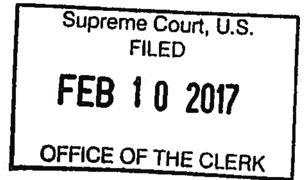

No. 16-7393

(Capital Case)

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE SMITH,
Petitioner,
v.
TERRY ROYAL, Warden,
Oklahoma State Penitentiary,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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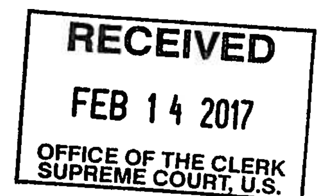

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REPLY TO BRIEF IN OPPOSITION

I. Oklahoma's *Atkins* Regime Undoubtedly Creates a Substantial Risk that Intellectually Disabled Offenders Will Be Executed.

Respondent casts off the compelling question presented by Petitioner, deeming it undeserving of this Court's attention.[1] But if the error complained of is allowed to persist, then a deeply intellectually impaired Mr. Smith will be executed without even an opportunity to prove his apparent ineligibility for that penalty. An unconstitutional execution will take place in this case, and others to follow, without this Court's intervention.

Respondent recognizes this Court has unequivocally and categorically banned states from executing the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). But despite recognizing this clear constitutional prohibition, Respondent

[1]Respondent's question presented in no way addresses, or even alludes to, the specifics of the important constitutional issue presented – that is, whether Oklahoma's failure to consider the inflationary impact of obsolete testing norms on IQ scores is contrary to or an unreasonable application of *Atkins v. Virginia* when Oklahoma employs a cutoff IQ score of 75 on a single test to preclude *Atkins* relief. Instead, in both his question presented and in his argument, Respondent heavily relies on Rule 10 of *Rules of the Supreme Court of the United States*, which advises "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law." Without conceding Mr. Smith's petition involved only misapplication of a properly stated rule of law, Rule 10 also contemplates the broad discretion of this Court in granting certiorari review, something Respondent neglects to mention. *See* Rule 10 ("[t]he following [reasons], although *neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons the Court considers. . . .") (emphasis added).

would give states carte blanche to determine who is and who is not intellectually disabled for the purposes of *Atkins* protection. *See Brief in Opposition* at 11-12 (citing *Bobby v. Bies*, 556 U.S. 825, 831 (2009)). The issue in *Bies* did not involve whether Ohio was using the "appropriate ways" to enforce the *Atkins* restriction. Instead the issue in *Bies* was whether the double jeopardy clause barred a renewed inquiry into the matter of the defendant's intellectual disability for the purposes of issue preclusion when the state courts, in a pre-*Atkins* posture, found the defendant's "mild to borderline mental retardation merit[ed] some weight in mitigation." *Bies*, 556 U.S. at 828. Of note, Ohio's *Atkins* scheme at the time of *Bies* did not involve a cutoff IQ score as an exclusionary diagnostic criterion like Oklahoma's scheme. *Id.* at 831 (citing *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (finding IQ tests are "one of the many factors that need to be considered, [but] they alone are not sufficient to make a final determination [of intellectual disability]")).

Respondent does not deny that under Oklahoma's *Atkins* regime, if an offender receives a single IQ score over 75, then *nothing* else matters for the purposes of determining whether he is intellectually disabled. This approach is completely inimical and contrary to *Atkins*, as endorsed by *Hall v. Florida*, 134 S. Ct. 1986 (2014), because Oklahoma's courts "cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's

failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, 134 S. Ct. at 1994. As this Court has acknowledged, "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Id.* at 2001.

Contrary to Respondent's position, *Atkins* tasked states with developing "*appropriate* ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (emphasis added). Oklahoma's scheme ostensibly aimed at enforcing the *Atkins* restriction erects an insurmountable barrier if an offender has even one IQ score above 75, regardless of whether that IQ score was obtained on a long-outdated test, he has other IQ scores below 75, he has significant deficits in his adaptive behavior, and he manifested his disability before age 18, Surely, Oklahoma's *Atkins* scheme is not an *appropriate* procedure to enforce the constitutional restriction. This unreasonable reliance on a single IQ score, without any consideration of the inflationary impact of aging test norms and other relevant diagnostic criteria, certainly creates perverse incentives for unethical prosecutors to thwart a defendant's *Atkins* claim by purposely relying on or administering a long-outdated IQ test, and Respondent refuses to deny as much.

Moreover, Respondent's assertion that *Hall* "had no relevance to the Tenth Circuit's review under § 2254(d)" because *Hall* "was not in existence at the time of the OCCA's adjudication" of Mr. Smith's *Atkins* claim is misplaced. *See Brief in Opposition* at 13. First, Mr. Smith's argument has always been that the OCCA's decision was contrary to and an unreasonable application of *Atkins* and its unequivocal and categorical constitutional ban on the execution of the intellectually disabled. And second, *Hall* did not announce a new constitutional rule; instead, it simply illuminated the proper interpretation and application of *Atkins*. *See Hall*, 134 S. Ct. at 1993 (finding "[t]he question this case presents is how intellectual disability must be defined in order to implement . . . the holding of *Atkins*"). *Hall*'s illumination of the *Atkins*' restriction is no different than this Court's reiteration and clarification of *Strickland v. Washington*, 466 U.S. 668 (1984) in *Williams v. Taylor*, 529 U.S. 362 (2000).[2]

After arguing that *Hall* provides no refuge to Mr. Smith because it was not clearly established law at the time the OCCA adjudicated Mr. Smith's *Atkins* claim, Respondent next maintains that "[e]ven if *Hall* were considered, it would not entitle

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[2]Recognizing that *Hall* does nothing more than clarify the constitutional restriction announced in *Atkins*, the Sixth Circuit has applied *Hall* in the context of § 2254(d)(1) in a case with an *Atkins* claim that was adjudicated by the state court well before the *Hall* opinion was rendered. *See Van Tran v. Colson*, 764 F.3d 594, 612-13 (6th Cir. 2014).

Petitioner to certiorari review." *Brief in Opposition* at 13. Specifically, Respondent claims that *Hall* stands only for the proposition that "[t]his Court found error in Florida's refusal to take the standard error of measurement into consideration" while using a hard cutoff IQ score of 70. *Id.* at 14. In coming to this conclusion, Respondent relies on only the most limited and parsimonious reading of *Hall*.

What Respondent fails to mention is that this Court found Florida's practice unconstitutional because it was restrictive and diverged from professional norms. *Hall*, 134 S. Ct. at 1990, 1995, 2001. Further, Respondent conveniently glosses over that this Court recognized "[i]ntellectual disability is a condition, not a number. . . . Courts must recognize, as does the medical community, that the IQ test is imprecise." *Id.* at 2001. Like Florida's scheme, Oklahoma's "takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id.* at 1995. And like Florida's scheme, Oklahoma's use of a cutoff IQ score as an exclusionary diagnostic criterion, together with its refusal to consider the inflationary impact of aging test norms, creates a substantial risk of executing those who suffer from intellectual disability.

What is more, Respondent's declaration that "Petitioner has failed to show that consideration of the Flynn Effect is even a prevailing clinical practice" falls flat. *Brief in Opposition* at 15. The two most preeminent clinical organizations that this

Court repeatedly relied on in *Atkins* and its progeny,[3] the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association, mandate consideration of the impact of aging test norms. *See Petition for Certiorari* at 15-16.

Finally, Respondent addresses each prong of Mr. Smith's argument – Oklahoma's use of a hard cutoff IQ score and its refusal to consider the inflationary impact of aging test norms – singularly. What Respondent fails to acknowledge is that Petitioner's argument rests on the combination of these factors. The use of a cutoff IQ score as an exclusionary criterion without any consideration of the inflationary impact of aging norms promotes circumventing the constitutional prohibition announced in *Atkins* and gives life-or-death value to potentially inaccurate scores. Such a scheme offends notions of truth and accuracy, which are long-held values of this Court, particularly in death penalty cases. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 362 (1977) (reversing death sentence because of potential that sentencer might have rested its decision on erroneous or inaccurate information that defendant had no opportunity to explain); *California v. Ramos*, 463 U.S. 992, 1004 (1983) (finding instruction constitutional that gave accurate sentencing information

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[3] *See Atkins*, 536 U.S. at 308 n.3; *Hall*, 134 S. Ct. at 1990, 1995, 2000; *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015).

regarding potential for commutation); *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (finding where *truthful* information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process requires that defendant be allowed to bring such truthful information to the jury's attention).

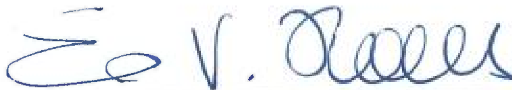
II. Despite Respondent's Protestations, Uncertainty and Inconsistency Exist Among the Lower Courts Regarding the Treatment of the Flynn Effect in *Atkins* cases.

To determine whether there is inconsistency in the lower courts regarding the treatment of the Flynn Effect in *Atkins* cases, one need look no further than the Tenth Circuit decision that served as the cornerstone in determining this issue in Mr. Smith's case: "[F]ederal and state courts are divided over the use of the Flynn Effect." *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016). In fact, Respondent concedes as much. *See Brief in Opposition* at 17 ("certainly there may be a disagreement among [lower] courts as to [the Flynn Effect's] validity, applicability, or implementation," but no lower courts mandate its application by either *Atkins* or *Hall*). This Court should grant certiorari review to settle the disagreement among the lower courts.

CONCLUSION

Without this Court's intervention, *Atkins*' promise will go unfulfilled and a deeply intellectually impaired man will be executed without even an opportunity to establish his ineligibility for such punishment. Mr. Smith respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,



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Dated this 10th day of February, 2017