No. 24-6798

IN THE

Supreme Court of the United States

KARL DOUGLAS ROBERTS,

Petitioner,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION,

Respondent.

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

BRIEF OF *AMICI CURIAE* THE CORNELL DEATH PENALTY PROJECT AND JUSTICE 360 IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* THE CORNELL DEATH PENALTY PROJECT AND JUSTICE 360 IN SUPPORT OF PETITIONER

INTEREST OF AMICI[1]

The Cornell Death Penalty Project is an undertaking of Cornell Law School, premised on the belief that when the government uses extreme criminal sanctions, it should do so with great care and reflection. The Project conducts empirical research and educates students and attorneys regarding issues related to capital punishment in the United States. Much of the empirical work has been in the area of intellectual disability and the death penalty, and members of this Court have relied upon articles published by faculty associated with the Project in published opinions.

Justice 360 is a South Carolina non-profit organization whose mission is to promote fairness, reliability, and transparency in the criminal justice system, with a focus on individuals facing the death penalty. Justice 360 conducts research and provides training related to the death penalty, including researching and tracking capital cases raising intellectual disability claims, pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and providing training to attorneys handling *Atkins* claims.

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1. No counsel for a party authored this brief, in whole or in part, and no entity or person, other than amici, their members and counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel of record for both parties timely received notice of amici's intent to file this brief.

Amici collectively have extensive expertise in intellectual disability and the intricacies of *Atkins* litigation nationwide.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals concluded that the Arkansas state courts adjudicated the merits of petitioner Karl Roberts's *Atkins* claim at a pretrial omnibus hearing, which occurred before *Atkins* was decided. That proceeding contained none of the standard elements of a typical *Atkins* hearing. At the time of Roberts's trial, Arkansas state courts did not protect people with intellectual disability from wrongful execution, and they continue to fail in this endeavor today.

STATEMENT OF FACTS

In 1999, 31-year-old Karl Roberts was arrested and charged with capital murder. FBI Special Agent Mark Jessie interrogated Roberts and found him to be "not very intelligent," like "a kid that would have been in the slow class in school." App. G71-72.[2] Agent Jessie's impression was accurate. Roberts experienced significant academic difficulties in school, a problem which only grew worse after he was hit by a truck at age twelve, sustaining a traumatic brain injury. App. S253-271. As an adult, he depended heavily on his parents and his wife to assist with daily functioning. Roberts's family members controlled his money, paid his bills, provided him with a weekly allowance, purchased groceries and managed household chores. App. N23-32. His brother helped him obtain a job

2. Citations to the record in this brief correspond to Appellant's Appendices filed with the Eighth Circuit Court of Appeals.

as a carpenter's helper and drove him to work. Although Roberts held this position for six years, his employer never promoted him, finding him to be "pretty limited in the things he could do." Indeed, Roberts was not trusted to perform even simple jobs in the absence of a supervisor, and complex tasks were out of the question. App. G423-425. Socially, he was "a strange bird" who lacked friends, avoided co-workers during free time, "never was in on" jokes made by his peers, and "always kept to himself." G425-426.

At the time of Roberts's trial, federal law permitted the execution of individuals with intellectual disability. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). However, Arkansas had recently enacted a state statute that purported to preclude a death sentence for people with "mental retardation"[3] at the time of the crime. Ark. Code Ann. § 5-4-618 (1993). Among many other pre-trial motions, Roberts's trial counsel filed a half-page "Motion for Hearing to Determine if the State May Seek the Death Penalty," which requested a hearing "to determine whether the defendant suffers from mental retardation." App. B3. On the same day, trial counsel filed a separate motion for a competency hearing.[4] App. B1.

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3. The term "mental retardation" has been replaced by and has the same meaning as "intellectual disability." This brief uses the contemporary term "intellectual disability" throughout, except when quoting historical statutes, pleadings and case law. *Hall v. Florida*, 572 U.S. 701, 704 (2014).

4. Arkansas's statutory definition of competency included mental retardation as one of three triggering "mental disease[s] or defect[s]" that could produce a criminal defendant's lack of ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. *See* Ark. Code Ann. §§ 5-2-301, 5-2-309 (1987).

The trial court responded by ordering a forensic examination by Dr. Charles Mallory at the Arkansas State Hospital.[5] No independent defense examiner was appointed. Dr. Mallory concluded that Roberts was fit to proceed at trial and satisfied state standards for criminal responsibility and culpability. His report made no mention of mental retardation. App. A1-10. Although Dr. Mallory addressed the presence or absence of a mental disease or defect, he discussed only the possibility of psychosis (which he ruled out) and Roberts's history of head injury (which he described as a "bad blow" from a "bike accident") as potential contributors. App. A8, E51.

At a pretrial omnibus hearing, the trial court heard testimony and argument on dozens of motions. During a brief portion of the hearing, Dr. Mallory testified that he assessed the "standard issues that we evaluate, the fitness to proceed, that is, criminal competency to proceed in a trial," "criminal responsibility" and "criminal culpability." App. E48. He stated that Roberts obtained a full-scale IQ score of 76[6] on the Wechsler Adult Intelligence Scale, and while this was low enough that it "could be a significant factor in judgment," "to get any kind of mental diagnosis, you have to have a major impairment of some life activity,

5. No examination specific to mental retardation was ordered. According to Dr. Mallory's report, the referral issue was "Fitness to Proceed, Criminal Responsibility, Criminal Culpability, and Diagnosis of Defendant." App. A1.

6. When the age of the norms for this test are properly considered, as clinical guidelines require, the adjusted score is 75. *See* Intellectual Disability: Definition, Classification, and Systems of Supports (AAIDD, 12th ed. 2021) [hereafter, AAIDD-12] at 42; Diagnostic and Statistical Manual of Mental Disorders [hereafter, DSM-5-TR] at 37.

and I couldn't determine that." App. E52, E72-73. Dr. Mallory noted that Roberts could "hold a job" (based on a conversation with Roberts's parents, not his past employers) and "participate in normal family life." App. E74-75. The trial court issued written findings addressing 44 pretrial pleadings. App. C1-6. Among them, in a one-sentence ruling, the court concluded:

> Following a hearing regarding the defendant's competency and after hearing testimony from Dr. Mallory of the Arkansas State Hospital regarding the defendant's IQ, the Court hereby finds that the State may seek the death penalty at the trial of the matter.

App. C4.

Roberts was convicted and sentenced to death. No claim regarding intellectual disability was raised on direct appeal or in Roberts's initial postconviction review proceeding. After he filed a federal habeas petition in 2004, the District Court for the Eastern District of Arkansas issued a stay to allow Roberts to exhaust additional claims in state court. *See Rhines v. Weber*, 544 U.S. 269 (2005). Having succeeded in reopening his state postconviction relief proceeding, Roberts raised a true *Atkins* claim for the first time. *See Atkins v. Virginia*, 536 U.S. 304 (2002). At an evidentiary hearing in 2017, Roberts presented uncontested expert testimony that he meets the diagnostic criteria for intellectual disability and argued his execution is barred by this Court's precedents in *Atkins*, *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017). The state court determined that Roberts's *Atkins* claim was procedurally barred because

"the issue of [his] competency at the time of the offense [was] settled on direct appeal and could not be reargued in postconviction proceedings." *Roberts v. State*, 592 S.W.3d 675 (Ark. 2020).

Upon a return to federal court, the Eighth Circuit held that the pretrial omnibus hearing in 1999 was "substantively akin to a federal *Atkins* hearing," and thus the Arkansas courts had "already decided the merits of Roberts's intellectual disability claim when they determined he was not intellectually disabled under Arkansas law, even if that determination occurred prior to the *Atkins* decision." *Roberts v. Payne*, 113 F.4th 801, 809-810 (2024). The court then applied 28 U.S.C. § 2254(d) and denied relief.

ARGUMENT

I. The Pretrial Hearing Was Not Substantively Akin to an *Atkins* Hearing.

a. Roberts did not have a hearing on intellectual disability prior to trial.

The hearing that occurred prior to Roberts's trial in 1999 was not equivalent to an *Atkins* hearing. There was no dedicated hearing that focused on the issue of intellectual disability. Rather, over the span of approximately half a day, the trial court heard argument and issued rulings on 44 defense motions on a wide variety of topics, including Roberts's motion to appear in civilian clothing, a request to sequester witnesses, and motions to declare Arkansas's death penalty statute unconstitutional. App. E1-89. The record is clear that the proceeding was a pretrial omnibus hearing. The only testimony came from witnesses called

by the State—law enforcement officers who testified on a suppression issue, and Dr. Charles Mallory whose evaluation and testimony was focused on competency.

Moreover, the record demonstrates that the court, the prosecutor and Dr. Mallory himself conflated the issues of competency and intellectual disability. Prior to Dr. Mallory's arrival at the hearing, the trial court ruled on dozens of motions and then observed, "[t]hat leaves us then with the expert testimony motion as to competency, that hearing, and the motion to suppress statement and physical evidence." App. E39. Roberts's trial attorney noted that the court also had yet to address motion number 33 (i.e., the mental retardation motion), and the prosecutor responded, "[y]es, that's tied in with the competency issue." *Id.*

Dr. Mallory testified that the court ordered him to assess "the standard issues" related to competency. App. E48. His written report contains no mention of intellectual disability. App. A1-10. During Dr. Mallory's direct testimony, the State did not ask *any* questions regarding intellectual disability. Dr. Mallory testified that he performed "a fairly standard evaluation"—one that he had performed on "hundreds of people." App. E80. He explained, "[w]e . . . can't tell every problem in their life from that . . . but what we can know is that their basic functioning is intact, putting it [in] a very general way." *Id.*; *see also*, App. E81 ("those are broad questions, and we do our best to ask the questions, get the data to address those issues, *not every issue*.") (emphasis added).

Throughout the hearing, the prosecutor referred to Dr. Mallory's testimony as focused solely on competency

and treated the topic of competency as coextensive with intellectual disability. *See e.g.*, App. E39 ("On the competency issue, your honor, we'll be waiting on Dr. Mallory."); App. E41 ("the testimony he's going to give is going to be to the nature of the competency of the Defendant."); App. E86 (arguing in response to both motions (i.e. including mental retardation), "the State would refer the Court to Dr. Mallory and his testimony").

At the conclusion of Dr. Mallory's testimony, the trial court ruled:

> [b]ased on the testimony of Dr. Mallory, I feel that the Defendant is competent and capable of standing trial and to be subject to the death penalty. I think he can assist his attorney in his defense and the doctor's testimony states his evaluation is sufficient to meet the requirements of the law.

App. E89. The trial court subsequently issued a written order stating Roberts's mental retardation motion was denied based on the testimony from Dr. Mallory "regarding the defendant's IQ." App. C4. Likewise, the Arkansas appellate courts treated Roberts's intellectual disability claim as having already been determined based on a pretrial finding of competency. *Roberts v. State*, 592 S.W.3d 675, 685 (Ark. 2020) (holding Roberts's intellectual disability claim was procedurally barred because "the issue of Roberts's *competency* at the time of the offense had been settled on direct appeal") (emphasis added).

b. There was no pretrial assessment of intellectual disability according to medical standards.

Prior to the pretrial omnibus hearing, Roberts did not have the assistance of an independent expert to evaluate whether he met the criteria for intellectual disability, which is a ubiquitous feature of any post-*Atkins* intellectual disability determination. Indeed, no defense witness testified at the hearing, and Roberts's lawyer made no argument on the topic of mental retardation other than to state, "[t]he Court has heard the testimony of Dr. Mallory, and I can't do anything but say the Court has the necessary information to make a ruling on that." App. E85.

Furthermore, at a legitimate post-*Atkins* hearing, the issue of intellectual disability is determined based on the appropriate legal framework and basic clinical guidelines. *See Hall*, 572 U.S. at 721 (instructing that the legal analysis of an intellectual disability determination must be "informed by the medical community's diagnostic framework."). Those guidelines set out a three-pronged definition of intellectual disability:

- Prong 1—subaverage intellectual functioning
- Prong 2—deficits in adaptive behavior; and,
- Prong 3—onset during the developmental period.

Atkins, 536 U.S. at 318 ("clinical definitions of mental retardation 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.").

It is clear from his report and his testimony that Dr. Mallory never assessed intellectual disability according to prevailing medical standards. Although he administered an IQ test, Dr. Mallory never properly assessed adaptive behavior or age of onset.[7] He acknowledged that Roberts's IQ was significantly low, but stated he was unable to determine that Roberts suffered from "a major impairment of some life activity." App. E73. Based largely on information reported by Roberts himself, Dr. Mallory concluded "[h]e can hold a job. He can participate in normal or family life acceptably, it's just that his intellectual handicap didn't prevent any major life activity." App. E75.[8]

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7. An assessment of adaptive behavior relies on a rigorous collection of data and focuses on significant *deficits*, rather than strengths. *Moore I*, 581 U.S. at 15. A broad array of information should be considered, including school records, medical records, previous psychological evaluations, and interviews with individuals who know the person and have had the opportunity to observe his behavior in the community. AAIDD-12 at p.33.

8. The medical community cautions against relying on self-reported information for an assessment of adaptive behavior because people with intellectual disabilities are often unreliable reporters who may attempt to hide their deficits and tend to over-estimate their own abilities. *See, e.g.*, Robert B. Edgerton, The Cloak of Competence: Stigma in the Lives of the Mentally Retarded 158–59 (1st ed. 1967); *United States v. Hardy*, 762 F.Supp.2d 849, 854–55 (E.D. La. 2010) (explaining that often, individuals with intellectual disability will "mask their deficits and attempt to look more able and typical than they actually are" and "typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding.").

The belief that a person cannot have intellectual disability if he is employed or married is a misconception that laypeople who lack training and experience with intellectual disability often hold. *Moore I*, 581 U.S. at (lay stereotypes, "much more than medical and clinical appraisals, should spark skepticism"). Individuals with intellectual disability can and do learn to read, drive a car, graduate from high school, have a bank account, hold a job, engage in romantic relationships, and so on.[9] In sum, there is no "one thing" that can be used as a short-hand way to determine the clinically relevant questions.

A careful, thorough assessment of adaptive behavior is a critical component of any reliable determination of intellectual disability. Because no such assessment occurred, the trial court's decision was based solely on a single IQ score. *See* App. C4 (denying Roberts's motion based on Dr. Mallory's testimony "regarding the defendant's IQ"). This Court has repeatedly rejected the notion that an examination of a single IQ score is sufficient support for a judicial determination under *Atkins*. *See Brumfield v. Cain*, 576 U.S. 305, 316 (2015) ("To conclude that . . . [an] IQ score of 75 somehow demonstrated that [defendant] could not possess subaverage intelligence

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Dr. Mallory stated that his team talked to Roberts's parents, but he did not interview his employer. There is no indication that Dr. Mallory spoke to other collateral witnesses, such as teachers, coworkers, other family members or friends.

9. *See* Lynn Newman et al., *Post-High School Outcomes of Young Adults with Disabilities up to 8 Years after High School: A Report from the National Longitudinal Transition Study-2* (2011); Office of Special Education & Rehabilitative Services, Office of Special Education Programs, *30th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, U.S. Dep't of Educ. (2011).

therefore reflected an unreasonable determination of the facts."); *Hall*, 572 U.S. at 722-23 (stating an IQ score "is an approximation, not a final and infallible assessment of intellectual functioning."); *Moore*, 581 U.S. at 15 ("we do not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score."). Rather, courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore*, 581 U.S. at 15; *see also Hall*, 572 U.S. at 712 (holding Florida's strict IQ cutoff disregarded established medical practice by "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence.").

c. Dr. Mallory lacked clinical training and judgment.

Proper clinical training and judgment plays an important role in the assessment of intellectual disability. DSM-5-TR at 41-42. Intellectual disability is a complex condition, and an accurate clinical diagnostic process cannot be limited to psychometric instruments alone.[10]

10. *See* KEITH F. WIDAMAN, CONCEPTS OF MEASUREMENT, IN THE DEATH PENALTY AND INTELLECTUAL DISABILITY 55, 59 (Edward A. Polloway ed., 2015) ("[T]he need for clinical judgment to combine all information to arrive at important diagnostic decisions is always a component of this assessment task."); ROBERT L. SCHALOCK & RUTH LUCKASSON, CLINICAL JUDGMENT 7 (2d ed. 2014) ("The purpose of clinical judgment is to enhance the quality, validity, and precision of the clinician's decision or recommendation in situations related to diagnosis, classification, and planning supports.").

Clinical judgment goes far beyond mere opinion; it is a "special type of judgment rooted in a high level of clinical expertise and experience." AAIDD-11 at 86. It is "a key component—along with best practices …, professional standards, and professional ethics—of professional responsibility in the field of [intellectual disability]." *Id.* Clinical judgment "is based on the clinician's explicit training, direct experience with those whom he or she is working, and specific knowledge of the person and the person's environment." *Id.*

Dr. Mallory did not comprehensively examine Roberts for intellectual disability, and his testimony strongly suggests that he was not adequately trained to do so. Dr. Mallory testified that the best way to evaluate Roberts for intellectual disability would be to perform a neuropsychological evaluation, but he decided not to have such an evaluation completed because "I'm not qualified to do them," and he and the medical staff "didn't see a reason for it." App. E65-71. Regarding Roberts's brain damage, Dr. Mallory could not state what problems a person suffering from brain damage might develop and conceded that he did not have the expertise to know whether to administer additional testing to explore that. App. E68.

Following his testimony in Roberts's case, Dr. Mallory was criticized by the Arkansas Supreme Court for his work on a competency case after evidence showed that he used inappropriate tests to evaluate the defendant, administered those tests incorrectly, scored the defendant's answers erroneously, and arrived at an incorrect IQ score that was inaccurately high. *Newman v. State*, 354 S.W.3d 61, 64 (Ark. 2009). Dr. Mallory conceded that he inappropriately relied on a test when the manual

instructed it "should not be used alone to make diagnoses and should not be used for legal or judicial purposes." *Id.* at 66. He further acknowledged that a second test he relied upon was a "homemade test" without "any reliability or validity or…ability to accurately predict intellectual functioning." *Id.* In addition, Dr. Mallory admitted that he incorrectly scored the defendant's IQ test results, which he agreed was "certainly . . . a big error." *Id.* at 67. The state court concluded that Dr. Mallory's errors "undermined[d] the validity and reliability of [his] testimony at trial" and found his assessment "suspect." *Id.* at 67.[11]

In the case of *Dimas-Martinez v. State*, Dr. Mallory again admitted that he made serious errors in testing. 385 S.W.3d 238, 254 (Ark. 2011). During his initial examination of Dimas-Martinez, Dr. Mallory concluded "there was no evidence of mental retardation." *Id.* at 255. However, following the Arkansas Supreme Court's recognition of the "problems with Dr. Mallory's evaluation of Newman," Dr. Mallory disclosed he had made similar errors regarding Dimas-Martinez. *Id.* at 255. The State moved for additional testing due to "its doubts about Dr. Mallory's qualifications." *Id.* at 256.[12]

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11. The state court later ordered additional competency testing of Newman, finding it "necessary because of the serious mistakes made by Mallory." *Newman v. State*, 2014 WL 197789, *26 (Ark. 2014).

12. Following additional testing by another expert, Dimas-Martinez's *Atkins* claim was rejected by the trial court, and the Arkansas Supreme Court affirmed. *Id.* at 257.

II. Arkansas Had No State Law Sufficient for Implementing *Atkins* at the Time of Roberts's Trial, and it Continues to Violate *Atkins* and its progeny today.

This Court issued its decision in *Atkins* three years after the trial court's ruling at Roberts's pretrial omnibus hearing. 536 U.S. 304 (2002). *Atkins* held that the Eighth Amendment imposes a substantive restriction against imposing a death sentence on an individual with intellectual disability, but it left the procedural "task of developing appropriate ways to enforce the constitutional restriction" to the States. *Id.* at 317. Although it is true that Arkansas had recently adopted a statute ostensibly barring the execution of people with intellectual disability under state law, the Arkansas Supreme Court had interpreted it in ways inconsistent with *Atkins* and its progeny.

Arkansas's statutory restriction became effective on August 12, 1993. Ark. Code Ann. § 5-4-618 (1993). The statute provided that "no defendant with mental retardation" at the time of the crime shall be sentenced to death. *Id.* Additionally, the statute stated "[t]here is a rebuttable presumption of mental retardation" when a defendant has an IQ score of 65 or below. *Id.* Between 1993 and Roberts's pretrial hearing, only three claims under the new statute reached the Arkansas Supreme Court. The first two were summarily dismissed on procedural grounds.

First, Barry Lee Fairchild sought to bring a claim of mental retardation and argued he should benefit from the statute's rebuttable presumption because he had an

IQ score of 63. *Fairchild v. Norris*, 861 S.W.2d 111 (1993). Although Fairchild was tried and convicted in 1983 (a decade before the new statute took effect), the Arkansas Supreme Court held that his claim was procedurally barred by collateral estoppel because a federal district court rejected his claim that his low IQ undermined his capacity to make a valid waiver of his right not to incriminate himself. *Id*. at 113 (Newbern, J., dissenting). The state court held that "appellant cannot reassert the issue of his mental retardation and is precluded from doing so." *Id*. at 111.

Similarly, the Arkansas Supreme Court rejected a claim of mental retardation based on the recently enacted statute from Kenneth Reams because he failed to raise it prior to trial. *Reams v. State*, 909 S.W.2d 324 (1995). The court explained:

> Reams concedes that he is not entitled to the rebuttable presumption of mental retardation under the Act, since his intelligence quotient is above that 65 quotient prescribed by law. This may well be the reason Reams failed to raise the defense of mental retardation as an affirmative defense as is required by Act 420. *See* § 6-4-618(d)(1). In any event, he did not assert Act 420 as a defense prior to trial, and for this reason alone, Reams's argument must fail.

Id. at 340. The state court's assertion that Reams likely failed to raise mental retardation because he did not have an IQ under 65 signaled that the court potentially viewed the "rebuttable presumption" (a provision that, on its face, appears designed to *benefit* criminal defendants) as in fact operating *against* claimants.

In the third and final decision addressing the new statute prior to Roberts's trial, the state court appeared to reinforce this interpretation. In *Rankin v. State*, the defendant presented evidence that he had two qualifying IQ scores (66 and 72) and performed at a fourth or fifth grade level in reading and arithmetic. 948 S.W.2d 397, 391 (Ark. 1997). The State's expert countered that Rankin was "able to communicate, to understand what he is hearing, and to respond in a coherent manner." *Id*. The trial court rejected Rankin's claim of mental retardation, and the Arkansas Supreme Court affirmed, reasoning that Rankin's IQ scores "do not fall within the range" of the rebuttable presumption and rejecting his argument that the trial court was obligated to apply any margin of error to its interpretation of the scores. *Id*. at 393.

In the 32 years since the Arkansas statute took effect, the Arkansas Supreme Court has *never* held that any criminal defendant can succeed under it. Consistent with its pre-*Roberts* decisions, the state court has continued to: (1) treat the statute's rebuttable presumption as a threshold for relief, and (2) apply an overly onerous view of collateral estoppel—finding that even defendants with strong ID claims have forfeited them in various procedural ways. Accordingly, individuals in Arkansas attempting to assert their constitutional rights have failed to obtain the relief envisioned by *Atkins* and its progeny.

a. Arkansas has consistently interpreted the rebuttable presumption of intellectual disability for individuals with an IQ of 65 or below as a threshold for relief.

Arkansas's statutory presumption of mental retardation is a relatively unique provision. At first blush, it would appear to offer greater protections to individuals with intellectual disability than other state statutes. However, the Arkansas Supreme Court has regularly misconstrued the directionality of this presumption, creating a near categorical bar to relief to those with IQ scores over 65. For instance, in *Jones v. State*, the defendant argued that Arkansas's standard was inconsistent with medical guidelines. He noted the then-current version of the Diagnostic and Statistical Manual required an IQ of approximately 70. 10 S.W. 449, 456-457 (Ark. 2000). The Arkansas Supreme Court rejected this argument, stating "*the standard of 65 is our law*, and therefore, Jones cannot show that he was prejudiced by a failure to use this suggested higher standard." *Id.* at 457 (emphasis added). Further, the court held that Jones could not benefit "from our adopting the so-called current standard of 70" because his own expert testified that his IQ was 71. *Id.*

In *Miller v. State*, the court again noted the statutory presumption of 65 yet failed to recognize that individuals with scores over the statutory presumption can also have intellectual disability. 362 S.W.3d 264, 278 (Ark. 2010) ("although there was no consensus among the expert opinions as to exactly what Miller's intelligence quotient was, all experts agreed that it was above 65"); *see also Engram v. State*, 200 S.W.3d 367, 372, n.3 (Ark. 2004)

("*Atkins* does not declare that the Constitution requires states to set a threshold for mental retardation of 70 or 75.").

Moreover, even individuals who meet the statutory presumption have failed in Arkansas. In *Anderson v. State*, the defendant demonstrated that he had a full-scale IQ score of 65. 163 S.W.3d 333, 355 (Ark. 2004). However, Dr. Mallory estimated the defendant's general intelligence fell within the range of 80 to 90 based on his administration of "the Kent Test, a ten-question measure."[13] *Id.* at 356. The trial court rejected the defendant's claim, and the Arkansas Supreme Court affirmed, finding "the State nonetheless rebutted the presumption of mental retardation with Mallory's report which found an IQ somewhere in the range of 80-90." *Id.*

As this Court explained in *Hall v. Florida*, a functional threshold for presenting a claim of intellectual disability is inconsistent with a criminal defendant's constitutional rights and deviates from the appropriate clinical guidelines for assessing intellectual disabilities in two critical ways. *See Hall v. Florida*, 572 U.S. 701 (2014). First, a functional threshold for intellectual disability "takes an IQ score as final and conclusive evidence of a defendant's intellectual

13. The "Kent Test" is not a measure of general intelligence. Dr. Mallory later admitted that "the Kent Test was not a commercially available instrument, but a 'homemade test that a psychiatrist once passed him.' Dr. Mallory explained that the Kent Test consisted of ten questions, such as 'What is sand used for?" and "What are the names of some fish?'" *Dimas-Martinez*, 385 S.W.3d at 255. He conceded that the Kent Test "had not been shown to have any reliability or validity or to have any ability to accurately predict intellectual functioning." *Id.*

capacity" without addressing other evidence medical experts would consider in making the assessment. *Id.* Second, a threshold for relief fails to recognize that an IQ score is an imprecise measure of cognitive functioning. *Id.* This misconstruction of the statutory presumption as a threshold for relief is troubling. However, the Arkansas Supreme Court routinely sidesteps this issue with its onerous application of collateral estoppel.

b. Arkansas has taken an onerous view of collateral estoppel that deems even the strongest of intellectual disability claims as defaulted.

Consistent with *Fairchild* and *Reams*, the Arkansas Supreme Court has continued to employ an overly onerous view of collateral estoppel and procedural default, refusing to hear the merits of *Atkins* claims. *See, e.g. Engram*, 200 S.W.3d at 375 (refusing to address the merits of a "mental-retardation issue that was raised by Engram before his trial in 1998" but not ruled on by the trial court, contrary to the Arkansas statute) (Brown, J., dissenting); *Nance v. State*, 2005 WL 984778, *2 (Ark. 2005) (holding petitioner's *Atkins* claim was not unknown to him prior to trial in 1994 because he had a brief IQ test, therefore it was procedurally barred). Further, the Arkansas Supreme Court has taken the position that *Atkins* was not a significant change in the law as it "merely reaffirmed this state's pre-existing prohibition against executing the mentally retarded." *Anderson v. State,* 163 S.W.3d 333, 334-335 (Ark. 2004). Relying on that view, the court has repeatedly sidestepped the merits of *Atkins* claims.

The *Atkins* claim that Roberts raised in his reopened state postconviction relief proceeding was the first to reach the Arkansas Supreme Court following this Court's decisions in *Hall* and *Moore*. Had the court not come to the erroneous conclusion that his claim was already "settled" on direct appeal, Roberts's case would have provided the state court with an opportunity to properly apply this Court's precedents. Instead, the Arkansas Supreme Court, consistent with its history, declined this opportunity. For the reasons discussed above, and as the Petition for Writ of Certiorari makes clear, it is appropriate for this Court to apply *de novo* review to Roberts's *Atkins* claim, which was presented for the first time in the state post-conviction proceedings.

CONCLUSION

The Court should grant the Petition and reverse the judgment below.

Respectfully submitted,

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