

Case No. 17-7685

IN THE SUPREME COURT OF THE UNITED STATES

WADE GREELY LAY,
Petitioner,

v.

TERRY ROYAL, Warden,
Oklahoma State Penitentiary,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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**CAPITAL CASE
QUESTION PRESENTED**

Should this Court grant certiorari review for claims that were procedurally barred in state court when Petitioner makes no attempt to avoid or excuse the procedural bar?

No. 17-7685

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2017

WADE GREELY LAY,

Petitioner,

-vs-

TERRY ROYAL, Warden,
Oklahoma State Penitentiary,

Respondent.

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

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on June 26, 2017. *See Lay v. Royal*, 860 F.3d 1307 (10th Cir. 2017).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Tulsa County, State of Oklahoma, Case No. CF-2004-2320. In 2005, Petitioner was tried by jury for one count of first degree

murder. A bill of particulars was filed alleging three statutory aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; (2) Petitioner committed the murder for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence of a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. *See* Okla. Stat. tit. 21, § 701.12. At the conclusion of the trial, the jury found Petitioner guilty as charged, found the existence of all three statutory aggravating circumstances and recommended a death sentence. Petitioner was sentenced accordingly.¹

The Oklahoma Court of Criminal Appeals (“OCCA”) affirmed Petitioner’s convictions and sentences in a published opinion filed on February 12, 2008. *See Lay v. State*, 179 P.3d 615 (Okla. Crim. App. 2008). Petitioner did not seek rehearing. Petitioner’s attempt to file a *pro se* petition for writ of certiorari in this Court was unsuccessful.

Petitioner filed an application for state post-conviction relief on May 30, 2008, which was denied by the OCCA in an unpublished opinion on September 26, 2008. *See Lay v. State*, No. PCD-2006-1013, slip op. (Okla. Crim. App. Sept. 26, 2008) (unpublished) (“PC Opinion”).

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Northern District of Oklahoma on September 4, 2009. Petitioner then filed a second application for state post-conviction relief on

¹ Petitioner was also convicted of one count of attempted robbery with a firearm, for which he was sentenced to twenty-five years’ imprisonment.

May 4, 2010. The OCCA again denied post-conviction relief in an unpublished decision. *Lay v. State*, No. PCD-2010-407, slip op. (Okla. Crim. App. Oct. 13, 2010) (unpublished). On October 7, 2015, the federal district court issued an order denying Petitioner's petition for habeas corpus relief. *See Lay v. Trammell*, No. 08-CV-617-TCK-PJC, slip op. (N.D. Okla. Oct. 7, 2015) (unpublished).

Petitioner appealed the Northern District of Oklahoma's denial of habeas relief to the Tenth Circuit. After briefing and oral argument, the Tenth Circuit affirmed the district court's denial of relief in an opinion filed on June 26, 2017. *See Lay v. Royal*, 860 F.3d 1307 (10th Cir. 2017). The Tenth Circuit denied Petitioner's request for rehearing and rehearing *en banc* on September 5, 2017. *See Lay v. Royal*, No. 15-5111 (10th Cir. Sept. 5, 2017) (unpublished).

On February 2, 2018, Petitioner's petition for a writ of certiorari was placed on this Court's docket.

STATEMENT OF FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal:

The facts in this case are largely undisputed. Lay does not challenge his convictions but only the sentences he received for them. On May 24, 2004, Wade Lay and his son, Chris, entered the MidFirst bank in Tulsa to rob the bank to fund the purchase of guns to avenge the United States Government's attacks on Ruby Ridge and the Branch Davidians. The Lays believed that the United States Government had become tyrannical and that they had to start a patriotic revolution as was done by America's founding fathers.

The Lays entered the bank armed, wearing ski masks and gloves. Christopher Lay confronted bank employee Brian Easlon and ordered him to the ground. When bank security guard Kenneth Anderson entered the lobby, a gun battle erupted wounding the Lays and killing Anderson. The Lays, without obtaining any money, fled across a field to their truck. Both were apprehended later that day and were taken to the hospital. At trial, both Lays admitted guilt but asserted that their actions were driven by a necessity for the greater good of the country.

Lay, 179 P.3d at 619 (paragraph numbers omitted).

REASONS FOR DENYING THE WRIT

Petitioner presents various arguments in opposition to the denial of his substantive and procedural competency-to-stand-trial claims. The OCCA procedurally barred the claims when they were raised in Petitioner's first post-conviction application. Petitioner makes no attempt to show that the procedural bar is inadequate or dependent on federal law, or to show cause and prejudice to avoid his default of the claims. Petitioner has failed to show that the Tenth Circuit has decided an important question of federal law in a way that conflicts with another United States court of appeals or of a state court of last resort. Nor has Petitioner shown that the Tenth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Petitioner presents no compelling reason for this Court to review the Tenth Circuit's decision. This Court should not grant certiorari to review this particular case.

**PETITIONER'S CHALLENGES TO THE TENTH
CIRCUIT'S DENIAL OF CLAIMS WHICH WERE
PROCEDURALLY BARRED IN STATE COURT
PRESENT NO IMPORTANT QUESTION OF
FEDERAL LAW.**

Petitioner seeks this Court's review of two claims that were procedurally barred in state court. Petitioner's failure to challenge the procedural bar or attempt to avoid it leaves this Court with no pertinent federal question to decide. This Court should deny Petitioner's request for a writ of certiorari.

A. Background of Petitioner's Claims

In his first application for post-conviction relief, Petitioner raised both substantive and procedural competency claims. 5/30/2008 *Application for Post-Conviction Relief – Death Penalty* (Okla. Crim. App. No. PCD-2006-1013) ("PC App.") at 6-32. Petitioner also claimed appellate counsel was ineffective for failing to raise the competency claims on direct appeal. PC App. at 7. The OCCA found Petitioner's competency claims to be procedurally barred and denied his ineffective assistance of appellate counsel claim on the merits. PC Opinion at 3. Specifically, the OCCA held that

Lay's application fails to support his contention that he was incompetent to represent himself at trial.^[2] In fact, his supplementary evaluation indicates his extremely high I.Q. Lay has failed to present this Court with sufficient evidence of his incompetence at trial. As a result, we find both that this claim is procedurally barred and that appellate counsel was not ineffective for failing to raising an unmeritorious issue on direct appeal. Moreover, we find that Lay has failed to present sufficient

² Petitioner's claim included his competency to stand trial and his competency to proceed *pro se*. PC App. at 11-21, 29-32.

evidence of his incompetence at trial to justify an evidentiary hearing on this issue.

PC Opinion at 3.

The Tenth Circuit, without explanation, overlooked the OCCA's procedural bar and denied the competency claims on the merits.³ *Lay*, 860 F.3d at 1314-15. The Tenth Circuit concluded that the OCCA's denial of Petitioner's competency claims was not contrary to, or an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. *Id.*

Although this is not a merits brief, Respondent must briefly dispute Petitioner's contention that his incompetence is "undisputed[.]" Pet. at 32. Both the federal district court and Tenth Circuit, relying in part on the failure of Petitioner's attorneys to suggest he was not competent, determined that the OCCA's decision was reasonable. The district court found that Petitioner "behaved in an orderly manner in the proceedings; he was responsive to inquiries from the Court and communicated well, at times very well; he seemed to understand the proceedings and even seemed to understand and follow the procedural rules." *Lay*, No. 08-CV-617-TCK-PJC, slip op. at 15. The Tenth Circuit concluded that

although [Petitioner] at times shared with the jury his unusual and conspiratorial beliefs, he conducted himself professionally throughout the proceedings and complied

³ The Tenth Circuit overlooked the procedural bar of the substantive competency claim because that court holds that such claims can never be procedurally barred. *Lay*, 860 F.3d at 1315. This Court has never held that the constitution prevents states from procedurally barring substantive competency claims. Petitioner does not ask this Court to consider the issue in his case. Accordingly, the state court's procedural bar must stand. In any event, Respondent will show that Petitioner's challenges to the Tenth Circuit's decision do not present a compelling question.

with procedural rules. The evidence before the OCCA suggests that [Petitioner] interacted with the trial court, that he understood the charges against him, the range of punishment he faced, and his rights as explained by the trial court. Importantly, [Petitioner's] defense counsel, who had represented [Petitioner] for more than a year, never questioned his competency despite having ample opportunity to do so.

Lay, 860 F.3d at 1314-15 (internal citation omitted). Respondent has never conceded Petitioner was incompetent and does not do so now.

B. Petitioner Presents No Federal Question to this Court

“This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Petitioner’s competency claims were procedurally barred by the OCCA. Petitioner does not argue that the procedural bar was inadequate or dependent on federal law, that he can show cause and prejudice⁴ or that application of the bar would result in a fundamental miscarriage of justice. *See id.* at 750 (a federal court may not consider a claim that was subject to an adequate and independent state procedural default unless the petitioner can show cause and prejudice or that application of the bar will result in a fundamental miscarriage of justice).

⁴ Petitioner asserts that he has, at all times, claimed ineffective assistance of appellate counsel as cause. Pet. at 16. While this is true, the petition challenges only the Tenth Circuit’s rejection of the underlying competency claims and makes no attempt to show ineffective assistance of appellate counsel.

Petitioner asks this Court to consider whether the Tenth Circuit should have applied 28 U.S.C. § 2254(d) (“AEDPA”) in its review of the OCCA’s alternative merits analysis, whether competency claims are purely questions of fact and whether the OCCA’s post-conviction procedures for considering extra-record evidence are adequate to warrant deference. None of these questions implicate the procedural bar. Petitioner has made no attempt to explain how this Court could consider his claims in spite of the procedural bar. Accordingly, Petitioner has not properly placed any federal question before this Court. Petitioner is not entitled to a writ of certiorari.

C. Assuming Petitioner Could Avoid the Procedural Bar, He Presents No Compelling Question for this Court’s Review

1. The Tenth Circuit’s Application of 28 U.S.C. § 2254(d) Presents No Question for this Court to Resolve

Petitioner claims AEDPA should only apply when a claim is adjudicated on the merits in state court. Pet. at 16. Respondent fully agrees. The OCCA alternatively adjudicated Petitioner’s competency claims on the merits. Accordingly, the Tenth Circuit properly applied AEDPA. There is no federal question for this Court to resolve.

Petitioner asserts that “[c]laims cannot be both defaulted and adjudicated on the merits.” Pet. at 17. This is patently untrue.

[A] State court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court’s judgment, even when the state court also relies on federal

law. Thus, by applying this doctrine to habeas cases, [*Wainwright v. Sykes*], 433 U.S. 72 (1977)] curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.

Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) (internal citation omitted). The fact that a state court can both procedurally bar a claim and alternatively deny it on the merits is settled. To the extent that Petitioner's reliance upon *Harris* establishes that the Tenth Circuit erred, he shows only that it erred in his favor. Petitioner should not have obtained review of his competency claims, whether under AEDPA or *de novo*.

Petitioner also suggests that the OCCA did not adjudicate his claims on the merits because it did not order an evidentiary hearing and did not evaluate his evidence. Pet. at 18-19, 23-24. An evidentiary hearing is not required for a merits adjudication, nor is the state court required to discuss Petitioner's evidence in its opinion. See *Johnson v. Williams*, 568 U.S. 289, 298-301 (2013) (holding, in a case in which no hearing was held and the highest state court issued a one-sentence order, that there is a rebuttable presumption that a state court denies every federal claim presented to it on the merits even when the state court's opinion contains no mention of the federal claim); *Harrington v. Richter*, 562 U.S. 86, 96, 98-100 (2011) (holding that AEDPA applied to state court's one-sentence summary denial

although no evidentiary hearing was held). Once again, Petitioner presents no important question of federal law that needs to be settled by this Court.⁵

Petitioner cites *Cole v. Trammell*, 755 F.3d 1142, 1158-59 (10th Cir. 2014) in an attempt to show that the Tenth Circuit is being inconsistent as to whether it will entertain the merits of a procedurally barred claim. However, any potential intra-circuit conflict should be addressed by the circuit. *See Joseph v. United States*, ___ U.S. ___, 135 S. Ct. 705, 707 (2014) (statement of Kagan, J., Ginsburg, J., and Breyer, J., respecting the denial of certiorari) (“we usually allow the courts of appeals to clean up intra-circuit divisions”). Further, Petitioner neglects to mention that, after finding the claim in *Cole* procedurally barred, the court went on to review the merits of the claim “[o]ut of an abundance of caution” and did so under AEDPA deference. *Cole*, 755 F.3d at 1159-63. Further, Petitioner fails to explain why this Court should grant certiorari to review a case in which he received more than what he was entitled to.⁶

⁵ In this case, the OCCA indisputably resolved Petitioner’s claims on the merits. The OCCA reviewed “Lay’s application” and found that it “fail[ed] to support his contention[.]” PC Opinion at 3. The OCCA explicitly considered the expert evaluation presented by Petitioner. PC Opinion at 3. The OCCA found the issue “unmeritorious” because Petitioner “failed to present th[e] Court with sufficient evidence of his incompetence at trial.” PC Opinion at 3. This was a merits adjudication. *See Johnson*, 568 U.S. at 302 (defining “merits” as relating to matters of substance, as opposed to form).

⁶ In fact, Petitioner’s suggestion that a federal court should overlook a procedural bar which is independent and adequate to review the defaulted claim *de novo* would improperly allow habeas petitioners to circumvent AEDPA by procedurally defaulting their claims in state court.

Finally, Petitioner fails to show an inter-circuit conflict. A state court's application of the *wrong* standard is not comparable to an alternative merits discussion. *See Appel v. Horn*, 250 F.3d 203, 209-12 (3d Cir. 2001) (reviewing *de novo* where the state court applied *Strickland* to a *Cronic* claim); *cf. Williams v. Taylor*, 529 U.S. 362, 405 (2000) (a state court's decision is "contrary to" clearly established federal law if it "arrives at a conclusion opposite to that reached by this Court on a question of law"). Nor is a case in which the state court applied an inadequate procedural bar and did not make an alternative merits adjudication comparable to this case. *See Conner v. Hall*, 645 F.3d 1277, 1284-85, 1287-92 (11th Cir. 2011) (holding AEDPA did not apply to the petitioner's request for an evidentiary hearing where the state court applied an inadequate procedural bar and did not alternatively reach the merits of the claim because it found his evidence to be inadmissible).

In *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 458 (6th Cir. 2015), the state trial court found the petitioner's claim to be procedurally barred and then expressed reservations as to the relevance and persuasiveness of the evidence offered by the petitioner. The Ohio Court of Appeals simply found the claim barred. *Barton*, 786 F.3d at 458. The Sixth Circuit stated, in dicta, that the trial court's offhand remarks on the merits did not constitute a merits adjudication.⁷ *Id.* at 461. However, this discussion was not necessary as the court went on to recognize that it

⁷ As shown above, the OCCA actually evaluated Petitioner's evidence and found it lacking. These were not mere offhand remarks, they were necessary to the OCCA's adjudication of Petitioner's ineffective assistance of appellate counsel claim.

must evaluate the opinion of the highest state court, which rested solely on a procedural bar. *Id.* at 462-64. More importantly for purposes of this case, the Sixth Circuit stated that it may apply AEDPA deference to a state court's alternative merits adjudication of a claim. *Id.* at 461. Accordingly, the Sixth Circuit is not in conflict with the Tenth Circuit.

Petitioner also relies upon the Second Circuit's refusal to apply AEDPA to a state court's alternative discussion of the merits of a procedurally barred claim when the state court explicitly declares that it is not reaching the merits of the claim. *See Fulton v. Graham*, 802 F.3d 257, 264-65 (2d Cir. 2015) (holding the state court's statement that it "would" deny the claim on the merits "if" it were to consider the claim meant that the court was not basing its decision on the merits of the claim); *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007) (holding that the state court did not make an alternative merits holding where it said it would deny a claim "if" it reached the merits). However, the Second Circuit does apply AEDPA where similar language does not appear in the state court's opinion. *See Fischer v. Smith*, 780 F.3d 556, 559-61 (2d Cir. 2015) (applying AEDPA where the state court said the claim was both procedurally barred and meritless). Here, the OCCA did not indicate that it was doing anything other than providing an alternative merits rationale for denying Petitioner's claims. The OCCA did not state that it would deny the claims "if" it were to consider them. Rather, the OCCA found the claims "unmeritorious[.]" PC Opinion at 3. The Tenth Circuit's application of AEDPA does

not conflict with the Second Circuit's approach. Petitioner has failed to demonstrate a conflict between the circuits.

As a final matter, although Petitioner's question presented asks whether federal courts are required to apply AEDPA to a state court's adjudication of the claim underlying an ineffective assistance of appellate counsel claim, he does not provide any argument or cases relevant to that aspect of his question presented. Petitioner has, therefore, waived this aspect of his argument. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, ___ U.S. ___, 135 S. Ct. 2076, 2083 (2015) (finding argument waived by inadequate briefing). In any event, although the ultimate question before the OCCA was whether appellate counsel's alleged ineffectiveness excused Petitioner's waiver of his competency claims, the OCCA quite plainly adjudicated the merits of the competency claims and determined them to be without merit.⁸ PC Opinion at 3.

The OCCA alternatively decided Petitioner's claims on the merits. Petitioner has failed to present a compelling argument that this Court should review the Tenth Circuit's decision to apply AEDPA to a claim that was "adjudicated on the merits in State court proceedings[.]" 28 U.S.C. § 2254(d). Further, it bears repeating that Petitioner is complaining about claims that were procedurally barred

⁸ Respondent acknowledges that a different rule might apply if a state court found a claim to be potentially meritorious but not so meritorious that it was unreasonable for appellate counsel to exclude it. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986))). However, such is not the case here.

giving him no right to merits review under any standard. Petitioner’s request for certiorari review should be denied.

2. *The Standard of Review for Competency Claims is not an Open Question*

Petitioner also asks this Court to resolve the “open question” of whether competency determinations are pure questions of fact. Pet. at 24-26. Petitioner does not discuss the Tenth Circuit’s treatment of his competency claims nor assert that the resolution of his claims would be different if they were mixed questions of fact and law.⁹ Petitioner’s argument is wholly insufficient to warrant this Court’s review. See *Zivotofsky*, 135 S. Ct. at 2083 (finding argument waived by inadequate briefing).

In any event, this Court “ha[s] held that a state court’s conclusion regarding a defendant’s competency” is entitled to the presumption of correctness which was afforded to questions of fact before the enactment of AEDPA. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (*per curiam*) (citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (*per curiam*)); accord *Austin v. Davis*, 876 F.3d 757, 777-78 (5th Cir. 2017) (“The Supreme Court concluded in *Maggio v. Fulford* that competency to stand trial is a question of fact.”); *Rosenthal v. O’Brien*, 713 F.3d 676, 684 n.4 (1st Cir. 2013)

⁹ The Tenth Circuit appears to have treated Petitioner’s procedural competency claim as a mixed question of law and fact, and his substantive competency claim as a question of fact. *Lay*, 860 F.3d at 1315. The only difference between the two claims was a few items of evidence Petitioner submitted in support of the substantive claim. *Id.* There is no reason to believe the Tenth Circuit’s holding that the OCCA reasonably determined that Petitioner’s substantive competency claim lacked merit would have changed had it asked whether the OCCA reasonably applied this Court’s cases to the evidence, as opposed to whether the OCCA reasonably determined the facts in light of the evidence.

(relying on *Demosthenes* to state that competency determinations are questions of fact but, like the Tenth Circuit here, reviewing a procedural competency claim as a question of law or mixed question of law and fact); *Johnson v. Norton*, 249 F.3d 20, 25-26 (1st Cir. 2001) (reviewing a procedural competency claim under 28 U.S.C. § 2254(d)(1)); *United States v. Hogan*, 986 F.2d 1364, 1269-72 (11th Cir. 1993) (relying on *Demosthenes* to hold that competency determinations are questions of fact). Petitioner does not cite a single case from any court which applies 28 U.S.C. § 2254(d)(1) to substantive competency claims. Petitioner has failed to demonstrate a conflict between the Tenth Circuit's decision and a decision of this Court, or any other court. Petitioner does not present a compelling question. This Court should deny Petitioner's request for a writ of certiorari.

3. *The OCCA's Standard for Granting an Evidentiary Hearing is Irrelevant to Petitioner's Procedurally Barred Claims*

Petitioner's final complaint is that the OCCA does not provide post-conviction applicants with an adequate opportunity to raise competency claims. The OCCA found that Petitioner's competency claims should have been raised on direct appeal. PC Opinion at 3. Petitioner has never argued the claims were not available at the time of his direct appeal. Petitioner identifies no precedent from this Court which would require a state court to permit him to raise a competency claim in post-conviction proceedings which was available on direct appeal. Indeed, Petitioner does not even argue that the constitution prevents state courts from procedurally barring competency claims. Petitioner's procedurally barred claims do not present a compelling question.

Moreover, Petitioner fails to establish that Oklahoma's post-conviction review of competency claims violates *Cooper* or *Panetti*. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), this Court held that states may not require criminal defendants to prove they are incompetent by clear and convincing evidence. According to Petitioner, Oklahoma violates *Cooper* because post-conviction applicants are entitled to an evidentiary hearing only if they "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." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008). The OCCA has followed this Court's decision in *Cooper*. See, e.g., *Grant v. State*, 205 P.3d 1, 8 (Okla. Crim. App. 2009) (applying the preponderance standard); *Smith v. State*, 955 P.2d 734, 738 (Okla. Crim. App. 1998) (recognizing the proper standard in light of *Cooper*). The standard for an evidentiary hearing on post-conviction requires clear and convincing evidence only that Petitioner's proposed evidence will likely be supported by fact and be relevant to his claim. This does not equate to requiring Petitioner to prove his incompetence by clear and convincing evidence. Cf. *Lott v. Trammell*, 705 F.3d 1167, 1212-13 (10th Cir. 2013) (holding that Oklahoma's standard for obtaining an evidentiary hearing on direct appeal, which requires the application to show by clear and convincing evidence a strong possibility that counsel was ineffective, does not equate to requiring the petitioner to show that counsel was ineffective by clear and

convincing evidence)¹⁰; *Simpson v. State*, 230 P.3d 888, 905-06 (Okla. Crim. App. 2010) (holding that the direct appeal evidentiary hearing standard is less onerous than *Strickland*). Petitioner’s argument thus amounts to a complaint that the OCCA (whose decision is not currently under review) misapplied a properly stated rule of law. Such does not warrant this Court’s review. *See* Sup. Ct. R. 10 (a writ of certiorari is rarely granted for an alleged misapplication of a properly stated rule of law).

Petitioner’s reliance upon *Panetti v. Quarterman* is similarly misplaced. In *Ford v. Wainwright*, 477 U.S. 399, 426 (1986), this Court held that a defendant who makes a substantial threshold showing that he is not competent to be executed is entitled to a hearing. *Panetti v. Quarterman*, 551 U.S. 930, 948-49 (2007). In *Panetti*, the state court failed to afford the petitioner a hearing in spite of it being “uncontested that petitioner made a substantial showing of incompetency.” *Id.* at 948. Here, Petitioner’s alleged incompetence is contested, which reduces Petitioner’s claim to a disagreement with the outcome of his appeal.

Finally, Petitioner’s request for “a uniform policy for when state evidentiary hearings are required for competency-to-stand-trial issues first raised in post-conviction” is not compelling. Pet. at 31. This Court typically does not dictate rules of procedure for state courts. *Cf. Atkins v. Virginia*, 536 U.S. 304, 317 (2002)

¹⁰ Petitioner asks this Court to resolve an alleged intra-circuit split concerning the OCCA’s treatment of direct appeal evidentiary hearing applications. As noted above, this Court generally does not resolve intra-circuit conflicts. Further, Petitioner’s claim was raised on post-conviction review, which renders the direct appeal rule irrelevant.

(leaving it to the States to develop ways to enforce the constitutional ban against executing mentally retarded offenders); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (leaving it to the States to develop ways to enforce the constitutional ban on executing someone who is not competent). Respondent acknowledges that this Court does not give states *carte blanche*, as evidenced by *Cooper* and *Panetti*. However, aside from an incorrect assertion that evidence of his alleged incompetency is uncontested and his flawed *Cooper* argument, Petitioner makes no attempt to demonstrate that Oklahoma's procedures are flawed or somehow failed him in this case. Again, Petitioner simply disagrees with the Tenth Circuit's application of AEDPA to his case. This Court should deny certiorari review.

CONCLUSION

Petitioner's argument that the Tenth Circuit improperly denied relief for procedurally barred claims does not present this Court with a "compelling reason" to grant a writ of certiorari. *See* Sup. Ct. R. 10 (stating that a petition for writ of certiorari will be granted only for compelling reasons). Therefore, and for the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

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