No. 17-8275

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals was required to conclude, on the petitioner's claim that an intellectual disability bars his execution under the Eighth Amendment, that the district court, as trier of fact, could not rely upon group-administered, school test scores as more probative of the petitioner's intellectual functioning than scores obtained by the petitioner in adulthood from individually administered full-scale measures of global intelligence.

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STATEMENT OF THE CASE

The petitioner claims that the Eighth Amendment bars execution of his death sentence due to an intellectual disability, under *Atkins v. Virginia*, 536 U.S. 304 (2002). On this point, the petitioners' intelligence quotient (IQ) has been measured a number of times over his lifetime. The results can be grouped into three distinct categories: (1) group-administered school tests conducted between 1963 and 1969, when the petitioner was 7 to 13 years of age, with scores ranging from 83 to 97; (2) individually administered tests taken in preparation for the petitioner's trial and his state-court collateral review proceedings between 1989 and 1997, when the petitioner was 33 to 41 years of age, with scores of 73 and 76; and (3) individually administered tests taken by experts retained by the petitioner during federal habeas corpus proceedings, when the petitioner was 45 years of age, with scores of 57 and 69. *Black v. Carpenter*, 866 F.3d 734, 738 (6th Cir. 2017); *Black v. Bell*, 664 F.3d 81, 87 (6th Cir. 2011).

In 1986, the petitioner shot Benny Clay, the estranged husband of the petitioner's girlfriend, Angela Clay. The petitioner was convicted of malicious shooting and sentenced to a period of confinement. During a weekend furlough from confinement in 1988, the petitioner shot and killed Angela Clay, her nine-year-old daughter Latoya Clay, and her six-year-old daughter Lakeisha Clay. Forensic evidence at trial established that the gun used to kill Angela Clay and her children was the same one used in the Benny Clay shooting. The jury convicted the petitioner of three counts of first-degree murder. He was sentenced to death for the murder of Lakeisha Clay and to life imprisonment for the murders of Angela Clay and Latoya Clay.

The petitioner's convictions and sentences were affirmed on direct appeal, and his petition for post-conviction relief was denied by the state courts. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8,

1999), *perm. app. denied* (Tenn. Sept. 13, 1999). The United States District Court for the Middle District of Tennessee later denied a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Black v. Bell*, 181 F. Supp. 2d 832 (M.D. Tenn. 2001). While the appeal of that decision was pending in the United States Court of Appeals for the Sixth Circuit, the petitioner reopened his state post-conviction petition to litigate a claim that intellectual disability bars his execution under the Eighth Amendment and Article I, Section 16 of the Tennessee Constitution, based upon the intervening decisions in *Atkins* and *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).

During the state-court evidentiary hearing on the reopened petition, the parties presented competing expert proof on whether the petitioner is intellectually disabled under Tenn. Code Ann. § 39-13-203. That statute defines intellectual disability as (1) significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of 70 or below; (2) deficits in adaptive behavior; and (3) manifestation during the developmental period or by 18 years of age. One of the petitioner's experts, Dr. Daniel Grant, acknowledged the petitioner's childhood IQ scores well above 70, but he discounted them because they were administered in a group setting at school. (Petitioner's Apx. 4.) Dr. Grant opined that the scores taken during the state-court collateral review process were inflated due to the Flynn Effect, based upon the age of the test when it was used and the periodic need to renorm test measures. (Petitioner's Apx. 4-5.)[1]

Another defense expert, Dr. Ruben Gur, testified that the petitioner's brain is damaged in the areas that control aggression and impulses. (Petitioner's Apx. 7.) Relying on testimony from family members that the petitioner's mother had consumed alcohol during pregnancy, Dr. Gur

[1]"The Flynn Effect, named after intelligence expert James Flynn, is a 'generally recognized phenomenon' in which the average IQ scores produced by any given IQ test tend to rise over time, often by approximately three points per ten years from the date the IQ test is initially standardized." *Black*, 866 F.3d at 738 n.1.

hypothesized that the petitioner's intellectual disability resulted from that alcohol exposure and thus manifested during the developmental period prior to the age of 18. (Petitioner's Apx. 3-4.)

The State's expert, Dr. Eric Engum, referenced the assessment made in 1989 prior to trial, with a score of 76. Dr. Engum explained that IQ tests tend to underestimate the intelligence of minorities, and he suspected that the petitioner performed at a much higher level in the community. He found no evidence that the petitioner had an IQ of 70 or below at the time of these offenses. (Petitioner's Apx. 5.) He agreed that group-administered tests are not as accurate as tests administered individually, but the consequence is that the standard error of measure (SEM) for a group-administered test is greater than that for a test administered individually, at eight points. Because the petitioner's scores from the group-administered tests were substantially higher than 70, when factoring in the eight-point SEM, there is no reason to suspect intellectual disability. (Petitioner's Apx. 61.)

Weighing the competing proof, the state court determined that the petitioner failed to prove intellectual disability, as defined by state law. The Tennessee Court of Criminal Appeals affirmed. Applying the Tennessee Supreme Court's decision in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the court concluded that a score of 70 is a "bright-line cutoff" for determining intellectual disability under Tenn. Code Ann. § 39-13-203 and that expert proof on the Flynn Effect and the SEM may not be used to adjust an IQ score derived from earlier testing. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, *14 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006).

At the conclusion of the state-court proceedings, the Sixth Circuit remanded the petitioner's habeas corpus petition to the district court for further proceedings on the Eighth Amendment intellectual disability claim. In that court, the petitioner presented a declaration from Dr. Stephen

Greenspan, who opined that a group-administered test is not an acceptable means for measuring IQ because of weaker reliability and validity and the lack of information on the circumstances of administration. (Petitioner's Apx. 129.) The district court applied the deferential review required by 28 U.S.C. § 2254(d) on state-court decisions and denied relief. (Petitioner's Apx. 14-26.)

On appeal, a divided panel of the Sixth Circuit reversed on the Eighth Amendment claim and remanded for further proceedings in light of the Tennessee Supreme Court's intervening decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). *Black*, 664 F.3d at 100-01. In *Coleman*, the state supreme court clarified that state law does not prohibit consideration of expert proof on the SEM and the Flynn Effect when determining whether a criminal defendant is intellectually disabled. In the Sixth Circuit's view, *Coleman* was an "elucidation of the *Atkins* standard under Tennessee law." *Id*. at 96. This rendered the decision of the Tennessee Court of Criminal Appeals "contrary to" federal law under 28 U.S.C. 2254(d), because *Atkins* had deferred to the states to set out the standard for intellectual disability under the Eighth Amendment. *Id*. at 96-97. The court vacated the district court's decision and remanded for that court "to review the record based on the standard set out in *Coleman* and consistent with this opinion." *Id*. at 101.[2]

On remand, the district court again concluded that the petitioner failed to prove intellectual disability by a preponderance of the evidence. Concerning the petitioner's multiple IQ scores and the probative value of the grade-school-era group-administered tests, the district court accredited testimony by Dr. Engum about the larger SEM placed on group-administered tests. "Applying the eight-point SEM suggested by Dr. Engum to reduce the Petitioner's IQ scores prior to age 18

[2]In dissent, Judge Boggs rejected the majority's assertions that *Coleman* elucidated the *Atkins* standard and that the deferential review required by 28 U.S.C. § 2254(d) should be removed. Instead, "*Coleman* is purely a construction of a state statute that makes only fleeting references to *Atkins*." *Id*. at 107. The Tennessee Supreme Court later characterized his view as "a more accurate assessment" of *Coleman*. *Keen v. State*, 398 S.W.3d 594, 608-09 n.13 (Tenn. 2012).

results in a range from 75 to 89, still comfortably above the statutory criteria of 70 or below." (Petitioner's Apx. 61-62.) The court found no basis to conclude that the petitioner's scores were inflated due to assistance from teachers, nor did the fact that the petitioner failed and repeated second grade have an impact on the test results. On this point, the court accredited testimony from another of the State's experts, Dr. Susan Vaught, that "the results would not be dramatic because there would only be a year's difference in the comparison." (Petitioner's Apx. 62-63.) The court accredited Dr. Vaught's testimony about cultural bias in testing against African American children in the 1960's. She explained that this was one reason why the diagnostic criterion for intellectual disability was changed in the 1970's from one standard deviation below the mean to two standard deviations. (Petitioner's Apx. 63.)

The district court considered the Flynn Effect on the adult scores reached in 1993 and 1997. But in light of the petitioner's age at the time of those tests and the ones conducted well before the petitioner reached the age of 18, "application of the Flynn Effect in this case provides weak support for the statutory requirement that the Petitioner have scores at or below 70 before he turned age 18." (Petitioner Apx. 64.) Instead, "the tests taken by the Petitioner in school most accurately reflect the Petitioner's level of intelligence by the time he was 18 years of age." (Petitioner's Apx. 65.) The district court aptly recognized that the petitioner was not diagnosed with intellectual disability "until he was 45 years of age, in 2001, as part of this litigation, though he was evaluated by numerous experts before that time." (Petitioner's Apx. 70.)

The court regarded the petitioner's expert proof on his potential exposure to alcohol while in utero—as an explanation for his alleged disability prior to the age of 18—as speculative and "not particularly persuasive." (Petitioner's Apx. 69-70.) While Dr. Gur opined that the petitioner's brain damage was consistent with a person exposed to alcohol while in utero, he

acknowledged that there is no way to know the exact cause of the damage, which was also consistent with adult alcoholism, lead poisoning, head injuries from football, and other conditions. (Petitioner's Apx. 66.) There was minimal proof presented by the petitioner's family members on the amount of alcohol consumed by the petitioner's mother during pregnancy. (Petitioner's Apx. 67-69.) The district court accredited testimony by Dr. Vaught that, from a review of the petitioner's childhood medical records, the "typical developmental impairments that you would see from Fetal Alcohol Effects or Fetal Alcohol Syndrome" and the "milestone failures" were not recorded. (Petitioner's Apx. 70.) The court made no finding on "why the Petitioner's test scores have declined over time—whether due to motivation or brain injury." (Petitioner's Apx. 72.)

On appeal, the Sixth Circuit affirmed the district court's decision, finding no clear error in the court's factual conclusion that the petitioner failed to prove intellectual disability by a preponderance of the evidence. The court described the petitioner's weighty task as follows:

> In short, Black's argument requires three steps: (1) reject Black's childhood "group-administered" IQ scores (83, 97, 92, 91, 83); (2) either rely exclusively on the 2001 IQ scores (69, 57), or else apply a downward adjustment to the pre-2001 adulthood IQ scores (76, 73, 76) to account for the Flynn Effect and the SEM, so as to reduce those scores to below 70; and (3) presume that the adulthood scores, in the absence of contradictory childhood IQ scores (and by disregarding evidence put on by the State to rebut Black's contention that his mother's alcohol consumption caused Black to suffer any brain damage that caused any level of mental retardation), are evidence of lifelong mental retardation that must have manifested itself before age eighteen. Each of these three steps is a necessary condition for Black to prevail on his *Atkins* claim as we see it. And Black has not shown us any authority that would support taking *any* of these steps.

Black, 866 F.3d at 748 (emphasis in original). In the face of competing expert proof on the reliability of group-administered IQ test results, the applicability of the Flynn Effect and the SEM on the petitioner's adult IQ tests, and whether the petitioner's alleged disability manifested itself before the age of 18, the court of appeals found no fault—and thus no clear error—in the district court's factual findings. "[A]fter all, even if Black's childhood IQ scores were reduced by *both*

eight points to account for the SEM (using the higher SEM applicable to group-administered tests, rather than five points for individually administered tests) *and* up to four points to counteract the Flynn Effect, they *all* would still exceed seventy." *Id.* (emphasis in original).

ARGUMENT

THE PETITIONER'S FACT-BOUND CHALLENGE TO THE DISTRICT COURT'S REJECTION OF HIS EXPERT PROOF ON INTELLECTUAL DISABILITY DOES NOT MERIT FURTHER APPELLATE REVIEW.

The district court considered competing expert proof on whether the petitioner is intellectually disabled, weighed the evidence presented, and concluded that the petitioner failed to prove by a preponderance of the evidence that he has an intellectual disability that manifested itself before the age of 18. Because the proof accredited by the district court fully supports that conclusion, the Sixth Circuit unsurprisingly found no clear error in the district court's decision and affirmed it. The petitioner takes issue with how the Sixth Circuit analyzed the evidence, specifically that the Sixth Circuit (1) failed to adhere to the medical community's diagnostic framework and practice, (2) improperly relied upon group-administered IQ tests, and (3) erroneously disregarded the lower end of the SEM. But those factors bear only on the weight of the evidence before the district court, a determination that ultimately rests with the district court as the trier of fact. More to the point, none of the petitioner's fact-bound challenges merit further appellate review.[3]

[3]In light of the Tennessee Supreme Court's determination that the Sixth Circuit previously misconstrued *Coleman*, it stands to reason that the deferential review under 28 U.S.C. § 2254(d) that the Sixth Circuit mistakenly rejected should apply in the adjudication of the petitioner's Eighth Amendment claim. *Keen*, 398 S.W.3d at 608-09 n.13. But regardless whether the district court's review should have been de novo or limited by § 2254(d), the petitioner has shown no basis to set aside the district court's factual findings and, thus, no reason to grant further review.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ." Sup. Ct. R. 10. This fits squarely within the deferential standard of review applied on factual findings made by a district court, which are reviewed for "clear error." *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). If the district court's findings are plausible in light of the entirety of the record, the reviewing court may not reverse those findings, even if it would have weighed the evidence and found the facts differently. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. When a circuit court has affirmed the factual findings of a district court, this Court "will not 'lightly overturn' the concurrent findings of the two lower courts." *Glossip*, 135 S. Ct. at 2740 (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

The petitioner presents no basis to overturn the district court's factual findings. Regarding the medical community's diagnostic framework and practice and the weight to place on group-administered IQ test scores, the district court had before it disputed proof on those issues. The petitioner has presented no legal authority that the district court was prohibited from considering evidence on certain types of IQ tests. He can show no clear error in the district court's determination that the five test scores collected during his minority more accurately reflect his IQ before the age of 18 than do the scores collected by the petitioner's own experts during his 30's and 40's while he was collaterally challenging his death sentence.

As the Sixth Circuit correctly noted in its more recent decision, "even if Black had persuaded the district court to reject his childhood IQ scores as useful for 'making or refuting a diagnosis of [intellectual disability],' he would still have fallen short of carrying *his burden* to prove that he *was* intellectually disabled by age eighteen." *Black*, 866 F.3d at 745 (emphasis in original). Regardless the cause for the petitioner's declining IQ scores throughout his lifetime, "whether due to motivation or brain injury," the district court could reasonably conclude under this record that the petitioner failed to prove by a preponderance of the evidence that an intellectual disability manifested itself by the age of 18. (Petitioner's Apx. 72.) The district court was not compelled to agree that an intellectual disability resulted from the petitioner's exposure to alcohol while in utero. Rejecting such a speculative assertion was a "permissible view[] of the evidence." *Anderson*, 470 U.S. at 574.[4]

It bears noting that the petitioner's particular challenge is distinguishable from the issues raised by *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), none of which called for this Court to make a selection among competing IQ scores. In *Hall*, the Court concluded that a trial court should consider proof on the applicable SEM when assessing intellectual disability. "[W]hen a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to

[4]The petitioner argues to the contrary by referring to this Court's statement in *Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015), that "[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." (Petition, 23.) The facts of the two cases are markedly different. This is not a case in which there is "little question" as to when the alleged intellectual disability manifested itself. Instead, it is a disputed issue squarely for the trier of fact to resolve. The petitioner could read and write. He was a successful athlete on his high school football team. He graduated from high school with a regular diploma and no special assistance. His family never regarded him as a slow learner. (Petitioner's Apx. 74-77.)

present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall,* 134 S. Ct. at 2001. Hall presented multiple IQ test scores of between 71 and 80. *Id*. at 1992. The Court acknowledged that he "may or may not be intellectually disabled," an issue to be decided at an evidentiary hearing on remand. *Id*. at 2001.

In *Brumfield,* the Court reviewed the state-court rejection of an intellectual disability claim under 28 U.S.C. § 2254(d). Applying *Hall,* the Court found an unreasonable determination of the facts due to the state court's failure to consider a five point SEM on an IQ score of 75, and the Court concluded that the petitioner was entitled to a hearing on his claim. *Brumfield,* 135 S. Ct. at 2278, 2283. While the record referred to another, possible IQ test score higher than 75, the Court held that a passing reference to the other score, with nothing more, was insufficient to "render the state court's determination reasonable." *Id*. Implicit within this statement is the recognition that, if another IQ test score existed whose SEM did not reach 70 or below, the state court, as the trier of fact, could have accredited it, and doing so could have been a reasonable determination of fact.

In *Moore,* the Court repudiated a balancing test adopted in Texas as inconsistent with the holding in *Hall* and *Brumfield* that a court assessing an intellectual disability claim must consider evidence of the SEM. *Moore,* 137 S. Ct. at 1050. In *Moore,* the SEM of one of the IQ scores that was accredited by the state court reached 70 or below, thus mandating further proceedings on the claim. *Id*. at 1047. As with *Hall* and *Brumfield,* the Court did not "end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score." *Id*. at 1050.

Unlike in *Hall, Brumfield,* and *Moore,* the issues here are (1) which particular IQ test scores best represent the petitioner's intellectual state, and (2) whether an intellectual disability manifested itself before the age of 18. Both disputed issues of fact were rightly presented to the

district court for resolution, upon the competing expert proof. With no "clear error" in that resolution, further review is not warranted.[5]

Finally, regarding the petitioner's arguments that the Sixth Circuit improperly (1) faulted him for having no IQ test scores during his minority that prove an intellectual disability, and (2) disregarded the lower end of the SEM, a review of the district court's opinion shows that the trier of fact made neither alleged error. Instead, the district court considered the SEM on the petitioner's IQ test scores, and it did not accredit the petitioner's earlier test scores simply because they were earlier. The district court considered all of the test scores, as well as the competing expert proof concerning them, before concluding that the earlier scores "most accurately reflect the Petitioner's level of intelligence by the time he was 18 years of age." (Petitioner's Apx. 64-65.)

[5]The district court also concluded on remand as a matter of fact—and in the face of competing expert proof—that the petitioner failed to prove deficits in adaptive behavior manifesting by the age of 18. (Petitioner's Apx. 72-79.) "A full, independent review of the record persuade[d] [the district court] that the Petitioner has not shown weaknesses or deficits in his adaptive behavior prior to age 18 within the meaning of the statute." (Petitioner's Apx. 78-79.) The Sixth Circuit declined to address the issue on appeal in light of the petitioner's failure to prove significantly subaverage general intellectual functioning manifesting before the age of 18. *Black*, 866 F.3d 734. The clear absence of proof on deficits in adaptive behavior, as recounted by the district court, provides additional reasons for why review is unnecessary.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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