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.

PETITION FOR REHEARING

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April 11, 2017

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INTRODUCTION

Pursuant to Supreme Court Rule 44.2, Petitioner, Michael DeWayne Smith, respectfully requests rehearing and reversal of the order entered by the Court on March 20, 2017, denying his Petition for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit. Specifically, Petitioner requests this Court enter an order granting, vacating, and remanding ("GVR") the petition because this Court's opinion in *Moore v. Texas*, 137 S. Ct. 1039, No. 15-797, 2017 WL 1136279 (Mar. 28, 2017) represents an "intervening circumstance[] of a substantial or controlling effect." *See* Sup. Ct. R. 44.2; *see also, e.g., Liberty University v. Geithner*, 133 S. Ct. 679 (2012) (granting petition for rehearing, vacating judgment, and remanding to court of appeals for further consideration in light of recent precedent).[1]

I. This Court's Recent Decision in *Moore v. Texas* Confirms That Oklahoma's Use of a Cutoff IQ Score and its Refusal to Consider the Inflationary Impact of Aging Test Norms to Preclude so Much as an Opportunity to Prove One's Ineligibility for the Death Penalty Is Contrary to *Atkins v. Virginia*.

This Court has made crystal clear that adjudications of intellectual disability for the purpose of *Atkins* protection must be "'informed by the views of medical experts.'" *Moore,* 137 S. Ct. 1039, 2017 WL 1136278 at *4 (quoting *Hall v. Florida*,

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[1]Further, the Court may modify any judgment brought before it, and vacate and remand that case to the court below "as may be just under the circumstances." 28 U.S.C. § 2106.

134 S. Ct. 1986 (2014)). Such command "cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus" because *Atkins* determinations "not aligned with the medical community's information . . . 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* (quoting *Hall*, 134 S. Ct. at 2000). Oklahoma's use of a cutoff IQ score as a diagnostic criterion, along with its reliance on outmoded IQ scores, "adhere[s] to superseded medical standards," *id.* at 8, in the area of intellectual disability; hence, the Oklahoma regime creates an unacceptable risk of executing the intellectually disabled. *See* Petition for Writ of Certiorari at 14-16 (discussing the adjustment of IQ scores in light of age of testing norms as endorsed by the American Psychiatric Association and the American Association on Intellectual Developmental Disabilities).

In *Moore*, this Court further confirmed that when making *Atkins* determinations, courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore,* 2017 WL 1136278 at *11. Specifically, the defendant in *Moore* had received scores of 74 and 78 on IQ tests. *Id.* at *18 (Roberts, C.J., dissenting). Focusing only on the score of 74, which yields an IQ range of 69 to 79, this Court

held that because the lower end of the defendant's IQ range fell at or below 70, the state court was required "to move on to consider Moore's adaptive functioning." *Id.* at 10. The defendant's score of 78 did not create an insurmountable bar to the continued inquiry into his *Atkins* status despite that such score, when adjusted for the standard error of measurement, yields an IQ range of 73-83.

In Mr. Smith's case, no court has ever continued the required intellectual disability inquiry and considered other evidence – namely, evidence of the significant limitations in his adaptive functioning[2] – despite that he has an IQ score *lower* than the 74 scored by the defendant in *Moore*. In 2009, Mr. Smith scored a 71 on the WAIS-IV, no doubt resulting in an IQ range where the lower end falls below 70. But instead of moving on to consider Mr. Smith's adaptive functioning deficits, the courts below summarily stopped the inquiry because Mr. Smith also received scores of 76 and 79, both of which were inflated due to norm obsolescence. Any conclusion that Mr. Smith is not intellectually disabled based solely on these three IQ scores is irreconcilable with *Atkins v. Virginia*, 536 U.S. 304 (2002), as confirmed by *Hall* and *Moore*.

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[2]*See* Petition for Writ of Certiorari at 7-8 for a detailed discussion of Mr. Smith's adaptive behavior deficits.

As this Court continues to confirm, a state cannot constitutionally execute anyone in the entire category of intellectually disabled offenders, even those considered mildly intellectually disabled. *See Moore,* 2017 WL 1136278 at *9 (holding the Constitution "restrict[s] . . . the State's power to take the life of *any* intellectually disabled individual"). And while states are tasked with developing the "appropriate ways to enforce" this constitutional restriction, the discretion of the states is "not unfettered." *Id.* Oklahoma's *Atkins* regime offers no constitutional protection to those offenders with scores that might place them in the upper part of the intellectually disabled range. Indeed, under Oklahoma's regime, a defendant's single score above 75 prevents further inquiry into his intellectual disability, even if he has scores below 75. Such practice is contrary to *Atkins*, as confirmed by *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) and now *Moore v. Texas*, 137 S. Ct. 1039, No. 15-797, 2017 WL 1136279 (Mar. 28, 2017).

CONCLUSION

This Court's decision in *Moore* is an "intervening circumstance of a substantial or controlling effect" relative to the Petition here. Petitioner, Michael DeWayne Smith, respectfully requests that this Court grant a rehearing and issue a GVR order remanding this case to the Tenth Circuit for consideration in light of its decision in *Moore*, and for such relief to which he may be entitled.

Respectfully submitted,

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Dated this 11th of April, 2017

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

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CERTIFICATE OF SERVICE

I, Emma V. Rolls, Assistant Federal Public Defender, a member of the Bar of this Court, pursuant to Rule 29, hereby certify that on this 11th day of April, 2017, I served a copy of the *Petition for Rehearing* via electronic email service and also by U.S. mail, first-class postage prepaid, addressed to Counsel for Respondent as follows:

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