NO. 19-1106

In the Supreme Court of the United States

TOMMY SHARP, WARDEN,

Petitioner,

v.

RODERICK L. SMITH,

Respondent.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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STATUTES

28 U.S.C. § 2254(d)(1) 1

The Tenth Circuit granted Smith habeas relief on his intellectual disability claim based on *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), and *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"), decisions issued years after the state court opinion under review and the date when Smith's death sentences became final. Pet. App. 37a-44a. On *de novo* review, the Tenth Circuit concluded that a finding against Smith on the adaptive-functioning prong violated *Moore I* and *Moore II* because (1) only Smith, and not the State, presented a formal assessment of Smith's adaptive functioning, contrary to the American Association on Mental Retardation's ("AAMR") recommendations; and (2) the State's evidence improperly emphasized lay stereotypes and adaptive strengths. Pet. App. 39a-40a. As the petition for certiorari showed, the Tenth Circuit's application of the new rules announced in *Moore I* and *Moore II* was improper under both *Teague v. Lane*, 489 U.S. 288 (1989), and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). Pet. 20-26.

Smith's response proves Petitioner's position. Smith insists that *Moore I* and *Moore II* were mere applications of *Atkins v. Virginia*, 536 U.S. 304 (2002), that did not announce new rules, but he repeatedly argues that he is entitled to relief on the adaptive-functioning prong because the State did not present a formal adaptive-functioning assessment and relied on adaptive strengths and lay stereotypes. Opp. 12, 17, 24-26, 32-33. These arguments find no mooring in *Atkins*—which expressly left to the States the task of defining intellectual disability, *Atkins*, 536 U.S. at 317—but exactly track this Court's criticisms of the state court in *Moore I* and *Moore II*, *see*

Moore I, 137 S. Ct. at 1050-53 (holding the state court improperly emphasized adaptive-functioning strengths and lay perceptions and failed to follow current medical and clinical standards); *Moore II*, 139 S. Ct. at 670-72 (same). Thus, Smith's arguments necessarily demonstrate that *Moore I* and *Moore II* announced new rules. Smith further does not show, as a threshold matter, that the Tenth Circuit properly applied *de novo* review. Finally, as Smith continues to rely on new rules first announced in *Moore I*, he has not shown that he is entitled to relief under *Atkins* alone.

Petitioner respectfully urges this Court to grant certiorari.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE LAW OF BOTH THIS COURT AND THE ELEVENTH CIRCUIT

A. *Shoop v. Hill*

As the petition demonstrated, even assuming *de novo* review of the adaptive-functioning prong were proper, the Tenth Circuit's application of *Moore I* and *Moore II* was contrary to *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*). Pet. 20-22. The Tenth Circuit concluded *Moore I* and *Moore II* were not *Teague*-barred because they were not "novel," but were instead mere "application[s]" of *Atkins* that did not announce new rules. Pet. App. 34a-37a (quotation marks omitted). This Court in *Hill*, however, rejected the Sixth Circuit's "assert[ion] that the holding in *Moore* was 'merely an application of what was clearly established by *Atkins*.'" *Hill*, 139 S. Ct. at 508 (quoting *Hill v. Anderson*, 881 F.3d 483, 487 (6th Cir. 2018)). While the Sixth Circuit faulted the state court for overemphasizing Hill's adaptive strengths and relying on strengths exhibited in prison, "the [Sixth Circuit] did not explain how

the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.'" *Id.* at 507-08 (citing *Hill*, 881 F.3d at 492). Smith has failed to reconcile the Tenth Circuit's conclusion with *Hill*.

Smith begins by sidestepping Petitioner's argument with the unremarkable observation, repeatedly acknowledged by Petitioner, Pet. 19-21, that *Hill* was governed by AEDPA and its "clearly established" law provision of § 2254(d)(1), Opp. 22-23. But this Court has recognized that an overlap between the *Teague* doctrine and AEDPA exists specifically as to *Teague*'s prohibition on the application of "new rules" and § 2254(d)(1)'s "clearly established" law requirement. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) ("With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law' . . . under § 2254(d)(1)."); *see also id.* at 379 (Stevens, J., writing for four Justices) ("The antiretroactivity rule recognized in *Teague*, which prohibits reliance on 'new rules,' is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'"). Thus, when *Hill* said that the rule in *Moore I* (*i.e.*, banning overreliance on adaptive strengths) was not clearly established by *Atkins*, it necessarily follows that it was not an old rule announced in *Atkins*. *Cf. Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313 (11th Cir. 2015) (concluding that, because the holding of *Hall v. Florida*, 572 U.S. 701 (2014), was not "clearly established" by *Atkins*, "*Hall* necessarily established a new rule of constitutional law" for purposes of *Teague*).

Furthermore, *Hill*'s AEDPA context does not change the fact that this Court expressly rejected the Sixth Circuit's conclusion that *Moore I* was a mere application of *Atkins*—the identical conclusion reached by the Tenth Circuit that was the lynchpin of its *Teague* analysis. *Compare Hill*, 881 F.3d at 487 ("[W]e find that *Moore*'s holding regarding adaptive strengths is merely an application of what was clearly established by *Atkins*."), *with* Pet. App. 35a ("[T]he Supreme Court's post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case."). If *Moore I* was more than a mere application of *Atkins*, then it announced a new rule for purposes of *Teague*. *See Teague*, 489 U.S. at 307.

Attempting to avoid the conflict between this case and *Hill*, Smith argues that while the Sixth Circuit "'did not explain how the rule it applied can be teased out of . . . *Atkins*,'" "the Tenth Circuit explicitly 'teased out' why and how" *Moore I* and *Moore II* were mere applications of *Atkins*. Opp. 25 (quoting *Hill*, 139 S. Ct. at 508). Smith reads the rhetorical phrase "did not explain" much too literally. The problem was not the Sixth Circuit's failure to adequately explain its conclusion that *Moore I* was an application of *Atkins*, but that this conclusion was simply wrong, a point *Hill* made clear in its next sentence:

> While *Atkins* noted that standard definitions of mental retardation included as a necessary element "significant limitations in adaptive skills that became manifest before age 18," *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States.

Hill, 139 S. Ct. at 508 (citations omitted, alteration adopted).

Even setting *Hill* aside, it is clear *Moore I* announced new rules. As Smith concedes, Opp. 24, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States," or if, put differently, its "result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality) (emphasis in original); *see also Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("[A] holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." (quotation marks omitted)). The rule of *Atkins* is that the execution of intellectually disabled offenders is "excessive and . . . the Constitution places a substantive restriction on the State's power to take the life of [such an] offender." *Atkins*, 536 U.S. at 321 (quotation marks omitted). *Atkins* provided *no* rules, however, as to how to define intellectual disability and instead expressly "[left] to the States the task of developing appropriate ways to enforce [this] constitutional restriction." *Id.* at 317 (alteration adopted, quotation marks omitted). Thus, when *Moore I* said that States may not "disregard . . . current medical standards," emphasize adaptive strengths over deficits, or rely on lay perceptions of intellectual disability, *Moore I*, 137 S. Ct. at 1049, 1050-52, this Court broke new ground and imposed new obligations on the States, *see Teague*, 489 U.S. at 301; *see also Chaidez*, 568 U.S. at 351-54 (reasoning that a case that decided a question "left open" by a prior case announced a new rule).[1]

[1] Federal courts have disagreed with Smith's alternative (and irreconcilably contradictory) position that *Moore I* and *Moore II* were "new substantive decisions of constitutional law." Opp. 26 n. 21. *See, e.g.*, *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1338-39 (11th Cir. 2019); *Davis v. Kelley*, 854 F.3d 967, 970 (8th Cir. 2017).

The Tenth Circuit's decision is contrary to *Hill*. In any event, even without *Hill*, it is clear *Moore I* announced new rules not dictated by *Atkins*. The Tenth Circuit's contrary conclusion cannot stand.

B. Circuit Split

Smith contends that Petitioner has not shown a "real" circuit split. Opp. 27-28. Smith is wrong. First, Smith claims that in *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330 (11th Cir. 2019), "the petitioner conceded the rule [in *Moore I*] was new," such that the Eleventh Circuit "was not asked to decide whether *Moore I* announced a new rule," Opp. 27. The former point is correct; the latter is not. In adjudicating the petitioner's claim that *Moore I* created a new rule of constitutional law that should be applied retroactively, the Eleventh Circuit conducted a lengthy *Teague* analysis that included deciding, in its independent judgment, that *Moore I* announced a new rule:

> To determine whether a rule is retroactive, we first decide if it is a new rule. . . .
>
> *Moore* established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled. *Moore* effectively narrowed the range of permissible methods—the procedure—that states may use to determine intellectual disability. While *Moore* may have the effect of expanding the class of people ineligible for the death penalty, it merely defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty. *Moore* thus announced a new rule, but it is procedural, not substantive.

Smith, 924 F.3d at 1338-39. The Tenth Circuit's opinion cannot be reconciled with *Smith*.

Second, Smith argues that Petitioner has shown no split between the Tenth Circuit and *In re Payne*, 722 F. App'x 534 (6th Cir. 2018) (unpublished), and *Ybarra v. Filson*, 869 F.3d 1016 (9th Cir. 2017). Opp. 27-28. This is a red herring, as Petitioner argued only a split between the Tenth and Eleventh Circuits. Pet. ii, 19, 22-23. What Petitioner showed with *Payne*—and that Smith has not disputed—is that the Sixth Circuit surveyed federal cases and found that federal courts have repeatedly determined that *Moore I* created new rules. *Payne*, 722 F. App'x at 538 (collecting cases); Pet. 22. The weight of authority is against the Tenth Circuit. As to *Ybarra*, Smith makes no attempt to square its recognition that "*Moore* [*I*] . . . changed the course of the Supreme Court's intellectual disability jurisprudence," *Ybarra*, 869 F.3d at 1025 n. 9, with the Tenth Circuit's conclusion that *Moore I* did not yield a novel result not dictated by precedent, Pet. App. 35a-37a. These conclusions are irreconcilable.

In sum, Smith has not identified a single additional case holding that *Moore I* did not create a new rule. Petitioner has presented a contrary, on-point opinion by the Eleventh Circuit and shown that federal courts have reached contrary opinions in related contexts. This conflict justifies this Court's intervention.

II. SMITH FAILS TO SHOW THAT *DE NOVO* REVIEW WAS PROPER

Smith fails to convincingly refute Petitioner's alternative position that the Tenth Circuit made a threshold error in even reaching *de novo* review, such that application of *Moore I* and *Moore II* was improper under § 2254(d)(1). Pet. 23-26. To recap, the Oklahoma Court of Criminal Appeals ("OCCA") determined that "the State

presented *persuasive evidence* from lay witnesses to refute Smith's evidence . . . of adaptive functioning deficits." Pet. App. 138a (emphasis added).[2] Smith fails to cite any law from this Court showing that this language was insufficient to establish a merits adjudication. Opp. 30. Instead, Smith essentially faults the OCCA for giving more discussion to the intellectual-functioning prong than to the adaptive-functioning prong. Opp. 29-30. As the petition showed, however, federal courts cannot tell state courts how they must write their opinions. Pet. 24-25.

Smith further does not dispute that the Tenth Circuit *sua sponte* reached *de novo* review and that such is inconsistent with *Johnson v. Williams*, 568 U.S. 289, 293 (2013). Pet. 25-26. Contrary to Smith's focus, the issue is not one of waiver. Opp. 31-32. Rather, the Tenth Circuit violated the spirit of AEDPA by scrutinizing the OCCA's decision even more closely than Smith, finding *de novo* review appropriate where Smith had tacitly admitted AEDPA applied. *See Williams*, 568 U.S. at 306 (concluding it was "most improbable" that state court overlooked Williams's claim when she "presumably knows her case better than anyone else . . . [and did] not appear to have thought that there was an oversight").[3]

For all these reasons, Smith has failed to overcome Petitioner's showing that the Tenth Circuit was incorrect to *sua sponte* strip the OCCA of deference.

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[2] Smith quotes this sentence from the OCCA but tellingly omits the phrase "persuasive evidence." Opp. 30.

[3] In any event, *Gardner v. Galetka*, 568 F.3d 862, 877-79 (10th Cir. 2009), Opp. 31, applied *AEDPA deference* even though *the State* mistakenly conceded *de novo* review. *See also Grant v. Royal*, 886 F.3d 874, 931 n. 20 (10th Cir. 2018) (refusing to apply *Gardner* to a habeas *petitioner's* waiver of an argument for *de novo* review in light of AEDPA's congressionally mandated deferential standard of review).

III. SMITH HAS NOT DEMONSTRATED HE WOULD BE ENTITLED TO RELIEF UNDER *ATKINS*

Finally, Smith disagrees with Petitioner's position that, with application of *Moore I* and *Moore II* barred, he is clearly not entitled to habeas relief under *Atkins*.[4] Smith's rebuttal fails both legally and factually.

Legally speaking, Smith continues to seek refuge in rules announced in *Moore I* and *Moore II*. For starters, he does not offer even a single citation to *Atkins* to show how the *Atkins* jury's verdict ran afoul of that case. Opp. 32-33. Instead, Smith repeatedly cites to the Tenth Circuit's opinion in arguing that the State failed to present a formal assessment of his adaptive functioning and relied on lay stereotypes. Opp. 26, 32-33. But as shown in the petition, the Tenth Circuit relied exclusively on *Moore I* and *Moore II*, not *Atkins*, in granting relief on the adaptive-functioning prong. Pet. 17. Indeed, the rules invoked by the Tenth Circuit and Smith are quite clearly drawn from *Moore I*. *Compare Moore I*, 137 S. Ct. at 1052 ("[T]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled."), *with* Pet. App. 39a ("The evidence the State emphasizes on appeal to refute Smith's adaptive functioning argument carries little weight in light of the Supreme Court's warnings against undue emphasis on 'perceived adaptive strengths,' *Moore I*, 137 S. Ct. at 1050, and 'lay stereotypes of the intellectually disabled,' *id.* at 1052."); *Moore I*, 137 S. Ct. at 1049 (States may not "disregard . . . current medical standards"), *with* Pet. App.

[4] The Tenth Circuit made no such alternative holding. Indeed, if Smith were entitled to relief under *Atkins*, it begs the question why it was necessary for the Tenth Circuit to *sua sponte* reach *de novo* review in order to apply *Moore I* and *Moore II*.

39a ("[C]ontrary to the AAMR's recommendations, the State neither conducted nor presented a single standardized assessment of Smith's adaptive behavior.").

Factually speaking, although Smith emphasizes Dr. Clifford Hopewell's Vineland results, Smith does not dispute Petitioner's showing that those results were *per se* invalid given Dr. Hopewell's improper administration of the assessment directly to Smith. Opp. 26; Pet. 8, 28. Furthermore, Smith's focus on whether and how the State "counter[ed]" his intellectual disability claim is irrelevant as *he* had the burden of proving intellectual disability.[5] Opp. 32; Pet. 7. In any event, the State did present evidence on which a rational jury could reject Smith's intellectual disability claim; as shown in the petition, Dr. John Call testified to evidence of Smith's malingering, and other witnesses contradicted the information relied on by Dr. Hopewell regarding Smith's functioning. Pet. 7-13, 27-29.[6]

The closest Smith comes to marshaling an argument based on *Atkins*, instead of *Moore I* and *II*, is his assertion that his death sentence is unconstitutional because he is "obviously intellectually disabled." Opp. 34. Smith forgets the posture of this case—a jury found he was *not* intellectually disabled. While Smith ignores the

[5] Regardless, Smith's repeated claim that State's expert Dr. John Call was unable to conclude Smith was not intellectually disabled, Opp. 8, 12, 26, is misleading. As shown in the petition, Dr. Call could not definitively rule out intellectual disability *because of Smith's malingering and the lack of valid tests*. Pet. 10.

[6] Although Smith repeatedly claims the State conceded deficits in the functional academics category, Opp. 22, 32, he entirely fails to address Petitioner's showing that no such clear "concession" occurred and whether it did is irrelevant under AEDPA, Pet. 10-11 n. 6. Furthermore, while Smith correctly notes that Petitioner mistakenly short-titled the transcripts from his 2004 *Atkins* trial as "2009 Tr.," Opp. 8 n. 5, he does not show the inaccuracy of any of Petitioner's factual assertions.

evidence that contradicts his claim of adaptive-functioning deficits and highlights any evidence favorable to his position, the relevant question under sufficiency review is not whether there was evidence on which a jury could have found Smith was intellectually disabled. Rather, it is whether *any* rational trier of fact could have found he was *not* intellectually disabled. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Smith has utterly failed to show that, under *Atkins*, no rational jury could have found he failed to carry his burden of meeting the adaptive-functioning prong.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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