

IN THE

**Supreme Court of the United States**

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WADE GREELY LAY,

Petitioner,

v.

TERRY ROYAL, WARDEN,  
OKLAHOMA STATE PENITENTIARY,

Respondent.

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*Reply to the Brief in Opposition to the Petition for Writ of Certiorari to the  
Tenth Circuit Court of Appeals*

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## **REPLY TO BRIEF IN OPPOSITION**

### **Respondent's Claim that the Petition Presents No Federal Question is Belied by the Record**

Respondent admits that at all times Petitioner claimed his appellate counsel's conceded failure to investigate and raise Mr. Lay's mental health issues, particularly the procedural and substantive incompetency claims, provided the "cause" to overcome the OCCA's explicit statement the claims were procedurally defaulted by not being raised on direct appeal. *Opp. Brf.* at 8, n.5. But now, Respondent claims Mr. Lay's underlying "cause" challenge is not specific enough to place a federal question before this Court. This is inaccurate.

Ineffective-assistance-of-appellate-counsel as "cause" is at the core of Petitioner's question to this Court, as is the manner in which the OCCA pushed the claims aside as defaulted and then referred to the claims generally as lacking merit when deciding whether appellate counsel was at fault for not raising them. The tension between the OCCA's explicit default and later limited references to appellate counsel's failures is what prompts the need for this Court to determine just when such maneuvering can be considered an "adjudication on the merits" of the underlying claim. The question is whether there was an adjudication on the merits under federal law. That is the federal question and one that impacts whether the federal courts

should have assessed the competency claims without providing the OCCA deference.

**Respondent Misunderstands the Question Presented.**

Respondent agrees the AEDPA only applies when a claim is adjudicated on the merits in state court, *Opp. Brf.* at 9, yet fails to recognize the critical difference in a state court offering alternative rulings to the claim itself, after having also raised a procedural default. That is not what happened here. The OCCA clearly defaulted both the procedural and substantive competency claims. It did not adjudicate those claims on the merits. Respondent relies on the alternative ruling concept that applies to rulings on the claims themselves<sup>1</sup> and bypasses the question before this Court: “[w]hen 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 adjudication on the merits?”

While Petitioner certainly argues throughout his petition that the OCCA did not evaluate the extra-record evidence of Mr. Lay’s incompetency in its toss-off

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<sup>1</sup> In fact, Respondent’s use of *Cole v. Trammell*, 755 F.3d 1142 (10th Cir. 2014) does not serve the purpose Respondent hopes. The Circuit clearly concluded that Mr. Cole’s claim of ineffective assistance of trial counsel was procedurally barred from federal habeas review. Its own “abundance of caution” review of the claim says nothing about whether a state court’s limited reference to the claim in assessing a completely different claim in a different context somehow raises the first claim to a merits adjudication.

conclusion appellate counsel had not been ineffective in failing to investigate and present the obvious mental health issues involving his client, this is completely separate from whether the OCCA adjudicated the underlying competency-to-stand-trial claims on the merits. It did not. It clearly defaulted them. The Tenth Circuit incorrectly applied the AEDPA to those circumstances.

Respondent's failure to wrestle with this critical question presented justifies a grant of certiorari.

Respectfully submitted,



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Dated this 11<sup>th</sup> day of April, 2018