IN THE
SUPREME COURT OF THE UNITED STATES

BYRON LEWIS BLACK
Petitioner,

v.

TONY MAYS, Warden,
Respondent.

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

PETITION FOR WRIT OF CERTIORI

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QUESTION PRESENTED

At a state post-conviction hearing to determine whether Petitioner was a person with intellectual disability whose death sentence should be set aside pursuant to this Court's decision in *Atkins v. Virginia*, evidence was presented that Petitioner's scores on "gold standard," individually administered full-scale IQ tests were 73, 76, 69 and 57. Subsequently, on federal habeas review, the court of appeals rejected these test scores as determinative of whether Petitioner had significantly subaverage intellectual functioning (and thus met prong one of the standard for intellectual disability). Instead, the court below chose to rely upon group-administered test scores found in Petitioner's school records—which clinical consensus considers invalid for assessing intellectual disability—as better indicators of his intellectual functioning prior to the age of eighteen. The question presented is:

Whether the court of appeal's decision to rely upon group-administered, school test scores as more probative of Petitioner's intellectual functioning than scores obtained from individually administered full-scale measures of global intelligence significantly deviated from accepted clinical consensus as well as the principles established by this Court in *Atkins*, *Hall v. Florida*, *Brumfield v. Cain*, and *Moore v. Texas*, and thus deprived Petitioner of his rights guaranteed by the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

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SUPREME COURT OF THE UNITED STATES

No. 17-____

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Byron Lewis Black respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported. *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017); Pet. App. 83–105.[1] The order of the court of appeals denying rehearing is unreported. *Black v. Mays*, No. 13-5224, 2017 U.S. App. LEXIS 21504 (6th Cir. Oct. 27, 2017); Pet. App.106–07. The order of the district court on remand, denying Petitioner's habeas petition and granting a certificate of appealability, is unreported. *Black v. Colson*, No. 3:00-cv-0764, 2013 U.S. Dist.

[1] The Petitioner's Appendix will be cited as "Pet. App." The Sixth Circuit Appendix will be cited as "App."

LEXIS 8436 (M.D. Tenn. Jan. 22, 2013); Pet. App. 50–81. The court of appeals decision remanding the case to the district court for further proceedings is reported. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011); Pet. App. 27–49. The district court's initial decision denying Black's habeas petition under the AEDPA is unreported. *Black v. Bell*, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908 (M.D. Tenn. Apr. 24, 2008); Pet. App. 14–26. The state court's opinion on the merits of Black's *Atkins* claim is unreported. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006); Pet. App. 1–13.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2017. Pet. App. 106. A timely petition for rehearing en banc was denied on October 27, 2017. Pet. App. 107. Justice Kagan granted an extension of time to file the instant petition to and including March 26, 2018. *Black v. Mays*, 17A740 (Jan. 15, 2018) (Kagan, J.). This petition is timely filed. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Byron Black was sentenced to death in 1998, after being convicted of the murders of his ex-girlfriend and her two children. After exhausting state appellate and post-conviction remedies, Black filed a federal habeas petition in which he argued that his death sentence "violates the Eighth and Fourteenth Amendments because he is mentally retarded."[2] *Black v. Bell*, 181 F.Supp.2d 832, 861 (M.D. Tenn. 2001). The district court summarily dismissed this claim as meritless. *Id*. Black appealed to the United States Court of Appeals for the Sixth Circuit and, while that appeal was pending, this Court held that the execution of intellectually disabled defendants is categorically barred as cruel and unusual punishment under the Eight Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Sixth Circuit held Black's appeal in abeyance on July 26, 2002, while he returned to the Tennessee courts to exhaust his *Atkins* claim. Order, *Black v. Bell,* 664 F.3d 81 (6th Cir. 2012) (No. 02-5032) ECF No. 19.

I. PETITIONER'S EVIDENCE OF INTELLECTUAL DISABILITY.

On March 1, 2004, a state court *Atkins* hearing began. App. 1. Black offered testimony from Dr. Daniel Grant, as well as several family members, a school administrator, Black's co-worker and brother-in-law, his former trial attorney, and a high school football coach. Declaration of Dr. Daniel Grant, *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908 (Apr. 24, 2008), Dkt. No. 120-5 [hereafter, "Grant Decl."] Pet. App. 110–20; App 21–140, 197–248, 283–341, 826–33. Grant spent between twelve and fourteen hours with Black and administered numerous tests to him over the course of two separate meetings. Grant Decl. at 1–2, Pet. App. 110–11; App. 205. Grant also

[2] This petition uses the medical community's preferred term of "intellectual disability" in place of "mental retardation" except where the term is in quoted material. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

reviewed numerous records, documents and testimony pertaining to Black, including interviews with approximately seventeen collateral witnesses who were largely family, friends and teachers. Grant Decl. at 2, Pet. App. 111. Grant relied on the definitions and classification systems put forth by the American Association on Mental Retardation (AAMR)[3] and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV TR), published by the American Psychiatric Association (APA) to evaluate whether Black suffers from an intellectual disability. Grant Decl. at 3–5, Pet. App. 112–14; App. 216–20.

On the issue of significantly sub-average general intellectual functioning (i.e., prong one of the three-pronged definition for intellectual disability), Grant testified that the Wechsler Adult Intelligence Scales [hereinafter "WAIS"] and the Stanford-Binet Intelligence Scales [hereinafter "Stanford-Binet"] are "the two most widely used adult measures" of intelligence. App. 210. Grant administered the Stanford-Binet-Fourth Edition in 2001, when Black was 45 years old, and Black obtained an overall composite score of 57, which is over two standard deviations below the mean. Grant also relied on three prior individually administered tests of full-scale intelligence. Black was given the WAIS-R in 1993 and received a score of 73. In 1997, Black was again given a WAIS-R and he received a score of 76. However, the testimony was clear that this score overstated Black's intelligence. At the time it was administered to Black, its norms were at least seventeen years out of date. App. 238. Moreover, the WAIS-R was replaced with the WAIS-III in July of 1997 – just four months after Black was tested. App. 244; Grant Decl. at 5, Pet. App. 114; *WAIS-III Administration and Scoring Manual* (1997). Grant explained that as an IQ test ages over time, "people start scoring a little better than they used to, and so we re-norm the test. And this is a

[3] The AAMR is now the American Association on Intellectual and Developmental Disabilities (AAIDD).

widely accepted concept." App. 238. Thus, a test given near the end of a norming cycle (as the WAIS-R was in 1997) will produce an inflated score compared to a test given with current norms. This phenomenon, referred to as the "Flynn Effect" (after Dr. James Flynn), was explicitly cited by the publisher of the Wechsler Scales as the reason for replacing the WAIS-R with the WAIS-III in 1997. App. 242–43. Grant testified that "using current norms is critically important," App. 221, and the clinical consensus requires that all psychologists at least be aware of aging norms and consider that variable when evaluating tests with older norms. App. 325–26. In 2001, Black was administered a WAIS-III (when the norms were only six years old) and he received a full-scale IQ score of 69. The table below summarizes the individually-administered full-scale IQ scores obtained by Black over the course of his lifetime:

Test/ (Admin. by)	Year Normed	Year Administered	Age of Norms	IQ Score Obtained
WAIS-R (Dr. Blair)	1980	1993	13 years	**73**
WAIS-R (Dr. Auble)	1980	1997	17 years	**76**
WAIS-III (Dr. van Eys)	1995	2001	6 years	**69**
Stanford Binet Forth Ed. (Dr. Grant)	1986	2001	15 years	**57**

Grant "control[led] for malingering" by administering multiple measures of similar concepts because it is difficult for a person to purposefully get a low score on multiple administrations of similar measures in a way that is consistent across time and testing instruments. App. 209. He concluded that Black "put forth maximum effort." App. 312. Grant opined that "all of the individually administered intelligence tests administered to Mr. Black have yielded consistent results. His full scale IQ on all of these tests place Mr. Black's level of intelligence

within the mildly retarded range according to the DSMIV-TR and AAMR diagnostic criteria." Grant Decl. at 5; Pet. App. 114.

Grant also concluded that Black met the criteria for prong two—deficits in adaptive functioning. Black's scores on the Independent Living Scales, a standardized test that directly measures adaptive skill areas, showed deficits in managing money, managing home and transportation, and health and safety. Grant. Decl. at 7; Pet. App. 116. Black's scores on the Oral Written Language Scales, the Picture Peabody Vocabulary Test-Third Revision, and the Expressive Vocabulary Test all showed significant deficits in communication skills. Grant Decl. at 8, Pet. App. 117. Black's performance on several different measures of academic achievement indicated Black's functional academic skills are significantly impaired at approximately a fourth-grade level. Grant Decl. at 8, Pet. App. 117. Black attended a segregated school prior to the time when the federal government mandated special education programs. He was retained in the second grade, and his fifth- and sixth-grade teachers stated, "I would not allow a student to get a bad grade in my class" and "teachers were liberal in their grading"—an A or B at that time would be equivalent to a C or D today. Grant Decl. at 6, Pet. App. 115. His high school football coach testified that Black "was always smiling . . . especially at inappropriate times," App. 106, and described him as the slowest player he had encountered during his thirty-one-year career. App. 115 ("I would single him out as the one that was the most, the hardest to teach offensive plays in my career . . . I know he was a lot slower than any of the other players I had."). Even after he married, Black and his wife lived with relatives who cared for Black. Grant Decl. at 7, Pet. App. 116. In sum, the testimony established that Black never lived independently, never had a bank

account, never did the laundry, cleaned the house, cared for his son, contributed money to the family or helped maintain his residence.[4]

Finally, Grant testified that prong three—onset prior to age eighteen—was also satisfied. Black's failure of the second grade and his football coach's observations occurred prior to the age of 18. In the ninth grade, Black was administered the Differential Aptitude Test and his significantly sub-average performance indicates he did not develop age appropriate independent living skills before the age of eighteen. Grant Decl. at 8, Pet. App. 117. Moreover, Dr. Albert Globus and Dr. Ruben Gur opined that Black had brain damage caused by his mother's drinking during pregnancy, football injuries, and possible childhood exposure to lead—all of which occurred prior to Black's eighteenth birthday.[5]

II. THE STATE'S EXPERT TESTIMONY.

The State relied on testimony from two expert witnesses, neither of whom had ever met Byron Black, conducted any testing of him, or interviewed any collateral witnesses. Dr. Susan Vaught agreed with Grant that prong one was satisfied. App. 538, 546, 584, 599. Dr. Eric Engum decided (without any factual basis to support his conclusion) that he did not need to meet with

[4] Dr. Stephen Greenspan also conducted a comprehensive adaptive behavior assessment using, among other sources, an interview with Black himself and several collateral witnesses, plus the Vineland Adaptive Behavior Scales – Second Edition, which he completed with information from three collateral informants (a childhood friend and two of Black's sisters). Declaration of Dr. Stephen Greenspan at 3–4, 18, *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908 (Apr. 24, 2008), Dkt. No. 120-2 [hereafter, "Greenspan Decl."] Pet. App. 123–24, 138. Black obtained a composite score of 70 on the Vineland with information provided by his childhood friend, as well as an identical score of 70 with information provided by his sisters. Greenspan Decl. at 19, Pet. App. 139. Dr. Greenspan concluded that Black meets all three prongs of the definition of intellectual disability. Greenspan Decl. at 20, Pet. App. 140.

[5] Dr. Greenspan's interviews with the three collateral informants who completed the Vineland focused on the age of 17 years and six months as the target age. Greenspan Decl. at 18, Pet. App. 138.

Black because Black was "test wise" and "has some sophistication in knowing how to present himself on these various tests, so to make himself look impaired."[6] App. 369. Engum relied heavily on purported "IQ scores" listed in Black's school records, which were later summarized as follows:

Date	Name of Test	Black's Approximate Age	Score
1963	Lorge Thorndike	7	83
1964	Unknown	8	97
1966	Lorge Thorndike	10	92
1967	Otis	11	91
1969	Lorge Thorndike	13	83

See Black v. Carpenter, 866 F.3d 734, 738 (6th Cir. 2017).

During Grant's testimony, which Engum observed, Grant explained that these tests "are not individually administered tests." App. 234. Instead, they are group tests that both the AAMR and the DSM-IV instruct "should not be used" for assessments of intellectual disability. App. 236, 338. Grant testified that individually administered full-scale intelligence tests like the WAIS and the Stanford-Binet are "more accurately normed, more accurately developed and more valid. And that's why the national organizations say that group administered tests should not be used in the diagnosis of retardation." App. 300. Engum "fully agreed" with Grant that group tests are not as accurate as individually administered IQ tests, but stated, "[o]n the other hand, they're utilized in a number of settings to determine how children are functioning." App. 373. He opined (again without providing any support for his testimony) that while the standard error of measurement ("SEM") for a WAIS might be plus or minus five points, the SEM for group administered tests might be larger, around plus or minus eight points. App. 374. Engum concluded that Black must

[6] Engum's expertise was in the area of rehabilitation of people with head injuries and he had never written anything about intellectual disability. App. 348.

have malingered his adult IQ scores because they were significantly lower than the group test scores reported in his school records:

> you're looking at scores that we had a high of 97, when he's in school; he somehow now manages to get a low of 57. That's a 40 point drop. And that's a fairly dramatic drop, without any real explanation as to why.

App. 369. Engum stated, "I seriously harbor doubts as to whether the IQ's [sic] that [were] obtained most recently, the 69 and the 57, are valid." App. 398.

III. THE LOWER COURTS' ADJUDICATION OF PETITIONER'S *ATKINS* CLAIM.

The Tennessee Court of Criminal Appeals decided Black could not satisfy prong one because the relevant Tennessee statute required an IQ score of seventy as a "bright-line cutoff" that must be met. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006). The statute did not allow "for any standard error of measurement or other circumstances whereby a person with an IQ above seventy could be considered mentally retarded." *Id*. (quoting *Howell v. State*, 151 S.W.3d 450, 456 (Tenn. 2004)). On federal habeas review, the district court denied Black's *Atkins* claim on the basis that the state court decision was not unreasonable in its application of *Howell*. *Black v. Bell*, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908 (M.D. Tenn. Apr. 24, 2008).

While Black's appeal from that decision was pending before the Sixth Circuit, the Tennessee Supreme Court decided, in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), that the Tennessee statute "does not require that raw scores on I.Q. tests be accepted at their face value and that the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. or that the raw I.Q. test score is artificially inflated or deflated." *Id*. at 224. The *Coleman* court emphasized a clinical approach to diagnosing intellectual disability and instructed trial courts that an expert should be permitted to base his or her assessment

of a defendant's functional IQ on considerations such as "a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used." *Id*. at 242 n.55. Moreover, the Tennessee Supreme Court noted that intellectual disability is "almost always accompanied by other serious co-morbid features (such as mental disorders)" and held that the Court of Criminal Appeals erred by, among other things, "finding that because mental illness could have caused Mr. Coleman's adaptive deficiencies, those adaptive deficits did not result from Mr. Coleman's intellectual disability." *Id*. at 252.

The Sixth Circuit subsequently vacated the district court's decision, finding the state court's decision rejecting Black's claim was contrary to *Coleman*. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011). Because *Atkins* reserved for the states the task of developing appropriate ways to enforce the constitutional restriction, the Sixth Circuit reasoned that federal courts conducting habeas review must look to state law to determine how *Atkins* applies to the specific case at hand. *Id*. at 91–92. The Tennessee Court of Criminal Appeal's ("TCCA") assessment of Black's intellectual functioning turned on its belief that Tennessee law imposed a bright-line cutoff of 70, which is contrary to *Coleman*.[7] *Id*. at 93–95. Moreover, the TCCA committed the same error in assessing Black's adaptive behavior as was condemned in *Coleman* by "repeatedly cit[ing] evidence that it interpreted as supporting the existence of Black's mental illness but not his mental retardation." *Id*. at 100. For example, the TCCA relied on Engum's testimony attributing evidence of adaptive deficits to Black's potential personality disorder, mental illness and delusions, which

[7] *Coleman* rejected a bright-line IQ cutoff of 70 because "experts in the field recognize that [IQ tests], like other measures of human functioning, are not actuarial determinations . . . these tests cannot measure intelligence with absolute precision and . . . these tests contain a potential for error." 341 S.W.3d at 245. *Coleman* is therefore consistent with the principles later adopted by this Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014).

he claimed were "separate issues" that "have nothing to do with mental retardation." App. 389–90, 399. The Sixth Circuit remanded to the district court for further review "because no court has yet analyzed Black's *Atkins* claim according to the proper legal standard, which was set out by the Tennessee Supreme Court in *Coleman*." *Black v. Bell*, 644 F.3d 81, 101 (6th Cir. 2011).

On remand, the district court reviewed the available record and determined Black had not met his burden of proving intellectual disability. The Sixth Circuit affirmed, holding the district court did not err by relying "strongly" on the group tests referenced above to conclude Black failed to satisfy prong one. *Black v. Carpenter*, 866 F.3d 734, 745 (6th Cir. 2017). The Sixth Circuit stated,

> [a]t the end of the day, without stronger evidence that Black's childhood IQ scores did not accurately reflect his intellectual functioning before he turned eighteen, the district court held that Black could not carry his burden of showing, by a preponderance of the evidence, that he had significantly subaverage general intellectual functioning before he turned eighteen.

Id. at 748. Further, the Sixth Circuit determined, "[b]ecause Black cannot show that he has significantly subaverage general intellectual functioning that manifested before Black turned eighteen, we need not analyze whether Black has the requisite deficits in adaptive behavior, which he would *also* be required to demonstrate in order to be entitled to *Atkins* relief." *Id*. at 750 (emphasis in original). This petition follows.

REASONS THE WRIT SHOULD BE GRANTED

I. THE COURT OF APPEALS FAILED TO ADHERE TO THIS COURT'S MANDATE THAT JUDICIAL DETERMINATIONS OF INTELLECTUAL DISABILITY "BE 'INFORMED BY THE MEDICAL COMMUNITY'S DIAGNOSTIC FRAMEWORK'" *MOORE V. TEXAS*, 137 S. CT. 1039, 1048 (2017), AND MAY NOT "DISREGARD[] ESTABLISHED MEDICAL PRACTICE." *HALL V. FLORIDA*, 134 S. CT. 1986, 1995 (2014).

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits the execution of people who are intellectually disabled. 536 U.S. 304, 321 (2002). The Court defined intellectual disability by reference to the clinical definitions of the AAMR (now the AAIDD) and the APA. *Id.* at 308 n.3. Both definitions consist of three independent prongs: (1) significantly subaverage intellectual functioning; (2) significant limitations in adaptive behavior; and, (3) onset during the developmental period, or prior to age eighteen.

Since *Atkins*, this Court has twice reaffirmed the importance of clinical standards to the judicial inquiry regarding a defendant's eligibility for a death sentence. In *Hall v. Florida*, the Court struck down Florida's rule that an IQ score above 70 foreclosed any further exploration of a defendant's intellectual disability. 134 S. Ct. at 1986, 1990. By "disregard[ing] established medical practice," *id.* at 1996, this rule created an "unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1990. Once again, the Court cited the AAIDD and the APA, noting that the states "must afford [IQ] test scores the same studied skepticism that those who design and use the tests do." *Id.* at 2000–01. Therefore, the Court concluded, clinical definitions of intellectual disability are "a fundamental premise of *Atkins*" that states are not free to ignore. *Id.* at 1989.

Last term, in *Moore v. Texas*, this Court reaffirmed this constitutional principle in the course of striking down Texas's use of the scientifically unsound *Briseno* factors because they were based on nonclinical "lay stereotypes of the intellectually disabled" that "the medical

profession has endeavored to counter." *Id*. at 1052. The Court again cited the AAIDD and APA and concluded that the lower courts failed to comply with the "prevailing clinical standards" by, among other things: (1) disregarding the lower end of the SEM for Moore's IQ scores that were close to, but above, 70; (2) overemphasizing Moore's perceived adaptive strengths instead of following the medical community's instructions to focus on adaptive deficits; (3) emphasizing Moore's improved behavior in prison instead of heeding the caution of clinicians against reliance on adaptive behavior in a "controlled setting" such as prison; and, (4) requiring Moore to show that his adaptive deficits were not related to a personality disorder and ignoring the clinical consensus that people with intellectual disability have co-morbid mental disorders at rates of three to four times higher than the general population. *Id*. at 1049–51. In making this determination, the Court concluded that "the medical community's current standards, reflecting improved understanding over time, constrain States' leeway" in defining intellectual disability. *Id.* at 1053.

Taken together, *Atkins*, *Hall*, and *Moore* establish the constitutional principle that clinical consensus constrains a state's discretion to determine a defendant's intellectual disability. Although a state need not "adhere[] to everything stated in the latest medical guide," this Court's precedent does not "license disregard of current medical standards." *Moore*, 137 S. Ct. at 1049. In each case, the Court cited the AAIDD and APA, requiring courts to assess the clinical consensus when evaluating a state's determination of intellectual disability. *Atkins*, 536 U.S. at 308 n.3, 317 n.22; *Hall*, 134 S. Ct. at 2000–01; *Moore*, 137 S. Ct. at 1048–50.

II. THE LOWER COURT DISREGARDED ESTABLISHED MEDICAL PRACTICE AND RENDERED A DECISION CONTRARY TO THE CLINICAL CONSENSUS ON INTELLECTUAL DISABILITY.

A. THE LOWER COURT RELIED ON GROUP-ADMINISTERED TESTS, WHICH ARE NOT FULL-SCALE MEASURES OF GLOBAL INTELLIGENCE.

The Sixth Circuit held that the district court did not err by relying "strongly on the IQ testing done during Black's school-age years as most probative of Black's mental condition prior to age eighteen." *Black*, 866 F.3d at 745. The fundamental flaw in the district court's (and thus the Court of Appeal's) reasoning is that the tests deemed "probative" of Black's intellectual functioning are not valid measures of global intelligence. Individually administered, full-scale IQ tests like the Wechsler Scales and the Stanford-Binet Intelligence Scales have been repeatedly identified as "gold standard" measures for accurately and reliably determining global intelligence.[8] David Wechsler, who developed the dominantly used individual IQ test, described intelligence as:

> the aggregate or global capacity of the individual to act purposefully, to think rationally, and to deal effectively with his [or

[8] *See, e.g.*, *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) ("Rivera scored a 68 on the Wechsler Adult Intelligence Scales (WAIS-III) IQ test, a test which both parties agree is the best full-scale IQ test available in English."); *United States v. Roland*, No. 12-0298 (ES), 2017 U.S. Dist. LEXIS 207018, at *75 (D.N.J. Dec. 18, 2017) ("Expert witnesses for both Roland and the Government described the Wechsler Adult Intelligence Scale, Fourth Edition as the 'gold standard' in intelligence testing."); *United States v. Williams*, 1 F. Supp. 3d 1124, 1148 n.23 (D. Haw. Mar. 6, 2014) (accepting the Stanford-Binet as "an appropriate instrument for assessing intellectual functioning, which the court accepts as similar to a WAIS instrument"); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 U.S. Dist. LEXIS 57689, at *79 (W.D. Tenn. Jan. 28, 2014) (citation omitted) ("Expert witnesses for both Defendant and the Government described the Wechsler family of IQ tests . . . as the 'gold standard' in intelligence testing. Federal courts typically rely on Wechsler IQ test scores in making prong-one determinations."); *United States v. Wilson*, 922 F. Supp. 2d 334, 365 (E.D.N.Y. Feb 7, 2013) (citing another source) ("Dr. James . . . had the opportunity to administer the WAIS-IV—the 'gold standard' of IQ tests."); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D. La. 2011) (citing another source) ("Psychologists use IQ testing to measure intelligence and the WAIS-III is a gold standard for this testing."); *Wiley v. Epps*, 668 F. Supp. 2d 848, 895 (N.D. Miss. 2009) (citing another source) ("Both the WAIS and SB meet the 'gold standard' measure for use in *Atkins*-related hearings."); *Pruitt v. State*, 903 N.E.2d 899, 914 n.11 (Ind. 2009) (citations omitted) ("Dr. Olvera testified that the Stanford-Binet IQ test, along with the WAIS, are considered the 'gold standard' among IQ tests. Dr. Hudson also testified that the Stanford-Binet test is 'reliable, well accepted.'").

> her] environment. It is global because it characterizes the individual's behavior as a whole; it is aggregate because it is composed of elements or abilities which, though not entirely independent, are qualitatively differentiable.

Lisa Whipple Drozdick et. al., *The Wechsler Adult Intelligence Scale—Fourth Edition and the Wechsler Memory Scale—Fourth Edition, in Contemporary Intellectual Assessment: Theories, Tests, and Issues* 197, 198 (Dawn P. Flanagan & Patti L. Harrison eds., 3d ed. 2012) [hereinafter *Contemporary Assessment*] (citing David Wechsler, *The Measurement of Adult Intelligence* 3 (1939)). Wechsler clearly stated that "intelligence should be measured by both verbal and performance tasks, each of which measured ability in a different way and which could be aggregated to form a general, global construct." *WAIS III WMS III Technical Manual* 2 (David Tulsky, Jianjun Zhu & Mark Ledbetter eds., 1997). The subtests of the Wechsler scales thus measure "many different mental abilities," including "abstract reasoning . . . perceptual skills, verbal skills, and processing speed." *Id*. at 2–3. No sub-test (or partial set of sub-tests) alone can assess the entire range of cognitive abilities; instead, they are aggregated to produce a full-scale IQ score (or "FSIQ") which is "the score most representative of . . . global intellectual functioning." *Contemporary Assessment* at 200 (describing the FSIQ as "a robust predictor of an array of important life outcomes"); *see also* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 47 (11th ed. 2010) [hereinafter "AAIDD-11"]. The Stanford-Binet similarly produces a FSIQ score from the aggregate of multiple sub-tests. *Contemporary Assessment* at 249–52. Both tests "are well established, cover multiple areas that provide a reasonably comprehensive profile, and are carefully researched IQ tests." Denis Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998).

The clinical literature is clear that "only global measures of intelligence are acceptable for making a diagnosis of mental retardation." Gilbert S. MacVaugh, III & Mark D. Cunningham, Atkins v. Virginia*: Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 144 (2009) [hereafter "Implications"] (citing other sources); *see also* AAIDD-11 at 41 ("For evaluating whether or not a person meets the significant limitations intellectual functioning criterion for a diagnosis of intellectual disability, one should employ an individually administered, standardized instrument that yields a measure of general intellectual functioning."); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) [hereinafter DSM-5] ("Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.").

Group administered tests, by contrast, do not produce valid measures of full-scale, global intelligence.[9] Rather, they are pencil-and-paper, multiple-choice tests that are typically "self-administered," meaning the test-taker works through a test booklet without any interaction with the test administrator, who is not required to have any professional training. *See* Alan S. Kaufman, *Tests of Intelligence, in Handbook of Intelligence* 449–50 (Robert J. Sternberg ed., 2000); John Fremer, *Group Tests*, *in* 1 *Encyclopedia of Human Intelligence* 508, 508–11 (Robert J. Sternberg ed., 1994). This makes group tests fast, easy and cost-efficient to administer, but presents a number of disadvantages. For example, the group test setting makes it impossible to collect any qualitative

[9] DSM-5 at 37 ("Invalid scores may result from the use of brief intelligence screening tests or group tests."); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM & MARY BILL RTS. J. 467, 474 (2014) ("A commonly observed error is the reliance on screening or group-administered intelligence tests that do not provide accurate measure of IQ."); *see also* Keyes et al., *supra*, at 536 ("group-administered IQ tests . . . are inadequate tests to diagnose mental retardation.").

data because the tests "simply provide[] data on the number of questions answered correctly. . . . Generally, it is impossible to determine with any precision why a person chose a particular (correct or incorrect) response to any given question on a multiple-choice group test." *Psychological Testing: Principles and Applications* 289 (Kevin R. Murphy & Charles O. Davidshofer eds., 2005). Moreover, multiple-choice questions use "different psychological processes than the open-ended questions typically used in individual testing, and many critics suggest that the functions measured by multiple-choice questions have little to do with intelligence." *Id*. In a group-test setting, there is also "the additional risk that the individual received additional help or copied the responses of others." Everington, *supra*, at 474.

Of special significance to this case, the publishers of both the Lorge-Thorndike and the Otis Beta—the tests upon which the lower courts relied—disavow the use of obtained scores as FSIQ equivalents. The Lorge-Thorndike Intelligence Test, subsequently renamed as the Cognitive Abilities Test (CogAT), was not designed to be used as an IQ test.[10] Likewise, the Otis test manual explains it is "designed primarily to assess the pupil's current readiness for school-oriented learning or to predict his likelihood of future success in dealing with the types of tasks encountered in his academic work." Arthur S. Otis & Roger T. Lennon, *Otis Lennon Mental Ability Test* 4 (1967). The manual notes that although results from the Otis tests can be "useful guides" for selecting students for gifted or "slow-learning" school programs, the authors "highly recommend"

[10] The Lorge-Thorndike Intelligence Test ("LTIT") manual suggests eight uses for the test: (1) "[s]election of curriculum materials and learning tasks," (2) "[c]omparing level of achievement and aptitude," (3) "[f]ormation of classroom groups," (4) "[g]rouping within classrooms," (5) "[i]dentifying students who may need special attention," (6) "[r]eporting a student's progress in school and helping parents to understand the strengths and weaknesses of the child," (7) "[c]ounseling students," and (8) "[v]ocational guidance. Gilbert Sax, *The Lorge-Thorndike Intelligence Tests/Cognitive Abilities Test, in* I TEST CRITIQUES 421, 428–29, 431 (Daniel J. Keyser and Richard C. Sweetland eds., 1985). However, "[i]t should be noted that no evidence either substantiates or refutes any of the eight stated purposes of the LTIT." *Id.*

a subsequent, individually administered test before final placement "to substantiate initial decisions based upon the group test results."[11] *Id*. at 19. Numerous courts have recognized, consistent with the clinical literature, that for purposes of making an *Atkins* determination, it is inappropriate to rely on non-comprehensive screening or group IQ tests. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1055 (2017) (Roberts, J., dissenting) (noting that the Otis-Lennon Mental Abilities Test was "not accepted as an instrument appropriate for the assessment of mental retardation or intellectual deficiency"); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 U.S. Dist. LEXIS 57689, at *116 (W.D. Tenn. Jan. 28, 2014) ("Federal courts unanimously focus on standardized IQ testing in making prong-one determinations.") (citing *United States v. Hardy*, 762 F. Supp. 2d 849, 856 (E.D. La. 2010); *United States v. Wilson*, 922 F. Supp. 2d 334, 343–44 (E.D.N.Y. 2013); *United States v. Salad*, 2013 WL 3776418, at *3 (E.D. Va. July 15, 2013); *United States v. Smith*, 790 F. Supp. 2d 482, 489–90 (E.D. La. 2011)). In fact, in *Porterfield v. State*, the Tennessee Court of Criminal Appeals affirmed the lower court's decision finding the Lorge-Thorndike and the Beta tests were "not suitable testing measures for determining intellectual functioning" because "they are group administered tests." No. W2012-00753-CCA-R3PD, 2013 WL 3193420, at *24 (Tenn. Ct. Crim. App. June 20, 2013).

The evidence presented at the state court hearing by Black's expert was unequivocal on this point. Dr. Grant was clear that group-administered tests are not reliable for assessing intellectual disability. App. 236, 301, 338. He testified it was not uncommon, in his experience working in adult corrections, for inmates to receive scores of "80, 84, 85" on group administered

[11] The publishers of the Otis-Lennon Mental Ability Test subsequently changed the title to Otis-Lennon School Ability Test to reduce confusion about what it tested and to eliminate unintentional surplus meanings. The test also changed "Deviation IQ" to "School Ability Index" in the same spirit. Richard H. Williams, *Otis-Lennon School Ability Test*, *in* I TEST CRITIQUES 499, 502 (Daniel J. Keyser & Richard C. Sweetland eds., 1985).

tests, but then "when [he] saw them individually, [they] would test within the mildly mentally retarded range." App. 235.[12] Furthermore, Dr. Marc Tassé, a nationally recognized expert on intellectual disability and co-author of the current AAIDD User's Guide, submitted a declaration to the district court in which he agreed: "results obtained from group administered tests of intelligence or abbreviated measures of intellectual functioning lack the sufficient reliability and psychometric robustness to be used for the purpose of making a diagnosis of mental retardation."[13] Declaration of Marc Tassé at 4, *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908 (Apr. 24, 2008), Dkt. No. 120-1 [hereafter, "Tassé Decl."] Pet. App. 144; *see also* Greenspan Decl. at 9, Pet. App. 129 ("Group measures are not acceptable for ruling MR in or out.").

The district court rejected Black's gold standard IQ scores in favor of an opinion from a single witness, Engum, who never even met Black. Engum's decision to render a diagnosis under

[12] This is consistent with numerous reported decisions in which defendants obtained relatively high scores on group-administered tests, but satisfied prong one when evaluated with an individually administered, full-scale IQ test. *See, e.g.*, *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015) (Otis-Lennon School Ability Test score of 81, Revised Beta score of 93, Lorge-Thorndike scores of 64–65 and 63–64, WAIS-III score of 76, Stanford-Binet score of 65); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007) (WAIS-III score of 68, group administered test scores ranging from 70 to 92); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 U.S. Dist. LEXIS 57689 (W.D. Tenn. Jan. 28, 2014) (Otis-Lennon Mental Abilities Test score of 82, WISC score of 61, WAIS-IV scores of 64 and 67); *Allen v. Wilson*, 2012 WL 2577492 (S.D. Ind. 2012) (Best test score of 104, Stanford-Binet scores of 68 and 70); *Fairchild v. Lockhart*, 744 F. Supp. 1429 (E.D. Ark. 1989) (Revised Beta score of 87, WAIS-R score of 63, Stanford-Binet score of 60).

[13] The district court also relied on the Shipley-Hartford test, on which Black received a 76. However, the Shipley-Hartford is merely a screening test, and no expert relied upon it at the state court evidentiary hearing. Grant testified that the Shipley-Hartford was never normed in the United States and it is a "screening test" that merely provides a "ballpark figure." App. 237. Engum agreed, stating he would "be the first one to tell you that that was kind of a screening instrument. It's a rough measure of IQ." App. 370; *see also* Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 660 (3d ed. 2005) (describing the Shipley-Hartford as a brief, self-administered test of "poor psychometric quality" with "a thoroughly inadequate normative sample and unimpressive stability data").

these circumstances flatly contradicts the clinical guidelines requiring a thorough, rigorous, and careful analysis using "extensive data obtained from multiple sources," AAIDD-11 at 86, including information collected from people who "know the person [being evaluated] and have had the opportunity to observe the person in the community." *Id*. at 48. Engum also ignored the medical community's emphasis on "clinical judgment" based on "direct experience with those with whom the professional is working, and specific knowledge of the person and their environment." *Id*. at 86. The ethical guidelines of the American Psychological Association similarly provide that it is improper for one of its members to make a diagnosis of a person he or she has never met.[14] As Dr. Greenspan explained:

> the notion of clinical judgment . . . requires the clinician to interview and have some personal contact, however brief, with the person he or she is diagnosing. This is a matter of basic professional ethics and practice.

Greenspan Decl. at 8, Pet. App. 128. Several lower courts have acknowledged this fact as well. *See Allen v. Wilson*, 2012 WL 2577492, at *8 (S.D. Ind. 2012) ("Dr. Hazelrigg admits that he never met Allen, never administered tests to him and never met with [his special education teacher]. . . . If Dr. Hazelrigg gave a diagnosis on the day of his testimony, he admitted that would be unethical."); *see also Brumfield v. Cain*, 854 F. Supp. 2d 366, 388 n.22 (M.D. La. 2012) (finding Dr. Blanche's failure to "interview anyone other than Brumfield" entitled his testimony to

[14] Principle 9.01(b) of the APA's "Ethical Principles of Psychologists and Code of Conduct" provides that "psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. . . . When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations.") American Psychological Association, *Ethical Principles and of Psychologists and Code of Conduct* 13 (2017).

"comparably less weight than Dr. Weinstein's and Dr. Swanson's, both of whom gave due consideration to the clinical guidelines in this regard"); *United States v. Smith*, 790 F. Supp. 2d 482, 534 (E.D. La. 2011) (finding government's expert's assessment unpersuasive because "[h]er method of only interviewing the defendant and correctional officers presented a very narrow perspective").

Engum not only failed to adhere to this basic ethical principle, but in addition to resting his opinion on the issue of significantly subaverage intellectual functioning on unreliable group test scores, he also relied on several other unscientific methods of reasoning. For example, Engum repeatedly asserted Black was not intellectually disabled if his deficits could be explained by "a personality disorder," "some other concurrent psychological disorder," or "delusional problems," which he insisted "are separate and apart from issues related to mental retardation."[15] App. 386–40. He testified Black's individually-administered IQ scores should be viewed with skepticism because Black is African-American, claiming "[i]t is well-known that minorities do score 10 to 15 points, sometimes, below white subjects in a variety of IQ tests, but they function at a much higher level." App. 370. Engum stated minorities have "street smarts. They have a certain degree of savvy."[16] *Id*.

[15] This assertion is flatly contradicted by the clinical literature. *See, e.g.*, DSM-5 at 40; AAIDD-11 at 58–63. It also contradicts this Court's decision in *Moore*, *see* 137 S. Ct. at 1051, and the Tennessee Supreme Court's decision in *Coleman*. *See* 341 S.W.3d at 252. As this Court has explained, "[t]he existence of a personality disorder or mental-health issue, in short, is 'not evidence that a person does not also have intellectual disability.'" *Moore*, 137 S. Ct. at 1051 (quoting Brief for American Psychological Association, APA, et al. as Amici Curiae at 19).

[16] This argument is reminiscent of the race-based testimony condemned last term in *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process.") (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

Moreover, the school records where the childhood group test results appear are remarkable in their paucity of information. Pet. App. 108–09. The entire school record consists of two sheets of paper. The first page purports to list a variety of test results, scores, and other information, much of which is illegible. Under a category entitled "Group Examinations," the first entry appears to state "L&T" with a score of 83, which Dr. Grant testified he "would guess" referred to the Lorge-Thorndike test, but he was uncertain. App. 296. The second entry lists a test name that is indecipherable, which the district court later simply referred to as "Unknown" with a score of 97.[17] The third entry contains results from the "Lorge Thorndike Verbal," a fact that can only be determined using a magnifying glass, with a reported score of 92. However, the date of birth listed for the examinee who produced this test result is August, 1957. App. 414. Byron Black's date of birth is March 23, 1956. App. 416. When questioned about this discrepancy, Engum testified:

> Q: Would it be fair to draw among others, perhaps, one of two conclusions: Either they used the wrong date, and they actually are applying this test result to someone who would be a year and five months younger than Byron Black was, at the time?
>
> A: I would grant you that.
>
> Q: Or on the alternative, they put somebody else's score in?
>
> A: That's also equally possible. I simply don't know.
>
> Q: Okay. So, basically, what you're saying is, we have no earthly idea of what that test result is?
>
> A: I would agree with you.

[17] It is worth noting that Engum selected this score of 97, which happens to be from a test that is "Unknown," to support his ultimate conclusion that Black must have malingered four individually-administered, full-scale IQ scores over an eight-year period, because Engum felt there was not "any real explanation" for the drop in scores. App. 369. Thus, we do not even know what test Engum relied on (and neither does he) for the starting point of his otherwise flawed calculation.

App. 415–16. The fourth entry lists a score of 91 for the "Otis Beta." A fifth score of 83 is listed for the "Lorge-Thorndike Intel. Test-Verbal." This same page lists results from the Differential Aptitude Test, on which Black scored in only the first percentile. App. 234–35. Neither the courts nor Engum acknowledged this score or offered any explanation for these divergent results. There was no testimony from anyone who administered any of the school tests; by contrast, Grant personally administered the Stanford-Binet and found that Black "put forth maximum effort." App. 312. Dr. Patti Van Eyes, who administered the WAIS-III on which Black scored a 69, likewise concluded "Mr. Black was clearly trying to do his best on the test." Affidavit of Patti Van Eyes, *Black v. Bell*, 2008 U.S. Dist. LEXIS 33908 (Apr. 24, 2008), Dkt. No. 156-1, Pet. App. 159.

Having rejected Black's argument that his "gold-standard" evidence should be credited over the school group test scores, the Sixth Circuit then concluded that even if it accepted Black's argument, he would still lose because then he would have no IQ scores prior to age eighteen. *Black*, 866 F.3d at 745 ("[E]ven if Black had persuaded the district court to reject his childhood IQ scores as useful for 'making or refuting a diagnosis of mental retardation,' he would still have fallen short of carrying *his burden* to prove that he *was* intellectually disabled by age eighteen."). This determination conflicts with *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), in which this Court concluded "[i]f Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child." *Id.* at 2283. Similarly, in *Hall*, this Court concluded that evidence beyond IQ scores, such as "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances" could provide "substantial and weighty evidence of intellectual disability." *Hall*, 134 S. Ct. at 1994. *Hall* and

Brumfield thus stand for the proposition that childhood IQ scores are not required for a diagnosis of intellectual disability.

The clinical definition of intellectual disability likewise does not require a childhood diagnosis or IQ score.[18] Whether a criminal defendant received testing or diagnostic services as a child depends on myriad factors, including: whether the person's age precluded involvement in specialized services; whether school special education services were required at the time; the availability of funding for such services; political and social considerations; parental or teacher concerns about labels; and, often, happenstance. *See* John H. Blume, Sheri Johnson, & Christopher W. Seeds, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 697 (2009) ("Some individuals, due in part to social and cultural factors, have taken standardized intelligence or adaptive behavior tests before the age of eighteen, while others have not."); Matthew H. Scullin, *Large State-Level Fluctuations in Mental Retardation Classifications Related to Introduction of Renormed Intelligence Test*, 111 AM. J. MENTAL RETARDATION 322, 332 (2006) ("[M]any adults who

[18] *See e.g.*, AAIDD-11 at 27–28 ("[D]isability does not necessarily have to have been *formally identified*, but it must have *originated* during the developmental period . . . the current criterion of 'originates before age 18' leaves open the possibility that when an accurate diagnosis of ID was not made during the developmental period, a retrospective diagnosis may be necessary in some situations . . . .") (emphasis added); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 115 (2009) ("It should be noted that 'originated during the developmental period' does not preclude making a first time diagnosis of mental retardation when an individual is an adult."); Matthew H. Scullin, *Large State-Level Fluctuations in Mental Retardation Classifications Related to Introduction of Renormed Intelligence Test*, 111 AM. J. MENTAL RETARDATION 322, 331 (2006) ("There is no professionally recognized requirement for a developmental period classification of mental retardation or developmental period IQs in the mental retardation range from childhood to establish mental retardation for these [Supplemental Security Income] benefits."); Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 APPLIED NEUROPSYCHOLOGY 124 (2009) ("Persons can, of course, be properly diagnosed as MR as adults even if no official diagnosis can be found over the ages of birth to 18.").

currently meet the IQ and poor adaptive functioning criteria necessary for being classified with mental retardation may have never received a formal developmental period classification."). Several lower courts have also noted that neither a diagnosis nor an IQ score is required prior to the age of eighteen,[19] and that post-eighteen full-scale IQ scores are highly relevant to an intellectual disability assessment given that IQ is generally considered stable over time.[20] As the Florida Supreme Court explained following this Court's remand in *Hall*, the argument "that a proper IQ test prior to the age of eighteen is the only valid evidence to establish [prong 3] is unjustifiable and would effectively preclude a finding of intellectual disability in most people born prior to a certain era." *Hall v. State*, 201 So. 3d 628, 637 (Fla. 2016).

[19] *See, e.g.*, *Oats v. State*, 181 So. 3d 457, 469–70 (Fla. 2015) (discounting testimony of an expert who testified that a diagnosis before the age of eighteen was required); *Nicholson v. Branker*, 739 F. Supp. 2d 839, 857 (E.D.N.C. 2010) (noting that the age of onset prong does not require that a defendant show deficient IQ scores (or any IQ scores) before the age of eighteen).

[20] *See, e.g.*, *Williams v. Mitchell*, 792 F.3d 606, 620 n.4 (6th Cir. 2015) ("[C]ourts have overwhelmingly held that intellectual capabilities remain stable throughout life"); *Talavera v. Astrue*, 697 F.3d 145, 152 (2d Cir. 2012) ("We agree with the majority of our sister Circuits that it is reasonable to presume, in the absence of evidence indicating otherwise, that claimants will experience a fairly constant IQ throughout their lives.") (internal quotation marks and brackets omitted); *Ochoa v. Workman*, 669 F.3d 1130, 1137–38 (10th Cir. 2012), (citing *Heller* for the proposition that because mental retardation is a static condition, any "temporal focus is more semantical than real") (internal quotation marks omitted); *Moormann v. Schriro*, 672 F.3d 644, 649 (9th Cir. 2012), ("The law . . . does not indicate retardation is a product of changing circumstances."); *Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) ("Mental retardation is not normally a condition that improves as an affected person ages. . . . Rather, a person's IQ is presumed to remain stable over time."); *Hodges v. Barnhart*, 276 F.3d 1265, 1268 (11th Cir. 2001) ("IQ tests create a rebuttable presumption of a fairly constant IQ throughout her life."); *United States v. Smith*, 790 F. Supp. 2d 482, 503–04 (E.D. La. 2011) ("[T]he AAMR/AAIDD has been clear that . . . IQ is a relatively stable, immutable trait.").

B. THE LOWER COURT DISREGARDED THE LOWER END OF THE SEM AND THUS COMMITTED THE SAME ERROR CONDEMNED BY THIS COURT IN *HALL* AND *MOORE*.

The Sixth Circuit disregarded clinical consensus and this Court's precedents by "disregarding the lower end of the standard-error range." *Moore*, 137 S. Ct. at 1049. In essence, the Sixth Circuit improperly used the SEM *against* Black to defeat his claim of intellectual disability. First, the court stated its view that "the SEM accounts for the possibility that an individual's true IQ score is *either higher or lower* than the reported score." *Black*, 866 F.3d at 746 (emphasis in original). After first claiming that this Court's precedents "in no way *require* a reviewing court to *make a downward* variation based on the SEM in *every* IQ score," *id.* (emphasis in original), the court of appeals concluded that even Black's full-scale IQ scores fell outside the requisite range for subaverage intellectual functioning, which obviated the need to consider his deficits in adaptive behavior. *Id.* at 750.

In *Moore*, this Court explicitly rejected this line of reasoning. There, after the defendant had received IQ scores of 78 and 74, the Texas Court of Criminal Appeals (CCA) refused to consider the lower portion of those scores' standard-error range, and thus determined that the defendant had failed to prove intellectual disability. *See Moore*, 137 S. Ct. at 1047. This Court labeled that conclusion as "irreconcilable" with *Hall*, stating "we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050. Further, this Court rejected Texas's argument that the CCA properly considered factors unique to Moore to support its decision to disregard the lower end of the SEM, finding "the presence of other source of imprecision in administering the test to a

particular individual cannot *narrow* the test-specific standard-error range." *Id*. at 1049 (emphasis in original) (citations omitted).

Thus, it is plain that the court below missed the essential point. A court must consider whether an individual score, adjusted for SEM, *could* fall within the range required for significantly subaverage intellectual functioning. *Moore*, 137 S. Ct. at 1050. If it does, the court must consider other evidence of intellectual disability. *Id.* Here, the Sixth Circuit failed to make this constitutionally mandated inquiry, and then compounded the error by fundamentally misstating the nature of the SEM. The court argued that the SEM on the WAIS-III for an individual between the ages of 45 and 54 is "reported as *only* 2.23 points," even though the SEM is discussed in the clinical literature as "approximately 5 points." *Black*, 866 F.3d at 739 n.2. The court apparently did not understand that clinical consensus supports reporting an IQ score as a range encompassing *two* SEM applied to a given IQ score. *See* AAIDD-11 at 36; DSM-5 at 37. Under the Sixth Circuit's approach, the resulting range of scores has only a 66 percent probability of encompassing an individual's true IQ, but under the approach favored by clinical consensus, that probability rises to 95 percent. *See* AAIDD-11 at 36. Accordingly, this Court has favored the clinical consensus approach in assessing *Atkins* cases. *See Moore*, 137 S. Ct. at 1049 (describing the SEM as a "statistical fact" that is "best understood as a range") (citations omitted); *Hall*, 134 S. Ct. at 1995 (noting that a range based on two SEM provides a 95 percent confidence level); *id.* at 2011 (Alito, J., dissenting) (arguing that the majority opinion would "require that a defendant be permitted to submit additional evidence when his IQ is above 70 so long as the 66% *or 95% confidence interval* (using one SEM or two SEMs, respectively) includes a score of 70") (emphasis added). The Sixth Circuit's misstatements thus provide additional evidence that the court impermissibly disregarded clinical consensus in assessing Black's claim of intellectual disability.

As this Court stated in *Hall*, "[c]linical definitions for intellectual disability . . . which have long included the SEM, were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. Therefore, a court cannot "rel[y] on a purportedly scientific measurement, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1988.

CONCLUSION

The Sixth Circuit disregarded established medical practice by relying on group test scores from Black's school records and rejecting evidence of four, individually-administered, full-scale IQ scores obtained on gold standard tests of global intelligence; faulting Black for not having a pre-18 full-scale IQ score in an era where his poor-performing segregated school system was not required to provide special education; and, refusing to properly apply the standard error of measurement. This Court should grant certiorari and reverse.

Respectfully submitted,

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