

Capital Case

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ISAIAH GLENNDALL TRYON,
Petitioner,

v.

CHRISTE QUICK, Warden,
Oklahoma State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CALLIE HELLER, Texas Bar No. 24101897*
Assistant Federal Public Defender
Office of the Federal Public Defender
Western District of Oklahoma
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
405-609-5975 (phone)
405-609-5976 (fax)
Callie_Heller@fd.org

ATTORNEY FOR ISAIAH GLENNDALL TRYON

March 25, 2024

* Counsel of Record

QUESTIONS PRESENTED (CAPITAL CASE)

At Isaiah Tryon's capital trial, the sole psychological expert, Dr. John Fabian, conceded on cross-examination that funding issues prevented him from performing neuroimaging to confirm the presence of brain damage. After a direct appeal that omitted all reference to trial counsel's effectiveness, despite Oklahoma law mandating the raising of such claims at that stage, Dr. Fabian provided initial post-conviction counsel an affidavit explaining he was not provided the time or funding to develop effective brain damage testimony, to perform confirmatory neuroimaging, or to conduct an *Atkins* evaluation, despite his recommendations that trial counsel do all of the above. However, post-conviction counsel was similarly stymied by a lack of funding and could not obtain brain scans, allowing the Oklahoma Court of Criminal Appeals (OCCA) to dismiss the initial post-conviction claim for a lack of prejudice.

Though post-conviction counsel provided an affidavit from Dr. Fabian diagnosing Mr. Tryon with intellectual disability after finally performing an evaluation, the OCCA dismissed that ineffective assistance of trial counsel claim as well, reasoning that Dr. Fabian relied on the Flynn Effect, which it was precluded from considering. The court looked to the decades-old Oklahoma statute, which does not mention the Flynn Effect, as well as an eight-year-old state case discounting the Flynn Effect as lacking universal acceptance.

In denying the successive post-conviction petition that finally presented neuroimaging, the OCCA reasoned that, "The real issue is whether the omitted evidence would have impacted the jury's sentencing decision" and answered in the negative. Though the OCCA examined trial counsel's effectiveness to determine whether post-conviction counsel had ineffectively omitted the underlying federal claim, which would have overcome the state procedural bar on successive post-conviction applications, the Tenth Circuit refused to consider the OCCA's merits adjudication, finding Mr. Tryon's argument on that subject "conflat[es] the OCCA's analysis of his statutory-based ineffective assistance of post-conviction counsel claim with a merits determination."

This case therefore presents the following questions:

1. Where a state habeas court, in a non-alternative holding, considers the merits of a defaulted ineffective-assistance-of-trial counsel claim to decide whether statutorily required post-conviction counsel was ineffective for omitting the claim, may a federal habeas court ignore the antecedent ruling on federal law to find the underlying claim defaulted?
2. Could reasonable jurists debate whether a state court may apply the state's *Atkins* statute in a way precluding consideration of current clinical standards?

List of Parties to the Proceeding

Petitioner Isaiah Glenndell Tryon and Respondent Warden of Oklahoma State Penitentiary have at all times been the parties in the action below. There have been automatic substitutions for individuals serving in the Warden's position, to include the following individuals: Mike Carpenter, Tommy Sharp, Jim Farris, and presently Christe Quick, Warden.

TABLE OF CONTENTS

Question Presented	i
List of Parties	ii
Table of Contents	iii
Index of Appendices	v
Table of Authorities	vi
Petition for Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
A. Trial and Direct Appeal	3
B. Initial State Post-Conviction Proceedings	6
C. Federal Habeas and Successive Post-Conviction Proceedings	8
Reasons for Granting the Petition	12
I. THIS COURT SHOULD GRANT CERTIORARI TO ALIGN THE TENTH CIRCUIT'S APPROACH TO DETERMINING THE INDEPENDENCE OF OKLAHOMA'S PROCEDURAL BAR WITH THAT OF OTHER JURISDICTIONS	13
A. The Oklahoma Court of Criminal Appeals Relied on an Antecedent Federal Law Determination to Apply Its Procedural Bar	13
B. Other Federal Courts Scrutinize the Specifics of the State Court Ruling to Determine Whether It Can Serve as a Federal Default	15
C. The Tenth Circuit Stands Apart in Failing to Engage with the Effect of the Antecedent Federal Adjudication in Mr. Tryon's case	17

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DEBATE WHETHER OKLAHOMA IS APPLYING ITS <i>ATKINS</i> STATUTE CONSTITUTIONALLY	21
A. Mr. Tryon’s Underlying Constitutional Claim is At Least Debatable	21
B. <i>Atkins</i> and Its Progeny Mandate Adherence to Current, Clinical Guidelines	22
C. Clinical Guidance Mandates Adjustment of IQ Scores for the Inflationary Impact of Obsolete Testing Norms	24
D. The Tenth Circuit is Enforcing Unconstitutional Application of Oklahoma’s Statute	26
Conclusion	31

INDEX OF APPENDICES

APPENDIX A	Opinion from the Tenth Circuit Court of Appeals, <i>Tryon v. Quick</i> , 81 F.4th 1110 (10th Cir. 2023)
APPENDIX B	Order Denying Rehearing, <i>Tryon v. Quick</i> , No. 21-6097 (September 28, 2023)
APPENDIX C	Memorandum Opinion from the Western District of Oklahoma, <i>Tryon v. Farris</i> , No. CIV-19-195-J, 2021 WL 3042664 (W.D. Okla. July 19, 2021) (unpublished)
APPENDIX D	Opinion from the Oklahoma Court of Criminal Appeals, <i>Tryon v. State</i> , 423 P.3d 617 (Okla. Crim. App. 2018)
APPENDIX E	Opinion Denying Application for Post-Conviction Relief, <i>Tryon v. State</i> , Case No. PCD-2015-378 (Okla. Crim. App. August 9, 2018)
APPENDIX F	Opinion Denying Second Application for Post-Conviction Relief, <i>Tryon v. State</i> , Case No. PCD-2020-231 (Okla. Crim. App. March 11, 2021)
APPENDIX G	Letter extending time to file petition for certiorari until March 25, 2024.

TABLE OF AUTHORITIES
UNITED STATES SUPREME COURT

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	15
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	<i>passim</i>
<i>Brumfield v. Cain</i> , 576 U.S. 305 (2015)	23
<i>Buck v. Davis</i> , 580 U.S. 100 (2017)	22
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	15, 16, 19
<i>Hall v. Florida</i> , 572 U.S. 701 (2014)	7, 22, 23, 27
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985)	13
<i>Ford v. Wainwright</i> , 477 U.S. 399 (1986)	22, 23
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	20
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	21, 22
<i>Moore v. Texas</i> , 139 S. Ct. 666 (2019)	29
<i>Moore v. Texas</i> , 581 U.S. 1 (2017)	23, 24, 27, 31
<i>Stewart v. Smith</i> , 536 U.S. 856 (2002)	15, 16, 19

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	10, 12, 13, 21
--	----------------

<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	13
--	----

FEDERAL CASES

<i>Bennett v. Mueller</i> , 322 F.3d 573 (9th Cir. 2003)	19
---	----

<i>Black v. Bell</i> , 664 F.3d 81 (6th Cir. 2011)	28
---	----

<i>Black v. Workman</i> , 682 F.3d 880 (10th Cir. 2012)	16, 19
--	--------

<i>Borden v. Allen</i> , 646 F.3d 785 (11th Cir. 2011)	17
---	----

<i>Fulks v. Watson</i> , 4 F.4th 586 (7th Cir. 2021)	27, 28
---	--------

<i>Goode v. Carpenter</i> , 922 F.3d 1136 (10th Cir. 2019)	18
---	----

<i>Henderson v. Stephens</i> , 791 F.3d 567 (5th Cir. 2015)	29
--	----

<i>Hooks v. Ward</i> , 184 F.3d 1206 (10th Cir. 1999)	13
--	----

<i>Hooks v. Workman</i> , 689 F.3d 1148 (10th Cir. 2012)	27
---	----

<i>Hutchison v. Bell</i> , 303 F.3d 720 (6th Cir. 2002)	16
--	----

<i>In re: Cathey</i> , 857 F.3d 221 (5th Cir. 2017)	30
--	----

<i>In re: Mathis</i> , 483 F.3d 395 (5th Cir. 2007)	29
--	----

<i>Ivey v. Catoe</i> , 36 F. App'x 718 (4th Cir. 2002)	14
<i>Ledford v. Warden, Ga. Diagnostic & Classification Prison</i> , 818 F.3d 600 (11th Cir. 2016)	30
<i>Maldonado v. Thaler</i> , 389 F.App'x 399 (5th Cir. 2010)	30
<i>McGowen v. Thaler</i> , 675 F.3d 482 (5th Cir. 2012)	22
<i>McManus v. Neal</i> , 779 F.3d 634 (7th Cir. 2015)	28
<i>Milton v. Miller</i> , 744 F.3d 660 (10th Cir. 2014)	13
<i>Nitschke v. Belleque</i> , 680 F.3d 1105 (9th Cir. 2012)	16
<i>Postelle v. Carpenter</i> , 901 F.3d 1202 (10th Cir. 2018)	26
<i>Powell v. Allen</i> , 602 F.3d 1263 (11th Cir. 2010)	17
<i>Rivera v. Quarterman</i> , 505 F.3d 349 (5th Cir. 2007)	16
<i>Rocha v. Thaler</i> , 626 F.3d 815 (5th Cir. 2010)	14, 16, 17
<i>Smith v. Comm'r, Ala. Dep't of Corr.</i> , 67 F.4th 1335 (11th Cir. 2023)	30
<i>Smith v. Duckworth</i> , 824 F.3d 1233 (10th Cir. 2016)	26
<i>Snow v. Pfister</i> , 880 F.3d 857 (7th Cir. 2018)	17

<i>Sullivan v. Wilson</i> , 673 F. App'x 855 (10th Cir. 2016)	19
<i>Thomas v. Allen</i> , 607 F.3d 749 (11th Cir. 2010)	28
<i>Thomas v. Allen</i> , 614 F.Supp.2d 1257 (N.D. Ala. 2009)	29
<i>Tryon v. Quick</i> , 81 F.4th 1110 (10th Cir. 2023)	1
<i>United States v. Hardy</i> , 762 F.Supp.2d 849 (5th Cir. 2010)	30
<i>United States v. Wilson</i> , 170 F.Supp.3d 347 (E.D.N.Y. 2016)	29
<i>Walker v. True</i> , 399 F.3d 315 (4th Cir. 2005)	29
<i>Wiley v. Epps</i> , 668 F.Supp.2d 848 (N.D. Miss. 2009)	30

STATE CASES

<i>Bowling v. Commonwealth</i> , 163 S.W.3d 361 (Ky. 2005)	28
<i>Ex Parte Briseno</i> , 135 S.W.3d 1 (Tex. Crim. App. 2004)	29, 30
<i>Fuston v. State</i> , 470 P.3d 306 (Okla. Crim. App. 2020)	7, 26
<i>Smith v. State</i> , 245 P.3d 1233 (Okla. Crim. App. 2010)	13, 26
<i>State v. Ford</i> , 140 N.E.3d 616 (Ohio 2019)	27
<i>State v. Thurber</i> , 420 P.3d 389 (Kan. 2018)	28

<i>Tryon v. State</i> , 423 P.3d 617 (Okla. Crim. App. 2018)	6
<i>Washington v. State</i> , 989 P.2d 960 (Okla. Crim. App. 1999)	13
<i>Woodall v. Commonwealth</i> , 563 S.W.3d 1 (Ky. 2018)	28

FEDERAL STATUTES

28 U.S.C. §2253	21
28 U.S.C. §2254	2, 17, 18
28 U.S.C. §2255	28
U.S. Const. amend. VI	2
U.S. Const. amend. VIII	2
U.S. Const. amend. XIV	2

STATE STATUTES

Okla. Stat. tit. 21, § 701.10b(C).....	3
Okla. Stat. tit. 22, § 1089(C)	<i>passim</i>

PETITION FOR WRIT OF CERTIORARI

Petitioner Isaiah Glennndell Tryon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *Tryon v. Quick*, 81 F.4th 1110 (10th Cir. 2023). *See* Appendix A. The order of the United States Court of Appeals for the Tenth Circuit denying rehearing is found at *Tryon v. Quick*, No. 21-6097 (Sept. 28, 2023). *See* Appendix B. The federal district court decision denying Mr. Tryon's petition for writ of habeas corpus is found at *Tryon v. Farris*, No. CIV-19-195-J, 2021 WL 3042664 (W.D. Okla. July 19, 2021). *See* Appendix C. The decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Tryon's state direct appeal is reported at *Tryon v. State*, 423 P.3d 617 (Okla. Crim. App. 2018). *See* Appendix D. The decision of the OCCA denying Mr. Tryon's first state post-conviction action is found at *Tryon v. State*, Case No. PCD-2015-378 (Okla. Crim. App. Aug. 9, 2018). *See* Appendix E. The decision of the OCCA denying Mr. Tryon's second state post-conviction action is found at *Tryon v. State*, Case No. PCD-2020-231 (Okla. Crim. App. Mar. 11, 2021). *See* Appendix F.

STATEMENT OF JURISDICTION

The Tenth Circuit rendered its opinion denying relief on August 30, 2023. Mr. Tryon filed a timely petition for rehearing and rehearing *en banc*, which the Tenth Circuit denied on October 27, 2023. *See* Appendix B. Justice Gorsuch extended the

time to petition for certiorari until March 25, 2024. *See* Appendix G. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2254(d) provides the following:

An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides:

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

U.S. Const. amend. XIV provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Trial and Direct Appeal

Isaiah Tryon was charged on March 21, 2012, with the stabbing death of Tia Bloomer, his son's mother, at a bus station five days prior. OR 1.¹ His trial counsel requested a pretrial hearing to determine whether Mr. Tryon was ineligible for the death penalty due to intellectual disability (ID). Counsel pointed to a recent neuropsychological examination by their expert, Dr. John Fabian, Ph.D., which yielded evidence of serious cognitive deficiencies and brain impairments as well as a 68 on a full-scale IQ test and triggered the need to proceed to adaptive skill evaluation (the second prong of the diagnosis). Mot. Tr. 12/18/2014 at 5; *see also* ROA I at 162; ROA II at 292-94, 296.

Arguing against the need for a hearing due to the score of 81 Mr. Tryon received at age fourteen, the State relied on Okla. Stat. tit. 21, § 701.10b(C), which provides “in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above . . . be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.” Mot. Tr. 12/18/2014 at 8-9. The trial court denied the hearing motion. *Id.* at 19. Trial counsel did not file a pretrial motion challenging the constitutionality of the statute and were unable to fund Dr. Fabian

¹ The consecutively-paginated Original Record is referred to as “OR [page].” The consecutively-paginated trial transcript is referred to as “Tr.[Vol.] [page].” The Tenth Circuit Record on Appeal is referred to as “ROA [Vol.] at [page].”

to conduct an *Atkins* evaluation, despite his flagging the possibility of ID for counsel based on their client’s “low intelligence and current IQ of 68.” ROA II at 296. *See also id.* at 186 ¶10(b), (h)-(i) (trial counsel affidavit regarding systemic issues in the Oklahoma County Public Defender Office preventing adequate expert funding); *id.* at 205 ¶¶7-13 (head of homicide division at Oklahoma County Public Defender at time of Mr. Tryon’s trial describing limited pool of funding allotted to cover *all* office expert needs and Public Defender’s policy against requesting additional funding from trial court); *id.* at 725 (internal funding request for \$13,500 for Dr. Fabian denied by Public Defender as costing “too much”).

Despite their inability to ensure their expert could do the needed work, trial counsel put him on the stand during the penalty phase. There, he inexplicably discarded the actual conclusion of his testing—that Mr. Tryon “should be considered for an *Atkins v. Virginia* mental retardation/intellectual disability evaluation,” ROA II at 296, to instead testify to a diagnosis that he had been unable to make: that Mr. Tryon was “certainly not mentally retarded.” Tr.VII 1684.

Elsewhere, Dr. Fabian testified regarding his neuropsychological battery, examining Mr. Tryon’s “neuropsychological . . . functioning, such as . . . attention, memory, executive functioning, which is problem solving, planning impulse control, visual spatial abilities and perception, as well as language skills.” Tr.VII 1644. Dr. Fabian explained how the test results pointed to deficits in several of these areas. *Id.* at 1677-78. He briefly touched on potential causes of brain damage and decreased cognitive functioning, including Mr. Tryon’s exposure to drugs both in utero and as a

result of his own drug use, blows to the head, early and repeated exposure to violence and trauma, and his other mental health conditions. Tr.VII 1657-58; 1679-80. He was not asked about, and did not discuss, prenatal alcohol exposure. On cross-examination, Dr. Fabian conceded that he had not conducted any brain scans or neuroimaging to “see if that [damage] was actually there,” but rather, “had informed the attorneys that they should get his brain scan [sic] and there was a funding issue.” *Id.* at 1750.

Several family members also testified for Mr. Tryon during the penalty phase, including testifying to Mr. Tryon’s mother’s drug use. *See* Tr.VI 1345, 1348 (testimony of Mr. Tryon’s sister); Tr.IX 2090-91 (testimony of Mr. Tryon’s brother); Tr.VII 1579-86 (testimony of Mr. Tryon’s cousin); Tr.VII 1543-46 (testimony of Mr. Tryon’s mother); Tr.VI 1486-88 (testimony of Mr. Tryon’s father); Tr.VI 1399-1401 (testimony of Mr. Tryon’s aunt). The State in closing, however, pressed the jury to doubt the severity of Mr. Tryon’s mother’s drug use. *See, e.g.*, Tr.IX 2219 (“I would submit to you, there’s no doubt that Sheryl Wilson was using, but I would submit to you, she wasn’t using to the extreme that they want you to believe she was.”); 2223 (“[T]he majority of this book is Sheryl Wilson, who according to the defense, was in such a crack cocaine induced stupor, couldn’t have possibly taken him to all these psychologists, filled out all these social security records, and done all the things that there’s documentation that she did.”).

The jury handed down its death verdict on March 5, 2015. Tr.IX 2237-38. On direct appeal, counsel employed by the same office as Mr. Tryon’s trial counsel

omitted all claims of trial counsel's ineffectiveness, despite Oklahoma law waiving such claims if they are not brought at this earliest opportunity. *See* Okla. Stat. tit. 22, § 1089(C). Mr. Tryon's conviction and sentence were affirmed. *Tryon v. State*, 423 P.3d 617 (Okla. Crim. App. 2018), *cert. denied*, 139 S. Ct. 1176 (2019) (mem.).²

B. Initial State Post-Conviction Proceedings

Oklahoma law required Mr. Tryon to file his application for post-conviction relief while his conviction was pending on direct review. *See* Oklahoma Court of Criminal Appeals Rule 9.7(A)(2). His post-conviction counsel raised trial counsel's ineffectiveness through the lens of direct appeal counsel's ineffectiveness for the omission, the only available framework given the claim's availability on direct appeal. *See* ROA I at 26. Though post-conviction counsel raised a subclaim focused on prior counsel's "failure to obtain a brain scan," ROA I at 57-59, Mr. Tryon's post-conviction application also omitted the brain scan evidence that would have comprised the prejudice showing due to a lack of funding. *See id.* at 59 n.2; *see also* ROA II at 786 ¶ 8 (head of capital post-conviction division of indigent defense office explaining that, due to a budget shortfall, the office's Executive Director had denied the request for brain scan funding in this case). The OCCA summarily denied relief on the subclaim given this lack of evidence, ROA II at 136, and also denied the evidentiary hearing

² The state court invalidated one of the four aggravating circumstances found by the jury, that the murder was committed while serving a sentence of imprisonment on a conviction of a felony, *Tryon*, 423 P.3d at 648-50, but nonetheless upheld the death sentence. *Id.* at 657.

that would have served as Mr. Tryon’s chance to develop his claim and retain expert assistance. *See id.* at 144.

Mr. Tryon’s post-conviction application also raised prior counsel’s ineffectiveness for omitting adaptive functioning testing and a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), ROA I at 59-69, as well as the unconstitutionality of Oklahoma’s *Atkins* statute. *Id.* at 63-64. The post-conviction application further included a new report from Dr. Fabian completing his evaluation and diagnosing Mr. Tryon with intellectual disability, as well as adjusting downward due to norm obsolescence the single score on an outdated test that had precluded Mr. Tryon from *Atkins* eligibility under Oklahoma’s statute. *Id.* at 36-37; *see also id.* at 233-34. In addition, Dr. Fabian provided an affidavit detailing the ways the insufficient funding had prevented him from completing an *Atkins* evaluation and from testifying adequately to Mr. Tryon’s brain damage at trial. *Id.* at 162, ¶¶15-17.

Despite Dr. Fabian’s diagnosis and acknowledgement of his inability to perform an *Atkins* evaluation at the time of trial, the OCCA referred to his trial testimony that Mr. Tryon “was **not** mentally retarded” to deny the claim. ROA II at 137.³ The OCCA further denied, by way of reference to an eight-year-old state case

³ The OCCA used the term “mental retardation” instead of intellectual disability throughout, including in its heading for the subclaim adjudication, despite issuing its opinion more than four years after this Court clarified that intellectual disability is the correct term in *Hall v. Florida*, 572 U.S. 701, 704-705 (2014). Even more recently, the OCCA has rejected scientific consensus by insisting it will continue to use “mental retardation,” drawing a spurious distinction between the two terms. *See Fuston v. State*, 470 P.3d 306, 315 n.2 (Okla. Crim. App. 2020) (“Use of the term ‘intellectual disability’ tends to negate the conclusion that the condition is the result of a birth

that had stated in a footnote that Oklahoma’s 2006 statute did not reference the Flynn Effect, that the Flynn Effect could be of any “consequence.” *Id.* at 18.

C. Federal Habeas and Successive Post-Conviction Proceedings

Mr. Tryon presented the omitted neuroimaging to the OCCA in a successive post-conviction application. The neuroimaging—a Quantitative Electroencephalogram (qEEG) performed by psychiatrist Richard Adler, M.D.—evidenced widespread abnormalities across Mr. Tryon’s brain. ROA III at 322-24. In addition to providing physical proof of brain damage, the neuroimaging results supported an additional diagnosis. The OCCA explained its understanding of the evidence:

Petitioner submits affidavits and reports from various neuropsychological and medical experts opining that Petitioner suffers from Fetal Alcohol Spectrum Disorder and/ or Alcohol Related Neurodevelopment Disorder. Petitioner’s experts utilize the results of recent neuroimaging of Petitioner’s brain to support this conclusion. Petitioner argues that his prenatal exposure to alcohol explains his cognitive and adaptive functioning deficits across the entire span of his lifetime. Petitioner argues the proposed testimony about his prenatal alcohol exposure, including evidence relating to his recent brain scan, could have resulted in [a different outcome].

ROA III at 264-65. These affidavits and reports included the findings from Dr. Adler, who concluded to a reasonable medical certainty that the qEEG and additional testing results were consistent with FASD. *Id.* at 321-22. Dr. Adler described the ways the widespread and symmetrical pattern of Mr. Tryon’s brain abnormalities is consistent with what would be expected when looking at a brain exposed to alcohol

defect and likens it to later developing mental impairments caused by lifestyle choices or disease.”).

while in the womb. *Id.* at 323-24. Dr. Kenneth Jones, M.D., a physician, used the neuropsychological test scores as well as the reported level of prenatal alcohol exposure and a physical examination of Mr. Tryon's facial features to also diagnose Mr. Tryon with FASD. *Id.* at 324-25. In addition, two different psychological reports were produced by the multi-disciplinary team.

Neuropsychologist Dr. Paul Connor, Ph.D., identified deficits across all ten domains of functioning in reviewing Mr. Tryon's neuropsychological testing (with the CDC requiring only three domains for this aspect of the diagnosis). *Id.* at 314. And psychologist Dr. Natalie Novick Brown, Ph.D., provided a report discussing the way Mr. Tryon's life history, executive dysfunction in cognitive skills, secondary disabilities, and hypersensitivity to stress are part and parcel with FASD. *Id.* at 315-21.

The OCCA again denied relief, finding "postconviction counsel's performance was not rendered ineffective for failing to obtain funding for the brain scan." ROA III at 267. The OCCA looked to the underlying merits of trial counsel's effectiveness and emphasized, "The real issue is whether the omitted evidence would have impacted the jury's sentencing decision." *Id.* Though presented with the precise evidence whose omission it previously deemed fatal to the claim, ROA II at 136, the OCCA did not engage with or discuss the neuroimaging results, instead resolving the claim by reference to the mitigation presented at trial:

This is not a case where counsel presented a substantially weaker case in mitigation than could have been presented through the omitted evidence. To the extent Petitioner is claiming that the brain neuroimaging shows he suffers from prenatal alcohol exposure, the

record shows that trial counsel did not neglect Petitioner's prenatal development.

ROA III at 267. The court went on to detail for three pages the trial mitigation evidence regarding Mr. Tryon's prenatal drug exposure. ROA III at 267-271.

In federal habeas proceedings following Mr. Tryon's successive state petition, the United States District Court for the Western District of Oklahoma upheld OCCA's initial finding of no prejudice without the neuroimaging as a reasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). ROA III at 475-76. The district court addressed the OCCA's subsequent opinion regarding the neuroimaging evidence in a footnote, ROA III at 474 n.10, in which it referenced the OCCA's adjudication that the "omitted evidence would not have impacted the jury's sentencing decision" but did not address whether this was an unreasonable *Strickland* application. The district court addressed the separate federal habeas FASD claim procedurally barred by the OCCA as federally defaulted, ROA III at 475-76, but did not acknowledge or engage with the OCCA's pronouncement that, "To the extent Petitioner is claiming that the brain neuroimaging shows he suffers from prenatal alcohol exposure, the record shows that trial counsel did not neglect Petitioner's prenatal development," ROA III at 267, and its lengthy supporting discussion. Though Mr. Tryon had argued that the "OCCA's discussion of the merits of Mr. Tryon's new claims, which provided unexhausted evidence explaining why his underlying IATC claim was defaulted, necessarily involved a merits analysis of Mr. Tryon's federal constitutional claims," ROA III at 439, the district court did not

examine whether the OCCA's procedural bar rested upon an adjudication of the federal claim.

The district court also concluded that direct appeal counsel was not ineffective for omitting trial counsel's failure to challenge Oklahoma's *Atkins* statute and to conduct an ID investigation. ROA III at 462-69. Looking to the merits of the omitted claim to evaluate appellate ineffectiveness, the court found that the statute's ineligibility for those with one score of 76 or above, and the OCCA's refusal to consider the Flynn Effect, were both within the range of discretion permitted by *Atkins*. ROA III at 465. The court further denied that the OCCA had unreasonably adjudicated Mr. Tryon's ineffective assistance of counsel (IAC) claim for the failure to pursue an ID evaluation, citing, as did the OCCA, Dr. Fabian's testimony as well as Mr. Tryon's preclusion from statutory protection given his outlier IQ score. ROA III at 466-69.

After a Certificate of Appealability grant from the Tenth Circuit on his IAC-brain scan subclaim, Order at 1, *Tryon v. Farris* (10th Cir. Feb. 3, 2022) (No. 21-6097), Mr. Tryon argued that the neuroimaging forming the prejudice showing was properly before the appellate court. The argument relied on the intertwining of the procedural bar's application with federal law: the OCCA had applied § 1089(D) to bar the IAC claim because the one exception at play—for post-conviction counsel's ineffective omission—did not apply, given the finding that the underlying claim lacked *Strickland* merit. Reply Br. of Pet'r/Appellant at 9-13, *Tryon v. Quick* (10th Cir. Mar. 15, 2023) (No. 21-6097). The Tenth Circuit found that such argument "conflat[ed] the OCCA's analysis of his statutory-based ineffective assistance of post-conviction

counsel claim with a merits determination” of the underlying constitutional claim. App. 65a. The circuit court thus limited its review to the OCCA’s initial post-conviction opinion—which had summarily denied the claim due to the lack of prejudice showing—and denied relief. The Tenth Circuit further declined to modify its Certificate of Appealability to review Mr. Tryon’s IAC-*Atkins* claim, finding the district court’s rejection of the claim not debatable due to, once more, Dr. Fabian’s testimony and case law it construed as precluding Oklahoma courts from considering the Flynn Effect. App. 56-61a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit found undebatable that the OCCA reasonably denied Mr. Tryon’s IAC-*Atkins* claim. It did so without considering whether the state court’s decision had deferred to current clinical guidelines, as mandated by this Court in *Atkins* and its progeny. It further declined to consider the effect of the OCCA’s explicit evaluation of the merits of the underlying *Strickland* claim omitted by post-conviction counsel in the course of the state court’s adjudication of Mr. Tryon’s successive post-conviction application. This Court should grant certiorari to ensure that the Tenth Circuit reviews lower court *Atkins* decisions in accordance with this Court’s precedent, and to mandate that the Tenth Circuit not altogether ignore state court merits adjudications in deciding whether a procedural default applies.

I. THIS COURT SHOULD GRANT CERTIORARI TO ALIGN THE TENTH CIRCUIT’S APPROACH TO DETERMINING THE INDEPENDENCE OF OKLAHOMA’S PROCEDURAL BAR WITH THAT OF OTHER JURISDICTIONS.

A. The Oklahoma Court of Criminal Appeals Relied on an Antecedent Federal Law Determination to Apply Its Procedural Bar.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court made clear that when counsel provides deficient performance, resulting in prejudice, judicial relief is necessary. The same two-pronged standard applies when assessing counsel’s penalty phase effectiveness. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Subsequent counsel are judged using the same two-pronged metric. *See, e.g., Evitts v. Lucey*, 469 U.S. 387 (1985). Logic dictates that, in determining whether subsequent counsel provided ineffective assistance by omitting a claim, the merits of the omitted claim serve as the guide. Courts in this jurisdiction have recognized the same:

The heart of an ineffective assistance of counsel allegation is the underlying substantive claim that counsel supposedly mishandled. *Washington v. State*, 1999 OK CR 22, ¶ 57, 989 P.2d 960, 977. To determine whether an appellant has met his burden of proving counsel’s performance was deficient and that he was prejudiced by that performance, we review the merits of the appellant’s substantive claim. *Id.* Unless an appellant meets this burden, the substantive claim remains waived. *Id.*

Smith v. State, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010); *see also Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999) (internal citation omitted) (“When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, we look to the merits of the omitted issue.”); *cf. Milton v. Miller*, 744 F.3d 660, 670 (10th Cir. 2014) (“By ignoring the merits of the underlying predicate claim in assessing

appellate counsel's performance, the OCCA necessarily rendered meaningless any accompanying prejudice analysis.”).

The OCCA applies the same logic in considering whether post-conviction counsel ineffectively omitted a claim. Oklahoma provides a statutory right to post-conviction counsel, whose effectiveness is also governed by *Strickland*. See ROA III at 262-63. The OCCA recognized in adjudicating Mr. Tryon's successive post-conviction application that, “The only ineffectiveness claims raised in the current application that were not, and could not have been, raised in prior proceedings, are Petitioner's claims that original post-conviction counsel was ineffective.” *Id.* Thus, ineffectiveness of post-conviction counsel is one ground through which Mr. Tryon could have overcome application of the §1089(D) procedural bar to his successive application.

Ineffectiveness of initial post-conviction counsel is not always a ground allowing for a successive post-conviction application. See *Ivey v. Catoe*, 36 F. App'x 718, 730 (4th Cir. 2002) (noting that in South Carolina, “[t]he mere fact that PCR counsel was ineffective is not sufficient grounds for a successive PCR application”). Oklahoma's “choice [comes] with costs” to the ability of its procedural bar to serve as a federal default. *Rocha v. Thaler*, 626 F.3d 815, 831 (5th Cir. 2010) (where state court screening function entails review of substantive merits, dismissals of successive petitions per state statute necessarily “robbed . . . of their independent, state-law character”).

To determine whether post-conviction counsel ineffectively omitted the underlying ineffective assistance of trial counsel claim, the OCCA explicitly and at length examined the merits of the omitted claim. ROA III at 267-72. The opinion was devoid of any explicit or implicit framing as an alternative merits decision. Rather, the state court addressed the underlying merits of the ineffective assistance of trial counsel claim to determine whether post-conviction counsel ineffectively omitted it. After determining the omitted claim was without merit, because trial counsel was not ineffective for failing to obtain neuroimaging, OCCA denied relief. Just as in *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), the OCCA “has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed.” Here, “[b]efore applying § [1089(D)] to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.” *Id.*

B. Other Federal Courts Scrutinize the Specifics of the State Court Ruling to Determine Whether It Can Serve as a Federal Default.

Courts of appeal, in examining whether a state habeas decision procedurally defaulted federal consideration of a claim or the state court instead intertwined its holding with federal law, have grappled with the question in various ways, as has this Court following *Ake*. See *Stewart v. Smith*, 536 U.S. 856, 859-60 (2002) (finding, after certifying question to Arizona Supreme Court, that rule at issue required only categorization of claim, not decision on claim’s merits); *Coleman v. Thompson*, 501 U.S. 722, 741-42 (1991) (rejecting argument that Virginia rule at issue required review of constitutional claims before denying extension of time and finding rule’s

application independent of federal law).⁴ The Sixth Circuit, citing *Coleman*, found a state court decision independent of federal law where the Tennessee court determined whether application of the procedural bar would impact due process rights and explicitly did not reach the claim’s merits. *Hutchison v. Bell*, 303 F.3d 720, 740-41 (6th Cir. 2002). The Ninth Circuit has similarly applied *Stewart* to distinguish between state-court decisions explicitly or implicitly ruling on the merits of the constitutional claim, and those merely categorizing the claim. See *Nitschke v. Belleque*, 680 F.3d 1105, 1112 (9th Cir. 2012).

The Fifth Circuit, in determining whether the Texas state court applied the state’s “abuse of the writ” doctrine to dismiss a successive state habeas petition in a way interwoven with federal law, has scrutinized the type of claim at issue. In *Rivera v. Quarterman*, 505 F.3d 349, 359 (5th Cir. 2007), the Fifth Circuit found that the state court necessarily adjudicates the merits of successive state habeas petitions raising *Atkins* claims, explaining that, “to decide whether an *Atkins* claim is an abuse of the writ, the [Texas court] examines the substance of the claim to see if it establishes a prima facie case of retardation, and only upon deciding that question can the state court decide whether remand is appropriate.” Then, in ruling on a different type of underlying claim, the Fifth Circuit decided in *Rocha v. Thaler* that

⁴ In both cases, the Court noted that it had not yet found *Ake* to apply in a case coming before it in a federal habeas, rather than direct review, posture. *Stewart*, 536 U.S. at 860; *Coleman*, 501 U.S. at 741. Courts of appeal have not found this to be a point of contention in deciding whether federal habeas petitioners may receive merits review due to state habeas decisions being dependent upon federal grounds, with some circuits holding so explicitly. See *Black v. Workman*, 682 F.3d 880, 919 (10th Cir. 2012); *Rocha v. Thaler*, 626 F.3d 815, 827 n.54 (5th Cir. 2010).

the state court need not have reached the merits in procedurally barring a successive state action raising actual innocence as the gateway, because a decision on the merits of the gateway innocence claim does not equate to a decision on the underlying federal claim. 626 F.3d at 823-24. Similarly, the Seventh Circuit found it “difficult” to default a *Brady* claim where the state court’s rule regarding leave to file a successive state habeas petition rested on the same cause-and-prejudice analysis as used in the underlying claim. *Snow v. Pfister*, 880 F.3d 857, 868 (7th Cir. 2018).

And the Eleventh Circuit has repeatedly found an aspect of Alabama’s post-conviction review scheme not to procedurally bar federal habeas review due to an antecedent ruling on the underlying claim’s merits. *See, e.g., Borden v. Allen*, 646 F.3d 785, 816 (11th Cir. 2011) (“[A]n Alabama court’s consideration of the sufficiency of the pleadings concerning a federal constitutional claim contained in a Rule 32 petition necessarily entails a determination on the merits of the underlying claim; we cannot construe such a rule to be a state procedural bar that would preclude our review.”); *Powell v. Allen*, 602 F.3d 1263, 1272-73 (11th Cir. 2010) (reviewing merits of underlying ineffective assistance of trial counsel claim under § 2254(d) after holding same).

C. The Tenth Circuit Stands Apart in Failing to Engage With the Effect of the Antecedent Federal Adjudication in Mr. Tryon’s Case.

There is no reading of the OCCA’s successor denial in which it did not examine the merits of the underlying federal claim to determine whether post-conviction counsel ineffectively omitted it, thereby overcoming § 1089. The Tenth Circuit’s treatment of this question, in which it sidestepped any analysis of the effect of the

OCCA's antecedent ruling, is out of step with that of its sister circuits and of this Court.

In the past, the Tenth Circuit has recognized the antecedent ruling on the underlying claim upon which the OCCA premised its procedural bar application:

[T]he OCCA essentially *resolved the substantive issue now before us* while deciding the procedural bar. It said that the procedural bar could be overcome if Goode's counsel in the first postconviction proceeding had been ineffective in failing to raise the claim presented in the third postconviction application. It then held that counsel had not been ineffective because the new claim failed for lack of a showing of prejudice.

Goode v. Carpenter, 922 F.3d 1136, 1159 (10th Cir. 2019) (emphasis added). The Tenth Circuit went on to explain that, in disposing of the merits of the underlying IATC claim presented in the successive application, "OCCA ruled that Goode had not shown 'a reasonable probability that the evidence would have impacted the jury's weighing of the aggravating and mitigating evidence.'" *Id.*; *see also id.* at 1161 ("The OCCA rejected this additional evidence [presented in successive APCR] as procedurally barred but, as previously described, went on to examine whether Goode had presented a claim of ineffective assistance of postconviction counsel that would excuse the procedural bar."). The Tenth Circuit proceeded to a detailed review of whether the OCCA's adjudication of the underlying IATC claim was an unreasonable application of *Strickland* under § 2254(d)(1). *Goode*, 922 F.3d at 1160-62.

Similarly, in examining the successive state-court litigation process in Wyoming, the Tenth Circuit had previously referred to ineffectiveness of later counsel as the "portal through which otherwise waived claims of trial-level error may be

reached.” *Sullivan v. Wilson*, 673 F. App’x 855, 858 (10th Cir. 2016) (unpub.) (internal citation omitted).

Despite these previous adjudications, the Tenth Circuit has now become an outlier in refusing entirely to engage with an adjudication of the underlying constitutional claim’s merits. The oral argument in the case at bar further muddled the waters, with a Tenth Circuit judge attempting to draw a distinction by misattributing the issue in *Goode* to one of cause and prejudice. See Oral Argument at 3:50-57, *Tryon v. Quick* (10th Cir. June 13, 2023) (No. 21-6097), available at <https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/21-6097.mp3>. But this was the opposite of what the *Goode* Court had held. 922 F.3d at 1161 n.11 (“Consideration of ineffective assistance of postconviction counsel was undertaken by the OCCA purely as a matter of state law. We doubt that the Supreme Court would consider such ineffective assistance as cause to overcome a procedural bar.”); see also *Coleman*, 501 U.S. at 755 (“Counsel’s ineffectiveness will constitute cause only if it is an independent constitutional violation.”).

The current confused approach deviates from the Tenth Circuit’s past practice, in which it saw fit to confirm independence with the state court, just as this Court did in *Stewart*, rather than “speculate.” *Black v. Workman*, 682 F.3d 880, 919 (10th Cir. 2012) (certifying question of whether a state miscarriage-of-justice exception to procedural bar required decision on merits of underlying federal claim); cf. *Bennett v. Mueller*, 322 F.3d 573, 581-82 (9th Cir. 2003) (finding independence after reviewing evolution of case law through which, in response to earlier Ninth Circuit finding of

dependence on federal law, the “California Supreme Court made clear that it would no longer consider federal law in denying a petition on untimeliness grounds”).

This Court has recently requested briefing on the question of whether the OCCA’s application of § 1089 to bar post-conviction relief was an adequate and independent state-law ground for the state court’s judgment. *Glossip v. Oklahoma*, No. 22-7466 (Jan. 22, 2024). While the question of whether a state court’s procedural bar was applied independently of federal law turns on the specifics of each decision, it would nonetheless be appropriate for the Court to hold Mr. Tryon’s certiorari petition pending its decision in Mr. Glossip’s case.

Mr. Tryon’s case presents a similarly important question about the independence of Oklahoma’s procedural bar where its application hinges on the merits of the underlying federal claim, a question that the Tenth Circuit has been unable to answer in accordance with other circuits, or even with its own rulings. The nature of Mr. Tryon’s underlying federal claim, on which he seeks his one bite at the apple of federal habeas review, underscores this case’s propriety as a vehicle for certiorari review. *See Martinez v. Ryan*, 566 U.S. 1, 12 (2012) (calling procedural hurdles preventing claim’s presentation “of particular concern when the claim is one of ineffective assistance of counsel,” as “[t]he right to the effective assistance of counsel as trial is a bedrock principle in our justice system”).

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER REASONABLE JURISTS COULD DEBATE WHETHER OKLAHOMA IS APPLYING ITS *ATKINS* STATUTE CONSTITUTIONALLY.

A. Mr. Tryon's Underlying Constitutional Claim is At Least Debatable.

Both the state and federal courts found that appellate counsel could not have ineffectively omitted a claim that trial counsel was ineffective for failing to challenge Oklahoma's *Atkins* statute, because the OCCA would have upheld the statute given its rejection of the Flynn Effect in the past.⁵ The federal courts found the issue did not even warrant a certificate of appealability (COA).

28 U.S.C. § 2253(c)(2) provides that a COA should issue if an inmate “has made a substantial showing of the denial of a constitutional right.” “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). In fact, “a claim can be debatable even

⁵ The Tenth Circuit also claimed that trial counsel *did* raise a constitutional challenge, but pointed to a statement made during the trial, just before the penalty phase began. *See* App. 57a. Trial counsel made no such argument at the time they requested a pretrial *Atkins* hearing. Further, the Tenth Circuit pointed to Dr. Fabian's testimony that Mr. Tryon “was not mentally retarded” as evidence that appellate counsel did not omit a meritorious issue. App. 58a. But as described in Section A of the Statement of the Case, *supra*, this testimony flew in the face of Dr. Fabian's pretrial report, in which he recommended Mr. Tryon for an *Atkins v. Virginia* evaluation. The juxtaposition between Dr. Fabian's report and testimony should have been a red flag for appellate counsel, not a stop sign. *See Strickland*, 466 U.S. at 690-91 (“Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”); *see also* ROA I at 784-85 ¶ 4 (head of post-conviction division of indigent defense office describing in affidavit how review of Mr. Tryon's trial transcripts and original record revealed potentially meritorious ID issue and precipitated post-conviction retention of Dr. Fabian to perform adaptive testing).

though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Buck v. Davis*, 580 U.S. 100, 117 (2017) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted). “[A]ny doubts as to whether a COA should be granted are resolved in the petitioner’s favor, and the severity of the death penalty may be a consideration in deciding whether a petitioner has made a ‘substantial showing.’” *McGowen v. Thaler*, 675 F.3d 482, 498 (5th Cir. 2012) (citation omitted).

After first being called not intellectually disabled by an unfunded expert without receiving an evaluation, Mr. Tryon has now received a diagnosis from the same expert, following adequate funding, that exempts him from the death penalty. No court, however, has heard his claim. He meets the COA requirements and deserves “encouragement to proceed further” on his underlying constitutional claim at this threshold stage. *Miller-El*, 537 U.S. at 327.

B. *Atkins* and Its Progeny Mandate Adherence to Current, Clinical Guidelines.

Although *Atkins v. Virginia* reserved to the states “the task of developing appropriate ways to enforce the constitutional restriction,” 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)), it did not give the states “unfettered discretion to define the full scope of the constitutional protection.” *Hall v. Florida*, 572 U.S. 701, 719 (2014). “If the States were to have complete autonomy to define intellectual disability . . . the Court’s decision in *Atkins* could become a nullity.” *Id.* at 720. Nothing in *Atkins* suggests states have the authority to narrow the definition of intellectual disability and thus alter the constitutional restriction itself.

Permitting that would circumvent the rule announced in *Atkins* and allow the execution of persons who meet the clinical definitions of intellectual disability. Instead, states are limited to developing procedures to vindicate substantive constitutional rights, not to impair them. *See Ford*, 477 U.S. at 416.

When this Court announced the bright-line, categorical exemption of the intellectually disabled from execution, it relied on the clinical definitions promulgated by the American Association on Mental Retardation (AAMR), now the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA), which issues the Diagnostic and Statistical Manual of Mental Disorders (DSM). *Atkins*, 536 U.S. at 317 n.22; *see also id.* at 308 n.3. Without a doubt, “[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*.” *Hall*, 572 U.S. at 721.

In its interpretation of *Atkins* in subsequent cases, this Court has continued to emphasize the clinical underpinnings of the constitutional restriction. In *Hall*, by recognizing that “[i]ntellectual disability is a condition, not a number,” *id.* at 723, the Court relied on clinical definitions and diagnostic practices in finding Florida’s IQ cutoff of 70 for intellectual disability claims was flatly unconstitutional. *Id.* at 721 (“The legal determination of intellectual disability . . . is informed by the medical community’s diagnostic framework”). And in *Brumfield v. Cain*, 576 U.S. 305, 316, 319-20 (2015), the Court pointed to the discord between the state court’s decision and current clinical guidelines. In *Moore v. Texas*, 581 U.S. 1, 5-6 (2017), the Court once more made clear that tension between state-level *Atkins* law and clinical guidance is

resolved in favor of adherence to clinical guidelines. In overruling Texas’s scientifically unsound *Atkins* standard, *Moore* further emphasized that, “The medical community’s current standards supply one constraint on States’ leeway in this area.” 581 U.S. at 20.

C. Clinical Guidance Mandates Adjustment of IQ Scores for the Inflationary Impact of Obsolete Testing Norms.

The inflationary impact of obsolete testing norms on IQ scores, known as the Flynn Effect, describes the reality that as IQ tests become more distant from when they were normed to the population as a whole, they provide increasingly inflated scores. “There is a scientific and professional consensus that the Flynn [E]ffect is a scientific fact.” Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in *The Death Penalty and Intellectual Disability* 155, 158 (Edward Polloway ed., 2015) (AAIDD Death Penalty). Adjusting for the effect in the *Atkins* setting is also the consensus best or standard practice. *Id.* at 160-61. “[T]he global scores impacted by the outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence.” *Id.* at 165. The older test norms reflect a level of performance that is lower than that of individuals in contemporary society. *Id.* at 155. “[B]est practices *require* recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment . . . of an IQ score.” American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* at 37 (11th ed. 2010) (emphasis added); *see also* AAIDD, *User’s Guide: Mental Retardation, Definition, Classification and Systems of Supports* at 20-21 (10th ed. 2007) (endorsing

correction for age of norms). Even if the Flynn Effect had not gained scientific acceptance in 2006, when the Oklahoma statute went into effect, or in 2010, when the OCCA questioned their relevance given their omission from the statute—already debatable contentions given the 2007 AAIDD Guide—clinical standards are not static and lower courts contravene *Atkins* and its progeny by deferring to precedent while ignoring current guidelines.

The mandated exclusion of this scientific reality from legal proceedings is thus contrary to the consensus best practice and to this Court’s directive to rely on clinical standards. To exclude consideration and application of the Flynn Effect is to elevate inaccurate and unreliable scores. This was especially the case for Mr. Tryon, as Dr. Fabian found, where the test on which Mr. Tryon received the single score that disqualified him from an *Atkins* hearing was obsolete *even at the time of its administration*. Dr. Fabian pointed out that the evaluator had used an outdated test, contrary to professional psychology ethics and standards. ROA I at 234. This was not just a matter of ethical principal; as new IQ test versions are developed, the older versions and their norming become outdated. *Id. See also* AAIDD Death Penalty at 161 (“In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times.”)

Although the WISC-IV had been available since 2003, the administrator of the 2004 test used the WISC-III, which was normed in 1989 and published in 1991. After stating the Flynn Effect “has been generally accepted in the field of psychology,” Dr. Fabian applied it to the 2004 test and its 1989 norm, which adjusted the 81 on the

2004 administration of the test to a 76. ROA I at 234. With the standard error of measurement of 3.2 points, this brought the 81 down to a score as low as 73. *Id.*

D. The Tenth Circuit is Enforcing Unconstitutional Application of Oklahoma’s Statute.

The Tenth Circuit’s dismissal was premised on the finding that “even if appellate counsel had challenged the constitutionality of the Oklahoma statute, the OCCA was certain to reject the argument. This is because the OCCA had already upheld the statute’s constitutionality against a challenge based on the Flynn Effect.” App. 59a. For this, the circuit court cited a footnote from a 2010 state court opinion, in which the OCCA denied the Flynn Effect had achieved universal acceptance and found that it could not be relevant in Oklahoma given its omission from the state statute. *See Smith v. State*, 245 P.3d 1233, 1237 n.6 (Okla. Crim. App. 2010).

The Tenth Circuit further noted that the OCCA had relied on this 2010 opinion as recently as 2020. App. 60a (citing *Fuston v. State*, 470 P.3d 306, 316 n.3 (Okla. Crim. App. 2020)). Finally, the Tenth Circuit cited its own decision upholding the OCCA in *Smith*, as well as another of its decisions in which it again cited to *Smith*. App. 60a (citing *Postelle v. Carpenter*, 901 F.3d 1202, 1212-13 (10th Cir. 2018); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016)).

In the Tenth Circuit, then, due to a footnote in a 2010 OCCA decision that noted the absence of the Flynn Effect in the 2006 statute, capital petitioners find the door shut to any consideration of their IQ scores with this clinical best-practice adjustment. Far from incorporating medical community’s diagnostic framework, the Tenth Circuit upholds the OCCA’s frozen-in-time preclusion of such standards,

impermissibly “fasten[ing] its intellectual-disability determination[s],” *Moore*, 581 U.S. at 20, to the four corners of a decades-old state statute.

Even ten years ago, clinicians took note of the Tenth Circuit’s deviation from clinical guidelines in its refusal to consider the Flynn Effect. *See* Nancy Haydt, Stephen Greenspan, Bhushan S. Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359, 382-83 (2014) (calling the Tenth Circuit’s denouncement of the Flynn Effect in *Hooks v. Workman*, 689 F.3d 1148, 1170 (10th Cir. 2012) “grossly inaccurate” and finding “this rejection of the Flynn Effect, in combination with the use of scientifically unjustified bright-line IQ cutoff scores, causes artificially high IQ scores, thus denying defendants a fair determination of intellectual functioning for *Atkins* purposes.”). A 2023 decision citing the same outdated case law should be viewed with even greater scrutiny and skepticism.

Other jurisdictions commonly understand that a constitutional *Atkins* process is not static, but rather, allows room for current clinical guidelines—including, where pertinent, the Flynn Effect. *See, e.g., Fulks v. Watson*, 4 F.4th 586, 591 (7th Cir. 2021) (“The Supreme Court’s decisions in *Hall*, *Moore I*, and *Moore II* recognized that the medical diagnostic standards have not stood still since *Atkins*.”); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, at *5-6 (defining “critical” role of clinical judgment and noting Flynn Effect considered an AAIDD “best practice”); *State v. Ford*, 140 N.E.3d 616, 654-55 (Ohio 2019) (finding that, although state and federal law did not mandate Flynn Effect inclusion, trial court should not have excluded it

from consideration, and further finding state law followed outdated clinical guidelines in evaluation of adaptive deficits); *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (“Courts [] must follow [] *Moore*, which predicate[d] a finding of intellectual disability by applying prevailing medical standards. Because prevailing medical standards change as new medical discoveries are made, routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility.”);⁶ *State v. Thurber*, 420 P.3d 389, 450 (Kan. 2018) (“Kansas cannot statutorily require courts to disregard other relevant medical standards.”).

And regarding the Flynn Effect in particular, courts across the country have allowed room for its potential application, even while not necessarily mandating its use, contrary to Oklahoma’s categorical exclusion upheld by the Tenth Circuit. *See, e.g., Fulks*, 4 F.4th at 591-92 (citing *McManus v. Neal*, 779 F.3d 634, 652-53, 653 n.6 (7th Cir. 2015) for proposition that evaluators *may* adjust scores based on the Flynn Effect and using “Flynn-adjusted IQ scores” in evaluating 28 U.S.C. § 2255 claim); *Black v. Bell*, 664 F.3d 81, 89 (6th Cir. 2011) (noting state court had “determined it was prohibited from considering [] scientific concepts” such as Flynn Effect in assessing IQ); *id.* at 95 (finding state court prohibition “misinterpreted the Flynn Effect’s relevance” where controlling state law “made no mention whatsoever” of the Flynn Effect); *Thomas v. Allen*, 607 F.3d 749, 752-53 (11th Cir. 2010) (laying out

⁶ *Woodall* abrogated *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), which in upholding Kentucky’s bright-line cutoff had noted that the legislature had omitted the margin of error and Flynn Effect from the state statute. *Id.* at 375.

Alabama statute, which made no mention of Flynn Effect, and stating “[a]n evaluator may consider the ‘Flynn effect’”); *Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (despite Virginia statute not mentioning Flynn Effect, finding district court’s refusal to consider Flynn Effect based on “lack of legal basis” ignored evidence that “directly addressed the relevant question”); *United States v. Wilson*, 170 F.Supp.3d 347, 374, 374 n.6 (E.D.N.Y. 2016) (district court upholding on post-*Hall* remand its prior opinion’s application of Flynn Effect, despite noting that *Hall* did not mandate such application); *Thomas v. Allen*, 614 F.Supp.2d 1257, 1277 (N.D. Ala. 2009) (rejecting State’s argument of Flynn Effect irrelevance given lack of official endorsements outside the AAIDD because that “does not justify ignoring the phenomenon in the face of its unchallenged existence”).

The Fifth Circuit in particular, while not definitively accepting the Flynn Effect, has grappled with the phenomenon’s applicability over the years, unlike the Tenth Circuit.⁷ Compare *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007) (noting Flynn Effect “has not been accepted in this Circuit as scientifically valid”) with *In re*

⁷ The Fifth Circuit’s attention to the Flynn Effect over the years is also notable when considering that the same circuit repeatedly found that Texas’s so-called *Briseno* factors, *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), which premised the ID determination on lay stereotypes, passed constitutional muster. See *Henderson v. Stephens*, 791 F.3d 567, 585 (5th Cir. 2015) (“This Court has held that *Briseno* is a constitutionally permissible interpretation and application of *Atkins*”); but see *Moore*, 581 U.S. at 17-18 (overturning “outlier” *Briseno* test as incompatible with Eighth Amendment); *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*) (finding “Moore has shown he is a person with intellectual disability” after Texas court continued to apply lay stereotypes). The Tenth Circuit has thus distinguished itself from even this previous outlier jurisdiction in its refusal to engage with the potential effect of a clinically recognized phenomenon.

Cathey, 857 F.3d 221, 227 n.33 (5th Cir. 2017) (“Importantly, however, nor has the Flynn Effect been rejected”) *and id.* at 232-33 (further finding, in authorizing successive habeas petition, that petitioner’s “IQ score may be even lower should a reviewing court ultimately find merit in the Flynn Effect”).⁸

Even without explicit acceptance in the circuit, courts in the Fifth Circuit have not viewed themselves as categorically prohibited from applying the Flynn Effect where warranted. *See Maldonado v. Thaler*, 389 F. App’x 399, 403 (5th Cir. 2010) (unpub.) (granting COA on *Atkins* claim where, among other issues, State’s expert “had failed to take the ‘Flynn Effect’ into account”);⁹ *United States v. Hardy*, 762 F.Supp.2d 849, 862-63 (5th Cir. 2010) (noting unsettled state of Flynn Effect in circuit before holding that, “In light of the substantial evidence supporting the existence of the Flynn Effect, the Court concludes that Hardy’s score of 73 should be corrected to take it into account.”); *Wiley v. Epps*, 668 F. Supp. 2d 848, 894 (N.D. Miss. 2009) (“The Court finds that regardless of whether the ‘Flynn effect’ is considered as a precise mathematical formula in this case, it will take into consideration the obsolescence of

⁸ *Cathey* also pointed to “the Eleventh Circuit’s recent conclusion that district courts, upon their consideration of expert testimony, may apply or reject the Flynn Effect, which is a finding of fact reviewed for clear error.” 857 F.3d at 227 n.33 (citing *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016)). *Ledford* was recently abrogated by *Smith v. Comm’r, Ala. Dep’t of Corr.*, 67 F.4th 1335, 1348 (11th Cir. 2023), *cert. pending*, *Hamm v. Smith* (No. 23-167), based on the Eleventh Circuit’s recognition that its pre-*Moore* law no longer comported with this Court’s dictates.

⁹ The Fifth Circuit saw fit to grant a COA on this claim despite that the controlling Texas law at that time did not account for the Flynn Effect and was overall noncompliant with clinical guidance. *See supra*, n.7 (citing *Ex parte Briseno*).

test norms in weighing the evidence concerning Petitioner’s intellectual functioning.”).

With the OCCA refusing to consider current clinical standards, and the reviewing federal courts cutting off consideration of such refusal at the quick, Oklahoma is operating outside the bounds of this Court’s *Atkins* protection. A grant of certiorari and reversal of the Tenth Circuit decision would not require this Court to overturn Oklahoma’s statute, but narrowly to hold that the Oklahoma courts’ *application* of the statute, in a way precluding adherence to current clinical guidelines, is unconstitutional. Without this Court’s intervention, the Tenth Circuit will continue to apply outdated case law to defer to the OCCA’s scientifically unsound reading of the state statute as excluding the Flynn Effect from the calculus. This Court should grant certiorari to remind the Tenth Circuit that *Atkins* and its progeny “cannot sensibly be read to give courts leave to diminish the force of the medical community’s consensus.” *Moore*, 581 U.S. at 5-6.

CONCLUSION

For the foregoing reasons, Mr. Tryon respectfully requests this Court grant his petition for writ of certiorari or alternatively hold his petition for consideration of Question (1) until after this Court decides *Glossip v. Oklahoma*, No. 22-7466 (cert. granted, Jan. 22, 2024).

Respectfully submitted,

s/ Callie Heller

CALLIE HELLER, Texas Bar No. 24101897*

Assistant Federal Public Defender

Office of the Federal Public Defender

Western District of Oklahoma

215 Dean A. McGee, Suite 707

Oklahoma City, Oklahoma 73102

(405) 609-5975 Phone

(405) 609-5976 Fax

Callie_Heller@fd.org

ATTORNEY FOR PETITIONER,
ISAIAH GLENNDELL TRYON

* Counsel of Record