

NO. _____
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

GILBERT POSTELLE, Petitioner,

v.

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Robert A. Nance, OBA No. 6581
COUNSEL OF RECORD
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
528 N.W. 12th Street
Oklahoma City, OK 73103
(405) 843-9909
rnance@riggsabney.com

JOHN T. CARLSON
1200 Pearl Street,
Suite 314
Boulder, Colorado 80302
(303) 323-1930
jtcarlson@gmail.com

COUNSEL FOR PETITIONER
GILBERT POSTELLE

QUESTIONS PRESENTED

1. Whether it violates the Sixth, Eighth, and Fourteenth Amendments for a state to defeat a post-conviction claim of ineffective assistance of counsel in a capital case by ruling, after the trial, that mitigating evidence of intellectual disability based on the Flynn Effect is “not a relevant consideration in the mental retardation determination,” so counsel’s failure to investigate and develop such mitigating evidence to correct inflated IQ scores of 76 and 79 to below the state threshold for “mental retardation” is categorically not ineffective assistance of counsel.
2. Whether it violates the Eighth Amendment for a capital trial court to refuse to allow the defendant to proffer as relevant mitigating evidence, during the sentencing phase of the trial, the life sentence imposed on the defendant’s brother, a co-defendant convicted earlier for the same murders.

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PETITION FOR A WRIT OF CERTIORARI

Gilbert Ray Postelle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Postelle v. Carpenter*, 901 F.3d 1202 (10th Cir. 2018), Appendix A. The order denying Petitioner's timely motion for rehearing, Order, *Postelle v. Carpenter*, No. 16-6290 (10th Cir. October 26, 2018) is Appendix B. The opinion of the U.S. District Court for the Western District of Oklahoma, *Postelle v. Royal*, No. 12-CV-1110-F (W.D. Okla. September 2, 2016) is unreported. Appendix C. The Post-Conviction Relief opinion of the Oklahoma Court of Criminal Appeals in *Postelle v. State*, No. PCD-2009-94 (Okla. Crim. App. February 14, 2012) is unreported, Appendix D. The Opinion of the Oklahoma Court of Criminal Appeals on direct appeal is reported as *Postelle v. State*, 267 P.3d 114 (Okla. Crim. App. 2011), Appendix E.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit issued its opinion on August 27, 2018 and denied rehearing October 26, 2018. This Court granted an extension until March 25, 2019. The District Court had jurisdiction under 28 U.S.C. § 2254(d). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 2253(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in pertinent part “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

The Eighth Amendment provides in pertinent part “nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment provides in pertinent part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

INTRODUCTION

The IQ scores presented by counsel in the punishment phase of this capital case were inflated and portrayed Postelle in a worse light than his correct scores, which were significantly lower. Given that substantial evidence pointed to Postelle as intellectually disabled, including that he scored in the bottom one tenth of a percentile of children his age on an adaptive behavioral test administered to him as a child, evidence of his inflated IQ scores—known as the Flynn Effect—should have been fully developed by trial counsel, and this failure in turn should have been asserted by appeal counsel as reversible error. Failure of both trial and appellate counsel prejudiced Postelle to the jury by omitting both his categorical ineligibility for execution and an important form of mitigating evidence at sentencing. Presentation of inflated IQ scores also prejudiced Postelle by falsely portraying him as having a higher cognitive capacity than he actually did.

STATEMENT OF THE CASE

The State proved that on Memorial Day 2005 Postelle accompanied his physically and mentally injured father Brad, older brother David, and another man on a mission of revenge to kill Donnie Swindle. Brad blamed Swindle, without apparent basis, for causing a motorcycle accident in which Brad was seriously injured. At the scene of the putative revenge killing, Brad, David, and Gilbert Postelle shot Swindle and another man outside Swindle's mobile home. The State showed that Gilbert Postelle, spurred by his father's command to "kill them all," ran through the Swindle trailer, chasing two more people out the back door and shooting them to death some distance away.

David and Gilbert Postelle were charged with four counts of capital murder and conspiracy to commit murder. Father Brad Postelle was found incompetent to stand trial. David was tried first and was sentenced to four terms of life without parole. The State then tried Postelle (as Gilbert Postelle will be called from this point forward) and he was convicted and given two sentences of death, two terms of life without parole and ten years on the conspiracy charge. At trial, Postelle's counsel argued unsuccessfully to admit his brother David's non-capital sentences as mitigating evidence. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Postelle's convictions and sentences on direct appeal.

Counsel on Post-Conviction Review argued for the first time that Postelle had suffered ineffective assistance of trial and appellate counsel for failure to argue that Postelle was intellectually disabled. Part of this claim was that counsel had been

ineffective for not researching and presenting the Flynn Effect as relevant mitigating evidence to correct Postelle's inflated IQ scores. The Flynn Effect corrects for the upward creep of IQ scores over time, and, if applied, would have lowered Postelle's IQ scores to within the range Oklahoma had set for mental retardation/intellectual disability. The OCCA denied Post-Conviction Relief saying, in part, "the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants."

The Court below called the Flynn Effect an observed phenomenon believed to impact the accuracy of IQ testing. *Postelle v. Carpenter*, 901 F.3d 1202, 1209 (10th Cir. 2018). The Court recognized that the IQ system does not aim to pinpoint the subject's absolute intelligence, but to measure intelligence relative to the rest of the population. *Id.* Accordingly, the creators of IQ tests must "norm" them by scoring the performance of a sample group. This norming process identifies how someone of average intelligence should perform on the new test. *Id.* The makers of the test then key that average performance at an IQ of 100 and construct a normal bell curve around that point. If the sample group accurately represented the general population, the test should be capable of identifying any single taker's relative intelligence. *Id.*

In 1984, Dr. James Flynn published a study documenting an increase in average performance on IQ tests over time, specifically finding an upward creep of average IQ scores by about 0.33 points every year. Other researchers found such a creep of about 0.31 points per year. Academic literature has since called this phenomenon "the Flynn Effect." *Id.*

The Flynn Effect carries relatively straightforward implications for the accuracy of IQ testing. The performance of the sample group used to norm a test is static—frozen in time. The average performance of all other test takers gradually improves each year. So a test normed in 1995 will not reflect average intelligence a decade later. Because of the upward creep in average scores, we should expect a person of average intelligence a *decade* after a test was normed to score a 103, rather than just 100. *Conversely, if a person scores 73 on an IQ test normed ten years before it was administered, we may adjust his score downward to 70 to reflect his intelligence relative to today’s general population. Id.* While recognizing this, the Court below neither endorsed nor rejected the Flynn Effect as a scientific matter, but for its analysis it assumed for the sake of argument that the Flynn Effect is indeed a feature of intelligence testing that counsels in favor of the personalized IQ score revisions Postelle proposed. *Id.*, n. 3.

REASONS FOR GRANTING THE WRIT

- I. **FAILURE OF TRIAL AND APPELLATE COUNSEL TO INVESTIGATE AND PRESENT RELEVANT MITIGATING EVIDENCE OF POSTELLE’S INTELLECTUAL DISABILITY USING THE FLYNN EFFECT PREJUDICIALLY DEPRIVED HIM OF EFFECTIVE ASSISTANCE OF COUNSEL**
 - A. **Postelle’s “borderline” intellectual disability called out for correction using the Flynn Effect to fully establish intellectual disability, yet counsel failed to use the Flynn Effect and offered testimony that he was more intelligent than he actually was.**

The Oklahoma County Public Defenders' Office represented Postelle at trial and on this direct appeal.¹ Though IQ tests showed his IQ scores to be 76 and 79, very close to the range of mental retardation/intellectual disability, neither trial nor appellate counsel argued that he suffered from intellectual disability. Indeed, his trial counsel introduced expert testimony that he was not intellectually disabled. His counsel on Post-Conviction Relief argued that both trial and appellate counsel were constitutionally ineffective for failing to introduce as mitigating evidence that Postelle's IQ scores had been inflated by the Flynn Effect, and that, once that erroneous inflation was corrected, his IQ scores were within the range needed to establish intellectual deficiency under Oklahoma law.

While the trial counsel missed the opportunity to make a powerful mitigating case based on intellectual disability and the Flynn Effect, she did submit mitigating evidence which would have been consistent with and reinforcing of a claim of intellectual disability. Counsel introduced mitigating evidence of organic brain damage, mental illness, a chaotic and disruptive upbringing, and drug abuse from an early age. *Postelle*, 901 F.3d at 1207-08. Trial counsel presented evidence establishing that Postelle's childhood was highly dysfunctional and that he had been seriously impaired since childhood. Mental illness ran in his family. His mother was

¹ Because appellate counsel worked in the same office as trial counsel she was not the independent counsel required to invoke a state procedural bar because the arrangement did not (1) allow petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) provide a procedural mechanism whereby a petitioner can adequately develop the factual basis of his claims of ineffectiveness. *English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998).

so mentally ill that at the time of trial she was committed to an inpatient mental institution in Arizona. The defense expert, Dr. Ruwe, testified that Postelle suffered from significant neurocognitive problems and severe psychological problems. However, the trial presentation merely touched upon the available mitigation evidence, despite that “courts have repeatedly found [evidence of mental illness] to be powerful mitigation.” *Postelle*, 901 F.3d at 1227, (Lucero, J., dissenting), citing *Wilson v. Sirmons*, 536 F.3d 1064, 1093 (10th Cir. 2008).

Direct appeal counsel failed to investigate further, even though there were indications in the trial transcript revealing that mental illness may have been a viable avenue of mitigation, and showing that Postelle’s borderline IQ scores might not accurately capture his mental capacity. According to direct appeal counsel, her failure to do so may have been caused by Postelle’s inability to meaningfully assist her. He failed to disclose any information about the crime to his lawyers or their investigators, and appeared to be ignorant of the seriousness of the sentencing proceedings. *Id.*

Only post-conviction counsel completed the basic investigation that unearthed the depth of Postelle’s cognitive and psychological issues. Post-conviction counsel also confirmed Postelle’s inability to help, saying when they met he spent most of his time giggling, laughing inappropriately and staring up at the ceiling. *Id.*

Many people who had known Postelle all his life testified that he had significant mental impairments from a young age: that he was “different from the rest of the kids,” “accident prone,” and “slow at processing things.” He “believed

everything he was told,” “couldn’t understand when people were joking,” and took frequent and unnecessary risks. Many of Postelle’s friends and family members reported that none of his lawyers until post-conviction counsel contacted them and that if they had been contacted, they would have testified to their observations of Postelle’s mental disability. Others indicated that, although they had spoken to Postelle’s trial attorneys, they were not asked about his mental health, cognitive function, or family history of mental illness. After post-conviction counsel provided a complete family history, Dr. Ruwe, the trial expert, diagnosed Postelle with major depressive disorder with psychotic features and found that he exhibited symptoms of post-traumatic stress disorder and possible schizophrenia. *Id.*

School records presented at trial indicated that Postelle was removed from mainstream classes and placed in special education early in elementary school, where he remained until he dropped out at the age of twelve. In 1999, shortly before leaving school, Postelle was given an Adaptive Behavior Inventory, an adaptive functioning test, and scored in the bottom 0.1 percentile. About 99.9 percent of children his age outperformed him. *Id.* This assessment showed that, at the age of twelve, when most children would be finishing sixth grade, Postelle was “beginning” to use spoken language to convey information to others, read a few simple sight words, and to become aware of the perceptions of others. *Id.* He could not answer questions about a story he had just read, convey knowledge in writing, do work independently without disturbing others, or comment appropriately in group situations. He had not

mastered any skills, including telling time or knowing the names and values of coins and bills. *Postelle*, 901 F.3d at 1227, (Lucero, J., dissenting).

After his arrest, in November 2006, Postelle took the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) and scored 79. He also took the Wechsler Abbreviated Scale of Intelligence (WASI) in March 2007 and scored 76. Without any adjustment for the Flynn Effect or the standard error of measurement, these scores fell within the range considered as borderline mental disability. *Id.* People with such borderline mental disability generally have limited skills relating to planning, decisionmaking, and spoken language. *Postelle*, 901 F.3d at 1228 (Lucero, J., dissenting).

Counsel would have had ample evidence supporting Postelle's intellectual disability had they used the Flynn Effect to demonstrate his true IQ more accurately dipped into the range of intellectual disability. Because of the imperfect statistical analysis in IQ tests, the 95% confidence interval—the range in which there is a 95% chance his IQ falls--Postelle's unadjusted November, 2006 WAIS-III test yields a true IQ score between 75 and 83. His March 2007 WASI test yielded a true IQ within the interval between 72 and 81. *Id.* The Flynn Effect adjusts both of these scores to 74, and with the 95% confidence interval there is a 95 percent probability that Postelle's true I.Q. score lies between lies between 70 and 79. *Postelle*, 901 F.3d at 1232 (Lucero, J., dissenting). This falls within the range required to demonstrate intellectual disability under Okla. Stat. tit. 21, § 701.10b (A)(3) which requires consideration of the standard error of measurement.

Instead of presenting evidence that Postelle's correct I.Q. score was 74 and could in fact be as low as 70, trial counsel presented evidence that it was either 76 or 79. *Postelle*, 901 F.3d at 1232, (Lucero, J., dissenting). Had trial or appellate counsel offered Flynn-corrected IQ scores of 74 they would have had a firm basis to argue that Postelle's IQ placed him under the statutory limit of 76 and thus eligible to be considered mentally retarded/intellectually disabled. The standard error of measurement offers the basis for an IQ within a range going to 70, or just below it.

Crucially, trial counsel did not merely fail to bring evidence that Postelle had a score below 75, but went on to present evidence that he had a score above 75. That is, trial counsel did not merely fail to introduce evidence of Postelle's lower adjusted scores, they instead introduced scores that were erroneously high. *Postelle*, 901 F.3d at 1234, (Lucero, J., dissenting). Worse, trial counsel introduced testimony that Postelle was not mentally retarded. Trial Tr. 2861:5-9. This was not the mere omission of mitigating evidence, but rather amounted to the introduction of evidence undermining the mitigation case counsel were trying to mount. *Postelle*, 901 F.3d at 1234 (Lucero, J., dissenting). The artificially high I.Q. scores were in tension with the family testimony that Postelle had been intellectually challenged since he was a small child, that his family members reported concerns about his cognitive capacities, and that he dropped out of school at age 12. *Id.* at 1233-34. This error of counsel showed him more intellectually capable than he was, and hence more responsible for his actions than he was. *Id.*

B. The Flynn Effect was available to correct Postelle's outdated IQ scores, and his circumstances called out for its use.

In his dissent, Judge Lucero demonstrated that by the time of Postelle's trial in 2008, the Flynn Effect was so well observed and documented that a reasonable capital defense attorney preparing a presentation of mitigating evidence, should have known about it. *Postelle*, 901 F.3d at 1230 (Lucero, J., dissenting). Judge Lucero noted that 24 years before Postelle's trial, Dr. Flynn showed that between 1932 and 1978, the IQ score of a representative sample of Americans rose by an average of 13.8 points and that the Flynn Effect had not only gained acceptance within the scientific community, but was commonly mentioned in capital punishment cases. *Id.* He amassed a voluminous collection of cases establishing the availability of the Flynn Effect as an argument by the time of Postelle's trial. *Id.*, n. 1.

Had trial counsel performed the constitutionally required investigation to locate, develop, and present Flynn Effect evidence as mitigating evidence in the penalty phase of the trial, such evidence would have pulled together the varied pieces of mitigating evidence into a consistent and compelling whole. The expert testimony and the affidavits of family members that were gathered should have prompted counsel to investigate Postelle's obvious cognitive limitations to make an *Atkins* exclusion plea, and, alternatively, simply to make a compelling mitigating evidence argument for a sentence less than death. His uncorrected IQ scores were borderline and his family members reported concerns about his cognitive capacity with pathos-inspiring vignettes of his limited intelligence. Jurors would have understood a claim of intellectual disability as the cause for Postelle's placement in special education

early in his short time in school and as cause for being found in the bottom 0.1% of the population in the Adaptive Behavior Inventory at the age of twelve. At that time, he was only “beginning” to use spoken language to convey information, read only a few sight words, and beginning to become aware of the perceptions of others.

The use of Flynn Effect evidence would allow an expert to put a common and unifying name on this array of cognitive-impairment evidence. That name was then “mental retardation,” and now is “intellectual disability.” There is no evidence the intellectually disabled are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan. Crucial for this case is that *in group settings they are followers rather than leaders*. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). This is borne out in Postelle’s trial. The State’s evidence from Randall Byus, the codefendant who turned state’s evidence, was that Gilbert arrived at the Postelle home on the day of the shootings shortly before they all left to go to the scene. Tr. 2045. Byus also testified that, on the way to the scene he asked his father if they had to kill Donnie Swindle’s father, whom Gilbert liked. Postelle’s father Brad Postelle told his son they needed to kill them all. *Postelle v. State*, 267 P.3d 114, 123-26 (Okla. Crim. App. 2011) Appendix D. As he virtually always did, Postelle followed the directive of a family member. Flynn Effect evidence of intellectual disability could have explained this.

Similarly, the *Atkins* court recognized that intellectually disabled persons frequently know the difference between right and wrong and are competent to stand trial but, because of their impairments, they have diminished capacities to

understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. *Id.*, 536 U.S. at 318. An argument based on intellectual disability that explained these impairments would have unified the existing expert testimony in a way the jury could understand. Dr. Ruwe, the expert employed by Postelle's counsel at trial, explained his severe deficits in cognition similarly, saying Postelle had pretty pronounced problems remembering information, had difficulty in reasoning, especially verbal reasoning, was pretty impaired on verbal tasks, and performed very poorly remembering visual information. Tr. 2849-50. Postelle had a tremendous amount of disturbance on many of the scales for subtle kinds of psychological and personality factors. Tr. 2851. He had difficulties thinking, some pronounced psychological difficulties in terms not only of depression, but organizing the way he perceives reality, was paranoid, had disorganized thinking and was not able to appreciate what is going on around him. Tr. 2849, 2851.

Before Postelle's trial the Court of Appeals found that evidence of mental retardation, brain damage, and troubled background constitute critical, permissible mitigating evidence. *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). In *Smith* the Court of Appeals found that empirical evidence shows that jurors are more likely to vote for life rather than death sentences in cases where there is clear and clearly presented evidence that the defendant has suffered from some form of mental illness, especially cognitive impairments like retardation. *Id.* The *Smith* Court reviewed studies finding evidence of mental retardation and mental illness to be the most

persuasive mitigation evidence; effectively, they have no aggravating effect. Mental retardation is “much more” mitigating than other potential factors. *Id.* *Smith* also observed that this Court has said evidence of borderline mental retardation and childhood privation and abuse is “consistent with the view that [Postelle's] behavior was a compulsive reaction rather than the product of cold-blooded premeditation.” *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)). Capital trial counsel should have known these fundamental points from *Smith* and other cases and employed them for Postelle’s benefit.

Thus, both the factual and legal basis existed for counsel at trial to find and apply the Flynn effect to add compelling mitigating evidence to the punishment phase case.

C. The Sixth Amendment guaranteed Postelle counsel who would investigate and present mitigating evidence, like that provided by the Flynn Effect.

The *Strickland* line of cases guaranteed Postelle the right to effective counsel. This right entitled him to a thorough investigation of law and facts relevant to plausible options that would have supported his plea for a sentence less than death. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Adequate representation in capital cases has long been understood to require a complete investigation and presentation of mitigating evidence. *Williams v. Taylor*, 362 U.S. 362, 396 (2000). The Court reversed a death penalty in *Williams* because counsel had failed to adequately investigate and present evidence of his intellectual disability and abusive childhood. *Id.* The Court again reversed a death sentence for trial counsel’s

inadequate investigation into mitigating evidence in *Wiggins v. Smith*, 539 U.S. 510 (2003). While counsel had hired a psychologist and researched certain records, the Court found counsel's performance defective because competent counsel, knowing the extent of Wiggins' abuse, would have hired a social worker to prepare a social history report and locate further evidence of that abuse. *Id.*, at 535. In *Rompilla v. Beard*, 545 U.S. 374, 381-82 (2005), trial counsel interviewed five of the client's family members and hired three mental health experts, but, despite knowing Rompilla had a criminal record and had left school in the ninth grade, did not examine his school records or records of his prior incarceration. The Court overturned this death sentence as well, holding that investigating easily available criminal records would have found a range of mitigating evidence, including the suggestion that he was cognitively impaired and suffered from schizophrenia, making a stronger mitigating case. *Id.*, at 390-91.

Investigation and presentation of mitigating evidence is a vital job of counsel in the punishment phase of a capital case. *Wiggins*, 539 U.S. at 522; *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Evidence of a defendant's abusive family background, lack of education, and reduced cognitive capacity is particularly strong mitigating evidence. *Wiggins*, 539 U.S. at 535.

The Flynn Effect, widely reported in cases and professional journals, was readily available to help counsel create a powerful mitigation case. It would have revealed the "plausible option" of an *Atkins* eligibility defense, or powerful and relevant mitigating evidence to argue for Postelle's life. Because the omitted evidence

generated by applying the Flynn Effect to Postelle's inflated IQ scores of 76 and 79 would have been mitigating, up to and including outright rendering him ineligible for execution under *Atkins*, Postelle's trial and appeals counsel had a constitutional duty to investigate the Flynn Effect and to employ it to save his life.

D. Flynn Effect evidence is relevant mitigating evidence under the Eighth Amendment.

As noted above, in *Lockett v. Ohio*, 438 U.S. 586, 593-94 (1978) the Court struck down a state statute mandating the death penalty for certain crimes, with only three potentially mitigating factors available. A plurality of the court noted that the concept of individualized sentencing had long been central in American law and the fundamental respect for humanity underlying the Eighth Amendment requires individualized consideration of the particular offender and the offense as a constitutionally indispensable part of inflicting the death penalty. *Id.*, 438 U.S. at 602-03. Thus, the Eighth and Fourteenth Amendments require a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a *basis for a sentence less than death.*" *Id.*, at 603 (quotations omitted and emphasis added).

In *Eddings* the Court expanded *Lockett's* directive and held that a defendant, sixteen years old at the time of the killing and who had suffered an extremely difficult upbringing and severe emotional and psychological disorders, must be allowed to offer evidence of his background and mental and emotional development as mitigating evidence in the punishment phase. *Eddings*, 455 U.S. at 116. The State

may not preclude by statute (as the OCCA did by relying on the statute) the sentencer from considering any mitigating factor, nor may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. *Eddings*, 455 U.S. at 114. So *Lockett* and *Eddings*, and other cases as well, guaranteed to Postelle a broad right to bring in a wide variety of mitigating evidence, providing it related to his own personal characteristic or to the circumstances of the crime. A competent capital defense lawyer would have known this and would not have succumbed to the OCCA's "it stands to reason" explanation that no lawyer could argue Postelle was intellectually disabled because Postelle's IQ scores prevented him from being found mentally retarded under the express language of the statute.

Flynn Effect evidence is relevant mitigating evidence, and was, at the time of trial, a recognized scientific method to arrive at a capital defendant's true IQ and to correct inflated IQ test results for the distorting effect of score inflation from the passage of time. Taking, as it does, inflated test results and correcting them to a truer and more accurate IQ score (or range of scores) the Flynn Effect offers intellectual disability as an aspect of a defendant's character or record to be proffered as a *basis for a sentence less than death*. The majority declined to find the OCCA, in its silent treatment of the Flynn Effect mitigation claim, contradicted the *Lockett* line of cases. *Postelle v. Carpenter*, 901 F.3d at 1213. However, the Court below did recognize that forced exclusion of Flynn Effect evidence from sentencing would indeed contradict the *Lockett* line of cases, because evidence of the Flynn Effect meets the low bar of relevance to the sentencing determination in light of *Atkins*. *Id.*

II. THE OCCA COMPLETELY FORCLOSED USE OF EVIDENCE BASED ON THE FLYNN EFFECT FROM USE IN THE “MENTAL RETARDATION DETERMINATION FOR CAPITAL DEFENDANTS” IN THE *ATKINS* ELIGIBILITY CLAIM.

All three judges of the Court below found that the OCCA could not compel exclusion of evidence based on the Flynn Effect, explained below, from being used to correct Postelle’s inflated IQ scores as relevant mitigating evidence to establish his intellectual disability. *Postelle v. Carpenter*, 901 F.3d at 1213 (Tymkovich, J., majority), 1232 (Lucero, J., dissenting). The majority erred by never coming to grips with the pronouncement of the OCCA that “the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants.” *Postelle v. State*, No. PCD-2009-94, slip op. at 13, n. 6 (Okla. Crim. App. February 14, 2012)., Appendix D (PCR opinion)

In this capital case, both trial and appellate counsel represented Postelle ineffectively not only by failing to investigate and develop readily available evidence of his intellectual disability, but also by affirmatively introducing at trial, and ignoring on appeal, flawed expert testimony showing he was not intellectually disabled. At the time of Postelle’s trial, *Atkins v. Virginia*, 536 U.S. 304 (2002), categorically barred execution of an intellectually disabled defendant, and before trial several of this Court’s cases had found capital trial counsel constitutionally ineffective for failing to investigate, develop, and present evidence of even border-line intellectual disability. The Flynn Effect, a statistical phenomenon well recognized in

published court opinions and professional sources at the time of Postelle's trial, would have supplied evidence of intellectual disability.

Post-conviction counsel raised the Flynn Effect as a basis for both a claim of ineffective assistance of trial and appellate counsel (1) under *Atkins* and (2) as relevant mitigating evidence. In rejecting the *Atkins* claim, the OCCA said that in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on *any* acceptable IQ test be considered "mentally retarded" and, thus, shall not be subject to any proceedings under Okla. Stat. tit. 21 § 701.10b, the statute governing "mental retardation" proceedings in capital cases. PCR op. at 12. The OCCA drove home the exclusionary rule prohibiting Flynn Effect evidence even more strongly saying, "the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants." *Id.*, n. 6. The OCCA also remarked that Postelle's expert witness at trial "testified that Postelle was not mentally retarded during the second stage of trial," *id.*, n. 7, using Postelle's own mitigation expert against him.

The OCCA concluded that "it stands to reason" that that neither trial nor appellate counsel pressed an intellectual disability claim because Postelle's IQ scores prevented him from being found mentally retarded under the express language of the statute. The trial counsel claim was waived because it could have been raised on direct appeal. PCR op. at 13. In considering the claim of ineffective assistance of appellate counsel, the OCCA repeated that trial counsel "could not contend" under the statute that Postelle was intellectually disabled because his IQ scores were 76

and above, so appellate counsel was not ineffective for failing to raise the issue on appeal. OCCA slip op. at 19-20. Because the OCCA foreclosed Flynn Effect evidence from correcting inflated IQ scores to a true score *under 76*, a range at which a claim of intellectual disability could have been made, the OCCA said counsel simply “could not contend” Postelle was intellectually disabled.

III. THE COURT BELOW ERRED IN FINDING THE OCCA ACTED REASONABLY.

Post-conviction counsel fairly presented a claim that Flynn Effect evidence could be used in mitigation even if it was not enough to secure a pretrial ruling that Postelle was intellectually disabled. The OCCA ignored that claim and was entirely silent about it. Therefore, as Judge Lucero found, the OCCA failed to decide the issue on the merits, entitling Postelle to de novo review of the claim rather than being subject to AEDPA deference. On the merits the readily available Flynn Effect evidence would have established Postelle was intellectually disabled. Instead, counsel allowed expert testimony that Postelle’s cognition was higher than it truly was, undermining the very mitigation case counsel was trying to mount. Both trial and appellate counsel were constitutionally ineffective.

The majority below erred in sidestepping Postelle’s claim that (1) trial and appellate counsel were constitutionally ineffective because they failed to investigate and present evidence of intellectual disability based on the Flynn effect, and that (2) Flynn Effect evidence was relevant mitigating evidence under the *Lockett/Eddings* line of cases that competent counsel should have presented. Despite the majority’s

view, the OCCA unreasonably excluded Flynn Effect from capital sentencing and then excused counsel's failure to offer it by asserting it was not deficient performance to omit Flynn Effect evidence it could not be used to show Postelle's IQ was below the state limit of 76. Flynn Effect evidence could not be used for the sole and dogmatic reason that Flynn Effect evidence is not a relevant consideration in the "mental retardation" determination.

The OCCA's opinion did not address the Flynn Effect mitigation claim. This claim was the only post-conviction claim the OCCA did not rule on specifically. The majority attempted to explain the absence of a ruling by positing "the most reasonable interpretation" as that the OCCA "did not comment on this throw-away assertion," referring to Postelle's argument that that Flynn Effect was vital mitigating evidence. *Postelle*, 901 F.3d at 1213. The majority then stated that the OCCA "focused solely on the eligibility argument in rejecting Postelle's Flynn Effect-based ineffective assistance of counsel theory."² *Id.* "Focusing solely" on the eligibility argument is tantamount to conceding that the OCCA did not decide the companion Flynn Effect-mitigation argument.

A. The Flynn Effect mitigation claim was not a "throw-away assertion."

² Unlike federal courts in habeas corpus matters under the AEDPA, the OCCA is not bound to act only if the claim results asserts action that is unreasonable or contrary the precise holding of one of this Court's decision. While the majority below resolved Postelle's *Atkins* eligibility claim on AEDPA grounds, *Postelle*, 901 F.3d at 1212-13, the OCCA was not similarly limited and decided the issue as if controlled by the Oklahoma statute without consideration of relevant mitigating evidence as required by the Eighth Amendment.

In his application for Post-Conviction Relief Postelle's counsel argued that his trial counsel had rendered ineffective assistance of counsel in the second stage by failing to investigate and present evidence of his intellectual disability. PCR op. at 9-10, Proposition 1(B)(1). Postelle argued trial counsel failed to develop evidence of his intellectual disability by using the Flynn Effect, failed to locate and offer educational records showing deficits in adaptive functioning, and failed to develop testimony of several of his family members. Postelle's counsel cited *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Strickland v. Washington*, 466 U.S. 668 (1984), in this section. The argument in this subsection of the Application concluded:

In addition even if counsel had been unsuccessful in obtaining a pre-trial finding that Postelle is mentally retarded, counsel could have still presented the evidence as mitigation during the second stage of his trial.

This assertion is supported both by the *Lockett/Eddings* line of cases and by Oklahoma's own statute Okla. Stat. tit. 21, § 701.10b(E), (F) and (G).³

Immediately after the above statement, PCR counsel stated, "One of the primary duties of a capital defense lawyer is to conduct a thorough investigation of his/her client's background and to present mitigating evidence discovered to the jury."

PCR counsel cited *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*,

³ The statute provides three different opportunities to assert mental retardation/intellectual disability in defense of a capital case. Okla. Stat. tit. 21, § 701.10b(E), (F), and (G). They are a pretrial evidentiary hearing on intellectual disability in subsection (E), a special issue to the jury at trial as to whether the defendant is intellectually disabled in subsection (F), and, finally, that the jury "may consider any evidence of mental retardation as a mitigating factor in sentencing the defendant" in subsection (G).

529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007), for the critical importance of mitigation in evidence in a capital case.

The alternative claim of ineffective assistance by failure to present mitigating evidence of mental retardation/intellectual disability, including failure to argue the Flynn Effect, was placed at the intersection between the *Atkins* ineligibility argument and the rest of the argument about failure to develop other mitigating evidence. It was a logically placed and integral part of PCR counsel’s second stage ineffectiveness of counsel claim, not a “throw-away assertion” as suggested by the majority. *Postelle*, 901 F.3d at 1213.

The majority found the only colorable reference to the mitigation-based Flynn argument was in the OCCA’s “sweeping rejection” of *any* ineffective assistance of counsel premised on a mitigation defense. *Postelle*, 901 F.3d at 1212. However, the OCCA did not make a “sweeping rejection” of mitigation claims. Postelle’s PCR counsel raised nine propositions of error, including those based on mitigation, and the OCCA specifically addressed every single one of them except the mental retardation mitigation claim:

Claim or portion of claim in PCR Application	Where addressed in OCCA PCR Order
Proposition 1 First Stage ineffectiveness of counsel	PCR Order pp. 9-10 ⁴

⁴ Pages 1-8 of the PCR Order are devoted to introductory matter and to a claim that Postelle was presently incompetent. Post-conviction counsel made a serious argument that Postelle was not competent to assist them in post-conviction proceedings.

Proposition 1 Second Stage ineffectiveness for failure to present mental retardation (<i>Atkins</i> claim)	PCR Order pp. 11-13
Proposition 1 Second Stage Ineffectiveness for failure to present intellectual disability, family history and mental health evidence as mitigating	PCR Order pp. 13-17
Propositions 2-7	Finding all were specifically waived by <u>number</u> per PCR Order pp. 17-18, n. 9
Proposition 8 Ineffectiveness of Appellate counsel	PCR Order pp. 18-20
Proposition 9 Cumulative Error	PCR Order p. 20

The OCCA specifically addressed every claim made on Postelle's behalf *except* the claim of second stage ineffective assistance of counsel for failure to present mental retardation, including Flynn Effect evidence, as mitigating. Given its specific mention of all the other issues on PCR, the OCCA must have overlooked the claim Flynn mitigation claim in Proposition 1(D)(1), or, as Judge Lucero surmised, misconstrued it as the *Atkins* argument in the same portion of the brief. *Postelle*, 901 F.3d 1232-34, n. 3 (Lucero, J., dissenting).

B. The Court of Appeals' dictum on the AEDPA deference due the *Atkins* eligibility argument based on has no reference to the mitigation claim based on intellectual disability and the Flynn Effect.

While suggesting the OCCA *did not comment on* the intellectual disability mitigation claim, the majority below found the OCCA's handling of Postelle's *eligibility-based* argument warranted AEDPA deference. *Postelle*, 901 F.3d at 1212. As the majority explained it, the OCCA rejected Postelle's eligibility-based post-conviction relief argument because it would have been fruitless, citing page 13 of the

OCCA's PCR order. Page 13 of that order built upon page 12 as its necessary foundation, and page 12 is necessary to understand the ruling of both the OCCA and the court below. The OCCA wrote:

We rejected a similar claim in *Smith v. State*, 2010 OK CR 24, ¶10, 245 P.3d 1233, 1237 stating:

The problem with this argument is that while the language of section 701.10b directs that an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above. In particular, after stating that "*[i]n determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account,*" section 701.10b goes on to say: "*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*" (emphasis added). By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on *any* scientifically recognized standardized test, 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.

On the same page the OCCA wrote the following footnote:

⁶ In *Smith v. State*, 2010 OK CR 24, ¶ 10, n. 6, 245 P.3d 1233, 1237 n. 6, this Court noted 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."⁵

PCR op. at 12-13. On page 13, relied upon by the majority below, the OCCA said in Postelle's case that "[i]t stands to reason" than neither trial nor appellate counsel

⁵ By its literal terms, this sentence prohibits the use of Flynn Effect evidence as constitutionally permissible relevant mitigating evidence of intellectual disability (the mental retardation determination for capital defendants) proffered to suggest a sentence of less than death under *Lockett* and *Eddings*.

pressed a [mental retardation/intellectual disability] claim under § 701.10b [the statute governing proceedings regarding mental retardation] because Postelle's I.Q. scores prevented him from being found mentally retarded under the express language of the statute. PCR op. at 13. And, of course, the Flynn Effect could not be allowed to show the defendant's true IQ is below 75. So the Oklahoma statutory scheme barred any use of Flynn Effect-generated evidence to establish intellectual disability. So the Oklahoma statutory scheme barred any use of Flynn Effect-generated evidence to establish intellectual disability though such evidence would doubtlessly be mitigating.

The majority took this to mean that counsel was wise to omit Flynn Effect evidence in the *Atkins* eligibility argument because the OCCA had said that under the statute any defendant with one scientifically valid IQ score of 76 or higher *simply could not be intellectually disabled*. Consequently, because evidence of the IQ score-correcting power of the Flynn Effect simply could not be offered as a matter of state law, its omission was not deficient performance and could not prejudice the defendant. *Postelle*, 901 F.3d at 1212. However, this eligibility-based argument does not affect the mitigation claim about which the OCCA was silent.

C. Counsel could not overlook such compelling mitigation in reliance on any expert, and the Flynn Effect would have been enough to demonstrate intellectual disability.

The majority speculated that trial counsel may have relied on her expert to rule out the Flynn effect. *Postelle*, 901 F.3d at 1215-17. Judge Lucero forcefully rebutted this speculation by showing it is the attorney's job to hire an expert to testify

to conclusions that the attorneys felt would advance their client's cause. *Postelle*, 901 F.3d at 1233, (Lucero, J., dissenting). But his counsel hired an expert who testified that he was not intellectually disabled. Given the defendant's background and available mitigation evidence, that is not a reasonable litigation strategy. *Id.* The expert's role is not to assume the role of counsel, but to assist in the presentation of a case in its best light, and the hired expert cannot inoculate counsel against claims of constitutional inadequacy. *Id.*

The expert testimony and affidavits of family members which trial counsel gathered should have prompted counsel to investigate his cognitive limitations as a mitigating factor. *Id.*, at 1233-34. Like counsel in *Wiggins* and *Rompilla*, Postelle's counsel had materials that indicated he had serious mental capacity issues. His IQ scores were borderline, his family members reported concerns about his cognitive capacities, and he dropped out of school when he was very young. *Id.*, at 1234. Dr. Ruwe testified that (based on his uncorrected IQ scores) though he was competent for *Atkins* purposes, he experienced significant cognitive issues. This range of mitigations should have prompted competent counsel to exercise due diligence. Further investigation would have lead counsel to the Flynn Effect which could explain Postelle's IQ scores. *Id.* Because the Flynn Effect was well known in 2008 in the legal field and the scientific community, a simple search would have discovered it. *Id.* Reliance on an expert cannot justify failure to do so.

D. The Flynn Effect would have provided the key increment needed to prove intellectual disability, not just some marginal benefit.

Unaccountably, the majority below commented that “the OCCA may have recognized, the difference of a few IQ points was not some magical key to success” and the “marginal benefit” would not be worth the battle of the experts to produce it. *Postelle*, 901 F.3d at 1217. However, under the plain language of the OCCA PCR opinion, an IQ score under 76 made all the difference in the world. It would be the “magical key” to a successful demonstration of mental retardation/intellectual disability, or at least to compelling mitigating evidence of such disability.

Judge Lucero noted, that, as a constitutional matter, a score of 75 or below (where Postelle’s correct IQ scores would have been) entitles a defendant into an inquiry whether he is intellectually disabled *Postelle*, 901 F.3d 1234 (Lucero, J., dissenting), citing *Hall v. Florida*, 572 U.S. 701, 714 (2014). Judge Lucero recognized, as would apply here, as a practical matter such a score can reasonably be expected to suggest to a jury that a defendant lacks the intellectual capacity to bear full culpability for his crimes. *Postelle*, 901 F.3d at 1234, (Lucero, J., dissenting). It was deficient performance not to investigate and present a Flynn-based claim of intellectual disability.

On the other hand, a score above 75 suggests the opposite as a legal and practical matter that the test-taker has below average but not deficient intellectual function. Thus, in the minds of the public, an IQ score, by its nature either indicates intellectual disability or its absence. *Id.* In this case, Postelle’s counsel did not merely fail to bring readily available evidence that he had an IQ score below 75; instead, they brought evidence he had a score above 75. *Id.* Counsel’s failure to introduce the

Flynn Effect amounted not just to the omission of mitigating evidence, but rather to the introduction of artificially high IQ scores that were in tension with the family testimony that Postelle had been intellectually challenged since he was a small child. *Id.* In effect, counsel put on evidence that went against mitigation, and indicated he was more intellectually capable than he actually was, and so bore more responsibility for his actions than he did. *Id.* It was especially deficient performance to portray Postelle as worse than he could accurately have been portrayed. The OCCA seized on the expert testimony to say, “Dr. Ruwe testified that Postelle was not mentally retarded during the second stage of trial.” PCR op. at 12, n. 7.

Correct IQ scores would have provided valuable context to the jury for the facts of the crimes themselves. *Postelle*, 901 F. 3d. at 1234 (Lucero, J., dissenting). Postelle was only eighteen at the time of the crime. He had been urged on by his father and older brother and acted as an impulsive follower. *Id.* at 1234-35. An intellectual disability diagnosis would have been particularly powerful mitigating evidence, and would have convinced at least one juror to vote for life or life without parole rather than death. As it was, counsel’s mitigation case portrayed Postelle as more capable, more cunning, and more culpable than he was. Ignorant of the Flynn Effect and presented with artificially high IQ scores the jury sentenced Postelle to death. *Id.*

IV. NO DEFERENCE IS WARRANTED BECAUSE THE OCCA OVERLOOKED THE FLYNN MITIGATION CLAIM, BUT IF IT ACTUALLY DECIDED THAT ISSUE, ITS DECISION IS UNREASONABLE AND CONTRARY TO THIS COURT’S AUTHORITY.

A. The OCCA overlooked the Flynn Effect disability mitigation claim.

The majority applied AEDPA deference despite the fact that the OCCA never addressed Postelle's mitigation argument. *Postelle*, 901 F.3d at 1220. The majority characterized this argument as a "throw-away assertion." *Id.*, at 1213. The Court was wrong to apply deference.

In *Johnson v. Williams*, 568 U.S. 289, 298-99, 303 (2013), this Court held that when a state court adjudicates some but not all of a Postelle's claims, federal courts apply a rebuttable presumption that the court adjudicated all of the claims and rejected them on the merits. This presumption may be rebutted if a Postelle shows *some reason to think* some other explanation for the state court's decision is more likely by pointing to *some indication that the state court ignored the claim or rejected it on grounds of state procedure*. *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011). Federal habeas courts could assume that any unaddressed federal claim was simply overlooked if state appellate courts always separately addressed every single claim that is mentioned in a defendant's papers. *Id.*, 568 U.S. at 298.

We cannot say with assurance that the OCCA *always* separately addresses every claim raised by every capital defendant on PCR. But in this case the evidence shows very clearly that the Flynn mitigating evidence claim was inadvertently overlooked or equated with the *Atkins* claim in state court. The OCCA had before it both the *Atkins* exclusion claim, a new claim since 2002, and the omissions of mitigating evidence claims, time honored and well established since *Lockett* and *Eddings*. It explicitly ruled on the *Atkins* claim and on all of the other mitigating evidence claims, *except* for the Flynn Effect mental retardation as mitigation. Under

these circumstances, the OCCA's silence on the Flynn Effect mitigation claim rebuts any presumption of a silent rejection of this claim.

As Judge Lucero stated, by failing to address the argument that Flynn Effect evidence could be used in mitigation, not just to support *Atkins* exclusion, the OCCA failed to adjudicate this claim on the merits. *Postelle*, 901 F.3d at 1232 (Lucero, J., dissenting). The fact the OCCA opinion emphasized the potential use of the Flynn Effect to show Postelle was ineligible for capital punishment under *Atkins*, rejecting it but without mentioning the evidence's potential second use as mitigation evidence, suggests that the OCCA may have misconstrued the mitigation argument as the *Atkins* argument, rather than silently rejecting it on the merits. Thus, the deferential standard of the AEDPA does not apply, and the Court below should have exercised its independent judgment and reviewed the district court's conclusions of law *de novo* and its factual findings for clear error. *Id.* 901 F.3d at 1232-33, (Lucero, J., dissenting), citing authorities. When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, Section 2254(d) entitles the Postelle to an unencumbered opportunity to make his case before a federal judge. *Johnson*, 568 U.S. at 303. Postelle is entitled to *de novo* review of the Flynn Effect mitigation ineffectiveness of counsel claim. The panel majority's finding to the contrary misapplies *Johnson*.

B. If the OCCA silently ruled on the Flynn intellectual disability claim, its decision is unreasonable and contrary to this Court's holdings.

Further, *if*, contrary to Judge Lucero’s belief, and ours, that the OCCA overlooked the non-*Atkins* mitigation claim raised on post-conviction relief, and *if*, the Court silently ruled on and denied that claim—alone of all the claims it ruled on and not at all mentioned in its opinion—that decision would be an unreasonable one, and flatly contrary to the clearly established precedent in this Court based upon both the *Strickland* line of cases, and the *Lockett/Eddings* line as well. 28 U.S.C. § 2254(d). Postelle has demonstrated that competent defense counsel, faced by the array of mitigating evidence and information, had a duty to investigate and use the Flynn Effect as mitigating evidence. They had a duty as well not to submit his existing, uncorrected, inflated IQ scores contrary to his interest in sentencing. Further, as the majority below conceded, the compelled exclusion of Flynn Effect Evidence from capital sentencing proceedings “would indeed contradict the *Lockett* line of cases, as evidence of the Flynn Effect clearly meets the low bar of relevance to the sentencing determination in light of *Atkins*.” *Postelle*, 901 F.3d at 1213. The failure to properly investigate, develop, and present Flynn Effect mitigation evidence violated Postelle’s right to effective assistance of counsel, and did so in a way that seriously prejudiced him and the defense of his life.

C. If the OCCA’s decision on the Flynn Effect mitigation claim was silently the same as its decision on the *Atkins* claim, it is unreasonable.

If the OCCA silently intended that its *Atkins* exclusion case ruling serve as well as its decision on the Flynn Evidence intellectual disability mitigating evidence claim, that decision is even more glaringly unreasonable and contrary to the decisions of this Court. It is tantamount to a judicial Catch-22. Failure to investigate and employ Flynn Effect evidence

cannot be deficient performance under the Sixth Amendment because concededly relevant and mitigating evidence of the operation of the Flynn Effect (though admissible under the Eighth Amendment) is barred from admission because, whatever its validity, it is not a relevant consideration in the mental retardation determination for capital defendants.

V. DISALLOWING INTRODUCTION OF DAVID POSTELLE’S LIFE SENTENCE WAS ALSO A DENIAL OF RELEVANT MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT.

Prosecutors charged Postelle’s brother David Postelle with the same four murders they alleged (Gilbert) Postelle committed. The two brothers were named as codefendants in a single charging document. During the penalty phase of his trial, Postelle tried to present evidence showing that his brother, convicted in a separate trial of the same four murders, received a life sentence. Gilbert Postelle urged that in *his* trial the relative lenience visited on his codefendant brother merited the jury’s consideration as a mitigating factor, since it might convince at least one juror to impose the same sentence on him (Gilbert). The trial judge barred the comparative evidence from reaching the jurors, excluding any mention or proof of David Postelle’s sentence less than life. *See Postelle v. State*, 267 P.3d at 140-41.

Background

Citing *Lockett v. Ohio*, cited above, Postelle argued on direct appeal that juries in capital cases must be permitted to consider any circumstance of the offense as reason to mitigate the punishment. He pointed to the “low threshold for relevance” regulating the introduction of mitigating evidence, stressing the “expansive” universe of admissible, mitigating facts. *See Tennard v. Dretke*, 542 U.S. 274, 284 (2004). In

capital trials, a state judge “cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death.” *Id.* at 285.

The OCCA saw things differently. It affirmed the exclusion of David Postelle’s life sentence from Gilbert Postelle’s sentencing trial. *Postelle v. State*, 267 P.3d 114, 140-41 (Okla. Crim. App. 2011). So did the federal district court on habeas review, refusing to issue a Certificate of Appealability on the claim. Postelle moved to expand COA in the Tenth Circuit; the court of appeals rejected his request in a brief discussion appended to its final decision. As justification for refusing a COA, the Tenth Circuit rested on what it called “the presence of a legitimate controversy regarding the relevance of a codefendant’s sentence.” *Postelle v. Carpenter*, 901 F.3d at 1223. It denied “Postelle permission to appeal,” adding “even if the OCCA was ultimately wrong, reasonable jurists could not debate that its decision deserves deference under federal habeas law.” *Id.*

Analysis

The court of appeals was wrong, unreasonably so. It should have certified the claim under this Court’s governing precedents, which hold that a COA must issue if “jurists of reason could disagree” about resolution of the claim, “or that jurists could conclude the issue[] presented [is] adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This standard reflects the controlling statute. A prisoner seeking a COA need only demonstrate “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 253(c)(2).

The court of appeals was wrong to withhold a COA not only because it applied an excessively stringent standard; it was also wrong because Postelle was correct on the ultimate merits of the question. His codefendant's life sentence should not have been excluded from evidence. Barring the evidence represented an unreasonable application of this Court's caselaw, and habeas relief is appropriate.

This Court has held that “the sentencer in capital cases must be permitted to consider any relevant mitigating factor.” *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). It is a rule rooted in *Lockett v. Ohio*, which concluded “that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett*, 438 U.S. at 604. And it is a rule consistent with *Payne v. Tennessee*: “Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Payne v. Tennessee*, 501 U.S. 808, 809 (1991). Yet here the Oklahoma courts did just that: they placed limits on relevant mitigating evidence. In affirming the state courts, the Tenth Circuit unreasonably applied this Court's precedents, satisfying the precondition for habeas relief contained at 28 U.S.C. § 2254(d).

A juror could rationally believe the punishment meted out to Postelle's brother—for the same murders—bears on the appropriate punishment for Postelle. Such a juror could regard a codefendant's punishment a broadly defined “circumstance of the offense,” one measure—though by no means the only one—of

Postelle's relative moral culpability. That juror could "could reasonably find that it [a comparison of punishments] warrants a sentence less than death." *Tennard v. Dretke*, 542 U.S. at 285. That is because of two concerns lying at the heart of this Court's acceptance of the death penalty. The first is the need to ensure a consistent, rational application of law's ultimate sanction. *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (Douglas, J., concurring). The second is the mandate to reserve the death penalty for a narrow category of persons "materially more depraved than that of any [other] person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (internal quotations removed). These twin goals of consistency and narrowing are threatened when information about one codefendant's punishment is withheld from a jury contemplating punishment for another.

Congress placed "the need to avoid unwarranted sentence disparities among defendants . . . found guilty of similar conduct" into the primary federal sentencing statute. *See* 18 U.S.C. § 3553 (a)(6). Federal law, in other words, compels federal judges imposing a sentence under § 3553 to consider—and try to avoid—unwarranted sentencing disparities. The administration of a just death-penalty scheme demands that jurors weighing life and death at minimum be given information about a codefendant's punishment, so they too, like judges imposing sentence, can avoid what they might perceive as unwarranted disparities.

More than systemic concerns are at work here. A more practical, instrumental factor operates too. There is a reasonable possibility that at least one juror on Postelle's panel of jurors might have experienced a merciful impulse had he or she

learned that Postelle's brother and codefendant received a life sentence for his conviction for the same crime.

The state courts violated the Eighth and Fourteenth Amendments in precluding that possibility of mercy.

CONCLUSION: THE COURT SHOULD GRANT THE WRIT AND REMAND FOR A RESENTENCING HEARING.

In order to remedy the deficient performance of his trial and appellate counsel, Mr. Postelle respectfully asks the Court to grant the writ of certiorari, reverse the judgment of the Court of Appeals, and remand with directions to require the State of Oklahoma to conduct a new sentencing hearing in his case.

Respectfully submitted,

Robert A. Nance, OBA No. 6581
COUNSEL OF RECORD
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
528 N.W. 12th Street
Oklahoma City, OK 73103
(405) 843-9909
rnance@riggsabney.com

JOHN T. CARLSON
1200 Pearl Street,
Suite 314
Boulder, Colorado 80302
(303) 323-1930
jtcarlson@gmail.com

COUNSEL FOR PETITIONER
GILBERT POSTELLE

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