NO. 19-____

In the Supreme Court of the United States

TOMMY SHARP, INTERIM WARDEN,

Petitioner,

v.

JIMMY DEAN HARRIS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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** CAPITAL CASE **
QUESTIONS PRESENTED

Oklahoma juries sentenced Jimmy Dean Harris to death initially and following a 2005 retrial on the penalty. In his appeal of that sentence, Harris alleged that his counsel was ineffective for not requesting a pre-trial hearing on whether he was intellectually disabled and therefore ineligible for the death penalty. The Oklahoma Court of Criminal Appeals (OCCA) rejected that claim, concluding that the weight of the expert evidence was that Harris was not intellectually disabled.

The Tenth Circuit granted Harris habeas relief. The court reviewed the claim *de novo*, not deferentially, because it concluded that the OCCA based its holding on an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The Tenth Circuit pointed to the OCCA's statement that "all Harris's experts, including the ones who testified at his first trial and competency hearing, . . . concluded he was not mentally retarded." That was untrue, said the Tenth Circuit, because one expert testified that Harris had a mild intellectual disability. The Tenth Circuit concluded this isolated sentence rendered the OCCA's decision unreasonable in spite of a footnote in which the state court expressly acknowledged that one dissenting expert's views. The questions presented are:

1. In holding that the OCCA made an "unreasonable determination of the facts," did the Tenth Circuit contravene this Court's repeated admonition that "state-court decisions be given the benefit of the doubt," *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011);

Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (*per curiam*)?

2. Was the OCCA objectively unreasonable in crediting the testimony of three experts who opined that Harris was not intellectually disabled and not crediting the testimony of the one dissenting doctor, who has been censured, used an outdated test, made no assessment of adaptive functioning, and disregarded the influence of factors he acknowledged could influence IQ test scores?

LIST OF PROCEEDINGS

Oklahoma Court of Criminal Appeals
OCCA No. PR-2001-898
Harris v. State
Judgment entered on July 26, 2001

Oklahoma County District Court
Case No. CF-1999-5071
State v. Harris
Judgment and Sentence entered on November 28, 2001

Oklahoma Court of Criminal Appeals
OCCA Case No. D-2001-1268
Harris v. State
Mandate issued on February 11, 2004

Oklahoma Court of Criminal Appeals
OCCA Case No. PCD-2002-629
Harris v. State
Order of Dismissal entered on March 11, 2004

Oklahoma County District Court
Case No. CF-1999-5071
State v. Harris
Judgment and Sentence entered on February 28, 2005

Oklahoma Court of Criminal Appeals
OCCA Case No. D-2005-117
Harris v. State
Mandate issued on July 19, 2007

Oklahoma Court of Criminal Appeals
OCCA Case No. PCD-2005-665
Harris v. State
Mandate issued on August 20, 2007

United States Supreme Court
Case No. 07-9101
Harris v. Oklahoma
Petition for Certiorari denied on March 24, 2008

United States District Court for the Western District of Oklahoma
Case No. CIV-08-375-F
Harris v. Royal
Judgment entered on April 19, 2017

United States Court of Appeals for the Tenth Circuit
Case No. 17-6109
Harris v. Sharp
Judgment entered on October 28, 2019

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PROCEEDINGS iii

TABLE OF AUTHORITIES vii

OPINIONS AND JUDGMENT BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 13

I. THE TENTH CIRCUIT'S CONCLUSION THAT THE OCCA'S FINDING OF NO PREJUDICE WAS BASED ON AN UNREASONABLE FACTUAL DETERMINATION CONTRAVENES THIS COURT'S CASES 15

II. THE OCCA REASONABLY HELD THAT RESPONDENT FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD THAT HE WOULD HAVE BEEN FOUND INTELLECTUALLY DISABLED HAD COUNSEL REQUESTED A PRETRIAL HEARING 18

III. THIS COURT SHOULD CONSIDER SUMMARY REVERSAL 24

CONCLUSION 27

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

FEDERAL COURT OPINIONS AND ORDERS

Opinion of the United States Court of Appeals for the Tenth Circuit (October 28, 2019) 1a

Opinion of the United States District Court for the Western District of Oklahoma (April 19, 2017) 93a

Order of the United States Court of Appeals for the Tenth Circuit Denying Petition for Rehearing (December 24, 2019) 184a

STATE OF OKLAHOMA OPINION

Opinion of the Court of Criminal Appeals of Oklahoma (July 19, 2007) 186a

OTHER DOCUMENT

Neuropsychological Consultation Report on Jimmy Dean Harris, Jr. by Jennifer L. Callahan, Ph.D. (Evaluation Date March 13, 2006) 221a

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 4, 8, 20, 22

Bobby v. Dixon,
565 U.S. 23 (2011)..... 14, 24, 25, 26

Bobby v. Mitts,
563 U.S. 395 (2011)..... 25

Bobby v. Van Hook,
558 U.S. 4 (2009) 11

Burt v. Titlow,
571 U.S. 12 (2013)..... 27

Cash v. Maxwell,
565 U.S. 1138, 132 S.Ct. 611 (2012) 17

Coleman v. Johnson,
566 U.S. 650 (2012) 25

Com. v. Hackett,
99 A.3d 11 (Penn. 2014) 10

Cullen v. Pinholster,
563 U.S. 170 (2011)..... i, 14, 18

Dunn v. Madison,
___ U.S. ___, 138 S.Ct. 9 (2017) 24

Hall v. Florida,
572 U.S. 701 (2014) 4

Harrington v. Richter,
562 U.S. 86 (2011) ..... passim

TABLE OF AUTHORITIES—Continued

Page

Holladay v. Allen,
555 F.3d 1346 (11th Cir. 2009) 9

Hooks v. State,
126 P.3d 636 (Okla. Crim. App. 2005) 21

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 21

Howell v. State,
138 P.3d 549 (Okla. Crim. App. 2006) 21

Johnson v. Williams,
568 U.S. 289 (2013) 17

Knowles v. Mirzayance,
556 U.S. 111 (2009) 11

McManus v. Neal,
779 F.3d 634 (7th Cir. 2015) 22

Murphy v. State,
54 P.3d 556 (Okla. Crim. App. 2002) ..... passim

Myers v. State,
130 P.3d 262 (Okla. Crim. App. 2005) 21

Parker v. Matthews,
567 U.S. 37 (2012) 25

Pickens v. State,
126 P.3d 612 (Okla. Crim. App. 2005) 21

Porter v. McCollum,
558 U.S. 30 (2009) 25

Pruitt v. Neal,
788 F.3d 248 (7th Cir. 2015) 4

TABLE OF AUTHORITIES—Continued

Page

Schriro v. Landrigan,
550 U.S. 465 (2007) 17

Sears v. Upton,
561 U.S. 945 (2010) 25

Sexton v. Beaudreaux,
___ U.S. ___, 138 S.Ct. 2555 (2018) 23, 25

Smith v. Ryan,
813 F.3d 1175 (9th Cir. 2016) 22

Smith v. Sharp,
935 F.3d 1064 (10th Cir. 2019)..... 21, 26

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

United States v. Salad,
959 F.Supp.2d 865 (E.D. Va. 2013)..... 22

United States v. Williams,
1 F.Supp.3d 1124 (D. Haw. 2014)..... 10, 22

Wearry v. Cain,
___ U.S. ___, 136 S.Ct. 1002 (2016) 25

Wetzel v. Lambert,
565 U.S. 520 (2012) 25

White v. Wheeler,
___ U.S. ___, 136 S.Ct. 456 (2015) 25

Williams v. Taylor,
529 U.S. 362 (2000) 15, 26

Woodford v. Visciotti,
537 U.S. 19 (2002) .....ii, 14, 18

TABLE OF AUTHORITIES—Continued

Page

Yarborough v. Gentry,
540 U.S. 1 (2003) 26

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 1

U.S. Const. amend. VIII 2

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254..... 2, 10, 18, 26

28 U.S.C. § 2254(d)(1)..... 13, 14, 15, 18

28 U.S.C. § 2254(d)(2)..... passim

Antiterrorism and Effective Death Penalty Act
of 1996..... passim

OTHER AUTHORITIES

Nolan Clay,
When Will Appeals End in 1999 Murder Case? https://oklahoman.com/article/5648546/when-will-appeals-end-in-1999-murder-case (last visited February 13, 2020) 27

Sheri Lynn Johnson et. al.,
Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation,
46 Hofstra L. Rev. 1107 (2018)..... 4, 9

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals is published as *Harris v. Sharp*, 941 F.3d 962 (10th Cir. 2019). App.1a-92a. The order denying rehearing and rehearing en banc is unpublished. App.184a-85a. The opinion of the federal district court is unpublished. App.93a-183a. The OCCA's decision on direct appeal following resentencing is published as *Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. 2007). App.186a-220a.

JURISDICTION

The judgment of the Tenth Circuit was entered on October 28, 2019. App.1a. The court of appeals denied Petitioner's petition for rehearing and rehearing en banc on December 24, 2019. App.184a-85a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

> law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

> (d) 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 an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the state court proceeding.

STATEMENT

1. In the weeks leading up to September 1, 1999, Respondent had repeatedly threatened to kill his wife, Pamela Harris, and her boss, Merle Taylor (2005 Tr. III 527-81). Respondent was angry at Mr. Taylor over his refusal to hire Respondent to work in his transmission shop (2005 Tr. III 519-20, 532-33). On the morning of September 1, Respondent entered the transmission shop and shot Mr. Taylor twice as Mr. Taylor attempted to protect Ms. Harris (2005 Tr. III 581-83; 2005 Tr. IV 783-84). Respondent then shot Ms. Harris and tried to shoot a bystander (2005 Tr. III 583-87, 668). When Respondent ran out of bullets, he pistol-whipped Ms. Harris, but she managed to get away (2005 Tr. III 587-88). Mr. Taylor died from his gunshot wounds (2005 Tr. IV 793).

2.a. Respondent was tried in Oklahoma County for first degree murder, shooting with intent to kill, and assault and battery with a dangerous weapon. App.186a. At a pre-trial hearing regarding Respondent's competency to be tried, Dr. Martin Krimsky testified that Respondent scored a 66 on the Slossen Intelligence Test-Revised (4/11/2001 Tr. 57-58). Dr. Krismky believed this score was inconsistent with Respondent's work as a transmission mechanic, so he administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) (4/11/2001 Tr. 63-64). Respondent scored a 68 on the "much more comprehensive" WAIS-R (4/11/2001 Tr. 64). Although there is no indication that Dr. Krimsky considered Respondent's adaptive functioning,

Dr. Krimsky diagnosed Respondent with mild intellectual disability[1] (4/11/2001 Tr. 65-66).

Dr. Krimsky acknowledged that "[o]ne would expect a higher level of IQ from an individual who has had a lifelong occupation of repairing auto transmissions." (4/11/2001 Tr. 64-65). Respondent told Dr. Krimsky he had learned his trade over a long period of time through observation (4/11/2001 Tr. 65). Dr. Krimsky indicated that persons with mild intellectual disability can learn things in that manner but it was "in [his] experience rare." (4/11/2001 Tr. 65). On cross-examination, Dr. Krimsky repeatedly admitted that the IQ scores he obtained were inconsistent with Respondent's occupation, his school performance, and his childhood IQ scores[2] (4/11/2001 Tr. 94-96, 107, 119-22, 126-27).

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[1] Dr. Krimsky used the then-common term mental retardation, which has since been replaced by the term "intellectual disability." *Hall v. Florida*, 572 U.S. 701, 704-05 (2014).

[2] Respondent was tested twice at the age of 7, and scored an 87 on the Stanford-Binet Revised, and an 83 on the Wechsler Intelligence Scale for Children. App.224a. These two tests are the "gold standard" for IQ tests and both scores place Respondent well outside the range of intellectual disability during the critical developmental period. *See Pruitt v. Neal*, 788 F.3d 248, 258 (7th Cir. 2015) (noting expert testimony that the Wechsler series of tests and the Stanford-Binet "are considered the gold standard in forensic cases"); Sheri Lynn Johnson et. al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 Hofstra L. Rev. 1107, 1120 (2018) ("We cannot overemphasize the point that only individually administered, full-scale IQ tests like the Wechsler Scales and the Stanford-Binet Intelligence Scales have been identified as 'gold standard' measures for accurately and reliably determining global intelligence.") (emphasis adopted); *see also Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (quoting the definition of

Dr. Krimsky believed Respondent was psychotic (4/11/2001 Tr. 65-66, 68, 83-84, 140-43). After Respondent took the Slossen, as he and Dr. Krimsky waited for jail staff, Respondent was hallucinating (4/11/2001 Tr. 139-40). Respondent also "drifted away" at "a couple of points" during administration of the WAIS-R (4/11/2001 Tr. 138, 148).[3] Dr. Krimsky testified a mere three weeks after administering the WAIS-R—and based on Respondent's condition on the days he administered both IQ tests—that Respondent's mental health symptoms were so severe that he was not competent to stand trial (4/11/2001 Tr. 65-68, 76-77, 84, 135-37, 139-40, 142, 182-83).

Dr. Krimsky admitted that, depending on the severity of someone's depression, it can have a "considerable" effect on IQ testing, and that Respondent was "definitely down" during administration of the WAIS-R (4/11/2001 Tr. 146). Dr. Krimsky further recognized that serious psychopathology or persistent drug and alcohol use can lower IQ (4/11/2001 Tr. 62-63). Dr. Krimsky also recognized that Respondent "had a sustained alcohol problem" (4/11/2001 Tr. 63).

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mental retardation used by the American Association on Mental Retardation which includes "manifest[ation] before age 18").

[3] Dr. John Smith, psychiatrist, saw Respondent on March 10, 2001, two days after Dr. Krimsky administered the Slossen, and eleven days before he administered the WAIS-R (4/11/2001 Tr. 176-77). Respondent was delusional and depressed (4/11/2001 Tr. 177-78). In addition, at almost every meeting with jail mental health staff from the time of his arrest at least through Dr. Krimsky's first test administration, Respondent complained of hallucinations and depression, and he was on a number of medications (4/11/2001 Tr. 7-16, 24).

The Tenth Circuit noted that "Dr. Krimsky did *not* testify that the delusions had affected the IQ scores . . . ." App.23a n.14 (emphasis adopted). However, Dr. Krimsky acknowledged that psychosis, and other factors present here, *can* affect IQ scores; he simply failed to account for the influence of those factors in this case. As will be discussed, other experts have discounted Dr. Krimsky's results. In addition, the trial court found Dr. Krimsky's testimony "very shaky" (7/18/2001 Tr. 52).

b. Respondent introduced evidence of alleged low intelligence and mental illness at both the guilt and sentencing stages of his trial. App.46a-47a, 100a. In particular, Dr. Ray Hand, a psychologist with experience working in an inpatient facility for intellectually disabled adults, testified that he was hired by the defense to "see what sense [he] could make out of" "some modest discrepancies" between IQ tests administered by Dr. Krimsky and at Eastern State Hospital (ESH) (where Respondent scored a 75 on the Wechsler Adult Intelligence Scale-III (WAIS-III)) (2001 Tr. XV 94-95, 122, 125).

Dr. Hand testified that after a psychologist obtains an IQ score, he or she will "then try to understand what factors may have affected that number." (2001 Tr. XV 105). Dr. Hand explained that a number of things may affect an individual's IQ test score including attention, fatigue, physical surroundings, mental health, medications, stress, and chronic use of alcohol or drugs (2001 Tr. XV 111-16, 130-32, 147). In particular, if a psychologist tests someone who is having delusions or hallucinating, "you have to account for that as you

look at the test results" and "it's certainly something that one has to factor in."[4] (2001 Tr. XV 116-17).

When defense counsel asked, "But it's possible to get an accurate reading of someone while you take [psychosis] into account?", Dr. Hand replied, "Well, accurate? You get a reading of someone and take that into account . . . ." (2001 Tr. XV 117-18). Dr. Hand believed the testing done at ESH was likely to be more accurate than that done by Dr. Krimsky (2001 Tr. XV 121, 131, 143). Dr. Hand believed Respondent has borderline intellectual functioning and is not intellectually disabled (2001 Tr. XV 133-36, 142, 152).

Dr. Hand testified that Dr. Krimsky had been censured at one point "because of the type of tests that he gave" (2001 Tr. XV 157-58). Dr. Krimsky also used an outdated test with Respondent in violation of a code of ethics which provides that "psychologists will not base their assessments or intervention decisions or recommendations on data or test results that are outdated for the current purpose" (2001 Tr. XV 159).

Dr. Hand evaluated Respondent's adaptive functioning, but did not conclude that he functions in the intellectually disabled range in any area (2001 Tr. XV 167-70).

c. Respondent was found guilty as charged and sentenced to death for first degree murder, life in prison for shooting with intent to kill, and ten years imprison-

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[4] Dr. Jennifer Callahan, who evaluated Respondent for purposes of the direct appeal, agreed that "[a]cute psychosis [such as that reportedly suffered by Respondent when he was tested in 2000 and 2001] is known to have a negative impact on one's intellectual functioning[.]" App.238a.

ment for assault and battery with a dangerous weapon. App.186a.

3. On direct appeal, the OCCA affirmed Respondent's convictions, and the non-capital sentences, but reversed Respondent's death sentence. *Harris v. State*, 84 P.3d 731 (Okla. Crim. App. 2004). The OCCA held that the trial court should not have attempted to instruct the jury regarding the possible prison placements to which Respondent could be assigned if given a life without parole sentence. *Id.* at 757.

4. Before Respondent's resentencing trial, this Court held that individuals with an intellectual disability may not be sentenced to death. *Atkins v. Virginia*, 536 U.S. 304 (2002). The OCCA then set forth a three-part test for intellectual disability, essentially adopting the standards of the American Psychiatric Association (APA) and American Association on Mental Retardation (AAMR). *Murphy v. State*, 54 P.3d 556, 566-69 (Okla. Crim. App. 2002).

5. At his resentencing trial, Respondent was represented by James Rowan. Mr. Rowan was indisputably familiar with the testimony given in previous proceedings. App.46a-47a. Mr. Rowan hired Dr. Wanda Draper, a developmental psychologist, as an expert witness for the resentencing trial. App.38a. The record is silent as to whether Mr. Rowan consulted any other expert witnesses.

Mr. Rowan did not request a pre-trial *Atkins* hearing before Respondent's resentencing, as he was entitled to do under Oklahoma law, because he believed Respondent "is not mentally retarded." (2005 Tr. II 352). Dr. Draper testified that Respondent was not intellectually disabled, but was "slow" and suffered from

dyslexia. App.38a-40a. Respondent was again sentenced to death.

6.a. In his direct appeal, Respondent claimed in Proposition I that Mr. Rowan was ineffective for not using the evidence developed during original trial proceedings to seek a pre-trial determination that he is intellectually disabled. App.206a. In Proposition XI and an accompanying motion for evidentiary hearing, Respondent claimed that Mr. Rowan was ineffective for failing to adequately investigate his alleged intellectual disability and provide the trial court with the opinion of Dr. Jennifer Callahan. App.216a-18a. Dr. Callahan diagnosed Respondent with borderline intellectual functioning, which means that he is not intellectually disabled.[5] App.238a. (2001 Tr. XV 209 (testimony of Dr. Hand: "Between 70 and 80 we think of as borderline intellectual functioning. Not borderline mentally retarded, but borderline intellectual functioning.")). *See Holladay v. Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009) ("A diagnosis of borderline intellectual functioning will not qualify for exemption from the death penalty."); *United States v.*

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[5] Respondent emphasized below that Dr. Callahan's report indicates that, on an abbreviated measure of intellectual functioning, his "full scale IQ was estimated to fall in the impaired to borderline impaired range . . . ." App.233a. However, abbreviated IQ tests should not be used to diagnose an intellectual disability. Johnson, 46 Hofstra L. Rev. at 1110-11 & n.20 (short-form tests may be informative but should never be treated as equivalent to full-scale tests). Dr. Callahan then administered the "more comprehensive[ ]" Woodcock-Johnson III on which Respondent's score fell between 72 and 77. App.233a More importantly, in the conclusion section of her report, Dr. Callahan opined that her "findings, in conjunction with past evaluations, indicate borderline intellectual functioning." App.238a.

Williams, 1 F.Supp.3d 1124, 1150-52 (D. Haw. 2014) (noting that both of the defendant's experts believed he had borderline intellectual functioning and that such "is distinct from 'intellectual disability'"); *Com. v. Hackett*, 99 A.3d 11, 13 (Penn. 2014) (reversing where the lower court "improperly equat[ed] borderline intellectual functioning with mental retardation").

b. The OCCA denied Proposition I on prejudice grounds based on "the opinion of several experts who testified that Harris was not mentally retarded." App.210a. The OCCA denied Proposition XI, which included the allegation that Mr. Rowan failed to conduct an adequate investigation into his alleged intellectual disability for purposes of a pre-trial hearing, because "the record does not support this allegation." App.217a.

7. Respondent sought habeas relief in the Western District of Oklahoma pursuant to 28 U.S.C. § 2254, combining direct appeal Propositions I and XI into a single ground. The court considered the totality of Respondent's IQ test scores, recognizing that "testimony was presented questioning" the tests which resulted in scores below 70. App.141a. The court further noted that "[c]onsiderable evidence was also presented at [Respondent's] first trial contrary to allegations of significant limitations in adaptive functioning." App.142a. The court concluded the OCCA did not unreasonably hold that Respondent was not prejudiced. App.142a.

8. On appeal, the Tenth Circuit reviewed the deficient performance prong *de novo*, concluding that the OCCA's denial of Proposition XI referred only to Respondent's claim that Mr. Rowan was ineffective for failing to present certain mitigating evidence, and not to the Proposition I claim regarding intellectual

disability. App.9a-10a. The court then held that Mr. Rowan performed deficiently because the ABA Guidelines "require[d]" him to "'take advantage of all appropriate opportunities to argue why death is not suitable punishment,'" and because he had "nothing to lose" by requesting a hearing.[6] App.13a-17a.

The court next held that the OCCA's prejudice determination was based on an unreasonable determination of the facts. App.18a-25a. The court pointed to a single sentence of the OCCA's opinion, which stated that, "'All Harris's experts, including the ones who testified at his [2001] trial and competency hearing, considered these [IQ] scores along with Harris's other characteristics and concluded he was not mentally retarded.'" App.18a. Because Dr. Krimsky had testified that Respondent is intellectually disabled—and in spite of the totality of the OCCA's opinion which expressly acknowledged Dr. Krimsky's opinion and which denied relief based on the opinion of "several experts" that Respondent is not intellectually disabled—the Tenth Circuit found 28 U.S.C. § 2254(d)(2) satisfied. App.18a-25a.

Assessing prejudice *de novo*, the Tenth Circuit concluded that the OCCA's reliance on the "several experts" who did not believe Respondent to be intellectually disabled was flawed. That was so, in its view,

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[6] Although this is not the proper standard for assessing counsel's performance, this petition focuses on the Tenth Circuit's prejudice analysis. *See Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (the court of appeals erred in treating the ABA Guidelines as "inexorable commands"); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims.").

because the OCCA disregarded the fact that "the controlling Oklahoma definition of intellectual disability was set forth in a case decided *after* the competency hearing and the first trial." App.24a n.15, 30a-35a (emphasis in original). But Respondent had not argued in his direct appeal brief that any expert failed to apply the proper standard. In fact, Respondent admitted to the Tenth Circuit that "[t]he *Murphy* definition of mental retardation tracked the definitions of the two most preeminent clinical organizations: the American Psychiatric Association ("APA") and the American Association on Mental Retardation ("AAMR"). *Murphy*, 54 P.3d at 566 n.13." 7/2/2018 Opening Brief of Petitioner/Appellant, Jimmy Dean Harris, Tenth Circuit Case No. 17-6109 (Opening Br.) at 14 (footnote omitted); *see also* 3/3/2009 Petition for a Writ of Habeas Corpus, W.D. Okla. Case No. 08-CV-375-F at 83 ("the OCCA has clearly adopted [the standards of the] AAMR and APA").

The Tenth Circuit further held that "the controlling standard does not require the parties or the court to identify the more realistic or representative score." App.24a-25a n.15. Finally, the court found that "Dr. Hand was not asked whether Mr. Harris had 'significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.' *Murphy*, 54 P.3d at 568." App.24a-25a n.15. In fact, Dr. Hand listed the areas he considered as: "[c]ommunication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills,

work, leisure[7], health and safety[.]" (2001 Tr. XV 167). While Dr. Hand "questioned" Respondent's functioning in some of these areas, he did not opine that Respondent functions in the intellectually disabled range on any of them (2001 Tr. XV 167-70).

Finally, the Tenth Circuit concluded that it could not make a prejudice determination without an evidentiary hearing because "no factfinder has considered Mr. Harris's evidence of intellectual disability based on the Oklahoma test that applied during Mr. Harris's retrial." App.26a. It therefore remanded for an evidentiary hearing on prejudice.

REASONS FOR GRANTING THE PETITION

Under AEDPA, a writ of habeas corpus is available only for "extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). AEDPA implements that rule by barring habeas relief based on a claim a state court adjudicated on the merits unless strict preconditions are met. No longer may a federal court simply review a state court's merits determination *de novo*. A federal court can do so only if it first concludes that the state court's merits determination was contrary to, or unreasonably applied, law clearly established by this Court, 28 U.S.C. § 2254(d)(1); or was based on an unreasonable determination of the facts, 28 U.S.C. § 2254(d)(2). These two preconditions ensure that

7 The OCCA did not adopt leisure as a relevant area of adaptive functioning. *Murphy*, 54 P.3d at 567-68. However, Respondent has never claimed a deficit in leisure.

habeas relief may be granted only when state courts commit "egregious errors," *Bobby v. Dixon*, 565 U.S. 23, 27 (2011) (*per curiam*), not whenever a federal court concludes *de novo* that relief is warranted.

This congressional scheme is undermined if federal habeas courts are too ready to find that state courts acted objectively unreasonably or unreasonably determined the facts. For that reason, this Court has cautioned that a federal court's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). More generally, AEDPA "demands that state court decisions be given the benefit of the doubt." *Id.* (*quoted in Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)).

The Tenth Circuit flouted those principles in the decision below. That court plucked one sentence out of a state court's lengthy discussion to conclude that the state court based its ruling on an unreasonable determination of facts—even though the state court dispelled any notion that it misapprehended the facts in a footnote to the very sentence in question. A more eager "readiness to attribute error" to a state court is difficult to imagine. And as a result, the Tenth Circuit was able to avoid the § 2254(d)(1) standard and review the prejudice issue *de novo* rather than deferentially, as Congress intended.

This is not a matter of mere error correction. This Court has intervened time and again to ensure that federal courts of appeal abide by the limits Congress imposed in AEDPA. *See* § III, *infra*. The Tenth Circuit's decision here warrants such intervention. Had the Tenth Circuit given the OCCA's decision "the benefit of the doubt," the outcome here was a foregone

conclusion. Three experts' opinions that Respondent is not intellectually disabled surely justified the OCCA's conclusion that Respondent could not show prejudice from his counsel's failure to request a pre-trial hearing on intellectual disability. At the very least, a "fair-minded jurist" could so conclude. *Richter*, 562 U.S. at 102 (a state court ruling is objectively unreasonable under § 2254(d)(1) only if "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents"). All the more so, given that Respondent based his direct appeal claim on the report of an expert who *did not* find him intellectually disabled. The OCCA's denial of this claim was eminently reasonable.

The Tenth Circuit's decision clearly violates both the letter and the spirit of AEDPA. Certiorari—if not summary reversal—is warranted.

I. THE TENTH CIRCUIT'S CONCLUSION THAT THE OCCA'S FINDING OF NO PREJUDICE WAS BASED ON AN UNREASONABLE FACTUAL DETERMINATION CONTRAVENES THIS COURT'S CASES.

The Tenth Circuit erred grievously when it held that the OCCA based its prejudice ruling on an unreasonable factual determination, thereby permitting the Tenth Circuit to assess prejudice *de novo*. In so holding, the Tenth Circuit did precisely what Congress sought to prevent when it enacted AEDPA and failed to give the state court the required benefit of the doubt.

1. As Respondent's claim is one of ineffective assistance of counsel, the applicable clearly established law is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Pursuant to *Strickland*, Respondent must show

that counsel's performance was deficient and that he was prejudiced thereby. *Strickland*, 466 U.S. at 687-94. To demonstrate prejudice, a defendant must show that there is a substantial likelihood the outcome of his trial would have been different if not for counsel's alleged errors. *Richter*, 562 U.S. at 111-12. Based on its review of all the evidence, the OCCA found that Respondent could not show prejudice from his counsel's failure to request a pre-trial hearing on intellectual disability. It had ample support for that conclusion.

Among other things, Respondent relied heavily on Dr. Callahan, who diagnosed him with borderline intellectual functioning—*i.e.*, who believes he is *not* intellectually disabled. Dr. Hand also comprehensively evaluated Respondent's condition and concluded he was not intellectually disabled. Dr. Draper agreed. On top of that, the trial court found that Dr. Krimsky, the one expert who believed Respondent was intellectually disabled, lacked credibility. The OCCA therefore concluded that Respondent was not prejudiced because "there is a great deal of evidence in the record to show [that Respondent is not intellectually disabled], *including* the opinion of *several* experts who testified that Harris was not mentally retarded." App.210a.

2. The Tenth Circuit nonetheless held that the OCCA based its prejudice ruling on an unreasonable determination of the facts. The Tenth Circuit pointed to one sentence in the OCCA's opinion which stated that "[a]ll" of Respondent's experts concluded he was not intellectually disabled. App.18a. That was wrong, found the Tenth Circuit, because it ignored Dr. Krimsky's testimony. App.21a. But the OCCA immediately qualified its use of the word "all" with a foot-

note that recognized Dr. Krimsky's testimony that Respondent was intellectually disabled. App.209a n.55. The OCCA then concluded that Respondent was not prejudiced by pointing to "the opinion of *several* experts who testified that Harris was not mentally retarded." App.210a (emphasis added).

So, the OCCA qualified its assertion that "all" of Respondent's experts testified he was not intellectually disabled with an explicit recognition of Dr. Krimsky's contrary testimony. The OCCA then considered all of the evidence in the record and concluded that, in light of all of the evidence—including the testimony of "several", as opposed to "all", of the experts—Respondent had not shown prejudice. The question is not whether one sentence of the OCCA's opinion, viewed in isolation and stripped of relevant context, was incorrect, but whether its finding of no prejudice was *based on* an *unreasonable* factual finding. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (describing the unreasonableness requirement of § 2254(d)(2) as a "substantially higher threshold" than incorrectness); *see also Cash v. Maxwell*, 565 U.S. 1138, 132 S.Ct. 611, 615 (2012) (Sotomayor, J., respecting the denial of certiorari) ("To establish even a wild exaggeration is not to establish what § 2254(d)(2) requires: that the state court's '*decision* . . . was based on an unreasonable *determination* of the facts.'") (alteration and emphasis adopted). It plainly was not.

The Tenth Circuit's conclusion that the OCCA's decision was based on an unreasonable factual determination ignores the totality of the OCCA's opinion, contrary to the highly deferential standard of AEDPA. *See Johnson v. Williams*, 568 U.S. 289, 300 (2013) ("federal courts have no authority to impose mandatory

opinion-writing standards on state courts"); *Pinholster*, 563 U.S. at 181 (state court decisions must be given the benefit of the doubt under §§ 2254(d)(1) and (d)(2)); *Visciotti*, 537 U.S. at 24 (the court of appeals' "readiness to attribute error is inconsistent with the presumption that state court's know and follow the law" and "incompatible with § 2254(d)'s highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal citation and quotation marks omitted).

In light of Dr. Krimsky's lack of credibility—including the impression of the trial court who personally witnessed his testimony that he was "very shaky"—the OCCA's decision to discount his testimony (while explicitly recognizing its existence) was entirely reasonable. The OCCA's finding of no prejudice under these circumstances cannot fairly be described as an "extreme malfunction" in Oklahoma's criminal justice system. *See Richter*, 562 U.S. at 102-03. The Tenth Circuit erred in proceeding to *de novo* review, and its remand for an evidentiary hearing cannot stand. *See Pinholster*, 563 U.S. at 181 (review under AEDPA is limited to the record before the state court). This Court should not let federal courts so readily dispense with AEDPA's requirement for deferential review of state court decisions.

II. THE OCCA REASONABLY HELD THAT RESPONDENT FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD THAT HE WOULD HAVE BEEN FOUND INTELLECTUALLY DISABLED HAD COUNSEL REQUESTED A PRE-TRIAL HEARING.

AEDPA demands that federal courts give great deference to the reasonable decisions of a state court.

Instead of following its mandate, the Tenth Circuit wrongly applied *de novo* review. Had the Tenth Circuit given deference to the OCCA's decision, as it should have, it would have had no choice but to affirm.

1. Respondent's childhood IQ scores were 83 and 87. Respondent's original trial counsel called Dr. Krimsky at the competency hearing, yet chose not to use him (likely concerned about his credibility) at trial and instead hired Dr. Hand. Dr. Hand testified that, in his opinion, counsel "very much . . . would have liked for [him] to say, oh, gee, he looks mentally retarded, look at that [Dr. Krimsky's] test. I think you were, frankly, disappointed that I wasn't willing and able to do that." (2001 Tr. XV 180). Direct appeal counsel tried again, turning to Dr. Callahan. Yet, once again, counsel's attempt to have Respondent diagnosed as intellectually disabled failed. Not a single expert who has considered the totality of the evidence has found Respondent intellectually disabled.[8]

Dr. Krimsky stands alone against all of this evidence.[9] The problems with Dr. Krimsky's testimony

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[8] Dr. John Smith testified at Respondent's competency hearing that his impression, based on information from ESH and his own interactions with Respondent, was that Respondent was of normal intelligence (4/11/2001 Tr. 196). *See* App.26a-27a n.16 ("Dr. Smith believed that Mr. Harris had 'normal intelligence.'"). Dr. Smith did acknowledge that "Dr. Krimsky's testing would indicate that he had a mild retardation." (4/11/2001 Tr. 216). However, Dr. Smith was not asked regarding his thoughts on the reliability of Dr. Krimsky's test results.

[9] Dr. Callahan's report also referenced a Dr. Nelda Ferguson who tested Respondent during the period of his questionable competency and obtained a score of 63 on the WAIS-III and "deemed" him mildly intellectually disabled based on this score. App.225a. This is the sole reference in the record to Dr. Ferguson.

have been discussed at length. The trial court told defense counsel that if they were "basing your argument [that Respondent is intellectually disabled][10] on Dr. Krimsky's report, Counsel, you are—you are going to be—you're losing the battle on that one, because Dr. Krimsky does not impress—his report or his definition of evaluation is lacking." (7/18/2001 Tr. 53). Many a fairminded jurist could agree with the OCCA's determination that there is no substantial likelihood that Respondent would have been found intellectually disabled had counsel requested a pre-trial hearing.

2. Only by wrongly assessing prejudice *de novo* could the Tenth Circuit conclude that an evidentiary hearing was necessary. But reviewing the claim *de novo* was not the Tenth Circuit's only error. It compounded its mistaken level of scrutiny by making fundamental mistakes of fact and law, without which the Tenth Circuit would have been bound to affirm the district court's denial of habeas relief.

Specifically, after concluding that the OCCA's decision rested on its "perception of the various expert opinions," the Tenth Circuit explained its belief that the experts and the OCCA failed to apply the proper standard in two respects.

a. First, the Tenth Circuit discounted Dr. Hand's opinion (and, implicitly, that of Dr. Callahan) and attempted to bolster Dr. Krimsky's testimony by asserting that that "the controlling [Oklahoma] standard

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Dr. Callahan indicated that this score, like those obtained by Dr. Krimsky, may have been impacted by Respondent's mental state. App.238a.

10 Respondent wanted the trial court to stay the trial pending litigation in *Atkins* (7/18/2001 Tr. 41-44).

does not require the parties or the court to identify the more realistic or representative score." App.24a-25a n.15. This could not be more wrong. The OCCA has consistently considered different tests' relative reliability. *See, e.g.*, *Howell v. State*, 138 P.3d 549, 563 (Okla. Crim. App. 2006) (considering the reliability of different tests based on expert testimony regarding various reasons that might have affected their reliability); *Hooks v. State*, 126 P.3d 636, 640-41 (Okla. Crim. App. 2005) (same); *Pickens v. State*, 126 P.3d 612, 616, 619 (Okla. Crim. App. 2005) (same); *Murphy v. State*, 66 P.3d 456, 457-61 (Okla. Crim. App. 2003) (same); *see also Myers v. State*, 130 P.3d 262, 267 n.10 (Okla. Crim. App. 2005) (finding results of testing using the WAIS-R to be "questionable" because the test was obsolete).

The Tenth Circuit's decision also ignores a plethora of evidence (including two decisions by that very court) that psychologists and courts *must* take into account variables which might influence the validity of a particular IQ score. *See Smith v. Sharp*, 935 F.3d 1064, 1080 n.10 (10th Cir. 2019) ("we consider the reliability of a particular IQ assessment when reviewing a sufficiency of evidence challenge"); *Hooks v. Workman*, 689 F.3d 1148, 1168-69 (10th Cir. 2012) (considering the experts' testimony at a post-*Murphy* hearing regarding the reliability of the various scores and concluding that "it was not unreasonable for the OCCA" to accord greater weight to the more reliable scores). Notably, the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision (DSM-IV-TR), in effect at the time of Respondent's resentencing, provided (at 42) that "interpretation of results should

take into account factors that may limit test performance." Courts around the nation agree. *See, e.g.*, *Smith v. Ryan*, 813 F.3d 1175, 1183-86 (9th Cir. 2016) (considering the reliability of various scores); *McManus v. Neal*, 779 F.3d 634, 651-54 (7th Cir. 2015) (discussing and considering expert testimony that certain IQ scores were not representative due to lack of effort, depression and anxiety, and learning disabilities); *United States v. Williams*, 1 F.Supp.3d 1124, 1140-45 & n.18, 1148-49, 1152-60 (D. Haw. 2014) ("In addition to the role of clinical judgment, 'the court must examine the reliability and validity of IQ scores, and consider the credibility of witnesses that proffer expert opinions on those scores.'") (quoting *United States v. Salad*, 959 F.Supp.2d 865, 871 (E.D. Va. 2013)). The Tenth Circuit gravely erred in second-guessing the OCCA's reliance on the experts on this basis.[11]

b. Second, the Tenth Circuit insisted that no one has applied the proper definition of intellectual disability in this case. App.26a-27a. The basis for this misapprehension is the fact that Dr. Hand testified before *Atkins* and the OCCA's decision in *Murphy*.

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[11] The extent to which the Tenth Circuit misunderstood the record in this case is illustrated by its conclusion that "Dr. Hand was not asked whether Mr. Harris had 'significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.' *Murphy*, 54 P.3d at 568." App.24a-25a n.15. This finding was flatly wrong. Dr. Hand specifically listed the areas he considered as: "[c]ommunication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety[.]" (2001 Tr. XV 167).

Yet, Respondent admitted that "[t]he *Murphy* definition of mental retardation tracked the definitions of the two most preeminent clinical organizations: the American Psychiatric Association ("APA") and the American Association on Mental Retardation ("AAMR"). *Murphy*, 54 P.3d at 566 n.13." Opening Br. at 14 (footnote omitted). And Dr. Hand applied the DSM-IV criteria (2001 Tr. XV 135, 165-68), consistent with his recognition that "anytime a psychologist takes a forensic role and testifies in court, we're obligated to provide basic, sound, state-of-the-art, scientific information" (2001 Tr. XV 94). There is no basis for the Tenth Circuit's conclusion that Dr. Hand applied his own definition of intellectual disability. App.26a n.16 ("Dr. Hand did not believe that Mr. Harris was mentally retarded (*under his definition of mental retardation*) . . . .") (emphasis added).

The Tenth Circuit also seemed to believe that Dr. Callahan did not apply the proper test. App.26a-27a. Yet, Dr. Callahan's report was written after *Murphy* and, as with Dr. Hand, there is simply nothing in the record to suggest she did not apply its test. In fact, Respondent admitted Dr. Callahan applied "contemporary clinical standards." Opening Br. at 19.

Respondent did not argue in the OCCA or Tenth Circuit that Dr. Hand and Dr. Callahan failed to apply the *Murphy* test. Nevertheless, the Tenth Circuit ordered an evidentiary hearing based on its belief that "no factfinder has considered Mr. Harris's evidence of intellectual disability based on the Oklahoma test that applied during Mr. Harris's retrial." App.26a. *See Sexton v. Beaudreaux*, ___ U.S. ___, 138 S.Ct. 2555, 2560 (2018) (*per curiam*) (the court of appeals fundamentally erred when it "considered arguments against

the state court's decision that Beaudreaux never even made in his state habeas petition"). On the contrary, the OCCA expressly applied the *Murphy* test. App.208a. Further, both the OCCA and the federal district court considered the opinions of Dr. Hand, Dr. Draper, and Dr. Callahan, who applied the proper standard. App.141a-42a, 208a-10a, 217a.

In light of Respondent's childhood IQ scores, Dr. Krimsky's numerous credibility problems, and the opinions of the other three experts, a fairminded jurist could conclude Respondent was not prejudiced. The Tenth Circuit's erroneous decision to apply *de novo* review was outcome-determinative. The court held up a magnifying glass to the OCCA's decision, scrutinizing each sentence rather than giving it the benefit of the doubt to which it was entitled. The Tenth Circuit even went so far as to find "errors" Respondent had not alleged. The Tenth Circuit's decision should not stand.

III. THIS COURT SHOULD CONSIDER SUMMARY REVERSAL.

"Because it is not clear that the [Oklahoma Court of Criminal Appeals] erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision, the [Tenth] Circuit's judgment must be reversed." *Dixon*, 565 U.S. at 24 (2011).

This Court should consider summarily reversing the Tenth Circuit's decision, as this Court has many times (even in capital cases) when a court of appeals committed errors as obvious as those present here. *See Dunn v. Madison*, ___ U.S. ___, 138 S.Ct. 9, 12 (2017) (*per curiam*) (summarily reversing court of appeals' grant of habeas relief in a capital case);

Wearry v. Cain, ___ U.S. ___, 136 S.Ct. 1002, 1007 (2016) (*per curiam*) (stating, in a capital case, that "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law" and citing a number of cases as examples); *White v. Wheeler*, ___ U.S. ___, 136 S.Ct. 456, 458-62 (2015) (*per curiam*) (summarily reversing grant of habeas relief in a capital case where the court of appeals' ruling "contravene[d] controlling precedents from this Court" and "again advis[ing] the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty"); *Parker v. Matthews*, 567 U.S. 37, 40-48 (2012) (reversing the court of appeals' grant of habeas relief which improperly disregarded a reasonable state court decision); *Lambert*, 565 U.S. at 521-26 (summarily reversing the court of appeals' grant of relief under AEDPA in a capital case); *Dixon*, 565 U.S. at 27-33 (same); *Bobby v. Mitts*, 563 U.S. 395, 395-400 (2011) (*per curiam*) (same); *Sears v. Upton*, 561 U.S. 945, 952-56 (2010) (summarily reversing in a capital case where the state court had failed to properly apply *Strickland*'s prejudice prong); *Porter v. McCollum*, 558 U.S. 30, 40-44 (2009) (*per curiam*) (summarily reversing in a capital case where the state court unreasonably failed to find *Strickland* prejudice); *see also Beaudreaux*, 138 S.Ct. at 2560 (summarily reversing grant of habeas relief in a non-capital case because the court of appeals "committed fundamental errors that this Court has repeatedly admonished courts to avoid"); *Coleman v. Johnson*, 566 U.S. 650, 654-57 (2012) (*per curiam*) (summarily reversing the court of appeals' grant of habeas relief in a non-capital case).

The errors committed by the Tenth Circuit in this case have effects beyond this one case. Petitioner is filing another petition for certiorari review, on the same day as this petition, in which the Tenth Circuit made similarly egregious errors. *See Smith*, 935 F.3d 1064. Moreover, this Court has repeatedly recognized the respect that must be afforded to state courts and to their fidelity to the Constitution. *See Richter*, 562 U.S. at 103 (state courts are "the principle forum for asserting challenges to state convictions"); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (*per curiam*) ("state courts . . . have primary responsibility for supervising defense counsel in state criminal trials"); *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000) ("state judiciaries have the duty and competence to vindicate rights secured by the Constitution"). The Tenth Circuit violated every principle of AEDPA, scrutinizing a single sentence of the OCCA's decision in isolation to engage in *de novo* review, second-guessing its reasonable judgment, and relying on arguments Respondent had not made in state court (or even in the Tenth Circuit). This significant and unwarranted intrusion into Oklahoma's sovereignty contravenes Congress's commands in AEDPA.[12] *See Richter*, 562 U.S. at 103

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[12] Respondent may argue that no real harm has come in this case, at least not yet, because all the Tenth Circuit has done is order an evidentiary hearing. However, an evidentiary hearing is a weighty intrusion into state sovereignty. The Tenth Circuit has wrongly held that the OCCA committed egregious errors. *See Dixon*, 565 U.S. at 27 (describing the preconditions for relief set forth in 28 U.S.C. § 2254(d) as requiring state courts to commit "egregious errors"). The State will expend significant resources in defending a sentence rendered nearly fifteen years ago. Moreover, the surviving family members of Merle Taylor will relive their worst nightmare once more. *See* https://oklahoman.

(recognizing that the intrusion into state sovereignty posed by the writ of habeas corpus is almost unmatched).

CONCLUSION

AEDPA and *Strickland* "do not permit federal judges to so casually second-guess the decisions of their state-court colleagues or defense attorneys" as the Tenth Circuit did here. *Burt v. Titlow*, 571 U.S. 12, 15 (2013). The Petition for Certiorari should be granted.

Respectfully submitted,

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