Mr. Sandman, Bring Me a Writ: Revisiting the Tenth Circuit's Decision in *Smith v. Aldridge*, 904 F.3d 874 (10th Cir. 2018).

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I. INTRODUCTION

Encapsulated within the Sixth Amendment of the United States Constitution is the guarantee that criminal defendants will be afforded certain rights to ensure that the procedures followed by the state to justify the deprivation of their liberty are fairly implemented.[1] One such right expressly guaranteed to criminal defendants is the right to a public trial "by an impartial jury."[2] Because the Sixth Amendment right to an impartial jury is seen as so essential to the perceived fairness of any given criminal trial, the failure to provide it "violates even the minimal standards of due process" guaranteed by the Fourteenth Amendment.[3] Derived from Western notions of individual liberty, the right to trial by jury has been described as "the most priceless" of rights in safeguarding the dignity and worth of every person whose liberties become threatened by state action in criminal proceedings.[4]

But what happens when a criminal defendant's fate has been left in the hands of jurors who, while physically present in the courtroom during proceedings, allow themselves to doze off during the presentation of the very evidence they have been entrusted to scrutinize? In its review of Raye Dawn Smith's habeas corpus petition from her 2007 conviction in an Oklahoma state court, the Tenth Circuit faced this exact question regarding allegations of jurors sleeping during her criminal proceedings.[5] In affirming the conviction, the Tenth Circuit went to questionable lengths in its attempt

1. U.S. CONST. amend. VI.
2. *Id.*
3. Irvin v. Dowd, 366 U.S. 717, 721–22 (1961) (stating "[i]n the ultimate analysis, only the jury can strip a man of his liberty or his life"); *see also* U.S. CONST. amend. XIV, § 1.
4. *Irvin*, 366 U.S. at 721–22 ("England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.").
5. *See* Smith v. Aldridge, 904 F.3d 874, 878 (10th Cir. 2018).

to show deference to the processes and findings of the Oklahoma state courts, and in so doing, relied upon logically fallacious reasoning.[6]

II. BACKGROUND

A. An Overview of Smith v. Aldridge

On October 11, 2005, Kelsey Smith-Briggs—the two year old daughter of Raye Dawn Smith—was killed by blunt force trauma to the abdomen at her home near Meeker, Oklahoma, where she resided with her mother and stepfather, Michael Porter.[7] Kelsey's death was highly publicized due to the fact that the Department of Human Services already had child welfare workers overseeing Kelsey at the time of her death due to suspected abuse, and the department was blamed for its perceived systematic failure to prevent Kelsey's death.[8]

While Kelsey's stepfather was originally charged by the State of Oklahoma with first-degree murder and child sexual abuse related to Kelsey's death, he instead pleaded guilty to the lesser crime of enabling child abuse in exchange for a thirty-year prison sentence.[9] Raye Dawn Smith was charged in the Lincoln County District Court with child abuse, and alternatively, with enabling child abuse.[10] The case was later transferred in a change of venue to the Creek County District Court (Bristow Division), but this still was not enough in the eyes of Smith's counsel to save her from the "zealous journalistic campaign of demonization of Raye Dawn" in connection with her daughter's death.[11] As noted by the Tenth Circuit, this campaign of demonization included the creation of a website by the family of Kelsey's biological father entitled "Kelsey's Purpose," which "all but accused Smith of causing the child's death" and called for justice against Kelsey's killer.[12]

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6. *See* discussion *infra* Part IV.

7. *See Smith*, 904 F.3d at 878; Kim Morava, *Kelsey's father reacts to $625K wrongful-death settlement*, SHAWNEE NEWS-STAR (July 1, 2009), https://www.news-star.com/article/20090701/NEWS/307019958 [https://perma.cc/5MKW-CMRR].

8. *See* Morava, *supra* note 7. Kelsey's death eventually prompted the passing of new legislation in the state of Oklahoma designed to improve the "training of court-appointed child advocates and to make judges more accountable for their rulings in child-placement cases." *Id.*

9. *See* Nolan Clay, *Stepdad testifies against ex-wife*, OKLAHOMAN (July 11, 2007), https://oklahoman.com/article/3080881/stepdad-testifies-against-ex-wife [https://perma.cc/DYW3-96HZ].

10. Brief for Petitioner at 2, Smith v. Aldridge, No. CIV-12-473-C, 2017 WL 2274474 (W.D. Okla. 2017).

11. *Id.* Indeed, the Tenth Circuit noted in its discussion that despite the trial court's "significant steps" to ensure the jurors were not exposed to media influence due to the heightened public interest in the trial, some selected jurors admitted to having prior knowledge of the case due to media coverage. Smith v. Aldridge, 904 F.3d 874, 888 (10th Cir. 2018). However, the Tenth Circuit felt that the exposure was not severe enough as to prejudice Ms. Smith. *Id.* at 888.

12. *Smith*, 904 F.3d at 878.

The court sentenced Smith to twenty-seven years imprisonment "after an eight-day trial, the jury convicted Smith of one count of enabling child abuse."[13] Subsequently, Smith moved for a new trial in the state district court, alleging numerous errors of procedure that prejudiced her defense, including the allegation that multiple jurors slept throughout the trial, with one female juror in particular sleeping continuously throughout the proceedings.[14] In support of this motion, Smith submitted the affidavits of two jurors supporting the allegation that multiple other jurors slept during the trial, but the trial court denied the motion.[15] In denying the motion, the trial court judge stated he had "constantly and zealously" watched the jury to determine whether they were "alert and attentive, as required by the Court's instructions and by the law."[16] The judge also stated that, while he did observe one juror who appeared to be asleep at one point, he "admonished the jury on the record to remain alert and attentive" and did not see any juror "give any appearance whatsoever of falling asleep" afterwards.[17]

When Smith appealed to the Oklahoma Court of Criminal Appeals, she submitted the affidavits of five jurors, each alleging that one juror (dubbed "L.E.") slept continuously during the trial.[18] One of these affidavits was obtained from the juror L.E. *herself*, in which she admitted that "[d]uring the trial, [she] continually fell asleep and the woman next to [her] was told to nudge [her] to keep [her] awake."[19] L.E.'s apparent explanation for her dozing during trial was "her low potassium levels," for which she had a prescription but "never c[ould] remember to take."[20] While Smith requested an evidentiary hearing on these and other potential violations of her due process rights, the Oklahoma appellate court refused to hold a hearing as to the specific allegation of sleeping jurors because, in its view, "[t]he judge's observations refute[d] the affidavits" of the jurors.[21]

Smith cited the appellate court's blind adherence to the statements of the trial court judge regarding his own performance in observing the jury in Smith's case—and more importantly, its refusal to hold an evidentiary hearing on the matter—as providing justification for seeking habeas relief in the federal courts pursuant to 28 U.S.C. § 2254.[22]

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13. *Id.* at 879.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Smith*, 904 F.3d at 878.
19. *Id.*
20. *Id.*
21. *Id.* at 881.
22. *Id.* at 878; *see also* Brief for Petitioner at 31, Smith v. Aldridge, No. CIV-12-473-C, 2017 WL 2274474 (W.D. Okla. 2017).

B. Legal Background

Under the Sixth and Fourteenth Amendments, criminal defendants are guaranteed the right to an "impartial, competent, and *unimpaired* jury."[23] A jury's verdict must be based upon evidence received in open court, and jurors falling asleep during proceedings and thus being unable to fairly consider the defendant's case could constitute a violation of the criminal defendant's rights.[24] However, juror misconduct, such as sleeping, will not warrant a new trial unless the criminal defendant can make a showing of prejudice—meaning that the defendant did not receive a fair trial.[25] In determining whether any prejudice resulted from a sleeping juror, a court may consider "whether 'the sleeping juror missed large portions of the trial [and] [whether] those portions missed were particularly critical.'"[26] Additionally, a court may review the record to determine whether the district court was made aware of sleeping jurors, whether action was taken, and whether the record establishes that jurors were in fact sleeping.[27]

Under the applicable federal statute, an application for a writ of habeas corpus shall not be granted on any claim adjudicated on the merits in a state court proceeding unless adjudication of the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law," 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."[28] Determinations by the state court as to factual issues are presumed to be correct, and the petitioner has the burden of rebutting this presumption by "clear and convincing evidence."[29]

III. THE TENTH CIRCUIT'S DECISION

Smith claimed that by not ordering an evidentiary hearing as to whether jurors were sleeping during her trial, the Oklahoma appellate court employed a flawed fact-finding process.[30] Smith reasoned that this flawed process resulted in an unreasonable determination of the facts, in part

23. *Smith*, 904 F.3d at 881 (citing Tanner v. United States, 483 U.S. 107, 126–27 (1987)) (emphasis added).

24. *See* United States v. McKeighan, 685 F.3d 956, 973–75 (10th Cir. 2012) (holding that the defendant failed to show that he had been prejudiced by jurors allegedly sleeping during his trial because he failed to identify those portions of the trial that the jurors allegedly slept through or that those portions were critical); *see also* United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000) (holding that there was no evidence that a sleeping juror "missed large portions of the trial or that the portions missed were particularly critical").

25. *Smith*, 904 F.3d at 879 (citing United States v. McKeighan, 685 F.3d 956, 973 (10th Cir. 2012)).

26. *McKeighan*, 685 F.3d at 974 (quoting Freitag, 230 F.3d at 1023).

27. *Id.* (citing United States v. Carter, 433 F.2d 874, 876 (10th Cir. 1970)).

28. 28 U.S.C. § 2254(d) (1996).

29. *Id.* § 2254(e)(1).

30. *Smith*, 904 F.3d at 881.

because the appellate court gave more credit to the trial judge's statements over the affidavits of the jurors.[31] The Tenth Circuit agreed that, when a state court declines to hold an evidentiary hearing, this may indeed infect the state court's fact-finding process and render the court's factual determinations unreasonable.[32] However, under the "stringent standard" contained in § 2254(d)(2), the Tenth Circuit stated that a state court's decision not to hold an evidentiary hearing only renders its factual findings unreasonable "if all '[r]easonable minds' agree that the state court needed to hold a hearing in order to make those factual determinations."[33] While the Tenth Circuit stated that it would have ordered an evidentiary hearing in this case at the outset—and furthermore, that the jurors' affidavits cited by Smith contained serious and credible charges describing the same event—it would not disturb the Oklahoma appellate court's decision to forgo such a hearing, because a reasonable court could have given more credit to the trial judge's statements without holding a hearing.[34]

The Tenth Circuit rationalized that more credibility could be given to the trial judge's statements than the five sworn affidavits of the jurors in several ways.[35] First, the Tenth Circuit stated that since no lawyer on either side made any mention of sleeping jurors during the trial, this supported the appellate court's decision to credit the trial judge's statement.[36] The reasoning was that the lawyers on either side—three for Oklahoma and two for the defense—"had a vested interest in the case" and would have closely watched the jury and raised sleeping jurors as an issue on the record if it actually occurred.[37] While the Tenth Circuit noted that Smith contended her counsel performed ineffectively in failing to object to sleeping jurors, it stated that this could not explain the lack of objection from the State's lawyers as well.[38]

Secondly, while the judge referenced sleeping jurors twice on the record—reminding jurors to "be sure [their] eyes [were] open at all times" and, at another point, to "'redouble [their] efforts to remain alert and attentive' and remember 'what [he] said the other day about the lower eyelid catching the upper eyelid'"—these references added *more* credibility to the trial judge's statement, according to the Tenth Circuit.[39] The justification for this was that the judge must have been watching the jury attentively to

31. *Smith*, 904 F.3d at 881; *see* 28 U.S.C. § 2254(d)(2).
32. *Smith*, 904 F.3d at 882.
33. *Id.* at 883 (citing Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015)).
34. *Id.* at 885.
35. *Id.*
36. *Id.* at 883.
37. *Id.*
38. *Smith*, 904 F.3d at 883.
39. *Id.* at 884.

have noticed a juror sleeping, and the fact that he took corrective measures only added to his credibility that no further sleeping occurred.[40]

IV. COMMENTARY

In its attempt to show the utmost deference to the processes and findings of Oklahoma's courts under the standard contained within the federal habeas corpus statute, the Tenth Circuit provided rationalizations that may seem reasonable when viewed from a distance, but reveal cracks in their foundations upon closer inspection.[41] More specifically, the Tenth Circuit's line of reasoning suffers from a logical fallacy known as "affirming the consequent."[42]

Legal arguments frequently tend to be structured in a particular form that philosophers have dubbed "mixed hypothetical syllogisms."[43] Syllogisms in general are arguments comprised of two distinct but related premises used to come to a logical conclusion based on those premises.[44] A "mixed hypothetical syllogism" is a three-part argument that uses both a "conditional premise" and a "categorical premise" in order to come to a logical conclusion related to the components of the conditional premise.[45] A conditional premise is "an 'if . . . then' proposition"; for example, if A (the antecedent) is true, then B (the consequent) is true.[46] A categorical premise is a proposition framing the subject matter of the syllogism.[47] To simplify these concepts, consider the following mixed hypothetical syllogism:

> (1) Conditional premise: If my professor won the lottery (the antecedent), then she would be very happy (the consequent).
>
> (2) Categorical premise: My professor won the lottery (affirming the antecedent).
>
> (3) Conclusion: Therefore, my professor must be very happy.[48]

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40. *Id.*
41. *Id.* at 883 (stating "our review must be 'particularly deferential to our state-court colleagues'").
42. *See* Stephen M. Rice, *Conspicuous Logic: Using The Logical Fallacy of Affirming The Consequent As A Litigation Tool*, 14 BARRY L. REV. 1, 10–11 (2010) (discussing rules of formal logic and how they can be used in crafting effective legal arguments).
43. *Id.* at 5–6.
44. *Id.* at 5.
45. *Id.* at 6, n.17.
46. *Id.*
47. *Id.*
48. Rice, *supra* note 42, at 6–7; *see also* Stephen West, *Episode 73 – How To Win An Argument Pt. 1*, PHILOSOPHIZE THIS! (Dec. 1, 2015), http://philosophizethis.org/how-to-win-an-argument-pt-1/ [https://perma.cc/V247-9NY5] (providing a discussion on various forms that logical fallacies can take and how they are commonly used). A classic example demonstrating the proper structure of a syllogism taken from philosophy is that "[a]ll men are mortal. Socrates is a man. Therefore, Socrates is mortal." *See* David McRaney, *YANSS 067 – The Fallacy Fallacy*, YOU ARE NOT SO SMART (Jan. 22, 2016), https://youarenotsosmart.com/2016/01/22/yanss-067-the-fallacy-fallacy/ [https://perma.cc/ASK8-

The above syllogism is logically valid in form, but the following related syllogism is not, due to a change in the categorical premise:

> (1) Conditional premise: If my professor won the lottery (the antecedent), then she would be very happy (the consequent).
>
> (2) Categorical premise: My professor is very happy (affirming the consequent).
>
> (3) Conclusion: Therefore, my professor must have won the lottery.[49]

This syllogism is logically invalid in form, because it affirms the consequent to come to a conclusion about the antecedent of the conditional premise.[50] Simply put, there could obviously be many reasons that my professor is happy that have nothing at all to do with her winning the lottery, and her happiness cannot be used to support the conclusion that she has won the lottery.

The Tenth Circuit's rationale for upholding the Oklahoma appellate court's decision to forgo an evidentiary hearing is largely based upon two different conditional premises:

> (1) If no jurors slept during Smith's trial, then the record would show the attorneys had not raised it as an issue; and
>
> (2) If the judge had been paying close attention to the jury throughout the whole trial, then he would have caught jurors sleeping.[51]

With the first conditional premise, the Tenth Circuit concluded that because the record reflected that no attorney raised sleeping jurors as an issue, this was evidence of the fact that no jurors were sleeping.[52] With the second conditional premise, the Tenth Circuit stated that because the judge did in fact catch a juror sleeping on one occasion, this means he must have been paying close attention to the jury throughout the whole trial.[53] The problem with each of these rationales is that their underlying syllogisms are invalid in form due to the fact that they affirm the consequents of their conditional premises, and thus "cannot be relied upon to ensure the truth of the conclusion."[54]

The Tenth Circuit failed to contemplate other conflicting factors that could explain the record before it. As to the assertion by the Tenth Circuit that Oklahoma's lawyers would have spoken up about jurors sleeping, this ignores the very real possibility that not objecting in such a circumstance

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QNTH] (discussing the usefulness of understanding logical fallacies in forming proper arguments, while also addressing concerns with using them as a means of defeating another's argument).

49. Rice, *supra* note 42, at 6–7.
50. *Id.* at 10.
51. *See* Smith v. Aldridge, 904 F.3d 874, 883–884 (10th Cir. 2018).
52. *See id.* at 883.
53. *See id.* at 884.
54. Rice, *supra* note 42, at 7.

might have been a sound legal strategy for the State.[55] In this highly publicized and controversial case, it is unlikely that Oklahoma's lawyers would have wanted anything on the record that would jeopardize the conviction sought, and they would have likely wanted to minimize the chance of a successful appeal following the conviction.[56] Objecting to a sleeping juror would only serve to provide Smith with a compelling basis to move for a new trial following conviction. Furthermore, Oklahoma's attorneys would likely have had no issue at all with jurors sleeping through Smith's presentation of her defense. After all, why not just let sleeping jurors lie?

Secondly, the trial judge's statements on the record about the juror sleeping in one instance simply show that he was paying attention in that particular instance, and leave open the possibility that he failed to note all other instances of jurors sleeping.[57] It does not take a drawn out syllogism to explain that the trial judge was limited to his own perspective, and that he would not be aware of those instances of jurors sleeping which he did not personally observe. It is absurd that the trial judge's statements were not subject to closer critique when weighed against the collective perspective of five sworn affidavits—each relating one consistent story of juror misconduct.[58] The Tenth Circuit's analysis also assumes that the trial judge in this case would have no incentive to defend himself from critique for the role he played in this highly publicized and controversial criminal trial in a state where judges are elected to limited terms.[59]

Simply put, there is no sound basis for the Tenth Circuit to have concluded that the evidence before the appellate court clearly weighed in favor of the conclusion that no juror slept throughout Smith's trial.[60] As such, the Tenth Circuit should have found that no reasonable court could have made a credibility determination in this case absent an evidentiary hearing, and that the Oklahoma appellate court's decision to forgo such a hearing was in violation of Smith's due process rights.

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55. *Strategy as Constituting Reasonable Basis for Failing to Make Motions or Objections*, *in* 26 STANDARD PENNSYLVANIA PRACTICE § 132:184 (2d ed. 2019) (suggesting that declining to object can be a reasonable legal strategy when attempting to avoid drawing the jury's attention to information damaging to one's case).

56. *See Smith*, 904 F.3d at 878.

57. *See id.* at 884.

58. *See id.* at 885.

59. *See* OKLA. CONST. art. VII, § 9 (stating "District Judges and Associate District Judges shall be elected by the voters of the several respective districts or counties at a non-partisan election in the manner provided by statute").

60. *See Smith*, 904 F.3d at 884.

V. CONCLUSION

With the failure of her habeas petition, Smith now has no option but to serve the remainder of her twenty-seven year sentence, set to expire in 2034.[61] Regardless of the horrible nature of the crime for which she was convicted, the Tenth Circuit had a duty to safeguard Smith's constitutionally protected rights, and it is unfortunate that it relied upon fallacious logic in denying Smith the opportunity to ensure the procedure used to keep her incarcerated was carried out in a proper manner.

61. Kim Morava, *Out of appeals: Conviction affirmed for Kelsey's mom*, SHAWNEE NEWS-STAR (Sept. 21, 2018), https://www.news-star.com/news/20180921/out-of-appeals-conviction-affirmed-for-kelseys-mom [https://perma.cc/3EZT-TJU7].