 S.Ct. 612, 617 (2009) (citation omitted).

It can be inferred that the Tulsa Court's acceptance and filing of the Notice of Post Conviction Appeal, deemed it to be properly filed. That is because jurisdiction lied within that court only. See OK St CR A Rule 5.2(c)(1). Therefore, it was the Tulsa Court who had the power to grant or deny Petitioner's Notice of Post Conviction Appeal, and the record dictates that the Court granted said Notice.

The Petitioner maintains that Rule 5.2(c)(1)'s twenty (20) day filing period is not "firmly established and regularly followed because it is predicated on when a Petitioner actually receives the order being appealed. IF the Petitioner [as in the instant case], receives the

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

order more than 20 days after its filing, the Tulsa Court has the discretion to excuse the procedural default, as they did herein. The Court's requirement that procedural rules be regularly and consistently applied reflects its constitutional and statutory obligation to make certain that state courts do not "avoid deciding ——— federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims," *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), and has long served to strike the proper balance between concerns for comity and federalism and the duty of federal courts to protect and achieve "desirable uniformity in adjudication of federal created rights," *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 299 (1949); see also *Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (an

## [ATTACHMENT B]<sup>cont</sup>

### Reason For Granting The Petition<sup>cont</sup>

"ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved") Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981) (observing that "justice is achieved when a complex body of law developed over a period of years is evenhandedly applied") (internal quotation omitted).

It is notable that in ruling that Petitioner's December 2019 / January 2020 appeal was not "properly filed," the Tenth Circuit ignores the overwhelming number of cases discussing the requirement that a rule be regularly applied and instead cites only three cases that address the adequacy of a state procedural rule :

## [ ATTACHMENT G ]<sup>cont</sup>

### Reason For Granting The Petition

Adams v. LeMaster, 223 F.3d 1177, 1181 (10<sup>th</sup> cir. 2000),  
Loftis v. Chrisman, 812 F.3d 1268, 1272 (10<sup>th</sup> cir. 2016), and  
Hoggro v. Boone, 150 F.3d 1223, 1226 n.4 (10<sup>th</sup> cir. 1998).  
But these cases are distinct from Petitioner's, addressing  
only a general reading of a "properly filed" application, and  
not the underlying jurisdiction of the state court that  
gives them the discretion to excuse a procedural  
default and waive the timeliness requirement as was  
done herein.

Oklahoma law dictates that:

Due to the statutory time constraints set out  
in section 1087 of Title 22, the judge shall  
monitor and ensure timely notice is provided  
to the parties by the clerk of the District Court,  
and if a notice of post-conviction appeal is  
filed, a timely completion of the record on appeal

## [ATTACHMENT B] cont

### Reason For Granting The Petition

by the clerk of the District Court together with the court reporter(s), as required.

OK St CA A CT Rule 5.4, Duties of the Judge of the District Court.

Furthermore, under Oklahoma law:

The Court Clerk shall on the same day that the order granting or denying post conviction relief is filed in the District Court, mail to Petitioner or counsel of record for the post-conviction proceeding, a file-stamped certified copy of the order of the District Court setting out findings of fact and conclusions of law granting or denying the application. The Court Clerk shall include a certificate of mailing with the order, which shall also be made a part of the record of the case.

OK St CA A CT Rule 5.3 (A), Rules of Court Clerks and Court Reporters.



## [ATTACHMENT B]<sup>cont</sup>

### Reason For Granting The Petition<sup>cont</sup>

In order for Petitioner to conform to the 20 day period mentioned above, the Judge, Court Clerk, and Court Reporter must perform their duties and ensure that Petitioner receives the Order in a timely manner. The Tenth Circuit being unaware of these protocols to filing a Notice of Post Conviction Appeal [in Oklahoma], relied on a general reading of the 20 day filing period; while the Tulsa Court understood its dependency upon when Petitioner receives the Order. Thus, Tulsa Court Judge Clifford A. Smith knowing that Mr. Davison did not receive the September 18, 2019 order in a timely manner, mailed it directly to Petitioner on December 12, 2019.

Mr. Davison filed the Notice on December 23, 2019, well within the 20 day deadline, and the Tulsa Court granted said Notice; the Court Clerk then prepared a timely completion of record on appeal.

## [ ATTACHMENT B ] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

Since the 20 day filing period For Notice of Post-Conviction Appeal is predicated upon when a Petitioner actually receives the order, it is not clear and certain and should not preclude the merits review on Mr. Davison's section 2241 Federal Habeas claim. To be adequate, the state procedural rule must be "well established and consistently applied." *Bennet v. Mueller*, 322 F.3d 573, 582-83 (9th cir. 2003). A state procedural rule can be neither "well-established nor consistently applied if it is not clear and certain." *Townsend v. Knowles*, 562 F.3d 1200, 1207 (9th cir. 2009). To constitute a procedural bar, the state's rule had to be adequate at the time petitioner purportedly failed to comply with it. *Townsend*, 562 F.3d at 1206. Here, the measure of Oklahoma's timeliness bar must be measured at the time Mr. Davison filed his Notice of Post-Conviction Appeal with the

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

District Court of Tulsa County on December 23, 2019, see *Valerio v. Crawford*, 306 F.3d 742, 776 (9th Cir 2002) ("In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be clear, consistently applied, and well established at the time of petitioner's purported default.").

Oklahoma has failed to "operate under clear standards for determining what constitutes 'properly filed' in its Notice of Post Conviction Appeal requirements," and therefore the Tenth Circuit has "failed to meet its burden of proving that Oklahoma's timeliness bar was sufficiently clear and certain to be an adequate state bar." *Townsend*, 562 F.3d at 1208.

The determination of whether Mr. Davison's Notice of Post Conviction Appeal was "properly filed" lies

## [ATTACHMENT B] <sup>cont</sup>

### Reason For Granting The Petition <sup>cont</sup>

with the District Court of Tulsa County, and, therefore, this court should grant certiorari in order to obtain clarity from the state court.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alonzo G. Davison

Date: July 24, 2023