No. 18-8592

IN THE

Supreme Court of the United States

WENDELL ARDEN GRISSOM,

Petitioner,

v.

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

Reply to Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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April 19, 2019

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I. The Issue was Adequately Raised.

In his petition for a writ of certiorari, Grissom asked if any AEDPA deference should apply in the absence of an evidentiary hearing or other appropriate opportunity to develop facts in state court. As Grissom noted, he argued in his appeal to the Tenth Circuit that the OCCA was unreasonable because, at the very least, the OCCA should have granted an evidentiary hearing to allow Dr. McGarrahan the opportunity to further scientifically explain and erase any misunderstanding or doubt regarding her report. Opening Brief at 22. Grissom returned to this core issue multiple times in his briefing. For example:

> [the OCCA's reasoning was] dubious at best, and by no means reason to flatly reject out of hand Dr. McGarrahan's scientifically-tested brain-based findings without granting Grissom an evidentiary hearing.

Opening Brief at 28;

> Permeating the unreasonableness of the OCCA's decision is the context in which it was made. As noted above, the question presented in an application for evidentiary hearing is whether

> the appellant "should be afforded further opportunity to present evidence ... This threshold stage is no place to be rejecting scientifically-arrived-at expert evidence without *any* opposing science-based evidence to the contrary.
>
> The OCCA's unreasonableness in this regard is thrown into sharp relief when contrasted to cases such as *Porter v. McCollum,* 558 U.S. 30 (2009). In *Porter*, the state court conducted a *two-day evidentiary hearing ... see also, e.g., Sears v. Upton,* 561 U.S. 945, 949-50 (2010). The OCCA's reasoning stands contrary to *Porter* and was unreasonable under the facts presented.

Opening Brief at 29-30 (emphasis added);

> the OCCA unreasonably determined on direct appeal that trial counsel was not ineffective because the brand-new brain-based evidence was "largely" the same as was presented at trial, drawing unreasonable conclusions without granting any evidentiary hearing.

Reply Brief at 6 (quoting petition) (brackets and ellipsis omitted).

Grissom persistently called the OCCA *unreasonable* for not granting Grissom an evidentiary hearing in an attempt to overcome AEDPA deference. He was clearly arguing AEDPA deference should not apply due to the absence of an evidentiary hearing or opportunity to develop facts.

The fact the Tenth Circuit ignored these arguments and did not address them in its opinion is of no moment. As a matter of logic and law, a court cannot avoid Supreme Court review of an issue by failing to

address it. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The issue presented is ripe for review by this Court.

II. There are Inter and Intra Circuit Conflicts.

Respondent does not dispute there are inter-circuit conflicts. For his argument there is no intra-circuit conflict, Respondent antithetically relies on one Tenth Circuit case calling "much of" another Tenth Circuit case "questionable." *Black v. Workman*, 682 F.3d 880, 895 (10th Cir. 2012). Brief in Opposition at 13. Moreover, in doing so, Respondent conflates the issue of the effect of evidence obtained in a federal evidentiary hearing with the issue of the effect of a state court failing to provide an evidentiary hearing at all or other appropriate opportunity to develop facts. *See Black*, 682 F.3d at 895-96.

As far as an intra-circuit split goes, the liberal and straightforward approach taken in *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) and *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998) is very different from the intermediate sliding-scale approach of *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018). *Smith* is a case, it should be

noted, that came out 17 days *after* the Tenth Circuit decided Mr. Grissom's case. The law in the Tenth Circuit is very much unsettled.

III. This Case is a Good Vehicle.

Respondent argues Grissom's case is not a good vehicle in which to consider the question presented because his claim would fail on *de novo* review. Brief in Opposition at 16-28. That remains to be seen. Congress entrusted discretionary review to this Court, not to Respondent. Any adverse effect on Respondent is not a consideration. *International Union, United Auto., Aerospace and Agr. Implement Workers of America AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 221-22 (1965).

Indeed, Respondent's attempt to litigate *de novo* review now is inappropriate. To speculate at the petition stage on how the Tenth Circuit would rule under a correct standard both usurps that court's prerogative and is not necessary in order for this Court to reach the legal issue presented. Rather, this Court can set the proper standard and leave application of that standard to the Tenth Circuit.

This capital case where uncontradicted evidence of severe brain damage was deemed unbelievable and ignored without a hearing

undoubtedly qualifies as meaningful litigation. This Court and the Tenth Circuit both understand how compelling brain damage evidence is. *See Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) (recognizing such evidence as "something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect"); *Williams v. Taylor*, 529 U.S. 362, 370 (2000) (requiring relief for counsel's failure to present evidence petitioner "might have mental impairments organic in origin"); *Sears v. Upton*, 561 U.S. 945, 946, 949 (2010) (noting deficits in "mental cognition," "reasoning," "planning," and "impulse control" possibly stemmed from insults to the brain and "traumatic experiences of the type expected to lead to these significant impairments"). *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)(finding evidence of neuro-cognitive deficits "exactly the sort of evidence that garners the most sympathy from jurors").

For all of the reasons presented, Respondent's opposition should be set aside for possible re-urging on the merits and this Court should grant certiorari.

Respectfully submitted,

s/ Thomas D. Hird

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