

No. 23-7085

In the

SUPREME COURT OF THE UNITED STATES

ISAIAH GLENDEL TRYON,

Petitioner,

-vs-

CHRISTE QUICK, 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

Gentner F. Drummond
Attorney General of Oklahoma

Caroline E.J. Hunt
Deputy Attorney General
*Counsel of Record**

Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 522-4410
caroline.hunt@oag.ok.gov

April 25, 2024

CAPITAL CASE QUESTIONS PRESENTED

As relevant here, the only claims addressed below were: (1) whether appellate and trial counsel were ineffective for not obtaining brain imaging to bolster Petitioner’s evidence of alleged brain injury (“Brain Scan IAC claim”) and (2) whether Petitioner was entitled to a Certificate of Appealability (“COA”) for his claim that appellate and trial counsel were ineffective for failing to challenge Oklahoma’s intellectual disability statute (“Intellectual Disability IAC claim”).

The Brain Scan IAC claim was raised in Petitioner’s first post-conviction application and denied by the Oklahoma Court of Criminal Appeals (“OCCA”) for lack of evidence; Petitioner failed to present brain scan results. In Petitioner’s second post-conviction application, he claimed his trial and appellate attorneys were ineffective for failing to investigate possible Fetal Alcohol Spectrum Disorder (“FASD IAC claim”). The OCCA denied the FASD IAC claim for procedural reasons. The OCCA also denied, as without merit, Petitioner’s state law claim that his first post-conviction attorney was ineffective for failing to raise the FASD IAC claim.

The Western District affirmed the OCCA’s merits and procedural rulings. On appeal, Petitioner did not challenge the procedural bar applied to his FASD IAC claim. The Tenth Circuit addressed only the Brain Scan IAC claim, finding the OCCA’s decision reasonable.

The Intellectual Disability IAC claim was denied on the merits by the OCCA in Petitioner’s first post-conviction application. The Tenth Circuit declined to review the Western District’s finding that the OCCA’s decision was reasonable.

Petitioner now argues, for the first time ever, that the procedural bar applied to his FASD IAC claim depended on federal law. He further argues that the OCCA failed to rely on “current clinical standards” in denying his Intellectual Disability IAC claim, ignoring that the question raised before the OCCA and Tenth Circuit was whether his attorneys were ineffective, not whether the statute was constitutional.

With the procedural posture of Petitioner’s claims in mind, this case presents the following questions:

1. Should this Court address arguments regarding the independence of a state rule of procedural default where neither the defaulted claim, nor any dependence arguments, were pressed or passed upon below?
2. Should this Court review a constitutional challenge to Oklahoma’s statute defining intellectual disability that was neither pressed nor passed upon below?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
STATEMENT OF FACTS.....	1
STATEMENT OF THE CASE.....	4
REASONS FOR DENYING THE WRIT.....	5
I. THE CLAIM THAT FORMS THE BASIS OF PETITIONER’S FIRST QUESTION PRESENTED WAS NOT PROPERLY PRESENTED, OR PASSED UPON, BELOW	8
A. Legal Background of Petitioner’s Claim	8
1. <i>Standard of review for habeas claims.....</i>	8
2. <i>Adequate and independent state law grounds</i>	9
3. <i>Ineffective assistance of counsel.....</i>	10
B. Procedural Background of Petitioner’s Claim.....	11
C. This Court is a Court of Review, Not of First View	13
D. The Tenth Circuit’s Decision does not Conflict with Decisions by Other Circuits.....	15
E. Petitioner’s Question Presented has been Answered by this Court.....	15
F. Petitioner’s Case Bears No Resemblance to <i>Glossip v. Oklahoma</i>, No. 22-7466	16
II. PETITIONER’S CHALLENGE TO OKLAHOMA’S INTELLECTUAL DISABILITY STATUTE WAS NOT PRESSED OR PASSED UPON BELOW	18
A. Procedural Background of Petitioner’s Claim.....	18
B. Petitioner’s Question Presented was not Pressed or Passed upon Below	20
C. Petitioner’s Claim Lacks Merit.....	21

CONCLUSION.....	34
-----------------	----

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991)	8, 23
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	7, 18, 22, 23
<i>Brumfield v. Cain</i> , 576 U.S. 305 (2015)	14, 22, 23
<i>Carlson v. Green</i> , 446 U.S. 14 (1980)	15
<i>Clayton v. Gibson</i> , 199 F.3d 1162 (10th Cir. 1999)	10
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	9
<i>Cuesta-Rodriguez v. Carpenter</i> , 916 F.3d 885 (10th Cir. 2019)	10
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011)	12
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	14, 21
<i>Duignan v. United States</i> , 274 U.S. 195 (1927)	14
<i>Fairchild v. Trammell</i> , 784 F.3d 702 (10th Cir. 2015)	10
<i>Glossip v. Oklahoma</i> , No. 22-7466, 144 S. Ct. 691 (Mem. Jan. 22, 2024)	10, 16, 17
<i>Granite Rock Co. v. Int'l Bhd. of Teamsters</i> , 561 U.S. 287 (2010)	14
<i>Hall v. Florida</i> , 572 U.S. 701 (2014)	22

<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	9, 10, 11
<i>Harris v. Reed</i> , 489 U.S. 255 (1989)	7, 9, 15, 16
<i>Hohn v. United States</i> , 524 U.S. 236 (1998)	14
<i>Johnson v. Williams</i> , 568 U.S. 289 (2013)	20
<i>McClung v. Silliman</i> , 19 U.S. 598 (1821)	24
<i>Medlock v. Ward</i> , 200 F.3d 1314 (10th Cir. 2000)	10
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	9, 18
<i>Moore v. Texas</i> , 581 U.S. 1 (2017)	23
<i>Nevada Comm'n on Ethics v. Carrigan</i> , 564 U.S. 117 (2011)	14, 21
<i>Pavatt v. Carpenter</i> , 928 F.3d 906 (2019)	10, 18
<i>Premo v. Moore</i> , 562 U.S. 115 (2011)	8, 23
<i>Simpson v. Carpenter</i> , 912 F.3d 542 (10th Cir. 2018)	10
<i>Smallwood v. Gibson</i> , 191 F.3d 1257 (10th Cir. 1999)	10
<i>Smith v. Robbins</i> , 528 U.S. 259 (2000)	11, 23
<i>Sperry v. McKune</i> , 445 F.3d 1268 (10th Cir. 2006)	23

<i>Stewart v. Smith</i> , 536 U.S. 856 (2002)	18
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	Passim
<i>The Monrosa v. Carbon Black Exp., Inc.</i> , 359 U.S. 180 (1959)	24
<i>Tryon v. Quick</i> , 81 F.4th 1110 (10th Cir. 2023)	1, 5
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	7, 14, 21
<i>Williams v. Trammell</i> , 782 F.3d 1184 (10th Cir. 2015)	10
<i>Yee v. City of Escondido, Cal.</i> , 503 U.S. 519 (1992)	14

STATE CASES

<i>Frederick v. State</i> , 37 P.3d 908 (Okla. Crim. App. 2001)	22
<i>Fuston v. State</i> , 470 P.3d 306 (Okla. Crim. App. 2020)	22, 23
<i>Gordon v. State</i> , 451 P.3d 573 (Okla. Crim. App. 2019)	22
<i>Mason v. State</i> , 433 P.3d 1264 (Okla. Crim. App. 2018)	22
<i>Murphy v. State</i> , 281 P.3d 1283 (Okla. Crim. App. 2012)	22, 23
<i>Nolen v. State</i> , 485 P.3d 829 (Okla. Crim. App. 2021)	7
<i>Tryon v. State</i> , No. PCD-2015-378, (Okla. Crim. App. Aug. 9, 2018)	5

<i>Tryon v. State</i> , 423 P.3d 617 (Okla. Crim. App. 2018)	4
<i>Tryon v. State</i> , No. PCD-2020-231, (Okla. Crim. App. Mar. 11, 2021).....	5
<i>Welch v. State</i> , 2 P.3d 356 (Okla. Crim. App. 2000)	22
<i>Welch v. State</i> , 968 P.2d 1231 (Okla. Crim. App. 1998)	22
<i>Wright v. State</i> , 30 P.3d 1148 (Okla. Crim. App. 2001)	22

FEDERAL STATUTES

28 U.S.C. § 2253.....	7
28 U.S.C. § 2254.....	9, 12, 21, 23

STATE STATUTES

OKLA. STAT. tit. 21, § 701.10b	7, 18, 19
OKLA. STAT. tit. 21, § 701.12	4
OKLA. STAT. tit. 22, § 1089	Passim

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 August 30, 2023. *See Tryon v. Quick*, 81 F.4th 1110 (10th Cir. 2023); Pet. App. 1a-74a.

STATEMENT OF FACTS

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

On March 16, 2012, around 10:30 a.m., Appellant fatally stabbed Tia Bloomer inside the Metro Transit bus station in downtown Oklahoma City. Tia recently broke off her relationship with Appellant due in part to his inability to support their infant child. Appellant was terminally unemployed and drew as income a meager \$628.00 a month in Social Security disability benefits. The couple too had a stormy relationship. The day before her death—March 15, 2012—Tia called Detective Jeffrey Padgett of the Oklahoma City Police Department (OCPD) Domestic Violence Unit to schedule a follow-up interview for an assault case in which she was the named victim. Tia previously denied to authorities that Appellant had assaulted her. Instead, she claimed another man had assaulted her.

During her phone conversation with Detective Padgett, Tia repeated this claim but agreed nonetheless to meet the next day. Later that night, Tia sent Appellant a text message stating the following:

It's okay bc im [sic] going to tell the truth tomorrow.
I'm tired of holding lies for yhu [sic]. Isaiah Tryon is
the guy who choked nd [sic] nearly killed me
Saturday.

(State's Ex. 38).

The next day, Appellant accosted Tia inside the downtown bus station while she was talking on her cell phone. Surveillance video from inside the terminal showed Appellant speaking to Tia before stabbing her repeatedly

with a knife. Immediately before this brutal attack, an eyewitness heard Tia yell for Appellant to leave her alone. Appellant then stabbed Tia in the neck with the knife, causing blood to gush out from her neck. The surveillance video shows Appellant grabbing the victim then stabbing her when she tried to leave the terminal building. Appellant stabbed the victim repeatedly after she fell to the floor. The victim said “help” as Appellant continued stabbing her repeatedly and blood gushed out of her wounds. During the attack, several bystanders unsuccessfully attempted to pull Appellant off the victim. At one point, a bystander can be seen on the surveillance video dragging Appellant across the floor while Appellant held on to Tia and continued stabbing her.

Appellant released his grip on the victim only after Kenneth Burke, a security guard, sprayed him in the face with pepper spray. The security guard then forced Appellant to the ground, handcuffed him and ordered the frantic crowd to move away both from Appellant and the bloody scene surrounding the victim’s body. A bloody serrated knife with a bent blade was found resting a short distance away on the floor.

While waiting for police to arrive, Burke checked on the victim but found no signs of life. Paramedics soon arrived and decided to transport the victim to the hospital because they detected a faint pulse. Despite the efforts of emergency responders, Tia died from her injuries. The medical examiner autopsied the victim and found seven (7) stab wounds to her head, neck, back, torso and right hand. Several superficial cuts were also observed on the victim’s face and the back of her neck. The medical examiner testified these cuts were consistent with having been made by a serrated blade. The cause of death was multiple stab wounds. In addition to these injuries, the medical examiner observed redness and heavy congestion in the victim’s eyes. The medical examiner did not associate this congestion with the victim’s stab wounds but testified it is sometimes found in cases of strangulation.

OCPD Lieutenant Brian Bennett was one of the first officers on the scene. He removed Appellant from the ground and escorted him out of the bus station. Because

Appellant had a great deal of blood on his hands and clothing, Lt. Bennett asked whether Appellant needed medical treatment. Appellant replied that he did not. Appellant said he was not injured and all of the blood on him “was hers.” Appellant was nonetheless transported to nearby St. Anthony’s Hospital where he was treated for cuts to his hand. When asked by a doctor about these injuries, Appellant calmly responded that he had stabbed his girlfriend.

After being released from the hospital, Appellant was transported to police headquarters. There, he was read the Miranda² warning by OCPD Detective Robert Benavides and agreed to talk. During his interview, Appellant admitted stabbing Tia repeatedly while inside the bus terminal. Appellant said he stabbed the victim six times with a kitchen knife he brought from home. Appellant explained that he and Tia recently broke up and that they had been fighting over his support of their infant son. When Appellant saw Tia at the bus station, he walked up and tried to talk with her about their problems. Tia refused and told Appellant to get away from her. That is when Appellant said he pulled out his knife and began stabbing her.

² See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1996).

Appellant claimed he did not know Tia would be at the bus station that morning or that he would even see her that day. Appellant did know, however, that Tia had some business to take care of that day. Appellant admitted bringing the knife with him because if he saw Tia, he planned to stab her. Appellant said Tia was facing him when he grabbed her and started stabbing her in the neck. Appellant described how he continued stabbing Tia after she fell to the ground and how he kept hold of her arm. Appellant said he was sad and depressed when he stabbed Tia because he didn’t want to be without her. Nor did he want anyone else to be with her. Appellant did not believe he could find someone else to be with. Appellant admitted that what he did to Tia “wasn’t right.” At one point during the interview, Appellant demanded protective custody

because “people ain’t gonna like that type of shit” and would try to kill him in the county jail.

During the interview, Appellant asked whether Tia was okay. Detective Benavides promised to let him know about Tia’s condition as soon as he found out. When informed by Detective Benavides at the end of the interview that Tia did not survive her injuries and was dead, Appellant showed no emotion to this news.

Pet. App. 156a-160a (paragraph numbers omitted).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-2012-1692. In 2015, Petitioner was tried by jury for one count of first degree murder. A bill of particulars was filed alleging four statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed while Petitioner was serving a sentence of imprisonment on conviction of a felony; (3) Petitioner was previously convicted of a felony involving the use or threat of violence; and (4) 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. The jury found Petitioner guilty as charged, found the existence of all four aggravating circumstances, and recommended a death sentence. Petitioner was sentenced accordingly.

The OCCA affirmed Petitioner’s conviction and sentence in a published opinion filed on May 31, 2018. *Tryon v. State*, 423 P.3d 617 (Okla. Crim. App. 2018); Pet. App. 156a-249a. The OCCA denied Petitioner’s request for rehearing on June 29, 2018.

This Court denied Petitioner’s petition for writ of certiorari on February 19, 2019. *Tryon v. Oklahoma*, 139 S. Ct. 1176 (2019).

Petitioner filed an application for state post-conviction relief on April 27, 2017, which was denied by the OCCA in an unpublished opinion on August 9, 2018. *Tryon v. State*, No. PCD-2015-378 (Okla. Crim. App. Aug. 9, 2018); Pet. App. 250a-272a.

Thereafter, Petitioner filed his petition for a writ of habeas corpus with the United States District Court for the Western District of Oklahoma on February 14, 2020. Petitioner subsequently filed a second application for post-conviction relief on March 13, 2020, which the OCCA denied in an unpublished opinion on March 11, 2021. *Tryon v. State*, No. PCD-2020-231 (Okla. Crim. App. Mar. 11, 2021); Pet. App. 273a-301a. On November 14, 2016, the federal district court denied Petitioner’s petition for habeas corpus relief. *Tryon v. Farris*, No. CIV-19-195-J (W.D. Okla. July 19, 2021); Pet. App. 76a-157a.

Petitioner appealed the Western District’s denial of habeas relief to the Tenth Circuit. After briefing and oral argument, the Tenth Circuit affirmed the district court’s judgment on August 30, 2023. *Tryon v. Quick*, 81 F.4th 1110 (10th Cir. 2023); Pet. App. 1a-74a.

On March 25, 2024, Petitioner’s petition for a writ of certiorari was placed on this Court’s docket.

REASONS FOR DENYING THE WRIT

Although not exhaustive, Rule 10 of this Court’s rules provides that “[a] petition for a writ of certiorari will be granted only for compelling reasons” and

includes examples of grounds for granting a petition for writ of certiorari. These include a conflict among the United States courts of appeals, a conflict between a United States court of appeals and a state court of last resort, a conflict between state courts of last resort, an opinion by a state court or United States court of appeals that decides an important federal question in a way that conflicts with relevant decisions of this Court, and an opinion by a state court or United States court of appeals that decides an important federal question that should be settled by this Court. SUP. CT. R. 10. Petitioner cannot make any of these showings.

In his first question presented, Petitioner argues the OCCA's application of a state rule of procedural default to his case was not independent of federal law. But Petitioner did not challenge the bar below.¹ In fact, the FASD IAC claim that was procedurally barred in the OCCA was not even properly before the Tenth Circuit, nor

¹ The Petition says: "Mr. Tryon argued that the neuroimaging forming the prejudice showing [for the Brain Scan IAC claim] was properly before the [Tenth Circuit]. The argument relied on the intertwining of the procedural bar's application with federal law: the OCCA had applied [OKLA. STAT. tit. 22,] § 1089(D) to bar the IAC claim [the FASD IAC claim] because the one exception at play—for post-conviction counsel's ineffective omission—did not apply, given the finding that the underlying claim lacked *Strickland* merit." Pet. at 11. If Petitioner is suggesting he argued to the Tenth Circuit that the bar applied to his FASD IAC claim was dependent on federal law, he is very mistaken. The Tenth Circuit correctly noted that Petitioner "d[id] not acknowledge" the OCCA's application of a procedural bar to his FASD IAC claim. Pet. App. 65a. Instead, Petitioner attempted to rely on the OCCA's adjudication of his ineffective assistance of post-conviction counsel claim (raised in his second post-conviction application) to establish that the OCCA's denial of his Brain Scan IAC claim (raised in his first post-conviction application) was contrary to, or an unreasonable application of, *Strickland*. Pet. App. 65a-66a.

Further, as Respondent will show *infra*, ineffective assistance of post-conviction counsel is an independent state statutory ground for relief, not an "exception" to the rule that—with very limited exceptions for newly available legal claims or new evidence that establishes clearly and convincingly that no reasonable fact-finder would have convicted the applicant or sentenced him to death—all claims raised in a second or successive post-conviction applications are waived. See OKLA. STAT. tit. 22, § 1089(D)(8).

did the Tenth Circuit address the independence of the bar. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (referencing refusal to consider claims not pressed or passed upon below as this Court’s “traditional rule”). Further, Petitioner fails to establish that the Tenth Circuit’s decision in his case conflicts with this Court’s precedent or that of other courts of last resort. Finally, this Court has already held that a plainly stated state procedural bar must be enforced even if the state court also decided the merits of the defaulted claim. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). Petitioner’s question presented is not compelling.

Petitioner’s second question presented similarly relies upon a claim that was not before, nor passed upon by, the Tenth Circuit. *See Williams*, 504 U.S. at 41. The Tenth Circuit declined to grant a COA—as required for appellate review in habeas cases challenging state convictions (28 U.S.C. § 2253(c))—on Petitioner’s claim that his trial and appellate attorneys were ineffective for failing to challenge the constitutionality of Oklahoma’s intellectual disability statute.² In this Court, Petitioner’s second question presented asks whether “reasonable jurists [could] debate whether a state court may apply the state’s *Atkins*^[3] statute in a way precluding consideration of current clinical standards[.]” Pet. at i.

² Petitioner criticizes the OCCA’s use of the term “mental retardation” in his case, Pet. at 7 n.3, but fails to acknowledge that the statute at issue used that term when his direct appeal was decided. *See OKLA. STAT. tit. 21, § 701.10b*. The statute has been amended and the OCCA now uses the term “intellectual disability.” *See Nolen v. State*, 485 P.3d 829, 836 (Okla. Crim. App. 2021); *OKLA. STAT. tit. 21, § 701.10b* (Supp. 2019).

³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

This freestanding challenge to Oklahoma’s intellectual disability statute was not pressed or passed upon below. Moreover, this claim lacks merit. *See Premo v. Moore*, 562 U.S. 115, 128 (2011) (“A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be “contrary to” [*Arizona v. Fulminante*, 499 U.S. 279 (1991)], for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness.”).

This Court should deny certiorari review.

I.

THE CLAIM THAT FORMS THE BASIS OF PETITIONER’S FIRST QUESTION PRESENTED WAS NOT PROPERLY PRESENTED, OR PASSED UPON, BELOW.

Petitioner asks this Court to consider the independence of the OCCA’s application of a state rule of procedural default to his claim that his trial and appellate attorneys were ineffective for failing to discover he allegedly suffers from Fetal Alcohol Spectrum Disorder (“FASD IAC claim”). But Petitioner’s FASD IAC claim was not properly presented to the Tenth Circuit; he did not have a COA for his FASD IAC claim and did not ask the Tenth Circuit panel to grant one. The petition should be denied.

A. Legal Background of Petitioner’s Claim.

1. Standard of review for habeas claims

A federal court may not disturb a state conviction unless the state court’s merits adjudication of a claim was contrary to, or an unreasonable application of,

clearly established federal law, or the adjudication was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). This statute “stops short of imposing a complete bar” on habeas relief but is meant to be difficult to meet, permitting relief only for “extreme malfunctions in the state criminal justice systems[.]” *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation marks omitted).

2. *Adequate and independent state law grounds*

A federal court may not grant a writ of habeas corpus to a state prisoner if the state courts denied the petitioner’s claims on adequate and independent state law grounds, to include a petitioner’s “fail[ure] to meet a state procedural requirement.” *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). This rule of procedural default requires the state court to “make clear by a plain statement in its judgment or opinion that [any] federal cases [cited therein] are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.” *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Finally, “a state court need not fear reaching the merits of a federal claim in an *alternative* holding.” *Harris*, 489 U.S. at 264 n.10.

In Oklahoma, the OCCA cannot consider claims that are raised for the first time in a second or subsequent post-conviction application unless the claims therein rely on a newly available legal basis or the claims therein rely on a newly available factual basis, that could not have been discovered earlier with reasonable diligence, and there is clear and convincing evidence that no reasonable fact finder would have convicted the applicant or sentenced him to death. OKLA. STAT. tit. 22, § 1089(D)(8). The adequacy and independence of § 1089(D)(8), as it is generally applied by the

OCCA,⁴ is a matter well-settled in the Tenth Circuit. *See, e.g., Pavatt v. Carpenter*, 928 F.3d 906, 929-30 (2019) (en banc); *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 900-03 (10th Cir. 2019); *Simpson v. Carpenter*, 912 F.3d 542, 570-71 (10th Cir. 2018); *Fairchild v. Trammell*, 784 F.3d 702, 719 (10th Cir. 2015); *Williams v. Trammell*, 782 F.3d 1184, 1212-14 (10th Cir. 2015). It is also a matter that is long-settled. *See, e.g., Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir. 2000); *Clayton v. Gibson*, 199 F.3d 1162, 1174 (10th Cir. 1999); *Smallwood v. Gibson*, 191 F.3d 1257, 1268-69 (10th Cir. 1999).

3. *Ineffective assistance of counsel*

In order to establish that he was denied the effective assistance of trial counsel, Petitioner must prove that counsel's performance was deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). According to *Strickland*, Petitioner must show that counsel's performance was unreasonable and that he suffered prejudice, that is, that there is a reasonable probability that, had the errors complained of not been made, the result of the trial would have been different. *Id.* at 695. To prove deficient performance, Petitioner must overcome a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance and that the alleged error might be sound trial strategy. *Id.* at 689. To establish prejudice, Petitioner must demonstrate a "substantial, not just conceivable" likelihood of a different outcome. *Richter*, 562 U.S. at 111-12. This same

⁴ The exception to this general statement, as seen in the *Glossip* litigation currently pending before this Court, where the OCCA did not apply § 1089(D)(8) independently of federal law under very unique circumstances specific to that case, is discussed *infra*.

standard applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

B. Procedural Background of Petitioner’s Claim.

Petitioner claimed in his first post-conviction application that appellate counsel was ineffective for failing to argue that trial counsel were ineffective during capital sentencing proceedings for failing to obtain neuroimaging to support expert testimony that Petitioner suffers from brain damage (“Brain Scan IAC claim”). ROA II at 335-37. However, Petitioner did not include the results of any imaging with his first post-conviction application, alleging a continued lack of funding. ROA II at 337 n.2. Petitioner merely asserted, without support, that “[h]ad counsel obtained a brain scan for Mr. Tryon, they could have further corroborated Mr. Tryon’s self-reported head injuries, which would have greatly strengthened his mitigation.” ROA II at 336. The OCCA denied the claim for lack of evidence. ROA II at 136. *Cf. Richter*, 562 U.S. at 111-12 (the likelihood of a different result must be “substantial, not just conceivable”).

In his second post-conviction application, Petitioner claimed “Trial and Appellate Counsel Failed to Investigate and Present the Clear and Indisputable Evidence Tryon Suffers from Fetal Alcohol Spectrum Disorder (FASD)” ROA III at 308 (bold removed). That is, Petitioner claimed his trial and appellate attorneys were ineffective for failing to investigate and discover that his brain was damaged by prenatal exposure to alcohol. ROA III at 309-11. This investigation included consultation with “a team of professionals, including a physician, a

neuropsychologist, and a psychologist who focuses on the functional and adaptive issues throughout the client’s life.” ROA III at 311. It also included a form of neuroimaging which measures electrical activity in the brain and is known as a QEEG, or Quantitative Electroencephalogram. ROA III at 321-24. According to the application, “the QEEG results confirm abnormalities in Tryon’s brain that illustrate a pattern expected with FASD.” ROA III at 324.

The OCCA found Petitioner’s ineffective assistance of trial and appellate counsel claims procedurally barred because they could have been raised in prior proceedings. ROA III at 253, 255-62. *See* OKLA. STAT. tit. 22, § 1089(D)(8). The OCCA discussed the merits of these claims only in denying Petitioner’s state statutory claim that his first post-conviction attorney was ineffective. ROA III at 262-272.

In his habeas petition, Petitioner’s first and second grounds for relief alleged ineffective assistance of trial and appellate counsel. In subsection G of Ground One, Petitioner presented the Brain Scan IAC claim from the first post-conviction application but argued the QEEG results from his second post-conviction application demonstrated “[w]hat neuroimaging could have shown.” ROA II at 60-64 (bold removed). *But see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (“review under § 2254(d)(1) is limited to the record that was before the state court”). Petitioner’s second ground for relief presented the FASD IAC claim that was contained within his second post-conviction application. ROA II at 64-83.

The district court denied subclaim G of Ground One without mentioning the QEEG results (likely because it was prohibited from doing so by *Pinholster*, 563 U.S.

at 181). ROA III at 474-75. The district court separately denied Petitioner’s Ground Two as procedurally barred. ROA III at 475-76. The district court granted a COA, as relevant here, *only* on the following: “Whether trial counsel provided ineffective assistance of counsel by failing to obtain neuroimaging (a brain scan) of Tryon’s brain, and whether appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal (Petition, Ground I(G)) [.]”

In his Tenth Circuit brief, Petitioner combined his Brain Scan IAC and FASD IAC claims into one. Pet. App. 63a-64a & n.17. The Tenth Circuit refused to consider the combined claim, on which Petitioner did not have a COA. Pet. App. 63a-64a. The court further found “no room for debating the district court’s recognition that the OCCA concluded that Mr. Tryon’s ineffective assistance of appellate counsel claim based on FASD was procedurally barred” Pet. App. 63a. In fact, Petitioner did not challenge the application of the procedural bar to his FASD IAC claim. Pet. App. 65a. (“Mr. Tryon does not acknowledge this ruling no less advance a cause and prejudice argument”). Therefore, the Tenth Circuit addressed only the OCCA’s adjudication of the brain scan claim, finding that decision reasonable. Pet. App. 64a-67a.

C. This Court is a Court of Review, Not of First View.

In his certiorari petition, Petitioner continues to ignore the procedural realities of his case. He appears to rely entirely upon the procedurally defaulted FASD IAC claim. *See* Pet. at 12 (arguing the Tenth Circuit “declined to consider the effect of the OCCA’s explicit evaluation of the merits of the underlying *Strickland* claim omitted

by *post-conviction counsel*") (emphasis added). While this Court has jurisdiction to review the denial of a motion for COA⁵, Petitioner did not request a COA below (or even acknowledge he lacked one). Nor does Petitioner's certiorari petition acknowledge the Tenth Circuit's holding that he lacks a COA, much less ask this Court to review that determination. Thus, the independence of the OCCA's determination that Petitioner's claims of ineffective assistance of trial and appellate counsel were waived is not properly before this Court.

This Court is "a court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). For that reason, this Court does not decide questions that were not presented or decided below, except in exceptional circumstances. *See Brumfield v. Cain*, 576 U.S. 305, 322-23 (2015) (refusing to consider an issue that was not presented below or in the brief in opposition); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (refusing to consider arguments that were not decided below); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 305-06 (2010) (refusing to consider an issue that was not presented below or in the brief in opposition); *Cutter*, 544 U.S. at 718 n.7 (describing this Court as "a court of review, not of first view"); *Williams*, 504 U.S. at 41 (referencing refusal to consider claims not pressed or passed upon below as this Court's "traditional rule"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (this Court reviews questions not presented or passed upon below only in exceptional cases); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (stating that, when directly reviewing state court judgments, this

⁵ *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

Court “has, with very rare exceptions, refused to consider petitioners’ claims that were not raised or addressed below”); *but see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering an issue not presented below because respondent did not object, it was an important, recurring issue, and was the subject of another pending petition for certiorari).

This Court should deny the petition for writ of certiorari because neither the federal constitutional claim underlying Petitioner’s first question presented nor the independence of § 1089(D)(8) was pressed or passed upon below.

D. The Tenth Circuit’s Decision does not Conflict with Decisions by Other Circuits.

Petitioner discusses cases from other circuits addressing the independence of various state law grounds. Pet. at 15-20. However, as shown *supra*, the Tenth Circuit did not address the independence of the state law ground in this case because Petitioner did not place it at issue (or even have a COA on the procedurally defaulted claim). Accordingly, Petitioner has failed to show that the Tenth Circuit “entered a decision in conflict with the decisions of another United States court of appeals[.]” See SUP. CT. R. 10.

E. Petitioner’s Question Presented has been Answered by this Court.

Petitioner asks this Court to ignore the OCCA’s application of a procedural bar to his FASD IAC claim because the OCCA decided the merits of his statutory ineffective assistance of post-conviction counsel claim. This Court has already held that “a state court need not fear” forfeiting enforcement of its procedural rule by “reaching the merits of a federal claim in an *alternative* holding.” *Harris*, 489 U.S. at

264 n.10 (emphasis in original). Petitioner appears to attempt to distinguish *Harris*, without expressly acknowledging it, by asserting that the OCCA’s “opinion was devoid of any explicit or implicit framing as an alternative merits decision.” Pet. at 15.

Petitioner misunderstands the rule of *Harris*. The state court need not use the word “alternative” to ensure a federal court will honor its adequate and independent state ground. Rather,

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. See *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935). 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, 489 U.S. at 264 n.10. Petitioner does not deny the OCCA explicitly invoked § 1089(D)(8) to deny his FASD IAC claims. Thus, habeas relief is foreclosed, regardless of whether the OCCA also reviewed the ineffective assistance of trial counsel claim on the merits. Petitioner has failed to present a compelling question that warrants this Court’s review.

F. Petitioner’s Case Bears No Resemblance to *Glossip v. Oklahoma*, No. 22-7466.

Petitioner asks this Court to hold his petition pending this Court’s decision in *Glossip v. Oklahoma*, No. 22-7466, *cert. granted* 144 S. Ct. 691 (Mem. Jan. 22, 2024).

This Court granted a writ of certiorari in *Glossip* on the questions presented by the parties as well as: “Whether the Oklahoma Court of Criminal Appeals’ holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.” 144 S. Ct. 691.

Petitioner is correct that “the question of whether a state court’s procedural bar was applied independently of federal law turns on the specifics of each decision[.]” Pet. at 20. The State filed its merits brief in *Glossip* on April 23, 2024, agreeing that the OCCA *did not apply* § 1089(D)(8) in an independent manner *under the unique facts of that case*. As a general matter, § 1089(D)(8) is an adequate and independent state ground that does not require the OCCA to determine the merits of the constitutional claim. *See supra*, pp. 10-11. That was certainly the case here. *See* Pet. App. 278a-279a (finding claims “procedurally barred from review because they either were or could have been raised in Petitioner’s original application for post-conviction relief” and the factual basis for the claims “was discoverable through the exercise of reasonable diligence prior to filing [Petitioner’s] original application”).⁶ The OCCA

⁶ Contrary to Petitioner’s contention, a statutory claim of ineffective assistance of post-conviction counsel is an independent ground for relief; the State need not prove post-conviction counsel was effective before § 1089(D)(8) can be applied, nor can a post-conviction applicant establish an exception to the bar by proving post-conviction counsel was ineffective. *See* OKLA. STAT. tit. 22, § 1089(D)(8) (prohibiting the OCCA from considering claims raised in successive post-conviction applications with limited exceptions *not* including alleged ineffective assistance of post-conviction counsel); *cf.* OKLA. STAT. tit. 22, § 1089(D)(4)(b)(2) (specifically permitting claims of ineffective assistance of appellate counsel to be raised in a first post-conviction application). Not once in its opinion denying Petitioner’s second post-conviction application did the OCCA suggest the FASD IAC claim would not be treated as waived if post-conviction counsel was ineffective. *See* Pet. App. 278a-293a. The OCCA did consider whether Petitioner’s allegation that post-conviction counsel was not adequately funded might establish an “exceptional circumstance[.]” that would permit it to review the defaulted claims. Pet. App. 283a. However, this exceptional circumstance exception involves

“clearly and expressly” stated that its decision was based on state law. *See Long*, 463 U.S. at 1041. Accordingly, § 1089(D)(8) was applied in an independent manner.

In any event, Petitioner’s independence argument was not pressed or passed upon below. Accordingly, this Court should deny Petitioner’s request for a writ of certiorari.

II.

PETITIONER’S CHALLENGE TO OKLAHOMA’S INTELLECTUAL DISABILITY STATUTE WAS NOT PRESSED OR PASSED UPON BELOW.

Petitioner claims the OCCA’s denial of his claim that trial and appellate counsel were ineffective for failing to challenge the constitutionality of Oklahoma’s intellectual disability statute is contrary to *Atkins v. Virginia*, 536 U.S. 304 (2002) and its progeny. This Court should deny the petition because Petitioner did not properly press this question below, and the Tenth Circuit did not pass on it. In addition, the Tenth Circuit correctly adjudicated the ineffective assistance of counsel claim before it. The petition should be denied.

A. Procedural Background of Petitioner’s Claim.

Before trial, Petitioner filed a notice of intent to pursue an intellectual disability defense in which he also indicated he would challenge the constitutionality of OKLA. STAT. tit. 21, § 701.10b(C) (O.R. V 916-18). This statute provides that, “in no event shall a defendant who has received an intelligence quotient of seventy-six (76)

categorizing the claim, not examining its merits, and is therefore independent of federal law. *See Stewart v. Smith*, 536 U.S. 856, 859-61 (2002) (per curiam) (finding state law ground independent because it involved categorizing the right alleged to have been violated as opposed to determining the merits of the claim); *Pavatt*, 928 F.3d at 929-30.

or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered intellectually disabled[.]” OKLA. STAT. tit. 21, § 701.10b(C). When Petitioner was fourteen years old, he scored an 81 on an IQ test (12/18/2014 Tr. 9). For that reason, the trial court denied Petitioner’s request for a hearing on his intellectual ability (12/18/2014 Tr. 19).

During trial, Petitioner objected to allowing the jury to consider the death penalty on the basis of his alleged intellectual disability, arguing that § 701.10b(C) is unconstitutional (Tr. V 1191). The trial court overruled Petitioner’s objection (Tr. V 1192). In mitigation, Petitioner presented the testimony of neuropsychologist Dr. John Fabian. Dr. Fabian administered an IQ test on which Petitioner scored a 68 (Tr. VII 1668-69). However, Dr. Fabian did not believe this score of 68 was a true reflection of Petitioner’s intellectual ability (Tr. VII 1671-72, 1678, 1683-84, 1722, 1724). Dr. Fabian testified that Petitioner is not intellectually disabled (although he did offer mitigating evidence regarding, *inter alia*, Petitioner’s low IQ) (Tr. VII 1654, 1664-74, 1679, 1683-84, 1724, 1726).

In his first post-conviction application, Petitioner alleged that his appellate attorney was ineffective for failing to argue that his trial attorneys were ineffective for failing to challenge the constitutionality of § 701.10b(C). Pet. App. 39a. Petitioner supported this claim with a new report from Dr. Fabian which found “significant evidence of intellectual disability.” Pet. App. 40a, 265a. The OCCA first noted the discrepancies between Dr. Fabian’s new report and his trial testimony, then held that

Petitioner’s score of 81 foreclosed his claim, and that § 701.10b(C) does not contemplate application of the “Flynn Effect.” Pet. App. 265a-267a. The OCCA thus concluded that, particularly in light of Dr. Fabian’s trial testimony, Petitioner had failed to show deficient performance or prejudice. Pet. App. 267a-268a.

Although the OCCA did not reference Petitioner’s argument that counsel failed to challenge § 701.10b(C), its opinion is presumed to have denied this claim on the merits. *See Johnson v. Williams*, 568 U.S. 289, 298-301 (2013). Petitioner makes no effort to rebut that presumption. The Western District found the OCCA’s decision reasonable. Pet. App. 96a-99a.

The Tenth Circuit rejected Petitioner’s request for a COA on this claim for three reasons. *First*, “Mr. Tryon’s claim rests on a faulty premise” in that trial counsel *did* challenge the constitutionality of the statute. Pet. App. 57a. *Second*, appellate counsel “had little incentive” to challenge the statute in light of Dr. Fabian’s testimony that he believed Petitioner’s IQ to be approximately 80, “well above the cutoff for an intellectual disability[.]”⁷ Pet. App. 58a. *Third*, the OCCA “was certain to reject” any challenge to the statute pursuant to its own precedent. Pet. App. 59a-60a.

B. Petitioner’s Question Presented was not Pressed or Passed upon Below.

Petitioner asks this Court to determine whether the OCCA is applying § 701.10b(C) in a constitutional manner. The problem with this request is that

⁷ The Tenth Circuit also noted that appellate counsel did not have the benefit of Dr. Fabian’s “about-turn report” and, therefore, refused to consider that report. Pet. App. 58a n.14.

Petitioner’s constitutional challenge to the statute was not presented directly in any court.⁸ Rather, Petitioner alleged that appellate counsel was ineffective for failing to claim that trial counsel were ineffective for failing to challenge the statute. As discussed *supra*, *Strickland* provides the clearly established federal law by which federal courts assess ineffective assistance of counsel claims. Yet, Petitioner provides no analysis of the reasonableness of appellate counsel’s performance or of the possibility he would have prevailed on appeal. Instead, Petitioner seeks to prove, as a de novo matter, that § 701.10b(C) is unconstitutional. Because the question before the Tenth Circuit was whether the OCCA reasonably denied Petitioner’s *Strickland* claim, this Court should deny the petition. *See Carrigan*, 564 U.S. at 128 (refusing to consider arguments that were not decided below); *Cutter*, 544 U.S. at 718 n.7 (describing this Court as “a court of review, not of first view”); *Williams*, 504 U.S. at 41 (referencing refusal to consider claims not pressed or passed upon below as this Court’s “traditional rule”).

C. Petitioner’s Claim Lacks Merit

This Court should also not grant review because the Tenth Circuit’s decision is correct. Trial counsel *did* challenge the constitutionality of the statute (Tr. V 1191). Petitioner notes that counsel did not challenge the constitutionality of the statute when requesting an evidentiary hearing, Pet. at 21 n.5, but fails to explain the significance of that fact. Although objections to pre-trial rulings must be preserved

⁸ The State does not waive exhaustion, therefore, Petitioner may not receive habeas relief for a direct challenge to the statute. *See* 28 U.S.C. § 2254(b) (habeas relief is unavailable for claims not exhausted in state court unless the State expressly waives the exhaustion requirement).

by a renewed objection during trial, *Mason v. State*, 433 P.3d 1264, 1270 (Okla. Crim. App. 2018), with very limited exceptions⁹, the State is aware of no OCCA case holding that the failure to raise an objection *before* trial constitutes waiver. *Cf. Welch v. State*, 968 P.2d 1231, 1249 (Okla. Crim. App. 1998) (failing to object before trial *or* when the challenged evidence is admitted constitutes waiver). The OCCA would have denied an ineffective assistance of trial counsel claim had appellate counsel raised one. *See Frederick v. State*, 37 P.3d 908, 955 (Okla. Crim. App. 2001) (denying ineffective assistance of trial counsel claim because “[t]rial [c]ounsel was not guilty of the dereliction he was accused of”).

Further, even if trial counsel had not objected, the Tenth Circuit was correct that the OCCA would not have found trial counsel ineffective in light of the OCCA’s finding that the statute is constitutional. In 2012, the OCCA affirmed the constitutionality of § 701.10b(C). *Murphy v. State*, 281 P.3d 1283, 1292-93 (Okla. Crim. App. 2012). In a 2020 decision issued after Petitioner’s direct appeal, the appellant (“Fuston”) filed a pre-trial motion for an *Atkins* hearing. *Fuston v. State*, 470 P.3d 306, 315 (Okla. Crim. App. 2020). Like Petitioner, Fuston scored 81 on an IQ test before he turned 18. *Id.* On appeal, Fuston challenged the trial court’s failure to apply the Flynn Effect and the constitutionality of § 701.10b(C). *Id.* at 316. Fuston relied, as does Petitioner, on *Hall v. Florida*, 572 U.S. 701 (2014), *Brumfield v. Cain*,

⁹ *See Gordon v. State*, 451 P.3d 573, 580 (Okla. Crim. App. 2019) (failure to object to the conduct of preliminary hearing); *Wright v. State*, 30 P.3d 1148, 1151 (Okla. Crim. App. 2001) (failure to request certification as a juvenile before preliminary hearing); *Welch v. State*, 2 P.3d 356, 372 (Okla. Crim. App. 2000) (failure to follow pre-trial procedures seeking recusal of the trial judge).

576 U.S. 305 (2015), and *Moore v. Texas*, 581 U.S. 1 (2017). *Id.* The OCCA denied Petitioner’s claims regarding the Flynn Effect and this Court’s post-*Atkins* decisions. *Id.* at 316-18. In light of *Murphy* and *Fuston*, Petitioner cannot show that trial or appellate counsel were ineffective, even as a de novo matter. *See Robbins*, 528 U.S. at 285-86 (appellate counsel is only ineffective if she fails to raise “arguable issues” that, by a reasonable probability, would have prevailed); *Sperry v. McKune*, 445 F.3d 1268, 1275 (10th Cir. 2006) (counsel was not ineffective for failing to make a meritless objection).

However, Petitioner’s claim was not reviewed de novo by the Tenth Circuit. Rather, Petitioner was required to establish that the OCCA’s decision was contrary to or an unreasonable application of *Strickland*, or was based on an unreasonable factual determination. Pet. App. 47a-48a (citing 28 U.S.C. § 2254(d)). Yet, in his certiorari petition, Petitioner focuses almost exclusively on *Atkins* and its progeny, ignoring that the question is not whether the statute is constitutional, but rather, whether prior counsel were ineffective for (allegedly) not challenging the statute.

The OCCA’s decision cannot be measured by *Atkins*. *See Premo*, 562 U.S. at 128 (“A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be “contrary to” [*Arizona v.*] *Fulminante*, [499 U.S. 279 (1991)]], for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness.”). Petitioner’s claim lacks merit; his petition for writ of certiorari should be denied. *See Premo*, 562 U.S. at 124 (state court reasonably denied claim that

counsel failed to file a motion to suppress where the motion would have been futile); *cf. McClung v. Silliman*, 19 U.S. 598, 603 (1821) (“The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed.”) (emphasis in original); *see also The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (this Court only decides “questions of public importance” in the “context of meaningful litigation,” and when the challenged issue may not affect the ultimate judgment of the court below, that issue “can await a day when the issue is posed less abstractly”).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Gentner F. Drummond
Attorney General of Oklahoma

Caroline E.J. Hunt
Deputy Attorney General
*Counsel of Record**
Oklahoma Office of the Attorney General
313 NE Twenty-First St.
Oklahoma City, OK 73105
caroline.hunt@oag.ok.gov

Counsel for Respondent

April 25, 2024