No. _____

IN THE

Supreme Court of the United States

WENDELL ARDEN GRISSOM,

Petitioner,

v.

MIKE CARPENTER, WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent.

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

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March 25, 2019

CAPITAL CASE

QUESTION PRESENTED

This Court has held that "capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998). Indeed, the Court has "demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Spaziano v. Florida*, 468 U.S. 447, 456 (1984)).

What, then, to make of inadequate capital state-court factfinding processes under review in a § 2254 case? This presents the following question for this Court's review:

> To what extent, if any, should a federal court defer to prior state court factfinding and adjudication under the Antiterrorism and Effective Death Penalty Act (AEDPA) in the absence of an evidentiary hearing or other appropriate opportunity to develop facts?

List of Parties to the Proceeding

Petitioner Wendell Arden Grissom and Respondent Warden of Oklahoma State Penitentiary have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Randall Workman, Anita Trammell, Maurice Warrior, Kevin Duckworth, Jerry Chrisman, Terry Royal, and presently Mike Carpenter.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wendell Arden Grissom respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *Grissom v. Carpenter,* 902 F.3d 1265 (10th Cir. 2018).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Grissom v. Carpenter,* 902 F.3d 1265 (10th Cir. 2018). *See* Appendix A. The order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Grissom v. Carpenter*, No. 16-6271 (October 26, 2018). *See* Appendix B. The federal district court decision denying Mr. Grissom's petition for writ of habeas corpus is found at *Grissom v. Duckworth*, No. CIV-11-1456-R (W.D. Okla., August 3, 2016) (unpublished). *See* Appendix C. The decision of the Oklahoma Court of Criminal Appeals (or OCCA) denying Mr. Grissom's state direct appeal is reported at *Grissom v. State*, 253 P.3d 969 (Okla. Crim. App. 2011). *See* Appendix D. The decision of the OCCA denying Mr.

Grissom's state post-conviction action is found at *Grissom v. State,* Case No. PCD-2008-928 (September 13, 2011). *See* Appendix E.

JURISDICTION

The Tenth Circuit rendered its opinion denying relief on August 31, 2018. Mr. Grissom filed a timely petition for rehearing and rehearing en banc, which the Tenth Circuit denied on October 26, 2018. *See* Appendix B. Justice Sotomayor extended the time to petition for certiorari until March 25, 2019. *See* Appendix F. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Title 28 U.S.C. §2254(d) provides the following:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides the following:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides the following:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Wendell Grissom set out on a trip from his home in Arkansas to Oklahoma City to find a job. He had at least one job application filled out and ready to go. Along the way he picked up a hitchhiker, a homeless drifter named Jessie Johns. Instead of looking for jobs in Oklahoma City, the easily-led Grissom allowed Johns to take him off course, due west out of Oklahoma City. After a long night and morning of heavy drinking, they embarked on a random home invasion that was utterly tragic and completely inept. Grissom killed one woman and badly injured another.

Grissom immediately began expressing great remorse and taking responsibility for the offenses, while at the same time revealing his bewilderment over why they occurred. In his videotaped confessions he made statements such as "what was in my head," "what was wrong in my head," "what was going on that morning in my head," and "what came out of my head." St. Ex. 82, transcript at 47; Def. Ex. 1, transcript at 5, 9, 27.

While Grissom was remorseful and took responsibility for the crimes, he pled not guilty, holding the State to its burden to prove him guilty beyond a reasonable doubt, and preserving his right to a jury trial in the sentencing stage. The trial court instructed the jury on the defense

of intoxication, but the jury rejected it and found Grissom guilty of first-degree murder. O.R. 651.

As second stage proceedings began, the jurors no doubt hoped for an explanation, some sense of the "why" behind a crime so random and unsettling. Instead, defense counsel told the jury this right off the bat in opening statement:

> Ladies and gentlemen, we will never know why this occurred that day. I can't answer the why.

Tr. III at 70.

Counsel couldn't answer the why because counsel failed to follow up on multiple red flags in Mr. Grissom's case for brain damage. The red flags included: very poor speech development as a child; neurological insults, including reported loss of oxygen at birth and at least three severe head injuries; and long-term chronic heavy alcohol consumption. *See, e.g.,* Tr. VIII 9-20. Sadly, despite all of the obvious indicators of brain damage, the word "brain" was never even uttered at Grissom's trial.

Appellate counsel easily saw the blazing red flags. She referred the case to Antoinette McGarrahan, Ph.D., a clinical and forensic psychologist with specialization in neuropsychology, for "a comprehensive

neuropsychological evaluation in order to determine whether Mr. Grissom, as a result of the several risk factors noted above, suffers from any cognitive impairment and, if so, the nature and severity of his difficulties." D-2008-595, Direct Appeal Application for Evidentiary Hearing, Exhibit 1-B, Neuropsychological Evaluation Report, Reason for Referral, at 1 (McGarrahan Report).

Under Oklahoma Court of Criminal Appeals procedure, appellate review of a conviction is confined to the original trial record unless that record has been supplemented through an evidentiary hearing. Okla. Stat. tit. 22, ch. 18, App. Rule 3.11(B)(3). OCCA's Rule 3.11(B)(3)(b) allows a defendant, on direct appeal, to offer non-record evidence in support of an application for evidentiary hearing in conjunction with an ineffective assistance of trial counsel claim. If the OCCA finds, "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence," the OCCA will remand to the trial court for an evidentiary hearing based on the claims raised in the application. Okla. Stat. tit. 22, ch. 18, App. Rule 3.11(B)(3)(b)(I).

Grissom's appellate counsel alleged ineffective assistance of trial counsel and sought an evidentiary hearing, attaching Dr. McGarrahan's report summarizing her clinical findings, opinions, and conclusions pertaining to brain damage. The report noted Grissom suffered from dementia, and further discussed Grissom's brain damage and its relation to the crimes as follows:

> The following opinions and conclusions are based on a reasonable degree of psychological certainty.
>
> Mr. Grissom presently suffers from *significant* cognitive dysfunction involving memory and planning, reasoning, and organization abilities. It is the opinion of this examiner that Mr. Grissom's cognitive impairment resulted from the *permanent* organic brain effects of his repeated head injuries in combination with his severe alcoholism, as he has had no further insults to his brain since his arrest for the instant offenses that would lead to the deficits seen on current testing. It is further believed that Mr. Grissom's *severe* cognitive dysfunction, as evidenced by the present testing results, was present at the time of the instant offenses as well as at the time of his trial for the instant offenses. It is also this examiner's opinion that at the time of the instant offenses Mr. Grissom's significant memory impairment and his difficulties in planning, reasoning, and organization abilities were made worse by his ingestion of a large amount of alcohol and likely impaired his ability to function in a cognitively efficient manner.

McGarrahan report, Opinions and Conclusions, at 12 (emphasis added).

In the application for evidentiary hearing and Brief-in-Chief, appellate counsel argued Mr. Grissom's brain damage and dementia diagnoses should have been developed by trial counsel, and the ramifications deriving from the same could have reasonably affected the outcome of the second-stage proceedings. Counsel also noted under Oklahoma law his application for evidentiary hearing was meant to provide only an extract of the pertinent factual matters arising outside the record. *Garrison v. State,* 103 P.3d 590, 613 n.36 (Okla. Crim. App. 2004). The State presented no evidence in opposition.

The OCCA denied Grissom an evidentiary hearing (and thus further supplementation and substantive relief) based on these conclusions regarding the prejudice prong of *Strickland*:

> The neuropsychological report largely reflects the mitigating narrative already presented at trial.[1] Other aspects of the

---

[1]As noted, the whole point of Dr. McGarrahan's referral was to determine if Mr. Grissom had brain damage, whereas at trial there was not so much as a single mention of the word "brain." Brain damage is something this Court and other courts have found to have an especially powerful mitigating effect. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (organic brain damage, fetal alcohol syndrome); *Porter v. McCollum*, 558 U.S. 30, 43 (2009) (brain abnormality and cognitive defects); and *Sears v. Upton,* 561 U.S. 945, 946, 949 (2010) (frontal lobe brain damage).

> report are equivocal, at best ... The proffered evidence of Appellant's diagnosis with dementia and its accompanying deficits does not appreciably alter the balance of aggravating and mitigating circumstances considered by the jury at trial.

Grissom v. State, 253 P.3d 969, 995-96 (Okla. Crim. App. 2011)). Appendix D.

The OCCA confirmed it was the credibility of Dr. McGarrahan's report that it found lacking when it issued its post-conviction order a little more than a month later. The OCCA chose to call both her findings of dementia and her findings of significant cognitive impairment "dubious," using that word in place of the synonym "equivocal" it used the month before ("dubious at best" instead of "equivocal at best"). *Grissom v. State,* PCD-2008-928, Order Denying Application for Capital Post-Conviction Relief and Related Motions, at 12. Appendix E. The OCCA specifically labeled Dr. McGarrahan's medical findings of dementia and significant cognitive impairment "dubious" without contrary medical evidence and no opportunity for development of the facts or a hearing.

Following the denial of Grissom's post-conviction action, he filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma, raising the brain-damage ineffective

assistance claim, arguing for an evidentiary hearing, and noting the OCCA's unreasonable and aberrant ruling denying him an evidentiary hearing in state court. WDOK Case No. CIV-11-1456-R, Docs. 20, 47. For example, Grissom argued:

> The OCCA denied Mr. Grissom an evidentiary hearing under an aberrant standard that actually requires a defendant prove by clear and convincing evidence a strong possibility that defense counsel was ineffective before receiving a proper hearing.

Doc. 20 at 11 n.6.

> the OCCA[] unreasonabl[y] determin[ed] 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.

Doc. 20 at 20.

Grissom also reaffirmed and re-verified what had *never* been challenged in any evidentiary or scientific way: Wendell Grissom has severe brain damage. Demonstrating that the OCCA was wrong when it found Dr. McGarrahan's findings of severe brain damage dubious, Grissom presented brain-imaging evidence through neuroradiologist, Dr. Anne Hayman, M.D., who found, for example, "[t]he level of

disorganization in Mr. Grissom's brain is severe and not confined to one area." Petition, Doc. 20, Exh. 9 at ¶4. The three most striking abnormalities include that Grissom's cerebellum is "roughly 60% smaller than a normal cerebellum," his occipital lobe is "mal-positioned and 20% larger than normal," and his lateral ventricle is "10X larger than that of the normal brain." The enlarged ventricle shows "generalized loss of brain tissue" because as brain tissue dies the ventricle cavity, which is filled with cerebrospinal fluid, gets larger. *Id.* at ¶¶5, 6, 7. The damage found is in areas of the brain "known to impact behavior." *Id.* at ¶11.

Despite medically-certain, uncontradicted-at-every-level evidence of severe brain damage, the district court denied habeas relief, along with Grissom's motions for discovery and an evidentiary hearing. Doc. 60. The district court granted a certificate of appealability (COA) on Ground Three of the petition (regarding intoxication and lesser included offenses). Doc. 62. The Tenth Circuit granted a COA pertaining to the brain-damage IAC claim. Case Management Order of February 17, 2017.

In his appeal to the Tenth Circuit, Grissom argued the OCCA's opinion was unreasonable, and 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 repeatedly criticized the OCCA's unreasonable decision to reject out of hand Dr. McGarrahan's scientifically-tested brain-based findings without granting Grissom an evidentiary hearing (especially in the absence of any scientific evidence to the contrary). *See, e.g.,* Opening Brief at 28, 35-36.

The Tenth Circuit affirmed without discussing the OCCA's denial of a hearing in regard to Grissom's ineffective assistance of counsel claim. *Grissom v. Carpenter*, 902 F.3d 1265, 1284 (10th Cir. 2018). Appendix A. Both panel and *en banc* rehearing were also denied. Appendix B.

REASONS THE PETITION SHOULD BE GRANTED

A. A Hodgepodge of Approaches Currently Exist.

The Courts of Appeals are divided with respect to the significance of a full and fair hearing or adequate opportunity for development of the facts in determining whether or how much deference is owed under AEDPA. Moreover, the courts have employed varying approaches to the issue, applying 28 U.S.C. § 2254 d(1), (d)(2), and the "adjudication on the

merits" requirement of the statute. Inter-circuit and intra-circuit inconsistencies abound.

- The Ninth Circuit and d(2)

The Ninth Circuit Court of Appeals' approach has long relied on § 2254(d)(2):

> We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, "the fact-finding process itself is deficient" and not entitled to deference. *Taylor* [*v. Maddox*], 366 F.3d [992], 1001 [9th Cir. 2004] ("If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts.") (internal quotation marks omitted); *see also Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006) (amended) ("In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness.") (citing *Taylor*, 366 F.3d at 1000); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003) ("But with the state court having refused [the petitioner] an evidentiary hearing, we need not of course defer to the state court's factual findings—if that is indeed how those stated findings should be characterized—when they were made without such a hearing."); *cf. Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("Having refused [petitioner] an evidentiary hearing on the matter, the state cannot argue now that the normal AEDPA deference is owed the factual determinations of the [state] courts."); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999) (according no deference where written statements by trial judge to defense counsel "were not subject to any of the usual judicial procedures

designed to ensure accuracy").

Hurles v. Ryan, 752 F.3d 768, 790-91 (9th Cir. 2014).

The Ninth Circuit's reasoning is consistent with this Court's precedent. *See, e.g., Brumfield v. Cain*, ___ U.S. ___., 135 S. Ct. 2269, 2273 (2015). While the Ninth Circuit approach predominates, it does have its detractors, such as the Fifth Circuit.

- The Fifth Circuit: no d(2), but a flash of d(1)

In contrast to the Ninth Circuit, the Fifth Circuit has clearly rejected the d(2) avenue. For example, in *Valdez v. Cockrell*, the Fifth Circuit ruled:

> the district court erred in determining that, where there had been a denial of a full and fair hearing, AEDPA's deferential framework, as set out in § 2254(d) and (e), did not apply to a state court's adjudication on the merits.

274 F.3d 941, 954 (5th Cir. 2001).

However, in *Blue v. Thaler*, 665 F.3d 647, 657 (5th Cir. 2011), the Fifth Circuit discussed another possible avenue while dealing with an *Atkins* issue. The court held a failure to hold a hearing may qualify as a violation of the Due Process Clause, and said violation of the Due Process Clause may constitute an unreasonable application of clearly established

federal law under § 2254(d)(1). *Id; see also Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013).

- The Fourth Circuit - No Adjudication on the merits

The Fourth Circuit has directed its focus on the fact a state court decision must qualify as an "adjudication on the merits" to trigger AEDPA deference. 28 U.S.C. § 2254(d). The Fourth Circuit reasoned:

> A claim is not "adjudicated on the merits" when the state court makes its decision "on a materially incomplete record." A record may be materially incomplete "when a state court unreasonably refuses to permit further development of the facts of a claim." In this circumstance, we do not offend the principles of "comity, finality, and federalism" that animate AEDPA deference because the state court has "passed on the opportunity to adjudicate the claim on a complete record."

Gordon v. Braxton, 780 F.3d 196, 202 (4th Cir. 2015) (citations omitted)); *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010) ("[W]hen a state court forecloses further development of the factual record, it passes up the opportunity exhaustion ensures. … If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)"). The First and Sixth Circuits have rejected the Fourth Circuit's approach. *Garuti v.*

Roden, 733 F.3d 18, 23 (1st Cir. 2013); *Ballinger v. Prelesnik*, 709 F.3d 558, 562 (6th Cir. 2013).

- The Third Circuit's Sliding Scale

The Third Circuit has adopted something of a sliding scale. In *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004), the Third Circuit held as follows:

> The extent to which a state court afforded a defendant adequate procedural means to develop a factual record - whether the defendant was afforded a "full and fair hearing," to put it in the parlance of the pre-AEDPA statute - may well affect whether a state court's factual determination was "reasonable" in "light of the evidence presented in the State court proceeding" or whether the petitioner has adequately rebutted a presumption that the state court's determination is correct… In other words, the extent to which a state court provides a "full and fair hearing" is no longer a threshold requirement before deference applies; but it might be a consideration while applying deference under § 2254(d)(2) and § 2254(e)(1).

387 F.3d at 239 (citations omitted). *See also Fahy v. Horn*, 516 F.3d 169, 182-83 (3d Cir. 2008). In *Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007), the First Circuit agreed with, and adopted, the Third Circuit's approach. Notably, the First Circuit has encapsulated the longstanding conflict that needs resolution by this Court: "Case law is divided on whether, when,

and to what extent lack of an evidentiary hearing in the state court might undercut the deference to state fact-finding that is due under the habeas statute." *Robidoux v. O'Brien*, 643 F.3d 334, 340 (1st Cir. 2011).

B. Critical Need to Eliminate Inconsistencies in Tenth Circuit Precedent and Resolve Problems with Oklahoma's Procedures.

The Tenth Circuit started out with a Ninth Circuit approach as opposed to a Fifth Circuit approach. *See, e.g.*, *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000); *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998). However, over the years the court has been inconsistent, and in a recent Tenth Circuit case that came out after its decision in this case the Circuit appeared to create something similar to the First and Third Circuit approach.

In *Smith v. Aldridge*, 904 F.3d 874 (10th Cir. 2018), the Tenth Circuit was faced with the Oklahoma Court of Criminal Appeals (OCCA) resolving a credibility dispute on the basis of dueling affidavits without an evidentiary hearing. Tenth Circuit Chief Judge Tymkovich reasoned as follows:

> We agree that when a state court denies a request for an evidentiary hearing and then makes factual determinations,

> the failure to hold a hearing *can*, in limited circumstances, render the court's subsequent factual findings unreasonable. This rule is unremarkable. After all, "substance and procedure frequently form a Gordian knot– impossible to disentangle." ...
>
> We consequently have little trouble concluding the procedures a state court employs to make factual determinations– here, deciding whether to order an evidentiary hearing– can affect the reasonableness of the court's subsequent factual determinations. And sometimes, declining to hold an evidentiary hearing may so affect, and indeed, infect, a state court's fact-finding process that it renders the court's factual determinations unreasonable.

Id. at 882 (emphasis in original) (citations omitted).

In *Smith v. Aldridge,* the Tenth Circuit noted it was dealing with a case "in which the parties presented competing contentions to the OCCA, but the evidence before the OCCA did not equally support both sides of the story," and the OCCA could have reasonably concluded without an evidentiary hearing that more evidence supported the State's contention than the contentions of the defendant's "competing affidavits." *Id.* at 884. It thus found the case akin to *Landers v. Warden, Atty. Gen. of Ala.,* 776 F.3d 1288, 1297 (11th Cir. 2015), where the Eleventh Circuit found it not unreasonable to "resolve a credibility dispute on the basis of dueling affidavits, without an evidentiary hearing" because the "state court had

plausible reasons . . . to credit one set of affidavits over another." *Smith,* 904 F.3d at 884.

These cases highlight the unreasonableness of the OCCA's denial of an evidentiary hearing in this case because in this case Grissom's brain damage evidence was not contradicted by opposing evidence. Such unreasonableness is thrown into sharp relief when reviewed in the light of this Court's capital jurisprudence and contrasted to cases such as *Porter v. McCollum,* 558 U.S. 30 (2009). In *Porter*, the state court conducted a two-day evidentiary hearing and the State presented two experts to counter Porter's expert's testimony "regarding the existence of a brain abnormality and cognitive defects." *Id.* at 43. Acknowledging the State's experts found problems with Porter's expert's testing and conclusions, this Court nevertheless found the post-conviction trial court and Florida Supreme Court unreasonable in rejecting the effect Porter's expert's testimony might have had on the jury. *Id.; see also, e.g., Sears v. Upton,* 561 U.S. 945, 949-50 (2010).

In addition, permeating the unreasonableness in this case is the application-for-evidentiary-hearing framework under which it was made.

For a capital defendant in Oklahoma, the question presented in an application for evidentiary hearing is whether he "should be afforded further opportunity to present evidence in support of his claim." *Grissom,* 253 P.3d at 995 (quoting *Simpson v. State,* 230 P.3d 888, 906 (Okla. Crim. App. 2010)). This *threshold stage* is no place to be rejecting scientifically-arrived-at expert evidence without *any* opposing science-based evidence to the contrary.

Contributing to the problem is the OCCA's bizarre formulation for obtaining an evidentiary hearing under its Rule 3.11. As the Tenth Circuit has noted:

> Although Rule 3.11 uses a lower [than *Strickland*] substantive standard ("strong possibility") it erects a *much higher evidentiary hurdle* for meeting that standard: to obtain an evidentiary hearing under Rule 3.11, the movant must provide "clear and convincing evidence" of this "strong possibility." The federal standard does not impose this "clear and convincing evidence" hurdle.

Wilson v. Sirmons, 536 F.3d 1064, 1081 (10th Cir. 2008), *affirmed on reh'g sub nom Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (*en banc*) (emphasis added).

A "much higher evidentiary hurdle" in a death penalty case in particular is wrong. It is too high a hurdle. Moreover, the question that is supposed to be presented in an application for evidentiary hearing is a low-threshold question of whether the appellant should have the opportunity to further develop evidence. Movants are not required to surmise all the exact information that might ensue in the proposed hearing, an extract suffices. *Garrison,* 103 P.3d at 613 n.36.

Yet the way the OCCA treated Mr. Grissom's application was as if it was incumbent on Grissom to produce a proposed transcript of the entirety of Dr. McGarrahan's expert testimony, anticipate possible points of skepticism among the judges, and offer fully-realized scientific explanations. It was not. This was, after all, merely a threshold stage. *Mayes v. State*, 887 P.2d 1288, 1316 (Okla. Crim. App. 1994).

A clear-and-convincing evidentiary hurdle does not belong at a threshold stage of a proceeding. Imagine a civil case (over money rather than a human life) where summary judgment was granted because a party had evidence, but not *clear and convincing* evidence, of a genuine issue of material fact.

Clear and convincing evidence is inappropriate for a threshold stage, especially when a life hangs in the balance. Clear and convincing is an aberrant standard in these circumstances. The vagaries of what state (or circuit) a capital defendant happens to be in should not dictate his or her ability to obtain a hearing or habeas relief.

These arguments provide additional fodder for certiorari for this particular case. Mr. Grissom respectfully submits his case presents an appropriate and compelling vehicle for consideration of these much-disputed and indisputably important issues.

CONCLUSION

This Court should grant certiorari to address the question presented, provide the guidance requested, and additionally assure the Constitution is enforced in this capital case, and others throughout the country. For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

s/ Thomas D. Hird

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Dated this 25th day of March, 2018.
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