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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (AUGUST 26, 2019)

935 F.3d 1064

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODERICK L. SMITH,

Petitioner-Appellant,

v.

TOMMY SHARP,
Interim Warden*, Oklahoma State Penitentiary,

Respondent-Appellee.

No. 17-6184

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

Attorneys and Law Firms

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.

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* 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.

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 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

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

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 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 adjudica-

tion 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

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).

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.

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).

"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).

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, ren-

dering the resulting factual finding unreasonable." *Byrd v. Workman*, 645 F.3d 1159, 1171-72 (10th Cir. 2011).

"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.*

"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]

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[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.*

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

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

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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)).

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 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]

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

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[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) arguments by failing to raise them expressly below.

Smith's evidence of . . . adaptive functioning deficits," *id.* at 8, it reached no conclusions regarding the adaptive functioning prong.

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 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"). 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 conflicting") with OCCA *Atkins* Op. at 8 ("the State presented persuasive evidence from lay witnesses to refute Smith's evidence of sub-average 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

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[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.

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 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)).

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 testimony in review of *Atkins* challenges. In granting habeas relief pursuant to *Atkins* in *Pruitt*, the Seventh Circuit

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[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).

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).

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

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

are not dispositive. The State cannot prevail on either basis. The former requires an unreasonable construction of the facts; the 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

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[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.

1997, five years prior to the Supreme Court's decision in *Atkins*.[8] 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 une-

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[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 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.

quivocally 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

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[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.'").

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 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 malin-

gering." *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

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[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)).

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 functioning 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 sub-average 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).

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.

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 conclusion 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

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[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.

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 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))).

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 opinions 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. 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

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[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.

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. Accordingly, 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.

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[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.").

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

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.").

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.

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).

"[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 con-

ceivable." *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 authenticate 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).

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 con-

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[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

ceded 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

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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.

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 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

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[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).

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.

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[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.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (JULY 13, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RODERICK L. SMITH,

Petitioner,

v.

TERRY ROYAL,
Warden, Oklahoma State Penitentiary,

Respondent.[1]

Case No. CIV-14-579-R

Before: David L. RUSSELL,
United States District Judge.

Petitioner, Roderick L. Smith, a state court prisoner, has filed a Petition for a Writ of Habeas Corpus seeking relief pursuant to 28 U.S.C. § 2254. Doc. 18. This is Petitioner's second habeas petition.

In 1994, in Oklahoma County District Court Case No. CF-1993-3968, Petitioner was tried by jury for

[1] Pursuant to Fed. R. Civ. P. 25(d), Terry Royal, who currently serves as warden of the Oklahoma State Penitentiary, is hereby substituted as the proper party respondent.

the murders of his wife and her four children. Petitioner was found guilty and was sentenced to death on all five counts. In 1998, after an unsuccessful pursuit for relief in the state courts, Petitioner initiated his first habeas corpus action, and in 2002, the Court denied Petitioner relief. *Smith v. Gibson*, No. CIV-98-601-R (W.D. Okla. Jan. 10, 2002) (unpublished). Six months later, the Supreme Court held that the Eighth Amendment prohibits the execution of a mentally retarded offender, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), and in March 2004,[2] Petitioner was given the opportunity to prove that he is mentally retarded.[3] A state court jury concluded that he is not (O.R. VI, 1115), and the Oklahoma Court of Criminal Appeals (hereinafter "OCCA") affirmed the jury's verdict. *Smith v. State*, No. O-2006-683 (Okla. Crim. App. Jan. 29, 2007) (unpublished). In July 2004, the Tenth Circuit affirmed this Court's denial of relief with respect to Petitioner's convictions, but found that Petitioner was entitled to a new sentencing proceeding due to ineffective assistance of counsel. *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004).

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[2] This was actually Petitioner's second mental retardation trial. The first one, held in November 2003, ended in a mistrial (O.R. V, 993-98).

[3] In *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1990 (2014), the Supreme Court began using the term "intellectual disability" instead of "mental retardation." Nonetheless, for purposes of simplicity and consistency, the Court will address Petitioner's claims utilizing the old terminology which was used throughout Petitioner's state court proceedings. *See Howell v. Trammell*, 728 F.3d 1202, 1206 n.1 (10th Cir. 2013); *Hooks v. Workman*, 689 F.3d 1148, 1159 n.1 (10th Cir. 2012).

In 2009, Petitioner had a jury trial to determine to his competence. Found competent (O.R. XII, 2276), Petitioner was then resentenced in 2010. This time around, the jury imposed two death sentences and three sentences of life without the possibility of parole (O.R. XIII, 2611-30). Petitioner appealed these sentences to the OCCA. The OCCA affirmed in a published opinion. *Smith v. State*, 306 P.3d 557 (Okla. Crim. App. 2013), *cert. denied*, 134 S. Ct. 2662 (2014). Petitioner was unsuccessful in his pursuit of post-conviction relief. *Smith v. State*, No. PCD-2010-660 (Okla. Crim. App. Feb. 13, 2014) (unpublished).

Petitioner presents seven grounds for relief. His first three grounds relate to the state court determination that he is not mentally retarded. Ground Four is a challenge to the legal representation he received at his competency trial and resentencing. In Grounds Five and Six, Petitioner argues that execution for his crimes would violate the Eighth Amendment's prohibition against cruel and unusual punishment. His final ground alleges cumulative error. Respondent has responded to the petition and Petitioner has replied. Docs. 35 and 43. In addition to his petition, Petitioner has filed motions for discovery and an evidentiary hearing. Docs. 20 and 38. After a thorough review of the state court record (which Respondent has provided), the pleadings filed in this case, and the applicable law, the Court finds that, for the reasons set forth herein, Petitioner is not entitled to his requested relief.

I. Standard of Review

A. Exhaustion as a Preliminary Consideration

The exhaustion doctrine, a matter of comity which has long been a part of habeas corpus jurisprudence, requires the Court to consider in the first instance whether Petitioner has presented his grounds for relief to the OCCA. As the Supreme Court stated in *Coleman v. Thompson*, 501 U.S. 722, 731 (1991), "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." The exhaustion doctrine is set forth in 28 U.S.C. § 2254(b). Section 2254(b)(1)(A) prohibits the Court from granting habeas relief in the absence of exhaustion (although Section 2254(b)(1)(B) sets forth two limited exceptions to this rule), but Section 2254(b)(2) expressly authorizes the Court to deny habeas relief "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

B. Procedural Bar

Beyond the issue of exhaustion, the Court must also examine how the OCCA adjudicated each of Petitioner's grounds for relief, *i.e.*, whether the OCCA addressed the merits of Petitioner's grounds or declined to consider them based on a state procedural rule. "It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that 'is independent of the federal question and adequate to support the judgment.'" *Cone v. Bell*, 556 U.S. 449, 465 (2009) (quoting *Coleman*, 501 U.S. at 729). "The doctrine applies to bar federal habeas

when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

C. Limited Merits Review

When the OCCA has addressed the merits of one of Petitioner's grounds for relief, the Court reviews that ground in accordance with the standard of relief set forth in 28 U.S.C. § 2254(d). Pursuant to that section of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), in order for Petitioner to obtain relief, he must show that the OCCA's adjudication of a claim either

> (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.

See Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (acknowledging that "[t]he petitioner carries the burden of proof"). The very focus of this statutory provision is the reasonableness of the OCCA's decision. "The question under AEDPA is not whether a federal court believes the [OCCA's] determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). In other words, "[i]t is not enough that [this] [C]ourt, in its independent review

of the legal question, is left with a firm conviction that the [OCCA] was erroneous." What is required is a showing that the OCCA's decision is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal quotation marks and citations omitted).

The Supreme Court has repeatedly acknowledged that Section 2254(d) "'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court[,]'" and that "[i]f [it] is difficult to meet, that is because it was meant to be." *White v. Wheeler*, 577 U.S. ___, 136 S. Ct. 456, 460 (2015) (quoting *Burt v. Titlow*, 571 U.S. ___, 134 S. Ct. 10, 16 (2013)); *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Section 2254(d) "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Richter*, 562 U.S. at 102. What remains, then, is a very narrow avenue for relief, one that permits relief only "where there is no possibility fairminded jurists could disagree that the [OCCA's] decision conflicts with [the Supreme] Court's precedents." *Id.* (emphasis added).

> Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner 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 102-03 (citation omitted). When reviewing a claim under Section 2254(d), review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181.

II. Analysis

A. Ground One: Sufficiency of the Evidence (Mental Retardation)

Petitioner's first ground for relief is an *Atkins* claim. He argues that because he is mentally retarded, his two death sentences cannot stand. The question of whether or not Petitioner is mentally retarded was submitted to a jury in 2004. The twelve-member jury listened to five days of testimony from twenty-three witnesses, ultimately concluding that Petitioner is not mentally retarded. On appeal to the OCCA, Petitioner challenged the jury's verdict, claiming it was contrary to the clear weight of the evidence. The OCCA denied relief on the merits. *Smith*, No. O-2006-683, slip op. at 6-11.

In denying Petitioner relief, the OCCA acknowledged that in mental retardation proceedings, Petitioner has the burden to prove by a preponderance of the evidence "'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 [communication; self-care; social/interper-

sonal skills; home living; self-direction; academics; health and safety; use of community resources; and work].'" *Id.* at 6 & n.8 (quoting *Myers v. State*, 130 P.3d 262 (Okla. Crim. App. 2005), for the definition of mental retardation developed by the OCCA in *Murphy v. State*, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002)).[4]

"When a defendant challenges the sufficiency of the 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." *Smith*, No. O-2006-683, slip op. at 6. The Tenth Circuit has found this to be "the relevant constitutional standard." *Hooks*, 689 F.3d at 1166. "Put a different way, if any rational trier of fact could have found that [Petitioner] failed to establish, by a preponderance of the evidence, that he is mentally retarded, then the jury verdict must be upheld." *Id.* This is a mixed question of law and fact. *Id.* at 1165.

Although the standard of review applied to a jury verdict in a mental retardation proceeding is a modification of the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), the deference is the same: a jury verdict is given substantial deference. Because it is the jury's job "to resolve conflicts in the testimony, to

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[4] Before Oklahoma enacted *Atkins* legislation, the OCCA defined mental retardation and set forth the procedures for mental retardation proceedings in *Murphy.* Because Oklahoma's *Atkins* statute was not enacted until July 1, 2006, *see* Okla. Stat. tit. 21, § 701.10b, some two years after Petitioner's mental retardation trial, Petitioner's proceeding was governed by *Murphy*. *See Hooks*, 689 F.3d at 1165 & nn.4 & 5.

weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts[,]" its verdict will be "impinge[d] . . . only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. And, in the habeas context, "a second layer of deference" is added. This Court does "not directly review the jury's verdict[,]" but looks to the OCCA's resolution of the sufficiency claim to determine if "the OCCA correctly identified the governing legal principle from *Jackson* and reasonably applied it to the facts of [Petitioner's] case." *Hooks*, 689 F.3d at 1167. Therefore, in order to obtain relief, Petitioner must overcome these layers of deference and show that all fairminded jurists would agree that the OCCA "got it wrong." *Lockett v. Trammel [sic]*, 711 F.3d 1218, 1231 (10th Cir. 2013). *See also Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014) ("If . . . some fairminded jurists could possibly agree with the [OCCA's] decision, then it was not unreasonable and the writ should be denied.").

In reviewing the OCCA's resolution of this claim, the Court can only consider the evidence which the OCCA had before it. *Pinholster*, 563 U.S. at 181; *Hooks*, 689 F.3d at 1167. Because Petitioner's Ground One is a challenge to the jury's verdict, the evidence before the OCCA was the evidence that was presented to the jury. Despite these review parameters, Petitioner's argument for relief relies heavily on evidence which was not presented at his mental retardation trial. The Court will not consider this evidence.[5] The following is a summary of the trial evidence.

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[5] In his reply, Petitioner states that with one exception (Attachment 5, Report of Dr. Terese Hall, dated September 12, 2005), all of his later developed evidence is simply "additional confirming

Petitioner's Trial Evidence

Two experts, Dr. Clifford Alan Hopewell and Dr. Fred Smith, testified on Petitioner's behalf. Dr. Hopewell, a clinical neuropsychologist who had been involved in Petitioner's case since 1997, testified that in his opinion, Petitioner is "within the range of mild mental retardation" (Tr. 3/9/04, 30, 42, 46). Dr. Hopewell tested Petitioner's intelligence quotient (I.Q.) using the third revision of the Wechsler Adult Intelligence Scale (WAIS-III). Petitioner's full scale score was a 55, a score which reflected significantly sub-average intellectual functioning (*id.* at 55-56). Dr. Hopewell testified that this score substantially limits Petitioner's ability to understand and process information, to communicate, to learn from experiences or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others (*id.* at 57).

To assess Petitioner's adaptive functioning, Dr. Hopewell administered the Vineland Test[6] and the

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evidence" which this Court can consider once it determines that he has satisfied Section 2254(d). Reply at 1-3. This is incorrect. A jury verdict cannot be invalidated based on evidence which it did not hear. *Matthews v. Workman*, 577 F.3d 1175, 1185 (10th Cir. 2009) ("[I]t makes no sense for us, in reviewing whether a jury's verdict was based on sufficient evidence, to consider facts the jury never heard."). Although Petitioner asserts that Dr. Hall's report is an exception to *Pinholster* because it was presented to the OCCA in support of a trial counsel ineffectiveness claim, the fact remains that this Court cannot consider later developed evidence when evaluating the OCCA's determination of a sufficiency of the evidence claim. *Hooks*, 689 F.3d at 1168 n.7.

6 With the exception of communication, Dr. Hopewell gave only general testimony about the adaptive functioning he assessed with the Vineland. Although he testified that the Vineland tests

Wide Range Achievement Test (WRAT-III),[7] concluding that Petitioner has significant deficits in all areas (Tr. 3/9/04, 61, 65, 68, 130). Regarding communication, Dr. Hopewell found that Petitioner was "impoverished." While Petitioner could talk and communicate about basic things, Dr. Hopewell described Petitioner's communication skills as limited and lacking in both detail and spontaneity. He testified that Petitioner's communication was at an eight-year-old level (*id.* at 62-64). Regarding academics (as tested with the WRAT-III), Dr. Hopewell testified that Petitioner was at the kindergarten or first-grade level in spelling and writing (*id.* at 65-66). He also noted that Petitioner is functionally illiterate (*id.* at 66-67).

Dr. Hopewell testified that he had seen evidence that Petitioner had this condition before age 18 and that he did not believe that Petitioner was malingering or faking his condition (*id.* at 71, 73, 77).

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five areas of adaptive functioning, he did not specify which ones, but simply stated that Petitioner tested out at an eight-year-old level on some things "like communication . . . and being able to do things and fix things and so forth" and at a five-year-old level "on a couple of things" (Tr. 3/9/04, 64). When asked if he believed that Petitioner had deficits in at least five of the areas of adaptive functioning, he responded that Petitioner had deficits in all of them (*id.* at 67-68). On cross-examination of Dr. John Call, defense counsel elicited the results of the Dr. Hopewell's Vineland testing in three primary areas: communication at four years, nine months; daily living skills at five years, eight months; and socialization at five years, eight months (Tr. 3/15/04, 49-51).

[7] Dr. Hopewell testified that the WRAT tests reading, writing, and math (Tr. 3/9/04, 65). Dr. Call testified that it tests reading, spelling, and math (Tr. 3/15/04, 27).

Dr. Smith, a psychologist with the Oklahoma Department of Corrections, testified about his evaluation and testing of Petitioner in 1997. On the Wechsler Adult Intelligence Scale–Revised (WAIS-R), Petitioner's full scale I.Q. score was a 65, and on the Standard Progressive Matrices, also known as the Raven's, Petitioner's I.Q. score was between 69 and 78. Dr. Smith testified that Petitioner's score on the WAIS-R was indicative of mental retardation (Tr. 3/10/04, 157-62). Although Dr. Smith believed that Petitioner was "a little bit brighter than what he tested out to be on the [WAIS-R]," he did not believe that Petitioner was faking. In his opinion, Petitioner "is consistent with mental retardation in his general level of functioning and speech" (*id.* at 163, 167-68). Noting that adaptive functioning is difficult to measure in a structured prison setting, Dr. Smith did not determine if Petitioner had any adaptive functioning deficits (*id.* at 164, 186-87). Ultimately, Dr. Smith testified that Petitioner was "right on [the] cusp" of being mentally retarded, but that he would "vote for mental retardation" (*id.* at 168).

Although all of Petitioner's school records except his high school transcript had been destroyed, school administrators and teachers testified that Petitioner was in special education classes beginning in elementary school (Tr. 3/9/04, 202-04; Tr. 3/10/04, 8-11, 14; Def.'s Exs. 1-3). Paul Preston, who taught high school special education, was Petitioner's teacher for four years. He described Petitioner as having very low/limited abilities. Although Petitioner received custodial training during high school, Mr. Preston testified that he would be surprised to learn that Petitioner worked as a janitorial supervisor because he did not

believe that Petitioner had the skills for such a position (Tr. 3/10/04, 22, 28, 31, 43). Another special education teacher, Mona Autry, also had Petitioner as a student. She testified that Petitioner functioned in her classes at about a third grade level. Although Petitioner tried hard, Ms. Autry testified that Petitioner was one of her lower functioning students. Like Mr. Preston, she testified that she would be "[e]xtremely surprised" to learn that Petitioner was able to become a head janitor (*id.* at 94, 99-101, 104, 114). Both Ms. Autry and Mr. Preston acknowledged Petitioner's very limited ability to read (*id.* at 34, 100).

Madeline Corsoro was the music teacher at the elementary school where Petitioner was employed as head custodian. They worked together for about five years. Petitioner was responsible for cleaning her room and he also helped her with other things from time to time. Ms. Corsoro testified that through her interaction with Petitioner, she discovered that he could not read (Tr. 3/10/04, 45-53; Def.'s Ex. 4).

Although witnesses testified that Petitioner was able to drive a car, Lee Frizzell, an Oklahoma Department of Public Safety employee, testified that Petitioner did not have a driver's license (Tr. 3/9/04, 112-14; Tr. 3/10/04, 63, 66, 75-76; Tr. 3/12/04, 41).

Petitioner's cousin, Chris Scott, testified that Petitioner was a loner, that he was slower than everyone else, that he did not read, and that Petitioner's mother did everything for him (Tr. 3/10/04, 69-71). For about a year, Mr. Scott worked as a janitor with Petitioner. Mr. Scott testified that although Petitioner was his supervisor, Petitioner did not perform supervisory duties. Mr. Scott's mother, who hired Petitioner,

handled the paperwork, ordering, and time cards (*id.* at 71-74).

Jack Fisher, an attorney who had previously represented Petitioner, described Petitioner "like an 11 or 12-year-old child" whose "main concern in life is that he have pens and coloring books." Mr. Fisher identified a folder containing numerous coloring pages Petitioner had colored and sent to him. Mr. Fisher testified that he purchased coloring books for Petitioner and sent him money to buy felt pens at the prison commissary. Mr. Fisher did not bother sending Petitioner any books because Petitioner "can't read more than just maybe a few words." Mr. Fisher testified that Petitioner was not smart enough to make the decision to malinger (Tr. 3/10/04, 147-50, 151, 155; Def.'s Ex. 7).

Norman Cleary, who had shared a cell with Petitioner over the years, testified about his interaction with Petitioner in prison (Def.'s Ex. B at 4).[8] When Petitioner first moved into his cell, Mr. Cleary knew "within 30 minutes . . . that [Petitioner] had some problems" (*id.* at 5). He testified that Petitioner could not read or write, and although he tried to teach Petitioner to read, "it was hopeless" (*id.* at 5-6, 7, 9-11). Mr. Cleary testified that Petitioner would color in his coloring books and watch TV all day (*id.* at 7-8). Mr. Cleary helped Petitioner write and address letters and fill out his canteen slips (*id.* at 12-13, 15-

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[8] Because Mr. Cleary was scheduled to be executed on February 17, 2004, he gave videotaped testimony on February 4, 2004, and a transcript of his testimony was then read to the jury (O.R. V, 1013-19; Tr. 3/10/04, 196). The transcript was preserved for the record as Defendant's Exhibit B.

16). Mr. Cleary testified that Petitioner could not tell time (except with a digital clock) or play simple games (except for Tic-Tac-Toe) (*id.* at 13-15, 29-30). When Petitioner would frequently cut himself and do nothing to address the bleeding, Mr. Cleary administered the first aid Petitioner needed (*id.* at 17-18). Mr. Cleary testified that other inmates took financial advantage of Petitioner (*id.* at 18-20).

Petitioner's mother, Eva Cates, testified that Petitioner "was very, very slow" from the start. For him, walking, talking, and potty training were all delayed developments (Tr. 3/11/04, 5-7). Ms. Cates testified that other kids were cruel and would tease Petitioner because he acted like a two-year-old (*id.* at 7). Ms. Cates testified that she was told that Petitioner was placed in special education classes (*id.* at 8). She did not teach Petitioner to cook because she "didn't want him to play with fire when [she] wasn't there" (*id.* at 9).

State's Trial Evidence

The State retained Dr. John Call, a forensic psychologist, to review Dr. Hopewell's opinion and conduct his own evaluation (Tr. 3/15/04, 3-7). It was Dr. Call's opinion that no reliable documentation existed to indicate that Petitioner was mentally retarded (*id.* at 39, 67).

Dr. Call disagreed with Dr. Hopewell's conclusion that Petitioner was not malingering. To determine if Petitioner was malingering, Dr. Hopewell administered two tests, the Test of Memory and Malingering (TOMM) and the 15-Item Memory Test. Petitioner's results on both of these tests showed that Petitioner was malingering; however, Dr. Hopewell discounted

these results due to Petitioner's low score on the WAIS-III. Dr. Call testified that there was no research to support Dr. Hopewell's disregard for the malingering test results based on Petitioner's low I.Q. (*id.* at 12-22, 24-25, 37). When Dr. Call himself administered the WAIS-III and the TOMM to Petitioner, he received the same results as Dr. Hopewell; however, giving appropriate consideration to Petitioner's scores on the TOMM, Dr. Call testified that Petitioner's WAIS-III score must be deemed invalid due to malingering. In sum, because there was evidence that Petitioner was malingering during both testing sessions, Dr. Call testified that neither his results nor Dr. Hopewell's results could be considered valid I.Q. assessments (*id.* at 25-26, 38-39, 69-70).

Dr. Call also took note of other I.Q. tests Petitioner had taken. In 1994, Petitioner received an I.Q. score of 73, and in 1997, he received a 70. Dr. Call testified that the drop from a 73 in 1994 to a 55 in 2003 was significant, and he explained how easy it would be to malinger on the WAIS test (Tr. 3/15/04, 34-38).

Dr. Call disagreed with Dr. Hopewell's use of the Vineland Test to assess Petitioner's adaptive functioning. Because Dr. Hopewell administered the test to Petitioner, and not to a third-party observer like a parent or a teacher as the Vineland was specifically designed, Dr. Call testified that Dr. Hopewell's assessment of adaptive functioning was also invalid. Acknowledging that adaptive functioning is extremely difficult to assess in a prison setting, as Dr. Smith likewise testified, Dr. Call did not do any formal adaptive functioning assessment of Petitioner. He did, however, testify that the Adaptive Behavior Assessment System, Second Edition (ABAS-II), could have been used.

Based on his interviews with certain prison personnel and his own interaction with Petitioner, Dr. Call did not believe that Petitioner had any deficiencies in any particular area of adaptive functioning (*id.* at 22-25, 30-34, 48-49).

Like Dr. Hopewell, Dr. Call also gave Petitioner the WRAT-III. Although Dr. Call expected results similar to those received by Dr. Hopewell, the results were not the same. One major difference was in spelling. When Dr. Call administered the test, Petitioner could not even spell his last name or recognize several additional letters—letters he was able to identify for Dr. Hopewell just eight months before.[9] After the State made reference to admitted exhibits wherein Petitioner had previously signed his name, Dr. Call testified that absent some significant brain damage since the time Petitioner had signed those documents (which there was no evidence of), it was clear to him that Petitioner was not putting forth his best effort (Tr. 3/9/04, 148; Tr. 3/15/04, 26-30, 70; State's Exs. 1-2, 5 and 6).

Ruby Badillo was an insurance agent who met with Petitioner and his wife about life insurance. Ms. Badillo testified that Petitioner "seemed perfectly normal" and "very sociable." Ms. Badillo stated that if Petitioner had had any kind of physical or mental challenge, she would not have been able to help him obtain a life insurance policy. After meeting with Petitioner for almost an hour, Ms. Badillo even asked

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[9] Dr. Hopewell tested Petitioner in January 2003 and Dr. Call tested Petitioner in September 2003 (Tr. 3/9/04, 129; Tr. 3/15/04, 36, 44). Petitioner's reference in the petition to a December 2003 testing by Dr. Hopewell is incorrect. Pet. at 12.

Petitioner if he would be interested in working at her company selling insurance and other services (Tr. 3/11/04, 46-52; State's Ex. 6).

Emma Watts, Petitioner's case manager at the Oklahoma Department of Corrections, testified about her interaction with Petitioner over a two to three-year period. She described Petitioner as quiet and respectful (*id.* at 55-57). But for his cell change requests, which she felt were manipulative, she testified that Petitioner was no different from the other inmates (*id.* at 57, 61).

Mark Woodward was Petitioner's supervisor at work in the months immediately preceding Petitioner's crimes. Mr. Woodward testified that as head custodian, Petitioner was the "go-to person if there was something that had to be done." Petitioner supervised four to five employees and did so adequately. No family members worked with Petitioner while Mr. Woodward was his supervisor (Tr. 3/11/04, 68-73). Mr. Woodward communicated with Petitioner through a pager, and Mr. Woodward testified that Petitioner knew how to operate the school's zoned alarm system (*id.* at 73-79). Mr. Woodward testified that Petitioner had access to carpet cleaners at the school and that from his review of crime scene photos, he could tell that the carpets had been cleaned by a cleaner similar to the ones at the school (*id.* at 79-81).

Fern Smith, one of the assistant district attorneys who originally prosecuted Petitioner, testified about her observations of him in 1993 and 1994. Ms. Smith, who has a Master's Degree in Special Education and previously taught high school special education before becoming an attorney, testified that she "didn't notice anything unusual or out of the ordinary during the

times that [she] was in court with [Petitioner]." Ms. Smith told the jury that Petitioner filed and argued some of his own motions and that he was "articulate" and "knew what he was doing." Ms. Smith further testified that Petitioner "made good arguments" and "knew why he was presenting them."[10] Ms. Smith also testified that during his original trial Petitioner took notes and discussed the notes with his attorney, which was very different from how Petitioner was currently acting in front of the jury. Based on her observations of Petitioner, Ms. Smith did not see anything that indicated he was mentally retarded (Tr. 3/11/04, 100-05, 111).[11]

Oklahoma City Police Officer John Maddox, who investigated the scene of Petitioner's crimes, testified that the crime scene had been altered after the crimes occurred (Tr. 3/11/04, 112-14). Some evidence was hidden in closets and under a bed, other evidence was concealed, and the title to Petitioner's car was found in the attic (*id.* at 114, 116). There was also evidence that the crime scene had been cleaned. After running some tests, the police determined that evidence had been removed from the carpet and from the kitchen and bathroom sinks (*id.* at 116-17). Officer Maddox testified that all of these actions were done

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[10] Even the Tenth Circuit noted that "[w]hile [Petitioner's] presentation did not reveal the skills of a trained legal mind, he put forth a coherent argument and demonstrated comprehension of both a lawyer's duties and the concept of a 'fair trial.'" *Smith*, 379 F.3d at 932.

[11] In rebuttal, Kenneth Watson, Petitioner's original trial counsel, testified that Petitioner did not know what was going on, that he was unable to assist in his defense, and that Petitioner doodled on a pad of paper most of the time (Tr. 3/15/04, 72-73).

to delay the investigation and did in fact do so, as Petitioner's crimes were not detected for some seven to ten days after their commission (*id.* at 116, 121-23).

Officer Maddox also testified about his interview of Petitioner on June 30, 1993. He testified that Petitioner understood his rights and answered some questions before pulling an attorney's business card out of his pocket and indicating that he did not want to talk anymore (*id.* at 117-19). He also testified how Petitioner was able to return a bicycle to a retail store and obtain a refund (*id.* at 119-20).

In the months before Petitioner's crimes, Petitioner was having an affair with Laura Dich.[12] Petitioner met Ms. Dich at a flea market. They exchanged phone numbers and began seeing each other the next day. Although Ms. Dich contacted Petitioner by pager and only met with Petitioner at certain times of the night, Ms. Dich had no idea that Petitioner was married and had kids. Ms. Dich saw Petitioner about four times a week and she considered him her boyfriend. Petitioner told her that he loved her and wanted to marry her and have kids with her. Petitioner maintained a sexual relationship with Ms. Dich and he rented a motel room for this specific purpose on more than one occasion. Ms. Dich testified that Petitioner acquired and paid for the motel room without her assistance (Tr. 3/12/04, 6-24, 26-27, 29).

Mariette Love, Petitioner's mother-in-law, testified that although she did not have a lot of contact with Petitioner, she did not believe he had anything wrong with him mentally. She did acknowledge, however,

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[12] Ms. Dich's prior testimony was read to the jury (Tr. 3/12/04, 4).

that Petitioner was a little slow, that "he didn't know what he should have known," and that she was not particularly happy with her daughter being in a relationship with him (*id.* at 32-34, 37-39).

Cherie Mishion, Petitioner's wife's niece, testified about the time she spent with Petitioner and his family. She told the jury about Petitioner's care of the kids and about how he would drive, read the paper, and cook breakfast. Petitioner even taught her how to drive. Ms. Mishion never had the impression that Petitioner was mentally handicapped or slow because he was no different than the rest of the family and was able to do what others could do (*id.* at 40-45).

Dina Dean was Petitioner's sister-in-law. Like Ms. Mishion, she testified about her familial relationship with Petitioner. She described Petitioner as "kind of stand-offish," but other than that he was normal. Because Ms. Dean had a younger sister who was "slow", she had a point of reference. She testified that in comparison to her sister, Petitioner was normal (*id.* at 47-51).

OCCA's Decision

As noted above, in denying Petitioner relief on the sufficiency issue, the OCCA applied the correct constitutional standard. The question therefore is whether the OCCA applied it reasonably given the presented evidence. In upholding the jury's verdict, the OCCA analyzed the issue as follows:

> Evidence of [Petitioner's] intellectual functioning was controverted at trial by the experts. [FN9] [Petitioner's] primary expert, Dr. Clifford Hopewell, tested him in January

2003 and scored his full scale I.Q. at 55. Dr. Hopewell concluded that [Petitioner] is mildly mentally retarded and that he has adaptive functioning deficits in at least five areas. Dr. Frederick Smith, another psychologist who evaluated [Petitioner] in prison in 1997, testified that his testing showed that [Petitioner'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 [Petitioner] was actually brighter than what his I.Q. test score showed. He wrote in a memo shortly after the evaluation that he suspected that [Petitioner's] score was somewhat low in terms of accuracy. Dr. Smith also administered the Raven's Standard Progressive Matrices that showed [Petitioner's] I.Q. was in the range of 69 to 78. He testified that he now believes [Petitioner's] I.Q. is closer to 70.

> FN9. 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.

The State presented the testimony of forensic psychologist Dr. John Call to refute [Petitioner's] expert evidence of subaverage intellectual functioning. Dr. Call gave [Petitioner] 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 [Petitioner] failed two tests designed to detect malingering given by Dr. Hopewell. [FN10]

According to Dr. Call, [Petitioner's] performance on these two tests provides significant doubt about his efforts on the WAIS-III I.Q. test and the validity of Dr. Hopewell's overall testing. Dr. Call also gave [Petitioner] one of the malingering tests (Test of Memory and Malingering) during his evaluation and found that [Petitioner] failed again. Dr. Call concluded that [Petitioner'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. [FN11] Dr. Call noted a previous I.Q. test given by Dr. Murphy in 1994 in which [Petitioner] scored a full scale I.Q. of 73. Dr. Call believed lack of effort on [Petitioner's] part was one possible explanation to account for the discrepancy in the subsequent scores. In Dr. Call's opinion, the data showed that [Petitioner] did not put forth his best efforts during his and Dr. Hopewell's testing and that [Petitioner's] I.Q. test results were unreliable and suspect.

> FN10. The tests were the 15-Item Test and the Test of Memory and Malingering commonly referred to as the TOMM test.
>
> FN11. Dr. Call's I.Q. testing of [Petitioner] also showed a full scale I.Q. score of 55.

Though evidence of [Petitioner's] I.Q. was disputed, the State presented persuasive evidence from lay witnesses to refute [Petitioner's] evidence of subaverage intellectual functioning and of adaptive functioning defi-

cits. Emma Watts, [Petitioner's] former case manager, now unit manager in prison, testified that she had daily contact with [Petitioner] for two years while acting as his case manager. Watts described [Petitioner] 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.

Ruby Badillo, a provider of financial services, testified that she met with [Petitioner] and his wife twelve years ago about purchasing life insurance. She recalled that [Petitioner] was kind and attentive to his wife. She identified their application and [Petitioner's] signature. She said that [Petitioner] neither indicated that he had any physical or mental challenges nor did she suspect that he had any based on their conversation. She described [Petitioner] as "perfectly normal" and "very sociable." [Petitioner] 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 [Petitioner] was the head custodian at Washington Irving Elementary School. Woodward described [Petitioner] as the "go-to" person if something needed to be done at the school. [Petitioner] was respon-

sible 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. [Petitioner] had to delegate custodial duties and, if someone was absent from work, reassign that person's duties. Woodward identified [Petitioner's] job application and signature; he also identified various forms that [Petitioner] had signed or filled out for his employment. He noted that [Petitioner] checked on his job application form that he could read, write and speak the English language. Woodward testified that he effectively communicated with [Petitioner] in person and through the use of a digital pager. He recalled an occasion when he had to reprimand [Petitioner] for not wearing his uniform and thereafter [Petitioner] followed the rules and wore his uniform. According to Woodward, [Petitioner] effectively operated the school's multi-zone alarm system and cleaning equipment. Woodward described [Petitioner] as a typical head janitor.

Fern Smith, one of the assistant district attorneys who prosecuted [Petitioner's] murder case, testified that [Petitioner] filed and presented several motions on his own behalf. She said that [Petitioner] 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 [Petitioner'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 [Petitioner] that led her to believe that [Petitioner] was mentally retarded.

Laura Dich testified that she met [Petitioner] in April 1993 at a flea market and they began dating shortly thereafter. [Petitioner] did not give her his home phone number, instead he had her use his digital pager number to contact him. [Petitioner] 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. [FN12] Dich testified that by the end of May 1993, her relationship with [Petitioner] was progressing and [Petitioner] 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 [Petitioner] took her to a motel on several occasions and that it was [Petitioner] who rented and paid for the motel room.

> FN12. Once when Dich paged [Petitioner], an upset woman returned the page causing Dich concern, but [Petitioner] convinced her for the most part that he had no other girlfriends.

The evidence presented at trial supports a finding that [Petitioner] 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 [Petitioner] 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 [Petitioner] is not mentally retarded is justified.

Smith, No. O-2006-683, slip op. at 7-11.

Analysis

Petitioner asserts that the OCCA's decision is "patently unreasonable." He claims that "the OCCA disregarded the clinical diagnostic practices and definitions of professionals in the field of intellectual disability by substituting its own I-know-it-when-I-see-it approach." Characterizing the evidence as a "consensus of professionals in the field of intellectual disability," Petitioner additionally argues that the OCCA decision is inconsistent with expert opinion and with "the requirements of *Atkins*." Pet. at 39-46. In sum, he declares that "the OCCA arbitrarily relied on isolated factors that it unreasonably believed were inconsistent with intellectual disability while disregarding the wealth of evidence that shows [Petitioner] is intellectually disabled." Reply at 5. However, Petitioner's arguments for relief are extensively supported by evidence which the jury did not hear and which this Court cannot consider in deciding his claim. Focusing on the evidence presented at trial and the OCCA's review of that evidence, the issue of whether Petitioner is mentally retarded is not as clear cut as Petitioner alleges.

Although Petitioner claims that the OCCA violated *Atkins* by disregarding expert opinion, what the OCCA found was a dispute among the experts. Although Dr. Hopewell believed that Petitioner's I.Q. testing showed sub-average intellectual functioning, the State's expert, Dr. Call, questioned that conclusion based on additional testing that indicated Petitioner was not putting forth his best effort. *Smith*, No. O-2006-683, slip op. at 7-8. The same is true regarding Petitioner's adaptive functioning. While Dr. Hopewell found that Petitioner had deficits in all areas of adaptive functioning (Tr. 3/9/04, 63-65, 67-68), Dr. Call testified that Dr. Hopewell's assessment was invalid because the test was inappropriately administered (Tr. 3/15/04, 22-25). In addition, as with the testing of Petitioner's intellectual function, Dr. Call testified that he believed that Petitioner did not put forth his best effort in adaptive functioning testing. Dr. Call's opinion is supported by the fact that Petitioner could not even spell his last name for Dr. Call, when he had done so on prior occasions, including for Dr. Hopewell just eight months earlier (Tr. 3/9/04, 129, 148; Tr. 3/15/04, 26-30, 36, 44; State's Ex. 1).

Petitioner's assessment of the evidence also fails to give due consideration to the very posture of the claim. This is a sufficiency-of-the-evidence claim. Although Petitioner argues with great fervor that he is mentally retarded, that is not for this Court to decide. Petitioner had the opportunity to prove he is mentally retarded. However, a jury determined that he had failed to meet his burden of proof. That jury verdict, and its subsequent validation by the OCCA, is what is under review here, and the Court's review is largely limited due to the deference afforded the jury's verdict

and the AEDPA deference afforded the OCCA's decision.

While Petitioner clearly does not agree with the jury's verdict, it was the jury's job to assess the evidence, and the OCCA found that when viewing the evidence in light most favorable to the State, a rational trier of fact could have reached the same conclusion. In addition to Dr. Call's testimony, which called into question Petitioner's primary expert, evidence from lay witnesses showed that Petitioner had skills and strengths which the jury could consider in assessing whether Petitioner had significant limitations. *See Smith*, No. O-2006-683, slip op. at 11 ("[Petitioner] held down a job with supervisory functions, carried on an affair, argued motions on his own behalf and manipulated those around him."). Although Petitioner argues that his strengths were overemphasized and inappropriately considered, the Tenth Circuit has held that "[b]oth strengths and deficiencies enter into [the mental retardation determination] because they make up the universe of facts tending to establish that a defendant either has 'significant limitations' or does not. Not only does *Murphy* not require the OCCA to focus on deficiencies to the exclusion of strengths but—most relevant to our inquiry here—neither does *Atkins*." *Hooks*, 689 F.3d at 1172.

Given the evidence presented to the jury, the OCCA's assessment of that evidence in upholding the jury's verdict, and the double-deference review this Court must apply in its review, the Court concludes that Petitioner is not entitled to relief on his first ground for relief. Ground One is therefore denied.

B. Ground Two: Challenges to the *Atkins* Trial

In his Ground Two, Petitioner cites irregularities in his mental retardation trial. He challenges the admission of evidence regarding his crimes, claims the prosecutors committed misconduct, and finds fault with a single instruction given to the jury.[13] The OCCA addressed all of these claims on the merits and denied relief. *Smith*, No. O-2006683, slip op. at 3-5, 17-18. Applying AEDPA deference, the Court concludes that Petitioner is not entitled to relief.

Petitioner's first complaint concerns the testimony of Officer Maddox and the prosecution's reference to the same in closing argument. As detailed in Ground One, *supra*, Officer Maddox testified about how the crime scene had been altered. He discussed hidden evidence and indications that the crime scene had been cleaned. Officer Maddox also testified about his interview with Petitioner and Petitioner's ability during that interview to understand his legal rights. Petitioner asserts that the admission of this evidence was "especially egregious," "highly prejudicial," and "unquestionably vague and confusing." Pet. at 57, 60.

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[13] Petitioner begins his Ground Two with a history/overview of mental retardation trials in Oklahoma in an effort to show that he never had a fair chance to receive a jury determination that he is mentally retarded. Pet. at 47-55. Within that discussion, Petitioner mentions, among other general complaints, the jury instruction defining the term mentally retarded, the prosecution's "novel interpretation" of the instruction, and an appeal that was "cramped," "abbreviated," and "clearly insufficient." The Court does not construe these references as additional grounds for relief and notes that while Respondent has specifically argued that the instruction and prosecutorial misconduct references are unexhausted claims, Petitioner has made no attempt to counter the argument.

He contends that this evidence was admitted in violation of the OCCA's decision in *Lambert v. State*, 71 P.3d 30, 31 (Okla. Crim. App. 2003), wherein the OCCA held that "[t]he jury should not hear evidence of the crimes for which [the defendant] was convicted, unless particular facts of the case are relevant to the issue of mental retardation." Petitioner additionally asserts that admission of this evidence "made it impossible to regard the verdict as [ ] factually reliable . . . [as] required by *Atkins*." Pet. at 60.

In denying Petitioner relief on this claim, the OCCA held as follows:

> [Petitioner] 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 [Petitioner] to avoid detection and which show that [Petitioner] is capable of logical reasoning. He maintains this testimony was beyond Detective Maddox's personal knowledge and is nothing but speculation.
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> 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 [Petitioner] 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 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 [Petitioner] 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. No facts of the murders [Petitioner] committed were introduced and the district court confined the evidence to the narrow issue of mental retardation. [Petitioner'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 [Petitioner] deliberately hid evidence to avoid being caught was rationally based on his perceptions of the crime scene and his dealings with [Petitioner] and were helpful to the jury's determination of whether [Petitioner] is mentally retarded. Such lay opinion testimony is admissible under 12 O.S.2001, § 2701. This claim is denied.

Smith, No. O-2006-683, slip op. at 3-4 (footnotes omitted).

This a state law evidentiary claim. Because this Court is only empowered "to vindicate [Petitioner's] constitutional rights," Petitioner "is entitled to relief only if [the] alleged state-law error [ ] was so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Hooks*, 689 F.3d at 1180 (internal quotation marks and citation omitted). The Court concludes that relief is not warranted under this standard of review. Officer Maddox's testimony was presented in generic terms. The jury did not hear the gruesome details of Petitioner's crimes or how Petitioner's victims were discovered. *See Smith*, 379 F.3d at 923-34. The jury was not told that Petitioner's five victims were shoved into closets and under a bed and that the carpets and sinks had been cleaned to remove the evidence of blood. Instead the jury heard that the scene had been altered–that Petitioner had taken certain actions to cover up his crimes. The OCCA did not act unreasonably in determining that this evidence, and evidence of Petitioner's interaction with Officer Maddox, was relevant and admissible to the issue of Petitioner's mental abilities.

Petitioner's next complaint concerns five comments made by the prosecutors during voir dire, opening statement, and closing statement. Petitioner asserts that the comments were "misleading," "argumentative," "inaccurate," "[d]enigrating and disparaging," and "deceptive." Pet. at 61, 62, 66. Alleging that the comments "thoroughly permeated the entire proceedings," he claims that he has been denied fundamental fairness and is entitled to relief. Reply at 17.

"Prosecutors are prohibited from violating fundamental principles of fairness, which are basic requirements of Due Process." *Hanson v. Sherrod*, 797 F.3d 810, 843 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2013 (2016). Therefore, when a petitioner alleges prosecutorial misconduct, the question is whether the prosecutor's actions or remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Evaluating the alleged misconduct in light of the entire proceeding, the reviewing court must determine "whether the jury was able to fairly judge the evidence in light of the prosecutors' conduct." *Bland v. Sirmons*, 459 F.3d 999, 1024 (10th Cir. 2006).

In denying Petitioner relief on this claim, the OCCA held as follows:

> [Petitioner] 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.

[Petitioner] 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 [Petitioner'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, No. O-2006-683, slip op. at 17-18.

Although Petitioner argues that the OCCA gave this claim "short shrift," Pet. at 65, the Court finds that the OCCA's above analysis is both sufficient and reasonable under the AEDPA. The record reflects that with respect to the first three comments complained of by Petitioner, the trial court appropriately responded to Petitioner's objections. *See Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (a fundamental fairness assessment includes consideration of the trial court's "cautionary steps . . . to counteract improper remarks"). To the extent the question during voir dire was "probably a little on the edge," Petitioner objected to it at the onset before any harm could develop and the trial court directed the prosecutor to rephrase the question (Tr. 3/8/04, 155-56). Petitioner's objection to the opening statement comment was initially sustained as argumentative, but then overruled when the prosecutor rephrased the comment within acceptable parameters of outlining the evidence to the jury (Tr. 3/9/04, 22-23). And finally, when the prosecutor made the comment in closing argument that the defense "don't put in front of you what they don't want you to see," the trial court sustained the objection (Tr. 3/15/04, 103), thereby curing any harm. *See Hanson*, 797 F.3d at 845 n.13 (a sustained objection is presumed to cure any error).

As for the remaining two comments, both of which also occurred in closing argument, Petitioner made no objection to them at trial (Tr. 3/15/04, 95, 110-11). *See Le*, 311 F.3d at 1013 (acknowledging

that the absence of an objection is "relevant to a fundamental fairness assessment"). In the first of these comments, the prosecutor stated that Petitioner is "either a bottom dweller, slobbering, or he's just right on the cusp" (Tr. 3/15/04, 95). Although referring to a person with mental retardation as a "slobbering bottom dweller" is harsh and inappropriate, the Court cannot conclude that this single reference rendered the entire proceeding fundamentally unfair. The comment was not objected to, the prosecutor made the reference only once, and it was made within an otherwise permissible argument discussing Petitioner's expert evidence. As for the third unobjected-to comment, it concerned Officer Maddox's testimony, which the Court has already addressed herein. Because the evidence was relevant and admissible, the prosecutor's reasonable comments based on the officer's testimony did not deny Petitioner due process. *See United States v. Dazey*, 403 F.3d 1147, 1170 (10th Cir. 2005) ("The prosecutor is entitled to argue to the jury that it should draw reasonable inferences from the evidence to support the government's theory of the case.").

Petitioner's final complaint concerns Jury Instruction No. 17 which required the jury to determine whether "the mental retardation [was] present and known before [Petitioner] was eighteen (18) years of age" (O.R. VI, 1138). Petitioner contends that the language "present and known" is contrary to *Atkins*, which referred to mental retardation manifesting itself (or the onset occurring) before the age of eighteen. *Atkins*, 536 U.S. at 308 n.3. Pet. at 70-71.

"A habeas petitioner who seeks to overturn his conviction based on a claim of error in the jury instructions faces a significant burden." *Ellis v. Hargett*,

302 F.3d 1182, 1186 (10th Cir. 2002). "Unless the constitution mandates a jury instruction be given, a habeas petitioner must show that, in the context of the entire trial, the error in the instruction was so fundamentally unfair as to deny the petitioner due process." *Tiger v. Workman*, 445 F.3d 1265, 1267 (10th Cir. 2006).

In denying Petitioner relief on this claim, the OCCA relied on its prior decisions in *Howell v. State*, 138 P.3d 549 (Okla. Crim. App. 2006), and *Myers v. State*, 130 P.3d 262 (Okla. Crim. App. 2005). *Smith*, No. O-2006-683, slip op. at 5. In *Myers*, the OCCA held as follows:

> Jury instructions are sufficient if, when read as a whole, they state the applicable law. *McGregor v. State*, 1994 OK CR 71, ¶ 23, 885 P.2d 1366, 1380. As used in this context, the word "manifest" is a transitive verb and the word "known" is an adjective. The *Random House Unabridged Dictionary* defines "known" as perceived or understood as fact or truth; apprehended clearly and with certainty. *See* "know" & "known" *Random House Dictionary* (2nd ed. 1997). It defines "manifest" as "to make clear or evident to the eye or the understanding; show plainly . . . to prove; put beyond doubt or question." *See* "manifest" *Random House Dictionary* (2nd ed. 1997).
>
> We find that the words "present and known" are words of common everyday understanding that do not require a level of proof above that required to prove that a condition "manifested" itself. "Known" as it relates to

> the jury instruction used in this case does not require a scientific finding or a medical diagnosis. *See Murphy I*, 2002 OK CR 32, ¶ 31 n.19, 54 P.3d at 567 n.19. The retardation has only to have been perceived or recognized by someone before the defendant reached the age of 18. The court's instruction accurately stated the applicable law and therefore we find that the district court did not abuse its discretion in giving this uniform instruction.

Myers, 130 P.3d at 269.

Petitioner has not shown that the OCCA's analysis is unreasonable. In addition to the fact that Petitioner's claim has been specifically rejected in both *Howell v. Workman*, No. CIV-07-1008-D, 2011 WL 5143069, at *20-21 (W.D. Okla. Oct. 28, 2011) (unpublished), and *Myers v. Workman*, No. 02-CV-140-GKF-PJC, 2010 WL 2106456, at *57-59 (N.D. Okla. May 25, 2010) (unpublished), when the Court considers the additional step taken by the trial court to clarify this issue, Petitioner's argument is especially weak. Pulling clarifying language from the *Murphy* decision, *Murphy*, 54 P.3d at 567 n.19, the trial court further instructed the jury as follows:

> Whether mental retardation before the age of eighteen was present and known is a question of fact to be decided by you the jury. To establish that the first signs of mental retardation appeared and were recognized before [Petitioner] turned eighteen, lay opinion and poor school records may be considered.

(O.R. VI, 1140; Tr. 3/15/04, 75-77). Therefore, reviewing the instructions as a whole and giving the OCCA's decision appropriate deference, the Court finds that no relief is warranted on this claim.

In conclusion, for the reasons set forth above, the Court finds that Petitioner has not demonstrated his entitlement to relief for the claims raised in his Ground Two. Ground Two is therefore denied.

C. Ground Three: Ineffective Assistance of *Atkins* Trial Counsel

In his third ground for relief, Petitioner argues that his *Atkins* trial counsel was ineffective for two reasons. First, Petitioner faults his trial counsel for failing to retain and present for testimony an expert like Theresa Flannery of the Dale Rogers Training Center.[14] Petitioner contends that Ms. Flannery should have testified to educate the jury regarding his ability to work as a head custodian despite his limited intelligence. Second, Petitioner asserts that his trial counsel should have retained an expert like Dr. Terese Hall to assess his adaptive functioning using the ABAS-II. Because his expert at trial failed to use this test and was criticized by the State's expert for failing to do so, Petitioner asserts that Dr. Hall's results should have been presented to the jury to establish his significant limitations in adaptive functioning. Had trial counsel presented these two pieces

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[14] "Dale Rogers Training Center is the oldest and largest community vocational training and employment center in Oklahoma that serves persons with disabilities. . . . [It] provides individuals whose IQ levels test 75 or below with meaningful, productive, and compensated work." Pet'r's Attach. 20 at 1.

of additional evidence, Petitioner claims that he would not be under a death sentence today.

As an initial matter, the Court must first determine whether the OCCA's determination of these claims is entitled to AEDPA deference, a matter which the parties dispute. The record reflects that in his presentation of these ineffectiveness claims to the OCCA, Petitioner attached four exhibits to his application for relief, including an August 2006 affidavit from Ms. Flannery (Pet'r's Attach. 20), Dr. Hall's September 2005 report (Pet'r's Attach. 5), and a September 2006 affidavit from trial counsel (Pet'r's Attach. 15). In denying Petitioner relief, the OCCA analyzed Petitioner's claims and discussed his extra-record material as follows:

> [Petitioner] 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, [Petitioner] 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, [Petitioner] 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, [Petitioner] 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. [Petitioner] 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 [Petitioner's] extra record material to evaluate the merits of his ineffective assistance of counsel claim under these

circumstances. [FN13] Convincing evidence was presented that [Petitioner] 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 [Petitioner] as capable and normal. This claim is denied.

> FN13. [Petitioner] 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 [Petitioner] attached this information for purposes of requesting an 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).

[Petitioner] contends in his tenth proposition that . . . his attorneys should have had an expert perform the ABAS II test to confirm deficits in his adaptive functioning.

> [Petitioner] 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 [Petitioner] has failed to meet his burden and cannot prevail. This claim is denied.

Smith, No. O-2006-683, slip op. at 18-20. In a subsequent post-conviction proceeding, where Petitioner challenged his appellate counsel's handling of the extra-record materials, the OCCA explicitly stated that in its review of Petitioner's mental retardation trial, "[it] did consider the materials appended by MR appeal counsel, as if they had been properly presented under Rule 3.11." *Smith*, No. PCD-2010-660, slip op. at 7.[15]

Petitioner argues for de novo review based on the Tenth Circuit's decision in *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc). Pet. at 85 n.53. In *Wilson*, 577 F.3d at 1300, the Tenth Circuit held that "[w]hen the OCCA, pursuant to Rule 3.11, refuses to grant an evidentiary hearing to consider material, non-record evidence of ineffective assistance of counsel that the defendant has diligently sought to

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[15] Although Petitioner faults his appellate counsel for not following proper Rule 3.11 procedure, Pet. at 83, the Court does not construe this one-sentence declaration as an additional claim of ineffectiveness. In any event, such a claim would be unworthy of habeas relief. Because the OCCA considered the materials as if they had been properly filed under Rule 3.11, it was reasonable for the OCCA to deny Petitioner relief on his appellate counsel claim due to the absence of prejudice. *Smith*, No. PCD-2010-660, slip op. at 7.

develop, and then rules on the ineffectiveness claim without consideration of this evidence, the OCCA's denial of the claim is not an adjudication on the merits to which the federal courts owe AEDPA deference." Petitioner stands on *Wilson*, despite the Tenth Circuit's subsequent holding in *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013). In *Lott*, the Tenth Circuit (1) acknowledged the OCCA's post-*Wilson* decision in *Simpson v. State*, 230 P.3d 888, 906 (Okla. Crim. App. 2010), wherein the OCCA explained the relationship between the *Strickland* standard and the Rule 3.11 standard a defendant must meet in order to obtain an evidentiary hearing in state court on his ineffectiveness claim; (2) reversed the position it took in *Wilson;* and (3) concluded, in light of *Simpson*, that when the OCCA applies Rule 3.11 to deny a defendant an evidentiary hearing, the same constitutes a merits ruling entitled to AEDPA deference. *Lott*, 705 F.3d at 1211-13. *See Glossip v. Trammell*, 530 F. App'x 708, 736 (10th Cir. 2013) (acknowledging that *Wilson* is "no longer good law given the OCCA's subsequent decision in *Simpson*"). Thus, contrary to Petitioner's assertion, *Lott* is controlling and the OCCA's decision on Petitioner's claims concerning Ms. Flannery and Dr. Hall is due AEDPA deference.

"[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance. . . . " *Burt v. Titlow*, 571 U.S.___, 134 S. Ct. 10, 18 (2013). Whether counsel has provided constitutional assistance is a question to be reviewed under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To obtain relief, *Strickland* requires a defendant to show not only that his counsel performed deficiently, but that he

was prejudiced by it. *Id.* at 687. A defendant must show that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The assessment of counsel's conduct is "highly deferential," and a defendant must overcome the strong presumption that counsel's actions constituted "'sound trial strategy.'" *Id.* at 689 (citation omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . . " *Id.* at 690.

As *Strickland* cautions, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Therefore, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Within "the wide range of reasonable professional assistance," "[t]here are countless ways to provide effective assistance in any given case[, and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*

As for prejudice, *Strickland* requires a defendant to show that his counsel's errors and omissions resulted in actual prejudice to him. *Id.* at 687. In order to make a threshold showing of actual prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been differ-

ent. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In *Richter*, the Supreme Court addressed the limitations of the AEDPA as specifically applied to a claim of ineffective assistance of counsel that a state court has denied on the merits. The Court held 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." *Richter*, 562 U.S. at 101 (internal quotation marks and citation omitted). The Court bluntly acknowledged that "[i]f this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

> [The AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.

Id. at 102-03 (internal quotation marks and citation omitted). When these limits imposed by the AEDPA intersect with the deference afforded counsel under *Strickland*, a petitioner's ability to obtain federal habeas relief is even more limited.

> Surmounting *Strickland*'s high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not

presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254 (d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so[.] The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254 (d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reason-

> able argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105 (internal quotation marks and citations omitted).

In disposing of Petitioner's claims, the OCCA applied *Strickland.* The question, therefore, is whether it applied *Strickland* in a reasonable manner. Although Petitioner characterizes the OCCA's analysis as "unclear," Pet. at 85, not knowing whether the OCCA denied Petitioner relief under the deficient performance prong, the prejudice prong, or both, does not make its decision unreasonable. *Williams v. Trammell*, 782 F.3d 1184, 1199 (10th Cir. 2015) ("[U]ncertainty does not change our deference."). It is the result, not the analysis, which is paramount to this Court's review. Lack of clarity is "not a license to penalize a state court for its opinion-writing technique." *Lafler v. Cooper*, 566 U.S. 156, 183 (2012). "Even '[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.'" *Williams*, 782 F.3d at 1199-1200 (citation omitted). Here then, this Court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Richter*, 562 U.S. at 102.

Theresa Flannery

Petitioner asserts that Ms. Flannery's testimony about the abilities of an individual with an I.Q. between 50 and 70 could have undercut the State's

evidence and argument that "someone with [an] intellectual disability surely could not carry out the duties required" by Petitioner's position as head custodian at an elementary school. Pet. at 77. Regarding the State's evidence and related argument, Petitioner points to the State's opening statement wherein the prosecutor commented on Petitioner's competence as a head custodian (Tr. 3/9/04, 27-28); the prosecutor's elicitation of testimony from Petitioner's former teachers that they would be surprised if Petitioner could hold such a position (Tr. 3/10/04, 43, 114); Dr. Call's testimony "that there would be some significant problems" with Petitioner having such a job (Tr. 3/15/04, 68); and the State's closing argument references to his teachers' surprise (*id.* at 93, 104-07). Pet. at 77-78.[16] Petitioner contends that his trial counsel's failure to seek out Ms. Flannery is made worse by the fact that after his first mental retardation trial (which ended in a mistrial), trial counsel knew that the prosecution would employ this strategy. From his first trial, Petitioner points to similar testimony from one of his teachers about his surprise (Tr. 11/18/03, 235) and testimony from a cousin/coworker who testified that Petitioner was his supervisor and had keys to the alarm-protected school building (Tr. 11/19/03, 16-17, 19, 21). Pet. at 78.

The OCCA's denial of relief on this claim is not unreasonable under either *Strickland* prong. From

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16 In his reply, Petitioner also points to the testimony of Mr. Woodward, a State's witness. Reply at 19. As detailed in Ground One, *supra*, Mr. Woodward was Petitioner's supervisor. He testified that Petitioner supervised four to five employees, communicated with him through a pager, and knew how to operate the school's alarm system.

Petitioner's argument, one might get the impression that trial counsel did absolutely nothing to counter this evidence. This is simply not the case. Trial counsel elicited evidence from its expert, Dr. Hopewell, that being in a supervisory position is not inconsistent with being mentally retarded (Tr. 3/9/04, 69). Dr. Hopewell described Petitioner's job as "routine," and while acknowledging that Petitioner had some people who reported to him, he testified that Petitioner's supervisory responsibilities were limited to making sure that the cleaning assignments of absent employees got done (*Id.* at 116). Petitioner's cousin, who worked with Petitioner at the school for a time, also testified that Petitioner's supervisory duties were limited: "He just made sure everybody did what we had to do. If one of us didn't come in, he would just have to do the work. That was it" (Tr. 3/10/04, 72). His cousin further testified that it was his mother, Petitioner's aunt, who hired Petitioner and did all the paperwork required. Petitioner did not have to complete any paperwork in his supervisory duties (*id.* at 73-74). Finally, through the testimony of one of Petitioner's former teachers, the jury learned that Petitioner had participated in a work-study program where he received specific training to be a school janitor (*id.* at 31).

Trial counsel offered and the court admitted into evidence Petitioner's work schedule. It listed Petitioner's area of responsibility; daily, weekly, and as needed assignments; and the full cleaning schedule. Although it classified Petitioner as "Head Custodian," no supervisory duties were noted (Def.'s Ex. 4). When trial counsel showed this schedule to one of Petitioner's former teachers who had testified that she would be "[e]xtremely surprised" to know that Petitioner was

working as a head janitor, she testified that she would not be surprised if Petitioner could carry out those general cleaning duties. She only questioned whether he might have issues reading the names of the chemicals and/or knowing which chemicals to use (Tr. 3/10/04, 114-15).

In response to testimony from Mr. Woodward, *see* n.16, *supra*, trial counsel brought out on cross-examination that he had only been Petitioner's supervisor for "a very short time," and that although Mr. Woodward had testified that Petitioner was responsible for making sure everyone's time cards were filled out, he admitted on cross-examination that he only came by the school to pick up the time cards from Petitioner and had no idea what, if anything, Petitioner had done to make sure they were ready to go (Tr. 3/11/04, 92, 94, 97). And in closing argument, trial counsel made the following comments about Petitioner's job:

> As an adult [Petitioner] became a janitor. And you will have the job description of that position. Now, it was called head janitor. But I ask you to look over that description. And what you will see is he cleaned, he straightened, he threw away trash, very simple tasks. The title of head janitor did not mean he was responsible for major supervisory responsibilities.
>
> In fact, Mr. Woodward, who was his supervisor for the last six to seven weeks of his employment, indicated that the biggest thing that the head janitor did was if someone didn't show up he was supposed to delegate the duties of the person that didn't show up. However, if you will remember Chris Scott's

> testimony, he didn't delegate those responsibilities. [Petitioner] would do the job—the cleaning job of the person who missed work.
>
> In addition to those duties, the state has argued that there was paperwork involved in this. However, Mr. Woodward also indicated there was a limited amount of paperwork that [Petitioner] was responsible for. And Mr. Scott told us that his mother was the one who assisted [Petitioner] with his paperwork.
>
> [. . .]
>
> The evidence that he had the janitor job. All the experts testified, including the Special Education teachers, including Fern Smith, the prosecutor in this case, testified that mentally retarded people can have jobs. They can work. I bet we shouldn't be surprised by that, should we, that mentally retarded people can have jobs? It's what kind of jobs they have and what kind of work that they can get. And Mr. Preston testified through the transcript that janitorial work is the kind of work that they were teaching children for in high school in the work co-op class to teach them how to be functional in society.
>
> The fact that he was able to have a job doesn't mean he's not mentally retarded.

(Tr. 3/15/04, 82-83, 120).

In light of what trial counsel did do, trial counsel was not deficient with respect to the Flannery evidence. At most, Petitioner has shown that there was some

additional evidence that trial counsel could have been presented to challenge the State's assertions about his job and its reflection of his mental capabilities. While Ms. Flannery's testimony may have bolstered trial counsel's efforts, there is always more that counsel could have done, but failing to pursue any and all evidentiary angles does not make counsel ineffective. As noted above, within "the wide range of reasonable professional assistance," "[t]here are countless ways to provide effective assistance in any given case[, and] [e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

There is no *Strickland* prejudice as well. Even if the Flannery evidence had been presented, there is no reasonable probability that Petitioner would have received a jury verdict that he is mentally retarded. The janitor evidence was just a part of the evidence before the jury, and given trial counsel's efforts to challenge the State's contentions about the significance of his job, as well as all of the other evidence presented, Petitioner was not prejudiced by its absence.

Dr. Terese Hall

Because trial counsel was aware that Dr. Call would criticize Dr. Hopewell's use of the Vineland Test to test Petitioner's adaptive functioning, Petitioner contends that trial counsel was ineffective for failing to retain an expert like Dr. Hall to assess his adaptive functioning using the ABAS-II. On the ABAS-II, administered by Dr. Hall in 2005, Petitioner scored "in the significantly impaired range in several areas. . . . " Pet'r's Attach. 5 at 12. Because trial counsel did not have Petitioner tested using the ABAS-II,

Petitioner asserts that his case "was left vulnerable to damaging attacks by the prosecution" and a "critical requirement for a finding of mental retardation was left in question." Pet. at 82, 83. Here again, however, the Court cannot conclude that the OCCA was unreasonable to deny Petitioner relief on this claim.

Regarding the Vineland Test, Dr. Hopewell testified that although it is usually administered to a caretaker, he administered it directly to Petitioner. He explained that given Petitioner's status as a prisoner, he did not have caretakers to interview in the traditional sense. While guards looked after Petitioner, Petitioner was housed in a cell and did not have frequent contact with them. Dr. Hopewell called it an "artificial setting." For example, Petitioner was not in a situation where others could assess his ability to cook a meal because cooking a meal in that setting was impossible. In Dr. Hopewell's opinion, "it was really much better just to get the information directly from [Petitioner], as well as what [he (Dr. Hopewell)] was seeing in [his] testing and then the information from the other records that [he] had" (Tr. 3/9/04, 60-62). Dr. Hopewell testified that the Vineland tests five areas of adaptive functioning, and although he did not detail each of the five areas tested, he did testify that Petitioner had deficits in all areas (*id.* at 64, 65, 68).

On cross-examination, the State did question Dr. Hopewell rather extensively about his use of the Vineland Test. Dr. Hopewell defended his use of the test and explained that he did not give the test to Petitioner's mother or a former teacher because Petitioner was an adult who had not lived with his mother for a number of years and relying on a

teacher's memory from that long ago would have been inappropriate (*id.* at 143-45). When questioned about whether the Vineland results may have been skewed due to Petitioner's failure to be truthful about his abilities, Dr. Hopewell acknowledged that if Petitioner had lied consistently, it could have changed some scores on the test; however, the Vineland results were just a part of the information he relied on to assess Petitioner's adaptive functioning. Beyond the Vineland, Dr. Hopewell relied on Petitioner's extensive records, his own personal observation of him, and discussions he had with Petitioner's nurse, prison guards, and attorneys (*id.* at 151-52, 154).

On redirect, Dr. Hopewell testified that no adaptive functioning test, including the ABAS-II, has been designed for the prison population. He also explained that the ABAS-II was new and that using it required caution. Even though the test had norms, "it's so new that still people don't know how to do on it." Dr. Hopewell testified that the Vineland was the most familiar test (one of the reasons why he chose it):

> [I]f I reported tests that other people are familiar with and aware of they can at least make some comparisons. So if I use a test that's brand new or other people aren't aware of that creates some problems. So I just felt it was quite—I thought it was quite adequate to and saw no reason not to [use the Vineland].

Dr. Hopewell further testified that although the Vineland was "an entirely appropriate or adequate measure to give," Petitioner's adaptive functioning deficits were so profound that his choice of test was of little or no consequence (Tr. 3/9/04, 190-91).

Dr. Call testified that Dr. Hopewell should not have used the Vineland because it was not designed to be given to the subject of the study, and because Dr. Hopewell gave the test to Petitioner, the results were of no value (Tr. 3/15/04, 22-25). He, however, did not do any adaptive functioning testing of Petitioner (*id.* at 45-46). Dr. Call interviewed a prison psychologist and a guard, but was "unable to use a standardized instrument with them" (*id.* at 31). He discussed Petitioner's ability to communicate with him, but he again "underline[d]" the fact that he "was unable to give any individual standardized technique" (*id.* at 32). Although Dr. Call admitted that it was difficult to measure adaptive functioning in the structured prison setting and agreed with Dr. Hopewell that there is no adaptive functioning test specifically designed for the prison population, he suggested that the ABAS-II could have been used (*id.* at 34, 48-49).

Like the Flannery evidence, the OCCA's determination that trial counsel was not ineffective with respect to the Hall evidence is also not unreasonable. While trial counsel was aware that Dr. Call would criticize Dr. Hopewell's use of the Vineland test, it was not unreasonable for counsel to forego additional testing. The evidence presented at trial showed that there was no standardized test to assess the adaptive functioning of prisoners. Dr. Hopewell not only had a reasonable explanation for using the Vineland, but also explained that it was not the only information he used to assess Petitioner's adaptive functioning. And while Dr. Call criticized Dr. Hopewell's use of the Vineland, he did no testing of his own, but only suggested that the ABAS-II may have been used. Here again, Dr. Hall's additional testing may have

aided Petitioner's case, but trial counsel was not deficient for relying on Dr. Hopewell alone. Assessing trial counsel's actions requires a deferential lens. Through this lens, trial counsel's actions were not unreasonable.

As for prejudice, even if trial counsel had presented Dr. Hall's ABAS-II results, no reasonable probability exists that the jury would have found Petitioner to be mentally retarded. Although Petitioner asserts that Dr. Call's discounting of Dr. Hopewell's Vineland results left a devastating void in his case, his assertion ignores (1) Dr. Hopewell's testimony that the Vineland was just a part of his total assessment of Petitioner's adaptive functioning; (2) the additional testimony Dr. Hopewell gave (apart from the Vineland) about Petitioner's adaptive functioning deficits in the areas of communication and academics (O.R. VI, 1138-39; Tr. 3/9/04, 62-63, 65-67);[17] and (3) all of the additional evidence which was presented at trial regarding Petitioner's skills. Considering all of this evidence, *Strickland* prejudice is lacking.

In conclusion, for the reasons set forth above, the Court concludes that Petitioner has failed to demonstrate that the OCCA was unreasonable in its denial of relief on these two claims of trial counsel ineffectiveness.[18] Ground Three is therefore denied.

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[17] The jury was only required to find significant limitations in two of nine skill areas.

[18] Petitioner's assertion that the OCCA's decision is unreasonable because it did not consider both failures by trial counsel in a *Strickland* prejudice analysis is unavailing because for the reasons set forth herein, neither failure by counsel was deficient. Pet. at 85-86.

D. Ground Four: Ineffective Assistance of Trial and Appellate Counsel (Competency and Resentencing)

Petitioner's Ground Four is another challenge to the effectiveness of his counsel. Here, however, Petitioner challenges the representation he received during his 2009 competency trial and 2010 resentencing. Petitioner asserts that his trial counsel in these proceedings was ineffective for failing to present a witness, Anna Wright, and a DVD of Petitioner which she could have sponsored for admission. Petitioner additionally contends that his appellate counsel was ineffective for failing to raise this trial counsel ineffectiveness claim on appeal. These claims were presented to the OCCA on post-conviction. The OCCA denied relief on the merits. *Smith*, No. PCD-2010-660, slip op. at 9-10. Because Petitioner has not shown that the OCCA was unreasonable in its denial, his Ground Four must be denied.[19]

Petitioner asserts that Ms. Wright could "have presented compelling and incisive testimony about [his] simple and childlike nature as observed by her in her capacity as a mental health counselor at the Oklahoma County Jail." Pet. at 87-88. Ms. Wright's admittedly "limited" observations of Petitioner are detailed in a 2013 affidavit appended to his post-conviction application as Attachment 5 (hereinafter "Wright Affidavit"). The real focus of Petitioner's

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[19] Having concluded herein that the OCCA did not unreasonably deny relief on Petitioner's trial counsel claim, the OCCA's determination of Petitioner's appellate counsel claim was likewise reasonable. Because the trial counsel claim was without merit, appellate counsel was not ineffective for failing to raise the claim on appeal.

Ground Four, however, is a 2009 video recording (Pet'r's Attach. 16), which Ms. Wright could have sponsored into evidence. The video in question is a 21-minute interview of Petitioner conducted by the Federal Public Defender's Office for use in another death row inmate's clemency proceeding. Ms. Wright was present during the interview. Wright Affidavit at 2-3. Characterizing the video as "extremely valuable," "unique," "compelling," and "humanizing," Pet. at 88, 91, 94, Petitioner faults his trial counsel for not showing this video to his competency and resentencing juries. As for prejudice, Petitioner argues that the video would have made a difference in his competency proceeding because the jurors could have seen for themselves how "concrete" he is and how "he [can] only answer simple and direct questions." *Id.* at 94. Petitioner asserts that the video would have made a difference at his resentencing as well because it would have humanized him, showing the jury "a real person they were being asked to sentence to death." *Id.* at 95.

Applying *Strickland*, the OCCA analyzed Petitioner's claims and denied relief as follows:

> At Petitioner's competency trial, and later at his re-sentencing trial, his counsel presented a considerable amount of evidence relevant to Petitioner's mental functioning. Petitioner now points to two pieces of evidence that trial counsel had, but did not use at either proceeding. He claims this evidence could have been outcome-determinative. Because Petitioner did not raise this claim on direct appeal, it would be forfeited, but for the fact that he alleges his direct-appeal counsel was

ineffective in omitting it. 22 O.S.2011, § 1089 (D)(4)(b).

Petitioner cites to several cases where we found error (though not always reversible error) when a trial court barred defense counsel from presenting certain mitigation evidence in a capital case. *See Medlock v. State*, 1994 OK CR 65, ¶¶ 42-43, 887 P.2d 1333, 1346; *Mitchell v. State*, 2006 OK CR 20, ¶¶ 55-57, 136 P.3d 671, 696-98. But Petitioner does not claim that the trial court barred him from presenting the evidence in question, at either the competency trial or the re-sentencing trial. Nor does he claim that trial counsel failed to uncover this information. In fact, as Petitioner concedes, trial counsel filed written notice concerning the potential use of this information in August 2009, well in advance of either proceeding. Petitioner merely claims that trial counsel made a fatal strategic error in deciding not to present this information, and that appellate counsel was ineffective for not raising this meritorious claim. We disagree.

When counsel has made an informed decision (*i.e.* after reasonable investigation) to pursue one strategy over another, that choice is virtually unchallengeable. *Underwood v. State*, 2011 OK CR 12, ¶ 82, 252 P.3d 221, 252 (quoting *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066). Trial counsel's decision not to present this or that piece of mitigation evidence may be sound trial strategy. *Coddington*, 2011 OK CR 21, ¶ 19, 259 P.3d

at 839. Petitioner's lead counsel at the competency and re-sentencing trials was not only highly experienced in capital criminal defense; she was also quite familiar with the long and complicated history of Petitioner's case. Our assessment of the omitted materials does not show them to be of a character substantially different from the evidence that trial counsel ultimately chose to use. [FN5] We find no reasonable probability that raising this claim on direct appeal would have changed the outcome thereof. Therefore, appellate counsel was not ineffective for failing to include it.

> FN5. The evidence in question consists of (1) the proposed testimony of a counselor/investigator who interacted with Petitioner several times over the years, and (2) a video interview where Petitioner describes his feelings about a fellow inmate at Oklahoma State Penitentiary (which had been prepared for the fellow inmate's clemency hearing). The counselor's involvement with Petitioner, and her opinions about his mental functioning, were similar to the opinions of many other witnesses who testified at both the competency trial and the re-sentencing trial. However, this potential witness characterizes her interactions with Petitioner as "limited" in nature. Petitioner claims that the video interview would have corroborated witness accounts of his limited intellectual

> functioning and humanized him to the jury. Without substituting our judgment for that of the fact-finder, we believe the interview's persuasive force on that point is debatable.

Smith, No. PCD-2010-660, slip op. at 4, 9-10.

In his attempt to demonstrate unreasonableness, Petitioner's first contention is that the OCCA completely mischaracterized his claims. Petitioner challenges the OCCA's focus on strategy, claiming that he did not allege a strategic error, but an error "of preparedness and the failure to properly investigate and prepare on the part of both trial and appellate counsel." He points to his post-conviction application wherein he argued about the "'lack of investigation and preparation.'" Pet. at 89-90. However, in assessing whether counsel was deficient, strategy is a *Strickland* consideration. *Strickland* requires a defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). Although Petitioner may have framed his claims in terms of a failure to investigate, the uncontested facts show otherwise. Petitioner's trial counsel knew about this evidence–about Ms. Wright and about the video. Before Petitioner was interviewed, trial counsel gave the Federal Public Defender's Office permission to interview him, and after the interview, the assistant federal public defender who conducted the interview contacted trial counsel about it. Thereafter, Ms. Wright spoke with trial counsel on two separate occasions, once when she dropped off the video at trial counsel's office and later in a telephone conversation. Wright Affidavit at 2-3. Trial

counsel was not only aware of the evidence, but she even endorsed Ms. Wright as a witness for both the competency proceeding and the resentencing. In her court filing, trial counsel gave the following summary about Ms. Wright's testimony:

> Anna Wright, Investigator, Federal Public Defender, Oklahoma City. Ms. Wright, until very recently, was the psychiatric social worker at the Oklahoma County Jail. She became familiar with [Petitioner] when he was remanded for court in approximately 2003. At the time [Petitioner] came he had coloring books and pencils. Wright remembers being instructed to allow [Petitioner] to continue to keep them. Wright made sure [Petitioner] was safe and had his medications. As she quickly recognized that he was slow, she also wanted to make sure no one took advantage of him. Wright did not have great amounts of time to spend with [Petitioner], as inmates who are well behaved tend to get the least attention. [Petitioner] was very compliant, and very childlike in answers to questions she posed. [Petitioner] appears to Wright to be consistent with having an IQ of 55. Recently Anna Wright and a Federal Defender made a visit to [Petitioner] to interview him about a former cellie at DOC, Michael Delozier. The visit was a surprise to [Petitioner]. Interactions with him were filmed and saved onto a DVD. [Petitioner] did not understand the trial and appellate process; did not understand the concept of execution; did not understand in legal terms

> the help he was being asked to provide. In the end, Wright and the Federal Defender simply asked [Petitioner] what he would like to say about his former cellie. Wright will authenticate this DVD for the jury. Should it become an issue, Anna Wright is aware that [Petitioner] had trouble with an inmate who has profound mental illness. The inmate accused [Petitioner] of sexually assaulting him, but based on the traumatized behavior of [Petitioner], as well as the other inmate's history of abusing other inmates, staff at the jail were comfortable that [Petitioner] was not at fault. In fact this inmate is currently at the Oklahoma County Jail, on isolation, for having abused yet another inmate.

(O.R. XI, 2074-75). Trial counsel also listed the DVD as an exhibit, stating it "will be provided to State once objectionable parts regarding death row are omitted" (*id.* at 2076). Under these circumstances, Petitioner's assertion that the OCCA's opinion is flawed because it failed to recognize the nature of his claims is undoubtedly without merit.

Next, Petitioner claims that the OCCA made no *Strickland* deficient performance determination. He therefore seeks de novo review of this *Strickland* prong. Pet. at 90-91. The Court does not agree. The OCCA's discussion of strategy was an assessment of trial counsel's performance under *Strickland*'s first prong. AEDPA double deference is therefore due. *See Jackson v. Warrior*, 805 F.3d 940, 954 (10th Cir. 2015) ("Given that the standards of review under both *Strickland* and AEDPA are highly deferential,

habeas review of ineffective assistance claims is doubly so.") (internal quotation marks and citation omitted), *cert. denied*, 137 S. Ct. 311 (2016).

Asserting that "[t]he deficient performance prong is easily met," Petitioner argues that trial counsel simply dropped the ball in failing to present Ms. Wright as a witness and introduce the video into evidence. His argument is that the video is of such great evidentiary value, there is no question that trial counsel was deficient for not presenting it. Pet. at 91. But trial counsel not only knew the evidence existed, but also what Ms. Wright could testify to and what the video would show. Since trial counsel was fully informed about the evidence, the OCCA's determination that trial counsel's decision not to present it fell within counsel's wide range of deference is not unreasonable. Petitioner has not overcome *Strickland*'s strong presumption that counsel's actions amounted to a strategic decision.[20]

Although concluding that the OCCA reasonably denied relief on the deficient prong is enough to defeat Petitioner's *Strickland* claims, the Court additionally concludes that the OCCA's prejudice determination survives AEDPA deference as well. The OCCA found that given the evidence which trial counsel did present, the omitted evidence was not outcome-determinative. Petitioner does not specifically challenge or even reference the case trial counsel did present at

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[20] Petitioner has provided an affidavit from his trial counsel dated April 21, 2015. Although *Pinholster*, 563 U.S. at 181, prohibits its consideration here, it is, in any event, no help to Petitioner's cause. In the affidavit, trial counsel simply states that she does not remember why she did not present this evidence. Pet'r's Attach. 17 at 2.

both his competency proceeding and resentencing, but only argues that the evidentiary quality of the video would have made a difference. The OCCA found that this argument was debatable, and the Court cannot disagree, especially in light of AEDPA deference. *See Frost*, 749 F.3d at 1225 ("Under the test, if all fairminded jurists would agree the state court decision was incorrect, then it was unreasonable and the habeas corpus writ should be granted. If, however, some fairminded jurists could possibly agree with the state court decision, then it was not unreasonable and the writ should be denied."); *Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013) ("We may reverse only if all fairminded jurists would agree that the state court got it wrong.") (internal quotation marks omitted).

For the reasons set forth above, the Court concludes that Petitioner has failed to demonstrate his entitlement to relief on his fourth ground. Relief is therefore denied.

E. Grounds Five and Six: Cruel and Unusual Punishment

Petitioner's Grounds Five and Six are unexhausted claims which are easily disposed of on the merits. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). In Ground Five, Petitioner asserts that because he is mentally ill, his execution would constitute cruel and unusual punishment under the Eighth Amendment, and in Ground Six, he argues that his rights under the Eighth and Fourteenth Amendments would be

violated if the State of Oklahoma is allowed to execute him for crimes he committed in 1993.

With respect to his Ground Five, Petitioner contends that mentally ill offenders should be categorically excluded from execution like mentally retarded offenders (*Atkins*) and juvenile offenders (*Roper v. Simmons*, 543 U.S. 551, 578 (2005)).

Given all of his alleged mental impairments (brain damage, mental retardation, and mental illness), Petitioner asserts that he is even more deserving of exclusion than the offenders in *Atkins* and *Roper*. Pet. at 98 (labeling his circumstance as "*Super Atkins*" or "*Atkins PLUS*").

Because neither *Atkins* nor *Roper* addresses the mentally ill offender, what Petitioner asks this Court to do is to extend their holdings and make new law which would prohibit the State from executing him. That is not the function of a habeas court. This Court has authority to entertain habeas applications from a state court prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The current state of the law is that it is cruel and unusual punishment to execute mentally retarded offenders and juvenile offenders. Petitioner is neither, and because the Supreme Court has not found mental illness to be a categorical exclusion, this Court has no authority to grant the relief he seeks.[21] *See Lockett v.*

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[21] Although mental illness is not a categorical exclusion, "[t]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). If a question of sanity exists at the time Petitioner's execution becomes imminent, Petitioner has an avenue for relief under *Ford*. *See Herrera v. Collins*, 506

Workman, No. CIV-03-734-F, 2011 WL 10843368, at *36-38 (W.D. Okla. Jan. 19, 2011) (denying the same claim due to lack of Supreme Court authority) (unpublished); *Thacker v. Workman*, No. 06-CV-0028-CVE-FHM, 2010 WL 3466707, at *23-24 (N.D. Okla. Sept. 2, 2010) (same) (unpublished).

In Ground Six, Petitioner asserts that because there has been an excessive delay between his crimes and the carrying out of his execution, "Oklahoma has forfeited its right to kill [him]." In support, Petitioner cites only a memorandum of Justice Stevens respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). Pet. at 99. This is clearly an insufficient demonstration of his entitlement to relief. *See Mitchell v. Duckworth*, No. CIV-11-429-F, 2016 WL 4033263, at *6-7 (W.D. Okla. July 27, 2016) (rejecting the same claim); *Rojem v. Trammell*, No. CIV-10-172-M, 2014 WL 4925512, at *3-5 (W.D. Okla. Sept. 30, 2014) (same).

For the foregoing reasons, Petitioner's Grounds Five and Six are hereby denied.

F. Ground Seven: Cumulative Error

In his final ground, Petitioner urges relief upon a theory of cumulative error; however, where there is no error, there can be no cumulative error. *Thacker v. Workman*, 678 F.3d 820, 849 (10th Cir. 2012). Because the Court has found no errors in the grounds for relief raised by Petitioner, Ground Seven presents no avenue for relief and is hereby denied.

U.S. 390, 406 (1993) ("the issue of sanity is properly considered in proximity to the execution").

III. Motions for Discovery and Evidentiary Hearing

Petitioner has filed a motion for discovery as well as a motion for an evidentiary hearing. Docs. 20 and 38. For the following reasons, the Court finds that both should be denied.

In order to conduct discovery, Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires petitioner to show good cause. In *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997), the Supreme Court acknowledged that "good cause" requires a pleading of specific allegations showing a petitioner's entitlement to relief if the facts are fully developed.

In support of his request to conduct discovery, Petitioner argues that because there have been some instances in which Oklahoma County prosecutors have failed to comply with their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), he "is concerned prosecutors may not have disclosed important evidence in [his] case as well." Doc. 20 at 3-4. Accordingly, Petitioner requests permission from the Court to explore the State's files to see what he can uncover.

Overall, Petitioner's discovery motion lacks the specificity required by *Bracy.* While a few of his requests are more detailed than others, he fails to show how any of the information he seeks would entitle him to relief if fully developed. This is reason enough to deny his motion. But in addition, the Court notes that his first two requests for production (for all of the State's files and records and all of the law enforcement files and records related to his case), Doc. 20 at 6, are so broad and generic that they are

best characterized as fishing expeditions which the Court will not permit. *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007) ("A habeas proceeding is not a fishing expedition."); *Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000) (noting that Rule 6 is not meant for fishing expeditions and that "factual allegations must be specific, as opposed to merely speculative or conclusory"). Petitioner's third request for production is akin to a fishing expedition, but is also vague and supported only by Petitioner's contention that he needs the information to try to explain "strange" things in his case. Doc. 20 at 5-6. This is clearly insufficient to warrant a grant of discovery.

Petitioner's fourth request for production (along with a related interrogatory) concerns State's witness Ruth Badillo, Assistant District Attorney Fern Smith, and the status of a life insurance policy on Petitioner's wife (State's Ex. 6). With reference to a 2001 evidentiary hearing conducted by the Court in Petitioner's prior habeas case, Petitioner questions whether Ms. Smith knew that he believed the policy had lapsed thereby negating a motive for his wife's murder.[22] Doc. 20 at 4-5. Although Petitioner asserts that "[m]ore information is needed" on this issue, *id.* at 5, a review of Petitioner's prior habeas case reveals that this matter was explored therein. Included with Petitioner's prior petition was an affidavit from Ms. Badillo dated November 5, 1998. Appendix at 45-48, *Smith*, No. CIV-98-601-R, Doc. No. 36 (Jan. 6, 1999). While acknowledging that the information contained in the affidavit

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[22] Although Petitioner also asserts that Ms. Badillo has "brain and memory problems [that] were left undiscovered but need exploration," Petitioner offers no further explanation as to why this is relevant. Doc. 20 at 5.

was concealed by the prosecution, prior habeas counsel claimed that the evidence was nevertheless discoverable by trial counsel. Petition at 50, *Smith*, No. CIV-98-601-R, Doc. No. 35 (Jan. 6, 1999). Both Ms. Badillo and Ms. Smith testified at the evidentiary hearing, and following the hearing, the Court concluded that trial counsel was not ineffective with respect to this evidence. Memorandum Opinion at 13-14, *Smith*, No. CIV-98-601-R, Doc. No. 168 (Jan. 10, 2002). Petitioner has not shown good cause for why this matter should be revisited.

Petitioner's final discovery request (fifth request for production and two related interrogatories) concerns Dr. John Call. Related to his Ground One, Petitioner seeks any and all information the State has on Dr. Call, including his "use and disuse" of the Blackwell Memory Test and whether he provided any legal services to the State in his case (beyond his expert services). Doc. 20 at 4, 6-7. Although the OCCA has previously questioned Dr. Call's use of the Blackwell Memory Test, and although Dr. Call did administer this test to Petitioner as a part of his evaluation, Pet'r's Attachs. 8 and 9, no evidence about the test was admitted in Petitioner's mental retardation trial. *See Smith*, No. O-2006-683, slip op. at 15-16 ("Both sides agree that no evidence was presented to the jury concerning Dr. Call's Blackwell Memory Test."). Petitioner's Ground One is a challenge to the jury's verdict, but because the jury did not hear any evidence related to the Blackwell Memory Test, Petitioner has not shown good cause to warrant further exploration of the issue. And as for the services Dr. Call provided the State, Petitioner has made absolutely no argument

as to how such information would support a claim for relief and therefore discovery is denied on this basis.

Petitioner's request for an evidentiary hearing is likewise denied. Petitioner requests that he be given an evidentiary hearing on his Grounds One, Three, Four, and Five. However, Petitioner's Grounds One, Three, and Four have all been denied by the Court on the merits because Petitioner has failed to show that the OCCA rendered unreasonable determinations of law or fact under Section 2254(d). In adjudicating these claims, the Court has noted that in accordance with *Pinholster*, 563 U.S. at 163, its review is limited to the record that was before the OCCA at the time it rendered its decision. Having failed to satisfy Section 2254(d), Petitioner is not entitled to an evidentiary hearing on these claims. *Jones v. Warrior*, 805 F.3d 1213, 1222 (10th Cir. 2015). As for Ground Five, the Court has addressed the merits of this claim de novo and denied relief due to the absence of Supreme Court authority. Because Petitioner's Ground Five is easily disposed of on the record, an evidentiary hearing is unwarranted on this ground as well. *See Anderson v. Attorney General of Kansas*, 425 F.3d 853, 859 (10th Cir. 2005).

IV. Conclusion

Having rejected all of Petitioner's grounds for relief, his petition for writ of habeas corpus is DENIED, along with his requests for discovery and an evidentiary hearing. Docs. 18, 20 and 38. Judgment will enter accordingly.

IT IS SO ORDERED this 13th day of July, 2017.

/s/ David L. Russell
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING A PETITION FOR REHEARING (DECEMBER 2, 2019)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODERICK L. SMITH,

Petitioner-Appellant,

v.

TOMMY SHARP,
Interim Warden, Oklahoma State Penitentiary,

Respondent-Appellee.

No. 17-6184

Before: LUCERO, MATHESON, and PHILLIPS, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
Clerk

ACCELERATED DOCKET ORDER OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA (JANUARY 29, 2007)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RODERICK L. SMITH,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

Not for Publication

No. 0-2006-683

Before: Gary L. LUMPKIN, Presiding Judge, Charles A. JOHNSON, Vice Presiding Judge, Charles S. CHAPEL, Judge, Arlene JOHNSON, Judge, David B. Lewis, Judge.

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 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

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[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).

[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).

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 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

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[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.

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 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

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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.

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.

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

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

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

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.

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.*

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

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[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.

[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.

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 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

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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.

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.

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 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

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[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.

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 arid 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] Convincing

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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

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

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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 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).

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.

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.

/s/ Gary L. Lumpkin
Presiding Judge

/s/ Charles A. Johnson
Vice Presiding Judge

/s/ Charles S. Chapel
Judge

/s/ Arlene Johnson
Judge

/s/ David B. Lewis
Judge

Attest:

/s/ Michael S. Richie
Clerk

CONCURING OPINION OF PRESIDING JUDGE LUMPKIN

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.

DISSENTING OPINION OF JUSTICE CHAPEL

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

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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.

show these only by a preponderance of the evidence, and on review we also apply the 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.

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

Smith was a head custodian, and experts did not believe that he could have assumed 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.

ORDER OF THE COURT OF CRIMINAL APPEALS OF OKLAHOMA GRANTING REHEARING (JANUARY 13, 1997)

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932 P.2d 521

COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RODERICK L. SMITH,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

No. F-94-1199

An Appeal from the District Court of Oklahoma County; The Honorable Richard W. Freeman, District Judge

Attorneys and Law Firms

Kenneth C. Watson, Vernon Smythe, Oklahoma City, for Appellant at trial. Lee Ann Jones Peters, Oklahoma Indigent Defense System, Norman, for Appellant on appeal.

Robert H. Macy, Fern L. Smith, Oklahoma County Courthouse, Oklahoma City, for the State at trial. W.A. Drew Edmondson, Attorney General, Robert L. Whittaker, Assistant Attorney General, Oklahoma City, for Appellee on appeal.

Before: Charles A. JOHNSON, Presiding Judge,
Charles S. CHAPEL, Vice Presiding Judge,
Gary L. LUMPKIN, Judge, James F. LANE, Judge,
Reta M. STRUBHAR, Judge.

STRUBHAR, Judge:

Appellant, Roderick L. Smith, was charged with five counts of First Degree Murder in violation of 21 O.S.1991, § 701.7, in the District Court of Oklahoma County, Case No. CF-93-3968. The case was tried before the Honorable Richard W. Freeman. The State filed a Bill of Particulars alleging five aggravating circumstances. The jury found Appellant guilty of the crimes charged and found all five alleged aggravating circumstances to exist.[1] Appellant was sentenced to death on all counts. From this Judgment and Sentence Appellant has perfected his appeal.

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[1] The jury found the following aggravating circumstances to exist:

1) The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2) The defendant knowingly created a great risk of death to more than one person;

3) The murders were especially heinous, atrocious or cruel;

4) The murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution (except as to Jennifer Smith); and

5) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

FACTS

Appellant was married to Jennifer Smith, who had four children from a prior relationship: ten year old Shemeka Carter, nine year old Glen Carter, Jr., seven year old Ladarian Carter, and six year old Kanesha Carter. The children lived with Appellant and Jennifer.

On the morning of June 28, 1993, Jennifer's mother called the police and asked them to check her daughter's house. She had not seen or heard from Jennifer since June 18, 1993. When Officer Peterson arrived at the residence where Jennifer and Appellant lived, the house appeared to be secured and no one answered the doors. Because he noticed an odor of decaying flesh and a large number of flies around the windows, he contacted his supervisor, Lieutenant Wayne Owen, who came to the address. Owen and Peterson entered the house through a window. Inside, they discovered a dead woman in one closet and a dead child in another. They called the homicide division of the Oklahoma City Police Department and secured the house. Once homicide detectives arrived, the rest of the house was searched. The bodies of three more children were found, two in closets and the third under a bed. The bodies were determined to be those of Jennifer Smith and her four children. They were determined to have been dead for at least two to three days and up to as long as two weeks or more.

The afternoon of that same day, June 28, 1993, Appellant walked into the Oklahoma County Sheriff's Office. He was turned over to the Oklahoma City Police and placed under arrest. During a custodial interrogation, Appellant told Detectives Bemo and

Cook that he had been laid off his job as head janitor at Washington Irving Elementary School because the company that he worked for had lost its contract. According to Appellant, when he told his wife this news a fight ensued. At one point Jennifer grabbed a knife and he took the knife from her and stuck her with it. When the boys came to their mother's defense, he stuck them with the knife as well. Although Appellant admitted that he "got" the girls also, he could not remember any details. Appellant told the police where he placed each of the bodies.

PRETRIAL ISSUES

Appellant first contends that the procedures utilized in Oklahoma to determine a person's competency to stand trial are less protective than those accepted as sufficient by the United States Supreme Court and therefore do not meet federal constitutional standards of due process. As Appellant points out, it is well settled that the Due Process Clause prohibits the criminal prosecution of a defendant who is not competent to stand trial. *See Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). In making such determination, the Supreme Court has held that "it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,'. . . . " *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960). Rather, it is incumbent upon the trial court to determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well

as factual understanding of the proceedings against him." *Id.*

These same principles are reflected in Oklahoma's law. Title 22 O.S.1991, § 1175.1 defines competency as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him, and to . . . effectively and rationally assist in his defense." This language has been interpreted to proffer a two-part test requiring first that an accused have sufficient ability to consult with his or her attorney and second, that an accused have a "rational and actual understanding of the proceedings against him." *Middaugh v. State*, 767 P.2d 432, 434 (Okl.Cr.1988). This Court has found little or no difference between the effective meaning of Oklahoma's law and the language used by the Supreme Court in *Dusky.* "In both cases, the accused is required to understand the charges against him, the implications of the charges against him and be able to effectively assist his attorney in defense of the charges against him." *Lambert v. State*, 888 P.2d 494, 498 (Okl.Cr.1994). *See also Perry v. State*, 893 P.2d 521, 526-27 (Okl.Cr.1995). Appellant has not persuaded us otherwise.

As part of his first proposition, Appellant contends that 22 O.S.1991, § 1175.4 is unconstitutional insofar as it presumes every defendant competent and requires the person whose competency is at issue to prove incompetence by clear and convincing evidence at the post-examination competency hearing. The United States Supreme Court recently addressed this issue in *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996), wherein it held that the clear and convincing burden of proof does violate due process.

"Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is incompetent." *Id.* 517 U.S. at –––, 116 S.Ct. at 1381.

On July 20, 1993, when defense counsel argued his motion for a competency examination, he advised the trial court that during their first few meetings, Appellant had not seemed to understand his questions about what had happened and had not known how to respond. Based upon this, defense counsel stated that he had serious questions about Appellant's ability to aid in his defense. The trial court granted the request for a competency examination. Subsequently, on September 3, 1993, at the post-examination competency hearing, neither the defense nor the State called any witnesses to testify. Rather, both parties stipulated to the admission of a letter from Dr. King, the expert who had performed Appellant's psychiatric evaluation. Dr. King concluded in the letter that, "Mr. Smith is able to communicate rationally with his attorney and to deal adequately with his defense."[2] Defense counsel stated that while he did not necessarily agree with Dr. King's findings, he was not prepared to contest any of her findings because no funds were available for him to secure a second opinion from another expert. Significantly, defense counsel did not advise the trial court that he was still having problems communicating with Appellant.

Based upon the evidence presented at the post-examination competency hearing, the trial court found Appellant competent to stand trial. After making

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[2] Original Record at 31.

this ruling, the trial court indicated that if evidence came to light demonstrating that Appellant was incompetent to stand trial such would be considered at that time. There is no indication from the record that such evidence was ever presented. Indeed, there is evidence to the contrary. Prior to the commencement of voir dire on October 18, 1994, Appellant, himself, argued two motions to the trial court. Appellant first stated that he was concerned about facial expressions the prosecutors would make to the jury. Second, Appellant had previously filed a motion to have his attorney removed from the case because he felt that defense counsel was not doing his job. At the motion hearing Appellant stated that he had subsequently changed his mind. Again, on October 20, 1994, Appellant argued another motion to the trial court regarding racial disparity of the jury. He was concerned because eleven of the twelve jurors were white. While these motions were not argued with the skill of a trial attorney, they were communicated clearly enough for the trial court to understand Appellant's concerns. Further, although these motions were without merit, they were not so preposterous as to have been inappropriately raised. These instances show that Appellant not only understood the proceedings against him, but he also was a very active participant in his own defense.

Appellant argues that the record reflects he did not display a rational and factual understanding of the proceedings because he could not distinguish reality from fantasy. This is based upon the notation of Dr. King, that Appellant was "largely concerned with having his mother visit him and with 'getting the

truth' so he can get out of jail."[3] That Appellant could have thought it possible that he would be able to go home after having confessed to the crime is said to demonstrate his inability to intellectually understand the proceedings and separate fact from fiction. This argument would seem more plausible if Appellant had not tried to back away from his original confession. However, instead of adhering to his original confession, Appellant started telling alternative stories about what had happened, ranging from him being poisoned to organized accounts of other persons having committed the acts. Appellant's statement to Dr. King can be found to have been based upon a very rational understanding of the proceedings and his hope that his later explanations would be believed over his original confession.

Despite Appellant's assertion to the contrary, we find the record supports a finding that he knew the nature of the proceedings and possessed a rational understanding of them. The defense failed to prove, even by a preponderance of the evidence, that Appellant was incompetent to stand trial. Because the evidence in this case so strongly supports the finding that Appellant was competent, we need not remand this case for a new determination on this issue.

Appellant complains in his second proposition that it was error for the trial court to dismiss for cause prospective juror Mario Tello. Initially, when asked about whether he could give equal consideration to each of the three possible punishments for First Degree Murder, Tello replied that he could give honest consideration to each of these choices. However,

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[3] Original Record at 35.

because he displayed some hesitation in answering the question, the trial court decided to question him further in this respect. Although Tello maintained throughout that he could give equal consideration to all three choices, he also consistently stated that he did not know if he could ever impose the death penalty. Based upon this, Tello was dismissed for cause.

In *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-52 (1985), the United States Supreme Court reaffirmed the standard for determining when a prospective juror may properly be excluded for cause based upon his or her views on capital punishment. "That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"[4] The Court in *Wainwright* went on to note that a juror's bias need not be proved with "unmistakable clarity."

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record,

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[4] This standard was first established in *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589 (1980).

> however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his [in part] is why deference must be paid to the trial judge who sees and hears the juror.

Id. 469 U.S. at 425-26, 105 S.Ct. at 852-53, 83 L.Ed.2d at 852-53.

Appellant argues that Tello's responses were not sufficient to warrant his removal for cause because Tello had simply expressed that he might be affected by the awesome responsibility of considering the death penalty. Although Tello's bias is not "unmistakably clear," the record reflects a greater concern than this. After extensive questioning by the trial court, prosecutor and defense counsel, the trial court believed that although Tello had said he could consider the death penalty he did not really mean it.[5] Tello's indication that he could not vote for the death penalty regardless of the circumstances, supports a finding that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Accordingly, we find that the trial court's dismissal of prospective juror Tello for cause was not violative of Appellant's Sixth and Fourteenth Amendment rights.

Shortly after the bodies of the victims were discovered on June 28, 1993, Appellant walked into the Oklahoma County Sheriff's Department appearing to be disoriented. After his identity was discovered, he

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[5] Trial Transcript, Vol. II, at 111-12. (Even defense counsel did not object to this dismissal.)

was taken to the Oklahoma City Police Department where he was arrested and taken into an interrogation room for questioning. This interrogation was videotaped and Appellant's confessions were admitted into evidence at trial. Appellant contends in this third proposition that the trial court erred in failing to suppress his confessions because he confessed without first having knowingly and intelligently waived his *Miranda*[6] rights.

In *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410, 421 (1986), the Supreme Court addressed effective waiver of *Miranda* rights finding that:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

See also Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Further, where the admissibility of a statement or confession is challenged, the burden is upon the State to show by

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6 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

a preponderance of the evidence that it was voluntary. *Young v. State*, 670 P.2d 591, 594 (Okl.Cr.1983).

Prior to the admission of Appellant's confession a *Jackson v. Denno*[7] hearing was held on defense counsel's motion to suppress. Therein, it was established that before he was questioned Appellant was read the *Miranda* warnings. Appellant initially appeared unresponsive and indicated that he did not understand his rights. The detective went over the rights again, explaining each right individually, and again asked Appellant if he understood them. Appellant stated that he believed he did. When the detectives proceeded with questioning Appellant talked about having been in an accident and claimed that he could not remember some things. At one point Detective Bemo told Appellant that he had spoken with Appellant's mother and she had said that there was not anything wrong with Appellant that morning. After this comment, Appellant's behavior changed. He no longer appeared to be disoriented and he responded well to the detective's questions. It was after this that Appellant confessed to having killed Jennifer and the children.[8] The following day, the detectives met again with Appellant at his request. Again, the detectives read him his *Miranda* rights prior to questioning him. Appellant was hesitant but indicated that he understood his rights. During this interview Appellant again talked about the death of his wife and her children.[9]

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[7] *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[8] Appellant's statements were all tape recorded.

[9] A third interview was attempted on June 30, 1993, but on this

The trial court, after hearing the testimony and viewing the video tapes, found that Appellant appeared to have understood the *Miranda* warnings. The trial court found it significant that Appellant acted more alert and responded more normally after the detectives told him that they had spoken with his mother who told them that there was nothing wrong with him. The trial court noted that while Appellant was not a genius and appeared to have been under stress, he seemed able to make a conscious, voluntary decision to speak. The totality of the circumstances surrounding the interrogation supports the trial court's ruling that Appellant's decision to speak with the detectives was uncoerced and made with the requisite understanding of his constitutional rights. Accordingly, this proposition does not warrant relief.

FIRST STAGE ISSUES

Appellant argues in his fifth proposition that he was denied a fair trial by the State's improper introduction of other crimes evidence. Prior to trial the State filed a notice apprising Appellant that it would offer evidence that Appellant had a history of physically abusing his wife and that he had engaged in an extramarital affair. Appellant claims that this evidence did not tend to prove a motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident as is acceptable under *Burks v. State*, 594 P.2d 771 (Okl.Cr.1979), *rev'd on other grounds, Jones v. State*, 772 P.2d 922, 925 (Okl.Cr.1989). Rather, he contends that it served only

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date Appellant, after he was read his *Miranda* rights, informed authorities that he had an attorney and the interview was appropriately terminated.

to show that he was a philandering wife-beater. Accordingly, Appellant urges this Court to find that this evidence was inadmissible and should have been excluded.

The weight of previous jurisprudence goes against Appellant's argument that the evidence of his prior physical abuse against his wife was inadmissible. This Court recently held in a capital case where the defendant killed his wife that "[e]vidence of previous altercations between spouses is relevant to the issue of intent." *Hooker v. State*, 887 P.2d 1351, 1359 (Okl.Cr.1994), *cert. denied*, 516 U.S. 858, 116 S.Ct. 164, 133 L.Ed.2d 106 (1995). In so finding, this Court relied upon prior cases which hold that in a marital homicide case evidence of ill feeling, threats or similar conduct by one spouse toward another is probative to show motive and/or intent. *See Cheney v. State*, 909 P.2d 74, 87 (Okl.Cr.1995); *Duvall v. State*, 825 P.2d 621, 626 (Okl.Cr.1991), *cert. denied*, 506 U.S. 878, 113 S.Ct. 224, 121 L.Ed.2d 161 (1992); *Holt v. State*, 774 P.2d 476, 478 (Okl.Cr.1989); *Lamb v. State*, 767 P.2d 887, 890 (Okl.Cr.1988); *Brown v. State*, 753 P.2d 908, 911 (Okl.Cr.1988). In keeping with this established precedent, we find that the evidence of Appellant's prior physical abuse of Jennifer was relevant to show motive and intent.

We disagree as well with the contention that the evidence of Appellant's extramarital affair should have been suppressed. During the course of this relationship, Appellant expressed to his girlfriend his intent to marry and have children with her. This was relevant to show Appellant's motive and intent.

Although the State did introduce evidence of crimes or bad acts other than those for which Appellant

was being tried, this evidence fell within well recognized exceptions to the rule prohibiting the introduction of other crimes evidence. Further, we find that the probative value of this relevant evidence outweighed its prejudicial effect. Appellant's argument concerning other crimes evidence is without merit.

Appellant argues in proposition eight that the evidence was insufficient to support his conviction for First Degree Murder. The evidence introduced against Appellant at trial was both direct and circumstantial. Accordingly, the test to be applied in determining the sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202 (Okl.Cr.1985); *Paxton v. State*, 867 P.2d 1309, 1315-16 (Okl.Cr.1993), *cert. denied*, 513 U.S. 886, 115 S.Ct. 227, 130 L.Ed.2d 153 (1994). It is worthy of notation that the jury is the exclusive judge of the weight and credibility of the evidence. *Robedeaux v. State*, 866 P.2d 417, 429 (Okl.Cr.1993), *cert. denied*, 513 U.S. 833, 115 S.Ct. 110, 130 L.Ed.2d 57 (1994). Further, despite conflicts in the evidence, this Court will not disturb the jury's verdict if there is competent evidence to support it. *Id.*

Appellant acknowledges that the only element of first degree murder which was contested was the element of malice aforethought. He claims that the State's evidence did not prove this element beyond a reasonable doubt. The evidence that Appellant stabbed his wife and the boys multiple times and then squeezed the girls to death before placing their bodies in various closets and under a bed is sufficient

to support the jury's conclusion that Appellant acted with malice aforethought. Further the conclusion that Appellant intended his victims to die finds support in his confession wherein he acknowledged that two of the victims were still alive when he checked on them later but he declined to call for help in an effort to save their lives. We find from these facts and circumstances surrounding the killing that the jury could have found beyond a reasonable doubt that Appellant killed the victims with malice aforethought.

ISSUES RELEVANT TO BOTH STAGES OF TRIAL

Appellant complains in his fourth proposition that his constitutional rights to due process, a fair trial and a fair and reliable sentencing hearing were violated by the admission into evidence of highly prejudicial and inflammatory color photographs. The six photographs complained of on appeal depict the bodies of the victims in advanced stages of decomposition. The photographs reveal skin slippage and skeletonization as well as maggot activity. The decomposition of the bodies was so extensive that the victims could not be identified by their appearance. Appellant argues that because facts concerning the location and condition of the bodies were not disputed at trial, the probative value of the photographs was outweighed by their prejudicial impact.

Decisions regarding the introduction of photographs are within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Hooks v. State*, 862 P.2d 1273, 1280 (Okl.Cr.1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994). Photographs which are

gruesome or inflammatory may be admissible where their probative value is not substantially outweighed by the danger of unfair prejudice. *McCormick v. State*, 845 P.2d 896, 898 (Okl.Cr.1993). It is well established that "photographs of murder victims can be probative in many respects. . . . They can show the nature, extent and location of wounds, establish the corpus delicti, corroborate testimony of medical examiners and expert witnesses and depict the crime scene." *Smallwood v. State*, 907 P.2d 217, 228 (Okl.Cr.1995). Further, "Appellant's willingness to concede that there is no dispute over the identity of the victim or the injuries sustained is not determinative of the photographs' admissibility." *Id.*

The photographs at issue in the present case are gruesome. However, they also accurately depict the crime scene and corroborate the testimony of the medical examiner and Appellant's confession. We find that this probative value is not substantially outweighed by the prejudicial impact. Accordingly, we cannot find that the trial court abused its discretion in admitting these photographs into evidence.

It is Appellant's argument in his sixth assignment of error that pervasive prosecutorial misconduct deprived him of a fair trial and reliable sentencing. Appellant cites to numerous instances during both stages of trial in which he contends the prosecutors exceeded the bounds of proper prosecutorial advocacy. He claims that the prosecutors unfairly attacked defense expert witnesses, appealed to the passions of the jurors, improperly presented evidence that Appellant had invoked his right to counsel, made reference to facts not in evidence, misstated the law, engaged in name calling, and voiced personal opinions.

Most of the comments complained of were not objected to at trial. Accordingly, as to these remarks, all but plain error has been waived. *Freeman v. State*, 876 P.2d 283, 287 (Okl.Cr.), *cert. denied*, 513 U.S. 1022, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994).

Our review of the record reveals that many of the comments not met with timely objection fell within the prosecutors' wide range of permissible argument. None were so egregious as to have risen to the level of reversible error. The record also reflects that of the few comments at issue which were objected to, some of these objections were sustained. Where the trial court admonished the jury to disregard the improper statement the error was cured. *See Romano v. State*, 909 P.2d 92, 116 (Okl.Cr.1995). Where no admonishment was given or requested, review, again, is limited to plain error. *Id.* In no instance where this occurred did the comment rise to the level of plain error. "Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such to deprive the defendant of a fair trial." *Duckett v. State*, 919 P.2d 7, 19 (Okl.Cr.1995). Because we do not find that the inappropriate comments deprived Appellant of a fair trial, affecting the jury's finding of guilt or assessment of the death penalty, we decline to grant relief on this proposition.

FIRST STAGE JURY INSTRUCTIONS

In his seventh proposition Appellant argues the trial court erred in failing to adequately instruct the jury on lesser included offenses and defenses which he claims were supported by the evidence. The record reveals that defense counsel failed to request most of the instructions he now claims were warranted. This

Court has held that "where the evidence warrants a lesser included offense instruction a defendant is entitled to the same whether requested or not." *Boyd v. State*, 839 P.2d 1363, 1367 (Okl.Cr.1992), *cert. denied*, 509 U.S. 908, 113 S.Ct. 3005, 125 L.Ed.2d 697 (1993). However, we have also held that "[j]ury instructions on lesser included offenses or theories of defense need only be given when there is evidence in the record to support such instructions." *Powell v. State*, 906 P.2d 765, 778 (Okl.Cr.1995), *cert. denied*, 517 U.S. 1144, 116 S.Ct. 1438, 134 L.Ed.2d 560 (1996).

Appellant first calls this Court's attention to the instructions regarding heat of passion manslaughter which were given by the trial court. He claims these instructions were constitutionally deficient under the Tenth Circuit's holdings in *United States v. Lofton*, 776 F.2d 918 (10th Cir.1985) and *Davis v. Maynard*, 869 F.2d 1401 (10th Cir.1989), *cert. granted and judgment vacated on other grounds, Saffle v. Davis*, 494 U.S. 1050, 110 S.Ct. 1516, 108 L.Ed.2d 756 (1990), *on remand, Davis v. Maynard*, 911 F.2d 415 (10th Cir.1990).

In the case at bar Appellant did not deny having killed his wife and the children. Rather, his defense to the charge of first degree murder with malice aforethought was that he lacked the ability to form the intent required for first degree murder. The defense put on evidence that Appellant has low intelligence bordering on mental retardation. In addition, an expert witness for the defense testified that a near drowning incident suffered by Appellant as a child caused brain damage. There was testimony that this damage diminished his ability to control emotions such as irritation and rage. This, however, was not the evidence

relied upon by the trial court for its decision to give the manslaughter instruction. That evidence was put on by the State in Appellant's video taped confession. During this confession, Appellant stated that when he told his wife that he was being laid off from his job, she thought that he was lying. She struck him so hard that he saw black for a few seconds. He said that "it went wild." They got into a fist fight and it got out of proportion. Before he knew it she grabbed a knife. He took it from her and "things went crazy." It was at this point that he stabbed his wife.

Under 21 O.S.1991, § 711(2), homicide is First Degree Manslaughter "[w]hen perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon. . . . " We find that under the facts of this case, the heat of passion manslaughter instructions simply were not warranted by the evidence because the evidence regarding the brain dysfunction which may have affected Appellant's ability to control his rage does not negate his intent to kill. Although Appellant claims that he was unable to control his rage, this does not preclude the conclusion that at the time he killed his family he intended the logical results of his actions. Accordingly, whether the instructions on First Degree Manslaughter were sufficient under *Lofton* and *Davis* is not of consequence to this case because these instructions were not warranted by the evidence. Any deficiency in these instructions is harmless.

Appellant's next argument concerns an instruction on First Degree Manslaughter which was not requested or given but which Appellant contends was required by the evidence. As Appellant points out, "this Court

held that 21 O.S.1981, § 711(2), sets forth two ways in which the offense of first degree manslaughter may be committed: 1) when perpetrated without a design to effect death and in a heat of passion but in a cruel and unusual manner or 2) when perpetrated without a design to effect death by means of a dangerous weapon." *Camron v. State*, 829 P.2d 47, 51 (Okl.Cr.1992), *citing, Moody v. State*, 38 Okl.Cr. 23, 259 P. 159 (1927), and *Smith v. State*, 652 P.2d 303, 304 (Okl.Cr.1982) (*overruled on other grounds*). It is argued that the evidence supported an instruction on the type of first degree manslaughter which omits heat of passion as an element. This instruction, again, is only warranted if there is evidence that Appellant did not have a design to effect death. As was discussed above, the nature of Appellant's actions omits a reasonable inference that he did not have the intent to kill his victims. This instruction was not warranted.

Next, Appellant argues that the defense of unconsciousness or automatism was warranted by the evidence and should have been given despite the fact that such was not requested. Appellant directs this Court's attention to 21 O.S.1991, § 152(6) which exempts from culpability "[p]ersons who committed the act charged without being conscious thereof." This Court has addressed this defense in prior cases holding that automatism "may be used in situations where the otherwise criminal conduct of an individual is the result of an involuntary act which is completely beyond the individual's knowledge and control." *Sellers v. State*, 809 P.2d 676, 686 (Okl.Cr.), *cert. denied*, 502 U.S. 912, 112 S.Ct. 310, 116 L.Ed.2d 252 (1991). *See also, Jones v. State*, 648 P.2d 1251, 1258

(Okl.Cr.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983). In *Sellers*, the defendant had said that he could not remember killing his parents and a psychologist testified that if the defendant had killed his parents he did not realize what he was doing. *Sellers*, 809 P.2d at 686. This Court held that this evidence was not sufficient to warrant an instruction on automatism. *Id.* Similarly, in the present case, the evidence of Appellant's borderline mental retardation and brain damage was not sufficient to require an instruction on the defense of automatism.

Appellant next contends that the evidence warranted an instruction on second degree depraved mind murder. An instruction on this crime is warranted where the evidence supports a finding that the homicide was "perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual."[10] Appellant argues that the record in the present case supports his contention because his brain dysfunction could have caused him to act in a way that evinced a depraved mind in extreme disregard for human life but without the intention of killing any person in particular. We find this argument untenable. While the record may be found to support a finding that Appellant evinced a depraved mind in disregard for human life, it would take a quantum leap to find that the victims of his rage were chosen randomly. The trial court did not err in not giving an instruction on second degree murder.

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[10] 21 O.S.1991, § 701.8.

Finally, Appellant argues that the trial court erred by giving the Uniform Jury Instruction on causation. This instruction informed the jury that:

> No person may be convicted of Murder in the First Degree unless his conduct caused the death of the person allegedly killed. A death is caused by conduct if the conduct is a substantial factor in bringing about the death and the conduct is dangerous and threatens or destroys life.[11]

Appellant contends this instruction should not have been given because there was no dispute regarding the cause of the victims' deaths. He argues that the jury could have misunderstood this instruction to be an alternative theory of first degree murder and believed that he could be found guilty of murder even absent a design to effect death. While it is true that the facts of this case did not require this instruction be given, we disagree with Appellant's argument that it may have misled the jury. The instructions, when read as a whole, accurately state the applicable law and preclude the possibility that the jury may have believed it appropriate to convict Appellant of first degree murder absent a finding of intent. This argument is without merit.

SECOND STAGE ISSUES

Appellant argues in his ninth assignment of error that the trial court's second stage instructions inappropriately precluded the jury from giving due consideration to the mitigating effect of evidence of his brain dysfunction and borderline mental retardation.

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[11] Original Record at 450; OUJI–CR 426.

In support of his argument Appellant cites *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In *Penry*, evidence was presented at trial that the defendant had been diagnosed as having organic brain damage and was mentally retarded. However, under the Texas sentencing scheme the jury was to answer three "special issues" which basically asked if they found the existence of aggravating circumstances. While the jury was instructed that it could consider all evidence submitted in both phases of trial in answering the special issue questions, they were not instructed to weigh the aggravating circumstances with the mitigating evidence. Although defense counsel argued that evidence of the defendant's mental condition was mitigating, the jury was not instructed that it could consider such evidence as mitigating and that it could take this mitigating evidence into consideration in imposing the defendant's sentence.

The Supreme Court acknowledged that evidence of the defendant's mental retardation and decreased ability to control his impulses could have been found by a rational juror to have made the defendant less morally culpable than those persons who have no such impediments. *Id.* 492 U.S. at 322-23, 109 S.Ct. at 2949, 106 L.Ed.2d at 280-81. Further, it rejected the State's argument that the jury was able to adequately consider all of the mitigating evidence even without any jury instruction on mitigating evidence. *Id.* 492 U.S. at 322, 109 S.Ct. at 2949, 106 L.Ed.2d at 280. The Supreme Court held that:

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [defendant's] mental retardation and abused

> background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision.

Id. 492 U.S. at 328, 109 S.Ct. at 2952, 106 L.Ed.2d at 284.

In the present case, the jury was not so restricted. The jury was instructed that "[m]itigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case."[12] While the jury was not specifically instructed that evidence of Appellant's mental condition was mitigating, it was instructed that it could determine what it wanted to consider as mitigating evidence. Defense counsel argued the mitigating value of the evidence of Appellant's brain dysfunction and decreased mental ability to the jury in second stage and these instructions adequately provided the jury a vehicle for expressing its "reasoned moral response" to this evidence. Accordingly, this proposition warrants no relief.

The State alleged the existence of five aggravating circumstances with regard to each count of murder: 1) that each murder was especially heinous, atrocious or cruel; 2) that there existed a probability that Appellant would constitute a continuing threat to society; 3) that the murders were committed to avoid lawful arrest

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[12] Original Record at 478; OUJI–CR 438.

or prosecution; 4) that Appellant created a great risk of death to more than one person; and 5) that Appellant was previously convicted of a felony involving the use or threat of violence to a person. The jury found each of these alleged aggravators to exist with regard to the counts involving the children, and found all but the third, murder committed to avoid lawful arrest, with regard to the count involving Jennifer Smith. In his tenth proposition Appellant challenges the propriety and validity of these aggravating circumstances.

Appellant argues first that the evidence did not support the jury's finding that each murder was especially heinous, atrocious or cruel because the facts indicate that unconsciousness, if not death, occurred quickly with each victim and there was no design to cause great suffering. We have held that "the heinous, atrocious or cruel aggravating circumstance requires a showing that torture or serious physical abuse preceded the victim's murder." *Hooks*, 862 P.2d at 1282. *See also, Stouffer v. State*, 742 P.2d 562, 563 (Okl.Cr.1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988). It is necessary that the State prove beyond a reasonable doubt that the victims consciously suffered before death. "Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met." *Perry v. State*, 893 P.2d 521, 534 (Okl.Cr.1995), citing *Battenfield v. State*, 816 P.2d 555, 565 (Okl.Cr.1991), *cert. denied*, 503 U.S. 943, 112 S.Ct. 1491, 117 L.Ed.2d 632 (1992). Torture, for purposes of this aggravator, can also include evidence of extreme mental cruelty. *Hawkins v. State*, 891 P.2d 586, 597 (Okl.Cr.), *cert. denied*, 516 U.S. 977, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995).

The evidence of the circumstances surrounding the deaths of the victims in this case came from Appellant's confession and testimony of the medical examiner. Appellant's statements to the police indicate that Jennifer was fighting with him at the time he stabbed her. The children were all in the house when this occurred and the two boys actually witnessed it as they attempted to protect their mother from Appellant. When this happened, Appellant started stabbing the two boys. When the two girls came down the hall Appellant squeezed them until they became unconscious and then died.

The medical examiner testified that Jennifer Smith was stabbed four times. Two of the stab wounds damaged muscular tissues and did not enter body cavities. The most severe stab wound severed an artery in her neck. This wound would have resulted in extensive bleeding. There was no testimony as to which stab wound was inflicted first or about how long she was conscious. The medical examiner was unable to determine with certainty the cause of death of the two girls. He found no stab wounds on their bodies and speculated that the cause of their deaths was some form of asphyxial injury. The medical examiner testified that he found that at least four stab wounds had been inflicted on Ladarian Carter. One stab wound was to the neck, one to the abdomen, and two to the chest region. He testified that any of these could have been fatal, but none would have killed the victim immediately. Glen Carter, Jr., was found to have been stabbed also. However, the decomposition of his body made it more difficult for the medical examiner to determine the extent of the stab wounds.

He was able to identify one stab wound to the chest area and another possible stab wound to the abdomen.

This evidence does not indicate that death for any of these victims was instantaneous. The evidence is less clear as to how long each of the victims remained conscious. Even so, the evidence does support a finding that Jennifer Smith was conscious for at least part of her struggle with Appellant. The boys suffered consciously as they, too, were fighting with Appellant prior to their death as they tried to protect their mother. Further, the evidence that they witnessed the stabbing of their mother supports a finding of extreme mental cruelty. Although the circumstances surrounding the death of the girls are not as clearly established, the evidence is sufficient to sustain the heinous, atrocious or cruel circumstance for these two deaths because they would have been conscious for at least part of the time that they were being squeezed to death.

Appellant also argues that the narrowed interpretation of the heinous, atrocious or cruel aggravating circumstance as is currently applied, is unconstitutionally vague. This Court has rejected this argument. *See Williamson v. State*, 812 P.2d 384, 407 (Okl.Cr.1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992). We do not choose to hold differently now.

Appellant next argues that there was insufficient evidence to support the finding that the murders of the children were committed to avoid or prevent a lawful arrest or prosecution. This Court has held that, "[t]his aggravating circumstance, by definition, requires that there be a predicate crime, separate from the murder, for which the appellant seeks to

avoid arrest or prosecution." *Barnett v. State*, 853 P.2d 226, 233 (Okl.Cr.1993). Appellant's intent to murder in order to avoid arrest or prosecution for the commission of this separate crime must often be inferred from circumstantial evidence. *McGregor v. State*, 885 P.2d 1366, 1385 (Okl.Cr.1994), *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995).

In the present case, the murder of Jennifer Smith provides the predicate crime, separate from the murders of the children, from which Appellant can be found to have sought to avoid arrest. Appellant's confession provided evidence that the two boys saw him kill his wife and that the girls were also present in the house when he stabbed Jennifer. Evidence that Appellant cleaned the house and lied to relatives to cover for Jennifer's failure to keep appointments provides circumstantial evidence from which it can be inferred that Appellant was concerned with avoiding detection of these crimes. Because any of the children could have identified him as the person who killed their mother, it is reasonable to infer that he killed them to prevent this from happening.

Appellant also argues that this aggravating circumstance has been interpreted in such a way that it is unconstitutionally vague and overbroad. This Court has previously addressed this issue and found it to be without merit. *Braun v. State*, 909 P.2d 783, 798 (Okl.Cr.1995), *cert. denied*, 517 U.S. 1144, 116 S.Ct. 1438, 134 L.Ed.2d 559 (1996). *See also, Castro v. State*, 844 P.2d 159, 175 (Okl.Cr.1992), *cert. denied*, 510 U.S. 844, 114 S.Ct. 135, 126 L.Ed.2d 98 (1993). Appellant has not persuaded us otherwise in this case.

Next, Appellant submits that the "great risk of death" aggravating circumstance is unconstitutionally vague and overbroad. He admits that this issue has been previously addressed and rejected. *See Braun*, 909 P.2d at 798. *See also, Cartwright v. Maynard*, 802 F.2d 1203, 1221-22 (10th Cir.1986), *Rev'd on other grounds on reh'g*, 822 F.2d 1477, *aff'd*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). However, Appellant asks this Court to reconsider this issue. We decline to do so at this time.

Appellant's next argument attacks the propriety of two aggravating circumstances, "prior violent felony conviction" and "continuing threat to society." He contends that error occurred because the jury relied upon the same evidence to find the existence of both of these aggravators. This was evidence of a prior conviction for assault and battery with a dangerous weapon arising from an incident in which Appellant repeatedly stabbed his girlfriend. Appellant recognizes that this Court has previously rejected this argument. *See Robedeaux*, 866 P.2d at 435; *Pickens v. State*, 850 P.2d 328, 336 (Okl.Cr.1993), *cert. denied*, 510 U.S. 1100, 114 S.Ct. 942, 127 L.Ed.2d 232 (1994). The record reflects that this was the only evidence used to support the "prior violent felony conviction" aggravating circumstance. However, despite Appellant's assertion to the contrary, we find evidence in the record other than this prior conviction which supports the "continuing threat to society" aggravating circumstance. This is the evidence of Appellant's history of physical abuse upon his wife and the evidence presented by Appellant's expert witnesses that he has diminished ability to control his rage. Accordingly, the evidence presented at trial was sufficient to

support the jury's findings regarding both of these aggravating circumstances.

Appellant also argues that the "continuing threat to society" aggravating circumstance is unconstitutional. He recognizes that this Court has repeatedly rejected constitutional attacks on this aggravating circumstance. *See Mitchell v. State*, 884 P.2d 1186, 1208 (Okl.Cr.1994), *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995). However, he asks this Court to reconsider those decisions. We decline this request.

During the second stage of trial, the State introduced evidence of victim impact through the testimony of two witnesses, Marietta Love, Jennifer Smith's mother, and Glen Carter, Sr., the father of the four children who were killed. In his eleventh proposition Appellant raises several issues concerning the use of victim impact evidence in the second stage of trial.

Appellant first argues that error occurred in the use of victim impact evidence at his trial because the State failed to follow statutory requirements in the presentation of such testimony. He contends that the relevant statutes provide that such evidence can only be introduced through the presentation of written statements, not through testimony. In support of this argument he directs this Court's attention to *Neill v. State*, 896 P.2d 537, 553 (Okl.Cr.1994), *cert. denied*, 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740 (1996), for its recognition that 22 O.S.Supp.1992, §§ 984, 984.1 and 991a(C) provide guidance regarding the use of victim impact evidence. Title 22 O.S.Supp.1992, § 984.1(A) provides that "[a] victim, or a member of the immediate family of the victim, may present a written victim impact statement or, at the court's op-

tion, appear personally at the sentencing proceeding and present the statement orally." While this language makes reference to a written victim impact statement, it does not preclude the introduction of victim impact evidence through testimony. Further, this Court has specifically found that "the trial court may wish to consider whether a question-and-answer format may be a preferable method of controlling the way relevant victim impact evidence is presented to a jury." *Cargle v. State*, 909 P.2d 806, 828 (Okl.Cr.1995).

Victim impact evidence is constitutionally acceptable unless "it is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720, 735 (1991). Appellant argues that the victim impact evidence exceeded the bounds of propriety when Glen Carter, Sr. made a comment which did not fall within the bounds of proper victim impact evidence.[13] Appellant is correct in his assertion that this comment was inappropriate evidence of victim impact. However, it cannot be found to have been so unduly prejudicial as to have rendered the trial fundamentally unfair.

Appellant also argues that *Payne v. Tennessee* and Oklahoma's amended capital sentencing statute have opened the floodgates for the introduction of highly emotional and irrelevant evidence. It is his

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[13] Glen Carter stated, "What is the world coming to when we just let people in our society just come and kill and go to prison and let them out and they come back and do the same act. What it[sic] going to take? More people got to be victims to these crimes that are being committed? More people have to suffer day for day because they know their loved ones are gone." Trial Transcript X, at 32.

position that victim impact evidence has no place in Oklahoma's death penalty scheme as our statutes require a balancing test of aggravating circumstances and mitigation and victim impact evidence is relevant to neither. He argues that victim impact evidence operates as irrelevant, improper, highly charged, emotion evidence which is present in every capital case and has the same effect as an unconstitutionally broad aggravating circumstance. Appellant implores this Court to adopt specific guidelines to prevent this from becoming a "superaggravator." This Court recently addressed these concerns and proffered such guidelines in *Cargle*, 909 P.2d at 824-30 (Okl.Cr.1995).

Finally, Appellant argues that error occurred in this case because the jury instructions did not address the victim impact evidence or its place in the sentencing decision. While it is true that the jury in this case was given no instructions regarding the victim impact statements, at the time of trial, such was not required. Although this Court recently promulgated an instruction to assist the jury in using victim impact evidence, we did so making clear that the instruction was to apply prospectively only. *Id.* at 828-29. In *Cargle*, as in the case at bar, a specific instruction on victim impact evidence was not given, nor was it found that the absence of such rendered the defendant's sentence unreliable. Accordingly, in the present case as in *Cargle*, the absence of such an instruction does not require reversal of the sentencing proceeding.

In his next proposition Appellant sets forth four arguments previously rejected by this Court in order to preserve such for appellate review. He first argues that error occurred because the instructions failed to inform the jury that its findings regarding the mitigat-

ing circumstances did not have to be unanimous. He acknowledges that this issue has previously been addressed by this Court and that on prior occasions relief has been denied. *See Harjo v. State*, 882 P.2d 1067, 1081 (Okl.Cr.1994), *cert. denied*, 514 U.S. 1131, 115 S.Ct. 2007, 131 L.Ed.2d 1007 (1995). *See also Bryson v. State*, 876 P.2d 240, 262 (Okl.Cr.1994), *cert. denied*, 513 U.S. 1090, 115 S.Ct. 752, 130 L.Ed.2d 651 (1995); *Pickens*, 850 P.2d at 339. Although Appellant asks this Court to reconsider this issue at this time, we decline to do so.

Appellant also argues that the instructions given to the jury on the issue of mitigation permitted the jurors to ignore mitigating evidence altogether, and seriously diminished the effect of the mitigating evidence presented in this case. Appellant advises this Court that the same or similar instructions to those given in the present case were upheld against this challenge in *Pickens*, 850 P.2d at 339. We decline to hold otherwise at this time.

Next, Appellant alleges that the trial court committed error when it failed to instruct the jurors that they could consider a sentence of life or life without parole even though they had found the existence of an aggravating circumstance. Such an instruction is not required and this Court has consistently rejected this argument. *See Valdez v. State*, 900 P.2d 363, 385 (Okl.Cr.1995), *cert. denied*, 516 U.S. 967, 116 S.Ct. 425, 133 L.Ed.2d 341 (1995); *Bryson*, 876 P.2d at 262-63; *Pickens*, 850 P.2d at 339; *Romano v. State*, 847 P.2d 368, 392 (Okl.Cr.1993), *aff'd, Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). We will not now depart from this prior holding.

Finally, Appellant argues that the instructions regarding the manner in which the jury was to weigh aggravating circumstance set forth an improper burden of proof. Again, he acknowledges that this preponderance of the evidence standard has been repeatedly approved by this Court. *See Mitchell*, 884 P.2d at 1206. *See also Rojem v. State*, 753 P.2d 359, 370 (Okl.Cr.), *cert. denied*, 488 U.S. 900, 109 S.Ct. 249, 102 L.Ed.2d 238 (1988); *Brogie v. State*, 695 P.2d 538, 544 (Okl. Cr.1985). Again, we decline to revisit this issue.

This Court has held that where there is no error present, there can be no accumulation of error. *Brecheen v. State*, 732 P.2d 889, 897 (Okl.Cr.1987), *cert. denied*, 485 U.S. 909, 108 S.Ct. 1085, 99 L.Ed.2d 244 (1988). However, when there have been numerous irregularities during the course of the trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial. *Bechtel v. State*, 738 P.2d 559, 561 (Okl.Cr.1987). While it can be found in the present case that there were a few irregularities during the course of the trial, even taken together, these cannot be found to have been so great as to have denied Appellant a fair trial. Accordingly, relief is not warranted.

MANDATORY SENTENCE REVIEW

In accordance with our statutory duty, we must now determine whether the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and also whether the evidence supports the jury's finding of the alleged statutory aggravating circumstances. *See* 21 O.S.1991, § 701.13(C). We are satisfied that neither passion,

prejudice nor any other arbitrary factor contributed to the jury's sentencing determination. After carefully reviewing the evidence presented, we also find that it supported the jury's finding of the aggravating circumstances.

Finding no error warranting reversal or modification, Appellant's Judgment and Sentence is AFFIRMED.

JOHNSON, P.J., CHAPEL, V.P.J., and LANE, J., concur.

LUMPKIN, J., concurs in results.

ORDER GRANTING REQUEST FOR PUBLICATION

On December 6, 1996, this Court granted Appellant's request for rehearing in the above styled case. This order did not grant relief but clarified an issue discussed in the opinion previously handed down in this case on October 1, 1996. The Order Granting Rehearing was not published. Subsequently, on December 11, 1996, Appellant filed a Motion to Publish the Order Granting Rehearing reasoning that trial judges should have the benefit of this Court's discussion regarding requests for instructions on second degree murder which is contained therein.

Having examined Appellant's motion this Court finds that Appellant's request should be, and the same hereby is GRANTED. The Order Granting Rehearing issued in Appellant's case shall be released for publication.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 13th day of January, 1997.

/s/ Charles S. Chapel
Presiding Judge

/s/ Reta M. Strubhar
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

/s/ Charles A. Johnson
Judge

/s/ James F. Lane
Judge

ORDER GRANTING REHEARING

Petitioner, Roderick L. Smith, was convicted of five counts of First Degree Murder in the District Court of Oklahoma County, Case No. CF-93-3968. He was sentenced to death on each count. From this Judgment and Sentence Petitioner perfected a timely appeal to this Court. Oral argument was heard on May 8, 1996, and a decision was rendered in a published opinion handed down by this Court on October 1, 1996. *See Smith v. State*, 932 P.2d 521 (Okl.Cr.1996). Subsequently, Petitioner filed a Petition for Rehearing.

Petitioner bases his request for rehearing upon the contention that the opinion is in conflict with authority not previously before this Court. *See Rules of the Court of Criminal Appeals*, 22 O.S.1991, Ch. 18, App., Rule 3.14(B)(1). Petitioner directs this Court's attention to that part of the opinion which addressed the issue of whether Petitioner was entitled to an instruction on second degree depraved mind murder. The opinion correctly noted that an instruction on this degree of murder is warranted where the evidence supports a finding that the homicide was "perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." *See* 21 O.S.1991, § 701.8. However, the opinion went on to find that the facts did not warrant an instruction on this degree of murder because the Petitioner had not chosen his victims randomly. This analysis focused on the language "any particular individual" and construed it too narrowly, limiting its use to situations where a person's wrath is not directed against any particular person. While second degree depraved mind

murder may still apply to such situations, it has not been limited to such situations. Convictions for second degree depraved mind murder have been upheld in cases where the victim was specifically targeted. *See Quilliams v. State*, 779 P.2d 990 (Okl.Cr.1989); *Dorsey v. State*, 739 P.2d 528 (Okl.Cr.1987); *Hall v. State*, 698 P.2d 33 (Okl.Cr.1985).

Allowing that this crime has been applied to situations where the accused may have intended to harm the victim but did not intend to kill, we find that under the facts of the present case, Petitioner was still not entitled to such an instruction. Given the evidence presented at trial, the only reasonable inference is that Petitioner specifically targeted his victims and that he intended to kill them. Again, the trial court did not err in failing to instruct the jury on the crime of second degree depraved mind murder.

Finally, Petitioner asks this Court also to reconsider its ruling regarding whether Petitioner was entitled to manslaughter instructions. Again, Petitioner contends that the opinion is contrary to controlling authority. We have reviewed this allegation and have found that this issue was decided based upon appropriate controlling authority.

Accordingly, for the reasons discussed above regarding the second degree depraved mind murder instruction, we find that the Petition for Rehearing should be GRANTED. However, no relief is warranted.

IT IS THEREFORE THE ORDER OF THIS COURT that this Petition for Rehearing is GRANTED with no relief required. The Clerk of this court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 6th day of December, 1996.

/s/ Charles A. Johnson
Presiding Judge

/s/ Charles S. Chapel
Vice Presiding Judge

/s/ Gary L. Lumpkin
Judge

Concur in Result

/s/ Reta M. Strubhar
Judge

/s/ James F. Lane
Judge

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254, RELEVANT EXCERPTS (MAY 22, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RODERICK L. SMITH,

Petitioner,

v.

ANITA TRAMMELL,
Warden, Oklahoma State Penitentiary,

Respondent.

Case No. 14-CV-579-R

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[. . .]

GROUND ONE
Roderick Smith's Execution Is Prohibited by the Eighth and Fourteenth Amendments Because He Is Intellectually Disabled.

Introduction and Summary

Mr. Smith cannot legally be executed because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S.Ct. 1986 (2014). His IQ scores and overall adaptive functioning have consistently been in the intellectually disabled range. Smith's placement in special education classes for the educable mentally handicapped from early elementary school through high school demonstrates his intellectual disability is not a feigned attempt to avoid being executed, as the State of Oklahoma has maintained; rather, the overwhelming evidence shows Smith has suffered from intellectual disability since infancy. If the State of Oklahoma is allowed to execute a man as intellectually impaired as Roderick Smith, then the constitutional protection announced in *Atkins* and reinforced in *Hall* surely would be meaningless.

In *Atkins*, the Supreme Court categorically banned the execution of the intellectually disabled. As the Court later explained in *Hall*, to determine whether a criminal defendant is in fact intellectually disabled requires the consideration of the informed views of medical and psychiatric experts. *Hall*, 134 S.Ct. at 2000. The American Association on Intellectual and Developmental Disabilities (AAIDD), one of the very groups of experts relied on by the Court in both *Hall*

and *Atkins*, provides the following definition of intellectual disability:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAIDD, *Intellectual Disability: Definitions, Classification, and Systems of Supports* 5 (11th ed. 2010).[3] The Court in both *Atkins* and *Hall* referenced the clinical definition. *Atkins*, 536 U.S. at 309 n.3; *Hall*, 134 S.Ct. at 1994.

Experts who have evaluated Smith's intellectual functioning are in a remarkable state of accord that he is intellectually disabled. Drs. Terese Hall, Alan Hopewell, William Ruwe, Fred Smith, James Patton, and Bhushan Agharkar have separately opined that he is intellectually disabled.[4] Tellingly, the State's own expert at Smith's *Atkins* trial, Dr. John Call, scored Smith with a full-scale IQ of 55, also placing

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[3] The determination at Smith's *Atkins* trial that he is not intellectually disabled is infected by a number of constitutional violations, including a flawed understanding and application of these core definitional concepts and the use of flawed jury instructions, later revised. See Ground Two (delineating a variety of deficiencies in Smith's *Atkins* proceedings).

[4] Drs. Hall, Hopewell, Ruwe, and Smith actually concluded Smith is mentally retarded; however, in *Hall,* 134 S. Ct. at 1990, the Supreme Court adopted the term "intellectual disability" in place of the term "mental retardation." Accordingly, this petition uses the term "intellectual disability" and related terms in place of "mental retardation" unless quoting specific language.

Smith in the intellectually disabled range. MR2 VI 38. In fact, when asked whether he could say that Smith is not intellectually disabled, Call responded "[n]o." *Id.* at 67. Any conclusion that Smith is not intellectually disabled is fundamentally at odds with the evidence and is scientifically untenable.

The Constitution's prohibition on execution of the intellectually disabled is not observed by the execution of a man whom numerous experts collectively find is intellectually disabled, particularly when the State's own expert is unable to find otherwise. *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (finding procedures that permitted trial of individual more likely than not incompetent deeply offensive to fundamental principles). Here, the evidence Smith is intellectually disabled is compelling. This Court should enforce *Atkins* and *Hall* by prohibiting the State of Oklahoma from executing Roderick Smith.

A. The Overwhelming Evidence Demonstrates Smith Is Intellectually Disabled.

1. Smith Suffers from Significant Limitations in His Intellectual Functioning.

The valid IQ test scores attributed to Smith throughout his life fall squarely within the intellectually disabled range. Evidence of a brain injury resulting from a hypoxic event when Smith was a child, reports from doctors, and testimony from teachers and relatives of Smith amplify and illustrate the dimension of his low IQ scores.

a. Smith's IQ scores Fall Squarely Within the Intellectually Disabled Range on Standardized Intelligence Quotient Tests Administered by Licensed Professionals.

The operational definition of the first criteria for intellectual disability—significant limitations in intellectual functioning—is defined as follows:

> [A]n IQ score that 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.

AAIDD, *supra*, at 27. "[A] test taker who performs two or more standard deviations from the mean will score approximately 30 points below the mean on an IQ test, *i.e.*, a score of approximately 70 points." *Hall*, 134 S.Ct. at 1994 (internal quotations omitted). One should keep in mind, however, that "IQ scores represent a range, not a fixed number." *Id.* at 1999. Further, only a limited number of IQ tests available provide an appropriate assessment of the general factor of intelligence, as well as multiple broad ability domains. Edward A. Polloway, *The Death Penalty and Intellectual Disability* 128 (2015). Often described as the "gold standard" for IQ assessment, RTr. VII 33-34, the Wechsler Adult Intelligence Scale (WAIS) is one of the most widely used instruments. Polloway, *supra*, at 130.

The various valid IQ tests administered to Smith over the years have resulted in remarkably consistent scores. Tests administered by defense experts, the State's expert at Smith's *Atkins* trial, and a Department of Corrections psychologist have pro-

duced IQ scores that fall well within the intellectually disabled range, even without application of the standard error of measurement[5] or the Flynn Effect.[6] So consistent were the results on four different IQ tests, including the WAIS-III and the WAIS-IV, they "would be virtually impossible" to "fake." RTr. VII 45.

1997 WAIS-R Testing

Dr. Fred Smith, a psychologist with the Oklahoma Department of Corrections, administered the WAIS-R to Mr. Smith in 1997. MR2 III 160. Mr. Smith scored a 64 on the verbal component and a 70 on the performance component, resulting in a full-scale IQ score of 65. *Id.* at 161. Although this score clearly falls within the intellectually disabled range without consideration of the Flynn Effect, it is nonetheless inflated. At the time Dr. Smith gave the WAIS-R to Mr. Smith, the WAIS-III was available, making the WAIS-R outdated. RTr. VII 37. When adjusted for the Flynn Effect, *see* note 6 *supra*, the results from the 1997 WAIS-R testing more accurately reflect a full-scale IQ score of 62, representing a range of 57-67 with the application of the SEM. RTr. VII 38; *see*

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[5] The standard error of measurement (SEM) is a measurement to provide confidence that the test-taker's true intellectual ability falls within a range of IQ scores (typically +/-5 points for a 95% confidence level). AAIDD, *supra*, at 36.

[6] The Flynn Effect is a statistical phenomena by which IQ scores are inflated as a function of the length of time between when the test was normed and when it is administered. Succinctly stated, old tests overstate IQ scores on average of about three points per decade. James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Pub. Pol'y & L., No 2, 170, 170 (2006).

note 5 *supra*. Dr. Smith concluded that Mr. Smith's results on the WAIS-R test "indicates mental retardation." MR2 III 161.

September 2003 WAIS-III Testing

Forensic psychologist and the State's expert at Smith's *Atkins* trial, Dr. John Call, administered the WAIS-III to Smith in September of 2003. Smith received a 57 on the verbal component and a 62 on the performance component, resulting in a full-scale score of 55. MR2 VI 38. Based on the results of this WAIS-III, Smith's IQ range is between 52-60 at a 95% confidence level. *Id.* at 60.

Dr. Call said he could not come to a conclusion as to whether Smith is intellectually disabled. Dr. Call's inability or unwillingness to make a determination as to whether Smith is intellectually disabled is unsurprising when one considers his experience and expertise: The majority of Call's practice is forensic in nature rather than clinical. MR2 VI 40. Of the few clinical clients Call has, none are intellectually disabled. *Id.* at 41. He has received no national awards in the area of intellectual disability, nor has he published any peer-reviewed articles on the subject. *Id.* He is the president of Crisis Management Consultants, a business that "deal[s] in violence issues," whose clients include the Oklahoma City Police Department, the City of Midwest City, and the Oklahoma District Attorneys' Council. *Id.* at 6, 41-43. And, he is also the director of Litigation Research Service, a business that puts together focus groups for civil cases. *Id.* at 43. Although Dr. Call is a jack-of-all-trades psychologist, of the many hats he wears, none are primarily

focused on the evaluation and assessment of the intellectually disabled.[7]

December 2003 WAIS-III Testing

Dr. Clifford Alan Hopewell, a clinical neuropsychologist, administered the WAIS-III in December of 2003 to Smith. *See* Att. 4, 1/31/03 Report of Hopewell found as App. 2 of Successor Application for Post Conviction Relief in a Death Penalty Case, PCD-2002-973. Having received specialized training in intellectual disability screening by both the military and a large independent school district, Dr. Hopewell is uniquely qualified to evaluate individuals suspected of suffering from intellectual disability.[8] MR2 II 37-39. On the test administered by Dr. Hopewell, Smith scored a 55 on the verbal component and a 64 on the performance component; he received a full-scale IQ score of 55, a score worse than 99% of potential test-takers. *Id.* at 56, 138. According to Dr. Hopewell, based on the September 2003 WAIS-III results, Smith's IQ range is estimated between 52 and 60 at a 95% confidence level. *See* Att. 4 at 4. Dr. Hopewell opined

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[7] In the directory for the American Academy of Forensic Psychology, Dr. Call lists his expertise in the following areas: dangerousness, risk assessment, child custody, and litigation strategy. MR2 VI 46-47. Not included in his areas of expertise is intellectual disability. Dr. James Patton, an internationally-renowned professional with over 34 years of experience with the intellectually disabled population, emphasizes that expertise of skilled intellectual disability professionals is integral to implementing the protections of *Atkins.* Att. 3, Report of Dr. Patton at 2. Dr. Call clearly does not fit the bill.

[8] Unlike Dr. Call whose practice is almost exclusively forensic in nature, Dr. Hopewell regularly diagnoses and treats patients because the majority of his practice is clinical. MR2 II 31.

that Smith's full-scale score of 55 substantially limits Smith's ability to communicate, learn from experience, engage in logical reasoning, understand the reactions of others, and control his impulses. MR2 II 57.

2005 WAIS-III Testing

In September of 2005, forensic psychologist Dr. Terese Hall administered the WAIS-III to Smith. Att. 5, Report of Dr. Hall, Exhibit D of Fast Track Appeal in O-2006-683; O.R. VIII 1620. Once again, Smith tested at a full-scale IQ of 55, resulting in an estimated IQ range of 52 to 60. RTr. VII 34. On the verbal component Smith received a 56, and on the performance component he received a 63. Att. 5 at 8. After reviewing the raw data of Drs. Hopewell and Call, Dr. Hall was struck by the remarkable consistency in Smith's scores and found "it would be virtually impossible" to "fake." RTr. VII 45.

2010 WAIS-IV Testing

Mr. Smith was last tested in 2010 by Dr. William Ruwe, a clinical neuropsychologist, who was assisted by Angela Fuller, a psychometrist. RTr. VIII 38, 44; Att. 6, Report of Dr. Ruwe. Dr. Ruwe is the Director of Clinical Neuropsychology at the Veteran's Affairs Medical Center, and he maintains a private clinical practice. RTr. VIII 32, 34-35. Dr. Ruwe administered the WAIS-IV, which differs from the WAIS-III by adding new measures, making some of the previous measures optional, and reducing the amount of time it takes to complete. *Id.* at 43-44. Further, the WAIS-IV employs a different scoring framework. *Id.* at 44. On the WAIS-IV, Smith again received a full-scale IQ of 55, scoring 56 on the verbal component and 67

on the performance component. *Id.* at 46. Like the results of the three earlier WAIS-III tests, the results of this test indicate Smith's IQ range is from 52 to 60. Based on Smith's level of functioning, Dr. Ruwe concluded that Smith was "more inclined to act impulsively." *Id.* at 84.

Unreliable Results from Invalid Tests

At Smith's original jury trial in 1994, Dr. Murphy, now deceased, testified that Smith's full-scale IQ was 73. RTr. VII 99-100. The State of Oklahoma made much of the "results" of Dr. Phillip Murphy's 1994 "testing." However, the State ignored the fact that Murphy never identified what particular test he used, nor did the domain results Murphy reported at the original trial fit any known IQ test. There was also no raw data available to support his "results." Notably, a few years after Murphy testified at Smith's original trial he had licensing problems for falsifying data and applying scores from one test to another. *Id.* at 98. In short, "there was a lot of unethical stuff going on with" Dr. Murphy. *Id.*; *See* Att. 7 *State ex rel. State Bd. of Exam'rs of Psychologists v. Murphy*, Case No. ADML 99-0013, BC98-9 (finding Dr. Murphy violated his Code of Ethics, placing his license on probation for 3 years, and prohibiting Dr. Murphy from administering tests, interpreting tests, or writing reports during probationary period). Surely, the State's reliance on this score should be questioned.

The other reported IQ score to which the prosecution and the OCCA cling is even less reliable. Along with the WAIS-R, Dr. Fred Smith also administered the Raven's Progressive Matrices to Mr. Smith. MR2 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 on the Raven's. Of the two tests, the WAIS-R and the Raven's, the WAIS-R more accurately depicted Smith's true intellectual functioning because "[t]he Wechsler Scale is the premiere instrument." *Id.* Further, the Raven's is not recognized as one of the few tests that serve as an appropriate assessment of the general factor of intelligence, as well as multiple broad ability domains. Polloway, *supra*, at 129-30. Unlike the WAIS, which comprises 11 sub-tests, the Raven's "just measures one aspect of cognitive function." MR2 III 162. The unidimensional Raven's should "only have a role in circumstances in which language or other issues preclude a comprehensive assessment of intelligence." Polloway, *supra*, at 131. To characterize the Raven's as having only limited value in intellectual disability assessment would be generous to say the least.

b. Smith's Low IQ Scores on Standardized, Scientifically Recognized Tests Represent His Best Efforts.

With the exception of Dr. Call, all of the experts who administered IQ tests to Smith concluded that the test results were reliable and that Smith gave his best effort. Dr. Ruwe was "confident" the full-scale IQ score of 55 Smith received on the 2010 WAIS-IV was an accurate result. RTr. VIII 80-81. According to Dr. Ruwe, Smith's consistent performance on all of the WAIS tests would be "challenging" to achieve if Smith was "trying to perform at a particular level, especially when . . . using a new instrument." *Id.* at 81. Dr. Ruwe found it "very hard to imagine" that Smith could "actually consciously answer" questions in such a way as to cause "that test score to be spot

on." *Id.* at 82. Further evidence of Smith's giving his best effort on the 2010 WAIS-IV is that while taking the test, he asked for additional time so "he had given his best shot." *Id.* at 48. "[T]hat is uncommon [with] folks who are trying to malinger or feign." *Id.*

In coming to the conclusion that Smith's full-scale score of 55 on three separate WAIS-III tests would be "virtually impossible" to fake, RTr. VII 45, Dr. Hall relied on the complex scoring system of the test. *Id.* at 46. Specifically, Dr. Hall explained that Smith received slightly different raw scores on the sub-tests for each administration of the test; such variation in raw scores is normal. *Id.* at 45-46. Despite this slight variation in raw scores, after the scores were converted into the scaled scores, each WAIS-III resulted in a full-scale score of 55. Even though Dr. Hall has administered the WAIS-III "many[,] many times," she opined that she would be unable to purposely achieve such results were she given the exam three separate times. *Id.* at 46.

Dr. Hopewell also "never saw any indication that [Smith] was faking, either when [Smith] was working with [Hopewell] or in the other tests that [Smith] had done with other people." MR2 II 73. Dr. Hopewell's unique experience makes him especially astute at detecting malingering. Not only does he possess in-depth experience with the assessment of the intellectually disabled, MR2 II 37-38, but he also contracted with the State of Texas to assess benefit applicants, which involved "frequently finding people that would like to get benefits," so they exaggerated symptoms. *Id.* at 39. Dr. Hopewell also 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 that was a consideration." *Id.*

Although DOC psychologist Dr. Smith was initially skeptical that Mr. Smith's full-scale score of 65 on the outdated WAIS-R was based on Mr. Smith's best effort, MR2 III 167, since that time "certain pieces have fallen in place." *Id.* Specifically, Dr. Smith went back and took "a closer look," and he "was very much struck" by the consistency in the results of his WAIS-R testing and the results of other psychological tests, including the Standard Progressive Matrices and the Memory-for-Designs Test he administered to Mr. Smith. *Id.* at 167-68. The consistency amongst all the results "was quite remarkable and it shows a consistent pattern rather than faking." Dr. Smith's initial "gut feeling" was eventually replaced by a clinical determination that the 65 full-scale score was accurate based on "objective test results." *Id.* at 166.

Notwithstanding the opinions of Drs. Ruwe, Hall, Hopewell, and Smith, Dr. Call "doubted the validity and reliability" of the results from the WAIS-III he administered to Mr. Smith because he thought Mr. Smith was not putting forth his best effort. RTr. VI 173; MR2 VI 38-39. Reasons exist to question Dr. Call's opinion, especially in the face of such overwhelming evidence to the contrary. Particularly for those practitioners who have little or 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, *supra*, at 270.

Further, in the past Dr. Call has been quick to undermine reported IQ scores which place a criminal defendant in the intellectually disabled range based on an allegation of malingering.[9] He has supported such allegations with results obtained from "The Blackwell Memory Test," a made-up malingering test which he created and named after his secretary. *See Salazar v. State*, 126 P.3d 625, 629-31 (Okla. Crim. App. 2005) (modifying petitioner's death sentence to life without parole based on counsel's failure to investigate Dr. Call's use of a non-standardized malingering test when Call suggested defense expert was "unethical to administer tests" that have norms the petitioner did not fall within). Call appears to have administered this same, non-standardized, self-created malingering test during his evaluation of Smith; *See* Att. 8, October 8, 2003 letter from Dr. Call to Pattye High; O.R. V 921; Att. 9, Raw Data from Dr. Call's evaluation of Roderick. This alone makes Dr. Call's opinion dubious at best.

What is more, Dr. Call's opinion that Smith was not putting forth his best effort was based in part on Smith's results on the Test of Memory Malingering (TOMM), a test with a standardization sampling representation which did not include people with intellectual disability. Polloway, *supra*, at 271. A review of this test has indicated that its reliability and validity are

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[9] 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" for the prosecution. *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 Smith's case. *Id.* at 652 n.17.

highly suspect when it is administered to the intellectually disabled. Karen L. Salekin & Bridget M. Doane, *Malingering Intellectual Disability: The Value of Available Measures and Methods*, 16 Applied Neuropsychology 105, 111 (2009). The research in the assessment of malingered intellectual disability indicates that "effort tests and indices of cognitive malingering are not working with this population, and that true cases can be misidentified as malingered." *Id.* at 111. Such is the case with Dr. Call's opinion that Smith malingered so as to perform poorly on IQ tests.

c. Smith's Placement in Special Education Classes for the Educable Mentally Handicapped Shows He Suffers from Significant Limitations in His Intellectual Functioning.

At no fault of Mr. Smith, all of his school records have been destroyed other than a copy of his highschool transcript.[10] MR2 III 19; MR2 Def. Ex. 3. Nonetheless, no doubt exists that Smith spent the majority, if not all, of his schooling in special education classes for the educable mentally handicapped (EMH).[11] Although Smith does not have the benefit of school

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[10] Oklahoma City Public Schools are required by law to maintain student records for six years from the last point of activity. MR2 III 8. After the six-year period, the district has a policy of destroying such records if they have not been picked up. *Id.* at 8-9.

[11] Dr. Call's allegation of malingering is further undermined by Smith's early placement in EMH classes because Smith would have had to begin malingering in childhood, before any incentive to avoid the death penalty occurred. *See also Lambert*, 126 P.3d at 651 n.14.

records, which would surely include results from IQ testing and individualized education plans (IEPs), the next-best sources of information still remain: the testimony of the special education teachers who taught him in high school and photographs of Smith in special education classes when he was in early elementary school. Smith's deficits left such an impression on his special education teachers, they were able to recall their experiences with Smith in detail nearly 20 years later.

Smith was in special education classes during the 1975-76 and 1976-77 school years when he was eight and nine years old. MR2 Def. Ex. 1 & 2. Jesse Thompson, the principal at Willard Elementary during those years, would often pose for photos with individual classes. MR2 II 202. One such photo includes Smith as a student in the 1975-1976 class of Mr. Anderson. MR2 Def. Ex. 2. Another shows Smith was a student in the 1976-77 class of Mrs. White. MR2 Def. Ex. 1. Mr. Thompson identified both teachers as special education teachers for "mentally handicapped children" with "limited abilities."[12] MR2 II 203. 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 To have maintained placement in special education in the

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12 The 1975-76 academic year was Mr. Thompson's first year at Willard Elementary. He does not know when Smith was first placed in special education classes because "[h]e was already placed" before Thompson's arrival. MR2 II 204. According to Eva Cates, Smith's mother, he was placed in special education classes "from the time he started regular school." MR2 IV 8.

1970s and 1980s, students were required to be given IQ tests every three years. RTr. V 216.

Both Paul Preston and Mona Autry recall having Smith in their EMH classes 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. MR2 III 95. Each student in these classes had an IEP which addressed the individual's special needs. *Id.* at 96. And, students in EMH classes were not assigned grades based on their comparative performance. MR2 II 97. Instead, as long as students tried to the best of their ability, they typically made A's and B's. MR2 III 28.

Ms. Autry served as Smith's EMH teacher during his 9th-11th grades, and she taught a variety of classes including math skills, communication skills, and social studies skills.[13] *Id.* at 94-95. During the three years Smith was in Ms. Autry's classes, she spent several hours a day with him. *Id.* at 95. Ms. Autry recalls that despite his best efforts, Smith functioned at about the third-grade level in math and reading. *Id.* at 99-100. Ms. Autry has absolutely no doubt that Smith was properly placed in her EMH classes, and of the many students she taught, she considers Smith "one of the lower" functioning students. *Id.* at 104. She describes Smith's ability to learn as

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[13] Smith's high school transcript shows all of his substantive classes bear the "skills" designation and he was enrolled in "co-op training." MR2 Def. Ex. 3. In the 1980s, "skills" classes were special education classes. MR2 III 11. "Co-op training" classes taught basic job skills. *Id.*

"very limited," *id.* at 112, and Smith as having a "[v]ery limited knowledge base." *Id.* at 113.

Paul Preston, Smith's EMH teacher for science skills and co-op training during his 9th-12th grades, echos much of the same sentiment about his experience with Smith. As part of co-op training, Mr. Preston taught Smith janitorial skills. *Id.* at 30-31. He recognized Smith's reading and writing skills were extremely limited; as a result, he filled out job applications for Smith. *Id.* at 30-34. Mr. Preston recalls Smith was "very low, very limited in his abilities." *Id.* at 28. He estimates that of all the EMH students he taught during his 27-year career, Smith fell in the "low-medium" range. *Id.* at 29. Although some students in EMH classes were occasionally mainstreamed into regular substantive classes, Mr. Preston would never have suggested Smith be mainstreamed because "[h]e does not have the ability . . . [it] wouldn't [have been] fair to him." *Id.* at 35.

d. A Hypoxic Brain Injury Exacerbated Smith's Already-Existing Low Intellectual Functioning.

Smith's already-compromised brain was further damaged when he was twelve years old and suffered a near-drowning after slipping off a rock and falling into water. Att. 10, Medical Records from Johnston Memorial Hospital. After he was pulled from the water, he was "unconscious and apneic." *Id.* at 5. At the emergency room at Johnston Memorial Hospital in Tishomingo, he presented "with dyspnea, tachycardia, and hypothermia." *Id.* Hypoxic injuries, like Smith's near-drowning, result in a reduction in the blood and oxygen supplies to the brain. RTr. VIII 66.

Specific areas of the brain "are particularly sensitive to that type of insult." *Id.* The temporal lobes and hippocampus, which are the areas involved in learning and memory, are "very sensitive to having appropriate levels of oxygenation." *Id.*

In addition to Smith having been "developmentally disabled probably from birth," there exists "no doubt" he has brain damage, likely in part, from his hypoxic injury. MR2 II 105. Smith has impairments which suggest "large areas of the brain are probably not functioning the way they should." RTr. VIII 67. A 1994 SPECT scan[14] of Smith's brain showed decreased uptake in the bilateral temporal lobe areas, confirming those parts of the brain do not function properly. *Id.* at 68. The results of the SPECT scan showed "abnormalities which were consistent with . . . the drowning episode." MR2 II 76.

Further confirming brain damage to Smith's temporal lobes and hippocampus, Dr. Hopewell found "[f]ormal testing of memory indicated defective storage of new information, to include both visual and verbal material." *See* Att. 12 at 5, 11/20/1998 Report of Dr. Hopewell-originally filed as Appendix 9 in PCD-1997-982. Smith's "learning and storage of new information was so poor as to result in a very poor memory profile, with memory functioning below the tenth percentile." *Id.* Dr. Hopewell had "no doubt" Smith suffers from documented and measurable brain dysfunction. *Id.* at 1. Such dysfunction is "without a doubt" likely to affect Smith's "memory, information proc-

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[14] A SPECT (single-photon emission computed tomography) scan is a type of imaging that looks at metabolic activity and functioning. RTr. VIII 67-68.

essing, and emotional behaviors and actions, especially under periods of stress." *Id.*

In addition to the SPECT results and the results of Dr. Hopewell's testing, Dr. Smith found Mr. Smith suffered from diffuse brain damage which is consistent with a near-drowning. MR2 III 161. 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. MR2 II 77. Dr. Ruwe shared Dr. Smith's opinion, finding that the "hypoxic insult caused additional neural damage, further exacerbating [Smith's] cognitive dysfunction." Att. 6 at 3. Medical tests and experts confirmed what Mr. Smith's mother knew all along: Smith's being "slow" was not "caused [solely] from a drowning. It got worser [sic] after he almost got drowned." MR2 IV 17.

2. Smith Suffers from Significant Limitations in His Adaptive Behavior.

While intelligence, as measured by IQ, has predominated as the primary criterion for diagnosing intellectual disability, sub-average intellectual functioning must coexist with related limitations in two or more areas of adaptive behavior.[15] *Atkins*, 536 U.S. at 309 n.3. Adaptive behavior is defined as the "collection of conceptual, social, and practical skills that have been learned and are performed by people

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15 Oklahoma currently requires a showing of "significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills." Okla. Stat. tit. 21, § 701.10b(A)(2).

in their everyday lives."[16] AAIDD, *supra*, at 43. Crucial is the fundamental precept that adaptive behavior must be evaluated on a deficit model: Intellectually disabled individuals, like all individuals, have strengths, and these strengths do not negate their disability. *Id.* at 45. Further, intellectually disabled people may also appear to have strengths they do not in fact have because they often hide their deficits in a cloak of competence. Polloway, *supra*, at 265.

An appropriate clinical assessment of adaptive behaviors includes consideration of many sources. For example, Dr. Hall conducted a full adaptive functioning evaluation which included administering The Adaptive Behavior Assessment System II (ABAS-II) to Smith; interviewing collateral sources; reading the testimony of Smith's family, teachers, cell mates, and former lawyers; and reviewing information about Smith's placement in special education and his job as a janitor. RTr. VII 53. Drs. Hopewell and Hall both came to the same conclusion: Smith has serious deficits in several areas of adaptive behavior.

Although Dr. Call was quick to criticize the methods used by Dr. Hopewell to assess Smith's adaptive behavior, MR2 VI 23, 34, Dr. Call never administered any adaptive behavior testing of his own. *Id.* at 45-46.[17] Despite fully knowing that adaptive behavior

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[16] The "two-out-of-ten-categories" approach has been removed from the latest AAIDD definition.

[17] Dr. Hopewell administered The Vineland Test to Smith to evaluate his adaptive behavior. He acknowledged that The Vineland is usually administered by questioning a caretaker rather than the individual suspected of being intellectually disabled. MR2 II 60. Dr. Hopewell opted to give the test to Mr. Smith because "there weren't any caretakers really available

is extremely difficult to measure in prison because of the highly structured environment, MR2 VI 48, Dr. Call relied on "general information" he obtained from an unnamed DOC psychologist and an unnamed DOC guard which led Call to believe Smith did not have any deficiencies in any particular areas. *Id.* at 31-32. Dr. Call's opinion stands in stark contrast to the evidence of Smith's significant limitations in several areas of adaptive behavior.

a. Smith Suffers from Impoverished Communication Skills.

This area of adaptive behavior includes the ability to comprehend and express information through speech or writing, as well as through facial expressions and gestures. Att. 5 at 9. Although Smith is able to carry on conversation about basic information, Dr. Hopewell found he suffers from "impoverished communication."[18] MR2 II 62. Noting that many people in Smith's past describe him as a "loner" or "non-communicative," Dr. Hopewell found what these people are really describing is simply "abulia," a technical term that means the inability to be spontaneous and produce ideas. *Id.* at 63. "Most of the time," according to Dr. Hopewell, Smith "simply can't come up with much of anything." *Id.* Finding that Smith has "[e]xtremely poor verbal skills" and "low abilities . . . in terms of language development," Dr. Hopewell concluded Smith's func-

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. . . in the prison setting." *Id.* at 61. Adequate functioning is expected of incarcerated individuals with intellectual disability because of the structured environment. *Polloway*, supra, at 202.

[18] Although Dr. Ruwe did not assess Smith's adaptive behavior, he did note that Smith suffered from a "poverty of speech." RTr. VIII 60.

tional communication skills are at approximately the same level as an almost five-year-old child. *See* Att. 4 at 7.

Mirroring Dr. Hopewell's findings, Dr. Hall determined Smith has "significant deficits in the communication domain." Att. 5 at 9. Dr. Hall noted the following:

> He's very simple. He is very concrete. You have to use very simple words. His ability to express what he thinks is very limited, very simple. He just doesn't have the mental processes. So communication is very poor.

RTr. VII 55. On the communication section of the ABAS-II Smith scored more than two standard deviations below the mean and at the 1st percentile. Att. 5 at 9.

Anecdotal evidence supports the findings of Drs. Hall and Hopewell. Inmates who have celled with or near Smith have noticed his limited communication skills. An inmate who once shared an inmate pod with Smith at the Oklahoma County Jail recalled that he assisted Smith by reading and writing Smith's correspondence. CTr. II 87. When writing letters for Smith, the inmate felt the need to add his own comments to the content because Smith's thoughts were so basic:

> I would always add a few things [to Smith's letters], . . . because . . . a letter don't [sic] consist of just telling someone, tell them I love them, tell them to send me this and a picture, so I would have to send some filler in the letter just to make it a letter. . . .

Id. at 88. Another inmate observed that Smith "kept to himself" and was "a very quiet man. You know, really unless you ask him questions he really don't [sic] talk." CTr. IV 33. And, Norman Cleary, an inmate with whom Smith celled at Oklahoma State Penitentiary for several years, noted "you can't really hold a conversation with [Smith]." MR2 Def. Ex. 8 at 9.

So too have correctional professionals observed Smith's limited ability to communicate. Jeremy Rodolph, an Oklahoma County Jail Detention Officer, described Smith's interaction with other guards and inmates to be "childlike." CTr. IV 27. Describing Smith's inability to engage in spontaneous conversation, another jail employee commented that Smith "never really speaks, unless I speak to him." *Id.* at 59. Instead, Smith "is usually quiet. He smiles a lot." *Id.* Further, in 1998, long before any incentive to feign intellectual disability existed, Dr. Wakeford, a psychologist with Oklahoma State Penitentiary, noted that Smith wanted a single cell, but he "doesn't know how to ask." He also commented that Smith is "probably M.R. [mentally retarded]." Att. 11, DOC records 8/13/1998.

Family members confirm that Smith often kept to himself and had a hard time understanding and engaging in communication. Family members describe their conversations with Smith as repetitive, RTr. V 84; RTr. Vol. VI 117, lacking depth, RTr. Vol. V 85, and typically not initiated by Smith. RTr. VI 117. In a recollection that poignantly illustrates the extent of Smith's limited ability to understand communication, his mother recalled when Smith was in early elementary school, he would at times walk home in the middle of the school day. When Ms. Cates walked

Smith back to school and asked his teacher why he was leaving the school grounds, she discovered the teachers told him he could go outside to play. Smith "took it as being" told to go home. MR2 IV 8.

b. Smith Possesses the Functional Academics of a Child in Kindergarten to First Grade.

Functional academics involve the ability to understand what is learned and to apply the lessons to everyday living. RTr. VII 55. Testing and collateral sources confirm that Mr. Smith's academic functioning is "quite defective." MR2 II 66. As previously discussed, Smith spent most, if not the entirety, of his academic career in special education classes for the educable mentally handicapped. And, by all accounts, Smith is functionally illiterate.[19] RTr. VII 54; Att. 6 at 10; MR2 II 67; MR2 III 34; *Id.* at 48; *Id.* at 70; *Id.* at 109. These pieces are just part of the picture portraying a man whose academic functioning is "in terms of grade level, Kindergarten or first grade." MR2 II 66.

Formal adaptive behavior assessments show that Smith suffers from significant deficits in this domain. During Dr. Hopewell's assessment of Smith's functional academics, Dr. Hopewell administered the Wide Range Achievement Test II (WRAT-III) in addition to The Vineland. *See* Att. 4 at 1. The WRAT-III is a basic test measuring one's ability in reading, writing, and arithmetic. MR2 II 65. On the reading and spelling

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[19] Functional illiteracy is the inability to read or write well enough to accomplish everyday tasks; it differs from pure illiteracy, which is the inability to read or write at all.

components of the WRAT-III, Mr. Smith scored at the kindergarten level, and on the arithmetic component, he scored at the first-grade level.[20] *See* Att. 4 at 2. Smith's results on Dr. Hall's measure of functional academics are similar. On the ABAS-II, Smith scored three standard deviations below the mean in this domain. Att. 5 at 11. Noting that Smith "was never able to progress sufficiently in school to read or write to any extent" and that Smith "does not have sufficient math skills to handle bill paying, purchases, or budgeting," Dr. Hall concluded that Smith has "clear and substantial deficits in this domain." *Id.*

Smith's special education teachers highlight his limited ability to learn information and apply such information in a practical way. Mr. Preston, one of Smith's EMH teachers, recalled that Smith's reading skills were so poor, Mr. Preston had to help him fill out job applications for such basic jobs as a sacker in a grocery store. MR2 III 32, 34. Ms. Autry, another one of Smith's EMH teachers, prioritized teaching her students basic "survival skills" so that her students could "be functional in society." *Id.* at 97. Such survival skills included rudimentary budgeting, basic reading skills to facilitate finding a job, and using money in the marketplace. *Id.* at 97-99; RTr. V 104. Despite her emphasis on reading, she never asked

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[20] Although neither Dr. Ruwe nor Dr. Call assessed Smith's adaptive behavior, they both administered versions of the WRAT to him. Dr. Call gave Smith the WRAT-III, and Smith performed at the preschool level on reading and spelling, and he performed at the kindergarten level on arithmetic. RTr. VI 152. On Dr. Ruwe's administration of the WRAT-IV, Smith performed at the kindergarten level on reading, spelling, and sentence comprehension, and he performed almost to the second-grade level on math computation. RTr. VIII 57-58.

Smith to read aloud in class because "you don't embarrass students or humiliate them. . . . His capabilities just weren't there." RTr. V 105. Not only did Mr. Smith lack the capabilities for basic reading, he could not construct sentences very well. *Id.* at 106. Nor could Smith apply math skills beyond very basic addition and matching. *Id.* According to Ms. Autry, Smith's inability to learn such basic concepts was not due to lack of effort on his part:

> [A]s a Special Ed teacher, you just hope and pray that one day the light bulb comes on. You practice, and you practice, and you practice and sometimes students will catch it and it's there for a while and sometimes they don't. But you've got to continue that repetition. . . . [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.

Id. at 107.

Family members also detail Smith's limitations in his functional academic abilities. Several family members recognize that Smith cannot read. MR2 III 70; RTr. VI 96; *Id.* at 118. Despite his inability to read, Smith would "act like he was reading" the newspaper. *Id.* at 117. When a family member asked him "what's going on in the paper," Smith "would talk about something totally different that wasn't in the paper." *Id.* Bonita Jackson, Smith's older cousin who grew up with him, saw first-hand Smith's inability to apply basic, functional math in everyday life. She recalls that when Smith was in high school he was unable to count money for purchases and he would walk away before clerks were able to give him his

change.[21] *Id.* at 97. Ms. Jackson also remembers that when she and Smith were around 20 years old, she went into labor at home with Smith present. Tasked with timing Ms. Jackson's contractions, Smith was unable to use a stopwatch to accurately report the rate at which her contractions came. *Id.* at 97-98.

Later in life, Smith's functional academics did not improve. He is and has been totally dependent on cell mates for reading and writing correspondence and filling out commissary slips. RTr. V 21; *Id.* at 59. Recognizing Smith's inability to read, Mr. Cleary tried to teach Smith to read by using the *Hooked on Phonics* series. MR2 Def. Ex. 8 at 8. After spending several hours a day for six months, Cleary eventually abandoned the project because "it was absolutely hopeless." *Id.* at 9. Illustrating Smith's deficits in functional arithmetic, Cleary also recalled that "[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. Smith's deficits in functional academics make him particularly vulnerable:

> [he] 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

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[21] Further confirming Smith's inability to count change, Eugene Wallace, a barber, recalls Smith "never paid attention to how much money he got back," and "didn't know how to count money." Att. 25 at ¶6.

> of chips. People used to really take advantage of [him] like that.

Id. at 18.

c. Smith Has Significant Deficits Both in Home Living and in Health and Safety, Placing Him More than Two Standard Deviations Below the Mean in These Domains.

The home living domain refers to skills related to functioning in the home, including clothing care, housekeeping, property maintenance, food preparation, planning and budgeting for shopping, home safety, and daily scheduling. Att. 5 at 9. The health and safety domain relates to the maintenance of one's health and basic safety considerations. *Id.* at 11. Because some skills have relevance to both domains, the two domains will be considered together here.

Drs. Hopewell and Hall concluded that Smith has significant deficits in these areas. The Vineland Test, administered by Dr. Hopewell, measured what was at that time known as "daily living," which included such skills as cooking and house maintenance. MR2 II 58. For the daily living portion of The Vineland, Dr. Hopewell estimated that Smith functioned at the level of an almost six-year-old child. *See* Att. 4 at 7. Dr. Hall's subsequent and more complete adaptive behavior assessment had similar results. On Dr. Hall's administration of the ABAS-II, Smith scored more than two standard deviations below the mean in the home living domain; in the domain of health and safety, he scored three standard deviations below the mean. Att. 5 at 9-10.

Dr. Hall relied on much of the following information to support her findings: Smith has never lived independently and without support. MR2 IV 28-29. According to several family members, Smith's mother took careful care of him, even into his adulthood. When Smith was in his early twenties, Ms. Cates "would do everything for him like iron his clothes, run his bath water. After she cooked she would fix his plate and put it in front of him." RTr. VI 119. Ms. Cates did not treat her other two sons this way, despite their being younger than Smith. *Id.* Smith was not required to do chores around the house while growing up. RTr. V 79; RTr. VI 99. Fearing injury to Smith, Ms. Cates did not teach him to cook. MR2 IV 9. And, "tasks such as property maintenance and budgeting clearly exceed his abilities." Att. 5 at 10.

Unable to rely on the support of his mother, Smith has relied on the support of other inmates since his incarceration. As detailed above, Smith's cell mates help him with correspondence and anything else that requires reading or writing. Smith has also required the assistance of inmates in using the telephone system at Oklahoma County Jail. RTr. V 63-64. Demonstrating Smith's deficits in health and safety, Mr. Cleary recalled that more than once he discovered Smith "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." MR2 Def. Ex. 8 at 17. Cleary would often "do first aid on [Smith's] toes and put Band-Aids on him and stuff." *Id.* at 18.

d. Smith Has Significant Limitations in the Social Domain.

Social skill limitations and intellectual disability have always been closely intertwined because social skills have a cognitive foundation. Leffert, J.S., Siperstein, G.N., & Widaman, K.F., *Social Perception in Children with Intellectual Disabilities: The Interpretation of Benign and Hostile Intentions*, 54 Intell. Disability Res. 168, 169 (2010). Skills related to this domain include social exchanges with others, displaying appropriate social behavior, and conforming conduct with laws. Att. 5 at 10. As with the four domains discussed above, Mr. Smith has significant deficits in this domain.

Smith's deficits in this domain are confirmed by formal adaptive behavior assessments. Dr. Hopewell found that Smith operates in the lower 2% of the population in this domain; he estimated Smith's skills in this domain are equivalent to an almost six-year-old child. *See* Att. 4 at 7. Although Dr. Hall estimated somewhat higher functioning than did Dr. Hopewell in this domain, she still found that Smith fell two standard deviations below the mean. Att. 5 at 10. Specifically, Dr. Hall recognized the complexity involved with assessing Smith's adaptive social skills:

> Information about his abilities in this area is mixed . . . but it appears that Mr. Smith has significant deficits in the Social domain. He has always been able to form and maintain relationships, but it appears that most of those relationships have been with family and have involved someone taking care of him in one way or another. He does have fairly good social skills at a superficial level,

> in that he is able to respond appropriately and pleasantly to typical conversation. Ironically, this ability may mask his deficits to the casual observer.

Id.

The people who knew Smith best are consistent in their description of Smith's social behavior. Cousins with whom Smith was raised describe him in the following ways: "a "loner-type person, always to himself," MR2 III 70; "quiet, distant. Kind of a loaner [sic]," RTr. VI 95; "[h]e didn't have many friends," CTr. III 201; and "I just don't think he was very . . . sociable." *Id.* at 202. Smith's cousin, Shawn Gallahar, recognized Smith's limited coping skills; he recalled that when Smith was 17 or 18 years old, if Smith "g[o]t frustrated, the way he actually would handle it was kind of—it struck kind of odd to me. He would actually go into a closet. . . . Just sit in the closet." RTr. VI 211. Despite being six years younger than Smith, Mr. Gallahar knew this response was not normal for an older teenager. *Id.* at 211-12. So too did Smith's mother recognize that he did not respond to frustration in age-appropriate ways. Ms. Cates describes 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." MR2 IV 7.

3. Smith's Intellectual Disability Manifested Itself Prior to the Age of 18.

The most valid approach to establishing whether intellectual disability manifested during the developmental period is to see if there is evidence of what

has been termed a "continuity of concern." Greenspan, S., *Homicide Defendants with Intellectual Disabilities: Issues in the Diagnosis in Capital Cases*, 19 Exceptionality, 219, 230 (2011). This term means that various people, both professionals and non-professionals, described the defendant from an early age as "slow" or as needing help in mastering various life tasks that individuals of the same age and cultural background are expected to master without assistance. *Id.* The key is not whether the person was formally diagnosed as having intellectual disability before turning 18, but rather, whether there were signs that the post-18 impairment did not suddenly emerge.[22] *Id.*

Undoubtedly, Smith's placement in EMH classes when he was in early elementary school proves that Smith's impairments did not suddenly emerge after he turned 18. Teacher recommendation and IQ testing

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[22] Oklahoma has adopted a continuity-of-concern approach. As the OCCA determined in *Murphy v. State*, 54 P.3d 556, 568 n.19 (Okla. Crim. App. 2006), *overruled in part by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006), "[m]anifestation before the age of eighteen is . . . intended to establish that the first signs of mental retardation were recognized before the defendant turned eighteen. Lay opinion and poor school records may be considered. Thus, a defendant need not, necessarily, introduce an intelligence quotient test administered before the age of eighteen or medical opinion given before the age of eighteen in order to prove his or her mental retardation manifested before the age of eighteen." This approach was later codified in Okla. Stat. tit. 21, § 701.10b(B). Despite the clear language in *Murphy*, the instructions given at Mr. Smith's *Atkins* proceedings required the heightened burden that a defendant's "mental retardation" be "present and known before the Defendant was eighteen (18) years of age." O.R. VI 1138. (emphasis added). *See Ground Two*, *infra* at 67-74 addressing this error.

were required for placement, and Smith clearly met the standards for placement year after year.

In addition to the professionals who recognized Smith had intellectual deficits long before his turning 18, his mother knew Smith was "very, very slow," even when he was a baby. MR2 IV 6. Ms. Cates recalls:

> [H]e wasn't like an ordinary one-year-old child. He wasn't fast. It took me longer to potty train him. And he wasn't really active. He wasn't—would be to himself all the time and—you know, he just acted like he wouldn't understand what I would be saying to him, you know . . . [H]e was almost three years old [when he learned to walk] . . . He didn't actually begin to talk until he was maybe four or five. And sometimes I couldn't understand what he was saying at four or five. Because he would constantly whine if you asked him something . . . [Neighborhood kids] would tease him, and you know and—you know, kids are cruel.

Id. at 6-7.

B. Dispelling the Myths Surrounding Intellectual Disability: the Intellectually Disabled Have Strengths That Co-Exist with Their Intellectual Deficits, and Having Strengths Does Not Negate or Contradict Their Disability.

When faced with such overwhelming evidence of Smith's intellectual disability, one may ask how he has not been given the protection to which he obviously is so entitled under *Atkins*. The answer is that mem-

bers of the public, including judges, jurors, and prosecutors, underestimate the abilities of individuals with intellectual disability. Intellectual disability occurs along a continuum, as does intellectual ability, and those who have mild intellectual disability are at the upper end of the continuum of intellectual limitations, displaying general intellectual functioning in the IQ range of 55-75. Att. 3 at 6. Like Smith, "most of these individuals are physically indistinguishable from the general population because no specific physical features are associated with intellectual disability at the higher IQs." *Id.* Yet, stereotypes held by the public are typically grounded in "an implicit behavioral and physical phenotype, which is more appropriate to moderate or severe ID [intellectual disability], where behavioral and physical characteristics are obvious and limitations are fairly global." Greenspan, *supra*, at 220.

The skills possessed by intellectually disabled individuals "vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job . . .) cannot be taken as disqualifying." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental and Physical Disability L. Rep. 11, 13 n.29 (2003). In fact, competence in certain day-to-day tasks is not at all inconsistent with a diagnosis of intellectual disability; to believe otherwise fundamentally misapprehends the nature of intellectual disability. Frank J. Floyd et al., *The Transition to Adulthood for Individuals with Intellectual Disability*, 37 Int'l Rev. of Research in Mental Retardation 31 (2009). *See also* S.A. Richardson, M. Katz, and H.

Koller, *Patterns and Leisure Activities of Young Adults with Mental Retardation*, 98 Am. J. Mental Retardation 431, 431-32 (1993) (noting that individuals with mild intellectual disability "are members of families, have friends, work, marry, and have children.").

Individuals suffering from mild intellectual disability, like Smith, can and do "develop enough superficial social skills that in just a superficial conversation you would never have a clue [they were intellectually disabled]." RTr. VII 60. Not only can the intellectually disabled marry and raise a family, but they can also lie and cheat on their spouses. *Id.* And, one certainly cannot determine whether an individual suffers from intellectual disability solely by looking at or occasionally speaking to that person. *Id.*

C. The OCCA Acted Unreasonably by Finding the Record in Smith's *Atkins* Proceeding Supported the Jury's Verdict That Smith Is Not Mentally Retarded.

In Smith's case, the OCCA concluded the record supported the verdict finding Smith "not mentally retarded." Att. 1. In coming to this conclusion, the OCCA disregarded the clinical diagnostic practices and definitions of professionals in the field of intellectual disability by substituting its own I-know-it-when-I-see-it approach. The OCCA's failure to adhere to clinical diagnostic practices is clearly an unreasonable application of and contrary to *Atkins.*

In *Atkins*, the Court left to "the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (*quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). "Appropriate" procedures, however, necessarily are tethered

to clinical definitions and practices, as demonstrated by the Court's reliance on and references to clinical definitions of mental retardation in the *Atkins* opinion. *Id.* at 309 n.3, 318. "The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S.Ct. at 1999.

In *Hall*, the Supreme Court effectively redoubled its commitment to ensuring the intellectually disabled are not unlawfully executed by emphasizing clinical definitions and diagnostic practices. As the Court in *Hall* recognized, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* would become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S.Ct. at 1999. One clear message from *Atkins* and *Hall* is that courts and legislatures should not act inconsistently with the consensus of professionals in the field of intellectual disability. *Id.* at 1993.

The Sixth Circuit has acknowledged the importance of accepted clinical practices and has granted habeas relief based on the state court's "failure to adhere to the clinical framework" required by *Atkins* and *Hall*. *Van Tran v. Colson*, 764 F.3d 594, 608, 621 (6th Cir. 2014). Specifically, the court held the state court of appeals was unreasonable in its determination that the petitioner was not intellectually disabled because it did not rely on clinical methods and definitions. *Id.* at 612. The court reasoned that "the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability." *Id.*

Here, the OCCA dispensed with diagnostic criteria and valid test results altogether when it concluded the following:

> 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.

Att. 1 at 10. The OCCA acted inconsistently with the consensus of professionals in the field of intellectual disability and unreasonably ignored the requirements of *Atkins*.

The OCCA's determination that Smith failed to meet even the first prong of the mental retardation definition is patently unreasonable. In coming to this conclusion, the OCCA's "overemphasis on certain perceived strengths, inferred from anecdotal evidence, is inconsistent with the expert testimony and accepted professional analyses." *Van Tran*, 764 F.3d at 609. Despite the fact that Smith's IQ results on three separate scientifically recognized tests[23] were remark-

[23] These three test results were confirmed by the subsequent testing of Drs. Hall and Ruwe.

ably consistent and well within the range of intellectual disability, the OCCA relied instead on its own uninformed beliefs about the mildly intellectually disabled. Sadly, the OCCA supported its decision with the type of stereotypes about the intellectually disabled discussed above.[24]

Nothing about Smith holding the job of janitor and eventually being promoted to head janitor contradicts the fact that he is intellectually disabled. MR2 II 105-07; *see also* Att. 3 at 11-12. Persons with intellectual disability are "very capable of getting and maintaining jobs," especially jobs which do not require complex activities.[25] *Id.* In fact, jobs in the cleaning industry are some of the most commonly held by the intellectually disabled population.[26] *Id.*

The supervisory duties attributed to Smith's position as a head janitor were truly illusory. In relying on his supervisory status, the OCCA unreasonably ignored the evidence of Smith's network of family support on the job. He got the job only because his aunt already worked for the company and assisted him in getting it. MR2 III 73. In addition to Smith's

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[24] The jurors who served at Smith's *Atkins* trial also engaged in the type of stereotyping discussed above. *See* Att. 13, Affidavit of Glenda Holliday, ¶5.

[25] Smith's assignments when he served as head custodian were simple and routine. They included the following: vacuuming, dusting, emptying trash, cleaning restrooms, stocking restrooms, mopping, cleaning chalkboards, shampooing carpets, changing light bulbs, and minor maintenance. *See* Att. 14, St. Ex. 147 from 1994 trial; MR2 III 73.

[26] This explains why janitorial training was offered as part of Smith's EMH classes in high school.

aunt, several other family members worked as janitors at the same school. *Id.* And, Smith relied on his aunt to do all the paperwork associated with his job. *Id.* at 73-74.

Although the OCCA pointed out that Smith was entrusted to use a pager and enable an alarm system as part of his responsibilities as a head janitor, Att. 1 at 9, such behavior is by no means beyond the capabilities of a mildly intellectually disabled individual. As Dr. Patton has observed through his contacts with hundreds of intellectually disabled individuals in the course of his decades-long career, many individuals with mild intellectual disability today use smart phones which are "more difficult to use than the pager Smith was provided." Att. 3 at 12; MR2 St. Ex. 68. The OCCA's unreasonable reliance on such information to endorse the verdict finding Smith not mentally retarded flies in the face of *Atkins*.

The OCCA's reliance on Smith's ability to communicate and understand is also scientifically unsustainable and contrary to *Atkins.* Att.1 at 11. The court focused on the testimony of witnesses who spent very little time with Smith to substantiate this finding. *Id.* at 8-10 (highlighting that Smith "was able to communicate" with a former case manager, and he was "very sociable" with an insurance agent who spent no more than an hour total with him). To rely on this evidence at the exclusion of the opinions of Dr. Hopewell, Smith's EMH teachers, and Smith's family is unreasonable. And, being mildly intellectual disabled in no way precludes an individual from being able to communicate; Results of The National

Longitudinal Transition Study-2[27] indicate that 43% of parents with intellectually disabled teenagers report their children conversed just as well as other children of the same age. Att. 3 at 13.

Even more indicative of the OCCA's unreasonable hostility to clinical definitions and diagnostic practices is the court's belief that Smith's alleged clean-up of the crime scene demonstrates his "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."[28] Att. 1 at 4. Smith's ability to clean the carpets and hide the victim's bodies in closets and under a bed inside his home in the heat of the summer in no way demonstrates "logical reasoning" relevant to the assessment of "whether he is mentally retarded." First, Smith had been a janitor for several years, and he clearly possessed the skill set to clean up. And even more importantly, attempting to avoid getting into trouble "is very much consistent with the behavior of individuals with [intellectual disability]." Att. 3 at 14. The reasoning involved with shampooing carpets and hiding bodies does "not

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[27] This is a comprehensive study commissioned by the United States Department of Education to evaluate the experiences of young people as they transition into adulthood. *See* http://www.nlts2.org/faq.html#whatisit (last visited 5/14/15).

[28] Somewhat related to the OCCA's focus on Smith's ability to clean up a crime scene as evidence of logical thinking, is the court's focus on Smith's ability to have an affair. Relying on such evidence is not only unreasonable, but it directly contradicts the State's expert, Dr. Call. MR2 VI 62. Even Dr. Call acknowledged that intellectually disabled individuals are capable of lying. *Id.*

reflect a well-thought out plan to avoid anyone finding the victims." *Id.*; *see also Van Tran*, 764 F.3d at 608-09 (finding the petitioner's fleeing the jurisdiction and selling the victim's stolen goods after the crime were "not so sophisticated or elaborate that the intellectually disabled could not have performed [them].").

Finally, that Mr. Smith "argued motions on his behalf" before his 1994 trial is of no import to whether he is intellectual disabled, especially when one scratches the surface of what <u>really</u> occurred. To support its determination that Mr. Smith's alleged ability to argue motions indicates he is not intellectually disabled, the court relied on the testimony of Fern Smith, an assistant district attorney who prosecuted Mr. Smith at his 1994 trial. Ms. Smith recalled that prior to the 1994 trial, Mr. Smith filed two pro se motions. According to Ms. Smith one involved a motion to dismiss the jury because "he said he was being racially discriminated against by the jury and Judge Freeman and by myself and Mr. Macy," and the other involved a motion to have counsel table moved because he felt the prosecution "could possibly communicate with the jury by rolling our eyes or making facial expressions to the jury." MR2 IV 107. According to Ms. Smith, when Mr. Smith attempted to defend those motions in court, "he was articulate. He knew what he was doing. He made good arguments to the court and knew why he was presenting them and articulated that to the court." MR2 IV 103. However, on cross-examination, Ms. Smith admitted that Mr.

Smith may not have actually written the motions.[29] *Id.* at 106.

Unlike the majority of the OCCA, Judge Chapel recognized the importance of the issue with which the court was faced:

> [A]ll the witnesses with experience in mental retardation agreed that one cannot tell if a person is mildly mentally retarded by looking at them, or in casual conversation. . . .

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[29] Had trial counsel for Mr. Smith simply read the transcript for the hearing wherein Mr. Smith defended his motions, Ms. Smith's statement that Mr. Smith was "articulate" would have been rich ground for cross-examination. *See* Oct. 18, 1994 Motion Hearing, Oklahoma County Case No. CF-1993-3968. Further, trial counsel should have been well aware that Mr. Smith did not write either motion and should have been able to pointedly cross-examine Ms. Smith on the matter. In 2001, as part of Mr. Smith's first habeas proceedings, his prior habeas counsel deposed Ronald Veatch, a former inmate and jailhouse lawyer who celled next to Mr. Smith at the Oklahoma County Jail before Mr. Smith's 1994 trial. Veatch testified that when he first met Mr. Smith, Veatch "didn't know if he was an idiot or something was wrong." Jan. 11, 2001 Depo. of Ronald Veatch at 9, Okla. West. Dist. Case No. CIV-98-601. After being unable to make sense of what Mr. Smith told him about his case, Veatch "agreed to take [Mr. Smith's case] on." *Id.* at 10. Thinking that Mr. Smith did not understand the severity of the situation, *id.* at 16, Veatch wrote the pro se motions and coordinated with an outside service to have the motions filed. *Id.* at 17-26. For several days, Veatch "had to go over and over and over . . . stuff with him to try to get him to understand what he had to do and what he had to say in court. *Id.* at 27. It was "almost impossible" to make Mr. Smith understand. *Id.* Trial counsel's failure to capitalize on this information during cross-examination of Ms. Smith is just another example of their ineffectiveness. *See* Ground 3 for more discussion of trial counsel's ineffectiveness.

> Smith presented significant evidence of mental retardation, including persons who taught him as mentally retarded [sic] 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.

Att. 1, Chapel, J., dissenting, at 2-3 (emphasis added). Judge Chapel clearly understood that the stereotypes perpetuated by the majority did not negate or contradict the overwhelming evidence of Smith's intellectual disability presented at his *Atkins* trial.

D. Conclusion.

Roderick Smith is intellectually disabled. The Supreme Court has recognized the lessened moral culpability of defendants like Smith. *Atkins*, 536 U.S. at 332. Smith's death sentences are in clear violation of *Atkins* and *Hall*. The Writ should issue to enable new re-sentencing proceedings in which the death penalty is precluded.

TENTH CIRCUIT OPENING BRIEF OF PETITIONER/APPELLANT RODERICK L. SMITH, RELEVANT EXCERPTS (AUGUST 3, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODERICK L. SMITH,

Petitioner/Appellant,

v.

MIKE CARPENTER,
Interim Warden, Oklahoma State Penitentiary,

Respondent/Appellee.

Case No. 17-6184 (Capital Case)
District Court: CIV-14-579-R (W.D. Okla.)

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-14-579-R
The Honorable David L. Russell, Federal District Judge

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ORAL ARGUMENT REQUESTED

Dated this August 3, 2018

[. . .]

PROPOSITION ONE
Smith's Execution Is Prohibited by the Eighth and Fourteenth Amendments Because He Is Intellectually Disabled.

A. Where the Claim Was Raised.

This claim was raised in Ground One of Smith's habeas petition, Doc. 18 at 6-46, and in his Motion for Evidentiary Hearing, Doc. 38 at 3. The district court denied relief. Doc. 47 at 6-25.

B. Introduction.

Smith cannot legally be executed because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002). His IQ scores and overall adaptive functioning place him squarely in the intellectually-disabled range. Smith's placement in special education for the educable mentally handicapped from early elementary school through high school demonstrates his intellectual disability is not a feigned attempt to avoid being executed, as the State of Oklahoma has maintained; rather, the overwhelming evidence shows Smith has suffered from intellectual disability since

infancy. If the State of Oklahoma is allowed to execute a man as intellectually impaired as Roderick Smith, then the constitutional protection announced in *Atkins* and later reinforced in *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Moore v. Texas*, 137 S. Ct. 1039 (2017) surely would be meaningless.[9]

In *Atkins*, the Supreme Court categorically banned the execution of the intellectually disabled. And although the Court tasked the states with developing their own procedures for determining whether someone is intellectually disabled, *Atkins*, 536 U.S. at 317, the Court "did not give the States unfettered discretion to define the full scope of the constitutional protection," *Hall*, 134 S. Ct. at 1998.

Instead, the Supreme Court charged the states with "developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317 (emphasis added). If states were given "complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity." *Hall*, 134 S. Ct. at 1999. As the Court has continued to emphasize, to determine whether a criminal defendant is intellectually disabled requires the consideration of the informed views of clinical experts and the application of current clinical standards.[10] *Hall*, 134 S. Ct.

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[9] "Although they were decided after the state court decision in [Smith's] case, the primary holdings in *Hall* and *Moore* were compelled by *Atkins*. Both are illustrations of what was previously established in *Atkins*." *Hill v. Anderson*, 881 F.3d 483, 491 (6th Cir. 2018).

[10] In *Atkins* the Supreme Court relied on the clinical definitions of mental retardation promulgated by the American Psychiatric Association ("APA") and the American Association on Mental

at 2000; *Brumfield*, 135 S. Ct. at 2276-82; *Moore*, 137 S. Ct. at 1053.

Smith recognizes when challenging the sufficiency of evidence following a jury verdict finding him not mentally retarded, a reviewing court must apply *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) to determine "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 v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012). But a state court's ability to correctly cite the sufficiency standard is not the end of the inquiry. Smith's sufficiency challenge "inescapably requires [consideration of] the kinds of evidence that state courts may (or may not) rely upon in adjudicating an *Atkins* claim." *Id.*

The Constitution's prohibition on execution of the intellectually disabled is not observed by the execution of a man whom clinical experts collectively find is intellectually disabled, particularly when the State's own expert is unable to find otherwise. *Cooper v. Oklahoma*, 517 U.S. 348, 367-68 (1996) (finding procedures permitting trial of individual more likely than not incompetent deeply offensive to fundamental principles). Here, the evidence presented at Smith's *Atkins* trial demonstrating his intellectual disability was compelling.

Retardation ("AAMR") to emphasize the clinical underpinning of the constitutional restriction. *Atkins*, 536 U.S. at 308 n.3, 317 n.22.

C. Smith Established by a Preponderance of the Evidence He is Intellectually Disabled and No Rational Jury Could Have Found Otherwise.

At his *Atkins* trial, Smith carried the burden to prove by a preponderance of the evidence 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. Attachment 4 at 6 & n.8. Undoubtedly, Smith presented sufficient evidence to prove his intellectual disability, especially under this low evidentiary standard.

1. Significantly Sub-Average Intellectual Functioning.

The operational definition of the first criterion for intellectual disability—significant limitations in intellectual functioning—is defined as follows:

> [A]n IQ score that 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.

American Association on Intellectual and Developmental Disabilities ("AAIDD"), *Intellectual Disability: Definition, Classification, and Systems of Supports* at 27 (11th ed. 2010). "[A] test taker who performs 'two or more standard deviations from the mean' will

score approximately 30 points below the mean on an IQ test, *i.e.*, a score of approximately 70 points." *Hall*, 134 S. Ct. at 1994. One should keep in mind, however, that "IQ scores represent a range, not a fixed number." *Id.* at 1999.

Further, only a limited number of IQ tests available provide an appropriate assessment of the general factor of intelligence. *See The Death Penalty and Intellectual Disability* at 129 (Edward A. Polloway ed. 2015) (hereinafter Polloway). The Wechsler Adult Intelligence Scale ("WAIS") is one of the most widely used and trusted instruments. *Id.* at 129-30.

Not one expert who testified at Smith's *Atkins* trial concluded he was "not mentally retarded." In fact, all of the experts who testified at Smith's *Atkins* trial, including State's expert Dr. Call, came up with similar IQ test results on versions of the WAIS, all of which place Smith well below an IQ of 70. *See supra* at 8-9 (discussing testimony and testing results of Dr. Smith,[11] Dr. Hopewell, and Dr. Call). And although Dr. Call testified he did not think Dr. Hopewell's results and his results were "accurate reflections of [Smith's] best performance" because he believed Smith was malingering, MR2 VI 39, he refused to say Smith is "not mentally retarded." *Id.* at 67 (When asked by defense counsel "[b]ased on your testing and your review of the records in this case, can you say that

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[11] As noted, Smith received a 65 on Dr. Smith's 1997 administration of the outdated WAIS-R. *Supra* at 8-9. The district court erroneously referred to this test as resulting in a score of 70. Doc. 47 at 14 (noting "Dr. Call . . . took note of other IQ tests Petitioner had taken . . . in 1997, he received a 70.") In fact, Dr. Call said the 1997 resulted in a "[f]ull [s]cale IQ of 65; Verbal IQ of 64; Performance IQ of 70." MR2 VI at 35-36.

Roderick Lynn Smith is not mentally retarded?" Dr. Call responded "No"). *Id.*

Dr. Call's opinion that 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 [Smith] was faking, either when [Smith] was working with [Hopewell] or in the other tests that [Smith] had done with other people." MR2 II 73. Dr. Hopewell's unique experience makes him especially astute at detecting malingering. Not only does he possess in-depth clinical experience assessing the intellectually disabled, *id.* at 37-38, he also has experience screening benefit applicants, which involved "frequently finding 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 that was a consideration." *Id.*

Dr. Smith also contradicted any allegations of Smith's alleged malingering. Although DOC psychologist Dr. Smith was initially skeptical Smith's 1997 full-scale score of 65 on the outdated WAIS-R was based on Smith's best effort, MR2 III 167-68, since that time Dr. Smith "took a closer look" and "was very much struck" by consistency in the results of his WAIS-R testing and the results of other psychological testing. *Id.* The consistency amongst all the 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.[12]

Dr. Call's malingering opinion was countered with overwhelming evidence to the contrary. The majority of Call's practice is forensic rather than clinical. MR2 VI 40. Of the few clinical clients Call has, none are intellectually disabled. *Id.* at 41. Particularly for those practitioners who have little or 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.

Further, in the past Dr. Call has been quick to undermine reported IQ scores which place a criminal defendant in the intellectually-disabled range based on an allegation of malingering.[13] He has supported such allegations with results obtained from "The

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[12] In addition to the WAIS-R, Dr. Smith also administered the Raven's Progressive Matrices to Smith. MR2 III 161. Instead of resulting in specific scores, the Raven's results in "a very general rough IQ range." *Id.* Smith scored in the range of 69-78. *Id.* at 62. The WAIS-R more accurately depicted 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. Polloway at 129-30.

[13] 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" for the prosecution. *See 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 Smith's case. *Id.* at 652 n.17.

Blackwell Memory Test," a made-up malingering test which he created and named after his secretary. *See Salazar v. State*, 126 P.3d 625, 629-34 (Okla. Crim. App. 2005) (vacating death sentence based on counsel's failure to investigate Call's use of a non-standardized malingering test when Call suggested defense expert was "unethical to administer tests" that have norms the petitioner did not fall within). Call appears to have administered this non-standardized, self-created test during his evaluation of Smith. O.R. V 921. Doc. 18, Atts. 8 and 9. This alone makes Dr. Call's opinion dubious.

What is more, Dr. Call's opinion Smith was not putting forth his best effort was based in part on Smith's results on the Test of Memory Malingering (TOMM), MR2 VI 13-18, a test with a standardization sampling representation which did not include the intellectually disabled. Polloway at 270-71. A review of this test has indicated its reliability and validity are highly suspect when it is administered to the intellectually disabled. *Id.* As the Seventh Circuit has recognized, "a defendant cannot readily feign the symptoms of mental retardation." *Newman v. Harrington*, 726 F.3d 921, 929 (7th Cir. 2013).

Dr. Call also relied on the results of testing from 1994 by Dr. Phillip Murphy, which indicated Smith had an IQ of 73, to opine Smith malingered on later tests. MR2 VI 34-37. But reasons exist to doubt the validity of Murphy's results used to support Call's malingering allegation. First, a few years after Murphy testified at Smith's original trial in 1994, he had licensing problems for falsifying data and applying scores from one test to another. *See* Doc. 18, Att. 7; *State ex rel. State Bd. of Exam'rs of Psychologists v.*

Murphy, Case No. ADML-99-0013 (placing Murphy on probation for three years, and prohibiting him from administering tests, interpreting tests, or writing reports during probationary period without supervision). Second, nowhere in Call's testimony at Smith's *Atkins* trial, nor in Murphy's 1994 testimony for that matter, is it mentioned what specific intelligence test Murphy gave Smith. MR2 VI 35-36; Oct. 26, 1994 Trial in Oklahoma County Case No. CF-94-1199, Tr. VIII at 89-159. And third, Call failed to consider, or even mention to the jury, Murphy's ultimate determination was Smith is "in the mentally retarded range." *Id.* at 124.

Further, there was no evidence presented to counter significantly sub-average intellectual functioning, as shown through his placement in EMH classes throughout the entirety of his schooling.[14] *See supra* at 10-13 (discussing testimony of EMH teachers, Mona Autry, Paul Preston, and principal, Jesse Thompson). No evidence was presented that a lack of effort resulted in Smith's longstanding placement in EMH classes. And exacerbating his already-compromised intellectual functioning, Smith suffered a near drowning when he was 12, resulting in brain damage. MR2 II 51, 76, 78, 105; MR2 III 161, 165-66.

2. Manifestation Before Age 18.

The most valid approach to establishing whether intellectual disability manifested during the develop-

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[14] Dr. Call's allegation of malingering is further undermined by Smith's early placement in EMH classes because Smith would have had to begin malingering in childhood, before any incentive to avoid the death penalty occurred. *See Lambert*, 126 P.3d at 651 n.14.

mental period is to see if there is evidence of what has been termed a "continuity of concern." Greenspan, S., *Homicide Defendants with Intellectual Disabilities: Issues in the Diagnosis in Capital Cases*, 19 Exceptionality 219, 230 (2011). This term means that various people described the defendant from an early age as "slow" or as needing help in mastering life tasks that individuals of the same age and cultural background are expected to master. *Id.* The key is not whether the person was formally diagnosed as having intellectual disability before turning 18, but rather, whether there were signs that the post-18 impairment did not suddenly emerge. *Id.* (*See* Proposition Two).

Undoubtedly, Smith's placement in EMH classes when he was in early elementary school proves Smith's impairments did not suddenly emerge after he turned 18. Teacher recommendations and IQ testing were required for placement, and Smith clearly met the standards for placement year after year. *See supra* at 10-13.

In addition to the professionals who recognized Smith had intellectual deficits long before turning 18, his mother knew Smith was "very, very slow," even when he was a baby. MR2 IV 6. Ms. Cates recalls

> [H]e wasn't like an ordinary one-year-old child. He wasn't fast. It took me longer to potty train him. And he wasn't really active. He wasn't—he would be to himself all the time and—you know, he just acted like he wouldn't understand what I would be saying to him, you know. . . . [H]e was almost three years old [when he learned to walk] . . . He didn't actually begin to talk until he was maybe four or five. And sometimes I couldn't

> understand what he was saying at four or five. Because he would constantly whine if you asked him something . . . [Neighborhood kids] would tease him, and you know and—you know, kids are cruel.

Id. at 6-7.

3. Significant Limitations in Adaptive Functioning.

While intelligence, as measured by IQ, has predominated as the primary criterion for diagnosing intellectual disability, sub-average intellectual functioning must coexist with related limitations in two or more areas of adaptive behavior.[15] *Atkins*, 536 U.S. at 308 n.3. Crucial is the fundamental precept that adaptive behavior must be evaluated on a deficit model: Intellectually disabled individuals, like all individuals, have strengths, and these strengths do not negate their disability. *See Moore*, 137 S. Ct. at 1050 (noting "the medical community focuses the adaptive-functioning inquiry on adaptive deficits"); *see also Brumfield*, 135 S. Ct. at 2281 (finding "intellectually disabled persons 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 *Mental Retardation: Definition, Classification, and Systems of Supports* at 8 (AAMR, 10th ed. 2002)).

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[15] At the time of Smith's *Atkins* trial, Oklahoma required a showing of significant limitations in two or more of the following areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work. Attachment 4 at 6 n.8.

Of the three experts who testified at Smith's *Atkins* trial, only Dr. Hopewell conducted an adaptive behavior assessment. MR2 II 58-61; MR2 III 164; MR2 VI 45-46. Based on Smith's results on The Vineland and the WRAT-III, Dr. Hopewell concluded Smith suffers from profound deficits in communication, *see supra* at 15-16; functional academics, *see supra* at 18; social skills, *see supra* at 21; and home living/ health and safety, *see supra* at 22-23. Smith's family members, former EMH teachers, and former cell mates corroborated Dr. Hopewell's formal findings with anecdotal evidence. *See supra* at 17, 20-21, 23-24, 25 (discussing testimony of Norman Cleary); *supra* at 19 (discussing testimony of EMH teachers); *supra* at 22-23 (discussing testimony of Smith's mother).

Dr. Call was quick to criticize Dr. Hopewell's methods, but he failed to administer his own adaptive behavior tests. MR2 VI 23-24, 45-46. And although Dr. Call acknowledged adaptive behavior is difficult to measure in prison because of the highly structured environment, MR2 VI 48, he nonetheless relied on "general information" he obtained from an unnamed DOC psychologist and an unnamed DOC guard to irrationally concluded Smith had no deficiencies. *Id.* at 31-32.

D. The OCCA Acted Unreasonably by Finding the Record Supported the Jury's Verdict That Smith Is "Not Mentally Retarded," and the District Court Erred by Endorsing Such Opinion.

The OCCA concluded the record supported the jury's verdict finding Smith "not mentally retarded." Attachment 4 at 11. But by failing to adhere to accepted clinical practices, the OCCA's decision to uphold the

jury determination was not an appropriate way to enforce *Atkins*' constitutional prohibition. Hence, it was an unreasonable application of and contrary to *Atkins* and its progeny. § 2254(d)(1). Moreover, OCCA's willingness to ignore abundant evidence strongly rebutting the jury verdict of "not mentally retarded" and to substitute its own arbitrary standards resulted in several unreasonable determinations of fact. § 2254 (d)(2). Further, the district court erred by failing to consider the import of *Atkins*' clinical underpinnings in its analysis, instead focusing exclusively on the *Jackson* standard. In doing so, the district court engaged in the same unreasonable decision-making as OCCA.

The OCCA dispensed with diagnostic criteria and valid test results altogether when it concluded

> The evidence presented at trial supports a finding that Smith failed to meet even the first prong of the *Murphy* definition of mental retardation. The evidence, viewed in the light most favorable to the State, portrayed Smith as a person who is able to understand and process information, to communicate, to understand the reaction 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.

Attachment 4 at 11. In an effort to discount the strong clinical evidence presented on Smith's behalf, the court noted "the State presented persuasive evidence

from lay witnesses to refute Smith's evidence of sub-average intellectual functioning and of adaptive deficits." *Id.* at 8.

OCCA's determination that Smith "failed to meet even the first prong of the *Murphy* definition" is an unreasonable determination of fact, and *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015) illustrates as much. In *Pruitt*, the court held the state court's reliance "on inaccurate assumptions and select pieces of evidence" to conclude the petitioner did not suffer from significantly sub-average intellectual functioning constituted an unreasonable determination of fact under § 2254 (d)(2). *Id.* at 268-69. The evidence relied on by the state court included the petitioner's ability to fill out job applications, his capacity to support himself financially, and his work history as a dishwasher, truck driver, carpenter, and laborer. *Id.*

The types of "inaccurate assumptions" and "select pieces" of evidence relied on by the state court in *Pruitt* are precisely what OCCA relied on in its decision finding Mr. Smith "failed to meet even the first prong" of "mental retardation." At the exclusion of Mr. Smith's IQ scores on scientifically-recognized tests, which all fell well within the intellectually-disabled range, OCCA relied on Mr. Smith's work history as a head janitor,[16]

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16 The "supervisory duties" ascribed to Mr. Smith's position as a head janitor were nothing more than illusory. In relying on his supervisory status, OCCA unreasonably ignored the evidence of Smith's network of family support on the job. Smith was hired by a family member and relied on his aunt to do all the paperwork. MR2 III 73-74. Further, Smith's assignments as head janitor were simple and routine. *Id.*

his ability to carry on an affair,[17] an isolated instance of his having argued pro-se motions on his behalf,[18] and that "he manipulated those around him" to conclude he failed to prove sub-average intellectual functioning. There is no scientific or clinical support for OCCA's determination such factors are relevant, let alone determinative, of whether an individual possesses sub-average intellectual functioning. To the contrary, Mr. Smith presented abundant evidence which clearly rebuts such and was never refuted by IQ testing with appropriate instruments. OCCA's determination Mr. Smith failed to meet "even the first prong" of mental retardation was premised on unreasonable determinations of fact.

The Supreme Court's opinion in *Brumfield* also illustrates the extent to which OCCA's determination of this prong was unreasonable. In *Brumfield*, the Court found the state court's decision that petitioner failed to establish sub-average intellectual functioning was based on an unreasonable determinations of fact because there was no "evidence of any higher IQ test score that could render the state court's determination reasonable." *Brumfield*, 135 S. Ct. at 2278. The same holds true in Mr. Smith's case. At Mr. Smith's *Atkins* trial, there was no evidence presented of IQ test results from standardized, scientifically-recognized tests placing him outside the intellectually-disabled range. In

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[17] Demonstrating OCCA's unreasonable reliance on Smith's ability to have an affair, even Dr. Call acknowledged intellectually disabled people are capable of lying. MR2 VI 62.

[18] That Mr. Smith once "argued motions on his behalf" before his 1994 trial is of no import to whether he is intellectually disabled, especially when one scratches the surface of what really occurred. *See* Doc. 18 at 44-45.

fact, the State's only expert was unable to say Mr. Smith is "not mentally retarded." MR2 VI 67.

Even more indicative of OCCA's unreasonable hostility to clinical definitions and diagnostic practices is the court's belief that Smith's alleged clean-up of the crime scene demonstrates his "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." Attachment 4 at 4. This statement is absurd. The reasoning involved with shampooing carpets and hiding bodies in closets and under beds in the heat of the summer does not reflect a well-thought out plan to avoid anyone finding victims. *See Van Tran v. Colson*, 764 F.3d 594, 608-09 (6th Cir. 2014) (finding the petitioner's fleeing the jurisdiction and selling the victim's stolen goods after the crime were "not so sophisticated or elaborate that the intellectually disabled could not have performed [them]"). In *Van Tran*, the Sixth Circuit granted habeas relief based on the state court's "failure to adhere to the clinical framework" mandated by *Atkins* and *Hall*. *Id.* at 608, 621. Such is precisely the case here.

In light of OCCA's unreasonable determinations of fact and its failure to reasonably apply *Atkins*, the district court erred by relying exclusively on the *Jackson* standard to deny relief. In denying relief, the district court reaffirmed this Court's holding in *Hooks* that "[n]ot only does *Murphy* not require OCCA to focus on deficiencies to the exclusion of strengths but—most relevant to our inquiry here—neither does *Atkins*." *Hooks*, 689 F.3d at 1172; Doc. 47 at 25. In light of the Supreme Court's illumination of *Atkins* in *Moore* and *Brumfield*, this position is no longer

sustainable. Undoubtedly, in order to reasonably apply *Atkins*, the focus of the adaptive-functioning inquiry must be on deficits. *See Moore*, 137 S. Ct. at 1043; *Brumfield*, 135 S. Ct. at 2281.

For an example of what a reasonable decision would look like in this case, one need look no further than Judge Chapel's dissent, in which he demonstrated an understanding of the clinical issues, together with the low standard of proof:

> I dissent. I am deeply troubled by this case. The State cannot execute a person who is mentally retarded.
>
> [. . .]
>
> 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.

Attachment 4 (Chapel, J., dissent at 1, 3).

E. Conclusion.

Smith's intellectual disability has been present since his infancy. His is a serious disability which has adversely affected his functioning his entire life. Mercifully, the Eighth Amendment does not permit his execution. This Court must grant the Writ to prevent Roderick Smith's unlawful execution.

[. . .]

TENTH CIRCUIT RESPONDENT-APPELLEE'S (STATE OF OKLAHOMA) ANSWER BRIEF, RELEVANT EXCERPTS (OCTOBER 1, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODERICK L. SMITH,

Petitioner/Appellant,

v.

MIKE CARPENTER,
Interim Warden, Oklahoma State Penitentiary,

Respondent/Appellee.

Case No. 17-6184

District Court: CIV-14-579-R (W.D. Okla.)

On Appeal from the United States District Court
for the Western District of Oklahoma
D.C. No. CIV-14-579-R

The Honorable David L. Russell,
United States District Judge

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October 1, 2018

ORAL ARGUMENT IS NOT REQUESTED

[. . .]

ARGUMENT AND AUTHORITY

PROPOSITION I
THE OCCA'S DETERMINATION THAT PETITIONER FAILED TO PROVE THAT HE IS INTELLECTUALLY DISABLED IS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, OR BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Petitioner's first proposition of error alleges that he cannot legally be executed because he is intellectually disabled. Petitioner raised this claim in his appeal of his *Atkins* jury trial that was held March 8-15, 2004, to the OCCA in Case No. O-2006-683. The OCCA rejected Petitioner's claim on the merits, holding that the record supported the jury's verdict that the Petitioner is not intellectually disabled. *Smith v. State*, No. O-2006-683 (Okla. Crim. App. 2007) (unpublished and attached to Opening Br. as Attachment 4). Petitioner alleges that the OCCA's determination was contrary to, and an unreasonable application of,

Atkins v. Virginia, 536 U.S. 304 (2002) and was based on an unreasonable determination of fact.

As will be shown below, the OCCA's determination is neither contrary to, nor an unreasonable application of, clearly established federal law, nor based on an unreasonable determination of the facts. Therefore, this Court must find Petitioner's first proposition of error to be without merit.

A. Preliminary Matters

Petitioner claims the OCCA's decision was unreasonable as to both law and fact. *See* 28 U.S.C. § 2254 (d)(1) & (2). Below, Petitioner only challenged the OCCA's opinion based on § 2254(d)(1). Doc. 18 at 39-46. Now, he adds "[m]oreover, OCCA's willingness to ignore abundant evidence strongly rebutting the jury verdict of 'not mentally retarded' and to substitute its own arbitrary standards resulted in several unreasonable determinations of fact. § 2254(d)(2)". Opening Br. at 38. This argument is forfeited because Petitioner did not make this argument below. Accordingly, this Court should not consider it here. *See Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015). While generally this Court can still review a forfeited argument for plain error, it does not engage in plan error review when a party fails to so request, as Petitioner fails to do so here. *See id.*

Petitioner presented evidence to the district court that was not proper pursuant to *Pinholster* and the district court properly refused to consider same when it denied relief. Doc. 35 at 19-25; Doc. 47 at 8, n. 5. Here, although Petitioner re-arranged his brief in a manner that makes it less obvious that he is relying on evidence never presented to the OCCA to

support this claim–by placing this evidence in his "Statement of Facts" (Opening Br. at 8-24)–he continuously refers back to that section throughout this proposition of error to support his argument. Opening Br. at 30, 34-35, 37. Unfortunately, that manner of presentation makes it quite difficult to distinguish those facts upon which this Court may rely from those on which it may not. Nevertheless, this Court cannot consider evidence that was not presented to the OCCA.

Similarly, Petitioner continues throughout this proposition of error to rely on publications that were never presented to the OCCA. Opening Br. at 30, 32-33, 35. Indeed, all of those publications were not even in existence at the time of the OCCA's decision. "Review of substantive rulings under § 2254(d)(1) 'is limited to the record that was before the state court that adjudicated the claim on the merits.'" *Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015) (quoting *Pinholster*, 563 U.S. at 181).

The prohibition against considering evidence that was not before the state court applies with even more force in the context of this sufficiency challenge. In reviewing a challenge to the sufficiency of the evidence, a court must consider all of the evidence that was before the jury, even that which was not properly admitted. *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (*per curiam*). It follows then that the inverse is also true, *i.e.*, a court may not consider evidence which was not before the jury. Accordingly, Petitioner's reliance upon scientific articles, evidence designed to impeach the credibility of Dr. John Call and Dr.

Phillip Murphy and other evidence developed post-*Atkins* trial is improper.[8]

B. Standard of Review

When reviewing the sufficiency of the evidence on a habeas corpus petition, this Court utilizes the beyond a reasonable doubt standard set forth in *Jackson v. Virginia*. *Jackson v. Virginia*, 443 U.S. 307 (1979); *McCracken v. Gibson*, 268 F.3d 970, 981 (10th Cir. 2001). This Court has tailored the *Jackson* standard when the defendant is challenging a jury determination that he is not intellectually disabled.

> First, the substantive law at the basis of his sufficiency challenge consists not of the "essential elements" of a state-law criminal offense, *Jackson*, 443 U.S. at 319, 99 S. Ct. 2781, but rather of the definition of mental retardation–definition that, although dependent on state law (here, *Murphy*), ultimately has Eighth Amendment underpinnings pursuant to *Atkins*. *See Ochoa v. Workman*, 669 F.3d 1130, 1143 (10th Cir. 2012) ("The liberty interest at issue in this case, the right of the mentally retarded to avoid execution, flows directly from the Eighth Amendment."). Thus, Mr. Hooks's sufficiency challenge inescapably

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[8] Petitioner also implies at times that the OCCA's decision is unreasonable in light of other decisions by the OCCA. The OCCA's cases are irrelevant. *See Donald Grant*, 886 F.3d at 947 n.25 ("we are at a loss to understand how any purported inconsistency in the OCCA's own (state law) precedent produced by the OCCA's ruling in Mr. Grant's case is germane to our inquiry under AEDPA—where the unalloyed legal concern is clearly established federal law.") (emphasis adopted).

requires that we consider the kinds of evidence that state courts may (or may not) rely upon in adjudicating an *Atkins* claim.[9]

Second, the jury in Mr. Hooks's *Atkins* trial was required to determine, not whether he is guilty of an offense beyond a reasonable doubt (a question on which the State would have borne the burden of proof), but whether he is mentally retarded by a preponderance of the evidence (a question on which Mr. Hooks bore the burden of proof). The different standard of proof requires us to tailor *Jackson* to fit this context. We hold that the relevant constitutional standard for the state appellate court was whether, viewing the evidence in the light most favorable to the prevailing party (the State), any rational trier of fact could have found Mr. Hooks not mentally retarded by a preponderance of the evidence. *See Maynard*, 468 F.3d at 674. If so, Mr. Hooks's evidentiary challenge would fail. Put a different way, if any rational trier of fact could have found that Mr. Hooks failed to establish, by a preponderance of the evidence, that he is mentally retarded, then the jury verdict may be upheld.

Of course, AEDPA adds a second layer of deference to this standard. We do not directly review the jury's verdict. AEDPA limits our gaze to "the highest state court's resolution

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9 Respondent strongly disagrees. As pointed out above, a sufficiency challenge requires this Court to consider all of the evidence that was before the jury, without regard to its admissibility.

> of a particular claim." *Alverson v. Workman*, 595 F.3d 1142, 1155 (10th Cir.2010). We therefore ask whether the OCCA correctly identified the governing legal principle from *Jackson* and reasonably applied it to the facts of Mr. Hooks's case. *See Matthews v. Workman*, 577 F.3d 1175, 1183 (10th Cir. 2009) ("Because the OCCA applied the *Jackson* standard in deciding Mr. Matthews's sufficiency claim on direct review, our task is limited by AEDPA to inquiring whether the OCCA's application of *Jackson* was unreasonable." (footnote omitted)). We reiterate that under both paragraphs (1) and (2) of § 2254 (d), we are precluded from considering evidence not before the OCCA. *See Pinholster*, 131 S.Ct. at 1398 (construing 28 U.S.C. § 2254 (d)(1)); 28 U.S.C. § 2254(d)(2).

Hooks v. Workman, 689 F.3d 1148, 1166-1167 (10th Cir. 2012) (emphasis added). This Court further held:

> 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. As noted, that inquiry also requires us to consider whether the OCCA, in upholding the jury's verdict, reasonably applied *Atkins* to [Petitioner's] claim of mental retardation.

Id. (Citation to authority omitted).

The *Jackson* standard gives substantial deference to the jury function of weighing the evidence, drawing reasonable inferences from same. *Wilson v. Sirmons*,

536 F.3d 1064, 1105 (10th Cir. 2008). When there is conflicting facts, this Court presumes "that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*

A habeas petitioner raising a *Jackson* claim challenging a jury's determination that he is not intellectually disabled must overcome double deference. *See Hooks*, 689 F.3d at 1167 (noting the "second layer of deference" added to a habeas claim that the evidence was insufficient to support a jury's finding that a defendant was not intellectually disabled). First, the evidence must be viewed in the light most favorable to the prosecution and the question is whether *any* rational trier of fact could have found as the jury did. *See Patton v. Mullin*, 425 F.3d 788, 796 (10th Cir. 2005) (citing *Jackson*, 443 U.S. at 319); *Hooks*, 689 F.3d at 1166. Second, on top of that, the AEDPA adds another layer of deference to the OCCA's resolution of a sufficiency of the evidence claim. *Patton*, 425 F.3d at 796. The habeas 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." *Richter*, 562 U.S. at 103.

Finally, the question is whether the OCCA reasonably applied *Jackson*, not whether the OCCA reasonably applied *Atkins*. *See Premo v. Moore*, 562 U.S. 115, 127-128 (2011) (criticizing the lower court for finding AEDPA satisfied by reference to a case regarding the improper admission of a confession where the claim before it was ineffective assistance of counsel).

C. OCCA's Merits Determination

In the present matter, the OCCA held:

> 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.3da 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.*

[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.

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

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 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 a 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.

[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.

Though evidence of Smith's I.Q. was disputed, the State presented persuasive evidence from lay witnesses to refute Smith's evidence of sub-average intellectual functioning and of adaptive functioning deficits. Emma Watts, Smith's former case manager, now unit manager in prison, tested 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.

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

> [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.

The evidence presented at trial supports a finding that [Petitioner] 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 [Petitioner] 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 [Petitioner] is not mentally retarded is justified.

Smith, No. O-2006-683, slip op. at 6-11 (Opening Br. Att. 4) (emphasis added).

Petitioner is challenging the sufficiency of the evidence presented at his *Atkins* jury trial. Petitioner claims the OCCA acted unreasonably by finding the record in Petitioner's 2004 *Atkins* jury trial supported the jury's verdict that Petitioner was not intellectually disabled. Petitioner claims the OCCA's opinion is contrary to, and, an unreasonable application of, *Atkins v. Virginia*, 536 U.S. 304 (2002).[10] Petitioner's claim is without merit.

In *Atkins*, the Supreme Court pronounced a prohibition against the execution of intellectually disabled offenders. Although the Court referenced the

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[10] Petitioner also relies on *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986 (2014), *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269 (2015) and *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039 (2017). As these cases were decided well after the OCCA's merits determination of this issue, they are not relevant here in a § 2254 appeal. *Smith v. Duckworth*, 824 F.3d 1233, 1245 (10th Cir. 2016) ("Because *Hall* was decided more than three years after the OCCA ruled against Mr. Smith on this issue, *Hall* provides no basis for us to disturb the OCCA's decision.").

clinical definitions of intellectual disability embraced by the American Association on Mental Retardation (now the American Association on Intellectual and Developmental Disabilities) and the American Psychiatric Association, it left to the states "the task of developing appropriate ways to enforce the constitutional restriction" it announced. *Atkins*, 536 U.S. at 317; *see also Bobby v. Bies*, 556 U.S. 825, 831 (2009) (stating that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation" falls within *Atkins*' scope); *Smith*, 824 F.3d at 1246 (holding that *Atkins* does not require adjustment of IQ scores for a clinical practice called the "Flynn Effect").

Following the Supreme Court's ruling in *Atkins*, the OCCA promulgated a definition of intellectual disability for use in the courts of Oklahoma. The OCCA held a person is intellectually disabled:

> (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.

Murphy v. State, 54 P.3d 556, 567-568 (Okla. Crim. App. 2002) (overruled on other grounds by *Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006)).[11]

As quoted above, the OCCA applied the *Jackson* standard and concluded the jury's verdict was rational. *Smith*, No. O-2006-683, slip op. at 6 (Opening Br. Att. 4).

D. District Court's Denial of Relief

The district court recognized Petitioner received a jury trial that lasted five days and included twenty-three witnesses. Doc. 47 at 6, 24. Relying on *Atkins* and this Court's decision in *Hooks*, this district court found Petitioner was not entitled to relief. The district court properly limited its consideration to evidence presented to the OCCA. Doc. 47 at 8, 23. Ultimately, the district court reviewed the evidence presented by both parties and found Petitioner failed to demonstrate he was entitled to relief. Doc. 47 at 9-25. The district court held:

> Although Petitioner claims that the OCCA violated *Atkins* by disregarding expert opinion, what the OCCA found was a dispute among the experts. Although Dr. Hopewell

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[11] The *Murphy* test has been supplanted by Okla. Stat. tit. 21, § 701.10b (2006), however, Petitioner's claim falls under *Murphy* because his trial was held before the statute was enacted.

believed that Petitioner's I.Q. testing showed sub-average intellectual functioning, the State's expert, Dr. Call, questioned that conclusion based on additional testing that indicated Petitioner was not putting forth his best effort. The same is true regarding Petitioner's adaptive functioning. While Dr. Hopewell found that Petitioner had deficits in all areas of adaptive functioning, Dr. Call testified that Dr. Hopewell's assessment was invalid because the test was inappropriately administered. In addition, as with the testing of Petitioner's intellectual function, Dr. Call testified that he believed that Petitioner did not put forth his best effort in adaptive functioning testing. Dr. Call's opinion is supported by the fact that Petitioner could not even spell his last name for Dr. Call, when he had done so on prior occasions, including for Dr. Hopewell just eight months earlier.

Petitioner's assessment of the evidence also fails to give due consideration to the very posture of the claim. This is a sufficiency-of-the-evidence claim. Although Petitioner argues with great fervor that he is mentally retarded, that is not for this Court to decide. Petitioner had the opportunity to prove he is mentally retarded. However, a jury determined that he had failed to meet his burden of proof. That jury verdict, and its subsequent validation by the OCCA, is what is under review here, and the Court's review is largely limited due to the deference afforded the

> jury's verdict and the AEDPA deference afforded the OCCA's decision.
>
> While Petitioner clearly does not agree with the jury's verdict, it was the jury's job to assess the evidence, and the OCCA found that when viewing the evidence in light most favorable to the State, a rational trier of fact could have reached the same conclusion. In addition to Dr. Call's testimony, which called into question Petitioner's primary expert, evidence from lay witnesses showed that Petitioner had skills and strengths which the jury could consider in assessing whether Petitioner had significant limitations. Although Petitioner argues that his strengths were overemphasized and inappropriately considered, the Tenth Circuit has held that "[b]oth strengths and deficiencies enter into [the mental retardation determination] because they make up the universe of facts tending to establish that a defendant either has 'significant limitations' or does not. Not only does *Murphy* not require the OCCA to focus on deficiencies to the exclusion of strengths but-most relevant to our inquiry here–neither does *Atkins*."
>
> Given the evidence presented to the jury, the OCCA's assessment of that evidence in upholding the jury's verdict, and the double-deference review this Court must apply in its review, the Court concludes that Petitioner is not entitled to relief on his first ground for relief. Ground One is therefore denied.

Doc. 47, 23-25 (internal citations omitted).

E. Merits

Petitioner has failed to demonstrate that the OCCA's adjudication was contrary to, or an unreasonable application of, pertinent Supreme Court precedent, or an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[12] As set forth above, the clearly established law that applies to this claim is *Jackson*, not *Atkins*. Further, *Atkins* does not mandate the application of the clinical standards that Petitioner endorses.

1. Intellectual Functioning

The first prong of *Murphy* is whether Petitioner "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." *Murphy*, 54 P.3d at 567-568. Petitioner does not complain that *Murphy's* definition of intellectual disability is inconsistent with *Atkins*. "Indeed, *Murphy's* definition closely tracks the AAMR (now AAIDD) definition discussed in *Atkins*. *See* 536 U.S. at 308 n. 3, 318." *Hooks*, 689 F.3d at 1165. Rather, Petitioner complains that the OCCA's decision to uphold the jury's determination that Petitioner was not intellectually disabled was contrary to, or an unreasonable application of, *Atkins*. Petitioner's complaints amount to nothing more than

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[12] Although Petitioner has waived any § 2254(d)(2) argument as discussed above, Respondent shows his new argument to be without merit.

a disagreement with the jury's verdict, in contravention of the jury's duty to resolve conflicts in the evidence.

Petitioner first claims that his IQ scores fall squarely within the intellectually disabled range on standardized IQ tests administered by licensed professionals. Under the *Murphy* test that predated § 710.10 (b), "[i]ntelligence quotients are one of the many factors that may be considered, but are not alone determinative." *Murphy*, 54 P.3d at 568; *see also Lambert v. State*, 126 P.3d 646, 650 (Okla. Crim. App. 2005) ("The test . . . requires that a defendant (a) meet the threshold legal requirement of an IQ test under 70, and (b) prove the three prongs of the *Murphy* test by a preponderance of the evidence: subaverage intellectual ability, ... " (emphasis added)). *Atkins* does not clearly establish that the first prong must be decided solely on the basis of IQ tests. *Atkins*, 536 U.S. at 316-318.

In any event, the jury could have rejected Petitioner's claims based on test results alone. Petitioner relies on several tests to support his claim. However, not relied on by Petitioner is a Wechsler IQ test administered by Dr. Phillip Murphy in 1994 on which Petitioner scored a 73 (*Atkins* Tr. VI, 35-36). The OCCA noted that Dr. Call testified about this test to show that subsequent, *post-Atkins* tests, showed a serious lack of effort on Petitioner's part.[13] *Smith*, No. O-2006-683, slip op. at 8 (Opening Br. Att. 4). It was well within the jury's province to place more

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[13] As noted above, Petitioner cannot attempt to undermine the credibility of Dr. Call or Dr. Murphy with evidence that was not before the jury.

reliance on this IQ score than on Petitioner's post-*Atkins* test results.

Petitioner shows that Dr. Fred Smith administered the Wechsler Adult Intelligent Scales-Revised (WAIS-R) test to Petitioner in 1997 (*Atkins* Tr. III, 161). Petitioner received a full scale score of 65 (*Atkins* Tr. III, 161). Dr. Smith testified that his impression of Petitioner during his 1997 evaluation was that Petitioner "seemed to me to be a little bit brighter than what he tested out to be on the Weschler." (*Atkins* Tr. III, 163, 181-182). Dr. Smith also wrote in a memo he produced during the evaluation process that "[a]lthough the WAIS-R Full Scale IQ tested out at 65, I suspect that this particular result may be somewhat low in terms of accuracy for whatever reason." (*Atkins* Tr. III, 165). Dr. Smith testified that he wrote the memo because he was considering that Petitioner may be malingering. (*Atkins* Tr. III, 165).

Although Dr. Smith did not administer any tests specifically designed to detect malingering, Dr. Smith was not satisfied with the WAIS-R score, so he administered the Raven Standard Progressive Matrices test. (*Atkins* Tr. III, 175-177, 189). Petitioner's general IQ score from the Raven test was 69-78, showing Petitioner was much brighter than what his WAIS-R test showed. (*Atkins* Tr. III, 161). Dr. Smith admitted that he testified in Federal Court, in a previous habeas proceeding, that he believed Petitioner's IQ score was somewhere between 70-75. (*Atkins* Tr. III, 183). Dr. Smith further testified that although it is not possible to fake a higher IQ score, it is possible to fake a lower score, and a difference of ten or more

points on separate tests is significant (*Atkins* Tr. III, 174).[14]

Petitioner was twice administered the WAIS-III test in 2003, once by Dr. John Call and once by Dr. Clifford Hopewell. Both Dr. Call and Dr. Hopewell testified that the results of the test he administered showed that Petitioner had full scale IQ of 55 (*Atkins* Tr. II, 56; VI, 36-38). Both Dr. Call and Dr. Hopewell administered malingering tests to Petitioner (*Atkins* Tr. VI, 37). According to Dr. Call, Petitioner failed the malingering tests administered by himself and Dr. Hopewell. (*Atkins* Tr. VI, 37). Dr. Call testified that Petitioner's nearly 20 point range on his IQ scores from 1994 to 2003 is unusual and statistically significant (*Atkins* Tr. VI, 37).[15]

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[14] Although Dr. Smith testified at the *Atkins* trial to his ultimate conclusion that Petitioner is on the cusp of being intellectually disabled (*Atkins* Tr., 168), the jury could reasonably have rejected this ultimate conclusion based on Dr. Smith's testimony that a ten point difference on IQ testing is significant in terms of malingering (*Atkins* Tr. III, 173-175).

[15] Interestingly, two prior EMH teachers testified at trial as to the qualification level to be enrolled in EMH classes. Paul Preston testified that to qualify for the classes Petitioner was in during high school, he would have had to have an IQ between 60-75 (*Atkins* Tr. III, 38). Students scoring below a 60 would be placed in the TMH (trainable mentally handicapped) program (*Atkins* Tr. III, 38, 44). Mona Autry testified the range was from 55-75 (*Atkins* Tr. III, 95). The TMH program was not available at Petitioner's school and if the student fell into that range (under 60 according to Mr. Preston and under 55 according to Ms. Autry) they would have to go to a different school (*Atkins* Tr. III, 44). However, for students who had an IQ just above 75, the psychometrist who performed the testing had discretion to manipulate a score-for example, decreasing a score of 77 to 74, so that the student could be placed in the special

Dr. Hopewell, in order to detect malingering, administered the Test of Memory and Malingering (TOMM) and the 15-Item Memory Test to Petitioner (*Atkins* Tr. VI, 13). Dr. Hopewell modified the "norms" of the TOMM test because Petitioner was allegedly intellectually disabled (*Atkins* Tr. II, 136-164).[16] Dr. Hopewell admitted that there is no published research that authorizes his modification of the test. Further, Dr. Hopewell admitted that had he used the "norms" prescribed by the TOMM test, Petitioner would have fallen within the range of malingering (*Atkins* Tr. II, 198). Dr. Call testified that Petitioner's results on Dr. Hopewell's tests are significant because Petitioner was demonstrating a performance level significantly below that of an individual who had a serious dementing disease and hardly any memory whatsoever (*Atkins* Tr. VI, 16-19). Even severely demented individuals with severely impaired memory functioning will improve during each trial of the test. The fact that Petitioner did not improve showed that Petitioner was not putting forth sufficient effort during the administration of the tests (*Atkins* Tr. VI, 16-19).

Dr. Call also administered the TOMM test during his evaluation of Petitioner. Dr. Call's results were similar to Dr. Hopewell's suggesting that Petitioner was not putting forth his best efforts (*Atkins* Tr. VI, 25-26, 38-39). Dr. Call and Dr. Hopewell also administered the Wide Range Achievement Test-III (WRAT-

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education class so that they could compete with students closer to their IQ level (*Atkins* Tr. III, 40).

[16] Of course, Dr. Hopewell was supposed to determine <u>whether</u> Petitioner was intellectually disabled. Thus, his decision to modify the TOMM on the assumption that Petitioner is intellectually disabled appears questionable.

III). Dr. Call expected that Petitioner would perform similarly on both tests. However, on the test given by Dr. Call, Petitioner was all of a sudden unable to spell certain words that he was able to spell during Dr. Hopewell's administration (*Atkins* Tr. VI, 26-30). These words included Petitioner's last name, "Smith," that Petitioner had previously been able to spell on a 1992 insurance application as well as other prison documents (*Atkins* Tr. VI, 26-30). Further, it is important to note the significant drop in IQ scores from his pre-*Atkins* scores of 73 and 65, to his post-*Atkins* scores of a consistent 55. Clearly Petitioner has learned the importance of a low score, and how to maintain it, which is further evidence that Petitioner does not function at a sub-average intellectual level.

Petitioner cannot overcome the deference due to the OCCA in affirming the jury's verdict that he was not intellectually disabled.

> First, AEDPA deference applies to the OCCA's review-and rejection-of [Petitioner's *Jackson*] claim. Thus, the OCCA's factual determinations are presumed correct absent clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Second, a jury concluded [Petitioner] was not mentally retarded, and our review of jury verdicts is 'sharply limited.' *Boltz v. Mullin*, 415 F.3d 1215, 1232 (10th Cir. 2005). We cannot overturn a jury verdict 'as long as it is within the bounds of reason.' *Id.* Given these layers of deference, [Petitioner] would have to present a very convincing case that he is, in fact, mentally retarded--*i.e.*, that the OCCA's

> and Oklahoma jury's decisions to the contrary were unreasonable.

Howell v. Trammell, 728 F.3d 1202, 1228 (10th Cir. 2013).

The evidence Petitioner relies on includes evidence that he was in special education classes in school[17] and that he nearly drowned at the age of twelve. (Opening Br. at 34-35). However, these facts are at best merely factors in the determination, and not definitive proof of intellectual disability. The credibility and weight of this evidence is for a jury to determine. Further, neither of these facts prove that Petitioner "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." *Murphy*, 54 P.3d at 567-568.

Petitioner argues the OCCA's reliance on the above facts is unreasonable and amounted to inaccurate assumptions and an improper reliance on select pieces of evidence. Generally, because the issue of the sufficiency of the evidence is a mixed question of law and fact, the claim is analyzed under both § 2254 (d)(1) and (2). *See Maynard v. Boone*, 468 F.3d 665, 673 (10th Cir. 2006) (explaining applicability of § 2254 (d)(1) and § 2254(d)(2) to mixed questions of law and fact such as sufficiency of the evidence, on habeas review). Here, however, Petitioner forfeited any argument that any factual findings supporting the OCCA's

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[17] As shown above in footnote 15, it is quite possible that Petitioner was not intellectually disabled but was still placed in these classes.

sufficiency claim were unreasonable pursuant to § 2254 (d)(2) by failing to raise same in the district court, as argued above.

In any event, his argument here does not adequately trigger a (d)(2) argument because he is merely complaining about the application of the law to the facts rather than an unreasonable factual finding itself. Regardless, even if this Court reviews Petitioner's (d)(2) claim, the argument above shows he cannot satisfy *Richter*'s "fairminded disagreement" standard, *Brumfield*'s "reasonable minds could disagree" standard nor has he shown, pursuant to § 2254(e)(1), by clear and convincing evidence the OCCA's factual findings were incorrect.

2. Adaptive Behavior

Next, Petitioner claims he has a significant limitation in adaptive behavior. The adaptive impairment prong of an intellectual disability diagnosis requires an evaluation of the individual's ability to function across a variety of dimensions." *Brumfield*, ___ U.S. at ___, 135 S. Ct. at 2279. The OCCA determined that a petitioner must show a significant limitation in adaptive functioning in at least two of the following skill areas: communication, self-care, social skills, home living, self-direction, academics, health and safety, use of community resources, and work. *Murphy*, 54 P.3d at 568.

Petitioner claims he suffers from profound deficits in communication, functional academics, social skills and home living/health and safety. Opening Br. at 37. The adaptive behavior test relied on by Petitioner was the Vineland Test given by Dr. Hopewell. Dr. Hopewell testified that the Vineland Test is supposed

to be administered to a caretaker rather than the individual suspected of being intellectually disabled (*Atkins* Tr. II, 60). However, Dr. Hopewell administered the test to Petitioner. This misuse of the test is even more egregious in light of Petitioner's performance on the TOMM, discussed above.

As shown below, an overwhelming amount of evidence was presented by the State to show Petitioner did not suffer from poor verbal skills or language development. The evidence supporting Petitioner's position the jury or the OCCA heard was that of Dr. Hopewell who claimed the Petitioner had extremely poor verbal skills and low ability in terms of language development (*Atkins* Tr. 62-67; Doc.18, Att. 4, pg. 7). Petitioner argues his "family members, former EMH [educable and mentally handicapped] teachers, and formal cell mates corroborated Dr. Hopewell's formal findings with anecdotal evidence." Opening Br. at 37. According to Petitioner, Norman Cleary's testimony, a former cell mate, that "you can't really hold a conversation with" Petitioner and that Mr. Cleary tried to teach Petitioner to read but to no avail supports Dr. Hopewell's opinion. He also says Mr. Cleary's testimony that Petitioner could not play cards, slowed down a dominoes game and could not understand the value of certain commissary items does as well. He further relies on Mr. Cleary's testimony that Petitioner would cut himself when he attempted to trim his toenails.

Petitioner also claims his educators presented evidence that he had limited ability to learn information and apply it practically. To support this assertion, Petitioner refers this Court to Paul Preston who recalled that Petitioner's reading skills were poor

and that he helped Petitioner fill out job applications and to Mona Autry who testified she taught her students basic survival skills so they could function in society (*i.e.* how to fill out job applications, create a budget, use a calculator to help manage money, basic reading skills, Oklahoma history, etc.) (*Atkins* Tr. III, 97-98).[18] Finally, he relies on his mother's testimony that Petitioner did not respond to frustration like other children his age and that she never taught him to cook because she "didn't want him to play with fire when [she] wasn't there." (*Atkins* Tr. IV, 9). This evidence was the only evidence presented to the jury that Petitioner relies on and the jury determined that it was not enough to meet his burden of proof and the OCCA agreed. This was clearly based on the overwhelming evidence presented that refuted any claim Petitioner was intellectually disabled.

The OCCA held that the State presented sufficient and persuasive evidence to refute Petitioner's claim of sub-average intellectual functioning and of adaptive functioning deficits. Smith, No. O-2006-683, slip op. at 7-8 (Opening Br. Att. 4). Clearly, as the evidence is relevant to the question of Petitioner's intellectual disability, any reliance by the OCCA on same is likewise relevant and proper for consideration. More importantly, Petitioner has pointed to no Supreme Court case which prevented the OCCA (or the jury) from relying on the facts discussed below.

Specifically, the OCCA first noted the testimony of Emma Watts, Petitioner's former prison case man-

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[18] This seems to contradict Mr. Cleary's testimony that Petitioner could not read nor appreciate the value of certain commissary items.

ager who had daily contact with Petitioner for two years. Smith, No. O-2006-683, slip op. at 8 (Opening Br. Att. 4) (*Atkins* Tr. IV, 55). Ms. Watts testified that Petitioner was able to communicate with her and understood how to use manipulative behavior to get a more desirable cell or cellmate. Smith, No. O2006-683, slip op. at 8 (Opening Br. Att. 4) (*Atkins* Tr. IV, 61).

The OCCA also noted the testimony of Ruby Badillo, Petitioner's insurance agent. Ms. Badillo testified that Petitioner was perfectly normal and very sociable, so much so that she attempted to recruit Petitioner to work for her company selling insurance or other financial services. Smith, No. O-2006-683, slip op. at 9 (Opening Br. Att. 4) (*Atkins* Tr. IV, 51). Next, the OCCA recalled the testimony of Mark Woodward, a facilities manager for a company that employed Petitioner as the head custodian at Washington Irving Elementary School. Mr. Woodward testified that Petitioner was the "go-to guy," was responsible for a staff of four to five people, ensured other workers had their time cards filled out properly, and was responsible for delegating and reassigning custodial duties on a daily basis. Smith, No. O-2006-683, slip op. at 9 (Opening Br. Att. 4) (*Atkins* Tr. IV, 69-72). Mr. Woodward testified that he was able to effectively communicate with Petitioner both in person and through a digital pager. Smith, No. O-2006-683, slip op. at 9 (Opening Br. Att. 4) (*Atkins* Tr. IV, 74-76).

Next, the OCCA remarked on the testimony of Fern Smith, one of the assistant district attorneys that prosecuted Petitioner's murder case. Ms. Smith testified she was once a special education teacher of intellectually disabled students, and there was nothing about her contact with Petitioner that led her to

believe Petitioner was intellectually disabled. Smith, No. O-2006-683, slip op. at 10 (Opening Br. Att. 4) (*Atkins* Tr. IV, 108). Further, Ms. Smith testified that Petitioner filed and presented several motions on his own behalf. Ms. Smith testified that Petitioner made good arguments and was articulate when presenting his motions. Smith, No. O-2006-683, slip op. at 10 (Opening Br. Att. 4) (*Atkins* Tr. IV, 102-105).

Finally, the OCCA noted the testimony of Laura Dich. Ms. Dich testified that she met Petitioner in April 1993 and they began dating shortly thereafter. Petitioner did not give Ms. Dich his phone number, but rather had her use his digital pager to contact him. Ms. Dich testified that by May 1993, Petitioner had told her that he wanted to marry her and have children with her. Ms. Dich also testified that Petitioner took her to a motel on several occasions and that it was Petitioner who reserved and paid for the room. Smith, No. O-2006-683, slip op. at 10-11 (Opening Br. Att. 4) (*Atkins* Tr. V, 5-29). Although Petitioner argues there is no scientific or clinical support to show the above evidence is relevant, it clearly is as it speaks directly to the factors Petitioner was required to prove to show he was intellectually disabled.[19]

The OCCA relied on the evidence to make a legal determination that the evidence was sufficient to support the jury's verdict. Petitioner was unable to show that he has significant limitations in adaptive

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[19] The third requirement in Oklahoma is that Petitioner's mental retardation be present prior to the age of 18. The presence or absence of this prong was not argued to the OCCA. As the OCCA concluded that the jury's verdict was supported as to the first two prongs of *Murphy*, it had no occasion to expressly discuss the third prong.

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. *Murphy*, 54 P.3d at 567-568. To the contrary, the evidence showed Petitioner was not impaired with any ability to adaptively function in society.

Petitioner argues the OCCA's reliance on these facts is unreasonable and amounted to inaccurate assumptions and an improper reliance on select pieces of evidence. Like above, any § 2254 (d)(2) is forfeited as it was not raised to the district court. Further, like above, his argument does not amount to proper (d)(2) argument because he is merely complaining about the application of the law to the facts and not specifically an unreasonable factual finding. Regardless, as in the first prong, Petitioner cannot satisfy *Richter, Brumfield* or the demanding standard of § 2254(e)(1).

The question before this Court is not whether Petitioner is intellectually disabled. Rather, the question is whether the OCCA's acceptance of the jury's verdict was so unreasonable that no fairminded jurist would agree. Petitioner relies heavily on the Sixth Circuit case of *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014), that a state court's determination of intellectual disability is unreasonable if the state court does not rely on clinical methods and definitions. *Id.* at 612. However, *Van Tran* is an inappropriate standard, as the sole yardstick for review is "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Not only was *Van Tran* decided after Petitioner's *Atkins* appeal, its interpretation of *Atkins* is also not clearly

established federal law. Petitioner does not identify a standard the OCCA failed to follow, rather, he merely complains that the OCCA accepted the jury's decision to disbelieve Petitioner's experts.

F. Conclusion

The OCCA concluded that the evidence supported the jury's determination that Petitioner was not intellectually disabled. Contrary to Petitioner's assertion, the evidence presented concerning his intellectual disability was not conclusive, but disputed. In fact, Petitioner relies upon a dissent from Judge Chapel which recognized that "[t]he State certainly presented testimony which cast doubt on some of Smith's evidence." Opening Br. at 43. Based on this evidence, considered in the light most favorable to the state, any rational juror could have concluded that Petitioner is not intellectually disabled. Thus, the OCCA's decision is not contrary to, or an unreasonable application of, *Jackson*, and Petitioner's first Ground for Relief is without merit and must be denied by this Court.

TENTH CIRCUIT REPLY BRIEF OF PETITIONER/APPELLANT RODERICK L. SMITH, RELEVANT EXCERPTS (DECEMBER 7, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODERICK L. SMITH,

Petitioner/Appellant,

v.

MIKE CARPENTER,
Warden, Oklahoma State Penitentiary,

Respondent/Appellee.

Case No. 17-6184
(Capital Case)

District Court: CIV-14-579-R (W.D. Okla.)

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. CIV-14-579-R

The Honorable David L. Russell, Federal District Judge

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[. . .]

ARGUMENT AND AUTHORITIES

Without waiver or abandonment of any issues or arguments, Mr. Smith replies to Respondent/Appellee's Response Brief (hereinafter Response).

REPLY CONCERNING PROPOSITION ONE

SMITH'S EXECUTION IS PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE IS INTELLECTUALLY DISABLED

A. Preliminary Matters

In an effort to dilute the strength of this claim, Respondent inaccurately asserts Smith "only challenged the OCCA's opinion based on § 2254(d)(1)" before the district court. Response at 18. Hence, according to Respondent, Smith forfeited any argument based on § 2254(d)(2) raised before this Court. *Id.* This is simply untrue. Smith raised numerous arguments based on § 2254(d)(2) before the district court. *See* Doc. 43 at 5, 8-11, 13. And the district court considered such arguments. *See* Doc. 47 at 23 (recognizing Smith argued that "the OCCA arbitrarily relied on isolated factors that it unreasonably believed were inconsistent with intellectual disability while disregarding the wealth

of evidence that shows [Petitioner] is intellectually disabled") (citing Doc. 43 at 5).

Further, Respondent's reliance on *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015) to support his forfeiture argument, Response at 18, stretches *Hancock* beyond its logical bounds. Neither *Hancock*, nor the case it relies on, *Olmos v. Holder*, 780 F.3d 1313, 1326 (10th Cir. 2015), supports the strained result Respondent seeks. In both cases, petitioner raised claims on appeal that had not been touched on below—in *Hancock* a claim the OCCA's decision did not encompass a due process claim and thus was not an adjudication on the merits, and in *Olmos*, a claim that a statute did not apply to petitioner because he had already been sentenced to probation rather than confinement. Here, the claim has consistently challenged the OCCA's adjudication as contrary to *Atkins v. Virginia*, 536 U.S. 304 (2002), for unreasonably applying *Atkins*, and for making unreasonable determinations of fact. The claim, in its entirety, is properly before this Court.

Next, Respondent complains that Smith's "manner of presentation" makes it "quite difficult to distinguish those facts upon which this Court may rely from those on which it may not." Response at 19. Although Smith did refer back to some facts set forth in the "Statement of Facts" section to support this claim, *see* Opening Brief at 30, 34-35, 37, the facts to which he referred were all very clearly part of the state-court record, as designated by their citation to the transcript volumes, page numbers, and exhibits from his *Atkins* trial.

B. Standard of Review

Respondent and Smith agree this Court's decision in *Hooks v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012) provides the appropriate standard of review when a defendant is challenging an *Atkins* jury determination: "[T]he relevant constitutional standard . . . was whether, viewing the evidence in the light most favorable to the prevailing party (the State), any rational trier of fact could have found [the petitioner] not mentally retarded by a preponderance of the evidence." *See* Response at 20-22; Opening Brief at 28. But while promoting *Hooks* as providing the appropriate standard of review for this claim, Respondent simultaneously "strongly disagrees" with the part of the opinion holding such sufficiency challenges "inescapably require[ ] that [the Court] consider the kinds of evidence that state courts may (or may not) rely upon in adjudicating an *Atkins* claim." Response at 21 n.9 (referring to *Hooks*, 689 F.3d at 1166). Respondent cannot have it both ways.

Respondent next attempts to sever *Atkins* from the analysis of this claim altogether by asserting "the question is whether the OCCA reasonably applied *Jackson* [*v. Virginia*, 443 U.S. 307 (1979)], not whether the OCCA reasonably applied *Atkins*." Response at 23. *See also id.* at 33 (arguing "the clearly established law that applies to this claim is *Jackson*, not *Atkins*"). This Court has flatly rejected Respondent's proffered argument. *Hooks* makes crystal clear the "inquiry also requires [the Court] to consider whether the OCCA, in upholding the jury's verdict, reasonably applied *Atkins* to [the petitioner's] claim of mental retardation." 689 F.3d at 1167.

Smith recognizes the high deference given to the review of jury verdicts, especially in cases involving the AEDPA. This Court has held:

> We cannot overturn a[n] [*Atkins*] jury verdict 'as long as it is within the bounds of reason.' Given these layers of deference [including AEDPA deference], [petitioner] would have to present a very convincing case that he is, in fact, mentally retarded–*i.e.*, that the OCCA's and Oklahoma jury's decisions to the contrary were unreasonable.

Howell v. Trammell, 728 F.3d 1202, 1228 (10th Cir. 2013) (internal citation omitted). Smith's is the rare case that surpasses that high level of deference.

Although not clearly established federal law, *Pickens v. State*, 126 P.3d 612, 615, 621 (Okla. Crim. App. 2005) demonstrates that sufficiency challenges in *Atkins* cases are not an impossibility; it also highlights how unreasonable the OCCA's determinations are in Smith's case. In *Pickens*, the OCCA found the jury's verdict finding Mr. Pickens not mentally retarded was contrary to the evidence, reversed the verdict, and modified Mr. Pickens' sentence to life without parole. Despite that Pickens had IQ scores ranging from 70-79, the OCCA found he met the first prong of *Murphy*. *Id.* at 615-16. And despite evidence that Mr. Pickens could "communicate normally," "dress[ ] very neatly," and fill out medical service forms and write letters, the court found he suffered from significant deficits in his adaptive functioning. *Id.* at 618-19. As discussed in his Opening Brief and below, Smith presented far lower IQ scores, yet the court found he failed to meet the first *Murphy* prong. And despite presenting evidence of significant deficits in his adap-

tive functioning, the court focused on a few perceived strengths and determined he failed to establish this prong. As demonstrated in his Opening Brief and again in this Reply, Roderick Smith is, in fact, intellectually disabled, and any decision to the contrary is unreasonable.

C. Respondent Has Not Countered the OCCA's Finding that the Record Supported the Jury's Verdict Smith Is "Not Mentally Retarded" Is Unreasonable

Respondent incorrectly asserts *Atkins* does not mandate the application of clinical standards. Response at 33. Respondent would have this Court ignore the Supreme Court's jurisprudence reinforcing this requirement of *Atkins*, specifically *Hall v. Florida*, 572 U.S. 701 (2014), *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Moore v. Texas*, 137 S. Ct. 1039 (2017).[1] Response at 29 n.10. *See* Opening Brief at 27, 29, 36-37, 41-42 (discussing how these cases illustrate *Atkins*' mandate for the application of clinical standards and definitions).

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[1] In *Hall*, the Supreme Court recognized "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." 572 U.S. at 720. Continuing to emphasize the clinical underpinnings of the constitutional restriction, in *Brumfield*, the Court relied on clinical practices and criteria to find the state court's rejection of the petitioner's request for an *Atkins* hearing was premised on an unreasonable determination of facts. 135 S. Ct. at 2276-82. And most recently, in *Moore*, the Court relied on prevailing clinical standards to conclude Texas' reliance on the non-clinical *Briseno* factors to assess adaptive functioning was unconstitutional. 137 S. Ct. at 1049-53. The Court went on to hold "[t]he medical community's current standards supply one constraint on States' leeway" in the area of defining intellectual disability for the purposes of *Atkins* protection. *Id.* at 1053.

Although these cases were decided after the state court decision in this case, the primary holdings in them were compelled by *Atkins*. *See, e.g.*, *Hill v. Anderson*, 881 F.3d 483, 491-92 (6th Cir. 2018), *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000) ("[C]learly established federal law as determined by the Supreme Court . . . means that the rule sought by petitioner must have been dictated or compelled by [existing precedent].")

The Sixth Circuit explained the relevance of the Supreme Court's post-*Atkins* intellectual disability cases:

> [T]he *Moore* Court described a 2015 case—*Brumfield*—as "relying on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual disability finding." 137 S. Ct. at 1049. Because *Brumfield* reached the Supreme Court on collateral review and the state post-conviction rulings on the defendant's *Atkins* claims preceded *Hall*, the Supreme Court's reliance on *Hall* in *Brumfield* makes clear that *Hall*'s principal holdings were compelled by *Atkins*.

Hill, 881 F.3d at 492 (internal citation omitted). Clearly, states and courts do not have carte blanche to apply standards and definitions that are inconsistent with current clinical standards; to do so would be an unreasonable application of, and contrary to, *Atkins*, as illustrated by *Hall*, *Brumfield*, and *Moore*.

Instead of employing clinically-accepted standards and definitions, here the OCCA arbitrarily relied on isolated factors that it unreasonably believed were inconsistent with intellectual disability. Its approach

was not an "appropriate way" to enforce the constitutional prohibition. *Atkins*, 536 U.S. at 317 (tasking states with "developing appropriate ways to enforce the constitutional restriction"). Hence, it was an unreasonable application of, and contrary to, *Atkins*. Moreover, the OCCA's willingness to ignore abundant evidence that strongly rebuts the jury verdict of "not mentally retarded" resulted in unreasonable determinations of facts.

1. Unreasonable Determinations Regarding Intellectual Functioning

In his Opening Brief, Smith raised four clear and discrete points attacking the reasonableness of the OCCA's finding that "Smith failed to meet even the first prong of the *Murphy* definition of mental retardation." Opening Brief at 38-39; Att. 1 at 11. Specifically, Smith attacked this finding as unreasonably deviating from clinical standards and definitions (contrary to and unreasonably applying *Atkins*) and raised the following arguments:

1) the OCCA unreasonably relied on evidence from lay witnesses, to the exclusion of expert testimony. Opening Brief at 39;

2) the OCCA unreasonably relied on inaccurate assumptions about the intellectually disabled and select pieces of evidence, namely Smith's history as a janitor, his ability to carry on an affair, and that he "manipulated those around him" to conclude he was "not mentally retarded." *Id.* at 39-40 (citing *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015));

3) the OCCA unreasonably failed to recognize the State presented no evidence of IQ test results from standardized, scientifically-recognized tests placing Smith outside the intellectually-disabled range, and not one expert, even the State's, could conclude Smith was "not mentally retarded." Opening Brief at 41 (citing *Brumfield*, 135 S. Ct. at 2278); and

4) the OCCA unreasonably believed that Smith's alleged clean-up of the crime scene was somehow relevant to "whether he is capable of logical reasoning and whether he is mentally retarded." Opening Brief at 41-42 (citing *Van Tran v. Colson*, 764 F.3d 594, 608-09 (6th Cir. 2014)).

Rather than address these specific arguments and the supporting case law, Respondent, like the lower courts, resorts to broad arguments limited to the *Jackson* standard without consideration of *Atkins*' mandate for the application of clinical standards. Respondent also ignores *Hooks*' requirement that reviewing courts must "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 (emphasis added). Instead, Respondent makes easily-debunked arguments regarding Smith's sub-average intellectual functioning.

First, Respondent attempts to blunt the significance of Smith's remarkably consistent history of IQ scores within the intellectually-disabled range by diminishing the role of IQ test results for determining whether a petitioner establishes prong one of the

Murphy definition.[2] Response at 34 (citing *Murphy v. State*, 54 P.3d 556, 568 (Okla. Crim. App. 2002)). Although an IQ score is not "final and conclusive evidence of a defendant's intellectual capacity," *Hall*, 572 U.S. at 712, "[t]his is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes," *id.* at 723.

Second, Respondent tries to undermine Smith's consistent history of IQ scores in the intellectually-disabled range by resurrecting the unreliable test results about which Dr. Phillip Murphy testified at Smith's original trial in 1994. Response at 34-35. Respondent, without any support from the record, characterizes the test Dr. Murphy administered to Smith as "a Wechsler IQ test." *Id.* at 34. Yet nowhere in the record–not even in the pages cited by Respondent (MR2 VI at 35-36)–is Murphy's test referred to as "a Wechsler IQ test."[3] In light of Dr. Murphy's ethical problems discussed in Smith's Opening Brief at 34, and the record's failure to identify whether Dr.

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[2] Smith did not rely solely on IQ test results to establish he suffers from significantly sub-average intellectual functioning. He also presented three witnesses who testified to his placement in classes for the educable mentally handicapped ("EMH") for the entirety of his schooling. Opening Brief at 34-35. "Mentally retarded" children comprised EMH classes at the time of Smith's placement. MR2 III at 7-8. Smith also presented evidence of a near-drowning when he was twelve that exacerbated his already-compromised intellectual functioning. Opening Brief at 34-35.

[3] In fact, in Murphy's testimony from Smith's original trial, not once does he state he administered "a Wechsler IQ test" to Smith. *See* Oct. 26, 1994 trial in Oklahoma County Case No. CF-94-1199 at 89-159. Respondent fails to mention that Dr. Murphy's opinion was that Smith is "in the mentally retarded range." *Id.* at 124.

Murphy used an appropriate testing instrument, the lower courts' reliance on the Murphy results to the exclusion of other credible testing is unreasonable.

Third, Respondent fails to effectively counter Department of Corrections Psychologist Dr. Fred Smith's opinion that Smith suffers from "mental retardation." MR2 III at 161, 168. Instead, Respondent, like the OCCA, wrenches Dr. Smith's opinion out of context to support the theory Smith was malingering. Response at 35-36. Respondent and the OCCA conveniently omit that although Dr. Smith initially had some doubts as to whether Smith put forth his best effort on an outdated WAIS-R administered in 1997 that resulted in a 65, Dr. Smith's ultimate conclusion was the following:

> At that time I felt more skeptical than I do now because certain pieces have fallen into place since then. Since that time the issue has developed into one of mental retardation. And based on that question, I took a closer look on the day that we had and I was very much struck by the fact that there's a consistency in what happened with the Wechsler Scale, with what happened with the Standard Progressive Matrices, and with what happened with the Memory-for-Designs, the consistency was quite remarkable and it shows a consistent pattern rather than faking.

MR2 III at 167-68 (emphasis added).

Fourth, Respondent dismisses Smith's EMH placement based on a very minor discrepancy in the testimony of two of Smith's EMH teachers. *See* Response at 36-37 n.15 (noting one witness testified placement

in EMH classes required a student to have an IQ between 60-75 and another witness testified the range was from 55-75). This insignificant discrepancy does nothing to undercut that Mona Autry, Smith's EMH teacher during his 9th through 11th grades, testified that of the many EMH students she taught, Smith was "one of the lower" functioning students." MR2 III at 104. She described Smith's ability to learn as "very limited," and Smith as having a "[v]ery limited knowledge base." *Id.* at 112-13. And Paul Preston, another high school EMH teacher of Smith concurred; he recalls Smith was "very low, very limited in his abilities." *Id.* at 28. Although some students in EMH classes were mainstreamed into the regular curriculum, Preston never would have suggested Smith be mainstreamed because "[h]e does not have the ability . . . [it] wouldn't [have] been fair to him." *Id.* at 35. Smith's placement in EMH classes for the entirety of his schooling, long before any incentive to malinger existed, undermines the State's malingering canard.

In a trial where such overwhelming evidence of sub-average intellectual functioning was presented and the State's own expert could not conclude Smith was "not mentally retarded," MR2 VI at 67, no rational juror could have found Smith failed to meet the first prong of the *Murphy* definition. The lower courts unreasonably concluded otherwise by failing to adhere to current clinical standards, by relying on inaccurate assumptions about the intellectually disabled, and by relying on select, improper pieces of evidence to support such inaccurate assumptions.

2. Unreasonable Determinations Regarding Adaptive Functioning

Respondent hones in on a few instances described by lay witnesses that allegedly demonstrate Smith's proficient adaptive functioning, while ignoring the overwhelming clinical evidence demonstrating his profound deficits. Respondent's position, as well as the position of the lower courts, fails to acknowledge that the Supreme Court has unequivocally held adaptive behavior must be evaluated on a deficit model: Intellectually disabled individuals, like all individuals, have strengths, and these strengths do not negate their disability. *See Moore*, 137 S. Ct. at 1050 (noting the "medical community focuses the adaptive-functioning inquiry on adaptive deficits"); *Brumfield*, 135 S. Ct. at 2281 (finding "intellectually disabled persons '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 American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* at 8 (AAMR) (10th ed. 2002)). *See also* Opening Brief at 36-37, 42. Respondent would have this Court ignore this clear directive. Response at 29 n.10. But as Smith explained *supra* at 5-6, *Brumfield* and *Moore* were compelled by *Atkins.* Hence, courts must adopt the deficit model to assess adaptive functioning to satisfy *Atkins'* requirement that state courts apply current clinical criteria.

As detailed in his Opening Brief at 36-38, Smith proved he suffers from significant deficits in his adaptive functioning in the following domains: communication, functional academics, social skills, and home living/ health and safety. Such deficits were established

through the testimony of expert and lay witnesses. If this Court employs the deficit model, as clearly established federal law compels it to do, the unreasonableness of the lower courts' finding that Smith failed to prove this prong will be apparent.[4]

D. Conclusion

Roderick Smith has suffered from significantly sub-average intellectual functioning and profound adaptive behavior deficits his entire life. Every clinically-recognized IQ test administered to Smith confirms his profound deficits, and multiple experts agree he is intellectually disabled. But because jurors and judges have disregarded clinical practices and definitions, Smith stands to be executed without this Court's intervention. If *Atkins*' constitutional restriction on the execution of the intellectually disabled has any meaning, then surely the State of Oklahoma cannot execute Roderick Smith. This Court should reverse with directions to grant the Writ to prevent his unlawful execution.

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[4] The OCCA did not address the "manifestation-before-age-eighteen" requirement. Nevertheless, Smith's placement in EMH classes in early elementary school, along with his mother's recognition Smith was "very, very slow," MR2 IV at 6, even when he was a baby, demonstrate his disability manifested long before he turned eighteen.

PROSECUTOR CLOSING ARGUMENTS AT TRIAL, RELEVANT EXCERPTS (MARCH 15, 2004)

IN THE DISTRICT COURT OF
OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Plaintiff/Respondent,

v.

RODERICK LYNN SMITH,

Defendant/Petitioner.

Case No. CF-1993-3968

Volume VI

Transcript of Jury Trial
Had on the 15th Day of March, 2004,
Before the Honorable Jerry D. Bass, District Judge

[March 15, 2004 Transcript, p. 86]

. . . indicate that Mr. Smith scored below a 70 on the IQ testing that each of them administered individually. As far as the area of adaptive functioning, only one expert administered an adaptive functioning test, and that was Dr. Hopewell.

And as the evidence showed, the Vineland, which was given to Mr. Smith, showed deficits in these

three areas. Did he function in the lower 2 percent of the population in these three areas? As it was mentioned, the Vineland doesn't measure all nine areas. But if you will remember, Dr. Hopewell said that Mr. Smith suffers significant deficits in all nine areas.

We would ask that when you review this evidence you remember the road map and you look at the three pit stops, those three pit stops being the three elements of mental retardation. We ask that you find—that you reach a conclusion and find that Mr. Smith is mentally retarded as defined in those instructions. Thank you.

THE COURT: Thank you, Ms. Hobbs.

Mr. Mashburn, you may address the jury, sir.

MR. MASHBURN: This guy is a faker. He is a faker. It's plain and simple, ladies and gentlemen. You've sat through a week of this stuff only to know that he's a faker. Two things that you know for sure, 100 percent dead cinch, you know, number one, that what you decide here will help this judge in determining a sentence. Number two, what you know, is that he wants you to find him mentally retarded. He gains something. He gets something out of this if you guys find him mentally retarded. He has a motive to fake it. That's what you know.

Well, ladies and gentlemen, I'm sure Ms. High is going to talk to you about malingering and things like that. But what I want to talk to you about is, despite his best efforts, despite him scoring 55 on an IQ test and mumbling and coloring pictures, despite his best efforts, they can't—these

good lawyers can't prove to you that he meets the definition of mentally retarded. Despite all of that, they're stuck with a guy that's really not.

And remember, remember, if you don't take anything else that I say right now, remember two things. As he sits here right now, he is presumed to be not mentally retarded. He is presumed to be just fine, as you guys sit here, unless and until they can prove otherwise. That's the second thing. They have to prove it to you.

We could stop. We could not have called any witnesses. We could have sat here with our heads down, not cross-examined one of those witnesses, and they would have had to prove it to you. So ask yourself this. Okay? When they got through calling witnesses the other day, I believe it was Thursday morning, when they got through, you heard their last witness, were you guys convinced? Had they met their burden at that time?

Because remember, we didn't have to call all of these other people. We could have stopped right then. But we went ahead and we called all of those people to show you that he's really not. So remember that. He's presumed just fine and they have to prove it to you. And have they? And I submit to you, ladies and gentlemen, they haven't come close.

Now, let's talk about this legal definition. Let's talk about this legal definition. And you guys are going to have these instructions back there with you. And we're going to—I'm going to direct you to what number that I have them listed at. Okay?

Now—and let me also point out, this Instruction No. 16, what I just got through talking to you guys about, the burden on them, the presumption and stuff, that's in Instruction No. 16. So it's not just me making it up. It's right there in the law. You guys are going to have this with you. Read it, go over it, talk about it, because this is the law that's going to guide you to your decision. Okay? And I'm only directing your attention to certain ones, and that doesn't meant that not all of them are important. Read them all. I just bring special attention to one that needs special attention. Now, let's look—that's Instruction No. 16.

Instruction No. 17 is basically the elements. You remember how I talked to you guys in voir dire about the elements and they have to prove all of them. Are you guys going to make them prove all of them, and not just one or two? And you guys all promised me, yes, we're going to hold them to their burden and make them prove all of them. So here it is, Instruction No. 17.

It gives you've the definition that—it starts out by giving you the definition of what mentally retarded is. Okay? And then this is it. And in the first element or the first question you have to answer is, is the defendant a person who is mentally retarded as defined in this instruction? So question number one is, does he meet this definition that's given up at the top? Okay? And here it is.

He's mentally retarded if he functions at a significantly sub-average intellectual level that substantially limits his ability—and then several things—substantially limits his ability, number

one, to understand and process information; number two, to communicate; number three, to learn from experience or mistakes; number four, to engage in logical reasoning; number five, to control impulses; and, number six, to understand the reactions of others. So "and" meaning all of these.

He has a significantly sub-average intellectual level that substantially limits his ability to do all of these, not just one or two. He can have deficits in a couple, but it has got to be substantially limit his ability to do all six of these things. All six of them. So you guys have to find that all six—he has trouble—significant trouble in all six of these areas. They have to have proven that to you.

But have they, ladies and gentlemen? I mean, just look at them. Just kind of go over them. Have they proven to you that he can't understand and process information? Have they proven to you that he can't communicate or that he has significant sub-average—and all that stuff—substantially limits his ability to do that stuff?

I mean, because think about it. And what this is, is significantly sub-average, and we talked about it over and over again, it's that two standard deviation.

Basically, he has to be in the bottom 2 percent of the population of the United States in every single one of these areas. He has to be worse off than 98 percent of the people in this country in all six of these areas.

Have they proven that to you? Have they even asked these questions to the witnesses that they

put on the stand, besides Dr. Hopewell? And we're going to talking about Dr. Hopewell. Did they even ask anybody those kind of questions? It's their burden and they didn't even ask it.

Now—and just look at these. To communicate, to learn from experience or mistakes. He learned that he needed to be wearing his uniform shirt at work. Remember? He was instructed, man, you need to start wearing a shirt. And then he started wearing his shirt. I mean, just little examples like that. There was a lot of stuff in there.

To engage in logical reasoning. Remember when Detective Maddox was up on the stand? And he talked about the crime scene and the cleanup that had gone on. The shampooed carpets, the items of evidence, some of them were put in the attic, the thing that was put in the attic. All of that stuff, logical reasoning. I need to keep from getting caught. How do I do that? I'm logically reasoning. I'm doing this.

Is that the bottom 2 percent of the—do you think the bottom 2 percent of the population would think I need to do this, this, and this to keep from getting caught? Common sense. Common sense, ladies and gentlemen. So there's that. That's the first one.

If you answer no, does he function at all of this, if you say no, he doesn't meet the definition of mentally retarded, you guys can stop. Done. Hit the buzzer. Come on down and give us your verdict. Because if you answer no to any of these, then game over. If they didn't prove one, if they missed one, that's it. So you guys can stop here

if your answer to this is no. You guys don't even have to keep deliberating.

And I'm going to keep going because—not because based on the evidence I submit to you that this has been met, but I have to keep going because I don't know what you're thinking right now.

So we go to the second question. So if for some reason you answer yes to that you have to go to the second question. Did the mental retardation—or the mental retardation was present and known before the age of 18. Have they proven that to you? Have they proven to you that this definition of mental retardation, he had trouble in all six of those areas before he was 18? Who did they call to talk to you guys about before the age of 18? They called Mom, his mother. And they called some teachers, some of them didn't even remember him. And some of them said, yeah, he was in my class, and if he went on to be a head janitor, man, that would be surprising, he probably wasn't properly placed.

MS. HOBBS: Objection, Your Honor. That's not what the evidence was.

THE COURT: Ladies and gentlemen of the jury, anything that any of these lawyers say is not evidence. Closing argument is for the purposes of persuasion only. I would remind you of that.

You may continue, Mr. Mashburn.

MR. MASHBURN: Okay. Now, did that stuff prove to you that this mental retardation that they say he has occurred before he turned 18? And if it doesn't, if you answered, no, we don't think that

the mental retardation happened before the age of 18—because remember, if it happens before he's 18, this brain damage, it's brain damage. If the brain damage happens before 18, it's mental retardation. If it happens after he turns 18, then it's called something else. It's called dementia or something like that. It's just plain old brain damage.

So that's why—because brain damage mental retardation, if the brain damage is before, it's developmental. Otherwise, it's just something that happened to your brain after you turned 18. Okay. So if your answer to that is no, stop, hit the buzzer, you guys are done. Say, no, that didn't happen before he turned 18, and you're done.

Take a look at this. Because this is what has happened here. They've given you basically this time line, between zero and 18, his mother comes in and some Special Ed pictures and stuff come in and say, okay, he's mentally retarded in this area, in this time frame. But then between 18 and 27, you know, he had his job, he was a father, a husband, he could hold girlfriends down on the side, he could drive around in his vehicle, he was the head supervisor in charge of all of these employees.

So, you know, he was okay when he was—because remember here they're saying, man, he was so awful in the year of 18. Well, he was decent 18 to 27. And then from 27 to now, they called some doctors to say, oh, man, he's bad again. He's—he colors pictures and he just sits around all day.

Now, ladies and gentlemen, dad-gummit, if this was the truth, if the truth was he's mentally retarded, then it's the same from day one to now. It doesn't fluctuate. It doesn't say, oh, it gets better here, but not here. You don't go back and pick out things here and there. The truth is the truth. Is he mentally retarded all the way through or is he not?

They can't even get their own experts to agree. One expert says, well, he's right on the cusp of being mentally retarded. That was Fred Smith. And then you've got the other doctor saying, man, he's 55, he's at the bottom 1 percent of the population. He's either a bottom dweller, slobbering, or he's just right on the cusp. If it's the truth, then it's one or the other. They can't have it both ways.

Now, third element. Suppose you say yes to this. Okay? If you say no, remember you don't. Third element, the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skilled areas. And so you have to find two out of these nine areas that he has to have significant limitations in. Communication, self-care, social/interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work. Two out of these he has to have significant limitations in. That's the third element.

Can they prove that to you? And, ladies and gentlemen, this is the one where they haven't even—they haven't even broken the skin on this element. Because they—because I asked these questions—you remember me asking those questions, like the defendant's mother, I said you were

available. Of those teachers who had contact with him in high school, when I said, hey, you're available, you're around town, aren't you? You would have been available if a doctor or somebody wanted to come and ask you questions about this defendant and the way he acted before he was 18 and stuff. And they were like, oh, yeah, I live right down the street or, yeah, I'm around. Because they didn't even bother to ask the witnesses about this stuff.

Their doctor, Dr. Hopewell, didn't even pick up the phone. He relied on a couple of transcripts and what this defendant told him. And they bring that to you saying, see, we've proven it. No, they cannot prove it to you based on that—based on what they brought to you.

Because, ladies and gentlemen, if they really wanted to—if they really wanted you to hear the answers to these questions, then they could have put—got Dr. Hopewell on the phone and called up those teachers and called up Mama and said let me ask you these questions that go to communication, self-care, and all this other stuff. But they didn't do that. They missed this one by a mile, ladies and gentlemen. They missed this one, the answer is no. Then all you have to do is buzz, ladies and gentlemen. Because they haven't met their burden in this case, plain and simple. He's a faker.

MS. HIGH: It's easy to say, well, your doctor didn't do it either. Dr. Call didn't do that either. Well, folks, make no mistake, the State of Oklahoma doesn't have the burden of proof in this case. And that's when Ms. Hobbs said no doctor did

that. Dr. Hopewell, is the only one that even did adaptive functioning tests. Dr. Hopewell did invalid, inappropriate, inadequate, completely unreliable adaptive functioning tests. That's exactly what Dr. Hopewell did. And that's the only evidence that they have brought to you of this. That is it.

The Vineland—read from the manual of the manual says you can't do it the way Dr. Hopewell did it. You can't do it that way. Dr. Hopewell was undeterred by the rules. The rules meant absolutely nothing to Dr. Hopewell. Because Dr. Hopewell didn't care what the rules of the TOMM or the 15-Item Test where either. I mean, if it doesn't fit what you are asked to do, then make it fit. Because that's what Dr. Hopewell told you.

When I asked him—I don't remember exactly the question I asked him, but it was something like why didn't you do this. And he said I wasn't asked to do that. Well, heaven forbid. Heaven forbid that Dr. Hopewell do one thing more than what he was asked to do. Which I submit to you was find this defendant mentally retarded by whatever means necessary. Because that's all that he did. He talked to not one single soul outside of Roderick Smith.

Now, he said he talked to a nurse. About what? Who knows? Who knows? It wasn't helpful to him. He said that he talked to a guard who told him that Roderick Smith behaved just fine in the facility in which he lives. Dr. Call at least talked to the prison psychologist, for heaven's sake. And it's not our burden of proof.

Dr. Hopewell did nothing. He wasn't going to do one single thing that he needed to do to come in front of the 12 of you. He didn't even know what the Oklahoma law was. Do you remember him saying, well, the law is different in all states? Well, folks he's coming in here to Oklahoma to talk to 12 Oklahomans about what they needed to do in this case.

This case may not have been important enough for Dr. Hopewell to spend some time on, but let me assure you, that the people of the State of Oklahoma take this case very, very seriously. Every case is serious. Every case is serious. And Dr. Hopewell may have gotten what he needed to get, but I submit, you have not gotten what you needed to get.

How? How can you take two tests, a 15-Item Test and a TOMM test, that both indicate that this defendant is malingering, if you look at them in the way that they're supposed to be looked at and just go, oh, well, whatever? And you know the most amazing thing about that is, Dr. Hopewell said that he did those tests because there have always been issues of malingering with this defendant. Do you remember him saying, well, you know the issue of malingering always comes up. Dr. Call said it. Dr. Smith said it. Well, lo and behold, Dr. Hopewell, your tests say it.

But you know what we did with that? We just pushed that aside. Why? Because that's not helpful to Roderick Smith. So let's just push that aside. Let's just call it something that it's not.

He is a malingerer. That is what he is. He is in a prison population where Dr. Smith told you that malingering is common. More common than it is in a free society. Why? Because, as Mr. Mashburn told you, people want something. And they will do what they need to do to get it. And what Roderick Smith did was not perform up to his full potential.

And how can you tell that? Folks, you heard about these tests. You know, all of this comes in. And you use your common sense. Come on, folks. Somebody shows you four dots and asks you to connect the dots, and if you don't do it fast enough, then they say that you're doing it right or you're doing it wrong, that is ridiculous. Absolutely ridiculous.

That's how Dr. Smith says, well, yeah, he had some diffuse brain damage, he didn't connect those dots fast enough. If that's the case, I could put myself forward as being in the bottom 1 percent of the population too, because all I have to do is stand there and act like I don't know what I'm doing. But when you compare those tests over time, Roderick Smith is a faker, but he can't remember how he faked the last time.

Because remember the WRAT test—remember the WRAT test given between September and January—or January and September of 2003. He couldn't spell his last name. Now, that is ludicrous. That is ludicrous that this defendant would say I can't spell my last name. Look through those exhibits. How many times could he spell his last name? Over and over and over again. But, you know, Dr. Hopewell, tells you it doesn't really matter if he lies to you, it doesn't really matter, it doesn't change the score, doesn't change any-

thing for Dr. Hopewell. Yet he told Dr. Hopewell, I can't write my name in cursive. Well, folks, he sure could when he was filling out his Oklahoma driver's identification card or his ID card. He sure could there. He could print it and write it on the insurance application.

And Dr. Hopewell said, oh, that doesn't matter. It doesn't matter to Dr. Hopewell because that's not what he was going to do. He was going to find this defendant mentally retarded. And that is exactly what he did. It does not mean that you have to. Because you can use something that Dr. Hopewell apparently refused to use, and that's your common sense.

And common sense tells you that if you can spell a "C" one time, you can spell a "C" the next time. If you can write Roderick Smith when you're getting an Oklahoma ID card, you can write Roderick Smith for Dr. Hopewell in 2003. Because there is no explanation for anything having happened to him between those two times except he went to prison. That's the only difference.

Now, all of a sudden, it is not in Roderick Smith's best interest to be able to write his last name. It's not in his best interest to be able to do all of these things that he could do before. Because remember who Roderick Smith was before he went to prison. He was married. Four children lived in his home. He could drive. He could keep a job. He could maintain a girlfriend. He could buy insurance. He could do everything that you can do and I can do.

But when you go to prison, folks, there's no advantage to being able to do all of those things anymore. The advantage is gone. What's in your advantage then is to all of a sudden get up a variety of mental disorders. Because that's what Roderick Smith has done. He has some difficulty figuring out which one he's supposed to be doing today because of the seizure disorder. Seizure disorder is helpful for some reason. It's not helpful in mental retardation, but it's helpful.

But you know what you get if you try to feign seizures? You get Tegretol and you get Depakote. And Dr. Hopewell told you what the effects of Tegretol and Depakote can be on individuals who don't have seizure disorders. Sedation and cognitive depression.

Now, do you see any other explanation in this case for why in 1994 Roderick Smith can score a 73 and in 2003 he can score a 55? How do you explain that? Ask that question. How do you explain a 73 going to a 55? And you know what? Any explanation has to be based on the evidence. It can't be something that we come up with now in closing argument. There has been no explanation for that, other than medication. That's the only possible one. Because he was fine here.

And this is a test given by his expert in 1994. Dr. Smith in 1997 says more likely 70 to 75. Hum, that's right in the middle there. And then Dr. Hopewell comes along and his is a 55. A 55 and fails two malingering tests. And he's a 55 on Dr. Call.

Dr. Call and Dr. Hopewell got similar scores. Well, folks, you have to expect that because they got the same full scale score. You can't get big high scores or big low scores and come out with the same full scale score. And, okay, so had the same number of points in a particular area of questioning. Did she ask him, gosh, did he get all of the same questions right or all of the same questions wrong? No. Funny, didn't ask that question. Why would that be? Because, folks, they don't put in front of you what they don't want you to see.

MS. HOBBS: Objection, Your Honor.

THE COURT: Sustained. I'm going to sustain that.

MS. HIGH: The evidence that has been put in front of you is not the evidence, as Mr. Mashburn pointed out to you, didn't put a scintilla of evidence about what this defendant was like between the ages of 18 and 27. Not a bit. We want to hear about how he was supposed to be this awful, awful student and then all of a sudden he's an awful, awful, sits in the corner and draws coloring pages while he's watching Jay Leno on TV in prison. Nothing about in the middle when he's out and he's an adult and he's able to do what he wants to do.

And they tell you Paul Preston and Mona Autry said, uh-huh, yeah, he was properly placed. Until they were given the facts of what Roderick Smith grew up to be. Until somebody said to them, well, what did he grow up to be? The head janitor. Oh, I would be surprised. You see, folks, you can't just take part of the picture. You've got

to take the whole picture. You can't just pick and choose. I want this fact. Ooh, I don't want that fact. That fact is not helpful to me. I wasn't asked to do that. I was asked to do this.

Let's say, you know, Dr. Call, yeah, he made some money off of the State of Oklahoma. Do you believe that's the reason why he came in and said the things that he did? Dr. Hopewell, didn't ask Dr. Hopewell about how much money he had made. Because experts get paid. That's how they make their living. So let's just throw all of the experts aside. Let's just throw out all of the people that have an interest in this case, monetary interest, or are related to the defendant. Who does that leave you with?

Well, that leaves you with Jesse Thompson. What did he tell you? I see him in two pictures. That's what he told you. Yeah, that's his picture in two Special Ed pictures. Uh-huh. That's it.

Paul Preston and Mona Autry both said, yeah, he was in my class, medium to low-medium in my class. Does that sound like the bottom 2 percent to you? Does that sound like the bottom 1 percent that Dr. Hopewell told you he was? Because you don't get any worse. You don't get any better. You stay the same. Mentally retarded is mentally retarded.

They tell you, both of them, because—and remember the line of questioning with Mr. Preston, because I said, I came out to your house the other day and we had a discussion and we talked about the fact that sometimes people have been misplaced in your class, and you said that if

someone grew up to be the head janitor at the—a head janitor in a position that they would have been misplaced. And he goes, yeah, I believe they would have been misplaced. Folks, that's what he said.

Now, at the time, did Paul Preston know that Roderick Smith had grown up to be the head janitor? No. But that's what he said because that's the truth. And then he went on. He was asked, "Why? Why do you think that?" "Because he wouldn't have had the social skills." That was one of the things that he talked about, about the supervising.

They want to explain away all of the paperwork by somebody else. Roderick Smith had to supervise four to six people. He had to get that school cleaned. He had to arm and disarm the alarm. And you heard Mark Woodward tell you about that process. He communicated with his supervisor by use of a pager. Can the bottom 2 percent of the population use and communicate by a pager? And he didn't just do in that thing, he did it with his girlfriend too.

And if you don't think Roderick Smith is smart, consider what Laura Dich told you, that's the girlfriend, when she talked about how a page was returned by a woman and the woman said, "I know all I need to know," and then five minutes later Roderick Smith called back. And she was angry and she said, yeah, I talked to him about that. But he convinced her that it wasn't another girlfriend.

He had the wherewithal intellectually to be able to go to a hotel, to rent a room, to pay for that room. So they want you to believe he can't use money. Well, how did he rent the hotel room? They don't give those out for free, I don't care how many girlfriends you've got, you've got to pay for those things.

And he's able to hide all of that from his wife and four children who live in his home. And he's able to do that and maintain a full-time job. And he's in the bottom 2 percent of the population? Do you believe that? Are you convinced that that is more probably true than not? Both teachers told you, I'd be surprised if he grew up to be a head janitor. And both of them mentioned social skills.

You had Emma Watts. Emma Watts is a unit manager in the unit Roderick Smith lives and has been his individual case manager before for two years. And she said there's nothing wrong with him. He's a little manipulative. He can manipulate people to try and get cell placements when he wants his cellmate changed. But he's just like everybody else. I never saw any seizures. I never saw any psychological problems. I never saw anything wrong with him.

Now, who is in a better position? And do you think that Emma Watts wasn't available to Dr. Hopewell?

Do you think he couldn't have called the unit manager and spoken with her? He didn't want to know what Roderick Smith was like, because that's not helpful to come in here and tell you

that. But Emma Watts told you there was nothing wrong with him, just like everybody else. As Dr. Smith said, there was nothing behaviorally or performance-wise different from him and any other incarcerated individual. Just like everybody else.

Madeline Corsoro, she was the music teacher. I submit to you she was well-intentioned. But you have to look at what she told you. She gave him notes, but she knew he couldn't read. But she knew he couldn't read, so she puts him on a stage with a list of names to read. Something is not quite right there. You either know that he can't read or you don't know that he can't read.

But look at his job application, because he said he could read. He has checked on there read, write, and speak the English language. All of the questions on the application are filled out just like they are on the insurance application. Everything is there just like it is supposed to be.

Madeline Corsoro didn't come into this courtroom and tell you that Roderick Smith was mentally retarded. She came in to tell you that in her opinion he couldn't read so well. Does that get you there? Does that get you to where you want to go? Uh-huh, I believe it's more probably true that this defendant is mentally retarded. I submit to you, it does not.

Ruby Badillo and Mark Woodward. Mark Woodward worked with this defendant, was the supervisor, said typical school custodian. Did all of the things that were asked of him, did them well, did them adequately. You've got his personnel

file, so the write-up that Mark Woodward gave him about not wearing his uniform shirt is in there. Anything else, if he wasn't capable of doing his job and then gotten written up for it, it would be in there. Look through that stuff and see what is in there.

He made decisions about insurance, health insurance. Did he want it? Did he not want it? He made all kinds of—he has the capability of having a check stop card—a check cashing card. Why do you need a check cashing card for if you can't manage your money? Why do you need that for? He has a social security card and he has an Oklahoma state identification card. This is a man that made his way in this world, just like everybody else, until he went to prison.

Laura Dich, Dinah Dean, Cherie Mishion, what did they tell you? Cherie Mishion and Dinah Dean told you he was in our family. He was married to my sister and my aunt. Cherie Mishion said he taught her how to drive, taught her how to drive. Now can the bottom 2 percent of the population take a 15-year-old and teach them how to drive? I submit to you they cannot. They cannot. But this defendant can. He can watch four children. He can cook, cook meals just like anybody else in this society. He can do everything until he goes to prison, and then it's not in his best interest to do that.

John Maddox told you—gave you the best example, I submit, of this defendant's ability to logically reason. Because when that crime was committed this defendant did what everybody would do that has the ability to logically reason, you try to

cover up. And he was successful, because John Maddox told you that this defendant's crime was not discovered for seven to ten days. And John Maddox told you that if you had gone and looked in that window of that house, his cleanup, his cover-up was so complete you would have never known that the crime had been committed there.

This defendant didn't just take evidence, he cleaned, he brought a carpet cleaner into that house and cleaned those carpets. He covered his tracks so well, so well. Could the bottom 2 percent of the population find—because Maddox told you that there were four items of evidence hidden in closets, one item of evidence hidden under a bed. That the bed had been made up to cover evidence that was in the bed. And some evidence had been taken up into the attic and hidden up there. Could the bottom 2 percent of the population do that? Could the bottom 2 percent of the population go and get a steam cleaner and clean it so completely that the only place you could find confirmation of that evidence was under the carpet?

This defendant is logical. He is clear-thinking. He is not mentally retarded. It is not more what is without a doubt true is that he is just the same as everybody else in this courtroom. Just the same. The only difference being he is in prison. And I ask you to find this defendant not mentally retarded.

When you go to that verdict form, when you get, I submit, to that first question, as Mr. Mashburn said, "Is the defendant a person who is mentally retarded as defined in this instruction?" and you say, no, he is not. Go to this verdict form. The

second line says, "Defendant is not mentally retarded as defined by the Court's instructions." Check that box and have your foreperson sign and push that buzzer and be done with Roderick Smith. Thank you.

THE COURT: Thank you, Ms. High. Ms. Werneke, you may address the jury.

MS. WERNEKE: Thank you, Your Honor.

May it please the Court, members of the jury, counsel. On behalf of Ms. Hobbs and Mr. Smith, we thank you for your undivided attention and the seriousness of this case. And both Mr. Mashburn and Ms. High have given very passionate arguments to you. I'm not going to raise my voice as loud as they have, though.

What I do want to say is that, first of all, Dr. Call did not say that there's no evidence that Roderick Smith is faking. The evidence out of Dr. Call's mouth was he didn't put forth his best effort. Ms. High kept saying faking or failed.

Dr. Call never said that. And I would ask that you recall exactly what he said. There is nothing that says that Mr. Smith is faking anything.

Was Mr. Smith faking it when he was in the mental retardation class as a small child? I don't know very many elementary children who want to fake being mentally retarded and be placed in those classes.

I'm going to go over with you some of these—the prongs that we have. And as you recall during voir dire, we weren't allowed to tell you what the legal . . .