

Capital Case

No. 23-7085

IN THE SUPREME COURT OF THE UNITED STATES

ISAIAH GLENDEL TRYON,
Petitioner,

v.

CHRISTE QUICK, Warden,
Oklahoma State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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

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**REPLY TO BRIEF IN OPPOSITION
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INTRODUCTION

Mr. Tryon's case does not pose the certiorari vehicle problems Respondent suggests. Despite Mr. Tryon putting the issue squarely before both the federal courts below, the Tenth Circuit did not opine on the dependence of the OCCA's procedural bar on federal law. Its decision here is at odds with its own precedent and with that of other circuits. The Tenth Circuit also failed to consider whether the OCCA's deference to its own outdated precedent upholding Oklahoma's *Atkins* statute in order to find appellate counsel effective had impermissibly ignored the current science. For these reasons, certiorari should be granted.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE TENTH CIRCUIT COURTS DO NOT PROCEDURALLY DEFAULT CLAIMS WITH FEDERAL LAW-DEPENDENT STATE COURT ADJUDICATIONS.

A. Mr. Tryon Has Presented This Claim Below.

Mr. Tryon and Respondent are in agreement that the issue before the Tenth Circuit, per the certificate of appealability granted by that court, was "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))[" Resp. at 13. Though Respondent focuses on refuting Mr. Tryon's supposed attempt to obtain this Court's review on an IAC subclaim regarding his diagnosis of Fetal

Alcohol Spectrum Disorder (FASD) on which he did not have a COA, in fact, the term FASD does not appear once in the “Reasons for Granting the Petition” section of his certiorari petition. *See* Pet. at 12-31.

Mr. Tryon’s COA was granted on his neuroimaging IAC subclaim, and he argued to the Tenth Circuit that such COA encompassed his neuroimaging results, as presented to the OCCA in his successive application for post-conviction relief. While the OCCA’s intertwining of the FASD and neuroimaging evidence renders the line between them difficult to parse, the OCCA nonetheless entitled this subsection of its successive opinion, “Failure to Obtain Funding for Brain Neuroimaging,” App. 286a, and went on to hold:

Based on the total circumstances presented here, post-conviction counsel’s performance was not rendered ineffective for failing to obtain funding for the brain scan. The real issue is whether the omitted evidence would have impacted the jury’s sentencing decision. This is not a case where counsel presented a substantially weaker case in mitigation than could have been presented through the omitted evidence.

App. 289a. The OCCA’s comparison of the mitigation evidence presented at trial, which arguably demonstrated prenatal drug exposure, to the omitted neuroimaging evidence, which supported a finding of prenatal *alcohol* exposure, *see* App. 289a-293a, does not transform the neuroimaging IAC subclaim Mr. Tryon urges to one about FASD.

Respondent erroneously asserts that the “federal constitutional claim underlying Petitioner’s first question presented” was not “pressed or passed upon below.” Resp. at 15. The federal constitutional claim underlying Mr. Tryon’s first

question presented is the ineffectiveness of trial counsel, regardless of whether Mr. Tryon's position that such claim should include the neuroimaging results presented in his successive petition, or Respondent's position that the claim turns only on Mr. Tryon's initial post-conviction application, is accepted.

Respondent is relatedly incorrect that Mr. Tryon did not press below the independence of § 1089(D)(8) in the face of an antecedent decision on the underlying federal claim. *See* Resp. at 15. As Mr. Tryon recited:

Mr. Tryon argued that the neuroimaging forming the prejudice showing was properly before the appellate court. The argument relied on the intertwining of the procedural bar's application with federal law: the OCCA had applied § 1089(D) to bar the 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. Reply Br. of Pet'r/Appellant at 9-13, *Tryon v. Quick* (10th Cir. Mar. 15, 2023) (No. 21-6097).

Pet. at 11.¹ *See also* ROA III at 439 (arguing in supplemental brief reply before federal district court, "OCCA's discussion of the merits of Mr. Tryon's new claims, which provided unexhausted evidence explaining why his underlying IATC claim was defaulted, necessarily involved a merits analysis of Mr. Tryon's federal constitutional claims."). The Tenth Circuit addressed this argument, albeit erroneously, finding that it "conflat[ed] the OCCA's analysis of his statutory-based ineffective assistance of post-conviction counsel claim with a merits determination" of the underlying constitutional claim. App. 65a.

¹ All citations are to internal pagination.

The “substance” of Mr. Tryon’s argument was more than fairly presented to the federal district and appellate courts, *Picard v. Connor*, 404 U.S. 270, 278 (1971), and Mr. Tryon is not asking this Court to take a “first view” on anything.

B. The OCCA’s Antecedent Decision on the Federal Merits of Mr. Tryon’s IAC Claim Is Distinct From an Alternative Merits Adjudication.

Respondent attacks a straw man in claiming that the OCCA’s ruling was not an alternative merits adjudication, because a “state court need not use the word ‘alternative’ to ensure a federal court will honor its adequate and independent state ground.” Resp. at 16. Mr. Tryon did not rely on the OCCA’s failure to include certain language. Instead, the specifics of the OCCA’s opinion render Respondent’s reference to *Harris v. Reed*, 489 U.S. 255 (1989), unavailing. As Respondent quotes, *Harris* “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.” Resp. at 16 (emphasis omitted) (quoting *Harris*, 489 U.S. at 264 n.10).

Such was not the case here. The state procedural bar was not a *separate* basis for the decision and the OCCA did not “also review[] the ineffective assistance of trial counsel claim on the merits.” Resp. at 16. Rather, the OCCA reviewed the underlying ineffective assistance of trial counsel claim to determine whether post-conviction counsel had ineffectively omitted it, which would have “resolved the substantive issue . . . while deciding the procedural bar.” Pet. at 18 (citing *Goode v. Carpenter*, 922 F.3d 1136, 1159 (10th Cir. 2019)). As the Tenth Circuit has explained, the OCCA thus “said that the procedural bar could be overcome if Goode’s counsel in the first

postconviction proceeding had been ineffective in failing to raise the claim presented in the third postconviction application.” *Id.* This directly contradicts Respondent’s assertion that a successful claim of post-conviction counsel’s ineffectiveness—as proven through the merit of the omitted claim—would not overcome the state procedural bar. *See* Resp. at 17 n.6. Respondent does not acknowledge or attempt to distinguish the controlling circuit precedent that belies her argument.

C. This Court’s Eventual *Glossip* Decision May Directly Bear on the Independence of the Procedural Bar the OCCA Applied to Mr. Tryon’s Claim.

Respondent urges this Court to deny Mr. Tryon’s alternative request to hold his petition in abeyance pending the Court’s decision in *Glossip v. Oklahoma*, No. 22-7466, *cert. granted*, 144 S. Ct. 691 (Jan. 22, 2024) (mem.), claiming that counsel for Respondent’s *Glossip* merits brief “agree[d] that the OCCA *did not apply* § 1089(D)(8) in an independent manner *under the unique facts of that case*.” Resp. at 17 (emphasis in original). While counsel for Respondent’s agreement might have come under the unique facts of that case, the OCCA’s failure to apply the procedural bar independently of federal law did not. Instead, as counsel for Respondent argued, “[t]he OCCA’s state-law holding was entirely dependent on its analysis of the federal merits.” Br. for Resp’t in Supp. of Pet’r at 50, *Glossip v. Oklahoma*, No. 22-7466 (Apr. 23, 2024). So too, here. “The OCCA simply held, based on these federal-law determinations, that the [IAC] issue was barred by § 1089(D)(8)(b).” *Id.* at 51. Mr. Tryon’s petition should not be prematurely dismissed while this Court considers an issue directly related to his.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DEBATE WHETHER OKLAHOMA IS APPLYING ITS *ATKINS* STATUTE CONSTITUTIONALLY.

A. Appellate Counsel's Ineffectiveness Turns on the Merit of the Omitted Claim.

Respondent's assertion that Mr. Tryon is challenging the constitutionality of Oklahoma's *Atkins* statute for the first time, Resp. at 20-21, belies both logic and the record in this case.² Since his initial state court proceedings, Mr. Tryon has "challenged Oklahoma's statute as unconstitutional under *Atkins* and its progeny, and argued trial and appellate counsel were deficient for failing to argue same." Case Management Statement of Issues Regarding Certification of Additional Issues for Appeal at 34, *Tryon v. Farris* (No. 21-6097) (10th Cir. Nov. 10, 2021) (citing ROA I at 63-64) ("COA Motion"); *see also* Mot. for Modification of Certificate of Appealability by the Merits Panel at 6-7, *Tryon v. Farris* (No. 21-6097) (10th Cir. Feb. 14, 2022). Mr. Tryon's briefing before the Tenth Circuit argued that the claim omitted by appellate counsel—trial counsel's ineffective failure to challenge Oklahoma's

² Respondent's own recitation of the procedural history contradicts her argument; she sets forth:

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.

Resp. at 20.

statute—was meritorious, rendering appellate counsel ineffective for its omission. *See* COA Motion at 34-36.

The Tenth Circuit opinion focused on the underlying claim’s merit, not on the dictates of *Strickland v. Washington*, 466 U.S. 668 (1984). *See* App. 58a-60a (finding appellate counsel did not ineffectively omit a claim on trial counsel’s statutory challenge omission, because Mr. Tryon’s score above the statutory cut-off, and the OCCA’s prior refusal to apply the Flynn Effect, rendered the claim without merit). So, too, did the OCCA. *See* ROA II at 138-140. The courts’ adjudications in Mr. Tryon’s case render inapposite Respondent’s reference to *Premo v. Moore*, 562 U.S. 115 (2011). Resp. at 23. *See Moore v. Czerniak*, 574 F.3d 1092, 1137 (9th Cir. 2009), *rev’d by Premo v. Moore*, 562 U.S. 115 (2011) (Bybee, J., dissenting) (emphasis in original) (“*Moore does not even cite [Arizona v.] Fulminante*, [499 U.S. 279 (1991)], nor was it cited by the district court, the state court, or any other party.”)

Mr. Tryon’s petition to this Court, asking for review of the Tenth Circuit decision, contains the same focus as that of the courts below. Expanded briefing delving into why omission of the meritorious claim further violated attorney performance standards would be appropriate for merits briefing.

B. Mr. Tryon’s Claim Is Meritorious.

Respondent continues to point to the OCCA’s reliance on its own outdated jurisprudence, and the Tenth Circuit’s following in kind, as evidence that prior counsel did not ineffectively omit a statutory challenge, *see* Resp. 22-23, without

acknowledging Mr. Tryon’s arguments that such reliance impermissibly fails to account for current clinical dictates.³ *See* Pet. at 22-31.

Respondent further attempts to paint appellate counsel’s omission as reasoned by noting trial counsel’s mid-trial reference to the statute’s constitutionality. *See* Resp. at 21-22. Respondent’s references to inapposite OCCA case law from non-*Atkins* contexts, *see id.*, only highlights the absurdity of equating trial counsel’s belated broaching of capital punishment ineligibility with a motion to spare the intellectually disabled Mr. Tryon from an unconstitutional death penalty when it would have mattered—before trial.

CONCLUSION

The petition for writ of certiorari should be granted.

³ Elsewhere, Respondent attempts to defend the OCCA’s refusal to follow current science by pointing to a 2021 decision in which the OCCA used the term intellectual disability, Resp. at 7 n.2, but does not attempt to square this with Petitioner’s reference to the 2020 opinion written by a different OCCA judge expressly disclaiming the term in favor of the outdated “mental retardation” label, Pet. at 7 n.3, despite extensively citing that same opinion. *See* Resp. at 22.

Respectfully submitted,

s/ Callie Heller

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