NO. 19-____

In the Supreme Court of the United States

TOMMY SHARP, INTERIM 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

PETITION FOR A WRIT OF CERTIORARI

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 522-4410
CAROLINE.HUNT@OAG.OK.GOV

MARCH 2, 2020 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

** CAPITAL CASE **
QUESTIONS PRESENTED

Oklahoma juries sentenced Roderick Lynn Smith to death initially and following a retrial on the penalty. Prior to Smith's resentencing, a jury found at the conclusion of a six-day trial that he was not intellectually disabled for purposes of *Atkins v. Virginia*, 536 U.S. 304 (2002). In 2007, on appeal from Smith's *Atkins* trial, the Oklahoma Court of Criminal Appeals ("OCCA") upheld the jury's verdict, finding that the State had presented persuasive evidence to refute Smith's claim of significant limitations in his adaptive functioning ("adaptive-functioning prong"). Smith's death sentences subsequently became final in 2014.

The Tenth Circuit granted Smith habeas relief. The court *sua sponte* determined that the OCCA's discussion of the adaptive-functioning evidence was too "cursory" to constitute a merits adjudication, such that the court would review the adaptive-functioning prong *de novo*. The court further concluded that application of *Moore v. Texas*, 137 S.Ct. 1039 (2017) ("*Moore I*"), and *Moore v. Texas*, 139 S.Ct. 666 (2019) ("*Moore II*"), was not barred by *Teague v. Lane*, 489 U.S. 288 (1989), because these cases were mere applications of *Atkins* that did not announce new rules. Applying *Moore I* and *Moore II*, the court held that no rational trier of fact could have found that Smith did not meet the adaptive-functioning prong. The questions presented are:

1. Did the Tenth Circuit err in concluding that *Moore I* and *Moore II* were mere applications of *Atkins* that could be applied retroactively on collateral review,

contrary to *Shoop v. Hill*, 139 S.Ct. 504, 505 (2019) (*per curiam*), and the Eleventh Circuit?.

2. In *sua sponte* holding that the OCCA did not rule on the adaptive-functioning prong because its analysis was too cursory, did the Tenth Circuit violate this Court's precedent that forbids the imposition of opinion-writing standards, *Johnson v. Williams*, 568 U.S. 289, 300 (2013)?

3. Whether reviewed *de novo* or with deference, did the Tenth Circuit err in granting habeas relief on Smith's claim of adaptive-functioning deficits where Smith's only expert to opine on this prong improperly administered the adaptive-functioning assessment directly to Smith, contemporaneously administered other tests to Smith that showed malingering, and relied on information that was disputed by other witnesses?

LIST OF PROCEEDINGS

Oklahoma County District Court
Case No. CF-1993-3968
State v. Smith
Judgment and Sentence entered on November 4, 1994

Oklahoma Court of Criminal Appeals
OCCA Case No. D-94-1199
Smith v. State
Mandate issued on December 9, 1996

United States Supreme Court
Case No. 96-8872
Smith v. Oklahoma
Petition for Certiorari denied on June 27, 1997

Oklahoma Court of Criminal Appeals
OCCA Case No. PCD-1997-982
Smith v. State
Order of Denial entered on March 24, 1998

United States District Court for the Western District of Oklahoma
Case No. CIV-98-601-R
Smith v. Gibson
Judgment entered on January 10, 2002

United States Court of Appeals for the Tenth Circuit
Case No. 02-6055
Smith v. Mullin
Judgment entered on July 29, 2004

Oklahoma Court of Criminal Appeals
OCCA Case No. PCD-2002-973
Smith v. State
Order of Dismissal entered on November 10, 2004

Oklahoma Court of Criminal Appeals
OCCA Case No. O-2006-683
Smith v. State
Mandate issued on January 29, 2007

Oklahoma County District Court
Case No. CF-1993-3968
State v. Smith
Judgment and Sentence entered on April 14, 2010

Oklahoma Court of Criminal Appeals
OCCA Case No. D-2010-357
Smith v. State
Mandated issued on August 7, 2013

Oklahoma Court of Criminal Appeals
OCCA Case No. PCD-2010-660
Smith v. State
Mandate issued on February 13, 2014

United States Supreme Court
Case No. 13-8706
Smith v. Oklahoma
Petition for Certiorari denied on May 27, 2014

United States District Court for the Western District of Oklahoma
Case No. CIV-14-579-R
Smith v. Royal
Judgment entered on July 13, 2017

United States Court of Appeals for the Tenth Circuit
Case No. 17-6184
Smith v. Sharp
Judgment entered on August 26, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

FEDERAL OPINIONS AND ORDERS

STATE OF OKLAHOMA COURTS' OPINIONS AND ORDERS

OTHER DOCUMENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals is published as *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019). App.1a-53a. The order denying rehearing and rehearing en banc is unpublished. App.128a-129a. The opinion of the federal district court is unpublished. App.54a-127a. The OCCA's decision denying Smith's *Atkins* claim on post-conviction review is unpublished. App.130a-154a.

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit was entered on August 26, 2019. App.1a. The court of appeals denied Petitioner's petition for rehearing and rehearing en banc on December 2, 2019. App.128a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII

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

U.S. Const. amend. XIV § 1

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. 2254

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

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the state court proceeding.

STATEMENT OF THE CASE

I. The Quintuple Homicide

More than twenty-six years ago, Roderick Smith murdered his wife, Jennifer Smith, and four step-children, ten-year-old S.C., nine-year-old G.C., seven-year-old L.C., and six-year-old K.C., in the family home

(1994 Tr. IV 112[1]). App.157a-158a. On or around June 18, 1993, Smith stabbed Jennifer four times, including in her neck, in their bedroom (1994 Tr. IV 122; 1994 Tr. V 96-97; 1994 VI 37). App.181a. The boys, G.C. and L.C., ran into the bedroom and attempted to come to their mother's aid, jumping on Smith and "hollering, 'Leave our momma alone, leave our momma alone!'" (State's Exhibit 94 at 2:12:30-2:12:06[2]). App.181a. In response, Smith stabbed each boy multiple times. App.181a-182a.[3] The girls, S.C. and K.C., who had been taking a bath, came running into the room, still naked and wet (1994 Tr. VI 138; 1994 Tr. VII 43; State's Exhibit 94 at 2:10:00-2:08:14). Smith suffocated both girls. App.181a; *Smith v. State*, 306 P.3d 557, 576 (Okla. Crim. App. 2013).

Smith wrapped his victims, some of whom were still alive, in sheets and hid them in closets and under a bed (1994 Tr. V 119; 1994 Tr. VI 6; 1994 Tr. VII 43). After hiding all of his victims' bodies, Smith laid down for a thirty-to forty-five-minute nap (1994 Tr. VII 38, 43). When he woke up, Smith checked on his victims; three of the children were dead but

---

[1] Record references in this Petition are abbreviated as follows: citations to Smith's original 1994 trial are cited as "1994 Tr. [Vol.]"; citations to his 2009 *Atkins* trial are cited as "2009 Tr. [Vol.]"; and citations to his 2010 resentencing trial are cited as "2010 Tr. [Vol.]." *See* Rule 12.7, *Rules of the Supreme Court of the United States*.

[2] The videotape of Smith's confession contains no time counter, so Petitioner cites to the videotape player's display counter, which counts down. All timestamps are approximate.

[3] Smith had an affinity for using knives on his loved ones, having previously repeatedly stabbed a former girlfriend in 1986. *Smith v. State*, 306 P.3d 557, 563 (Okla. Crim. App. 2013).

Jennifer and G.C. were still breathing (1994 Tr. VII 43). Jennifer and G.C. sometime thereafter succumbed to their wounds, ultimately bleeding to death (1994 Tr. VI 132, 136-37). Smith thoroughly cleaned the home and subsequently went to stay with his aunt (1994 Tr. IV 182, 188-90; 1994 Tr. V 8, 32, 34; 1994 VI 44; 1994 Tr. VII 44).

The murders went undetected for around ten days (1994 Tr. IV 47, 82, 106, 149-50; 1994 Tr. V 97; 1994 Tr. VI 128). Shortly after the bodies were discovered by police, which generated immediate media coverage, Smith came into an Oklahoma County Sheriff's Office, acting hungry and thirsty and alleging he did not know where he was (1994 Tr. IV 171; 1994 Tr. VII 47). After Sheriff's Office employees identified Smith, they handed him over to the Oklahoma City Police Department detectives who were investigating the quintuple homicide (1994 Tr. VII 47-48).

When Smith first met with the detectives, he acted "disoriented" and "daze[d]" and claimed that he had recently been in a serious car wreck, during which he hit his head and then woke up in the woods (1994 Tr. VII 28, 33; State's Exhibit 94 at 3:06:10-2:46:23). Smith insinuated that he had a head injury with claims that he could not remember anything, including even his last name or age, and that he was "hearing things and seeing things" (State's Exhibit 94 at 2:58:52-2:58:36, 2:55:16-2:55:01, 2:46:06-2:43:45). After detectives confronted Smith with the fact that they had spoken to his mother earlier that day, and she had reported Smith was acting normally, his behavior immediately changed and his memory drama-

tically improved (1994 Tr. VII 34; State's Exhibit 94 at 2:33:50-2:33:37, 2:33:40-2:26:10).[4]

Smith suddenly remembered who he was and proceeded to provide numerous details regarding problems he and Jennifer had been having in the previous months (State's Exhibit 94 at 2:33:20-2:25:20). He eventually confessed to the murders, claiming that he and Jennifer got into an argument after he was laid off from his job. App.157a-158a. He alleged that, after Jennifer grabbed a knife during the fight, he took it from her and stabbed her with it. App.158a. He also admitted to stabbing the boys and that he "got" the girls. App.158a. Smith claimed that he "panicked," "everything happened so fast," and "everything just went dark" (State's Exhibit 94 at 2:19:40-2:19:05).

Despite Smith's story that Jennifer came at him with a knife, the evidence showed that Smith had a history of physically abusing her and that he was having an extramarital affair at the time of the killings. App.167a-169a. Smith had twice strangled Jennifer to the point of unconsciousness (1994 Tr. IV 39-40, 44). On another occasion, Smith beat Jennifer so severely that it left one eye bloody and swollen shut (1994 Tr. IV 40, 118; 1994 Tr. V 40). Jennifer told her mother she feared for her life (1994 Tr. IV 136).

II. Procedural History

Smith has received decades of process on various iterations of his intellectual disability or borderline intellectual disability claims, for purposes of guilt, mitigation, *Atkins*, and competency. App.131a-132a,

---

[4] As one of the interviewing detectives put it, "[Smith] was playing a game with us" (1994 Tr. VII 49).

173a; *Smith*, 306 P.3d at 563. His *Atkins* claim in particular was rejected by the jury, trial court, OCCA, and federal district court prior to the Tenth Circuit's grant of relief.

A. Pre-*Atkins* Proceedings

In 1994, a jury convicted Smith of five counts of first-degree murder and imposed five death sentences. App.156a. The OCCA affirmed on direct appeal. App.190a. Subsequently, during the pendency of Smith's first federal habeas proceedings, this Court decided *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), holding that the imposition of the death penalty against an intellectually disabled offender violates the Eighth Amendment. This Court "le[ft] to the States the task of developing appropriate ways to enforce [this] constitutional restriction." *Atkins*, 536 U.S. at 317 (alteration adopted, quotation marks omitted).

B. *Atkins* and Resentencing Trials

1. *Atkins Trial.* While Smith's first habeas proceeding was still pending, the OCCA ordered, in light of *Atkins*, that Smith's case be remanded back to the trial court for a jury trial on the issue of intellectual disability. Following a six-day *Atkins* trial in March 2004 (the *Atkins* trial at issue), a twelve-member jury unanimously found that Petitioner was not intellectually disabled (O.R. VI 1115). App.131a.

The jury was instructed on the OCCA's test for intellectual disability under *Murphy v. State*, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002). *Murphy*, issued in the wake of *Atkins*, adopted a three-prong test for intellectual disability essentially mirroring that of the American Psychiatric Association ("APA") and Amer-

ican Association on Mental Retardation ("AAMR"). *Murphy*, 54 P.3d at 566-69. Relevant here, the jury was instructed, consistent with *Murphy*, that Smith had the burden of proving by a preponderance of the evidence that he had "significant limitations in adaptive functions 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" (O.R. VI 1136, 1138-39). App.136a.

Over several days of testimony, the jury heard from twenty-three witnesses, including thirteen for the defense and ten for the State. The three experts, Drs. Clifford Hopewell and Frederick Smith for the defense, and Dr. John Call for the State, testified to Smith's widely varying IQ scores, which ranged from 55 to 73. App.136a-138a. Drs. Hopewell and Call both evaluated Smith in 2003. App.136a-137a. Dr. Call testified that the IQ scores of 55, obtained by both him and Dr. Hopewell, were suspect and unreliable given Smith's contemporaneous scores on tests designed to detect malingering. App.137a-138a. Even defense expert Dr. Hopewell admitted that malingering had been raised as a concern with every prior expert to have examined Smith (2009 Tr. II 187).

Only Drs. Hopewell and Call opined as to Smith's adaptive functioning (2009 Tr. II 68; 2009 Tr. VI 164, 186-87). To measure adaptive functioning, Dr. Hopewell administered, directly to Smith, the Vineland Adaptive Behavior Scales ("Vineland") and, as to academic functioning in particular, the Wide Range Achievement Test ("WRAT") (2009 Tr. II 61-66). Based on the Vineland results, Dr. Hopewell believed that Smith was at least two standard deviations below the mean

in all domains measured by the Vineland (2009 Tr. II 64-65). As to age equivalency, in the communication domain, Smith scored at four years and nine months, and in both the daily living skills and socialization domains, Smith scored at five years and eight months (2009 Tr. II 64; 2009 Tr. VI 49-51). On the WRAT, a basic test of reading, writing, and mathematics, Smith's score was "roughly equivalent to the IQ score of 55" (2009 Tr. II 65-66). Dr. Hopewell determined that Smith's WRAT score was consistent with his belief that Smith was functionally illiterate (2009 Tr. II 66-67).

The State presented a significant case against Dr. Hopewell's findings of adaptive-functioning deficits. On cross-examination, Dr. Hopewell admitted that the only people he spoke to were Smith, some Department of Corrections ("DOC") employees, and Smith's attorneys (2009 Tr. II 94). Dr. Hopewell did not speak to anyone, besides Smith himself, who would have been familiar with Smith's functioning outside of prison, such as Smith's mother or schoolteachers (2009 Tr. II 94). Dr. Hopewell admitted that, if Smith lied as to the information he supplied for the Vineland, that would affect the test's results (2009 Tr. II 151).

State's expert Dr. Call testified that Dr. Hopewell's administration of the Vineland was entirely inappropriate, as the test was designed to be given to a third-party caretaker, not directly to the subject of the testing, per both the Vineland's manual and the medical literature (2009 Tr. VI 23-24). Given Dr. Hopewell's administration of the Vineland directly to Smith, the results were *per se* invalid (2009 Tr. II 23). Dr. Hopewell used the Vineland despite the availability of a more appropriate instrument, the Adaptive Behavior

Assessment System, Second Edition, which can be administered to the subject being evaluated (2009 Tr. VI 34). Dr. Call testified to his opinion that no appropriate evaluation had ever been performed and documented as to Smith's adaptive functioning (2009 Tr. VI 33, 39, 67).

The results of the Vineland and WRAT were further undermined by Smith's contemporaneous scores on tests designed to detect malingering. Drs. Hopewell and Call both administered the Test of Memory and Malingering ("TOMM") to Smith, and he miserably failed both times (2009 Tr. II 198; 2009 Tr. VI 25). On the TOMM, Smith "demonstrate[ed] a performance level significantly below that of an individual who had a serious dementing disease and hardly any memory whatsoever" (2009 Tr. VI 16-18, 25). Dr. Call also reviewed the raw data of the 15-Item Memory Test ("15-Item Test") administered by Dr. Hopewell and testified that Smith also failed this malingering test (2009 Tr. VI 20-21). Dr. Call testified that a 1998 study demonstrated the 15-Item Test's accuracy in diagnosing malingering in incarcerated intellectually disabled persons (2009 Tr. II 21-22).

Like Dr. Hopewell, Dr. Call administered the WRAT to Smith (2009 Tr. VI 25). Dr. Call's comparison of his results to Dr. Hopewell's again raised significant indications of malingering. When Dr. Call administered the WRAT, Smith claimed not to be able to write the letters C, O, W, N, G, Y, and X, but he could write these same letters when Dr. Hopewell administered the WRAT earlier that same year (2009 Tr. VI 27). Smith also claimed during Dr. Call's administration of the WRAT that he could not spell his own last name, but Dr. Call reviewed numerous documents,

including prison forms, a job application, and a life insurance application, on which Smith wrote and correctly spelled his own name (2009 Tr. VI 27-30).

In sum, Dr. Call opined that, given that Smith failed two tests designed to detect malingering, "significant doubt" existed as to Smith's level of effort on all of the other tests administered by Dr. Hopewell (2009 Tr. VI 22). Dr. Call concluded there was not "any reliable information out there that indicates Roderick Smith is mentally retarded"[5] (2009 Tr. VI 67). While Dr. Call admitted he could not affirmatively state that Smith was not intellectually disabled, Dr. Call made clear this was because of Smith's malingering and the lack of valid tests (2009 Tr. VI 39, 67).[6]

---

[5] Petitioner uses the term "intellectual disability," *Hall v. Florida*, 572 U.S. 701, 704-05 (2014), except where directly quoting a source that used the now-antiquated term "mental retardation."

[6] The Tenth Circuit stated that "the State conceded at oral argument that Smith demonstrated significant limitations in adaptive functioning in the academics category." App.37a. This "concession" was ambiguous, as State's counsel, appearing to misunderstand the judge's question, stated, "I think I would have to concede that based on the prosecutors' arguments at the hearing" (Oral Argument at 51:40-52:01, *Smith v. Carpenter*, No. 17-6184 (10th Cir. Mar. 20, 2019) ("Oral Argument"), available at https://www.ca10.uscourts.gov/oralarguments/17/17-6184.MP3 (last visited Feb. 18, 2020)). Counsel immediately went on to argue that the State's evidence showed that "there [were] no adaptive functioning deficits" and indicated that the *Atkins* jury had evidence going "both" ways as to functional academics (Oral Argument at 52:01-54:40). Indeed, the prosecutors never conceded significant deficits in academics, conceded only that Smith was in special education classes (though likely misplaced), and argued that Smith "missed" the entire adaptive-functioning prong "by a mile," and the State's brief to the Tenth Circuit argued strenuously that Smith had not shown significant

Both Smith and the State presented a number of lay witnesses in support of their respective expert's opinion. Several of these witnesses specifically refuted information from Smith on which Dr. Hopewell relied in scoring the Vineland. For instance, Dr. Hopewell gave Smith zero points for being able to write in cursive on the Vineland, but multiple witnesses testified to Smith's ability to sign his name in cursive (2009 Tr. II 146-49; 2009 Tr. III 110; 2009 Tr. IV 52, 84). As another example, Dr. Hopewell gave Smith zero points for being able to make change or tell time (2009 Tr. II 155), but other evidence tended to refute Smith's alleged deficits in these areas. Prior to the murders, Smith was employed through the Marriott Corporation as the head custodian at an elementary school, and in this capacity, he was in charge of reviewing the other custodians' timecards and ensuring they were properly filled out (2009 Tr. IV 92, 97). Smith had a check cashing card and, during his extra-marital affair, repeatedly paid for the motel rooms he visited with his girlfriend, L.D. (2009 Tr. IV 86; 2009 Tr. V 24).

As previously noted, Dr. Hopewell opined that Smith was functionally illiterate (2009 Tr. II 66-67). But the State's evidence contradicted Smith's alleged illiteracy. Smith's Marriott Corporation job application was admitted, showing that it was filled out and

---

deficits in functional academics. App.284a-290a, 312a-327a. In any event, a "concession" extracted from State's counsel years after the OCCA's opinion is irrelevant given the "backward-looking" nature of AEDPA, which "focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Furthermore, even assuming significant deficits in functional academics, Smith would still need to demonstrate same as to a second area, which he failed to do.

signed by Smith (2009 Tr. IV 83-84). On the application, Smith checked that he could read, write, and speak English (2009 Tr. IV 83). Fern Smith, who was a prosecutor in the 1994 trial, testified that during the original trial she observed Smith write notes on a legal pad during the witnesses' testimony (2009 Tr. IV 104-05). Smith would show his notes to his trial attorneys, and the attorneys would look over the notes and confer with Smith (2009 Tr. IV 104-05). On rebuttal, one of Smith's trial attorneys, Kenneth Watson, testified that Smith did not write any words on the pad and instead only "doodled" (2009 Tr. VI 72-73). Prosecutor Smith, however, when asked on cross-examination about the possibility that Smith was "doodling," observed, "Oh, he could have, but I doubt that counsel would have been looking at his doodling and talking back and forth to him in the midst of a trial of that magnitude about doodling" (2009 Tr. IV 105-06).

Dr. Hopewell's claim that Smith had significant deficits in the area of communication was again contradicted by the State's witnesses. Prosecutor Smith testified that, on at least two occasions during the original trial, Smith filed and orally argued motions to the trial court (2009 Tr. IV 102). Prosecutor Smith recalled that Smith "was articulate," "knew what he was doing," and "made good arguments to the Court" (2009 Tr. IV 103, 107). For example, in one motion, Smith argued that the prosecution table should be moved because its proximity to the jury box enabled the prosecutors to communicate to the jury through facial expressions or rolling their eyes (2009 Tr. IV 107). Prosecutor Smith did not believe this to be a "silly" argument and instead felt that Smith

demonstrated "abstract thinking" in "recogniz[ing] that that could be done and . . . fil[ing] a motion to ask that it not be done" (2009 Tr. IV 107).[7] As to Smith's alleged deficits in both communication and social skills, an insurance saleswoman, Ruby Badillo, who sold life insurance policies to Smith and Jennifer, found Smith to be "very sociable" and was so impressed by him that she tried to recruit him to sell insurance for her company (2009 Tr. IV 46-51). Smith's DOC case manager of two to three years, Emma Watts, testified that she never had any problems communicating with Smith and that he used manipulation on multiple occasions to obtain more favorable cell assignments (2009 Tr. IV 56-57, 61).

Following the jury's determination that Smith was not intellectually disabled, the trial court issued written Findings of Fact and Conclusions of Law finding that "[t]he evidence presented at trial . . . was not inconsistent with the jury's determination that

---

[7] The Tenth Circuit discounted this evidence of Smith's communication strengths, stating that "one of those motions was a request that the prosecutor's table be moved because Smith thought the prosecutor was making faces at him, which the prosecutor denied making at the *Atkins* trial." App.42a. This is flatly incorrect. On cross-examination, defense counsel at the *Atkins* trial asked Prosecutor Smith whether one of Smith's motions alleged that the prosecutors were making faces at Smith (2009 Tr. IV 105-07). Prosecutor Smith corrected defense counsel, clarifying that Smith's allegation was that the prosecution was communicating with the *jury* (2009 Tr. IV 107). Despite Prosecutor Smith's clarification, defense counsel asked, "So were you making facial expressions against him?", to which Prosecutor Smith responded, "No" (2009 Tr. IV 107). At no point, however, did Prosecutor Smith indicate that Smith's motion had anything to do with an allegation that the prosecutors were making faces at Smith himself.

Smith is not mentally retarded" (O.R. VII 1098-99). The OCCA affirmed, as discussed in the Statement of the Case, II.C.1, *infra*.

2. *Resentencing Trial.* Meanwhile, in Smith's federal habeas proceedings that were still pending when *Atkins* issued, the Tenth Circuit in July 2004 reversed the denial of habeas relief as to Smith's death sentences based on ineffective assistance as to mitigation in the penalty phase. *Smith v. Mullin*, 379 F.3d 919, 938-44 (10th Cir. 2004).

In 2010, following a resentencing trial, a jury imposed sentences of life without the possibility of parole as to the murders of Jennifer and the boys and sentences of death as to the girls (O.R. I 98-99; 2010 Tr. X 3-6). *Smith*, 306 P.3d at 562.

In 2013, the OCCA affirmed the sentences imposed in the resentencing proceeding. *Id.* Smith's death sentences became final on May 27, 2014, with this Court's denial of certiorari review on direct appeal. *Smith v. Oklahoma*, 572 U.S. 1137 (2014); *see Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

C. Appeals of *Atkins* Claim

1. *The OCCA's decision.* The OCCA affirmed the jury's *Atkins* trial verdict on January 29, 2007. The OCCA began with quoting the three-part *Murphy* test for intellectual disability, including the full list of adaptive-functioning areas. App.135a-136a. The OCCA noted that "[e]vidence of Smith's intellectual functioning was controverted at trial by the experts" and then outlined the various expert assessments as to Smith's intellectual functioning. App.136a-138a. The OCCA continued, "Though evidence of Smith's

I.Q. was disputed, *the State presented persuasive evidence from lay witnesses to refute Smith's evidence* of subaverage intellectual functioning and *of adaptive functioning deficits*." App.138a. (emphasis added). The OCCA then devoted five paragraphs to summarizing the testimony of Watts, Badillo, Prosecutor Smith, L.D., and Smith's former boss, Mark Woodward, repeatedly referencing testimony by these individuals relevant to the adaptive-functioning prong. App.138a-140a. Finally, the OCCA concluded:

> The evidence presented at trial supports a finding that Smith failed to meet even the first prong of the *Murphy* definition of mental retardation. The evidence, viewed in the light most favorable to the State, portrayed Smith as a person who is able to understand and process information, to communicate, to understand the reactions of others, to learn from experience or mistakes, and to engage in logical reasoning. *He held down a job with supervisory functions, carried on an affair, argued motions on his own behalf and manipulated those around him*. The jury's verdict finding that Smith is not mentally retarded is justified.

App.140a (emphasis added).[8]

2. *The federal district court's denial of relief.* In 2015, Smith filed the instant habeas petition, which the district court denied on July 13, 2017. App.54a.

---

[8] Although the OCCA failed to use the phrase "adaptive functioning" in its concluding paragraph, the emphasized sentence plainly referred to the evidence refuting Smith's claim of adaptive-functioning deficits.

The district court, in relevant part, concluded that Smith had not overcome the double deference, to the jury and the OCCA, owed to his claim of adaptive-functioning deficits. App.80a-82a.

3. *This Court issues Moore I and Moore II.* Shortly before the district court's decision in this case, this Court decided *Moore I*, holding that, although States need not "adhere[ ] to everything stated in the latest medical guide," States may not "disregard. . . current medical standards." *Moore v. Texas*, 137 S.Ct. 1039, 1049 (2017). 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*, issued during the pendency of Smith's habeas appeal. 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).

4. *The Tenth Circuit's granting of the writ.* On appeal, the Tenth Circuit found Smith was entitled to relief as to his death sentences based on *Atkins* because "Smith is intellectually disabled as a matter of law." App.44a-45a. The Tenth Circuit reviewed Smith's *Atkins* claim under *Jackson v. Virginia*, 443 U.S. 307 (1979), asking "whether, viewing the evidence

in the light most favorable to the prevailing party (the State), any rational trier of fact could have found Smith not mentally retarded by a preponderance of the evidence." App.18a-19a. The Tenth Circuit concluded that no rational trier of fact could have so found. App.19a, 44a. In pertinent part, the Tenth Circuit *sua sponte* raised the argument that the OCCA had not adjudicated the merits of the adaptive-functioning prong, because its discussion of the evidence was too "cursory," and therefore reviewed this prong *de novo*. App.15a-18a. Unconstrained by the AEDPA, the Tenth Circuit then held that *Moore I* and *Moore II* were not *Teague*-barred and therefore could retroactively apply to convictions, like Smith's, under collateral attack. App.34a-37a. The Tenth Circuit reasoned that *Moore I* and *Moore II* were not "novel," but were instead mere "applications" of *Atkins* that did not announce new rules. App.35a-36a.

The Tenth Circuit then held that "*Moore I* and *Moore II*, which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated, make clear that no reasonable jury could conclude Smith failed to establish by a preponderance of evidence that he suffered deficits in at least two areas of adaptive functioning." App.37a. In summarizing the evidence that it believed supported Smith's claim of adaptive-functioning deficits, the Tenth Circuit cited *Moore I* and *Moore II* more than ten times and did not cite to *Atkins* once. App.37a-44a. The Tenth Circuit concluded that a finding against Smith on the adaptive-functioning prong violated *Moore I* and *Moore II* in two ways: (1) only Smith, and not the State, presented a formal assessment of Smith's adaptive functioning, contrary to the AAMR's recommenda-

tions; and (2) the State's evidence improperly emphasized adaptive strengths instead of deficits and lay stereotypes of the intellectually disabled. App.40a.

REASONS FOR GRANTING THE PETITION

In adopting *Teague*'s anti-retroactivity rule, this Court recognized that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Accordingly, "[w]hen [this Court] announce[s] a new rule, a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding," unless the new rule fits one of *Teague*'s two exceptions: "watershed rules of criminal procedure and rules placing conduct beyond the power of the government to proscribe." *Chaidez v. United States*, 568 U.S. 342, 347 & n. 3 (2013) (quotation marks and one alteration omitted, one alteration adopted). A case does "not announce a new rule," however, where it is "merely an application of the principle that governed [an earlier] decision" of this Court. *Teague*, 489 U.S. at 307 (quotation marks omitted).

The Tenth Circuit flouted these principles in applying *Moore I* and *Moore II*, which were decided years after Smith's death sentences became final, to grant habeas relief in this case. The Tenth Circuit's holding that *Moore I* was a mere application of *Atkins*, and therefore not a new rule barred by *Teague*, is contrary to this Court's decision just last term in

Shoop v. Hill, 139 S.Ct. 504, 505 (2019) (*per curiam*). In *Hill*, in the context of AEDPA review, this Court specifically rejected the Sixth Circuit's conclusion that *Moore I* was a mere application of *Atkins*. *Hill*, 139 S.Ct. at 508. Given this Court's express rejection of the proposition that *Moore I* is an application of *Atkins*, it follows that *Moore I* announced a new rule for purposes of *Teague*. Furthermore, the Tenth Circuit's holding that *Moore I* was not *Teague*-barred directly conflicts with a holding by the Eleventh Circuit on this precise issue.

The Tenth Circuit also made a threshold error in even reaching *de novo* review. In concluding that the OCCA's analysis of the adaptive-functioning evidence was too "cursory" to constitute a merits adjudication, the Tenth Circuit disregarded this Court's command that "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013). AEDPA deference was owed to the OCCA's decision on the adaptive-functioning prong, and thus application of *Moore I* and *Moore II*, which post-dated the OCCA's 2007 opinion, was barred by § 2254(d)(1). *See Hill*, 139 S.Ct. at 505; *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

Accordingly, whether reviewed *de novo* or under AEDPA, *Moore I* and *Moore II* cannot be applied to Smith's *Atkins* claim, and the Tenth Circuit's decision cannot stand. The Tenth Circuit's finding that Smith satisfied the adaptive-functioning prong rested *exclusively* on *Moore I* and *Moore II*. App.37a-44a. Moreover, with *Moore I* and *Moore II* set aside, it is clear the jury's verdict must not be disturbed. Smith presented an expert whose Vineland results were

thoroughly impeached by the improper administration of the test directly to Smith, Smith's contemporaneous failure of two tests designed to detect malingering, and the contradiction of the information relied on by that expert by other witnesses.

Certiorari—if not summary reversal—is warranted.

I. THE TENTH CIRCUIT'S HOLDING THAT *MOORE I* AND *MOORE II* MAY BE APPLIED RETROACTIVELY ON COLLATERAL REVIEW IS CONTRARY TO *HILL* AND CREATED A CIRCUIT SPLIT.

A. *Hill* Forecloses the Tenth Circuit's Conclusion That *Moore I* and *Moore II* Were Mere Applications of *Atkins.*

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 *Hill*. The Tenth Circuit concluded that *Moore I* and *Moore II* did not state a new rule within the meaning of *Teague* because the cases constituted mere applications of the general rule in *Atkins* that did not "yield a result so novel that it forge[d] a new rule, one not dictated by precedent." App.36a. (alteration adopted, quotation marks omitted). This conclusion has essentially already been rejected by this Court.

In *Hill*, the Sixth Circuit, relying extensively on *Moore I*, granted habeas relief on an *Atkins* claim based on the state court's overemphasis of adaptive strengths. *Hill*, 139 S.Ct. at 505, 507. This Court held that the Sixth Circuit's reliance on *Moore I*, which post-dated the state court decision, "was plainly improper under § 2254(d)(1)." *Id.* at 505. Although

this Court's holding was compelled by the "clearly established" law provision of § 2254(d)(1), relevant here, this Court addressed the Sixth Circuit's "assert[ion] that the holding in *Moore* was 'merely an application of what was clearly established by *Atkins*.'" *Id.* at 508 (quoting *Hill v. Anderson*, 881 F.3d 483, 487 (6th Cir. 2018)). Expressly rejecting this assertion, this Court noted that "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.* "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." *Id.* (quoting *Atkins*, 536 U.S. at 318); *see also Moore I*, 137 S.Ct. at 1057-58 (Roberts, C.J., dissenting) ("Today's decision departs from this Court's precedents, followed in *Atkins* and *Hall* [*v. Florida*, 572 U.S. 701 (2014)], establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice.").

Although the *Hill* Court's rejection of the proposition that *Moore I* was a mere application of *Atkins* was in the context of AEDPA, and not *Teague*, it is directly relevant to, and dispositive of, the question whether the Tenth Circuit erred in holding that *Moore I* and *Moore II* did not announce new rules. Clearly, *Moore I* and *Moore II* were not mere applications of *Atkins*, and thus they announced new rules

that are subject to *Teague*'s anti-retroactivity rule. *See Teague*, 489 U.S. at 307.[9]

B. The Tenth Circuit's Holding That *Moore I* May Be Applied Retroactively on Collateral Review Created a Circuit Split.

In holding that *Moore I* was a mere application of *Atkins* that did not announce any new rules for purposes of *Teague*, the Tenth Circuit created a circuit split. The Eleventh Circuit has held that *Moore I* announced a new rule that does not meet either of *Teague*'s exceptions and thus cannot be applied retroactively on collateral review. In *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330 (11th Cir. 2019), the Eleventh Circuit ruled that "*Moore* [*I*]. . . announced a new rule, but it is procedural, not substantive. . . . Because *Moore* [*I*] cannot meet the requirements of *Teague*'s second exception, it cannot be applied retroactively." *Id.* at 1338-40; *see also In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) (unpublished) ("Federal courts have repeatedly concluded that *Hall* and *Moore* [*I*] merely created new procedural requirements that do not amount to 'watershed rules of criminal procedure.'") (collecting cases).[10] And the

---

[9] Although *Hill* did not address *Moore II*, the same logic applies. *Moore II* was based on *Moore I*, *see Moore II*, 139 S.Ct. at 670 ("[W]e agree with Moore that the appeals court's determination is inconsistent with our opinion in *Moore* [*I*]."), and thus was no more a mere application of *Atkins* than was *Moore I*.

[10] The Tenth Circuit also held that *Hall* was a mere application of *Atkins* and was not *Teague*-barred, thereby creating another circuit split. *Compare* App.36a, *with Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313-14 (11th Cir. 2015) ("*Hall*'s holding undeniably is 'new'. . . . *Hall* does not meet any of the *Teague* exceptions to nonretroactivity."). But the Tenth Circuit did not

Ninth Circuit, in addressing AEDPA as opposed to *Teague*, noted that "*Moore* [*I*] . . . changed the course of the Supreme Court's intellectual disability jurisprudence." *Ybarra v. Filson*, 869 F.3d 1016, 1025 n. 9 (9th Cir. 2017). The Tenth Circuit's conclusion that *Moore I* did not announce a new rule is directly contrary to the holding of the Eleventh Circuit and cannot be squared with the Ninth Circuit's recognition that *Moore I* changed the course of this Court's intellectual disability jurisprudence.

II. THE TENTH CIRCUIT'S *DE NOVO* REVIEW OF THE ADAPTIVE-FUNCTIONING PRONG CONFLICTS WITH MULTIPLE DECISIONS OF THIS COURT.

A. In *Sua Sponte* Reaching *De Novo* Review, the Tenth Circuit Disregarded the Plain Language of the OCCA's Opinion and Improperly Imposed Opinion-Writing Standards.

The Tenth Circuit should never have even reached *de novo* review. The plain language of the OCCA's opinion demonstrates that the Tenth Circuit erred in finding that the OCCA did not adjudicate the adaptive-functioning prong on the merits. As previously quoted, the OCCA found that "the State presented persuasive evidence . . . to refute Smith's evidence . . . of adaptive functioning deficits." App.138a. Furthermore, in its concluding paragraph, the OCCA stated that "[t]he jury's verdict finding that Smith is not mentally retarded is justified," and summarized evidence relevant to the intellectual-functioning prong as well as

---

actually apply *Hall* to Smith's case, instead finding that *Moore I* and *Moore II* compelled relief.

to the adaptive-functioning prong, *e.g.*, Petitioner's job history. App.140a.

Despite this plain language, the Tenth Circuit concluded the OCCA had not adjudicated the adaptive-functioning prong on the merits by imposing what can *only* be described as opinion-writing standards. App.15a-18a. Discounting the OCCA's reference to the State's "persuasive evidence," the Tenth Circuit concluded that "such a cursory reference to the evidence presented absent any conclusion does not constitute an adjudication on the merits." App.17a. The Tenth Circuit devoted multiple paragraphs to criticizing the OCCA for "neither address[ing] how a rational jury could have viewed the adaptive functioning evidence, nor conclud[ing] that the evidence presented at trial supported a finding of deficits in adaptive functioning"; "ma[king] no attempt to connect the evidence it considered relevant to the intellectual functioning prong to *Murphy*'s adaptive functioning categories"; and "[a]fter acknowledging the adaptive functioning categories in a footnote at the beginning of its opinion, . . . not mention[ing] them [again] at all." App.16a-17a. (quotation marks omitted, alterations adopted).

The Tenth Circuit ignored its lack of authority to impose mandatory opinion-writing standards and failed to give the OCCA the benefit of the doubt. The Tenth Circuit graded the OCCA's opinion and searched for "particular language" to determine whether the OCCA decided this prong. But as this Court has held, "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Williams*, 568 U.S. at 300; *see also Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions. . . . [W]e

will not impose on state courts the responsibility for using particular language. . . . "). It is clear based on the OCCA's language that it rejected Smith's contention that he had presented sufficient evidence of adaptive-functioning deficits; the OCCA was not required to use "particular language." Assuming *arguendo* the OCCA's opinion was ambiguous, the Tenth Circuit improperly failed to give the OCCA's decision the benefit of the doubt. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Smith himself did not believe the OCCA failed to adjudicate the adaptive-functioning prong. As this Court has held, that is telling. In *Williams*, 568 U.S. at 293, the Ninth Circuit *sua sponte* raised the argument that the state court had overlooked the habeas petitioner's claim; in fact, "[t]he possibility that the California Court of Appeal had simply overlooked Williams' Sixth Amendment claim apparently did not occur to anyone until that issue was raised by two judges during the oral argument in the Ninth Circuit." *Id.* at 306. This Court held that the Ninth Circuit erred in finding that the state court overlooked Williams's constitutional claim, noting that "Williams presumably knows her case better than anyone else, and the fact that she does not appear to have thought that there was an oversight makes such a mistake *most improbable*." *Id.* at 304-06 (emphasis added).

Here too, prior to the Tenth Circuit's decision, in more than four years of federal habeas litigation, Smith never argued that the OCCA failed to adjudicate the merits of the adaptive-functioning prong. Smith, in arguing the unreasonableness of the OCCA's decision, has repeatedly conceded that § 2254(d) is applicable. App.230a-238a, 250a-256a, 303a-304a. Indeed, Smith

has stated that "[t]he OCCA did not address the 'manifestation-before-age-eighteen' requirement," App.304a—an implicit concession that the OCCA *did* address the other two prongs. *See also* App.18a. (Tenth Circuit's acknowledgment that it was *sua sponte* raising the reason for *de novo* review). The fact that Smith himself never thought to argue that the OCCA failed to adjudicate the adaptive-functioning prong makes this possibility "most improbable." *Williams*, 568 U.S. at 306. Moreover, the *sua sponte* raising of an argument that the state court did not adjudicate parts of a claim on the merits is again inconsistent with the mandate that state courts be given the benefit of the doubt. *See Pinholster*, 563 U.S. at 181.

B. Given the Tenth Circuit's Error in Reaching *De Novo* Review, Application of *Moore I* and *Moore II* Was Improper Under § 2254(d)(1).

As shown above, the Tenth Circuit improperly stripped the OCCA of deference, and thus its review should have been restricted by § 2254(d). Under *Shoop v. Hill*, the Tenth Circuit was therefore barred from applying *Moore I* and *Moore II* when assessing the reasonableness of the OCCA's rejection of Smith's claim. 139 S.Ct. at 505 ("The Court of Appeals' reliance on *Moore* [*I*]," "which was not handed down until long after the state-court decisions," "was plainly improper under § 2254(d)(1).").

III. WITH APPLICATIONS OF *MOORE I* AND *MOORE II* PLAINLY BARRED, WHETHER BY *TEAGUE* OR § 2254(d)(1), HABEAS RELIEF IS CLEARLY NOT WARRANTED.

As demonstrated in Parts I and II, *Moore I* and *Moore II* cannot be applied in this case, regardless of whether Smith's *Atkins* claim is reviewed *de novo* or under AEDPA. Yet, in concluding that no rational jury could find against Smith on the adaptive-functioning prong, the Tenth Circuit relied repeatedly and exclusively on *Moore I* and *Moore II* and expressly based its holding on these cases. App.37a. ("*Moore I* and *Moore II*, which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated, make clear that no reasonable jury could conclude Smith failed to establish by a preponderance of evidence that he suffered deficits in at least two areas of adaptive functioning."). Thus, if this Court agrees with Petitioner as to either Part I or Part II, the Tenth Circuit's decision must be reversed.

With *Moore I* and *Moore II* off the table, the jury's rejection of Smith's claim of adaptive-functioning deficits undoubtedly does not justify habeas relief. Even under *de novo* review, the evidence must be viewed in the light most favorable to the State, with deference owed to the jury's credibility determinations. *See, e.g.*, *McDaniel v. Brown*, 558 U.S. 120, 134 (2010) (*per curiam*) ("[T]he Court of Appeals' analysis failed to preserve the factfinder's role as weigher of the evidence by reviewing *all of the evidence* in the light most favorable to the prosecution." (quotation marks omitted, alteration adopted, emphasis in original)). Smith, who had the burden of proving his intellectual disability, presented only one expert to opine on this

prong and that expert was thoroughly impeached by the State. Specifically, as shown in the Statement of the Case, II.B.1, *supra*, Dr. Hopewell improperly administered the Vineland directly to Smith, meaning its results were *per se* invalid; contemporaneously gave Smith two other tests designed to detect malingering that Smith failed; and relied on information regarding Smith's functioning that was contradicted by the State's witnesses. While some of the defense's lay witnesses provided support for Dr. Hopewell's opinion, the jury was obviously entitled to disbelieve those witnesses but believe the State's witnesses. *See United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the jury is the lie detector." (quotation marks and emphasis omitted)).[11]

Assuming AEDPA deference applies, Smith's *Atkins* claim must be reviewed with double deference, and it is doubly clear that he is not entitled to habeas relief. *See Parker v. Matthews*, 567 U.S. 37, 43 (2012) (*per curiam*) (*Jackson* and AEDPA provide a "twice-deferential standard"). In relevant part, the OCCA upheld the jury's verdict on grounds that "the State presented persuasive evidence from lay witnesses to refute Smith's evidence . . . of adaptive functioning deficits." App.138a. As demonstrated by the summary of the *Atkins* trial evidence in the Statement of the Case, II.B.1, *supra*, this conclusion was fully supported by the record. Thus, the OCCA's rejection of Smith's

---

[11] In addition to the errors shown in Parts I and II, the Tenth Circuit also violated this basic principle of sufficiency review. For example, the Tenth Circuit improperly credited Trial Attorney Watson's recounting of Smith's behavior at trial over Prosecutor Smith's. App.42a.

Atkins claim was reasonable; it was certainly not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*) (when review is constrained by *Jackson* and the AEDPA, "[b]ecause rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold").

IV. ADDITIONAL COMPELLING REASONS JUSTIFY THIS COURT'S REVIEW.

Besides the circuit split generated by the Tenth Circuit's decision, additional compelling reasons warrant a grant of certiorari review in this case. To begin with, any grant of habeas relief "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "denies society the right to punish," as here, "admitted offenders." *Richter*, 562 U.S. at 103 (quotation marks omitted). Furthermore, disregarding *Teague*'s anti-retroactivity rule "*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310 (emphasis in original).

The grant of habeas relief in this case goes even further. Neither *Moore I* nor *Moore II* was in existence at the time the State responded to Petitioner's 2015 habeas petition, let alone at the time of the OCCA's decision rejecting Smith's intellectual disability claim

or when Smith's death sentences became final. In fact, *Moore I* was decided just a few months before the district court's denial of habeas relief, and *Moore II* was decided during the pendency of Smith's habeas appeal, after briefing and a mere month before oral argument. Worse still, the State has never had even the opportunity to marshal resources to defend Petitioner's death sentences against these cases because the panel *sua sponte* stripped the OCCA's opinion of deference and decided the *Teague* question without the benefit of briefing.[12] This is fundamentally unfair; flies in the face of comity, finality, and federalism; violates both § 2254(d) and *Teague*; and justifies this Court's intervention. *See Teague*, 489 U.S. at 308-10.

This intrusion by the Tenth Circuit into Oklahoma's sovereignty, and its disregard of this Court's well-established principles restricting habeas review, is not isolated. Petitioner is filing another petition for certiorari review, on the same day as this petition, in which the Tenth Circuit made similarly egregious errors. *See Harris v. Sharp*, 941 F.3d 962 (10th Cir. 2019).

Finally, given the similarities between this case and the Sixth Circuit's decision in *Hill*, this Court should consider summarily reversing, as this Court did in *Hill*. *Hill*, 139 S.Ct. at 505. Indeed, this Court has repeatedly summarily reversed habeas decisions (even in capital cases) when a court of appeals com-

---

[12] Admittedly, the State did not argue *Teague* until its petition for rehearing. But the State had no reason to previously argue *Teague* because Smith *did not dispute that § 2254(d) was applicable*. *Teague* matters only if AEDPA does not apply and here Smith conceded that AEDPA applied. *Cf. Greene v. Fisher*, 565 U.S. 34, 39 (2011).

mitted errors as obvious as those present here. *See, e.g.*, *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016) (*per curiam*) (stating, in a capital case, that "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law" and citing a number of cases as examples); *White v. Wheeler*, 136 S.Ct. 456, 458-62 (2015) (*per curiam*) (summarily reversing grant of habeas relief in a capital case where the court of appeals's ruling "contravene[d] controlling precedents from this Court" and "again advis[ing] the Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty"); *Parker*, 567 U.S. at 43-45 (summarily reversing the court of appeals's grant of relief on a sufficiency claim in a capital case where the court disregarded the "twice-deferential standard" of *Jackson* and AEDPA).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA

CAROLINE E.J. HUNT
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD
OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE TWENTY-FIRST STREET
OKLAHOMA CITY, OK 73105
(405) 522-4410
CAROLINE.HUNT@OAG.OK.GOV

COUNSEL FOR PETITIONER

MARCH 2, 2020