No._____

(CAPITAL CASE)

IN THE
Supreme Court of the United States

ANTHONY CARR,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Did the Mississippi Supreme Court establish an erroneous legal standard when it held that proof of intellectual disability in *Atkins* cases requires a showing of "adaptive functioning deficits . . . so severe that [the petitioner] should be ruled intellectually disabled," when the term "so severe" does not appear in the diagnostic criteria, and in light of this Court's holding that *Atkins* decisions must be "informed by the work of medical experts"?

PARTIES TO THE PROCEEDINGS BELOW

Anthony Carr, petitioner here, was the petitioner/appellant below. The State of Mississippi, respondent here, was the respondent/appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Carr respectfully prays that a writ of certiorari issue to review the judgment below.

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The Mississippi Supreme Court's 2019 opinion, *Anthony Carr v. State of Mississippi*, No. 2017-CA-01481-SCT, 2019 WL 2384142 (Miss. June 6, 2019) (*Carr IV*), is in Appendix A. The Circuit Court of Quitman County's unpublished Revised Order Denying Post-Conviction Relief is in Appendix B. The Mississippi Supreme Court's 2016 opinion, *Anthony Carr v. State of Mississippi*, 196 So. 3d 926 (Miss. 2016) (*Carr III*), is in Appendix D. The Circuit Court of Quitman County's unpublished (first) Order Denying Post-Conviction Relief is in Appendix E.

JURISDICTION

The Mississippi Supreme Court's opinion issued on June 6, 2019. A copy of that opinion is in Appendix A. Mr. Carr timely filed a motion for rehearing, which was denied on September 12, 2019, making the deadline for filing this petition December 11, 2019. A copy of the decision letter showing the date of the denial of rehearing is in Appendix C. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The U.S. Constitution's Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment provides in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

I. Procedural History

In September 1990, in the Circuit Court of Quitman County, Mississippi, Anthony Carr was convicted of capital murder and sentenced to death. *Carr v. State*, 655 So. 2d 824, 828 (Miss. 1995) (*Carr I*). During the trial, a psychologist testified that Mr. Carr was intellectually disabled.[1] He had evaluated Mr. Carr pre-trial and found that Mr. Carr's full-scale IQ was 70.

On October 17, 1990, counsel for Mr. Carr filed a notice of appeal. On February 6, 1995, the Mississippi Supreme Court affirmed Mr. Carr's conviction and sentence on direct appeal. Among other claims, counsel for Mr. Carr argued that the death sentence was disproportionate because of his intellectual disability and organic brain damage. *Carr I*, 655 So. 2d at 857. The court rejected that claim. *Id*. at 857–58. Mr. Carr's motion for rehearing was denied on June 22, 1995. This Court denied his petition for certiorari on January 16, 1996. *Carr v. Mississippi*, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

On October 23, 2001, counsel for Mr. Carr filed a petition seeking post-conviction relief (PCR) in the Mississippi Supreme Court. The petition argued, *inter alia*, that the execution of the intellectually disabled should be prohibited under the Eighth Amendment.

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[1] The term for intellectual disability at the time was "mental retardation." It has been supplanted by the term "intellectual disability," *Hall v. Florida*, 572 U.S. 701, 704–05 (2014), which will be used here unless the obsolete terminology is appropriate (such as when quoting from a case or a pleading).

On June 20, 2002, while Mr. Carr's PCR was pending, this Court held that the Eighth Amendment does indeed prohibit the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). On September 9, 2002, counsel for Mr. Carr filed a supplement to the PCR in the Mississippi Supreme Court, seeking *Atkins* relief.

On May 20, 2004, the Mississippi Supreme Court granted Mr. Carr's PCR in part, giving leave to return to the trial court "for an evidentiary hearing to determine whether he is still eligible for the death penalty. . . . If in fact Carr is determined to be sufficiently mentally retarded to meet the criteria of *Atkins* and *Chase*,[2] then the trial court should vacate the death penalty and resentence him accordingly." *Carr v. State*, 873 So. 2d 991, 1007 (Miss. 2004) (*Carr II*).

The trial court held the *Atkins* hearing at the Mississippi State Penitentiary on February 6, 2013. On June 17, 2013, the trial court entered its Order Denying Petition for Post-Conviction Relief, holding that Mr. Carr had not carried his burden of proof and was not entitled to relief. AppE. Mr. Carr filed a motion for reconsideration on July 2, 2013. The trial court denied that motion on March 3, 2014.

Mr. Carr then appealed to the Mississippi Supreme Court. On August 11, 2016, that court reversed the judgment and remanded the case to the trial court. *Carr v. State*, 196 So. 3d 926 (Miss. 2016) (*Carr III*). AppD. On September 20, 2017, the trial court entered its Revised Order Denying Petition for Post-Conviction Relief. AppB.

[2] In *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), the Mississippi Supreme Court addressed *Atkins* for the first time and adopted standards for the determination of intellectual disability in *Atkins* cases.

That order was filed in the Quitman County Circuit Court on September 25, 2017, and in the Mississippi Supreme Court on September 28, 2017. Because of a delay in receiving notice that the order had been entered, counsel for Mr. Carr filed a motion for enlargement of time to file a motion for reconsideration on October 11, 2018. The trial court granted that motion on October 13, 2018. Also filed on October 11, 2017, was a motion for reconsideration, which was denied. Counsel for Mr. Carr then filed a notice of appeal on October 26, 2017.

On June 6, 2019, the Mississippi Supreme Court affirmed the trial court's judgment by a vote of six to three. A separate dissenting opinion was filed. *Carr v. State*, No. 2017-CA-01481-SCT, 2019 WL 2384142 (Miss. June 6, 2019) (*Carr IV*). AppA.

On June 12, 2019, Mr. Carr requested additional time to file a motion for rehearing, which was granted. The motion was filed on July 11, 2019, and denied on September 12, 2019. AppB.

II. Facts Material to the Question Presented

Before Mr. Carr's capital murder trial in 1990, a psychologist evaluated him at the behest of the defense. This was before this Court's *Atkins* decision but shortly after *Penry v. Lynaugh*, in which this Court observed that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." *Penry v. Lynaugh*, 492 U.S. 302, 335, 109 S. Ct. 2934, 2955, 106 L. Ed. 2d 256 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and *holding modified by Boyde v. California*, 494

U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

Mr. Carr's pre-trial psychological evaluation included the administration of the Wechsler Adult Intelligence Scale-Revised (WAIS-R), which resulted in a full-scale IQ of 70. The psychologist, Dr. William Kallman, found that "Mr. Carr is functioning in the mildly retarded range in intelligence." At that time, however, that diagnosis did not bar a death sentence.

One claim in Mr. Carr's direct appeal to the Mississippi Supreme Court was that the "death penalty is disproportionate [because of] his mental retardation and organic brain damage." *Carr I*, 655 So. 2d at 857. In its opinion affirming the conviction and sentence, the court did not engage much with the issue. It found that the case cited in the brief in support of the claim was "distinguishable as Carr was not diagnosed as a paranoid schizophrenic." *Id*. at 857–58.

While Mr. Carr's 2001 petition for post-conviction relief with its supplement was pending, this Court decided *Atkins*, holding that the Eighth Amendment prohibits executing persons with intellectual disability. In 2004, the Mississippi Supreme Court handed down *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), recognizing the *Atkins* decision and setting forth procedures for its implementation in Mississippi. Among the provisions of *Chase*: "The trial judge will make such determination, by a preponderance of the evidence, after receiving evidence presented by the defendant and the State." *Id.* at 1028.

On the same day that it issued the *Chase* decision, the Mississippi Supreme Court granted Mr. Carr the opportunity to prove in the trial court that he is

intellectually disabled under *Atkins* and *Chase* and therefore exempt from the death penalty. The *Atkins* hearing took place on February 6, 2013. The court took evidence in the form of the testimony of two expert witnesses, psychologists Gerald O'Brien, Ph.D., for the petitioner and Gilbert Macvaugh, Ph.D., for the State; one lay witness, Johnie Chaney, a childhood friend of Mr. Carr; and exhibits.

Dr. O'Brien testified that, to a reasonable degree of psychological certainty, Mr. Carr has intellectual disability. Dr. Macvaugh, the State's expert, testified that he "could not form an opinion" on that issue. He said that it was "too close to call." He did not testify that Mr. Carr is *not* intellectually disabled. No expert ever has.

Mr. Chaney recalled Mr. Carr as a fourteen-to-sixteen-year-old youth who needed help putting his clothes and shoes on correctly, who had bad hygiene, and who needed help catching a ball. He painted a picture of a "follower." Mr. Chaney testified that others "t[ook] advantage of" Mr. Carr and "tr[ied] to make him do crazy things."

The exhibits included reports by the two testifying experts as well as one prepared by Dr. Kallman, the psychologist who had evaluated Mr. Carr before the trial. Dr. Kallman's report stated that he had administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R), which resulted in a full-scale IQ of 70. Dr. Kallman wrote that "Mr. Carr is functioning in the mildly retarded range in intelligence." Also among the exhibits were school records and information about people Dr. O'Brien had interviewed for his report.

On June 19, 2013, the trial court entered its Order Denying Petition for Post-Conviction Relief, holding that Mr. Carr had not carried his burden of proof and was

not entitled to relief. AppE. The court wrote, "This court finds that Macvaugh best sums up Carr's assessment of mental retardation—'too close to call.'" App055. It looked like a "tie" to the trial court, but "[t]here cannot be a tie." *Id*. So, the court continued, "This is when the burden of proof becomes the deciding factor." *Id*. Because the post-conviction statute places the burden on the petitioner to prove the claim by a preponderance of the evidence, the trial court ruled that "Carr has not met the three-pronged *Atkins* test for mental retardation." *Id*.

The trial court's order did, however, briefly and without elaboration state that "based upon the evidence presented, the court finds that Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas noted in the applicable definitions." App053.

Mr. Carr appealed to the Mississippi Supreme Court. He argued, first, that because the trial court had held that the outcome of the *Atkins* hearing was a tie, logically it was just as likely that Mr. Carr is intellectually disabled as not, which means that if he were to be executed it would be just as likely that Mississippi had put an intellectually disabled man to death as not. That would be a violation of his Eighth and Fourteenth Amendment rights, and it would frustrate one goal of this Court's death-penalty jurisprudence—to eliminate the "unacceptable risk that persons with intellectual disability would be executed." *Hall v. Florida*, 134 S. Ct. 1986, 1990, 188 L. Ed. 2d 1007 (2014). Mr. Carr also asserted that the trial court had erred in finding that he is not intellectually disabled.

The Mississippi Supreme Court rejected the first argument but found that, as

to the second, the trial court had used an erroneous legal standard. *Carr III*, 196 So. 3d at 943 ("the circuit judge applied an incorrect legal standard by treating Carr's IQ score alone as dispositive of this case"). App037. In its order denying relief, the trial court had recounted the results of three IQ tests that Mr. Carr had taken, which resulted in full-scale scores of 70, 72, and 75. The trial court had written:

> It can be said comfortably that Carr's IQ, as demonstrated by the tests which were given, falls somewhere in the 70 to 75 range. Given the applicable and conceded margin or [*sic*] error of five (5) points either way which is applicable to such test, Carr's actual IQ could range anywhere from a low of 65 to a high of 80. Obviously, the lower the IQ, the more mental retardation is suggested. The higher the IQ, the less mental retardation is suggested. This is the inherent flaw in attempting to come to a concrete conclusion regarding a particular subject when the means for doing so relies on a margin of error. Certainly, Carr's intelligence level is at the lower end of the spectrum, but is it *significantly* sub-average? Given the range within which the test results are found and the applicable margin of error, this court cannot find by a preponderance of the evidence that Carr has carried his burden of proof. While this finding alone is sufficient to deny Carr's claim of mental retardation, because of the significance of this decision, the court will consider the other two remaining factors.

App049.

The Mississippi Supreme Court quoted this Court's instructions in *Hall v. Florida* that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment" and "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Carr v. State*, 196 So. 3d 926, 934 (Miss. 2016) (*Carr III*). App030. The court further held that because the trial court had stated that "this finding [concerning IQ scores] alone is sufficient to deny Carr's claim of mental retardation,"

it had reversibly erred "by failing to balance and analyze his adaptive functioning deficits with his IQ score." *Id*. at 943. App037.

The Mississippi Supreme Court remanded the case to the trial court "for proceedings consistent with this opinion." *Id.* at 944. App038. It instructed the trial court to make "new factual findings applying the correct legal standard." *Id*.

In remanding the case, though, the Mississippi Supreme Court issued the following instruction:

> We therefore reverse the trial court judgment and remand this case to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75.

Id. at 943. App037–038.

The trial court entered its "Revised Order Denying Petition for Post-Conviction Relief." AppB. Once again, it found that Mr. Carr had not proved that he is intellectually disabled. *Id*. This time, however, it held that the problem was with prong 2 of the three-prong test—adaptive functioning deficits. While the first order denying relief had found that prong 2 was satisfied, this time, under the new "so severe" criterion, it was not.

Once again, Mr. Carr appealed to the Mississippi Supreme Court. In an opinion handed down on June 6, 2019, the court affirmed the trial court's judgment. *Carr v. State*, No. 2017-CA-01481-SCT, 2019 WL 2384142 (Miss. June 6, 2019) (*Carr IV).* AppA. Three dissenting justices wrote that they would reverse and render because "Carr established that his IQ scores each fell within the margin of error applicable to

the test, that he had significant adaptive deficits in more than one area, and that those deficits manifested before the age of eighteen." *Id.* at *13. App014. The dissent pointed out:

> This is not even a case of opposing experts. The evidence showed that one expert stated Carr *could* be intellectually disabled but that he was not certain. Yet Carr presented evidence from two experts stating that he was intellectually disabled, presented school records that showed significant academic deficits, presented testimony indicating that Carr had to be told when to tie his shoes and when to bathe, and presented IQ tests showing significant intellectual deficits.

Id. (emphasis in original). App014.

REASONS TO GRANT THE PETITION

This Court should grant the writ because the Mississippi Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Supreme Ct. R. 10(c). Specifically, the Mississippi Supreme Court's decision conflicts with *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014); *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017) (*Moore I*); and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

I. The diagnostic criteria for intellectual disability do not include the term "so severe" and it is not part of the definition of the disability.

In its opinion remanding this case to the trial court, the Mississippi Supreme Court established an erroneous legal standard for evaluating adaptive functioning deficits (known as prong 2 of the three-prong test) in *Atkins* cases. The opinion instructed:

> We therefore reverse the trial court judgment and remand this case to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are *so severe* that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75.

Carr v. State, 196 So. 3d 926, 943 (Miss. 2016) (*Carr III*) (emphasis added). App037–038.

The term "so severe" does not appear in the diagnostic criteria for intellectual disability in either of the two authorities cited by this Court in *Atkins* and by the Mississippi Supreme Court in *Chase*—the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the diagnostic

manual of the American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation). (In 2004, following this Court's lead in *Atkins*, the Mississippi Supreme Court approved of the definitions of intellectual disability in both manuals. *Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004). Mississippi does not have a statute on point.)

This implementation of a criterion that does not appear in the diagnostic criteria is contrary to this Court's holding in *Hall* that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721. It is also contrary to the *Moore* cases. *Moore I*, 137 S. Ct. at 1048 ("the determination [of intellectual disability] must be 'informed by the medical community's diagnostic framework . . . .'"); *Moore II*, 139 S. Ct. at 669 (same).

It is true that the term "so severe" appears in the DSM-5. But it is not in the diagnostic criteria. It is in a separate section, four pages later, titled "Diagnostic Features." DSM-5 at 37. It should be read in context.[3] It occurs in the fourth paragraph of that section, which is not primarily concerned with adaptive functioning deficits. It is, rather, a discussion of problems that may arise in interpreting IQ

[3] It also should be read with the "Cautionary Statement for Forensic Use of DSM-5," which is on page 25 of the manual, firmly in mind. It advises that "the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."

scores. It advises that

> IQ scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ scores. Thus, clinical judgment is needed in interpreting the results of IQ tests.

DSM-5 at 37.

The sentence that includes "so severe" begins with "For example . . . ." It discusses a hypothetical situation where someone's IQ is "above 70." It does not specify how many points above 70, but it clearly discusses a hypothetical case where there is a score high enough to raise doubts about a diagnosis of intellectual disability. Mr. Carr is not in that category because his IQ scores—70, 72, and 75—all fall within the range that, once the SEM[4] is taken into account as required by *Hall*, satisfy prong 1 of the test. One of the three scores, in fact, is not above 70 to begin with.

The majority opinion states, incorrectly, that "the medical community's diagnostic framework recognizes that Carr's IQ between 70 and 75, coupled with 'severe adaptive behavior problems' could support a diagnosis of intellectual disability . . . ." *Carr III*, 196 So. at 943. App037. While the term "diagnostic framework" does not appear in the DSM-5, "Diagnostic Criteria" does. DSM-5 at 33. To import the term "so severe" from one part of the DSM-5 into the Diagnostic

[4] The "standard error of measurement (SEM), a statistical fact reflecting the test's inherent imprecision and acknowledging that an individual score is best understood as a range, *e.g.,* five points on either side of the recorded score." *Hall*, 134 S. Ct. at 1988.

Criteria, which constitutes the definition of intellectual disability, is to change the definition. That is not permissible under *Hall* and *Moore*.

Historically, this "so severe" language never has been part of the diagnostic criteria. A survey of every edition of the DSM, beginning with the first edition in 1952, and of every edition of the diagnostic manual of the American Association on Intellectual and Developmental Disabilities dating back to 1959, shows that, while there has been some evolution of the diagnostic criteria over the past half a century or so, the core concepts have not changed substantially. Marc J. Tassé, Ruth Luckasson, & Robert L. Schalock, *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, 54:6 Intellectual and Developmental Disabilities 381, at 384–86 (2016). Most editions speak of deficits in intelligence and in adaptive behavior and of the onset in the developmental period. (Some editions specify an age of onset, while others, including the current DSM-5, simply use the term "developmental period.")

Not one of these fifteen manuals uses the term "so severe" in its diagnostic criteria. That term simply is not, and never has been, part of the diagnostic criteria. In cases like Anthony Carr's, in which IQ scores consistently satisfy prong 1, a diagnosis of intellectual disability need not and does not include an undefined measure of "severity" in assessing the interrelation of the first two prongs of the inquiry.

The Mississippi Supreme Court's interpretation and application of the DSM-5 is unconstitutional. It has fostered the mistaken belief that the DSM-5 mandates that

a defendant prove that he or she has "super deficits" in adaptive functioning. It has established an unconstitutional legal standard. Respectfully, this Court should take this opportunity to clear up this confusion.

II. The interpretation of the term "significant"

The Mississippi Supreme Court's 2019 *Carr* opinion states that "while the trial court did originally find that 'Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas,' the trial court did not find *significant* adaptive-skill deficits." *Carr IV* at *7 (emphasis in original). App009. However, the court never defines "significant" in this context. The term is mentioned three more times (in paragraphs 34–36 (App009)), but the court never explains what it means in the *Atkins* context. This ambiguity underlies the court's error: the evidence shows very significant deficits.

As for the meaning of "significant," consider the purpose for which the AAIDD included it in the three-part test for intellectual disability:

> The purpose of this element of the definition is to make sure that the impairment indicated in psychometric tests actually has a real-world impact on the individual's life and thus is a disabling condition rather than merely a testing anomaly. This requirement arose from concerns about the potentially inappropriate labeling of school children, some of whom might not have had limitations in functioning in everyday life.

James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1305, 1374 (2018).

A "significant" deficit, then, is simply one that "actually has a real-world impact on the individual's life." Examples include the inability to hold a job, to read and do math at an age-appropriate level, to practice good personal hygiene, and to

have basic living skills. The evidence in Mr. Carr's case shows that he has significant deficits, including:

- At the age of forty-four, he could read and could do arithmetic only at the level of a third- or fourth-grader.
- According to Dr. Kallman, Mr. Carr "doesn't understand a whole lot of what goes on around him, [and] doesn't have a lot of basic living skills."
- As a teenager, Mr. Carr could not "keep his clothes on him right," "tie his shoes" and "clean up when he had an odor" without help.
- He could not hold a steady job.

The above is only a partial listing of the deficits that are in evidence. By any definition of the word "significant," they qualify under the second prong of the *Atkins* analysis. It is unconstitutional to decide otherwise.

Mr. Carr has proven that he has significant limitations in adaptive functioning, and that he has had since childhood. He has proved it by the requisite preponderance of the evidence, and he is entitled to the protection of *Atkins* to be free of excessive punishment pursuant to the Eighth Amendment.

III. The unconstitutional legal standard set forth in *Carr III* clearly affected the judgment of the trial court on remand.

The trial court's 2017 order explains its understanding of the Mississippi Supreme Court's instructions on remand as follows:

> In an effort to be clear, it is this court's understanding that, to make a finding of intellectual disability, each of the above three criteria ["[s]ignificantly sub-average intellectual function," "[s]ignificant deficits in adaptive behavior," and "[m]anifestation prior to age 18"] must be met. There is some amount of interplay between two of the criteria: (a) significantly sub-average intellectual function, and (b) significant deficits in adaptive behavior. These two factors can act as a "sliding scale" or require a "balancing," *i.e.*, although an individual may possess an IQ above what is normally considered appropriate for a finding of

> intellectual disability, the deficits in such an individual's adaptive behavior might be *so severe* that a finding [of] intellectual disability may still be made or even compelled, or an individual may possess[] an IQ sufficiently low that a finding of intellectual disability would normally be considered appropriate, however such individual's adaptive behavior might be of such a high or higher order that a finding of intellectual disability might be inappropriate.

App017 (emphasis added).

The trial court interpreted the Mississippi Supreme Court's remand as a mandate to determine whether Mr. Carr's adaptive functioning deficits, which it had previously found to exist in at least two of the areas specified in the diagnostic criteria, are "so severe" as to allow or compel a finding of intellectual disability. But as explained *supra*, the diagnostic criteria do not contain any requirement of such severity. All that is required is a degree of deficits that "result[s] in failure to meet developmental and socio-cultural standards for personal independence and social responsibility." DSM-5 at 33. Or, as the *Hofstra Law Review* article cited *supra* puts it, a degree of deficits that "has a real-world impact on the individual's life." Ellis, *supra* at 1374.

The trial court's order uses the term "sliding scale," but it is a mystery what that term means in this context or, more importantly under *Hall*, where it comes from. App017. This term does not appear in any of the literature on intellectual disability, as far as counsel for Mr. Carr can determine. It is clear, however, that a death row inmate with Anthony Carr's IQ scores of 70, 72, or 75 is not required to show more severe adaptive functioning deficits than one with, say, a score of 65. If that is what the trial court meant by "sliding scale," it made that analysis up. The medical and psychological professions did not tell the trial court that it works that

way.

The evidence before the trial court in this case is sufficient to prove deficits under the established criteria. In 2013 the trial court held that "[b]ased on the evidence presented, the court finds that Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas noted in the applicable definitions." App053. That assessment was correct at the time, and it still is.

There is another problem with the trial court's understanding of its task and the Mississippi Supreme Court's approval of how the trial court analyzed Mr. Carr's *Atkins* claim. The trial court's characterization of the diagnostic criteria as having "some amount of interplay," App017, is not what the science says. According to a recent article in the journal of the American Association on Intellectual and Developmental Disabilities, written by three of the authors of the AAIDD manual on intellectual disability who are among the foremost authorities in the field, the best practice in approaching the first two prongs is as follows:

> Because there have been studies (see Tassé et al., 2012) documenting the correlational relationship between intellectual functioning and adaptive behavior, and because the constructs of intellectual functioning and adaptive behavior and their assessment are better understood and comparable in terms of the metrics used in their assessment, both must be weighed equally and considered jointly in the diagnosis of ID.

Tassé, *supra* at 384–86.[5] Saying that the two criteria "must be weighed equally and considered jointly" is hardly the same as saying there is "some amount of interplay."

[5] Dr. Tassé and his colleagues also point out that "[t]he ordering of the presentation of these two criteria in all diagnostic systems is merely historical and should not be interpreted as a sequential ordering or steps in the diagnostic process." *Id.*

Clearly, the trial court misapprehended what the medical community has stated about the proper way to analyze intellectual disability.

IV. The arguments regarding the "so severe" language in this petition were fully briefed in the appeal to the Mississippi Supreme Court.

After the trial court entered its Revised Order Denying Petition for Post-Conviction Relief, AppB, Mr. Carr appealed to the Mississippi Supreme Court. Mr. Carr put his arguments against the newly formulated "so severe" requirement before the court, and the court addressed those arguments in its *Carr IV* opinion.

CONCLUSION

For the foregoing reasons, Mr. Carr prays that this honorable Court will grant the petition for a writ of certiorari. Alternatively, this Court should summarily vacate the judgment below and remand for an analysis of Mr. Carr's *Atkins* claim.

Respectfully submitted,

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