No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE JAMES PYE,

Petitioner,

v.

SHAWN EMMONS, Warden,
Georgia Diagnostic & Classification Prison

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Georgia requires persons with intellectual disability to prove their disability 'beyond a reasonable doubt' in order to vindicate their Eighth Amendment right to be free from execution. It is the only state to do so. Georgia's onerous burden is an extreme outlier not merely on the issue of intellectual disability; to petitioner's knowledge, no other state, in any other context, requires an individual to prove the factual predicate for any constitutional right beyond a reasonable doubt. Under this standard, Georgia will execute capital defendants who are more likely than not intellectually disabled. Indeed, it will even execute those who establish by clear and convincing evidence that they are intellectually disabled.

The questions presented are:

(1) Can the State under *Atkins v. Virginia* execute a person who is intellectually disabled by all clinical standards?

(2) Can the State impose a burden of proof so onerous that it effectively eviscerates a substantive constitutional right?

PETITION FOR A WRIT OF CERTIORARI

Petitioner WILLIE JAMES PYE petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The unreported March 20, 2024, order of the Georgia Supreme Court denying Petitioner's Certificate of Probable Cause to Appeal is attached as Appendix A. The Butts County Superior Court order dated March 20, 2024, is attached as Appendix B.

JURISDICTION

The Georgia Supreme Court entered a judgment on March 20, 2024. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

Ga. Code Ann. § 17-7-131(c)(3) provides: "The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is intellectually 2 disabled. If the court or jury should make such finding, it shall so specify in its verdict."

INTRODUCTION

Willie Pye is intellectually disabled. Expert testimony presented in state habeas proceedings by both parties established that Mr. Pye had significantly subaverage intellectual functioning, including an IQ score 68 on the state's testing. The experts also agreed Mr. Pye's deficits were present during the developmental period. The state and defense further agreed that Mr. Pye had subaverage adaptive functioning. The only dispute was how significant those deficits were. The state's expert testified that Mr. Pye's adaptive deficits "affect his ability each and every day to function in the community" and "put him at a much greater disadvantage than the average person." But he disagreed that these admittedly critical deficits were severe enough to categorize Mr. Pye as intellectually disabled, arguing that he instead fell on the "borderline" side of the threshold. Mr. Pye's claim of intellectual disability was denied under Georgia's beyond a reasonable doubt burden of proof.

Proof beyond a reasonable doubt is the most demanding burden known to the law. Historically, its application has been limited to the government's obligation to produce sufficient evidence to convict an individual for an alleged crime. In that setting, the standard reflects the judgment that it is better to see ten guilty persons go free than to wrongly convict one innocent person. *In re Winship*, 397 U.S. 358, 361-64 (1970); *id*. at 372 (Harlan, J., concurring); see 4 William Blackstone, Commentaries *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer.")

The Eighth Amendment prohibits executing people with intellectual disability. Atkins v. Virginia, 536 U.S. 304 (2002). But Georgia, alone among the states, requires defendants invoking this right to prove beyond a reasonable doubt

that they are intellectually disabled. Virtually every other state that imposes the death penalty requires only a preponderance of evidence. Georgia's unique burden has effectively nullified the right, as no jury has ever found this burden met in a case of intentional murder. Georgia, it seems, would rather unconstitutionally execute ten intellectually disabled people than spare the life of one non-disabled person.

The beyond-a-reasonable-doubt standard has no place in assessing whether an individual can establish a factual predicate for a constitutional violation, particularly where the consequence of inevitable error is an unconstitutional execution. The Court should grant certiorari and reverse. And the error is so plain that the Court should also consider summarily granting, vacating, and remanding.

In *Atkins v. Virginia*, the United States Supreme Court ruled that the United States Constitution protects intellectually disabled persons from execution. 536 U.S. 304 (2002). Willie Pye is by all clinical standards intellectually disabled. His execution would violate the Eighth Amendment pursuant to *Atkins*, *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 581 U.S. 1 (2017). According to the lower court, Mr. Pye's claim is procedurally barred because it was raised and denied in his first habeas proceeding before that court. But intellectual disability is a categorical exclusion in the same way a state may not execute anyone under the age of 18. *Roper v. Simmons*, 543 U.S. 551 (2005). Mr. Pye cannot waive or default an immutable characteristic which excludes him from eligibility for the death penalty. *Atkins* is a

categorical ban against executing all intellectually disabled persons.[1] His execution would be a miscarriage of justice.

In 1989, in response to the public outcry over the execution of Jerome Bowden, an intellectually disabled person, Georgia became the first state in the nation to prohibit the execution of the intellectually disabled.[2] In 2002, the United States Supreme Court followed suit in *Atkins*, ruling that the United States Constitution protects all intellectually disabled persons from execution. Despite being intellectually disabled, Mr. Pye faces execution tonight.

In the years since Mr. Pye's previous state habeas proceedings, [3] this Court has established that evidence contrary to the teachings of the medical community cannot be the basis of a finding of no intellectual disability. An esteemed member of that medical community has examined the record here, and found it is contrary to clinical practice and thus this Court's guidance in *Atkins*.

We also now know that during those proceedings, Dr. King failed to reveal that his own adaptive functioning assessment put Mr. Pye in the significantly subaverage range, and actually supported a diagnosis of intellectual disability. Dr. James Patton, an esteemed member of the scientific community, recently examined Dr. King's

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[1] The United States Supreme Court's analysis of the definitional limitations it addressed in both *Hall* and *Moore* leaves no room for doubt: "Mild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities, . . . and States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 581 U.S. at 18 (emphasis in original) (citation omitted).

[2] O.C.G.A. § 17-7-131; *Fleming v. Zant*,386 S.E.2d 339 (1989).

[3] The state habeas court evidentiary hearing was in 2009; the state court issued its order in 2012. Appendix 2.

assessment. In that assessment, Dr. King did not consider the standard error of measurement ("SEM") for the test he gave, even though part of the diagnostic framework for adaptive functioning is applications of the SEM.[4] When confidence intervals are properly applied, *Dr. King's own testing obtained an adaptive behavior score that qualified Mr. Pye for a diagnosis of intellectual disability*. Yet he never revealed that fact in his testimony.

Dr. King also relied on misconceptions and gross stereotypes about mildly intellectually disabled persons in assessing Mr. Pye's adaptive behavior. Incredibly, the things King believed intellectually disabled persons could not do without assistance included "being able to take care of themselves, dress themselves, feed themselves, pay their bills, earn money to support themselves." HT 436.[5] According to Dr. King, "When you're able to do that you don't meet the requirements for being mentally retarded in terms of adaptive functioning." *Id.* Misconceptions about what mildly intellectually disabled persons can and cannot do, based on Dr. King's testimony, were specifically cited in the order prepared by Respondent and adopted by the lower court in 2012 denying Mr. Pye habeas corpus relief because he had not proven his intellectual disability.[6]

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[4] *See* Appendix 1. Report of James Patton, Ed.D.; *see also* ABAS-2, Clinical Use and Interpretation at 44 (Oakland and Harrison, 2008). The SEM estimates how repeated measures of a person on the same instrument tend to be distributed around their "true" score.

[5] References to the record are as follows:

HT: Transcript of record before the state habeas court in Case No. 2000-v-85.

[6] Appendix 2 at 26-30.

In order to avoid a miscarriage of justice in Mr. Pye's case, this Court must grant relief as the Court's rulings since the prior habeas proceedings that make clear that under *Atkins*, assessments for intellectual disability must be "informed by the medical community's diagnostic framework," *Hall v. Florida*, 572 U.S. 701, 721 (2014), and that specifically reject the methodology and misconceptions relied on by Dr. King. *Moore v. Texas*, 581 U.S. 1 (2017).

This Court's decisions in *Hall* and *Moore* command review of the lower court's determination that Mr. Pye is not intellectually disabled. There can be no dispute that Mr. Pye, using the acknowledged standards of the medical community and proper diagnostic framework, meets all criteria for a diagnosis of intellectual disability and is not eligible for execution. In order to avoid a miscarriage of justice, this Court must grant the application.

MR PYE IS INTELLECTUALLY DISABLED AND HIS EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

This Court in *Atkins* held that the execution of intellectually disabled persons violates the Eighth and Fourteenth Amendments but left it to the individual states to develop procedures for adjudicating which capital defendants were exempted. *Atkins*, 536 U.S. at 317.

In Georgia, the definition of intellectual disability is 1) significantly subaverage intellectual functioning, 2) resulting in or associated with impairments in adaptive behavior, and 3) manifestation of this impairment during the developmental period." *Stripling v. State*, 401 S.E.2d 500, 504 (1991). That definition is virtually identical to that in *Atkins*, which recognized the then-current defining manuals of the American Association on Mental Retardation ("AAMR,"), now the American

Association on Intellectual and Developmental Disabilities ("AAIDD")[7] and the American Psychiatric Association.[8] *Atkins* at n.3. With the exception that the developmental period of criterion 3 has increased from 18 to 22 years old, that definition of intellectual disability has not changed. That revision does not impact this case.

As noted, with IQ scores of 68 and 70, it was and remains undisputed that Mr. Pye meets the first criterion.[9] There is likewise no dispute that Mr. Pye's adaptive deficits arose in the developmental period. *See infra* at 32. The only controversy in

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[7] The lower court's 2012 order references "the most recent publications of the AAMR" which included the 2002 10th edition of the AAMR diagnostic manual, (Mental Retardation: Definition, Classification and Systems of Supports), accompanied by the 2007 User's Guide to that edition. In 2012, AAIDD published an 11th Edition of its handbook and accompanying User's Guide. The most current editions of defining manuals include the American Association on Intellectual and Developmental Disabilities (formerly American Association on Mental Retardation) (12th ed. 2021)("AAIDD-12").

[8] The American Psychiatric Association publishes the *Diagnostic and Statistical Manual of Mental Disorders,* currently in its Fifth edition (5th ed. 2013)("DSM-V"). In 2012 when Mr Pye's case was decided, the fourth edition (4th ed. Text rev'n 2000)("DSM-IV-TR") was in use.

[9] There are no other IQ scores in this case. Significantly subaverage intellectual functioning is defined as a full scale IQ score of "about 70 or below" on a standardized, individually administered intelligence test. *See* DSM-IV-TR. There are no scores above 70. The State's expert, Dr. King, administered a Wechsler Adult Intelligence Scale – Third Edition ("WAIS-III") to Mr. Pye in 2007, resulting in a full-scale IQ score of 68. Appendix 4. This was consistent with a full-scale IQ of 70 from the WAIS-III administered in 2001 by defense expert Dr. Toomer. Appendix 5. There is no question that Pye meets the first prong, nor has the State ever disputed this fact.

this case centers on the second criterion, significantly subaverage adaptive functioning.

A. This Court's Law on Intellectual Disability Since 2012

Since the lower court initially considered Mr. Pye's *Atkins* claim, this Court has given additional direction on how courts must assess claims of intellectual disability. In *Hall v. Florida* in 2014, this Court made clear that states are not free to ignore the diagnostic practices and definitions used by the medical and psychiatric community, particularly those articulated by national authorities on intellectual disability such as the AAIDD, which were part of the underlying "fundamental premise" of *Atkins*. *See, e.g.*, *Hall*, 572 U.S. at 721 (relying on clinical studies and the psychiatric and psychological professions in determining whether Florida's 70 IQ cutoff for intellectual disability violates the Eighth Amendment).

In *Hall*, this Court explained:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. *Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.... In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions*.

Id. (emphasis supplied). The Court added that states "must recognize" and may not ignore accepted clinical approaches to determining intellectual disability. *Id* at 723. Under *Atkins*, assessments for intellectual disability must be "informed by the medical community's diagnostic framework," *id*. at 721, as clinical definitions of

intellectual disability are "a fundamental premise" of the *Atkins* analysis, *id.* at 702. 1999.

In 2017, in *Moore v. Texas*, this Court again made clear that any intellectual disability evidence that is inconsistent with the standards of the medical community undermines the mandate of Atkins. "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Moore*, 581 U.S. at 5 (citing *Hall*, 572 U.S. at 721).[10] *Moore* holds that states have some flexibility but not unfettered discretion in enforcing Atkins' holding, and the medical community's current standards, "[r]eflecting improved understanding over time," constrain a state's leeway in this area. *Id*. at 13.

In *Moore*, the Court rejected factors used by Texas to assess the second criterion of an intellectual disability diagnosis: adaptive functioning deficits. *Moore*, 581 U.S. at 9-10. These so-called "*Briseno*" factors,[11] many of which relied on misconceptions about intellectual disability, were "not aligned with the medical community's information," and "create[e] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 17 (citing *Hall*, 572 U.S. at ___,134 S. Ct. at 1990) "Accordingly, they may not be used, as the [Texas court] used them, to restrict qualification of an individual as intellectually disabled." *Id*. Many of these rejected factors are identical or nearly so to the considerations relied upon by

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[10] The *Moore* majority made clear that courts simply may not "diminish the force of the medical community's consensus" by crediting an unqualified opinion, as happened here. 581 U.S. at 31. *See infra* at 33-34.

[11]The "*Briseno* factors" were the legislatively-formulated factors applied by the Texas courts and struck down as an unacceptable "invention" by this Court in *Moore*.

Respondent's expert in Mr. Pye's case to conclude that Mr. Pye does not exhibit significant deficits in adaptive behavior. *See infra* at 24.

B. The State's intellectual disability evidence in Mr. Pye's case conflicts with the standards of the medical community and this Court's law

Dr. James Patton is a national leader in the field of intellectual disability. He holds master's and doctoral degrees from the University of Virginia in Special Education/Disability, has taught in higher education since 1977, and has 50 years of experience working in the field of intellectual disability. He has served as a special education teacher, consultant, researcher, author, and professor in the field of disability, with a focus on intellectual disability. In addition to numerous publications on the topic of intellectual disability, he is the coauthor of the Adaptive Behavior Diagnostic Scale (Pearson, Patton, and Mruzek, 2016), a commercially published instrument developed to assist in diagnosing intellectual disability which is recognized by the AAIDD as a valid and reliable standardized measure. Dr. Patton has been a special education teacher and diagnostician and has first-hand knowledge of how characteristics associated with intellectual disability manifest during everyday situations. His professional expertise in intellectual disability is unassailable.[12]

Dr. Patton reviewed the evidence in Mr. Pye's case. His report is appended hereto and excerpted below. Specifically, he examined and performed a comparison of the adaptive functioning assessment methodology and findings of the defense expert on

[12] Appendix 1, report of James Patton, Ed.D.

adaptive functioning, Dr. Victoria Swanson,[13] and the state's expert, Dr. Glen King.[14]

Dr. Patton's examination resulted in two major conclusions. First, he concluded that even by Dr. King's own flawed administration of a standardized adaptive behavior measure, Mr. Pye's score nevertheless qualified him for a diagnosis of intellectual disability. Additionally, Dr. Patton examined many of Dr. King's suppositions about what persons with mild intellectual disability can do in terms of adaptive functioning. He provided data from robust, peer-reviewed clinical studies demonstrating what intellectually disabled persons actually can do.

C. Mr. Pye's Adaptive Functioning Deficits

Adaptive functioning, also referred to as adaptive behavior, "refers to how effectively individuals cope with common life demands."[15] According to Dr. Patton:

> Deficits in adaptive functioning exist when a convergence of information obtained from a variety of sources and settings indicates that the subject's typical adaptive functioning differs clearly and appreciably from the standards of personal independence expected

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[13] Dr. Swanson was the sole expert in the proceedings with the requisite training and expertise in the field of intellectual disability. Her career and daily clinical practice were focused entirely on intellectual disability. and her specialty was in evaluating adaptive behavior. *See* Appendix 3.

[14] Dr. King was not a "medical expert in determining intellectual disability," *Hall* 572 U.S. at 710. At the time of his evaluation and testimony in this case, he spent a majority of his time performing contract evaluations for the Alabama Vocational Rehabilitation Services and the Social Security Administration. Appendix 5. In these evaluations, Dr. King did not do adaptive behavior assessments, but administered an IQ test only, a relatively objective measure.

[15] *See* DSM-V.

> of a person of the same age, sociocultural background, and community setting.[16]

The medical community divides the types of adaptive functioning into three broad domains: conceptual, social, and practical. [17] To meet the definition of intellectual disability, an individual need only have significantly subaverage adaptive functioning in one of the three domains. Significantly subaverage means at least two standard deviations below the mean. Scores are reported as standard or composite scores, which have a mean of 100 and a standard deviation of 15. As with IQ scores, a score of approximately 70 is two standard deviations below the mean which satisfies the requirement of significant deficits in adaptive functioning.[18]

In addition to evidence such as "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances," *Hall,* 572 U.S. at 712, adaptive behavior is also measured by personal interviews with persons who have knowledge of the adaptive functioning of the individual, and results on formal assessment scales such as the Vineland Adaptive Behavior Scales, Second Edition ("Vineland-II") or the Adaptive Behavioral Assessment Scale, Second Edition ("ABAS-II").As noted by Dr. Patton regarding these formal assessment scales, "[t[he form instrument is completed by a third party – i.e., a person or persons who are credible, unbiased, and realistic about how the client's

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[16] Appendix 1, Patton report.

[17] The conceptual domain is made up of skill areas including communication, functional academics, self-direction, health and safety. The social domain includes social skills, leisure, gullibility and naivete. The practical domain includes self-care, home living, community use and work.

[18] Appendix 1, Patton report.

dealt with/deals with the demands of everyday life on a regular basis. It is not advisable to have the client complete an instrument on him/her/their selves." Appendix 1 at 5.

Further,

> typical adaptive behavior assessment is a multiphase process that begins with a review of a social history of the individual followed by a detailed examination of school and other pertinent records and documents. As mentioned, the assessment also includes meeting with the individual on who the adaptive assessment is being conducted. Face-to-face interviews with all key respondents who were able to observe the individual when he was growing up are required as well. With some of these respondents, a second meeting for the purpose of administering a formal, standardized assessment of adaptive behavior is needed.

Appendix 1 at 5.

In Mr. Pye's case, following AAIDD Guidelines that clinicians use multiple informants and multiple contexts in assessing adaptive functioning, Dr. Swanson administered the Vineland-II scales with Mr. Pye's siblings Pamela Bland and Ricky Pye. She also chose to administer a formal assessment to Mr. Pye's mother, Lolla. In contrast, Dr. King measured Pye's adaptive functioning skills by administering the ABAS-II directly to Pye and having him report on his own abilities.

1. Dr. Patton analyzed the assessment methods used by Drs. Swanson and King in Mr. Pye's case.

Dr. Patton compared in detail the assessment methods utilized by both Dr. Swanson and Dr. King, see Table 1, Appendix 1 at 6-7, and found that there were clear differences in the methodology used by each. For instance, Dr. King relied on

just three sources of information: records, "one interview (with Mr. Pye) and the administration of a formal instrument (ABAS-2) to Mr. Pye." He concluded that Dr. King's assessment is not comprehensive. More importantly, it had four specific clinical shortcomings. As Dr. Patton wrote:

- The assessment does not focus on adaptive functioning during the developmental period rather the emphasis is on adulthood (i.e., time of the interview in 2007). While examining adaptive functioning after the developmental period is justifiable, attention to adaptive functioning during the developmental period is essential. Dr. King's report is silent on this issue.

- While Dr. King did report that records were provided to him, only one person was interviewed – Mr. Pye. Several individuals who had information about his functioning during the developmental period were available to interview. The assessment of adaptive functioning requires multiple sources of information as even the *ABAS-2* manual recommends: "Whenever possible, professional users should obtain ratings from multiple respondents." p. 19.

- The formal instrument that was used was done so using Mr. Pye as the source of the information. … it is important to point out that conducting the formal assessment using "self-report" is not supported in practice. While the *ABAS-2* does allow for obtaining information via self-report, using this technique is contraindicated given the fact that individuals with ID are prone to overstate how well they can do things – this is referred to as masking. The AAIDD in their most recent manual states that … "Self-report may be susceptible to biased responding."

- Qualitative data regarding Mr. Pye's adaptive functioning that was provided in Dr. King's report …perpetuate[d] many misconceptions about mild ID.

In comparison, Dr. Patton found Dr. Swanson's assessment to be "thorough and detailed," having relied on the administration of three formal instruments to three different reporters as well as records and interviews. He noted that Dr. Swanson followed clinical practices:

- The assessment included data from both the developmental period and adulthood years.

- Dr. Swanson did conduct face-to-face interviews with, not only Mr. Pye, but also three of his family members. These interviews generated detailed examples of adaptive functioning problems that Mr. Pye and his relatives reported, as documented in Dr. Swanson's report (pp. 31-42).

- Dr. Swanson incorporated adaptive information obtained from the affidavits of individuals (e.g., teachers) who knew Mr. Pye when he was growing up.

- Dr. Swanson performed an exhaustive review of Mr. Pye's academic records, reviewing grades, teacher notes, academic test data, and documenting his participation in Title I services from grades five to eight. …

- When meeting with Mr. Pye, Dr. Swanson used several "academic and adaptive probes." These probes required Mr. Pye to perform certain tasks that are associated with adaptive functioning using various prompts. The activities that Mr. Pye was asked to perform included manipulating items (e.g., simulated phone pad) or pictures (e.g., pictorial sequence for cooking). The probes included performance in the following areas: functional academics; functional living; work; telephone usage; traffic signs; cooking; time skills; money/purchasing skills; health/safety; leisure.

- Dr. Swanson administered a formal adaptive functioning instrument to three family members (mother, sister, and brother). … the use of retrospective assessment comes with cautions; however, this technique is an accepted methodological approach to obtaining reliable information.

Appendix 1 at 10. Dr. Patton also noted Dr. Swanson's conclusion that her findings were supported by Dr. Eisenstein's neuropsychological testing. [19]

2. Dr. King's adaptive functioning assessment qualifies Mr. Pye as intellectually disabled

Dr. Patton compared the formal adaptive assessment administered by both Dr. Swanson and Dr. King. He found that each of the formal adaptive functioning assessments showed significant deficits in adaptive functioning. He concluded that:

> The results from the four formal assessments conducted in this case all indicate that Mr. Pye demonstrated significant deficits in adaptive functioning. The results from the third-party assessments conducted by Dr. Swanson clearly indicate significant deficits in multiple domains. The assessment conducted by Dr. King also meets the criterion of significant deficit in the social domain. All of the formal adaptive functioning instruments administered in this case qualify Mr. Pye as a person with ID.

Table 2 in Dr. Patton's report plainly shows this:

[19] Dr. Eisenstein performed a neuropsychological assessment of Mr. Pye. His testing found significant brain damage. *See* Appendix 7.

Table 2
Results of Formal Adaptive Functioning Assessment

Key Information	Lolla Pye	Pamela Bland	Ricky Pye	Willie Pye
Instrument Used	*ABAS-2*	*Vineland-II*	*Vineland-II*	*ABAS-2*
Examiner	Swanson	Swanson	Swanson	King
Focal Age (Norms)	6-9 y/o	16 y/o	25 y/o	42 y/o
Conceptual/ Communications	51*	63*	40*	90
Social/Socialization	--	67*	54*	**75**
Practical/Daily Living	--	61*	59*	85
Adaptive Behavior Composite/General Adaptive Composite	--	62*	51*	85

Significantly, Dr. Patton observes that even Dr. King's own administration of the ABAS-II – the one given to Mr. Pye to report his own behavior – supported a diagnosis of intellectual disability. But Dr. King obscured that fact by failing to report the SEM, which is inconsistent with clinical practices:

> Even utilizing the non-recommended practice of self-report in cases where ID is suspected or is being investigated, Dr. King obtained a composite score of 75 in the social domain. According to the "Practice Guidelines Regarding the Assessment of Adaptive Behavior" in the AAIDD manual (2021), clinicians should "Interpret the person's adaptive behavior score(s) considering a 95% confidence interval based on the standard error of measurement for the specific, individually administered test used." Furthermore, The ABAS-2 has a 95% confidence interval of +/- 6 points for the Social Adaptive Domain for ages 40-45 on the Adult Form – Self-Report norms (ABAS manual at p.255). The manual clearly states that

> confidence intervals should be reported when interpreting results (ABAS 2 manual at p. 34).
>
> As noted, the standard error of measurement for the *ABAS-2* (adult form/self-report) using age norms for ages 40-49 is +/- 6 points. In other words, the confidence interval for the social domain score in which the true score resides is from 69 to 81. Neither on the test protocol or in his report does Dr. King provide the confidence interval for this score of 75. If he had done so, he would need to concede the Mr. Pye's adaptive score for social domain could be 69.
>
> **Pursuant to the professional definitions of intellectual disability, to obtain a qualifying score for diagnosis as a person with ID, a person needs to obtain significantly subaverage scores (meaning, a score approximately two standard deviations below the mean) in one of three domains (one of: social, practical, conceptual). The score of 75 (CI: 69-81) obtained by Dr. King is such a qualifying score.**

Appendix 1 at 11-12.

Dr. King's testimony before the habeas court in 2012 never revealed that he obtained an adaptive functioning score that qualified Mr. Pye for a diagnosis of intellectual disability. His failure to do so subverted the clear directive of the medical community, and both the practice guidelines of the AAIDD and the test manual itself.[20]

In addition to the failure to apply the SEM, Dr. Patton observed additional problems with Dr. King's scoring of Mr. Pye's social domain:

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[20] *See* AAIDD manual at 13 (10th ed.2007); ABAS-II test manual at 34 (2003).

> The score Dr. King obtained on the social domain also appears to over-state the actual score. Dr. King scored several items himself, based on his brief interaction with Mr. Pye as an adult in custody, and not based on Mr. Pye's typical behavior or Mr. Pye's own self-report. Thus, Dr. King scored Mr. Pye as always refraining from saying something that might embarrass or hurt others based solely on Mr. Pye's apparent reluctance to tell Dr. King historical information about Mr. Pye's mother. Mr. Pye self-reported that he did this sometimes (a score of 2) but Dr. King decided to score this as "always" (a score of 3) based on a single example; that is not what this item is designed to elicit. …
>
> Similarly, Dr. King scored Mr. Pye with a 3 on an item which asks whether Mr. Pye typically offers to lend personal belongings (clothes or tools) to others. That score means that Mr. Pye *always* offers to lend personal items to others. Dr. King based his score on a single example of Mr. Pye telling him that he offered to let someone else use a golf cart that he used at a job. Again, this is neither a reflection of typical behavior nor adequately reflects an answer to the question.
>
> There are additional such examples in other domains. Importantly, each of these examples of scoring problems increased the raw score for Mr. Pye. In no instance that I was able to identify did the errors under-score Mr. Pye. This is a type of systematic bias which raises questions about the reliability of Dr. King's data and therefore his opinion.

Appendix 1 at 12.

Dr. King's failure to acknowledge that his ABAS-II social domain score was not a precise score was at best incomplete. At worst, it was purposefully misleading. Either way, it "deviated from prevailing clinical standards," *Moore*, 581 U.S. at 15.

Proper consideration of the SEM means Mr. Pye's score for that domain ranges from 69 to 81, a score that puts Mr. Pye in the range of intellectual disability. Aside

from the unsupported use of the self-report, the scoring problems pointed out by Dr. Patton are convincing evidence that the actual social domain score is lower than 75.

D. Incorrect Reliance on Misconceptions and Stereotypes

In addition to the problems with the methodology itself and the scoring, Dr. King also relied on scientifically disproved notions of what mildly intellectually disabled adults can do, removing the other main support for his opinion relied upon by the lower court in 2012.[21]

As pointed out by Dr. Patton, "[m]any misconceptions are present in reports and testimony at the State Habeas proceedings. Misconceptions about people with mild ID are common yet disproven by decades of research."

Dr. Patton addressed the misconceptions in a table, "as a vehicle for explaining the reality associated with misconceptions in this case. I present only a few of the quantitative studies available on these misconceptions. The intent of the table is to clarify misconceptions about adaptive functioning demonstrated by persons with mild intellectual disability."

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[21] The conclusion in the lower court's order, authored by Respondent, that this testimony is consistent with *Hall* and *Moore* when it is directly and specifically contradicted by the *Moore* court, is patently wrong.

Table 3
Misconceptions in this Case

Misconception	Research Facts	Source
Got a driver's license	Eight years after high school, 39% of young adults with ID had a driver's license or learner's permit, and 9% of them held jobs in transportation and material moving.	2011 NLTS2 The Post-High School - 8 years out p64, 136
Worked in a job	As adults, 8 years after high school, 76% of those with ID had been employed and 39% were currently employed. At age 56, 80% of males and 77% of females with ID were usually employed. Of this same group, 65% were totally self-supporting and another 24% were partially self-supporting. Most were working unskilled jobs (44%) and semi-skilled jobs (27%), and 28% were working skilled or professional job.	2011 NLTS2 The Post-High School - 8 years out, Table 19 p55 Baller
Literacy abilities	At age 43, 23% of those with mild ID had reading problems (meaning, 77% did not).	Hall NHSD Hall NHSD

	At age 43, 46% of those with mild ID had writing problems (meaning, 54% did not). On the passage comprehension section of the Woodcock-Johnson Tests, approximately 27% of students with ID perform better than two standard deviations below mean; 2.6% perform between mean and one standard deviation below mean; and 0.6% perform better than mean. This indicates literacy abilities for nearly a third of people with ID is higher, for some significantly higher, than general marker of two standard deviations below the mean.	NLTS2 2006 Academic Achievement, Figure 2, p.21
Played basketball and went to movies	Young adults with ID spend leisure time: visiting friends (31%), visiting family (26%), reading for pleasure (13%), driving around (3%), talking on the phone (21%), playing computer games (25%), watching TV (60%), playing sports (29%), listening to music (44%).	NLTS2 2005 After School: A first Look, Exhibit 7-5
Had friends	At age 43, 53% of people with mild ID had six or more friends, and 35% saw friends or relatives six or more times a week.	Hall NHSD
Could handle money	As young adults, 8 years after high school, 42% of people with ID had a bank account, 29% had a checking account, and 19% had a credit card.	NLTS2 2011, Post-High School Outcomes, Table 71, p123
Provided financial support to girlfriend (caregiver role)	About half of people with ID were able to make appropriate decisions on vignettes designed to assess financial decision-making and widely varying ability was observed.	Suto, Clare, Holland and Watson 2005
Offense facts show planning and leadership (used ski	On a measure of temporal planning (which required the subject to plan the order of a series of tasks to	Palmqvist et al 2020

mask, gloves and alias)	accomplish a goal), youth with ID performed similar to mental age matched typically developing youth. Youth with ID were less able to make use of life experience or apply previous experience to the planning task.	
Street savvy (criminal conduct)	Youth with IQ mean scores of 71 (IQ scores ranged from 60 to 83, including both ID and borderline scores, recruited from special education schools) were more likely to take risks on a computerized risk-taking test when influenced to do so by peers, compared to non-ID youth with behavioral disorders.	Bexkens 2019
Filed grievances in prison	70% of youth with ID at age 22 had no verbal communication disorder. 16.5% of students with ID ask for what they need to succeed in class very well.	22 Years NLTS2 2003, Achievements of Youth with Disabilities, Exhibit 6-11, p.6-12
Knows address, phone numbers and able to make changes to visitor list	35% of people with ID who had a cell phone report using it every day, and 19% say they remember other people's phone numbers in their head.	Bryen et al 2007

As noted by Dr. Patton, "Some of these [attributions] are disputed and the evidence differs by self-report compared to collateral reports. For instance, Mr. Pye told Dr. King that he could make change for fifty-dollar bills when selling drugs, but Dr. Swanson found him unable to perform money tasks or count change when she assessed him in person." And:

- Similarly, Dr. King suggested that Mr. Pye's prison letters and grievances were evidence of sophisticated language use. In contrast, repeated testing data that showed Mr. Pye had less than 6th grade academic abilities. (Dr. King acknowledged reading the ABAS-2 questions to Mr. Pye because his testing battery had shown Mr. Pye could not read and comprehend at a level sufficient to read and understand the questions himself.) Dr. Swanson testified that Mr. Pye's spontaneous writing differed markedly from the language in the grievances, explaining that Mr. Pye told her he worked for many hours on the grievances with a dictionary, writing and re-writing each page.

- A third area of disagreement was whether Mr. Pye's self-report of earning $1,200 selling crack cocaine per week was accurate. Dr. Swanson's interview with collateral witnesses indicated this was an overstatement given his living conditions and lack of resources available at that time. This reflects the risks of relying on self-report without collateral witness confirmation when interviewing people with ID. Such overstatements are often referred to as using a "cloak of competence" utilized by a person with ID to make himself appear higher functioning and more successful.

- Fourth, Dr. King's reliance on criminal conduct as an adaptive strength runs counter to the medical and scientific guidelines as articulated by the AAIDD and DSM. Criminal conduct, especially repeated criminal conduct, reflects an adaptive deficit and should not be characterized as a strength ("street savvy" or "street smart"). The concepts used by Dr. King lack scientific merit and have no scientifically recognized definition - meaning that there is no measure or accepted definition of "street savvy" or "street smart." Instead, those are terms that reflect the personal biases of the evaluator and are likely to introduce bias into the assessment.

Appendix 1 at 15-16.

When asked generally about adaptive functioning for people with mild ID, Dr. King inaccurately stated it was highly unlikely someone with ID could be in the

military, have a family, have a job, or read and write. He continued that: "We're talking about people being able to take care of themselves, dress themselves, feed themselves, pay their bills, earn money to support themselves. When you're able to do that, you don't meet the requirements for being mentally retarded in terms of adaptive functioning. [King state habeas hearing testimony Document 14-44, 9/11/13, p 82]."[22]

This reflects a fundamental misunderstanding about mild ID and what someone with ID can do in terms of adaptive functioning. Appendix 1 at 15-16.

This Court in *Moore v. Texas* addressed many of these same misconceptions. For example, "[i]n concluding that Moore did not suffer significant adaptive deficits," the Texas court relied on perceived adaptive strengths, including that Moore "lived on the streets, mowed lawns, and played pool for money." 581 U.S. at 15. He also "commit[ted] the crime in a sophisticated way," fled, testified and represented himself at trial, and developed skills in prison. *Id.* at 11. According to this Court, this reliance by the lower court wrongly "overemphasized Moore's perceived adaptive strengths," *id.* at 15, while "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits. E.g.,* AAIDD-11 at 47 ('significant

[22] HT 436.

limitations in conceptual, social or practical skills [are] not outweighed by the potential strengths in some adaptive skills'.) *Id*. (emphasis and citations in original).

1. "Wholly non-clinical" Factors Relied on By Dr. King

In addition to the misconceptions enumerated by Dr. Patton, the *Moore* Court singled out and rejected what it called "wholly nonclinical *Briseno* factors," 137 S.Ct. at 1053.[23] Many of these parallel other behaviors relied on by Dr. King and adopted by the lower court. These factors, "an invention" that is "untied to any acknowledged source," act "by design and in operation …[to] 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Moore*, 581 U.S. at 17(quoting *Hall*, 572 U.S. at __, 134 S.Ct. at 1990).

For example, Dr. King and the lower court found that it was significant that petitioner's family did not think he was mentally retarded despite having one son who was diagnosed as mentally retarded and another who received SSI benefits for mental illness. App. 2 at 23.[24] Yet one of the discredited factors was whether "those persons who knew the person best during the developmental stage – family, friends,

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[23] *See* n.11, *supra*.

[24] On the other hand, Dr. King ignored the testimony of Mr. Pye's teachers, one of whom testified that she observed Mr. Pye's performance to be consistent with children who are mentally retarded, and another who testified that he was barely able to pass Title I coursework at a grade level four years below his age-appropriate grade level. *See* Appendix 8, testimony of Melissa Durrett.

teachers, employers, authorities – [thought] he was mentally retarded at that time…" *Ex Parte Briseno,* 135 S.W.3d 1, 8 (CCA Tex. 2004). The *Moore* Court dismissed these lay perceptions of intellectual disability as "stereotypes of the intellectually disabled," which "much more than medical and clinical appraisals, should spark skepticism." *Moore*, 581 U.S. at 18 (citing AAIDD-11 User's Guide 25-27; Brief for AAIDD et al. as Amici Curiae 9-14 and nn 11-15).

Another of the factors that the Court found to be inconsistent with clinical standards was "[d]oes he respond coherently, rationally, and on-point to oral or written questions or do his responses wander from subject to subject?" The lower court in 2012 relied on Dr. King's nearly identical finding: "Petitioner answered questions as they were asked; did not go off on tangents; did not state irrelevant things; and demonstrated no evidence for any psychosis or strange thinking patterns." Appendix 2 at 23. And in still another instance, the *Moore* court rejected the notion that the facts of the crime were relevant to the adaptive functioning prong, i.e "did the commission of that offense require forethought, planning, and complex execution of purpose?" The habeas court credited similar testimony when it wrote approvingly of Dr. King's testimony that the facts of the crime were "indicative of predetermination, premeditation, and goal directedness with an attempt to avoid apprehension and detection, which reflect adaptive behaviors," App. 2 at 29. Again,

this is not relevant to the question of adaptive functioning, as noted by Dr. Patton and by the United States Supreme Court in *Moore.*

In addressing the mistaken reliance on strengths rather than deficits, intellectual disability experts submitted an amicus brief in *Moore* and noted that it is not just laypersons, but untrained mental health professionals, who rely on stereotypes regarding intellectual disability. "These strengths may confound a layperson or a professional with limited clinical experience with individuals who have mild mental retardation. These laypersons may erroneously interpret these pockets of strengths and skills as inconsistent with mental retardation because of their misconceptions regarding what someone with mental retardation can or cannot do." AAIDD Brief, 2016 WL 4151451 at *10 (citing Marc J. Tasse, Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases, 16 Applied Neuropsychology 114, 121 (2009). Amici further noted that "[s]uch preconceived assumptions about what it means for someone to have intellectual disability often contrast sharply with the understanding of professionals and clinicians in the field." *Id.*

Dr. King is not a "medical expert in determining intellectual disability…" *Hall*, 572 U.S. at 710. At the time of Mr. Pye's proceedings before the habeas court, he had done no research in the field, never published an article or paper on intellectual disability, never attended a workshop or conference specifically on intellectual

disability, and did not provide services to the intellectually disabled. App. 6. In contrast, Dr. Swanson was a lifelong professional and clinician in the field of intellectual disability.[25]

E. There is No Question Mr. Pye Suffers Adaptive Functioning Deficits that Qualify Him for an Intellectual Disability Diagnosis

The evidence in the proceedings in the lower court, in accord with the consensus of the medical community emphasized in *Atkins*, overwhelmingly shows Mr. Pye suffers from significantly subaverage adaptive functioning, the second criterion for intellectual disability.

> In my professional opinion, based on my review of the materials provided to me to review, I believe that Mr. Pye displayed significant deficits in adaptive functioning during and after the developmental period, and therefore meets the requirements of the second component of the professional definitions of intellectual disability.

Dr. Patton based his opinion on:

- The thorough compilation of information (review of materials, interviews, previous reports of experts, formal assessment, and informal academic/adaptive probes) generated by Dr. Swanson regarding Mr. Pye's problems in adaptive functioning.

- The fact that Dr. King's formal assessment corroborates a finding of significant deficits in the social domain when the standard error of measurement of the ABAS-2 (Adult Form/Self-Report) for ages 40-49

[25] As noted, Mr. Pye's expert, Dr. Swanson practiced throughout her career entirely in the field of intellectual disability. App. 3. She is an expert in evaluating adaptive behavior. She was a member of the national and local chapters of the AAIDD, the definitive source for diagnostic and classification information concerning intellectual disability, and a member of the National Association of Qualified Mental Retardation Professionals.

is recognized and applied to this case, *as professional standards of practice indicate.*

- The recognition of a host of misconceptions about adaptive functioning exist in this case, as highlighted in the report of Dr. King.

Appendix 1 at 17 (emphasis added).

Because Mr. Pye meets both the intellectual functioning and adaptive functioning criteria, only the third criterion, age of onset, remains.[26]

F. The Third Criterion: Onset in the Developmental Age

Intellectual disability must also manifest during the developmental period, i.e. before the age of 22.[27] Dr. King did not challenge that Mr. Pye's "intellectual difficulties" had manifested during the relevant period. "I think that Mr. Pye has always had intellectual difficulties, and certainly that has been true since he was a young child." HT 409. Dr. Swanson expressly addressed it and found that Mr. Pye met the third criteria. HT 178. The record evidence, including unrefuted evidence from Mr. Pye's teachers, school records, and achievement tests, fully supports this final prong of the definition.

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[26] In its 2012 order, the lower court found the age of onset prong was not met because Mr. Pye could not show an IQ test score from his developmental period. App. 2 at 39. There is no such requirement.

[27] The age of onset for prong three was previously age 18, but in 2021 was revised to age 22. The revision has no relevance to Mr. Pye's case.

This Court's decisions in *Hall* and *Moore* mandate that this Court review the lower court's determination that Mr. Pye is not intellectually disabled, as does Dr. Patton's report. This Court "must recognize" the clinical guidance of the AAIDD in identifying stereotypes and misconceptions which informed the lower court's decision and give effect to the now unrefuted clinical opinions that Mr. Pye is intellectually disabled. This claim has "arguable merit"[28] and should proceed to a full appeal. To do otherwise will mean the execution of an intellectually disabled person, and an egregious miscarriage of justice, in violation of the Eighth and Fourteenth Amendments, *Fleming, Atkins, Hall* and *Moore*.

CLAIM II

Georgia's Reasonable Doubt Standard for Determining Intellectual Disability Violates *Atkins* and the Eighth and Fourteenth Amendments. This Court Must Resolve the issue.

A. Georgia's limitation of *Atkins* protection to those with disability "significant enough to be provable beyond a reasonable doubt" violates the Eighth Amendment.

The percentage of defendants with intellectual disability arbitrarily excluded from the *Atkins* category by the bright-line IQ cutoff invalidated in Florida or by the non-clinical *Briseno* factors invalidated in Texas pales in comparison to the percentage excluded by Georgia's decision to extend Eighth Amendment protection only to those defendants with "deficiencies [that] are significant enough to be provable beyond a reasonable doubt." *Hill*, 587 S.E. 2d at 622. "The burden of proof imposed on Georgia's mentally retarded defendants -- beyond a reasonable doubt --

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[28] Supreme Court Rule 36: the certificate "will be issued where there is arguable merit."

is the most stringent in our criminal justice system, and defendants who seek to satisfy this burden in order to avoid the death penalty bear an enormous risk of erroneous decisions." *Id*. at 628-29 (Sears, J., dissenting). Indeed, as Justice Bethel recently explained in his *Young* dissent:

> Under Georgia's standard, a meaningful portion of intellectually disabled offenders are effectively excluded from the constitutional protection recognized in *Atkins*. *See Humphrey*, 662 F.3d at 1365-1366 (Barkett, J., dissenting) (noting that the State does not "have unfettered discretion to establish procedures that through their natural operation will deprive the vast majority of [intellectually disabled] offenders of their Eighth Amendment right not to be executed"). The United States Constitution protects *all* intellectually disabled offenders from execution under *Atkins*, and Georgia's standard "effectively limits the constitutional right protected in *Atkins* to only those who [suffer from severe or profound intellectual disability]" such that their disability is not subject to any real dispute or doubt. Id. at 1365-1377. But as the Supreme Court has determined, the Eighth and Fourteenth Amendments must afford protection to an offender whose disability is less obvious or profound. *See Moore*, 137 S. Ct. at 1051 (IV)(C)(1).

800 S.E. 2d at 797.

There is no question that the concerns stated by Justices Bethel and Sears are real. "Indeed, in the last 30 years not a single capital defendant in Georgia has been able to establish intellectual disability when the matter has been disputed." *Raulerson v. Warden*, 928 F.3d 987, 1009 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part), *cert. denied*, 140 S.Ct. 2568 (2020). As the Sudeall study confirmed, not one capital defendant in Georgia has successfully obtained a jury verdict of GBMR in a case of intentional murder in the nearly thirty-year history of the exemption." *Empirical Assessment of Reasonable Doubt*, 33 Ga. St. U. L. Rev. at 582. "By comparison, a national study found that, from 2002 to 2013, 55% of

capital defendants succeeded in proving their *Atkins* intellectual disability claims." *Raulerson*, 928 F.3d at 1018.[29]

This extreme discrepancy between a baseline success rate of 55% and a success rate of 0% is a direct and predictable consequence of the "insurmountable hurdle" posed by Georgia's beyond a reasonable doubt standard, and it is accounted for by the fact that "[i]ntellectual disability is an inherently imprecise and partially subjective diagnosis." *Raulerson*, 928 F.3d at 1015. "Requiring proof beyond a reasonable doubt, *when applied to the highly subjective determination of mental retardation*, eviscerates the Eighth Amendment constitutional right of all mentally retarded offenders not to be executed, contrary to *Atkins v. Virginia[.]*" *Hill*, 662 F.3d at 1365 (Barkett, J., dissenting) (emphasis supplied). "Given that intellectual disability disputes will always involve conflicting expert testimony, there will always be a basis for rejecting an intellectual disability claim." *Raulerson*, 928 F.3d at 1016 (Jordan, J., concurring in part and dissenting in part). As Judge Tjoflat ably outlined in his concurrence with the *en banc* Eleventh Circuit in *Hill v. Humphrey*, "[t]his swearing match [between conflicting, and equally qualified, experts] could easily—if not always—create reasonable doubt that the defendant is not mentally retarded." *Hill*, 662 F.3d at 1364.

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court explained why questions of nuanced diagnoses should not be subject to the onerous reasonable-doubt standard typically reserved for "specific, knowable facts":

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[29] Citing John H. Blume, et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 397 (2014) (reviewing cases from 29 states.

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician.

Addington, 441 U.S. at 430. More particularly, "[t]he intellectual disability analysis, with its inherent difficulties, renders *Atkins* claims highly susceptible to uncertainty[,]" *Raulerson*, 928 F.3d at 1015 (Jordan, J., dissenting), because of "the highly subjective nature of the inquiry into mental retardation, making it even clearer that the reasonable doubt standard unquestionably will result in the execution of those offenders that *Atkins* protects." *Hill*, 662 F.3d at 1372 (Barkett, J., dissenting).

1. The Georgia standard subverts the clinical criteria undergirding *Atkins.*

One need look no further than the first criterion required for a finding of intellectual disability, significantly subaverage intellectual functioning, to settle the point of the unconstitutionality of Georgia's beyond a reasonable doubt standard. Whereas in Florida the state attempted to exclude every defendant with an obtained IQ score over 70 from the protected *Atkins* category, here, requiring proof beyond a reasonable doubt of intellectual disability effectively excludes any defendant with an obtained score over 65. Because the SEM is plus or minus five points, the State will always be able to argue "reasonable" doubt about whether an obtained score of 66 (or 67, 68, or 69) reflects true functioning above 70 (and therefore is not "significantly subaverage"). *Hall* thus controls the result here: surely if a state may

not exclude defendants with intellectual disability who have an obtained IQ score between 70 and 75, a rule that results in the exclusion of an even wider group of defendants with intellectual disability (those with obtained IQ scores 66 and higher) cannot possibly withstand constitutional scrutiny. *See Hill*, 662 F.3d at 1367 (Barkett, J., dissenting) (explaining that "the use of a standard of proof so high… effectively limits the constitutional right protected in *Atkins* to only those who are severely or profoundly mentally retarded"). No clinician would approve such a scheme.

The second and third criteria are no more impervious to proof beyond a reasonable doubt than the first. Whether a person exhibits "impairments in adaptive behavior" is inherently subjective. Far from clarifying or objectifying the inquiry into intellectual disability, "the requirement that an individual possess adaptive skills impairments . . . further complicates the assessment." *Id.* at 1373 (Barkett, J., dissenting). Beyond the subjectivity inherent in assessing adaptive skills lurk other complications. Because the criteria requires administration of a formal assessment scale, the resulting scores are subject to the same problems with the SEM as are IQ scores for the intellectual functioning criteria. The bottom line is that the process of evaluating "impairments in adaptive behavior" is exceedingly, perhaps uniquely, ill-suited to proof beyond a reasonable doubt.

The third criterion—onset during developmental period —may appear to be less subjective and perhaps thus more amenable to proof beyond a reasonable doubt. But the *retrospective* assessment of whether intellectual and adaptive impairments presented during early (and sometimes distant) years is not. Leading experts concede that "the retrospective nature of most *Atkins* evaluations involves considerable challenges, both for clinicians and for the courts." James W. Ellis et al., *Evaluating*

Intellectual Disability: Clinical Assessments in Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1392 (2018).

For all of these reasons, intellectual disability is "almost never provable beyond a reasonable doubt (at least where contested), and the 'risk' of an erroneous determination resulting in a wrongful execution approaches a near certainty." *Hill*, 662 F.3d at 1371 (Barkett, J., dissenting). By restricting the definition of intellectual disability to only those defendants "whose mental deficiencies are significant enough to be provable beyond a reasonable doubt," Georgia has "effectively limit[ed] the constitutional right protected in *Atkins* to only those who are severely or profoundly [intellectually disabled]." *Id.* at 1367 (citation omitted). Indeed, thirty years of experience with this statute in our courts has confirmed that defendants with mild intellectual disability will, like Pye, *invariably* fail to prove it beyond a reasonable doubt.

The *Young* Court acknowledged that the Supreme Court in *Cooper v. Oklahoma*, 517 U.S. 348, 366-67 (1996), held that requiring a criminal defendant to prove by clear and convincing evidence that he is not mentally competent to stand trial violates due process, because it means that persons who are more likely than not mentally incompetent will be forced to stand trial. But the Court declined to follow *Cooper*, and relied instead on *Leland v. Oregon*, 343 U.S. 790, 798-99 (1952), in which the Supreme Court rejected a due process challenge to a state law requiring a criminal defendant to prove beyond a reasonable doubt that he is not guilty by reason of insanity, a state law defense that the Supreme Court deemed not required by the Constitution.

The Court's reliance on *Leland* as opposed to *Cooper* is flawed. Critical to the Supreme Court's analysis in *Leland* was the fact that it viewed the insanity defense

as solely a matter of state law, *not* constitutionally based. 343 U.S. at 798-99. The state has substantial leeway in how it defines and implements its own state law defense. *Cooper*, however, established that due process applies with substantially more bite when a constitutional right is at stake. *See Cooper*, 517 U.S. at 354; *see also Medina v. California*, 505 U.S. 437, 448-49 (1992) (distinguishing standard for proving incompetence to stand trial from standard for insanity defense at issue in *Leland* because "[the Supreme Court] ha[s] not said that the Constitution requires the States to recognize the insanity defense"). The right not to be executed if intellectually disabled is, like the right in *Cooper*, a constitutional right, not a matter of state law. *Atkins*, 536 U.S. at 321. Accordingly, *Cooper*, not *Leland*, controls.

This Court's contrary analysis is a holdover from a pre-*Atkins* decision, in which the Court distinguished *Cooper* by explaining that claims for exemption from execution on the basis of intellectual disability were not constitutionally founded, but solely a matter of state law. *See Mosher v. State*, 491 S.E.2d 348, 353 (Ga. 1997) (distinguishing *Cooper* because it involved a constitutional right, while the State's sentencing rules regarding persons with "mental retardation" did not). After *Atkins* held that persons with intellectual disability had a constitutional right not to be executed, the adherence to this view is flawed as the essential predicate for that view no longer obtains. *See, e.g.*, *Hill*, 587 S.E.2d at 621.

While the *Young* plurality sought to distance itself from its earlier rationale for upholding the beyond-a-reasonable-doubt standard, *Young*, 860 S.E. 2d at 770, the Court failed to even *address* whether the demanding burden of proof creates an unacceptable risk of executing a person with intellectual disability. This Court's rulings conflict with the Supreme Court's decisions in *Hall* and *Moore* which together establish that states may not implement *Atkins*'s Eighth Amendment

protection in a manner that creates an unacceptable risk of executing persons with intellectual disability. The beyond-a-reasonable-doubt standard does not merely create such a risk; it virtually *guarantees* that Georgia will execute people with intellectual disability.

B. The unconstitutionality of the Georgia standard is exemplified by Mr. Pye's case.

By all clinical and medical standards, Mr. Pye is intellectually disabled. His significantly subaverage intellectual functioning is not at issue, nor is its onset during the developmental period. His adaptive functioning is subaverage by the agreement of both state and defense experts. But a single score by a single expert on a formal adaptive functioning scale, which failed to take into account the SEM, was used to disqualify him as being significantly subaverage, and therefore ineligible for an intellectual disability diagnosis, as did reliance on stereotypical misconceptions of what intellectually disabled persons can and cannot do, which impermissibly disregarded established medical practice. Because he could not prove his intellectual disability beyond a reasonable doubt, his claim failed.

If Mr. Pye does not prevail on his claim now based on the evidence before this Court it will not be because he does not meet the clinical criteria for a diagnosis of intellectual disability but rather because Georgia's standard "diminishe[s] the force of the medical community's consensus," making it impossible for defendants with mild intellectual disability, like him, to succeed. *Moore*, 581 U.S. at 31.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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