No. 21-5491

IN THE
SUPREME COURT OF THE UNITED STATES

ALTON ALEXANDER NOLEN,

***Petitioner*,**

vs.

THE STATE OF OKLAHOMA,

***Respondent*.**

On Petition for Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether this Court should consider if Oklahoma's standard of review for capital intellectual disability claims is constitutional when that issue was neither pressed nor passed upon below.

2. Whether Oklahoma's standard of review is constitutional where it does not conflict with, or run afoul of, any case of this Court or any other court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny Petitioner Alton Alexander Nolen's petition for a writ of certiorari to review the published opinion of the Oklahoma Court of Criminal Appeals ("OCCA") entered in this case on March 18, 2021, *Nolen v. State*, 485 P.3d 829 (Okla. Crim. App. 2021), Pet'r Appx. A.[1]

STATEMENT OF THE CASE

A. Factual Background

The OCCA set forth the relevant facts in its opinion below:

> On September 25, 2014, Alton Nolen was working the bruschetta line with several other employees at Vaughn Foods in Moore, Oklahoma. One of his co-workers, Traci Johnson, who was new to the job, told him to stir the mixture more thoroughly and to put his back into it. She told him that he was lazy and that he needed to "man up." Nolen became defensive and agitated and said, "I hate white people, I beat white people up." Johnson ran from the line and reported the perceived threat to a supervisor, Timothy Bluford. After having Johnson write out a statement about the incident, Bluford spoke with Nolen and had him write out a statement as well.[5] Bluford advised Human Resources about the threat and subsequently delivered Nolen to a security guard who escorted him from the facility. Nolen was suspended pending an investigation.

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[1] Record references in this brief are abbreviated as follows: citations to the original record will be referred to as "O.R. [Vol.]"; citations to the jury trial will be referred to as "Tr. [Vol.]"; citations to formal sentencing will be referred to as "Sent. Tr."; citations to the first competency trial, held October 26-27, 2015, will be referred to as "1st Comp. Tr. [Vol.]"; citations to the second competency trial, held April 3-6, 2017, will be referred to as "2nd Comp. Tr. [Vol.]"; and citations to other transcripts will be referred to as "[Date] Tr." *See* Sup. Ct. R. 12.7, *Rules of the Supreme Court of the United States*. Citations to Petitioner's Petition for Writ of Certiorari will be cited as "Pet."

[5] Nolen's statement, admitted at trial as State Exhibit #25, was written as follows:

> I was dealing with a batch bruschetta & the white lady (gentile) told me that i need to stir it up after i had already stirred it. I then told her it was no need for it & to tone her voice that im 30 yrs old & not one of her kids, so then she reply im a immature brat and i kind laughed about it in a way of blowin the comment off, so then 5-10 mins passed and she told the black woman on the line that i got caucassians (gentiles) fucked up. so after hering that statement i tells the black woman that i beat on caucassions (gentiles). So then she left the line. Im a Muslim & my religion come before anything!

(Errors in original).

After he left work, Nolen went back to his apartment where he retrieved a butcher knife. He returned to Vaughn Foods around 4:00 p.m. with the knife concealed in his boot. Although he no longer was authorized to enter, he gained access to the building by going inside through a door as another employee was leaving. Nolen went to the administrative area of the building where Colleen Hufford had stepped into Gary Hazelrigg's office to discuss a purchase order. As Hazelrigg glanced down to look at the document, he noticed movement in his peripheral vision. When Hazelrigg looked up, he saw Nolen grabbing Hufford from behind.

Nolen pinned Hufford's head to his body by putting his left forearm across her forehead, fully exposing her neck. Nolen held a knife in his right hand, which he drew across her throat inflicting a deep wound. As Hazelrigg rose from his chair to help Hufford, Nolen spun her around and pushed her out into an open area. When Hufford was on her back on the floor, Nolen straddled her and continued cutting her throat. Hazelrigg started screaming and trying unsuccessfully to pull Nolen off Hufford. Another employee, Sam Thurman, came upon the assault, ran toward Nolen, hit him, and tried to get him off Hufford. This was not successful; Nolen was not fazed and did not stop cutting Hufford's neck. Thurman left the area and yelled for help. He called 911 and then started telling people to leave.

Mark Vanderpool and Bryan Aylor were outside the building when they heard someone screaming for help and saying that someone was "cutting Colleen." They ran back into the building and came upon Nolen who was on the floor beside Hufford still cutting her neck with a knife. Hazelrigg was trying unsuccessfully to pull Nolen off Hufford. Vanderpool kicked Nolen under the chin as hard as he could with steel-toe boots. Nolen fell back slightly and then slashed toward Vanderpool with the knife. Vanderpool and two other employees ran from the area. Nolen stood up and Aylor grabbed his wrist. Aylor pushed Nolen up against a doorway but Nolen overpowered him causing Aylor to fall on his back to the floor. Aylor held Nolen's wrist and kicked at Nolen as Nolen tried to force the knife down to stab Aylor. Finally, Nolen just stood up and ran back to Hufford. Aylor jumped up and ran from the building.

When Nolen was interacting with the others, Hazelrigg made a quick phone call to 911. While Hazelrigg was on the phone, Nolen returned and continued to slice Hufford's neck with his knife. After Hufford's head was completely detached from her body, Nolen stood up and approached Hazelrigg before he became distracted and left the area.

Traci Johnson had just changed her clothes preparing to go home when she stepped out of the locker room and saw Nolen in the hall close to the administrative offices. She froze and was unable to move when she saw the bloody knife in his hand. Nolen rushed toward her and pushed her up against a wall. He held her with his forearm and started slicing her neck. Johnson tried pushing him away as she screamed for help.

As this was happening, Mark Vaughn, the chief operating officer of Vaughn Foods, who was aware of the situation and had retrieved an AR-15 from his vehicle, arrived at the hallway where the assault was occurring. Vaughn yelled at Nolen to stop. Nolen stopped and took a few steps toward Vaughn before turning around as if to run back to Johnson. Vaughn moved eight to ten feet closer to Nolen and as he did, Nolen turned and started running toward Vaughn holding the bloody knife over his head. When Nolen was about fifteen feet from him, Vaughn yelled at Nolen to stop and then fired three rounds at him in rapid succession. Nolen did not fall but leaned against the wall of the hallway and lowered himself to the ground still clutching the knife. Nolen had been hit by the gunshots and was in obvious distress. The police and EMTs arrived shortly and transported Nolen to the hospital. Johnson was also treated by the medics and taken to the hospital for wounds to

her neck. She subsequently had surgery to repair damaged veins in her neck.

Nolen was interviewed at the hospital that same day by two Moore Police detectives and two FBI agents. Nolen advised them that he was a Muslim and that he had beheaded someone because he felt oppressed. Nolen explained that he worked at Vaughn Foods and a woman with whom he was working called him an immature brat and criticized the way he was doing his job. The woman got him into trouble and he was sent to Human Resources where he was told to go home for a couple of days. At home he retrieved a knife which he took back to work. When he went back into the building he assaulted the first woman and cut off her head because he felt oppressed. He explained that this was condoned by the Koran and that he intended to cut her head all the way off. The other woman he assaulted was the one who had disrespected him by calling him an immature brat.

Nolen was interviewed a second time a few days later on September 28, 2014. His account of what happened was substantially the same in the second interview. Nolen added, however, that he told the woman who called him an immature brat that he "beat on Caucasians." Nolen explained that up until the day of the assaults he had worked at Vaughn Foods for two years without incident; he went to work on time, had only missed one day, he prayed five times a day, did not steal, and had not fought with anyone. When he was pulled from the line and sent to Human Resources he felt discriminated against and oppressed. Nolen stated in the interview that he did not regret what he had done because it would probably make Vaughn Foods a better place for Muslims to work at in the future.

Nolen, 485 P.3d at 835-36 (paragraph numbering omitted).

B. Procedural Background

Petitioner was tried by jury for one count of Murder in the First Degree (Malice Aforethought) (of Ms. Hufford, Count 1), one count of Assault and Battery with a Deadly Weapon (of Ms. Johnson, Count 2), and four counts of Assault with a Dangerous Weapon (of Mr. Vaughan, Count 3; Mr. Hazelrigg, Count 4; Mr. Aylor, Count 5; and Mr. Vanderpool, Count 6) in the District Court of Cleveland County,

State of Oklahoma, Case No. CF-2014-1792. The State alleged four aggravating circumstances in seeking the death penalty for the murder of Ms. Hufford: (1) the murder was especially heinous, atrocious, or cruel; (2) Petitioner created a great risk of death to more than one person; (3) Petitioner was a continuing threat to society; and (4) Petitioner was previously convicted of a felony involving the use or threat of violence to the person. *See* OKLA. STAT. tit. 21, § 701.12(1), (2), (4), (7).

The jury found Petitioner guilty on all counts (Tr. XI 2403-04). As to the non-capital counts, the jury found they were committed after two or more felony convictions and recommended terms of life on Count 2, fifty-five years on Count 3, life on Count 4, life on Count 5, and seventy-five years on Count 6 (Tr. XII 2475-76). In the final stage of trial, the jury found the existence of all four aggravating circumstances alleged and recommended a sentence of death on Count 1 (Tr. XIX 3781-82). The trial court sentenced Petitioner in accordance with the jury's recommendations, with the terms of imprisonment to run consecutively (Sent. Tr. 7-9).

At trial, and in the months preceding, Petitioner's claim that he is intellectually disabled was rejected, in one form or another, by the fact-finder on three different occasions. First, in October 2015, the trial court held a hearing on the defense's claim that Petitioner had an intellectual disability that rendered him incompetent to stand trial (1st Comp. Tr. I; 1st Comp. Tr. II). After hearing experts from both sides, the trial court rejected that claim, finding any communication issues between Petitioner and his attorneys stemmed from differences in opinion on

litigation strategy (O.R. I 105-06). Second, in April 2017, the trial court held a pre-trial *Atkins*[2] hearing in which Petitioner presented yet a third expert to opine on his intellectual ability (4/7/2021 Tr.). The court found Petitioner had not proven his intellectual disability based on his failure to show significant deficits in adaptive functioning, without prejudice to his presentation of his claim to the jury (4/7/2021 Tr. 247-51). *See* OKLA. STAT. tit. 21, § 701.10b(E). Finally, at Petitioner's trial, held in September to October 2017, the issue of intellectual disability was submitted to the jury in a special stage prior to the capital sentencing stage,[3] and the jury found unanimously that Petitioner was not intellectually disabled (Tr. XVII 3443-44).

On direct appeal, Petitioner argued, in Proposition I, that his death sentence should be vacated or modified because the jury's verdict that he is not intellectually disabled was not supported by the evidence. *Nolen v. State*, No. D-2017-1269, *Brief of Appellant* at 6-14 (Okla. Crim. App. Aug. 23, 2019) ("Pet.'s OCCA Brief"). Petitioner spent most of Proposition I rehashing the evidence from his *Atkins* jury trial before concluding, in an argument spanning barely one page, that, while historically the OCCA "gives great deference to jury findings of fact" as to intellectual disability determinations, "the reasonable factfinder test of *Jackson v. Virginia*, 443

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of intellectually disabled offenders is unconstitutional under the Eighth and Fourteenth Amendments).

[3] Over the State's objection, the trial court granted the defense's request to hold a third stage, separate from the capital sentencing proceeding—to which he was *not* entitled under Oklahoma law—in which the jury determined solely whether Petitioner was intellectually disabled *before* being exposed to the capital sentencing phase aggravating evidence (Tr. XII 2490).

U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970), is not appropriate in this context." Pet.'s OCCA Brief at 13. Petitioner's only reasoning in support of this assertion was that "a finding of [intellectual disability] does not affect the defendant's conviction or his eligibility for a life or life without the possibility of parole sentence"; the OCCA once referenced a seemingly lower standard in *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005); and state courts in Florida, Nevada, Indiana, Ohio, and Pennsylvania "similarly apply less-stringent tests than the reasonable factfinder test." Pet.'s OCCA Brief at 13-14. Notably, Petitioner did not acknowledge that the *Jackson* standard was mandated by Oklahoma statute in review of intellectual disability determinations, claim that statute was unconstitutional, or cite any federal law that he contended required the OCCA to apply a lower standard.

Indeed, these were all points the State was quick to make in responding to Petitioner's Proposition I. The State opened its briefing on Proposition I with reminding the OCCA that it was statutorily obligated to apply *Jackson*: "'The standard of review for a trier of fact intellectual disability determination *shall be* whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the defendant not intellectually disabled . . . , giving full deference to the findings of the trier of fact.'" *Nolen v. State*, No. D-2017-1269, *Brief of Appellee* at 13 n. 18 (Okla. Crim. App. Dec. 23, 2019) ("State's OCCA Brief") (quoting OKLA. STAT. tit. 21, § 701.10b) (emphasis added). The State then dropped a footnote addressing Petitioner's state-law-based argument to the contrary:

> Relying on fleeting language in *Lambert v. State*, 2005 OK CR 26, 126 P.3d 646, decided before the enactment of § 701.10b, and case law from

> other courts, the defendant asserts that this Court should apply a "less-stringent test[] than the reasonable factfinder test." Appellant's Br. at 13-14. As shown above, however, **this Court's standard of review is statutorily mandated, and the defendant marshals no argument that the statute is unconstitutional.** In any event, even prior to the statute this Court applied an "any rational trier of fact" standard and determined that this standard was in accord with the standards of review announced by other jurisdictions. *See Myers v. State*, 2005 OK CR 22, ¶ 7 & n. 9, 130 P.3d 262, 267 & n. 9.

State's OCCA Brief at 13 n. 18 (emphasis added).

The OCCA affirmed Petitioner's convictions and sentences. *Nolen*, 485 P.3d at 860. Denying relief on Proposition I, the OCCA noted at the outset its statutory obligation to "'review the evidence in a light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion.'" *Nolen*, 485 P.3d at 837 (quoting OKLA. STAT. tit. 21, § 701.10b(I)). Given the plain language of § 701.10b(I), and Petitioner's failure to marshal any constitutional argument regarding that statute, the OCCA unsurprisingly did not discuss his assertion that a different standard should apply based on the apparent preference of other states' courts and legislatures. *See Johnson v. State*, 308 P.3d 1053, 1055 (Okla. Crim. App. 2013) ("A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." (quotation marks omitted)); *Johnson v. State*, 272 P.3d 720, 732 (Okla. Crim. App. 2012) ("[T]hese arguments are policy arguments which are best left to the legislature."); *Horn v. State*, 204 P.3d 777, 781 (Okla. Crim. App. 2009) ("The constitutionality of a statute will be upheld unless it is clearly, palpably, and plainly

inconsistent with fundamental law. Parties alleging the unconstitutionality of a statute have the burden of proof." (quotation marks and citation omitted)).

The OCCA then conducted a lengthy survey of the evidence, ultimately concluding that "[t]he evidence, viewed in the light most favorable to the State, supports the jury's finding that Nolen did not show, by a preponderance of the evidence," that he is intellectually disabled, particularly as to the adaptive functioning and onset-before-adulthood prongs. *Nolen*, 485 P.3d at 845; *see* OKLA. STAT. tit. 21, § 701.10b(A)-(B) (to prove intellectual disability, a capital defendant must demonstrate (1) significantly subaverage intellectual functioning; (2) significant limitations in adaptive functioning; and (3) that the onset of the intellectual disability manifested before the age of eighteen). Petitioner did not move for rehearing.

On August 16, 2021, Petitioner filed a petition for writ of certiorari with this Court seeking review of the OCCA's decision.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to grant certiorari to consider whether Oklahoma's "procedure" for determining and reviewing capital intellectual disability determinations is constitutional. Pet. at i. Petitioner does not clearly identify which aspects of Oklahoma's procedure he finds unconstitutional, but he appears to complain in particular about Oklahoma's use of the deferential *Jackson* standard on review of intellectual disability determinations by triers of fact. Pet. at 17-22. So the argument goes, Oklahoma juries never find anyone intellectually disabled, and the

courts rarely overturn such a finding because they apply a standard that is overly deferential and too onerous for the defendant. Pet. at 14-16, 21-22.

A grant of certiorari review to consider this issue is both foreclosed by 28 U.S.C. § 1257(a) and not warranted under Rule 10 of this Court's Rules. As to § 1257(a), the federal-law question Petitioner now attempts to advance was neither pressed nor passed upon below. As to Rule 10, Petitioner has not identified a compelling issue worthy of this Court's review. He has not shown that Oklahoma's capital intellectual disability scheme is in conflict with any precedent of this Court or any other court. At best, he seeks error-correction review, asking this Court to reweigh the evidence from his intellectual disability hearing and disagree with the jury and the OCCA. This does not present a compelling or appropriate issue for certiorari review. The writ of certiorari should be denied.

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED WAS NOT PRESSED OR PASSED UPON BELOW, AND IN ANY EVENT IT IS NOT A COMPELLING ONE.

A. The question presented was neither pressed nor passed upon below.

Section 1257 of Title 28 provides that this Court may review the decision of a highest state court where, *inter alia*, "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). However, the constitutional challenge to the statute must have been presented to the state court below. "Under [§ 1257(a)] and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either

addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). When the issue presented on certiorari has not been addressed by the state court, this Court presumes "the issue was not properly presented" and places the burden on petitioner to show "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams*, 520 U.S. at 87 (quoting *Webb v. Webb*. 451 U.S. 493, 501 (1981)). Failure to do so precludes this Court from addressing the federal issue a petitioner seeks to be addressed for the first time in this Court. *Id.* at 90.

Refusal to consider claims raised in the first instance reinforces the role of this Court as a "court of review, not of first view." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). Indeed, the longstanding practice of the Court is to refrain from considering a question not pressed or passed upon below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions . . . .").

Strict refusal to consider claims not raised and addressed below furthers the interests of comity by allowing the states the first opportunity to address federal law concerns and resolve any potential questions on state-law grounds. *Adams*, 520 U.S. at 90; *see also Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018) (Court "will ordinarily await 'thorough lower court opinions to guide our analysis of the merits'" (citation

omitted)); *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983). A further benefit of refusing to consider claims not raised below is a practical one—"the creation of an adequate factual and legal record" developed by the court below to better aid this Court's understanding and determination of the case presented. *Adams*, 520 U.S. at 90-91.

Here, the petition should be denied because Petitioner's claim that Oklahoma imposes an unconstitutional standard of review as to *Atkins* jury verdicts was neither pressed nor passed upon below. As previously described, on direct appeal Petitioner did not even acknowledge the statute that required the OCCA to apply the *Jackson* test, § 701.10b(I), much less did he marshal an argument that the statute was unconstitutional. He asked the OCCA to apply a lower standard only by pointing to the standards allegedly preferred by other states' courts and legislatures—what, absent a constitutional argument, undoubtedly amounted to a policy argument the OCCA would not entertain. Nor did he cite the law review articles he does to this Court, or argue to the OCCA that it would run afoul of the Constitution if its consideration of his *Atkins* claim took into consideration mental health problems or a lack of childhood IQ tests or "put[] too much emphasis on the adaptive skills criterion." Pet. at 21-22. Based on the above-cited authority, this Court should refuse to grant certiorari to consider the constitutionality of § 701.10b(I), both under § 1257(a) and this Court's general policy against considering issues in the first instance. *See, e.g.*, *Cutter*, 544 U.S. at 718 n. 7; *Howell*, 543 U.S. at 443; *Adams*, 520 U.S. at 86.

Indeed, Petitioner admits the OCCA did not address his constitutional argument: "Without directly addressing this argument [that Petitioner's *Atkins* claim should not be subjected to the *Jackson* standard], the [OCCA] reviewed Petitioner's claim under a standard as least as deferential as the *Jackson* standard." Pet. at 12. What Petitioner does not acknowledge, however, is that when the issue presented on certiorari has not been addressed by the state court, this Court presumes "the issue was not properly presented" and he has the burden to show "that the state court had 'a fair opportunity to address the federal question that is sought to be presented.'" *Adams*, 520 U.S. at 87. Petitioner does not even attempt to meet this burden. By his own account, he cited only a handful of state-court cases to the OCCA in support of his argument that the OCCA should apply something less than *Jackson*—he does not explain how these cases, or his arguments related thereto, would have alerted the OCCA to the constitutional or federal nature of his argument. *See Adams*, 520 U.S. at 88 (concluding that even a citation to a federal case and isolated references to "due process" were insufficient to properly raise a federal issue to the state court). Certiorari review should be denied.

B. Certiorari review should further be denied because Petitioner does not present a compelling federal issue.

"A petition for a writ of certiorari will be granted only for compelling reasons," including, for example, where a state court's decision on an important federal question conflicts with another state or federal court or this Court, or the federal question is one this Court has not considered but should intervene and settle. Sup. Ct. R. 10(b)-(c). "A petition for a writ of certiorari is rarely granted when the asserted

error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. In other words, this Court generally does not engage in mere error correction. *See Halbert v. Michigan*, 545 U.S. 605, 605 (2005) (explaining that, on "certiorari review in this Court," "error correction is not" this Court's "prime function").

Relevant to Petitioner's claim here, this Court held in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), that the execution of intellectually disabled offenders is unconstitutional under the Eighth and Fourteenth Amendments. This Court "[left] to the States the task of developing appropriate ways to enforce the constitutional restriction" in *Atkins*. *Atkins*, 536 U.S. at 317. In *Hall v. Florida*, 572 U.S. 701, 723 (2014), however, this Court invalidated Florida's strict intelligence quotient ("IQ") cutoff of 70 for intellectual disability claims, holding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[4] This Court noted that its "determination [was] informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments." *Hall*, 572 U.S. at 721.

[4] The court here did exactly that: "Because the lower end of Nolen's score range falls at or below 70, which is within the range required to demonstrate significantly subaverage intellectual functioning, we move on to consider Nolen's adaptive functioning." *Nolen*, 485 P.3d at 839 (citing *Hall*, 572 U.S. at 723).

Then, in *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) ("*Moore I*"), this Court held that, although States need not "adhere[] to everything stated in the latest medical guide," States may not "disregard . . . current medical standards." This Court concluded that the Texas Court of Criminal Appeals's ("TCCA") consideration of Moore's claim of adaptive-functioning deficits deviated from prevailing clinical standards in emphasizing adaptive strengths over deficits and relying on the factors from *Ex parte Briseno*, 135 S.W.3d 1 (2004) ("*Briseno* factors"), which were unmoored from current medical and clinical standards and instead "advanced lay perceptions of intellectual disability." *Moore I*, 137 S. Ct. at 1050-52. On remand, the TCCA again rejected Moore's intellectual disability claim, and this Court again reversed in *Moore II*. This Court held the TCCA repeated many of the same errors, including reliance on the *Briseno* factors. *Moore v. Texas*, 139 S. Ct. 666, 670-72 (2019) ("*Moore II*").[5]

Here, Petitioner has not presented a compelling issue of the sort contemplated by Rule 10. Petitioner alleges that other states, in contrast to Oklahoma, apply a different standard than the *Jackson* standard in review of intellectual disability determinations. Pet. at 18. He also cites two law review articles lamenting the allegedly overly high standard courts tend to apply in the *Atkins* context. Pet. at 21-22. However, Petitioner does not explain under what authority of this Court, or any

[5] Here, the OCCA explicitly recognized that "States may not adopt factors that reflect superseded medical standards or that substantially deviate from prevailing clinical standards." *Nolen*, 485 P.3d at 837. Furthermore, the OCCA considered, in reaching its decision, the relevant portions of the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association 5th ed. 2013), as such was attached to the State's direct appeal brief. State's OCCA Brief, Exhibit A.

other federal court, Oklahoma is *constitutionally* required to apply something other than the *Jackson* standard. As such, it is perfectly acceptable, and expected, that states do not have identical standards of review as to *Atkins* verdicts. *See Atkins*, 536 U.S. at 317 ("[W]e leave to the States the task of developing appropriate ways to enforce [this] constitutional restriction [against executing the intellectually disabled] upon their execution of sentences." (quotation marks omitted, alterations adopted)). Petitioner's concerns should be directed to the Oklahoma legislature, not the OCCA, and certainly not to this Court.

This Court has of course recognized limits on states' ability to define and determine intellectual disability, as summarized above. *See Hall*, 572 U.S. at 721-23; *Moore I*, 137 S. Ct. at 1049-52; *Moore II*, 139 S. Ct. at 670-72. But Petitioner does not even cite *Hall*, *Moore I*, or *Moore II*, let alone claim that they mandate a standard of review of *Atkins* verdicts less stringent than *Jackson*. Thus, Petitioner has not shown that the OCCA's decision on his *Atkins* claim conflicted with any decision of this Court. *See* Sup. Ct. R. 10(c). Moreover, the other states Petitioner identifies employ the standard of review they do based on their particular state precedents or statutes, not based on a *constitutional* holding. *See Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009); *Ybarra v. State*, 247 P.3d 269, 276 (Nev. 2011); *Rondon v. State*, 711 N.E.2d 506, 516 (Ind. 1999); *State v. White*, 885 N.E.2d 905, 912 (Ohio 2008); *Com. v. Crawley*, 924 A.2d 612, 615 (Pa. 2007).

What Petitioner appears to hint at, but does not actually say, is that Oklahoma's use of the *Jackson* standard in this context "creates an unacceptable risk

that persons with intellectual disability will be executed" because it goes against a "consensus" among the states on how to review *Atkins* verdicts. *Hall*, 572 U.S. at 704.[6] Even giving Petitioner the benefit of this construction, Petitioner's certiorari petition still falls short. The claimed split between Oklahoma and the five states Petitioner cites to—Florida, Nevada, Indiana, Ohio, and Pennsylvania—is totally illusory. While these courts articulate their standards of review in distinct ways, they are all applying something that looks a lot like *Jackson* and its highly deferential respect for the fact-finder. *See Nixon*, 2 So. 3d at 141 ("When reviewing mental retardation determinations, we must decide whether competent, substantial evidence supports the trial court's findings. We do not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." (citations and quotation marks omitted)); *Ybarra,* 247 P.3d at 276 ("[W]e will give deference to the district court's factual findings so long as those findings are supported by substantial evidence and are not clearly erroneous, but we will review the legal consequences of those factual findings de novo. Matters of credibility in this area remain, however, within the district court's discretion." (citation omitted)); *Rondon*, 711 N.E.2d at 516 ("In a classic 'battle of the experts,' Rondon and the State presented expert witnesses to testify as to Rondon's intellectual and adaptive functioning. . . . The post-conviction

[6] There is no merit to Petitioner's cursory argument that the OCCA, in stating it "will not disturb the jury's verdict where there is any competent evidence reasonably tending to support it," *Nolen*, 485 P.3d at 837 (quotation marks omitted), "went well beyond the *Jackson* standard," Pet. at 13. The OCCA has explained that "the 'any competent evidence' and the 'rational fact finder' standards are the same." *Bernay v. State*, 989 P.2d 998, 1013 (Okla. Crim. App. 1999).

court heard the evidence and chose to believe the testimony of the State's expert rather than the testimony of Rondon's experts, and found that Rondon is not mentally retarded. The post-conviction court did not abuse its discretion."); *White*, 885 N.E.2d at 915 (stressing that the post-conviction court abused its discretion in rejecting White's experts' testimony because it did so *without* a "finding that the expert witnesses before it lacked either credentials or credibility"); *Crawley*, 924 A.2d at 616 ("A question involving whether a petitioner fits the definition of mental retardation is fact intensive as it will primarily be based upon the testimony of experts and involve multiple credibility determinations. Accordingly, our standard of review is whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous. We choose this highly deferential standard because the court that finds the facts will know them better than the reviewing court will, and so its application of the law to the facts is likely to be more accurate." (citations and quotation marks omitted)).[7] If a consensus exists on

[7] In four of the five cases cited by Petitioner the appellate court *upheld* the jury or lower court's verdict that the defendant was not intellectually disabled, which hardly advances Petitioner's argument that Oklahoma's *Jackson* standard of review is foreclosing meritorious *Atkins* claims.

Petitioner's claim that, "[i]n the nineteen years since *Atkins* was decided, there have been precisely zero documented cases of a capital defendant in Oklahoma prevailing on this issue as a contested matter before either a district court judge prior to trial or a jury during trial," Pet. at 14 (footnote omitted), is also unconvincing. Petitioner provides no information about how he came to this statistic, and he does not account for the possibility of undocumented cases—for example, a defendant who succeeded on an intellectual disability claim and then received a sentence of life or life without parole may have chosen not to appeal. In other instances, a prosecutor, presented with ample and convincing evidence of intellectual disability by defense counsel pre-trial, may decide to dismiss or not file a bill of particulars. Finally, by Petitioner's own account, Oklahoma defendants have repeatedly successfully

this matter, Petitioner has shown, if anything, that Oklahoma *aligns* with that consensus.

In reality, Petitioner has attempted to shroud a request for error-correction review in an imagined legal split. At bottom, Petitioner disagrees with the jury's resolution of conflicting evidence on his intellectual disability claim and with the OCCA's refusal to reweigh credibility determinations and decide the matter *de novo*. Indeed, as Petitioner admits, Pet. at 19-20, while his two experts testified he did have significant limitations in at least two adaptive skill areas,[8] the State's expert, Dr. Jarrod Steffan, testified to his opinion, based on the review of voluminous records, that he did not find Petitioner had any significant deficits in adaptive functioning that were due to intellectual disability (Tr. XVII 3343).[9] Likewise, as to the onset-

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obtained appellate relief on *Atkins* claims. Pet. at 15-17. Petitioner's ultimate claim—that "[t]he promise of *Atkins* is, in Oklahoma, an empty one"—is utterly meritless. Pet. at 22.

[8] The defense experts could not even agree on which areas Petitioner allegedly had deficits in. Dr. Jeanne Russell testified to her opinion that Petitioner had significant limitations in the areas of self-care, social skills, self-direction, health, safety, and functional academics (Tr. XII 2544). Petitioner's second intellectual disability expert, Dr. Daniel Reschly, on the other hand, believed he had significant limitations in the areas of communication, social skills, functional academics, and leisure skills (Tr. XIV 2948-50). Petitioner wrongly claims the OCCA was incorrect in finding "[t]he defense experts only agreed with each other that Nolen suffered significant limitations in the two areas of functional academics and social skills." *Nolen*, 485 P.3d at 844. Petitioner states that both Dr. Russell and Dr. Reschly found significant limitations in health and safety. Pet. at 20. It is Petitioner who is mistaken. Dr. Reschly indicated it was a "close call" as to health and safety but definitively found significant limitations only in the aforementioned areas (Tr. XIV 2948-50).

[9] Petitioner's statement that "Dr. Steffan, who never met with Mr. Nolen face-to-face and did not interview any witnesses who knew Mr. Nolen to the point of being familiar with his home life at the time of the crime, simply disagreed" with his experts is both incomplete and misleading. Pet. at 22. Dr. Steffan did not "simply disagree[]" with the defense experts based on nothing. Dr. Steffan conducted his own thorough

before-adulthood prong, Petitioner simply rehashes the wildly varying childhood scores he received and the trial court's pre-trial *Atkins* findings, based on a limited record,[10] to disagree with the jury's resolution of conflicting evidence. Pet. at 20-21.

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evaluation of voluminous records—including the "evaluation reports, raw test data, and/or examination notes" of all other experts to have examined Petitioner—in reaching his conclusion that Petitioner is not intellectually disabled, and also identified flaws in the defense experts' assessments (Court's Ex. 2 at 1-2). *See Nolen*, 485 P.3d at 842-44. And Dr. Steffan did not meet personally with Petitioner because *Petitioner, twice, refused to meet with him* (Tr. X 2166-67; Tr. XVII 3320). Finally, Dr. Steffan tried to administer an adaptive functioning test but could not obtain the cooperation of any of Petitioner's family members to serve as a sufficiently knowledgeable informant (Tr. XIII 2743-44, 2750; Tr. XVII Tr. 3326, 3342, 3396-97). *See* DSM-V at 37 (standardized measures of adaptive functioning must be used with "knowledgeable informants"). Notably, in addition to standardized adaptive functioning assessments, the DSM also allows for clinical evaluation in determining adaptive functioning. *See* DSM-V at 37-38.

[10] The pre-trial *Atkins* hearing before the judge lasted less than a day and involved the testimony of only a single witness—Dr. Daniel Reschly, a capital defense hired gun who was ultimately brutally impeached at trial (Tr. XIII 2786-87, 2836, 2840; Tr. XIV 2955-56, 2965-70, 2974-78, 2981, 2987-92, 2999-3005, 3012-13, 3019, 3023, 3028-29, 3034-35, 3061, 3075, 3109). *See also United States v. Jones*, No. 6:10-CR-03090-DGK, 2017 WL 4231511, at *3-4 & n. 5 (W.D. Mo. Sept. 22, 2017) (unpublished) (giving "Dr. Reschly's testimony limited weight and his conclusions no weight" where his "analysis and testimony were results-oriented," his "opinion [was] also inconsistent with several key facts, his "demeanor while testifying was, at times, incongruous with that of a disinterested witness," he lied about being licensed in Iowa, and he had previously lied "under oath before a federal judge in another death penalty case that he was a licensed psychologist when he was not"); *Chase v. State*, 171 So. 3d 463, 481-85 (Miss. 2015) ("Dr. Reschly relied on his own personal opinions and moral judgments rather than on science" and his opinions were "replete with instances of attributing deficits easily and based on personal beliefs, not science" (quotation marks omitted)); *United States v. Montgomery*, No. 2:11-CR-20044-JPM-1, 2014 WL 1516147, at *9-11 (W.D. Tenn. Jan. 28, 2014) (unpublished) ("The Court finds Dr. Reschly's testimony and conclusions in this matter unreliable and substantially lacking in credibility."). In contrast, the intellectual disability phase of trial lasted days and included two additional experts, multiple lay witnesses, and a robust case in opposition by the State (*see generally* Tr. XII, XIII, XIV, XV, XVI, XVII).

Petitioner's request for error correction should be rejected. *See Halbert*, 545 U.S. at 605.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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