Capital Case

Case No. 16-7393

IN THE SUPREME COURT OF THE UNITED STATES

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

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED

The Oklahoma statute governing *Atkins* proceedings prohibits so much as a hearing on *Atkins* eligibility if a capital defendant has even one full-scale IQ score over 75. Okla. Stat. tit. 21, § 701.10b(C). This exclusionary criterion applies regardless of whether such defendant obtained the IQ score over 75 on a test that was long outdated, has multiple IQ scores at 75 or below, has significant limitations in adaptive functioning, and has demonstrated that the onset of his intellectual disability manifested before turning 18. In interpreting and applying this statute, the Oklahoma Court of Criminal Appeals ("OCCA") refuses to consider the inflationary impact of obsolete testing norms on IQ scores, i.e., the Flynn Effect. According to the OCCA, the Flynn Effect "is not a relevant consideration in the [intellectual disability] determination for capital defendants." *Smith v. State*, 245 P.3d 1233, 1237 n.6 (Okla. Crim. App. 2010). The Tenth Circuit has endorsed the OCCA's refusal to consider the inflationary impact of obsolete testing norms on IQ scores. *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016). From this outcome, the following question warrants this Court's review:

> Whether refusal to consider the inflationary impact of obsolete testing norms on IQ scores is contrary to or an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002) when a state employs a cutoff IQ score of 75 on a single test to preclude *Atkins* relief?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS. ii

INDEX OF ATTACHMENTS. iii

TABLE OF AUTHORITIES.. iv

PETITION FOR WRIT OF CERTIORARI. 1

OPINIONS BELOW. 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT. 11

I. This Court Should Hold that Where a State Employs a Cutoff IQ Score as an Absolute Bar to *Atkins*' Protection, the Failure to Consider the Inflationary Impact of Obsolete Testing Norms is Contrary to and an Unreasonable Application of *Atkins v. Virginia*, 536 U.S. 304 (2002) Because Such Practice Creates an Unacceptable Risk that Persons with Intellectual Disability will be Executed 11

A. Introduction. 11

B. State procedures for enforcing the constitutional restriction announced in *Atkins* must adhere to clinical definitions and practice. 12

C. Clinical practice and definitions mandate adjustment of IQ scores for the inflationary impact of obsolete testing norms. 14

D. Oklahoma's failure to consider the inflationary impact of aging test norms coupled with its use of a strict, cutoff IQ score as an exclusionary criterion for *Atkins* protection is contrary to *Atkins v. Virginia*, and the Tenth Circuit Court of Appeals erred by finding otherwise. 17

II. This Court Should Settle Uncertainty and Inconsistency Among the Lower Courts Regarding the Treatment of the Flynn Effect in *Atkins* Cases.. 22

CONCLUSION. 25

INDEX OF ATTACHMENTS

(Attachments located in a separate volume entitled Appendix of Attachments)

ATTACHMENT A: *Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016) (Tenth Circuit opinion denying relief).

ATTACHMENT B: *Smith v. Duckworth*, No. CIV-09-293, 2014 WL 4627225 (W.D. Okla. Sept. 16, 2014) (unpublished) (Federal district court opinion denying relief).

ATTACHMENT C: *Smith v. State*, 157 P.3d 1155 (Okla. Crim. App. 2007) (State court decision denying direct appeal).

ATTACHMENT D: *Smith v. State*, PCD-2005-142 (Okla. Crim. App. Feb. 24, 2009) (State court decision denying first post-conviction relief relief).

ATTACHMENT E: *Smith v. State,* PCD-2010-150, 245 P.3d 1233 (Okla. Crim. App. 2010) (State court decision denying second post-conviction relief).

ATTACHMENT F: *Smith v. Royal*, No. 14-6201 (Order Denying Appellant's Petition for Rehearing) (Aug. 1, 2016).

ATTACHMENT G: *Smith v. Royal*, No. 16A382, Supreme Court grant of extension of time to file cert. petition (Oct. 19, 2016)

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII (Eighth Amendment).. 2

U.S. Const. amend. XIV (Fourteenth Amendment).. . . . . 2, 3

UNITED STATES SUPREME COURT CASES

Atkins v. Virginia, 536 U.S. 304 (2002). . . . . i, 4, 5, 9, 11, 13, 17, 19

Brumfield v. Cain, 135 S. Ct. 2269 (2015). 13

Cooper v. Oklahoma, 517 U.S. 348 (1996).. 12

Ford v. Wainwright, 477 U.S. 399 (1986). 11

Hall v. Florida, 134 S. Ct. 1986 (2014). 4, 11, 13, 14, 15, 18, 20, 22

Penry v. Lynaugh, 492 U.S. 302 (1989). 9, 19

FEDERAL CIRCUIT COURT CASES

Black v. Bell, 664 F.3d 81 (6th Cir. 2011). 24

Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012). 17, 22, 23

Maldonado v. Thaler, 625 F.3d 229 (5th Cir. 2010). 23

In re Mathis, 483 F.3d 395 (5th Cir. 2007).. 24

Smith v. Duckworth, 824 F.3d 1233 (10th Cir. 2016).. . . . . i, 1, 10, 17, 23

Thomas v. Allen, 607 F.3d 749 (11th Cir. 2010).. . . . . 23, 24

Walker v. True, 399 F.3d 315 (4th Cir. 2005).. 23

Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010). 23

FEDERAL CASES

Berry v. Epps, No. 04CV328D, 2006 WL 2865064
(N.D. Miss. Oct. 5, 2006). 24

Smith v. Duckworth, No. CIV-09-293, 2014 WL 4627225
(W.D. Okla. Sept. 16, 2014) 1

United States v. Davis, 611 F. Supp. 2d 472 (D. Md. 2009). 22, 23

United States v. Lewis, No. 08CR404, 2010 WL 5418901
(N.D. Ohio Dec. 23, 2010). 24

United States v. Smith, 790 F. Supp. 2d 482 (E.D. La. 2011) 24

FEDERAL STATUTES

Title 28 U.S.C. § 1254(l).. 2

Title 28 U.S.C. § 2254(d). 2

STATE COURT CASES

Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) 24

Martinez v. State, 80 P.3d 142 (Okla. Crim. App. 2003). 9

Ex Parte Moore, 470 S.W.3d 481 (Tex. Crim. App. 2015), *cert. granted in part by Moore v. Texas*, 136 S. Ct. 2407 (2016). 14

Myers v. State, 133 P.3d 312 (Okla. Crim. App. 2006). 9

People v. Superior Court, 28 Cal. Rptr. 3d 529 (Cal. Ct. App. 2005). 23

Pickens v. State, 126 P.3d 612 (Okla. Crim. App. 2005). 9

Smith v. State, 157 P.3d 1155 (Okla. Crim. App. 2007). 1

Smith v. State, 245 P.3d 1233 (Okla. Crim. App. 2010). . . . . i, 8, 10, 17

State v. Burke, No. 04AP-1234, 2005 WL 3557641 (Ohio Ct. App. Dec. 30, 2005). 23

Thompson v. State, No. SC15-1752, 2016 WL 6649950 (Fla. Nov. 10, 2016). . . 21

STATE STATUTES

Okla. Stat. tit. 21, § 701.10b. . . . . i, 5, 7, 9, 18, 20, 21

OTHER AUTHORITIES

American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support*s (11th ed. 2010) (AAIDD). 15, 16

American Association on Intellectual and Developmental Disabilities, *User's Guide: Mental Retardation, Definition, Classification and Systems of Supports* (10th ed. 2007) 16

American Association on Intellectual and Developmental Disabilities, *User's Guide to Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2012). 19

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5). 15, 20

Cecil R. Reynolds, et al., *Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow*, 28 J. Psychoeducational Assessment 477 (2010). 22

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John H. Blume, et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393 (2014). . 20

Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in *The Death Penalty and Intellectual Disability* 155, 158 (Edward Polloway ed., 2015).. . . 15, 16

Nancy Haydt, Stephen Greenspan, Bhushan S. Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359 (2014) 17

PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael DeWayne Smith, 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 *Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016) (Case No. 14-6201).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016). *See* Attachment A. The federal district court decision denying Mr. Smith's Petition for Writ of Habeas Corpus is found at *Smith v. Duckworth,* No. CIV-09-293, 2014 WL 4627225 (W.D. Okla. Sept. 16, 2014) (unpublished). *See* Attachment B. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Smith's direct appeal is reported at *Smith v. State*, 157 P.3d 1155 (Okla. Crim. App. 2007). *See* Attachment C. The OCCA's decisions denying Mr. Smith's petitions for post-conviction relief can be found at *Smith v. State*, PCD-2005-142 (Okla. Crim. App. Feb. 24, 2009) and *Smith v. State*, PCD-2010-150, 245 P.3d 1233 (Okla. Crim. App. 2010). *See* Attachments D and E, respectively.

JURISDICTION

The Tenth Circuit rendered its opinion denying relief on June 6, 2016. Mr. Smith filed a timely petition for rehearing and rehearing *en banc*, which the Tenth Circuit denied on August 1, 2016. *See* Attachment F. Justice Sotomayor extended the time to petition for certiorari until December 29, 2016. *See* Attachment G. 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;

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment, Section 1, 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, § 1.

STATEMENT OF THE CASE

Shortly after 7:30 a.m. on February 22, 2002, the apartment manager of the Del Mar Landing Apartments in Oklahoma City, Oklahoma discovered the body of Janet Moore in Ms. Moore's apartment at the complex. Ms. Moore had received a single fatal gunshot wound to her chest.

Around 8:30 a.m. that same day, the Oklahoma City Fire Department responded to a reported fire at a convenience store located several miles from the Del Mar Landing Apartments. At the scene, officials discovered the body of store clerk, Sarath Pulluru, behind the counter. Mr. Pulluru had been shot several times, and his body was charred from having been set on fire. Mr. Pulluru died from gunshot wounds to his chest; he was not alive when his body was set on fire.

Mr. Smith was arrested on an unrelated matter two days after Ms. Moore's and Mr. Pulluru's homicides. Three days after his arrest, on February 27, 2002, police interrogated Mr. Smith, and he admitted responsibility for the homicides. He was

charged with two counts of first-degree murder and three non-capital offenses: burglary, robbery, and arson. Mr. Smith was only nineteen years old when he was arrested and charged with these crimes.

Nearly four months after Mr. Smith was charged with the instant offenses, this Court unequivocally banned execution of the intellectually disabled[1] and found such executions were cruel and unusual punishments prohibited by the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Despite this Court's clear directive banning the execution of the intellectually disabled, Mr. Smith's trial counsel failed to present an *Atkins* defense notwithstanding Mr. Smith had not completed school beyond the sixth grade, had been in special education classes, and had received a full-scale IQ score of 76 on an outdated Wechsler Adult Intelligence Scale Revised exam ("WAIS-R")[2] just thirteen months prior to the these offenses.

In September of 2003, a jury returned two death sentences for Ms. Moore's and Mr. Pulluru's murders, finding two aggravating circumstances attending each murder:

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[1]When this Court rendered its opinion in *Atkins*, it employed the term "mental retardation." The Court now uses the term "intellectual disability" to describe the identical phenomenon. *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

[2]The Oklahoma Office of Juvenile Affairs administered the WAIS-R to Mr. Smith in 2001, although the WAIS-III, which was released for clinical use in 1997, was the appropriate test at that time. The WAIS-R was normed in 1978 – 23 years earlier.

1) that the murders were especially heinous, atrocious, or cruel and 2) that there was a probability the defendant will commit criminal acts of violence that would constitute a continuing threat to society. Not until 2006, almost three years after Mr. Smith's trial, did the Oklahoma legislature promulgate Okla. Stat. tit. 21, § 701.10b, the Oklahoma statute that ostensibly bars execution of the intellectually disabled.

Following trial, Mr. Smith unsuccessfully sought state direct appeal relief and state post-conviction relief in his first post-conviction action. Counsel for Mr. Smith failed to raise an *Atkins* claim in both actions.

In Mr. Smith's second state post-conviction action he first presented the argument that his death sentences violate his Eighth and Fourteenth Amendment rights because he is intellectually disabled.[3] In support of this argument, Mr. Smith presented myriad evidence to substantiate the three defining requirements of intellectually disability: 1) "significantly subaverage general intellectual functioning," 2) "significant limitations in adaptive functioning," and 3) onset of the condition before the age of 18. Okla. Stat. tit. 21, § 701.10b(A)(B).

[3]In Mr. Smith's second post-conviction action, counsel asserted that the failure to raise an *Atkins* claim by trial counsel, who also served as direct-appeal counsel, and the failure to raise an *Atkins* claim by original post-conviction counsel constituted ineffective assistance of counsel.

Mr. Smith presented to the OCCA the following evidence that he has consistently scored within the intellectually-disabled range on standardized IQ tests administered by licensed professionals. First, at the behest of the Oklahoma Juvenile Authority, in 2001 a psychologist administered the WAIS-R, which was normed 23 years earlier, to Mr. Smith. Mr. Smith received a full-scale score of 76 on this outdated test, and when adjusted for norm obsolescence, the results of this test yield a full-scale score of 69, indicating an IQ range of 64 to 74. Mr. Smith expended an appropriate level of effort to complete the assigned tasks, and the results were felt to be an accurate evaluation of Mr. Smith's current functioning levels.

Next, in 2003, Mr. Smith received a full-scale score of 79 on the WAIS-III. Adjustment of this score for aging norms is necessary because the test was normed eight years before Mr. Smith took it and the WAIS-III gave inflated scores, even in the year in which it was normed. *See* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Publ. Pol'y & L., 170, 179 (2006). Proper adjustment of this score results in a full-scale score of 74, indicating an IQ range of 69-79.

And in 2009, Mr. Smith received a full-scale score of 71 on the WAIS-IV, indicating an IQ range of 68-75. There was no evidence during this exam that Mr. Smith exaggerated his symptoms, lacked motivation to perform the tests, or

intentionally skewed the results.

Further evidence was presented to the OCCA that Mr. Smith has significant adaptive behavior deficits. Results on the Adaptive Behavior Assessment System II ("ABAS-II") administered in 2009 by Dr. Saint Martin, Board Certified by the American Board of Psychiatry and Neurology, confirm Mr. Smith's significant limitations in *all* of the adaptive skill areas listed in Okla. Stat. tit. 21, § 701.10b(A)(2), including communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills, and work skills. Dr. Saint Martin concluded the information from the ABAS II and Mr. Smith's developmental background suggest that a diagnosis of mental retardation is appropriate. Additionally, two rounds of psychological testing before 2009 reveal that Mr. Smith's academic abilities are extraordinarily poor; his reading and mathematic abilities were gauged at the second-to-fourth-grade level when he was 18 and 20 years old.

Anecdotal evidence illustrating Mr. Smith's adaptive behavior deficits was also presented to the OCCA. For example, family members[4] revealed Mr. Smith suffered

[4]Interestingly, Mr. Smith's paternal aunt, who described herself as intellectually disabled, revealed a pervasive history of intellectual disability within the family. She reported that five of Mr. Smith's paternal family members have mental retardation.

from cognitive impairment, speech delay and school failure. Further, a former cell mate of Mr. Smith's confirmed he had difficulty with seemingly mundane tasks. For example, this cell mate helped Mr. Smith find words in the dictionary, complete arithmetic on commissary forms, write correspondence, and even had to remind Mr. Smith to maintain his hygiene.

And finally, Mr. Smith presented evidence to the OCCA that his intellectual disability undoubtedly manifested before he turned 18. His mother recalled Mr. Smith was slow to speak, read, and write. He flunked kindergarten. He was unable to learn the days of the week until around third or fourth grade. He had to attend special education classes for reading. He had difficulty doing math beyond basic addition and subtraction. And he stopped attending school regularly after the sixth grade because school work was difficult for him, and he felt frustrated because he always responded to the teachers' questions with the wrong answer.

Despite this compelling evidence demonstrating Mr. Smith's intellectual disability, the OCCA denied relief on Mr. Smith's *Atkins* claim without so much as a hearing. *Smith v. State*, 245 P.3d 1233, 1237-38 (Okla. Crim. App. 2010). Specifically, after finding that Mr. Smith's *Atkins* claim was waived "[b]ecause the evidence proffered as the factual basis for the claim was available before [Mr. Smith's] first application for post-conviction relief," the OCCA found the underlying

Atkins claim was without merit through the lens of ineffective assistance of counsel.[5]

Id. at 1236-38. In coming to this conclusion, the state court relied on Okla. Stat. tit. 21, § 701.10b(C), which reads, in part, as follows:

> [I]n 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 licenced psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.[6]

Smith, 245 P.3d at 1237. Adding its own judicial gloss to the interpretation of this

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[5]Both the federal district court and the Tenth Circuit proceeded directly to the merits of Mr. Smith's *Atkins* claim, bypassing any procedural bar issue. At the district court and on appeal to the Tenth Circuit, Mr. Smith raised the following separate challenges to the OCCA's application of waiver to this claim: 1) Mr. Smith is innocent of the death penalty due to his intellectual disability; hence, his execution would constitute a miscarriage of justice; 2) Mr. Smith substantially complied with the state procedural rules when he filed his successive post-conviction application and in fact the OCCA had granted an extension of time in which to file such application; and 3) the ineffectiveness of original post-conviction counsel provided cause to excuse any procedural defaults.

[6]Mr. Smith's case was the first time the OCCA analyzed an *Atkins* claim under Okla. Stat. tit. 21, § 701.10b. Prior to Mr. Smith's case, the OCCA operated under its own judicially-created *Atkins* procedures which did not preclude *Atkins* hearings, or even preclude *Atkins* sentencing relief, based on a cutoff IQ score of 75. *See*, *e.g.*, *Martinez v. State*, 80 P.3d 142, 144 n.2 (Okla. Crim. App. 2003) (remanding case for *Atkins* jury determination despite previous IQ score in "borderline range"); *Pickens v. State*, 126 P.3d 612, 616, 621 (Okla. Crim. App. 2005) (modifying death sentence to life without parole where defendant had IQ scores of 70, 71, 76 and 79); *Myers v. State*, 133 P.3d 312, 335-36 (Okla. Crim. App. 2006) (reviewing defendant's post-conviction remand for *Atkins* jury determination notwithstanding defendant's prior full-scale IQ score of 77).

statute, the OCCA disregarded the inflationary impact of obsolete testing norms on IQ scores by finding "that under the Oklahoma statutory scheme, the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants." *Id*. at 1237 n.6.

Mr. Smith filed his Petition for Writ of Habeas Corpus before the United States District Court for the Western District of Oklahoma on February 19, 2010. After briefing, the federal district court denied habeas relief, discovery, and an evidentiary hearing on September 16, 2014. With respect to Mr. Smith's *Atkins* claim, the district court deferred to the OCCA and found Mr. Smith's IQ scores prevented him from being considered intellectually disabled under Okla. Stat. tit. 21, § 701.10b(C).

On June 6, 2016, the Tenth Circuit affirmed the judgment of the district court. *Smith v. Duckworth*, 824 F.3d 1233, 1256 (10th Cir. 2016). Proceeding directly to the merits of Mr. Smith's *Atkins* claim, the circuit court found the OCCA's decision was neither contrary to nor an unreasonable application of *Atkins*. *Id*. at 1245-46. This Writ follows.

REASONS FOR GRANTING THE WRIT

I. This Court Should Hold that Where a State Employs a Cutoff IQ Score as an Absolute Bar to *Atkins*' Protection, the Failure to Consider the Inflationary Impact of Obsolete Testing Norms is Contrary to and an Unreasonable Application of *Atkins v. Virginia*, 536 U.S. 304 (2002) Because Such Practice Creates an Unacceptable Risk that Persons with Intellectual Disability will be Executed.

A. Introduction.

In *Atkins*, this Court categorically banned the execution of the intellectually disabled. Although *Atkins* reserved to the states "the task of developing appropriate ways to enforce the constitutional restriction," *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)), it did not give the states "unfettered discretion to define the full scope of the constitutional protection." *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014). "If the States were to have complete autonomy to define intellectual disability . . . the Court's decision in *Atkins* could become a nullity." *Id.* at 1999. In fact, nothing in *Atkins* suggests states have the authority to narrow the definition of intellectual disability and thus alter the constitutional restriction itself. Permitting that would circumvent the rule announced in *Atkins* and allow the execution of persons who meet the clinical definitions of intellectual disability. Instead, states are limited to developing procedures to vindicate substantive constitutional rights, not to impair them. *See Ford*, 477 U.S. at 416.

Yet Oklahoma's rigid IQ test-score cutoff, coupled with the OCCA's failure to consider the inflationary impact of obsolete testing norms, does just that. Rather than enforcing the prohibition on executing persons with intellectual disability, Oklahoma has redefined intellectual disability so that it means something narrower than this Court contemplated in *Atkins*.[7]

Under Oklahoma's rule, which has been endorsed by the Tenth Circuit, a defendant who has just one IQ score above 75 *always* falls outside of *Atkins*' protection, regardless of whether such IQ score was obtained on an outdated test or whether such defendant has other IQ scores at 75 or below. And such defendants are precluded from introducing any evidence – no matter how compelling – of the deficiencies in functioning that render unconstitutional the execution of persons with intellectual disability.

B. State procedures for enforcing the constitutional restriction announced in *Atkins* must adhere to clinical definitions and practices.

When this Court announced the bright-line, categorical exemption of the intellectually disabled from execution, it relied on the clinical definitions promulgated

[7]This is not the first time Oklahoma has undermined constitutional guarantees with restrictions that frustrate the purpose of those guarantees and virtually assure they will be violated. *See Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996) (holding Oklahoma's procedures impermissibly allowed some who were incompetent to be unconstitutionally put to trial).

by the American Association on Mental Retardation (AAMR), now the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA). *Atkins*, 536 U.S. at 317 n.22; *see also id.* at 308 n.3.[8] Without a doubt, "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999.

In its interpretation of *Atkins* in subsequent cases, this Court has continued to emphasize the clinical underpinnings of the constitutional restriction. For example, in *Hall*, by recognizing that "[i]ntellectual disability is a condition, not a number," *id.* at 2001, the Court relied on clinical definitions and diagnostic practices in finding Florida's IQ cutoff of 70 for intellectual disability claims was flatly unconstitutional. *Id.* at 2000 ("The legal determination of intellectual disability . . . is informed by the medical community's diagnostic framework"). The Court warned that lower courts and legislatures are not free to impose rigid rules, *id.* at 1990, nor can they use IQ scores as an excuse to exclude relevant evidence of an individual's actual impairment. *Id.* at 1995. And in *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015), while relying on clinical definitions and diagnostic practices, the Court cautioned that an "IQ test

[8]The definitions of what was then termed mental retardation provided by the APA and the AAMR at the time of *Atkins* were essentially the same and consisted of 1) significantly subaverage intellectual functioning, 2) significant limitations in adaptive functioning, and 3) the onset of the condition before age 18. *Atkins*, 536 U.S. at 308 n.3.

result cannot be assessed in a vacuum. . . . [T]he assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement."[9]

In giving content to the substantive constitutional prohibition it described in *Atkins*, this Court has continued to rely on established clinical definitions and practice. This approach makes sense because intellectual disability is, in fact, a clinical condition.

C. Clinical practice and definitions mandate adjustment of IQ scores for the inflationary impact of obsolete testing norms.

The operational definition of the first criterion of intellectual disability– significant limitations in intellectual functioning – is defined as "an IQ score that is *approximately* two standard deviations below the mean,[10] considering the standard

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[9]Signaling a continued interest in tethering *Atkins* determinations to established clinical practice and current professional consensus, on November 29, 2016, the Court heard oral argument in *Moore v. Texas. See Ex Parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015), *cert. granted in part by Moore v. Texas*, 136 S. Ct. 2407 (2016). The question presented in *Moore* is "[w]hether it violates the Eighth Amendment and this Court's decisions in *Hall* . . . and *Atkins* . . . to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed." *Id.*

[10]The mean score for a standardized IQ test is 100, and the standard deviation is approximately 15. "Thus a test taker who performs 'two or more standard deviations from the mean' will score *approximately* 30 points below the mean on an IQ test, *i.e.*, a score of *approximately* 70 points." *Hall*, 134 S. Ct. at 1994 (emphasis added).

error of measurement[11] for the specific assessment instruments used and the instruments' strengths and limitations." American Association on Intellectual Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification, and Systems of Support* 27 (11th ed. 2010) (emphasis added). According to the AAIDD,

> [t]he intent of this definition is not to specify a hard and fast cutoff . . . for meeting [this] . . . criterion of [intellectual disability]. Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement, . . . and other factors such as practice effects, fatigue effects, and *age of norms* used.

Id. at 35 (emphasis added); *see also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, DSM-5 at 37 (5th ed. 2013) ("Clinical training and judgment are required to interpret test results and assess intellectual performance").

The inflationary impact of obsolete testing norms on IQ scores, known as the Flynn Effect, describes the reality that as IQ tests become more distant from when they were normed to the population as a whole, they provide increasingly inflated scores. "There is a scientific and professional consensus that the Flynn [E]ffect is a scientific fact." Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in *The*

[11]The generally accepted standard error of measurement (SEM) adjustment for assessing intellectual disability is plus or minus five points of IQ. *Hall*, 134 S. Ct. at 1995.

Death Penalty and Intellectual Disability 155, 158 (Edward Polloway ed., 2015).[12]

Adjusting for the effect in the *Atkins* setting is also the consensus best or standard practice. *Id.* at 160-61. "[T]he global scores impacted by the outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence." *Id.* at 165. The older test norms reflect a level of performance that is lower than that of individuals in contemporary society. *Id*. at 155. "[B]est practices *require* recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment . . . of an IQ score." AAIDD at 37 (emphasis added); *see also* AAIDD, *User's Guide: Mental Retardation, Definition, Classification and Systems of Supports* at 20-21 (10th ed. 2007) (endorsing correction for age of norms). Any exclusion of this scientific reality from legal proceedings is contrary to this Court's direction to rely on clinical standards. To exclude consideration and application of the Flynn Effect is to elevate inaccurate and unreliable scores.

[12]Dr. Kevin McGrew is the director of the Institute for Applied Psychometrics. He conducts research in the areas of human intelligence, intelligence testing, adaptive behavior, and applied psychometrics. And he is the co-author of the Woodcock-Johnson IV assessment battery. *Id.* at xv.

D. Oklahoma's failure to consider the inflationary impact of aging test norms coupled with its use of a strict, cutoff IQ score as an exclusionary criterion for *Atkins* protection is contrary to *Atkins v. Virginia*, and the Tenth Circuit Court of Appeals erred by finding otherwise.

In a decision that is both contrary to and an unreasonable application of *Atkins*, and by extension *Hall*, the OCCA disregarded established clinical practice, definitions, and the clinical community's professional consensus when it found that adjustment of IQ scores for the inflationary impact of aging norms "is not a relevant consideration in the [intellectual disability] determination for capital defendants" under the Oklahoma statutory scheme. *Smith*, 245 P.3d at 1237 n.6. The Tenth Circuit deferred to this unreasonable view by relying on *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), in which the court found "*Atkins* does not mandate an adjustment for the Flynn Effect. Morever, there is no scientific consensus on its validty." *Id.* at 1170[13]; *Smith*, 824 F.3d at 1246.

[13]According to experts in the field of intellectual disability, this statement from *Hooks* "is grossly inaccurate and this rejection of the Flynn Effect, in combination with the use of scientifically unjustified bright-line IQ cutoff scores, causes artificially high IQ scores, thus denying defendants a fair determination of intellectual functioning for *Atkins* purposes." Nancy Haydt, Stephen Greenspan, Bhushan S. Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359, 382-83 (2014).

Mr. Smith's case cogently illustrates the unconstitutionality of Oklahoma's *Atkins* regime, and the Tenth Circuit erred by endorsing it. Just 13 months before the crimes at issue in this case, Mr. Smith was forever disqualified from even the opportunity to prove his *Atkins* eligibility when he scored just one point beyond the statutory cutoff provided in Okla. Stat. tit. 21, § 701.10b(C). Although this score was obtained on an outdated WAIS-R test which was normed 23 years before its administration to Mr. Smith,[14] and although an agency of the State of Oklahoma selected and administered this outdated test, because Mr. Smith scored a 76 on it, Oklahoma law, as endorsed by the Tenth Circuit, prohibits Mr. Smith from presenting evidence of his significant deficiencies in adaptive functioning.

The OCCA's failure to recognize the scientific reality of the Flynn Effect, along with Okla. Stat. tit. 21, § 701.10b(C), creates a perverse incentive for less-than-ethical prosecutors to thwart a defendant's *Atkins* claim by simply administering an outdated IQ test.[15] Such scenario flouts the constitutional restriction announced in *Atkins* and creates "an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990.

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[14]The WAIS-R was normed in 1978 – almost four years before Mr. Smith was born.

[15]Counsel for Mr. Smith is not suggesting that is what occurred here, but the statute undoubtedly allows an opportunity for such manipulation.

All of Mr. Smith's Flynn-adjusted IQ scores place him squarely within the mildly intellectually disabled range as defined by clinical standards and by Okla. Stat. tit. 21, § 701.10b, absent the cutoff provision. As this Court has recognized, "mild" intellectual disability is not a trivial or insignificant disability. *See Atkins*, 536 U.S. at 308-09 & n.5.[16] Individuals who are "profoundly or severely [intellectually disabled]" are unlikely to be convicted, thus, "most [intellectually disabled] who reach the point of sentencing are mildly [intellectually disabled]." *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also* James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14 Exceptionality 237, 238 (2006) ("[A]lmost all capital cases with an *Atkins* claim involve individuals whose levels of intellectual and adaptive functioning fall in, at, or near the mild range").

Statistics bear out that offenders who would not be eligible for *Atkins* protection under the current Oklahoma regime are, in fact, a large component of the

[16] *See also, e.g.*, AAIDD, *User's Guide: to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports*, 14 tbl. 3.1 (11th Ed. 2012) (identifying characteristics of persons with intellectual disability with higher IQ scores, including "[i]mpaired social judgment . . . , lessened interpersonal competence and decision making skills, . . . increased vulnerability and victimization," "gullibility . . . and/or naivete or suggestibility," and "difficulties in making sense of the world through . . . planning, problem solving, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience").

population to have been found categorically exempt from the death penalty. As of 2014, of the 49 then-reported decisions with a successful *Atkins* claim, 46% of the individuals had at least one score over 75; 20% involved one or more IQ scores over 80. John H. Blume, et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 404 (2014).

Similar results once obtained in Oklahoma before the legislature promulgated the exclusionary diagnostic criterion in Okla. Stat. tit. 21, § 701.10b(C) and the OCCA refused to consider the inflationary effect of outdated testing norms. *See supra* at page 9, n.6. But under Oklahoma's current restrictive regime, "the Court's decision in *Atkins* could become a nullity," *Hall*, 134 S. Ct. at 1999, for Mr. Smith and many others who are intellectually disabled but have one score above 75, even if such score resulted from an outdated test.

Further, by ignoring the inflationary impact of obsolete testing norms while using a cutoff IQ score as an exclusionary diagnostic criteria, the OCCA unreasonably fails to recognize that "[i]ntellectual disability is a condition, not a number." *Hall*, 134 S. Ct. at 2001. And the clinical diagnosis of that condition requires a "conjunctive and interrelated assessment." *Id.* (citing DSM-5 at 37) ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems

. . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). Because the definitional prongs of intellectual disability are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strengths of other prongs. *See*, *e.g.*, *Thompson v. State,* No. SC15-1752, 2016 WL 6649950 (Fla. Nov. 10, 2016).

The evidence below is undisputed that Mr. Smith suffers from significant limitations in *all* of the adaptive skill areas listed in Okla. Stat. tit. 21, § 701.10b(A)(2). Dr. Saint Martin, the only person who has administered a clinical diagnostic assessment of Mr. Smith's adaptive behavior skills, concluded that a diagnosis of "mental retardation" is appropriate in Mr. Smith's case. Yet despite this clinical diagnosis which considered *all* of the interrelated prongs of intellectual disability, Mr. Smith has not been given an opportunity to prove his obvious ineligibility for the death penalty because of Oklahoma's strict cut-off regime, together with its rejection of the Flynn Effect. As matters stand, he will be executed, and so will other similarly- situated defendants in Oklahoma.

The impact of Oklahoma's rigid IQ cutoff together with the OCCA's failure to consider the Flynn Effect could forever disqualify all but the most severely intellectually disabled from even having an opportunity to prove his intellectual disability. Where courts adhere to a strict cutoff, a single point can mean the

difference between a constitutional and an unconstitutional execution. *See* Cecil R. Reynolds, et al., *Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow*, 28 Journal of Psychoeducational Assessment, 477, 480 (2010) (noting that failure to adjust for norm obsolescence very likely will result in unconstitutional executions). What is more, Oklahoma's approach prohibits courts from considering "even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's . . . inability to adapt to his social and cultural environment." *Hall*, 134 S. Ct. at 1994. Surely, such a result is contrary to and an unreasonable application of *Atkins*, as confirmed in *Hall*. *See id.* at 2001 (finding "[p]ersons facing [the] most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution").

II. This Court Should Settle Uncertainty and Inconsistency Among the Lower Courts Regarding the Treatment of the Flynn Effect in *Atkins* Cases.

"[F]ederal and state courts are divided over the use of the Flynn Effect" in *Atkins* cases. *Hooks*, 689 F.3d at 1170. Cases can generally be placed into four categories based on their treatment of the Flynn Effect: 1) validation of the Flynn Effect and subsequent adjustment of IQ scores accounting for it, *see, e.g.*,*United States v. Davis*, 611 F. Supp. 2d 472, 486-88 (D. Md. 2009); 2) validation and required consideration of, but not necessarily adjustment for, the Flynn Effect, *see*,

e.g.,*Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010); 3) indecision on the validity of the Flynn Effect and on the need to adjust for it, *see, e.g.*, *Maldonado v. Thaler*, 625 F.3d 229, 238 (5th Cir. 2010); and 4) outright rejection of the Flynn Effect in the *Atkins* context, *see, e.g.*, *Hooks*, 689 F.3d at 1170; *Smith*, 824 F.3d at 1246. *See* Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for The Flynn Effect In Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615, 630 (2012).

"Numerous courts recognize the Flynn [E]ffect." *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010) (citing *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (stating that on remand, the district court should consider the Flynn Effect evidence to determine if petitioner's IQ score in overstated); *Davis*, 611 F. Supp. 2d at 486-88 (considering the Flynn Effect in evaluation of defendant's intellectual functioning); *People v. Superior Court*, 28 Cal. Rptr. 3d 529, 558-59 (Cal. Ct. App. 2005), *overruled on other grounds by* 155 P.3d 259 (Cal. 2007) (recognizing that Flynn Effect must be considered); *State v. Burke*, No. 04AP-1234, 2005 WL 3557641, at *13 (Ohio Ct. App. Dec. 30, 2005) (stating that court must consider evidence on Flynn Effect, but it is within court's discretion whether to include it as

a factor in the IQ score)).[17]

Other courts do not recognize the Flynn Effect. *Thomas*, 607 F.3d at 758 (citing *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007) (noting this circuit has not recognized Flynn Effect as scientifically valid); *Berry v. Epps*, No. 04CV328D, 2006 WL 2865064, at *35 (N.D. Miss. Oct. 5, 2006) (refusing to consider Flynn Effect); *Bowling v. Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005) (noting that because Kentucky statute unambiguously sets IQ score of 70 as cutoff, courts cannot consider Flynn Effect)).

The consequence of this uncertainty and inconsistency amongst the lower courts is the reality that a large portion of the population *Atkins* was intended to protect will be executed. This consequence becomes more likely in a state, like Oklahoma, that uses a cutoff IQ score to preclude even an *Atkins* hearing.

[17] *See also Black v. Bell*, 664 F.3d 81, 95 (6th Cir. 2011) (noting that purpose of adjusting for Flynn Effect is to determine the single score "that most accurately reflects the subject's IQ" and that adjustment is appropriate especially where defendant must meet a "strict numerical cutoff"); *United States v. Smith*, 790 F. Supp. 2d 482, 491 & n.43 (E.D. La. 2011) (adjusting capital defendant's IQ scores for Flynn Effect); *United States v. Lewis*, No. 08CR404, 2010 WL 5418901, at *11 (N.D. Ohio Dec. 23, 2010) (noting adjustment of IQ scores for the Flynn Effect as "a best practice" for an intellectual disability determination).

CONCLUSION

Oklahoma's refusal to apply science, as *Atkins* itself directs, and as this Court continues to teach, must not result in the execution of a deeply intellectually impaired Mr. Smith without even a sound inquiry into his apparent ineligibility for that penalty. An unconstitutional execution will take place without this Court's intervention, in this case, and others to follow. The issue presented needs to be settled. This Court should grant a writ of certiorari.

Respectfully submitted,

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