Case No. 16-7393

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

MICHAEL DEWAYNE SMITH,

Petitioner,

v.

TERRY ROYAL, WARDEN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

***THOMAS LEE TUCKER, OBA #20874**
ASSISTANT ATTORNEY GENERAL

313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 FAX
ATTORNEYS FOR RESPONDENT
fhc.docket@oag.ok.gov
thomas.tucker@oag.ok.gov

***Counsel of record**

January 31, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

CAPITAL CASE
QUESTION PRESENTED

Whether this Court should grant certiorari to review the United States Court of Appeals for the Tenth Circuit's application of a properly stated rule of law, namely that the Oklahoma Court of Criminal Appeals decision was not contrary to, or, an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002).

No. 16-7393

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 2016

Michael Dewayne Smith,

***Petitioner*,**

-vs-

Terry Royal, Warden,

***Respondent*.**

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

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Opinion of the United States Court of Appeals for the Tenth Circuit entered June 6, 2016. *See Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016).

STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of Oklahoma County, Case No. CF-2002-1329, convicting him of two counts of first degree murder, one count of burglary in the first degree, one count of robbery with a firearm, and one count of first degree arson. Petitioner's

convictions are the result of a jury trial in which he was found guilty beyond a reasonable doubt of breaking into the home of Janet Moore and murdering her, then robbing the A-Z Mart, murdering the clerk, Sarath Pulluru, and setting the store on fire. The jury found the existence of the same two aggravating circumstances for each murder count, namely: (1) each murder was especially heinous, atrocious or cruel; and (2) there existed a probability that Petitioner would commit future acts of violence constituting a continuing threat to society. *See* Okla. Stat. tit. 21, § 701.12 (2011). At the conclusion of Petitioner's trial, the jury recommended sentences of death for the murders, twenty years imprisonment for the burglary, thirty years imprisonment for the robbery, and thirty-five years imprisonment for the arson. The trial court sentenced Petitioner accordingly on October 14, 2003.

From his convictions, Petitioner filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA). On April 26, 2007, the OCCA affirmed Petitioner's convictions and sentences. *See Smith v. State*, 157 P.3d 1155, 1180 (Okla. Crim. App. 2007). Petitioner sought a rehearing in the OCCA which was denied on June 26, 2007. *See* 06/26/2007 Order, OCCA Case No. D-2003-1120 (unpublished). This Court denied certiorari on February 19, 2008. *See Smith v. Oklahoma*, 552 U.S. 1191 (2008). Petitioner's first application for post-conviction relief was denied by the OCCA in an unpublished order on February 24, 2009. *See Smith v. State*, OCCA Case No. PCD-2005-142 (Okla. Crim. App. December 16, 2015) (unpublished). Petitioner's second

application for post-conviction relief was denied on November 5, 2010. *See Smith v. State*, 245 P.3d 1233 (Okla. Crim. App. 2010).

Petitioner next sought federal habeas relief in the United States District Court for the Western District of Oklahoma. The district court denied relief on September 16, 2014 in an unpublished opinion. *See Smith v. Trammell*, No. CIV-09-293-D, 2014 WL 4627225 (W.D.Okla. Sept. 16, 2014) (unpublished). Petitioner appealed the denial of habeas relief to the United States Court of Appeals for the Tenth Circuit. After briefing and oral argument, the Tenth Circuit affirmed the district court's denial of habeas relief on June 6, 2016. *See Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016).

STATEMENT OF THE FACTS

The OCCA set forth the relevant facts in its published opinion on direct appeal. Such facts are presumed correct under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(e)(1). Finding Petitioner failed to rebut the presumption, the district court adopted the OCCA's factual summary as its own. *See Smith v. Trammell*, No. CIV-09-293-D, 2014 WL 4627225, at 1-3. Likewise, the Tenth Circuit also found Petitioner had not rebutted the presumption and based its facts properly on OCCA's factual summary. *See Smith v. Duckworth*, 824 F.3d at 1238-1239. The following is the OCCA's factual summary as adopted by the district court and court of appeals.

> [Petitioner] was a member of the Oak Grove Posse, a subset of the Crips gang in Oklahoma City. On November 8, 2000, three members of the Oak Grove Posse attempted to rob Tran's Food Mart in south Oklahoma City. The three

robbers were Teron "T–Nok" Armstrong, Kenneth "Peanut" Kinchion, and Dewayne "Pudgy–O" Shirley. During the course of the robbery attempt, the owner of the store shot and killed Armstrong. Kinchion and Shirley were eventually arrested. [Petitioner] was not involved in the attempted robbery but had close personal ties to Armstrong.

On Friday, February 22, 2002, two days before the trial of Kinchion and Shirley was scheduled to start, [Petitioner] left his apartment in the Del Mar Apartments in Oklahoma City early in the morning. His roommate, Marcus Berry (also known as Marcus Compton), saw [Petitioner] take a .357 caliber revolver with him. [Petitioner] went first to Janet Moore's apartment looking for her son Phillip Zachary who he believed was a police informant. [Petitioner] had earlier told Berry that "snitches need to be dead."

The evidence supports the conclusion that [Petitioner] arrived at Moore's apartment sometime before 6:30 a.m. Shoe prints indicated that [Petitioner] kicked in her front door and then her bedroom door. Moore began screaming, and, at approximately 6:30 a.m., a downstairs neighbor heard arguing between a man and a woman and then a single "pop" followed by footsteps.

Later that morning around 7:30 a.m. [Petitioner] arrived at A–Z Mart, a convenience store approximately fifteen miles from the Del Mar Apartments. A–Z Mart was immediately next door to Tran's Food Mart, the site of the earlier robbery attempt where Armstrong had been killed. The clerk on duty that morning at A–Z Mart was Sarath "Babu" Pulluru. Pulluru was filling in for the store owner who was taking the day off. [Petitioner] told detectives that he emptied two pistols into Pulluru, took some money, and used bottles of Ronsonol lighter fluid to start fires in the store. [Petitioner] said he set fire to the cash register, Pulluru's body, and a back room in order to destroy evidence. Shoeprints at the scene tracked Pulluru's blood from the cash register area, where his body was found, down the aisle to where the Ronsonol lighter fluid was displayed

for sale. The bloody shoe prints at the A–Z Mart were similar to the shoe prints found at Moore's apartment.

At 1:00 or 2:00 a.m. the next morning, [Petitioner] returned to his apartment and told Berry that he had killed Janet Moore. He also told Berry that he had done something else to "take care of business," that he had avenged his family.

At 3:00 or 4:00 a.m., [Petitioner] went to Sheena Johnson's apartment and told her that he had killed two people that day. During that conversation, [Petitioner] told her that he had killed Phillip Zachary's aunt because Zachary had been "snitching." Johnson had already learned of Moore's murder and told [Petitioner] that the victim was Zachary's mother, not his aunt. In response, [Petitioner] shrugged his shoulders, and said "oh well." [Petitioner] showed Johnson how he held his gun when he shot Moore and went on to say that he had also killed a person at a "chink" store. During his description of the second homicide, [Petitioner] mentioned something about one of his fellow gang members having his head blown off during a robbery. He said he would kill anyone who crossed his family. [Petitioner] also mentioned that someone had been on television "dissing" his set in regard to that robbery. Subsequently, Johnson contacted CrimeStoppers and reported the conversation. When she made that report, [Petitioner] was already in police custody on a different matter.

Three days after [Petitioner] was detained, detectives interviewed him. [Petitioner] was given Miranda warnings, waived them, and agreed to talk. During the interview, [Petitioner] first denied committing the murders, then admitted only to being present, and finally admitted committing both murders. He explained he killed both victims in retaliation for wrongs done him or his family. He told detectives he went to Moore's apartment looking for her son, that Moore panicked and started screaming, so he had to kill her. He said he killed Pulluru in retaliation against the store owner who shot Armstrong and in retaliation for disrespectful comments about Armstrong in the press

> attributed to someone from the A–Z Mart Mart [sic]. According to [Petitioner], as he fired off the initial barrage of bullets, Pulluru asked "what did I do?" [Petitioner] told him: "[M]y mother-f* * * * * * little homey, my people on the set, like, bam, bam, before he died I let him know, like this is for my little homey that's dead. Bam, bam, bam." [Petitioner] also told detectives that he had disposed of the clothes he had worn during the murders, that he had wiped down Moore's apartment to eliminate fingerprints, and that he set fire to whatever he had touched in the A–Z Mart to destroy evidence.

Smith, 157 P.3d at 1160-1162.

REASONS FOR DENYING THE WRIT

Petitioner submits no compelling reason for this Court to grant certiorari review. Further, he has not demonstrated that the Tenth Circuit's decision conflicts with the decision of another federal court of appeals or with a state court of last resort. Nor has Petitioner demonstrated that the Tenth Circuit's holding in this case departed from "the accepted and usual course of judicial proceedings" in such a manner that this Court's supervisory power should be exercised. *See* Rule 10, *Rules of the Supreme Court of the United States*. Finally, Petitioner has not demonstrated the Tenth Circuit decided an important federal question that either has not been decided by this Court, or conflicts with a relevant decision of this Court. *Id.*

PETITIONER'S CHALLENGE TO THE TENTH CIRCUIT'S APPLICATION OF A PROPERLY STATED RULE OF LAW DOES NOT WARRANT CERTIORARI REVIEW AS OKLAHOMA'S STATUTES AND CASE LAW EMPLOYING A CUTOFF IQ SCORE AS AN ABSOLUTE BAR TO FURTHER DETERMINATION OF INTELLECTUAL DISABILITY IS NOT CONTRARY TO, OR, AN UNREASONABLE APPLICATION OF *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002).

Petitioner raises a single issue that does not warrant certiorari review. Petitioner alleges that Oklahoma's statute regarding the determination of intellectually disabled for the purposes of the imposition of the death penalty is contrary to *Atkins v. Virginia*, 536 U.S. 304 (2002), because the statute employs a cutoff IQ score as a absolute bar to a further determination. The Oklahoma Statute provides in pertinent part that:

> The defendant has the burden of production and persuasion to demonstrate mental retardation by showing significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that the onset of the mental retardation was manifested before the age of eighteen (18) years. An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years. In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account.
>
> However, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized,

> standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.

Okla. Stat. tit. 21, § 701.10b(C) (2011). Neither the statute, nor the OCCA's interpretation of it, are contrary to, or, an unreasonable application of *Atkins*. Therefore, the Tenth Circuit's denial of habeas relief was proper and this issue does not warrant certiorari review.

A. History of the claim.

Petitioner first raised the claim of intellectual disability in his second application for post-conviction relief filed in 2010. Petitioner submitted three IQ scores, 76 (2001), 79 (2003), and 71 (2009), as evidence of sub-average general intellectual functioning. *Smith*, 245 P.3d at 1237. Petitioner argued that when those scores are downward adjusted for the standard error of measurement, and then again downward adjusted for the so-called "Flynn Effect," each of his scores fell below the adjusted cutoff IQ score of 70 as required by Okla. Stat. tit. 21, § 701.10b(C). The OCCA first found that two of the three scores were available prior to Petitioner's trial, and as the issue could have been raised at trial, on direct appeal, or in his first application for post-conviction relief, the claim was now waived and procedurally barred. *Smith*, 245 P.3d at 1236-1237. However, the OCCA still reviewed the merits of the claim under the rubric of ineffective assistance of post-conviction counsel. *Id.*

The OCCA recognized that the Oklahoma Legislature had already taken into account the standard error of measurement, and that the Flynn Effect had not

achieved universal acceptance in other courts to have any relevant consideration. *Smith*, 245 P.3d at 1237 n.6. The OCCA further recognized that because the standard error of measurement was built into the statute, "the Legislature has implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70." *Smith*, 245 P.3d at 1237. Accordingly, the OCCA determined that because Petitioner had two scores of 76 or higher, Petitioner was not entitled to any further *Atkins* proceedings on the determination of intellectual disability. *Id.*

Petitioner then raised the claim in his petition for habeas relief in the United States District Court for the Western District of Oklahoma. The district court bypassed the procedural bar and reviewed the merits of his claim. *Smith*, No. CIV-09-293-D, 2014 WL 4627225, at 13. The district court relied on *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012) (("The OCCA's failure to account for and apply the Flynn Effect was not 'contrary to' or 'an unreasonable application of' clearly established federal law, 28 U.S.C. § 2254(d)(1), because . . . . *Atkins* does not mandate an adjustment for the Flynn Effect.") (internal citation omitted)). The district court held, "[t]he problem with this argument, however, is that Oklahoma does not recognize the Flynn Effect, and to date, its consideration has not been mandated by the Supreme Court." *Smith*, 2014 WL 4627225, at 14. The district court went on to note that, even though it was not law when the OCCA made its determination, the OCCA's ruling was not contrary to, or, an unreasonable application of *Hall v. Florida*, 572 U.S. __, 134 S.

Ct. 1986 (2014). "In *Hall* . . ., the Supreme Court recently found Florida's I.Q. test score cutoff of 70 to be unconstitutional. Unlike Oklahoma, Florida did not take into consideration the standard error of measurement. *Hall*, 134 S. Ct. at 1994-1996." *Smith*, 2014 WL 4627225, at 14 n.13.

Petitioner appealed the district court's denial of habeas relief to the Tenth Circuit. The Tenth Circuit first recognized the deference owed to the OCCA. "The OCCA evaluated the merits of this claim and our review is therefore governed by AEDPA." *Smith*, 824 F.3d at 1242. The Tenth Circuit then affirmed the district court's denial of habeas relief reasoning that:

> [Petitioner] argues that "Oklahoma's rigid IQ score cut-off" is contrary to and an unreasonable application of *Atkins*. Although [Petitioner] couches this argument broadly in terms of the Oklahoma law's failure to comport with clinical practices in evaluating intellectual-disability claims, the only clinical practices he identifies as relevant to our inquiry are adjustment for the SEM and the Flynn Effect.
>
> With respect to the SEM, *Atkins* itself does not discuss the concept of the SEM, and nothing in that decision mandates adjustment of IQ scores to account for inherent testing error. Rather, the Supreme Court first held in *Hall v. Florida* that the SEM must be accounted for in evaluating an *Atkins* intellectual-disability claim. __ U.S. __, 134 S. Ct. 1986, 2001, 188 L. Ed. 2d 1007 (2014). As discussed above, our review of the OCCA's decision is normally limited to evaluating whether that decision was contrary to or unreasonably applied the holdings of the Supreme Court in force at the time it was rendered. Because *Hall* was decided more than three years after the OCCA ruled against [Petitioner] on this issue, *Hall* provides no basis for us to disturb the OCCA's decision.

Smith, 824 F.3d at 1245 (internal citation omitted). The Tenth Circuit went on to hold:

> Again leaving aside whether [Petitioner] can rely on *Hall*-a decision issued more than three years after the OCCA ruled against him-*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability. . . .
>
> [Petitioner] has failed to show that the OCCA's refusal to apply the Flynn Effect to his IQ scores was contrary to or an unreasonable application of clearly established federal law. We therefore affirm the district court's denial of habeas relief on [Petitioner's] intellectual-disability claim.

Smith, 824 F.3d at 1246. *See also Woods v. Donald*, __ U.S. __, 135 S. Ct. 1372, 1377 (2015) ("Because none of our cases confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court."(citation omitted)). As the OCCA's ruling was not contrary to, or, an unreasonable application of clearly established Supreme Court law, the Tenth Circuit's affirmation of that denial, is not proper for certiorari review.

B. Application of a properly stated rule of law.

Rule 10 of this Court's rules clearly cautions: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, Petitioner's claim that the Tenth Circuit's application of *Atkins* was erroneous is not grounds for granting certiorari.

The OCCA addressed the substance of Petitioner's *Atkins* claim under the rubric of an ineffective assistance of counsel claim. *Smith*, 245 P.3d at 1237. In *Atkins* this Court pronounced a prohibition against the execution of intellectually disabled

offenders. Referencing the clinical definitions of intellectual disability embraced by the American Association on Mental Retardation ("AAMR"), now the American Association on Intellectual and Developmental disabilities (AAIDD), and the American Psychiatric Association (APA), this Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 at 308, 317 n.3. However, this Court "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall" within the class of defendants ineligible for capital punishment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (internal punctuation omitted).

Following the *Atkins* decision, the Oklahoma Legislature promulgated a definition of intellectual disability for use in the criminal courts of Oklahoma. *See* Okla. Stat. tit. 21, §701.10b (Supp.2006). First, by requiring the standard error of measurement to be considered, the Legislature established that any such test returning an IQ of 76 or above would under no circumstances result in an IQ score that would be 70 or lower. *Smith*, 245 P.3d at 1237. Second, this Court in *Atkins* recognized that an IQ score, **not** adjusted for the standard error of measurement, of 70 to 75 is the typical cutoff for the intellectual function prong of intellectual disability. *Atkins*, 536 U.S. at 309 n.5. Thus, a cutoff score of 76, **not** adjusted for the standard error of measurement, is not contrary to *Atkins*.

Furthermore, this Court did not adopt or discuss use of the Flynn Effect in *Atkins*, or in any opinion since *Atkins*. Likewise, the Oklahoma Legislature did not

include the so-called Flynn Effect in considering IQ scores in making an intellectual disability determination. *Smith*, at 1237 n.6. Consequently, Oklahoma's standard for determining whether a defendant is ineligible for the death penalty is not contrary to, or an unreasonable application of *Atkins*. Accordingly, the Tenth Circuit's denial of habeas relief on this issue does not warrant certiorari review. *Donald*, 135 S. Ct. at 1377.

C. Petitioner's reliance on *Hall v. Florida*, 134 S. Ct. 1986 (2014).

The OCCA ruled against Petitioner's *Atkins* claim on November 5, 2010. *Smith*, 245 P.3d 1233. This Court announced its ruling in *Hall v. Florida* over three years later on May 27, 2014. *Hall*, 134 S. Ct. 1986. The statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers "to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Because *Hall* was not in existence at the time of the OCCA's adjudication of Petitioner's second application for post-conviction relief, it had no relevance to the Tenth Circuit's review under § 2254(d). "[R]eview under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

Even if *Hall* were considered, it would not entitle Petitioner to certiorari review of his *Atkins* claim. First, in *Hall*, the issue centered around the Florida Supreme

Court's interpretation of their statute defining intellectual disability. Specifically, that a hard cutoff IQ score of 70 was to be used without consideration of the standard error of measurement. *Hall*, 134 S. Ct. at 1994. This Court found error in Florida's refusal to take the standard error of measurement into consideration. *Hall*, at 2001. To the contrary in the present case, Oklahoma specifically mandates that the standard error of measurement **must** be considered. "In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account." Okla. Stat. tit. 21, § 701.10b(C).

Second, Oklahoma's cutoff score is 76. This Court noted in *Hall* that, "Petitioner does not question the rule in States which use a bright-line cutoff at 75 or greater, and so they are not included alongside Florida in this analysis." *Id.* at 1996. Finally, *Hall* is inapplicable because *Hall* does not address the applicability of the Flynn Effect, the crux of Petitioner's *Atkins* claim. Even assuming *Hall* was applicable during the OCCA's determination of Petitioner's *Atkins* claim, *Hall* did not mention or require an adjustment for the Flynn Effect. As stated above, *Hall* specifically held its analysis is inapplicable to States with a cutoff score of 75 or above. Further, Oklahoma, already requires consideration of the standard error of measurement. Accordingly, the Tenth Circuit's denial of habeas relief does not warrant certiorari review.

Petitioner argues that Oklahoma's law fails to comport with clinical practices in evaluating intellectual disability claims as required by *Hall*. However, although

Hall recognized that clinical definitions were a fundamental premise of *Atkins*, those medical opinions were not **the** single factor in arriving at its decision.

> In addition to the views of the States and the Court's precedent, this determination is informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments. It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.

Hall, 134 S. Ct. at 2000 (internal citation omitted). The problem with Petitioner's argument is that the only clinical practices he identifies are the adjustment for the standard error of measurement and the Flynn Effect, neither of which were identified by *Atkins*. As noted earlier, Oklahoma's law properly takes the standard error of measurement into consideration, and this Court has not held that the Flynn Effect is a clinical practice that must too be considered.

Further, Petitioner has failed to show that consideration of the Flynn Effect is even a prevailing clinical practice. As noted by the Eleventh Circuit, Petitioner's contention is simply without merit.

> First, district courts do not need to revisit rulings every time the APA publishes a revised DSM or the AAIDD publishes a new article. . . .
>
> Second, these new items do not show a general consensus in the medical community about the Flynn effect. [Petitioner] overstates and misconstrues the DSM–V's discussion of the Flynn effect. Far from mandating numerically specific Flynn-effect reductions to all IQ scores, the DSM–V does little more than acknowledge the

> possibility that the Flynn effect is a "factor" that "may" impact an individual's IQ score. In its only reference to the Flynn effect, the DSM–V provides: "Factors that **may** affect [intelligence] test scores include practice effects and the 'Flynn effect' (i.e., overly high scores due to out-of-date test norms)." DSM–V at 37 (emphasis added). While the DSM–V states that the Flynn effect "may" affect intelligence scores, it does not provide any guidance as to how a clinician should actually apply the Flynn effect, let alone mandate any 0.3 point-per-year reduction for IQ scores obtained from tests with outdated norms. *See Id.*

Ledford v. Warden, Georgia Diagnostic & Classification Prison, 818 F.3d 600, 638 (11th Cir. 2016). Petitioner also cites Kevin McGrew's article, *Norm Obsolescence: The Flynn Effect in The Death Penalty and Intellectual Disability* (Edward Polloway ed., 2015), for his contention that the Flynn is Effect is a prevailing medical practice. However, in regard to this article, the Eleventh Circuit has held:

> Based on his survey of various academic studies conducted between 2007 and 2012, McGrew asserts that "there is . . . a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases." *Norm Obsolescence* at 160. But McGrew qualifies this assertion by stating that "[t]he use of the Flynn effect correction in clinical settings is less of an issue." Of course, it is less of an issue because, as Dr. King testified in this case, the Flynn effect is not used in clinical settings, and *ipso facto*, there is no **medical** consensus at all. McGrew even undercuts the imperative quality of his original assertion by later stating that "best practices require recognition of a **potential** Flynn effect when older editions of an intelligence test ... are used." *Norm Obsolescence* at 160 (emphasis added).

Ledford, 818 F.3d at 638 (emphasis in original). As the downward adjustment of IQ score for the Flynn Effect is not a prevailing medical or clinical norm, Petitioner's claim is without merit and this case is not proper for certiorari review.

D. Lack of inconsistent holdings in the Circuit Courts.

Petitioner cites several state and federal court decisions in an effort to show that there is a general divide, or a significant split among those courts as to if and how the Flynn Effect is to be applied. While certainly there may be a disagreement among those courts as to its validity, applicability, or implementation, Petitioner cites to no decision, and indeed there is none, that claims the application of the Flynn Effect is mandated by either *Atkins* or *Hall*. Further, Petitioner is unable to show any disagreement that a failure to apply the Flynn Effect is contrary to, or, an unreasonable application of *Atkins* under the guise of the AEDPA.

Several circuits have had the opportunity to consider an *Atkins* claim under AEDPA review involving the Petitioner requesting a downward adjustment of his IQ score for the Flynn Effect. The Fourth Circuit has held, "[Petitioner] does not cite to any North Carolina law, nor could we find any such law, requiring courts to consider and apply the 'Flynn effect.'" *Richardson v. Branker*, 668 F.3d 128, 152 (4th Cir. 2012). *See also Green v. Johnson*, 515 F.3d 290, 300 n.2 (4th Cir. 2008) (applying Virginia law in reviewing habeas petition and observing that "neither *Atkins* nor Virginia law appear to require expressly that [the Flynn Effect] be accounted for in determining mental retardation status.").

The Fifth Circuit has simply refused to recognize the Flynn Effect. "The State correctly points out that the Fifth Circuit has not recognized the Flynn effect." *Brumfield v. Cain*, 808 F.3d 1041, 1060 (5th Cir. 2015). *See also Maldonado v. Thaler*, 625 F.3d 229, 238 (5th Cir. 2010) ("As the district and state habeas courts recognized, however, neither this court nor the [Texas Court of Criminal Appeals] has recognized the Flynn Effect as scientifically valid.").

The Sixth Circuit vacated and remanded a district court's denial of habeas relief on a petitioner's *Atkins* claim because the Tennessee Court of Criminal Appeals failed to consider the Flynn Effect **and** the standard error of measurement. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011). However, the Sixth Circuit based its decision on the Tennessee Court of Criminal Appeals failure to follow its own state law on the determination of intellectual disability, and not on a requirement to consider the Flynn Effect. *Black*, 664 F.3d at 96-97. In fact, "Tennessee law, . . . made no mention whatsoever of the Flynn Effect." *Black*, 664 F.3d at 95.

The Seventh Circuit has noted that, "nothing in *Atkins* suggests that IQ test scores must be adjusted to account for the Flynn Effect in order to be considered reliable evidence of intellectual functioning." *Pruitt v. Neal*, 788 F.3d 248, 267 n.2 (7th Cir. 2015) (citation omitted). *See also McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015) ("Although the Flynn Effect is acknowledged in the field, it is not common practice to adjust IQ scores by a specific amount to account for the phenomenon.").

The Ninth Circuit in *Smith v. Ryan*, 813 F.3d 1175, 1184-1185 (9th Cir. 2016) cited favor for the Flynn Effect, but has not ruled it is required by *Atkins*. Of course, the Tenth Circuit, in the present case and in *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012), has held that this Court had not mandated the use of the Flynn effect when making an intellectual disability determination.

Finally, the Eleventh Circuit has rejected the Flynn Effect both as a sound medical theory and as being mandated by this Court. "There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of *Hall* wholly inapposite." *Ledford*, 818 F.3d at 639.

Petitioner has failed to establish that there is a circuit split as to whether a failure to downward adjustment of an IQ score for the Flynn Effect is contrary to, or, and unreasonable application of *Atkins*. As such, certiorari review of this case should be denied.

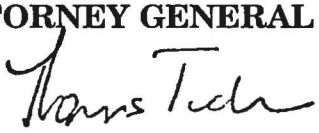
CONCLUSION

Petitioner submits no compelling reason for this Court to grant certiorari review. Petitioner merely disagrees with the Tenth Circuit's application of a properly stated rule of law. Neither the OCCA's, district court's, nor the Tenth Circuit's opinions are contrary to, or, and unreasonable application of *Atkins*. Further, *Hall* was not law at the time of the OCCA's decision on Petitioner's *Atkins* claim. *Donald*, 135 S. Ct. at 1377. Finally, Petitioner has failed to show that a downward adjustment for the Flynn

Effect is a prevailing clinical practice. Moreover, Petitioner has not demonstrated that the Tenth Circuit's ultimate decision conflicts with the decision of another federal court of appeals or with a state court of last resort. Nor has Petitioner demonstrated that the Tenth Circuit's holding in this case departed from "the accepted and usual course of judicial proceedings" in such a manner that this Court's supervisory power should be exercised. *See* Rule 10, *Rules of the Supreme Court of the United States*. Finally, Petitioner has not demonstrated the Tenth Circuit decided an important federal question that either has not been decided by this Court, or conflicts with a relevant decision of this Court. *Id*. Accordingly, for the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA



THOMAS LEE TUCKER, OBA # 20874*
ASSISTANT ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921 FAX (405) 521-6246
Service emails: fhc.docket@oag.ok.gov
thomas.tucker@oag.ok.gov
ATTORNEYS FOR RESPONDENT

*Counsel of record

No. 16-7393

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE SMITH,
Petitioner,

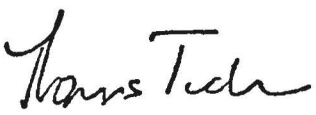
vs.

TERRY ROYAL, WARDEN,
Respondent.

CERTIFICATE OF SERVICE

I, Thomas Lee Tucker, a member of the Bar of this Court, hereby certifies that 1 copy of the Brief in Opposition was mailed by first-class, postage prepaid mail, to Counsel for the Petitioner:

Emma V. Rolls
Patty Palmer Ghezzi
Assistant Public Defenders
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102



THOMAS LEE TUCKER
ASSISTANT ATTORNEY GENERAL

Dated: January 31, 2017