No. 09-948

IN THE
Supreme Court of the United States

JUSTIN JONES, DIRECTOR
Oklahoma Department of Corrections,

Petitioner,

v.

MICHAEL JOE WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

On the eve of trial, respondent was offered a ten-year sentence in exchange for a guilty plea. Respondent wanted to accept the offer, but his attorney threatened to withdraw if he accepted the plea. Respondent was subsequently convicted and sentenced to life in prison without the possibility of parole. The Oklahoma Court of Criminal Appeals ("OCCA") held that the attorney's conduct violated respondent's Sixth Amendment right to effective counsel. In fashioning a remedy for this constitutional violation, however, the OCCA held that it was constrained by state sentencing law, and thus imposed as a remedy life in prison *with* the possibility of parole—the minimum sentence available under state law for the crime of which respondent was convicted. On a subsequent federal habeas challenge to that remedy, the Tenth Circuit held that the OCCA violated clearly established federal law in holding that its remedies for the Sixth Amendment violation were constrained by state law. The court remanded the case for the district court to determine, without regard to state sentencing law, what remedy would provide appropriate and permissible redress for the federal constitutional violation.

The question properly presented is:

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), was the OCCA's conclusion that the appropriate remedy for respondent's Sixth Amendment violation was constrained by state sentencing law contrary to or an unreasonable application of *United States v. Morrison*, 449 U.S. 361 (1981)?

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INTRODUCTION

The State labors to make this case something it is not. The first substantive sentence of the petition states:

> This Court has not clearly established that a defendant is prejudiced and that the Sixth Amendment is therefore violated when the defendant rejects a plea offer because of deficient assistance of counsel but then is convicted at a fair trial.

Pet. 9. But the question whether respondent was prejudiced by his counsel's deficient performance *is not before this Court*: the state's highest criminal court found that respondent was prejudiced when he was effectively denied the opportunity to accept a favorable plea he wanted to accept, and the State did not contest that finding in the habeas proceedings in the district court or court of appeals below. Instead the State argued only that the OCCA correctly deemed its remedial authority constrained by state law and thus that the OCCA's remedy—resentencing respondent to the minimum sentence allowed by state law for the crime of which he was convicted—was a valid remedy for a federal constitutional violation.

That argument, limited to the proper scope of the OCCA's remedial authority, was correctly rejected by the Tenth Circuit and raises no question worthy of review by this Court. The OCCA's holding that state law constraints precluded it from providing a fully adequate remedy for the Sixth Amendment violation suffered by respondent is directly contrary to the clearly established precedent of this Court in *United*

States v. Morrison, 449 U.S. 361 (1981), which directs that a court must provide a remedy tailored to cure the Sixth Amendment violation. *Id.* at 364. The court of appeals' holding that *Morrison* governs what is now an effectively conceded Sixth Amendment violation is straightforward and unexceptional. The decision certainly implicates no decisional conflict—*no court anywhere* has directed the sentence-reduction remedy ordered by the OCCA and rejected by the Tenth Circuit on the basis of *Morrison*. And while there is some disagreement over whether the proper remedy for a Sixth Amendment violation in rejection of a plea offer is specific performance of the plea, a new trial, or allowing the defendant a choice between the two, the instant case does not implicate that disagreement because *no remedy has yet been ordered*. Instead the court of appeals remanded to the district court to consider the appropriate remedy in the first instance. For that reason alone, this Court's review of the case at this stage is unwarranted: because the case remains in an interlocutory posture, it remains to be seen whether the remedy ultimately imposed will be unsatisfactory to either party, and whether there is any need for this Court to intervene at all. Certiorari should be denied.

STATEMENT

1. Respondent was charged in Oklahoma with first-degree murder. *See* Okla. Stat. tit. 21 § 701.9. Respondent's parents hired Fred M. Schraeder, Esq., as counsel for respondent and sold their home to pay him. Aff. of Barbara Williams (May 4, 2001); OCCA App. Ex. F-2.

While preparing for trial, the assistant district attorney grew worried about the strength of the State's case against respondent. Just before trial was about to commence, the prosecutor offered respondent a ten-year sentence in exchange for pleading guilty to second-degree murder. Pet. App. 111; Evidentiary Hr'g at 60. Respondent informed Schraeder that he "wanted to take the deal," but Schraeder threatened to withdraw as counsel if respondent pleaded guilty. Pet. App. 112; *see also* Evidentiary Hr'g at 5-6, 81. As Schraeder himself later acknowledged, the decision regarding whether to plead guilty or proceed to trial should rest "entirely upon the client." Evidentiary Hr'g at 6; *see also* Okla. Rule of Professional Conduct 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

The effect of Schraeder's threat was to place respondent "in the position of finding another attorney on the eve of trial, paying that attorney with money he did not have (his family having already paid $30,000), and staying in jail until these events could happen, if he wanted to take the ten year deal." Pet. App. 119. Rather than proceed without counsel, respondent reluctantly proceeded to trial. He was subsequently convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole.

2. At sentencing, Schraeder informed the court that he would continue to represent respondent on appeal. Pet. App. 105. Schraeder filed the initial notice of intent to appeal in the OCCA, but he then

failed to file the actual appeal in a timely manner, resulting in dismissal of the appeal for lack of jurisdiction. *Id.* at 105-06. Soon thereafter, Schraeder withdrew as respondent's appellate counsel and abandoned him entirely. When Schraeder was referred to the Oklahoma Bar Association for his conduct in respondent's case, he blithely explained his withdrawal by saying, "when they quit paying the fee as agreed upon, I quit doing the work." OCCA App. Ex. F-2.[1]

Respondent, proceeding *pro se*, sought and was granted permission to file an appeal out of time. On appeal, respondent challenged the verdict and sentence, *inter alia*, on the ground that Schraeder had provided ineffective assistance in threatening to withdraw as counsel if respondent accepted the plea. Resp. OCCA Br. at 34-40. The OCCA directed the trial court to conduct an evidentiary hearing and issue findings of fact and conclusions of law. Evidentiary Hr'g at 2. After the hearing, the trial court found that Schraeder's conduct "in advising his client that he would withdraw from his representation if he entered a guilty plea was highly improper." Pet. App. 113. But based on the mistaken belief that

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[1] Schraeder's indefensible conduct extends beyond this case. His unprofessional conduct with two other clients contemporaneous with his representation of respondent led the Oklahoma Supreme Court to temporarily suspend his law license. *See State v. Schraeder*, 51 P.3d 570, 581 (Okla. 2002). In November 2009, Schraeder was charged with racketeering and conspiracy in connection with a scheme to embezzle more than $1.1 million from clients. *See* Information in Okla. Docket No. CF-2009-5279 (Tulsa Cty. Nov. 5, 2009). He entered a plea of not guilty to these charges on March 24, 2010, and is awaiting further proceedings.

Schraeder's threat to withdraw had come after the plea offer had expired, the trial court concluded that respondent had not been prejudiced by Schraeder's deficient performance. *Id.* at 113-14.

The OCCA reviewed the trial court's findings of fact and conclusions of law under the two-prong test for ineffective assistance in *Strickland*. It "agree[d] wholeheartedly" with the trial court's conclusion that Schraeder's performance was unacceptable. Pet. App. 113; *see also id.* at 117 ("We find Schraeder's ultimatum to Appellant concerning the guilty plea—that he would have to obtain new counsel if he desired to accept the ten year deal—amounted to deficient performance under *Strickland*."). The OCCA further held that respondent was prejudiced by Schraeder's deficient performance because of the "lost opportunity to pursue th[e] plea offer with his retained counsel." *Id.* at 119.

Having found both deficient performance and prejudice under *Strickland*, the OCCA turned to the remedy. To redress the federal constitutional violation, the OCCA held that it was constrained by state sentencing law, and therefore modified respondent's sentence from life imprisonment without the possibility of parole to life imprisonment with the possibility of parole—the lowest possible penalty for a first-degree murder conviction. Pet. App. 119; *see also* Okla. Stat. tit. 21 § 701.9. One judge dissented, stating that the appropriate remedy would be to "reverse and remand for a new trial." Pet. App. 121 (Chapel, J., dissenting).

3. Respondent filed a petition for habeas relief in federal district court, contending, *inter alia*, that the

appropriate remedy was to grant him a new trial or modify his sentence to the ten-year sentence offered by the prosecutor that respondent "was willing to accept but [was] forbidden due to ineffective assistance of trial counsel." Statement of Facts in Support of 28 U.S.C. § 2254 Petition at 8.

In its response to the habeas petition, the State did not contest the OCCA's findings of deficient performance and prejudice. It argued *only* that the OCCA's remedy could not be challenged because the "decision of what relief to afford [for ineffective assistance] . . . is a matter of state law" rather than federal law. Response to Pet. for Writ of Habeas Corpus at 15-16.

The district court referred respondent's habeas petition to a magistrate judge for a report and recommendation. The magistrate judge "agree[d]" with the OCCA's conclusion that respondent had been deprived of his Sixth Amendment right to effective assistance of counsel in connection with the forgone plea. The magistrate judge nevertheless recommended denial of the petition. Starting from the premise that sentencing is a matter of state law, the magistrate judge concluded that as long as the OCCA's modified sentence fell within the state's statutory range for first-degree murder, it was not an impermissible remedy. Pet. App. 84.

The district court adopted and affirmed the magistrate judge's report and recommendation and dismissed respondent's habeas petition without a separate opinion. Pet. App. 87-89. The district court also declined to issue a certificate of appealability ("COA").

4. Respondent sought a COA in the court of appeals, which the court granted on "the limited question whether the OCCA's modification of Mr. Williams's sentence from life imprisonment without parole to life imprisonment with parole was a constitutionally adequate remedy for the ineffective assistance of counsel Mr. Williams received during plea negotiations." Order, *Williams v. Jones*, No. 06-7103 (10th Cir. Aug. 7, 2007) ("COA Order"). Because "a COA is a jurisdictional prerequisite to a decision on the merits of an appeal," the court of appeals' consideration was expressly limited to the question of remedy and the OCCA's findings of deficient performance and prejudice were not properly before the panel. Pet. App. 3. Indeed, at no time during the federal habeas proceedings did the State challenge the OCCA's finding that respondent had been deprived of his Sixth Amendment right to effective assistance of counsel in connection with the plea negotiations. *Id.* Rather, the State argued only that state law exclusively governed the question of remedy.

5. The Tenth Circuit (in a *per curiam* opinion per McConnell and Kelly, JJ.) held that the remedy fashioned by the OCCA was objectively unreasonable because it was improperly constrained by state law. Pet. App. 8. The court of appeals found it "axiomatic" that the remedy for a federal constitutional violation must be consistent with federal law and not constrained by state law, because respondent was "not seeking habeas relief for errors of State law, but rather for a Sixth Amendment violation." *Id.* at 8, 12. "[I]n an abundance of caution," the court of appeals "remand[ed] the case with instructions to the

district court to entertain briefing and impose a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law." *Id.* at 17, 14.

Judge Gorsuch dissented. He asserted that the appropriate remedy was no remedy at all because, in his view, respondent had not been prejudiced by Schraeder's deficient performance—a point the State had never raised. Pet. App. 17-56.

6. The State sought rehearing and rehearing en banc. Its primary contention was that the OCCA's decision was neither contrary to, nor an unreasonable application of, clearly established federal law. *See* Rehearing Pet. at 6-10. The court of appeals denied the petition. Pet. App. 122-123.

Judge Kelly, joined by Chief Judge Henry and Judge Holmes, concurred in the denial of rehearing en banc. Pet. App. 123-128. Judge Kelly stated that "the prejudice question [wa]s beyond the scope of the COA because no one contest[ed] the state appellate court's finding of ineffective assistance of counsel during the plea process." *Id.* at 124.

Judge Gorsuch again dissented, joined by Judges Tacha, O'Brien, and Tymkovich. Pet. App. 128-138. He again argued that respondent was not prejudiced by counsel's deficient performance and, in the absence of a Sixth Amendment violation, no remedy was required. *Id.*

ARGUMENT

The holding of the court of appeals is correct and indeed dictated by prior decisions of this Court. The case is not a suitable vehicle for considering broader questions about ineffective assistance in the plea context because the substantive Sixth Amendment questions were neither pressed nor passed upon below, and the remedial question arises in an interlocutory posture and is partially unreviewable. Finally, the narrow holding of the court of appeals does not implicate any conflict in the lower courts. This Court's review is therefore not warranted.

A. The Decision Below Correctly Applied The AEDPA Standard In Reviewing The Inadequate Remedy Imposed By The OCCA

1. The court of appeals correctly concluded that the OCCA contravened clearly established federal law when it held that the remedy for a *federal* constitutional violation was constrained by *state* sentencing law.

As a threshold matter, the OCCA identified and applied the correct legal standard—the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984)—to respondent's ineffective assistance claim. *See* Pet. App. 6-7. Under *Strickland*, the OCCA found that respondent's counsel had been deficient in threatening to withdraw if respondent pleaded guilty and that respondent was prejudiced by that deficient performance. *Id.* The State did not challenge these findings either before the state court or during federal habeas proceedings. *Id.* at 3 ("The State does not contest the OCCA's finding of ineffec-

tive assistance of counsel in this context."). Those arguments are thus waived. *See infra* pp. 15-17.

As the Tenth Circuit held, however, the OCCA violated clearly established federal law in fashioning a remedy for the undisputed Sixth Amendment violation. The OCCA incorrectly considered itself "[c]onstrained by a state-law statutory minimum for those convicted of first-degree murder," Pet. App. 53, such that it was "powerless to reinstate the plea offer even with a reversal and new trial," *id.* at 7. Accordingly, "the OCCA settled on a remedy that was consistent with state-law sentencing options for first-degree murder," specifically, life imprisonment with the possibility of parole. *Id.*

That ruling was squarely contrary to longstanding precedents of this Court clearly establishing that the remedy for a "Sixth Amendment deprivation[] . . . should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). While the remedy "should not unnecessarily infringe on competing interests," *id.*, it must go as far as is necessary to "neutralize the taint by tailoring relief appropriate in the circumstances." *Id.* at 365.[2]

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[2] The State essentially concedes that the OCCA's remedy does not sufficiently "neutralize the taint." *Morrison*, 449 U.S. at 365. According to the State: "Admittedly, the remedy adopted by the Oklahoma Court of Criminal Appeals is also an imperfect one. Preserving the defendant's conviction but resentencing him to a lower sentence within the range falls short of restoring the defendant to his original pre-trial position." Pet. 18-19.

It is "axiomatic that the remedy for a properly presented constitutional violation should not be frustrated by the sentencing options available under state law, but rather should be consistent with federal law." Pet. App. 8. Indeed, "the whole point of habeas [is] that convictions secured in compliance with state law must be vacated if they violate the Constitution." *Id.* at 53 (Gorsuch, J., dissenting).

Having found a violation of federal constitutional law, the OCCA was required to fashion a remedy that "neutralize[d] the taint" of the *federal constitutional* violation, even if it required infringing on competing interests under state law. *See Morrison*, 449 U.S. at 364. Instead, the OCCA thought itself "powerless" to infringe on state law at all in considering what was necessary to address the constitutional violation. Pet. App. 7. That approach turns *Morrison* on its head and is thus unreasonable under AEDPA's standard of review. *Id.* at 8.

2. The decision of the court of appeals is also consistent with—indeed is dictated by—this Court's precedents. The State's contentions to the contrary are unavailing.

The State contends that because "this Court has not clearly established that the Sixth Amendment is even violated in [the forgone plea] context, it inexorably follows that this Court has not clearly established what the remedy would be if there were a violation." Pet. 10. Essentially, in the State's view, unless and until this Court issues a decision on the precise application of the Sixth Amendment in the context of a forgone plea, there is no "clearly established law" by which to review the OCCA's decision.

This Court has explained, however, that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citations omitted).

Similarly, the State complains that *Morrison* is only a "general rule" about the appropriate remedy for a Sixth Amendment violation. Pet. 13. But that ignores the fact that "[r]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams v. Taylor*, 529 U.S. 362, 382 (2000).

The State argues (Pet. 12-13) that the court of appeals made "the exact same mistake" that this Court reversed in *Carey v. Musladin*, 549 U.S. 70 (2006), and *Wright v. Van Patten*, 552 U.S. 120 (2008). Not so. *Musladin* and *Van Patten* stand for the principle that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by th[e Supreme] Court." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) (internal quotation marks omitted). But here, there *is* a "specific legal rule" that *has* been "squarely established by the Supreme Court": *Morrison*'s rule requiring that the remedy for a federal constitutional violation be adequately tailored to remove the taint of the violation. The issue is not whether *Morrison* established *which particular* remedy "is appropriate in this particular category of cases," as the State would have it (Pet. 13), but whether *Morrison* ruled out *the remedy imposed by the state court.* The answer to that question is yes.

Morrison plainly required the court to impose a remedy that would cure the violation, and the state's remedy just as plainly did not achieve that objective, or even purport to do so. Whether a different remedy would have cured the violation is not before this Court, because no other remedy has yet been imposed. *See infra* pp. 17-18.

Having found ineffective assistance in violation of the Sixth Amendment, the OCCA was bound to apply *Morrison*'s rule requiring a remedy sufficient to remove the taint of that violation. Its failure to apply that rule was thus directly contrary to clearly established federal law.

B. This Case Is Not A Suitable Vehicle For Addressing The Questions Presented In *Arave v. Hoffman*

The State goes to great lengths to present this case as an opportunity for this Court to resolve the questions that were presented, but not decided, in *Arave v. Hoffman*, 552 U.S. 1008 (2007), *dismissed as moot*, 552 U.S. 117 (2008) (per curiam). But this case is an especially poor vehicle for resolving the questions presented in *Hoffman* because the substantive Sixth Amendment questions were never pressed or passed upon in the court of appeals (or, indeed, in the district court) and the remedial question is both in an interlocutory posture and partially unreviewable.

In *Hoffman*, the defendant was charged with first-degree murder and the State offered not to seek the death penalty if he pleaded guilty to the charge. The defendant's counsel advised him to reject the plea agreement on the mistaken belief that the

state's death penalty law would be struck down as unconstitutional. The defendant rejected the plea and was subsequently convicted and sentenced to death. *Hoffman v. Arave*, 455 F.3d 926, 929-30 (9th Cir. 2006).

After unsuccessfully seeking state post-conviction relief, the defendant filed a habeas petition in federal court. He raised several claims, the most relevant of which was that his counsel had been ineffective in advising him to reject the plea agreement. The district court dismissed the defendant's claim about the plea agreement. The court of appeals reversed, ordering the district court to direct the State to either release the defendant or offer him a plea agreement with the "same material terms" as the original plea agreement. *Hoffman*, 455 F.3d at 943.

The State sought certiorari on whether the defendant had established deficient performance and prejudice in connection with his forgone plea. This Court granted certiorari on those questions and additionally directed the parties to brief the third question of "[w]hat, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" *Hoffman*, 552 U.S. at 1008.

Before this Court could hear the case, however, the defendant sought to have it dismissed. The defendant had prevailed in the lower court on a separate claim in his habeas petition, the remedy for which was resentencing, and he wanted to abandon his plea claim in order to proceed more expediently with resentencing in state court. Accordingly, the

Court dismissed the case and vacated the portion of the court of appeals' opinion concerning the defendant's claim of ineffective assistance in connection with the plea. *Hoffman*, 552 U.S. at 118-19.

The State tries to frame its petition as an opportunity for the Court to revisit the questions presented in *Hoffman*. And by devoting a considerable portion of its petition (Pet. 14-19) to cataloging myriad cases that loosely touch on the questions presented in *Hoffman*, the State attempts to give the impression that this case implicates an entrenched conflict in the lower courts. But even if this case implicated such a conflict—which it does not, *see infra* pp. 19-21—this case presents an especially poor vehicle for resolving the questions left open after *Hoffman*.

1. This case presents no occasion for the Court to consider the substantive constitutional question of whether the Sixth Amendment is violated when a defendant forgoes a plea due to ineffective assistance of counsel and is later convicted and receives a higher sentence. That issue was conclusively resolved in respondent's favor in state court, and the State has never challenged it at any stage of the proceedings.

On direct appeal in state court, the OCCA held that respondent had received ineffective assistance of counsel during plea negotiations in violation of the Sixth Amendment. Applying the two-prong test in *Strickland*, the OCCA found that respondent's counsel had performed deficiently by threatening to withdraw as counsel if respondent accepted the

prosecutor's plea agreement, and that respondent had been prejudiced by the deficient performance.

The State has *never* challenged the OCCA's findings of deficient performance and prejudice, be it in the state court, the federal district court, or the court of appeals. *See, e.g.*, Pet. App. 3 ("The State does not contest the OCCA's finding of ineffective assistance of counsel."); *see also* Rehearing Pet. 13 (petitioner acknowledging that it had not "address[ed] the issue at any level of review before the OCCA, before the Federal Magistrate Judge, before the Federal District Judge[,] or the Panel issuing this Opinion"). The remedial question has been the sole focus of the federal habeas proceedings. The unique procedural posture of this case thus places the merits of the substantive constitutional question beyond the jurisdiction of this Court.

The limited scope of the COA issued in the court of appeals confirms that the merits of the Sixth Amendment claim are not properly presented in this case. The court of appeals granted the COA on "the limited question whether the OCCA's modification of Mr. Williams's sentence from life imprisonment without parole to life imprisonment with parole was a constitutionally adequate *remedy* for the ineffective assistance of counsel Mr. Williams received during plea negotiations." COA Order (emphasis added). A COA is jurisdictional and must be issued in accordance with 28 U.S.C. § 2253(c). *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). The lack of a COA on the merits of the Sixth Amendment precludes appellate review of the deficient performance and prejudice issues, as the State may have recognized in declining to raise those issues below.

This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) (internal quotation marks omitted). There is simply no reason to depart from that rule here.

2. The case is also not a suitable vehicle to review the remedial question for two reasons. First, the remedial question is presented in an interlocutory posture. The court of appeals did not fashion a remedy for respondent's ineffective-assistance claim, but instead "remand[ed] the case with instructions to the district court to entertain briefing and impose a remedy that comes as close as possible to remedying the constitutional violation, and is not limited by state law." Pet. App. 14. This was done "in an abundance of caution" to allow "the parties [to] explore any alternatives under a backdrop of the applicable law." *Id.* at 17. Until a remedy is imposed, review by this Court would be premature.

The interlocutory posture of a case "alone furnishe[s] sufficient ground" to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Where "the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) (where court of appeals "remanded the case to the District Court for determination of an appropriate remedy," it was "prudent" to wait for a final judgment "before exercising . . . certiorari jurisdiction").

If the district court resolves the remedy question in a manner the State considers satisfactory, that will moot the State's arguments here. On the other hand, if the State is dissatisfied with the final judgment, the State will be able to pursue avenues of appropriate appellate relief, including ultimately a petition to this Court. Review at this time is thus premature and unnecessary.

Second, this Court's review of the remedial question is constrained by the State's failure to challenge the remedy imposed by the OCCA. Simply put, even if this Court were to review the case and conclude that the appropriate remedy was no remedy at all, the Court would have no authority to apply that ruling to alter the OCCA's final judgment and eliminate its remedy of resentencing respondent to life imprisonment with the possibility of parole.

The OCCA is Oklahoma's highest court for criminal appeals. After the OCCA concluded that modification of respondent's sentence was the appropriate remedy for the Sixth Amendment violation, the State could have sought to challenge the remedy by filing a petition for certiorari in this Court, but it declined to do so. The judgment of the OCCA therefore "became final and unreviewable upon the expiration of the 90-day deadline . . . for filing a petition for certiorari." *Salazar v. Buono*, No. 08-472, Slip. Op. at 7 (U.S. Apr. 28, 2010) (Kennedy, J.), *available at* 2010 WL 1687118, at *8; *see also* 28 U.S.C. § 2101(d); Sup. Ct. R. 13(1). While a federal court on habeas review can provide the habeas petitioner with more relief than the state court provided (the very point of habeas), the court has no authority to grant *the State* relief it failed to seek or obtain on direct review. Ac-

cordingly, a ruling by this Court that no remedy is appropriate in these circumstances could not even be applied to this case.

C. There Is No Decisional Conflict Warranting Review

The State suggests that the lower courts have ordered "divergent remedies" for a Sixth Amendment violation involving a rejected plea offer, indicating that "there is no clearly established law from this Court controlling the lower courts' choice of remedy." Pet. 14. This again misses the point. As explained above, the question is not whether there is clearly established law requiring any one particular remedy, but whether there is clearly established law prohibiting the particular remedy the OCCA imposed. As also explained above, the answer to that question—the only question presented here—is yes. *Morrison* makes perfectly clear that one remedy that is *not* permissible is the facially and concededly inadequate remedy of reducing respondent's sentence to life imprisonment with the possibility of parole.

And there is no "divergen[ce]" among the lower courts on that issue. The State cites no decision imposing or authorizing a plainly inadequate remedy like that imposed by the OCCA, or citing state-law constraints as a barrier to complete relief for a Sixth Amendment violation. The Tenth Circuit's reversal of the OCCA's remedy thus implicates no conflict in the lower courts requiring resolution by this Court.

Nor does the State cite any decisions where, in the face of a conceded Sixth Amendment violation, a court determined that the appropriate remedy was no remedy at all. Instead the State cites *State v.*

Greuber, 165 P.3d 1185 (Utah 2007); *Bryan v. State*, 134 S.W.3d 795 (Mo. Ct. App. 2004); and *State v. Monroe*, 757 So. 2d 895 (La. Ct. App. 2000), which are all cases where the courts imposed no remedy only because, as the State concedes, they found "there [was] no prejudice in the first place." Pet. 15. Because the OCCA here concluded that respondent *was* prejudiced by counsel's deficient performance—and the State has never contested that finding in these habeas proceedings—those cases are inapposite.

Specifically, in *Greuber*, the court held that the defendant's rejection of a plea bargain did not result in prejudice under *Strickland*, both because the defendant would not have accepted the plea agreement regardless of counsel's performance, and because defendant ultimately received a fair trial. *Greuber*, 165 P.3d at 1189-91. Both of the court's conclusions went to whether the second prong of *Strickland* could be established, and, accordingly, the court had no opportunity to consider what an appropriate remedy would be in the event the prejudice prong of *Strickland* was satisfied. Similarly, the court in *Bryan* held that the defendant's claim was not cognizable under *Strickland*, *see Bryan*, 134 S.W.3d at 802-03, and thus it had no occasion to consider what remedy would be appropriate for a conceded Sixth Amendment violation. Finally, while the court in *Monroe* did not expressly discuss *Strickland*, the court affirmed denial of the defendant's motion for a new trial because "rejection of the plea bargain" did not "prejudice[] the conduct of the trial." *Monroe*, 757 So. 2d at 898. None of these cases, then, has any bearing on how to fashion an appropriate remedy

when a state court finds, and the State fails to challenge, the existence of both deficient performance and prejudice in violation of the Sixth Amendment.

The only cases actually involving "divergent remedies" cited by the State essentially involve a choice between two alternative remedies: a new trial, *see* Pet. 14 (citing cases), or specific performance of the forgone plea offer, *see id.* (citing cases). Some cases reflect, as the State puts it, "hybrids of the new-trial and reinstatement-of-plea approaches." *Id.*; *see also id.* at 14-15 (citing cases). Whatever may be the merits of those different approaches, none of that is implicated here, because the court below did not order *either* remedy, or any hybrid or other alternative remedy. The only issue properly before this Court is whether the Tenth Circuit erred in rejecting the OCCA's literally unprecedented remedial order. Whether some other remedial order is a valid exercise of a federal court's habeas authority is a question for another day.

CONCLUSION

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

Respectfully submitted,

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