No. _____

IN THE

Supreme Court of the United States

DEXTER PAYNE, Director, Arkansas Department of Correction,

Petitioner,

v.

ALVIN BERNAL JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

A defendant seeking to prove an intellectual disability that makes him ineligible for the death penalty must prove that he has significant adaptive deficits in at least one of three broad adaptive-skill domains. Applying that requirement, *Moore v. Texas* held that courts may not offset deficits in one domain with strengths in another. 137 S. Ct. 1039, 1050 n.8 (2017). But it expressly left open whether courts may "consider adaptive strengths alongside adaptive weaknesses in the same adaptive-skill domain." *Id.*

Since *Moore*, a large majority of courts have held they may consider a defendant's strengths in a domain to resolve whether he has deficits there overall. Yet a small minority, including a divided panel of the court of appeals below, hold strengths are irrelevant. The only evidence courts may consider in deciding whether a defendant has adaptive deficits, they maintain, are weaknesses that suggest he does.

The question presented is:

Whether courts may consider adaptive strengths in deciding whether a defendant is intellectually disabled and thus ineligible for the death penalty.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Dexter Payne, in his official capacity as Director of the Arkansas Department of Correction. He was respondent-appellant in the court of appeals.

Respondent is Alvin Bernal Jackson. He was petitioner-appellee in the court of appeals.

RELATED PROCEEDINGS

Jackson v. Norris, No. 5:03-cv-00405-SWW (E.D. Ark.) (judgment entered Mar. 23, 2020).

Jackson v. Norris, No. 07-1331 (8th Cir.) (judgment entered Nov. 20, 2007)

Jackson v. Norris, No. 09-1229 (8th Cir.) (judgment entered Aug. 11, 2010)

Jackson v. Kelley, No. 16-1847 (8th Cir.) (judgment entered Aug. 7, 2018).

Jackson v. Payne, No. 20-1830 (8th Cir.) (judgment entered Aug. 13, 2021, rehearing denied October 20, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dexter Payne, Director of the Arkansas Department of Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-32a) is reported at 9 F.4th 646. The district court's order (Pet. App. 33a-74a) is reported at 448 F. Supp. 3d 1028.

JURISDICTION

The court of appeals entered judgment on August 13, 2021 and denied rehearing on October 20, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

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

INTRODUCTION

In *Atkins v. Virginia*, this Court held that executing an intellectually disabled offender violates the Eighth Amendment. 536 U.S. 304, 321 (2002). Initially, the Court "le[ft] to the States the task" of defining intellectual disability. *Id.* But over time, the Court has largely constitutionalized the clinical definition. Today, it is settled that States must deem a defendant intellectually disabled if he has: (1) significantly sub-average intellectual functioning, as measured by IQ; (2) significant deficits in at least one of the three adaptive skill sets—conceptual/academic, social, or practical; and if (3) the defendant's disability manifested when he was still a minor. *Moore v. Texas*, 137 S. Ct. 1039, 1045-46 (2017).

Before *Moore*, it was far less clear that deficits in just one skill domain sufficed. Indeed, only two years prior, the Court had suggested requiring deficits in two or even three domains was permissible. *See Brumfield v. Cain*, 576 U.S. 305, 317 & n.6 (2015). Consequently, before *Moore*, state courts often holistically assessed deficits across domains, attending less to the distinctions between them. With the advent of *Moore*'s one-domain rule, that kind of balancing became unsustainable. So in *Moore*, the Court forbade "offsetting . . . deficits against unconnected strengths" in different domains. 137 S. Ct. at 1050 n.8.

Left unanswered, however, was the role of strengths in making the domain-specific findings that *Moore* required. In response to the dissent's contention that clinicians do consider strengths—particularly alongside "deficits within the same skill area," *id.* at 1059 (Roberts, C.J., dissenting)—the majority conceded that clinicians might "consider adaptive strengths alongside adaptive weaknesses within the

same adaptive-skill domain" and said it needn't decide whether they do or courts may. *Id.* at 1050 n.8.

This case tests that question. Twenty-seven years ago, while already serving a life sentence for a prior murder, Alvin Jackson stabbed a prison guard to death. After *Atkins* was decided, Jackson claimed he was intellectually disabled and ineligible for the death penalty. A federal district court, sitting in habeas, disagreed, finding Jackson's substantial adaptive strengths outweighed his deficits. But the court of appeals, reading *Moore* to bar considering adaptive strengths altogether, instructed the district court to redo the analysis by reviewing Jackson's weaknesses alone. With strengths deducted from the mix, the district court found Jackson had significant deficits that made him ineligible for execution, and a divided panel of the court of appeals affirmed.

In reading *Moore* to command courts assess intellectual disability by only looking at a defendant's weaknesses, the majority below deepened an existing split and broke with at least six state courts of last resort, all of which hold that courts may and should consider strengths. The court of appeals' opinion conflicts with multiple decisions of this Court, including a later iteration of *Moore*, that indicate strengths are relevant. It contravenes medical definitions of intellectual disability, which instruct clinicians to diagnose intellectual disability by assessing the whole person, not just his weakest skills. It inexplicably instructs finders of fact they can hear only evidence that supports intellectual-disability claims, not evidence that refutes them. And it effectively abrogates the adaptive-deficit requirement by deeming anyone with significant weaknesses in *some* skills—which almost anyone with a significantly sub-average IQ will

have—to have significant adaptive deficits. The Court should grant certiorari and reverse the decision below.

STATEMENT

1. On July 30, 1989, Charles Colclasure went into his office in Little Rock to work on the weekend. *Jackson v. State*, 811 S.W.2d 299, 299 (Ark. 1991). He never returned home. *Id.* The following day, his body was found in the Arkansas River. *Id.* Alvin Jackson, then 19, Pet. App. 2a, confessed to robbing and murdering Colclasure, *Jackson*, 811 S.W.2d at 300.

According to Jackson, he and his nephew spotted Colclasure walking out of his office to his car. *Jackson v. Norris*, No. 5:03-cv-00405-SWW, 2009 WL 10635225, at *5 (E.D. Ark. Jan. 6, 2009). Jackson told Colclasure to hand over his wallet. *Id.* When Colclasure hesitated, he shot Colclasure with a rifle. *Id.* Colclasure attempted to flee and Jackson gave chase, shooting Colclasure several more times. *Id.* When Colclasure continued to flee, Jackson's nephew, who had taken Colclasure's car, hit Colclasure with his own vehicle. *Id.* Finally, Jackson and his nephew picked up Colclasure, who was injured but still breathing, put him in his car's trunk, drove him to the Arkansas River, and dumped him into the water. *Id.* Jackson was found guilty of capital murder and sentenced to life in prison. Pet. App. 2a.

In 1995, while he was serving that sentence, Jackson fatally stabbed Sergeant Scott Grimes, a prison guard, with a handmade shank. Pet. App. 50a. Jackson's plan was to stab a prisoner whom Sergeant Grimes was escorting, in revenge for some wrong Jackson believed the prisoner had done a friend. *Jackson v. State*, 105 S.W.3d 352, 359 (Ark. 2003). Jackson carefully planned his attack, removing a

piece of metal from his cell door to provide a means of escape and then, just as Grimes was escorting the prisoner past Jackson's cell, kicking his door open, escaping, and lunging toward his target. Pet. App. 50a. That plan only failed because Sergeant Grimes shielded Jackson's intended victim. *Id.* That heroic action cost Grimes his life. *Id.*

Jackson was tried, convicted, and sentenced to death for killing Grimes. Pet. App. 2a. Even though Arkansas law prohibited the execution of the intellectually disabled, Jackson did not claim to be intellectually disabled. *See Jackson v. Norris*, 468 F. Supp. 2d 1030, 1045-46 (E.D. Ark. 2007). The Arkansas Supreme Court subsequently affirmed Jackson's conviction and sentence, and it later denied his petition for postconviction relief. Pet. App. 2a.

2. After this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which was rendered while Jackson's postconviction appeal was still pending, *see Jackson*, 468 F. Supp. 2d at 1045, Jackson filed a federal habeas petition in which he claimed for the first time that he was intellectually disabled and thus ineligible for the death penalty. *Id.* The district court, in an order by Judge Susan Webber Wright, who presided over all proceedings in the case, held his claim was procedurally defaulted. *Id.* The court of appeals, however, reversed, holding that his failure to present an intellectual-disability defense under state law didn't default his *Atkins* claim. *Jackson v. Norris*, 256 F. App'x 12 (8th Cir. 2007). That decision touched off over a decade of de novo federal litigation over whether Jackson was intellectually disabled.

On remand, the district court initially held Jackson's claim was too weak to even justify an evidentiary hearing. *Jackson*, 2009 WL 10635225, at *9. It found the existing record—which contained pro se prisoner suits Jackson filed, deposition transcripts, and police interviews about his murders—proved Jackson could "process and understand information, communicate fluently, and engage in logical reasoning." *Id.* But the court of appeals reversed that decision too, finding that his evidence of deficits created enough doubt for a hearing. *Jackson v. Norris*, 615 F.3d 959 (8th Cir. 2010).

3. The district court then conducted an evidentiary hearing at which it credited the State's expert, discredited Jackson's, and found that Jackson was not intellectually disabled. Pet. App. 5a. The district court found that Jackson's most recent IQ scores were unreliable on account of malingering. *Id.* And it found that his childhood scores, which ranged from 72 (when Jackson was only 6 years old) to 81 (when he was 11), did not clearly support a finding of significantly below-average intellectual functioning. *Jackson v. Norris*, No. 5:03-CV-00405 SWW, 2016 WL 1740419, at *10, 13-14 (E.D. Ark. Mar. 31, 2016).

Nevertheless, the district court proceeded to address whether Jackson had deficits in adaptive functioning. Though granting that Jackson exhibited deficits in particular skills, *id.* at *20, it found Jackson showed considerable adaptive strengths, evidenced both by the numerous pro se lawsuits and grievances he filed, *id.* at *19-20, and by the careful planning of his second murder, *id.* at *23. Moreover, the district court found Jackson failed to prove that any adaptive deficits he had were directly related to intellectual impairments, rather than personality disorders—

which the court understood the clinical definition of intellectual disability to require. *Id.* at *20-21. It thus concluded Jackson failed to prove significant adaptive deficits. *Id.* at *21.

4. Jackson appealed. While his appeal was pending, this Court decided *Moore v. Texas*, 137 S. Ct. 1039 (2017), which would heavily inform the court of appeals' decision. *Moore* contained three potentially relevant holdings. First, the Court held that when a defendant's IQ score, adjusted by a five-point standard error of measurement, falls at or below 70, courts must "move on to consider [his] adaptive functioning." *Id.* at 1049. Second, it held defendants need not prove their adaptive deficits are unrelated to personality disorders and are instead caused by intellectual impairments. *Id.* at 1051. Third, and most critically, it cautioned courts not to "overemphasize . . . adaptive strengths," *id.* at 1050, and held that deficits in one of the three adaptive-skill domains suffice to prove adaptive deficits, *id.* Accordingly, while the Court declined to decide whether courts may "consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain," it held courts may not offset deficits "against unconnected strengths in *different* skill domains, *id.* at 1050 n.8 (emphasis added).

The court of appeals read *Moore* to require a remand. First, it held the district court was required to consider Jackson's adaptive functioning because some of his childhood IQ scores, though each above 70, were below 70 when adjusted by the standard error of measurement. *Jackson v. Kelley*, 898 F.3d 859, 864 (8th Cir. 2018). Second, it held the district court had erred by relying on Jackson's personality disorders to conclude his adaptive deficits, if any,

were not related to his intellectual functioning. *Id.* at 865. Third, it read *Moore* to hold that "significant limitations in adaptive skills are not outweighed by potential strengths in other adaptive skills," *id.* at 864, and held that under *Moore*, the district court had "inappropriately found" that Jackson's "adaptive strengths outweighed his adaptive deficits," *id.* at 865. It thus remanded for the district court to decide "whether Jackson's adaptive functioning deficits rather than his adaptive functioning strengths indicate that he is not intellectually disabled." *Id.* at 869.

5. On remand, the district court concluded that, "[a]s one would expect, Jackson's record of adaptive deficits . . . provide no indication that he is *not* intellectually disabled." Pet. App. 72a-73a. Applying that test, it found, in only two sentences of its opinion, that Jackson's childhood school records showed he had deficits in "basic functional academic skills"; that he had "severe behavioral problems, indicating deficits in the social domain"; and that his "difficulty with self-management and staying on task, indicat[ed] possible deficits in the practical domain." Pet. App. 70a.

Though the district court believed Jackson's prison behavior "seems particularly relevant" to his culpability for a murder he committed while in prison, it also believed the court of appeals had barred it from considering that behavior. Pet. App. 72a. Indeed, "given the Eighth Circuit's admonition," it "place[d] no weight on Jackson's adaptive strengths, his activities in prison," or even the expert's opinion it had previously credited, considering only Jackson's evidence of childhood deficits. *Id.* On those crabbed grounds, it reluctantly granted Jackson relief. Pet. App. 73a.

6. The State appealed. While that appeal was pending the court of appeals decided *Sasser v. Payne*, 999 F.3d 609 (8th Cir. 2021). In *Sasser*, Judge Colloton, writing for the court, held that though courts may not balance deficits in one skill area against strengths in another, courts should consider "all evidence of [a defendant's] adaptive functioning" in a skill domain, strengths and deficits alike, in order to decide whether a defendant has deficits in any one skill domain. *Id.* at 620. Unlike the district court below, which read the court of appeals' earlier opinion in Jackson's case to preclude any consideration of adaptive strengths, the *Sasser* panel read that opinion as consistent with its approach. *Id.* at 619 (citing *Jackson*, 898 F.3d at 864).

Despite that, on this appeal, two members of the panel held that the district court's interpretation of its prior opinion—and not *Sasser*'s—was the correct one and affirmed the district court's decision granting habeas relief.[1] Holding the district court hadn't erred by "placing no weight on Jackson's purported adaptive strengths," the majority said it had "expressly directed" the district court to do just that. Pet. App. 22a. Though it acknowledged that *this* Court "has not expressly forbidden any consideration of adaptive strengths," Pet. App. 23a, the panel majority claimed this Court's decisions, particularly *Moore*, "suggest that adaptive strengths play little (if any) role in the adaptive functioning analysis." *Id.*

[1] The two members of the panel who joined its opinion were members of the prior *Jackson* panel; the third, who dissented, was not.

In a footnote, the majority acknowledged that *Sasser* had held otherwise, "notwithstanding *Moore*." Pet. App. 23a n.10. The majority doubted that "adaptive strengths could be relevant." *Id.* But purporting to alternatively assume they could, the majority said "the district court did not clearly err in declining to conclude" they "outweighed or undermined" Jackson's deficits. Pet. App. 24a n.10. The factual finding the majority claimed to defer to, however, was one of its own creation. The district court did not find Jackson's deficits outweighed his strengths, but simply refused under the court's directive to consider his strengths, after previously finding they outweighed his deficits.

Judge Grasz dissented. Agreeing with *Sasser*'s reading of *Moore*, he disagreed with the majority that "adaptive strengths . . . must be completely ignored." Pet. App. 29a (Grasz, J., dissenting). Judge Grasz found the majority's standard particularly problematic as applied to this case. As Judge Grasz noted, the only expert the district court found credible was the State's, and that expert did not conclude Jackson had significant adaptive deficits in any skill area. Pet. App. 30a-31a. Yet, because that expert acknowledged Jackson showed deficits in certain skills, it necessarily followed under the majority's strength-blind standard that Jackson had significant adaptive deficits.

The court of appeals denied the State's petition for rehearing en banc, which urged the full court to adopt *Sasser*'s reading of *Moore*. Pet. App. 75a.

REASONS FOR GRANTING THE WRIT

I. The court of appeals' decision conflicts with the decisions of multiple state courts of last resort.

The court of appeals' decision deepens a split among the state courts of last resort—the primary adjudicators of intellectual-disability claims. That split concerns a question this Court expressly left open in *Moore*: whether courts may "consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain." *Moore*, 137 S. Ct. at 1050 n.8. Or, put less prosaically, may courts consider adaptive evidence that disproves intellectual disability, or only evidence that confirms it?

An overwhelming majority of state courts of last resort hold that though courts may not offset confirmed weaknesses in one skill domain with strengths in another, they may consider a defendant's strengths in each domain to decide whether he suffers from overall deficits in any one. But a couple state courts of last resort—like the court of appeals below—hold that even that limited consideration of adaptive strengths is impermissible, and that courts, in essence, may only consider adaptive evidence that supports a defendant's intellectual-disability claim. That conflict presents an elemental question about the *Atkins* standard, and warrants this Court's review.

1. Perhaps the clearest statement of the majority view on the relevance of adaptive strengths post-*Moore* comes from the Arizona Supreme Court. In *State ex rel. Kemp v. Montgomery in & for Cnty. of Maricopa*, 469 P.3d 457 (Ariz. 2020), that court recognized that after *Moore* a court "cannot offset weaknesses in one category with unrelated strengths from

another category." *Id.* at 463. Notwithstanding that limitation, it held that "a court should . . . holistically consider[] the strengths *and* weaknesses in each of the life-skill categories . . . to determine if there is a deficit in any of these areas." *Id.* That assessment, it held, should, where necessary, include an assessment of strengths manifested in prison. *Id.* at 463 n.3. "Consideration of both strengths and weaknesses within each individual category," it concluded, is part of the necessary overall assessment for an intellectual disability determination in Arizona." *Id.*

The Florida Supreme Court, in a decision on remand from this Court in light of *Moore* that was later found reasonable under AEDPA by the Eleventh Circuit, has adopted the same rule. *See Wright v. State*, 256 So. 3d 766, 776-78 (Fla. 2018), *approved by Wright v. Sec'y, Dep't of Corr.*, No. 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021).

There, rejecting a "bright-line prohibition" that would deem any "mention of strengths and prison conduct in an [intellectual-disability] opinion" "per se error," *id.* at 776 n.8, the court opted for a more nuanced approach. While it recognized *Moore*'s instruction that courts may not "offset deficits against unconnected strengths," *id.* at 777, it held courts may consider strengths that *are* "connected with adaptive functioning within [a given] domain" to decide whether a defendant has deficits in that domain. *Id.* Subsequently, the court reaffirmed that approach, holding that courts "determine[] whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations." *Haliburton v. State*, — So. 3d —, No. SC19-1858, 2021 WL 2460806, at *8 (Fla. June 17, 2021).

The Pennsylvania Supreme Court, too, recently adopted the same rule. In *Commonwealth v. Flor*, 259 A.3d 891 (Pa. 2021), a dissenter argued that "the failure to consider adaptive strengths in assessing [a defendant's] deficits cannot . . . undermine credibility as to whether there are adaptive deficits in the first place"; only skill deficits should be considered. *Id.* at 948 (Wecht, J., dissenting). The majority disagreed. Courts could not, it held, use "adaptive strengths to offset established adaptive deficits," but they may consider them "in determining the existence of a particular deficit in the first place." *Id.* at 924.

2. Numerous additional state courts of last resort have similarly held since *Moore*—though in more fact-bound terms—that it is still appropriate to consider adaptive strengths to decide whether a defendant has an overall deficit in any adaptive skill domain.

For example, in *Ex parte Carroll*, the Alabama Supreme Court affirmed a trial court that looked to evidence of strengths in exhaustive detail "to reconcile the opinions of the experts regarding [the defendant's] functional limitations." 300 So. 3d 59, 72 (Ala. 2019). Rather than offsetting weak domains against strong ones, the court relied on strengths to find the defendant lacked overall weaknesses in any. *Id.* at 74. In *State ex rel. Johnson v. Blair*, the Missouri Supreme Court relied on evidence of strengths in communication because it "contradict[ed] deficits in communication." 628 S.W.3d 375, 386 (Mo. 2021). And in *Nolen v. State*, the Oklahoma Court of Criminal Appeals relied on a defendant's academic and communication abilities to find he had "no significant deficiencies in [his] functional academic or communication skills." *Nolen v. State*, 485 P.3d 829, 843-44 (Ok. Ct. Crim. App. 2021).

3. While most courts understand *Moore* to allow consideration of adaptive strengths so long as they are not offset against unrelated deficits, a couple state courts of last resort, like the court of appeals below, forbid considering adaptive strengths altogether.

The California Supreme Court bars reliance on adaptive strengths, reading *Moore* to have "rejected the view that adaptive strengths constitute evidence adequate to overcome considerable objective evidence of adaptive deficits." *In re Lewis*, 417 P.3d 736, 767 (Cal. 2018). Rather than distinguish, as its sister courts have, between strengths offered to disprove overall deficits in a particular domain and strengths offered to offset established deficits in different domains, the court simply deemed the State's evidence of strengths irrelevant because it evidenced strengths, not deficits. *Id.*

Likewise, the Nevada Supreme Court, albeit in an unpublished disposition, has categorically rejected reliance on adaptive strengths as "improper[]." *State v. Covington*, 433 P.3d 1252, at *3 (Nev. 2019) (table case). Approvingly citing the court of appeals' prior opinion in this case, the Nevada Supreme Court held that courts must narrow their evidentiary focus to "adaptive deficits rather than any perceived adaptive strengths." *Id.* (citing *Jackson v. Kelley*, 898 F.3d 859, 865 (8th Cir. 2018)).

* * *

In sum, at least six state courts of last resort hold that after *Moore*, courts may and should consider evidence of adaptive strengths so long as it is offered to disprove deficits in the domain where those strengths lie, not to offset established deficits in a different one. But the court of appeals below, and

two state courts of last resort, read *Moore* to bar considering strengths altogether. That sharp and deep conflict on the meaning of this Court's decisions warrants the Court's review.

II. The court of appeals' decision is incorrect.

The rule imposed by the court of appeals below is startling. Stripped of clinical jargon, what it means is that once a defendant offers one IQ score at or below 75, courts may only consider evidence that supports his claim of intellectual disability and must ignore evidence that refutes it. Evidence that a defendant read and wrote fluently would be irrelevant to whether he had deficits in the academic domain; evidence that a defendant had a broad group of friends would be irrelevant to whether a defendant had deficits in the social domain. And so long as such a defendant could point to significant deficits in *some* skills in those domains, he would be deemed to have significant adaptive deficits. Such a view is as counterintuitive as a matter of diagnostics as it is foreign to how courts normally adjudicate evidentiary disputes. *See Wright*, 256 So. 3d at 776 ("As lawyers, it seems counter-intuitive that courts cannot consider certain connected adaptive strengths because the existence of certain connected strengths necessarily illustrates the absence of certain deficits.").

If this Court's precedent, or clinical definitions of intellectual disability, mandated such an approach, there would be a serious question of whether to adhere to that precedent, or to continue to tether the legal definition of intellectual disability to the clinical one. But neither precedent nor clinical practice mandates that approach. Just the opposite.

Moore expressly left open whether courts could consider adaptive strengths alongside related deficits, and other decisions of this Court indicate they can. As for clinical practice, the diagnostic procedure is simple, and contrary to the court of appeals' approach below: clinicians assess skills across a skill domain to determine whether a person has significant deficits overall in that domain. They do not focus on a patient's weakest skills in isolation and pronounce them intellectually disabled because they struggle at some skills.

1. The court of appeals' disregard of adaptive strengths, like that of the state courts that have adopted its approach, rests almost entirely on *Moore*. But *Moore* could not have left this question open more plainly.

In *Moore*, the Court held the court below "over-emphasized Moore's perceived adaptive strengths," in a manner it deemed contrary to clinical practice. 137 S. Ct at 1050. The dissent responded that there was no clinical consensus against considering strengths, particularly when weighed against "deficits within the same skill area." *Id.* at 1059 (Roberts, C.J., dissenting). The majority responded that "even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the [lower court] engaged." *Id.* at 1050 n.8. *Moore*, then, rested exclusively on the Court's disapproval of offsetting strengths against "unconnected" deficits. The Court was expressly agnostic on whether clinicians consider strengths alongside related weaknesses, let alone whether courts may.

After leaving that question open in *Moore*, the Court said in a later iteration of that case that strengths are relevant to the adaptive-deficits inquiry. On remand from *Moore*, the lower court "emphasized Moore's ability to communicate, read, and write based in part on *pro se* papers Moore filed in court"—precisely the kind of evidence of strengths the district court originally relied on here. *Moore v. Texas*, 139 S. Ct. 666, 671 (2019) (per curiam). The Court flatly concluded "[t]hat evidence is relevant," only giving it less weight because the court below failed to find that Moore himself drafted the papers, which was in dispute. *Id.*

Likewise, in *Brumfield v. Cain*, decided only two years before *Moore*, the Court acknowledged that a panoply of adaptive-strengths evidence "may have cut against Brumfield's claim of intellectual disability." 576 U.S. 305, 320 (2015). "Perhaps most significant," in the Court's view, was an expert's view that Brumfield's "problem solving and reasoning skills" were "adequate." *Id.* And the Court also acknowledged that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder he committed required a degree of advanced planning," *id.*—again, evidence that mirrors the evidence the district court originally relied on here. The Court never discounted that evidence, but merely held Brumfield had offered sufficient evidence of disability to meet the State's extremely low threshold for an evidentiary hearing. *Id.* At bottom, then, whenever the Court has encountered evidence of strengths that relate to claimed deficits, it has deemed that evidence relevant.

2. The clinical practice is consistent with the Court's, and the majority of lower courts', approach. Clinicians consider the full body of evidence on a person's functioning in a skill domain, weaknesses and strengths alike, to assess whether a person has overall deficits in that domain. As the Court stated in *Moore*, clinicians do not offset, for example, social skills against academic deficits. Nor do clinicians define intellectual disability so exactingly that strengths in one or two skills preclude a diagnosis. But clinicians *do* weigh strengths in deciding whether a person suffers from significant overall deficits in a skill domain.

Begin with the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. It provides that the adaptive-functioning criterion for diagnosing the condition is only "met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired." Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 38 (5th ed. 2013) ("DSM-5"). That requirement necessitates an assessment of all skills within the domain; requiring "at least one domain" to be impaired would have no meaning if it sufficed to merely show substantial deficits in individual skills.

The DSM-5's specific definitions of deficits in individual domains confirm this understanding. They define deficits holistically, requiring weaknesses across the domain—and, necessarily, an absence of key strengths. For example, in the conceptual domain, even a "moderate" deficit exists only when "progress in reading, writing, mathematics, *and* understanding of time and money . . . is markedly limited," and "the individual's conceptual skills lag markedly behind those of peers" in their totality. *Id.* at 35 (emphasis added). And when a strength is compatible with

overall deficits, the DSM-5 is careful to say so—which would be unnecessary if its authors believed clinicians should ignore strengths altogether. *See, e.g.*, *id.* at 35-36 (allowing that people with moderate disabilities in the social domain "may have successful friendships," or "sometimes romantic relations," but making no such allowance for people with severe social deficits).

The American Association on Intellectual and Developmental Disabilities' (AAIDD) clinical manual, on which the Court relied heavily in *Moore*, even more plainly supports a holistic approach to assessing adaptive deficits. Its current edition simply instructs clinicians that to find "significant limitations in adaptive behavior," a person must have "an adaptive behavior score that is approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains," under a standardized test of adaptive behavior. Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 31 (12th ed. 2021). Clinicians are not allowed to discard parts of the test where a person excelled; their diagnosis must rest on the total score.

In *Moore*, the Court, in barring offsetting unrelated adaptive strengths against deficits, largely relied on a sentence in the prior edition of the AAIDD's manual that stated "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." *Moore*, 137 S. Ct. at 1050 (quoting Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 47 (11th ed. 2010)). That sentence no longer appears in the current edition. And

as the Chief Justice observed, to no disagreement from the majority, it did not clearly address weighing strengths and deficits "within the same skill area." *Id.* at 1059 (Roberts, C.J., dissenting).

The clearer statement on this point from the AAIDD, also quoted in *Moore*, comes from its manual's tenth edition, which noted that intellectually disabled persons may have "strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." *Id.* at 1050 (quoting Am. Ass'n of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (10th ed. 2002)). That statement acknowledges that people with overall deficits in a skill area may have strengths in some aspects of it. But it does not instruct clinicians to disregard strengths, and it confirms that the question is ultimately whether someone has "an overall limitation," not isolated deficits. That question can only be answered by an even-handed review of all skills.

III. The question presented is exceptionally important.

Whether courts can consider adaptive strengths is a profoundly important question, one with the potential to control the outcome of every litigable *Atkins* claim. The first criterion of the intellectual-disability test, intellectual-functioning deficits, rarely presents difficult issues under this Court's cases. If a defendant's IQ score, adjusted by the standard error of measurement, falls at or below 70, courts must move on to consider adaptive deficits; if it falls above 70, they do not. *Moore*, 137 S. Ct. at 1049-50. The fighting question in *Atkins* cases is whether the defendants who satisfy the first criterion have significant adaptive deficits.

Under the court of appeals' approach, a defendant will nearly always satisfy that second criterion; under the majority rule, it will meaningfully narrow the class of people ineligible for the death penalty. Many people with significantly sub-average IQ scores don't have significant adaptive deficits overall; otherwise, the adaptive-deficit requirement would do no diagnostic work. Yet very few, if allowed to focus on their deficits in isolation, cannot marshal significant deficits in certain skills. After all, there is substantial overlap between what an IQ test measures and adaptive functioning, particularly the academic domain. Experience proves the point: the opinion has yet to be written that refuses to consider adaptive strengths, but nevertheless finds that a defendant with significantly sub-average intellectual functioning failed to prove significant adaptive deficits.

Thus, depending on the answer to the question presented, either virtually anyone with a significantly sub-average IQ score is ineligible for the death penalty, or only a subset of that group—one that maps onto actual clinical definitions of intellectual disability—is. Which of these understandings of the Eighth Amendment and this Court's jurisprudence is right is an undeniably important question that demands this Court's review.

IV. This case is an ideal vehicle.

This case is an unusually good vehicle for reviewing the question presented. For it is all but certain that resolution of the question would be dispositive. The district court has already applied the rule this petition proposes, and under that rule it found that Jackson did not have significant adaptive deficits. It would undoubtedly make that finding again were it instructed it could once again consider adaptive

strengths. Thus, were the Court to resolve the question presented in the State's favor, Jackson could only prevail by clearing the high bar of clear-error review—an extremely unlikely outcome, given the district court's credibility findings and the paucity of evidence of Jackson's adaptive deficits. *See Jackson*, 2016 WL 1740419, at *20 (crediting State's expert's testimony that he was "without sufficient data" to conclusively opine on Jackson's adaptive functioning).

Jackson will presumably respond that the court of appeals has already held it wasn't clear error, even if strengths were legally relevant, to decline to give dispositive weight to Jackson's strengths. But that is *all* the court of appeals held on this score: that had the district court discounted Jackson's strengths on factual grounds—which, in reality, it didn't—doing so wouldn't have been clearly erroneous. It doesn't follow that if the district court reached the opposite conclusion, doing so *would* be clearly erroneous.

Indeed, the grounds on which the court of appeals held the district court's phantom-finding wasn't clearly erroneous would not compel or even allow reversal of an opposite finding. The court of appeals acknowledged "the fact that some evidence supports the State's position," Pet. App. 24a n.10, and suggested Jackson and the State offered "two permissible views of the evidence . . . [the] choice between [which] cannot be clearly erroneous." *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). And the specific bases on which the court of appeals held the district court could discount Jackson's strengths would not compel discounting them.

For example, the court of appeals observed that Jackson denied drafting his pro se filings and noted the district court never found whether he drafted

them. Pet. App. 24a-25a n.10. But the district court indicated at length in its first opinion that Jackson's denial wasn't credible, *Jackson*, 2016 WL 1740419, at *19-20, and would surely make an explicit finding on the point after this Court flagged its importance in *Moore II*, *supra* at 17. Far from an obstacle to review, the court of appeals' alternative clear-error holding shows that a finding on remand in the State's favor would be sustained under the proper legal standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-1830

ALVIN BERNAL JACKSON,

Plaintiff - Appellee,

v.

DEXTER PAYNE, DIRECTOR,
DEPARTMENT OF CORRECTION,

Defendant - Appellant.

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: May 12, 2021
Filed: August 13, 2021

Before SMITH, Chief Judge, SHEPHERD and GRASZ, Circuit Judges.

SHEPHERD, Circuit Judge.

Alvin Bernal Jackson is an Arkansas prisoner on death row. This is the fourth appeal regarding his petition for federal habeas relief on the basis that he is intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment and Atkins v. Virginia, 536 U.S. 304 (2002). In a previous appeal, this Court reversed and remanded for further

proceedings on Jackson's Atkins claim. See Jackson v. Kelley, 898 F.3d 859 (8th Cir. 2018). On remand, the district court[1] found that Jackson met his burden of showing that he is intellectually disabled and accordingly vacated Jackson's death sentence. Dexter Payne, Director of the Arkansas Department of Correction, appeals. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 1989, when he was 19 years old, Jackson killed Charles Colclasure and was later convicted of capital murder and sentenced to life in prison. In 1996, while in prison, Jackson killed a prison guard, Scott Grimes. Jackson was convicted of capital murder and sentenced to death. The Arkansas Supreme Court affirmed his conviction and sentence, see Jackson v. State, 954 S.W.2d 894 (Ark. 1997), and later denied his petition for state postconviction relief, see Jackson v. State, 105 S.W.3d 352 (Ark. 2003).

In 2003, Jackson filed a petition pursuant to 28 U.S.C. § 2254 in the federal district court, asking that the court find him intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment and Atkins. The district court denied relief, and we reversed and remanded. See Jackson v. Norris, 256 F. App'x 12 (8th Cir. 2007) (per curiam) (Jackson I). On remand from Jackson I, the district court again denied Jackson relief without a hearing. Again, we reversed and remanded, finding that Jackson was entitled to an Atkins hearing. See Jackson v. Norris, 615 F.3d 959 (8th Cir. 2010) (Jackson II).

[1] The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

In 2011, the district court held an evidentiary hearing on Jackson's Atkins claim and heard from two experts: clinical psychologist Dr. James Moneypenny, Jackson's expert; and clinical and forensic psychologist Dr. Gilbert S. Macvaugh, III, the State's[2] expert. The district court also heard testimony from Jackson. The district court heard testimony and reviewed records that Jackson, who grew up in Little Rock, exhibited serious behavioral problems early in his life and did not perform well in school. Jackson was administered multiple intelligence quotient (IQ) tests in childhood, resulting in observed scores of 72, 73, 74, and 81. During childhood, Jackson was diagnosed with anti-social personality disorder and ADHD, among other disorders. Throughout his schooling, Jackson exhibited violent and disruptive behavior, and he consistently tested below his age and grade level. At age eight, Jackson had to be removed from the classroom because he was considered too dangerous, and he was referred to the Elizabeth Mitchell Children's Center for evaluation. That institution found that Jackson was "unable to function physically or emotionally at the present time." At age 13, his academic skills were at the second and third grade level, and he was placed in a homeschooling program. In his early teens, Jackson was placed in various special education and day treatment programs, and he was terminated from one such program for "disruption." In tenth grade, Jackson dropped out of school due to failing grades.

Dr. Moneypenny opined that Jackson met the criteria for intellectual disability. Dr. Macvaugh offered a clinical opinion that Jackson is not intellectually

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[2] Because the Director has changed during this litigation, and following the district court's lead, we will refer to the Director as the State in this opinion.

disabled. However, Dr. Macvaugh refused to offer a forensic opinion, within a reasonable degree of scientific certainty, as to whether Jackson is intellectually disabled. He wrote in his report that "some of the data suggest that [Jackson] may have mental retardation,[3] and some of the data suggest that he may not." He testified at the hearing that if Jackson "has mental retardation, it's not by much. If he doesn't have it, it's not by much." Dr. Macvaugh observed that there were incomplete details regarding Jackson's childhood IQ tests, but he opined that "when you have lots of scores that all fall in the same approximate area or range, then there is probably less error associated with each of those scores because we have evidence of consistency across multiple administrations."

In 2016, the district court found that Jackson had not met his burden of demonstrating that he is intellectually disabled. The district court applied the standard from the fifth edition of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM-5),[4] a then-current and still current psychiatric manual setting forth the diagnostic criteria for intellectual disability. The three core elements are: (1) intellectual functioning deficits (indicated by an IQ score of 70 or below adjusted for the standard error of measurement [SEM], which is generally plus or minus five points); (2) adaptive

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[3] At the time of Jackson's Atkins hearing, "mental retardation," rather than "intellectual disability," was the accepted term. In subsequent quotations of cases that use the term "mental retardation," we have replaced the term with "intellectual disability." However, quotations of record evidence will retain the original language.

[4] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

deficits; and (3) the onset of these deficits during the developmental period. See DSM-5, supra note 4, at 33, 37. The district court credited Dr. Macvaugh's opinion and did not credit Dr. Moneypenny's. The court found that Dr. Macvaugh "conducted a more comprehensive investigation and provided more reliable testimony," R. Doc. 113, at 43, whereas Dr. Moneypenny did not adequately assess Jackson for malingering and relied on improper testing methods. The district court found that the scores from Jackson's two most recent IQ tests—one administered by Dr. Macvaugh, one administered by Dr. Moneypenny—were unreliable because Jackson was malingering. The district court also referenced the IQ scores from Jackson's childhood but did not apply any standard error of measurement to those scores. The court found that Jackson's test scores did not preclude a finding of intellectual disability and proceeded to analyze Jackson's adaptive functioning. The district court found that Jackson had adaptive deficits but failed to demonstrate that those deficits were due to intellectual functioning deficits or another disorder. The court also focused heavily upon Jackson's supposed adaptive strengths and improvements in prison.

Jackson again appealed, and we reversed and remanded in light of the United States Supreme Court's intervening decision in Moore v. Texas, 137 S. Ct. 1039 (2017) (Moore I). See Jackson v. Kelley, 898 F.3d 859 (8th Cir. 2018) (Jackson III). We ordered the district court on remand to

> include in its reconsideration: the standard error of measurement as applied to Jackson's IQ tests administered during his youth; whether Jackson's adaptive functioning deficits are related to his subaverage intellectual function-

> ing without requiring Jackson to demonstrate a specific link between the two; and whether Jackson's adaptive functioning deficits rather than his adaptive functioning strengths indicate that he is not intellectually disabled.

Id. at 869. We also explained that the district court should apply a SEM of plus or minus five points. Id. at 863-64.

On remand from Jackson III, the district court applied a SEM of plus or minus five points to Jackson's four childhood IQ test scores, resulting in three scores whose low end of the score range fell below 70. The district court assigned no weight to Dr. Macvaugh's opinion that, notwithstanding Jackson's IQ scores and ranges, Jackson's intellectual functioning fell within the low-to-mid borderline range of intelligence and thus was not subaverage. The district court also found that Jackson's adaptive functioning deficits are related to his subaverage intellectual functioning. The district court assigned no weight to Jackson's purported adaptive functioning strengths or his improvements in prison. The district court ultimately concluded that Jackson sufficiently demonstrated that he is intellectually disabled and accordingly granted his § 2254 petition and vacated his death sentence.

II.

The State contends that the district court erred in concluding that Jackson had shown, by a preponderance of the evidence, that he is intellectually disabled and thus ineligible for the death penalty under Atkins. The State principally argues that Jackson failed to prove, by a preponderance of the evidence, that he has intellectual functioning deficits or adaptive functioning deficits. "The legal standard applicable to an

Atkins claim presents a pure question of law, which we review de novo. Whether an individual is [intellectually disabled] under the applicable legal standard, however, is a pure question of fact, which we review for clear error." Id. at 863 (quoting Sasser v. Hobbs, 735 F.3d 833, 841-42 (8th Cir. 2013)). "We will overturn a finding of fact under clear error review if the finding is: (1) not supported by substantial evidence; (2) based upon an erroneous view of the law; or (3) such that `we are left with the definite and firm conviction that an error has been made.' Phelps-Roper v. Ricketts, 867 F.3d 883, 890 (8th Cir. 2017) (citation omitted).

The Arkansas statute barring a death sentence for persons with an intellectual disability defines intellectual disability as follows:

> (A) Significantly below-average general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and
>
> (B) A deficit in adaptive behavior.

Ark. Code Ann. § 5-4-618(a). "[T]he Arkansas Supreme Court has consistently construed [this statute] to be concurrent with the federal constitutional right established in Atkins." Jackson III, 898 F.3d at 863 (alterations in original) (quoting Sasser, 735 F.3d at 842). Jackson bears the burden of proving his intellectual disability "by a preponderance of the evidence." Ark. Code Ann. § 5-4-618(c). To satisfy his burden, he

must show: (1) "Significantly [below-]average[5] general intellectual functioning"; (2) "[a] significant deficit or impairment in adaptive functioning"; (3) "[t]hat both of the above 'manifest[ed] . . . no later than age eighteen'; and (4) "[a] deficit in adaptive behavior." Sasser, 735 F.3d at 843 (fourth and fifth alterations in the original) (quoting Ark. Code Ann. § 5-4-618(a)).[6]

After the district court's 2016 decision and while Jackson's appeal in Jackson III was pending, the Supreme Court decided Moore I, in which it vacated the Texas Court of Criminal Appeals' (CCA) decision that a habeas petitioner was not intellectually disabled under Atkins. See 137 S. Ct. 1039. The Supreme Court described the medical community's "generally accepted, uncontroversial intellectual-disability diagnostic definition" as containing "three core elements":

> (1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"—i.e., a score of roughly 70—adjusted for "the standard error of measurement");
> (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing circumstances"); and (3) the onset of these deficits while still a minor.

Id. at 1045 (citations omitted). Reaffirming its analysis in Hall v. Florida, 572 U.S. 701, 713, 724 (2014), the Moore I Court explained that "where an IQ

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[5] A prior version of the statute used the word "subaverage." In 2019, the statute was amended to replace "subaverage" with "below-average." See 2019 Ark. Acts 1035.

[6] The dissent refers to the presumption of constitutionality afforded to this statute. However, the constitutionality of Ark. Code. Ann. § 5-4-618(a) is not in question in this case.

score is close to, but above, 70, courts must account for the test's 'standard error of measurement.' Id. at 1049. Because IQ tests are inherently imprecise, "an individual's score is best understood as a range of scores on either side of the recorded score." M. (quoting Hall, 572 U.S. at 713). And when the low end of an individual's IQ score range "falls at or below 70," courts must "move on to consider [the petitioner's] adaptive functioning." Id.

The Moore I Court also provided guidance on how to properly analyze the adaptive deficits prong. The Court criticized the CCA for "overemphasiz[ing] [the petitioner's] perceived adaptive strengths," explaining that "the medical community focuses the adaptive-functioning inquiry on adaptive deficits." Id. at 1050. The Court also criticized the CCA for "stress[ing] [the petitioner's] improved behavior in prison," explaining that clinicians "caution against reliance on adaptive strengths developed `in a controlled setting,' as prison surely is." Id. (citation omitted).[7] The Supreme Court also stated that the CCA "departed from clinical practice by requiring [the petitioner] to show that his adaptive deficits were not related to 'a personality disorder,'" explaining that "many intellectually disabled people also have other mental or physical impairments" such as ADHD. Id. at 1051 (citation omitted). "The existence of a personality disorder or mental-health issue, in short, is 'not evidence that a person does not also have intellectual disability.'" Id. (citation omitted). The Supreme Court vacated and remanded

[7] The record indicates that Jackson was first imprisoned when he was 12 or 13 years old. Jackson has been incarcerated continuously since August 1989 when he was charged with the Colclasure murder; he was approximately 19 years old. Jackson is currently 51.

to the CCA for further proceedings. Id. at 1053. Moore I heavily informed our decision in Jackson III and our instructions to the district court on remand.

After our decision in Jackson III, the Supreme Court decided Moore II, Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam). On remand from Moore I, the CCA once again determined that the petitioner had not demonstrated intellectual disability, this time focusing almost entirely on adaptive deficits. Id. at 670. The Supreme Court reversed, concluding that the CCA's remand opinion suffered from the same analytical flaws as the prior opinion the Court vacated in Moore I. See id. at 672. Among other things, the Moore II Court criticized the CCA for "again rel[ying] less upon the [petitioner's] adaptive *deficits* . . . than upon [his] apparent adaptive *strengths*" and for "rel[ying] heavily upon adaptive improvements made in prison." Id. at 670-71. The Supreme Court also said the CCA erred in concluding that the petitioner failed to show that his adaptive deficits were related to intellectual functioning deficits, "rather than 'emotional problems.'" Id. at 671 (citation omitted). The Court reiterated its discussion from Moore I that the CCA "'departed from clinical practice' when it required [the petitioner] to prove that his 'problems in kindergarten' stemmed from his intellectual disability, rather than 'emotional problems,'" and the medical community's view that "a personality disorder or mental-health issue is 'not evidence that a person does not also have intellectual disability.' Id. (citation omitted). The CCA also erred in reaching its intellectual disability determination when it relied on evidence that the petitioner's crime "required 'a level of planning and forethought.' Id. (citation omitted). The Supreme Court held that, "on the basis of the trial record, [the petitioner] has shown he is a person with intellectual disability." Id. at 672. We view Moore II

as reaffirming Moore I's reasoning and guidance on how to properly evaluate intellectual disability claims under Atkins.

A.

"The first prong of Arkansas's intellectual disability statute—'significantly [below-]average general intellectual functioning,' § 5-4-618(a)—matches the first clinical diagnostic criterion for intellectual disability—deficits in intellectual functioning." Jackson III, 898 F.3d at 863 (citing DSM-5, supra note 4, at 33). Intellectual functioning "is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence." DSM-5, supra note 4, at 37. "[A]n IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the [intellectual disability] definition." Atkins, 536 U.S. at 309 n.5. Recognizing the psychiatric and psychological communities' consensus—adopted by the Supreme Court—that IQ tests are inherently imprecise, we have held that courts should consider "a margin of error of plus or minus five points on [IQ] tests because it is possible to diagnose intellectual disability 'in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.' Jackson III, 898 F.3d at 863-64 (quoting Sasser, 735 F.3d at 843). When the low end of an IQ score range "falls at or below 70," courts must "move on to consider [the petitioner's] adaptive functioning." Moore I, 137 S. Ct. at 1049.

In 2016, the district court, crediting Dr. Macvaugh's testimony, found that the scores from Jackson's two most recent IQ tests—one administered by Dr. Macvaugh, one administered by Dr. Moneypenny—were inaccurate because Jackson was malingering. In Jackson III,

we explained that, notwithstanding the two recent test scores, the district court could still consider Jackson's four childhood scores. See 898 F.3d at 864. We observed that "[t]he district court did not find that any of the IQ tests administered to Jackson before he was 18 were invalid." Id.

In accordance with our instructions, the district court on remand applied a SEM of plus or minus five (+/-5) points to Jackson's childhood IQ scores of 72, 73, 74, and 81. The lower end of the score range fell below 70 for three scores. Thus, because the lower end of Jackson's IQ "score range falls at or below 70," the district court "had to move on to consider [Jackson's] adaptive functioning." See Moore I, 137 S. Ct. at 1049.

The State argues that the district court clearly erred in determining that Jackson met his burden of showing intellectual functioning deficits. According to the State, the district court first erred in considering Jackson's childhood IQ test scores, which the State contends are unreliable or invalid. But as we explained in Jackson III, the district court in 2016 "did not find that any of the IQ tests administered to Jackson before he was 18 were invalid." See 898 F.3d at 864. The State did not request rehearing in this Court to challenge the validity or use of the childhood IQ scores, nor did it make any such arguments to the district court on remand. The State now points to the testimony of its expert, Dr. Macvaugh, in which he opined that the record was not "real specific" about which version of a test was given and that he was uncertain whether the tests were administered by a licensed psychologist trained to administer IQ tests. In context, however, it appears Dr. Macvaugh was opining that the absence of test details prevented him from assessing the "Flynn effect," which the DSM-5 describes as "overly

high scores due to out-of-date test norms." DSM-5, supra note 4, at 37. And Dr. Macvaugh also testified: "[W]hen you have lots of scores that all fall in the same approximate area or range, then there is probably less error associated with each of those scores because we have evidence of consistency across multiple administrations." This testimony undermines the State's contention that Dr. Macvaugh found Jackson's childhood IQ tests to be invalid or unreliable. Thus, the district court did not clearly err in considering Jackson's childhood IQ scores in accordance with this Court's instructions.

The State also contends that the district court erred in applying a SEM of +/5 points to Jackson's childhood IQ scores. The State's position appears to be premised on the possibility that a lower SEM may apply to some or all of Jackson's childhood IQ scores, which in turn may result in the lower end of the score range being above 70. We disagree. The DSM-5 states that the "margin for measurement error" for IQ tests is "generally" +/-5 points. The Supreme Court and this Court have also endorsed a five-point SEM. See Moore I, 137 S. Ct. at 1049; Hall, 572 U.S. at 722 (explaining that "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning" (quoting Atkins, 536 U.S. at 309)); Brumfield v. Cain, 576 U.S. 305, 315-16 (2015) (relying on Hall to find unreasonable a state court's conclusion that a score of 75 precluded a finding of intellectual disability); Jackson III, 898 F.3d at 863-64. The DSM-5 does state that the margin of error is "generally" +/-5 points, and the Supreme Court has acknowledged that "[e]ach IQ test has a 'standard error of measurement,' Hall, 572 U.S. at 713 (citation omitted). But here the State does not explain what

SEM(s) the district court should have applied to Jackson's scores, arguing only that the district court erred in applying a SEM of +/-5 points. Because the State did not identify a different test-specific SEM, we cannot say the district court clearly erred in applying the "generally" applicable SEM of +/-5 points. Even if there were a lower SEM, the Flynn effect suggests that Jackson's older scores may be artificially inflated. Thus, the Flynn effect may well "cancel out" the lower SEM such that the lower end of Jackson's score range would remain at 70 or below. Thus, in this case, applying a +/-5 points SEM mitigates the "unacceptable risk that persons with intellectual disability will be executed." See Hall, 572 U.S. at 704. Accordingly, the district court did not clearly err in applying a +/-5 SEM to Jackson's childhood IQ test scores.

The balance of the State's argument is that the district court clearly erred in rejecting Dr. Macvaugh's conclusion that Jackson exhibits low-to-mid borderline intelligence, and that his opinion precludes a finding of intellectual-functioning deficits notwithstanding Jackson's IQ scores. But the Supreme Court is clear: When the lower end of a petitioner's IQ "score range falls at or below 70," the court "ha[s] to move on to consider [the petitioner's] adaptive functioning." Moore I, 137 S. Ct. at 1049. The Supreme Court has never held that, in determining whether a petitioner has intellectual functioning deficits, an expert opinion can outweigh an IQ score where the low end of the petitioner's IQ score range is at or below 70. In fact, Moore I appears to reject such a proposition.[8] Perhaps

[8] In Moore I, one of the petitioner's IQ scores was 74, resulting in a score range of 69 to 79 after applying a +/-5 point SEM. Moore I, 137 S. Ct. at 1049. Based on the observed score of 74, but

the Supreme Court's view diverges from the DSM-5, whose diagnostic criteria for intellectual functioning deficits call for confirmation "by both clinical assessment and individualized, standardized intelligence testing." DSM-5, supra note 4, at 33. "However, the Supreme Court's decision in Hall strongly suggests that the legal standard for intellectual disability in Atkins cases has become more protective than the clinical standard." United States v. Wilson, 170 F. Supp. 3d 347, 391 (E.D.N.Y. 2016). Accordingly, we find that the district court did not clearly err in concluding that Jackson satisfied the intellectual functioning deficit prong.

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not on the lower portion of the range, the CCA found that the petitioner's IQ score was above the range for intellectual disability. Id. at 1047. The CCA recognized that significantly subaverage intellectual functioning was "generally shown by an IQ of 70 or less." Ex Parte Moore, 470 S.W.3d 481, 513 (Tex. Crim. App. 2015), vacated and remanded by Moore I, 137 S. Ct. 1039 (2017). However, the CCA considered expert testimony that the petitioner's depression and "history of academic failure" might have hindered his test performance. Id. at 517-19. In light of these factors, the CCA rejected the possibility that the petitioner's actual IQ score was in the "lower portion of that 69 to 79 range," finding it had "no reason to doubt" that the observed score of 74 "represented [petitioner's] intellectual functioning as being above the intellectually disabled range." Id. at 519. The Supreme Court criticized the CCA's analysis as inconsistent with Hall because the CCA had disregarded the low end of the score range. Moore I, 137 S. Ct. at 1049. The Supreme Court instructed that "the presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range." Id. (citation omitted). Because the lower end of petitioner's score range was at or below 70, the CCA was required to continue the inquiry and consider the petitioner's adaptive functioning. Id.

B.

"The second criterion for intellectual disability in both the DSM-[5] and the Arkansas [s]tatute is a deficit in adaptive functioning. There are three adaptive-skills domains—conceptual, social, and practical. The DSM-[5] states that deficits in only one of the three adaptive-skills domains is sufficient to show adaptive deficits." Jackson III, 898 F.3d at 864 (citations omitted). The DSM-5 explains the three adaptive-skills domains as follows:

> The *conceptual* (*academic*) *domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.

DSM-5, supra note 4, at 37. The DSM-5 further states:

> Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of infor-

> mation include educational, developmental, medical, and mental health evaluations. . . . Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.

Id. at 37-38. The DSM-5's diagnostic criteria do not require a direct relationship between adaptive deficits and subaverage intellectual functioning, but the explanatory text states that "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in [prong one]." DSM-5, supra note 4, at 38 (emphasis added). However, following Moore I, we explained that "Jackson is not required to demonstrate a specific connection between subaverage intellectual functioning and adaptive behavior deficits. Rather, he must show only that deficits related to intellectual functioning exist." Jackson III, 898 F.3d at 869. And "Jackson is not required to exclude [other] disorders as causes of his adaptive behavior deficits." Id.

Although the district court in 2016 did not find that Jackson's IQ scores demonstrated subaverage intellectual functioning, it nonetheless proceeded to consider evidence of Jackson's adaptive functioning. The district court in 2016 found that Jackson exhibited adaptive functioning deficits, specifically intellectual deficits (part of the "conceptual" domain). The district court's finding appeared to be based on Dr. Macvaugh's opinion that Jackson had "adaptive deficits in a number of areas, including functional academic skills." See R. Doc. 113, at 40. But the district court also found that Jackson had not demonstrated that his adaptive

deficits were "directly related" to intellectual functioning deficits as opposed to his antisocial personality disorder, ADHD, or other disorders. This finding was consistent with Dr. Macvaugh's opinion that he could not determine whether Jackson's adaptive deficits were due to intellectual functioning deficits or other disorders. Dr. Macvaugh stressed his belief that determining the etiology of an individual's adaptive deficits is important for an intellectual disability diagnosis, while acknowledging that other clinicians believe "if the deficits are present, that's all that matters."

On remand from Jackson III, the district court explained that no parent or caretaker was available to provide retrospective information about Jackson's adaptive functioning in the community. The court also discussed Dr. Macvaugh's opinion that traditional standardized tests for assessing adaptive functioning were not appropriate in Jackson's case because "such tests assess adaptive functioning in the open community and were not developed for use with incarcerated populations." R. Doc. 130, at 29. The district court then expanded its earlier adaptive deficits finding and concluded that "[e]ducational and related mental health records from Jackson's childhood document that he had deficits in *each domain* of adaptive functioning." R. Doc. 130, at 40 (emphasis added). The district court explained:

> Relevant to the conceptual domain, Jackson lacked basic functional academic skills, and he appeared to suffer from a language or communication disorder. Jackson also had severe behavior problems, indicating deficits in the social domain, and his academic record demonstrated that he had difficulty with self-

> management and staying on task, indicating possible deficits in the practical domain.

R. Doc. 130, at 40. The district court also found that "Jackson's documented deficits in the conceptual, social, and practical domains in childhood, regardless of etiology, were at least related to his deficits in intellectual functioning." R. Doc. 130, at 41-42. The court explained that while Dr. Macvaugh found Jackson's other disorders to be "a roadblock to assessing Jackson's adaptive functioning, Moore I clearly requires a different approach." R. Doc. 130, at 41. The State does not challenge the "relatedness" finding.

Substantial evidence in the record supports the district court's conclusion that Jackson sufficiently demonstrated adaptive functioning deficits. Dr. Macvaugh testified that there was "no question" Jackson suffered from adaptive deficits as a child.[9] Jackson's educational records reveal that he was sent home from elementary school at age seven because he was "unable to function in a normal classroom setting." At age eight, Jackson once again had to be removed from the classroom because he was considered too dangerous: In a letter to Jackson's mother, Jackson's elementary school principal wrote that it

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[9] We note that the district court claimed to give "no weight" to Dr. Macvaugh's opinion regarding Jackson's intellectual functioning. But that does not mean the district court gave no weight to Dr. Macvaugh's opinion regarding Jackson's *adaptive deficits*, or that we are prohibited from considering his report in determining whether the record contains substantial evidence in support of the district court's conclusion that Jackson had significant adaptive deficits. The district court previously credited Dr. Macvaugh's opinion, and it reiterated in the decision below that it had done so.

would be "necessary to keep [Jackson] out of school until something is worked out about his further education." The principal continued:

> It is almost impossible to get him into or keep him in a classroom. He wanders over the building upsetting furniture, yelling into other classrooms, and hitting or kicking anyone who is within reach. Yesterday he kicked a supervising aide bruising her leg. Today he has choked two children and kicked or hit at a number of others.

Jackson was referred to the Elizabeth Mitchell Children's Center for evaluation. That institution found that Jackson was "unable to function physically or emotionally at the present time." Additionally, Dr. Bill Johnson, a clinical psychologist who evaluated Jackson at the Elizabeth Mitchell Children's Center, wrote in a 1977 psychological report that Jackson had "severe behavior problems at both home and school, . . . he is aggressive toward other children, won't do his work, and generally is disruptive in the classroom." In his early teens, Jackson was placed in various special education and day treatment programs, and he was expelled from one such program for "disruption." These records are substantial evidence supporting the district court's conclusion that Jackson had adaptive deficits in the social and practical domains.

Other records provide substantial evidence to support the district court's conclusion that Jackson had adaptive deficits in the conceptual (academic) domain. For example, Dr. Johnson's report also noted that Jackson had "extremely limited vocabulary and language usage was poor with his speech being slurred and almost incomprehensible at times." A

1982 evaluation—when Jackson was 11 years old—put Jackson's mental age at seven years eight months. When Jackson was 13 years old and in seventh grade, achievement testing put his academic skills at the second-to third-grade level, and he was placed in a homeschooling program. Cf. Moore II, 139 S. Ct. at 670-71 (criticizing CCA for failing to discuss evidence that by sixth grade the petitioner struggled to read at a second-grade level). According to Metropolitan Achievement Tests administered while Jackson was in ninth grade, Jackson's math computation grade equivalent was 4.1; his total math grade equivalent was 3.6; his science grade level equivalent was 3.6; and his total reading grade equivalent was 2.8. Jackson dropped out of school in tenth grade after receiving all failing grades. Further, a 1990 report from neurologist Dr. Lee Archer states that Jackson's school records "indicate[] test scores that raise the question of borderline mental retardation, and [Jackson] was classified in the mental retardation category during part of his schooling." Dr. Macvaugh found that "[Jackson's] school records and related mental health records during his childhood years clearly illustrate that he demonstrated significant difficulty succeeding academically."

The State argues that the district court clearly erred in determining Jackson met his burden of proof because no "standardized measures" or "knowledgeable informants" could be used, as recommended by the DSM-5, to evaluate Jackson's adaptive functioning in the open community because he has been imprisoned for nearly all his adult life. The State contends that it was error for the district court to rely solely on documentary evidence from Jackson's childhood, which the DSM-5 classifies as "[a]dditional . . . information" to consider. DSM-5, supra note 4, at 37. We disagree. The DSM-5 anticipates that standard-

ized testing for adaptive functioning is not always an available option: "When standardized testing is difficult or impossible, because of a variety of factors . . . , the individual may be diagnosed with unspecific intellectual disability." Id. at 37-38. Here, standardized testing was not possible because no parent or caretaker was available and because Jackson was incarcerated and had been for nearly all his adult life. Dr. Macvaugh explained that none of the instruments used to measure adaptive functioning in the open community was developed for use with incarcerated individuals. He also explained that "the retrospective use of these instruments to measure adaptive behavior prior to age 18 for those who have been incarcerated for an extended period of time remains [a] topic of controversy in the field." Thus, because Jackson has been incarcerated for nearly all his adult life, "any retrospective assessment of his adaptive deficits prior to age 18 is likely to be of questionable validity and plagued by measurement error." And given that nearly all of Jackson's time in the open community was during his childhood, it was not clearly erroneous for the district court to rely on the childhood records.

The State also contends that the district court clearly erred by placing no weight on Jackson's purported adaptive strengths, including his conduct in prison. But we expressly directed the district court to consider "whether Jackson's adaptive functioning deficits *rather than his adaptive functioning strengths* indicate that he is not intellectually disabled." Jackson III, 898 F.3d at 869 (emphasis added). Our instruction was informed by Moore I, which stressed that the psychiatric literature "focuses . . . on" adaptive deficits, not strengths. See 137 S. Ct. at 1050 (citing several psychiatric texts, including DSM-5). Indeed, the DSM-5 is silent about whether adaptive strengths should

be considered at all when diagnosing a person with intellectual disability. The Arkansas statute defining intellectual disabilities similarly says nothing about adaptive strengths, requiring only a showing of a "significant deficit or impairment in adaptive functioning." Ark. Code Ann. § 5-4618; accord Sasser, 735 F.3d at 845 ("Consistent with nationally accepted clinical definitions of [intellectual disability], the Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations."). This view was reinforced in Moore II, where the Supreme Court criticized the lower appellate court for "again rel[ying] less upon the [petitioner's] adaptive *deficits* . . . than upon [his] apparent adaptive *strengths*." See 139 S. Ct. at 670. Although the Supreme Court has not expressly forbidden any consideration of adaptive strengths, it has twice said that the focus is on adaptive deficits. The Supreme Court's decisions—consistent with the psychiatric literature—suggest that adaptive strengths play little (if any) role in the adaptive functioning analysis. In the absence of new guidance from the Supreme Court or the medical community regarding the appropriate role of adaptive strengths evidence, we cannot say that the district court's conclusion that Jackson sufficiently demonstrated adaptive functioning deficits was clearly erroneous.[10]

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[10] Another panel of this Court recently held that, notwithstanding Moore I, a district court did not clearly err in considering evidence of an Atkins petitioner's adaptive strengths in assessing the petitioner's overall adaptive functioning. See Sasser v. Payne, 999 F.3d 609, 619-20 (8th Cir. 2021). However, even assuming adaptive strengths could be relevant, the district court here did not clearly err in assigning them no weight. The State points out that Jackson had some menial labor jobs growing up, which, according to the State, indicates that Jackson has adaptive

strengths in the practical domain. But Dr. Macvaugh testified that "[n]othing that [Jackson] has done before the first capital murder charge would necessarily be inconsistent by way of work history with someone with an intellectual disability." Indeed, the medical community estimates that "between nine and forty percent of persons with intellectual disability have some form of paid employment." Brief for APA et al. as Amici Curiae 8, Moore v. Texas, 139 S. Ct. 666 (2019) (No. 15-797). The State additionally notes that when Little Rock police questioned Jackson regarding the Colclasure murder, Jackson expressed concern that the police planned to question his girlfriend and stated, "I just don't want her having nothing to do with that." According to the State, Jackson displayed concern and empathy that is "inconsistent with someone who has significant deficits in the social domain." Appellant Br. 56. But the evidence of Jackson's empathy for his girlfriend stood in contrast to evidence of his recurring violent outbursts towards other children and teachers. And the fact that some evidence supports the State's position does not render the district court's contrary conclusion clearly erroneous. See Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (explaining that when there are "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"). We find that the district court did not clearly err in declining to conclude that the State's proffered evidence outweighed or undermined the documented evidence of Jackson's adaptive deficits.

The State's remaining examples of Jackson's purported adaptive strengths relate to Jackson's prison behavior. The State focuses primarily on Jackson's pro se filings and other prison writings, contending that such evidence shows Jackson has adaptive strengths in the conceptual domain and thereby undermines Jackson's claim of adaptive functioning deficits. But as the Supreme Court observed, clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting,' as prison surely is." Moore I, 137 S. Ct. at 1050 (citation omitted). Dr. Macvaugh similarly opined that "what [Jackson] does in prison is not a valid index of his adaptive functioning that's necessary for a diagnosis of [intellectual disability]. That has to be based on his functioning in the community." Regarding pro se filings in particular, the Supreme Court has stated that such evidence is "relevant" but "lacks convincing strength without a determina-

The State also suggests that the district court erred because Jackson failed to demonstrate by a preponderance of the evidence that that he was intellectually disabled "at the time of committing capital murder," Ark. Code Ann. § 5-4-618(b) i.e., when he murdered Scott Grimes. But Atkins held that it violates the Eighth Amendment to execute a person who is intellectually disabled. See Atkins, 536 U.S. at 321. Again, we have explained that the Arkansas statute is "concurrent with the federal constitutional right established in Atkins," Sasser, 735 F.3d at 842-43, and that the Arkansas statute and Atkins together "preclud[e] the execution of an individual who can prove [intellectual disability] *either* (a) at the time of committing the crime *or* (b) at the presumptive time of execution," id. at 846 ("Arkansas may not execute an individual who sufficiently proves he met all four prongs of the Arkansas [intellectual disability] standard at *either* relevant time, even if the individual lacks proof he satisfied the standard at *both* relevant times." (citing Miller v. State, 362 S.W.3d 264, 276 (Ark. 2010))). We

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tion about whether [the petitioner] wrote the papers on his own." Moore II, 139 S. Ct. at 671. Here, the district court made no such determination. And we note Jackson's testimony that every pro se filing, library request, grievance, and commissary request was drafted by fellow inmates, and he merely copied the documents. Dr. Macvaugh corroborated the common phenomenon of prisoners copying pleadings and also echoed the Supreme Court's caution against reliance on writing skills developed in prison. And Dr. Macvaugh also opined that recordings of Jackson's prison phone calls illustrate that Jackson "clearly has genuine intellectual limitations." Thus, Dr. Macvaugh's testimony effectively discounted the relevance of Moore's so-called adaptive strengths that Moore I and Moore II say not to focus on anyway. The district court did not clearly err in declining to credit adaptive strengths allegedly exhibited by Jackson in prison over documented adaptive deficits he exhibited in the open community.

have referred to Sasser's "presumptive time of execution" language as dicta when we rejected a habeas petitioner's argument that his Atkins claim was not ripe until his execution was scheduled. See Davis v. Kelley, 854 F.3d 967, 972-73 (8th Cir. 2017) (per curiam). Whatever else is meant by the phrase "the presumptive time of execution," from context it is plainly a placeholder for "at the relevant time under the federal standard."

The State does not present its "timing" argument as a standalone argument but instead folds it into the arguments regarding adaptive deficits. The State also does not provide much explanation about how the district court allegedly erred, only generally arguing that the evidence was insufficient because Jackson's proffered evidence was from childhood and not around the time of the crime. Appellant Br. 38. But the district court found that Jackson sufficiently proved that he *is* intellectually disabled and entitled to relief under Atkins. The State points to no case holding that Jackson needed to prove something more with respect to the timing of his status as intellectually disabled in order to be entitled to Atkins relief. In fact, Moore I and Moore II—which the district court summarized and discussed at length—undermine the State's argument. The Moore petitioner committed capital murder at age 20. Moore I, 137 S. Ct. at 1044. When the petitioner was approximately 59 years old, the Supreme Court held that, "on the basis of the trial court record, [the petitioner] has shown he is a person with intellectual disability" and thus ineligible for the death penalty. Moore II, 139 S. Ct. at 672. The IQ score that the Supreme Court relied upon was from a test the petitioner took at age 30, Moore I, 137 S. Ct. at 1049; Ex Parte Moore, 470 S.W.3d at 514, and the adaptive deficits evidence was from the petitioner's

childhood, Moore II, 139 S. Ct. at 670-71. Moreover, the DSM-5 explains that "[a]fter early childhood, the disorder is generally lifelong." DSM-5, supra note 4, at 39. It is the State's burden on appeal to show that the district court's conclusion was clearly erroneous, and the State has failed to do so here.

In light of Supreme Court precedent, prevailing medical standards, and the record, we find that the district court did not clearly err in concluding that Jackson met his burden of demonstrating that he has significant adaptive functioning deficits.

C.

The third criterion in § 5-4-618(a) and the DSM-5 is that both intellectual functioning deficits and adaptive functioning deficits manifested no later than age 18. The parties agree, and the district court found, that the third criterion was satisfied. The record contains substantial evidence—particularly Jackson's childhood IQ scores, childhood records, and the expert testimony—supporting this conclusion. Thus, the district court did not clearly err in determining that the requisite deficits manifested before age 18.

D.

The fourth and final criterion in § 5-4-618(a) is a deficit in adaptive behaviors. We explained in Jackson III, and the parties agree, that "'[t]he fourth prong largely duplicates the second prong, but places no age requirement on the evidence used to establish limitations in adaptive behavior.' Accordingly, the same evidence used to prove the second prong is used to prove the fourth prong." 898 F.3d at 867 (citation omitted). Thus, our analysis under prong two also applies to prong four. As explained above, the district

court did not clearly err in determining that Jackson has adaptive deficits.

E.

We find that the district court did not clearly err in concluding that Jackson met his burden of demonstrating that he is intellectually disabled and thus ineligible for the death penalty. In our view, Dr. Macvaugh's refusal to offer a forensic opinion that Jackson is *not* intellectually disabled, coupled with his admission that "some of the data" suggest that Jackson may be intellectually disabled, supports and certainly does not contradict the district court's conclusion. The State has not persuaded us that the district court's conclusion lacked substantial evidence, was based on an erroneous view of the law (particularly given the Supreme Court's recent decisions in Moore I and Moore II), or otherwise leaves us with "the definite and firm conviction that an error has been made." See Phelps-Roper, 867 F.3d at 890 (citation omitted).

III.

Discerning no clear error, we affirm the district court's judgment.

GRASZ, Circuit Judge, dissenting.

Many things about this twenty-five-year-old case are tragic. And this latest appeal involves difficult legal questions with uncertain answers. Still, I believe that certain aspects of the court's holding tend to advance an incremental de-constitutionalization of capital punishment. I do not see those aspects of the opinion as consistent with precedent or with our limited judicial role, and so, I respectfully dissent.

First, while we must respect the factual findings of the district court, a finding of fact resulting from an

erroneous view of the law constitutes clear error. See Howard v. United States, 964 F.3d 712, 716 (8th Cir. 2020). The district court's disregard of all evidence of Jackson's adaptive strengths, all evidence of his functioning while in prison, and Dr. Macvaugh's clinical assessment of Jackson's intellectual functioning is not dictated by Supreme Court precedent. And it is inconsistent in important ways with our own recent precedent. See Sasser v. Payne, 999 F.3d 609, 619-20 (8th Cir. 2021).

The district court, in my view, ascribed an overly broad meaning to Moore v. Texas, 137 S. Ct. 1039 (2017) (*Moore I*), and applied this errant view to ignore evidence of Jackson's adaptive functioning. While the Supreme Court has warned courts not to rely too heavily on adaptive strengths developed in prison, id. at 1050, that does not mean such evidence must be completely ignored in the overall assessment. Sasser, 999 F.3d at 620 ("The district court . . . properly considered all available evidence of Sasser's adaptive functioning in order to make the necessary findings of fact in each relevant domain."). This misapplication of Moore I is especially problematic when, as here, evidence outside the prison context is extremely limited or unavailable. Jackson has been incarcerated almost all of his adult life. When discussing this issue in Moore I, the Supreme Court cited the DSM-V, which notes: "*[I]f possible*, corroborative information reflecting functioning outside those [prison] settings should be obtained." 137 S. Ct. at 1050 (emphasis added) (quoting DSM-5, at 38). A fair reading of Moore I, then, cautions against over-relying on information reflecting functioning while inside a prison setting. It does not say such information cannot be considered within the overall framework set forth by the Supreme Court.

Second, Jackson failed, in my view, to meet his burden of proof to show that he is intellectually disabled. The district court's order contains broad hints that it thought so too. Under controlling precedent, Jackson had "[t]o prove that he was intellectually disabled . . . by a preponderance of the evidence[.]" Sasser, 999 F.3d at 616. However, Jackson provided little reliable evidence as to either intellectual functioning or adaptive functioning. His one and only medical expert was found not credible by the district court. This lack of reliable evidence was not the fault of the State. Nor is it the result of an unfair burden on Jackson. As the court notes, "[t]he district court found that the scores from Jackson's two most recent IQ tests—one administered by Dr. Macvaugh, one administered by Dr. Moneypenny—were *unreliable because Jackson was malingering*." Ante, at 4 (emphasis added). And the evidence from tests administered during Jackson's childhood was also unreliable. For one thing, as the district court noted, "The unique SEMs associated with the tests administered to Jackson are unknown." R. Doc. 130, at 39. More importantly, though, the childhood tests resulted in highly discrepant scores such that they were "probably not a very reliable measure of his overall intellectual functioning," according to the only credible medical expert, Dr. Macvaugh. R. Doc. 130, at 25. The district court found that "Dr. Macvaugh's observation is consistent with the DSM-5, which states that 'highly discrepant individual test score[s] may make an overall IQ score invalid.'" R. Doc. 130, at 25 (quoting DSM-5, at 37). Dr. Macvaugh was not alone in this assessment. The doctor who administered the test to Jackson at age seven "noted that the 30-point divergence between Jackson's verbal and performance

scores indicated that the reported 73-point, full-scale score was not reliable." R. Doc. 130, at 24.

Despite the inconclusive intellectual functioning evidence, the district court was correct in proceeding to the adaptive functioning analysis. See Hall v. Florida, 572 U.S. 701, 714 (2014). But, at best, the record shows that Jackson presented inconclusive evidence as to adaptive functioning as well. The State's medical expert, who was found credible, said the record contained too few data to arrive at a valid opinion on Jackson's adaptive functioning at age eighteen. This inconclusive evidence of adaptive functioning means that Jackson failed to carry his burden of proof as to intellectual disability.

In the face of this evidence—or lack thereof—the district court, acting under what it seemed to view as compulsion arising from a previous order of this court, shifted the burden to the State. Specifically, the district court stated, "Jackson's record of adaptive deficits . . . provide no indication that he is *not* intellectually disabled." R. Doc. 130, at 43-44. But it was not the State's burden to prove that Jackson was not intellectually disabled. This *sub silentio* burden shifting contradicts settled law, and it has serious consequences.

Arkansas law has placed the burden of proof squarely on the party claiming exemption from capital punishment. Ark. Code Ann. § 5-4-618(c). It is not our role to re-write Arkansas law or to infer and apply overriding standards that the Supreme Court has not articulated. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions."). Under our precedent,

the Arkansas statute carries a presumption of constitutionality. Fitz v. Dolyak, 712 F.2d 330, 333 (8th Cir. 1983). And Jackson did not try to rebut that presumption. While it may be true that careful application of legal safeguards takes on heightened importance in capital cases because "death is different," Woodson v. North Carolina, 428 U.S. 280, 322 (1976) (Rehnquist, C.J., dissenting), creating unwritten exceptions to the law, even in capital cases, erodes public trust in the legal system.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Filed March 23, 2020]

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THIS IS A CAPITAL CASE

No. 5:03-CV-00405 SWW

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ALVIN BERNAL JACKSON,

Petitioner,

LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

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OPINION and ORDER

Petitioner Alvin Bernal Jackson ("Jackson"), sentenced to death for capital murder and confined at the Varner Supermax Unit of the Arkansas Department of Correction ("ADC"), seeks a writ of a habeas corpus pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. Following discovery and an evidentiary hearing, by order and judgment entered March 31, 2016, the Court denied Jackson's remaining claim, that he intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). The Court denied relief under *Atkins* because it found that Jackson had failed to prove, by a preponderance of the evidence, that he met each requisite for intellectual disability required under

Arkansas law. Jackson appealed, and the Eighth Circuit Court of Appeals reversed and remanded for consideration of Jackson's *Atkins* claim in view of the Supreme Court's decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017). After reevaluating Jackson's *Atkins* claim under *Moore*, and according to the specific instructions provided by the Eighth Circuit on remand, the Court finds that Jackson is entitled to relief under *Atkins* and thus orders that the State reduce his sentence to life imprisonment without parole.

I. Criteria for Assessing Intellectual Disability under *Atkins*

A. The *Atkins* Categorical Rule

With its 1989 decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), the Supreme Court held that the Eighth Amendment did not mandate a categorical rule banning the death penalty for all intellectually disabled offenders. At the time, only two States had enacted laws that prohibited such executions, and the consideration of intellectual disability as a mitigating factor allowed jurors to assess the appropriateness of a death sentence in individual cases. Citing several authorities on intellectual disability, the *Penry* Court observed that while intellectually disabled individuals share common attributes of deficits in intellectual functioning and adaptive behavior, "[intellectually disabled] persons are individuals whose abilities and experiences can vary greatly." *Penry*, 492 U.S. at 338, 109 S. Ct. 2934, 2957. Writing for the majority, Justice O'Connor stated: "In light of the diverse capacities and life experiences of [intellectually disabled] persons, it cannot be said on the record before us today that all [intellectually disabled] people, by definition, can never act with the

level of culpability associated with the death penalty." *Penry*, 492 U.S. at 338-39, 109 S. Ct. at 2957.

In *Atkins v. Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242 (2002), the Court abrogated *Penry* and held that the execution of intellectually disabled criminals amounted to cruel and unusual punishment, prohibited by the Eighth Amendment. The *Atkins* Court proceeded in two steps.[1] First, the Court considered that during the thirteen-year period following *Penry*, numerous states, including Arkansas, had enacted laws exempting intellectually disabled offenders from the death penalty. *See Atkins*, 536 U.S. at 314, 122 S. Ct. at 2248. The Court concluded that the recently-enacted statutes amounted to reliable, objective evidence of contemporary values and a national consensus

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[1] In *Graham v. Florida*, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 2022 (2010), *as modified* (July 6, 2010), the Supreme Court explained that "categorical rules" prohibiting the death penalty are premised on the specific characteristics of the offender. The Court explained the two-step decisional process employed when determining whether a proposed categorical rule properly defines Eighth Amendment standards:

> In the cases adopting categorical rules the Court has taken the following approach. The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the sentencing practice at issue. *Roper v. Simmons*, 543 U.S. 551, 572. 125 S. Ct. 1183 (2005). Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' *Kennedy v. Louisiana*, 554 U.S. 407, 421, 128 S. Ct. 2641, 2650 (2008), the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 U.S. at 61, 130 S. Ct. at 2022.

that intellectually disabled defendants were "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316, 122 S. Ct. at 2249.

Second, the Court exercised its own independent judgment to decide for itself whether executing a person with intellectual disability violates the Eighth Amendment. The Court looked to clinical definitions of intellectual disability, which "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins v. Virginia*, 536 U.S. at 318, 122 S. Ct. at 2250. The Court also considered that because of their impairments, intellectually disabled persons "by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318, 122 S. Ct. at 2250. The Court added: "There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.*

Writing for the majority, Justice Stevens provided two justifications for a categorical rule forbidding the execution of intellectually disabled capital defendants: One, the above-mentioned characteristics of intellectually disabled people diminish personal culpability to such an extent that a death sentence would betray the penological goals of deterrence and retribution. *Atkins*, 536 U.S. at 31920, 122 S. Ct. at 2250-51. Two, the "reduced capacity" of intellectually disabled offenders presents a risk "that the death penalty will be wrongly

imposed [despite] factors that may call for a less severe penalty." *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252. Relevant to the second justification, Justice Stevens reasoned that intellectually disabled defendants are less able to make a persuasive showing of mitigation because they "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.*

The *Atkins* Court concluded: "Our independent evaluation of the issue reveals no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for [an intellectually disabled] criminal." *Id.*

B. Arkansas Code § 5-4-618 and Clinical Criteria for Intellectual Disability

Arkansas Code § 5-4-618, enacted before *Atkins*, provides: "No defendant with [intellectual disability] at the time of committing capital murder shall be sentenced to death." Ark. Code. Ann. § 5-4-618(b). Arkansas law requires that a defendant show intellectual disability by proving four factors by the preponderance of the evidence:

1. "Significantly subaverage general intellectual functioning";

2. "[A] significant deficit or impairment in adaptive functioning";

3. That both . . . above "manifest[ed] . . . no later than age eighteen"; and

4. "A deficit in adaptive behavior."

Sasser v. Hobbs, 735 F.3d 833, 843 (8th Cir. 2013) (quoting Ark. Code Ann. § 54-618(a)). Arkansas's four-

pong test is consistent with clinical diagnostic criteria for intellectual disability prescribed by the American Psychiatric Association ("APA") in the *Diagnostic and Statistical Manual of Mental Disorders*, 33 (5th ed. 2013) ("DSM-5"). DSM-5 sets forth three requisites for intellectual disability, labeled Criterion A, B, and C, that match Arkansas Code §5-4-618(a) prongs 1 through 3 above.

Criterion A requires deficits in intellectual functions, "such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by *both clinical assessment and individualized, standardized intelligence testing*." DSM-5, at 33(emphasis added). "Intellectual functioning is typically measured with individually administered and psychometrically valid . . . tests of intelligence[,]" and a person with intellectual disability has an intelligence quotient ("IQ") score of approximately two standard deviations or more below the population mean. *See id.* For a standardized intelligence test with a standard deviation of 15 and a mean of 100, an IQ score of 70 marks the point two standard deviations below the mean, and if the specific test administered has a standard error of measurement ("SEM") of plus or minus five points, intellectual disability would involve an IQ score range of 65-75.[2] *See id.*

DSM-5 lists factors that might invalidate an IQ score, including practice effects, the 'Flynn effect' (i. e., overly high scores due to due to out-of-date test

[2] The DSM-5 places a major focus on adaptive behavior and parts with the practice of categorizing levels of intellectual disability based on IQ score "because it is adaptive functioning that determines the level of support required" and "IQ measures are less valid in the lower end of the IQ range." DSM-5, at 33.

norms)[,]" *id*., and highly discrepant subtest scores. DSM-5 recognizes that IQ scores "are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks" and that "*clinical judgment is needed in interpreting the results of IQ tests*." *Id.* (emphasis added).

Criterion B requires deficits in adaptive functioning "that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility." *Id.* Criterion B "is met when at least one domain of adaptive functioning--conceptual, social, or practical--is sufficiently impaired that ongoing support is needed for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." DSM-5, at 38. The *conceptual* (*academic*) *domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. DSM-5, 37.

The APA prescribes that a clinician should assess adaptive functioning using both clinical evaluation and standardized measures with knowledgeable informants, such as family members. *See* DSM-5, at 37. "Additional sources of information include educational, developmental, medical, and mental health

evaluations." *Id.* Unlike previous versions of the APA's diagnostic manual, the DSM-5 provides: "To meet the diagnostic criteria for intellectual disability, the deficits in adaptive behavior must be directly related to intellectual impairments described in Criterion A [deficits in intellectual functioning]." DSM-5, at 38. Particularly relevant to *Atkins* claims, the DSM-5 provides: "Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained." *Id.*

Criterion C requires that the onset of the intellectual and adaptive deficits occurred during the developmental period, before the defendant's eighteenth birthday. Finally, the fourth prong of the Arkansas statute, which has no counterpart under DSM-5, requires a deficit in adaptive behavior, which is equivalent to adaptive functioning, with no reference to the time of onset. *See Jackson v. Norris*, 615 F.3d 959, 967)(8th Cir. 2010)(discussing *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010)).

C. Evolving Supreme Court Precedent Regarding Review of *Atkins* Claims

1. *Hall v. Florida*

The *Atkins* Court noted that the States' various statutory definitions of intellectual disability were "not identical, but generally conform[ed] to the clinical definitions . . .." *Atkins*, 536 U.S. at 317, and n.22, 122 S. Ct. at 2250. The Court also acknowledged that "[n]ot all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus" and that "[t]o the extent there

is serious disagreement about the execution of [intellectually disabled] offenders, it is in determining which offenders are in fact [intellectually disabled]. *Atkins*, 536 U.S. at 317, 122 S. Ct. at 2250. Despite these observations, the *Atkins* Court offered no guidance as to how lawmakers and courts would implement the *Atkins* rule and purposely left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 536 U.S. at 315, 16, 112 S. Ct. at 2249(citing *Ford v. Wainright*, 477 U.S. at 405, 416-417, 106 S. Ct. 2595 (1986)).

Post *Atkins*, the Florida Supreme Court interpreted the state's statutory definition of intellectual disability to require a threshold showing of an IQ score of 70 or below, without consideration of a margin for error. *Cherry v. State*, 959 So. 2d 702, 712-713 (Fla. 2007), *abrogated by Hall v. Florida*., 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). Florida's rule foreclosed exploration of a capital defendant's adaptive functioning or other evidence of intellectual deficiencies even if, accounting for the SEM applicable to an IQ test, the defendant's IQ score fell within a range that included scores at or below 70.

In *Hall v. Florida*, the Supreme Court held that Florida's strict IQ cutoff "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall v. Fla*., 572 U.S. 701, 704, 134 S. Ct. 1986, 1990 (2014). Writing for the majority, Justice Kennedy explained that Florida's rigid decisional rule disregarded a consensus among professionals that "[t]he SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score . . . [and] allows clinicians to calculate a range within which one

may say an individual's true IQ score lies." *Hall*, 572 U.S. at 713, 134 S. Ct. at 1995. Justice Kennedy further noted that Florida's cutoff contravened clinical standards by precluding an assessment of adaptive functioning even in cases where application of the SEM produces an IQ score range or confidence interval that includes scores of 70 or below. *Hall*, 572 U.S. at 714, 134 S. Ct. at 1996. As DSM-5 advises, "a person with an IQ score of above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." DSM-5, at 37.

Each version of a standardized intelligence test has a unique SEM, calculated according to data regarding the specific test's reliability. A test's unique SEM is used to construct a confidence interval, or range of scores around the reported or observed score, to any degree of certainty. In his dissent in *Hall*, Justice Alito detailed the relationship between a test's unique SEM and related confidence intervals:

> Once we know the SEM for a particular test and a particular test-taker, adding *one* SEM to and subtracting *one* SEM from the obtained score establishes an interval of scores known as the [68%][3] confidence interval. That interval represents the range of scores within which "we are [68%] sure" that the "true" IQ falls. The interval is centered on the obtained score, and it includes scores that are above and below that score by the amount of the

[3] As noted in *United States v. Wilson*, 170 F. Supp. 3d 347, 354 (E.D.N.Y. 2016), the actual text of Justice Alito's dissent refers to a "66% confidence interval" due to a misprint in a 2010 manual by the American Association on Intellectual and Developmental Disabilities.

SEM. Since there is about a [68%] chance that the test-taker's "true" IQ falls within this range, there is about a 32% chance that the 'true' IQ falls outside the interval, with approximately equal odds that it falls above the interval [16%] or below the interval [16%].

An example: If a test-taker scores a 72 on an IQ test with a SEM of 2, the [68%] confidence interval is the range of 70 to 74 (72 ± 2). In this situation, there is approximately a [68%] chance that the test-taker's "true" IQ is between 70 and 74; roughly a [16%] chance that it is above 74; and roughly a [16%] chance that it is 70 or below. Thus, there is about an [84%] chance that the score is above 70.

Similarly, using *two* SEMs, we can build a 95% confidence interval. The process is the same except that we add two SEMs to and subtract two SEMs from the obtained score. To illustrate the use of two SEMs, let us hypothesize a case in which the defendant's obtained score is 74. With the same SEM of 2 as in the prior example, there would be a 95% chance that the true score is between 70 and 78 (74 ± 4); roughly a 2.5% chance that the score is above 78; and about a 2.5% chance that the score is 70 or below. The probability of a true score above 70 would be roughly 97.5%. As these two examples show, the greater the degree of confidence demanded, the greater the range of scores that will fall within the confidence interval and, therefore, the further away from 70 an obtained score could be and yet still have 70 fall within its confidence interval.

Hall, 572 U.S. at 738-39, 134 S. Ct. at 2010 (Alito, J., dissenting)(internal citations omitted). Justice Alito opined that where state law requires a defendant to prove intellectual disability by a preponderance of the evidence, which is the case in Arkansas, employing a 68% or 95% confidence interval effectively transforms the burden of proof and allows a defendant to prove significantly subaverage intellectual functioning "by showing simply that the probability of a 'true' IQ of 70 or below is as little as [16%] (under a one-SEM rule) or 2.5% (under a two-SEM rule)." *Hall*, 572 U.S. at 741, 134 S. Ct. at 2011(Alito, J., dissenting).

The *Hall* Court recognized that every IQ test has a distinct SEM. *See Hall*, 572 U.S. 701, 713-14, 134 S. Ct. 1986, 1995 (2014)(quoting Brief for American Psychological Association *et al. as Amici Curiae*, 2013 WL 6805688, at *23)("For example, the average SEM for the WAIS—IV is 2.16 IQ test points[,] and the average SEM for the Stanford-Binet 5 is 2.30 IQ test points . . . ."). But the Court provided mixed signals as to whether lower courts should employ a test-specific SEM, which is normally less than half of the "general" five-point SEM mentioned in DSM-5, or simply apply an across-the-board, five-point SEM. On one hand, the Court referenced its "independent assessment" that "an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning," *Hall*, 572 U.S. at 722, 134 S. Ct. at 2000(quoting *Atkins*, 536 U.S. at 309, n. 5, 122 S. Ct. 2242), indicating that the Court endorsed a blanket, five-point SEM. On the other hand, the Court stated its agreement "with the medical experts that 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." *Hall*, 572 U.S. at 723, 134 S. Ct. at 2001(emphasis added). In his dissent, Justice Alito noted that if lower courts applied a five-point SEM in all cases, even when the known, statistically correct SEM is less than 2.5, it would involve applying more than two SEMs, resulting in a 98% confidence interval. *Hall*, 572 U.S. at 740, 134 S. Ct. at 2011 (Alito, J., dissenting).[4]

2. *Moore v. Texas*

In *Moore v. Texas* ("*Moore I*"), 137 S. Ct. 1039 (2017), handed down after this Court denied Jackson's remaining claim, the Supreme Court provided additional

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[4] In remanding this case, the Eighth Circuit specified that for *Atkins* purposes, "the standard error of measurement ["SEM"] is plus or minus 5 points," *Jackson v. Kelley*, 898 F.3d 859, 864 (8th Cir. 2018), and this Court is required to follow that instruction. At the same time, the dissent in *Hall* demonstrates that adoption of a comprehensive five-point SEM, when the test-specific SEM is less than five, decreases the precision of the data and lessens a petitioner's burden of proof. At least one other district court has made a similar observation. In *United States v. Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016), the court rejected the idea that *Hall* requires lower courts to apply a five-point SEM in all cases because doing so would ignore the fact, observed in *Hall*, that every IQ test has a unique, data-based SEM. *Wilson*, 170 F. Supp. 3d at 364. The district court further noted: "In situations where a given test's SEM is greater than five, a blanket cutoff at 75 [*i.e.*, a five-point SEM] would run afoul of *Hall's* requirement to apply the SEM." *Id.* In *Wilson*, the district court reasoned that the critical question was whether *Hall* prescribes a 68% or 95% confidence interval. *Id.* After considering the options, the district court determined that by indicating that the margin of error was *generally* plus or minus five points, "the Supreme Court all but explicitly stated that lower courts should employ two SEMs [a 95% confidence interval] in conducting this analysis." *Wilson*, 170 F. Supp. 3d at 365.

guidance on the proper assessment of *Atkins* claims. In that case, the Texas Court of Criminal Appeals ("CCA") had rejected a state habeas court's finding that death row inmate Bobby James Moore ("Moore") was intellectually disabled. *See Ex parte Moore* ("*Ex parte Moore I*"), 470 S.W.3d 481, 527 (Tex. Crim. App. 2015), *vacated and remanded sub nom. Moore v. Texas*, 137 S. Ct. 1039 (2017). The Supreme Court granted certiorari, found that the CCA had strayed from prevailing clinical standards in assessing Moore's claim, and remanded the case for further proceedings.[5]

In evaluating evidence of Moore's intellectual functioning, the CCA considered two IQ scores: 78, obtained when Moore was thirteen, and 74, obtained after he had arrived on death row. *Ex parte Moore I*, 470 S.W.3d at 518-19. Apparently applying an across-the-board, 5-point SEM, the CCA determined that the score range for the observed 78 IQ score was 73 to 83, and the score range for the observed 74 IQ score was 69 to 79. The CCA recognized that both ranges encompassed the zone for significantly subaverage intellectual functioning. However, the CCA also considered expert testimony that Moore's IQ scores were artificially low due to depression and/or suboptimal effort, and the CCA ultimately found "no reason to doubt" that Moore's observed IQ scores of 78 and 73

[5] Not particularly relevant here, in *Moore I*, the Supreme Court also struck down Texas's standard for assessing intellectual disability set forth in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). *Briseno* required courts to consider seven evidentiary factors, known as the *Briseno* factors, in assessing whether adaptive deficits are related to intellectual functioning deficits. In *Moore I*, the Supreme Court held that the *Briseno* factors had no alignment to clinical standards and created an unacceptable risk that persons with intellectual disability would be executed. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

fairly represented his intellectual functioning and were above the range for intellectual disability.

Despite finding that Moore failed to prove significantly subaverage intellectual functioning, the CCA proceeded to assess Moore's adaptive functioning, and it concluded that he failed to show significant limitations that were related to his intellectual deficiencies. Among other things, the CCA noted that in the open community, Moore made money by mowing lawns and playing pool, and in prison, he functioned well and learned to read and write. The CCA found: "The significant advances applicant has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning." *Ex parte Moore I*, 470 S.W.3d at 526.

The Supreme Court criticized the CCA's analysis as irreconcilable with *Hall*, reasoning that the Texas court had disregarded the lower end of the range of scores for Moore's observed 74 IQ score obtained during his incarceration on death row. The Supreme Court instructed that "the presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range." *Moore I*, 137 S. Ct. at 1049-1050. Despite the experts' clinical observations, because the lower end of Moore's score range fell at or below 70, the *Moore* Court found that the CCA was bound to continue its inquiry and consider Moore's adaptive functioning. *Id.*

The Supreme Court also faulted the CCA's assessment of Moore's adaptive functioning, finding that it had departed from clinical standards in multiple ways by overemphasizing evidence of Moore's adaptive

strengths; stressing adaptive strengths that Moore developed in prison, a controlled setting; concluding that Moore's history of academic failure, abuse, and suffering detracted from a determination that his intellectual and adaptive deficits were related; and requiring Moore to show that his adaptive strengths were not related to a personality disorder. *Moore I*, 137 S. Ct. at 1050-1051. In reaching its decision, the Court referred to then-current publications, including DMS-5, and stated that "the medical community's current standards supply one constraint" on the States' flexibility in enforcing *Atkins*' holding." *Moore I*, 137 S. Ct. 1039, 1052-53 (2017).

On remand, the CCA adopted DSM-5's criteria for intellectual disability and concluded once again that Moore had not demonstrated intellectual disability. *Ex parte Moore* ("*Ex parte Moore II*"), 548 S.W.3d 552 (2018). In reaching its decision, the CCA credited testimony by the State's expert, who also followed the DSM-5 framework and found that Moore's level of adaptive functioning, both before and after entering prison, was too great to support a diagnosis of intellectual disability. Although Moore had deficits in reading, writing, and math in his youth, the CCA considered evidence including Moore's *pro se* filings and prison commissary records and found that as an adult, he had progressed to the point where he could read and write on a seventh-grade level and had command of basic math skills. The CCA recognized DSM-5's caution that it may be difficult to assess adaptive functioning in a controlled environment, such as prison, but it found that "the amount and pace of [Moore's] improvement . . . is simply inconsistent with the habeas court's description of [Moore] as a 'slow learner.'" *Ex parte Moore II*, 548 S.W.3d at 569.

The Supreme Court granted certiorari, reversed the CCA a second time, and found for itself that Moore had established intellectual disability. *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666, 670 (2019). In *Moore II*, the Supreme Court repeated evidence that it had described in *Moore I* regarding Moore's adaptive deficits in childhood, including the lack of a basic understanding of the days of the week, months of the year, and seasons, an inability to tell time and comprehend basic math concepts, and limited reading skills, *Moore II*, 139 S. Ct. at 667-668, and it found that the CCA had once again overemphasized Moore's apparent adaptive strengths and relied too heavily upon adaptive improvements made in prison. *Moore II*, 139 S. Ct. at 670-671.

II. Jackson's Case

A. Factual and Procedural Background

Jackson and his twin brother Calvin Jackson ("Calvin") were born June 30, 1970. As a child, Jackson exhibited serious behavior problems, which persisted throughout his grade-school years. In contrast to Calvin, Jackson made little academic progress, and he could not function in a regular classroom. Records from Jackson's youth show that he had a language disorder, attention deficit hyperactivity disorder ("ADHD"), which went largely untreated, and a possible brain disorder.

When Jackson was nineteen, he directed his cousin to lure a man out of a commercial building that was closed for the day. Jackson guessed that the man, Charles Colclasure, was a security guard, and he planned to take money from him. Colclasure came outside, Jackson demanded his wallet, and Colclasure ran. Jackson chased Colclasure on foot and shot him

several times with a pellet gun, and he directed his cousin to join the chase using Colclasure's car. The cousin struck Colclasure with the vehicle, immobilizing him, and Jackson then drove Colclasure, who was subdued but alive, to the Arkansas River. Jackson and his cousin pushed Colclasure into the river, and Jackson later surmised that Colclasure "just drowned" because he didn't have enough energy to breathe. The next day, Colclasure's dead body, covered with wounds from rat shot, was recovered from the river.

Six years later, while serving a life sentence for Colclasure's capital murder, Jackson escaped his prison cell and stabbed to death ADC Sergeant Scott Grimes. Jackson committed the murder with a shank that he had handcrafted in his prison cell, and his intended victim was another inmate who was Jackson's enemy. Jackson had prepared for the attack by removing a piece of metal from his cell door, which would allow him to kick the bottom of the door open during the short window of time when the target of his attack plan would pass by, escorted by Sergeant Grimes. At the opportune moment, Jackson kicked open his cell door and ran toward his enemy, intending to stab him, but he missed and stabbed Sergeant Grimes, who was shielding the inmate's body. In 1996, a jury found Jackson guilty of the capital murder of Sergeant Grimes and imposed a death sentence.

In 2003, Jackson commenced this habeas action, and the sole remaining claim is that he is intellectually disabled and thus exempt from the death penalty under *Atkins*. Three times, the Court has denied habeas relief under *Atkins*, and three times, the Eighth Circuit has reversed and remanded. Most recently, this Court denied Jackson's *Atkins* claim after considering evidence presented during a two-day

evidentiary hearing and finding that Jackson failed to show, by a preponderance of the evidence, that he meets each requirement for intellectual disability required under Arkansas law.

B. Overall Expert Opinions

In finding that Jackson had failed to meet his burden of proof, the Court considered, among other evidence, expert testimony from Dr. James Moneypenny, a clinical psychologist retained by Jackson, and Dr. Gilbert S. Macvaugh, III, a clinical and forensic psychologist retained by the State. Dr. Moneypenny opined that Jackson met the criteria for intellectual disability, but for reasons detailed in its order denying Jackson's claim, the Court found Dr. Moneypenny's opinion unreliable.

Dr. Macvaugh provided his "clinical" opinion that Jackson did not qualify as intellectually disabled, and he formed that opinion after reviewing extensive information about Jackson's history, conducting in-person clinical interviews with Jackson, interviewing Jackson's brother Calvin, and administering psychological tests over the course of two days.[6] Notwithstanding Dr. Macvaugh's "clinical". assessment that Jackson is not intellectually disabled, he could not provide a "forensic" opinion, within a reasonable degree of psychological certainty, whether Jackson was intellectually disabled. Dr. Macvaugh explained the difference a "clinical" opinion and a "forensic" opinion:

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[6] Dr. Macvaugh described his in-depth investigation and set forth his opinions in a written report. *See* Resp't *Atkins* Hr'g Ex. #6.

> A clinical opinion is an opinion based on assessment of relevant information outside the medical/legal context and the standards are not as rigorous as they are in a forensic context. So in a clinical setting where a person may present for treatment, for example, one may be able to arrive at a clinical opinion about the person's diagnosis, et cetera. But in a forensic setting, a forensic evaluation, the standards are much, much higher, in part because mental health professionals, forensic psychologists like [me] are working to assist the fact-finder in making a legal finding about some psycho-legal issue. And in this case, it's very difficult to offer an opinion to a reasonable degree of certainty that he does not have [intellectual disability].[7]

Dr. Macvaugh listed several factors that prevented him forming a forensic opinion in Jackson's case: difficulties in measuring Jackson's intellectual functioning and adaptive behavior, his opinion that Jackson appeared to malinger cognitive deficits, and the substantial time, approximately twenty-three years, that had passed from the requisite age of manifestation, eighteen or younger, and Dr. Macvaugh's evaluation.[8]

Dr. Macvaugh reaffirmed his clinical assessment on cross-examination and restated that he could not rule out, to a reasonable degree of psychological certainty, that Jackson was *not* intellectually disabled. He added: "It may be helpful for me to rephrase it this way. If he has [intellectual disability], it's not by much.

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[7] ECF No. 112, at 10.

[8] ECF No. 112, at 266.

If he doesn't have it, it's not by much."[9] Directly addressing this Court, Dr. Macvaugh explained:

> Clinically, I don't think he has it. Clinically, I think he is squarely in the mid borderline of intelligence, and he has other issues. His brain is not right, Judge. This man does have intellectual problems, but I don't think that, based on the information that I had, that his intellectual functioning was so low that he would qualify for that diagnosis. But, again, I cannot testify to a reasonable degree of certainty that he does not have it because the consequences of my mistakes would be great. And because of the threats to the data and the validity of the information, it just would be intellectually dishonest for me to state an opinion forensically that he does not have it when I would not be confident in that opinion.[10]

B. Evidence of Jackson's Intellectual Functioning

In assessing intellectual functioning, Drs. Moneypenny and Macvaugh evaluated Jackson separately in 2011, and each clinician separately administered the Wechsler Adult Intelligence Scale, fourth edition ("WAIS-IV"). Dr. Macvaugh obtained a full-scale IQ score of 50, and Dr. Moneypenny obtained a full-scale IQ score of 56. Dr. Macvaugh provided detailed testimony explaining that the 50-point IQ score he obtained was not valid because Jackson grossly malingered intellectual deficits during testing. Dr. Moneypenny failed to assess for malingering, and he could not rule out that

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[9] ECF No. 112, at 295.

[10] ECF No. 112, at 267-68.

Jackson feigned intellectual deficits during the test that he administered. Crediting Dr. Macvaugh's testimony, the Court found that Jackson's 2011 IQ scores were not reliable evidence of his true intellectual functioning.

The doctors also reviewed testimony and exhibits from Jackson's state court criminal proceedings, which provided limited information about intelligence tests administered to Jackson in the context of special education and mental health services that he received as a child:

- When Jackson was six, an unknown examiner administered an unspecified version of the Stanford Binet Intelligence Test, and Jackson obtained an overall IQ score of 72. The subtest results are not known.
- When Jackson was seven, Dr. Bill Johnson, a psychologist, administered the Wechsler Intelligence Scale for Children, Revised, and Jackson received a full-scale IQ score of 73, a performance subtest score of 90, and a verbal subtest score of 60. Dr. Johnson noted that the 30-point divergence between Jackson's verbal and performance scores indicated that the reported 73-point, full-scale IQ score was not reliable.
- When Jackson was eleven, an unknown examiner administered an unknown version of the Wechsler Intelligence Scale for Children. Jackson obtained a verbal subtest score of 72, a performance subtest score of 95, and a full-scale IQ of 81. Again, the examiner noted a 30-point difference between Jackson's performance and verbal subtest scores.

- When Jackson was 16, an unknown examiner administered an unknown version of the Wechsler Intelligence Scale for Children. Jackson obtained a verbal subtest score of 62, a performance subtest score of 91, and a full-scale IQ score of 74. Again, the examiner noted a significant gap between Jackson's verbal and performance subtest scores.

Dr. Macvaugh noted several threats to the psychometric validity of the IQ scores from Jackson's youth, including the substantial gap between Jackson's verbal and performance subtest scores. Referring to the test administered by Dr. Johnson, when Jackson was seven years old, Dr. Macvaugh explained:

> And at that time[,] his overall IQ score was 73, again classified in the borderline range. And what's notable about that set of scores is that -- and maybe I should back up. In previous editions of these intelligence tests, there was a different breakdown in terms of the structure of the scores. Before the current instrument that we use [now], the scores were reported as three different IQ scores -- verbal IQ, performance or nonverbal IQ, and the full-scale overall IQ.
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> So back when Dr. Johnson administered the Wechsler Intelligence Scale for Children, Revised, on the verbal IQ, Mr. Jackson obtained an IQ score of 60, which is in the range of mild mental retardation. However, his performance or non-verbal IQ was a 90, which is average. Therefore, his full-scale IQ, although it is 73 and technically in the borderline range, is not all that meaningful because there is such a significant disparity

> between his verbal and performance IQ scores, which means that overall full-scale IQ is probably not a very reliable measure of his overall intellectual functioning. It's somewhat skewed.[11]

Dr. Macvaugh's observation is consistent with the DSM-5, which states that "highly discrepant individual test score may make an overall IQ score invalid." DSM-5, at 37. Contrary to DSM-5 standards for diagnosing intellectual disability, Dr. Moneypenny opined that Jackson's significantly lower verbal subtest scores were meaningful indicators of his intellectual functioning. ECF No. 111, at 14.

Dr. Macvaugh further explained that the lack of raw test data and information about the specific versions of IQ tests administered to Jackson prevented him from confirming the validity of the reported scores[12] or accounting for the Flynn effect, which usually results

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[11] ECF No. 111, at 230-31.

[12] Dr. Macvaugh testified:

> I couldn't determine, based on all these previous administrations, exactly what version of the test was administered. Many of them I learned about through reading the testimony at the sentencing phase of his capital murder trial. They weren't . . . specific about dates or which version, and I don't have a whole lot of confidence in all these administrations being done by a licensed psychologist who was trained to administer intelligence tests. I couldn't confirm the raw data in other words.

ECF 111, at 24. In his forensic report, Dr. Macvaugh noted: "[N]one of the raw test data regarding any of Mr. Jackson's previous intellectual assessments were available for review. As such, the validity of those prior scores could not be confirmed." Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 57).

in a retroactive reduction of previous IQ scores.[13] Notwithstanding the presence of factors that would otherwise affect the validity of Jackson's early scores, Dr. Macvaugh found that the administration of multiple, varied tests that produced similar scores lessened concerns about psychometric validity and revealed a pattern that suggested Jackson "is above the cut" for intellectual disability.[14] He testified:

> He is squarely in the low to mid borderline range, and when we consider . . . the test error of plus or minus five points -- at a certain point, when you have repeated administrations of multiple different tests that have roughly the same conclusion, you have less concern about the error in those scores because the error conceptually is what we use

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[13] ECF No. 111, at 244-246. "The Flynn effect acknowledges that as an intelligence test . . . moves farther from the date on which it was standardized, or normed, the mean score of the population . . . on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects. Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field." *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010).

[14] ECF No. 111, at 242. Dr. Macvaugh's approach is consistent with an observation by the dissenters in *Hall* that "the well-accepted view is that multiple consistent scores establish a much higher degree of confidence [than a single IQ score]. *Hall v. Fla.*, 572 U.S. 701, 742, 134 S. Ct. 1986, 2011 (2014)(Alito, J., dissenting)(citations omitted). In a footnote, Justice Alito added: "When there are multiple scores, moreover, there is good reason to treat low scores differently from high scores: `Although one cannot do better on an IQ test than one is capable of doing, one can certainly do worse.'" *Hall*, 572 U.S. at 742 n.13, 134 S. Ct. at 2011 n.13 (Alito, J., dissenting)(quoting Forensic Psychology and Neuropsychology for Criminal and Civil Cases 56 (H. Hall ed. 2008)).

> to describe the possibility that one score might not be correct, but when you have lots of scores that all fall in the same approximate area or range, then there is probably less error associated with each of those scores because we have evidence of consistency across multiple administrations."[15]

Stressing his view that more data leads to less error, Dr. Macvaugh cited additional observations that contributed to his "clinical" assessment that Jackson's intellectual functioning fell within the low to mid-borderline range. He recounted that when he met Jackson in 2011, he was vigilant in protecting his rights and reluctant to sign a confidentiality/notice of rights form, and he asked questions that indicated he understood the content of the form. Dr. Macvaugh testified that in his experience, "persons who have genuine [intellectual disability] are not capable of asking those questions because they don't understand the content as well as he appeared to."[16] Dr. Macvaugh also observed that Jackson's vocabulary was inconsistent with intellectual disability and that he understood and could estimate measurement and distance, which is often lacking in people with mild intellectual disability. Dr. Macvaugh listened to recordings of Jackson's prison telephone conversations and opined that the content suggested "intellectual

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[15] *Id.* In his written report, Dr. Macvaugh summarized: "These psychometric limitations notwithstanding, it is my clinical impression that Mr. Jackson is functioning between the low to mid borderline range of intelligence; and this conclusion is based on the totality of the data available, as opposed to any single source of information, test score, etc." *See* Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 5-6).

[16] ECF No. 112, at 15.

capacities much higher" than indicated by the results of his 2011 IQ tests. On the other hand, he found it telling that Jackson did not appear to appreciate that he was possibly being monitored during the conversations, despite a clear automated warning that at the beginning of each call, warning that the calls "may be" monitored.

C. Evidence of Jackson's Adaptive Functioning

Dr. Macvaugh explicitly declined to provide an opinion, clinical or forensic, as to whether Jackson has adaptive functioning deficits that meet the standard for intellectual disability. According to Dr. Macvaugh, determining whether Jackson demonstrated significant deficits in adaptive behavior prior to age eighteen was even more challenging than assessing his intellectual functioning. First, Jackson had lived his entire adult life in prison, and no parent or previous caretaker was available to provide retrospective information about his adaptive behaviors outside of prison. Dr. Macvaugh interviewed Calvin but found that he was an inappropriate source of information because he did not serve as Jackson's caretaker and could provide only limited information based on what he remembered from his early childhood. Second, Dr. Macvaugh opined that traditional tests used for assessing adaptive functioning were not appropriate in Jackson's case. In his written report, he explained that such tests assess adaptive functioning in the open community and were not developed for use with incarcerated populations, "and the retrospective use of these instruments to measure adaptive behavior prior to age eighteen for those who have been incarcerated an

extended period of time remains of topic of controversy in the field."[17]

Although Dr. Macvaugh found that Jackson's circumstances prevented a valid, retrospective analysis of his adaptive functioning,[18] he acknowledged that documentary evidence showed that Jackson had adaptive deficits during his childhood in several areas, including functional academic skills, social/interpersonal skills, communication, and self-direction.[19] However, Dr. Macvaugh was unable to determine whether these deficits were due to intellectual disability, Jackson's untreated ADHD, or other disorders that were either diagnosed or suspected during Jackson's youth, which included a conduct disorder, polysubstance abuse, unspecified encephalopathy or degeneration of the brain, and a verbal learning and/or communication disorder. As stated in the Court's prior decision, Dr. Macvaugh expressly recognized that the presence of comorbid conditions did not preclude intellectual disability, but he found that they made a differential diagnosis extraordinarily difficult.[20] He recognized that some clinicians think that "if the deficits are present, that's all that matters"[21] but that he believed it necessary to determine the etiology of an adaptive

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[17] Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 49).

[18] Dr. Macvaugh reported that "because Mr. Jackson has been incarcerated for nearly all of his adult life (and also during a portion of his adolescent years), any retrospective assessment of his adaptive deficits prior to age eighteen is likely to be of questionable validity and plagued by measurement error." Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 59).

[19] Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 58).

[20] See Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 59).

[21] ECF No. 112, at 45.

deficit rather than considering the deficit a necessary consequence of intellectual impairments.

Dr. Moneypenny testified that Jackson has "significant deficits pretty much across the board."[22] He assessed Jackson's adaptive functioning based on the results of a test he administered, the Adaptive Behavior Assessment, Second Edition (ABAS-II), using Calvin as the informer or rater. The ABAS-II required that Calvin rate whether or how well his brother correctly performed various behaviors without help. Dr. Moneypenny reported that the test results reflected significant deficiencies in adaptive functioning in virtually all skill areas, but he failed to provide specific information about the test results. Dr. Macvaugh viewed the ABAS-II as a highly inappropriate assessment tool because it is designed to assess current functioning, and this case requires a retrospective assessment of Jackson's adaptive functioning before he entered prison.

Calvin testified that he lived with Jackson during childhood and recalled that his twin was "slower" than he and had difficulty understanding things and following instructions. Calvin remembered that Jackson would become frustrated and break toys and that other children teased him. He also confirmed that Jackson had behavior problems in school and was placed in special classes. Calvin testified that teachers would call upon him to encourage his brother to behave. Additionally, Jackson had speech problems, and Calvin would often serve as an interpreter and tell others what Jackson was saying.

Evidence about Jackson's adaptive functioning in adolescence included that he held two menial-labor

[22] ECF No. 111, at 25.

jobs before his incarceration and that he drove and stole cars. Drs. Macvaugh and Moneypenny both testified that Jackson's functioning in prison could not serve as a valid index of his functioning in a noncontrolled setting before the age of eighteen, but they agreed that such information should be considered. Evidence about Jackson's institutional adaptation included that he has filed pro *se* lawsuits and grievances and understood and utilized a complex method to send written correspondence to other prisoners. Furthermore, this Court notes that he was in prison when planned and committed the murder for which he was sentenced to death.

D. This Court's Prior Decision and Reasoning

In evaluating the evidence, the Court found the testimony of Jackson's expert witness, Dr. Moneypenny, entirely unhelpful. Dr. Moneypenny failed to adequately assess for malingering when he administered the WAIS-IV to Jackson in 2011; he opined, contrary to DSM-5 standards, that Jackson's low verbal subtest results from prior testing was a meaningful indicator of his overall intellectual functioning; and he gauged Jackson's adaptive behavior with a test designed to assess a person's adaptive functioning in the open community, not correctional populations. The Court found Dr. Macvaugh's investigation thorough and thoughtful, but inconclusive. The Court clearly understood that despite his "clinical" opinion that Jackson is "above the cut" for intellectual disability, Dr. Macvaugh could not state to a reasonable degree of psychological or medical certainty whether Jackson meets the criteria for intellectual disability.

Given the Court's assessment of Dr. Moneypenny's testimony, and despite Dr. Macvaugh's inability to rule out intellectual disability to a forensic certainty,

the Court found that Jackson had failed to meet his burden of proof to show, by a preponderance of the evidence, the first two criteria for intellectual disability: significantly subaverage general intellectual functioning and a significant deficit or impairment in adaptive functioning.[23] The Court did not find that Jackson *is not* intellectually disabled, explaining:

> The resolution of Jackson's claim . . . does not rest on whether the Court finds, by a scientific or forensic certainty, that he *is not* intellectually disabled. The question for the Court is whether Jackson has proved, by a preponderance of the evidence, that he meets each requisite for intellectual disability under Arkansas law, and the Court finds that he has not.

In the interest of providing a complete record, the Court went on to find that Jackson met the third prong under § 5-4-618(a), Criterion C under DSM-5, because regardless of the severity of Jackson's intellectual and adaptive deficits, it was undisputed that the onset of his deficits occurred during the developmental period. The fourth prong under § 5-4-618(a), which has no counterpart under DSM-5, requires a deficit in adap-

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[23] In reversing the Court's decision, the Eighth Circuit stated that this Court found that "Jackson did not have an intellectual disability because he did not demonstrate a specific link between [adaptive deficits] and subaverage intellectual functioning." *Jackson v. Kelley*, 898 F.3d 859, 869 (8th Cir. 2018). In its prior decision, this Court repeated DSM-V's requirement that adaptive deficits be directly related to intellectual deficits, and the Court recited Dr. Macvaugh's testimony that he could not determine whether Jackson's history of adaptive deficits was related to intellectual deficits. However, despite the Eighth Circuit's conclusion, this Court made no definitive finding as to whether Jackson is intellectually disabled.

tive behavior without regard to the date of onset. Because this requirement "largely duplicates" the second prong under § 5-4-601(a), *see Sasser v. Hobbs*, 735 F.3d 833, 845 (8th Cir. 2013), the Court found that Jackson had failed to satisfy his burden of proof as to the fourth prong.

Jackson's failure to prove significantly subaverage general intellectual functioning and a significant deficit or impairment in adaptive functioning precluded relief under *Atkins.* But given the serious consequence of Court's decision, and recognizing that Jackson does indeed have intellectual impairments, the Court went further to consider whether he possibly possessed the characteristics and deficits described in *Atkins*, which the Supreme Court found lessen personal culpability to such an extent that the penological purposes of retribution and deterrence[24] are not served, rendering

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[24] Jackson committed his second capital murder while serving a life sentence for his first capital murder, which may implicate a third valid penological interest: prevention of future crime. However, the Supreme Court has never embraced incapacitation as a justification for the death penalty, reasoning that a sentence of life without parole is enough to prevent future crime. *See Baze v. Rees*, 553 U.S. 35, 78, 128 S. Ct. 1520, 1546-47, 170 L. Ed. 2d 420 (2008)("While incapacitation may have been a legitimate rationale [for capital punishment] in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty."); *Ring v. Arizona*, 536 U.S. 584, 614-15 (2002)(Breyer, J., concurring) (noting "the continued difficulty of justifying capital punishment in terms of its ability . . . to incapacitate offenders"); *California v. Ramos*, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting) (arguing that capital punishment "simply cannot be justified as necessary to keep criminals off the streets," and that life imprisonment and, if necessary, solitary confinement would fully accomplish the aim of incapacitation).

imposition of the death penalty cruel and unusual punishment. These traits include acting on impulse rather than a premeditated plan, acting as a follower, and a reduced capacity to process information, communicate, learn from experience, engage in logical reasoning, control impulses, and understand the reaction of others. *See Atkins*, 536 U.S. at 320-21, 112 S. Ct. at 2251-52. This Court observed, among other things, that Jackson's careful planning and premeditation in prison that resulted in the death of Scott Grimes indicated that he is not "'so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus [regarding the death penalty]." *Jackson v. Norris*, No. 5:03-CV-00405 SWW, 2016 WL 1740419, at *23 (E.D. Ark. Mar. 31, 2016), *rev'd and remanded sub nom. Jackson v. Kelley*, 898 F.3d 859 (8th Cir. 2018)(quoting *Atkins*, 536 U.S. at 317, 122 S. Ct. at 2250).

III. The Eighth Circuit's Reversal and Remand

The Eighth Circuit found that this Court committed the same errors that the Supreme Court condemned in *Moore I*; specifically, that the Court (1) relied too heavily on Jackson's perceived strengths, rather than his deficits; (2) inappropriately found that Jackson was not intellectually disabled because his adaptive strengths outweighed his adaptive deficits; (3) gave significant weight to skills that Jackson may have developed in prison; and (4) placed too much emphasis on the existence of other diagnosed disorders. Additionally, the Court of Appeals perceived that this Court attempted to bolster its analysis by considering whether the undisputed facts regarding Jackson's crimes indicated that he possesses the characteristics of intellectually disabled persons described in *Atkins*, commenting that this analysis "essentially required

Jackson to prove that there was a nexus between his mental capacity and his crime—i.e., that his criminal conduct reflected mental disability." *Jackson v. Kelley*, 898 F.3d at 866.

The Court of Appeals has directed this Court to reconsider its decision in view of *Moore* and has instructed that this Court's findings shall include the following:

> [T]he standard error of measurement as applied to Jackson's IQ tests administered during his youth; whether Jackson's adaptive functioning deficits are related to his subaverage intellectual functioning without requiring Jackson to demonstrate a specific link between the two; and *whether Jackson's adaptive functioning deficits* rather than his adaptive functioning strengths *indicate that he is not intellectually disabled.*

Jackson v. Kelley, 898 F.3d 859, 869 (8th Cir. 2018)(emphasis added).

IV. Analysis on Remand

A. Intellectual Functioning

In remanding this case, the Eighth Circuit observed: "In line with the Supreme Court and the DSM-V, we have previously held that courts should take into consideration a margin of error of plus or minus five points on these tests because it is possible to diagnose intellectual disability 'in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.' *Jackson v. Kelley*, 898 F.3d 859, 863-64 (8th Cir. 2018)(quoting *Sasser v. Hobbs*, 735 F.3d 833, 843 (8th Cir. 2013)). And the Court of Appeals has specifically instructed: "The [district] court shall include

in its reconsideration: the standard error of measurement as applied to Jackson's IQ tests administered during his youth." *Id.*, 898 F.3d at 869.

For reasons discussed at length in its prior decision, this Court found that Jackson's 50 and 56-point full scale IQ scores obtained from the administration of the WAIS-IV in 2011 do not qualify as reliable evidence of his intellectual functioning. The Eighth Circuit did not disturb that finding on appeal, and it remains this Court's finding. Further, this Court specifically found that Jackson's full-scale IQ scores obtained from 1977 to 1986, which ranged from 72 to 81, *did not* preclude a finding that he met the criteria for intellectual disability, and consistent with the Supreme Court's directive in *Hall*, the Court considered evidence of Jackson's adaptive functioning. Given the lack of specific test data regarding Jackson's early intelligence assessments, the Court, like Dr. Macvaugh,[25] did not attempt to construct a confidence interval for Jackson's early scores. But in keeping with the Eighth Circuit's instructions on remand, the Court will now

[25] As the Court understood Dr. Macvaugh's in-person testimony and forensic report, he could not employ the SEM method to account for error with respect to Jackson's early IQ scores because, except for the test administered to Jackson in 1977, there is no information about the version of tests administered to Jackson in his youth. Accordingly, rather than construct a confidence interval for each of the four full-scale IQ scores, in reaching his overall "clinical" opinion that Jackson fell within the low to mid-borderline range of intelligence, Dr. Macvaugh considered that Jackson's scores on multiple different tests obtained scores falling within the same general range: low to mid-borderline. As previously explained, Dr. Macvaugh also considered other information in reaching his "clinical" opinion that Jackson's intellectual functioning did not qualify him as intellectually disabled—including Jackson's in-person interview responses and his prison-recorded telephone conversations.

construct a score range for each of Jackson's early, full-scale IQ scores by adding five points to and subtracting five points from each observed score. The value of this step is uncertain because without more information about the tests administered, the Court is unable to assign a specific confidence level or percentage to these ranges, and in the end, the Court's inquiry will not change as it will once again consider evidence of Jackson's adaptive functioning.

As shown in the chart below,[26] Jackson's early full-scale scores of 72, 73, 81, and 74, adjusted for an across-the-board SEM of plus or minus five points, yield the following ranges: 67 to 77; 68 to 78; 76 to 86; and 69 to 79. These adjusted ranges include IQ scores at, below, and above 70, and as the Court recognized in its prior decision, Jackson's early scores do not preclude a finding that he is intellectually disabled, but they are not conclusive, and an assessment of Jackson's adaptive functioning is necessary to determine the severity of his intellectual deficits.

Date	Age	Examiner	Test (version)	VIQ	PIQ	FSIQ	SEM***	Range
4/26/77	6	Unknown	SBIS(?)*	?	?	72	5	67 to 77
12/09/77	7	Johnson	WISC-R	60	90	73	5	68 to 78
2/18/82	11	Unknown	WISC(?)*	72	92	81	5	76 to 86
9/22/86	16	Unknown	WISC(?)**	62	91	74	5	69 to 79

*Stanford Binet Intelligence Test (unspecified version) and Wechsler Intelligence Scale for Children (unspecified version), referenced in testimony by Dr. Patty Koehler,

[26] The chart's title columns contain the following abbreviations: Verbal Intelligence Quotient ("VIQ"); Performance Intelligence Quotient ("PIQ"); and Standard Error of Measurement ("SEM").

Director of Special Education for the Little Rock School District, during the sentencing phase of Jackson's trial for the capital murder of Charles Colclasure (test reports not available for review)

**Wechsler Intelligence Scale for Children (unspecified version), referenced in testimony by Dr. Glen White, a clinical psychologist, during an omnibus hearing in proceedings for the capital murder of Charles Colclasure (test reports not available for review)

***The unique SEMs associated with the tests administered to Jackson are unknown.

B. Adaptive Functioning

DSM-5 provides that adaptive functioning "is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures." DSM-5, at 37. "Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible." *Id.* When Drs. Moneypenny and Macvaugh evaluated Jackson in 2011, he was forty years old and had lived his entire adult life, and a portion of his adolescent years, in prison. Not one adult from Jackson's childhood was available to corroborate how he functioned in the open community. Calvin Jackson confirmed that his twin brother had behavior problems as a child, attended special education classes, and had problems communicating, but his ability to recall Jackson's behaviors with specificity was understandably limited. As Dr. Macvaugh explained, given Jackson's unique circumstances, it is not possible to obtain reliable information about Jackson's adaptive functioning in the open community using standardized measures and knowledgeable informants, as recommended under DSM-5.

DSM-5 also provides that "additional sources of information include educational, developmental, medical, and mental health evaluations." *Id.* Educational and related mental health records from Jackson's childhood document that he had deficits in each domain of adaptive functioning. Relevant to the conceptual domain, Jackson lacked basic functional academic skills, and he appeared to suffer from a language or communication disorder. Jackson also had severe behavioral problems, indicating deficits in the social domain, and his academic record demonstrated that he had difficulty with self-management and staying on task, indicating possible deficits in the practical domain.

Dr. Macvaugh found it impossible to determine whether Jackson's apparent deficits in adaptive behavior, exhibited in his childhood, were due to subaverage intellectual functioning, untreated AHDH, a learning or language disorder, brain damage, or a combination of these conditions. Particularly informative to Dr. Macvaugh was a 1977 psychological report by Dr. Bill Johnson, a clinical psychologist who assessed Jackson at the Elizabeth Mitchell Children's Center.[27] Dr. Johnson noted that Jackson had severe problems in conceptualization, an extremely short attention span, and limited capability of dealing with abstract verbal material, and he suspected that the extreme discrepancy between Jackson's verbal and performance IQ scores pointed to severe organic damage in the left hemisphere.[28]

Although Dr. Macvaugh viewed Jackson's comorbid conditions a roadblock to assessing Jackson's adaptive

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[27] *See* Resp't *Atkins* Hr'g Ex. #6 (Macvaugh Forensic Report, 56).

[28] *Id.*

functioning, *Moore I* clearly requires a different approach. Following *Moore I*, the Eighth Circuit has advised that DSM-5's language requiring that deficits in adaptive functioning be "directly related" to intellectual impairments does not require "a specific connection between subaverage intellectual functioning and adaptive behavior deficits." *Jackson v. Kelley*, 898 F.3d 859, 869 (8th Cir. 2018). Instead, Jackson "must show only that deficits related to intellectual functioning exist." *Id.* The record shows that Jackson's documented deficits in the conceptual, social, and practical domains in childhood, regardless of etiology, were at least related to his deficits in intellectual functioning.

In its previous order, the Court noted that Drs. Moneypenny and Macvaugh testified that Jackson's ability to function in prison, standing alone, cannot serve as a valid index of his adaptive functioning. However, both experts agreed that clinical standards did not preclude consideration of Jackson's institutional adaptation and that such evidence should be considered. Accordingly, the Court considered evidence regarding Jackson's activities in prison, most of which indicated adaptive strengths. In remanding this case, the Eighth Circuit stated that like the CCA in *Moore I*, this Court placed too much emphasis on Jackson's adaptive strengths and functioning in prison and "inappropriately found that Jackson was not intellectually disabled because his adaptive strengths outweighed his adaptive deficits."[29] *Jackson v. Kelley*, 898 F.3d at 865.

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[29] Once again, this Court did not so find but only found that Jackson had failed to carry his burden of proof.

In *Moore I*, the Supreme Court cautioned against overemphasizing adaptive strengths and relying too much on prison-based development, but the Court provided no guidance as to when and to what extent such information is properly considered. The *Atkins* rule is founded on a consensus that intellectually disabled offenders are less culpable for the crimes they commit because, among other things, there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan." *Atkins*, 536 U.S. at 318, 122 S. Ct. at 2250. Because the *Atkins* rule is fundamentally about the offender's culpability for his crime, Jackson's adaption to prison, where he planned and carried out his second capital murder, seems particularly relevant. However, given the Eighth Circuit's admonition to this Court and the Supreme Court's increasingly generous standard in *Atkins* cases, the Court places no weight on Jackson's adaptive strengths, his activities in prison, or Dr. Macvaugh's clinical assessment of Jackson's intellectual functioning. As this Court understands it, the current legal standard for *Atkins* claims requires a Court to find that a defendant is intellectually disabled if the defendant produces an IQ score between 70 and 75 or lower and shows that he had a significant adaptive deficit, such as a learning disability, as a child. This standard is arguably more generous that the clinical criteria for intellectual disability set forth in DSM-5, which stresses the importance of clinical judgment, such as Dr. Macvaugh's "clinical" assessment of Jackson's intellectual functioning.

The Eighth Circuit has instructed that this Court shall include in its analysis "whether Jackson's adaptive functioning deficits rather than his adaptive functioning strengths indicate that he is not intellectually disabled." *Jackson v. Kelley*, 898 F.3d at 869. As

one would expect, Jackson's record of adaptive deficits (*i.e.*, academic and behavioral problems experienced in childhood) provide no indication that he is *not* intellectually disabled.

V. Conclusion

Upon reconsideration, the Court finds that Jackson has significant deficits in adaptive functioning as required under the second prong of Arkansas's intellectual disability statute. And viewing Jackson's early IQ scores together with evidence of his adaptive deficits, the Court finds that Jackson also meets the requirement of significantly subaverage intellectual functioning, as required under the first prong. Jackson also meets the third and fourth prongs of the Arkansas statute. As stated previously in this case, it is undisputed, and the Court finds, that the onset of Jackson's deficits occurred during the developmental period and were present before his eighteenth birthday,[1] and Jackson has proven deficits in adaptive behavior, without regard to the age of onset.

IT IS THEREFORE ORDERED that Petitioner Jackson's petition for a writ of habeas corpus is GRANTED as to his claim that he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). Jackson's conviction for capital murder remains, but his death sentence is set aside, and the State must change his penalty to life imprisonment without parole. A judgment and decree so ordering will be entered separately.

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[1] On cross-examination, when asked whether there was "no dispute here that whatever he had, whatever Mr. Jackson has, its onset [was] before age eighteen," Dr. Macvaugh answered, "Correct." ECF No. 112, at 26.

IT IS SO ORDERED THIS 23RD DAY OF MARCH, 2020.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1830

ALVIN BERNAL JACKSON,

Appellee,

v.

DEXTER PAYNE, DIRECTOR,
DEPARTMENT OF CORRECTION,

Appellant.

Appeal from U.S. District Court for the
Eastern District of Arkansas - Pine Bluff
(5:03-cv-00405-SWW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans