No. _____

IN THE

Supreme Court of the United States

WADE GREELY LAY,

Petitioner,

v.

TERRY ROYAL, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

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Capital Case

Questions Presented

Petitioner, who represented himself at trial and never believed he was mentally ill or incompetent, first raised procedural and substantive competency-to-stand-trial issues through state post-conviction counsel. The state court specifically defaulted those Due Process claims for not having been raised on direct appeal.

Post-conviction counsel had proffered substantial and unrefuted evidence of Petitioner's mental illness and incompetence. The state appellate court passingly referred to Petitioner's Due Process claims as unmeritorious and denied an evidentiary hearing. Two questions arise from this outcome that warrant this Court's review:

> 1. When a state court explicitly defaults a claim, must federal courts apply 28 U.S.C.§2254(d) to an alternative discussion of the claim? For example, when procedural and substantive competency-to-stand-trial claims are defaulted, are federal courts required to treat limited references to those defaulted claims, made in deciding an ineffective-assistance-of appellate-counsel claim, as adjudications on the merits?
>
> 2. Is the question of competency purely a factual one? If so, when unrefuted evidence of a petitioner's delusions and incompetency is first presented in state post-conviction for a pro se defendant who did not raise his own incompetency at trial, must federal courts defer to a state court's denial of an evidentiary hearing when the court did not consider and engage the proffered evidence?

List of Parties

Appellant/Petitioner, Wade Greely Lay, and Appellee/ Respondent, Warden of Oklahoma State Penitentiary, have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Anita Trammell, Maurice Warrior, Jerry Chrisman, and presently Terry Royal.

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Petition For Writ of Certiorari

Petitioner, Wade Greely Lay, respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *Lay v. Royal*, 860 F.3d 1307 (10th Cir. 2017).

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Lay v. Royal*, 860 F.3d 1307 (10th Cir. 2017). *See* Attachment A. The federal district court decision denying Mr. Lay's Petition for Writ of Habeas Corpus is found at *Lay v. Trammell*, No. CV-08-617, 2015 WL 5838853 (N.D. Okla. Oct. 7, 2015) (unpublished). *See* Attachment B. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Lay's direct appeal is reported at *Lay v. State*, 179 P.3d 615 (Okla. Crim. App. 2008). *See* Attachment C. The OCCA's decision denying Mr. Lay's petition for post-conviction relief can be found at *Lay v. State*, PCD-2006-1013 (Okla. Crim. App. Sept. 26, 2008) (unpublished). *See* Attachment D.

Jurisdiction

The Tenth Circuit rendered its opinion denying relief on June 26,

2017. Mr. Lay filed a timely petition for rehearing and rehearing *en banc*, which the Tenth Circuit denied on September 5, 2017. *See* Attachment E. Justice Sotomayor extended the time to petition for certiorari until February 2, 2018. *See* Attachment F. This Court has jurisdiction pursuant to 28 U.S.C. §2254(1).

Statutory Provisions

Title 28 U.S.C. §2254(d) provides the following:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Title 28 U.S.C. §2254(e) provides the following:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Constitutional Provisions

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides:

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

U.S. Const. amend. VIII.

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Statement of the Case

Mr. Lay and his son, Christopher Lay, entered the lobby of a bank in Tulsa, Oklahoma, intending to rob it. Immediately upon Christopher Lay ordering a bank employee to the ground, gunfire broke out. The pellets from the sawed-off shotgun fired by Christopher Lay killed security guard Kenneth Anderson. The Lays, both wounded in the shoot-out, left without obtaining money and were apprehended later that day. The entire incident, recorded on security cameras, lasted less than one minute.

Mr. Lay was initially represented by the Tulsa County Public Defender. Mr. Lay rejected the offer negotiated for him for a sentence of life without the possibility of parole (LWOP).[1]

As plans for the joint trial proceeded, Mr. Lay worried his public defenders did not intend to present the defense he believed to be unprecedented in American legal history. In an improvised ex parte hearing less than four months before trial, the trial judge announced Mr.

[1] During habeas proceedings, one of Mr. Lay's public defenders stated she believed Mr. Lay would have accepted the deal had Christopher Lay not been set on rejecting it and presenting the Lays' so-called defense theory. While Wade Lay offered effusive words about this defense, Christopher Lay was more willing to act on it and make decisions.

Lay had filed a motion "*essentially*" requesting to represent himself.[2] Without a competency-to-stand- trial evaluation or hearing, Mr. Lay was allowed to proceed pro se. During a colloquy with the trial judge, Mr. Lay denied the only competency-related question the judge asked – whether he had been treated for mental illness.[3] Though Mr. Lay asked for legal assistance from his public defenders, the trial judge prohibited such assistance unless Mr. Lay were to change his mind or disrupt the trial.[4]

Mr. Lay received the death penalty following a *joint* trial in which he presented no coherent defense to mitigate the death penalty. In contrast, Christopher Lay was represented by two qualified capital litigators whose strategy was to vilify Wade Lay throughout both phases of the trial in order to save Christopher Lay's life. The strategy was successful. Christopher Lay received a sentence of life without possibility

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[2] The written "motion" was never filed of record or located in files of the trial judge, district attorney, or public defender.

[3] Mr. Lay received mental health treatment during a prior incarceration in Colorado and while awaiting trial. He was prescribed the psychotropic drug Prozac, approved for treatment of major depressive disorders, obsessive-compulsive disorders, and panic disorders. *Physicians Desk Reference*, 1771-73 (Ed. 2006).

[4] The trial judge's belief "stand-by counsel" referred to attorneys standing by in another building was sufficiently troubling to the OCCA that it ruled the *appointment* and *presence* of standby counsel for pro se defendants would be required in all future capital cases. *Lay*, 179 P.3d at 620. Mr. Lay was not given the benefit of this ruling.

of parole.[5]

Wade Lay's attorneys, before their dismissal, did nothing to trigger statutory procedures to resolve questions of Mr. Lay's incompetency.[6] Yet, second-chair counsel was greatly concerned about her client's mental stability, his obsessions with a tyrannical shadow government, his unusual beliefs about aliens and Satan, and his inability to grasp the ridiculousness of a defense in which he saw himself (and his son) as patriots – prophets chosen by God to lead America out of tyranny.

Christopher Lay's attorneys also doubted Wade Lay's competency. One attorney described Mr. Lay as very delusional and noted that his strange explanations of his defense at pretrial hearings and trial were nonsensical and difficult to follow. The lead attorney would have

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[5] The OCCA acknowledged the joint trial strengthened Christopher Lay's sentencing defense and negatively affected Wade Lay. *Lay*, 179 P.3d at 622. Similarly, the district court recognized the joint trial made it likely Christopher Lay's mitigation evidence became aggravating evidence against Wade Lay. *Lay v. Trammell*, 2015 WL 5838853 at *30. Yet, the OCCA concluded Mr. Lay could not complain of error from the joint trial because he had repeatedly opposed severance and the trial court would have severed the trial had he only made such a request. *Lay*, 179 P.3d at 622. The Circuit concluded that by Mr. Lay "explicitly refusing severance," he waived a challenge that the joint trial did not permit the individualized consideration the Constitution requires. *Lay*, 860 F.3d at 1318.

[6] Counsel need only state facts sufficient to raise a doubt as to competency. Okla. Stat. tit. 22, §1175.2 (A).

requested a competency evaluation if Wade Lay had been his client, noting how disjointed Mr. Lay's conversations were and how irrational the theories he espoused were. Wade Lay had apocalyptic notions about the end of the world. In pontificating on American history, the founding fathers, the federalist papers, and dire predictions about impending disasters, both natural and political, Mr. Lay was unable to connect anything he espoused to the reality he faced alone in a trial for his life.

There is no record the trial judge was informed about the doubts of either previous counsel or Christopher Lay's attorneys. He was, however, privy to Mr. Lay's long, rambling writings about Madison, Jefferson, tyrannical government, arcane eighteenth century history, and how all of that established a legal "defense" to murder and attempted robbery. The trial judge clearly had difficulty making sense of Mr. Lay's disorganized thought processes:

- I don't think . . . anything in Locke, the Federalist Papers have anything to do with any of the cases.
- I don't see any relevance . . . about what your belief is about what the Constitution says . . . I continue to not understand . . . your interpretation.
- I'm having a little trouble following this.

- [T]hose are all words in the English language, but they . . . don't make any sense at all. That . . . is preposterous.

- [T]hey're words in the English language, but when it's all over, I don't know any more than when you got started.

- [I]t has nothing to do with any of the defenses that are recognized in the law.

Mr. Lay does not believe he suffers from a major psychotic illness or that he was, or is, incompetent.[7] He fears that by acknowledging his illness and its effect on him, he will be marginalized and society will ignore his brilliant, groundbreaking theories and predictions. Mr. Lay has written extensively about these.[8]

Mr. Lay's intelligence has been the veil that, to the untrained eye,

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[7] The district court initially granted an evidentiary hearing on Mr. Lay's present competency. The Bureau of Prisons' examiner, like Mr. Lay's habeas expert, agreed Mr. Lay suffers from paranoid schizophrenia and is presently incompetent. The federal evidentiary hearing was struck after this Court decided *Ryan v. Gonzales*, 568 U.S. 57 (2013).

[8] Mr. Lay's appellate lawyer did not file a petition for certiorari from the direct appeal. Mr. Lay, pro se, attempted to file a petition for certiorari with this Court. His rejected petition referenced Washington, Madison, Jefferson, J.P. Morgan, August Belmont, climate change, Federalist #53, a report on the Alien and Sedition Act, the New Testament, the Republican form of government, and the Seventeenth Amendment, among other things. It presented snippets from anachronistic cases from the nineteenth century, *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), *Barron v. City of Baltimore*, 32 U.S. 243 (1833), *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837), and *Luther v. Borden*, 48 U.S. 1 (1849). Mr. Lay's meandering and bombastic writing muddles, rather than clarifies, his views. His writings confirm his disorganized thought processes. Doc. 19, Ex. 39.

disguises his mental illness. The disguise was effective with Mr. Lay's lead public defender at trial, who noted his client's superior intelligence during a *Faretta* hearing. It was effective with Mr. Lay's appellate counsel who succumbed to pressure from Mr. Lay to submit a pro se supplemental brief, which counsel characterized, as is required by OCCA rules, as a viable legal argument, yet he never even investigated his client's mental health.[9] And, it was effective with the OCCA. Notably, the OCCA announced it would not adjudicate Mr. Lay's competency claims because they were waived, having not been raised on direct appeal. Yet, in gratuitously noting the post-conviction application failed to present sufficient evidence of incompetence to prevent waiver of Mr. Lay's Sixth Amendment right to counsel, the only evidence noted was Mr. Lay's "extremely high I.Q." *Lay*, PCD-2006-1013 at 3, Att. C.

I.Q. has never been the standard for competency. All experts who evaluated Mr. Lay for competency have found him to be mentally ill and

[9] The pro se supplemental brief presented a long, convoluted, and flowery commentary on Justice Marshall's opinion in *Barron v. City of Baltimore*. It ultimately claimed Oklahoma denied Mr. Lay's *Barron v. Baltimore* "defence" – a defense "that upholds the spirit of redress . . and justifies the temperament of the desperado." He twice asked for a new trial in which "truth" is allowed as a "defense."

incompetent.[10] They have further acknowledged his exceptional intelligence, but noted Mr. Lay's intelligence does not immunize him from his severe mental illness or incompetency.[11] Yet, Mr. Lay's powerful competency claims have never been tested in the crucible of a hearing in either state or federal court. Mr. Lay was permitted, without the assistance of counsel, to become a target of both the prosecutors and his son's attorneys in the joint capital-sentencing trial, thus assuring his death sentence. The state and federal courts have failed to protect Mr. Lay from the substantial risk that he was tried while incompetent to stand trial.

Reasons For Granting the Writ

I. Introduction.

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[10] Throughout all state and federal proceedings, the State never requested to have Mr. Lay examined by its own expert.

[11] Post-conviction expert Jeanne Russell, Ed.D., in her retrospective evaluation, diagnosed Mr. Lay with delusional disorder, mixed type (grandiose and paranoid features) and concluded his delusional beliefs at the time of trial interfered with his ability to conduct his own defense or work rationally with an attorney. Xavier Amador, Ph.D., diagnosed Mr. Lay with schizophrenia, paranoid subtype, continuous course during federal habeas proceedings. He concluded Mr. Lay was suffering from the illness during death-penalty proceedings and his trial-competency was impaired. Richart DeMier, Ph.D., a Bureau of Prisons expert appointed by the district court, agreed Mr. Lay was properly diagnosed with schizophrenia, paranoid type, with symptoms appearing as early as the mid-1980s. Dr. DeMier further concluded Mr. Lay was currently incompetent and there had been no appreciable change in his mental state since the filing of his habeas petition in 2009.

The Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. *Pate v. Robinson*, 383 U.S. 375 (1966). The existence of this *fundamental* right has repeatedly and consistently been recognized by this Court. "'Competence to stand trial is *rudimentary*, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring)). "[A]n erroneous determination of competence threatens a 'fundamental component of our criminal justice system'– the basic fairness of the trial itself." *Cooper*, 517 U.S. at 364.

The safeguards this Court has established to protect incompetent defendants are heightened. Unlike those established to enforce other Due Process rights, they are not subject to state-by-state variance. *See Cooper*, 517 U.S. at 349 (holding Oklahoma was not permitted to require a defendant to prove his incompetence by its heightened clear-and-convincing- evidence standard because such a standard does not "exhibit

'fundamental fairness' in operation"). Indeed, Oklahoma's heightened standard offended a "principle of justice . . . 'rooted in the traditions and conscience of our people.'" *Id.* at 355 (quoting *Medina v. California*, 505 U.S. 437, 445 (1992)).

The dire consequences of an erroneous determination of competency sets the competency-to-stand-trial right on higher ground than other Due Process rights, such as the burden to prove defenses. *Cf. Leland v. Oregon*, 343 U.S. 790, 797 (1952) (holding state practice requiring defendant to prove his insanity beyond a reasonable doubt does not offend Due Process Clause); *Patterson v. New York*, 432 U.S. 197, 204 (1977) (holding state practice placing burden on defendant to prove affirmative defenses by preponderance of evidence does not offend Due Process Clause). This Court has installed special precautions to assure no incompetent defendant will be prosecuted. Thus, states are forbidden from regulating the burden of producing evidence and the burden of persuasion when such regulations offend fundamental principles of justice.

While it is well-settled a competent defendant has the Constitutional right to waive his Sixth Amendment right to counsel and represent himself at trial, trial judges must take precautions to protect a pro se

defendant's Sixth Amendment rights. *Faretta v. California*, 422 U.S. 806, 835 (1975) (finding waiver of many of the traditional benefits associated with the right to counsel must be accompanied by warnings of the dangers and disadvantages of self representation); *Indiana v. Edwards,* 554 U.S. 164,174 (2008) (permitting states to limit a defendant's self-representation and insist on counsel's representation because it may be necessary to protect fair-trial rights when a defendant lacks the mental capacity to conduct his trial defense).

Against this backdrop, Oklahoma, then the federal courts, failed Mr. Lay. First, the OCCA explicitly defaulted the claims yet received the benefit of AEDPA deference. Second, neither the OCCA nor the federal courts demanded any precautions be taken to assure that an incompetent (or mentally incapacitated) Mr. Lay be protected from his own demented need for a joint trial that would pit his son's attorneys against him and prevent the individualized consideration the Eighth Amendment requires. Third, despite being presented with substantial evidence of Mr. Lay's incompetency, that should have been taken as true,[12] neither the trial

[12] In Oklahoma, responses by the State to post-conviction applications are not automatic. Only when the OCCA requires a response does the State offer one. Here, the required response was filed but presented no evidentiary support to counter that

court, the OCCA, nor the federal courts ordered an evidentiary hearing. Thus, Mr. Lay's attorneys have had no opportunity to prove his incompetency by the lowest burden in the law – a preponderance of evidence.

II. Federal Courts' Review of Constitutional Claims is Constrained by the AEDPA Only When Claims are Adjudicated on the Merits in State Court. Uncertainty Regarding This Concept Should be Settled by This Court.

A. Principles of habeas review.

A writ of habeas corpus on behalf of a state prisoner cannot be entertained in federal court unless a violation of the Constitution or federal law is raised. 28 U.S.C. §2254(a). The State must be offered the first opportunity to correct such violations through exhaustion of available state court remedies. 28 U.S.C. §2254(b)(1). Exhaustion requires the prisoner to fairly present the federal claim to state courts in the first instance. *Picard v. Connor*, 404 U.S. 270, 276 (1971). When a fairly presented claim is adjudicated on the merits in a state court proceeding, federal courts cannot grant the Writ unless the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable

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presented by Mr. Lay's post-conviction counsel.

application of, clearly established Supreme Court law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d)(1-2). For an adjudication to be "contrary to" clearly established precedent, it must conflict with the governing law. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). For an adjudication to be an "unreasonable application" of clearly established precedent, the state court must fail to reasonably apply the correctly identified governing legal principles to the facts of the case. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005).

If a state court clearly and expressly determines the prisoner has failed to meet procedural requirements to present his claim, the claim is considered defaulted, and a different hurdle may exist. Federal courts will not review claims that have been procedurally defaulted on "independent and adequate" state grounds unless the prisoner can show "cause" for the default and resulting "prejudice." *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). The existence of "cause" ordinarily turns on whether the prisoner can show that some objective factor, external to the defense, impeded counsel's efforts to comply with the state's procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The question of "cause" is a

question of federal law. To show prejudice, the prisoner must show the Constitutional error worked to his actual and substantial disadvantage. *Id.* at 489. Mr. Lay's counsel have raised at all times that the "cause" for the competency claims not being raised on direct appeal was ineffective assistance of appellate counsel.

B. The Circuit Court's approach.

The Tenth Circuit concluded Mr. Lay's challenges to his competency to stand trial first raised in state post-conviction were procedurally barred by the OCCA because the claim could have been raised on direct appeal. But the Circuit also applied deference to the OCCA's decision under §2254(d), concluding the OCCA "nevertheless rejected the merits of Mr. Lay's claim." *Lay,* 860 F.3d at 1314.

The AEDPA does not *dictate* such a narrow review, nor should it. Only when claims are "adjudicated on the merits" are federal court decisions constrained by §2254(d). Here, the OCCA clearly and expressly invoked state procedures and refused to adjudicate the competency claims on the merits. The OCCA relied exclusively on Oklahoma's post-conviction statute and its own case law to conclude the claim was waived (defaulted) by not being raised on direct appeal. This was a procedural adjudication,

not a substantive one.

The Circuit's opinion is inconsistent with what this Court has said about claims that are adjudicated on the merits and claims that are defaulted. Rather than moving to the separate determination of whether there was "cause" for the default, the Circuit court applied AEDPA provisions under §2254(d) to the OCCA's alternative statement that Mr. Lay's direct-appeal counsel was not ineffective for failing to raise "unmeritorious" issues.[13]

Claims cannot be both defaulted and adjudicated on the merits. This extension of deference is not required. *See Williams v. Taylor,* 529 U.S. 362, 386 (2000) (finding "significant that the word 'deference' does not appear in the text of the statute itself"). This Court should establish the precise contours of the AEDPA statutory language and determine whether such language can be applied to a claim that has not been adjudicated on the merits because it was explicitly defaulted.

C. AEDPA unambiguously constrains federal courts'

[13] Direct-appeal counsel was questioned by OCCA judges during his oral argument about whether his client suffered from mental health issues and what investigation he conducted. On the record, counsel stated he had not conducted any such investigation and that such facts would best be presented by post-conviction counsel.

review *only* for those claims adjudicated on the merits in state court.

By applying §2254(d) principles to a claim that was not adjudicated on the merits, the Circuit neglected what should have been the starting point in its analysis – the language of the statute. *Williams*, 529 U.S. at 431. The phrase "adjudicated on the merits" is not ambiguous. The plain, ordinary, and contemporary meaning of those terms clearly spells that deference is owed state courts only for claims they actually adjudicate. This Court has reiterated that the language of §2254(d) makes it *clear* that it applies only when a federal claim was "adjudicated *on the merits* in State court." *Johnson v. Williams*, 568 U.S. 289, 302 (2013). To be considered an adjudication on the merits, the state court must have "heard and *evaluated* the evidence and the parties' substantive arguments." *Id.* (emphasis added).

Moreover, when the state court "explicitly invokes a state procedural bar rule as a separate basis for decision," it need not fear its discussion of a federal claim will be considered a merits adjudication. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). Here, the OCCA explicitly invoked such a state procedural bar rule. The OCCA unambiguously said the claim could

have been raised on appeal, and therefore, was waived. While the OCCA recognized direct-appeal counsel had the obligation to present the competency arguments, it held no hearing and did not evaluate the competency evidence counsel was obligated to present. Therefore, there was no "adjudication on the merits" to trigger an analysis under §2254(d).

Interpreting the statute as the clear language demands fosters AEDPA's purposes. The requirement that §2254(d) be applied only to claims "adjudicated on the merits" exists because comity, finality, and federalism are fostered by affording deference to the *judgments* of state courts when they are made on a complete record. *Winston v. Kelly*, 592 F.3d 535, 556 (4th Cir. 2010). Procedural bars are not such judgments.

D. The OCCA's discussion of Mr. Lay's incompetence to represent himself at trial in the context of appellate counsel's ineffectiveness is not a merits adjudication of the underlying claim.

The Circuit acknowledges it must apply the OCCA's procedural bar rulings even if the OCCA, on an alternative basis, discusses and rejects the merits of a Constitutional claim. *Thacker v. Workman*, 678 F.3d 820, 834, n.5 (10th Cir. 2012). Thus, in *Cole v. Trammell*, 755 F.3d 1142, 1158-59 (10th Cir. 2014) when the OCCA's "sole reason" for addressing an

ineffective-assistance-of-trial-counsel claim was to address and reject Cole's ineffective-assistance-of-appellate-counsel claim, the Circuit felt compelled to apply the OCCA's procedural bar ruling. *Id.* at 1159. In *Ryder ex. Ryder v. Warrior*, 810 F.3d 724, 746 (10th Cir. 2016), the Circuit concluded the OCCA's alternative discussion of trial counsel's ineffective assistance in the context of appellate counsel's effectiveness, although no harbor for challenging a procedural bar, otherwise required it to apply §2254(d) principles. *Id.* And now, the Circuit goes further, and merely assumes that §2254(d) applies to all alternative discussions about an underlying claim, no matter how cursory. *Lay,* 860 F.3d at 1314. In effect the Circuit, despite the OCCA clearly choosing to impose a procedural bar, permits the State to have it both ways. When a state elects to procedurally default a claim, there should be no deference given to the state court's alternative analysis or perfunctory discussion made in adjudicating another claim.

Though the statutory language is clear, some courts have clarified that §2254(d) standards apply only to *claims* adjudicated on the merits and not to discussions of related issues or claims. In *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001), the Third Circuit recognized §2254(d) did not

apply to a *Cronic*[14] claim the state court re-characterized as a *Strickland* claim. Although the state court discussed counsel's failures in some detail in its decision, it did not specifically adjudicate the *Cronic* claim on the merits. Thus, the federal court's review of the claim was *de novo*. *See also Conner v. Hall*, 645 F.3d 1277, 1292 (11th Cir. 2011) (refusing to apply §2254(d) standards to whether an evidentiary hearing is appropriate when state court determined *Atkins* claim was procedurally barred and did not adjudicate it on the merits).

The interplay between a state court's procedural default statements and additional merits discussions requires clarification by this Court. In Mr. Lay's case, it is clear the OCCA's ruling on the competency claims rested on "form" not "substance," and the separate discussion that appellate counsel was not ineffective for not raising a meritless claim did not convert the procedural default to an adjudication on the merits.

The lower courts have wrestled with when and whether such a conversion could occur. For instance, in *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450 (6th Cir. 2015), the Circuit concluded

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[14] *United States v. Cronic*, 466 U.S. 648 (1984) (holding the Sixth Amendment is denied if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing).

any presumption the *Brady* claim was adjudicated on the merits was overcome by the context in which the discussion of the claim was made. There, appellate courts clearly stated the claim was barred by principles of res judicata. The Circuit determined the imposition of this "classic example" of a procedural bar, even though the state trial courts had considered some substantive aspects of the claim, was not an adjudication of the merits. *Id*. at 461. *See also Fulton v. Graham*, 802 F.3d 257, 265 (2d Cir. 2015) (finding state court's comments on the merits of an ineffective-assistance claim did not constitute an adjudication on the merits for purposes of §2254(d)); *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (finding "contingent observation" of the merits was not an adjudication on the merits).

However, in *Fischer v. Smith*, 780 F.3d 556 (2d Cir. 2015), the Circuit concluded there was an adjudication on the merits despite the state court initially stating the ineffective-assistance claim was procedurally barred when it later commented on the merits of the claim in considerable detail. *Id*. at 561. *See also Brown v. Artuz*, 283 F.3d 492, 498 (2d Cir. 2002) (finding claim was adjudicated on the merits when there was "no basis" for believing the claim was denied on procedural

grounds).

When the state court states a reason for rejecting a claim, that stated reason should be the exclusive basis for making assessments under §2254**.** This Court has always looked to the state court's stated reasoning to make such assessments. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (holding review was *de novo* to that part of attorney's performance the state court did not assess); *Rompilla*, 545 U.S. at 390 (holding review of prejudice prong of *Strickland* is *de novo* because state court "never reached the issue of prejudice"). *See also Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (finding there must be a state court determination a federal court can defer to in assessing whether Brumfield satisfied §2254(d)).

Indeed, an approach that focuses on a state court's reason for rejecting a claim is the most faithful to the language and objective of the AEDPA. The statute was designed to insulate adequate state-court performance when and where it actually occurs. Here, the OCCA's stated reason for rejecting the competency claims was not based on the merits. The OCCA did not engage the evidence submitted to support the claim on the merits, noting only that the psychological evaluation found Mr. Lay to have an extremely high I.Q. Because there was no adjudication on the

merits, the court's discussion of the claim, in the process of adjudicating yet another claim, deserves no deference. The Tenth Circuit abandoned the plain language of the statute and the intent of Congress in imposing §2254(d) standards. This Court should grant the writ of certiorari to establish that a claim that has been explicitly defaulted is not reviewed under §2254(d) standards.

III. It is Critical to Establish Uniformity Among States Concerning Whether a Finding of Competency is Strictly a Question of Fact.

The characterization of whether a competency determination is strictly factual determination should not vary among jurisdictions. Characterizing a competency determination as a fact has far-reaching effects in the habeas context. The AEDPA permits states to make erroneous (if reasonable) determinations of facts. Additionally, if a state's competency finding is purely a question of fact, that fact carries with it a presumption of correctness despite there having never been a hearing to test the facts. 28 U.S.C. §2254(d)(2) and §2254(e). If competency is indeed solely a question of fact, then it is all the more critical that the fact-finding process be adequately designed to assure accurate results.

This Court has not overruled its triumvirate of competency-to-stand-

trial cases. *Dusky v. United States*, 362 U.S. 402 (1960); *Pate v. Robinson*, 383 U.S. 375 (1966); and *Drope v. Missouri*, 420 U.S. 162 (1975). However, in *Maggio v. Fulford*, 462 U.S. 111, 118-19 (1983) (per curiam), according to the concurring opinion of Justice White, this Court treated competency as a question of "historical fact" rather than the "mixed question of law and fact" it had in prior jurisprudence. *Id.* The nature of the competency question is an important open question this Court should conclusively answer.

A. There is confusion among the Circuits over whether competency is a question of fact or law.

There has been confusion over how competency-to-stand-trial questions are to be treated even after *Maggio*. *See Austin v. Davis*, 876 F.3d 757, 778 (5th Cir. 2017) (adhering to rule of orderliness and resolving intra-circuit dispute by concluding competency to stand trial is a question of fact);[15] *Price v. Wainwright*, 759 F.2d 1549, 1551 (11th Cir. 1985) (holding competency question is mixed question of law and fact), *overruling recognized by United States v. Hogan*, 986 F.2d 1364, 1371

[15] Other Fifth Circuit cases determined the "ultimate competency finding" was one of law or was a mixed question of law and fact. *Moody v. Johnson*, 139 F.3d 477, 482 (5th Cir. 1998); *Bouchillon v. Collins*, 907 F.2d 589, 593 n.11 (5th Cir. 1990); *Washington v. Johnson*, 90 F.3d 945, 950 (5th Cir. 1996).

(11th Cir. 1993) (holding proper standard of review on direct appeal requires treating competency to stand trial as a fact-finding subject); *Rosenthal v. O'Brien*, 713 F.3d 676, 684 n.4 (1st Cir. 2013) ("A finding of competency is treated as a purely factual matter"); *see also Johnson v. Norton*, 249 F.3d 20, 25-26 (1st Cir. 2001) (finding decision not to hold a competency hearing is either a legal question or a mixed question of law and fact).

For state courts to properly rule upon critical Due Process issues of competency, this Court should clarify what part of the competency standard requires courts to resolve the facts and what elements of the test resolves a question of law, especially as that relates to the decision of whether or not to conduct a competency hearing at all.

B. Oklahoma's post-conviction scheme does not provide for a fact-finding process that adequately protect applicants from being tried while incompetent to stand trial.

Oklahoma's capital post-conviction scheme requires an applicant to originate his action in the OCCA while the direct appeal is still pending. *Oklahoma Court of Criminal Appeals,* Rule 9.7(A)(2). Affidavits and evidentiary material must be filed with the application, as was done for

Mr. Lay. However, supplementation of the record is limited to materials supporting matters which "were not and could not have been raised in direct appeal." The supplemental record must also support the conclusion the outcome of the trial would be different or the defendant is factually innocent. Rule 9.7 (D)(1)(a)(b). None of these conclusions fit competency-to-stand-trial determinations.

Petitioner's request for an evidentiary hearing "must contain sufficient information to show the OCCA 'by clear and convincing evidence' the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief."[16] Rule 9.7 (D)(5). The OCCA "shall not" remand for an evidentiary hearing "absent a showing by the submitting party that the materials sought to be submitted could not have been previously submitted upon exercise of due diligence." Rule 9.7 (D)(7)(a). Even when the petitioner's applications comply with the above, the OCCA cannot remand for an evidentiary hearing without determining

[16] Applying a "clear and convincing" evidence standard to competency-to-stand-trial issues is unconstitutional. *Cooper*, 517 U.S. at 1350 (noting that enforcing Oklahoma's clear and convincing evidence standard means a defendant could be "put to trial even though it is more likely than not he is incompetent").

that "controverted, previously unresolved factual issues material to the legality of the petitioner's judgment or sentence do exist and otherwise meet the requirements of Okla. Stat. tit. 22, §1089(D)(4)."[17] Rule 9.7 (E)(1)(2). Again, the inclusion of a "clear and convincing" evidence standard as a requirement for a hearing is especially problematic in the competency-to-stand-trial context. *See Cooper*, 517 U.S. at 349.

Oklahoma's post-conviction procedures do not provide an adequate mechanism for presenting competency-to-stand-trial claims that require a nunc pro tunc determination. Mr. Lay's counsel presented numerous documents in support of the post-conviction application, more than enough evidence to meet what should be a low bar: a bona fide doubt of his incompetency – a mere threshold showing that an evidentiary hearing was needed.[18] The OCCA thwarted the fact-finding process by denying a

[17] Under Okla. Stat.tit. 22, §1089(D)(4), the OCCA's review is limited to whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and whether the applicant raised or could have raised the issues earlier.

[18] The risks from inconsistent approaches are best shown by the contrast between this case and that of James Ryder. Between the guilt stage and sentencing stage of Mr. Ryder's capital trial his counsel presented an expert evaluation that indicated Mr. Ryder was depressed and incompetent. *Ryder v. State*, 83 P.3d 856, 865-66 (Okla. Crim. App. 2004). The trial judge denied counsel's application to determine Mr. Ryder's competency. The OCCA, on appeal, remanded to the trial court to determine whether a retrospective hearing on competency was feasible, if so, whether there existed a doubt concerning Mr. Ryder's competence in 2000, and if a doubt was

hearing altogether in the face of credible and undisputed evidence Mr. Lay was delusional and incompetent at the time he represented himself in his capital trial.

As previously noted, the OCCA explicitly defaulted Mr. Lay's competency claims for not being presented on direct appeal. Yet, the Circuit court considered the OCCA's rejection of the ineffective-assistance-of-appellate-counsel claim as an adjudication on the merits of the interwoven competency claims, without ever engaging the evidence.[19] It was essential for the OCCA to actually take up the evidence to adjudicate the competency claims on the merits, but it did not.

In *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007), this Court found there was no adjudication on the merits when the state's "fact finding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that

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found to exist, ordering a post-examination competency hearing. *Id.* at 866. The evidence presented by Mr. Lay's counsel in state post-conviction was considerably more extensive and compelling than that presented in Mr. Ryder's direct appeal. Yet, Mr. Lay never received the benefit of the hearing that was afforded to Mr. Ryder.

[19] Because the OCCA called for the State's response to the post-conviction application, it must have concluded the State's answer brief was "necessary to the resolution of the issues raised in the petitioner's application and brief." Rule 9.7(A)(5). Yet, the State did nothing other than attempt to controvert counsel's factual materials with argument. The State presented no evidentiary materials of its own.

appeared to be 'seriously inadequate for the ascertainment of the truth.'" The extent to which the evidence must be engaged to create an adjudication on the merits has been subject to disparate treatment within the Tenth Circuit. *See Lay,* 860 F.3d at 1314 (finding the OCCA applied a waiver, and thus, Mr. Lay's "contentions" were "procedurally barred, " but also concluding the OCCA "rejected the merits . . . and found that there was insufficient evidence to warrant a competency hearing"); *Cf. Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009)(en banc) (holding when the OCCA summarily disposed of an ineffective-assistance-of-counsel claim and evidentiary hearing without discussing or considering proffered non-record evidence, there is no adjudication on the merits). Despite the fact one panel cannot overrule the en banc court, in *Lott v. Trammell*, 705 F.3d 1167, 1211-13 (10th Cir. 2013), the panel concluded *Wilson* was no longer good law given the OCCA's subsequent decision in *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010).[20] This

[20] In *Simpson,* the OCCA concluded that its direct appeal rule (Rule 3.11) obligated it to review and consider the non-record evidence in support of an ineffective-assistance-of-trial-counsel claim. It gratuitously offered that its "clear and convincing" evidentiary standard was intended to be less, not more, demanding than the *Strickland* standard. *Simpson,* 230 P.3d at 905. The same cannot be said for the "clear and convincing" evidence standard as it relates to comptency-to-stand-trial issues. *See Cooper*, 517 U.S. at 379.

Court should resolve this intra-circuit inconsistency.

It is important for there to be a uniform policy for when state evidentiary hearings are required for competency-to-stand-trial issues first raised in post-conviction. There are significant differences in how the circuits assess whether state fact-finding processes are defective. *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (noting that if a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of facts); *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015) (noting there is no adjudication on the merits when the state court refuses to permit further development of facts, and thus, leaves the record materially incomplete). This Court has not determined, in the competency-to-stand-trial context, whether a state court, by merely allowing extra-record evidentiary materials to be attached to a post-conviction application raising competency claims, provides constitutionally sufficient process that safely avoids the risk an incompetent person will be tried.

A remedy can be fashioned that respects the state court's authority to find the facts. *See Odle v. Woodford*, 238 F.3d 1084, 1090 (9th Cir. 2001)

(remanding to district court with instructions to grant the writ unless the state trial court conducts a hearing to determine whether defendant was competent to stand trial). Or, when the state process is defective or the state court has refused to engage the evidence, a defendant raising a competency claim may be entitled to a federal evidentiary hearing. *See Austin v. Davis*, 647 Fed. App'x 477, 483-84 (5th Cir. May 6, 2016) (granting COA on petitioner's entitlement to a federal evidentiary hearing where petitioner pursued his claims regarding his mental state and its impact on his waiver of counsel in state post-conviction and where the state court defaulted the claim).

Significant contemporaneous evidence of Mr. Lay's incompetency to stand trial was presented in state court. The proffered evidence was substantial, unequivocal, and undisputed, yet Mr. Lay never received a hearing on his competence in the trial court, from the OCCA, or federal courts. Without an evidentiary hearing there is no assurance Mr. Lay's fundamental Due Process rights were not violated.

Conclusion

This Court should grant certiorari to determine if the underlying meritorious Fourteenth Amendment claims may be heard by the federal

courts for either or all of the reasons outlined above.

Respectfully submitted,

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Dated this 2nd of February, 2018