Capital Case

Case No.19-1106

In the Supreme Court of the United States

TOMMY SHARP, Interim Warden
Oklahoma State Penitentiary,
Petitioner,
v.
RODERICK L. SMITH
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EMMA V. ROLLS, OBA # 18820 *
THOMAS D. HIRD, OBA # 13580
Assistant Federal Public Defenders
Western District of Oklahoma
215 Dean A. McGee Ave., Suite 707
Oklahoma City, Oklahoma 73102
(405) 609-5975 telephone
(405) 609-5976 facsimile
emma_rolls@fd.org
tom_hird@fd.org

COUNSEL FOR RESPONDENT,
RODERICK L. SMITH

* Counsel of Record

Dated this 26th day of May, 2020

CAPITAL CASE

No. 19-1106

QUESTIONS PRESENTED

1. Did the Tenth Circuit err in concluding *Moore I* and *Moore II* were mere applications of *Atkins* that could be retroactively applied on collateral review, unrestrained by AEDPA, when this Court's post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case?

2. Did the Tenth Circuit err in finding the OCCA did not adjudicate on the merits the adaptive-functioning prong when the OCCA reached no conclusions regarding this prong and instead discussed the "persuasive evidence" exclusively as it related to the factors necessary to establish the intellectual-functioning prong?

3. Did the Tenth Circuit err in finding Mr. Smith demonstrated a reasonable jury would have concluded he proved significant deficits in his adaptive functioning where Petitioner conceded Mr. Smith suffers from adaptive functioning deficits in the area of academics; where Dr. Hopewell, the only expert to formally assess Mr. Smith's adaptive functioning capacities, concluded he suffers from profound deficits in at least five of the nine areas; where other witnesses testified to his illiteracy as a child and as an adult; and where the State neither conducted nor presented a standardized assessment of his adaptive functioning capacities?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

CIRCUIT COURT CASES

FEDERAL STATUES

STATE COURT CASES AND ORDERS

OTHER AUTHORITIES

INTRODUCTION

Respondent, Roderick Lynn Smith, respectfully urges this Court to deny the petition for writ of certiorari to review the unanimous Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered August 26, 2019. *See Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019).

STATEMENT OF THE CASE

I. Procedural History.

Petitioner complains Mr. Smith has received "decades of process on various iterations of his intellectual disability or borderline intellectual disability claims." Petition at 5. But the many years of litigation surrounding Mr. Smith's intellectual disability reflect Oklahoma's resistence to this Court's command that the Eighth Amendment prohibits the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). Former Judge Charles Chapel of the Oklahoma Court of Criminal Appeals ("OCCA") expressed his disgust with the OCCA's hostile approach to assessing intellectual disability. In *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006), the case that first set forth the standard for assessing a capital litigant's *Atkins* eligibility, he stated:

> [T]he majority is not concerned with preventing the execution of the mentally retarded. Instead, the majority sets forth procedures in pending and future cases which, taken together, allow the continued execution of mentally retarded defendants. I regret to say that I believe the majority opinion is primarily concerned with limiting the determination of mental retardation, thus limiting those who fit within [*Atkins*'s] holding.

Id. at 577 & n.22 (Chapel, J., concurring).[1] The OCCA has been especially resistant to the clinical

[1]Of note, Judge Chapel dissented to the opinion affirming Mr. Smith's jury verdict finding him "not mentally retarded." *Smith v. State*, No. O-2006-683 (Okla. Crim. App. Jan. 29, 2007) (Chapel, J., dissenting at 1-3) ("*Atkins* Slip Op."). Resp. App. 52-54.

underpinnings of *Atkins,* and sadly, it remains so to this day. *See, e.g., Fuston v. State*, __ P.3d __ No. D-2017-773, 2020 WL 1074845, at *3 n.2 (Okla. Crim. App. Mar. 5, 2020) (drawing a distinction between "mental retardation" and "intellectual disability," without citing a clinical or legal source to support such distinction and despite this Court's holding in *Hall v. Florida*, 572 U.S. 701, 704-05 (2014) that both terms refer to the "identical phenomenon"). This is the context in which Mr. Smith's procedure progressed.

On June 30, 1993, Mr. Smith was charged in Oklahoma County District Court, Case No. CF-1993-3968, with five counts of Murder in the First Degree for killing his wife and her four children. O.R. 1-4. Mr. Smith was originally convicted and sentenced to five death sentences in a 1994 trial. His convictions and sentences were affirmed and he was denied collateral relief by the OCCA in 1996.

In 2002, while Mr. Smith was seeking federal habeas corpus relief (CIV-98-601), this Court held the imposition of the death penalty against the intellectually disabled violates the Eighth Amendment's ban on cruel and unusual punishment. *Atkins,* 536 U.S. at 321. Shortly thereafter, Mr. Smith filed a successor application for post-conviction relief based on *Atkins* in the OCCA. (PCD-2002-973), and in August, 2003, the OCCA remanded the case to the Oklahoma County District Court for a jury trial to determine Mr. Smith's *Atkins* claim. O.R. 706-11. A jury trial was held March 8-15, 2004, and the jury found Mr. Smith was "not mentally retarded." O.R. 1115. Mr. Smith was not afforded a direct appeal from the jury verdict of "not mentally retarded" at that time.

In 2004, the Tenth Circuit ruled on Mr. Smith's still-pending federal habeas action, affirming his convictions but reversing his death sentences based on a violation of Mr. Smith's Sixth Amendment right to effective assistance of counsel at the sentencing stage. *Smith v. Mullin*, 379 F.3d

919 (10th Cir. 2004). Specifically, the Tenth Circuit held trial counsel's failure to present any mitigating evidence of Mr. Smith's "mental retardation" and brain damage fell far below constitutional standards. *Id.* at 940-44.[2] The circuit court remanded Mr. Smith's case to the state trial court for a new capital sentencing proceeding. *Id.* at 944.

Thus, Mr. Smith was back at the Oklahoma County District Court in a resentencing posture. On January 3, 2005, Mr. Smith requested his resentencing jury determine his *Atkins* eligibility since he had been given no appellate review of the 2004 jury determination. O.R. 1167-1171.The trial judge ruled Mr. Smith's resentencing jury should determine the issue of his *Atkins* eligibility since he had not been afforded appellate review. 3/2/05 M. Tr. at 9.

On November 10, 2005, trial counsel for Mr. Smith announced instead of litigating his intellectual disability before the resentencing jury, he was going to present it at a bench trial prior to his resentencing. 11/10/05 M. Tr. 4-6. On May 8, 2006, *more than 14 months after first indicating it would file a writ*, the State sought emergency intervention from the OCCA in case No. PR-2006-509, *State ex rel. Lane v. Bass*. Within three weeks, the OCCA granted the State's emergency writ and reinstated a fast-track, abbreviated appeal of the 2004 jury determination that Mr. Smith was not mentally retarded. O.R. 1542-46.

On January 29, 2007, the OCCA, in Case No. O-2006-683, upon an accelerated docket, affirmed the jury's finding Mr. Smith was "not mentally retarded" in an unpublished opinion.

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[2]In its 2004 opinion, the Tenth Circuit noted strong evidence of Mr. Smith's intellectual disability in its discussion of omitted mitigating evidence: "Smith is completely illiterate. . . . Even the State's experts and prison doctors determined . . . Smith's IQ to be in the mentally retarded or borderline mentally retarded range. . . . 'His understanding and his emotional development and his ability to relate all seem to be fairly similar to what we would perceive to be a 12-year-old child.'" *Id.* at 941 (internal citations and quotations omitted).

("*Atkins* Slip Op."). Resp. App. 30-54. In relevant part, the OCCA found that Mr. Smith failed to meet the first prong of the Oklahoma state-law standard articulated in *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). Resp. App. 40. In *Murphy*, the OCCA provided the following definition:

> A person is "mentally retarded": (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work. . . .
>
> [N]o person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test.

Id. at 567-68. Specifically, the OCCA found "Smith failed to meet even the first prong of the *Murphy* definition of mental retardation" because "[t]he 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 reaction of others, to learn from experience or mistakes, and to engage in logical reasoning." *Atkins* Slip Op. at 11 (referencing all of the relevant factors for the first *Murphy* prong). Resp. App. 40.

In October 2007, Mr. Smith filed an Application for Determination of Competency. A competency jury trial was held November 16-24, 2009, and the jury found Mr. Smith competent to undergo further criminal proceedings. Comp. Tr. VII 85. In February and March of 2010, a resentencing jury trial was held, and Mr. Smith received the death penalty on two counts and received life without parole on three counts. 2010 Tr. X 1-6.

Mr. Smith appealed the judgments and sentences resulting from his competency trial and

resentencing in OCCA Case No. D-2010-357. On August 7, 2013, the OCCA affirmed the jury's decision in *Smith v. State*, 306 P.3d 557 (Okla. Crim. App. 2013). Mr. Smith pursued a state post-conviction action under PCD-2010-660 and was denied relief in an unpublished opinion on February 13, 2014.

Mr. Smith filed his Petition for Writ of Habeas Corpus in 2015, CIV-14-579 (Doc. 18), and raised a sufficiency-of-the-evidence claim with respect to the "not mentally retarded" verdict from his *Atkins* trial. On July 13, 2017, the district court denied habeas relief but granted a certificate of appealability on Mr. Smith's *Atkins* claim. Docs. 47-49. After appealing the district court's denial of relief to the Tenth Circuit, on August 26, 2019, Case No. 17-6184, a unanimous panel held Mr. Smith was entitled to relief as to his death sentences because "Smith is intellectually disabled as a matter of law." *Smith*, 935 F.3d at 1088. Resp. App. 25. This is the decision from which Petitioner is seeking certiorari.

With respect to the first *Murphy*/*Atkins* prong, significant sub-average intellectual functioning, the Tenth Circuit found "the OCCA's determination Smith did not satisfy the first prong of the *Murphy* definition constitutes either an unreasonable determination of the facts, or amounts to an unreasonable application of *Atkins* because such determination requires the OCCA to have disregarded the clinical definitions *Atkins* mandated states adopt." *Id.* at 1083. Resp. App. 20. The circuit court highlighted Mr. Smith's "consistent scoring in the intellectually disabled range[3] and the Supreme Court's clear statements regarding the significant role of IQ assessments under the

[3]As will be discussed in greater detail, the defense expert's and the State's expert's IQ testing of Mr. Smith resulted in full-scale scores of 55. A Department of Corrections psychologist also tested Mr. Smith using an outdated instrument, and that test resulted in a full-scale score of 65. *See infra* at 9-13-14.

intellectual functioning prong of *Atkins*." *Id.* at 1078. Resp. App. 15.

With respect to the second *Murphy*/*Atkins* prong, manifestation of symptoms of intellectual disability prior to age 18, Petitioner conceded at oral argument that there exists insufficient evidence for a reasonable juror to conclude Mr. Smith's symptoms did not manifest before the age of 18, and the circuit court agreed. *Id.* at 1083. Resp. App. 20. In support of this conclusion, the Tenth Circuit pointed to the fact that Mr. Smith was placed in classes for the educable mentally handicapped throughout his schooling, and placement in these courses required Mr. Smith "submit to a psychometrist-administered test and score a full scale IQ in the intellectually disabled range." *Id.*

With respect to the third *Murphy*/*Atkins* prong, significant deficits in adaptive functioning, the Tenth Circuit first found the OCCA failed to adjudicate this prong on the merits. *Id.* After applying de novo review, the circuit court concluded "no reasonable jury could conclude Smith failed to establish by a preponderance of [the] evidence that he suffered deficits in at least two areas of adaptive functioning."[4] *Id.* at 1085. Resp. App. 22. In support of this conclusion, the court noted the following: The State conceded at oral argument that Mr. Smith demonstrated significant limitations of adaptive functioning in academics. *Id.* And defense expert Dr. Clifford Hopewell, the only expert to conduct a formal assessment of Mr. Smith's adaptive functioning, concluded Mr. Smith suffers from "profound deficits in at least five of the nine adaptive functioning areas." *Id.*

[4]After determining the analysis of Mr. Smith's adaptive functioning was not constrained by AEDPA, the Tenth Circuit held "the Supreme Court's post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case." *Smith*, 935 F.3d at 1084. Resp. App. 21 Hence, the court considered "on de novo review the Supreme Court's application of *Atkins* in *Hall* [*v. Florida*, 572 U.S. 701 (2014)], *Moore I* [*v. Texas*, 137 S. Ct. 1039 (2017)] and *Moore II* [*v. Texas*, 139 S. Ct. 666 (2019)], which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated." *Id.* at 1085. Resp. App. 22.

II. The Crime.

On the morning of June 28, 1993, police officers arrived at the home of Roderick and Jennifer Smith in Oklahoma City. The couple shared the home with Jennifer's four children from another relationship, G.C., L.C, S.C., and K.C. The officers' visit was prompted by a phone call from Jennifer's mother, who was concerned because she had not heard from her daughter in several days. 2010 Tr. III 144-45. Officers found Jennifer's body in a closet and a child's body in another closet. *Id.* at 150. Once homicide detectives arrived, they found the bodies of three more children, two in closets and a third under a bed. *Id.* at 158.

At 12:30 p.m. that same day, Mr. Smith walked into the Oklahoma County Sheriff's Office and said "I need to check in." When staff asked Mr. Smith why he needed to check in, he replied "I don't know[;] they told me to come and check in." 2001 Fed. Evid. Hrg. Ex. 22. Sheriff deputies transported him to the Oklahoma County Crisis Intervention Center for a mental health evaluation. Noted on his intake form was a description of Mr. Smith as "psychotic/out of touch." 2001 Fed. Evid. Hrg. Pet. Ex. 12.

Around 2:30 that afternoon, Mr. Smith was detained as a suspect in the murders of his wife and her four children. Within two hours of being determined to be in need of a mental health evaluation, Mr. Smith confessed to the killings. During his interrogation, he admitted to stabbing his wife and her two sons. Although he remembered he "got" the girls, he could not remember any details. *Smith v. State*, 932 P.2d 521, 526 (Okla. Crim. App. 1996).

Mr. Smith stands sentenced to death for the murders of S.C. and K.C. and life without the possibility of parole for the murders of Jennifer Smith, G.C., and L.C. His intellectual disability and severe mental illness have been cornerstones to his defense since the beginning of his case.

III. Mr. Smith's *Atkins* Trial.

A. The Experts.

Not one expert, including the State's expert, who testified at Mr. Smith's *Atkins* trial concluded he was "not mentally retarded." In fact, *all* of the experts who testified came up with similar IQ test results on the Wechsler Adult Intelligence Scale (WAIS), all of which place Mr. Smith well below an IQ of 70. And although the State's expert testified he did not think the defense expert's results were "accurate reflections of [Mr. Smith's] best performance" because he believed Mr. Smith was malingering, *Atkins* Tr.[5] VI 39, he refused to conclude Mr. Smith is "not mentally retarded." *Id.* at 67.

Defense expert Dr. Clifford Hopewell, a clinical psychologist, possesses in-depth clinical experience assessing intellectually disabled individuals. *Atkins* Tr. II 37-38. Dr. Hopewell administered the WAIS-III in January of 2003 to Mr. Smith. Doc. 18, Att. 4 (Report of Dr. Hopewell); Appendix 2 of Successor Application for Post Conviction Relief, PCD-2002-973. Resp. App. 67-74. Mr. Smith scored 55 on the verbal component and 64 on the performance component; he received a full-scale IQ score of 55, a score worse than 99% of potential test-takers. *Atkins* Tr. II 56, 136-37; Doc. 18, Att. 4 at 3-5. Resp. App. 69-71. According to Dr. Hopewell, based on these WAIS-III results, Mr. Smith's IQ range is estimated between 52 and 60 at a 95% confidence level. Doc. 18, Att. 4 at 4-5. Resp. App. 70-71. Dr. Hopewell opined Mr. Smith's full-scale score of 55 substantially limits Mr. Smith's ability to communicate, learn from experience, engage in logical reasoning, understand the reactions of others, and control his impulses. *Atkins* Tr. II 57.

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[5]Throughout Petitioner's petition, he refers by citation to Mr. Smith's *Atkins* trial as "2009 Tr. __." *See* Petition at 7 for example. In fact, Mr. Smith's *Atkins* trial occurred in 2004.

In addition to conducting IQ testing on Mr. Smith, Dr. Hopewell detected the damage to Mr. Smith's brain caused by a near-drowning incident when Mr. Smith was 12 years old.[6] *Atkins* Tr. II 105; Doc. 18, Att. 10 (Medical Records from Johnston Memorial Hospital). This hypoxic injury to Mr. Smith's brain resulted in damage to his temporal lobes and hippocampus as confirmed by Dr. Hopewell's testing: "Formal testing of memory indicated defective storage of new information, to include both visual and verbal material." Doc. 18, Att. 12 at 5 (11/20/1998 Report of Dr. Hopewell). Resp. App. 59. Mr. Smith's "learning and storage of new information was so poor as to result in a[] very poor memory profile, with memory functioning being below the tenth percentile." *Id.* Dr. Hopewell had "no doubt" Mr. Smith suffers from documented and measurable brain dysfunction. *Id.* at 1. Resp. App. 55. Such dysfunction is "without a doubt" likely to affect Mr. Smith's "memory, information processing, and emotional behaviors and action, especially under periods of stress." *Id.* Dr. Hopewell had "no doubt" that Mr. Smith suffers from brain damage as a result of his near drowning, in addition to having been "developmentally disabled probably from birth." *Atkins* Tr. II 105.

Dr. Hopewell was also the only expert presented at the *Atkins* trial to have formally assessed Mr. Smith's adaptive behavior functioning. *Atkins* Tr. II 130. After administering The Vineland, a standardized test for assessing adaptive functioning, Dr. Hopewell concluded Mr. Smith suffers from significant deficits in numerous areas of adaptive behavior, including profound deficits in communication skills. *Id.* at 62-65. Although Mr. Smith is able to carry on conversations about basic

[6]After slipping on a rock and falling into water at a boy scout camp, *Atkins* Tr. II 111, Mr. Smith was pulled from the water "unconscious and apn[e]ic." Doc. 18, Att. 10 at 5. At the emergency room, he presented "with dyspnea, tachycardia, and hypothermia." *Id.*

information, Dr. Hopewell found he suffers from "impoverished" communication. *Atkins* Tr. II 62. Noting many people in Mr. Smith's past describe him as a "loner" or "noncommunicative," Dr. Hopewell found what these people are really describing is simply "abulia," a technical term meaning the inability to be spontaneous and produce ideas. *Id*. at 63. "[M]ost of the time," according to Dr. Hopewell, Mr. Smith "simply can't come up with much of anything." *Id.* Finding Mr. Smith has "[e]xtremely poor verbal skills" and "low abilities . . . in terms of language development," Dr. Hopewell concluded Mr. Smith's functional communication skills are at approximately the same level as an almost-five-year-old child. Doc. 18, Att. 4 at 3, 6. Resp. App. 69, 72.

During Dr. Hopewell's assessment of Mr. Smith's functional academics, Dr. Hopewell administered the Wide Range Achievement Test III ("WRAT-III") in addition to The Vineland. Doc. 18, Att. 4 at 1. Resp. App. 67. The WRAT-III is a basic test measuring one's ability in reading, writing, and arithmetic. *Atkins* Tr. II 65. On the reading and spelling components of the WRAT-III, Mr. Smith scored at the kindergarten level, and on the arithmetic component, he scored at the first-grade level. Doc. 18, Att. 4 at 2. Resp. App. 68.

So too does Mr. Smith suffer from significant deficits in the social skills domain as confirmed by formal adaptive behavior assessments. Dr. Hopewell found Mr. Smith operates in the lower 2% of the population in this domain; he estimated Mr. Smith's socialization skills are equivalent to an almost-six-year-old child. Doc. 18, Att. 4 at 3, 6. Resp. App. 69, 72.

Further, Mr. Smith has significant deficits in daily living. The Vineland Test measured what was at that time known as "daily living," which included such skills as cooking and house maintenance. *Atkins* Tr. II 58. For the daily living portion of The Vineland, Dr. Hopewell estimated Mr. Smith functioned at the level of an almost-six-year-old child. Doc. 18, Att. 4 at 8. Resp. App.

74. Ultimately, Dr. Hopewell concluded that Mr. Smith's results on The Vineland were "consistent with mental retardation, and range from four years and nine months to a high of eight years and nine months." *Id.* at 5. Resp. App. 71.

Dr. Fred Smith, a psychologist with the Oklahoma Department of Corrections, administered the WAIS-R to Mr. Smith in 1997, five years prior to this Court's decision in *Atkins*. *Atkins* Tr. III 160. Mr. Smith scored a 64 on the verbal component and 70 on the performance component, resulting in a full-scale IQ score of 65. *Id.* at 161.[7] Dr. Smith concluded Mr. Smith's results on the WAIS-R test "indicate[] mental retardation." *Atkins* Tr. III 161. In addition to the WAIS-R, Dr. Smith also administered the Raven's Standard Progressive Matrices to Mr. Smith. *Atkins* Tr. III 161. Instead of resulting in specific scores, the Raven's results in "a very general rough IQ range." *Id.* Mr. Smith scored in the range of 69-78. *Id*. at 162. The WAIS more accurately depicted Mr. Smith's true intellectual functioning because "[t]he Wechsler Scale is the premier instrument." *Id.* The Raven's is not recognized as one of the few tests that serve as an appropriate assessment of the general factor of intelligence. *The Death Penalty and Intellectual Disability* 129-30 (Edward A. Polloway ed., 2015).

Further, Dr. Smith found Mr. Smith suffered from diffuse brain damage consistent with his near drowning. *Atkins* Tr. III 165-66. Because of the "developmental problems [Smith had] from the beginning," the near drowning from which he suffered "could have been a significant incident" that contributed to his limited intellectual functioning. *Atkins* Tr. II 77. Medical tests and experts confirmed what Mr. Smith's mother knew all along: Mr. Smith's being "slow" was not "caused from

[7]When Dr. Smith administered the WAIS-R to Mr. Smith, the WAIS-III was available, making the WAIS-R outdated and subject to inflated scores. *Atkins* Tr. II 139-40. Mr. Smith's 1997 results on the WAIS-R more accurately reflect a full-scale IQ score of 62. *Smith*, 935 F.3d at 1080 n.9. Resp. App. 17.

a drowning. It got worser [sic] after he almost got drowned." *Atkins* Tr. IV 17.

State's expert Dr. John Call, a forensic psychologist with a limited clinical practice that does not include the treatment of any intellectually disabled patients, *Atkins* Tr. VI 40-41, administered the WAIS-III to Mr. Smith in September of 2003. *Id.* at 44. Mr. Smith received 57 on the verbal component and 62 on the performance component, resulting in a full-scale score of 55. Doc. 18, Att. 9 at 6; *Atkins* Tr. VI 38. Based on the results of this WAIS-III, Mr. Smith's IQ range is between 52-60 at a 95% confidence level. *Id*. at 59-60. Although Dr. Call suspected Mr. Smith did not put forth his best effort on the test, *Call was unable to conclude Mr. Smith is "not mentally retarded,*" his raison d'etre in the case. *Atkins* Tr. VI 39, 67 (emphasis added).[8]

Dr. Call's opinion that Mr. Smith failed to put forth his best efforts is completely at odds with the opinion of Dr. Hopewell. According to Dr. Hopewell, he "never saw any indication that [Mr. Smith] was faking, either when [Mr. Smith] was working with [Dr. Hopewell] or in the other tests that [Mr. Smith] had done with other people." *Atkins* Tr. II 73. Dr. Hopewell's unique experience makes him especially astute at detecting malingering. Not only does he possess in-depth clinical experience assessing individuals with intellectual disability, *id.* at 37-38, he also has experience screening benefit applicants, which involved "frequently find[ing] people that would like to get benefits," so they exaggerated symptoms, *id.* at 39. Additionally, Dr. Hopewell served as an Army psychologist, and in that role, he "had much more experience with malingering and faking because we saw so much of that happening in the military. . . . [W]e saw literally hundreds of patients where

[8]Despite criticizing Dr. Hopewell's method of assessing Mr. Smith's adaptive functioning, Dr. Call conducted no formal adaptive-behavior assessment of his own. *Atkins* Tr. II 58-61; *Atkins* Tr. III 164; *Atkins* Tr. VI 45-46.

that was a consideration." *Id.*

Dr. Smith also contradicted any allegations of Mr. Smith's alleged malingering. Although Dr. Smith was initially skeptical Mr. Smith's 1997 full-scale score of 65 on the outdated WAIS-R was based on Mr. Smith's best effort, *Atkins* Tr. III 165-68, since that time Dr. Smith "took a closer look" and "was very much struck" by the consistency in the results of his WAIS-R testing and the results of other psychological testing. *Id.* at 167-68. The consistency amongst all the testing results "was quite remarkable and it shows a consistent pattern rather than faking." *Id.* at 168. Dr. Smith's initial gut feeling was eventually replaced by a clinical determination that the 65 on the outdated WAIS-R was accurate based on "objective test results." *Id.* at 166.

Dr. Call's malingering opinion was countered with overwhelming evidence to the contrary. As previously mentioned, the majority of Dr. Call's practice is forensic rather than clinical, and of the few patients he treats, none are intellectually disabled. *Atkins* Tr. VI 40-41. Particularly for those practitioners who have little to no clinical experience with the intellectually disabled, like Dr. Call, malingering may be suspected as a result of confusion related to a combination of psychiatric symptoms, neurological symptoms, and cognitive deficits. Polloway at 270. What is more, Dr. Call's opinion that Mr. Smith was not putting forth his best effort was based in part on Mr. Smith's results on the Test of Memory and Malingering ("TOMM"), *Atkins* Tr. VI 13-18, a test with a standardization sampling that did not include the intellectually disabled. Polloway at 270-71. A review of this test had indicated its reliability and validity are highly suspect when administered to the intellectually disabled population. *Id. See also Atkins* Tr. II 74-75 (Dr. Hopewell testifying to same).

Dr. Call also testified to the 1994 IQ test results of Dr. Phillip Murphy to support his

malingering accusation. According to Dr. Call, Dr. Murphy testified in Mr. Smith's original 1994 trial that Mr. Smith scored a full-scale score of 73 on an IQ test. *Atkins* Tr. VI 34-37. But nowhere in Dr. Call's testimony at Mr. Smith's *Atkins* trial, nor in Dr. Murphy's 1994 testimony for that matter, is it mentioned what specific intelligence test Dr. Murphy gave to Mr. Smith. *Atkins* Tr. VI 35-36; 1994 Tr. VIII at 89-159. Interestingly, Dr. Call failed to inform the jury that Dr. Murphy's ultimate conclusion was that Mr. Smith is "in the mentally retarded range." *Id.* at 124.

Finally, even before Mr. Smith's *Atkins* trial, Dr. Call was always quick to undermine reported IQ scores placing capital defendants in the intellectually disabled range based on allegations of malingering. The OCCA was on notice of such, and in an opinion before the OCCA affirmed Mr. Smith's jury verdict of "not mentally retarded," the court chastised the State's continued use of Dr. Call. In the years immediately after *Atkins*, Dr. Call, despite his admitted lack of clinical experience with the intellectually disabled, "made a specialty of examining capital defendants for mental retardation" purposes. *Lambert v. State*, 126 P.3d 646, 652 (Okla. Crim. App. 2005). In each of these cases, Dr. Call either administered or attempted to administer several malingering tests as he did in Mr. Smith's case. *Id.* at 652 n.17. He went so far as to support his allegations of malingering with results obtained from "The Blackwell Memory Test," a made-up malingering test, which he created and named after his secretary. *Salazar v. State*, 126 P.3d 625, 629-34 (Okla. Crim. App. 2005). Dr. Call appears to have administered this non-standardized, self-created test during his evaluation of Mr. Smith. O.R. V 921; Doc 18, Att. 9.

B. Mr. Smith's Teachers for the Educable Mentally Handicapped.

Mr. Smith spent the majority, if not all, of his schooling in classes for the educable mentally handicapped. Mr. Smith was in such classes as early as the 1975-76 and 1976-77 school years when

he was eight and nine years old. *Atkins* Tr. Def. Exs. 1 & 2. Jesse Thompson, the principal at Mr. Smith's elementary school during those years, identified photographs of special education classes in which Mr. Smith was a student. One such photo includes Mr. Smith as a student in the 1975-1976 class of Mr. Anderson. *Atkins* Tr. Def. Ex. 2. Another shows Mr. Smith was a student in the 1976-77 class of Mrs. White. *Atkins* Tr. Def. Ex. 1. Mr. Thompson identified both teachers as special education teachers for "mentally handicapped children" with "limited abilities."[9] *Atkins* Tr. II 203-04. Students were placed in these classes if "they couldn't handle the regular curriculum" and needed "remedial help so they [could] be able to have some success." *Id.* at 204. Placement in these classes required a recommendation by a teacher and testing. *Id.* at 205.[10]

Both Paul Preston and Mona Autry recalled having Mr. Smith in their classes for the educable mentally handicapped while he was in high school. To be eligible for these classes, students were recommended by a teacher and given IQ tests; they had to score in the 55-to-75 range for placement. *Atkins* Tr. III 95. Each student had an individualized educational plan, which addressed the student's special needs. *Id.* at 96.

Ms. Autry served as Mr. Smith's teacher for the educable mentally handicapped during his 9th through 11th grades, and she taught a variety of classes including math skills, communication

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[9]The 1975-76 academic year was Mr. Thompson's first year at this elementary school. He does not know when Mr. Smith was first placed in classes for the educable mentally handicapped because "[h]e was already placed" before Thompson's arrival. *Atkins* Tr. II 204. According to Eva Cates, Mr. Smith's mother, he was placed in such classes "from the time he started regular school." *Atkins* Tr. IV 8.

[10]Through no fault of Mr. Smith, all of his school records have been destroyed other than a copy of his high school transcript pursuant to policies of Oklahoma City Public Schools. *Atkins* Tr. III 8-9.

skills, and social studies skills.[11] *Id.* at 94-95. During the three years Mr. Smith was in Ms. Autry's classes, she spent several hours a day with him. *Id.* at 95. Ms. Autry recalled that despite his best efforts, Mr. Smith functioned at about the third-grade level in math and reading.[12] *Id.* at 99-100. Ms. Autry had absolutely no doubt Mr. Smith was properly placed in her classes for the educable mentally handicapped, and of the many students she taught, she considered Mr. Smith "one of the lower" functioning students. *Id.* at 104. She described Mr. Smith's ability to learn as "very limited," *id.* at 112, and Mr. Smith as having a "[v]ery limited knowledge base." *Id.* at 113.

Paul Preston, Mr. Smith's teacher for the educable mentally handicapped in the areas of science skills and co-op training during his 9th-12th grades, echoed much of the same sentiment about his experience with Mr. Smith. *Atkins* Tr. III 23. As part of co-op training, Mr. Preston taught Mr. Smith janitorial skills. *Id.* at 30-31. He recognized Mr. Smith's reading and writing skills were extremely limited; as a result, he filled out job applications for Mr. Smith. *Id*. at 30-34. Mr. Preston recalls Mr. Smith was "very low, very limited in his abilities." *Id.* at 28. He estimates that of all the educable mentally handicapped students he taught during his 27-year career, Mr. Smith fell in the "low-medium" range. *Id.* at 29. Although some students in classes for the educable mentally handicapped were occasionally mainstreamed into regular substantive classes, Mr. Preston would never have suggested Mr. Smith be mainstreamed because "[h]e does not have the ability. . . . [It]

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[11]Mr. Smith's high school transcript shows all of his substantive classes bear the "skills" designation and he was enrolled in "co-op training." *Atkins* Tr. Def. Ex. 3. In the 1980s, "skills" classes were special education classes. *Atkins* Tr. III 11. "Co-op training" classes taught basic job skills. *Id.*

[12]In a subsequent proceeding, which is not part of the *Atkins* trial record, Ms. Autry testified that Mr. Smith's inability to learn basic concepts was not due to lack of effort on his part: "And with Roderick . . . [i]t was difficult. It was very very difficult. He tried. He tried all the time to do a good job, but he didn't always catch it." 2010 Tr. V 107.

wouldn't [have been] fair to him." *Id.* at 35.

C. The Lay Witnesses.

Other than Dr. Call, the State called only lay witnesses to convince the jury that Mr. Smith was "not mentally retarded." Most of the State's lay witnesses spent very limited time with Mr. Smith, as opposed to the lay witnesses called on Mr. Smith's behalf. As for the State's lay witnesses, most of their testimony rested on inaccurate stereotypes about the intellectually disabled, such as they cannot hold jobs, have relationships, or express their needs.

The State first called Ruby Badillo, an insurance agent who had sold a policy to Mr. and Ms. Smith over ten years before her testifying. *Atkins* Tr. IV 46-49. Ms. Badillo testified to two brief interactions, totaling roughly an hour, with Mr. Smith. *Id.* at 52-54. Based on her brief interactions with Mr. Smith, she described him as "sociable" and offered him a job. *Id.* at 51. Ms. Badillo spent less than an hour with Mr. Smith and has no experience diagnosing intellectual disability. *Id.* at 53-54.

Next, the State called Emma Watts, Mr. Smith's case manager at Oklahoma State Penitentiary for a few years. *Id.* at 55-56. According to Watts, Mr. Smith could communicate with her and use "manipulative" behavior to get a more desirable cell or cell mate. *Id.* at 61. Ms. Watts admitted that she is not qualified to say if one inmate is smarter than another or to say whether Mr. Smith is "mentally retarded," which makes sense because Ms. Watts has no clinical experience with intellectual disability. *Id.* at 63.

Next, in an effort to exploit Mr. Smith's job history as a "head" janitor,[13] the State relied on Mark Woodward, a former supervisor of Mr. Smith's almost ten years earlier, who detailed Mr. Smith's tasks and described Mr. Smith as a "typical head janitor." *Id.* at 92-93. Mr. Woodward admitted to supervising Mr. Smith for only six to ten weeks, *id.* at 73, 94, and spending very little time with him during that time, *id.* at 96-97. As with Ms. Watts and Badillo, the record does not support that Mr. Woodward had any clinical experience with the intellectually disabled.

The State next called former Assistant District Attorney, Fern Smith, who prosecuted Mr. Smith at his initial criminal trial on this matter. *Id.* at 102. Ms. Smith testified Mr. Smith filed and presented several motions on his behalf and that he demonstrated abstract thinking. *Id.* at 106-07. One of those motions was a request that the prosecutor's table be moved because Mr. Smith thought the prosecutors were making faces at him, which the prosecutor denied. *Id.* at 107. And evidence indicates that a former cell mate wrote the motions.[14]

The State also emphasized the testimony of Laura Dich, a young woman with whom Mr. Smith had an affair while he was married. *Atkins* Tr. V 10, 16. Although Ms. Dich's testimony reflected Mr. Smith could lie and be involved in a romantic relationship, the State made no effort to provide any clinical justification that would render meaningful evidence of Mr. Smith's extra-marital relationship. And even the State's own expert, Dr. Call, acknowledged that intellectually

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[13]The supervisory duties ascribed to Mr. Smith's position as head janitor were nothing more than illusory. Mr. Smith was hired by a family member and relied on his aunt to do all the paperwork. *Atkins* Tr. III 73-74. Further, Mr. Smith's assignments as head janitor were simple and routine. *Id.*

[14]That Mr. Smith once "argued motions on his behalf" before his 1994 trial is of no import as to whether he is intellectually disabled, especially when one scratches the surface of what *really* occurred and learns such motions were drafted by a former cell mate. Doc. 18 at 44-45. *See Moore v. Texas*, 139 S. Ct. 666, 671 (2019) (noting such evidence "lacks convincing strength without determination about whether [the individual] wrote the papers on his own.")

disabled persons can lie, hold a job, drive, cook, clean, use a telephone, marry, and love, *Atkins* Tr. VI 62-64, all of the many stereotypes used by the State to undermine Mr. Smith's lifelong intellectual disability.

Finally, the State called three members of Jennifer Smith's family: Marietta Love, Ms. Smith's mother; Cherie Mishion, Ms. Smith's niece; and Dina Dean, Ms. Smith's sister. Ms. Smith's family members provided limited information about Mr. Smith, but did include observations that Mr. Smith seemed a little "slow," *Atkins* Tr. V 34; that he "stayed to himself" and was "stand-offish," *id.* at 36, 49; and that he didn't know things he should know, *id.* at 38.

In contrast to most of the State's lay witnesses who spent very limited time with Mr. Smith, Mr. Smith presented numerous lay witnesses who had or have known Mr. Smith well for many years, if not most of his life. And the anecdotal evidence provided by these witnesses support the findings of Dr. Hopewell with respect to Mr. Smith's limited adaptive-functioning behavior.

Inmates who have celled with Mr. Smith and DOC staff have noticed his limited communication skills. Norman Cleary, an inmate with whom Mr. Smith celled at Oklahoma State Penitentiary for several years, noted "you can't really hold a conversation with [Roderick]." *Atkins* Tr. III 195-96; Def. Ex. B at 9. Further, in 1998, Dr. Wakeford, a psychologist with Oklahoma State Penitentiary, noted Mr. Smith wanted a single cell, but he "doesn't know how to ask." He also commented Mr. Smith is "probably M.R. [mentally retarded]." Doc. 18, Att. 11, DOC records 8/13/1998.

Family members detailed Mr. Smith's limitations in his functional academics. Several family members recognize Mr. Smith cannot read. *Atkins* Tr. III 70. Mr. Smith's functional academics have not improved. He is and has been totally dependent on cell mates for reading and writing

correspondence and filling out commissary slips. Recognizing Mr. Smith's inability to read, Mr. Cleary tried to teach Mr. Smith to read by using the *Hooked on Phonics* series. *Atkins* Tr. Def. Ex. B at 9-10. After spending several hours a day for six months, Cleary eventually abandoned the project because "it was absolutely hopeless." *Id.* at 10. Illustrating Mr. Smith's deficits in functional arithmetic, Cleary also recalled "[Smith] can't play cards . . . [N]obody likes for him to play dominoes because he slows everything down. . . . [A]ll he really does is just match the ends, the numbers. He doesn't know how to – any strategy or anything like that." *Id.* at 8. Mr. Smith's deficits in functional academics make him particularly vulnerable:

> [H]e doesn't understand values on different things. Like you can say if he's got a bag of potato chips that costs $1.05 and you've got two sodas that cost 29 cents, . . . he thinks he's getting a great deal, he is getting two for one if you give those two pops for that bag of chips. And people used to really take advantage of [Roderick] like that.

Id. at 18.

The people who knew Mr. Smith best are consistent in their description of his deficits in social behavior. Cousins with whom Mr. Smith was raised describe him in the following way: "a loner-type person, always to himself." *Atkins* Tr. III 70. Mr. Smith's mother, Eva Cates, also recognized he did not respond to frustration in age-appropriate ways. Ms. Cates described Mr. Smith as acting "just like a two-year-old" when being teased by neighborhood children. "[S]ometimes he would go up under the . . . porch in the back and he would go up under there and I guess you would call it hiding from them." *Atkins* Tr. IV 7.

Mr. Smith's lay witnesses also corroborated that he has significant deficits in both home living and in health and safety. Mr. Smith has never lived independently and without support. *Atkins* Tr. IV 28-29. Fearing injury to Mr. Smith, Ms. Cates did not teach him to cook. *Atkins* Tr. IV 9.

Demonstrating Mr. Smith's deficits in health and safety, Mr. Cleary recalled more than once he discovered Mr. Smith in their cell, "sitting in his socks and the whole toe of his socks [was] just blood red. And I will say, Man, what did you do? He'll say, Oh, I was trying to cut my toenails and slipped again." *Atkins* Tr. Def. Ex. B at 17. Cleary would often "do first aid on [Smith's] toes and put Band-Aids on him and stuff." *Id.* at 18.

REASONS FOR DENYING THE WRIT

In an effort to secure the execution of a man whom multiple experts have found to be intellectually disabled and not one expert has concluded otherwise, Petitioner raises numerous procedural arguments attacking the Tenth Circuit's finding that a reasonable jury would have been compelled to conclude Mr. Smith satisfied that he suffers from deficits in two areas of adaptive functioning. *Smith,* 935 F.3d at 1088.[15] Resp. App. 25. And with Petitioner having conceded at oral argument that Mr. Smith demonstrated significant limitations in the adaptive-functioning category of academics, *id.* at 1085, Resp. App. 22, what stands between the execution of a profoundly impaired and intellectually disabled man is the determination that a reasonable jury would have been compelled to conclude Mr. Smith established only one other adaptive-functioning category.

I. THE TENTH CIRCUIT'S HOLDING THAT *MOORE I* AND *MOORE II* MAY BE APPLIED RETROACTIVELY ON COLLATERAL REVIEW IS NOT CONTRARY TO *SHOOP V. HILL*,[16] AND NO SIGNIFICANT CIRCUIT SPLIT EXISTS AS A RESULT OF THE TENTH CIRCUIT'S DECISION.

A. The Tenth Circuit's Conclusion that *Moore I* and *Moore II* May Be Applied Retroactively on Collateral Review, Unrestrained by AEDPA, Is Not Contrary to *Hill*.

Petitioner argues the Tenth Circuit's conclusion that *Moore I* and *Moore II* apply retroactively on collateral review because they are mere extensions of *Atkins* "has *essentially* already been rejected by this Court." Petition at 20 (emphasis added). This Court has done no such thing. In *Hill*, a case that turned on 28 U.S.C. § 2254(d)(1), 139 U.S. at 509, this Court found "[t]he Court of

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[15] Petitioner raises no challenge to the circuit court's finding that the OCCA's disposition of the first prong was unreasonable under AEDPA review. And Petitioner conceded at oral argument there exists insufficient evidence for a jury to conclude Mr. Smith's symptoms did not manifest before the age of 18. *Smith*, 935 F.3d 1083. Resp. App. 20.

[16] 139 S. Ct. 504 (2019) (per curiam).

Appeals' reliance on *Moore* [*I*] [to address the state court's overemphasis of adaptive strengths] was plainly improper under § 2254(d)(1)" because "*Moore* [*I*] . . . was not handed down until long after the state-court decisions."[17] *Id.* at 505. Because *Hill* turned on the application of § 2254(d)(1) to the court's analysis of the adaptive-behavior prong, the circuit court was constrained to consider only Supreme Court precedent clearly established at the time of the state adjudication as required under AEDPA. 28 U.S.C. § 2254(d)(1).

But contrary to *Hill*, in Mr. Smith's case the Tenth Circuit was *not* constrained by AEDPA's clearly established federal law requirement of § 2254(d)(1) because the OCCA did not adjudicate the merits of the adaptive-functioning prong of the *Murphy*/*Atkins* test. *Hill*, 139 S. Ct. at 506; *Smith*, 935 F.3d at 1083. Resp. App. 20; *see infra* at 29-31 (discussing the Tenth Circuit's proper application of de novo review to this prong). This critical distinction between *Hill* and Mr. Smith's case makes *Hill* inapposite.

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[17]The Supreme Court remanded Mr. Hill's case back to the Sixth Circuit to determine whether the circuit court's conclusions could "be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time." 139 S. Ct. at 509. Very recently, the Sixth Circuit answered this Court's question. In *Hill v. Anderson*, Nos. 99-4317/14-3718, 2020 WL 2551881, at *16 (6th Cir. May 20, 2020), the court held:

> [T]he Ohio courts' legal conclusions [regarding adaptive functioning] breach the most basic tenets of *Atkins*, and . . . their factual findings cannot be sustained on this record. *Atkins*, on its most basic level, forbids the execution of persons who are intellectually disabled. . . . This is not a case where evidence of intellectual disability comes out after conviction. Hill was diagnosed as intellectually disabled from a very young age. He attended special education classes. . . . Even if *Atkins* alone (without the assistance of *Moore*) poses no bar to offsetting adaptive deficiencies with adaptive strengths, "the Ohio courts failed to grapple with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses." . . . There is no getting around it – Hill is intellectually disabled. To deny the obvious is unreasonable.

Although the Tenth Circuit's analysis of the adaptive-behavior prong was not constrained by AEDPA, it remained subject to the general rule for retroactive application of the law to convictions under collateral attack. The retroactivity of this Court's criminal procedure decisions depends on whether such decisions are novel. *Teague v. Lane*, 489 U.S. 288, 301 (1989).[18] When the Supreme Court announces a new rule, a person whose conviction is already final many not benefit from the decision in a habeas or similar proceeding. *Chaidez v. United States*, 568 U.S. 342, 347 (2013). "[A] case announces a new rule," *Teague* explained, "when it breaks new ground or imposes a new obligation" on the government.[19] *Id.* But "*Teague* also made clear that a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez,* 568 U.S. at 347-48 *(*quoting *Teague*, 489 U.S. at 307). "'Where the beginning point'" of the Court's analysis is a rule of "'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.'" *Chaidez*, 568 U.S. at 348 (quoting *Wright v. West*, 505 U.S. 277, 309 (1992)). If the rule is not new, the petitioner may "avail herself of the decision on collateral review." *Chaidez*, 568 U.S. at 347.

Glossing over the critical distinction between *Hill*'s § 2254(d)(1)-constrained status and Mr. Smith's §2254(d)-free status, Petitioner posits the Tenth Circuit's holding that *Moore I* and *Moore II* may be applied retroactively on collateral review is contrary to *Hill*. Petition at 20-21. Specifically, Petitioner argues this Court "expressly reject[ed]" the Sixth Circuit's assertion that the holding in

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[18] As Petitioner concedes, *Teague*'s retroactivity was not at issue in *Hill*. Petition at 21.

[19] *Teague* included two exceptions: "[W]atershed rules of criminal procedure" and rules placing "conduct beyond the power of the [government] to proscribe" apply on collateral review, even if novel. *Chaidez*, 568 U.S. at 347 n.3.

Moore was "merely an application of what was clearly established by *Atkins*." *Id.* Petitioner pointed to the following passage:

> Although the Court of Appeals asserted that the holding in *Moore* was "merely an application of what was clearly established by *Atkins*," . . . the court 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."

Hill, 139 S. Ct. at 508. Contrary to the Sixth Circuit, the Tenth Circuit explicitly "teased out" why and how this Court's "post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case." *Smith*, 935 F.3d at 1084. Resp. App. 21. Concluding the post-*Atkins* cases do not constitute a new rule, *id.*, the Tenth Circuit highlighted this Court's explanation in *Hall*:

> *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection. The *Atkins* Court twice cited definitions of intellectual disability. . . . *Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. . . . The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. . . If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. *This Court thus reads Atkins to provide substantial guidance on the definition of intellectual disability.*

Smith, 935 F.3d at 1084 (quoting *Hall*, 572 U.S. at 719-21). Resp. App. 21.

Much like *Strickland v. Washington*, 466 U.S. 668 (1984), *Atkins* declared "a rule of general application[20] . . . designed for the specific purpose of evaluating a myriad of factual contexts." *Chaidez*, 568 U.S. at 348. And the application of this rule to *Moore I*, and *Moore II* did not "yield[]

[20]Courts have recognized *Atkins* announced a general standard. *See, e.g., Hill v. Humphrey*, 662 F.3d 1335, 1379 (11th Cir. 2011) (Wilson, J., dissenting).

a result so novel that it forges a new rule, one not dictated by precedent," *Chaidez*, 568 U.S. at 348, especially in light of this Court's proclamation in *Hall* that "*Atkins* . . . provide[s] substantial guidance on the definition of intellectual disability." *Hall*, 572 U.S. at 721. The Tenth Circuit's holding that *Moore I* and *Moore II* may be applied retroactively on collateral review is proper and supported by this Court's jurisprudence.[21]

Even if this Court were to find *Moore I* and *Moore II* were not retroactively applicable on collateral review, the application of *Atkins* alone would yield the same result as it did in *Hill v. Anderson*: A reasonable jury would have been compelled to conclude Mr. Smith suffers from significant limitations in at least two of the areas of adaptive functioning listed in *Murphy*.[22] *See, e.g., Hill v. Anderson*, 2020 WL 2551881 (6th Cir. May 20, 2020). The State's only expert conducted no formal adaptive-behavior assessment (and could not even conclude Mr. Smith was "not mentally retarded"). Meanwhile, defense expert Dr. Hopewell conducted The Vineland Adaptive Behavior Scales and concluded that Mr. Smith suffers from significant deficits in at least five of the nine areas assessed by the test: academics, social skills, home living, and health and safety. *Smith*, 935 F.3d at 1085. Resp. App. 22. And while *Moore I* and *Moore II* strengthen the conclusion Mr. Smith suffers from significant limitations in at least two areas of adaptive functioning, *Atkins* alone mandates that conclusion. "*Atkins*, on its most basic level, forbids the execution of persons who are intellectually

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[21] Alternatively, should this Court find that *Moore I* and *Moore II* are not mere extensions of *Atkins*, then they are new substantive decisions of constitutional law that change the class of individuals that States may punish, or the range of punishments that States may impose. *See, e.g., Saffle v. Parks*, 494 U.S. 484, 494-95 (1990). *See supra* at n.19 (discussing *Teague* exceptions).

[22] Those areas include communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work. *Murphy*, 54 P.3d at 567-68. Petitioner made the burden even easier after conceding at oral argument that Mr. Smith proved significant limitations in the academics category. *Smith*, 935 F.3d at 1085. Resp. App. 22.

disabled." *Hill,* 2020 WL 2551881, at *16. And based on the evidence, Mr. Smith suffers from the lifelong condition of intellectual disability.

B. No Real Circuit Split Exists as a Result of the Tenth Circuit's Decision, and the Cases Cited by Petitioner Are Distinguishable from Mr. Smith's Case.

A review of the cases cited by Petitioner shows the Tenth Circuit's opinion did not create a circuit split. Petitioner first cites *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330 (11th Cir. 2019) for the proposition the Eleventh Circuit held *Moore I* announced a new rule that cannot be applied retroactively because such rule did not meet either of *Teague*'s two exceptions. Petition at 22. But Petitioner fails to explain the petitioner in *Smith* conceded *Moore I* announced a new rule of constitutional law. *Id.* at 1337-38. There, the petitioner argued the rule was substantive and met *Teague*'s first exception and therefore was retroactive. Because the petitioner conceded the rule was new, the question left for the court was whether such new rule was procedural or substantive for the purpose of meeting a *Teague* exception. *Id.* Ultimately, the court found the conceded new rule was procedural rather than substantive and did not meet *Teague*'s second exception; hence, the new rule was not retroactively applicable. *Id.* at 1339-40. In contrast to the petitioner in *Smith*, in the instant case, Mr. Smith never conceded *Moore I* or *II* announced a new rule. Instead, the argument here is that *Moore I* and *Moore II* did *not* announce a new rule; rather, they were merely applications of *Atkins.* Because the Eleventh Circuit was not asked to decide whether *Moore I* announced a new rule, there is no real split between the two circuits on the relevant threshold issue.

Petitioner next relies on *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) (unpublished) for the proposition that *Hall* and *Moore I* "merely created new procedural requirements that do not amount to watershed rules of criminal procedure." Petition at 22. But again, Petitioner omits

important details from *Payne* that would ameliorate any perceived "split." In *Payne*, the petitioner sought authorization to file a successive § 2254 petition, and as a result, he had to show *Hall* and *Moore I* announced new rules of constitutional law that the Supreme Court had made retroactive to cases on collateral review. 722 F. App'x at 536. The Sixth Circuit made clear it was not deciding whether *Moore* announced a new rule. Instead it found "[e]ven if we assume, without deciding, that *Hall* and *Moore* announce new rules of constitutional law, Payne has not shown that these decisions apply retroactively." *Id*. at 538. The Sixth Circuit specifically addressed the possibility that these cases did not announce new rules: "The Supreme Court, for instance, could hold in a new case that *Hall* and *Moore* merely clarify *Atkins* rather than establish separate rules, or that *Hall* and *Moore* prescribe procedural rather than substantive requirements for the application of *Atkins*." *Id.* at 539. *Payne* makes clear the Sixth Circuit did not decide whether *Moore* announced a new rule.

Finally, Petitioner relies on *Ybarra v. Filson*, 869 F.3d 1016, 1025 n.9 (9th Cir. 2017), ostensibly to show a deeper circuit split.[23] Petition at 23. Petitioner plucks the following statement, located in a footnote, from *Ybarra*: "*Moore* [*I*]. . . changed the course of the Supreme Court's intellectual disability jurisprudence." Petition at 23. The Ninth Circuit did not hold that *Moore I* was a new rule. Ultimately, the circuit court found the district court erred in its AEDPA analysis and remanded the case because the district court "overlooked a number of instances where [the state court] contradicted the very clinical guidelines that it purported to apply." *Id.* at 1023.

The Tenth Circuit's opinion does not create the purported circuit split about which Petitioner complains. Petitioner provides no reason for this Court to grant certiorari.

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[23]Petitioner admitted the court in *Ybarra* was addressing AEDPA as opposed to *Teague*. Petition at 23.

II. THE TENTH CIRCUIT PROPERLY APPLIED DE NOVO REVIEW TO ITS ANALYSIS OF THE ADAPTIVE-FUNCTIONING PRONG BECAUSE THE OCCA DID NOT ADJUDICATE THIS PRONG ON THE MERITS.

In an attempt to persuade this Court the Tenth Circuit disregarded the plain language of the OCCA's opinion, Petitioner provides an excerpt of the OCCA's concluding paragraph addressing Mr. Smith's challenge to the jury's verdict. But such excerpt omits relevant language supporting the Tenth Circuit's conclusion that the OCCA did not adjudicate the adaptive-functioning prong on the merits. Specifically, Petitioner characterized the OCCA's dispositive paragraph as follows: "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 to the adaptive-functioning prong, *e.g.,* Petitioner's job history." Petition at 23-24 (quoting *Atkins* Slip Op. at 11). But the language Petitioner omitted is telling. The entire paragraph to which Petitioner refers reads as follows:

> 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.[24] 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.

Atkins Slip Op. at 11. Resp. App. 40. This language referred to the first prong of the *Murphy* definition of intellectual disability, detailing each component of significantly sub-average intellectual

[24]This sentence mimics verbatim the *Murphy* considerations for the intellectual-functioning prong. *See Murphy,* 54 P.3d at 567 (stating the first prong of *Murphy* considers "[i]f he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

functioning and explaining that Mr. Smith failed to meet that prong. *Smith*, 935 F.3d at 1075. Resp. App. 12. Noticeably absent from the court's dispositive paragraph is a conclusion as to whether Mr. Smith met the adaptive-functioning prong.

Admittedly, elsewhere in its opinion, the OCCA made the following statement about adaptive functioning: "[T]he State presented . . . lay witnesses to refute Smith's evidence of . . . adaptive functioning deficits." *Atkins* Slip Op. at 8. Resp. App. 37. This statement is analogous to a statement leading the Seventh Circuit to conclude the state court made no merits adjudication on the adaptive-functioning prong. *See Pruitt v. Neal*, 788 F.3d 248, 269 (7th Cir. 2015) (holding state court's statement that "the evidence on the adaptive behavior prong is at least conflicting" made nothing more than a cursory reference to the evidence presented about the defendant's adaptive behavior and did not adjudicate the prong on the merits).

Petitioner accuses the Tenth Circuit of imposing "mandatory opinion-writing standards" on the OCCA Petition 24. Although this Court has held "federal courts have no authority to impose mandatory opinion-writing standards on state courts," *Johnson v. Williams* 568 U.S. 289, 300 (2013), "[i]t remains the duty of the federal courts . . . to determine the scope of the relevant state court judgment," *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Rather than requiring the OCCA to use "particular language" as alleged by Petitioner, Petition at 24-25, the Tenth Circuit simply had no decision on the adaptive-functioning prong to which it could defer.

Moreover, Petitioner accuses the Tenth Circuit of "improperly fail[ing] to give the OCCA's decision the benefit of the doubt" with respect to determining whether a claim has been adjudicated on the merits. Response at 25 (citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). But *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011) established only a rebuttable presumption that

the state court has adjudicated a claim on the merits. *See also Wilson v. Sellers*, 138 S. Ct. 1188, 1195 (2018) (internal quotation marks omitted) ("*Richter* . . . set[] forth a presumption, which may be overcome when there is reason to think some other explanation for the state court's decision is more likely"). The *Richter* presumption controls if a state court summarily resolves a claim without explanation, but the presumption is overcome as to unadjudicated prongs of a claim if a state court provides a reasoned explanation that rests exclusively on one prong of a multi-prong analysis. *See Mann v. Ryan*, 828 F.3d 1143, 1167 n.3 (9th Cir. 2016) (Thomas, C.J., concurring in part). That is precisely what happened here. The OCCA disposed of Mr. Smith's sufficiency/*Atkins* claim by adjudicating the first prong only. Disposing of a multi-prong claim by adjudicating one prong is proper. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

With respect to Petitioner's complaint about the Tenth Circuit's sua sponte application of de novo review to the analysis of the adaptive-behavior prong, numerous circuits "have concluded that the standard of review under AEDPA cannot be waived by the parties." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (citing *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008), *overruled on other grounds by Williams v. Lafler*, 494 Fed. App'x 526 (6th Cir. 2012); *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003); *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001)). Since *Gardner*, more circuits have held similarly. In 2019, the Fourth Circuit held "'parties cannot waive the proper standard of review by failing to argue it' or by consenting to an incorrect standard." *United States v. Venable*, 943 F.3d 187, 192 (4th Cir. 2019) (quoting *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 286 (4th Cir. 2018)). In 2017, the Third Circuit noted, "[P]arties cannot waive the application of AEDPA deference." *Gibson v. Sec'y Pennsylvania Dep't of Corr.,* 718 F. App'x 126, 130 n.3 (3d Cir. 2017) (unpublished). And in 2014, the Ninth Circuit explained the court

has "the obligation to apply the correct standard [to the habeas claim], for the issue is non-waivable."*Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014).

III. EVEN IF THIS COURT WERE TO FIND *MOORE I* AND *MOORE II* BARRED, MR. SMITH STILL WOULD BE ENTITLED TO HABEAS RELIEF.

Moore I and *Moore II* are not necessary for a finding that no rational juror could find against Mr. Smith on the adaptive-functioning prong. The clinical definitions mandated in *Atkins* alone make clear no reasonable jury could conclude Mr. Smith failed to establish by a preponderance of evidence that he suffers from deficits in at least two areas of adaptive functioning (and with the State's concession of the academics category, only one area must be established now).

First, Dr. Hopewell was the only expert to conduct a formal assessment (The Vineland) of Mr. Smith's adaptive functioning, and he concluded Mr. Smith suffers from profound deficits in at least five areas tested. Dr. Hopewell also administered the WRAT-III, and Mr. Smith scored at the kindergarten or first-grade level in each academic area. Dr. Hopewell found Mr. Smith is functionally illiterate, unable to read more than a few words at a very basic level. *Smith*, 935 F.3d at 1085. Resp. App. 22. And the clinical evidence Mr. Smith presented showing his many deficits in adaptive behavior was corroborated by the testimony of Mr. Smith's teachers for the educable handicapped.

In contrast to the standardized assessment of Mr. Smith's adaptive behavior presented by the defense, the State neither conducted nor presented a single assessment of Mr. Smith's adaptive behavior. *Id.* at 1085-86. Resp. App. 22-23. The only evidence the State presented to counter the clinical and educational evidence demonstrating Mr. Smith's adaptive-functioning deficits was lay stereotypes of the intellectually disabled presented through lay witnesses, many of whom spent little

time with Mr. Smith. For example, the State presented evidence of Mr. Smith's marriage, his affair, his holding a janitorial job, and his ability to lie and manipulate. Even the State's expert, Dr. Call, testified that intellectually disabled people can lie, be polite, hold a job, be hard workers, speak, take showers, dress themselves, watch and use the television, drive, cook, clean, use a telephone, get married, and love another person. *Atkins* Tr. VI 62-64. Petitioner has made no effort on appeal to provide any clinical justification that would render these stereotypes meaningful evidence of Mr. Smith's intellectual disability.

Such evidence would support a finding that a reasonable jury would have been compelled to conclude Mr. Smith established the adaptive-behavior prong, even with the enhanced deference AEDPA adds to the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard. This enhanced deference "does not imply abandonment or abdication of judicial review." *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); nor does it impose an "insurmountable barrier." *Smith*, 935 F.3d at 1077. Resp. App. 14. *See, e.g., Torres v. Lytle*, 461 F.3d 1303, 1313 (10th Cir. 2006) (even while applying *Jackson*, the court held the evidence was not sufficient to convict the petitioner "[e]ven under AEDPA's exponential deference. . . . . '[W]hile the jury may draw reasonable inferences from . . . evidence, an inference must be more than speculation and conjecture to be reasonable.'") Both the *Atkins* jury and the OCCA made unreasonable inferences and engaged in conjecture and speculation about persons with intellectual disability based on non-clinical stereotypes.

CONCLUSION

Petitioner has presented no compelling reason for this Court to grant certiorari review. Although Petitioner alleges the Tenth Circuit opinion creates a circuit split, upon closer examination of the cases cited by Petitioner, the supposed split disintegrates. The Tenth Circuit's decision does not conflict with Supreme Court precedent; nor does it present an important unsettled question of federal law. Petitioner complains the Tenth Circuit's unanimous decision "frustrates both the States's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," Petition at 29, and flies in the face of comity, finality, and federalism, *id*. at 30. But as much as AEDPA and *Teague* seek to protect federalism, finality, and comity, they also seek to ensure defendants are not sentenced to death in violation of the federal constitution. Mercifully, this Court can stop the execution of an obviously intellectually disabled man by denying the Petition for Certiorari.

Respectfully submitted,

s/ *Emma V. Rolls*
EMMA V. ROLLS, OBA # 18820*
THOMAS D. HIRD, OBA # 13580
Assistant Federal Public Defenders
Office of the Federal Public Defender
Western District of Oklahoma
Capital Habeas Unit
215 Dean A. McGee Ave., Suite 707
Oklahoma City, Oklahoma 73102
(405) 609-5975 - telephone
(405) 609-5976 - facsimile
Emma_Rolls@fd.org
Tom_Hird@fd.org

COUNSEL FOR RESPONDENT, RODERICK L. SMITH

Dated this 26th day of May, 2020 * Counsel of Record

Capital Case
Case No. 19-1106

TOMMY SHARP, Interim Warden,
Oklahoma State Penitentiary,
Petitioner,
v.
RODERICK L. SMITH,
Respondent.

TABLE OF CONTENTS

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITON

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any question concerning whether that argument was adequately preserved.

The government now concedes that it never presented or argued to the district court or to us that § 3583(k)'s constitutional infirmity could be remedied by empaneling a jury. Therefore, the issue is not preserved. Mot. to Dismiss at 2. Further, the government states in its supplemental briefing that "even if this Court were to adopt the government's remedial argument, [it] would not seek a jury trial in this case" and that the district court's February 14, 2018, resentencing ordering Haymond to a time-served term of imprisonment would "remain in effect."[6] Gov't Supp. Br. at 6. As a consequence, the government argues this case is moot because whatever remedial cure this court may now fashion for § 3583(k), it will have no effect in this case. Or, as stated by the government, "whatever the Court decides, Haymond's time-served term of imprisonment will stand." *Id.* at 8.

In response, Haymond agrees that the government failed to preserve the jury trial remedy or argue plain error on remand. Haymond agrees that "whether couched in terms of issue preservation or mootness, the government has abandoned" any jury trial remedy in Haymond's case. Haymond Supp. Reply Br. at 1.

As the jury remedy issue was not preserved by the government and would have no effect on Haymond's sentence even if reached, we grant the government's unopposed motion to dismiss.

6. We decline to adopt the government's subsequent suggestion that we "should vacate the district court's September 2016 judgment and remand for the district court to re-impose its February 2018 order reducing Mr. Haymond's term of imprisonment to time served." Gov't Supp. Br. at 10.

III

The appeal is dismissed.

Roderick L. SMITH, Petitioner - Appellant,

v.

Tommy SHARP, Interim Warden,* Oklahoma State Penitentiary, Respondent - Appellee.

No. 17-6184

United States Court of Appeals, Tenth Circuit.

FILED August 26, 2019

Background: Following affirmance of his murder convictions and death sentence, 932 P.2d 521, and denial of state postconviction relief, 955 P.2d 734, state inmate filed petition for writ of habeas corpus. The United States District Court for the Western District of Oklahoma denied petition, and petitioner appealed. The Court of Appeals, 379 F.3d 919, conditionally granted petition. After jury found him competent to stand trial, state court resentenced him to death. Following affirmance of that sentence, 306 P.3d 557, inmate again sought habeas relief. The United States District Court for the Western District of Oklahoma, No. 5:14-CV-00579-R, David L. Russell, Senior District Judge, 2017 WL

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Tommy Sharp, current Interim Warden of Oklahoma State Penitentiary, is automatically substituted for Mike Carpenter, Warden, as Respondent in this case.

2992217, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Lucero, Circuit Judge, held that:

(1) petitioner was intellectually disabled, and thus his execution would violate Eighth Amendment;

(2) state court's determination that petitioner failed to establish that he had sub-average intellectual ability was unreasonable;

(3) clinical standards endorsed by Supreme Court in *Atkins* were retroactively applicable on collateral review;

(4) lay testimony about petitioner's perceived adaptive strengths was insufficient to overcome expert testimony that defendant had significant limitations in adaptive functioning;

(5) determination that petitioner was not denied effective assistance of counsel at his competency and resentencing trials was reasonable.

Affirmed in part, reversed in part, and remanded.

1. Habeas Corpus ⚿842, 846

On appeal from orders denying writ of habeas corpus, Court of Appeals reviews district court's legal analysis of state court decision de novo and its factual findings, if any, for clear error.

2. Habeas Corpus ⚿452

Writ of habeas corpus may be granted only in cases where there is no possibility fairminded jurists could disagree that state court's decision conflicts with Supreme Court precedent. 28 U.S.C.A. § 2254(d)(1).

3. Habeas Corpus ⚿450.1

To obtain federal habeas relief, petitioner must show that state court's ruling on claim being presented in federal court was so lacking in justification that there was error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d)(1).

4. Habeas Corpus ⚿450.1, 452

Federal habeas court must ask at threshold whether there exists clearly established federal law, focusing exclusively on Supreme Court's holdings at time of state adjudication, and absence of clearly established federal law requires denial of relief. 28 U.S.C.A. § 2254(d)(1).

5. Habeas Corpus ⚿452

State-court decision is "contrary to" clearly-established federal law, thus warranting federal habeas relief, if state applies rule different from governing law set forth in Supreme Court cases, or if it decides case differently than Supreme Court has done on set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

6. Habeas Corpus ⚿450.1

State court decision that identifies correct governing legal principle from Supreme Court's decisions but unreasonably applies that principle to facts of petitioner's case is "unreasonable application" of clearly established federal law warranting federal habeas relief. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Habeas Corpus ⚿450.1

In order for state court's decision to be unreasonable application of Supreme Court's case law, ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice to warrant federal habeas relief. 28 U.S.C.A. § 2254(d)(1).

8. Habeas Corpus ⚿753

Federal habeas court may review only record that was before state court that adjudicated claim on merits. 28 U.S.C.A. § 2254.

9. Habeas Corpus ⚿450.1

State court's determination of facts is unreasonable, thus warranting federal habeas relief, if court plainly and materially misstated record or petitioner shows that reasonable minds could not disagree that finding was in error. 28 U.S.C.A. § 2254(d)(2).

10. Habeas Corpus ⚿765.1

Even in context of federal habeas, deference does not imply abandonment or abdication of judicial review. 28 U.S.C.A. § 2254(d).

11. Habeas Corpus ⚿450.1

If petitioner shows that state courts plainly misapprehend or misstate record in making their findings, and misapprehension goes to material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine fact-finding process, rendering resulting factual finding unreasonable and warranting federal habeas relief. 28 U.S.C.A. § 2254(d)(2).

12. Habeas Corpus ⚿842, 846

On issues not decided on merits by state court, Court of Appeals reviews district court's legal conclusions in habeas proceedings de novo and its factual findings for clear error. 28 U.S.C.A. § 2254(d).

13. Habeas Corpus ⚿841

In federal habeas proceeding, if district court based its factual findings related to issues that state court did not adjudicate on merits entirely on state court record, Court of Appeals reviews that record independently. 28 U.S.C.A. § 2254.

14. Habeas Corpus ⚿768

When federal claim has been presented to state court and state court has denied relief, federal habeas court may presume that state court adjudicated claim on merits in absence of any indication or state-law procedural principles to contrary. 28 U.S.C.A. § 2254(d).

15. Habeas Corpus ⚿766

In cases in which state court addresses only one prong of multi-prong analysis, federal habeas courts must address other prongs de novo. 28 U.S.C.A. § 2254.

16. Sentencing and Punishment ⚿1642

Capital defendant was intellectually disabled, and thus his execution would violate Eighth Amendment's prohibition against cruel and unusual punishment, where defendant had sub-average intellectual ability, his symptoms manifested before age of eighteen, and he suffered deficits in at least two areas of adaptive functioning—academics and communication. U.S. Const. Amend. 8; 28 U.S.C.A. § 2254(d).

17. Habeas Corpus ⚿766

For purposes of federal habeas relief, state court does not adjudicate claim on merits without addressing claim's factual basis. 28 U.S.C.A. § 2254(d).

18. Sentencing and Punishment ⚿1642, 1793

In determining whether defendant is intellectually disabled, such that imposition of death sentence would violate Eighth Amendment, intellectual disability must be assessed, at least in part, under existing clinical definitions applied through expert testimony. U.S. Const. Amend. 8.

19. Habeas Corpus ⚿508

State court's determination that petitioner failed to establish that he had sub-average intellectual ability, and thus

was eligible for death sentence, was unreasonable determination of facts or unreasonable application of clearly established federal law in *Atkins*, for purposes of determining his entitlement to federal habeas relief, despite state's expert's testimony that petitioner was likely malingering, and lay witnesses' testimony about his intellectual functioning, where every IQ test that petitioner took—including tests given in grade school—placed him firmly within intellectually disabled range, petitioner's high school teachers testified that he was one of lower functioning students in their educable mentally handicapped courses, two experts concluded that petitioner was intellectually disabled, and state's expert had no prior experience with intellectually disabled and could not conclusively contradict ultimate diagnosis of intellectual disability. U.S. Const. Amend. 8; 28 U.S.C.A. § 2254(d).

20. Courts ⚿100(1)
Criminal Law ⚿1456

To determine whether post-conviction constitutional rule applies to case on collateral review, court must first determine when defendant's conviction became final, and then must decide whether rule is actually new; if it is not new, defendant may avail herself of decision on collateral review, but if it is new, it is not retroactively applicable on collateral review unless it falls within exception to nonretroactivity.

21. Courts ⚿100(1)

Clinical standards endorsed by Supreme Court in *Atkins* to provide guidance in determining whether defendant has intellectual disability rendering him ineligible for death sentence did not announce new rule, and thus were retroactively applicable on collateral review.

22. Sentencing and Punishment ⚿1793

Evidence that rests on lay stereotypes about intellectually disabled, such as incorrect stereotypes that they cannot have jobs or relationships, is disfavored in evaluating defendant's adaptive functioning, as factor for determining whether he has intellectual disability that precludes his execution. U.S. Const. Amend. 8.

23. Sentencing and Punishment ⚿1793

Lay testimony about defendant's perceived adaptive strengths was insufficient to overcome expert testimony that defendant had significant limitations in adaptive functioning, as factor for determining whether he had intellectual disability rendering him ineligible for death sentence, where witnesses had no experience in diagnosing intellectual disabilities, and their testimony rested on lay stereotypes about intellectually disabled. U.S. Const. Amend. 8.

24. Criminal Law ⚿1602

Criminal defendants' constitutional right to counsel encompasses post-conviction proceedings to determine whether defendant is mentally retarded and thus entitled to protection under *Atkins* prohibition of execution of mentally retarded defendants. U.S. Const. Amends. 6, 8.

25. Criminal Law ⚿1881

Defendant can establish constitutional violation of right to counsel where counsel's performance was deficient, and deficient performance prejudiced defense. U.S. Const. Amend. 6.

26. Criminal Law ⚿1882

To establish deficient performance, defendant asserting claim of ineffective assistance of counsel must show that counsel's representation fell below objective standard of reasonableness as assessed from counsel's perspective at that time. U.S. Const. Amend. 6.

27. Criminal Law ⚿1882

In evaluating claim of ineffective assistance of counsel, court must determine

whether attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom. U.S. Const. Amend. 6.

28. Criminal Law ⚿1871

In evaluating claim of ineffective assistance of counsel, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in exercise of reasonable professional judgment. U.S. Const. Amend. 6.

29. Criminal Law ⚿1883

To establish prejudice, defendant asserting claim of ineffective assistance of counsel must show that, but for counsel's deficient performance, there is reasonable probability result of proceeding would have been different. U.S. Const. Amend. 6.

30. Criminal Law ⚿1886

In capital-sentencing context, if defendant demonstrates that there is reasonable probability that at least one juror would have refused to impose death penalty, defendant has successfully shown prejudice under *Strickland*. U.S. Const. Amend. 6.

31. Habeas Corpus ⚿486(2)

To assess whether inadequate investigation prejudiced habeas petitioner, for purposes of evaluating claim of ineffective assistance of counsel, court must reweigh evidence on both sides, this time accounting for petitioner's proposed additions, and for how state would have responded to omitted evidence. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

32. Habeas Corpus ⚿486(5)

State court's determination that petitioner was not denied effective assistance of counsel at his competency and resentencing trials in capital murder proceeding as result of counsel's decision not to call mental health worker at jail to testify and sponsor video recording of interview with him that allegedly would have shown his humanity and intellectual disability was not contrary to, or unreasonable application of, clearly established federal law under *Strickland*, and thus did not warrant federal habeas relief, even though counsel could not recall why she did not call witness to testify, and state court did not identify any strategic justification for failure to present her testimony and video, where counsel was aware of video, and its value was debatable. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:14-CV-00579-R)

Emma V. Rolls, Assistant Federal Public Defender (Thomas D. Hird, Assistant Federal Public Defender, with her on the briefs), Oklahoma City, Oklahoma, for Petitioner - Appellant.

Jennifer J. Dickson, Assistant Attorney General (Mike Hunter, Attorney General of Oklahoma, with her on the brief), Oklahoma City, Oklahoma, for Respondent - Appellee.

Before LUCERO, MATHESON, and PHILLIPS, Circuit Judges.

LUCERO, Circuit Judge.

Roderick Smith was sentenced to death by an Oklahoma state jury for the 1993 murders of his wife and four stepchildren. Before the resolution of Smith's collateral attacks on his convictions and sentence, the Supreme Court issued its decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), prohibiting the execution of the intellectually disabled.[1] Smith filed a successor application

1. The Supreme Court formerly employed the phrase "mentally retarded," but now "uses

in state court for post-conviction relief pursuant to Atkins, and the Oklahoma Court of Criminal Appeals ("OCCA") remanded the case to the Oklahoma County District Court for a jury trial to determine whether Smith was intellectually disabled. At the subsequent jury trial in 2004 (the "Atkins trial"), the jury found Smith was not intellectually disabled and allowed his execution to move forward. But our circuit then granted relief on Smith's previously filed habeas corpus petition in Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004), entitling him to resentencing. A jury found Smith competent to stand trial in 2009, and he was resentenced to death in 2010.

Smith again sought federal habeas relief. The district court denied relief in an unpublished opinion. Smith v. Royal, No. CIV-14-579-R, 2017 WL 2992217 (W.D. Okla. July 13, 2017) (unpublished). Before us, Smith alleges that the state prosecution in his Atkins, competency, and resentencing trials violated several of his constitutional rights, including his Eighth Amendment right against cruel and unusual punishment and his Sixth Amendment right to counsel. Specifically, Smith contends: (1) the Eighth and Fourteenth Amendments prohibit his execution because he is intellectually disabled; (2) the jury instruction requiring a finding that his intellectual disability was "present and known" before the age of eighteen violated Atkins; (3) counsel's failure to call an expert witness to testify about the employment capabilities of the intellectually disabled and prepare an additional adaptive functioning measurement denied him effective assistance of counsel during his Atkins trial; (4) counsel's failure to introduce video footage of Smith into the record denied him effective assistance of trial and appellate counsel in his competency and resentencing trials; and (5) cumulative error violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we reverse the district court's denial of habeas relief on Smith's Atkins challenge to the constitutionality of his execution. Because we grant relief on Smith's Atkins challenge, we need not address Smith's remaining claims concerning his Atkins proceeding. We otherwise affirm the district court's denial of Smith's § 2254 petition for a writ of habeas corpus. We remand with instructions to grant a conditional writ vacating Smith's death sentence and remanding to the State for a new penalty-phase proceeding.

I

A

Smith was convicted of the murder of his wife, Jennifer Smith, and her four children from a prior relationship. The following facts concerning the underlying offense are undisputed and taken from the opinion of the OCCA affirming Smith's convictions and sentences on direct appeal. Smith v. State, 932 P.2d 521, 526 (Okla. Crim. App. 1996).

On the morning of June 28, 1993, Jennifer Smith's mother called the police and asked them to check on her daughter, who had not been seen or heard from for ten days. When the responding officer arrived

the term 'intellectual disability' to describe the identical phenomenon,'' noting ''[t]his change in terminology is approved and used in the latest edition of the Diagnostic and Statistic Manual of Mental Disorders.'' Hall v. Florida, 572 U.S. 701, 704, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). Recently enacted federal legislation known as Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010), mandates the use of the term ''intellectual disability'' in place of ''mental retardation'' in all federal enactments and regulations. We accordingly use the term intellectual disability throughout this opinion, although many of the sources cited employ the old terminology.

at the residence where Smith and Jennifer lived with her four children, he smelled decaying flesh and observed many flies around the windows. The responding officer contacted his supervisor, and the officers entered the house together. They discovered the body of a woman in one closet, and the body of a child in another. The officers requested assistance from the homicide division of the police department, and the bodies of three more children were found. The bodies were identified as those of Jennifer and her four children, and were determined to have been dead for at least two days and up to two weeks.

Later that day, Smith walked into the Oklahoma County Sheriff's Office. He was then arrested by the Oklahoma City Police. Smith was interrogated and admitted that he had stabbed Jennifer and the two male children. Smith also admitted that he "got" the female children, but could not remember any details. He told the police where he had placed each of the bodies.

B

As summarized in Smith's first habeas case, Smith was tried and convicted before an Oklahoma County jury of five counts of first-degree murder. Smith v. Mullin, 379 F.3d at 924. The jury recommended sentences of death on each count, and the Oklahoma court agreed. Smith filed an unsuccessful direct appeal with the OCCA, Smith v. State, 932 P.2d at 539, and the Supreme Court denied his petition for writ of certiorari. Smith v. Oklahoma, 521 U.S. 1124, 117 S.Ct. 2522, 138 L.Ed.2d 1023 (1997). He subsequently filed an unsuccessful application for post-conviction relief in the Oklahoma courts. Smith v. State, 955 P.2d 734 (Okla. Crim. App. 1998). Smith did not seek Supreme Court review of the OCCA's denial of post-conviction relief.

Smith then filed his first habeas corpus action, and the district court denied relief. Smith v. Gibson, No. CIV-98-601-R (W.D. Okla. Jan. 10, 2002) (unpublished). Smith appealed to this court. Pending the resolution of that appeal, the Supreme Court held the Eighth Amendment prohibits the execution of the intellectually disabled. Atkins, 504 U.S. at 321, 112 S.Ct. 1904. The state provided Smith a jury trial to prove that he is intellectually disabled, bifurcating the further adjudication of Smith's challenges into an Atkins trial (and subsequent appeals) and the federal habeas claims that developed out of his initial conviction and sentencing.

Smith's first Atkins trial ended in a mistrial, but a state jury eventually concluded that he was not intellectually disabled. Smith appealed to the OCCA, which affirmed the jury's verdict. Smith v. State, No. O-2006-683 (Okla. Crim. App. Jan. 29, 2007) (unpublished) ("OCCA's Atkins Op.").

Shortly after Smith's Atkins trial, however, this court granted in part Smith's habeas petition, entitling Smith to resentencing due to ineffective assistance of counsel. Smith v. Mullin, 379 F.3d 919. We specifically held counsel's failure to introduce any mitigation evidence regarding Smith's intellectual disability, brain damage, and troubled background denied Smith effective assistance of counsel during his sentencing proceedings. Id. at 940-44. Prior to the resentencing proceedings, Smith received a jury trial to determine his competence. The jury found Smith competent, and he was resentenced in 2010. At the resentencing, the jury imposed two death sentences and three sentences of life without the possibility of the parole. Following those jury trials, Smith appealed the resentencing and competency determinations, and the effectiveness of counsel in those proceedings. The OCCA affirmed. Smith v. State, 306 P.3d 557 (Okla. Crim. App. 2013), cert. denied, 572

U.S. 1137, 134 S. Ct. 2662, 189 L.Ed.2d 213 (2014). Smith applied for but failed to obtain post-conviction relief in state court. Smith v. State, No. PCD-2010-660 (Okla. Crim. App. Feb. 13, 2014) (unpublished) ("OCCA's Resentencing and Competency Op.").

Smith then filed a second habeas petition in federal court, bringing claims related to: (1) sufficiency of evidence supporting the jury's determination that he was not intellectually disabled; (2) purported irregularities in his Atkins trial; and (3) ineffective assistance of counsel during his Atkins, competency, and resentencing trials. The district court denied relief on all counts. We granted certificates of appealability as to: (1) sufficiency of evidence as to the jury's determination that Smith was not intellectually disabled at his Atkins trial; (2) his Atkins challenge to language in the jury instructions at that trial; and (3) various effectiveness of counsel claims during his Atkins, competency, and resentencing trials.

II

[1] On appeal from orders denying a writ of habeas corpus, "we review the district court's legal analysis of the state court decision de novo and its factual findings, if any, for clear error." Michael Smith v. Duckworth, 824 F.3d 1233, 1241-42 (10th Cir. 2016) (quotation omitted). But "[t]he Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") circumscribes our review of federal habeas claims that were adjudicated on the merits in state-court proceedings." Grant v. Royal, 886 F.3d 874, 888 (10th Cir. 2018) (quotation omitted), cert. denied sub nom. Grant v. Carpenter, —— U.S. ——, 139 S. Ct. 925, 202 L.Ed.2d 659 (2019). Under AEDPA, a petitioner may obtain federal habeas relief on a claim only if the state court's adjudication of the claim on the merits: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(1), (2).

[2, 3] The Supreme Court has explained that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quotation omitted). That is, the writ may be granted only "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent, id. at 102, 131 S.Ct. 770, and petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," id. at 103, 131 S.Ct. 770.

[4] Applying § 2254(d)(1)'s legal inquiry, "we ask at the threshold whether there exists clearly established federal law, an inquiry that focuses exclusively on holdings of the Supreme Court." Grant, 886 F.3d at 888 (quotation omitted). "The absence of clearly established federal law is dispositive" and requires the denial of relief. Id. at 889 (quotation omitted). And that Supreme Court precedent must have been "clearly established at the time of the [state] adjudication." Shoop v. Hill, —— U.S. ——, 139 S. Ct. 504, 506, 202 L.Ed.2d 461 (2019) (per curiam) (quotation omitted).

[5–8] "If clearly established federal law exists, a state-court decision is contrary to it if the state applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a

case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." Hooks v. Workman, 689 F.3d 1148, 1163 (10th Cir. 2012) (quotation omitted). A state court decision that "identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of petitioner's case" is an "unreasonable application" of clearly established federal law. Wiggins v. Smith, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (quotation omitted). "In order for a state court's decision to be an unreasonable application of th[e Supreme] Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." Virginia v. LeBlanc, —— U.S. ——, 137 S. Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (quotation omitted). Under § 2254(d)(1), we review only the record that was before the state court that adjudicated the claim on the merits. Cullen v. Pinholster, 563 U.S. 170, 180, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

[9–11] Applying § 2254(d)(2)'s factual inquiry, we "conclude that a state court's determination of the facts is unreasonable" if "the court plainly and materially misstated the record or the petitioner shows that reasonable minds could not disagree that the finding was in error." Michael Smith, 824 F.3d at 1250. But "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." Brumfield v. Cain, —— U.S. ——, 135 S. Ct. 2269, 2277, 192 L.Ed.2d 356 (2015). And if the petitioner shows "the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." Byrd v. Workman, 645 F.3d 1159, 1171-72 (10th Cir. 2011).

[12, 13] "The § 2254 standard does not apply to issues not decided on the merits by the state court." Welch v. Workman, 639 F.3d 980, 992 (10th Cir. 2011). On those unadjudicated issues, "we review the district court's legal conclusions de novo and its factual findings for clear error." Id. "[I]f the district court based its factual findings" related to issues that the state court did not adjudicate on the merits "entirely on the state court record, we review that record independently." Id.

[14, 15] "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Richter, 562 U.S. 86 at 99, 131 S.Ct. 770. But the petitioner may rebut the presumption that the state court adjudicated the petitioner's claim on the merits. As discussed in more detail below, in cases in which a state court addresses only one prong of a multi-prong analysis, the Supreme Court requires that federal habeas courts address the other prongs de novo. See Porter v. McCollum, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) ("Because the state court did not decide whether [petitioner's] counsel was deficient, we review this element of [petitioner's] Strickland claim de novo."); Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the Strickland claim de novo." (citation omitted)); Wiggins, 539 U.S. at 534, 123 S.Ct. 2527 (same); see also Grant, 886 F.3d at 910 ("Because the OCCA did not—by the plain terms of its ruling—reach the prejudice question, we resolve this overarching question de novo."); Hooks, 689 F.3d at 1188 ("[I]n those instances where the OCCA did not

address the performance prong of Strickland and we elect to do so, our review is de novo.").[2]

And as with un-adjudicated prongs of Strickland's two-part analysis, we review un-adjudicated prongs of Atkins' three-part analysis de novo. As the Supreme Court explained in Brumfield, if the relevant state "court never made any finding that [petitioner] failed to produce evidence suggesting he could meet" one of the Atkins prongs, federal habeas courts review that prong of the Atkins analysis de novo because "[t]here is thus no determination on that point to which a federal court must defer in assessing whether [petitioner] satisfied § 2254(d)." 135 S. Ct. at 2282; see also Pruitt v. Neal, 788 F.3d 248, 269 (7th Cir. 2015) ("While the [state] court noted that 'the evidence on the adaptive behavior prong is at least conflicting,' it did not actually conclude that [petitioner] failed to establish substantial impairment of adaptive behavior. Thus, we review this prong de novo." (citation omitted)).

III

[16] Smith appeals the district court's denial of habeas relief on five grounds. With respect to his Atkins trial, Smith asserts: (1) he is intellectually disabled and his execution would violate Atkins; (2) flawed jury instructions rendered his Atkins trial fundamentally unfair; and (3) ineffective assistance for his counsel's failures to investigate and call an expert specializing in the employment capabilities of the intellectually disabled, and to refute the State's impeachment of Smith's adaptive functioning measurement. Because we grant habeas relief on Smith's claim that his execution would violate Atkins, we need not address the remaining claims concerning his Atkins trial.

With respect to his competency and resentencing trials, Smith asserts he was

2. As we have previously observed, there is "some possible tension between" the language in Richter requiring federal habeas courts to grant AEDPA deference to the adjudication of claims, not arguments, and "the approach of Wiggins and its progeny where" we deny AEDPA deference to the "portion of a Strickland claim . . . not reached by a state court." Grant, 886 F.3d at 910 (quotation omitted) (citing McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 100 n.10 (3d Cir. 2012)). But even after Richter, this court has denied AEDPA deference to the unadjudicated prejudice prongs of a broader Strickland habeas claim. See id. And so, too, has the Supreme Court denied AEDPA deference to the unadjudicated prong of a broader Atkins habeas claim. See Brumfield, 135 S. Ct. at 2282.

Moreover, Richter establishes only a rebuttable presumption that the state court has adjudicated a claim, or portions of that claim. See Wilson v. Sellers, —— U.S. ——, 138 S. Ct. 1188, 1195, 200 L.Ed.2d 530 (2018) ("Richter . . . set[ ] forth a presumption, which may be overcome when there is reason to think some other explanation for the state court's decision is more likely." (quotation omitted)). Supreme Court precedent indicates the presumption of adjudication of an entire claim on the merits outlined in Richter is overcome as to components of that claim if, as in Wiggins, a state court decision explicitly rests its analysis on a particular prong of a claim without deciding the claim's other prongs. Porter, 558 U.S. at 39, 130 S.Ct. 447 (2009). In other words, the Richter presumption controls if a state court summarily resolves a claim without explanation, but the presumption is overcome as to unadjudicated prongs of a claim if a state court provides a reasoned explanation that rests exclusively on one prong of a multi-prong analysis. See Mann v. Ryan, 828 F.3d 1143, 1168 (9th Cir. 2016) ("This distinction between AEDPA review of summary denials and partial adjudications is apparent in post-Richter Supreme Court caselaw, which applies de novo review to unanalyzed portions of multi-prong tests."); Grueninger v. Dir., Vir. Dep't of Corr., 813 F.3d 517, 526 (4th Cir. 2016) ("[T]he Richter rule requiring deference to hypothetical reasons a state court might have given for rejecting a federal claim is limited to cases in which no state court has issued an opinion giving reasons for the denial of relief." (quotation and alteration omitted)).

denied effective assistance of trial and appellate counsel for counsel's failure to call Anna Wright, a mental health worker at the Oklahoma County jail, to testify and sponsor the introduction of a video recording of Smith speaking. Smith also asserts cumulative error.

A

Smith first argues he cannot legally be executed pursuant to Atkins because he is intellectually disabled. At the time of Smith's Atkins trial, the OCCA implemented Atkins' prohibition on the execution of the intellectually disabled through its decision in Murphy v. State, 54 P.3d 556 (Okla. Crim. App. 2002), overruled in part on other grounds by Blonner v. State, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). In that case, the OCCA articulated the following definition of intellectual disability:

> A person is "mentally retarded": (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work. It is the defendant's burden to prove he or she is mentally retarded by a preponderance of the evidence at trial. Intelligence quotients are one of the many factors that may be considered, but are not alone determinative. However, no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligent quotient test.

Id. at 567-68. Smith contends that based on the evidence presented, a reasonable jury would be compelled to find he was intellectually disabled.

1

Smith argued insufficiency of evidence to the OCCA in his direct appeal from the jury verdict following his Atkins trial. OCCA Atkins Op. at 6. The OCCA concluded that "Smith failed to meet even the first prong of the Murphy definition of mental retardation" because "[t]he 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." Id. at 11. Accordingly, to prevail on this sufficiency of evidence challenge, Smith must demonstrate the OCCA's decision that he failed to establish significantly sub-average intellectual functioning was contrary to, or an unreasonable application of, Atkins, or an unreasonable determination of the facts. Hooks, 689 F.3d at 1165 ("A sufficiency-of-the-evidence challenge in a habeas petition presents a mixed question of fact and law .... which is why we apply both 28 U.S.C. § 2254(d)(1) and (d)(2) when reviewing sufficiency of the evidence on habeas." (quotation omitted)); see also Brown v. Sirmons, 515 F.3d 1072, 1089 (10th Cir. 2008).[3]

3. Because the law of our circuit clearly states that a sufficiency of evidence challenge necessarily "presents a mixed question of law and fact," Hooks, 689 F.3d at 1165, and Smith presented a sufficiency of evidence challenge before the district court, we reject the State's contention that Smith forfeited § 2254(d)(2)

But the OCCA did not adjudicate on the merits Smith's challenge to the sufficiency of evidence on either the age-of-onset or the deficits in adaptive functioning prongs of Murphy, meaning there exists no state court decision to which we must defer under AEDPA. Grant, 886 F.3d at 888 ("[AEDPA] circumscribes our review of federal habeas claims that were adjudicated on the merits in state-court proceedings." (quotation omitted)). Specifically, the OCCA made no mention of the age-of-onset requirement beyond including it in the general definition of intellectual disability in the section of its opinion addressing Smith's sufficiency of evidence challenge. OCCA Atkins Op. at 6-11. And although the OCCA noted "the State presented persuasive evidence from lay witnesses to refute Smith's evidence of ... adaptive functioning deficits," id. at 8, it reached no conclusions regarding the adaptive functioning prong.

[17] Instead, the OCCA's dispositive language rejecting Smith's sufficiency of evidence claim referred only to the first prong of the Murphy definition of intellectual disability, detailing each component of significantly sub-average intellectual functioning and explaining that Smith failed to meet that prong. Id. at 11. The OCCA neither addressed how a rational jury could have viewed the adaptive functioning evidence, nor concluded that the "evidence presented at trial support[ed]" a finding of deficits in adaptive functioning, as it stated for the intellectual functioning prong. Id. And a state court does not adjudicate a claim on the merits without addressing the claim's factual basis. See Fairchild v. Workman, 579 F.3d 1134, 1149 (10th Cir. 2009) ("A claim is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis." (citation omitted)).

Moreover, the OCCA couches the entirety of its discussion regarding the "persuasive evidence" in terms relevant to the intellectual functioning prong of Murphy, stating the evidence "portrayed Smith as a person who is able to understand and process information, to communicate, to understand the reactions of others, to learn from experiences or mistakes, and to engage in logical reasoning." OCCA Atkins Op. at 11. These are Murphy's intellectual functioning categories. Although they may overlap with the adaptive functioning skills, the psychological terms are different. And even if evidence supporting these intellectual functioning findings could be relevant to the adaptive functioning prong, we cannot ignore the fact that the OCCA addresses this evidence exclusively in the context of Murphy's definition of the intellectual functioning prong. Compare id. with Murphy, 54 P.3d at 567-68 (defining the intellectual functioning prong as "[i]f he or she functions at a significantly subaverage intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others"). The OCCA made no attempt to connect the evidence it considered relevant to the intellectual functioning prong to Murphy's adaptive functioning categories. After acknowledging the adaptive functioning categories in a footnote at the beginning of its opinion, see OCCA Atkins Op. at 6 n.8, the OCCA did not mention them at all.

The OCCA's statement that comes closest to adjudicating on the merits the third Murphy prong closely resembles the relevant state court statement in Pruitt. Compare 788 F.3d at 269 ("the evidence on the adaptive behavior prong is at least conflict-

arguments by failing to raise them expressly below.

ing") with OCCA Atkins Op. at 8 ("the State presented persuasive evidence from lay witnesses to refute Smith's evidence of subaverage intellectual function and of adaptive functioning deficits"). As the Seventh Circuit similarly concluded, such a cursory reference to the evidence presented absent any conclusion does not constitute an adjudication on the merits. Pruitt, 788 F.3d at 269. We determine the OCCA resolved the intellectual disability issue on the intellectual functioning prong and did not address the other two prongs of the Murphy test.

As explained above, if the state court explicitly relies on one element of a multi-element test to the exclusion of others, we review challenges to the remaining elements de novo. See Brumfield, 135 S. Ct. at 2282 (holding when relevant state "court never made any finding that [petitioner] failed to produce evidence suggesting he could meet" one of the Atkins prongs, federal habeas courts review that prong de novo because "[t]here is thus no determination on that point to which a federal court must defer in assessing whether [petitioner] satisfied § 2254(d)"); Pruitt, 788 F.3d at 269. Accordingly, although we grant AEDPA deference to the OCCA's determination on the first Murphy prong, we review de novo Smith's sufficiency of evidence challenge to the age-of-onset and deficits in adaptive functioning prongs.[4]

The proper standard as to the latter two prongs are thus set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), as explicated in Hooks: "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." Hooks, 689 F.3d at 1166 (emphasis in original). And because the district court "based its factual findings" in rejecting Smith's claims "entirely on the state court record, we review that record independently." Welch, 639 F.3d at 992 (quotation omitted).

2

In addressing the Murphy prongs, we first conclude Smith has demonstrated the OCCA either unreasonably applied Atkins or unreasonably construed the facts in deciding the evidence justified the jury's verdict regarding the intellectual functioning prong of Murphy. Next, as the State conceded at oral argument, Smith met the age-of-onset Murphy prong, and that prong thus does not provide a viable justification for upholding the jury's determination that Smith was not intellectually disabled. Finally, we conclude Smith has successfully demonstrated that based on the evidence presented, a reasonable jury would have been compelled to find that he suffers from deficiencies in at least two of the nine listed skill areas of adaptive functioning. We thus reverse the district court's denial of this claim.

a

The first Murphy prong requires Smith prove by a preponderance of evidence that he "functions at a significantly sub-average intellectual level that substantially limits

4. In Grant, the majority concluded we may not sua sponte deny AEDPA deference when the OCCA purportedly "misunderstood" petitioner's argument. 886 F.3d at 909. That rule is inapplicable to our denial of AEDPA deference on a claim the OCCA plainly failed to reach. Id. at 932 n.20. In Grant, the dissent did not deny that the OCCA issued a decision on a particular claim for relief, and instead asserted the OCCA misunderstood petitioner's arguments on that question. See 886 F.3d at 968 (Moritz, dissenting) (explaining "[t]he OCCA misunderstood this argument" and then "rejected [it]"). Unlike in Grant, there is no OCCA determination on the adaptive functioning prong of the Murphy analysis to which we may defer.

his [ ] ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 54 P.3d at 567-68. Because the OCCA adjudicated the first Murphy prong on the merits, AEDPA constrains our review of its finding Smith failed to meet "the first prong of the Murphy definition," OCCA Atkins Op. at 11.

But this is not an insurmountable barrier. Even under AEDPA's deferential review, at least four of our sibling circuits have held unreasonable a state court's determination that an individual was not intellectually disabled, or that an individual failed to meet a particular prong of the relevant definition of intellectual disability. Pruitt, 788 F.3d at 269 ("The [state court] made an unreasonable determination of fact in concluding ... that [petitioner] failed to establish significantly subaverage intellectual functioning."); Van Tran v. Colson, 764 F.3d 594, 612 (6th Cir. 2014) ("In light of the methods and analyses employed by the expert witnesses, the [state court] unreasonably determined that Van Tran was not intellectually disabled."); Burgess v. Comm'r, Ala. Dep't of Corr., 723 F.3d 1308, 1315-16 (11th Cir. 2013) ("[T]he ruling of [the state court] that Burgess is not mentally retarded was an unreasonable determination of the facts in this case." (quotation omitted)); Rivera v. Quarterman, 505 F.3d 349, 357 (5th Cir. 2007) ("[I]t was unreasonable ... to reject Rivera's Atkins claim as failing to even establish a prima facie case—especially when viewed through the prism of Atkins' command that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." (quotations omitted)).

[18] Because Smith's sufficiency of evidence challenge "presents a mixed question of fact and law," we will grant relief if the OCCA's decision to uphold the jury determination on the first Murphy prong was contrary to, or an unreasonable application of, Atkins, or was an unreasonable determination of the facts. Hooks, 689 F.3d at 1165. The Court's decision in Atkins provides the "substantive law at this basis of his sufficiency challenge." Hooks, 689 F.3d at 1166. Atkins broadly imposed a "substantive restriction on the State's power to take the life of a mentally retarded offender." 536 U.S. at 321, 122 S.Ct. 2242. The Supreme Court in Atkins accepted clinical definitions for the meaning of the term "mentally retarded." Id. at 308 n.3, 314-16, 122 S.Ct. 2242. And although Atkins left the primary task of defining intellectual disability to the states, Smith's "sufficiency challenge inescapably requires that we consider the kinds of evidence that state courts may (or may not) rely upon in adjudicating an Atkins claim." Hooks, 689 F.3d at 1166. Atkins clearly establishes that intellectual disability must be assessed, at least in part, under the existing clinical definitions applied through expert testimony. Atkins, 536 U.S. at 308 n.3, 122 S.Ct. 2242.[5]

We recognized the centrality of expert testimony to our review of Atkins verdicts in Hooks. In that case, the defendant's IQ test scores ranged from 53 to 80. The experts testified that he fell into a "gray area." Hooks, 689 F.3d at 1168. With a range of expert testimony, the court saw no reason to overturn the jury's finding of not intellectually disabled. Id. And other circuits similarly prioritize expert testimo-

5. Atkins is thus consistent with other areas of the law concerning medical diagnoses, which place similar emphasis on expert testimony. For example, the Supreme Court has recognized the importance of experts in diagnosing insanity for a defense in a criminal trial. Ake v. Oklahoma, 470 U.S. 68, 80-82, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

ny in review of Atkins challenges. In granting habeas relief pursuant to Atkins in Pruitt, the Seventh Circuit explained that four "highly qualified experts with extensive experience with the intellectually disabled ... all agreed that the [petitioner's] IQ scores demonstrated significantly subaverage intellectual functioning and that [petitioner] is intellectually disabled." 788 F.3d at 267. And, as in this case, the State's expert in Pruitt could not claim with certainty that the petitioner is not intellectually disabled. Id. Applying Atkins, both Pruitt and Hooks turned on consideration of expert opinions.

As in Hooks, id. at 1167, the OCCA applied the correct legal standard in this case, explaining that "[w]hen a defendant challenges the sufficiency of evidence following a jury verdict finding him not mentally retarded, [the OCCA] reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion." OCCA Atkins Op. at 6. "Because the OCCA applied the correct legal standard, our inquiry is limited to whether its determination that the evidence was sufficient to support the jury's verdict was reasonable ... [T]hat inquiry also requires us to consider whether the OCCA ... reasonably applied Atkins." Hooks, 689 F.3d at 1167 (quotation omitted).

[19] We conclude that in holding Smith failed to satisfy the intellectual functioning Murphy prong, the OCCA either relied upon an unreasonable determination of the facts or unreasonably applied Atkins. Every IQ test Smith took placed him firmly within the intellectually disabled range. The sub-average intellectual ability requirement generally turns on IQ scores. See id. at 1167-68 ("[A] capital defendant's IQ score is ... strong evidence of sub-average intelligence."); American Association on Mental Retardation ("AAMR"), Mental Retardation: Definition, Classification, and Systems of Supports at 58 (10th ed. 2002) ("In the 2002 AAMR system, the 'intellectual functioning' criterion for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the [standard error of measurement] for the specific assessment instruments used and the instruments' strengths and limitations.").[6] As the Supreme Court explained in Atkins, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. at 309 n.5, 122 S.Ct. 2242; see also Michael Smith, 824 F.3d at 1243 (explaining that "a clinical diagnosis of intellectual disability generally requires an IQ score that is approximately two standard deviations below the mean .... The mean score for a standardized IQ test is 100, and the standard deviation is approximately 15.").

In light of Smith's consistent scoring in the intellectually disabled range and the Supreme Court's clear statements regarding the significant role of IQ assessments under the intellectual functioning prong of Atkins, for the OCCA's decision to withstand review there must be evidence that either: (1) all of the IQ assessments administered to Smith significantly underestimate his intellectual functioning; or (2) contrary to the clinical definitions of the intellectual functioning prong at the time of Smith's Atkins trial, expert assessments relying upon standardized metrics are not dispositive. The State cannot prevail on either basis. The former requires an unreasonable construction of the facts; the

6. We cite to the Tenth Edition as the current AAMR at the time of Smith's Atkins trial in 2004.

latter an unreasonable application of Atkins.

Three experts testified at Smith's Atkins trial: Dr. Clifford Allen Hopewell, a clinical neuropsychologist retained by Smith; Dr. Frederick H. Smith, a psychologist with the Oklahoma Department of Corrections initially retained by the State for Smith's first habeas petition but called to testify as an expert for Smith at his Atkins trial; and Dr. John A. Call, a forensic psychologist retained by the State. The doctors' opinions largely track the clinical and legal definitions of intellectual disability set forth in Murphy. Both Dr. Hopewell and Dr. Smith concluded Smith was intellectually disabled. And Dr. Hopewell testified that Smith's "case is pretty obvious." Dr. Call suggested Smith was malingering but admitted he could not "say that [Smith] is not mentally retarded." In other words, although Dr. Call challenged the accuracy of some of Smith's tests, even Dr. Call could not conclusively contradict the ultimate diagnosis of intellectual disability.

And Smith's IQ scores, all of which place him in the intellectually disabled range, strongly compel a finding of significant deficits in intellectual functioning. Unlike in previous cases in which we denied relief on the intellectual functioning prong, not even one of Smith's IQ scores falls outside the intellectually disabled range "between 70 and 75 or lower," Atkins, 536 U.S. at 309 n.5, 122 S.Ct. 2242; see Hooks, 689 F.3d at 1168 n.7 (noting petitioners IQ scores of: 80, 70, 61, 57, 61, 80, 72, 76, and 53, determining the 72 and 76 to be most reliable); Michael Smith, 824 F.3d at 1244 (noting petitioner's IQ scores of 76, 79, and 71). In this case, the IQ scores addressed by the OCCA in its opinion were: 65 on the Wechsler Adult Intelligence Scale-Revised (WAIS-R); 55 on the Wechsler Adult Intelligence Scale-III (WAIS-III); 55 (WAIS-III); 69-78 on the Raven's Standard Progressive Matrices, which provide a range rather than fixed score; and 73. OCCA Atkins Op. at 7-8.[7]

Of the scores presented at Smith's Atkins trial and to the OCCA, the 55 scores were obtained by Dr. Hopewell, one of Smith's experts, and Dr. Call, the State's expert, roughly nine months apart. Dr. Hopewell administered the WAIS-III to Smith in January 2003, and obtained a Verbal IQ interval of 51-61, a Performance IQ interval of 59-73, and a full scale interval of 52-60. Dr. Call's administration of the same assessment nine months later produced not only an identical full scale score of 55, but also similar intervals. Dr. Call obtained a Verbal IQ interval of 53-63, a Performance IQ interval of 58-71, and a full scale interval of 52-60. Dr. Call's administration of the assessment produced age-adjusted scales either identical to or within one point of Dr. Hopewell's administration in nine of the eleven areas the WAIS-III measures.

Dr. Smith administered the WAIS-R and the Raven's Standard Progressive Matrices to Smith in 1997, five years prior to the Supreme Court's decision in Atkins.[8]

7. Smith also attempts to present scores of 55 (WAIS-III) and 55 (WAIS-IV) obtained by Drs. Hall and Ruwe in 2005 and 2010, respectively. But these scores were obtained after Smith's Atkins trial, and were thus not presented to the OCCA. Under AEDPA, our "review is limited to the record that was before the state court," Pinholster, 563 U.S. at 180, 131 S.Ct. 1388, and we may not consider either score.

8. And experts on both sides believed Smith to be intellectually disabled before Atkins was decided. Although our opinion on Smith's first habeas petition concerned mitigation evidence rather than Smith's intellectual disability, we noted the strong evidence of his intellectual disability: "Smith is completely illiterate. Even the State's experts and prison doctors determined ... Smith's IQ to be in the mentally retarded or borderline mentally retarded range. His understanding and his

On the WAIS-R assessment, Smith's Verbal IQ score was 64, his Performance IQ was 70, and full scale IQ was 65. Dr. Smith testified that the score indicated Smith was intellectually disabled.[9] With regard to the Raven's Standard Progress Matrices, Dr. Smith testified that assessment provides a range, rather than a fixed score like the WAIS assessments, and Smith obtained a range of 69 to 78. When asked to compare the assessments' accuracy, Dr. Smith unequivocally stated the WAIS "is the premier instrument used throughout the world for IQ measurement."

Finally, the 73 results from a test administered in preparation for Smith's original criminal trial in 1994. Smith notes that the type of test administered to obtain the 73 is unclear. Dr. Call's testimony provides the only source for the score in the Atkins trial record, noting that Dr. Murphy administered the test in 1994. The transcript from Smith's original criminal trial includes testimony from Dr. Murphy that Smith's full scale IQ is 73, and "in the mentally retarded range of intellectual functioning." At no point in his testimony did Dr. Murphy state what type of test was administered, and he did not testify at Smith's Atkins trial. Accordingly, although we note the score obtained by Dr. Murphy for its consistent placement of Smith in the intellectually disabled range, we do not consider a score on an unknown test and only introduced into the Atkins trial record indirectly to be of particular significance to our review.[10]

In view of the evidence showing Smith's consistent low IQ scores and Atkins' statement that a score of 75 or lower will generally satisfy the intellectual functioning prong of an intellectual disability diagnosis, the State must provide some basis for a reasonable juror to believe that every single one of Smith's IQ assessments was inaccurate, and that his actual IQ was some ten to fifteen points higher than his scores indicate. The OCCA dismissed the relevance of these scores consistently placing Smith in the intellectually disabled range by first emphasizing Dr. Call's testimony that Smith was likely malingering. OCCA Atkins Op. at 8. But to the extent the OCCA determined Smith failed to satisfy the intellectual functioning Murphy prong because he was malingering, we conclude such a determination amounts to an unreasonable factual conclusion. Byrd, 645 F.3d at 1171-72 (10th Cir. 2011) (explaining that in cases where the state

emotional development and his ability to relate all seem to be fairly similar to what we would perceive to be a 12-year-old-child.'' Smith v. Mullin, 379 F.3d at 941 (citations and quotation omitted).

9. Dr. Hopewell addressed the discrepancy between the scores of 55 that Dr. Call and Dr. Hopewell obtained and the 65 Dr. Smith obtained, testifying that the scores are consistent because Dr. Smith administered the older version of the WAIS assessment that would have inflated Smith's score pursuant to the Flynn effect. As we explained in Hooks, under the Flynn effect, ''if an individual's test score is measured against a mean of a population sample from prior years, then his score will be inflated in varying degrees (depending on how long ago the sample was first employed) and will not provide an accurate picture of his IQ.'' 689 F.3d at 1169. We need not rely upon the Flynn effect to conclude a reasonably jury would have been compelled to find that Smith met the intellectual functioning Murphy prong because every score placed Smith in the intellectually disabled range, but merely acknowledge its existence to refute any suggestion that the discrepancy between Smith's 1997 and 2003 scores support the conclusion that he malingered.

10. And we consider the reliability of a particular IQ assessment when reviewing a sufficiency of evidence challenge under AEDPA. See Hooks, 689 F.3d at 1170 (''Given the [uncontested] reliability problems associated with many of the scores and the strong reliability of the scores of 72 and 76 from [petitioner's] own experts, we agree that [petitioner] falls into a 'gray area.' '').

courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable" (quotation omitted)).

As explained supra, Smith has consistently scored in the intellectually disabled range on every IQ test he has taken. And Smith almost certainly scored in that range when he was first placed in courses for the educable mentally handicapped while in grade school, as special education instructors from his school testified that placement in such courses required IQ testing in the intellectually disabled range. Dr. Hopewell testified that children would not fake an intellectual disability for placement in the educable mentally handicapped courses. Two of Smith's high school teachers testified that Smith was one of the lower functioning students in their educable mentally handicapped courses.

As all three experts expressly testified, Smith's consistent placement in the intellectually disabled range provides compelling evidence that he was not malingering. Dr. Hopewell testified that Smith's consistent scoring across a wide range of tests and his prior experience with the intellectually disabled refuted any claims that Smith was malingering. Dr. Smith testified that Smith's scores from 1997 through 2003 demonstrate a "remarkable" consistency difficult to reconcile with a malingering diagnosis. And Smith obtained the 65 score in 1997 on the assessment that Dr. Smith administered, five years prior to the Supreme Court's decision in Atkins, calling into question any purported motivation for malingering. Even the State's expert, Dr. Call, agreed that comparing test performance on the same or similar tests over time would provide one way of assessing whether an individual was malingering. Moreover, as the Seventh Circuit explains, "a defendant cannot readily feign the symptoms of mental retardation." Newman v. Harrington, 726 F.3d 921, 929 (7th Cir. 2013) (quotation omitted).

The State's assertion that Smith was malingering thus rests on Dr. Call, the sole expert to so testify. Unlike Dr. Hopewell, who had extensive experience with both the intellectually disabled and malingering patients, Dr. Call had no prior experience with the intellectually disabled and practiced almost exclusively in the unrelated field of forensic psychology. See Lambert v. State, 126 P.3d 646, 651-52 (Okla. Crim. App. 2005) ("Dr. Call is a forensic psychologist. His practice has not primarily been in the field of mental retardation, and he has not had a mentally retarded patient in a clinical setting for fifteen years. However, since 2002 he has made a specialty of examining capital defendants for mental retardation."). The OCCA had previously chastised Dr. Call because he "himself made up and administered a non-standardized test ... not administered pursuant to accepted scientific norms ... to convince the jury Petitioner was malingering." Salazar v. State, 126 P.3d 625, 632 (Okla. Crim. App. 2005). Moreover, Dr. Call could not conclude that Smith is not intellectually disabled. Presented with the testimony of two experts who concluded Smith was intellectually disabled, Dr. Call could only state that the record established that Smith had neither an intellectual disability nor an absence thereof. And the OCCA noted an identical admission from Dr. Call to deemphasize his malingering diagnosis in concluding a defendant met the first Murphy prong in Lambert. 126 P.3d at 651 ("Dr. Call did not testify that Lambert was not mentally retarded. In fact, he explicitly stated he could not say that Lambert was not mentally retarded.").

The OCCA also emphasized Dr. Call's testimony that the tests he and Dr. Hopewell administered to assess malingering demonstrate "Smith did not put forth his best efforts during his and Dr. Hopewell's testing and that Smith's I.Q. test results were unreliable." OCCA Atkins Op. at 8. Dr. Call testified that the Test of Memory and Malingering and 15-Item Memory Test both demonstrated Smith was malingering. Dr. Hopewell disputed this conclusion, testifying the assessments of malingering that he and Dr. Call administered would not accurately assess the intellectually disabled.

Even if the OCCA had used the malingering assessments to disregard Smith's scores (both 55) on the WAIS-III assessments, Smith still averaged a 69 on the remaining fixed score assessments. For a reasonable jury not to be compelled to conclude that Smith satisfied the first Murphy prong based on the malingering assessments, there must exist some basis for the jurors to infer that Smith's actual IQ falls outside the intellectually disabled range. But every score presented refuted such an inference. And "[w]hile the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and conjecture to be reasonable." Torres v. Lytle, 461 F.3d 1303, 1313 (10th Cir. 2006).

The OCCA's conclusion that Smith "failed to meet even the first prong of the Murphy definition," OCCA Atkins Op. at 11, is thus an unreasonable determination of the facts in light of Smith's consistent IQ scores that demonstrate significantly subaverage intellectual functioning. See Pruitt, 788 F.3d at 267 ("Even when viewed through AEDPA's deferential lens, the [state court's] determination that [petitioner] failed to demonstrate significantly subaverage intellectual functioning ... was objectively unreasonable .... The record establishes that [petitioner's] reliable IQ scores consistently demonstrated significantly subaverage intellectual functioning.").[11]

The OCCA attempted to justify its disregard for Smith's consistent IQ scores by explaining "the State presented persuasive evidence from lay witnesses to refute Smith's evidence of subaverage intellectual functioning." OCCA Atkins Op. at 8. But to the extent that the OCCA determined Smith failed to satisfy the intellectual functioning Murphy prong because of evidence from lay witnesses, such a determination constitutes an unreasonable application of Atkins. See Wiggins, 539 U.S. at 520, 123 S.Ct. 2527.

Atkins demands the Eighth Amendment's prohibition of the execution of the mentally disabled tracks the "national consensus [that] developed against" the execution of "offenders possessing a known IQ less than 70." Atkins, 536 U.S. at 316 & 309 n.5, 122 S.Ct. 2242 ("[A]n IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."). The Diagnostic and Statistical Manual of Mental Disorders, cited by the Atkins court, id. at 308 n.3, 122 S.Ct. 2242, is even more explicit: "Intellectual func-

11. Because we conclude the OCCA's holding that Smith failed to meet the intellectual functioning prong constitutes a "decision that was based on an unreasonable determination of the facts," § 2254(d)(2), we have necessarily concluded that Smith has carried his Jackson burden. A reasonable jury would have been compelled to find that Smith satisfied the intellectual functioning Murphy prong. See Hooks, 689 F.3d at 1166 (explaining Jackson, as applied to the Atkins context, requires assessing "whether, viewing the evidence in the light most favorable to the prevailing party (the State), any rational trier of fact could have found [petitioner] not mentally retarded by a preponderance of the evidence" (emphasis in original)).

tioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual for Mental Disorders at 37 (4th ed.-Text Rev. 2000). And, citing Atkins, we have similarly concluded that "[a]n IQ score of 70 or below . . . is [ ] strong evidence of subaverage intelligence." Hooks, 689 F.3d at 1168. This court has noted that "[t]he [Supreme] Court in Atkins . . . base[d] its analysis on clinical definitions of intellectual disability, and the [Supreme] Court has since recognized that such definitions were a fundamental premise of Atkins." Michael Smith, 824 F.3d at 1243.

Therefore, the OCCA's determination Smith did not satisfy the first prong of the Murphy definition constitutes either an unreasonable determination of the facts, or amounts to an unreasonable application of Atkins because such determination requires the OCCA to have disregarded the clinical definitions Atkins mandated states adopt. We conclude the OCCA erred in determining a reasonable jury would not have been compelled to find Smith intellectually disabled.

b

The State conceded at oral argument that there exists insufficient evidence for a reasonable jury to conclude that Smith's symptoms did not manifest before the age of eighteen. The record supports the State's concession: throughout his schooling, Smith was placed in educable mentally handicapped courses, and placement in those courses required Smith submit to a psychometrist-administered test and score a full scale IQ in the intellectually disabled range. Two of Smith's teachers from his educable mentally handicapped courses confirmed that his placement in those classes was appropriate. We accordingly conclude that Smith's sufficiency of evidence challenge prevails with regards to the age-of-onset prong of the Murphy definition of intellectual disability.

c

Finally, Smith must demonstrate that a rational jury would have been compelled to find he satisfied the adaptive functioning prong of the Murphy analysis: "that he has significant limitations in adaptive functioning in at least two of the nine listed skill areas." OCCA Atkins Op. at 6. As explained by the OCCA, the "adaptive functioning skill areas are: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work." Id. at 6 n.8. Because the OCCA did not adjudicate this prong of Murphy on the merits, we review the evidence and conduct the legal analysis de novo. Brumfield, 135 S. Ct. at 2282.

Under de novo review, we are not constrained to consider only Supreme Court precedent "clearly established at the time of the [state] adjudication," as required under AEDPA. Shoop, 139 S. Ct. at 506. We thus apply the general rule for retroactive application of law to convictions under collateral attack to assess whether the Supreme Court's recent applications of Atkins "are novel." Chaidez v. United States, 568 U.S. 342, 348, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

[20] In general, "[o]nly when we apply a settled rule may a person avail herself of the decision on collateral review." Id. at 347, 133 S.Ct. 1103. To determine whether a post-conviction constitutional rule applies to a case on collateral review, the court must first "determine when the defendant's conviction became final." Beard v. Banks, 542 U.S. 406, 411, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004). It then must decide "whether the rule is actually 'new.' " Id. Typically, a rule is "new" if it either

"breaks new ground or imposes a new obligation on the States or the Federal Government," or its "result was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). A result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result. Beard, 542 U.S. at 414, 124 S.Ct. 2504. If the rule is not new, the petitioner may "avail herself of the decision on collateral review." Chaidez, 568 U.S. at 347, 133 S.Ct. 1103. But "if the rule is new," it is not retroactively applicable on collateral review unless "it falls within either of the two exceptions to nonretroactivity." Beard, 542 U.S. at 414, 124 S.Ct. 2504.

[21] When the Supreme Court "appl[ies] a general standard to the kind of factual circumstances it was meant to address, [it] will rarely state a new rule." Chaidez, 568 U.S. at 348, 133 S.Ct. 1103. And the Supreme Court's post-Atkins jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in Atkins constitutes a mere application of that case. We thus conclude these cases do not state a new rule. As the Supreme Court explained in Hall:

> Atkins did not give the States unfettered discretion to define the full scope of the constitutional protection. The Atkins Court twice cited definitions of intellectual disability .... Atkins itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions .... The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins ... If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads Atkins to provide substantial guidance on the definition of intellectual disability.

572 U.S. at 720-21, 134 S.Ct. 1986 (emphasis added); see also Michael Smith, 824 F.3d at 1243 ("The Court in Atkins did, however, base its analysis on clinical definitions of intellectual disability."); Hooks, 689 F.3d at 1166 ("[T]he definition of mental retardation ... although dependent on state law (here, Murphy), ultimately has Eighth Amendment underpinnings pursuant to Atkins."). And the Supreme Court reiterated this reading of Atkins in Moore v. Texas (Moore II), —— U.S. ——, 139 S. Ct. 666, —— L.Ed.2d —— (2019), explaining that "[w]hile our decisions in Atkins and Hall left to the States the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled, a court's intellectual disability determination must be informed by the medical community's diagnostic framework." Id. at 669 (citations and quotations omitted).

As in Strickland, the Supreme Court in Atkins declared "a rule of general application ... designed for the specific purpose of evaluating a myriad of factual contexts." Chaidez, 568 U.S. at 348, 133 S.Ct. 1103 (quotation omitted). The application of this general rule to Hall, Moore v. Texas (Moore I), —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017), and Moore II cannot be understood to "yield[ ] a result so novel that it forges a new rule, one not dictated by precedent", Chaidez, 568 U.S. at 348, 133 S.Ct. 1103 (quotation omitted), in light of the Court's proclamation in Hall that "Atkins ... provide[s] substantial guidance on the definition of intellectual disability," 572 U.S. at 721, 134 S.Ct. 1986. The Court's application of Atkins more closely resembles, for example, our conclu-

sion that the extension of Strickland's guarantee of effective counsel to the plea-bargaining context merely applied Strickland rather than created a new rule. In re Graham, 714 F.3d 1181, 1183 (10th Cir. 2013) (per curiam).

Accordingly, we consider on de novo review the Supreme Court's application of Atkins in Hall, Moore I, and Moore II. The Court's decisions in 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, with the most compelling evidence concerning academics and communication. And the State conceded at oral argument that Smith demonstrated significant limitations in adaptive functioning in the academics category.

Dr. Hopewell, the only expert to conduct a formal assessment of Smith's adaptive functioning capacities, concluded Smith suffers from profound deficits in at least five of the nine adaptive functioning areas: communication; academics; social skills; home living; and health and safety. Dr. Hopewell based this assessment on the Vineland Adaptive Behavior Scales assessment; his own interactions with Smith; and his review of Department of Corrections testing on Smith's adaptive functions, which revealed significant deficits in reading, writing, and personal finances (placing Smith at the third and fifth grade levels). With regard to Smith's significant communication deficits, Dr. Hopewell noted that Smith could not keep a cellmate because his fellow prisoners would become bored with his lack of engagement, and frustrated that he spent much of his time completing grade-school level coloring books.[12]

Dr. Hopewell also administered the Wide Range Achievement Test III (WRAT-III), intended to assess an individual's ability in reading, writing, and arithmetic to substantiate the finding of significant deficits in the functional academics category of adaptive functioning. Smith scored at the kindergarten or first grade level in each academic area, at or below two standard deviations from the mean. Dr. Hopewell characterized Smith as functionally illiterate, unable to read more than a few words at a very basic level.

And Smith's teachers from high school confirmed his illiteracy, with one teacher testifying that she never asked Smith to read aloud because of his illiteracy, and another stating it was "very, very likely" that he graduated high school without having learned to read. Smith was unable to fill out job applications without the assistance of his teachers. Evidence of Smith's adult illiteracy arose out of his employment; one teacher in the school where Smith worked as a custodian noted that he was unable to read notes containing special cleaning requests. And we noted the evidence that "Smith is completely illiterate" in resolving Smith's first habeas petition. Smith v. Mullin, 379 F.3d at 941.

Only Smith presented a standardized assessment of his adaptive behavior; contrary to the AAMR's recommendations, the State neither conducted nor presented

12. Although Dr. Call heavily criticized Dr. Hopewell's administration of the Vineland test directly to Smith, rather than a caretaker, it remains the only formal assessment of adaptive functioning conducted at the time of Smith's Atkins trial. And, as Dr. Hopewell explained, his analysis of Smith's deficits in adaptive functioning was not wholly reliant on the Vineland assessment, because he determined many of Smith's deficits to be manifest without testing, and thus "pathological." Dr. Hopewell also made efforts to independently verify or corroborate Smith's deficits by speaking with his nurse, prison guards, and his attorneys.

a single standardized assessment of Smith's adaptive behavior. AAMR, Mental Retardation: Definition, Classification, and Systems of Supports at 83 (10th ed. 2002) ("Regardless of the purpose of diagnosis . . . adaptive behavior should be measured with a standardized instrument that provides normative data on people without mental retardation."). The evidence Smith presented, including the only formal assessment of his deficits in adaptive functioning corroborated by expert testimony and testimony from Smith's teachers and colleagues about his deficits, thus overwhelmingly supports Smith's claim that he satisfies the third Murphy prong.

The evidence the State emphasizes on appeal to refute Smith's adaptive functioning argument carries little weight in light of the Supreme Court's warnings against undue emphasis on "perceived adaptive strengths," Moore I, 137 S. Ct. at 1050, and "lay stereotypes of the intellectually disabled," id. at 1052. As the Supreme Court explained in Moore I:

> [T]he medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD–11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM–5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits).

Id. at 1050 (alterations in original); see also Brumfield, 135 S. Ct. at 2281 ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.' " (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports at 8 (10th ed. 2002))).

[22, 23] Evidence that rests on lay stereotypes about the intellectually disabled, such as the incorrect stereotypes that they cannot have jobs or relationships, is similarly disfavored. See Moore II, 139 S. Ct. at 672. As the Court explained in Moore I, "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled" and "[t]hose stereotypes, much more than medical and clinical appraisals, should spark skepticism." 137 S. Ct. at 1052. In light of the Supreme Court's admonitions against consideration of adaptive strengths and lay stereotypes, no rational jury could decide that Smith failed to demonstrate by a preponderance of evidence deficits in adaptive functioning. All the evidence emphasized by the State falls into one or both of those two disfavored categories.

The State first emphasizes the testimony of Smith's former prison case manager, Watts, who testified that Smith could communicate with her and "use manipulative behavior to get a more desirable cell or cellmate." However, Watts has no experience with intellectual disabilities, and the State's own expert acknowledged at the proceeding that the intellectually disabled can lie. Additionally, the Supreme Court has "caution[ed] against reliance on adaptive strengths developed in prison." Moore II, 139 S. Ct. at 671 (quotation omitted); Moore I, 137 S. Ct. at 1050 (citing DSM-5 for the proposition that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained").

Reliance on the testimony of Smith's insurance agent and work supervisor by the State is similarly unavailing. As with Smith's prison case manager, these individuals have no experience in diagnosing intellectual disability, and based their opin-

ions exclusively on lay stereotypes. Moreover, the testimony of Smith's insurance agent concerned two interactions with Smith over ten years earlier cumulatively taking roughly an hour. The mere fact that Smith's insurance company wanted to hire him, or that his work supervisor did not have problems with Smith's performance of his work duties, is of limited significance. The Supreme Court has repudiated the notion that persons with intellectual disability "never have . . . jobs" when "it is estimated that between nine and forty percent of persons with intellectual disability have some form of paid employment." Moore II, 139 S. Ct. at 672 (citations and quotations omitted). Even if clinically informed, evidence of perceived adaptive strengths such as the ability to hold down a job does not constitute "evidence adequate to overcome . . . objective evidence of [the individual's] adaptive deficits." Moore I, 137 S. Ct. at 1050. As Dr. Hopewell explained in his testimony, a work-related deficit in adaptive functioning does not require the individual be incapable of work; instead, the deficit is assessed against the population in general, the overwhelming majority of which can perform work at a much higher level than can Smith.

Reference to the testimony of an assistant district attorney from the team that prosecuted Smith's initial criminal trial does not overcome the strong medical evidence of significant deficits in adaptive functioning. The assistant district attorney testified that Smith filed and presented several motions on his behalf, and made good arguments in support of those motions. But 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. And the Supreme Court has warned against using papers an individual files in court as convincing evidence of communication skills, especially where, as in this case, evidence suggests the papers were written by a cellmate. See Moore II, 139 S. Ct. at 671 (noting such evidence "lacks convincing strength without a determination about whether [the individual] wrote the papers on his own"). Further, Smith's counsel from his criminal trial refuted the State's suggestion that Smith played any role in his own defense, testifying that Smith spent most of the trial drawing and did not have "much of a clue about what was going on."

The State next emphasizes Smith's relationship with Laura Dich to refute Smith's evidence of deficits in adaptive functioning. Such emphasis further evinces impermissible "reliance upon . . . lay stereotypes of the intellectually disabled," as the Court has warned against adopting the "incorrect stereotypes that persons with intellectual disability never have [relationships]." Moore II, 139 S. Ct. at 672 (quotations omitted). And the State makes no efforts on appeal to provide any scientific or clinical justifications that would render meaningful evidence of Smith's relationships.[13] Even if we were to accept the lay stereotype evidence above as relevant, the State's failure to connect that evidence to any areas of adaptive functioning renders the evidence uncompelling in this context. See Van Tran, 764 F.3d at 612 ("[T]he [state court] unreasonably determined that Van Tran was not intellectually disabled.

13. The testimony of Dr. Call, the State's primary expert witness, provides no such basis. Dr. Call acknowledged that the intellectually disabled can lie, hold a job, work hard, drive, cook, clean, use a telephone, marry, and love. To the extent the State would rely upon Dr. Call's testimony to refute Smith's showing of deficits in adaptive function, Dr. Call explicitly acknowledged that he did not assess Smith using any "standardized instrument," and could therefore not definitively testify to Smith's deficits in adaptive functioning.

The [state court] emphasized too heavily in its analysis the facts of the crime, which are not relevant to the analysis of most of the areas of adaptive behavior, especially that of functional academics.").

In sum, Atkins and its progeny prohibit states from "disregard[ing] established medical practice." Moore I, 137 S. Ct. at 1049 (alteration in original). "[O]ur precedent [does not] license disregard of current medical standards." Id. And our review of the record indicates Smith could only fail to establish by a preponderance of evidence significant deficits in adaptive functioning in at least two of the enumerated areas if the jury disregarded medical standards in favor of lay stereotypes and undue emphasis on adaptive strengths in the precise manner prohibited by the Supreme Court in Moore I and Moore II. Only speculation or conjecture based on lay stereotype could support a jury verdict finding Smith failed to demonstrate significant deficits in adaptive functioning. And "[w]hile the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and conjecture to be reasonable." Torres, 461 F.3d at 1313 (quotation omitted).

Because Smith has demonstrated a reasonable jury would have been compelled to conclude he satisfied all three prongs of the Murphy test, we reverse the district court's denial of his habeas petition for relief on this claim.

B

Because we grant habeas relief on Smith's sufficiency of evidence Atkins challenge, we do not need to address Smith's Atkins challenge to the "present and known" jury instruction or his claims of ineffective assistance of counsel at his Atkins proceedings. See Pruitt, 788 F.3d at 270 ("[Petitioner] raises three alleged errors in support of his ineffective-assistance-of-counsel claim, but we need address only one—whether trial counsel was ineffective at the penalty phase in investigating and presenting evidence that [petitioner] suffered from paranoid schizophrenia."). Were we to grant Smith relief on those claims, the appropriate remedy would entitle Smith to relitigate intellectual disability at a new Atkins trial. But we hold Smith is intellectually disabled as a matter of law and therefore constitutionally ineligible for execution. Accordingly, any relief we could grant on Smith's remaining claims concerning his Atkins trial would be meaningless because the State is not permitted to conduct a new Atkins trial.[14]

We must nevertheless consider Smith's ineffective assistance of counsel claim concerning counsel's representation at the competency and resentencing trials. The relief Smith seeks on that claim could require the OCCA to vacate his sentences and order a new competency trial. Only if Smith were found competent could the OCCA then order resentencing, including on Smith's three murder convictions for which he was not sentenced to death. Ac-

14. We also need not address Smith's cumulative error argument for purported aggregated constitutional violations. "A cumulative-error analysis merely aggregates all the errors that individually have found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." Hanson v. Sherrod, 797 F.3d 810, 852 (10th Cir. 2015) (quotation omitted). Because we reverse only on Smith's claim that the Eighth Amendment prohibits his execution, there are no harmless errors to aggregate. Id. at 853 ("Because [petitioner] has failed to prove at least two errors, we have no occasion to apply a cumulative error analysis.").

cordingly, we address this claim and affirm the district court's denial of habeas relief.

Smith argues his counsel at the competency and resentencing trials, and attendant direct appeal, was constitutionally ineffective for failing to present to the jury a video recording of an interview with Smith, which he contends would have shown his humanity and intellectual disability. Specifically, Smith argues that counsel was ineffective in these proceedings for failing to call Anna Wright, a mental health worker at the Oklahoma County jail, to testify and sponsor the introduction of a video recording of Smith speaking. Wright assisted in a video interview of Smith conducted in preparation for one of Smith's prior cell mate's clemency hearing. Smith claims this video would have made clear his intellectual disability and demonstrated his humanity to the juries in those proceedings. Smith also attaches an auxiliary ineffective assistance of appellate counsel claim to this failure, arguing his appellate counsel at resentencing was ineffective for failing to raise the deficiency of his trial counsel on direct appeal.

1

[24] The Sixth Amendment guarantees a criminal defendant "the right . . . to have Assistance of Counsel for his defense." U.S. Const. amend. VI. Criminal defendants' constitutional right to counsel encompasses post-conviction Atkins proceedings. Hooks, 689 F.3d at 1184. ("We have concluded that defendants in Atkins proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments.").

[25] The right to counsel requires a minimum quality of advocacy from a professional attorney. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant can establish a constitutional violation of the right to counsel where "counsel's performance was deficient," and "the deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. 2052. "These two prongs may be addressed in any order, and failure to satisfy either is dispositive." Hooks, 689 F.3d at 1186.

[26–28] To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" as assessed from counsel's perspective at the time. Strickland, 466 U.S. at 688, 104 S.Ct. 2052. In this way, "hindsight is discounted by pegging adequacy to counsel's perspective at the time investigative decisions are made." Rompilla, 545 U.S. at 381, 125 S.Ct. 2456 (quotation omitted). In so doing, we determine "whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Richter, 562 U.S. at 105, 131 S.Ct. 770. And "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Hooks, 689 F.3d at 1168 (quotation omitted); see also Strickland, 466 U.S. at 689, 104 S.Ct. 2052 ("[A] court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (quotation omitted)). "In other words, [counsel's performance] must have been completely unreasonable, not merely wrong." Byrd, 645 F.3d at 1168 (quotation omitted).

[29–31] "[T]o establish prejudice, the defendant must show that, but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different." Michael Smith, 824 F.3d at 1249. "[I]n

the capital-sentencing context, if the petitioner demonstrates that there is a reasonable probability that at least one juror would have refused to impose the death penalty, the petitioner has successfully shown prejudice under Strickland." Grant, 886 F.3d at 905 (quotation omitted). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112, 131 S.Ct. 770. To assess "whether an inadequate investigation prejudiced a habeas petitioner, we reweigh the evidence on both sides, this time accounting for the petitioner's proposed additions," and "account for how the state would have responded to the omitted evidence." Postelle v. Carpenter, 901 F.3d 1202, 1217 (10th Cir. 2018) (quotation omitted), cert denied, —— U.S. ——, 139 S.Ct. 2668, 204 L.Ed.2d 1073 (2019).

In cases in which the OCCA has adjudicated a Strickland claim on the merits, our review of the OCCA decision is "doubly deferential" because "[w]e take a highly deferential look at counsel's performance through the deferential lens of [AEDPA]." Pinholster, 563 U.S. at 190, 131 S.Ct. 1388 (citations and quotations omitted). Applying, AEDPA deference, we must "determine whether reasonable jurists could agree with the OCCA that [Smith's] trial and appellate counsels acted reasonably." Johnson v. Carpenter, 918 F.3d 895, 900 (10th Cir. 2019). But, as explained supra, we do not apply this double deference to an unadjudicated Strickland prong if the OCCA's decision rests entirely on a single prong. See, e.g., Porter, 558 U.S. at 39, 130 S.Ct. 447.

2

The parties agree that the OCCA adjudicated the merits of Smith's ineffective assistance of counsel claims concerning Wright's testimony and the attendant video. See OCCA Resentencing and Competency Op. at 9-10 n.5. The OCCA addressed deficient performance and prejudice, holding both that Smith failed to demonstrate counsel's purported failings amounted to more than a strategic decision and that Smith failed to demonstrate the omitted materials are "of a character substantially different from the evidence that trial counsel ultimately chose to use," rendering their omission immaterial. Id. The OCCA also explained Wright had characterized her interactions with Smith as limited, and that the interview's persuasive force on the question of Smith's intellectual functioning was debatable. Id.

Smith nonetheless contends we should review these ineffective assistance claims de novo because the OCCA "misidentified" the allegations by holding Smith alleged mere strategic error rather than counsels' failures to investigate and prepare. He relies on Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002), in which that court stated "if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." Id. at 606. Smith explains that he couched his ineffective assistance claim in terms of counsels' failure to develop, prepare, and investigate for trial.

But the OCCA need not accept an inaccurate characterization of a claim to adjudicate that claim on the merits. And the OCCA did not misconstrue Smith's claim by concluding that he alleges only an imprecise strategic decision by counsel. OCCA Resentencing and Competency Op. at 9-10. Smith does not and cannot dispute that his counsel was aware of Wright and the video testimony because counsel provided notice that she intended to present Wright at the competency and resentencing trials and intended to have her authen-

ticate and sponsor the video recording in question. Any failure to present the evidence thus cannot amount to a failure to investigate; counsel merely chose not to present the evidence after investigating. The OCCA's presumption that counsel made an appropriate strategic decision not to present the evidence thus properly understands Smith's argument. See Burt v. Titlow, 571 U.S. 12, 22-23, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) (noting the strong presumption that counsel "made all significant decisions in the exercise of reasonable professional judgment" (quotation omitted)). Accordingly, because the OCCA sufficiently understood Smith's resentencing and competency ineffective assistance claims to have adjudicated those claims on the merits, we afford "both the state court and the defense attorney the benefit of the doubt" required by AEDPA. Woods v. Donald, —— U.S. ——, 135 S. Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (quotation omitted).

[32] Applying this standard, we reject Smith's claim that counsel inadequately investigated and prepared for trial by failing to submit evidence of which counsel was fully aware. Smith submits an affidavit from his trial counsel, attesting that her failure to present Wright and the video was due to a "lack of investigation and preparation." We may not consider this affidavit on habeas review because it was not presented to the OCCA. Pinholster, 563 U.S. at 181, 131 S.Ct. 1388 ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").[15] Smith conceded before the OCCA that trial counsel was aware of Wright and the video because counsel provided notice that she intended to present Wright and the video at the hearings in question.

This analysis would not change even were we to consider the affidavits submitted for the first time on habeas review. The affidavit from Smith's trial counsel during the resentencing and competency hearings states only that trial counsel could not recall why she did not call Wright to testify. Because, at best, the "evidence establishes that there is no discernable explanation for counsel's failure to call" the witness in question, Smith "most certainly ha[s] not overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." Sallahdin v. Mullin, 380 F.3d 1242, 1248-49 (10th Cir. 2004) (quotation omitted).

Smith contends the OCCA's deficiency determination is unreasonable because the OCCA declined to identify any strategic justification for the failure of his counsel to present Wright's testimony and the attendant video. But "[i]t should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." Titlow, 571 U.S. at 23, 134 S.Ct. 10 (quotation omitted). That presumption places "the burden to show that counsel's performance was deficient ... squarely on" Smith, id. at 22-23, 134 S.Ct. 10, and Smith fails to identify any support in the record to carry that burden. Moreover, after review of the video recording, we do not consider the OCCA's conclusion that the "persuasive force" of the evidence was "debatable," OCCA Resentencing and

15. Smith asserts on appeal that we may consider the affidavits of trial and appellate counsel because the OCCA never adjudicated Smith's allegations of deficient performance. This assertion fails for the same reason as Smith's efforts to free this claim from the confines of AEDPA deference: the OCCA's rejection of Smith's characterization of his claim does not preclude it from adjudicating that claim on the merits. And the OCCA plainly did adjudicate this claim on the merits, holding that Smith failed to satisfy either prong of the Strickland analysis. OCCA Resentencing and Competency Op. at 9-10.

Competency Op. at 10 n.5, to be an "unreasonable determination," § 2254(d)(2).

Relying upon Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002), Smith also argues that an "objectively unreasonable" strategic decision may satisfy the deficient performance prong of the Strickland analysis. Id. at 1051. But Smith has failed to carry his burden to establish the objectively unreasonable nature of that decision in light of the OCCA's determination that the evidence was of little utility because of Wright's limited interactions with Smith and the debatable value of the video.[16]

Accordingly, we conclude that Smith has failed to demonstrate ineffective assistance of trial counsel for failure to call Wright as a witness to sponsor the introduction of the video interview of Smith. And because trial counsel's performance was neither deficient nor prejudicial for failing to introduce the evidence in question, Smith's ineffective assistance of appellate counsel necessarily fails. Johnson, 918 F.3d at 906 ("[B]ecause we conclude that trial counsel was not deficient . . . [Petitioner's] auxiliary claim cannot succeed. Appellate counsel cannot be ineffective for omitting an unsuccessful issue on appeal.").[17]

IV

For the foregoing reasons, we **REVERSE** in part and **AFFIRM** in part the district court's decision denying Smith's § 2254 petition for a writ of habeas corpus. We **REMAND** with instructions to grant a conditional writ vacating Smith's death sentence and remanding to the State.

16. Moreover, even if Smith's counsel performed deficiently, Smith fails to demonstrate the OCCA's prejudice determination was unreasonable. Smith contends the video renders obvious his humanity and intellectual disability, and emphasizes the uniquely persuasive nature of video evidence. ''The likelihood of a different result must be substantial, not just conceivable.'' Richter, 562 U.S. at 112, 131 S.Ct. 770. And Smith fails to demonstrate that the OCCA obviously erred in concluding the video recording did not present substantially different evidence of Smith's intellectual disability and humanity from the materials counsel did use at the resentencing and competency proceedings. See Johnson, 913 F.3d at 902 (concluding the omission of video evidence was not prejudicial because the jury had already heard significant testimony in support of the issue that the omitted video evidence would have bolstered).

17. Because we reject as unmeritorious Smith's ineffective assistance claim, we also reject as unnecessary Smith's request for an evidentiary hearing on the question.

Malik M. HASAN, M.D.; Seeme G. Hasan, Plaintiffs - Appellants,

v.

AIG PROPERTY CASUALTY COMPANY, a Pennsylvania corporation, Defendant - Appellee.

No. 18-1309

United States Court of Appeals, Tenth Circuit.

FILED August 27, 2019

Background: Insureds filed state court action against insurer to recover under private collections insurance policy for alleged loss of wine bottles that were not delivered to them by retailer whom they had paid for wine. After removal, the United States District Court for the District of Colorado, No. 1:16-CV-02963-RM-MLC, Raymond P. Moore, J., entered summary judgment in insurer's favor, and denied insureds' motion for leave to amend. Insureds appealed.

ATTACHMENT B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RODERICK L. SMITH,	)	
	)	
Appellant,	)	
	)	NOT FOR PUBLICATION
v.	)	No. O-2006-683
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

Roderick Smith was convicted by jury and sentenced to death for the 1993 murders of his wife and four step-children. Following the denial of both his direct appeal and his original application for post-conviction relief,[1] Smith filed a successor application for post-conviction relief, claiming he cannot be executed because he is mentally retarded.[2] This Court granted the successor application in part and remanded the matter for a jury trial on the issue of whether Smith is mentally retarded.[3] The district court conducted a six-day jury trial in March 2004 and the jury found that Smith was not mentally retarded. Smith appealed the jury's verdict to this Court. While that appeal was pending here, the Tenth Circuit Court of Appeals granted Smith a writ of habeas corpus and vacated his death sentence because of ineffective assistance of counsel during his capital sentencing proceeding. *Smith v. Mullin*, 379 F.3d 919 (10th Cir.2004). Smith's

[1] *Smith v. State*, 1996 OK CR 50, 932 P.2d 521 (direct appeal); *Smith v. State*, 1998 OK CR 20, 955 P.2d 734 (post-conviction).

capital post-conviction counsel moved to dismiss the appeal from Smith's mental retardation trial, which was part of his capital post-conviction case, for lack of jurisdiction because Smith was no longer under a death sentence. This Court dismissed that appeal without prejudice and without ruling on the merits of his claims related to his jury trial on mental retardation.[4]

Smith's case is now pending before the district court for a new capital sentencing proceeding. There, he moved to quash the Bill of Particulars, alleging that he is mentally retarded and thus ineligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The district court reluctantly granted Smith's request for a second jury trial on the issue of mental retardation and the State appealed. On May 26, 2006, this Court issued an Order assuming original jurisdiction and granting a writ of prohibition. We found that rather than being entitled to a second jury trial on an issue already decided by a jury, that Smith should be allowed to pursue an appeal out-of-time of the verdict from his earlier jury trial finding him not mentally retarded to determine if that verdict should stand. *State ex rel. Lane v. Bass,* Case No. PR-2006-509. Smith sought and was granted this appeal out-of-time and his case was assigned to the Accelerated Docket of this Court pursuant

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[2]*Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding it is unconstitutional to execute mentally retarded persons).
[3]*Smith v. State,* Case No. PCD-2002-973 (Okl.Cr. August 5, 2003).
[4] *Smith v. State,* Case No. PCD-2002-973 (Okl.Cr. Nov. 10, 2004).

to the procedure outlined in *Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135.[5] The Court heard oral argument on Smith's claims of error on January 18, 2007, and took the matter under advisement. We now affirm the jury's verdict finding that Smith is not mentally retarded.

Smith argues in his first proposition that the district court erred in allowing Detective Maddox to testify, over objection, that the concealing of evidence and altering of the crime scene were thoughtful, deliberate actions undertaken by Smith to avoid detection and which show that Smith is capable of logical reasoning. He maintains this testimony was beyond Detective Maddox's personal knowledge and is nothing but speculation.

A trial court's decision to admit evidence will not be disturbed on appeal absent a showing of abuse of discretion accompanied by prejudice. *Howell v. State*, 2006 OK CR 28, ¶ 33, 138 P.3d 549, 561. Detective Maddox testified that he was the lead investigator in the crime for which Smith was convicted. He explained that evidence at the crime scene was hidden in closets and in the attic and that a bed had been "remade" in such a way as to conceal evidence hidden underneath it. He further explained that police determined that the carpet at the scene had been cleaned based on tracks in the carpet consistent with a carpet cleaning machine and tests confirming that evidence on the carpet had been removed through a cleaning process. The prosecutor asked Detective Maddox

[5] The State filed a motion to reconsider this Court's earlier decision accepting Smith's petition in error as timely based on the unique and complex procedural circumstances of this case. We have reviewed the motion to reconsider and find that it should be **DENIED.**

what the condition of the crime scene indicated to him about the mental ability of the perpetrator and Maddox testified that the placement of the evidence indicated the perpetrator thoughtfully hid evidence to avoid detection.

The district court did not err in allowing this testimony. Jurors were told that Smith had been found guilty of a crime, but neither the crime itself nor the sentence imposed was revealed. Throughout the trial, no reference was made to the death penalty, capital punishment, or death row.[6] No facts of the murders Smith committed were introduced and the district court confined the evidence to the narrow issue of mental retardation. Smith's ability to recognize the wrongfulness of his criminal acts and to conceal evidence of his crimes is relevant to the issue of whether he is capable of logical reasoning and whether he is mentally retarded. The evidence regarding the crime scene was presented without prejudicial details of the crime itself to comport with our prior decisions concerning admission of evidence related to the crime and admission of this evidence was not unfairly prejudicial. *See e.g., Lambert v. State,* 2003 OK CR 11, ¶ 3, 71 P.3d 30, 31. Maddox's opinion that Smith deliberately hid evidence to avoid being caught was rationally based on his perceptions of the crime scene and his dealings with Smith and were helpful to the jury's determination of whether Smith is mentally retarded. Such lay opinion testimony is admissible under 12 O.S.2001, § 2701.[7] This claim is denied.

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[6] The district court granted a mistrial in an earlier trial on this issue when mention was made of the death penalty.

[7] Title 12 O.S.Supp.2002, § 2701 provides:

Smith claims in his second proposition that the trial court erred in instructing the jury, over his objection, that mental retardation must be "present and known" before age eighteen. This is the standard uniform instruction adopted in *Murphy v. State,* 2002 OK CR 32, 54 P.3d 556, 570 Appendix A. He contends that the phrase "present and known" is more restrictive than the *Murphy* definition, as well as other definitions, of mental retardation. He maintains that, while the *Murphy* language requires only that someone observed his mental disability as a child, the instruction requires him to prove that his subaverage intellectual condition was recognized and diagnosed as mental retardation. This same claim was rejected in *Howell,* 2006 OK CR 28, ¶ 19, 138 P.3d at 558 and *Myers v. State,* 2005 OK CR 22, ¶ 14, 130 P.3d 262, 269. Smith has provided no new authority to convince us that our prior decisions on this issue are wrong. This claim is denied.

Smith argues in his third proposition that the trial court erred in refusing his request to submit non-unanimous verdict forms to the jury. This Court has rejected this claim repeatedly. *Howell,* 2006 OK CR 28, ¶ 19, 138 P.3d at 558; *Hooks v. State,* 2005 OK CR 23, ¶ 12, 126 P.3d 636, 642; *Myers,* 2005 OK CR 22, ¶ 16, 130 P.3d at 269. Smith offers nothing new to persuade us to revisit the issue here. This claim is denied.

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
1. Rationally based on the perception of the witness;
2. Helpful to a clear understanding of his testimony or the determination of a fact in issue; and

Smith complains in his fourth proposition that the jury's verdict is contrary to the clear weight of the evidence and that the State failed to rebut evidence of his deficits. When a defendant challenges the sufficiency of the evidence following a jury verdict finding him not mentally retarded, this Court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion. *Myers,* 2005 OK CR 22, ¶ 7, 130 P.3d at 267. Applying this standard of review to the present case, we find the record supports the jury's verdict that Smith is not mentally retarded.

It is the defendant's burden to prove mental retardation by a preponderance of the evidence. *Myers,* 2005 OK CR 22, ¶ 6, 130 P.3d at 265-66. "He must show: 1) that he functions at a significantly sub-average intellectual level that substantially limits his ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; 2) that his mental retardation manifested itself before the age of 18; and 3) that he has significant limitations in adaptive functioning in at least two of the nine listed skill areas."[8] *Id.*

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3. Not based on scientific, technical or other specialized knowledge within the scope of Section 2702 of this title.

[8] The adaptive functioning skill areas are: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.

Evidence of Smith's intellectual functioning was controverted at trial by the experts.[9] Smith's primary expert, Dr. Clifford Hopewell, tested him in January 2003 and scored his full scale I.Q. at 55. Dr. Hopewell concluded that Smith is mildly mentally retarded and that he has adaptive functioning deficits in at least five areas. Dr. Frederick Smith, another psychologist who evaluated Smith in prison in 1997, testified that his testing showed that Smith's full scale I.Q. was 65, some ten points higher than Dr. Hopewell's score. Dr. Smith was left with the impression during his evaluation that Smith was actually brighter than what his I.Q. test score showed. He wrote in a memo shortly after the evaluation that he suspected that Smith's score was somewhat low in terms of accuracy. Dr. Smith also administered the Raven's Standard Progressive Matrices that showed Smith's I.Q. was in the range of 69 to 78. He testified that he now believes Smith's I.Q. is closer to 70.

The State presented the testimony of forensic psychologist Dr. John Call to refute Smith's expert evidence of subaverage intellectual functioning. Dr. Call gave Smith the Wechsler Adult Intelligence Scale-III (WAIS-III) I.Q. test and reviewed Dr. Hopewell's data and score on this same test, as well as several other tests. He found that Smith failed two tests designed to detect malingering given by Dr. Hopewell.[10] According to Dr. Call, Smith's performance on these two tests provides significant doubt about his efforts on the WAIS-III I.Q. test and the

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[9] Intelligence quotients are one of the many factors that may be considered, but are not alone determinative. *Myers*, 2005 OK CR 22, ¶ 8, 130 P.3d at 268.

validity of Dr. Hopewell's overall testing. Dr. Call also gave Smith one of the malingering tests (Test of Memory and Malingering) during his evaluation and found that Smith failed again. Dr. Call concluded that Smith's score suggested a lack of effort on his part calling into doubt the reliability and validity of the I.Q. score that both he and Dr. Hopewell obtained.[11] Dr. Call noted a previous I.Q. test given by Dr. Murphy in 1994 in which Smith scored a full scale I.Q. of 73. Dr. Call believed lack of effort on Smith's part was one possible explanation to account for the discrepancy in the subsequent scores. In Dr. Call's opinion, the data showed that Smith did not put forth his best efforts during his and Dr. Hopewell's testing and that Smith's I.Q. test results were unreliable and suspect.

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. Emma Watts, Smith's former case manager, now unit manager in prison, testified that she had daily contact with Smith for two years while acting as his case manager. Watts described Smith as quiet and respectful for the most part; he appeared to be like the other inmates in her unit. He was able to communicate with her and she found that he understood how to use manipulative behavior to get a more desirable cell or cellmate.

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[10] The tests were the 15-Item Test and the Test of Memory and Malingering commonly referred to as the TOMM test.

[11] Dr. Call's I.Q. testing of Smith also showed a full scale I.Q. score of 55.

Ruby Badillo, a provider of financial services, testified that she met with Smith and his wife twelve years ago about purchasing life insurance. She recalled that Smith was kind and attentive to his wife. She identified their application and Smith's signature. She said that Smith neither indicated that he had any physical or mental challenges nor did she suspect that he had any based on their conversation. She described Smith as "perfectly normal" and "very sociable." Smith appeared so personable and capable that Badillo tried to recruit him to work for her company selling insurance policies and presenting other financial services to would-be customers.

Mark Woodward, the facilities manager for a company providing custodial services to local schools, testified that Smith was the head custodian at Washington Irving Elementary School. Woodward described Smith as the "go-to" person if something needed to be done at the school. Smith was responsible for supervising a staff of four to five people working shifts from 7 a.m. until 11 p.m. and insuring that their time cards were filled out. Smith had to delegate custodial duties and, if someone was absent from work, reassign that person's duties. Woodward identified Smith's job application and signature; he also identified various forms that Smith had signed or filled out for his employment. He noted that Smith checked on his job application form that he could read, write and speak the English language. Woodward testified that he effectively communicated with Smith in person and through the use of a digital pager. He recalled an occasion when he had to reprimand Smith for not wearing his

uniform and thereafter Smith followed the rules and wore his uniform. According to Woodward, Smith effectively operated the school's multi-zone alarm system and cleaning equipment. Woodward described Smith as a typical head janitor.

Fern Smith, one of the assistant district attorneys who prosecuted Smith's murder case, testified that Smith filed and presented several motions on his own behalf. She said that Smith was articulate and made "good" arguments to the court in support of his motions. She did not notice anything unusual or out of the ordinary about Smith's demeanor during trial or his many court appearances. She recalled him taking notes and conferring with counsel during trial. Ms. Smith, who was once a special education teacher of mentally retarded students, stated there was nothing in her contacts with Smith that led her to believe that Smith was mentally retarded.

Laura Dich testified that she met Smith in April 1993 at a flea market and they began dating shortly thereafter. Smith did not give her his home phone number, instead he had her use his digital pager number to contact him. Smith lied to Dich and told her that he lived with a cousin instead of with his wife and step-children and Dich claimed that she was none the wiser.[12] Dich testified that by the end of May 1993, her relationship with Smith was progressing and Smith told her that he wanted to marry and have children with her. Dich, who was only 19 years old and still living with her parents, testified that Smith took

[12] Once when Dich paged Smith, an upset woman returned the page causing Dich concern, but Smith convinced her for the most part that he had no other girlfriends.

her to a motel on several occasions and that it was Smith who rented and paid for the motel room.

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.

Smith argues in his fifth proposition that the trial court erred in allowing evidence that he suffers from seizures and has been diagnosed with dissociative identity disorder, multiple personality disorder and schizophrenia. He contends that this evidence, admitted through Dr. Hopewell, Dr. Smith and Norman Cleary, Appellant Smith's cellmate, was irrelevant to the issue of mental retardation and was unfairly prejudicial. We disagree.

The prosecutor on cross-examination questioned Dr. Hopewell about the sources he used to form his opinion that Smith is mentally retarded. He explained that he did not conduct personal interviews with Smith's family because it was not necessary to his task. The prosecutor asked what Dr. Hopewell's original task was in Smith's case in 1997 and he said that, at that

time, he was asked to examine Smith for brain damage and dysfunction. Dr. Hopewell continued in his response, without objection, that Smith had been given a variety of diagnoses and that with each diagnosis there was concern about malingering. He recounted Smith's various diagnoses, including dissociative identity disorder, schizophrenia, malingering and mental retardation. The prosecutor further questioned Dr. Hopewell about the materials he reviewed as part of his 1997 evaluation. Ultimately, defense counsel objected and the trial court admonished the prosecutor to "tie" her questions to the issue of mental retardation. The prosecutor then asked about brain damage as it related to mental retardation and whether Dr. Hopewell used portions of his 1997 evaluation to formulate his opinion that Smith is mildly mentally retarded.

The record shows that it was not the State who first questioned Dr. Smith about his involvement in Smith's case and his I.Q. testing in 1997, but defense counsel. Dr. Smith testified that he and two other doctors were investigating whether Smith had brain damage. Defense counsel asked Dr. Smith if mental retardation was also one of the issues being investigated at that time. He said that they were not looking so much for mental retardation as for other issues, namely multiple personality disorder, and if Smith was malingering. On cross-examination, the prosecutor confirmed that Dr. Smith was investigating a claim of multiple personality disorder, a disorder in which Dr. Smith does not believe. Dr. Smith felt that Smith was being influenced by someone to mold his behavior to be consistent with a diagnosis of multiple personality disorder.

The trial court did not commit error, plain or otherwise, in allowing the challenged testimony of Dr. Hopewell and Dr. Smith and finding that defense counsel opened the door to much of the testimony. Both doctors provided background information of their involvement in Smith's case. Neither was retained initially to determine if Smith was mentally retarded, but both used information obtained during earlier evaluations for brain damage to form opinions about whether Smith is mentally retarded and a malingerer. Both doctors explained the circumstances of their earlier evaluations regarding their investigation of brain damage and other mental illnesses vis a vis their opinions that Smith is mildly mentally retarded. Such evidence was relevant and did not unfairly prejudice Smith. In addition, whether Dr. Smith believed that Smith had feigned symptoms of some type of multiple personality disorder or other dissociative identity disorder is relevant to give the jury a full understanding of Smith's functioning.

Nor did the trial court err in admitting the challenged testimony of Norman Cleary, Smith's cellmate, and finding that the defense opened the door to much of his testimony as well. Cleary described Smith's daily routine of coloring and watching television. He explained how he tried, without success, to teach Smith to read. He went into detail about how he had to assist Smith with filling out requests for medical attention, using the prison canteen and writing letters to family and friends because Smith was incapable and slow. He also testified that Smith had seizures after which Smith would be violent. On cross-examination,

Cleary further described these seizure episodes and said that he documented the various incidents for one of Smith's attorneys. Questioning Cleary about Smith's seizures and violent episodes that he alone witnessed was proper to test the credibility and perceptions of this witness, and was relevant to the issue of whether Smith is malingering. The trial court did not abuse its discretion in admitting this evidence. This claim is denied.

Smith contends in his sixth proposition that his Sixth Amendment right to confrontation was abridged when the trial court limited his cross-examination of Dr. Call, who is also a licensed attorney, on an issue of bias, specifically if he co-wrote the State's response brief defending the Blackwell Memory Test, a non-standardized test designed by Dr. Call, himself, to detect malingering. During cross-examination, defense counsel asked Dr. Call to identify the State's response brief and the State objected. At the bench, defense counsel told the court that she believed that Dr. Call prepared most of the brief and that she wanted to expose his bias and show that Dr. Call was not only acting as a witness in this matter, but also as an advocate against Smith. The prosecutor denied that Dr. Call wrote the brief and told the court that the witness had only provided information about the test to be used in writing the brief. The trial court held that, without any evidence to contradict the prosecutor, there was no good faith basis for the question; defense counsel offered no further evidence to support the question.

While the Sixth Amendment guarantees a defendant the right to cross-examine witnesses, it also allows a trial judge to place reasonable limits on cross-examination. *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *Thrasher v. State,* 2006 OK CR 15, ¶ 7, 134 P.3d 846, 849. "Not all limitations on the cross-examination of a prosecution witness run afoul of the right of confrontation." *Thrasher,* 2006 OK CR 15, ¶ 7, 134 P.3d at 849. That is why trial judges have wide latitude to impose reasonable limits on such cross-examination based on concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall,* 475 U.S. at 679, 106 S.Ct. at 1435; *Thrasher,* 2006 OK CR 15, ¶ 7, 134 P.3d at 849.

As we stated in *Thrasher*:

> In determining whether the Sixth Amendment has been violated, we look to see whether there was sufficient information presented to the jury to allow it to evaluate the witness and whether the excluded evidence was relevant. "[W]e 'distinguish between the core values of the confrontation right and more peripheral concerns which remain within the ambit of the trial judge's discretion.'" "Limiting the right to cross examine for impeachment purposes involves a peripheral concern."

2006 OK CR 15, ¶ 9, 134 P.3d at 849 (citations omitted).

Our review of the record convinces us that we are dealing with "peripheral concerns," and we can see no abuse of discretion here. Both sides

agree that no evidence was presented to the jury concerning Dr. Call's Blackwell Memory Test. The record shows that Smith's counsel had nothing more than a hunch that Dr. Call co-wrote the brief and no evidence to support the inquiry. Such evidence would have been confusing to the jury and had the potential to open up issues regarding the test not relevant here. The trial court did not err in limiting Smith's cross-examination of Dr. Call under these circumstances.

Smith argues in his seventh proposition that the trial court erred in excusing a prospective juror for cause. We addressed a similar challenge in *Hooks v. State*, 2005 OK CR 23, ¶ 20, 126 P.3d 636, 645. The juror challenged here, like the one in *Hooks*, had professional experience with mental retardation. There, we noted that the *Murphy* definition of mental retardation for capital punishment purposes is substantially similar to the accepted clinical definitions of mental retardation, but that it differs slightly in requiring proof of significant limitations in adaptive functioning in nine, rather than ten, areas. The prospective juror here was asked if the legal and clinical definitions differed, whether she could follow the law and apply the definition given by the trial court. She replied that she could not, and was excused for cause over Smith's objection.

The decision to excuse a juror for cause rests within the trial court's sound discretion. *Id.* "A juror must agree to follow the law; any other response would prevent or substantially impair performance of her duties in accordance with her

instructions and oath." *Id.* Even though the differences between the state and clinical definitions are so small that there is little likelihood of conflict, that is not the issue here. In order to be qualified as a juror, the prospective juror had to agree to follow the law, whatever it was. She could not do this. The trial court did not abuse its discretion in excusing her for cause. This claim is denied.

Smith argues in his eighth proposition that he was denied a fair trial on the issue of mental retardation because of prosecutorial misconduct. Allegations of prosecutorial misconduct do not warrant reversal unless the cumulative effect of error found deprived the defendant of a fair trial. *Warner v. State,* 2006 OK CR 40, ¶ 197, 144 P.3d 838, 891.

Smith challenges one of the prosecutor's statements during jury selection relating to the burden of proof, two statements in opening statement about the experts review of the evidence and three statements made during closing argument. The defense's objection to the prosecutor's question during jury selection about the burden of proof was sustained before any juror answered; the trial court advised the prosecutor to rephrase. We find the trial court's ruling cured any error in light of the instructions and other discussion about the burden of proof. *McElmurry v. State,* 2002 OK CR 40, ¶ 126, 60 P.3d 4, 30 (sustaining an objection generally cures any error.). The trial court also sustained the defense's objection to the first challenged remark during opening statement because it was argumentative and the prosecutor followed the court's ruling and outlined the evidence. The second objection, for the same reason

(argumentative), was properly overruled because the prosecutor was merely outlining the evidence. *Howell,* 2006 OK CR 28, ¶ 7, 138 P.3d at 556 (The purpose of opening statement is to tell the jury of the evidence the attorneys expect to present during trial and its scope is determined at the discretion of the trial court.). Likewise, any error in the prosecutor's statement during closing argument brought to the court's attention was cured when the trial court sustained Smith's objection. *McElmurry,* 2002 OK CR 40, ¶ 126, 60 P.3d at 30. The other two statements challenged in closing argument were not met with objection and a review of the remarks shows they were fair comments on the evidence. This claim is denied.

Smith contends in his ninth proposition that he was denied a fair trial because of ineffective assistance of counsel. He contends that trial counsel failed to investigate and fully present evidence demonstrating that he, in his status as a custodial supervisor, was working at his full potential as a person with mental retardation.

This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: [1] that counsel's performance was constitutionally deficient; and [2] that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. Under this test, Smith must affirmatively prove prejudice resulting from his

attorney's actions. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067; *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Head,* 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. Rather, Smith must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

On appeal, Smith contends that trial counsel should have secured an expert in the field of training mentally retarded individuals to show that the skills he performed as head custodian were not inconsistent with someone who is mentally retarded. Smith has appended to his brief, among other things, an affidavit from Theresa Flannery who is the Administrator for the Dale Rogers Training Center's Vocational Programs, a vocational training program for mentally retarded individuals in Oklahoma City. She attests that individuals with an I.Q. in the range of 55 can be trained to be custodians, to set security alarms, to use pagers and to learn repetitive cleaning tasks.

We cannot consider Smith's extra record material to evaluate the merits of his ineffective assistance of counsel claim under these circumstances.[13]

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[13] Smith has not requested an evidentiary hearing on his ineffective assistance of counsel claim under Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2007). This Court does not consider *ex parte* affidavits and extra-record material for purposes of assessing the merits of an ineffective assistance of counsel claim. Rather, we will consider such material to determine if an evidentiary hearing is warranted. *Dewberry v. State,* 1998 OK CR 10, ¶ 9, 954 P.2d 774, 776. Assuming Smith attached this information for purposes of requesting an

Convincing evidence was presented that Smith did not suffer from sub-average intellectual functioning that prevented him from being productive and able to function adequately. Those witnesses with first-hand knowledge of his skills portrayed Smith as capable and normal. This claim is denied.

Smith contends in his tenth proposition that his trial attorneys were ineffective for failing to present an expert to confirm that I.Q. testing by experts, Dr. Hopewell, Dr. Smith and Dr. Call, was consistent with a score clearly in the mentally retarded range. He also argues his attorneys should have had an expert perform the ABAS II test to confirm deficits in his adaptive functioning.

Smith submits an affidavit from Dr. Terese Hall in support of this claim again without requesting an evidentiary hearing. We cannot consider this affidavit for purposes of evaluating the merits of this claim. Thus, we must find that Smith has failed to meet his burden and cannot prevail. This claim is denied.

Smith asks this Court to review the aggregate impact of the errors identified in his case in his final proposition. He argues the cumulative effect of the errors committed during his trial on mental retardation necessitates relief. Where there is no error, there can be no accumulation of error. *Myers v. State*, 2006 OK CR 12, ¶ 103, 133 P.3d 312, 336. We have reviewed the record along with Smith's claims for relief and have found no error. This claim is denied.

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evidentiary hearing on his ineffective assistance of counsel claim, the information is insufficient to show by clear and convincing evidence that there is a strong possibility that counsel was ineffective for failing to utilize the complained-of evidence. Rule 3.11(B)(3)((b)(i).

IT IS THEREFORE THE ORDER OF THIS COURT that the Judgment finding that Smith is not mentally retarded is **AFFIRMED.** Smith's capital sentencing proceeding may now proceed in the District Court of Oklahoma County. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of January, 2007.

Gary L. Lumpkin Concur in Result

GARY L. LUMPKIN, Presiding Judge (Opinion Attached)

CHARLES A. JOHNSON, Vice Presiding Judge

Charles S. Chapel Dissenting (Opinion attached)

CHARLES S. CHAPEL, Judge

Arlene Johnson

ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

ATTEST:

Michael S. Richie

Clerk

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS

I continue to believe this Court's decision in *Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135, was errant as I wrote in my separate vote in that case. However, I accede to its procedure based on *stare decisis*.

I also believe the breadth of Appellant's I.Q. Tests, i.e. 55 to 78, in and of itself shows he was not mentally retarded. As I have previously written, truly mentally retarded individuals do not record that amount of variance. Combined with the evidence of adaptive functioning, the jury verdict is fully supported by the evidence in this case.

I concur in the judgment of the Court.

CHAPEL, J., DISSENTING:

I dissent. I am deeply troubled by this case. The State cannot execute a person who is mentally retarded.[1] Smith was among those defendants who had a jury determination of mental retardation after he had been convicted of a capital crime. This Court has gone to great lengths to fashion a process which focuses the jury's attention on the issue of mental retardation and protects the rights of the defendant and the State in capital mental retardation cases.[2] After reviewing Smith's case, it appears that Smith's jury trial on the mental retardation issue was carefully conducted in accordance with the procedures developed by this Court. As the majority notes, the jury heard nothing regarding the facts of this case or even the specific crimes Smith committed. There was no mention of the death penalty, capital punishment, or death row. However, notwithstanding these facts, I cannot concur in the majority opinion upholding the jury's verdict.

To prove mental retardation, a defendant must have an IQ score of 70 or below, and show (1) functioning at a significantly sub-average intellectual level in specific ways; (2) with significant limitations in adaptive functioning in at least two of nine skill areas; (3) and that this mental retardation manifested itself before he was eighteen years old.[3] However, a defendant must show these only by a preponderance of the evidence, and on review we also apply the

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[1] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 566.
[2] *Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135, 1139-43..
[3] *Myers v. State*, 2005 OK CR 22, 130 P.3d 262, 265-66.

preponderance standard.[4] Smith had IQ tests of 55, 55, 65 and 73, with one test in the range of 69 to 78. While some witnesses suggested he may not have been performing at his best effort during the testing resulting in the lowest scores, no witness testified that Smith would have had a significantly higher result, or that he was not mentally retarded. The expert consensus appears to be that Smith's IQ is close to 70. Smith presented evidence that he was in educably mentally handicapped classes in school, and that those classes were used for mentally retarded children. Two former teachers testified that he was in their EMH classes, that he was appropriately placed, and that they believed him to be retarded. Smith presented evidence that he was functionally illiterate, though he could copy letters and possibly read at a second or third grade level. He received assistance with reading and writing. He was slow developmentally from birth and lived with either his wife or mother until he was imprisoned. While Smith could carry on simple conversations and conduct basic business transactions, there was no evidence that he used abstract thought or was capable of abstract conversation.

The State did present evidence contrary to Smith's claims. The State presented several witnesses who had brief, though regular, contact with Smith without noticing any mental handicap. However, all the witnesses with experience of mental retardation agreed that one cannot tell if a person is mildly mentally retarded by looking at them, or in casual conversation. Smith was a head custodian, and experts did not believe that he could have assumed

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[4] *Blonner*, 127 P.2d at 1140; *Myers*, 130 P.2d 265.

that responsibility if he were mildly mentally retarded. However, there was evidence that Smith had help in performing those duties. While Smith used his janitorial skills to aid him in cleaning the crime scene and hiding evidence, the experts did not state that a mildly mentally retarded person cannot engage in any form of short-term planning. There was also evidence that Smith could, and did, lie and manipulate people to get what he wanted. Again, experts agreed that a mentally retarded person can do those things. Smith presented evidence of other deficits corresponding to the definition of mental retardation in capital cases.

Smith presented significant evidence of mental retardation, including persons who had taught him as mentally retarded and test scores which put him in the mentally retarded range. The State certainly presented testimony which cast doubt on some of Smith's evidence. I have the greatest respect for our jury system. However, on reviewing the entire case, I cannot conclude that Smith is not, more likely than not, mentally retarded. The constitutional issue in this case, whether we may execute Smith for his crimes, is of the utmost importance. Given the extremely low burden of proof, I am compelled to give Smith the benefit of any doubt I may have. I cannot concur in a decision which finds that Smith is not mentally retarded.

Dallas Neuropsychological Institute
Psicologia Clinica Hispana

Suite 116 ◆ 3401 Altamesa ◆ Ft. Worth, Texas 76133
Voice (817) 361 - 9747 ◆ *Cellphone* (817) 919 - 2322
Facsimile (817) 361 - 9003

Suite 407 ◆ 7515 Greenville Ave ◆ Dallas, Texas 75231
Voice (214) 373 - 8080

E-mail hopewell@airmail.net ◆ Website www.ptan.com/dni/

"We were the first; We are the Future"

Neuropsychological Consulting Report

Name:	**Smith, Roderick**
Age:	32
Education:	Special Education
Occupation:	Not in Labor Force
Referred by:	Jack Fisher, Esq.
Examiner:	C.Alan Hopewell PhD.ABPP
Date of Exam:	20 November 1998

Referral:

This referral was received subsequent to a previous analysis of the Roderick Smith case which I performed on 17 August 1997 at the request of the Oklahoma Indigent Defense System. That assessment was based upon a careful and thorough review of both extensive written materials as well as the videotapes which I was able to review. It was, and remains, my opinion that there is no doubt that Mr. Smith suffers from documented and measurable brain dysfunction. The most likely cause of this brain dysfunction is the hypoxic episode experienced as a child in that (a) hypoxia is a known cause of brain damage and (b) hypoxic episodes are known to cause injury In particular to temporal and hippocampal systems, the systems which are documented to function poorly in Mr. Smith both by neuroradiological as well as neuropsychological testing methods. The dysfunction may well have been exacerbated by subsequent head Injuries, migraine attacks, and or cerebral dysrhythmia (seizure activity). The dysfunction is without a doubt likely to affect memory, information processing, and emotional behaviors and action, especially under periods of stress. The dysfunction either by itself or in conjunction with other factors such as (limited) educational opportunities, results In mild mental retardation or borderline IQ levels.

As a result of these factors, it has been seriously questioned if Roderick Smith was able to competently understand his *Miranda Rights* and competently, willfully, and intelligently waive those rights during his initial interrogations by law enforcement personnel. The current examination was

performed, therefore, to address this issue. In addition, I have performed some additional neuropsychological tests both to insure the validity and reliability of previous testing as well as to more fully investigate neuropsychological functioning as related to the understanding of *Miranda Rights*.

Records Reviewed:

- Crisis Center Intake Sheet
- Newspaper Article Re: Sheriff Office Commitment

Tests Administered:

- Clinical Interview
- Adult Neuropsychological Questionnaire
- Wide Range Achievement Test III
- Psychiatric Symptom Assessment Scale (Modified BPRS)
- Neurobehavioral Rating Scale
- Draw a Person
- California Verbal Learning Test
- Complex Figure of Rey-Osterrieth
- Controlled Word Association
- Assessing, Understanding, and Appreciation of *Miranda Rights*
- Sentence Completion Test (Attempted)

Background Information and Behavioral Observations:

Roderick Smith's background and history have been extensive reviewed and reported, and will only be briefly summarized here. Roderick Smith was convicted in Oklahoma County of Murder in the First Degree of his wife and four stepchildren in 1994, for which he received the death penalty. He is now at the stage of his appeal known as "federal appeals." Despite a long mental defect and mental illness history which included at least borderline mental retardation, documented organic brain damage with seizure activity as a result of a drowning incident, special education, and mental illness which required extensive family counseling, and numerous attempts to arrange more extensive neuropsychological assessment and treatment immediately prior to the murders, the issues of Roderick's mental illness were addressed only briefly and ineffectively at his trial.

Based upon the review of the record, It is evident Dr. John R. Smith and Phillip Murphy, M.D., who examined Roderick Smith at trial, were unaware he had walked into the Oklahoma County Sheriff's office, "incoherent and mumbling," and that he at that time had stated that 'he hadn't eaten In four days," and that Oklahoma County Sheriff deputies had subsequently transported Roderick to the Oklahoma County Crisis Intervention Center (OCCIC) for commitment and treatment. This information was obtained from a newspaper article that appeared the morning after his Mr. Smith's arrest. The OCCIC Intake report reveals one of the mental health professionals made a preliminary diagnosis of "psychotic" and "out of touch [with reality.]" Instead of remaining at OCCIC for treatment, Mr. Smith was arrested at OCCIC a short

time later and brought back to the Oklahoma County Police Department for interrogation, and before any stabilization of his mental condition could be achieved. After telling Mr. Smith they wanted to talk to him about his car accident on the videotapes which I was able to review, the detectives read Mr. Smith the Miranda warning which they claim he understood and voluntarily waived.

The personnel at the Oklahoma County Sheriff's office determined Mr. Smith to be mentally impaired to the extent that he required mental health evaluation at OCCIC. It was observed at that time by deputy Angel Samuel that he appeared to be grossly disoriented. Reports from these deputies included:

(2) Report by Deputy Kimberly K. Hensley Incident #93-0796:

(12:30 p.m.) Black male approached Deputy Samuel and asked to check in. (later identified as Roderick Smith). Hensley observed Roderick Smith to be disoriented. He also appeared to have an abrasion on his forehead and dirt on his 'T' shirt.

Roderick Smith was asked if he had warrants and he responded by saying "they told him to check in." There were no warrants. Ho again stated he had hit his head and didn't feel good due to his being In a car wreck and needed to check in. Lt. Samuel called Lt. Thomas to the front desk and he took control and took Smith to his office. (Typed 7/7/93).

(3) Report by reporting Deputy M. Steadman Incident #93-0796:

(6-28-93 at 13~00) Deputies Steadman, Spencer and Hagan were at OCCIC when they were advised of a possible mental patient at the front clerk of the Oklahoma County jail. Hagan responded to the jail and transported the subject to OCCIC, voluntarily because subject kept stating he wanted help, a place to stay and something to eat. Steadman and Spencer felt like something wasn't right and began trying to locate a family member or friend. They say the address of 623 NW 90th and attempted to criss-cross the address for ~a telephone number which was non-published. They asked subject further questions and he "appeared very distraught and unable to answer questions." Steadman contacted the dispatcher to send a unit by 623 NW 90th. Deputy Lilly later advised Steadman that OCPD homicide stated to retain the subject. Steadman and Hagan transported subject to the Homicide division where he was turned over to Detective BEMO.

Note; While at OCCIC, the subject did advise Steadman and Spencer that he wanted help, a place to stay, and something to eat. Steadman and Hagan understood the subject to be voluntary and no evaluation had been started by the doctor because Steadman and Spencer were still assessing the situation because we knew of the homicide in the "Highlands," but they did not know the exact address'. Steadman and Spencer realized the suspect's address was in the Highlands and that he was acting very distraught. Therefore, Steadman and Spencer believed there was something he was not

When compared to Newspaper article that ran in the Oklahoman on 6-29-93,

"Oklahoma County Sheriff J. D. Sharp said Roderick Smith showed up at the front desk of the sheriff's office and said he hadn't eaten on four days, Sharp said. "He told us someone told him to come here, so we took him to the Crisis Center. The Crisis Center is for mental health care. Later Monday, Sharp said, his deputies made the connection between Smith's address and the scene of the homicide. They then turned Smith over to Oklahoma City homicide detectives. "Police said the suspect complained of being in car accident three days ago."

(4) PMH form by reporting Deputy H. Hagan Incident #93-0796;

(6-28-93 al 14:00) Hagan was dispatched to the County, Lt. Thomas' office to check on a possible mental patient. Lt. Thomas said he was called to the front desk and he found the subject there. His action had scared the people at the front desk. LS. Thomas brought the subject back to the patrol office area but was unable to get any information from him. Hagan talked to the subject and he acted like he was out of touch with reality. Subject was identified from a driver's license. Based on the subject's action, the verbal information from Lt Thomas, the subject was transported to OCCIC for evaluation. There were no warrants. Hagan was met by Steadman and took subject to Dr. Boa's office. Hagan handed the driver's

license to Steadman who was going to check to see if he could get some more information on the subject. "We felt that the subject did not meet the criteria of an out-of-touch mental patient" #234 (?) Took custody of the subject and Hagan went 10-98. Hagan overheard OCPD radio traffic on this subject and asked dispatch to tell #234 to be careful with him.

(5) Report by reporting Deputy H. Hagan incident #93-0796;

Same as PMH #4.

In my professional opinion, such information would have been invaluable to Dr. Smith and Dr. Murphy or to any mental health practitioner in their assessment of Mr. Smith. Dr. Smith has subsequently had adewquate opportunity to exam Roderick Smith at length, and has provided a diagnosis of multiple personality disorder in addition to the other diagnoses of retardation and organic brain syndrome. In addition, If I had been retained by any counsel to examine Roderick Smith in 1994, my expert opinion would have been that Roderick Smith was incompetent knowingly and intelligently to understand and voluntarily to waive his *Miranda Rights*; that he was mentally incompetent to give a voluntary confession; and that he was mentally incompetent to understand the nature and consequences of the proceedings or to assist his attorney in his defense. These opinions will be further explained and supported by my examination and testing of Roderick Smith as set out below.

My examination was carried out during the morning of 20 November 1998 on Cell Block "H" of the Death Row Unit of the Oklahoma State Penitentiary in McAllester, Oklahoma.

Communication is impoverished but functional, and is often punctuated by obsessive perseverations. Sensorium is intact for name. He is often difficult to understand. Eye contact was poor, and he was adequately attentive and cooperative throughout the interview. However, he often had to be redirected to the task at hand. Stream of speech is noted to demonstrate poverty as well as rigidity of thought, and is often confusing and irrelevant. The examination documented the presence of thought disorder and obsessional ideas. Ideas of reference or influence, delusions, derogatory or grandiose ideas are currently not noted. **Cognitive functions** are impoverished and deteriorated, with defective memory and defective sensorium **Judgement and insight** are essentially absent, and he cannot remember key elements of the crime. He also cannot remember elements of his trial. **Mood** is seen to be characterized by depression, fear, and anxiety. **Affect** is blunted. **Hygiene and grooming** are adequate and appropriate to the situation; he was dressed in jeans and a denim shirt. **Perceptual abnormalities** are currently not noted. I have consulted with Dr. John R. Smith, and, based upon that consultation regarding his diagnosis of Dissociative Identity Disorder, it is my opinion that when I examined Roderick L. Smith on 20 November 1998, I was interviewing the "host" personality - "Roger." On that date, Mr. Smith exhibited no aggressive behavior and was in fact subdued, if not withdrawn, during the entire interview.

Neuropsychological Functioning:

Sensorimotor

Right hand dominance appears well established. Sensorimotor functioning appears to be grossly normal and unremarkable, with slowed psychomotor speed, adequate motor programming, and an acceptable level of motor learning. Visual perception and visuomotor integration also appears within normal limits upon my examination. Testing was consistent with previous similar testing, such as the Trailmaking Test, indicating that there is no evidence of malinger or distortion.

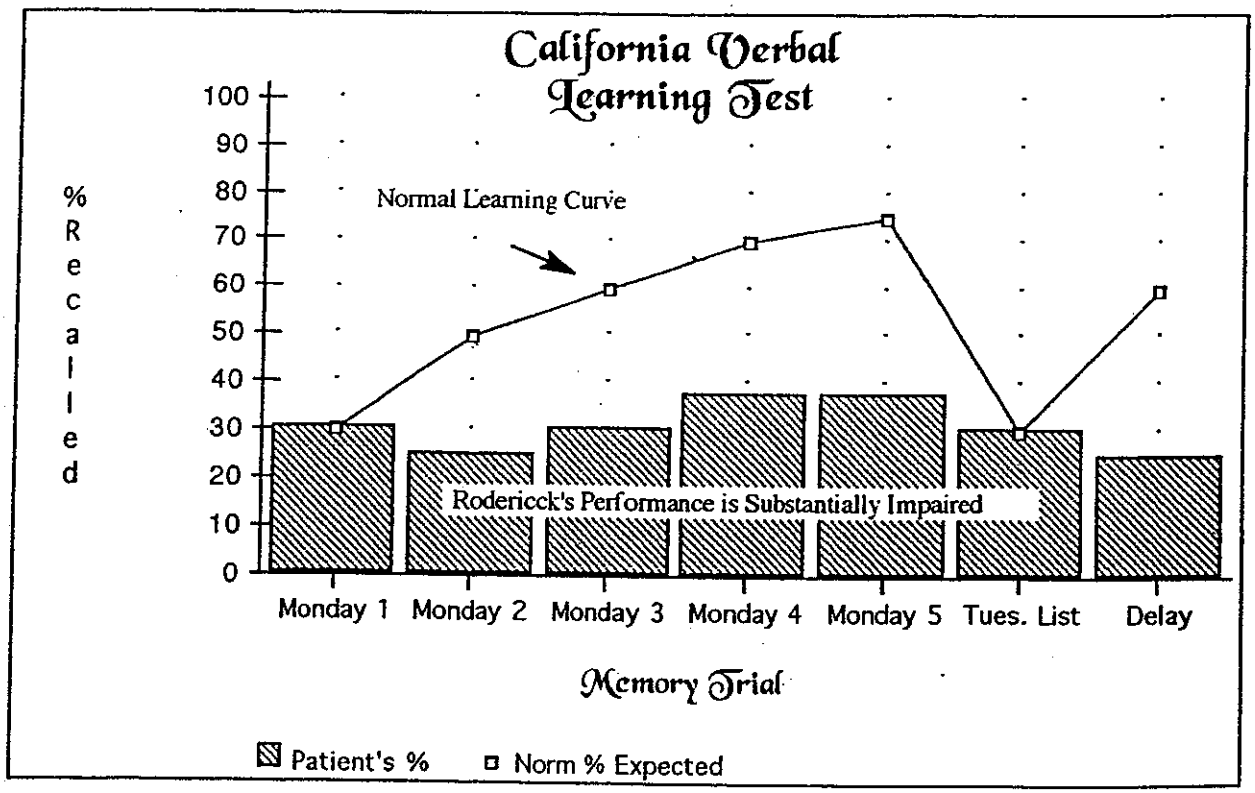
Speech and Language

Speech and language functions are noted for a colloquial speech pattern as well as language of limited intellectual ability, but communication is functional for the activities of daily living. Roderick is completely illiterate due to his brain damage.

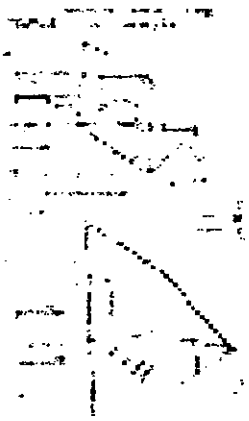
Memory

Defective Storage Memory Profile.

Formal testing of memory indicated defective storage of new information, to include both visual and verbal material. In the case of Roderick, for example, learning and storage of new information was so poor as to result in an very poor memory profile, with memory functioning being below the tenth percentile. This is consistent with a ***Defective Storage Memory Profile.*** Due to the difficulties in the initial ***storage*** of new information, attempt to consolidate new knowledge will be hampered as facts cannot be ***retrieved and used*** if they are not first stored efficiently. Therefore, simple cueing techniques will be of little use by themselves, and it will be better to reduce memory demands and attempt to train only essential domain-specific information. A check of the possibility of memory malingering was performed with the 15 Item Malingering test, which documented that there was no evidence of malingering, and, indeed, Rod seemed to try his best on this test. A graphic example of Roderick's learning and memory curve performance is provided below, in which significantly impaired learning and overall memory functioning is demonstrated:



Likewise, visual memory is impaired although immediate visual perception is intact. Roderick's inability to remember information presented earlier to him is illustrated In the reproduction of his *Rey Figure* attempts below:



⇐ Original *Rey Figure* to be Copied

⇐ Roderick's Copy is Adequate

Roderick's Recall of the *Rey Figure* After 30 Minutes is Impoverished and Defective ⇒

Literacy Functioning

The *Wechsler Adult Intelligence Scale - Revised*, was previously administered to help estimate the overall intellectual ability Roderick. The *Wechsler Adult Intelligence Scale - Revised* thoroughly measures verbal and school-related skills such as language development, the understanding of verbal concepts, one's general fund of information, and English word knowledge obtained both through formal academic training as well as those obtained through life-experiences. The *Wechsler Adult Intelligence Scale - Revised* also measures a number of nonverbal skills relating to the ability of the client to reason what is happening in social situations, to solve problems by being able to analyze a situation and describe it verbally, and to understand and to describe verbally relationships occurring in social situations along with perceptual-motor functions.

The *Wechsler Adult Intelligence Scale - Revised* is administered individually and therefore also allows for judgements to be made about the client's motivational level, attention span, and tolerance to frustration. IQ Scores may range from a low of below 40 to a high score of above 160. The "statistically average" person receives an IQ score between 90 and 110, and about half of all adults score within this range. Almost all people (about 95 percent) achieve IQ scores between 70 and 130. Scores above 130 are considered to be unusually high and are obtained only by about 2 percent of the population. Similarly, scores below 70 are considered to be unusually low and are obtained only by about 2 percent of all clients. Roderick has on numerous times been determined to be within ether *borderline* levels of intellectual

functioning or within the range of *retardation*. My impression is that he functions at even a lower level than would normally be indicated by his IQ due to his brain damage.

Academic abilities in English are so limited as to indicate that Roderick is completely illiterate. Roderick was able to achieve a word recognition grade equivalent score of the kindergarten grade on the *Wide Range Achievement Test*; spelling in English is at the kindergarten level. Mathematics are measured at the second grade level.

Academic Scores

Wide Range Achievement Test III

Subtest	Standard Score	Grade Equivalent
Reading	<45	Kindergarten
Spelling	<45	Kindergarten
Arithmetic	46	2

Understanding of Miranda Rights

The *Instruments for Assessing the Understanding and Appreciation of Miranda Rights* are a set of instruments developed and validated by Thomas Grisso, Ph.D., designed to assist mental health professionals in assessments of juveniles' and adults' capacities to understand and appreciate the significance of their *Miranda Rights*: the rights to remain silent and to have legal counsel during police questioning. The instruments were originally developed for a research project that was funded by the National Institute of Mental Health (MH-27849). The purpose of the initial project was to identify the capacities of youths to understand and appreciate the significance of Miranda warnings regarding the rights to silence and to legal counsel, and to compare delinquent youths' capacities in this regard to those of adult offenders.

The instruments have subsequently been used by mental health professionals when they are asked to examine the capacities of individual youths or adults to have waived their *Miranda Rights* knowingly and intelligently at the time of their police interrogation. This question often forms part of the inquiry in judicial determinations of the validity of waiver of *Miranda Rights*, as it relates to the legal question of the admissibility of defendants' confessions as evidence in later adjudicative proceedings.

These instruments were first described as an appendix in *Juveniles' Waiver of Rights: Legal and Psychological Competence* (Grisso, 1981, Plenum Press). The test currently consists of four instruments for evaluating understanding and appreciation of Miranda rights:

⇒ Comprehension of Miranda Rights (CMR)

⇒ Comprehension of Miranda Rights—Recognition (CMR-R)

⇒ Comprehension of Miranda Vocabulary (CMV)

⇒ Function of Rights in Interrogation (FRI)

The CMR assesses the examinee's understanding of the Miranda warnings as measured by the examinee's paraphrased description of the warnings. The procedure involves presentation of each of the four Miranda warnings, one by one, to the examinee. After each warning is presented, the examinee is invited to tell the examiner "what that means in your own words." Administration rules indicate when the examiner

should probe for further explanation after the examinee provides an initial answer. Administration typically requires no more than 15 minutes.

The CMR-R assesses the examinee's understanding of the Miranda warnings as measured by the examinee's ability to identify whether various interpretations provided by the examiner are the same as or different from the warning that was presented. This measure allows examinees to demonstrate their understanding without requiring that they paraphrase the warning in their own words. Thus examinees who understand the warnings but who have verbal expressive difficulties are less likely to be "penalized," as might occur if one relied on the CMR alone (which requires verbal expression).

As with the CMR, the CMR-R requires that each warning be presented to the examinee. After each warning statement, the examiner asks the examinee to listen to three other statements, some of which are the same as the warning and some of which are not the same. The examinee simply says "same" or "different" after each alternative statement. Among the 12 alternative statements (3 for each of the 4 Miranda warning statements), 6 are "the same" and 6 are "different." Administration of the CMR-R requires about 5 to 10 minutes.

The CMV assesses the examinee's ability to define six words that appear in the version of the Miranda warnings on which the Miranda instruments are based. The examiner reads each word, uses it in a sentence, and then asks the examinee to define the word. Administration typically requires about 10 minutes.

The FRI assesses the examinee's grasp of the significance of the Miranda rights m the context of interrogation. For example, some defendants may understand the warning that they have the "right to an attorney," yet they may fail to appreciate its significance because they do not understand what an attorney does. The FRI, therefore, goes beyond understanding of the Miranda warnings themselves to explore examinees' grasp of the significance of the warnings in three areas:

⇒ *Nature of Interrogation:* jeopardy associated with interrogation

⇒ *Right to Counsel:* the function of legal counsel

⇒ *Right to Silence:* protections related to the right to silence, and the role of confessions

The FRI uses four picture stimuli, which are accompanied by brief vignettes (e.g., a story about a suspect who has been arrested, accompanied by a picture of a young man sitting at a table with two police officers). Each picture and vignette are followed by a set of standardized questions (15 in all) that assess the examinee's grasp of the significance of the three matters noted previously.

Rules for scoring the examinee's answers provide for 2-point (adequate), 1-point (questionable), and O-point (inadequate) credit for each of the responses. This produces scores on three subscales corresponding to:

⇒ Recognition of the Nature of Interrogation (NI subscale)

⇒ Recognition of the significance of Right to Counsel (RC subscale)

⇒ Recognition of the significance of the Right to Silence (RS subscale)

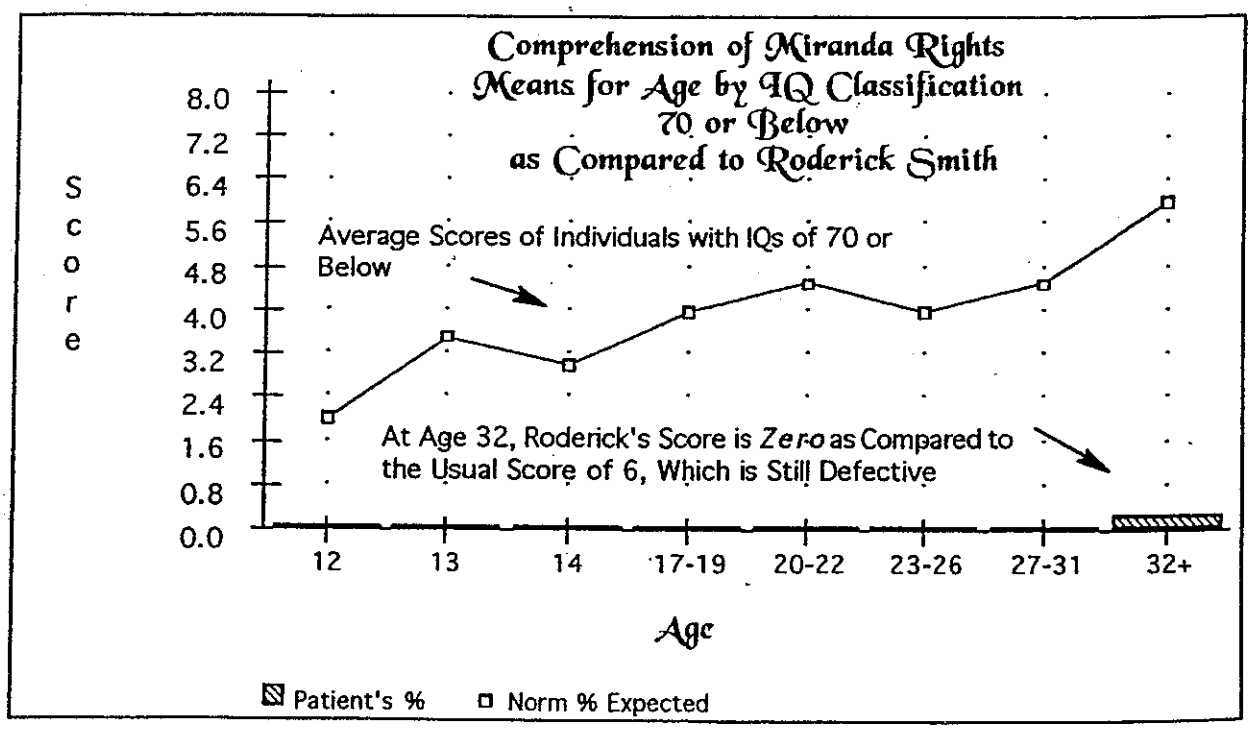
FRI total scores range from 0-30. Subscale scores and total FRI scores may be compared to norms for delinquent youths and adult offenders of various ages, as provided in the Tables section (pp. 91-94) of the manual.

The use of these instruments provides several benefits to the examiner who is evaluating cases involving questions of the waiver of Miranda rights. First, these instruments offer the examiner a standardized method for assessing a defendant's understanding and appreciation of the Miranda warnings. In contrast to assessing the same abilities in unstructured interviews, using the instruments assures that all examinees will be presented with the same stimuli, thus increasing the strength of the argument that

differences between defendants are more likely to reflect actual differences in abilities. Second, the instruments offer objective methods for scoring responses. Thus, in addition to describing the content of a defendant's responses, the quality of the responses can be expressed numerically and compared to those of other defendants, Third, three of the instruments (CMR, CMR-R, CMV) offer the potential to detect consistencies and inconsistencies in an examinee's responses to the Miranda warnings. As described in Part VII (Interpretation), this assists the examiner in identifying an examinee's attempts to feign deficits in Miranda comprehension, and to avoid presuming that the examinee has deficits merely because he or she performed poorly in the context of a single, specific response mode. Fourth, the use of the instruments can improve the examiner's ability to communicate the results of the evaluation in written reports and testimony. They provide a structure that the examiner can use to clearly describe the basis for the examiner's opinions, so that the foundation for testimony is more understandable to the court.

Roderick's responses indicated essentially no understanding of these rights whatsoever, even with repeated presentation and cueing. For example, Rodericks' response to "What is an attorney? For example, the attorney left the building" is "[That's what I got in here. (query) He write books. (query) He talk to me." Rodericks' response to "What does 'appoint' mean? We will appoint her to be your social worker." "A point." You mean you point?"

Roderick frequently needed phrases repeated and was able to achieve only a single point on the Recognition version of the Comprehension Test. His score is far below even others with similar IQs, thereby reflecting the additional effects of his brain damage. ***Indeed, his level of functioning is seen to be equivalent to that of a twelve year old child with an IQ of approximately 70.*** Rodericks' score is shown on the graph below, in which the score of a number of youngsters and adults up to the age of 32, all with IQs of 70 and below, are shown for comparison:



Summary:

In summary, Roderick Smith is completely illiterate, demonstrates both brain damage and an IQ which is within the range of retardation, lacks the intelligent and knowing capacity to understand or waive a complex legal concept such as his *Miranda Rights*, and suffers from periodic episodes of both loss of touch with reality due to his multiple personality disorder as well as seizure activity. Such individuals typically show varying degrees of mental ability, and, when they are performing at a higher level, may be mistakenly judged by casual or naive observers to be "faking" or malingering." There is, of course, no evidence that Roderick is "faking" his retardation, his illiteracy, his brain damage, or his seizure episodes. When originally speaking to his interrogators, he repeatedly asked to see a doctor due to his head hurting, a symptom possibly related to seizure activity, migraine activity, head injury, or a combination of the above.

Based upon the review of the records, my testing and evaluation of Mr. Smith, I have formulated the following expert opinions based upon a reasonable certainty applying accepted principles of psychology:

(1) It is my professional opinion that Roderick Smith could not knowingly and intelligently waive his rights in response to a Miranda warning as a result of a functional level of mental retardation, his illiteracy, and the fact that specific *"Grisso"* testing of Miranda Comprehension documents him to function at the level of a retarded twelve-year old child in his ability to understand such legal concepts.

(2) Regarding the voluntariness of Roderick Smith's confession, it is particularly important that he was told by the interrogators they wanted to talk to him about his car accident and head injury. Before the *Miranda* warning was read to him, Mr. Smith told the officers he "had blow to his head." Detective Cook Immediately said, "that is what we wanted to talk to you about. We understand you were involved in a serious car wreck, and we want to talk to you about that." Then Detective Bemo said, "But first I want to read your rights to you, so you understand them."

It Is my expert opinion that a person functioning at Mr. Smith's level, again, the level of a retarded twelve-year old child, would believe he was going to be interviewed about his head injury. He would be unable to appreciate the consequences of discussing the murder.

(3) As the interview progressed, (before the murder was discussed), the discussion focused entirely on the car accident and his head Injury. Mr. Smith told the detectives on page seven of the interrogation report that "I need a doctor."

Det. Bemo replied,	"Do you need the doctor now?"
Roderick,	"Yeah."
Det. Cook:	"What kind of doctor?"
Roderick,	"I don't know, just somebody I can talk to."
Bemo:	"We'll talk to you."
Cook:	"Maybe we can help you."

Then the detectives told Mr. Smith several times they will help him if he would talk to them.

In my expert opinion it would be evident to a person functioning at Roderick's level, that of a retarded twelve-year old child, that if he talked to the detectives they would help him with the pain in his head and the confusion he was experiencing.

(4) It is also my expert opinion that Roderick Smith was unable to discern the difference between the authority figures present and to discern knowingly and intelligently that he was waiving his rights as ho spoke not to ***doctors***, but to ***law enforcement officials.***

(5) It is my expert opinion that a person functioning at the level of Roderick Smith, the level of a retarded twelve-year old child, exposed to the misleading representations of the detectives that they only wanted to talk to him about the car accident and his head Injury, coupled with the inducement that if he would talk to them they would help him with the pain and confusion in his head, that Mr. Smith's will to

resist speaking to the detectives was overcome. It is also my expert opinion that Mr. Smith's first and second statements to the detectives were not freely, and voluntarily made, but were the direct result of the coercive tactics of the detectives and his impaired mental condition.

My opinion that the second confession was also involuntary is based upon these factors:

(1) No attempt was made to dispel the original misrepresentations of the detectives that if he would talk to them they would help him with the problems with his head;

(2) In the second interview before the detectives began interrogating him about the facts of the murder, they told him (page 4)

Det. Cook; "You know however, ever since we talked to you yesterday you know we're interested in your welfare. If we can help you in any way we certainly will give it our best try."

Roderick: "Well, I really thinks [sic] I need to see a doctor though.

Bemo: "They've got you . . .did you see a doctor this morning?"

Roderick: "They told me yesterday that they would let me see one but uh . . . "

Bemo: "Well, they've got you on the doctor's books so whenever the doctor comes in you will get to see him, okay?"

(Roderick just nods his head, "yes").

These statements by the detectives not only failed to dispel the original misrepresentations but instead served to reinforce the earlier statements in the first interview that "if he would talk freely with them they would obtain a doctor for him."

(3) Roderick was functioning at the same level of a retarded twelve-year old child during the second interview. Nothing had occurred which would lead to the conclusion that his statements in the second interview were made freely and voluntarily without the coercive influence of the misrepresentations made by the detectives in the first interview coupled with his impaired mental status.

C. Alan Hopewell, PhD, ABPP
Diplomate, American Board of Clinical Neuropsychology
American Board of Professional Psychology; #3639
Registrant #24409
National Register of Health Service Providers in Psychology
New Hampshire License #712
North Carolina Permanent License #1951
Texas Clinical License #21833; School License #30391

VERIFICATION

STATE OF TEXAS
COUNTY OF TARRANT

I, C. Alan Hopewell, Ph.D., of lawful age and being duly sworn upon oath state the contents of the this report and the expert opinions stated therein are true and correct based upon my information and belief.

C. Alan Hopewell

C Alan Hopewell, PhD, ABPP

Subscribed and sworn to before me the undersigned Notary Pubilc this day 23 of December 1998.

My Commission expires: 12-21-2001

Ramesh Sharma

Notary Public

RAMESH SHARMA
NOTARY PUBLIC
STATE OF TEXAS
EXPIRES
12-21-2001

C. Alan Hopewell, Ph.D., M.S. Psy Pharm, ABPP
Neuropsychological & Psychological Testing
Family, Group and Individual Therapy

3704 Mattison Avenue
Fort Worth, Texas 76107

817/732-8441
By Appointment Only

Neuropsychological Report of Consultation

Name:	**Smith, Roderick**
Examiner:	*C Alan Hopewell PhD ABPP*
Age:	37
Testing Date	31 January 2003

Tests Administered:

- Long Term Health Assessment (LTC)
- Wechsler Adult Intelligence Test III
- Wade Range Achievement Test III
- Vineland Adaptive Behavior Scales
- 15 Item Test
- Test of Memory Malingering

Background Information and Behavioral Observations:

Roderick Smith's background and history have been extensively reviewed by others as well as by myself in my prior reports and my examination of this client in 1997, and will not be repeated here. Roderick was convicted in Oklahoma County of murder in the first degree of his wife and four stepchildren, an offense for which he received the death penalty. Previous medical history as well as my examination of this client in 1997 have documented a long history of mental defect, mental illness, special education, hypoxic brain damage, and probable mental retardation. The current examination was undertaken to address specifically the question of mental retardation, and constitutes the second time I have examined Roderick on "H" unit of the Oklahoma State Penitentiary.

Mental Status and Behavioral Observations:

Communication is functional and Roderick is cooperative. Sensorium was intact. I was able to get him to respond to testing probes with structure. Stream of speech is noted to demonstrate substantial poverty as well as rigidity of thought. **Cognitive functions** are impoverished and within the range of mental retardation, with defective memory. **Judgement and insight** are poor. **Mood** is seen to be characterized by depression. **Affect** is restricted. **Hygiene and grooming** are congruent with his incarceration, and he is dressed and groomed neatly. **Rapport** was judged to be good, and he was cooperative to verbal commands. He is currently maintained on depakote and tegretol, and he complains of headache.

Multicultural Factors

Multicultural factors are contributory for this being an African-American male living in Oklahoma.

Psychological Findings

Overall test results are consistent with my previous findings. As before, reading, spelling, and math levels were estimated by responses to the WRAT III to be at the kindergarten level, or, in the case of math, at the first grade level. Roderick spends much of his time in his cell doing simple colorings which are at the level of grade school children. He complains that he cannot keep a cellmate as the cellmates become bored with him, frustrated by his coloring, and that he cannot engage in games with them such as card games, etc.

Wide Range Achievement Test - III

Subtest	Raw Score	Standard Score	Grade Equivalent
Reading	16	<45	Kindergarten
Spelling	16	<45	Kindergarten
Arithmetic	16	<45	1

The *WAIS - III* was administered to help estimate the overall intellectual ability of Roderick. The *WAIS - III* primarily measures verbal and school-related skills such as language development, the understanding of verbal concepts, one's general fund of information, and English word knowledge obtained both through academic training and life-experiences. To a similar degree, the *WAIS - III* measures a number of nonverbal skills relating to the ability of Roderick to reason what is happening in social situations, to solve problems by being able to analyze a situation and describe it verbally, to perform motor and performance manipulations of the environment, and to understand and to describe verbally relationships occurring in social situations.

The *WAIS - III* is administered individually and therefore also allows for judgements to be made about Roderick's motivational level, attention span, and tolerance to frustration. As with all intelligence tests, the scores should be thought of as estimates of ability level only, and should be interpreted along with other psychological, adaptive, and behavioral measures.

To provide meaningful interpretations of the *WAIS - III* , the number of correct responses on the test is converted to an estimate of IQ as well as a corresponding percentile level. IQ Scores may range from a low of 40 to a high score of 160. The "statistically average" person receives an IQ score between 90 and 110, and about half of all adults score within this range. Almost all people (about 95 percent) achieve IQ scores between 70 and 130. Scores above 130 are considered to be unusually high and are obtained only by about 2 percent of the population. Similarly, scores below 70 are considered to be unusually low and are obtained only by about 2 percent of all clients.

It is important to understand that no test measures IQ with complete "accuracy." Many factors can affect test scores, and results may be affected by a client being tired, ill, anxious, distracted, or poorly motivated. In addition, as is the case with Roderick, clients being administered different tests over a wide range of time and under many different circumstances will necessarily show some variance in test scores. Because there is some error present in every test score, it is recommended that performance on the test be thought of as within a range of scores rather than as a single, precise score. However, scores on the WAIS – III are considered to be among the most robust and valid of IQ scores.

Roderick appears to be functioning within the Lower Extreme levels for general cognitive abilities, and will undoubtedly demonstrate substantial difficulty in being able to participate in most training and programs. Such individuals would not normally be considered to be acceptable clients for training programs, and would without doubt experience difficulty in completing all training programs. Roderick was able to achieve an overall IQ score of 55, a score which is achieved by only the lower 1% of the population. Individuals scoring within this range are generally felt to be diagnosed as being at least mildly mentally retarded or defective. This score is consistent with previous scores obtained for Roderick, and also indicates the level of brain damage which I have previously documented.

Extremely poor verbal skills are demonstrated, and very low abilities are documented in terms of language development, the understanding of verbal concepts, and a very rudimentary general fund of information. A restricted level of word knowledge which has been obtained both through academic training and life-experiences is apparent. Roderick will have difficulty with even basic communication skills. Common sense, judgement, and reasoning are very poorly developed, and Roderick is likely to demonstrate substantial difficulties with understanding cause and effect relationships and with inferential thinking.

Classroom learning, especially that which requires reading, communication skills, and the understanding of manuals and training guides, will be far beyond the ability level for most clients scoring within this range, and as is the case with Roderick, many are functionally illiterate. Such individuals may even have a learning style in which they even have trouble with learning by practice and a "hands-on" orientation, and reading and visualization is most likely not productive for them. Written assignments are quite beyond Roderick. Such individuals will even have trouble being "followers" or learning by doing due to their intellectual limitations.

Such individuals are generally unable to "think for themselves." Such clients may show an unacceptable progression in terms of advancement and training beyond the entry levels of a program or profession, regardless of their levels of motivation. Individuals in this range of intellectual ability function best when they are seldom challenged mentally and when they work in routine and predictable environments. They tend to be unimaginative, but may even be poor followers due to their limitations.

The nonverbal skills relating to the ability of Roderick to reason what is happening in social situations, to solve problems by being able to analyze a situation and to describe it verbally, and to understand and verbally describe relationships in social situations is also felt to be severely restricted. Roderick will be very concrete and will see most situations in terms of being "black or white." Substantial difficulties in understanding complex situations or being able to see "shades of gray" are expected. Cognitively, Roderick will have substantial difficulties in terms of frustration tolerance as well as marked restrictions in abilities to deal with complicated, stressful, complex, and ambiguous situations. These difficulties are likely to be so marked that poor or impulsive judgements are likely when faced with stress.

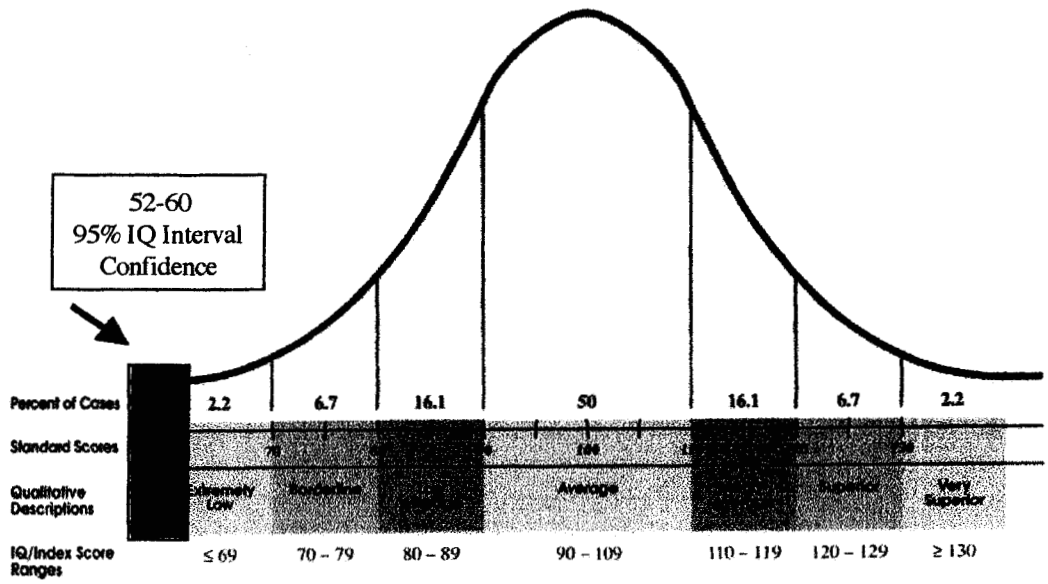
The bell curve illustrated below demonstrates the "curve" of IQ scores in the population. Roderick's confidence interval of IQ scores at the 95% are illustrated by the red bar, with this interval estimated to be between 52 and 60. Again, this is consistent with prior estimates of intellectual ability.

Wechsler Adult Intelligence Scale - III

Subtest	Scaled Score	Subtest	Scaled Score
Vocabulary	1	Picture Completion	4
Similarities	3	Digit Symbol	4
Arithmetic	2	Block Design	5
Digit Span	2	Matrix Reasoning	4
Information	3	Picture Arrangement	4
Comprehension	2	Symbol Search*	
Letter-Number Sequencing*		Object Assembly*	

Optional Tests*

Factor	Score	IQ/ Index	Percentile
Verbal	13	55	0.1
Performance	21	64	1
Full Scale	34	55	0.1
Verbal Comprehension	7	57	0.2
Perceptual Organization	13	67	1
Working Memory	4	50	<0.1
Perceptual Speed	4	60	0.4



Scores from the Vineland Adaptive behavior Scales are also consistent with mental retardation, and range from four years and nine months to a high of eight years and nine months.

Such deficiencies meet Murphy standards in more than two of the required areas of *communication, self – care, social skills, home living, self direction, academics, health and safety, use of community resources, and work.* Specifically, *communication* areas are rated as being equivalent to that of 4 years 9 months. *Social skills* are given an overall rating of 5 years 8 months. *Self-care* is rated as low at a level of 2 years 4 months, but *home living* (Vineland *Domestic* area) is rated as being Adequate at 12 years 3 months, the latter probably reflecting the known uneven development of adaptive skills after an event such as anoxia. "*Self direction*" would be considered to also be within the "*Personal*" domain of 2 years 4 months. *Academic* areas are clearly deficient based upon repeated WRAT – III and the current WAIS – III testing. Defective skills are noted in terms of the use of *community resources* as Vineland scores are at the 9 years 8 month level. *Health and safety* as well as *work domains* are not specifically measured by the Vineland, but are felt to be adequate based on work and psychosocial history, this again being consistent with the uneven skill development seen in both hypoxic encephalopathy as well as the overall level of mild mental retardation in that individuals within the mild level of retardation often can perform structured supportive work and show basic health care skills. All specific domain scores are included in the attached Vineland Table.

The TOMM and 15 Item Tests were administered to detect possible malingering, and both tests were determined to be within normal limits for a person with this IQ level.

Summary

Previous medical history as well as my examination of this client on 20 November 1998 have documented a long history of mental defect, mental illness, special education, hypoxic brain damage, and probable mental retardation. The current examination was undertaken to address specifically the question of mental retardation, and constitutes the second time I have examined Roderick on "H" unit of the Oklahoma State Penitentiary. The current testing also documents both an IQ and adaptive behavior levels within the range of mental retardation, and since this condition was acquired prior to the age of 17, the condition meets Oklahoma standards for Mental Retardation. Such deficiencies meet Murphy standards in more than two of the required adaptive function areas of *communication, self – care, social skills, self direction, academics, and use of community resources.*

Axis I

296.35 Major Depressive Disorder, Recurrent In Partial Remission

Axis II

317 Mild Mental Retardation With Hypoxic/ Anoxic Brain Damage

Axis III

No Diagnosis

Axis IV

- ◊ Legal Problems
- ◊ Problems related to the social environment
- ◊ Other psychosocial and environmental problems

Axis V

30 Serious impairment in communication or judgment

2/27/03

RAMESH SHARMA NOTARY PUBLIC STATE OF TEXAS EXPIRES APRIL 2005

C. Alan Hopewell, PhD. MS PsyPharm ABPP
Diplomate, American Board of Professional Psychology
American Board of Clinical Neuropsychology
Master's Degree in Clinical Psychopharmacology
Affiliate, American Academy of Neurology

Nevada License PY0438
Texas Clinical License #21833; School License #30391

Smith, Roderick 31 January 2003

Vineland Adaptive Behavior Scales

Domain	Subdomain	Adaptive Level	Age Equivalent
Communication		*Low*	*4 years 9 months*
	Receptive	Moderately Low	*4 years 0 months*
	Expressive	Low	*4 years 9 months*
	Written	Low	*5 years 9 months*
Daily Living Skills		Low	*5 years 8 months*
	Personal	Low	*2 years 4 months*
	Domestic	Adequate	*12 years 3 months**
	Community	Low	*9 years 8 months*
Socialization		Low	*5 years 8 months*
	Interpersonal	Low	*4 years 10 months*
	Play/Leisure	Low	*4 years 6 months#*
	Coping	Low	*7 years 1 month*
Motor Skills			
	Gross	Low	
	Fine	Low	

* Possibly Reflects Uneven Adaptive Function Secondary to Hypoxic Encephalopathy
\# Reflected in Inability to Keep a Cellmate Secondary to Inability to Interact