**Capital Case**

Case No.19-1105

# In the Supreme Court of the United States

TOMMY SHARP, Interim Warden
Oklahoma State Penitentiary,
*Petitioner*,
v.
JIMMY DEAN HARRIS
*Respondent*.

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

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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Dated this 11th day of May, 2020

**CAPITAL CASE**

## QUESTIONS PRESENTED

1) Did the Oklahoma Court of Criminal Appeals make an unreasonable factual finding in concluding all defense experts had opined Mr. Harris was not "mentally retarded" when a defense expert had repeatedly and unequivocally testified Mr. Harris was "mildly mentally retarded" during a competency hearing that predated *Atkins v. Virginia*, 536 U.S. 304 (2002)?

2) Mr. Harris has never been afforded a hearing on whether his trial attorney was ineffective for failing to seek a pre-trial *Atkins* determination, despite sufficient evidence to trigger an *Atkins* hearing under the then-existing Oklahoma standard and sufficient evidence to establish a prima facie case. Recognizing the issue of whether a reasonable fact-finder could find Mr. Harris intellectually disabled was "hotly debated" and the lack of factual findings, the Tenth Circuit remanded the case for an evidentiary hearing on whether trial counsel's deficient performance prejudiced Mr. Harris. From this outcome, the question presented is as follows:

   Should this Court use its extraordinary power to grant a writ of certiorari to review the Tenth Circuit's decision to remand Mr. Harris's case for an evidentiary hearing?

**List of Directly Related Proceedings in State and Federal Courts**

Oklahoma County District Court (Case No. CF-1999-5071)
State of Oklahoma v. Jimmy Harris
Competency Trial held April 2001
Order finding defendant did not meet its burden as to competency to stand trial
2001 Comp. Trial, Vol. 3 at 486 (April 13, 2001)
[omitted from Petitioner's list of proceedings][1]

Oklahoma County District Court (Case No. CF-1999-5071)
State of Oklahoma v. Jimmy Harris
Jury trial sentenced Respondent to death Sept. 26, 2001
Judgment and Sentence entered October 23, 2001
[Petitioner misstated judgment date as Nov. 28, 2001]

Oklahoma Court of Criminal Appeals (Case No. PR-2001-898)
Jimmy Harris v. State of Oklahoma
Order denying Petitioner's Application for Writ of Prohibition/Stay of Proceedings
Order denying entered July 26, 2001 (O.R. at 1077-79).
[Petitioner misstated order as judgment]

Oklahoma Court of Criminal Appeals (Case No. D-2001-1268)
Jimmy Harris v. State of Oklahoma
*Harris v. State*, 84 P.3d 732 (Okla. Crim. App. Jan. 7, 2004)
Judgment affirmed, death sentence vacated, case remanded for resentencing

Oklahoma County District Court (Case No. CF-1999-5071)
State of Oklahoma v. Jimmy Harris
Resentencing jury trial (punishment stage)
Judgment and Sentence entered February 3, 2005
[Petition misstated judgment date as Feb.28, 2005]

[1]Pursuant to Sup. Ct. R. 15.2, Respondent has corrected or added to Petitioner's List of Proceedings where noted.

Oklahoma Court of Criminal Appeals (Case No. D-2005-117)
Jimmy Harris v. State of Oklahoma
*Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. July 19, 2007)

United States Supreme Court (Case No. 07-9101)
*Harris v. Oklahoma*, 552 U.S. 1286 (2008)
Denying Petition for Writ of Certiorari on March 24, 2008

Oklahoma Court of Criminal Appeals (Case No. PCD-2002-629)
Jimmy Harris v. State of Oklahoma
Post-Conviction Application to Hold Proceedings in Abeyance filed May 16, 2002
Order dismissing post-conviction application entered March 11, 2004

Oklahoma Court of Criminal Appeals (Case No. PCD-2005-665)
*Harris v. State*, 167 P.3d 438 (Okla. Crim. App. 20007)
Post-Conviction Application denied August 20, 2007

United States District Court for the Western District of Oklahoma
Case No. CIV-08-375-F
Jimmy Harris, Petitioner v. Terry Royal, Warden, OSP
Memorandum Opinion entered April 19, 2017
*Harris v. Royal*, No. CIV-08-375, 2017 WL 1403302 (unpub.)
(W.D. Okla. Apr. 19, 2017)

United States Court of Appeals for the Tenth Circuit (Case No. 17-6109)
*Harris v. Sharp*, 941 F.3d 962 (10th Cir. 2019)
Judgment affirming in part, reversing in part, entered October 28, 2019

## TABLE OF CONTENTS



## APPENDIX INDEX

(The following attachments are located in a separate Appendix volume)

## TABLE OF AUTHORITIES

### SUPREME COURT CASES



### CIRCUIT AND DISTRICT COURT CASES

**FEDERAL STATUTES**



**STATE COURT CASES**

**Capital Case**
Case No. 19-1105

# In the Supreme Court of the United States

Tommy Sharp, Interim Warden,
Oklahoma State Penitentiary,
*Petitioner*,
v.
Jimmy Dean Harris,
*Respondent.*

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

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

Respondent, Jimmy Dean Harris, respectfully urges this Court to deny the petition for writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered October 28, 2019. *See Harris v. Sharp*, 941 F.3d 962 (10th Cir. 2019). Resp. App. at 1-52. References to Respondent's Appendix referencing transcripts and other court documents will be as noted.[2]

[2]References to the federal district court proceedings below will be "Doc. __" followed by number. The The 2001 original jury trial as "2001 Tr."; the 2001 competency trial as "Comp. Tr."; and the 2005 resentencing trial as "2005 Tr." followed by volume number and page. The Original Record from the state court will be "O.R." followed by page number. Respondent's Appendix as "Resp. App. at __" followed by page number.

## STATEMENT OF THE CASE

On September 1, 1999, Mr. Harris entered the workplace of his wife, Pamela Harris, shot and wounded her, and shot and killed her boss, Merle Taylor. The incident arose from an ongoing divorce and property dispute. *Harris v. State*, 164 P.3d 1103, 1106-07 (Okla. Crim. App. 2007). Resp. App. at 121-22.

Following his arrest, Mr. Harris appeared psychotic and was placed on suicide precautions in jail. Comp. Tr. Vol. 1 at 7. In October of 1999, he was declared incompetent and sent to Eastern State Hospital for competency restoration. He returned to jail in March of 2000. In July of 2001, Mr. Harris was again sent to Eastern State Hospital with instructions for continued medication to maintain his competency. Comp. Tr. Vol. 1 at 7-8, 159, 164-65; O.R. at 15-35, 43; O.R. at 810-13, 833, 888-92, 899-90. A hearing on the issue of his competency to stand trial was held April 11-13, 2001, at which the court determined Mr. Harris to be competent for trial when properly medicated. Comp. Tr. Vol. 3 at 479-87. Ultimately, Mr. Harris was tried, convicted, and sentenced to death in September of 2001. O.R. at 1633-43.

Evidence of Mr. Harris's impaired intellectual functioning was developed prior to his competency hearing and his original trial on the charges. Specifically, prior to his competency hearing, two psychologists administered IQ tests to Mr. Harris. On October 20, 2000, Dr. Nelda Ferguson administered the Wechsler Adult Intelligence Scale ("WAIS") III to Mr. Harris; he received a full-scale IQ score of 63. Dr. Ferguson reported Mr. Harris's IQ score "places him in the mentally retarded range of intelligence." (Reference to Dr. Nelda

Ferguson's 2000 testing is stated in Dr. Callahan's report). Resp. App. at 148. *See infra* at 6, references to Dr. Callahan's Report.

In March of 2001, Dr. Martin Krimsky administered two IQ tests to Mr. Harris: the Slosson Intelligence Revised ("SIT-R"), a brief verbal IQ test, and the WAIS-R. Comp. Tr. Vol. 1 at 57-58 & Def. Ex. 2. Resp. App. at 157-58. On the SIT-R, Mr. Harris received a 66, which would "classify as mild mental retardation," and on the WAIS-R, Mr. Harris received a full-scale IQ score of 68, which also classifies as "mild mental retardation."[3] *Id.* at 58, 64-65. Resp. App. at 157-58. And prior to Mr. Harris's trial on the charges, in July of 2001, psychologist Dr. Elizabeth Grundy administered the WAIS-III to Mr. Harris while he was undergoing competency restoration at Eastern State Hospital; he received a full-scale IQ score of 75. (Reference to Dr. Grundy's testing is found within Dr. Callahan's report). Resp. App. at 148.

At Mr. Harris's 2001 trial on the charges, lay-witness testimony demonstrated his impaired intellectual functioning. He struggled academically, relied on tutors and special education, and did not finish high school; he does not read or write well, and he lacks comprehension skills. 2001 Tr. Vol. 11 at 85-87; 2001 Tr. Vol. 12 at 122-23, 148-49; 2001 Tr. Vol. 15 at 7; 2001 Tr. Vol. 16 at 125. A former employer testified Mr. Harris often had trouble making important decisions and believed him to be "mentally retarded in a way."

[3]As will be discussed in greater detail in the Reasons for Denying the Writ section, based on Dr. Krimsky's test results, he unequivocally and repeatedly testified at Mr. Harris's competency hearing that Mr. Harris is mildly mentally retarded. Comp. Tr. I at 58, 65, 66.

2001 Tr. Vol.13 at 77-78. Further, the defense presented clinical psychologist Dr. Ray Hand. Dr. Hand was called to explain the variability in Mr. Harris's IQ scores. 2001 Tr. Vol.15 at 94. Despite conducting no testing and spending no more than an hour with Mr. Harris, *id.* at 160, he testified to the following:

> I think that some people may describe him as borderline intellectual functioning because his scores fall into that range. I think at other times people are going to describe him as mentally retarded, although I don't really think that fits. At times his scores fall into that range. I think that probably he would be described as having mixed specific learning disabilities because he appears to have problems with spelling, . . . reading, arithmetic. I think that the slow label or borderline intellectual functioning is likely to be applied to him.

*Id.* at 133-34. The evidence of Mr. Harris's limited mental functioning was included as a mitigating factor at his 2001 trial. O.R. at 1269-70.

After Mr. Harris's 2001 trial on the charges, this Court unequivocally banned the execution of the intellectually disabled and found such executions are prohibited by the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).[4] After *Atkins*, the Oklahoma Court of Criminal Appeals ("OCCA") adopted the following definition to be applied to those defendants claiming death ineligibility under *Atkins*:

> A person is "mentally retarded": (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself

[4]When this Court issued *Atkins*, it employed the term "mental retardation." The Court now uses the term "intellectual disability" to describe the identical condition. *Hall v. Florida*, 572 U.S. 701, 704-05 (2014). Respondent will use the term intellectual disability except when quoting or discussing earlier court decisions and documents in the state-court record.

> before the age of eighteen (18); and (3) The mental retardation is accompanied by 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. . . .
>
> *[N]o person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test*.

*Murphy v. State*, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002), *overruled on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006) (emphasis added).

Recognizing Mr. Harris clearly met the triggering criterion entitling him to an *Atkins/Murphy* hearing,[5] original direct-appeal counsel raised an *Atkins*/*Murphy* claim. *Harris v. State*, D-2001-1268, Brief of Appellant at 88-93 (Okla. Crim. App. Mar. 6, 2003). Counsel also filed an application for remand for a hearing on his *Atkins*/*Murphy* status. *See Harris v. State*, Application for Remand to the District Court, D-2001-1268 (Okla. Crim. App. Nov. 20, 2002). Ultimately, the OCCA granted sentencing relief on an unrelated issue and remanded the case for a resentencing trial, leaving Mr. Harris's *Atkins* status unresolved. *Harris v. State*, 84 P.3d 731, 757 & n.21 (Okla. Crim. App. 2004).

[5]At the time of Mr. Harris's resentencing, *Murphy*, 54 P.3d at 567-68 controlled the issues of 1) what was required to trigger an *Atkins* hearing; and 2) what was required to prove a defendant's "mental retardation." All that was required to trigger a hearing was at least one scientifically recognized IQ test of seventy or below. *Id*. Mr. Harris clearly met this threshold.

Despite this Court's clear directive banning the execution of the intellectually disabled and the already developed evidence, which would have undoubtedly entitled Mr. Harris to an *Atkins*/*Murphy* hearing, Mr. Harris's resentencing trial counsel failed to pursue, investigate, and present an *Atkins* defense. Instead, trial counsel engaged the services of Dr. Wanda Draper, a developmental specialist, to present a "developmental life path" to Mr. Harris's resentencing jury. 2005 Tr. Vol. V at 28, 35. She conducted no IQ testing, and according to Dr. Draper, she dealt only with Mr. Harris's "development"; she was "not really the person" who dealt with diagnosing his psychiatric or psychological problems. *Id.* at 129. Despite her lack of testing and that "she was not really the person" who dealt with diagnosing psychiatric or psychological problems, Dr. Draper testified Mr. Harris was "slow" but not intellectually disabled. *Id.* at 58. Ultimately, Mr. Smith was again sentenced to death at the conclusion of his resentencing trial. O.R. at 1633-43.

Based on trial counsel's failure to investigate and present an *Atkins* defense to Mr. Harris's death eligibility, Mr. Harris's direct-appeal counsel following his resentencing trial raised a claim of trial counsel's ineffectiveness. *Harris v. State,* D-2005-117, Brief of Appellant at 9-14 (Okla. Crim. App. May 18, 2006). In support of this claim, in addition to the evidence discussed above, direct-appeal counsel relied on the report of clinical psychologist Dr. Jennifer Callahan. *Id.* at 11 n.11 (Report of Dr. Callahan was attached to Mr. Harris's 2005 direct appeal, Application for Evidentiary Hearing as Exhibit A, Case No. D-2005-117 (Okla. Crim. App. May 18, 2006)); *see also* Doc. 32, Ex. 1. Resp. App. at 136-

56. Dr. Callahan tested Mr. Harris's IQ and obtained scores ranging from 67-75 (on the WASI) and 72-77 (on the Woodcock-Johnson-III). Resp. App. at 151-52. Based on her testing, Dr. Callahan concluded Mr. Harris's IQ fell in the "*impaired* to borderline impaired range," and his results on the Woodcock-Johnson demonstrated Mr. Harris's general intellectual abilities were "approximately equivalent to the ability of a 6 year, 10 month old child, with broad discrepancies in the underlying abilities." (emphasis added). Resp. App. at 152.

Dr. Callahan also explained the variability in Mr. Harris's past IQ scores[6] and concluded that "greater consistency" existed in the scores than "one may appreciate initially." Resp. App. at 153. First, she explained an individual's IQ is ideally viewed as a range rather than a fixed number. Second, she explained IQ scores change over time based on the Flynn effect, which refers to the observation that

> the average IQ drifts upward slightly each year, which necessitates the development of new IQ tests on a regular basis. The publishers of the WISC have acknowledged that for this series of tests, the Flynn effect is most pronounced in the lower IQ ranges. In this test series, the Flynn effect equates to scores drifting ⅓ to ½ a scaled score point annually. For Mr. Harris, this means that a score of 83+/-5 in 1964 would equate to a score of 75.5+/-5 (using the more likely ½ point drift estimate) had the WISC not been as dated of a test at the time of administration to Mr. Harris. This range is consistent with the currently obtained findings on both the WASI and [Woodcock-Johnson-III] measures.

[6]In addition to the IQ testing discussed above, Mr. Harris took two IQ tests in 1964 when he was seven years old. On the Stanford-Binet Revised, he received a full-scale IQ score of 87. On the WISC, he received a full-scale IQ score of 83; *Harris v. Sharp*, 941 F.3d 962, 985 (10th Cir. 2019). Resp. App. at 147, 154-55.

Resp. App. at 153-54. Based on her analysis of Mr. Harris's history of IQ testing, she concluded Mr. Harris suffers from impaired to borderline intellectual functioning. "However, Mr. Harris' cognitive abilities are not uniformly at this level and he demonstrates a range of strengths and weaknesses. . . . Areas of relative weakness[es] are more common." Resp. App. at 154.

As to adaptive functioning,[7] there was substantial evidence in the record demonstrating Mr. Harris's deficits in several areas:

1. Self-direction - Dr. Callahan reported Mr. Harris has an impaired ability to reason when a situation is ambiguous and an impaired ability to anticipate consequences and plan effectively. Doc. 32, Ex. 1(A), Aff. at ¶ 5. Resp. App. at 136.

2. Academics - Evidence presented at Mr. Harris's first trial and subsequent resentencing trial clearly established Mr. Harris struggled in school, relied on tutors and special education, did not finish high school, does not read or write well, and lacks

[7]Mr. Harris's adaptive functioning has not been formally assessed. Although Dr. Hand offered some opinions as to Mr. Harris's adaptive functioning, he did not conduct any testing or attempt to diagnose Mr. Harris. 2001 Tr. Vol. 15 at 135. In fact, he met with Mr. Harris for "less than an hour." *Id.* at 160. After this brief visit with Mr. Harris and after reviewing prior evaluations, Dr. Hand detected deficits in Mr. Harris's communication skills, self-care skills, and functional academics. *Id.* at 168; *Harris v. State*, D-2005-117, Brief of Appellant at 11 n.10 (Okla. Crim. App. May 18, 2006). And contrary to Petitioner's assertion, the Tenth Circuit did not misunderstand the record with respect to Dr. Hand's testimony about adaptive functioning. Petition at 22 n.11. While Dr. Hand was questioned about Mr. Harris's adaptive functioning under the DSM-IV, he was never questioned about Mr. Harris's functioning pursuant to the *Murphy* standard because he testified prior to *Atkins/Murphy*. 2001 Tr. Vol. 15 at 166-76.

comprehension skills. Comp. Tr. Vol. I at 209-212; 2001 Tr. Vol. 11 at 85-87; 2001 Tr. Vol. 12 at 32, 33, 46-47, 50, 55-58, 122-23, 148-49; 2001 Tr. Vol. 15 at 7, 136, 140; 2001 Tr. Vol. 16 at 125; 2005 Tr. Vol. V at 27-68. Results on a Wide Range Achievement Test, the WRAT-3, administered by Dr. Ferguson in 2000, reflected Mr. Harris's impaired skills in word recognition, spelling, and arithmetic. Resp. App. at 148. Results on the WRAT-4 by Dr. Callahan in 2006 indicated Mr. Harris is at the first-grade level for spelling and second-grade level for word recognition, spelling comprehension, and math computation. Resp. App. at 152.

3. Communication - A former employer testified when he asked Mr. Harris for an explanation "there would be long pauses between his statements, there would be confusion when he spoke. He would start one sentence and end it with a different sentence." 2001 Tr. Vol. 12 at 28-29.

4. Health and Safety/ Self-Care - A childhood friend of Mr. Harris affirmed that, as a child, Mr. Harris engaged in dangerous activities without regard for his safety and often injured himself. For example,

> [w]hen we were teenagers, . . . I was riding on the back of the motorcycle and Jimmy Dean was driving. We were riding near a construction area . . . . Jimmy Dean drove up the side of one of those mounds [of dirt], and then off the other side. We dropped about thirty feet. Neither of us wore a helmet and we were seriously injured. . . . Another time, Jimmy Dean flipped his motorcycle. . . . Again, we were injured. There were no limits with Jimmy Dean, as he had no concept of safety.

Doc. 32, Ex. 5, ¶ 4. The record below is also replete with Mr. Harris's lifelong substance abuse, certainly calling into question his functioning in the area of self-care.

Despite being presented with evidence that easily would have met the threshold requirement for an *Atkins*/*Murphy* hearing, and in fact would have established a prima facie case, the OCCA denied relief *without so much as a hearing*. Without addressing the performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984), the state court held:

> Harris cannot show he was prejudiced by counsel's failure. . . . All the evidence in the record, including the evidence from the first trial and competency hearing, indicates that Harris could not meet [the *Murphy*] test. . . . All Harris's experts, including the ones who testified at his first trial and competency hearing, considered these scores along with Harris's other characteristics and concluded he was not mentally retarded.[55]
>
> > [55]One expert did testify at the competency hearing that, based on the two low scores, he believed he had to say Harris was mildly mentally retarded, but that was not his conclusion after examining Harris and he found the scores surprising. [[8]]

*Harris v. State*, 164 P.3d 1103, 1115 & n.55 (Okla. Crim. App. 2007). Resp. App. at 130.

After the federal district court denied Mr. Harris habeas relief, *See* Doc. 77 (*Harris v. Royal*, Opinion, Case No. CIV-08-375-F (W.D. Okla. Apr. 19, 2017) ( 2017 WL 1403302)), he sought relief in the Tenth Circuit Court of Appeals. Applying de novo review to the performance prong,[9] the Tenth Circuit found Mr. Harris's trial attorney was deficient in

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[8]Although Petitioner refers to footnote 55 of the state-court opinion throughout his petition, he never once includes it verbatim. As will be discussed in the Reasons for Denying the Writ section, Petitioner's failure to include footnote 55 is likely because it reinforces the unreasonableness of the OCCA's factual determination that premised its no-prejudice finding as opposed to serving as "an explicit recognition of Dr. Krimsky's contrary testimony." Petition at 17.

[9]OCCA's failure to address the performance prong was so clear Petitioner defended OCCA's decision only on the prejudice prong before the district court. Doc. 42 at 61-83. (State's Response Brief to Mr. Harris's Petition for a Writ of Habeas Corpus).

failing to request a pre-trial hearing to assess Mr. Harris's intellectual disability. *Harris v. Sharp*, 941 F.3d 962, 976 (10th Cir. 2019). Resp. App. at 15. With respect to prejudice, the Tenth Circuit unanimously found "[t]he OCCA thus made an unreasonable factual finding that all of Mr. Harris's experts had opined that he was not intellectually disabled. Dr Krimsky was one of Mr. Harris's experts, and he specifically opined that Mr. Harris *was* intellectually disabled." *Id.* at 981. Resp. App. at 20.

What is more, the Tenth Circuit recognized all of the evidence related to Mr. Harris's intellectual disability adduced during his competency hearing and his first trial on the charges was developed and presented pre-*Atkins*/*Murphy*. *Id.* at 981 n.15. Resp. App. at 20. As a result, Mr. Harris has not yet had a full opportunity to develop the record for the purpose of proving his intellectual disability. *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015) ("[T]he state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability *was not at issue*. The court's failure to do so resulted in an unreasonable determination of the facts.") (emphasis added).

Finally, the Tenth Circuit unanimously concluded that Mr. Harris "alleged a theory of prejudice that, if true, could justify habeas relief." *Harris*, 941 F.3d at 987. Resp. App. at 26. But recognizing disputes in the record, the court remanded the case to the district court for an evidentiary hearing as to prejudice. *Id.* Resp. App. at 26.

## REASONS FOR DENYING THE WRIT

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, requires that federal habeas courts extend deference to the factual findings of state courts. 28 U.S.C. § 2254(e). But "deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003). Congress stated in no uncertain terms that federal habeas relief remains available when a state court's holding is "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). In this case, the state court's finding of no prejudice regarding Mr. Harris's ineffective-assistance-of-counsel/*Atkins* claim was premised on its factual finding that *all* of the defense experts from Mr. Harris's competency hearing and 2001 trial on the charges had opined Mr. Harris was not intellectually disabled. *Harris v. State*, 164 P.3d 1103, 1115 (Okla. Crim. App. 2007) Resp. App. at 130. Because the Tenth Circuit's unanimous opinion scrupulously demonstrated this finding was unreasonable and because the opinion in no way contravenes this Court's jurisprudence, this Court should decline Petitioner's invitation to second-guess the Tenth Circuit's opinion and deny certiorari review.

### I. The Tenth Circuit's Decision Does Not Contravene This Court's Jurisprudence.

#### A. The State Court's No-Prejudice Finding Was Based on an Unreasonable Determination of the Facts.

The unanimous panel opinion recognized the stringent standard required for the grant of habeas relief based on 28 U.S.C. § 2254(d)(2):

> We must defer to the state court's factual findings unless "the state court[] plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to [the] petitioner's claim." *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) [internal citation omitted]. To overcome the state appellate court's factual findings, the petitioner must show that they are objectively unreasonable. *Smith v. Aldridge*, 904 F.3d 874, 880 (10th Cir. 2018).[10]

*Harris*, 941 F.3d at 972. Resp. App. at 11. Both the record and the circuit court's opinion demonstrate the court faithfully adhered to this standard while determining the OCCA premised its finding of no prejudice on an unreasonable determination of facts.

As noted above, in disposing of Mr. Harris's ineffective-assistance-of-counsel/*Atkins* claim, the OCCA concluded:

> *All the evidence in the record*, including the evidence from the first trial and competency hearing, indicates that Harris could not meet [the *Murphy*] test. Despite [Dr. Krimsky's] two IQ scores, all Harris's other IQ scores were over 70. *All Harris's experts*, including the ones who testified at this first trial and competency hearing, considered these scores along with Harris's other characteristics and concluded he was not mentally retarded.

*Harris*, 164 P.3d at 1115 (emphasis added). Resp. App. at 130. The record belies the OCCA's assertion, demonstrating the unreasonableness of its finding.

At his competency hearing, first trial, and resentencing trial, Mr. Harris presented numerous expert witnesses who testified to his intellectual functioning and/or his serious mental illness. Admittedly, the defense experts' opinions regarding Mr. Harris's intellectual functioning diverged at times. *See supra* at 4, 6, 8 (discussing testimony of Drs. Hand and

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[10]In *Smith*, 904 F.3d at 880, the circuit court discussed this Court's recent § 2254(d)(2) cases – namely, *Brumfield* and *Miller-El* – and recognized the "daunting standard" for granting relief under such provision.

Draper). But contrary to the OCCA's findings, neither "all the evidence in the record" nor "all Harris's experts" indicated he was "not mentally retarded."

Dr. Krimsky, a clinical psychologist with experience conducting "[c]ompetency evaluations of individuals with mental retardation," Comp. Tr. Vol. 1 at 38, conducted an abbreviated IQ test and a full IQ test on Mr. Harris in March 2001, which resulted in full-scale scores of 66 and 68. *Id*. at 58, 64-65; *See supra* at 3 (detailing tests and scoring). Dr. Krimsky met with Mr. Harris three times and spent numerous hours with him. *Id.* at 40. Based on his test results[11] and the time he spent with Mr. Harris, Dr. Krimsky testified *repeatedly* that Mr. Harris suffers from "mild mental retardation." *Id.* at 58, 65, 66. Dr. Krimsky was so emphatic about his opinion that he corrected an attorney who referred to Mr. Harris as "borderline mentally retarded":

> Q: Okay. Is that [learning the skills of repairing transmissions after observing his father for years] consistent with how a person with a borderline mentally retarded IQ scale would learn?
> A: He's not borderline. He's mild mental retardation.
> Q: Sorry. I apologize.

*Id.* at 65. Clearly, neither the test results obtained by Dr. Krimsky nor his testimony supports the OCCA's conclusion that "all the evidence in the record" and "all Harris's experts" indicated he was "not mentally retarded."

[11]Dr. Krimsky saw no indication Mr. Harris attempted to "fool the test." Comp. Tr. Vol. 1 at 65.

Further substantiating the factual unreasonableness of the OCCA's finding that "all of the evidence in the record" demonstrated Mr. Harris was "not mentally retarded" is the reference to Dr. Nelda Ferguson's 2000 testing within Dr. Callahan's report. Specifically, Mr. Harris's results on the WAIS-III administered by Dr. Ferguson resulted in a full-scale IQ score of 63. Resp. App. at 148, 159-60. "On the basis of these testing results, Mr. Harris was deemed to evidence Mild Mental Retardation." *Id.* Dr. Ferguson also administered the WRAT-3 to Mr. Harris, and he demonstrated impaired skills in word recognition, spelling and arithmetic. *Id.* Although Dr. Ferguson did not testify at any of Mr. Harris's proceedings, the evidence of her test results and her opinion that he suffers from "mild mental retardation" was part of the record before the state court. *Harris*, 941 F.3d at 985. Resp. App. at 24.

In an effort to salvage the OCCA's factually unreasonable opinion, Petitioner points to a footnote in the state-court opinion that ostensibly "dispelled any notion that [the OCCA] misapprehended the facts." Petition at 14. Based on this footnote, Petitioner accuses the circuit court of "ignor[ing] the totality of the OCCA's opinion, contrary to the highly deferential standard of AEDPA." *Id.* at 17-18 (citing *Johnson v. Williams*, 568 U.S. 289, 300 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). But Petitioner strips the OCCA's opinion of relevant context by omitting the text of the footnote in his attempt to convince this Court that the Tenth Circuit failed to give the proper deference to the state-court opinion.

The footnote to which Petitioner refers, *but he never includes*, reads as follows: "One

expert did testify at the competency hearing that, based on the two low scores, he believed he had to say Harris was mildly mentally retarded, but that was not his conclusion after examining Harris and he found the scores surprising." *Harris*, 164 P.3d at 1115 n.55. Resp. App. at 130. Petitioner characterizes this footnote as "recognizing Dr. Krimsky's testimony that Respondent was intellectually disabled." Petition at 17. But this footnote does far more than "recognize" Dr. Krimsky's contrary testimony. It reinforces the already unreasonable factual findings and further mischaracterizes Dr. Krimsky's testimony.

Based on Dr. Krimsky's repeated and emphatic testimony that Mr. Harris suffers from "mild mental retardation," one could not reasonably state "he believed he *had* to say Harris was mildly mentally retarded." As discussed above, Dr. Krimsky went out of his way to correct an attorney who mistakenly characterized Mr. Harris as "borderline mentally retarded." *See supra* at 14. What is more, nothing in the record supports the OCCA's assertion that Dr. Krimsky's opinion Mr. Harris was mildly mentally retarded "was not his conclusion after examining Harris." In response to questioning as to why he conducted two IQ tests, Dr. Krimsky replied, "[t]here was an ambiguity comparing the result of the [SIT-R] . . . and [Mr. Harris's] occupation of having been involved in repair of auto transmissions."[12] Comp. Tr. Vol. 1 at 63. Dr. Krimsky testified the later WAIS-R test was "much more comprehensive" with "a high validity in relation to occupational and socioeconomic status."

[12]Dr. Krimsky admitted he knew nothing about the repair of auto transmissions; he merely assumed it involved complex constructive operations. Comp. Tr. Vol. 1 at 63-64.

*Id.* at 64. Dr. Krimsky also testified Mr. Harris's skills of repairing auto transmissions could have been acquired by someone who was mildly mentally retarded, especially because Mr. Harris had spent "a long period of time . . . observing his father and other people fix transmissions." *Id.* at 65.[13] Dr. Krimsky's 2001 opinion is entirely consistent with what this Court has previously held: "[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield,* 135 S. Ct. at 2281 (quoting American Psychiatric Association of Mental Retardation, Mental Retardation: Definition, Classifications, and Systems of Supports 8 (10th ed. 2002)).

Contrary to Petitioner's argument, the Tenth Circuit's unanimous conclusion that the OCCA based its no-prejudice finding on an unreasonable determination of facts in no way contravenes this Court's admonition to give state-court decisions the benefit of the doubt. *See* Petition at 17-18 (citing *Pinholster*, 563 U.S. at 181; *Visciotti*, 537 U.S. at 24).[14] *See infra* at 18-21 (discussing *Brumfield*). The OCCA explicitly premised its no-prejudice determination

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[13]Petitioner also makes much of the fact that Mr. Harris was "psychotic" at the time of Dr. Krimsky's testing as a way to undermine his test results. Petition at 5-7; However, this was not a reason on which the OCCA based its no-prejudice finding. *Harris*, 164 P.3d at 1115-16. Resp. App. at 130-31. Further, mental illness and intellectual disability are not mutually exclusive. As this Court has noted, "mental-health professionals recognize . . . many intellectually disabled people also have other mental or physical impairments." *Moore v. Texas,* 137 S. Ct. 1039, 1051 (2017).

[14]Both *Pinholster* and *Visciotti* involved grants of habeas relief based on 28 U.S.C. § 2254(d)(1) as opposed to § 2254(d)(2), which is at issue here. Curiously, Petitioner never discusses *Brumfield,* a § 2254(d)(2) case directly on point. *See infra* at 18-21 (discussing the applicability of *Brumfield* to Mr. Harris's case).

on the finding that *all* evidence in the record and *all* of Mr. Harris's experts concluded he was *not* mentally retarded. And then, the OCCA doubled down on this unreasonable factual finding with a footnote that reinforced and exacerbated the unreasonableness of the court's finding. An examination of the record before the state court compels the conclusion that its critical factual determinations were unreasonable. *See Miller-El*, 537 U.S. at 340 (§ 2254(d)(2) does not bar federal court review where state court's determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding"). This Court should deny certiorari review.

### B. Mr. Harris's Case Is Directly Analogous to *Brumfield v. Cain*.

In the wake of *Atkins*, the state court's refusal to grant Mr. Harris a hearing on his ineffective-assistance-of-counsel/*Atkins* claim was inexplicable.[15] That refusal was based in large part on a review of a record that had been developed before this Court first held that persons with intellectual disability are ineligible for the death penalty and before Oklahoma

[15]To decide the issue of *Strickland* prejudice with respect to trial counsel's failure to seek a pretrial adjudication of Mr. Harris's *Atkins* status, a court must assess the likelihood that defense counsel could have proven Mr. Harris is intellectually disabled under the then-existing *Murphy* standard. Under Oklahoma law, Mr. Harris was charged with proving his intellectual disability by a preponderance of the evidence, the lowest evidentiary standard. *Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). Further, Mr. Harris need only prove at least one juror would have found him intellectually disabled. *Id.* at 1142 (requiring unanimous verdict and directing trial courts to strike bill of particulars and enter an order finding defendant "not mentally retarded" when jury cannot reach unanimous verdict). *See Harris*, 164 P.3d at 1115 nn.51, 52 (recognizing *Blonner* applies). Resp. App. at 130.

first adopted its own definition of intellectual disability based on those standards.[16] Nevertheless, Mr. Harris's pre-*Atkins* record revealed myriad evidence that he suffers from intellectual disability. Specifically, he has IQ scores ranging from the 60s to the 80s[17] on various tests. Moreover, the pre-*Atkins* record demonstrated he struggled academically, was placed in special education, did not finish high school, does not read or write well, and lacks comprehension skills. 2001 Tr. Vol. 11 at 85-87; 2001 Tr. Vol. 12 at 123, 149; 2001 Tr. Vol. 15 at 7; 2001 Tr. Vol. 16 at 125; 2005 Tr. Vol V at 27-68. The state court's determination that these facts did not even merit a hearing was patently unreasonable, and this Court's opinion in *Brumfield* supports the Tenth Circuit's decision remanding Mr. Harris's case for an evidentiary hearing.

[16]The only relevant post-*Atkins* evidence in the state-court record was Dr. Jennifer Callahan's report and Dr. Draper's testimony that Mr. Harris was "slow" but "not mentally retarded." *See supra* at 6-8 (discussing results of Dr. Callahan's testing and her explanation of the variability of Mr. Harris's past IQ scores); *supra* at 6 (discussing Dr. Draper's lack of testing and that she was "not really the person who dealt with diagnosing [Mr. Harris's] psychiatric or psychological problems"). Dr. Callahan's scores would not preclude a hearing under Oklahoma's then-existing standard, nor would they preclude a finding of "mentally retarded," especially when one considers the standard error of measurement. *See Hall v. Florida*, 134 S. Ct. 1986, 1995, 1998, 2000 (2014) (finding clinical practices mandate consideration of the standard error of measurement. The generally accepted adjustment for assessing intellectual disability is plus or minus five points).

[17]As Dr. Callahan explained, the scores from Mr. Harris's childhood were artificially inflated due to obsolete testing norms. *See supra* at 7.

In *Brumfield*, this Court warned state courts against denying *Atkins* hearings[18] based on pre-*Atkins* records *that contain conflicting evidence* of a defendant's intellectual disability. *Brumfield*, 135 S. Ct. at 2279-82. Similar to the evidence adduced at Mr. Harris's competency hearing and first trial, the evidence from Mr. Brumfield's pre-*Atkins* trial was somewhat conflicting as to intellectual disability. Evidence demonstrated "that he had registered an IQ score of 75, had a fourth-grade reading level, had been prescribed numerous medications, . . . had been identified as having some sort of learning disability, and had been placed in special education classes." *Id.* at 2275. But there was also expert testimony in the record that Mr. Brumfield may have scored higher than 75 on an IQ test. *Id.* at 2277. Further, there was evidence Mr. Brumfield "'appear[ed] to be normal from a neurocognitive perspective,' with a 'normal capacity to learn and acquire information when given the opportunity for repetition,' and 'problem solving and reasoning skills' that were 'adequate.'" *Id.* at 2280-81. And there was no evidence of results from a formal adaptive behavior assessment presented in Mr. Brumfield's pre-*Atkins* trial. *Id.* at 2279.

The state court denied Mr. Brumfield a hearing on his *Atkins* claim based on the following factual findings: "Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and . . . he had presented no evidence of adaptive impairment." *Id.* at 2276-77. Ultimately, this Court found the state court's rejection of Mr. Brumfield's *Atkins*

[18]Mr. Harris recognizes he asked for a hearing on trial counsel's ineffectiveness, but to establish prejudice, he would have had to show a reasonable probability that a fact-finder would find him intellectually disabled.

hearing was premised on unreasonable determinations of facts within the meaning of § 2254(d)(2) and vacated and remanded the Fifth Circuit's reversal of the district court's grant of habeas relief.[19] *Id.* at 2276.

The similarities between Mr. Harris's case and *Brumfield* are striking. In both cases conflicting evidence as to the defendant's intellectual disability was adduced at pre-*Atkins* proceedings. There was sufficient evidence to raise a question as to the defendant's intellectual disability. Yet neither defendant was afforded a hearing by the state court. The Tenth Circuit, like the federal district court in *Brumfield*, properly granted a hearing as to the prejudice resulting from Mr. Harris's trial counsel's failure to seek a pre-trial *Atkins* hearing. This Court should deny certiorari review.

## II. Disputes in the Facts and Questions of Credibility Raised by Petitioner Should Be Settled at an Evidentiary Hearing.

Petitioner's arguments on pages 20 through 22 of his petition for writ of certiorari highlight why a hearing is necessary. *All* of the cases[20] relied on by Petitioner to support his argument that the Tenth Circuit erred by stating "the controlling [Oklahoma] standard does

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[19]The federal district court granted habeas relief after conducting a hearing and finding Mr. Brumfield intellectually disabled. *Id.* at 2275.

[20]*Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019); *Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016); *McManus v. Neal*, 779 F.3d 634 (7th Cir. 2015); *United States v. Williams*, 1 F. Supp. 3d 1124 (D. Haw. 2014); *United States v. Salad*, 959 F. Supp. 2d 865 (E.D. Va. 2013); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012); *Howell v. State*, 138 P.3d 549 (Okla. Crim. App. 2006); *Hooks v. State*, 126 P.3d 636 (Okla. Crim. App. 2005); *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005); *Murphy v. State*, 66 P.3d 456 (Okla. Crim. App. 2003); *Myers v. State*, 130 P.3d 262 (Okla. Crim. App. 2005).

not require the parties or the court to identify the more realistic or representative [IQ] score," 941 F.3d at 981 n.15, Resp. App. at 20, have one significant thing in common that differs from Mr. Harris's case: In those cases, the lower courts granted hearings on the issue of whether the defendants were intellectually disabled. The proposition for which Petitioner cites these cases – that courts should consider the more representative IQ score – is accurate, but only when a defendant in Oklahoma has gotten a hearing after meeting the threshold *Murphy* test. Contrary to Petitioner's assertion, the Tenth Circuit did not "second guess[ ] the OCCA's reliance on the experts on this basis." Petition at 22. The circuit court simply found certain contrary evidence did not preclude an *Atkins* hearing.[21] Petitioner's argument essentially conflates the standard at the time of Mr. Harris's resentencing for entitlement to a pretrial *Atkins* hearing with the standard for proving a defendant's intellectual disability for the purposes of ineligibility for the death penalty.

As a result of Petitioner's conflating these two standards, he misinterprets the panel's discussion of Dr. Hand's 2001 opinion and the panel's statement that "the controlling standard does not require the parties or the court to identify the more realistic or representative score." *Harris*, 941 F.3d at 981 n.15.[22] Resp. App. at 20. Clearly, the panel

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[21]Further, the Tenth Circuit rejected this line of argument because the OCCA did not reject the claim based on reliability findings, but instead the OCCA unreasonably found no defense expert had testified Mr. Harris was mentally retarded. *Harris*, 164 P.3d at 1115; Resp. App. at 130.

[22]Petitioner also omits the sentence that immediately follows: "The question is instead whether the defendant has 'an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved and contemporary intelligence

did not find the issue of test reliability and accuracy improper considerations for courts evaluating whether a defendant met the criteria for establishing intellectual disability once a hearing has been granted. The panel simply found that Dr. Hand's pre-*Atkins* opinion and issues of test reliability did not preclude a hearing.

Petitioner also chastises the Tenth Circuit for "insist[ing] that no one has applied the proper definition of intellectual disability in this case. . . . The basis for this misapprehension is the fact that Dr. Hand[23] testified before *Atkins* and the OCCA's decision in *Murphy*." Petition at 22. But there is nothing remarkable about the Tenth Circuit's acknowledging that experts whose testimony predated *Atkins* (in proceedings that had nothing to do with the preclusion of the death penalty based on intellectual disability) did not apply the proper Oklahoma standard (that did not even come into being until over a year later). This Court acknowledged as much in *Brumfield*.

Further, Petitioner inaccurately posits Mr. Harris had not previously argued that "no factfinder has considered Mr. Harris's evidence of intellectual disability based on the Oklahoma test that applied during Mr. Harris's retrial." Petition at 23. But Mr. Harris did exactly that (using different words) when he argued before the Tenth Circuit that "Mr. Harris has never had a full and fair opportunity to present evidence of his intellectual disability in

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quotient test.' *Murphy*, 54 P.3d at 568. Dr. Hand did not apply this test." *Harris*, 941 F.3d at 981 n.15. Resp. App. at 20.

[23]As noted earlier, Dr. Hand conducted no IQ testing on Mr. Harris and spent less than an hour with him. *See supra* at 8.

the *Atkins* context." *Harris v. Royal*, Case No. 17-6109, Opening Brief of Petitioner/Appellant Jimmy Dean Harris at 22-23 (10th Cir. July 2, 2018) (citing *Brumfield*). He then went on to discuss a number of Oklahoma cases wherein defendants were given the opportunity to retroactively litigate *Atkins* claims under the controlling Oklahoma standard. *Id.* at 25.

An evidentiary hearing is usually unavailable when the petitioner has failed to diligently develop the factual bases of the claim in state court. *Williams v. Taylor*, 529 U.S. 420, 432 (2000). Here, however, Mr. Harris diligently attempted to develop the factual foundations of his ineffective-assistance-of-counsel/*Atkins* claim when he was in state court. By denying Mr. Harris the opportunity for an evidentiary hearing, the OCCA left the federal courts with a cold record and no factual findings for "the innately fact-intensive issue of prejudice." *Harris*, 941 F.3d at 983. Because factual and credibility disputes have never been presented to a fact-finder for resolution,[24] the Tenth Circuit's grant of an evidentiary hearing is proper. *See Littlejohn v. Trammell*, 704 F.3d 817, 856-57 (10th Cir. 2013) (remanding case for evidentiary hearing on the fact-intensive question of prejudice resulting from trial counsel's deficient performance); *Sasser v. Hobbs*, 735 F.3d 833, 850 (8th Cir. 2013) (concluding that "misconceptions about the Arkansas legal standard [for identifying the

[24]For example, Petitioner attacks the credibility of Dr. Krimsky by attempting to undermine his IQ test results with the testimony of Dr. Smith. Petition at 6, 19 & n.8. But what Petitioner omits is that Dr. Smith testified that he had "a great deal of confidence in" Dr. Krimsky and described him as "one of the most experienced people around" with respect to testing. Comp. Tr. Vol. 1 at 179, 225.

intellectually disabled] led the district court to answer the wrong factual questions, leaving the pertinent questions unanswered" and that "[t]he proper course . . . [was] to vacate the district court's finding that [the defendant] [was] not mentally retarded and remand so that the district court [could] answer the critical factual questions in the first instance according to the correct legal standard"); *Allen v. Buss*, 558 F.3d 657, 663, 665 (7th Cir. 2009) (observing that "the [state] trial court did not determine whether [the petitioner] is mentally retarded under Indiana's test for mental retardation" and remanding the case to the federal district court for an evidentiary hearing).

## CONCLUSION

Petitioner has presented no compelling reason for this Court to grant certiorari review. He has presented no jurisdictional splits or conflicts and no important unsettled question of federal law; nor is the Tenth Circuit's decision in conflict with Supreme Court precedent. The Petition for Certiorari should be denied.

Respectfully submitted,

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