No. 19-1105

In the Supreme Court of the United States

TOMMY SHARP, WARDEN,

Petitioner,

v.

JIMMY DEAN HARRIS,

Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Rather than affording the deference required by 28 U.S.C. § 2254(d) (AEDPA), the Tenth Circuit persists in uncharitably construing state court decisions in order to find them unreasonable.[1] Here, the Tenth Circuit held that the Oklahoma Court of Criminal Appeals (OCCA) unreasonably denied Respondent's claim that his trial attorney was ineffective for failing to seek a ruling that he is intellectually disabled. Contrary to Congress's mandate, the Tenth Circuit interpreted any ambiguity in the language of the OCCA's opinion as an unreasonable determination of the facts, which that court then used to proceed to *de novo* review under 28 U.S.C. § 2254(d)(2). Respondent opposes certiorari based on his belief that the Tenth Circuit faithfully deferred to the state court's determination. Respondent could not be more wrong.

I. THIS COURT MUST ENSURE FEDERAL COURTS ARE FAITHFULLY APPLYING AEDPA.

Federal courts must comply with Congress's mandate that habeas relief is available only when state courts commit egregious errors. Pet. 13-15, 24-27. In this case, it was the Tenth Circuit that grievously erred.

The Tenth Circuit found section 2254(d)(2) violated solely because the OCCA said "all" of Respondent's experts concluded he was not intellectually disabled, in

[1] Petitioner has another petition pending in which the Tenth Circuit granted relief on a challenge to the jury's determination that the respondent is not intellectually disabled. *Sharp v. Smith*, No. 19-1106. As in this case, the Tenth Circuit applied an improper level of scrutiny to the Oklahoma Court of Criminal Appeals' decision and *sua sponte* raised arguments not made by the respondent. *See* Pet. 12. Petitioner expects that *Smith* will be conferenced on June 25, and asks this Court to consider that the Tenth Circuit's lack of adherence to AEDPA is not limited to this case.

spite of a footnote in which the OCCA expressly recognized the lone dissenting expert's views. Respondent does not contest that, if the OCCA accurately acknowledged Dr. Martin Krimsky's opinion, its decision was not based on an unreasonable determination of the facts. BIO 15-17. Nor does Respondent disagree that the OCCA acknowledged Dr. Krimsky's opinion that he is intellectually disabled. Instead, Respondent argues that the footnote in which the OCCA referenced Dr. Krimsky's opinion was itself unreasonable because it said Dr. Krimsky "'had to say'" Respondent was intellectually disabled "'but that was not his conclusion after examining Harris and he found the scores surprising.'" BIO 15-16 (quoting *Harris v. State*, 164 P.3d 1103, 1115 n.55 (Okla. Crim. App. 2007)).

The Tenth Circuit shared Respondent's concern. Pet. App. 22a-23a. Yet everything the OCCA said in the footnote was accurate. Dr. Krimsky agreed that he was "surprised at the outcome of the Slossen test" (4/11/2001 Tr. 94). Based primarily on Respondent's occupation as a transmission mechanic, Dr. Krimsky felt it necessary to administer the more comprehensive Wechsler Adult Intelligence Scale-Revised (WAIS-R) (4/11/2001 Tr. 94, 97). When the WAIS-R results were consistent with the Slossen results, Dr. Krimsky unquestioningly accepted his test results and concluded Respondent is intellectually disabled (4/11/2001 Tr. 64-65).[2]

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[2] As shown in the petition, Dr. Krimsky did not assess adaptive functioning and failed to consider Respondent's mental state, which he considered to be so poor as to rise to the level of incompetence. Pet. 3-6. Respondent claims that "credibility disputes have never been presented to a fact-finder for resolution . . . ." BIO 24. Yet, the trial court emphatically determined that Dr. Krimsky was not credible. Pet. 6, 20. Respondent further claims Dr. Krimsky's lack of credibility did not factor into the OCCA's decision. BIO 22 n.21. On the contrary, the OCCA considered *all* of the evidence in the record. Pet. App. 208a-210a. And credibility evidence was specifically called to the court's attention by the State. 7/25/2006

In spite of his repeated insistence that Respondent is "mentally retarded", Dr. Krimsky admitted that his test results appeared inconsistent with Petitioner's academic and occupational functioning, his childhood IQ scores, and with observations made by staff at Eastern State Hospital (4/11/2001 Tr. 94-97, 107, 119-22, 125-27). Dr. Krimsky further admitted that the results of his testing "raised a question in [his] mind." (4/11/2001 Tr. 126-27).

Thus, Dr. Krimsky "found the scores surprising" and doubted the results of his initial examination, *as well as his final conclusion* (4/11/2001 Tr. 126-27) (Dr. Krimsky admitted that the results of both of his IQ tests "raised a question in [his] mind."). The OCCA accurately summarized Dr. Krimsky's testimony.[3]

The Tenth Circuit's "readiness to attribute error" is contrary to both the letter and the spirit of AEDPA. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (the "difficult to meet and highly deferential" standard of 28 U.S.C. § 2254(d) "demands that state-court decisions be given the benefit of the doubt") (internal citations and quotation marks omitted). The OCCA's factual assertions were correct. However, assuming *arguendo*

Brief of Appellee (OCCA No. D-2005-117) at 11-12. *Cf. Bell v. Cone*, 543 U.S. 447, 457 n.7 (2005) (concluding the state court applied the proper standard in part because the state's brief had called its attention to that standard). Thus, although that court did not explicitly rely on Dr. Krimsky's lack of credibility, it no doubt considered evidence thereof.

[3] Respondent argues, for the first time ever, that the OCCA unreasonably stated that "all of the evidence in the record" demonstrates he is not intellectually disabled. BIO 13-15. Respondent further appends to his response a report prepared by Dr. Nelda Ferguson which was not before the OCCA. This Court should disregard these eleventh-hour attempts to salvage the Tenth Circuit's decision. *Sexton v. Beaudreaux*, ___ U.S. ___, 138 S. Ct. 2555, 2560 (2018) (*per curiam*); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Clark v. Arizona*, 548 U.S. 735, 765 (2006).

the court made any misstatements, such were not unreasonable. *See Cash v. Maxwell*, 565 U.S. 1138, 132 S. Ct. 611, 615 (2012) (Sotomayor, J., respecting the denial of certiorari) ("To establish even a wild exaggeration is not to establish what § 2254(d)(2) requires: that the state court's '*decision* … was based on an unreasonable *determination* of the facts.'") (alteration and emphasis adopted); *Wood v. Allen*, 558 U.S. 290, 302 (2010) (although there was some evidence that could "plausibly be read as inconsistent with" the state court's finding, such did not "suffice to demonstrate that the finding was unreasonable"); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (describing the unreasonableness requirement of section 2254(d)(2) as a "substantially higher threshold" than incorrectness).

The Tenth Circuit was required to consider *all* of the evidence, including that revealed by cross-examination of Dr. Krimsky. *Wood*, 558 U.S. at 303. Even if that court found the OCCA's finding debatable, that was not enough to satisfy section 2254(d)(2). *Id.* ("even if [the state court's finding] is debatable, it is not unreasonable"); *cf. Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("In § 2254(d)(1), Congress specifically used the word 'unreasonable,' and not a term like 'erroneous' or 'incorrect.'"). The Tenth Circuit had no basis on which to find section 2254(d)(2) satisfied.

The Tenth Circuit was wrong for a second reason. Respondent is required to demonstrate both that the OCCA made an unreasonable finding and that its decision was based on that finding. Pet. 17-18. According to Respondent, "The OCCA explicitly premised its no-prejudice determination on the finding that *all* evidence in

the record and *all* of Mr. Harris's experts concluded he was *not* mentally retarded." BIO 17-18 (emphasis adopted). That is not the case.

The disputed sentence regarding "all" of the experts appears at the beginning of the OCCA's analysis, in a section which briefly summarized the evidence which supported a conclusion Respondent is not intellectually disabled. Pet. App. 208a-209a. This evidence included Respondent's other IQ test scores and the testimony of the other experts. Pet. App. 209a ("[Dr. Draper] and other experts stated in this and other proceedings that Harris was 'slow' or of low intelligence, but all agreed that his employment history, aptitude as a transmission mechanic, and other characteristics were not those of a mentally retarded person."). The OCCA then set forth the standard Respondent has to meet—a reasonable probability he would have been found intellectually disabled. Pet. App. 209a. The court concluded that

> Nothing in this record shows that, had counsel made that request [for a hearing], evidence would have shown by a preponderance of the evidence that Harris was mentally retarded. There is a great deal of evidence in the record to show otherwise, including the opinion of several experts who testified that Harris was not mentally retarded. We cannot conclude there was a reasonable probability that, but for counsel's omission, the results of this resentencing proceeding would have been different.

Pet. App. 210a. The OCCA expressly considered all of the evidence (including its acknowledgment of Dr. Krimsky's opinion) but denied relief in light of the "great deal" of evidence that Respondent is not intellectually disabled "including the opinion of *several experts*[.]" Pet. App. 210a (emphasis added). Dr. Ray Hand, Dr. Wanda

Draper, and Dr. Jennifer Callahan all believe Respondent is not intellectually disabled.[4] Pet. 6-10.

It bears repeating that Dr. Callahan is the expert Respondent relied upon to support his claim that counsel was ineffective. It defies belief that a state court could ever unreasonably deny an ineffective assistance of counsel claim when the very expert the defendant hired found him not intellectually disabled. This is especially true where two other experts agree and the lone dissenting expert was not credible for a number of reasons. Pet. 3-10. If this case represents an "extreme malfunction[] in [a] state criminal justice system[]," AEDPA is no longer "difficult to meet" as Congress intended it to be. *See Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation marks omitted). This Court should grant Petitioner's request for a writ of certiorari.

II. THIS CASE IS NOTHING LIKE *BRUMFIELD V. CAIN*.

Respondent argues this Court's decision in *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269 (2015), supports the Tenth Circuit's decision. BIO 18-21.

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[4] Respondent egregiously mischaracterizes Dr. Callahan's report which is appended to the petition in its entirety. BIO 6-8. Dr. Callahan wrote that Respondent scored "in the impaired to borderline impaired range" on only one of the tests she administered—the short-form test. Pet. 9 n.5; Pet. App. 233a. She said no such thing about the "more comprehensive[]" Woodcock-Johnson III results. *Compare* BIO 6-7 *with* Pet. App. 233a. Respondent also incorrectly asserts that Dr. Callahan found "the *scores* from Mr. Harris's childhood were artificially inflated due to obsolete testing norms." BIO 19 n.17 (emphasis added). Dr. Callahan actually wrote that Respondent's score of 83 on the Wechsler Intelligence Scale for Children could be as low as 75.5 (still outside the range of intellectual disability), and she made **no** similar adjustment to his score of 87 on the Stanford-Binet Revised. Pet. App. 237a-238a. Finally, Respondent claims Dr. Callahan concluded that he "suffers from impaired to borderline intellectual functioning." BIO 8. This assertion is flatly untrue, which likely explains Respondent's failure to support it with a citation. Dr. Callahan concluded, "The current findings, in conjunction with past evaluations, indicate borderline intellectual functioning." Pet. App. 238a.

Unsurprisingly, the Tenth Circuit did not rely on *Brumfield*, as it is easily distinguished on both the law and the facts.

Like Respondent, Brumfield was sentenced to death before *Atkins v. Virginia*, 536 U.S. 30 (2002). *Brumfield*, 135 S. Ct. at 2273-74. The state trial court declined Brumfield's request for a post-conviction *Atkins* hearing because, according to the mitigating evidence from his trial, Brumfield had an IQ score of 75 and had presented no evidence of impairment in adaptive functioning. *Id*. at 2274-77. This Court found the decision unreasonable because a score of 75 falls within the standard error of measurement, and because there were "substantial grounds [in the record] to question Brumfield's adaptive functioning." *Id*. at 2278-80.

It was "critical" to this Court's decision that "in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability[.]" *Id*. at 2281. The Court also held that "the state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue." *Id*. at 2282.

Unlike Brumfield, Respondent was required to do more than raise a reasonable doubt as to his intellectual disability. This Court determined that the state court in *Brumfield* ignored evidence that could have supported a finding of intellectual disability. Here, the OCCA considered all of the evidence and determined Respondent failed to show a reasonable probability that he could have proven he is

intellectually disabled because three experts believed otherwise. Pet. App. 208a-210a.

Also unlike Brumfield, Respondent's intellectual disability was at issue when the evidence the OCCA relied upon was generated. Respondent raised intellectual disability as a guilt-stage defense in his first trial and his jury was instructed thereon (Original Record I 79, VII 1243). Indeed, it was the very reason Dr. Hand was hired. Pet. 19. Thus, his intellectual disability was "at issue." *Brumfield*, 135 S. Ct. at 2282. In addition, Dr. Krimsky's job was to assess competency among intellectually disabled individuals, and Dr. Draper and Dr. Callahan were hired after *Atkins* was decided (4/11/2001 Tr. 38). Pet. App. 221a.

The error made by the Tenth Circuit in this case—plucking a single sentence out of context to disregard a very reasonable state court opinion—has no parallel in *Brumfield*. *Brumfield* does not support the Tenth Circuit's decision.

III. RESPONDENT'S *DE NOVO* DISCUSSION OF THE EVIDENCE IS IRRELEVANT.

This Court need not consider Respondent's *de novo* discussion of the evidence. Rather, this Court should summarily reverse the Tenth Circuit's decision and order that court to reevaluate this claim with AEDPA deference. Pet. 24-27.

Section II of the petition demonstrates that the Tenth Circuit's failure to adhere to AEDPA matters in this case because the OCCA's decision was eminently reasonable. Thus, although the bulk of Respondent's factual and legal

representations are incorrect or taken out of context, such is immaterial.[5] The question is not whether Respondent can point to a few isolated pieces of evidence that he could have presented at an *Atkins* hearing. The question is whether the OCCA reasonably concluded that he would not have prevailed had a hearing been held. The answer—provided by Drs. Hand, Draper, and Callahan—is yes.

Nevertheless, one of Respondent's arguments does merit a brief rebuttal. Respondent's primary theme (partially adopted by the Tenth Circuit) is that his competency proceedings and original trial were pre-*Atkins*. Pet. App. 24a n.15. Respondent never fully explains the significance of that fact. As shown above, his alleged intellectual disability was fully litigated—indeed, it was his first-stage defense—at his first trial. Moreover, both Dr. Draper and Dr. Callahan formed their opinions after *Atkins*. Perhaps most importantly, Respondent does not disagree that he has previously admitted that the clinical definition expressly applied by Dr. Hand, and presumably applied by Drs. Draper and Callahan, is the same as that adopted by the OCCA post-*Atkins*. Pet. 12, 23.

Respondent did not ask the OCCA to consider the pre-*Atkins* nature of Dr. Hand's opinion. The Tenth Circuit erred in doing so. *Sexton v. Beaudreaux*, ___ U.S.

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[5] For example, Dr. Hand unequivocally testified that Respondent is not intellectually disabled. *Compare* BIO 4 *with* (2001 Tr. 152 (Q: "Is he mentally retarded?"; A: "No.")). And Dr. Draper testified that she was not the person who dealt with Respondent's mental illnesses because he was not diagnosed with them until after the murder; she said no such thing about his intelligence, which formed part of his "life path." *Compare* BIO 6 *with* (2005 Tr. 28-33, 133-34 (Dr. Draper's extensive experience with and understanding of education and intelligence), 67 (mental illness was "after the fact"), 129 (quoted by Respondent but, in context, Dr. Draper was discussing whether Respondent was malingering his mental illnesses).

___, 138 S. Ct. 2555, 2560 (2018) (*per curiam*) (it is a fundamental error for a federal court to find AEDPA satisfied based on arguments not made in state court).

In this battle-of-the-experts case, where three experts agree Respondent is not intellectually disabled, and the lone dissenter has enormous credibility problems, the OCCA's decision is eminently reasonable. Instead of giving that decision the benefit of any doubts it might have had, the Tenth Circuit misconstrued the OCCA's opinion, misapprehended the law, and appears to have viewed the evidence in the light most favorable to Respondent. This Court should summarily reverse to ensure faithful adherence to Congress's mandate that federal courts interfere with state court convictions only when necessary to correct egregious errors.

Respectfully submitted,

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