OCTOBER TERM 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED BOURGEOIS,
Petitioner,

v.

T.J. WATSON, Warden, USP-Terre Haute, and UNITED STATES OF AMERICA,
Respondents.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
VOLUME II

--- CAPITAL CASE ---
EXECUTION SCHEDULED FOR DECEMBER 11, 2020

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

ALFRED BOURGEOIS, Petitioner, V. SUPERINTENDENT, USP–Terre Haute, UNITED STATES OF AMERICA, Respondents.	CIVIL ACTION (Capital Habeas Corpus) Case No. 2: 19-cv-392 **CAPITAL CASE** **EXECUTION SCHEDULED FOR** **JANUARY 13, 2020**

PETITION FOR WRIT OF HABEAS CORPUS

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Dated: August 15, 2019

PRELIMINARY STATEMENT

Petitioner Alfred Bourgeois shall be referred to as Petitioner, Mr. Bourgeois, or, when discussed in conjunction with other members of the Bourgeois family, Alfred. Respondents shall be referred to as the Government. Citations to witness declarations and affidavits shall be referred to as "Dec." and "Aff.," respectively, followed by the name of the relevant witness. Citations to expert reports shall be referred to as "Report," followed by the name of the expert, the date, and the page number. All declarations, reports, affidavits, and other relevant records cited herein are provided in Appendix A filed with this Petition. Cites to pages in Appendix A shall be referred to by the initial "A" and relevant page number.

Relevant transcripts from Petitioner's § 2255 level proceedings are provided in Appendix B filed with this Petition. Cites to pages from the transcript shall be referred to as "Tr.," followed by the relevant date and page number.

All other citations are either self–explanatory or will be explained.

All emphasis in this Petition is supplied unless otherwise indicated.

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I. INTRODUCTION

Alfred Bourgeois, a death–sentenced inmate currently housed at the United States Penitentiary, Terre Haute, is intellectually disabled ("ID"). His execution is categorically barred by the Federal Death Penalty Act ("FDPA") and per se unconstitutional pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. There is no doubt that Mr. Bourgeois meets the three prongs of the clinical definition of intellectual disability under current clinical definitions: subaverage intellectual functioning, adaptive deficits, and onset before age eighteen. He has been IQ tested twice in his lifetime. His scores of 70 and 75 (corrected under clinically–accepted standards to 67 and 68) each falls within the presumptive range for ID. Standardized testing, clinical evaluation, contemporaneous records, and numerous witnesses attest to his significant adaptive impairments in conceptual, social, and practical skills, any one of which is by itself sufficient to establish adaptive deficits. And Petitioner's lifelong intellectual and adaptive impairments long predate his eighteenth birthday.

The only court to review Mr. Bourgeois's claim of categorical ineligibility for the death penalty applied non–clinical, unscientific standards; relied largely on commonly held, but erroneous stereotypes of intellectually disabled persons; and employed a number of the so–called "*Briseño* factors," which the United States Supreme Court later described as factors "untied" to the "medical community's information" that "creat[ed] an unacceptable risk that persons with intellectual disability will be executed." *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore–I*"). For example, the district judge:

- set aside diagnostic standards and relied on her own armchair assessment of Mr. Bourgeois's conduct to determine that his "true" intellectual functioning did not satisfy the IQ component for intellectually disability, despite the fact that all of his IQ scores fall within the presumptive range for ID;

- found that Mr. Bourgeois's perceived adaptive *strengths* counteracted the evidence of his adaptive *deficits*, despite acknowledging that the medical community focuses strictly on deficits;

- applied unscientific stereotypes of intellectually–disabled persons—including that ID persons look and talk differently than the general population and are incapable of driving or maintaining a job—to support her conclusion that Mr. Bourgeois's adaptive functioning was inconsistent with a diagnosis of ID; and

- treated risk factors and comorbidities as alternate *explanations for* Mr. Bourgeois's deficits, as opposed to *contributors to* his intellectual disability.

The district court's approach was subsequently declared unconstitutional by the United States Supreme Court in *Moore–I* and *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore–II*"), which held that courts must apply the medical community's current standards in assessing *Atkins* claims, and which specifically criticized many of the analytical errors that plagued the initial review of Petitioner's claim, including reliance on the *Briseño* factors. Following *Moore–I*, Mr. Bourgeois sought to have his *Atkins* claim reviewed under current constitutional standards, but was denied the opportunity to do so when the Fifth Circuit ruled that additional review under *Moore–I* would amount to an impermissible "second or successive" petition for post–conviction relief under 28 U.S.C. § 2255.

A federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013). Cognizable claims include those that rely on a new legal or factual basis not available at the time of the petitioner's trial proceedings or his § 2255 proceedings. *See, e.g.*, *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015); *In re Davenport*, 147 F.3d 605, 607–11 (7th Cir. 1998). Section 2241 is also the appropriate vehicle where a petitioner challenges the execution, as opposed to the imposition, of the sentence. *See, e.g.*, *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003). Mr. Bourgeois's claim relies on the

Moore–I and *Moore–II* decisions, which rendered unconstitutional Fifth Circuit precedent rejecting the application of medical standards to *Atkins* claims, as well as newly–adopted diagnostic criteria. Additionally, Mr. Bourgeois challenges the execution of his fundamentally illegal death sentence. The FDPA requires such prospective relief to be available, providing as it does that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c); *see also Atkins*, 536 U.S. at 320 (establishing "categorical rule making [intellectually disabled] offenders ineligible for the death penalty").

On July 25, 2019, the Government notified Mr. Bourgeois that his execution has been scheduled for January 13, 2020. Mr. Bourgeois now stands to be among the first individuals executed by the federal government in over fifteen years, even though his scheduled execution is per se unconstitutional, even though no court has ever reviewed his claim of ID under constitutionally–mandated current medical standards, and even though the FDPA specifically prohibits the execution of an intellectually–disabled prisoner. The unique circumstances of the case require this Court's careful review, and thereafter, a grant of habeas corpus under 28 U.SC. § 2241 to prevent Mr. Bourgeois's unlawful execution.

II. PROCEDURAL HISTORY AND STATEMENT OF THE CASE

A. Trial and Initial Habeas Proceedings

1. In 2004, Mr. Bourgeois was convicted of capital murder and sentenced to death in the United States District Court for the Southern District of Texas for the 2002 death of his two–year–old daughter, J.G. On August 25, 2005, the Fifth Circuit affirmed Mr. Bourgeois's conviction and sentence on direct appeal. *United States v. Bourgeois*, 423 F.3d 501 (5th Cir. 2005). The Supreme Court denied his petition for writ of certiorari on May 15, 2006. 547 U.S. 1132 (2006).

2. On May 14, 2007, Mr. Bourgeois filed a Motion for Relief Pursuant to 28 U.S.C.

§ 2255 challenging his conviction and sentence of death, including a claim that he is intellectually disabled and his death sentence is unconstitutional pursuant to *Atkins*.

3. The district court held evidentiary hearings on September 10, 2010, and September 20–24, 2010. Additionally, the parties deposed several witnesses. In support of his *Atkins* claim, Mr. Bourgeois presented testimony from: neuropsychologist Donald E. Weiner, Ph.D.; neuropsychologist Michael Gelbort, Ph.D.; clinical psychologist Victoria Swanson, Ph.D.; and numerous lay witnesses who, collectively, were able to testify to Petitioner's low intellectual functioning in various domains throughout his life. The Government presented testimony from forensic psychologist Roger Bryan Moore, Jr., Ph.D.; neuropsychologist J. Randall Price, Ph.D.; and a small number of lay witnesses, each of whom knew Mr. Bourgeois only in the context of work and only as an adult.

4. On May 19, 2011, the district court denied Petitioner's § 2255 motion and denied a Certificate of Appealability ("COA") on all claims. *United States v. Bourgeois*, No. C–02–CR–216, 2011 WL 1930684 (S.D. Tex. May 19, 2011). The Fifth Circuit denied Mr. Bourgeois's request for a COA on August 5, 2013. *United States v. Bourgeois*, 537 F. App'x. 604 (5th Cir. 2013).

5. In dismissing Petitioner's *Atkins* claim, the district court applied the Fifth Circuit's then–valid precedent, which largely disregarded medical standards governing the diagnosis of intellectual disability. For instance, although both of the leading diagnostic authorities in the field of intellectual disability—the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA")—recognize that an IQ score of 75 or below falls within the presumptive range for intellectual disability, the district court disregarded Mr. Bourgeois's two qualifying scores. Instead, the court

relied on various unscientific stereotypes to determine that Petitioner's "true" intellectual functioning did not satisfy the IQ component of ID. *See id.* at *22–29 (finding Mr. Bourgeois's low intellectual functioning to be belied by the fact that he "answers the questions asked of him, engages in conversation, [and] has logical thoughts"; "lived a life which, in broad outlines, did not manifest gross intellectual deficiencies"; "worked for many years as a long haul truck driver . . . bought a house, purchased cars, and handled his own finances"; had a "well–groomed appearance"; and "otherwise carried himself without any sign of intellectual impairment"); *see also id.* at *27 ("[T]he Fifth Circuit has denied relief when . . . notwithstanding borderline IQ scores, an inmate's intelligence is more consistent with the higher end of the confidence interval.").

6. The district court also relied on Fifth Circuit precedent for the proposition that there is a "legal" and a "psychological" approach to assessing the adaptive functioning prong of ID, and that "the federal inquiry into adaptive deficits takes on a much different flavor than that done by mental health professionals." *Id.* at *32. Applying the "legal" approach, the district court found that Mr. Bourgeois's perceived adaptive strengths counteracted the evidence of his adaptive deficits, despite acknowledging that the medical community focuses strictly on deficits:

> [T]he AAIDD manual has expressly adopted as an underlying "assumption" in the definition of mental retardation that "within an individual, limitations often coexist with strengths. . . ." The Fifth Circuit, however, teaches that the *Atkins* inquiry should not be so narrow as to ignore that which an inmate can do, even if the psychological profession approaches the issue differently. . . . [T]he federal inquiry probes more deeply the accuracy of the reported deficiencies and aims to put them into context. . . .
>
> A broad review of the evidence does not make Bourgeois' claim of adaptive deficits believable. . . . The record shows strengths that more than coexist with weaknesses, they call into question the depth and accuracy of reports of those weaknesses. The Court finds that Bourgeois has not shown substantial adaptive deficits by a preponderance of the evidence.

Id. *33–34, 44 (citing, inter alia, *United States v. Webster*, 421 F.3d 308, 313 (2005), another case denying *Atkins* relief under § 2255); *see also id.* at *42 (disparaging the credibility of defense expert Dr. Swanson because she recognized that Mr. Bourgeois demonstrated certain adaptive strengths, but explained—consistent with diagnostic standards—that these strengths did not "offset the other deficits" that Mr. Bourgeois has in any given area).

7. Furthermore, as with its assessment of Mr. Bourgeois's intellectual functioning, the court relied upon unscientific stereotypes of persons with ID to support its conclusion that Mr. Bourgeois's adaptive functioning was inconsistent with a diagnosis of ID. For instance, the court noted that Mr. Bourgeois was competent at his job as a truck driver, that "[h]is appearance and grooming were beyond presentable," and that individuals who knew him through his work as a truck driver did not perceive him as intellectually disabled. *Id.* at *39. Again, this was consistent with Fifth Circuit jurisprudence in 2011, *see, e.g.*, *Webster*, 421 F.3d at 313, but current diagnostic standards make clear that none of these "skills" conflicts with a medical diagnosis of intellectual disability. *See, e.g.*, AAIDD *User's Guide* (11th ed. 2012) ("AAIDD–12") (identifying numerous commonly held but erroneous stereotypes about persons with ID, including that they "look and talk differently from persons from the general population," "are completely incompetent and dangerous," "cannot get driver's licenses, buy cars, or drive cars," "cannot acquire vocational and social skills necessary for independent living," and "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations"); Am. Psychiatric Assoc'n, Diagnostic and Statistical Manual of Mental Disorders—5th Edition ("DSM–5") (explaining that persons with ID can, inter alia, maintain regular employment in jobs that do not emphasize conceptual skills, function age–appropriately in personal care, and develop a variety of recreational skills").

8. Other unscientific aspects of the district court's analysis included that the court gave significant weight to its own lay assessment of Mr. Bourgeois's communication skills, which it found incompatible with ID; considered evidence of a deficit to be evidence of a strength so long as Mr. Bourgeois eventually learned to perform the task; and treated risk factors and comorbidities as *alternate explanations for* Mr. Bourgeois's deficits, as opposed to *contributors to* his intellectual disability. In short, practically every aspect of the court's ID analysis violated current clinical standards.

B. *Moore v. Texas* and Petitioner's Motion to File a Successive Habeas Petition in the Fifth Circuit

9. While the district court's approach to analyzing Mr. Bourgeois's *Atkins* claim was consistent with Fifth Circuit precedent at the time, that precedent was abrogated by the Supreme Court's decision in *Moore–I*. *Moore–I* made clear that courts must apply *Atkins* according to current clinical standards; that adaptive deficits must be analyzed according to a defendant's impairments, not his strengths; that lay stereotypes are an improper and unconstitutional substitute for the scientific evaluation of intellectual disability; and that the *Briseño* factors created an unacceptable risk that ID persons would be unconstitutionally executed.

10. Following *Moore–I*, Petitioner requested authorization from a panel of the Fifth Circuit to file a successive habeas petition under 28 U.S.C. § 2255(h)(2), which allows for successive motions based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In his motion, Petitioner argued that *Moore–I* rendered *Atkins* newly available to him by invalidating Fifth Circuit precedent governing such claims at the time of his trial and his initial § 2255 proceedings. In support of his claim, Mr. Bourgeois cited to *Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 232 (5th Cir. 2017), in which the Fifth Circuit held that *Atkins* was "previously

unavailable" to a petitioner whose first habeas petition was filed after *Atkins*, but who failed to raise an ID claim because the circuit's pre–*Moore–I* precedent precluded a finding of intellectual disability at the time of the initial habeas petition.[1] The only distinctions between Mr. Bourgeois's application and that of Mr. Cathey were that Mr. Bourgeois was seeking to raise a successive petition under § 2255, as opposed to § 2254, and that Mr. Bourgeois had previously litigated his *Atkins* claim. However, as Mr. Bourgeois argued in his application to the Fifth Circuit, the § 2244(b)(1) re–litigation bar is expressly limited to petitions brought by state prisoners under § 2254. *See* 28 U.S.C. § 2254(b)(1) ("A claim presented in a second or successive habeas corpus application *under section 2254* that was presented in a prior application shall be dismissed."). Nor is there any discernable reason that Mr. Bourgeois should be punished for having been *more diligent* than Mr. Cathey in attempting to litigate his *Atkins* claim in earlier proceedings.

11. Nevertheless, on August 23, 2018, the Fifth Circuit denied Mr. Bourgeois's request on procedural grounds, holding that he was barred from re–litigating his *Atkins* claim under 28 U.S.C. § 2244(b)(1), despite the plain language of the statute limiting its applicability to petitions under § 2254. *In re Bourgeois*, 902 F.3d 446 (5th Cir. 2018). The circuit court did not question Petitioner's argument that *Moore–I* effectively overruled Fifth Circuit precedent that had required the district court to (erroneously) reject Mr. Bourgeois's *Atkins* claim.

[1] The Fifth Circuit recently reached the same holding in another case. *See In re Johnson*, No. 19–20552, 19–70013, 2019 WL 3814384, at *5–6 (5th Cir. Aug. 14, 2019) (granting state habeas petitioner's request to file a successive petition to raise an *Atkins* claim because *Atkins* was "unavailable" to petitioner prior to *Moore–I* and the publication of new diagnostic standards that "included significant changes in the diagnosis of intellectual disability").

C. Subsequent Developments

12. On February 19, 2019, the United States Supreme Court issued *Moore–II*, reversing the decision of the Texas Court of Criminal Appeals ("CCA")[2] on remand from *Moore–I*. Specifically, although the state court purported to base its post–*Moore–I* denial of relief on a finding that the State's expert was more credible than those presented by Mr. Moore, the *Moore–II* Court found in the CCA's opinion "too many instances in which, with small variations, it repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion." *Id.* at 670. Because the district court that denied Mr. Bourgeois's initial *Atkins* claim likewise relied on contra–diagnostic criteria in crediting the Government's adaptive–behavior expert over the defense expert, *Moore–II* further strengthened Mr. Bourgeois's claim that he is entitled to *Atkins* relief.

13. On July 25, 2019, with no prior indication that the Government had adopted revisions to the Bureau of Prisons' Lethal Injection Protocol used to effectuate federal death sentences, the Government notified Mr. Bourgeois that he is scheduled to be executed on January 13, 2020. This petition, seeking review of Mr. Bourgeois's *Atkins* claim under current medical standards under 28 U.S.C. § 2241 follows.

14. A federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality" of his detention or sentence. 28 U.S.C. § 2255(e). The Seventh Circuit has expressly recognized that claims based on legal authority not available at the time of a petitioner's § 2255 proceedings are cognizable under § 2241. *See, e.g.*, *Webster*, 784 F.3d at 1136; *In re Davenport*, 147 F.3d at 609. This includes cases where the district court and appellate panel would have been required by erroneous circuit precedent to deny the § 2255

[2] The CCA is Texas's court of last resort in criminal cases. *See* Tex. Const. Art. 5, § 5.

claim. Section 2241 is also available where, inter alia, a petitioner challenges the execution of his sentence, and where a prisoner would otherwise be precluded from obtaining review of a legal theory that addresses the "fundamental legality" of his sentence.

15. Here, Fifth Circuit precedent erroneously precluded Mr. Bourgeois from successfully challenging his unconstitutional death sentence in his initial § 2255 proceedings. *See infra* Section IV.A.2. And, while Mr. Bourgeois again attempted to raise his *Atkins* claim in a successive § 2255 petition filed after *Moore–I* effectively reversed that precedent, the Fifth Circuit denied him the opportunity to do so, despite acknowledging elsewhere that "new diagnostic guidelines" have brought "significant changes in the diagnosis of intellectual disability" and that "it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*." *In re Johnson*, 2019 WL 3814384, at *5–6. There can be no doubt that § 2255 is "inadequate or ineffective" under these circumstances. Furthermore, this petition is reviewable under § 2241 because Mr. Bourgeois challenges the execution of his fundamentally illegal death sentence. The FDPA requires such prospective relief to be available, providing as it does that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c).

16. In light of the foregoing, discussed in detail below, Mr. Bourgeois is: (i) entitled to raise his *Atkins* claim via § 2241; and (ii) entitled to relief from his unconstitutional sentence of death, which is scheduled to be carried out in a matter of months.

III. MR. BOURGEOIS IS INTELLECTUALLY DISABLED AND IS INELIGIBLE FOR THE DEATH PENALTY UNDER THE FEDERAL DEATH PENALTY ACT AND *ATKINS V. VIRGINIA* AND ITS PROGENY.

A. Introduction

17. In *Atkins*, the United States Supreme Court ruled that the Eighth Amendment categorically bars the execution of intellectually disabled individuals. As the Court explained:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

536 U.S. at 306.[3]

18. In *Moore–I*, the Court made clear that current, prevailing clinical definitions are binding in the task of determining whether an individual should be exempted from the death penalty under *Atkins*. *See Moore–I*, 137 S. Ct. at 1049, 1052–53. It also identified the two main diagnostic authorities in the field of intellectual disability as the prevailing medical standards: the AAIDD, publisher of the *Intellectual Disability: Definition, Classification, and Systems of Supports Definition Manual* (11th ed. 2010) ("AAIDD–10"); and the APA, which has most recently set forth its definition of intellectual disability in the DSM–5. These current standards, and not outdated standards employed in the past, govern the disposition of Mr. Bourgeois's *Atkins* claim. *See Moore–I*, 137 S. Ct. at 1053.

19. Pursuant to the definitions set forth by the APA and the AAIDD and endorsed by the Supreme Court, there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age eighteen ("prong three"). *See* A0075 (DSM–5 at 33); A0088 (AAIDD–10 at 5). As the voluminous evidence summarized below shows, Mr. Bourgeois satisfies these criteria.

[3] *Atkins* referred to this diagnosis as mental retardation, which was the name used in the field at the time. Since *Atkins* was decided, the diagnosis of mental retardation has been renamed as intellectual disability. In 2014, the Supreme Court acknowledged this change in nomenclature and adopted the term intellectual disability instead of mental retardation. *Hall v. Florida*, 572 U.S. 701 (2014). Accordingly, this petition uses the term intellectual disability or the abbreviation "ID." However, the terms "mental retardation" or "mentally retarded" are also used in their historic context relevant to this case.

B. Deficits in Intellectual Functioning

1. The diagnostic criteria

20. Under the classification schemes outlined by the APA and the AAIDD, deficient intellectual functioning is defined as an intelligence quotient of approximately 70 with a confidence interval derived from the standard error of measurement ("SEM") taken into consideration. Because a margin for measurement error or "confidence interval" on IQ tests generally involves a measurement error of five points, at a minimum, scores up to 75 also fall within the presumptive range for intellectual disability. A0079 (DSM–5 at 37). *See also* A0098 (AAIDD–10 at 36) (finding the consideration of the standard error of measurement or "SEM" and reporting an IQ score with a confidence interval deriving from the SEM to be critical considerations in the appropriate use of IQ tests).

21. Consistent with the AAIDD's and APA's diagnostic criteria, the Supreme Court held in *Hall v. Florida* that because the SEM is "a statistical fact, a reflection of the inherent imprecision of the test itself," at a minimum, full–scale IQ scores of 75 or below will establish the diagnosis of intellectual disability if the other two prongs are met. *Hall*, 572 U.S. at 712, 723; *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (IQ score of 75 was "squarely in the range of potential intellectual disability").

22. In addition, both the AAIDD and the APA have rejected fixed cutoff points for IQ in the diagnosis of intellectual disability and mandated that any test score be evaluated according to clinical judgment. In its 2010 Guidelines, the AAIDD specified:

> It is clear from th[e] significant limitations criterion used in this Manual that AAIDD . . . *does not* intend for a fixed cutoff point to be established for making the diagnosis of ID. Both systems (AAIDD and APA) require clinical judgment regarding how to interpret possible measurement error. Although a fixed cutoff for diagnosing an individual as having ID is not intended, and cannot be justified psychometrically, it has become operational in some states [citation omitted]. It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment

> rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable.

A0102 (AAIDD–10 at 40) (emphasis in original).

23. Similarly, the DSM–5 makes clear that "[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance" and "clinical judgment is needed in interpreting the results of IQ tests." A0079 (DSM–5 at 37).

24. IQ scores must also be corrected for the Flynn Effect. The Flynn Effect reflects a well–established finding that the average IQ score of the population increases at a rate of 0.3 points per year or three points per decade. Indeed, the Psychological Corporation, which publishes the Wechsler tests that Mr. Bourgeois was administered, *see infra*, first acknowledged the existence of the Flynn Effect and its inflation rate of 0.3 points per year in 1997. *See* Technical Manual, Wechsler Adult Intelligence Scale, the Psychological Corporation 8–9 (3d ed. 1997).

25. Accordingly, the AAIDD requires that any IQ score be corrected downwards at a rate of 0.3 points per year since the test was normed.[4] *See* A0099 (AAIDD–10 at 37); A0131 (AAIDD–12 at 23); A170–76 (McGrew, K., Norm Obsolescence: The Flynn Effect, *The Death Penalty and Intellectual Disability*, AAIDD (2015) at 160–66 ("AAIDD–15")); A0141–42 (Watson, Dale G. Intelligence Testing, *The Death Penalty and Intellectual Disability*, AAIDD–15 at 118–19). The McGrew article elaborates:

> Not only is there a scientific consensus that the Flynn [E]ffect is a valid and real phenomenon, there is also a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn [E]ffect, particularly in *Atkins* cases. . . . [Hence,] in cases where current or historical IQ test scores are impacted by norm obsolescence (i.e., Flynn [E]ffect), and the scores are to be used as part of the diagnosis of ID in *Atkins* or other high

[4] Norming is a statistical term to describe how the creators of a given test are able to assign percentile ranks to given scores.

> stakes decisions, the global scores impacted by outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence.

McGrew, *supra* at 162–65.

26. The APA also recognizes that "[f]actors that may affect test scores include . . . the 'Flynn effect' (i.e. overly high scores due to out–of–date test norms)" and mandates that IQ scores be interpreted using clinical judgment and training. A0079 (DSM–5 at 37). Test score interpretation using clinical judgment includes correction for the Flynn Effect.

27. The AAIDD and APA also mandate that the spurious inflation of IQ scores arising from prior administrations of intelligence tests—the "practice effect"—be taken into consideration when interpreting IQ testing. *See, e.g.*, A0100 (AAIDD–10 at 38); A0079 (DSM–5 at 37).

2. Mr. Bourgeois has deficits in intellectual functioning.

28. Mr. Bourgeois's IQ has been tested on two occasions. In both instances, Petitioner's intellectual capacity fell in the intellectually disabled range.

29. First, one week prior to trial, on February 28, 2004, Mr. Bourgeois was evaluated by neuropsychologist Dr. Donald E. Weiner. Petitioner obtained a full–scale IQ of 75[5] on this administration of the Wechsler Adult Intelligence Scale–Revised ("WAIS–R"). *See* Tr. 9/20/10 at 218–19; *see also* A0060 (Dr. Weiner Score Sheet from WAIS–R); A0053–59 (Declaration of Dr. Donald E. Weiner and Attached Report of 3/03/04). Although Mr. Bourgeois's results on Dr. Weiner's test administration put him in the range of intellectual disability, his score of 75

[5] This score was reported as a 76 in Dr. Weiner's report, however this was a typographical error. The data sheet has the score as 75. *See Bourgeois*, 2011 WL 193064, at *37, 25 (noting the discrepancy and the fact that Dr. Weiner clarified that the error during the evidentiary hearing); *see also* Tr. 9/20/10 at 218–19.

overestimates his actual IQ due to the Flynn Effect discussed above. Dr. Weiner used the WAIS–R in assessing Mr. Bourgeois's intelligence, despite the availability of the re–normed and updated Wechsler Adult Intelligence Scale–III ("WAIS–III").[6] The WAIS–R was normed in 1978, twenty–six years prior to its administration to Mr. Bourgeois. Accordingly, Dr. Weiner's testing must be "Flynn–corrected." Appropriately adjusted, Mr. Bourgeois's 2004 IQ score is more accurately reflected as a score of 68. *See* Tr. 9/10/10 at 33 (Dr. Gelbort); Tr. 9/20/10 at 222–23 (Dr. Wiener); *id.* at 37 (Dr. Swanson).

30. Second, in preparation for Mr. Bourgeois's initial habeas petition, neuropsychologist Dr. Michael Gelbort conducted extensive psychological and neuropsychological testing that yielded even further evidence demonstrating Petitioner's intellectual disability. *See* Tr. 9/10/10 at 32–52; *see also* A0039–41 (Declaration of Michael M. Gelbort, Ph.D. – 05/11/2007, ¶ 3). These results include an IQ of 70 (Verbal 67 and Performance 78) on the WAIS–III,[7] which was the then–current version of the test given by Dr. Weiner. *See* Tr. 9/10/10 at 32; *see also* A0039–41 (Gelbort Declaration, ¶ 3). The WAIS–III was normed in 1995–96, eleven years before it was administered to Mr. Bourgeois in 2007, yielding a Flynn–corrected IQ score of 67.

31. That these IQ tests validly measured Mr. Bourgeois's intellectual functioning is confirmed by the consistency between the full–scale scores he received on each test, as well as

[6] Dr. Weiner testified that he employed the older test because he felt that insufficient research had been done on the WAIS–III at the time of his evaluation. *See* Tr. 9/20/10 at 217. The fact that the WAIS–R had been replaced by the WAIS–III at the time of its administration in this case does not make it invalid. Indeed, Dr. Swanson explained that neuropsychologists often use "the Wechsler instruction that has the greatest amount of research associated with it at the time," even if a newer test is available. *Id.* at 37.

[7] The WAIS–III is considered the "gold standard" of IQ tests. *Bourgeois*, 2011 WL 193064, at *25 n.33 (citing *Thomas v. Quarterman*, 335 F. App'x 386, 391 (5th Cir. 2009)).

the consistency in the overall pattern of correct and incorrect answers on each test. *See* Tr. 9/10/10 at 32. As Dr. Gelbort explained, it would be very difficult for an individual to "feign bad" in the same way on two tests administered three years apart. *Id.* at 33–35; *see also* Tr. 9/20/10 at 223–25, 229 (Dr. Weiner testifying similarly); *id.* at 31 (Dr. Swanson testifying similarly). Furthermore, the scores are consistent with Mr. Bourgeois's history of impaired functioning, *see infra*, and the manner in which he presented during his clinical interview. *See* Tr. 9/10/10 at 38–39; Tr. 9/20/10 at 264–65. Even Government expert Dr. Price testified that he did not have any evidence that Mr. Bourgeois "malinger[ed]." Tr. 9/23/10 at 258.[8]

32. In sum, Mr. Bourgeois has scored well within the range of subaverage intellectual functioning on two psychometrically–valid and comprehensive tests of intelligence.[9] He has satisfied prong one of the definition for ID.

C. Deficits in Adaptive Functioning

1. The diagnostic criteria

33. The AAIDD–10 defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in their everyday lives."

[8] While Dr. Price opined that Mr. Bourgeois did not try as hard as he could have, that conclusion is inconsistent with other testimony in which Dr. Price stated that Mr. Bourgeois engaged in "adult impression management," "portray[ing] himself with abilities and accomplishments that are exaggerations." Tr. 9/23/10 at 204; *see also* Tr. 9/24/10 at 161–62 (Government expert Dr. Moore similarly testifying that Petitioner "tends to want to make himself look better than he really is").

[9] In his § 2255 proceedings, the district court observed: "IQ testing before trial resulted in low scores, but one expert nonetheless described his intelligence in a manner inconsistent with mental retardation." *Bourgeois*, 2011 WL 193064, *18. While the court provides no citation for this (erroneous) finding, it presumably refers to trial expert Dr. Carlos Estrada's finding that Mr. Bourgeois was of "above average intelligence," a finding which was unsupported by any IQ testing and which Dr. Estrada subsequently retracted. *See* Tr. 9/10/10 (a.m.) at 71; *see also* Tr. 9/24/10 at 48–49 (Dr. Price testifying that Dr. Estrada's conclusion was "clearly wrong").

A0115 (AAIDD–10 at 55). The DSM–5 defines adaptive deficits as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." A0079 (DSM–5 at 37).

34. Both the AAIDD–10 and DSM–5 state that the adaptive deficits prong is satisfied if there is a significant limitation in one of three types of adaptive behavior—conceptual, social, or practical—or in the composite of the individual's adaptive functioning. A0103 (AAIDD–10 at 43); A0079 (DSM–5 at 37).

35. Skills included in the conceptual realm are: executive functioning (judgment, planning, impulse control, and problem solving), memory, language, functional academic skills, and self–direction. The social realm encompasses skills and characteristics such as: social judgment and competence, interpersonal responsibility, self–esteem, gullibility, naiveté, following rules, obeying laws, and avoiding victimization. The practical realm refers to skills such as: activities of daily living/learning and self–management across life settings, occupational skills, use of money, health and safety, and other self–care skills.

2. The adaptive behavior assessment

36. Current diagnostic standards specify several parameters to be followed in the process of assessing adaptive behavior.

37. First, as it is expected that strengths co–exist with weaknesses, analysis of adaptive behavior is based on the presence of weaknesses, not the absence of strengths. As stated in the AAIDD–10, "significant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." A0107 (AAIDD–10 at 47); *see also Moore–I*, 137 S. Ct. at 1050 ("[T]he medical community focuses the adaptive–functioning inquiry on adaptive *deficits*.") (emphasis in original); *Moore–II*, 139 S. Ct. at 670 (CCA erred in relying "less upon the adaptive *deficits* to which the trial court had referred than

upon Moore's apparent adaptive *strengths*") (emphasis in original); Tr. 9/10/10 at 43–45, 79; Tr. 9/20/10 at 17–18.

38. Second, the concept of deficits in adaptive functioning includes both acquisition deficits, or the failure to acquire a skill, and performance deficits, or the failure to perform a skill even though it has been acquired. For this reason, the focus for an individual's adaptive behavior is on an individual's typical level of adaptive functioning rather than maximal functioning or what he or she may be capable of achieving at a given point in time in the future, etc. Therefore, if an individual *can* do something, but typically does not do it, that still constitutes a deficit in adaptive functioning. *See* A0076–77 (DSM–5 at 34–35); A0089 (AAIDD–10 at 27).

39. Third, the APA warns against the use of prison functioning to assess adaptive behavior, and the AAIDD outright precludes it. *See* A0080 (DSM–5 at 38) ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)."); A0129 (AAIDD–12 at 20) ("The diagnosis of ID is not based on the person's . . . behavior in jail or prison."); *Moore–I*, 137 S. Ct. at 1050 ("Clinicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." (citing DSM–5 at 38 and AAIDD–12 at 20)); *Moore–II*, 139 S. Ct. at 669 (same).

40. Fourth, a diagnosis of ID is not a diagnosis of exclusion. Rather, "[c]o–occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population." A0082 (DSM–5 at 40); *see also* A0117–22 (AAIDD–10 at 58–63). Hence, "the existence of a personality disorder or mental–health issue . . . is not evidence" that a person does not also have adaptive deficits. *Moore–I*, 137 S. Ct. at 1051; *see also Moore–II*, 139 S. Ct. at 669 (same). "The diagnosis of intellectual

disability should be made whenever Criteria A, B, and C [i.e., prongs one, two, and three] are met." A0081 (DSM–5 at 39).

41. Fifth, and of particular importance to Mr. Bourgeois's case, it is critical to avoid the use of stereotypes in assessing adaptive functioning. *See* A0134 (AAIDD–12 at 26) (identifying "a number of incorrect stereotypes" about ID that "can interfere with justice"); *see also Moore–I*, 137 S. Ct. at 1051–52 (holding Texas's approach to *Atkins* claims unconstitutional because it had no basis in either medicine or law, but instead relied on inaccurate stereotypes of the intellectually disabled by laypeople); *Moore–II*, 139 S. Ct. at 671 (faulting CCA for continued "reliance upon what we earlier called 'lay stereotypes of the intellectually disabled,'" such as citing to evidence that Moore had a girlfriend and a job as "tending to show he lacks intellectual disability"). Among the commonly held, but erroneous, stereotypes relating to individuals with intellectual disability are that individuals with ID: "look and talk differently from persons from the general population," "are completely incompetent and dangerous," "cannot do complex tasks," "cannot get driver's licenses, buy cars, or drive cars," "do not (and cannot) support their families," "cannot romantically love or be romantically loved," "cannot acquire vocational and social skills necessary for independent living," and "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations." A0134 (AAIDD–12 at 26). The DSM–5 confronts several of these stereotypes by expressly recognizing that persons with significant adaptive deficits can, inter alia, have romantic relationships in adulthood, maintain regular employment in jobs that do not emphasize conceptual skills, function age–appropriately in personal care, arrange for their own transportation and manage money with support, raise a family with support, and develop a variety of recreational skills. *See* A0076–77 (DSM–5 at 34–35).

42. Sixth, the diagnostician must employ "clinical judgment," which is defined as a "special type of judgment rooted in a *high level of clinical expertise and experience* and judgment that emerges directly from extensive training, experience with the person, and extensive data." A0092 (AAIDD–10 at 29). The type of data that should inform clinical judgment includes clinical interviews with third–party reporters, record review, and individually administered and psychometrically sound neuropsychological and achievement testing. A0079 (DSM–5 at 37). The AAIDD–10 further explains that clinical judgment is "characterized by its being systematic (i.e., organized, sequential, and logical), formal (i.e., explicit and reasoned), and transparent (i.e., apparent and communicated clearly)." A0123 (AAIDD–10 at 86).

43. Finally, the AAIDD warns that persons with mild ID often try to "mask their deficits and attempt to look more able and typical than they actually are." A0111–12 (AAIDD–10 at 51–52); *see also* A0132 (AAIDD–12 at 24) (explaining that an ID individual will commonly attempt to "'fake good' so as to hide their [intellectual disability] and try to convince others that he or she is more competent"); Tr. 9/10/10 at 65 (Dr. Gelbort explaining that ID individuals may try to "steer conversations" to talk about "what they know about or what they think they know about" and hide their deficiencies in other areas); Tr. 9/20/10 at 101–02 (Dr. Swanson testifying similarly). This is in part a symptom of impaired problem solving skills. A0118 (AAIDD–10 at 159). It also results from a history of teasing and maltreatment caused by their impairments. *Id*.; Tr. 9/20/10 at 102 ("When you are functioning at a lower level it probably doesn't bother you, but when you are mild you have enough cognitive ability to recognize the difference, and it's a self–esteem issue. You would like to present better and you would like to be like the other people that you know.").

3. Mr. Bourgeois has significant deficits in adaptive functioning.

44. In connection with Petitioner's § 2255 *Atkins* claim, clinical psychologist Victoria Swanson, Ph.D., conducted a broad–based adaptive behavior assessment of Mr. Bourgeois, considering formal testing; records; third–party interviews with family members, former neighbors, and former colleagues; testimony; the reports of Drs. Weiner and Gelbort; the reports of Government experts Dr. Price and Dr. Moore; the video recordings of the evaluations conducted by Drs. Price and Moore; and her own clinical evaluation of Mr. Bourgeois. *See* Tr. 9/20/10 at 19–21, 82–85. Dr. Swanson, who has spent her career diagnosing and providing services to intellectually disabled individuals and who served as the President of the National Psychology Division of the AAIDD from 2003 to 2005, was eminently qualified to conduct this evaluation. *See* A0001 (Declaration of Victoria Swanson, Ph.D., ¶ 2). Based on her evaluation, Dr. Swanson concluded that Petitioner suffered from significant adaptive deficits before the age of eighteen, satisfying the second prong of ID as defined by the AAIDD and the DSM–5. *See* Tr. 9/20/10 at 104. Her conclusions are supported by extensive lay–witness evidence, records, and formal testing, as detailed below.

a. Conceptual domain

i. Academic functioning

45. One element of the conceptual domain is academic functioning. Due to Mr. Bourgeois's age, no records from elementary school are available. Likewise, there is no record of his achievement on standardized testing.[10] However, family members reported to Dr. Swanson

[10] While there are no records that Mr. Bourgeois was ever tested for special education, neither is there evidence that such services were even available. Indeed, the availability of services for Mr. Bourgeois is highly doubtful in light of the fact that his older brother Anthony, who suffered from cerebral palsy, did not receive any services in the state of Louisiana until 2001, when he was middle–aged. *See* Tr. 9/20/10 at 41, 78–79; *see also id.* at 79 (Dr. Swanson

that Petitioner failed a grade in elementary school[11] and participated in speech therapy. *See* Tr. 9/20/10 at 98; A0006 (Swanson Supplemental Report at 3); *see also* Tr. 9/21/10 at 323–24 (cousin Carl Henry testifying that Alfred had to repeat fourth grade and that, unlike other children at his school, he had to stay in the same class all day, which was considered "special education" at the time). "Reporters also advise[d] that Mr. Bourgeois had significant problems in learning, and that relatives would spend hours with him every night reviewing his school work and trying to teach him basic skills, and that he was delayed when compared to his peers in areas like reading and counting money." *Id.* at 3; *see also* Tr. 9/21/10 at 27, 37–38, 58–59 (older sister Claudia Williams testifying that as a young child, Alfred had trouble with basic things like learning the alphabet and how to count); *id.* at 98–99 (neighbor Beverly Frank testifying that Alfred couldn't count money at the age of nine).

46. Mr. Bourgeois's Lutcher High School transcript confirms that he was an adolescent with low intelligence who struggled in school. He achieved poor grades across all subjects in high school, with a median score of C to D. In addition, he attended basic level classes. For example, the highest level of math studied was first year algebra. This was only a half credit course taken in his third year of high school, and he obtained a D. *See* A0216 (Lutcher High School Transcript dated 05/24/83).

47. Non–academic records further corroborate that Mr. Bourgeois struggled in the academic realm. For instance, in 1985, Mr. Bourgeois attempted to qualify for permanent

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testifying that special education services were not available in the area of southern Louisiana where Mr. Bourgeois grew up prior to approximately 1980). Dr. Swanson also testified that, even if such services were available, the fact that Anthony was severely impaired may have (incorrectly) signaled to Alfred's family members that he was merely slow, but by comparison to Anthony, not intellectually disabled. *Id.* 81–82.

[11] This is confirmed by a subsequent record, albeit not a school record. *See infra*.

employment with the St. John the Baptist Parish Sheriff's Office, but was unable to pass the necessary examinations. His training instructor, Lt. David M. Wilson, described Mr. Bourgeois's conceptual difficulties, noting that Mr. Bourgeois was given two opportunities to pass the firearms test, and he participated in fifty–four hours of training in preparation for the test. In Lt. Wilson's view, Petitioner's failure on the firearms test, and his "poor performance scholastically," made further training "unfruitful and unwarranted." *See* A0218 (Letter from Lt. David M. Wilson to Sheriff Lloyd B. Johnson dated 5/6/85).

48. Mr. Bourgeois also underwent a psychological evaluation pursuant to his application to the St. John the Baptist Parish Sheriff's Office. The resulting report notes that Mr. Bourgeois had to repeat a grade in school. *See* A0219–22 (Psychological Evaluation by Morris & McDaniel, Inc., dated 5/22/85).

49. Finally, Petitioner's results on the Woodcock–Johnson Third Edition Tests of Achievement ("WJ–III") confirm his low level of academic functioning. Dr. Swanson administered the WJ–III to Mr. Bourgeois in 2009. Tr. 9/20/10 at 43–44; *see also id.* at 44–46 (explaining that the WJ–III is a "battery of many tests assessing many types of adaptive skills and then collapsing them into broad areas," revealing scores that indicate an individual's current academic functioning).

50. Overall, the achievement testing showed that Mr. Bourgeois's "academic fluency is at the fifth grade level and his actual ability to apply academics actually is at the third grade level," which is "consistent with what you would see with a person who has mild mental retardation." Tr. 9/20/10 at 58. Petitioner's individual achievement test scores on the WJ–III include: story recall at a kindergarten level; applied problem solving at a second–grade level; oral comprehension and passage comprehension at a third–grade level; writing samples and

understanding directions at a fourth–grade level; calculation, reading fluency, and writing fluency at a fifth–grade level; and math fluency at a sixth–grade level. *See* A0020 (WJ–III Score Report).

51. The fact that so many of Mr. Bourgeois's individual scores—as well as his overall "academic fluency" and "ability to apply academics"—fell at or below the sixth–grade level is significant. At the time of Petitioner's § 2255 proceedings, the Diagnostic and Statistical Manual of Mental Disorders—4th Edition, Text Revision ("DSM–IV–TR") provided that, "by their late teens," individuals with mild intellectual disability could "acquire academic skills up to approximately the sixth–grade level." DSM–IV–TR at 43. The current DSM–5 uses no grade–specific cut off in the description of mild ID, and only requires that an individual's functional use of academic skills be impaired for deficits to be present. *See* A0076 –77 (DSM–5 at 34–35).[12] Hence, under current diagnostic standards, Petitioner's achievement scores indicate that he is not just mildly intellectually disabled, but falls within the moderate level of severity.[13]

[12] The DSM–5 description for functional academics at *mild* level of ID states: "For school–age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age–related expectations. In adults, abstract thinking, executive function . . ., and short–term memory, as well as functional use of academic skills (e.g., reading, money management) are impaired." A0076 (DSM–5 at 34).

[13] Government expert Dr. Moore disagreed that Mr. Bourgeois's WJ–III scores were low enough to indicate ID. However, Dr. Moore based this conclusion on the "scaled score" column of the test results, rather than the "age and grade equivalent" column, despite agreeing with the proposition that "experienced neuropsychologists would be able to rely on the age and education equivalence" score. Tr. 9/24/10 at 180–85. Furthermore, Dr. Moore conceded that, based on the age and equivalency column, Mr. Bourgeois has "far more grade equivalents below the sixth grade," the grade level which the then–current version of the DSM recognized as attainable for a "person with mild mental retardation." *Id.* at 181–82. And, as mentioned above, the current DSM–5 uses no grade–specific cut off in the description of mild ID, and only requires that an individual's functional use of academic skills be impaired for deficits to be present. *See* A0076–77 (DSM–5 at 34–35).

52. Meanwhile, the only tests on which Mr. Bourgeois scored above a sixth–grade level—namely, letter–word identification (eighth grade) and spelling (thirteenth grade)—are tests that implicate mere rote learning, as opposed to any problem solving, analysis, or higher–level thinking. The primary significance of these higher scores, therefore, is that they support Dr. Swanson's conclusion that Mr. Bourgeois was not malingering; he scored well where he could, even if the scores still reflect limited academic functioning for an adult. *See* Tr. 9/20/10 at 57–58.

53. The validity of Petitioner's achievement testing is further confirmed by the fact that he scored low in areas in which he demonstrated deficits during the Government's experts' clinical evaluations, such as reading comprehension, writing fluency, and abstract reasoning. *Id.* at 47–51, 57–60. Likewise, his overall pattern of scores on the WJ–III mirrored the pattern of scores on the WAIS–R and WAIS–III administered by Drs. Weiner and Gelbort, respectively. *Id.* at 56–58.

ii. Executive functioning and self–direction

54. Along with academic functioning, another element of deficits in the conceptual domain is limited executive functioning and self–direction. In Mr. Bourgeois's case, such deficits were apparent from a very young age. Family members and friends recall that he was slow to learn and comprehend concepts as a child. *See, e.g.*, Tr. 9/21/10 at 13–14, 17 (older sister Claudia Williams testifying that Alfred was "very slow" and "couldn't catch on" when she was trying to teach him things, so she had to "constantly show him . . . over and over what to do"); *id.* at 36 (same); *id.* at 97–98 (childhood neighbor Beverly Frank testifying that Alfred was "slow" and "couldn't grasp the things" that other children his age talked about or the games they played); A0193 (Declaration of Beverly Frank, ¶ 7) ("Growing up, Alfred wasn't a bright child. His grasp of learning was weaker than the rest of the children."); Tr. 9/21/10 at 135 (childhood neighbor Brenda Goodman testifying that Alfred was "slow" as a child); *id.* at 399–400 (cousin

Murray Bourgeois testifying that he tried to teach ten–year–old Alfred how to work on cars, but Alfred was "slow to catch on" and the "mechanic thing was like too fast of a pace for him"); *id.* at 324 (cousin Carl Henry testifying Alfred was "slow" and had "trouble catching on to" new games and activities other children would play).

55. Alfred also had trouble understanding and following directions, even after he had received repeated instructions. *See, e.g.*, Tr. 9/21/10 at 100 (Ms. Frank testifying that her grandmother, with whom Alfred lived for several years as a child, would have to continually re–teach Alfred things like how to button his shirt, even at the age of nine or ten); *id*. at 138 (Ms. Goodman testifying Alfred "could not follow instructions"); A0193 (Frank Declaration, ¶ 8) ("My grandmother had a lot of patience with Alfred. She tried to teach him to cook simple things, like frying an egg or frying toast. He had trouble following directions, remembering simple tasks."); A0214 (Declaration of Claudia Williams, ¶ 5) ("He would get beat [by our mother] for the same thing over and over like he just couldn't learn."); A0189 (Declaration of Lawanda Cook, ¶ 4) ("I always thought Alfred was really slow like a child. He never seemed to understand anything. I used to have to repeat the same thing over and over again to him and even then I'm not sure he understood what I was saying to him.").

56. These problems continued into adulthood. *See*, *e.g.*, Tr. 9/21/10 at 401 (cousin Murray Bourgeois testifying that, as an adult, Alfred was "slower than most of the guys, you know, catching on to a lot of things"); *id.* at 325–29 (cousin Carl Henry, who worked for the same supermarket as Alfred, testifying that Alfred was slower to advance from warehouse porter to truck driver than other employees because he had difficulty learning the necessary skills for the latter position); *id.* at 371–72 (Donald Reese, a co–worker at a long haul trucking company, describing one occasion when Petitioner was driving and became very lost, taking them some

400 miles out of the way, despite Mr. Reese having explicitly given Mr. Bourgeois straightforward directions); A0181–82 (Declaration of Michelle Armont, ¶ 8) ("[Alfred] did not have the ability to think of different ways to solve problems with his wives and girlfriends. His mind just did not work that way. He could not reason through a problem."); *id.* ("Things that would be obvious to a normal person were not obvious to Alfred."); A0212 (Declaration of Michelle Warren, ¶ 16) ("It was like [Alfred] had a block and could not reason things out or change his behavior."); A0207 (Declaration of Ivy Thomas, ¶ 4) ("Alfred was really slow. I remember that I used to have to explain things to him several times, and even then it seemed like he didn't always understand what I was trying to say.").

57. Mr. Bourgeois's decreased ability to comprehend and problem solve meant that he was destined to repeat mistakes and was unable to learn from his actions. In the words of his half–sister, Michelle Armont, "Alfred could not consider the consequences of his actions." A0181–82 (Armont Declaration, ¶ 8).

58. The results of the neuropsychological testing performed by Dr. Weiner and Dr. Gelbort confirm these witness reports. Both doctors found that Mr. Bourgeois's ability to process new information and comprehend new topics is significantly impaired. *See* Tr. 9/10/10 at 26 (Dr. Gelbort testifying that Petitioner's "learning is problematic, especially when he has to understand conceptually the information being presented to him"); Tr. 9/20/10 at 238 (Dr. Weiner testifying that Mr. Bourgeois is "likely to have difficulty adjusting to new and unfamiliar situations"). Additionally, testing of his memory shows mild to moderate impairment. More generally, Dr. Gelbort explained that the testing overall demonstrated that Mr. Bourgeois has trouble with "things that are more conceptual[,] that require higher level processing, that require him to think about more things at once and then work with them in a goal–directed fashion." Tr. 9/20/10 at

239–40; *see also id.* at 52. Likewise, after reviewing this testing, combined with her "own observations and evaluations," Dr. Swanson concluded that "Mr. Bourgeois is deficient in his ability to absorb and understand information" and "is significantly impaired in his ability to solve problems." A0006 (Swanson Supplemental Report at 3). This testing is further evidence of Mr. Bourgeois's conceptual deficits, and also explains his deficits in other domains as it reflects his inability to make decisions, acquire knowledge, and control his emotions and impulses.

iii. Communication

59. An individual's ability to effectively communicate also falls within the conceptual domain. Mr. Bourgeois had difficulty communicating from a young age. According to family members and friends, "when he was much younger he was pretty much silent and non–communicative." Tr. 9/20/10 at 91; *see also* Tr. 9/21/10 at 100 ("[H]e couldn't really explain himself real well. . . . [I]t was a thing of not being able . . . just to explain his self, you know, if he wanted to do something."). Mr. Bourgeois was eventually placed in speech therapy because he spoke with a stutter. Tr. 9/20/10 at 91.

60. These communication deficits continued into adulthood, as demonstrated by Petitioner's results on the WJ–III, which includes tests for oral comprehension, oral language, and listening comprehension. Tr. 9/20/10 at 58. Mr. Bourgeois's scores in these areas were at the third– and fourth–grade level, or the 9th to 16th percentile. *Id.* at 59. As discussed above, the DSM–5 states that adults whose "functional use of academic skills" is "impaired" have significant conceptual deficits at the mild level of ID. That Petitioner functioned at the third– to –fourth–grade level went far beyond an impairment.

61. Mr. Bourgeois's communications deficits were also apparent in Dr. Swanson's clinical evaluation of Mr. Bourgeois. *See* Tr. 9/20/10 at 58 (explaining that her "clinical judgment" of Petitioner's communication deficits were "back[ed] up" by his standardized scores

on achievement testing); *id.* at 105 ("He may have good expressive language when he is on a familiar topic but he doesn't have a good underlying understanding.").

b. Social domain

62. Childhood playmates recall Petitioner's difficulties in the social realm. His family and neighbors remember him as a slow and awkward child who had difficulty playing with the other children and "fitting in." *See* Tr. 9/21/10 at 97–98 (Beverly Frank testifying that Alfred could not understand the games played by other children his age); *id.* at 120 (Alfred was "shy in making friends"); A0205 (Declaration of Louis Russell, Jr., ¶ 3) ("Growing up Alfred had a hard time. He was a big and awkward kid. We would all laugh at how he played sports. He had big feet that he was always falling over. Alfred always tried to fit in with other kids. Alfred has always had an awkward nature."); A0183 (Declaration of Nathaniel Banks, ¶ 3) ("Alfred wasn't any good at sports. He didn't play sports with us.").

63. Alfred did not handle the rejection of his peers well. *See, e.g.*, Tr. 9/21/10 at 102 ("Alfred was teased a lot. He used to come home crying from school. . . . [H]e used to cry a lot."); A0183 (Banks Declaration, ¶ 3) ("Alfred was a fragile child. He spent a lot of time by himself. People used to pick on Alfred a lot. . . . I just remember Alfred crying at anything. Someone would tease him and he would break down crying."). These witness reports of crying inappropriately and uncontrollable behavior are evidence of adaptive impairments seen in persons with mild intellectual disability. *See* A0076 (DSM–5 at 34) (significant deficits in the social domain include "difficulties regulating emotion and behavior in age–appropriate fashion"); Elaine E. Castles, *We're People First: The Social and Emotional Lives of Individuals with Mental Retardation*, at 26 (1996) ("Cognitive disabilities may [] affect an individual's ability to cope with emotional discomfort and stressful interpersonal situations.").

64. As described in relation to his conceptual deficits, Mr. Bourgeois also had trouble effectively communicating from a young age. *See, e.g.*, Tr. 9/20/10 at 91 (describing young Alfred as "pretty much silent and non–communicative"); Tr. 9/21/10 at 100 (relaying that as a child, Petitioner could not explain when he "wanted to do something"). Mr. Bourgeois was eventually placed in speech therapy because he spoke with a stutter. Tr. 9/20/10 at 91.

65. Mr. Bourgeois's ability to communicate was also hindered by his lack of "internal monitor." A0202 (Declaration of Claudia Mitchell dated 9/16/07, ¶ 3). As his half–sister Claudia Mitchell explained, teenaged Alfred "just blurted stuff out and that made him come across as bold but it was really that anything he thought just came out of his mouth." *Id.*

66. Mr. Bourgeois's social abilities did not improve with age. A psychiatric evaluation conducted in 1985, when Petitioner was twenty–one years old, reported that Mr. Bourgeois had problems in evaluating his self–worth and had low self–esteem, which reflects deficiencies in social adaptive functioning. *See* A0219–22 (Psychological Evaluation). His communication deficits also continued past the developmental period, as demonstrated by Mr. Bourgeois's achievement testing placing him at the third– and fourth–grade level, or the 9th to 16th percentile, in the areas of oral comprehension, oral language, and listening comprehension. *See* Tr. 9/20/10 at 58.

67. Lastly, Mr. Bourgeois proved unable to maintain a healthy intimate relationship. He was married to four different women. *See* A0046–48 (Declaration of Kathleen Kaib, M.S.S., M.L.S.P., L.S.W. – 05/04/2007, ¶¶ 5–12). Consistent with the executive functioning and emotional dysregulation issues discussed above, each marriage was characterized by dysfunction

and ultimately failed. *Id.* Indeed, all of his relationships were "chronically unstable due to his inability to regulate his emotions." *Id.* at ¶ 4.[14]

c. Practical domain

68. As noted above, as a child, Mr. Bourgeois proved unable to follow simple directions, which implicates both the conceptual and the practical domain. Reporters also told Dr. Swanson that Petitioner "was delayed compared to his peers in learning simple skills like tying his shoes and counting money," and it "took young Alfred much more time than his peers to learn how to ride a bike." A0007 (Swanson Supplemental Report at 4); *see also* Tr. 9/20/10 at 90–91; Tr. 9/21/10 at 98–100 (Ms. Frank testifying that at the age of nine, Alfred couldn't count money or dress himself; he was always putting on mismatched socks and could not tie his shoes or button a shirt even when he was "really up in age"); *id.* at 137–39 (Ms. Frank's cousin, Brenda Goodman, corroborating Ms. Frank's account of Petitioner's difficulties dressing himself); *id.* at 324, 360 (Alfred's cousin testifying that young Alfred had difficulty learning new games and how to ride a bike). Mr. Bourgeois was generally described as someone who had to rely on family and friends "in order to perform daily life activities." A0005 (Swanson Supplemental Report at 2).

69. As with the other realms, Petitioner's practical deficits persisted as he grew older. Half–sister Claudia Mitchell, who first met Alfred when he was a teen, explained:

> Alfred stayed with me in Texas for a while. When he got here he was wearing clothes that were too small for him. He could not cook at all. He could not really function on his own so he started to feed off my life. He would ride on my accreditation. I helped him with paperwork. I filled out applications for him. His pattern was to just try to look good and hide his failings, then he could connect

[14] Although Ms. Kaib took the stand in Petitioner's § 2255 proceedings, the court would not allow her to testify as to her interviews with Mr. Bourgeois's ex–wives and ex–girlfriends. *See* Tr. 9/20/10 at 383–93.

> with someone who could help him function so that he could continue to try and feel less inferior to everyone else. There were other people at other times that filled this role for Alfred.

A0203 (Mitchell Declaration dated 9/16/07, ¶ 7).[15]

70. Several reporters also recall Alfred's impaired financial abilities. *See* A0181–82 (Armont Declaration, ¶ 8) ("[Alfred] did not understand that he could not afford the things he bought. . . . He just bought things without understanding how hard it would be to make the payments."). Based on her interviews of Petitioner's family, friends, and co–workers, as well as her review of financial records, Dr. Swanson concluded that Mr. Bourgeois had "difficulty understanding and managing money." Tr. 9/20/10 at 164–66; 172–76.[16]

71. As with the other realms, his practical deficits persisted through adulthood. Several reporters recall Alfred's impaired financial abilities. *See* A0181–82 (Armont Declaration, ¶ 8) ("[Alfred] did not understand that he could not afford the things he

[15] Ms. Mitchell had planned to testify at Petitioner's § 2255 evidentiary hearing, but was unable to do so because her husband suffered a debilitating stroke shortly before the hearing. *See* A0204 (Declaration of Claudia Mitchell dated 8/26/10, ¶¶ 3–6).

[16] In her testimony, Dr. Swanson stated that Mr. Bourgeois has "deficits in the area of conceptual and social," but only referred to "limitations" in the practical realm. Tr. 9/20/10 at 104. Dr. Swanson found that Mr. Bourgeois was someone who had to rely on family and friends "in order to perform daily life activities," A0005 (Swanson Supplemental Report at 2), and who had "difficulty understanding and managing money." Tr. 9/20/10 at 164–66; 172–76. These limitations would qualify Mr. Bourgeois as someone with adaptive deficits in the practical domain as described in the DSM–5. *See* A0076 (DSM–5 at 34) (individuals with adaptive deficits in the practical domain include those who "need some support with complex daily living tasks in comparison to peers," including in the areas of "banking and money management"). In addition, several deficits relevant to the conceptual and social domains (in which Dr. Swanson found there were "definitely" adaptive deficits), also serve to establish deficits in the practical realm. For instance, his inability to understand and follow directions (conceptual) affects his ability to cook for himself and acquire new vocational skills (practical). Likewise, his inability to control his emotions and effectively communicate (social) affect all aspects of his daily living, including occupational skills and self–care (practical).

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72. Mr. Bourgeois is also described as oblivious towards safety. Family members and neighbors recall that as a teenager, Alfred drove a four–wheeler "straight into a pole." A0205 (Russell, Jr. Declaration, ¶ 4); *see also* A0214 (Williams Declaration, ¶ 6). An acquaintance later in life, Lawanda Cook, likewise remembers Alfred taking "crazy chances in the truck he drove. . . . [O]ne time he was driving the truck and I was sitting in the back near the sleeper compartment. He stood up in his seat and turned around to talk to me then he acted like he was going to walk back to me. I was scared to death and it didn't seem to affect him at all." A0189 (Cook Declaration, ¶ 3). Donald Reese, Mr. Bourgeois's co–worker at a long haul trucking company, testified about a time when Mr. Bourgeois drove their truck into a ditch along the wall of a mountain and Mr. Reese had to take over and get the truck out. Tr. 9/21/10 at 372–75. After that, Mr. Reese refused to accept jobs that would require him to ride with Mr. Bourgeois. *Id.* at

[17] In her testimony, Dr. Swanson stated that Mr. Bourgeois has "deficits in the area of conceptual and social," but only referred to "limitations" in the practical realm. Tr. 9/20/10 at 104. Dr. Swanson found that Mr. Bourgeois was someone who had to rely on family and friends "in order to perform daily life activities," A0005 (Swanson Supplemental Report at 2), and who had "difficulty understanding and managing money." Tr. 9/20/10 at 164–66; 172–76. These limitations would qualify Mr. Bourgeois as someone with adaptive deficits in the practical domain as described in the DSM–5. *See* A0076 (DSM–5 at 34) (individuals with adaptive deficits in the practical domain include those who "need some support with complex daily living tasks in comparison to peers," including in the areas of "banking and money management"). In addition, several deficits relevant to the conceptual and social domains (in which Dr. Swanson found there were "definitely" adaptive deficits), also serve to establish deficits in the practical realm. For instance, his inability to understand and follow directions (conceptual) affects his ability to cook for himself and acquire new vocational skills (practical). Likewise, his inability to control his emotions and effectively communicate (social) affect all aspects of his daily living, including occupational skills and self–care (practical).

375–76; *see also id.* at 400 (cousin Murray Bourgeois testifying that another of Alfred's co–workers, who was also one of his good friends, warned people not to ride with Alfred because he was so unsafe).

d. Masking

73. Like many individuals with intellectual disability, *see* A0125–27 (AAIDD–10 at 158–59), Mr. Bourgeois tried hard to "mask" his deficits. Indeed, each of the mental health experts that evaluated Mr. Bourgeois in connection with his § 2255 *Atkins* claim found that he actively sought to portray himself as far more gifted, intelligent, and accomplished than the objective evidence showed. *See, e.g.*, Tr. 9/23/10 at 204 (Dr. Price testifying Mr. Bourgeois engaged in "adult impression management," "portray[ing] himself with ability and accomplishments that are exaggerations"); Tr. 9/24/10 at 161–62 (Dr. Moore testifying Petitioner "tends to want to make himself look better than he really is"); Tr. 9/20/10 at 229 (Dr. Weiner testifying that Mr. Bourgeois had a history of "attempting to present himself in a much more favorable light in terms of grades, functioning, than actually was the case"); *id.* at 60 (Dr. Swanson testifying that Mr. Bourgeois "overestimates everything he can do" and "likes to present himself in the best possible manner"); *id.* at 101–02 (very important to Mr. Bourgeois that he appear able to do everything his non–impaired older brother could do); Tr. 9/10/10 (p.m.) at 65 (Dr. Gelbort testifying that Mr. Bourgeois would mask his low intellect by steering the conversation to talk about things he felt he knew about, "rather than just simply answering questions").

74. Lay witnesses explained that Mr. Bourgeois had been engaged in such masking behavior for most of his life. For instance, cousin Carl Henry testified that Alfred was a "proud guy" who "wanted everybody to feel he was on the same playing field." Tr. 9/21/10 at 339–40; *see also id.* at 329–30 (explaining that Alfred was skillful at soliciting help from others to cover

up his deficits); A0181–82 (Armont Declaration, ¶ 8) ("Alfred wanted to be accepted. Because of his limitations he tried to gain the acceptance he wanted by getting possessions and by telling people things he thought would make them like him."). Aunt Elnora Bourgeois McGuffy recalls:

> Alfred was not as smart as [his brother] Lloyd, but he wanted everyone to think that he was. Alfred would brag on himself, even when it wasn't true. You never know how much Alfred knew about anything because he was always exaggerating so much. He had a problem with that. Alfred would try to make himself seem like he was doing better that [sic] he was more successful than he was and smarter than he was.

A0200 (McGuffy Declaration, ¶ 7). Nathaniel Banks confirms:

> Alfred wanted to impress people. Alfred lied a lot. I remember that Alfred would say things that you just knew weren't true. I used to work for the sheriff's office. Alfred told people he worked there. He was never a proper deputy. Alfred tried to build himself up—present himself as more than he was. I think Alfred lied so much he started to believe it.

A0183 (Banks Declaration, ¶ 4).

75. Even the district court that (erroneously) rejected Mr. Bourgeois's *Atkins* claim in 2011 made observations tending to confirm that, with age, Mr. Bourgeois became masterful at masking his deficits. *See, e.g.*, *Bourgeois*, 2011 WL 1930684, at *30 ("Bourgeois' ability to appear intelligent likely stems from his narcissism and desire to look good."); *id.* at *29 ("While testimony from various individuals questioned his intellect when younger, those who knew him as an adult did not suspect that he was mentally retarded."); *id.* at *28 (quoting Government expert Dr. Price, who testified that Mr. Bourgeois is very good at talking positively about "himself, his life, his situation," but that when it came to "objective testing," he "kind of shuts down a little bit"); *id.* at *30 (referring to Dr. Price's opinion that "Bourgeois' verbal abilities and social skills give off the impression that he is smarter that he is").

76. Regardless of how successfully Mr. Bourgeois was able to mask his disability, the evidence discussed above demonstrating his significant lifelong intellectual and adaptive deficits is irrefutable.

4. Formal test of adaptive behavior

77. Adaptive behavior can also be assessed using formal instruments. However, even under ideal circumstances, an adaptive behavior determination is not meant to be based only on adaptive behavior scores. The DSM–5 does not require a particular score on a test of adaptive functioning to establish prong two or identify any range of scores as being in the presumptive range for intellectual disability. A0079 (DSM–5 at 37). The AAIDD–10 provides that scores that are approximately two standard deviations below the mean (70–75) are in the presumptive range for intellectual disability. A0106 (AAIDD–10 at 46). These scores can be on any one of the three domains or the composite score. Nevertheless, the AAIDD acknowledges that formal adaptive behavior testing instruments are generally imperfect, and even fail to assess certain areas of adaptive functioning. *Id.* at 51. These instruments are far less reliable than IQ or neuropsychological tests as they assess a collateral reporter's opinion of the individual's functioning, rather than directly assessing performance in a given task. Moreover, under both the DSM–5 and the AAIDD–10, scores from formal tests of adaptive behavior are intended to be interpreted with clinical judgment and considered alongside other sources of information such as third party interviews, other medical and mental health evaluations, and records review. A0079 (DSM–5 at 37); A0112 (AAIDD–10 at 52).

78. As one part of her extensive evaluation, Dr. Swanson administered both of the "gold standard" adaptive assessment tests—the Vineland Adaptive Behavior Scales, 2d Edition ("Vineland–II") and the Adaptive Behavior Assessment System, 2d Edition ("ABAS–II")—to Beverly Frank, the granddaughter of a woman with whom Mr. Bourgeois lived as a child for

several years. Dr. Swanson chose Ms. Frank because she fit the description of a "good informant" set forth by the publishers of the Vineland–II and ABAS–II: she knew Mr. Bourgeois well over an extended period and was also able to recall his functioning at a specific point in time (namely, when he was seven years old). Tr. 9/20/10 at 65–66. Furthermore, Ms. Frank observed a full spectrum of Petitioner's abilities, as opposed to a single area such as work. *Id.* at 67, 72. Lastly, Dr. Swanson explained that it was important to use an informant who knew Mr. Bourgeois at a young age, before he developed the ability to mask. *Id.* at 103; *see also infra* Section III.C.3.d (detailing Mr. Bourgeois's long history of hiding his deficits and exaggerating his capabilities and achievements).

79. Dr. Swanson also explained why she administered both the Vineland–II and the ABAS–II to Ms. Frank, even though she believes the former is a far better test. The ABAS–II is a test that the informant completes alone; there is no interaction between the test–taker and the administrator. By contrast, the Vineland–II employs a semi–structured interview format that allows the administrator to ask follow–up questions to ensure an accurate score is being assigned for each function. Hence, Dr. Swanson used the ABAS–II more as a screening device to confirm that there were no large gaps in Ms. Frank's knowledge of Mr. Bourgeois and, having found this to be true, she then administered the Vineland–II to obtain a better sense of Petitioner's true functioning. *Id.* at 70–73; *see also id.* at 73–74 (explaining she feels the "Vineland is a more accurate estimate of where [Mr. Bourgeois] really is in compared to the ABAS").[18]

[18] As Dr. Swanson explained, the differences between the test formats accounts for what the district court described as "inconsistencies" in Ms. Frank's answers. *See* Tr. 9/20/10 at 73–74, 154, 191; *Bourgeois*, 2011 WL 1930684, at *36. Additionally, Dr. Swanson testified that the ABAS–II is less accurate in measuring the functioning of an individual with mild ID, as opposed to someone more profoundly impaired, which explains why the ABAS–II results suggested Mr. Bourgeois is more impaired than did the Vineland–II results. Tr. 9/20/10 at 74–78.

80. Dr. Swanson's testing indicates profound deficits in adaptive functioning in all three of the domains recognized by the AAIDD–10 and the DSM–5 (conceptual, practical, and social), as well as in the composite score of Petitioner's overall adaptive functioning. In all three of those domains and the composite score, Dr. Swanson's testing returned scores that were more than two standard deviations below the mean[19] and well into the impaired range. As she summarizes in her declaration:

> Mr. Bourgeois scored a 66 on the Vineland–II. On the sub–scales he scored a 69 in Communication; a 66 in Daily Living Skills; and 66 in Socialization. These scores place him well within the range of mental retardation in the sphere of adaptive deficits. They also corroborate what the other psychologists had already learned through interviews and affidavits of Mr. Bourgeois's relatives and neighbors.

A0002 (Swanson Dec., ¶ 5); *see also* Tr. 9/20/10 at 74–75.[20]

81. Although these scores are significant, consistent with the directive of the DSM–5 and AAIDD–10 discussed above, Dr. Swanson considered the scores merely as one piece of information among many, including third party interviews, medical and mental health evaluations, neuropsychological testing, and records review. *See* Tr. 9/20/10 at 19–21, 82–85.

D. Onset Prior to Age Eighteen

82. A diagnosis of intellectual disability requires that the deficits in intellectual functioning and adaptive deficits manifested prior to the age of eighteen.

83. Evidence of Mr. Bourgeois's intellectual disability has existed since his early childhood. As detailed above, people who have known Mr. Bourgeois since childhood attest that, throughout his youth and into adulthood, he exhibited intellectual and adaptive impairments that

[19] The mean is a score of 100 and one standard deviation is fifteen points.

[20] Ms. Frank's testing resulted in a composite score of 42 on the ABAS–II. *See* A0008–19 (Swanson ABAS Score Report).

affected all facets of his life. Furthermore, based on interviews with these people and other sources, Dr. Swanson concluded that "it is absolutely clear that the onset of Mr. Bourgeois' deficiencies in both his intellectual and adaptive functioning began before age 18 and continued into adulthood." A0007 (Swanson Supplemental Report at 4); *see also* Tr. 9/20/10 at 104.

E. Risk Factors for Intellectual Disability

84. No etiology is required to establish a diagnosis of intellectual disability, and the majority of intellectual disability diagnoses have no confirmed etiology. *See* A0116–21 (AAIDD–10 at 57–62). Nevertheless, presence of risk factors can corroborate a diagnosis of intellectual disability and explain its origins. A0081 (DSM–5 at 39); A0116–21 (AAIDD–10 at 57–62). Both the DSM–5 and the AAIDD–10 identify risk factors for ID, including biomedical factors that result in direct insults to cognition, as well as environmental risk factors in the social, educational, and behavior domains. *See* A0081 (DSM–5 at 39); A01119 (AAIDD–10 at 60); *see also* Tr. 9/24/10 at 52 (Government expert Dr. Price testifying that "risk factors for intellectual disability can include impaired child giving [sic] interaction, lack of adequate stimulation, family poverty, chronic illness in the family, things of that nature. So environmental factors can contribute to a person's development of [intellectual disability]").

85. Mr. Bourgeois's diagnosis of intellectual disability is reinforced by the presence of a number of recognized risk factors for intellectual disability in his life history.

1. Child abuse

86. Witnessing the abuse of others, and being the victim of abuse, increase the risk of intellectual disabilities in children. A0134 (AAIDD–12 at 26); *see also* Tr. 9/20/10 at 89. Mr. Bourgeois experienced both.

87. Numerous witnesses reported that Petitioner's mother took out her hard life and troubles on her children, with a special focus on Alfred. *See, e.g.*, Tr. 9/21/10 at 13–15 (sister

Claudia Williams testifying that their mother used to beat all of the children, but was particularly abusive toward Alfred, whom she beat "constantly"); *id.* at 78 ("She beat all of us, but she didn't beat us like she beat him."); A0214 (Williams Declaration, ¶ 5) ("Alfred got more whippings than the rest of us. . . . Like the rest of us he got beat sometimes for nothing and then he got beat because he was just stupid and kept doing things that got him beat."); Tr. 9/21/10 at 97 (Ms. Frank testifying "Alfred was really mistreated by his mom"); *id.* at 142 (Ms. Goodman testifying Eunice would curse and beat Alfred, and that she "was harder on him than the other kids"); *id.* at 322–23 (cousin Carl Henry testifying that Eunice resented Alfred because her relationship with Alfred's biological father "didn't work out" and she "took the misery of . . . that relationship out on him").[21]

88. Eunice's abuse of Alfred was not only more frequent than her abuse of his siblings, but also more violent. As his sister Claudia explained, all of the children would receive "whippings," but Alfred was whipped so hard that he would be "blue black" and have blood coming from his back and legs. Tr. 9/21/10 at 13–15; *see also id.* at 14 (Eunice once used a meat cleaver to cut off the tip of his finger while the family ate dinner); *id.* at 15 (Eunice would lock young Alfred in a closet with no lights on and leave him there).

[21] *See also* A0191 (Frank Declaration, ¶ 3) ("Alfred's mother treated him differently than her other children."); A0194 (Declaration of Allen Henry, ¶ 3) ("Eunice used to be rough on Alfred. She used to chastise him more than other kids and used to beat him more than the others. . . . Eunice treated Alfred differently from her other children. She scolded him more and whipped him more. She also didn't pay enough attention to him."); A0185 (Declaration of Murray Bourgeois, ¶ 3) ("Eunice was the kind of person who yelled at her kids and whipped them all the time, but Alfred got more beatings than any of them. She was really hard on Alfred."); A0198 (Declaration of Yvonne Robinson Joseph, ¶ 3) ("Alfred's mother used to pick on him and treat him bad. She treated him much worse than she did her other children. She was always fussing at him and whipped him more than the others. She used to call him 'little yellow bastard' and slap him for nothing.").

2. Sexual abuse

89. In addition to the parental abuse and neglect Petitioner experienced, he was also a victim of sexual abuse as a child. Specifically, although neighbor Miss Mary's home was intended to be a "safe" place where young Alfred would be spared the abuse from his mother, while there, Alfred was raped over the course of several years by Miss Mary's son. *See* Tr. 9/21/10 at 142–43; Tr. 9/20/10 at 292.

3. Neglect and impaired parenting

90. The AAIDD identifies neglect as a risk factor for ID, and also lists other factors relevant to the types of neglect suffered by Mr. Bourgeois as a child, including impaired child–caregiver interaction, impaired parenting, rejection of parenting, and chronic maternal illness. *See* A0119 (AAIDD–10 at 60).

91. Alfred was the fifth of seven children born to Eunice Bourgeois. All seven children were born in a time span of under nine years and were conceived by four different fathers. *See* Tr. 9/21/10 at 6–7. Eunice was "overwhelmed" by the number of children in her care. *Id.* at 132–33; *see also id.* at 260–61, 265 (Dr. Mark Cunningham testifying that there were indications that Petitioner suffered psychological damage from being raised in an "overwhelmed family system").[22]

92. Eunice was chronically depressed by the time Alfred was born. She first became depressed when the father of her first three children suddenly abandoned her. A0200 (Declaration of Elnora Bourgeois McGuffey, ¶ 2); A0196 (Declaration of Jersey Henry, ¶ 3). Her

[22] Dr. Cunningham, a forensic psychologist, was retained by trial counsel as a "mitigation expert," but never called to testify. He never evaluated Mr. Bourgeois for ID, but testified in Petitioner's § 2255 proceedings regarding, inter alia, mitigating aspects of Mr. Bourgeois's background that he could have presented if called at trial.

depression worsened when her mother died while Eunice was in the hospital delivering her fourth son. A0187–88 (Declaration of Wilmer Bourgeois, Sr., ¶ 7). That son, Anthony, was born severely disabled. Tr. 9/21/10 at 10; A0214 (Williams Declaration, ¶ 3). Subsequently, her first son Clyde died at the age of twelve when he fell out of a boat and drowned. *See* Tr. 9/21/10 at 6–7; A0209 (Warren Declaration, ¶ 3); *see also* A0214 (Williams Declaration, ¶ 3) (Alfred's older sister, Claudia, explaining that these last two factors—Anthony's disability and Clyde's death—were particularly hard on their mother and took her away from her other children).

93. Eunice was also an alcoholic. *See* Tr. 9/21/10 at 132–34 (neighbor testifying that Eunice drank "excessively," getting intoxicated "every day"); *id.* at 397 (relative of Eunice testifying that she "drank every day").

94. According to family neighbor Brenda Goodman, Eunice's alcoholism and the stress of raising so many children on her own caused her to forget what "was important in life regarding raising her children," including such basic tasks as sending them to school. *Id.* at 132–33. Family members concurred that Eunice failed to fulfill her role as a parent to Petitioner and his siblings. *See, e.g.*, A0187(Wilmer Bourgeois, Sr., Declaration, ¶ 4) ("Eunice did not know how to raise children. She didn't raise them right or teach them the right things. She didn't spend enough time with her kids. My sister Eunice should have never been a mother."); A0224 (Memoranda Generated by Gerald Bierbaum at 39) (quoting Harry Bourgeois, Eunice's cousin, as saying: "Alfred's momma didn't do shit for him. . . . All her kids raised they self. . . . It was like he didn't have no momma."); A0202 (Mitchell Declaration dated 9/16/07, ¶ 2) (Alfred's half–sister remarking: "His mother had basically just thrown Alfred away.").

95. Ultimately, Alfred was cast out by his mother, who sent him at the age of seven to live with an elderly neighbor, Miss Mary Clayton. *See* Tr. 9/21/10 at 93. Even after Miss Mary

died several years later, Alfred still was not welcomed home, but instead had to live with his paternal half–sister, Michelle Armont. *See* Tr. 9/21/10 at 38.

96. Meanwhile, Petitioner was completely abandoned by his paternal father, Alfred Sterling, who "provided no support and made no effort to exercise any sort of relationship with Mr. Bourgeois." A0029 (Declaration of Mark D. Cunningham, Ph.D., ABPP – 05/11/2007, ¶ 19); A0202 (Mitchell Declaration dated 9/16/07, ¶ 2) ("Since [his mother] had rejected him he was looking for a family where he could be accepted. Our father, Alfred Sterling, was not the answer that Alfred was looking for. Alfred tried to make his way into his father's life but Alfred Sterling was a manipulative, mentally abusive man and could not be the father that Alfred wanted and needed.").

4. Low socioeconomic status

97. Poverty is another risk factor for intellectual disability. *See* A0119 (AAIDD–10 at 60); Tr. 9/20/10 at 89–90. Mr. Bourgeois grew up in an impoverished, isolated neighborhood on the banks of the Mississippi River, about fifty miles from New Orleans. His community, called "the Bend," consisted of a one lane dirt road connecting about twenty homes, representing two or three different family units. Tr. 9/21/10 at 8–9; *id.* at 131; *id.* at 395. A family friend who was raised in the same neighborhood described it as consisting of "[p]oor black families." A0227 (Excerpt from Trial Transcript dated 3/23/04); *see also* Tr. 9/21/10 at 131 ("It was very poor."). The neighborhood was surrounded by sugar cane fields, and hemmed in on one side by the river. Tr. 9/21/10 at 9. The Bend was not connected to a sewage line. *Id.* at 141.

98. While poverty is itself one social risk factor, low socioeconomic status also signals the presence of others, including malnutrition, educational inadequacy, insufficient stimulation, and deficient medical and/or educational interventions. *See* A0119 (AAIDD–10 at 60). Thus, as explained by Government expert Dr. Price, Alfred's "lack of education, . . .

impoverishment and the lack of cultural enrichment" bore a "relationship to his low intelligence." Tr. 9/24/10 at 51–52; *see also* Tr. 9/23/10 at 232 (Dr. Price acknowledging that Petitioner's "cultural, spiritual, [and] economic" impoverishment was relevant to "his cognitive intelligence").

5. History of learning difficulties

99. Childhood learning difficulties also constitute risk factors for intellectual disabilities as they correlate with declines in IQ during the developmental period. As discussed above, Alfred is reported to have failed a grade in elementary school and required speech therapy. A0206 (Swanson Supplemental Report at 3); *see also* Tr. 9/21/10 at 323–24. He is also said to have "had significant problems in learning, and that relatives would spend hours with him every night reviewing his school work and trying to teach him basic skills." A0206 (Swanson Supplemental Report at 3); *see also* Tr. 9/21/10 at 27, 37–38, 58–59; *id.* at 98–99.

6. Family heredity risk

100. Having a parent or sibling with intellectual disability significantly increases the likelihood of having an intellectual disability. *See* A0081 (DSM–5 at 39) (comprehensive evaluation for ID involves identification of genetic etiologies, including "three–generational family pedigree"); A0121 (AAIDD–10 at 62) (same).

101. Mr. Bourgeois has a family history of intellectual and adaptive impairments. His older brother, Anthony, was born with cerebral palsy. Tr. 9/21/10 at 10. He was profoundly disabled, unable to feed, bathe, or dress himself throughout his life. *Id.*; *see also* A0200 (McGuffy Declaration, ¶¶ 2–4) (describing Anthony as afflicted with life–long developmental problems); *see also* A0214 (Williams Declaration, ¶ 3) ("We lost [brother] Clyde and then our brother Anthony took a lot of extra care due to his disabilities.").

102. Additionally, Petitioner's mother, Eunice, was described by her brother as "not that smart and slow in understanding." A0187 (Wilmer Bourgeois, Sr., Declaration, ¶ 3); *see also* A0224 (Bierbaum Memorandum at 39) (quoting Harry Bourgeois, Eunice's cousin, describing Eunice as "half–ass retarded").

F. Conclusion

103. For the reasons set forth above, Mr. Bourgeois has established that he is an intellectually disabled person. He suffers from significant deficits in intellectual and adaptive functioning, which have been present since very early in the developmental period. Accordingly, this Court should find Mr. Bourgeois intellectually disabled and categorically ineligible for execution.

IV. RELIEF IS APPROPRIATE UNDER 28 U.S.C. § 2241.

104. This claim is appropriately brought under 28 U.S.C. § 2241. A federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown*, 719 F.3d at 588 (§ 2241 applies to challenges to a habeas petitioner's sentence, in addition to his conviction). "The essential function [of § 2241] is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d at 609 (internal quotations omitted); *Webster*, 784 F.3d at 1136 (same).

105. Cognizable claims include those that rely on a new legal or factual basis not available at the time of the petitioner's trial proceedings or his § 2255 proceedings. *See, e.g.*, *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001); *Davenport*, 147 F.3d at 607–09; *Webster*, 784 F.3d at 1136. The majority of circuit courts of appeal—including the Seventh Circuit—have also expressly recognized that § 2241 is available to petitioners if circuit precedent would have required the district court and appellate panel to erroneously reject petitioner's claim at the time

of his § 2255 motion. *See, e.g.*, *Davenport*, 147 F.3d at 611.[23]

106. Section 2241 is also the appropriate vehicle where a petitioner challenges the execution of his sentence. *Kramer*, 347 F.3d at 217; *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998) ("A motion seeking relief on grounds concerning the execution but not the validity of the conviction and sentence . . . may not be brought under § 2255 and therefore falls into the domain of § 2241."). Likewise, § 2255 is "inadequate" when it prevents a prisoner from obtaining review of a legal theory that addresses the "fundamental legality" of a sentence. *Webster*, 784 F.3d at 1124–25.

107. As detailed below, Mr. Bourgeois's claim that his intellectual disability renders him categorically ineligible for the death penalty fits within the category of claims cognizable under § 2241, as § 2255 was and remains inadequate or ineffective to test the legality of his sentence. That purpose is all the more apt because Congress and the United States Supreme Court have both expressly forbidden the *execution* of any prisoner who is intellectually disabled. *See* 18 U.S.C. § 3596(c) ("A sentence of death shall not be carried out upon a person who is mentally retarded."); *Atkins*, 536 U.S. at 320 (establishing "categorical rule making [intellectually disabled] offenders ineligible for the death penalty").

A. Petitioner's *Atkins* Claim Relies on Supreme Court Jurisprudence and Diagnostic Criteria Not Available to Him in § 2255 Proceedings.

108. As stated above, a federal prisoner may proceed under § 2241 when asserting a habeas claim that relies on a legal or factual basis not available at the time of petitioner's trial or

[23] *See also United States v. Barrett*, 178 F.3d 34, 51–52 (1st Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 247–48, 251 (3d Cir. 1997); *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018); *Reyes–Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001); *Martin v. Perez*, 319 F.3d 799, 805 (6th Cir. 2003); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002).

§ 2255 proceedings. *See Garza*, 253 F.3d at 924–25; *Davenport*, 147 F.3d at 607. For instance, in *Garza*, the § 2241 petitioner challenged his conviction and death sentence based on the issuance of an opinion from the Inter–American Commission on Human Rights, which found his execution would violate international law. *Id.* at 923. Because the opinion upon which the *Garza* petitioner relied could not have been generated until § 2255 proceedings had ended and Mr. Garza's legal claim did not satisfy the conditions necessary for a successive § 2255 petition, the Seventh Circuit found that Mr. Garza's claim was reviewable under § 2241. Similarly, in *Davenport*, the Seventh Circuit reviewed a claim based on a retroactive change in the United States Supreme Court's interpretation of federal statutory law under § 2241, explaining that § 2255 was not available because the Court's decision related to statutory, and not constitutional law. 147 F.3d at 607–11.

109. In *Webster*, the habeas petitioner had been convicted of federal capital charges and sentenced to death. At his trial, Mr. Webster claimed that he was intellectually disabled and challenged his eligibility for the death penalty under *Atkins*, a claim the trial court rejected. *Webster*, 784 F.3d at 1125–33. Mr. Webster then presented newly discovered evidence of his intellectual disability that could not have been discovered at the time of trial by diligent counsel. *Id.* at 1133. Because Mr. Webster's execution would be constitutionally prohibited if his *Atkins* claim was meritorious and he could not seek review of this evidence under a successor § 2255 petition, the Seventh Circuit ruled that Mr. Webster's renewed *Atkins* claim and the new evidence were appropriately reviewed under § 2241. *Id.* at 1146.

110. As discussed in detail below, Mr. Bourgeois's *Atkins* claim fundamentally relies on the Supreme Court's decisions in *Moore–I* and *Moore–II*, as well as the current diagnostic manuals that *Moore–I* and *Moore–II* require courts to use in evaluating ID claims. Because

Moore–I and *Moore–II* were decided in 2017 and 2019, respectively, they constitute legal bases that were not available at the time of Mr. Bourgeois's initial § 2255 proceedings. Likewise, because the AAIDD–12, AAIDD–15, and the DSM–5 were each adopted after Petitioner filed his 2007 habeas, they constitute new factual bases not available at the time of Mr. Bourgeois's initial § 2255 proceedings. Finally, because the Fifth Circuit denied Petitioner's request to file a second § 2255 petition following *Moore–I*, there is no question that § 2255 is an "inadequate and ineffective" means to challenge Mr. Bourgeois's sentence under these new legal and factual bases. Accordingly, the claim is properly asserted under § 2241.

1. Background: *Atkins*, *Ex Parte Briseño*, *Moore–I*, and *Moore–II*

111. In *Atkins*, the Supreme Court held that the execution of intellectually disabled individuals violates the Eighth Amendment's prohibition against cruel and unusual punishment, but "left the contours of that new exemption murky." *Bourgeois*, 2011 WL 1930684, at *23. The Court recognized that "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." *Atkins*, 536 U.S. at 318 (referring to the then–current diagnostic criteria for intellectual disability). For the most part, however, the *Atkins* Court left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* at 317.

112. The approach that was adopted for determining *Atkins* claim in Texas was first set forth in the case of *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by Moore–I*, 137 S. Ct. 1039. Despite the fact that *Atkins* excluded the "entire class" of intellectually disabled individuals from execution, 536 U.S. at 321, the CCA in *Briseño* explicitly stated that its goal was to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death

penalty," 13 S.W.3d at 6. The court also opined that the narrow group of individuals who satisfy this "Texas consensus" may be defined by their "level and degree of mental retardation," pointing to the fictional character "Lennie" from John Steinbeck's *Of Mice and Men* as someone who "might" be considered entitled to *Atkins* relief. *Id.*

113. To effectuate its goal of limiting *Atkins* to those individuals who would be considered ID by a consensus of Texas laypersons, the CCA first instructed courts to adopt a "flexible" approach to prong one, observing that "sometimes a person . . . whose IQ tests below 70 may not be mentally retarded." *Id.* at 7 n.24; *see also id.* at 14 (crediting the trial court's finding that that petitioner's IQ scores of 72 and 74 "understated [his] intellectual functioning"). With regard to prong two, the CCA held that courts must evaluate adaptive functioning according to seven non–clinical factors it deemed incompatible with a diagnosis of intellectual disability.[24] *Id.* at 8–9. Finally, the court held that, "[a]lthough experts may offer insightful opinions on the question of whether" an individual meets the "diagnostic criteria" for ID, "the

[24] These seven factors, commonly referred to in subsequent caselaw and commentary as the "*Briseño* factors," were:

> (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination? (2) Has the person formulated plans and carried them through or is his conduct impulsive? (3) Does his conduct show leadership or does it show that he is led around by others? (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? (6) Can the person hide facts or lie effectively in his own or others' interests? (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?
>
> *Briseño*, 135 S.W.2d at 8.

ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact." *Id.* at 9.

114. Yet in 2017, the United States Supreme Court rejected the CCA's approach to *Atkins* claims as unconstitutional. *Moore–I*, 137 S. Ct. at 1044. The Court began by stressing that lower courts do not have "unfettered discretion to define the full scope of the constitutional protection" recognized in *Atkins*. *Id.* at 1052–53. Rather, courts are required to apply the "medical community's *current standards*" when assessing a claim of intellectual disability. *Id.* at 1053. Citing the current manuals from the APA and the AAIDD, the Court explained that "[r]eflecting improved understanding over time, . . . current manuals offer the 'best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id*. (quoting DSM–5 at xli).

115. The Court went on to conclude that the CCA's disregard of current diagnostic standards created an unconstitutional risk that persons with mild intellectual disability would be executed. *Id.* at 1044, 1053; *see also id.* at 1048 (stressing that "the Constitution 'restrict[s] . . . the State's power to take the life of' *any* intellectually disabled individual" (quoting *Atkins*, 536 U.S. at 321) (emphasis in original)). In reaching this conclusion, the *Moore–I* Court identified several problematic aspects of the Texas approach that are relevant to Mr. Bourgeois's case.

116. Considering prong one first, the Court faulted the CCA's "flexible" approach to assessing intellectual functioning, rejecting the argument that courts may disregard scores falling in the "lower end of the standard–error range" based on factors "unique" to the petitioner. *Id.* at 1049. Mr. Moore had an IQ score of 74, which, "adjusted for the standard error of measurement, yields a range of 69 to 79." *Id.* Because this score placed him in the range for intellectual disability, the CCA was wrong to conclude that he did not satisfy the first criteria of the

definition of ID. *Id.* at 1050. Rather, "where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual–functioning deficits," prong one is established and courts must continue the inquiry on to prong two.

117. *Moore–I* also rejected the CCA's approach to prong two,[25] criticizing the state court for the myriad ways its adaptive–functioning analysis disregarded current diagnostic criteria. First, the Supreme Court concluded that the CCA had "overemphasized Moore's perceived adaptive strengths"—e.g., he "lived on the streets, mowed lawns, and played pool for money"—when "the medical community focuses the adaptive–functioning inquiry on adaptive *deficits*." *Id.* at 1050 (emphasis in original).

118. Second, the Supreme Court faulted the CCA for finding that risk factors for intellectual disability somehow "detracted from a determination that [Moore's] intellectual and adaptive deficits were related." *Id.* at 1051. Contrary to the CCA's findings, the Supreme Court explained that "[c]linicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Id.* (citing AAIDD–10 at 59–60).

119. Third, the Supreme Court reasoned that emphasis on Mr. Moore's conduct while in confinement was not relevant to an ID determination under the medical standards. *Id.* at 1050. Specifically, the Court warned that "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* (citing DSM–5 at 38 and AAIDD–12 at 20).

[25] Despite having determined that Mr. Moore failed to satisfy prong one, the CCA went on to find that "[e]ven if applicant had proven that he suffers from significantly sub–average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." *Ex Parte Moore*, 470 S.W.3d at 520.

120. Fourth, the Court found that the CCA "departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to 'a personality disorder.'" *Moore–I*, 137 S. Ct. at 1051 (quoting decision below, in which CCA observed that Moore's problems in kindergarten were "more likely cause[d]" by "emotional problems" than by intellectual disability). The Court explained that "many intellectually disabled people also have other mental or physical impairments, for example, attention–deficit/hyperactivity disorder, depressive and bipolar disorders, and autism." *Id.* (citing DSM–5 at 40). "The existence of a personality disorder or mental–health issue, in short, is not evidence that a person does not also have intellectual disability." *Id.*

121. Finally, the Court held that the CCA's "attachment to the seven *Briseño* evidentiary factors further impeded its assessment of Moore's adaptive functioning." *Id.* at 1051. The Court explained that the *Briseño* factors had no basis in either medicine or law, but instead relied on inaccurate stereotypes of the intellectually disabled. *Id.* at 1051–52; *see also id.* at 1053 ("I agree with the Court today that [the *Briseño*] factors are an unacceptable method of enforcing the guarantee of *Atkins*.") (Roberts, C.J., dissenting). The Supreme Court concluded that:

> As we instructed in *Hall*, adjudications of intellectual disability should be "informed by the views of medical experts." That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseño* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseño* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed." Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.

Id. at 1044 (internal citations omitted).

122. On remand following *Moore–I*, the CCA again found insufficient evidence of Mr. Moore's adaptive deficits, purporting to use "current medical diagnostic standards," but

nevertheless crediting the conclusion of the State's expert, Dr. Kristi Compton, that Mr. Moore's "adaptive functioning was too great to support an intellectual-disability diagnosis." *Ex parte Moore*, 548 S. W. 3d 552, 563 (Tex. Crim. App. 2018), *abrogated by Moore–II*, 139 S. Ct. at 672.

123. The Supreme Court summarily reversed, per curiam, and rejected the CCA's credibility determinations as invalid. *Moore-II* noted that the CCA's determination:

- relied on Mr. Moore's adaptive strengths, rather than focusing on his adaptive *deficits*;
- required Mr. Moore to show that his adaptive deficits were unrelated to emotional problems, in violation of *Moore-I*'s directive that a comorbid mental health issue "is not evidence that a person does not also have ID";
- focused on "adaptive improvements made in prison," which was "difficult to square with [the Supreme Court's] caution against relying on prison-based development"; and
- employed certain *Briseño* factors, despite claiming that it had abandoned reliance on them

Moore–II, 139 S. Ct. at 670-72 (citations omitted).

124. Because the CCA's analysis was inappropriate, the Supreme Court overturned the CCA's credibility determination and found that Mr. Moore was intellectually disabled. *Id.* at 672.

2. The district court denied Mr. Bourgeois's *Atkins* claim under the same unconstitutional standards struck down in *Moore–I* and *Moore–II*.

125. Prior to *Moore–I*, the Fifth Circuit applied the same contra–diagnostic standards that the CCA had used in analyzing claims of intellectual disability. For instance, in 2005, the Fifth Circuit upheld the district court's denial of an *Atkins* claim raised by § 2255 petitioner Bruce Webster with the following analysis:

> Looking at all the evidence presented by both sides at trial, while it is undisputed that Webster has had low I.Q. scores on almost every I.Q. test that has been administered to him, these scores are, according to even defense witness Dr. Keyes, attributable to "nonorganic" factors, which this Court understands to mean his lack of quality formal education and any positive or productive home life. Nevertheless, the evidence presented at trial does reflect that Webster has adapted to the criminal life that he chose and has illustrated the ability to communicate with others, care for himself, have social interaction with others, live within the confines of the "home" he has been in since he was sixteen, use community resources within this home, read, write, and perform some rudimentary math. This evidence therefore supports a finding that Webster does not have a deficit in adaptive skills.

Webster, 421 F.3d at 313. In other words, just like the CCA in the *Ex Parte Moore* decisions, the Fifth Circuit: disregarded clinical standards in assessing Mr. Webster's claim; treated risk factors for ID as alternative explanations for his low functioning, as opposed to contributors to it; used Mr. Webster's perceived adaptive strengths to discount his deficits; and relied on erroneous stereotypes that ID persons look and talk differently from non–ID persons, are completely incompetent, and are unable to acquire social or functional skills.[26]

[26] Notably, the Fifth Circuit went on to chastise Mr. Webster for having raised in habeas an *Atkins* claim that had been denied at trial, saying that he could not "continue to litigate this claim hoping that some court eventually will agree with him." *Id.* at 314; *see also id.* ("Webster failed to convince *either* the district court that he is retarded or, moreover, a majority of the jurors that he is or even *may* be retarded.") (emphasis in original). Yet, as mentioned above, Mr. Webster did relitigate his claim before this Court via a § 2241 petition and, applying current diagnostic standards as required by *Moore–I*, this Court determined him to be intellectually disabled and ineligible for death. *See Webster v. Lockett*, No. 2:12–v–86–WTL–MJD, 2019 WL 2514833 (S.D. Ind. June 18, 2019). While the Court cited to some new evidence not presented to the Fifth Circuit, it also took an entirely different approach to analyzing Mr. Webster's adaptive functioning. For instance, the Court explained that, "in accordance with guidance from the medical community and as instructed by the Supreme Court," its focus was on adaptive deficits over adaptive strengths. *Id.* at *10. Additionally, the Court gave "little weight" to evidence of Mr. Webster's adaptive functioning in prison, citing *Moore–I* for the proposition that "[c]linicians . . . caution against reliance on adaptive strengths developed in a controlled setting, as a prison surely is." *Id.* (citing *Moore–I*, 137 S. Ct. at 1050) (internal quotation marks omitted). Likewise, the Court gave "little weight" to the testimony of the Government expert, who relied on such evidence as Mr. Webster's "musical ability, excellent hygiene, ability to drive" and "ability to engage in conversation" to conclude he failed to establish prong two. *Id.* After reviewing this evidence, the Court did not find the "conclusions that [the expert] has drawn to be

126. While Mr. Webster and Mr. Bourgeois have been the only § 2255 petitioners to raise an *Atkins* claim in the Fifth Circuit pre–*Moore–I*, the circuit court has repeatedly denied relief to Texas prisoners who sought *Atkins* relief under 28 U.S.C. § 2254. *See, e.g.*, *Clark v. Quarterman*, 457 F.3d 441, 445–47 (5th Cir. 2006) (affirming state court denial of *Atkins* relief based on *Briseño*); *Woods v. Quarterman*, 493 F.3d 580, 586–87 (5th Cir. 2007) (same); *Williams v. Quarterman*, 293 F. App'x. 298 (5th Cir. 2008) (same); *Eldridge v. Quarterman* 325 F. App'x. 322, 328–29 (5th Cir. 2009); *Thomas v. Quarterman*, 335 F. App'x. 386, 389–91 (5th Cir. 2009) (same); *Esparza v. Thaler*, 408 F. App'x. 787, 790–96 (5th Cir. 2010) (same).

127. Citing to the precedent established by *Webster*, as well as the Fifth Circuit's § 2254 jurisprudence, the district court that evaluated Mr. Bourgeois's 2007 *Atkins* claim adopted the same non–clinical approach.

a. The district court's erroneous prong–one analysis

128. As discussed *supra*, an IQ score of 75 or below satisfies prong one of *Atkins*. *Hall*, 572 U.S. at 712, 723. Mr. Bourgeois's only two full–scale IQ scores met this threshold: a 75 on the WAIS–R and a 70 on the WAIS–III. *See* Tr. 9/10/10 at 32; Tr. 9/20/10 at 217–19; *see also* A0060 (Dr. Weiner Score Sheet from WAIS–R); A0053–59 (Declaration of Dr. Donald E. Weiner and Attached Report of 3/3/04); A0039–41 (Gelbort Declaration, ¶ 3). The district court did not "invalidate or ignore Bourgeois' IQ test scores." *Bourgeois*, 2011 WL 1930684, at *31; *see also* Section III.B.2 (discussing various experts' testimony that Mr. Bourgeois did not "feign bad" on his IQ testifying). Nor did the court question that the "psychological profession accepts 75 as a qualifying score for a diagnosis of mental retardation." *Id.* at *25; *see also id.* at *26

persuasive." *Id.* at *10, n.21. In short, by applying diagnostic criteria, this Court found Mr. Webster to have significant adaptive deficits based on largely the same evidence that the Fifth Circuit had used to deny his claim pre–*Moore–I*.

("The psychological profession allows any score falling along [the range of 65–75] to qualify for a diagnosis of mental retardation. Accordingly, psychologists generally do not question whether an inmate's true IQ falls in the higher or lower end of that range."). Nevertheless, the court found that "[i]n the *legal context*, whether an inmate had significantly subaverage intellectual functioning is a question of fact that the court decides." *Id.* at *26; *see also id.* (stressing that Fifth Circuit had repeatedly denied relief to inmates who had IQ scores below 70 based on a determination that the inmate's "intelligence is more consistent with the higher end of the confidence interval"); *Briseño*, 135 S.W.2d at 7 n.24, 14 (endorsing a "flexible" approach to prong one, not dependent on IQ scores).

129. The court, like the CCA in Mr. Moore's case, went on to determine that despite his IQ scores, Mr. Bourgeois's "true" intellectual functioning "does not correspond to a finding of significant intellectual limitations." *Id*. at *26, 31. This finding alone violated *Moore–I*[27] and current diagnostic standards, which *require* that courts find prong one satisfied and proceed to prong two "where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual–functioning deficits." *Moore–I*, 137 S. Ct. at 1049-50; *accord United States v. Roland*, 281 F. Supp. 3d 470, 528 n.76 (D.N.J. 2017) ("where the lower end of a defendant's score falls at or below 70—as two of Roland's Flynn-adjusted IQ scores do here—the deciding court must move on to consider the defendant's adaptive functioning."); *United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) (prong two analysis required "if even one valid IQ test score generates a range that falls to 70 or below"). Furthermore, the district court violated *Moore–I* and current diagnostic standards by relying on

[27] The *Moore–II* Court did not address prong one, as the CCA focused only on prong two in re–evaluating Mr. Moore's claim on remand following *Moore–I*. *See Moore–II*, 139 S. Ct. at 670.

unscientific, erroneous stereotypes of intellectually disabled persons in support of its conclusion that Mr. Bourgeois's "true" IQ did not satisfy prong one. According to the court, the conclusion that "Bourgeois' behavior and characteristics are inconsistent with an IQ that would fall below 70" was demonstrated by the following: Mr. Bourgeois "answers the questions asked of him, engages in conversation, has logical thoughts, and does not otherwise give any impression of mental retardation," *id*. at *28; he "lived a life which, in broad outlines, did not manifest gross intellectual deficiencies," *id* at *22; he "worked for many years as a long haul truck driver . . . bought a house, purchased cars, and handled his own finances" *id.* at *29; and "otherwise carried himself without any sign of intellectual impairment," *id*.

130. Even assuming this testimony accurately represented Mr. Bourgeois—who has a long history of masking his ID[28] and soliciting supports that obscured his deficits[29]—none of the "skills" cited by the court conflicts with a finding of intellectual disability. To the contrary, each one is implicated in the erroneous but commonly held stereotypes identified by the AAIDD–12, as demonstrated in the following chart:

[28] *See* Section III.C.3.d (summarizing testimony from experts and lay witnesses describing Mr. Bourgeois's long history of masking his deficits).

[29] *See, e.g.*, Tr. 9/20/10 at 106; Tr. 9/21/10 at 42–43.

District court findings of "skills" that are inconsistent with ID	Commonly held, but erroneous stereotypes of persons with ID
Mr. Bourgeois "answers the questions asked of him, engages in conversation, has logical thoughts, and does not otherwise give any impression of mental retardation." *Bourgeois*, 2011 WL 1930684, at *28.	Persons with ID "look and talk differently from persons in the general population." A0134 (AAIDD–12 at 26).
Mr. Bourgeois "lived a life which, in broad outlines, did not manifest gross intellectual deficiencies." *Bourgeois*, 2011 WL 1930684, at *22.	Persons with ID "are completely incompetent and dangerous," "cannot acquire vocational and social skills necessary for independent living," "cannot do complex tasks," and "are characterized only by limitations and do not have strengths that occur concomitantly with their limitations." A0134 (AAIDD–12 at 26).
Mr. Bourgeois "worked for many years as a long haul truck driver, . . . bought a house, purchased cars, and handled his own finances." *Bourgeois*, 2011 WL 1930684, at *29.	Persons with ID "cannot get driver's licenses, buy cars, and drive cars," "do not (and cannot) support their families," and "cannot acquire vocational and social skills necessary for independent living." A0134 (AAIDD–12 at 26).
Mr. Bourgeois "otherwise carried himself without any sign of intellectual impairment." *Bourgeois*, 2011 WL 1930684, at *29.	Persons with ID "look and talk differently from persons in the general population." A0134 (AAIDD–12 at 26).

131. The district court's findings that the above–referenced "skills" were inconsistent with a finding of ID is further contradicted by the DSM–5, which expressly recognizes that persons with significant adaptive deficits can, among other things, maintain regular employment in jobs that do not emphasize conceptual skills and function age–appropriately in personal care. *See* A0076–77 (DSM–5 at 34–35). At the same time, the findings invoke several of the "*Briseño* factors" struck down by the *Moore–I* Court has having no basis in medicine or law, including: "Has the person formulated plans and carried them through or is his conduct impulsive?"; "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is

socially acceptable?"; and "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" *Briseño*, 135 S.W.2d at 8.

132. In addition to relying on false stereotypes of ID persons to discount Mr. Bourgeois's IQ scores, the court also placed significant weight on its own lay assessment of Mr. Bourgeois's intellectual functioning. *See Bourgeois*, 2011 WL 1930684, at *30 ("The Court had sufficient interaction with Bourgeois to make a lay assessment of whether he functions at the low level described by his expert witnesses. . . . Based on this Court's own observations, the testimony that Bourgeois has significant intellectual limitations is not credible or persuasive."). But *Moore–I* expressly condemned lay assessments of ID, uninformed by "medical and clinical appraisals," saying such lay diagnoses should "spark skepticism." *Moore–I*, 137 S. Ct. at 1051 (citing, inter alia, AAIDD–12 at 25–27).

133. Additionally, the court acted contrary to *Moore–I* and current standards in crediting Dr. Price's opinion that Mr. Bourgeois's "inability to test well" could be explained by the fact that he "is someone who has been somewhat culturally deprived, didn't profit from education as much as someone else, [and did] not experience things that were intellectually academically enriching." *Bourgeois*, 2011 WL 1930684, at *28. Yet per *Moore–I* and current diagnostic guidelines, Mr. Bourgeois's limited education and stimulation are factors that make intellectual disability *more*, not *less*, likely. *See Moore–I*, 137 S. Ct. at 1044; *cf. id.* at 1049 ("[T]he presence of other sources of imprecision in administering [an IQ] test to a particular individual cannot *narrow* the test-specific standard-error range.") (emphasis in original); *see also supra* Section III.E. And of course, an "inability to test well" is itself something that would be expected of an individual with low intellectual functioning, not a factor that counters a finding of low intelligence.

134. Lastly, the district court's prong–one analysis violated *Moore–I* and diagnostic standards because the court refused to apply the Flynn Effect. *See Bourgeois*, 2011 WL 1930684, at *26 n.37. As discussed above, both the AAIDD–10 and the DSM–5 require that IQ scores be Flynn–corrected. *See* A0099 (AAIDD–10 at 37); A0079 (DSM–5 at 37); *see also* Tr. 9/23/10 at 227 (Government expert Dr. Price testifying that the Flynn Effect "should be considered and noted when you are using a test that's older"); Tr. 9/24/10 at 89, 187 (Government expert Dr. Moore testifying that AAIDD–10 directs that individual scores should be corrected for the Flynn Effect). Yet the district court merely mentioned the Flynn Effect in a footnote, concluding that there was nothing to "require the adoption of the Flynn Effect as a legal method to lower an inmate's Full Scale IQ Score." *Bourgeois*, 2011 WL 1930684, at *26 n.37.

135. In short, the district court rejected prong one after considering unscientific and erroneous factors that led the court to reach a layperson's conclusion that Mr. Bourgeois's "true" intelligence did not satisfy the IQ component for ID. Furthermore, it rejected a prong–one finding after setting aside the medical diagnostic standards applicable to ID. While consistent with Fifth Circuit jurisprudence upholding *Briseño* that remained good law at the time, such an analysis is utterly at odds with current Supreme Court law and diagnostic criteria.

b. The district court's erroneous prong–two analysis

136. Despite finding that Mr. Bourgeois had failed to satisfy prong one, the district court went on to analyze prong two of his *Atkins* claim, which the court also rejected. In so doing, the court again applied the unscientific standards that the Supreme Court has now identified as unconstitutionally divergent from current clinical criteria. Indeed, the court began its analysis by explicitly dismissing the clinical approach to adaptive functioning, observing: "An examination for mental retardation, and particularly the adaptive–skills component of that inquiry, *involves the subjective evaluation* of skills, aptitudes, and life experiences." *Bourgeois*,

2011 WL 1930684, at *24. This view contradicts both the DSM–5 and the AAIDD–10, which require the use of "clinical judgment" in evaluating prong two. A0079 (DSM–5 at 37); A0115 (AAIDD–10 at 55). The AAIDD–10 provides further detail, explaining:

> Clinical judgment is defined as a special type of judgment rooted in a high level of clinical expertise and experience and judgment that emerges directly from extensive training, experience with the person, and extensive data. . . . [It] is characterized by its being systematic (i.e., organized, sequential, and logical), formal (i.e., explicit and reasoned), and transparent (i.e., apparent and communicated clearly). . . . [It] should not be thought of as justification for abbreviated evaluation, a vehicle for stereotypes and prejudice, a substitute for insufficiently explored questions, an excuse for incomplete or missing data, or a way to solve political problems.

A0123–24 (AAIDD–10 at 86–87).

137. The court further expressed its disregard for diagnostic standards by differentiating between a "legal" and a "psychological" approach to adaptive functioning:

> The mental health community ignores an individual's strengths when looking at adaptive functioning. . . . In fact, the 11th edition of the AAIDD manual has expressly adopted as an underlying "assumption" in the definition of mental retardation that *"within an individual, limitations often coexist with strengths."* The mental health profession looks only at what an individual cannot do, presumably as a function of its role in providing support and services to impaired individuals.
>
> The Fifth Circuit, however, teaches that the *Atkins* inquiry should not be so narrow as to ignore that which an inmate can do, even if the psychological profession approaches the issue differently. The subjective *Atkins* question is not myopic and must take into account the whole of an individual's capabilities. . . . Accordingly, the federal inquiry into adaptive deficits takes on a much different flavor than that done by mental health professionals.

Bourgeois, 2011 WL 1930684, at *32 (citations omitted); *see also id.* at 33 ("The law will compare the deficiencies to positive life skills, presuming that adaptive successes blunt the global effect of reported insufficiencies.").

138. This approach was expressly discredited by both *Moore–I* and *Moore–II*, in which the Supreme Court rejected the CCA's attempt to make an *Atkins* determination on the

defendant's strengths rather than his or her weaknesses *Moore–I*, 137 S. Ct. at 1050 (CCA erred by "overemphasiz[ing] Moore's perceived adaptive strengths" because "the medical community focuses the adaptive-functioning inquire on adaptive *deficits*"); *see also Moore–II*, 139 S. Ct. at 670 (CCA erred in relying "less upon the adaptive *deficits* to which the trial court had referred than upon Moore's apparent adaptive *strengths*") (emphasis in original). That criticism applies equally to the district court's prong–two analysis in Petitioner's case, in which the court wrongly discounted the extensive evidence of Mr. Bourgeois's adaptive deficits and denied relief relying on the things it found he *could* do.

139. Similarly to the CCA in *Ex Parte Moore–II*, the court's refusal to follow diagnostic criteria also caused it to wrongly credit the Government's adaptive–behavior expert, Dr. Moore, over Dr. Swanson. According to the court, Dr. Moore "took a full range of behavior into consideration when evaluating informal accounts for adaptive deficits," whereas "Dr. Swanson lessened her credibility when she only focused on information supporting mental retardation without giving weight to or reconciling factors that disproved her conclusions." *Bourgeois*, 2011 WL 1930684, at *42. In fact, Dr. Swanson testified that she "considered the different *strengths or deficits* that [she] saw . . . when [she] was doing [her] assessment with [Mr. Bourgeois] and talking to people who knew him growing up." Tr. 9/20/10 at 19; *see also id.* at 136 ("Overall he functions at about the third or fourth grade level, but he has some other unique strengths in his ability."). More specifically, Dr. Swanson expressly recognized that: Mr. Bourgeois "copies very well," *id.* at 34; his adaptive functioning tests revealed that "he does have some significant strengths," *id.* at 45; there are "things he does actually quite well with reading," *id.* at 46; "recognizing words. . . is a particular strength for him," *id.*; "he can spell extremely well," *id.* at 50; and he has a strength in "expressive language," *id.* at 132. But,

consistent with diagnostic criteria, she also explained that these strengths did not "offset the other deficits" the Mr. Bourgeois has in any given area. *Id.* at 159. *Atkins* and current diagnostic standards require prong–two determinations to be made based on what the individual does not do, rather than what he or she can do. Because the district court focused on what Mr. Bourgeois could do, rather than what he did not do, its determination violated *Moore–I* and *Moore–II* and current diagnostic standards.

140. In addition to improperly considering Petitioner's perceived adaptive strengths as undermining his adaptive deficits, the court violated the *Moore* decisions and diagnostic criteria by once again resorting to unscientific and outdated stereotypes to determine Mr. Bourgeois's functioning was inconsistent with a diagnosis of ID. For instance, the court supported its conclusion that Mr. Bourgeois did not satisfy prong two by citing to testimony that he was competent at his job as a truck driver, that "[h]is appearance and grooming were beyond presentable," and "none of the Government's witnesses suspected that Bourgeois had mental impairments." *Bourgeois*, 2011 WL 1930684, at *39; *see also id.* at *22 ("Bourgeois had lived a life which, in broad outlines, did not manifest gross intellectual deficiencies."); *id.* at *29 ("[T]hose who knew [Mr. Bourgeois] as an adult did not suspect that he was mentally retarded."); *id.* (citing Dr. Price's opinion that having a job as a long–haul trucker was "inconsistent with mental retardation."); *id.* at *38–39 (describing Mr. Bourgeois's competence at his truck driving job); *id.* at *39 (describing his well–groomed appearance); *id.* (his work as a truck driver belied any intellectual disability).

141. Just as with its prong–one analysis, none of the "skills" cited in the court's prong–two assessment conflicts with a finding of intellectual disability. Indeed, while the court cites Mr. Bourgeois's "presentable" appearance and grooming as evidence countering a diagnosis of

ID, the DSM–5 expressly states that individuals with significant deficits in the practical domain "may function age–appropriately in personal care." A0076 (DSM–5 at 34). The same is true for the fact that Mr. Bourgeois had a job. Specifically, the DSM–5 states that individuals with significant deficits in the practical domain "*often*" experience "competitive employment . . . in jobs that do not emphasize conceptual skills." *Id.* Truck driving surely falls under this description. Other "skills" cited by the court align directly with many of the erroneous stereotypes of ID identified by the AAIDD. *See* A0134 (AAIDD–12 at 26) (erroneous stereotypes of ID persons include that they "look and talk differently from persons in the general population," "cannot acquire vocational and social skills necessary for independent living," "cannot do complex tasks," "cannot get driver's licenses, buy cars, or drive cars," and "are completely incompetent and dangerous"); *see also supra* Section III.C.2.

142. Furthermore, the fact that none of the Government's witnesses described Mr. Bourgeois as ID does nothing to rebut the showing of his many deficits. To be sure, one of the *Briseño* factors expressly struck down by *Moore–I* instructed courts to consider whether the person's "family, friends, teachers, [and] employers" thought he was ID. *Moore–I*, 137 S. Ct. at 1051 (citing *Briseño*, 135 S.W.3d at 8). The *Moore–I* Court singled out this particular factor for criticism, explaining: "[T]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled. Those stereotypes, much more than medical and clinical appraisals, should spark skepticism." *Id.* (citing, inter alia, AAIDD–12 at 25–27).

143. The district court also inappropriately gave significant weight to its own assessment of Mr. Bourgeois's communication skills, which it found incompatible with ID. *See, e.g.*, *Bourgeois*, 2011 WL 1930684, at *22 (Mr. Bourgeois's trial testimony, colloquies with the court, and writings never called into question his intellectual functioning); *id.* at *28 ("Bourgeois

answers the questions asked of him, engages in conversation, has logical thoughts"); *id.* (Mr. Bourgeois produces "voluminous amounts of writing"); *id.* at *30 ("Bourgeois's extensive writings, while not polished masterpieces, certainly do not contain gross indicia of mental impairment."); *id.* ("During trial, Bourgeois communicated with this Court on several occasions. . . . Bourgeois never gave the Court any impression that he functioned at an intellectual level equal to that of a child."); *id.* at *43 ("Bourgeois can engage in the give–and–take of normal conversation without any hint of impairment."). With this analysis, the district court employed yet another of the *Briseño* factors struck down in *Moore–I*: whether the individual could "respond coherently, rationally, and on point to oral or written questions." *Moore–I*, 137 S. Ct. at 1044, 1046 n.6; *see also* A0129 (AAIDD–12 at 20) (ID determinations should not be based on verbal behavior).[30] Additionally, to the extent it relied on Mr. Bourgeois's "writings," all of which were produced while he was in prison, the district court ran afoul of the prohibition on use of prison behavior as evidence of adaptive functioning. *See* A0129 (AAIDD–12 at 20); A0080 (DSM–5 at 38); *Moore–I*, 137 S. Ct. at 1050; *Moore–II*, 139 S. Ct. at 669; *see also* Tr. 9/23/10 at 221 (Dr. Price testifying that relying on an individual's writings is "complicat[ed]" by the fact that he may have received help and we don't know how long the writings took to complete); *id.* ("Yes, it may look good but did they, they have plenty of time, obviously, and did they just spend so much time on this that it looks as good as it is.").

144. Yet another problem with the district court's analysis is that it considered evidence of a deficit to be evidence of a strength so long as Mr. Bourgeois eventually learned to

[30] As Government expert Dr. Moore testified, relying on "verbal behavior" to assess adaptive behavior or intellectual disability is particularly inappropriate in a "case like this" where the person being evaluated "dissimilates" and "tends to want to make himself look better than he really is." Tr. 9/24/10 at 161–62.

perform the task. For instance, while noting that Mr. Bourgeois was slow to learn "his ABCs" as a child, the court stressed that it is a skill at which he now "excels." Bourgeois, 2011 WL 1930684, at *39; *see also id.* at *38 (court observing that Mr. Bourgeois had difficulty "becom[ing] proficient at driving," but was eventually able to do so). However, persons with mild ID, like everyone, can grow and mature. As Dr. Price acknowledged, "if [Mr. Bourgeois] relied on people to teach him things and was able eventually to learn to drive a truck and to . . . handle some financial matters and as an adult to dress himself, that doesn't mean he's not having adaptive deficits as a child. . . pre–18." Tr. 9/23/10 at 284–85; *see also* Tr. 9/20/10 at 104–05 ("[H]e got a lot of supports and he gradually learned to master [certain skills]. . . . [T]hat's not uncommon with people with mild mental retardation, they find people that will help them."). Thus, the question is not whether an individual ultimately acquires a skill, the question is "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." A0079 (DSM–5 at 37). The fact that Mr. Bourgeois was slower than his peers in learning the alphabet is evidence of impaired conceptual functioning as it demonstrated that he needed support "in one of more areas to meet age-related expectations." The fact that he "excels" in "his ABCs" as an adult does nothing to undermine this finding.

145. Also, as it did in its prong–one analysis, the district court departed from clinical standards by treating risk factors as alternate explanations for Mr. Bourgeois's deficits. Specifically, the court theorized that Petitioner's poor academic performance may have been due to "his unstable home life" or "the hampering effects of a deprived home environment." *Bourgeois*, 2011 WL 1930684, at *41; *see also id.* at *44 ("To the extent that Bourgeois may have had difficulties when younger, the record does not *conclusively link* those problems to

mental retardation rather than a culturally deprived upbringing, poverty, or abuse."). But an unstable home life, deprived upbringing, poverty, and abuse are all risk factors that *support* a diagnosis of intellectual disability. As *Moore–I* explains, an individual's "record of academic failure, along with the childhood abuse and suffering he endured," are "traumatic experiences [that] count in the medical community as '*risk factors*' for intellectual disability." *Moore–I*, 137 S. Ct. at 1051. Accordingly, "clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Id*.

146. Similarly, the district court treated comorbidities as alternative explanations to Mr. Bourgeois's deficits, rather than supporting evidence of his adaptive deficits, as is appropriate under clinical standards. As noted *supra*, *Moore–I* rejected any requirement that defendants prove that adaptive deficits were not related to other mental health issues as "mental–health professionals recognize [that] many intellectually disabled people also have other mental or physical impairments." *Moore–I*, 137 S. Ct. at 1051; *see also Moore–II*, 139 S. Ct. at 671 (criticizing CCA for determining on remand that Moore failed to show that the "cause of [his] deficient social behavior was related to any deficits in general mental abilities" rather than "emotional problems"). The district court took the opposite approach to comorbidities, minimizing Mr. Bourgeois's poor adaptive behavior because it was "more likely related to his personality disorder, especially his impulsivity and sense of entitlement." *Bourgeois*, 2011 WL 1930684, at *41.

147. In sum, Mr. Bourgeois has presented overwhelming evidence that he satisfies the criteria for a diagnosis of intellectual disability under current clinical standards, and the district court's 2011 denial of *Atkins* relief carries no weight after *Moore–I* and *Moore–II*.

3. This claim is reviewable under § 2241.

148. The principles from *Moore–I* and *Moore–II* articulated above were not available to Mr. Bourgeois during his initial § 2255 proceedings. In rejecting his *Atkins* claim in 2011, the district court relied on Fifth Circuit jurisprudence, including *Webster*, that was not invalidated until 2017, when the Supreme Court decided *Moore–I*. Accordingly, post–*Moore–I*, Mr. Bourgeois was in the same position as the petitioner in *Cathey*, in which the Fifth Circuit determined that *Atkins* was "previously unavailable" to a petitioner who had filed his first habeas petition after *Atkins* was decided because, under the now–invalidated nonclinical standards applied in the Fifth Circuit at that time, he did not qualify as intellectually disabled. *See Cathey*, 857 F.3d at 233 (an *Atkins* claim was previously unavailable to Mr. Cathey because "a claim must have some possibility of merit to be considered available"). Nevertheless, the Fifth Circuit denied Mr. Bourgeois's attempt to renew his *Atkins* claim via a successive § 2255 petition, relying on procedural grounds unrelated to the merits of his claim. Accordingly, § 2255 is plainly not an effective mechanism by which Mr. Bourgeois can raise his meritorious *Atkins* claim under the new law established in *Moore–I* and *Moore–II*, meaning this court has jurisdiction under § 2241.

149. Additionally, the new diagnostic criteria cited above from the AAIDD–12, the AAIDD–15, and the DSM–5, each of which was published after the district court denied Mr. Bourgeois's § 2255 petition, constitute new factual bases not available at the time of his § 2255 proceedings. As the Fifth Circuit recently recognized in granting a state habeas petitioner's request to file a successive petition to raise an *Atkins* claim under current standards, the "DSM–5 manual *changed the diagnostic framework* for intellectual disability." *In re Johnson*, 2019 WL 3814384, at *5 (5th Cir. 2019). The court also affirmed that "it is correct to equate legal

availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*." *Id.* at 6.

150. Among the specific changes to the diagnostic framework relevant to Mr. Bourgeois's claim is that the DSM–5 makes clear that IQ test scores must be evaluated pursuant to "clinical judgment," not the court's lay assessment of a petitioner's "true" intellectual abilities. A0079 (DSM–5 at 37); *see also In re Johnson*, 2019 WL 3814384, at *5 (noting that the DSM–5 "included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment"). Likewise, while the AAIDD mandated application of the Flynn Effect as early as 2007, the APA did not do so prior to the publication of the DSM–5 in 2013, and the AAIDD–15 reiterated the AAIDD's earlier position. *See supra* Section III.B.1.

151. Furthermore, under prong two, both the AAIDD–12 and the DSM–5 made clear that it is critical to avoid the use of stereotypes in assessing adaptive functioning, specifically identifying a number of the same factors relied upon by the district court in Mr. Bourgeois's case as erroneous misconceptions about persons with ID. *See supra* Section III.C.2; A0134 (AAIDD–12 at 26); A0076–77 (DSM–5 at 34–35).

152. Another new development relevant to prong two of Mr. Bourgeois's claim is that the DSM–5 now includes descriptors of the typical adaptive functioning for individuals with significant deficits in each of the three domains. *See* A0076–78 (DSM–5 at 34–36).

153. As discussed above, the DSM–5 also did away with the DSM–IV–TR's provision that, "by their late teens," individuals with mild intellectual disability could "acquire academic skills up to approximately the sixth–grade level." DSM–IV–TR at 43. By contrast, the DSM–5

summarizes the level of functioning necessary for significant impairments in the conceptual domain as follows:

> For school–age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age–related expectations. In adults, abstract thinking, executive function . . ., and short–term memory, as well as functional use of academic skills (e.g., reading, money management) are impaired.

A0076 (DSM–5 at 34). This difference reinforces the fact that the district court's *Atkins* determination violates *current* diagnostic standards. The district court relied on the fact that certain achievement test scores were at the seventh or eighth grade, rather than the elementary school, level. The DSM-5 does not require elementary school functioning to establish academic deficits, only that functioning in this area be impaired. As discussed *supra*, the achievement testing showed that Mr. Bourgeois's academic functioning has more than met this standard. Moreover, even if Mr. Bourgeois's academic functioning showed no deficits, under current diagnostic standards, this would do nothing to preclude a finding of ID as academic functioning is only one aspect of one domain. A relative strength in this area would do nothing to rule-out deficits in other areas of conceptual functioning or deficits in the social or practical domains. *See supra* Section III.C.2.

154. As explained above, the Fifth Circuit has afforded petitioners who were in a nearly identical procedural posture to Mr. Bourgeois the opportunity to pursue *Atkins* relief through successive habeas petitions. *See In re Cathey*, 857 F.3d at 232; *In re Johnson*, 2019 WL 3814384, at *5–6. It did so *prior to* Mr. Bourgeois's own request to file a successive *Atkins* claim, finding that *Atkins* was "previously unavailable" to Mr. Cathey because the circuit's pre–*Moore–I* precedent precluded a finding of intellectual disability at the time of his initial habeas petition. *In re Cathey*, 857 F.3d at 232. And it did so *since* rejecting Mr. Bourgeois's request to file a successor, finding that the publication of the DSM–5 had changed the diagnostic landscape

in a manner that rendered *Atkins* "previously unavailable" to Mr. Johnson. *In re Johnson*, 2019 WL 3814384, at *5–6. Mr. Bourgeois's *Atkins* claim relies on *both* legal and diagnostic changes that have occurred since his initial § 2255 petition. Nevertheless, the Fifth Circuit arbitrarily denied him the same opportunity for review that it granted to Mr. Cathey and Mr. Johnson. This disparate treatment starkly demonstrates that § 2241 is the only vehicle through which Mr. Bourgeois may challenge his unconstitutional sentence.

B. Petitioner's Claim Challenges the Execution of his Sentence, as Well as the Fundamental Legality of that Sentence.

155. As explained above, § 2241 is the appropriate vehicle for claims that challenge the execution of a petitioner's sentence. This use of § 2241 has been explained as follows:

> [F]ederal prisoners challenging some aspect of the execution of their sentence, such as denial of parole, may proceed under Section 2241. This difference arises from the fact that Section 2255, which like Section 2241 confers habeas corpus jurisdiction over petitions from federal prisoners, is expressly limited to challenges to the validity of the petitioner sentence. Thus, Section 2241 is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence.

Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001); *see also Valona*, 138 F.3d at 694 (7th Cir. 1998) ("A motion seeking relief on grounds concerning the execution but not the validity of the conviction and sentence . . . may not be brought under § 2255 and therefore falls into the domain of § 2241.").

156. Here, Mr. Bourgeois is not claiming that his sentence violated *Atkins* at the time it was imposed. Rather, consistent with the Supreme Court's decision in *Moore–I*, he claims that the execution of his sentence would now be unconstitutional under newly recognized legal and diagnostic standards. *See Moore–I*, 137 S. Ct. at 1050–53 (reversing Texas's denial of petitioner's *Atkins* claim, in part, because Texas employed diagnostic standards in effect at the time of petitioner's sentencing, as opposed to those current at the time of post–conviction

review); *see also Atkins*, 536 U.S. at 320 (establishing "categorical rule making [intellectually disabled] offenders ineligible for the death penalty").

157. Moreover, by its plain language, the FDPA states that "[a] sentence of death *shall not be carried out* upon a person who is mentally retarded." 18 U.S.C. § 3596(c); *see also United States v. Webster*, 162 F.3d 308, 352 (5th Cir. 1998) (finding significant Congress's "placement" of the intellectual–disability exemption among "restriction[s] on who could be executed . . . rather than in the earlier sections" on who could be sentenced to death). And legislative history tends to confirm that Congress understood the placement and language it was importing into the FDPA would allow defendants to raise such claims "at any time," including between judgment and execution. *See* 136 Cong. Rec. S6873–03, S6876, 1990 WL 69446, 101st Cong., 2d Sess. (May 24, 1990) (comments by Sen. Hatch). Accordingly, Mr. Bourgeois's challenge goes to the execution of his sentence, making his claim appropriate under § 2241.

158. Section 2241 is also the appropriate avenue of relief where the petitioner challenges the "fundamental legality" of his or her sentence. *Webster*, 784 F.3d at 1124–25 (7th Cir. 2015). The *Webster* court held that the petitioner had properly filed a § 2241 petition to establish that his intellectual disability made him ineligible for the death penalty. It described the "'Kafkaesque' nature of a procedural rule that, if construed to be beyond the scope of the savings clause, would (or could) lead to an unconstitutional punishment." *Id*. at 1139. It accordingly recognized that, where a "structural problem" prevents a petitioner from bringing a second § 2255 motion, the petitioner may in some circumstances (there, because of the availability of new facts), bring a § 2241 petition. *Id*. "To hold otherwise," the Seventh Circuit explained, "would lead in some cases . . . to the intolerable result of condoning an execution that violates the Eighth

Amendment." *Id.*; *see also id.* (noting that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence").

159. Under current legal and diagnostic standards, Mr. Bourgeois is an intellectually disabled person. As such, precluding him from raising his *Atkins* claim under § 2241 to challenge the execution and fundamental legality of his unconstitutional death sentence would lead to precisely the "intolerable result" against which the *Webster* court warned.

REQUEST FOR RELIEF

For all of the above reasons, and based upon the full record of this matter, Petitioner requests that the Court provide the following relief:

A) That Petitioner be granted a stay of execution pending a final resolution of the claim raised in this Petition;

B) That leave to amend this Petition, if necessary, be granted;

C) That Respondents be Ordered to respond to this Petition;

D) That Petitioner be permitted to file a Reply and/or a Traverse addressing Respondents' affirmative defenses and arguments;

E) That an evidentiary hearing be conducted on the merits of Petitioner's claims, any procedural issues, and all disputed issues of fact;

F) That habeas relief from Petitioner's convictions and sentences, including his sentence of death, be granted.

Respectfully submitted,

/s/ Peter Williams

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Dated: August 15, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

ALFRED BOURGEOIS, Petitioner, V. SUPERINTENDENT, USP–Terre Haute, UNITED STATES OF AMERICA, Respondents.	CIVIL ACTION (Capital Habeas Corpus) Case No. 2:19-cv-392 **CAPITAL CASE** **EXECUTION SCHEDULED FOR** **JANUARY 13, 2020**

MOTION FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

Petitioner Alfred Bourgeois shall be referred to as Petitioner or Mr. Bourgeois.

Pursuant to Local Criminal Rule 6–1(h), the following documents are included in the Appendix filed with this Motion: (i) a listing of prior petitions, with docket numbers, filed in any state or federal court challenging the conviction and sentence challenged in the current petition; and (ii) a copy of, or a citation to, each state or federal court opinion, memorandum, decision, order, transcript of oral statement of reasons, or judgment involving an issue presented in the petition.

All emphasis in this Motion is supplied unless otherwise indicated.

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INTRODUCTION

Petitioner Alfred Bourgeois respectfully requests a stay of execution pending the Court's consideration of his Petition for Writ of Habeas Corpus Pursuant to 29 U.S.C. § 2241 ("Petition").

In his Petition, Mr. Bourgeois establishes that he is intellectually disabled ("ID"), based on his IQ scores of 70 and 75 (corrected under clinically–accepted standards to 67 and 68), each of which falls within the presumptive range for ID; his demonstrated adaptive deficits in academic skills and otherwise; and the undisputed onset of these deficiencies before the age of eighteen. Therefore, his execution is categorically barred by the Federal Death Penalty Act ("FDPA") and per se unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny.

Mr. Bourgeois further establishes that the only court to ever consider his *Atkins* claim denied it under non–clinical, unscientific standards. *See United States v. Bourgeois*, No. C–02–CR–216, 2011 WL 1930684 (S.D. Tex. May 19, 2011). For example, the district judge:

- set aside diagnostic standards and relied on her own armchair assessment of Mr. Bourgeois's conduct to determine that his "true" intellectual functioning did not satisfy the IQ component for intellectually disability, despite the fact that all of his IQ scores fall within the presumptive range for ID;
- found that Mr. Bourgeois's perceived adaptive *strengths* counteracted the evidence of his adaptive *deficits*, despite acknowledging that the medical community focuses strictly on deficits;
- applied unscientific stereotypes of intellectually–disabled persons—including that ID persons look and talk differently than the general population and are incapable of driving or maintaining a job—to support her conclusion that Mr. Bourgeois's adaptive functioning was inconsistent with a diagnosis of ID; and
- treated risk factors and comorbidities as alternate *explanations for* Mr. Bourgeois's deficits, as opposed to *contributors to* his intellectual disability.

The district court's approach was subsequently declared unconstitutional by the United States Supreme Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore–I*"), and *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore–II*"), which held that courts must apply the medical community's current standards in assessing *Atkins* claims, and which specifically criticized many of the analytical errors that plagued the initial review of Petitioner's claim.

Following *Moore–I*, Mr. Bourgeois diligently sought to file a successive habeas petition in the same court under 28 U.S.C. § 2255(h), but the Fifth Circuit Court of Appeals denied his request on procedural grounds. Habeas relief pursuant to § 2255 being unavailable to Mr. Bourgeois, he now seeks review of his meritorious claim before this Court under § 2241. *See* 28 U.S.C. § 2255(e) (federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality" of his detention or sentence).

On July 25, 2019, the Government notified Mr. Bourgeois that his execution has been scheduled for January 13, 2019. Mr. Bourgeois had no reason to anticipate the setting of his execution date, as the federal government has not carried out an execution since 2003 and has had no execution protocol in place since 2011.[1] Yet Mr. Bourgeois now stands to be among the first individuals federally executed in over fifteen years, even though his scheduled execution is per se unconstitutional, even though no court has ever reviewed his claim of ID under constitutionally–mandated current medical standards, and even though the FDPA specifically

[1] *See Roane, et al. v. Barr, et al.*, Case 1:05–cv–02337–TSC–DAR (D.D.C.), Parties' Joint Motion to Continue the August 2, 2011 Status Conference and Briefing Schedule Governing the Above–Captioned Case (July 28, 2011) (ECF No. 288) (Government informing the court presiding over litigation challenging the previously–existing lethal injection protocol "that the Federal Bureau of Prisons has decided to modify its lethal injection protocol"). Subsequent status reports filed by the Government with the court indicated that it was continuing to develop a new protocol, but it was not until July 25, 2019—the day Mr. Bourgeois received his warrant—that any new protocol was announced.

provides that "a sentence of death shall not be carried out upon a person who is mentally retarded." 28 U.S.C. § 3596(c).

Given the fact–intensive nature of an *Atkins* claim, Mr. Bourgeois's Petition includes requests for further pleadings by the parties and an evidentiary hearing before this Court. He also seeks a stay of execution so that the Court can fully and fairly review his compelling claim for relief.

PROCEDURAL HISTORY

In 2004, Mr. Bourgeois was convicted of capital murder and sentenced to death in the United States District Court for the Southern District of Texas for the 2002 death of his two–year–old daughter, J.G. On August 25, 2005, the Fifth Circuit affirmed Mr. Bourgeois's conviction and sentence on direct appeal. *United States v. Bourgeois*, 423 F.3d 501 (5th Cir. 2005). The Supreme Court denied his petition for writ of certiorari on May 15, 2006. 547 U.S. 1132 (2006).

On May 14, 2007, Mr. Bourgeois filed a Motion for Relief Pursuant to 28 U.S.C. § 2255 challenging his conviction and sentence of death, including a claim that he is intellectually disabled and his death sentence is unconstitutional pursuant to *Atkins*.

On May 19, 2011, the district court denied Petitioner's § 2255 motion and denied a Certificate of Appealability ("COA") on all claims. *Bourgeois*, 2011 WL 1930684. The Fifth Circuit denied Mr. Bourgeois's request for a COA on August 5, 2013. *United States v. Bourgeois*, 537 F. App'x. 604 (5th Cir. 2013).

On March 27, 2018, Petitioner requested authorization from a panel of the Fifth Circuit to file a successive habeas petition under 28 U.S.C. § 2255(h)(2). On August 23, 2018, the Fifth Circuit denied Mr. Bourgeois's request. *In re Bourgeois*, 902 F.3d 446 (5th Cir. 2018).

MR. BOURGEOIS IS ENTITLED TO A STAY OF EXECUTION.

The standard for issuance of a stay is like that for issuance of a preliminary injunction. The moving party must show: (i) a significant possibility of success on the merits; (ii) irreparable harm will result in the absence of the stay; (iii) the balance of harms is in favor of the moving party; and (iv) the public interest supports a stay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Mr. Bourgeois meets these requirements.

A. Mr. Bourgeois Can Demonstrate a Significant Possibility of Success on the Merits of His Claim.

Mr. Bourgeois is able to demonstrate a "significant possibility of success on the merits" of his *Atkins* claim. *Hill*, 547 U.S. at 584. As discussed in detail in his Petition, there is no doubt that Mr. Bourgeois meets the three prongs of the clinical definition of intellectual disability under current clinical definitions: subaverage intellectual functioning, adaptive deficits, and onset before age eighteen. His uncorrected IQ scores of 70 and 75, like his properly corrected scores of 65 and 68, each establish subaverage intellectual functioning. Standardized testing, clinical evaluation, contemporaneous records, and numerous witnesses attest to his significant adaptive impairments in conceptual, social, and practical skills, any one of which is by itself sufficient to establish adaptive deficits. It is also clear that Petitioner's lifelong intellectual and adaptive impairments long predate his eighteenth birthday. Lastly, while no etiology is required, Mr. Bourgeois's diagnosis of intellectual disability is corroborated by the presence of a number of recognized risk factors for ID in his life history, including: child abuse, sexual abuse, neglect and impaired parenting, low socioeconomic status, history of learning difficulties, and family heredity risk.

Mr. Bourgeois's Petition also demonstrates that his claim is cognizable under § 2241. A

federal habeas petitioner is entitled to review under § 2241 when § 2255 is "inadequate or ineffective to test the legality of his detention" or sentence. 28 U.S.C. § 2255(e); *see also Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013) (§ 2241 applies to challenges to a habeas petitioner's sentence, in addition to his conviction). Cognizable claims include those that rely on a new legal or factual basis not available at the time of the petitioner's trial proceedings or his § 2255 proceedings. *See, e.g.*, *Webster v. Daniels*, 784 F.3d 1123, 1136 (7th Cir. 2015) (petitioner's *Atkins* claim cognizable under § 2241 based on newly–discovered evidence establishing innocence of death penalty); *In re Davenport*, 147 F.3d 605, 607–11 (7th Cir. 1998) (legal claim was unavailable to petitioner at time of initial habeas proceedings because circuit precedent would have required the district court and appellate panel to erroneously reject petitioner's claim at the time of his § 2255 motion). Section 2241 is also the appropriate vehicle where a petitioner challenges the execution of the sentence. *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003); *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998).

Mr. Bourgeois's claim relies on the *Moore–I* and *Moore–II* decisions, which rendered unconstitutional Fifth Circuit precedent rejecting the application of medical standards to *Atkins* claims, as well as newly–adopted diagnostic criteria. Notably, the Fifth Circuit has authorized the filing of successive habeas petitions by petitioners who were in a nearly identical procedural posture. *See, e.g.*, *Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 232 (5th Cir. 2017) (holding *Atkins* was "previously unavailable" to Mr. Cathey because the circuit's pre–*Moore–I* precedent precluded a finding of intellectual disability at the time of his initial habeas petition); *In re Johnson*, No. 19–20552, 19–70013, 2019 WL 3814384, at *5–6 (5th Cir. Aug. 14, 2019) (holding that "new diagnostic guidelines" have brought "significant changes in the diagnosis of intellectual disability" and that "it is correct to equate legal availability with changes in the

standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*"). Nevertheless, the Fifth Circuit denied Mr. Bourgeois's own request to file a successive habeas petition, making § 2241 the only remaining vehicle by which he may obtain review of his unconstitutional sentence. Additionally, Mr. Bourgeois challenges the execution of his fundamentally illegal death sentence. The FDPA requires such prospective relief to be available, providing as it does that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c); *see also Atkins*, 536 U.S. at 320 (establishing "categorical rule making [intellectually disabled] offenders ineligible for the death penalty").

B. Mr. Bourgeois Will Suffer Irreparable Injury Without a Stay.

The harm to Mr. Bourgeois of being put to death without ever receiving full and fair review of the constitutionality of his execution cannot be overstated. Both the FDPA and *Atkins* categorically prohibit the execution of intellectually disabled persons, and Mr. Bourgeois has set forth a substantial claim that he is ID under current standards. Yet if no stay of execution is granted, Mr. Bourgeois will be killed on January 13, 2020, before any court has the opportunity to review that claim. Plainly, this would constitute irreparable harm. *See, e.g.*, *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (granting stay of execution in light of the "obviously irreversible nature of the death penalty"); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) ("There can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury.").

The risk of harm to Mr. Bourgeois is aptly illustrated by the case of Bruce Webster. Mr. Webster, like Mr. Bourgeois, was convicted and sentenced to death under the Federal Death

Penalty Act in Texas. Also like Mr. Bourgeois, Mr. Webster was denied *Atkins* relief on habeas review based on Fifth Circuit precedent that called for the application of non–clinical standards in assessing intellectual disability. *See United States v. Webster*, 421 F.3d 308, 313 (2005). Like Mr. Bourgeois, Mr. Webster then raised his *Atkins* claim before this Court in a § 2241 petition. This Court initially dismissed Mr. Webster's petition on jurisdictional grounds, but the Seventh Circuit reversed, explaining that to hold otherwise might lead to the "intolerable result of condoning an execution that violates the Eighth Amendment." *Webster*, 784 F.3d at 1139. Had the Seventh Circuit not authorized this Court's review of Mr. Webster's § 2241 petition, Mr. Webster could very well have been among the federal inmates now facing a scheduled execution. Yet, as this Court established after reviewing Mr. Webster's petition on the merits, Mr. Webster is intellectually disabled and ineligible for death. *See Webster v. Lockett*, No. 2:12–cv–86–WTL–MJD, 2019 WL 2514833, at *1 (S.D. Ind. June 18, 2019). Mr. Bourgeois deserves the opportunity to make the same showing.

C. A Stay Will Not Substantially Harm the Government; the Potential Injury to Mr. Bourgeois Outweighs Any Harm to Respondents.

The Government's interest in securing Mr. Bourgeois's execution before full and fair judicial review of his *Atkins* claim is adherence to an arbitrary schedule announced mere days ago. Mr. Bourgeois's request for a stay is not based on any delay on his part. He moved diligently in the wake of the *Moore–I* decision to seek permission from the Fifth Circuit to file a successive habeas petition. That request was denied on August 23, 2018. Petitioner diligently filed his § 2241 Petition after his application to file a successive § 2255 motion was denied. Furthermore, as noted above, Mr. Bourgeois had no reason to anticipate the setting of his execution date, as the federal government has not carried out an execution since 2003 and has had no execution protocol in place since 2011.

Given the circumstances, Mr. Bourgeois was undeniably diligent in bringing his § 2241 petition, and the posture of his litigation therefore stands in contrast to those cases where last–minute stay requests have been denied due to a prisoner's delay. *See, e.g.*, *Nelson*, 541 U.S. at 649 (court may deny a stay of execution based on a civil rights claim when prisoner is abusive, *citing*, *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653 (1992)); *Hill*, 547 U.S. at 584 ("A court considering a stay must also apply a strong equitable presumption against the grant of a stay *where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay*.") (internal quotation marks and citations omitted).

In any event, under no scenario can the Government's interest in adhering to an execution schedule set more than fifteen years after the last federal execution outweigh the interest of the Petitioner and the public in ensuring that a person with an intellectual disability not be put to death. *See Moore–I*, 137 S. Ct. at 1048 (Eighth Amendment limits a state's "power to take the life of *any* intellectually disabled individual.") (emphasis in original) (quotation marks and citation omitted). As the Supreme Court in *Atkins* explained: "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S at 306. Therefore, "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

D. The Public Interest Weighs Strongly in Favor of a Stay.

There can be no public interest in an unconstitutional execution. "The public interest clearly favors the protection of constitutional rights." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 1992) (affirming preliminary injunction to protect plaintiffs' free exercise rights where the harm to the borough of posting items on utility poles is outweighed by the harm to plaintiffs of being unable to practice their religion). Injunctive relief, in fact, will serve the Government's and the public's interest in executing the death sentence in a manner consistent with the Constitution. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

To the extent there is a public interest in timely enforcement of a death sentence, that interest does not outweigh the public interest in knowing that the federal government will carry out an execution in conformity with the Constitution and the will of Congress. *See* 28 U.S.C. § 3596(c).

REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons and those explained in his § 2241 Petition, Mr. Bourgeois respectfully requests that the Court stay his execution pending its consideration of his *Atkins* claim.

Respectfully submitted,

/s/ Peter Williams

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Dated: August 15, 2019

CERTIFICATE OF SERVICE

I, Peter J. Williams, hereby certify that on this date, a copy of the within document has been caused to be served upon the following party via first class mail at the address listed below:

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Dated: August 15, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ALFRED BOURGEOIS, Petitioner,	§	
v.	§	No. 2:19-cv-00392-JMS-DLP
SUPERINTENDENT, USP—Terre Haute, UNITED STATES OF AMERICA, Respondents.	§	

RETURN TO ORDER TO SHOW CAUSE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ALFRED BOURGEOIS, Petitioner,	§ §	
v.	§	No. 2:19-cv-00392-JMS-DLP
	§	
SUPERINTENDENT, USP—Terre Haute, UNITED STATES OF AMERICA, Respondents.	§ § §	

RETURN TO ORDER TO SHOW CAUSE

For their return to the Order to Show Cause and in response to Petitioner Albert Bourgeois' (Bourgeois) petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241, the Respondents advise the Court as follows:

INTRODUCTION

Bourgeois is a federal inmate currently housed on death row at the United States Penitentiary at Terre-Haute (USP-Terre Haute), scheduled for execution on January 13, 2020, for the 2002 brutal and horrifying murder of his two-year-old daughter (JG) while making a delivery at a United States Naval base. Bourgeois savagely beat and tortured JG during the last six weeks of her life while having custody

over her—that is, biting her all over her body, burning her, whipping her with belts, extension cords and his hands, beating her with a baseball bat, shoes and other objects, duct-taping her mouth shut, and forcing her to drink his urine from a jug that the kept in his truck. He murdered his daughter by forcibly slamming her head into the window of his truck until JG's face became "real, real sad," as witnessed by his then other 7-year old daughter, who testified at trial.

Based on well-established Seventh Circuit precedent applied to the facts of this case, Bourgeois' *Atkins* claim began under 28 U.S.C. § 2255 in the Southern District of Texas and ends there. Bourgeois timely moved under 28 U.S.C. § 2255 to vacate his sentence on the ground that he is intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia,* 536 U.S. 304 (2002). The United States District Court for the Southern District of Texas decided Bourgeois' *Atkins* claim on the merits after affording him the opportunity to fully litigate that claim without imposing any limitation. United States District Court Judge Janice Graham Jack, who presided over the guilt and punishment phases of his trial and the entire 2007-2011 § 2255 proceeding, determined that Bourgeois is not intellectually disabled under the *Atkins* criterion. She

did so after holding a complete and extensive evidentiary hearing and denied his request for *Atkins* relief in a careful and comprehensive order and opinion filed on May 19, 2011. *United States v Alfred Bourgeois,* No. 2:02-cr-216, No. 2:07-cv-223, 2011 WL 1930684, *1 (S.D.Tex. May 19, 2011), c*ertificate of appealability denied,* No. 11-70024, 537 F. App'x 604 (5th Cir. Aug. 5, 2013), *cert. denied,* 135 S. Ct. 46 (2014). The decision of the Southern District of Texas is final under 28 U.S.C. § 2244(a), (b)(1), and (b)(2).

Years later on March 28, 2018, Bourgeois requested Fifth Circuit authorization to proceed on a successive 28 U.S.C. § 2255 motion under § 2255(h)(2), pursuant to 28 U.S.C. § 2244(b)(3)(A). Bourgeois argued that, based on the Supreme Court's decision in *Moore v. Texas (Moore I),* --- U.S. ---, 137 S. Ct. 1039 (2017), he satisfied the requirements of § 2255(h)(2) because *Atkins* created a new rule of constitutional law made by the Supreme Court retroactively applicable to cases on collateral review. The United States' position before the Fifth Circuit in opposition to Bourgeois' request was then, and is now, that Bourgeois failed to satisfy the gatekeeping requirements of 28 U.S.C. § 2255(h)(2) and § 2244(b)(3)(C); that Bourgeois' *Atkins* claim presented in his second or

successive § 2255 motion and the evidence he attached in support duplicated the *Atkins* claim and evidence that he presented to the district court in his first § 2255 motion, and that the Supreme Court did not declare *Moore (I)* or its predecessor, *Hall v. Florida,* 572 U.S. 701 (2014), a new rule of constitutional law retroactively applicable to cases on collateral review. The Fifth Circuit agreed, holding that Bourgeois' "successive § 2255 motion present[ed] only a single claim that was already presented in his original motion." *In re Bourgeois,* 902 F.3d 446, 448 (5th Cir. 2018). Joining the other circuits having addressed the issue, including the Seventh Circuit in *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997), and *White v. United States,* 371 F.3d 900, 901 (7th Cir. 2004), the Fifth Circuit held that the strict litigation bar in 28 U.S.C. § 2244(b)(1) applies equally to federal prisoners and barred Bourgeois from relitigiting his *Atkins* claim. Accordingly, the Fifth Circuit denied Bourgeois' request for authorization to proceed on a successive § 2255 pursuant to § 2241(b)(1).

Bourgeois filed this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Dkt. 1), asserting this Court's jurisdiction via the "savings clause" in 28 U.S.C. § 2255(e) and claiming that he is categorically

exempt from execution under *Atkins* under *Moore (I)* and the Supreme Court's recent decision in *Texas v. Moore (Moore II),* --- U.S. ---, 139 S. Ct. 666 (2019). The declarations, affidavits, and reports of mental health professionals, the declaration of lay witnesses, and other investigatory records that Bourgeois attaches as appendices to his § 2241 petition and as supporting his claim of intellectual disability, Dkt. 1-1, is evidence that was available to him at the time of his first § 2255 proceeding and is in fact the *same* evidence that he presented to the United States District Court for the Southern District of Texas at that evidentiary hearing in September 2010 through January 2011.

The "savings clause" under § 2255(e) does not allow Bourgeois' *Atkins* claim to proceed under § 2241 because Bourgeois cannot meet his burden of showing that § 2255 is "inadequate or ineffective." The Seventh Circuit holds that, to pass through the savings clause and proceed under § 2241, there must be a structural problem with § 2255 that prevents an opportunity to address claims on collateral review. Bourgeois agrees, and the record establishes, that he fully adjudicated his *Atkins* claim at his first § 2255 proceeding. The mere fact that Bourgeois' petition is barred as a successive petition under § 2255 does

not bring Bourgeois' petition under the savings clause's protection. To hold otherwise would denigrate the careful structure Congress has created to avoid repetitive filings to meaning little or nothing, as the Seventh Circuit pointedly holds in *Garza v. Lappin,* 253 F.3d 918, 921 (7th Cir. 2001).

As important, Bourgeois does not satisfy the Seventh Circuit's tests under *In re Davenport,* 147 F.3d 605 (7th Cir. 1998), and *Webster v. Daniels,* 784 F.3d 1123 (7th Cir. 2015) (en banc), to proceed under § 2241. *Davenport* precludes the use of § 2241 for claims based on a constitutional case. *Atkins* and its progeny, *Hall, Moore I,* and *Moore II,* are all grounded in the Eighth Amendment and are not statutory interpretation cases. Neither *Moore I* nor *Moore II* establish new "legal and factual bases" beyond *Atkins.* The Supreme Court has not declared *Moore* a new rule of constitutional law retroactively applied to Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) cases. The development of new diagnostic standards does not constitute newly discovered evidence retroactively applicable to Bourgeois. The Supreme Court pronounced in *Atkins* the three criteria required for determining intellectual disability and ineligibility for execution under the Eighth Amendment. Bourgeois

shows no structural problem with § 2255 prevented him from having a reasonable opportunity for a reliable judicial determination of the merits of his *Atkins* claim in his first § 2255 proceeding.

Bourgeois' attempt to circumvent § 2255(h) and the strict litigation bar under § 2244(b)(2) by proceeding under § 2241 to relitigate his *Atkins* claim amounts to an invitation to abuse the writ under pre-AEDPA law. Furthermore, in addition to performing any analysis required by AEDPA, this Court must conduct a threshold *Teague v. Lane*, 489 U.S. 288 (1989) analysis. *Moore* does not announce a new substantive rule that could retroactively apply under *Teague*, and Bourgeois' *Atkins* claim does not fall within a *Teague* exception.

Finally, Bourgeois seeks to proceed in this § 2241 habeas petition to relitigate the same *Atkins* claim that he fully adjudicated in the United States District Court for the Southern District of Texas in his first § 2255 proceeding and which that court finally denied on the merits in a comprehensive decision. The relief that Bourgeois requests of this Court is to stay his execution pending a final disposition of his *Atkins* claim in the Southern District of Indiana, a request to amend his claim if necessary, and for an evidentiary hearing conducted on the merits of his

Atkins claim. Bourgeois' *Atkins* claim is barred by the savings clause at § 2255(e). Bourgeois' claim should be dismissed with prejudice and his motion for stay of execution denied.

Bourgeois' execution is scheduled for January 13, 2020. "[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Bourgeois does not demonstrate a significant possibility of success on the merits of his *Atkins* claim. The United States District Court for the Southern District of Texas made the *Atkins* intellectual-disability determination that Bourgeois is not exempt from execution under the Eighth Amendment based on and applying the clinical definition of intellectual disability by the American Association on Intellectual and Developmental Disabilities (AAIDD) and American Psychiatric Association (APA), as *Atkins* directs.

The United States has a strong interest in enforcing Bourgeois' death sentence imposed by the jury on March 25, 2004, for the savage and horrific premediated murder of his two-year daughter. "Equity must take into consideration the [United] State's strong interest in proceeding

with its judgment." *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992). The public interest mandates that Bourgeois' scheduled execution on January 13, 2020, be enforced by the United States. This Court should deny Bourgeois' motion for stay of execution: there is no public interest or constitutional basis to grant it.

I.

BACKGROUND

A. Facts: Bourgeois brutally murdered his 2-year daughter at the Corpus Christi Naval Air Station on June 27, 2002.

These facts and the aggravating and mitigating evidence the parties presented to the jury at the punishment phase of Bourgeois' trial and at the evidentiary hearing held at his first 28 U.S.C. § 2255 proceeding in September 2010 through January 1, 2011, are set forth in comprehensive detail in the opinion of the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) affirming his conviction and sentence on August 25, 2005, the opinion of the United States District Court for the Southern District of Texas, U.S. District Court Judge Janice Graham Jack (Judge Jack), denying his request for post-conviction relief under 28 U.S.C. § 2255 on May 19, 2011, and the Fifth Circuit opinion denying his request for a certificate of appealability (COA) on August 5, 2013,

pursuant to 28 U.S.C. § 2253(c). *See United States v Alfred Bourgeois,* 423 F.3d 501 (5th Cir. 2005), *cert. denied,* 547 U.S. 1132 (2006); *United States v Alfred Bourgeois,* No. 2:02-cr-216, No. 2:07-cv-223, 2011 WL 1930684, *1 (S.D.Tex. May 19, 2011), *certificate of appealability (COA) denied,* 537 F. App'x 604 (5th Cir. Aug. 5, 2013), *cert. denied,* 135 S. Ct. 46 (2014).

Bourgeois brutally and savagely murdered his two-year-old daughter (JG) on the grounds of the Corpus Christi Naval Air Station, where he was making a delivery. Bourgeois systematically and savagely tortured JG during the last six weeks of her life while she was in his custody. He bit her all over her body, burned her, whipped her with belts and extension cords, beat her with his hands, a baseball bat, shoes, and other objects, duct-taped her mouth shut, and forced her to drink his urine from a jug that the kept in his truck. Bourgeois murdered his daughter by slamming her head into the window frame and dashboard of his truck. JG's murder was witnessed by AB1994 (AB), Bourgeois' other 7-year old daughter who was in the truck. AB testified that Bourgeois slammed JG's head until JG's face became "real, real sad."

JG was Bourgeois' two-year old biological daughter. At the time of JG's murder, Bourgeois was married to a woman (Robin) who was not JG's biological mother. Bourgeois and Robin had two biological daughters, then 7-year old AB and AB2001, who was one year old. After a court ordered Bourgeois to pay child support for JG, Bourgeois demanded visitation rights for the summer of 2002. Medical evidence established that JG was a very healthy baby with no substantial injuries when Bourgeois took physical control of her.

The trial established that Bourgeois developed a scheme to systematically torture JG and did so from the time he obtained possession of JG until he murdered her while on the federal Naval base on June 27, 2002. Circumstantial evidence, together with AB's testimony and subsequent medical evidence, established that Bourgeois murdered JG by slamming her head four times against the window inside of his tractor-trailer while seated in the driver's seat. AB, who testified at trial, described how Bourgeois held JG by the shoulders and slammed her head into the window frame and dashboard of his truck cab. The medical examiner found the ultimate cause of death to have been an impact to the head resulting in a devastating brain injury.

The evidence established that Bourgeois entered into a pattern of conduct aimed at controlling or killing JG, who Bourgeois referred to as a "trifling little bitch like her mother [Katrina]" and "a mother f***er." A few days after JG came to live at Bourgeois' home, and with Bourgeois proclaiming he would teach JG to swim, a 30-minute videotape captured Bourgeois tossing her in the air and letting her fall into the swimming pool where she sank until he pulled her out, coughing and gasping for breath, and to the brink of downing before he let her go. He did this again on a trip to the beach when he repeatedly held her under the waves.

Bourgeois also brutally and systematically beat JG, often with electrical cords, resulting in looped injuries, and other objects. AB witnessed Bourgeois beating JG with a belt so hard that it broke. Bourgeois beat JG with electrical cords, shoes, and a toy baseball bat until her head swelled "like a football." Bourgeois told an inmate with whom he was incarcerated prior to trial about how JG fell about ten feet at a dinosaur park, and he laughed as he said "that f***ing baby's head got as big as a watermelon." Bourgeois hit JG with all his strength in the eyes until she had to wear sunglasses to mask the injuries. AB testified that JG had black eyes from being hit by her father. AB witnessed

Bourgeois beat JG until she lost consciousness. Foreshadowing her murder, Bourgeois knocked JG unconscious by striking her head against the truck's steering wheel because she referred to herself by her mother's, not his, surname.

The medical evidence established that JG had over 300 injuries, including a multitude of pattern injuries which appeared to be whip marks, human bite marks, a burn mark on her foot, extensive trauma and hemorrhaging in her eyes, 110 to 140 nonspecific and pattern contusions, abrasions or excoriations, and approximately 10 separate head contusions. AB testified that she repeatedly saw Bourgeois bite JG "all over" on her hands, feet, head, and back until JG bled; that JG's hands and feet were pretty when she came to them, but got ugly from Bourgeois biting them; that JG wore socks because "she was all bitten up, and her feet looked real bad." JG's sores on her feet would not heal because Bourgeois kept pressing his thumbs into the wounds. The forensic experts found bite marks on JG's hands and back matched to Bourgeois. Bourgeois taped JG's mouth shut and burned holes in her foot the size of a cigarette lighter. Once while stopped for refueling, two-year old JG reached for a plastic Hawaiian Punch plastic bottle containing

urine and tried to drink it. Robin returned from the restroom and took the jug of urine away from JG, but when Bourgeois heard what happened, he poured some urine in a cup and forced JG to drink it.

Bourgeois, who at that point no longer shared a bed with Robin, would lock himself in the bedroom with JG, AB, and his other one-year old daughter. JG would spend the night tied to her potty chair under a window. Robin testified that some nights she could hear pounding in the bedroom accompanied by crying. A bloodstain found by law enforcement confirmed that one loud thump Robin heard was Bourgeois throwing JG against a wall. At some point blood was found in JG's diapers. There was some evidence of vaginal trauma, and rectal swabs after JG's death indicated the presence of semen. Bourgeois said to one of the inmates who testified at trial that JG was a "bad child" who "used to shake her butt all the time."[1]

Bourgeois' callous and cavalier attitude towards JG continued when she was dying. After having delivered the killing blows to JG at the federal Naval base, Bourgeois handed JG back to AB and left the

[1] *Bourgeois,* 537 F. App'x at 608 & n.15.

truck. Robin, who was asleep when this happened, woke up, saw JG's motionless and limp body, unsuccessfully attempted to revive JG, and honked the horn. Bourgeois came back, took JG out of the truck, laid her on the ground, and crafted the story: "AB forgot to close the cab door" and "JG fell from the truck." Robin attempted CPR and paramedics then took over when they arrived. While this was happening, Bourgeois was on the phone trying to see about his next load to Kingsville.

Robin testified that Bourgeois said he wanted to kill JG; that once he killed JG, he planned on leaving her body in the woods or in a swamp and have Robin report her as kidnapped. After Bourgeois was arrested and confined in jail, he wrote a large number of letters to his wife discussing how she poorly handled the police. Bourgeois also made multiple telephone calls to relatives and friends making incriminating statements. Another inmate testified that Bourgeois told him that he killed JG and was going to make it look like an accident. Bourgeois attempted to explain away all of JG's injuries on cross examination at trial and to lay blame on Robin for many of those injuries. While confined prior to trial Bourgeois threatened to have witnesses killed. As the

district court found, Bourgeois' "threats were not toothless; witnesses, including JG[ ]'s mother, were murdered before trial."[2] (DE 24).

Bourgeois' testimony at trial was that JG was alive when he drove onto the U.S. Naval base and that he did not fatally injure her. The jury did not believe him and found him guilty of first degree premeditated murder with malice aforethought. Bourgeois addressed the jury a second time at punishment, saying:

> My sympathy goes out to the soul of JG1999, my baby, her family, my family, relatives and friends, and I'm very sorry for the death of my child. It's a hurting pain and a sorrowful thing that happened. And I feel or believe that I have been wrongfully accused of this crime that I've been convicted for....
>
> So I feel like you all have been misled and I've been wrongfully convicted, and I'm just sorry for the pain and suffering, that I've been wrongfully accused for the death of my baby, and I did not kill my baby.
>
> I just want to close with that I loved JG1999, she's an infant that didn't actually come in this world and I think the real murderer got off with this crime. I just think you all should know that I have been wrongfully convicted. I feel my wife had a lot to do with this and she walked away free, and I just had to say this. If I never get an opportunity to say this to nobody else, my family, Katrina's family, JG1999 came from a lovely family. When I picked her up, when she got in my custody I had no problems with JG1999. She was a lovely kid, very lovely. I realize some of the pictures that you all seen in the swimming pool, I will say I was a little rough like that, I'm

[2] *Bourgeois,* 2011 WL 1930684, at *9.

> like that with all my children. And I just feel you all have been wrongfully misled.
>
> I just think I want to close with that, saying that I love my baby, I love her family, I love my family. And I thank each and every one of you for participating, the lawyers for the job they did, and for everybody that communicated. And God bless all of you all. Thank you.

Bourgeois, 537 F. App'x at 641. The jury was not persuaded and sentenced Bourgeois to death.

B. Procedural History.

1. Trial, Sentencing, and Direct Appeal, *United States v. Bourgeois*, No. 2:02-cr-216 (S.D.Tex. 2004), 423 F.3d 501 (5th Cir. 2005), *cert. denied*, 547 U.S. 1132 (2006).

On July 25, 2002, the Grand Jury for the United States District Court for the Southern District of Texas, returned a two-count indictment, Criminal No. 2:02-cr-216, charging Bourgeois with murder (unlawful killing with malice aforethought) in violation of 18 U.S.C. §§ 7 and 1111, and injury to a child in violation of 18 U.S.C. § 13 and Texas Penal Code, Section 22.04(a)(1). (Crim. Dkt. 1, 5).[3] The grand jury returned a two-count superseding indictment on April 9, 2003, alleging

[3] "Crim. Dkt." refers to docket entries in *United States v. Bourgeois,* No. 2:02-cr-216 (S.D. Texas). The Clerk of the District Court for the Southern District of Texas ordered that all post-conviction collateral attack pleading filed under 2:07-cv-223 be docketed under the criminal number.

premeditated murder with malice aforethought and injury to a child, to which Bourgeois pleaded not guilty. (Crim. Dkt 43).

At the status conference on July 16, 2003, the United States announced that the United States Attorney General had authorized seeking the death penalty. (Crim. Dkt. 74, 111). The grand jury returned a second superseding indictment on July 22, 2003, alleging a single count of premeditated murder with malice aforethought and alleging special findings, including all four of the statutory intent elements and three statutory aggravating factors. On July 23, 2003, the United States filed the Notice of Intent to Seek the Death Penalty ("Death Notice"), in which it added two non-statutory aggravating factors.[4]

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[4] The indictment alleged the following statutory intent elements: Bourgeois (A) intentionally killed the victim, (B) intentionally inflicted serious bodily injury that resulted in the death of the victim, (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, [other than one of the participants in the offense], who died as a direct result of the act; and (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, [other than one of the participants in the offense], and constituted a reckless disregard for human life and the victim died as a direct result of the act. Crim. Dkt. 78; *see* 18 U.S.C. § 3591(a)(2).

The three alleged statutory aggravating factors were that Bourgeois: (1) committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim; (2) committed the offense after substantial planning and premeditation to cause the death of a person; and (3) that the victim was particularly vulnerable due to youth or infirmity. Crim. Dkt 78; *See* 8 U.S.C. § 3592(c)(6), (c)(9) and (c)(11).

Bourgeois pleaded not guilty to the second superseding indictment on July 25, 2003. The guilt/innocence phase of Bourgeois' capital trial began on March 2, 2004, and ended on March 16, 2004, with a guilty verdict for first degree premeditated murder with malice aforethought. The capital trial resumed with the punishment phase on March 22, 2004, and ended on March 24, 2004, with a unanimous jury verdict that Bourgeois be sentenced to death. The jury found that the government had proven all of the statutory and non-statutory factors and that Bourgeois had shown two mitigating factors: six jurors found that he was under stress, and all found that he was driving across the country in a truck with three children and another adult in the cab of an 18-wheeler truck. The jury unanimously found that the aggravating factors outweighed the mitigating factors and recommended a death sentence. The district court entered the judgment and order implementing the judgment on March 25, 2004, sentencing Bourgeois to death. *See Bourgeois,* 537 F. App'x at 606-09.

The two alleged non-statutory aggravating factors were: (1) future dangerousness of the defendant, and (2) victim impact evidence. Crim. Dkt. 79.

Bourgeois appealed his conviction and sentence to the Fifth Circuit, raising four issues:

> (1) a Fifth Amendment claim that the United States failed to allege the required statutory intent elements and aggravating factors in the indictment, *id.* at 506-08;
>
> (2) an Eighth Amendment claim challenging the application of the intent element under 18 U.S.C. § 3591(a)(2)(D), *id.* at 508-09;
>
> (3) a due process claim regarding this Court's delegation of ministerial powers in how and where the sentence of death will be carried out, *id.* at 509-10; and
>
> (4) a claim that the aggravating factors alleged in his case were vague and ambiguous and violated the Eighth Amendment, *id.* at 511-12.

The Fifth Circuit affirmed his conviction and sentence in all respects on August 25, 2005, concluding that "[t]his is not a close case," and that "Bourgeois fail[ed] to prove there was any error, much less plain error, in any aspect of his trial." *Bourgeois*, 423 F.3d at 512. The Supreme Court denied certiorari review on May 15, 2006. *Bourgeois v. United States,* 547 U.S. 1132 (2006).

2. 28 U.S.C. § 2255, Motion to Vacate, *United States v. Bourgeois*, Nos. 2:02-cr-216, 2:07-cv-223, 2011 WL 1930684 (S.D.TX, May 19, 2011).

The district court appointed Mr. Victor J. Abreu, Bourgeois' present counsel of record, and Mr. Michael Wiseman, both with the Federal Community Defender Office for the Eastern District of Pennsylvania, Capital Habeas Corpus Unit. ROA-5th.138. On May 14, 2007, Bourgeois filed "Petitioner's Motion for Relief Pursuant to 28 U.S.C. § 2255 or in the Alternative Pursuant to 28 U.S.C. § 2241" with appendices, 5thCir.[5]338-474, 477-915, and a supplemental motion with appendices on October 5, 2007, *see* 5thCir.928-1077, 1079-1165. The United States filed its answer and response on October 15, 2008. (Crim. Dkt. 442-443). Bourgeois filed his reply with appendices to the United States' answer on June 26, 2009, which are contained in the record at 5thCir.1356-474, 1476-755.[6]

[5] A complete copy of the Fifth Circuit's record on appeal from Bourgeois' first 28 U.S.C. § 2255 proceeding is contained in *United States v. Bourgeois,* No. 11-70024 (5th Cir. 2013). Because the record is voluminous, the United States files that record on appeal as appendices to this opposition for purpose of record completeness. This record is cited as "5thCir." followed by the posted number at the bottom right-hand corner of each page.

[6] Bourgeois filed additional supplemental and amended motions relating to claims of ineffective assistance and remaining issues. *See*, *e.g.,* 5thCir.4436-512, 4723-792, 5960-6061.

Bourgeois raised fourteen claims.[7] On May 19, 2011, the district court entered its Memorandum, Order, and Final Judgment, deciding Bourgeois issues on the merits and denying him relief under 28 U.S.C. §

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[7] (1) Bourgeois is mentally retarded, making him ineligible for execution under *Atkins*, *Bourgeois,* 2011 WL 1930684 at *22-46.

(2) Trial counsel provided ineffective assistance of counsel at the punishment phase of trial by failing to present available mitigating evidence, including that of his alleged mental retardation. *Id.* at *46-70.

(3) Bourgeois' conviction violates due process because the fatal injury occurred outside the territorial jurisdiction of the United States. Trial counsel should have disputed the location of the crime. *Id.* at *70-79;

(4) Trial counsel provided ineffective assistance by failing to present available expert testimony that would have shown that Bourgeois did not sexually assault the victim. *Id.* at *80-89.

(5) Trial counsel provided ineffective assistance by not litigating a *Daubert* challenge to testimony from Dr. Senn and Dr. Chrz concerning bite-mark evidence. *Id,* at 93-95.

(6) Trial counsel provided ineffective assistance by not litigating a *Daubert* challenge to testimony from Dr. Oliver concerning digitally enhanced autopsy photographs. *Id.* at *89-93.

(7) The Government *violated Brady v. Maryland*, 373 U.S. 83 [ ] (1963), by failing to disclose that four inmates were promised some benefit for testifying against Bourgeois. *Id.* at *96-100.

(8) Trial counsel labored under a conflict of interest because of representation of clients associated with this case. *Id.* at *100-101.

(9) The Government engaged in misconduct by making improper argumentative statements in the guilt/innocence and penalty phases. *Id.,* at *101-04.

(10) Trial counsel provided ineffective assistance by not rebutting evidence of Bourgeois' indifferent demeanor at trial. *Id.* at *105-06.

(11) A witness improperly relied on Bourgeois' interactions with counsel as a basis to formulate an adverse opinion about him *Id.* at 106-107.

(11) Appellate counsel ineffectively failed to advance several claims. *Id.* at *108-09.

(13) The cumulative effect of the claimed errors resulted in a constitutional violation. *Id.* at *110.

(14) The method by which the government would carry out Bourgeois' execution violates the Constitution. *Id.* at *110.

2255(a). *Bourgeois,* 2011 WL 1930684, at *1-111. The district court's opinion details defense counsel's pretrial preparation and investigation, *id.* at *6-9, the guilt and innocence phase of trial, *id.* at *9-18, and a summary of the § 2255 proceeding and evidentiary hearing, *id.* at *19-22.

The court carefully and comprehensively analyzed Bourgeois' *Atkins* claim of intellectual disability and ineligibility for execution, *id.* at *22-46, and his claim of ineffective assistance of counsel, *id.* at *46-71, including trial counsels' failure to develop evidence of mental retardation as mitigating punishment evidence, *id.* at *44-45. Regarding the ineffective assistance of counsel claims, the court's analysis includes detailed accounts of defense counsel's investigation and preparation of mitigating evidence, *id.* at *49-51, trial counsel's preparations before the guilt/innocence phase of trial and defense strategies, *id.* at 51-54, the "unpresented evidence" of childhood abuse by lay witnesses, *id.* at *55-58, and expert testimony, *id.* at *58-69.

At the § 2255 evidentiary proceeding, the district court allowed Bourgeois to present testimony and evidence supporting nearly all of his § 2255 claims without imposing any limitation. *Id.* at *20. In that regard, the court "liberally allowed Bourgeois to prepare the factual basis for his

post-judgment claims through expert and investigative assistance." *Id.* The court held a week-long evidentiary hearing for the parties to present evidence and placed no limitation on Bourgeois' ability to call witnesses. *Id.* at *20, 55. "Testimony during that week often extended long afDter normal hours. Aside from the witnesses called during that hearing, the [court] heard testimony at different dates and allowed the taking of video depositions of other witnesses." *Id.* at *20. The court found that the parties "developed a rich factual record through the submission of written interrogatories, declarations, and record documents." *Id.* The parties presented extensive in-court testimony of medical experts and lay witnesses, video taped depositions, interrogatories, affidavits, and documentary reports related to Bourgeois' *Atkins* claim and ineffective assistance of counsel claim for failing to present his alleged mental retardation as mitigating evidence at punishment. [8] The court informed

[8] The Fifth Circuit record on appeal in No. 11-70025, includes attachments:

- 5thCir.6151-75 (telephone conference on December 14, 2009);
- 5thCir.1904-71 (hearing on April 20, 2010);
- 5thCir.1976-95 (telephone conference on May 6, 2010);
- 5thCir.2061-85 (telephone conference on June 7, 2010);
- 5thCir.2087-135 (telephone conference on June 9, 2010)

- 5thCir. 2201-348 (evidentiary hearing on September 10, 2010, including testimony of Dr. Glebort at 2210-82, 2294-348);

- 5thCir.2698-3104 (evidentiary hearing on September 20, 2010, including testimony of: Dr. Swanson at 2704-895; Dr. Weiner at 2895-966; Dr. Toomer at 2697-3075; Kathleen Kaib at 3075-93);
- 5thCir.3403-48 (evidentiary hearing on September 21, 2010, including testimony of: Claudia Williams at 3405-93; Beverly Clayton Frank at 3494-531; Brenda Clayton Goodman at 3532-82; Dr. Mark Douglas Cunningham at 3582-723; Carl Kevin Henry at 3723-64; Donald Reese at 3765-95; Murray Bourgeois at 3796-819; Jon Curtis Daily at 3820-46);

- 5thCir.2395-568, 3849-4170 (evidentiary hearing on September 22, 2010, including testimony of: Elizabeth Ann Johnson at 2395-568; Dr George Walker Holden at 3856-68; Jennifer Valdez at 3872-79; Charles Michael Bowers at 3881-972; attorney John Gilmore at 3794-4076; Kerry Dion Brown at 4078-99; Timothy Lynn Allen at 4100-04; AFD Gerald Bierbaum at 4105-55);

- 5thCir.3106-3401 (evidentiary hearing on September 23, 2010, including testimony of: Danny Lee Clark at 3109-44; Robert Patterson at 3158-76; William D. Shotts at 3177-306; Carlin Christopher Key at 3208-45; Rhonda Michelle Davis at 3246-92; Dr. Jack Randall Price at 3292-339);

- 5thCir.2569-662, 4171-4413 (evidentiary hearing on September 24, 2010, including testimony of: Jerrilyn Conway at 2571-661; Dr. Jack Randall Prices at 4192-225; Dr. Roger Byron Moore, Jr. at 4236-4412);

- 5thCir.4516-661 (transcript of videotaped deposition of Dr. William Russell Oliver on October 28, 2010);

- 5thCir.4661-705 (transcript of videotaped deposition of Manfred Schenk) on October 28, 2010;

- 5thCir.4869-935 (transcript of videotaped deposition of Dr. Randall Price on November 10, 2010);

- 5thCir.4982-5018 (telephone conference on December 1, 2010);

- 5thCir.6176-82 (telephone conference on December 6, 2010);

- 5thCir.5047-221 (transcript of video-teleconference of Dr. Jan Edward Leestman on January 10, 2011);

that it "spent many hours reviewing the testimony of the out-of-court witnesses" and "afforded Bourgeois a full and fair opportunity to develop his arguments." *Id.*

The district court's order and opinion on May 19, 2011, established that the court properly applied *Atkins'* criterion for intellectual disability (mental retardation) as defined by the AAIDD and the APA in AAIDD-11 (11th edition, 2010) and the DSM-IV-TR (2010): (1) significantly subaverage intellectual functioning, (2) existing concurrently/ accompanied by related significant limitations in adaptive functioning in at least two adaptive skills, (3) the onset of which occurs prior to the age of 18. *Bourgeois*, 2011 WL 1930684 at 23 (citing *Atkins*, 536 U.S. at 309 n.3). Summarized, the district court scrupulously adhered to the AAIDD and APA clinical definitions in determining Bourgeois' *Atkins* intellectual functioning and adaptive functioning. The court determined, based on a comprehensive analysis of the medical experts' clinical assessment and judgment, that Bourgeois did not show by a preponderance of the

- 5thCir.5226-445, 5579-694 (miscellaneous hearing on January 13, 2011, including testimony of Dr. Rouse at 5228-79; arguments of counsel at 5282-443, including the *Atkins* standard at 5282-5346; testimony of William Edward May, Jr. at 5582-95; James Sales at 5593-620; Debra Hohle at 5621-57; AUSA Booth at 5662-86).

evidence that he is intellectually disabled and categorically exempted from execution under the Eighth Amendment. *Id.* at 22-46 ("Bourgeois' Alleged Mental Retardation Claim" (*22); "Background of Bourgeois' Atkins Claim" (*23-26); "Intellectual Functioning" (*25); "Bourgeois' IQ Score " (*25-26); "Legal Evaluation of Intelligence in *Atkins* cases" (*26-27); "Bourgeois' IQ Does Not Persuasively Fall at the Lower End of the Confidence Interval" (*27-31); "Significant Limitations in Adaptive Skill Areas" (*31-33); "Assessment by Testing Instruments" (*33-37); "Lay Accounts of Bourgeois' Functioning" (*37-39); "Bourgeois' Adaptive Abilities (*40); "Conceptual Domain-Functional Academics" (*40-42), "Practical Domain—Health and safety" (*42-43); "Social Domain—Social /interpersonal skills" (*43-44); "Manifestation of Limitation Before Age 18" (*44); "Trial Counsel's Failure to Develop Evidence of Mental Retardation" 44-46). In conjunction with Bourgeois' *Atkins* claim, the district court decided the merits of Bourgeois' claim of ineffective assistance of counsel for failing to develop evidence of his mental retardation at the time of sentencing. *Id.* at *44-46, 46-71.

Finding that it had "afforded Bourgeois a full and fair opportunity to show whether mental retardation precludes his execution," and

referring directly to *Atkins,* the court found that, "Bourgeois' intellectual and adaptive functioning, while possibly low, does not bear the characteristics that would render his sentence a cruel and unusual punishment." *Id.* at *46.

For Bourgeois' *Atkins* claim and each of the other claims he presented in his first § 2255 motion, the district court found "no error invalidating Bourgeois' capital conviction or death sentence." *Id.* at *111. The court found that Bourgeois "failed to show that his sentence was imposed in violation of the laws of the United States, was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[;]" and that "his claims do not merit section 2255 relief." *Id.*. The court additionally found that Bourgeois had "not shown that [the Court of Appeals for the Fifth Circuit] should authorize any issue for appellate review" and denied a COA of any issue for consideration by the Fifth Circuit. *Id.* at *111.

3. *United States v. Bourgeois*, 537 F. App'x 604 (5th Cir. 2013) (per curiam), *cert. denied*, 135 S. Ct. 46 (2014).

Bourgeois requested the Fifth Circuit grant a COA limited to the following three issues presented in his § 2255 petition:

> 1) The district court erred in dismissing, without an evidentiary hearing, his claim that trial counsel were ineffective for failing to challenge jurisdiction.
>
> 2) Trial counsel were ineffective at both phases of trial for failing to present available expert testimony to rebut the government's assertion that JG was sexually assaulted.
>
> 3) Trial counsel provided ineffective assistance during the punishment phase by failing to pursue and present mitigating evidence of his life history of abuse, neglect and abandonment, personality disorder, cognitive deficits, and the combined impact of his mental-health problems.

Bourgeois, 537 F. App'x at 610.

The Fifth Circuit denied Bourgeois' request for COA on August 5, 2013; it made extensive factual and legal findings with respect to each of those issues and resolved each on the merits. *See id.* at 611-17 (Issue 1), 617-31 (Issue 2), and 631-65 (Issue 3); *see also United States v. Bourgeois,* No. 11-70024, 2012 WL 2884266 (July 9, 2012) (5th Cir. Brief of the United States). So doing, the Fifth Circuit concluded that Bourgeois "ha[d] not made a substantial showing of the denial of a constitutional right, [that] the issues he presents were inadequate to deserve encouragement to proceed further, and [that] no reasonable jurist could debate the district court's assessment of his claims." *Id.* at 665. The Supreme Court denied Bourgeois' petition for writ of certiorari (No. 13-

8397) on October 6, 2014. *Bourgeois v. United States,* --- U.S. ---, 135 S. Ct. 46 (2014).

Pertinent to this 28 U.S.C. § 2241 habeas petition, the Fifth Circuit expressly found that "Bourgeois did not request a COA of the remaining claims his raised in his § 2255 petition." *Bourgeois,* 537 F. App'x at 610 n. 7. This included Bourgeois' claim that he is ineligible for execution under *Atkins.* Accordingly, Bourgeois waived appellate review of his *Atkins* claim, including whether he was afforded a full and fair opportunity to adjudicate his intellectual-disability *Atkins* claim and ineligibility for execution, and whether the district court's *Atkins* determination was unreasonable and violated the Eighth amendment.

4. *In re Bourgeois*, 902 F.3d 446 (5th Cir. 2018).

Well over four years later, on March 27, 2018, Bourgeois filed in the United States District Court for the Southern District of Texas a "Second Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255," pursuant to 28 U.S.C. § 2244(b)(3)(A), for purposes of relitigating his *Atkins* claim. *See In re Alfred Bourgeois*, U.S. App. Lexis, No. 18-40270, Doc. 00514404925, ("Second Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255" (filed

March 28, 2019)).[9] On March 28, 2018, pursuant to 28 U.S.C. § 2244(b)(3)(B), Bourgeois moved the Fifth Circuit for an "Order Authorizing the Southern District of Texas to Consider a Successive Petition under 28 U.S.C. § 2255." *See In re Alfred Bourgeois,* U.S. App. Lexis, Doc. Doc. 00514404917 ("Motion for Order Authorizing the Southern District of Texas to Consider a Successive Petition Under 28 U.S.C. § 2255" (filed March 28, 2019)).

In that motion, Bourgeois acknowledged that he had previously raised his *Atkins* claim asserting he is intellectually disabled and his death sentence is unconstitutional, and that the district court denied his *Atkins* claim on the merits. *Id.* at 7-8. Bourgeois also acknowledged that he did not seek a COA on his *Atkins* claim based on Fifth Circuit precedent that he alleged the district had relied on to resolve his claim. *Id.* at 8. He argued generally that the Supreme Court's decision in *Moore v. Texas (Moore I),* 137 S. Ct. 1039 (2017), invalidated the Fifth Circuit's approach to determining eligibility for *Atkins* relief, thereby making the

[9] These documents are electronically available via PACER and through Lexis-Nexis. However, they were unavailable to the undersigned through Westlaw.

rule articulated in *Atkins* available to him for the first time and his claim viable under 28 U.S.C. § 2255(h)(2). *Id.* at 8.

The United States disagreed, on grounds that the Supreme Court had not made *Moore* retroactively applicable to cases on collateral review (citing to *In re Payne,* 722 F. App'x 534 (6th Cir. 2018), *Williams v. Kelley,* 858 F.3d 464, 474 (8th Cir. 2017), and other cases), and that this was the issue underlying his motion to certify a successive § 2255 motion. The United States' position was, and is, that Bourgeois failed to make a prima facie showing that his claim has not previously been presented in a prior § 2255 application, and that he did not satisfy the 28 U.S.C. § 2244(b)(2) exceptions to certify a successive *Atkins* claim in a second § 2255 motion. The United States' position was, and is, that Bourgeois failed to demonstrate he did not present his *Atkins* claim in his prior § 2255 motion, that the record unequivocally showed that he in fact had raised his *Atkins* claim in his first § 2255 motion and the district court denied that claim on the merits, and that the strict litigation bar in § 2244(b)(1) required his successive motion be dismissed. *See In re Bourgeois,* U.S. App. Lexis, No. 18-40270, Doc. 00514529907 (United States' Opposition for Leave to File Successive 28 U.S.C. § Petition (filed June 26, 2018));

see also 28 U.S.C. § 2241(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

On August 23, 2018, the Fifth Circuit found that Bourgeois' "successive § 2255 motion present[ed] only a single claim that was already presented in his original motion." *In re Bourgeois,* 902 F.3d at 446 (published September 24, 2018). Finding that "[e]very other circuit to take up the question agrees," and adopting the Seventh Circuit's decisions in *Bennett*, 119 F.3d at 469, and *White,* 371 F.3d at 901, the Fifth Circuit held that "the larger statutory context favors applying § 2244(b)(1)'s strict litigation bar to federal prisoners." *In re Bourgeois,* 902 F.3d at 448. The Fifth Circuit held that Bourgeois was barred from relitigating his *Atkins* claim under § 2241 and denied Bourgeois' request for authorization to proceed on a successive § 2255 motion on that ground. *Id.*

On August 27, 2019, the district court entered its "Memorandum and Order" finding that "the Court held an evidentiary hearing in which expert and lay witnesses gave testimony relating to [Bourgeois'] *Atkins* claim," that the "Court denied Bourgeois' 2255 in a lengthy Memorandum

and Order which included substantial discussion of the *Atkins* issue," and that "Bourgeois did not seek appellate review of the denial of his *Atkins* claim." *Bourgeois,* No. 2:07-cr-223 (S.D.Tex Aug. 28, 2019). Finding that the Fifth Circuit denied Bourgeois' motion to proceed in a successive § 2255 motion and did not authorize a successive motion, the district court dismissed Bourgeois' second § 2255 motion without prejudice. *Id.*

II.

ARGUMENT

A. BECAUSE BOURGEOIS CANNOT SHOW THAT 28 U.S.C. § 2255 IS "INADEQUATE OR INEFFECTIVE" TO TEST THE LEGALITY OF HIS DETENTION, THIS COURT SHOULD DISMISS THE ATKINS CLAIM HE PRESENTED UNDER 28 U.S.C. § 2241.

In his petition for writ of habeas corpus, Bourgeois argues he is intellectually disabled and therefore ineligible for the death penalty under *Atkins* and its progeny. Because Bourgeois could have, and did, fully explore this claim during extensive proceedings under 28 U.S.C. § 2255, this Court should deny and dismiss the current petition.

In *Atkins,* the Supreme Court held that executing an offender who has mental retardation (now intellectual disability) violates the Eighth Amendment ban on excessive punishments. *Atkins*, 536 U.S. at 321.

Atkins adopted the clinical definition of intellectual disability: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset of these deficits before the age of 18. *Id.* at 318. Since *Akins,* the Supreme Court has consistently confirmed *Atkin's* three-prong criterion as the basis for determining whether a defendant is intellectually disabled and therefore death penalty-ineligible.

The Supreme Court has, on several occasions, evaluated the appropriate clinical standards to use in determining whether an inmate suffers from subaverage intellectual functioning or deficits in adaptive functioning. Each time, the Court's opinion has served to underscore the validity of *Atkins* and not a new rule of constitutional law. In *Hall v. Florida,* 572 U.S. 701, 704, 710 (2014), the Supreme Court, holding that intellectual disability "is a condition, not a number," embraced *Atkins*' definition of intellectually disabled, but rejected as unconstitutional a Florida law that categorically restricted *Atkins* claims to defendants with an IQ score of 70 or less. The Supreme Court concluded in *Hall* that, "when a defendant's IQ score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony

regarding adaptive deficits." *Id.* at 723. The ruling did not alter any Eighth Amendment threshold, it simply recognized that the Court does not author medical standards.

Likewise in *Moore v. Texas (Moore I),* the Supreme Court instructed that adjudications of intellectual disability should be "informed by views of medical experts." 137 S. Ct. 1039, 1044 (2017) (citing *Hall,* 572 U.S. at 722). The Supreme Court affirmed *Atkins'* criterion, finding the Texas Court of Criminal Appeals' (CCA) conclusion that Moore's IQ score established he was not intellectually disabled was irreconcilable with *Hall*. *Id.* at 1050. The Supreme Court held that it "do[es] not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score." *Id.* "Rather, in line with *Hall,* [the Court] require[s] that courts 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 I,* 137 S. Ct. at 1050.

The Supreme Court reaffirmed *Atkins'* criterion in *Moore v. Texas (Moore II),* --- U.S. ---, 139 S. Ct. 666 (2019), holding that the CCA's decision on remand was "inconsistent with our opinion in [*Moore I*]." 139

S. Ct. at 670. "*Moore II* in effect applies *Moore I* to the record before the Texas Court of Criminal Appeals" and is "properly seen as an enforcement of the mandate rule." *Elmore v. Shoop*, 1:07-CV-776, 2019 WL 3423200, at *5 (S.D. Ohio July 30, 2019). Like *Hall* and *Moore I, Moore II* "does not create a new substantive constitutional right which is retroactively applicable on collateral review." *Id.; see Smith v. Sharp,* 935 F.3d 1064, 1084 (10th Cir. 2019) ("[T]he Supreme Court's post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case."). In sum, *Atkins* remains the standard for evaluating claims of mental retardation and/or intellectual disability.

1. Section 2255 provides the exclusive means for a federal prisoner to collaterally attack his conviction or sentence.

"As a general matter, § 2255 provides the exclusive means for a federal prisoner to collaterally attack his conviction or sentence." *Beason v. Marske*, 926 F.3d 932, 935 (7th Cir. 2019); *see Chazen v. Marske,* --- F.3d --- 2019 WL 4254295 (7th Cir. Sept. 9, 2019) ("[A] federal prisoner wishing to collaterally attack his conviction must do so under § 2255 in the district of conviction."); *Kramer v. Olson,* 347 F.3d 214, 217 (7th Cir. 2013) ("A Section 2255 motion is ordinarily the 'exclusive means for a

federal prisoner to attack his conviction."); *Hill v. Werlinger,* 695 F.3d 644, 647-48 (7th Cir. 2012) (same); *see also Garza v. Lappin,* 253 F.3d 918, 920-23 (7th Cir. 2001) (examining the interplay between 28 U.S.C. § 2255 and 28 U.S.C. § 2241).

The interplay between § 2255 and § 2241, the traditional writ of habeas corpus, was recently explained in *Fulks v. Krueger,* --- F.Supp.3d ---, No. 2:15-cv-33-JRS-MJD, 2019 WL 4600210, at *2 (S.D. Ind. Sept. 20, 2019). There, the court observed, "Prior to the enactment of 28 U.S.C. § 2255 in 1948, federal prisoners wishing to file a collateral attack on their convictions or sentences were required to petition for a writ of habeas corpus—codified at 28 U.S.C. § 2241—in the federal district court in which they were incarcerated.'" *Id.* (quoting *In re Davenport,* 147 F.3d 605, 608 (7th Cir. 1998)). In enacting § 2255, Congress crafted a new procedure that diverted federal prisoner habeas attacks from the district of confinement into the "'more convenient' jurisdiction of the sentencing court," *United States v. Hayman,* 342 U.S. 205, 219 (1952), while still "afford[ing] federal prisoners a remedy identical in scope to federal habeas corpus," *Davis v. United States*, 417 U.S. 333, 343 (1974). To that end, § 2255(a) provides that "[a] prisoner in custody ... claiming the right

to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

In this case, the record establishes that Bourgeois raised his *Atkins* claim in his first § 2255 proceeding his *Atkins* claim and his contention that his trial attorney ineffectively failed to present evidence of mental retardation at the punishment phase of trial. In 2010, the district court afforded Bourgeois a week-long evidentiary hearing to present evidence and argument supporting his *Atkins* claim and ineffective assistance of counsel claim, without imposing any limitation on the evidence he presented or the arguments he made. Following the hearing and other evidentiary proceedings, the court issued an opinion and final judgment denying Bourgeois' *Atkins* and ineffective assistance of counsel claims.

The district court's opinion is comprehensive and directly on point on both issues. *Bourgeois,* 2011 WL 1930684, at *2-70. Just as 28 U.S.C. § 2254 sets limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner, *see Cullen v.*

Pinholster, 563 U.S. 170, 181-87 (2011), so does § 2255 limit the power of a federal court to grant successive habeas relief to a federal prisoner.

2. The remedy afforded by § 2255 functions as an effective substitute for § 2241, not as an "in addition to."

"The history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis,* 417 U.S. at 343. "In general, federal prisoners who wish to attack the validity of their convictions or sentences are required to proceed under § 2255." *United States v. Prevatte*, 300 F.3d 792, 799 (7th Cir. 2002) (quoting *Garza,* 253 F.3d at 921). "As a rule, the remedy afforded by section § 2255 functions as an effective substitute for the writ of habeas corpus, [28 U.S.C. § 2241], that it largely replaced.'" *Fulks,* 2019 WL 4600210, at *2 (quoting *Webster v. Daniels,* 784 F.3d 1123, 1124 (7th Cir. 2015) (en banc)); *Brown v. Caraway,* 719 F.3d 583, 586 (7th Cir. 2013) ("Federal prisoners who seek to bring collateral attacks on their conviction or sentences must ordinarily bring an action under 28 U.S.C. § 2255, 'the federal prisoner's substitute for habeas corpus.'") (internal citation omitted). It does not follow, however, that habeas corpus relief under 28 U.S.C. § 2241, or 28 U.S.C. § 1651, is a substitute for § 2255.

Congress' original intent in codifying § 2255 was that this new motion be used instead of, not in addition to, the traditional habeas corpus remedy.

The fact "that one has lost the right to relief under § 2255 does not automatically mean that one gets relief under § 2241." *Cooper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999). "It is only when a fundamental defect exists in the criminal conviction—a defect which cannot be corrected under § 2255—that we turn to § 2241." *Id.* "[I]n the overwhelming majority of cases § 2255 specifically prohibits prisoners from circumventing § 2255 and challenging their convictions or sentences through a habeas petition under § 2241." *Prevatte*, 300 F.3d at 799 (quoting *Garza*, 253 F.3d at 921)).

As enacted in 1948, and as it appears today in subsection (e), § 2255 contains an exclusivity provision, referred to as the "savings clause," stating that the district court "shall not" entertain a federal habeas prisoner's application for a writ of habeas corpus "unless it also appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The savings clause was dormant for the first half-century after its enactment. During that time § 2255's adequacy was never seriously questioned because there

were no categorical restrictions on the filing of repetitive § 2255 motions. Although successive motions could be dismissed under modified res judicata principles like "abuse of the writ," courts could entertain them on the merits when the "ends of justice" so required. *See Sanders v. United States*, 373 U.S. 1, 12 (1963); see also *Peoples v. United States*, 403 F.3d 844, 847 (7th Cir. 2005).

The enactment of the AEDPA in 1996 altered this landscape, indirectly causing the savings clause to take on new-found importance. The AEDPA sought to enhance the finality of criminal judgments by "dramatically limit[ing] successive attempts at [postconviction] relief." *Stewart v. United States*, 646 F.3d 856, 859 (11th Cir. 2011); *see also Tyler v. Cain*, 533 U.S. 656, 661 (2001). To that end, the law prohibits a defendant from filing a "second or successive" collateral attack unless he first applies to the court of appeals "for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Pursuant to § 2244(b)(1), a "claim presented in second or successive application under section [2255] that was presented in a prior application shall be dismissed." *See Taylor v. Gilkey,* 314 F.3d 832, 836 (7th Cir. 2002); 28 U.S.C. § 2244(b)(1).

A claim presented in a second or successive § 2255 that was not presented in a prior § 2255 shall also be dismissed unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), or "the factual predicate for the claim could not have been discovered through the exercise of due diligence," and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convicting evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(i)-(ii). The exception under § 2244(b)(2)(A) may be satisfied only if the Supreme Court has held that the new rule of constitutional law is retroactively applicable to cases on collateral review. *Tyler v. Cain,* 533 U.S. at 661.

In conformity with § 2244(b), § 2255(h) "sharply limits the ability of a prisoner to bring a second or successive motion under that section." *Shepherd v. Krueger,* 911 F.3d 861, 862 (7th Cir. 2018), *cert. denied,* 139 S. Ct. 1582 (2019). A prospective second or successive movant must show either (1) newly discovered evidence that by clear and convincing

evidence shows that no reasonable factfinder would have found the movant guilty of the offense, 28 U.S.C. § 2255(h)(1), or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, 28 U.S.C. § 2255(h)(2). "[A] prisoner may not file 'what amounts to a motion for reconsideration under the guise of a separate and purportedly 'new' application when the new application raises the same claim that was raised and rejected in the prior application." *In re Jones,* 830 F.3d 1295, 1297 (11th Cir. 2016) (internal citations and marks omitted).

3. Section 2241 does not permit Bourgeois to circumvent § 2255's limits on second or successive motions.

The record establishes that Bourgeois unsuccessfully raised his *Atkins* claim in his first § 2255 proceeding, *see Bourgeois*, 2011 WL 1930684 at *22-44, and he requested authorization for a second or successive § 2255 proceeding. *See In re Bourgeois,* U.S. App. Lexis, No. 18-40270, Doc. 00514529907 (United States' Opposition for Leave to File Successive 28 U.S.C. § 2255 Petition (June 26, 2018)). The Fifth Circuit determined "Bourgeois' successive § 2255 motion presents only a single claim that was already presented in his original motion" and denied his request for authorization under § 2241(b)(1). *United States v Bourgeois,*

902 F.3d 446, 447-48 (5th Cir. 2018). In so doing, the Fifth Circuit joined the Seventh Circuit in holding that "§ 2244(b)(1)'s strict litigation bar is incorporated by 28 U.S.C. § 2255(h), the provision governing a federal prisoner's successive motion," *id.* (citing *Bennett v. United States,* 119 F.3d 468, 469 (7th Cir. 1997), and that Bourgeois was barred from relititgating his *Atkins* claim. *See Taylor,* 314 F.3d at 836 (analogizing § 2255 to § 2254 cases for purpose of limitations under 2244) (citing *Bennett,* 119 F.3d at 468); *see also White v. United States,* 371 F.3d 900, 901 (7th Cir. 2004) (rejecting the argument that § 2241(b)(1) applies only to 28 U.S.C. § 2254 cases on the ground that § 2255 contains no provision directly corresponding to § 2244(b)(1)).

"If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." *Tyler v. Cain,* 533 U.S. at 661 (citing to 28 U.S.C. § 2244(b)(1)). As the Supreme Court holds, "if the prisoner asserts *a claim that was not presented in a previous petition, the claim must be dismissed unless it falls within one of two narrow exceptions*," one of which is for claims relying on new rules of constitutional law. *Id.* (citing 28 U.S.C. § 2244(b)(2)(A)) (emphasis added)).

4. Bourgeois' *Atkins* claim does not meet the requirements of § 2255(h) for a successive motion.

As indicated, § 2255 contains two provisions applicable to Bourgeois: a second or successive § 2255 petitions under subsection (h) and the "savings clause" under subsection (e). The first, § 2255(h), bars Bourgeois from filing second or successive § 2255 petitions except in two narrow circumstances: (1) persuasive new evidence of his innocence of the crime; or (2) a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. *Garza*, 253 F.3d at 921.

Regarding the first exception, § 2255(h)(1), Bourgeois raised no claim of newly discovered evidence in the request to proceed on a successive § 2255 that he filed in the Southern District of Texas and the Fifth Circuit, and he presented no new evidence supporting a claim of actual innocence. *See Hare v. United States,* 688 F.3d 878, 880 n.2 (7th Cir. 2012) (holding that the "newly discovered evidence" exception in § 2255(h)(1) applies to evidence that concerns guilt; that "there is no "actually innocent of the sentence" exception in § 2255(h)" (citing *Taylor,* 314 F.3d at 835-86). "As explained in *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997), 'a successive motion under 28 U.S.C. § 2255 ... may not be filed on the basis of newly discovered evidence unless the

motion challenges the conviction and not merely the sentence.' That is an unavoidably correct reading of 28 U.S.C. § 2255(h)(1), whether we like it or not." S*usi nka v. United States*, 855 F.3d 728, 729 (7th Cir. 2017). Bourgeois does not claim any new evidence of his intellectual disability that had not been discovered before his first § 2255 proceeding.

Regarding the second exception, § 2255(h)(2), to make a prima facie showing to proceed with a second or successive § 2255 application, Bourgeois must identify a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255(h)(2). Bourgeois cites *Hall* and *Moore* but neither is a new rule of constitutional law made retroactively applicable to collateral cases by the Supreme Court.[10]

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[10] *See In re Bowles*, 935 F.3d 1210, 1220 (11th Cir. 2019) (holding *Moore I* cannot be applied retroactively) (citing *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1338–39 (11th Cir. 2019)); *In re Payne,* 722 F. App'x 534, 537-39 (6th Cir. 2018) (holding that *Moore I* and *Hall* "merely created new procedural requirements that do not amount to 'watershed rules of criminal procedure"); *Elmore v. Shoop*, 1:07-CV-776, 2019 WL 3423200, at *5 (S.D. Ohio July 30, 2019) (holding *Hall* and the *Moore* opinions did not create new substantive and retroactively applicable constitutional rights); *Smith v. Dunn*, 2:13-CV-00557-RDP, 2017 WL 3116937, at *5 (N.D. Ala. July 21, 2017) (*Moore* "dealt with the 'procedural requirement[s]' associated with . . . determination of a petitioner's disability."); *see also Williams v. Kelley*, 858 F.3d 464, 473-474 (8th Cir. 2017) (rejecting a claim that *Moore 1* announced a new rule of constitutional procedure that must be given retroactive effect); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014) (per curiam) (holding "*Hall* 'created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability.' ") (*quoting In re*

5. Bourgeois cannot show § 2255 is "inadequate or ineffective" and that should have access to § 2241.

The critical issue in this case is whether Bourgeois can pass through the "Savings Clause" under § 2255(e)[11] and proceed under § 2241. *See Fulks,* 2010 WL 4600201, at *2. Congress created § 2255(e) to serve as a safety hatch to "preserve and authorize access to the traditional habeas corpus relief under 28 U.S.C. § 2241 if the remedy available under § 2255 was 'inadequate or ineffective to test the legality of his detention." *Beason,* 926 F.3d at 935; *Shepherd v. Krueger,* 911 F.3d 861, 862 (7th Cir. 2018), *cert. denied,* 138 S. Ct. 1582 (2019). As codified, § 2255(e) is not available to Bourgeois "if it appears that [he] has failed to apply for relief, by motion, to the court which sentenced him," or simply because "such court has denied him relief." Bourgeois must show "that

Henry, 757 F.3d 1151, 1161 (11th Cir. 2014)); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015) (holding *Hall* not retroactive).

[11] 28 U.S.C. § 2255(e):

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

the *remedy* by motion be inadequate or ineffective to *test* the *legality* of his detention." *Id.* (emphasis added).

As such, the Seventh Circuit hold that pass through the saving clause and proceed under § 2241, there must be a structural problem with § 2255 that prevents an opportunity to address claims on collateral review. *See, e.g., Webster v Daniels,* 784 F.3d 1123, 1136 (7th Cir. 2015) (en banc) (observing "there must be some kind of structural problem with section 2255 before section 2241 becomes available.") Whether the § 2255 remedy was inadequate or ineffective "depends on whether a proceeding under that section afforded the petitioner 'a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *Beason,* 926 F.3d at 935 (quoting *In re Davenport,* 147 F.3d 605, 609 (7th Cir. 1998) (citing *Webster,* 784 F.3d at 1136, "as reinforcing *Davenport* as the law of the circuit.")).

Section 2255 is not inadequate or ineffective simply because Bourgeois may be barred from filing a second § 2255 motion, a point the Seventh Circuit has made abundantly clear. "To hold otherwise ... would be to nullify the limitations on successive petitions." *Garza v. Lappin,* 253 F.3d 918, 921 (7th Cir. 2001) (citing *In re Davenport,* 147 F.3d at

608). "The mere fact that Garza's petition would be barred as a successive petition under § 2255, however, is not enough to bring the petition under § 2255's savings clause; otherwise, the careful structure Congress has created to avoid repetitive filings would mean little or nothing." *Id.*

Section 2255(e) focuses on procedure rather than outcomes. *Taylor,* 314 F.3d at 835. The Seventh Circuit in *Taylor* rejected the argument that whenever § 2255(h) closes the door to a renewed challenge under § 2255, the savings clause must open the door to a challenge under § 2241. *Id.* at 833-36. Taylor wanted to argue that the district court erred in denying his first § 2255 motion based on a new intervening Supreme Court decision. The intervening decision did not, however, create a new and retroactive rule of constitutional law: at most it showed the district court had erred in applying an old rule to his situation, an error insufficient to justify a second collateral attack. *Id.* at 836. The Seventh Circuit rejected Taylor's claim to proceed under § 2241, concluding that this would make § 2255(h) self-defeating. *See id.* Congress intended through the AEDPA to define limited circumstances

that permit successive collateral attacks; "[t]he escape hatch in [§ 2255(e)] must be applied in light of that history." *Id.*

6. To proceed under § 2241 requires a structural problem with § 2255 that forecloses even one round of effective collateral rule.

"A procedure for postconviction relief can fairly be termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense." *In re Davenport,* 147 F.3d at 611. "[S]omething more than a lack of success with a section 2255 motion must exist before the savings clause is satisfied." *Webster,* 784 F.3d at 1136. To pass through § 2255(e) to § 2241 "requires a structural problem in § 2255 that forecloses even one round of effective collateral review, unrelated to the petitioner's own mistakes." *Camacho v. English,* 872 F.3d 811, 813 (7th Cir. 2017) (citing *Poe v. LaRiva*, 834 F.3d 770, 772 (7th Cir. 2016)) (quoting *Taylor,* 314 F.3d at 835)), *cert. denied,* 138 S. Ct. 1028 (2018). Bourgeois therefore "bears the burden of coming forward with evidence affirmatively showing the inadequacy or ineffectiveness of the § 2255 remedy" in the first

instance. *Smith v. Warden, FCC Coleman – Low,* 503 F. App'x 763, 765 (11th Cir. 2013) (citation omitted). He has not met that burden.

As *Fulks* held, the Seventh Circuit has found § 2255 "inadequate or ineffective" in only limited circumstances and infrequently has found the savings clause satisfied in circumstances beyond those articulated in *Davenport*. 2019 WL 4600210, at *3. In *Davenport* and *Webster,* the Seventh Circuit established narrow pathways through the savings clause to relief under § 2241. In both cases, the Seventh Circuit identified a structural problem in § 2255 that wholly foreclosed collateral review of a claim and justified permitting a federal prisoner to file a habeas petition under § 2241. *See Poe,* 834 F.3d at 773-74.

In *Davenport,* the Seventh Circuit held that Appellant Davenport could not meet the savings clause requirement because he could have raised his challenge during his direct appeal and initial § 2255 but choose not to. "Davenport thus could not meet the Savings Clause because [n]othing in 2255 made the remedy provided by that section inadequate to enable Davenport to test the legality of his imprisonment. He had an unobstructed procedural shot at getting his sentence vacated.'" *Fulks,* 2019 WL 4600210, at *3 (quoting *In re Davenport,* 147 F.3d at 609).

Section 2241 review was, however, appropriate for Appellant Nichols when the law of the circuit was so firmly against" his claim that it would have been futile to raise it at the time of his first petition, but the Supreme Court subsequently overruled the Seventh Circuit's interpretation of that relevant statue and made that ruling retroactive on collateral review. Given the retroactive application of the decision overruling the prior rule, the Seventh Circuit concluded that § 2255 was "inadequate or ineffective" to test Nichols' claim that he was imprisoned for a non-existent crime. *In re Davenport,* 147 F.3d at 610. Section 2241 provided an appropriate vehicle because the defendant could not have raised his claim in an initial § 2255 motion and could not obtain permission to file a successive § 2255 motion because his claim did not rely on new evidence or a new rule of constitutional law. *Id*. at 610. In short, *Davenport* recognized a structural problem in the failure of § 2255(h) to permit a successive petition for new rules of statutory law made retroactive by the Supreme Court. *See Poe,* 834 F.3d at 773; *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014) (holding § 2255 "is silent on how a prisoner can challenge his sentence based on a new and retroactive *statutory* decision") (emphasis in original); *Prevatte,* 300 F.3d

at 799-802 (holding Prevatte had not had an opportunity to obtain judicial correction of a potential defect in his conviction based on retroactive rules of statutory interpretation).

The Seventh Circuit followed *Davenport* in *Garza v. Lappin,* 253 F.3d at 918, holding that a § 2241 petition was properly cognizable via § 2255(e)'s savings clause and analyzed the unique facts and claim presented. As recently explained in *Fulks,* the Seventh Circuit reasoned that it was "literally impossible" for Garza to have raised his claim in his first proceeding:

> In *Garza*, after Garza's direct appeal and § 2255 proceedings were complete, the Inter-American Commission on Human Rights (the "Commission") determined that Garza's rights were violated during the penalty phase of his proceedings. *Garza,* 253 F.3d at 919. Garza sought to use this favorable decision to argue that he was entitled to habeas relief. *Id*. Looking to *Davenport*, the Seventh Circuit reasoned that because Garza could not meet either avenue set forth in § 2255(h) to file a second or successive § 2255 motion, and because it was "literally impossible" for Garza to have raised the Commission's favorable decision in his first § 2255 proceeding because the Commission had not yet issued its decision, § 2255 did not then nor had it ever "provided an adequate avenue for testing Garza's present challenge to the legality of his sentence." *Id*. at 922-23.

Fulks, 2019 WL 4600210, at *4.

In *Webster*, like *Davenport*, the Seventh Circuit determined that a structural problem existed that entirely foreclosed effective collateral review under § 2255. *See Poe*, 834 F.3d at 774. The Federal Defender in *Webster* filed an *Atkins* claim under § 2241, seeking to present evidence they discovered after Webster's initial § 2255 motion was denied; that evidence revealed that Webster had been diagnosed as mentally retarded a year before the commission of the crime for which he was sentenced to death. *Webster,* 784 F.3d at 1133-35. The Seventh Circuit determined Webster could not have used § 2255 at the time *Atkins* was decided because, despite due diligence, the new evidence was not available to him. Likewise, he could not file a successive § 2255 motion after discovering the new evidence because the Fifth Circuit required that the evidence show he could not be found guilty of the offense, rather than the penalty. *Id.* at 1134. Accordingly, the Seventh Circuit determined Webster's challenge to his sentence could not, "as a structural matter," be entertained by the use of a § 2255 motion and that he could therefore proceed under § 2241. *Webster,* 784 F.3d at 1139.

As the Seventh Circuit held in *Poe,* "the *Webster* court took great care to assure that its holding was narrow in scope." 834 F.3d at 777.

"There is nothing in *Webster* to suggest that its holding applies outside the context of new evidence." *Id.*

7. The Seventh Circuit's decisions do not permit Bourgeois to relitigate his *Atkins* claim under § 2241.

Bourgeois contends that cognizable claims under § 2241 "include those that rely on a new legal or factual basis not available at the time of the petitioner's trial proceedings or his § 2255 proceedings." (Bourgeois Petition, 2). While true in the abstract, Bourgeois cannot, however, marshal any authority for this proposition, which in its application expands the § 2255 saving clause beyond recognition.

Recognizing other circuits disagree, *see McCarthan v. Director,* 851 F.3d 1076 (11th Cir. 2017) (en banc), *cert. denied,* 138 S. Ct. 502 (2017); *Prost v. Anderson,* 636 F.3d 578 (10th Cir. 2011) (Gorsuch, J.), the Seventh Circuit held in *Roundtree v. Krueger*, 910 F.3d 312 (7th Cir. 2018), "that § 2255 is 'inadequate or ineffective' when 'it cannot be used to address novel developments either statutory or constitutional law, whether those developments concern the conviction or the sentence." *Id.* at 313 (citing *In re Davenport,* 147 F.3d at 605; *Brown v. Caraway,* 719 F.3d 583 (7th Cir. 2013); *Webster,* 784 F.3d at 1123). But *Roundtree* qualified this, holding that "none of this circuit's decisions—and none in

the circuits that agree with *Davenport, Brown,* and *Webster*—permits relitigation under § 2241 of a contention that was actually resolved in a proceeding under § 2255, unless the law changed after the initial collateral review." 910 F.3d at 313. Stated differently in *Prevatte v. Merlak,* "the 'savings clause of § 2255 ... will permit a federal prisoner 'to seek habeas corpus *only* if he had *no reasonable opportunity* to obtain earlier judicial correction of a fundamental defect in his conviction or sentence *because the law changed after his first 2255 motion.*'" 865 F.3d 894, 897 (7th Cir. 2017) (emphasis added) (quoting *Montana v. Cross,* 829 F.3d 775, 783 (7th Cir. 2016) (quoting *In re Davenport,* 147 F.3d at 611)).

The Seventh Circuit reiterated in *Hill v. Werlinger* that "[i]nadequate or ineffective' means that 'a legal theory that could not have been presented under [Section] 2255 establishes the petitioner's actual innocence.'" 695 F.3d 644, 647-48 (7th Cir. 2012) (citing *Taylor*, 314 F.3d at 835); *In re Davenport,* 147 F.3d at 608. Accordingly, Bourgeois "must show that the legal theory he advances relies on a change in law that postdates his first § 2255 motion (for failure to raise a claim the first time around does not render § 2255 'inadequate') *and* 'eludes the permission in section 2255 for successive motions,'" *and*

"supports a non-frivolous claim of actual innocence." *Kramer,* 347 F.3d at 217 (emphasis added).

8. The Seventh Circuit's *Davenport* standard does not allow Bourgeois' *Atkins* claim to proceed under § 2241.

The savings clause of § 2255(e) does not give Bourgeois a further bite at the post-conviction relief apple. Instead, *Davenport* developed a three-part test to establish that § 2255 was inadequate:

> (1) that [Bourgeois] relies on not a constitutional case, but a statutory-interpretation case, so [that he] could not have invoked it by means of a second or successive 2255 motion; (2) that the new rule applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding, and (3) that the error is "grave enough ... to be deemed a miscarriage of justice corrigible thereof in a habeas proceeding," such as one resulting in "a conviction for a crime for which he was innocent."

Beason, 926 F.3d at 35 (quoting *Cross,* 829 F.3d at 783) (citation and quotation marks omitted). In *Taylor*, the Seventh Circuit made explicit what *Davenport* strongly implied: "[A] claim of error in addressing the sort of constitutional theory that has long been appropriate for collateral review does not render § 2255 'inadequate or ineffective.' ... Every court that has addressed the matter has held that § 2255 is 'inadequate or ineffective' only when a structural problem in § 2255 forecloses even one round of effective collateral review—and then only when as in *Davenport*

the claim being foreclosed is one of actual innocence." 314 F.3d at 835; *Kramer,* 347 F.3d at 217 ("We have explained that § 2255 is 'inadequate' when its provisions limiting multiple § 2255 motions prevent a prisoner from obtaining review of a legal theory that 'establishes the petitioner's actual innocence.") (citing *Taylor* 314 F.3d at 835).

As stated, nothing in *Webster* suggests that its holding applies outside the context of new evidence. *Poe*, 834 F.3d at 774. Arguments that would have abused the writ of habeas corpus before the 1996 AEDPA cannot be raised after the amendments.

To meet the first prong of the *Davenport* test, Bourgeois "must show that he relies on a 'statutory-interpretation case,' rather than a 'constitutional case.'" *Brown,* 719 F.3d at 586. The Supreme Court in *Atkins* held that the Eighth Amendment forbids execution of an individual who has an intellectual disability. 536 U.S. at 321; *Hall,* 572 U.S. at 704. Unquestionably *Atkins* and its progeny, *Hall, Moore I,* and *Moore II,* are all grounded in the Eighth Amendment and are not statutory interpretation cases. "Simply put, [Bourgeois] asks 'th[is] court to set aside his sentence' as violative of the Eighth Amendment," a claim falling squarely within § 2255(a). *Fulks,* 2019 WL 4600210, at * 9.

Moreover, *Davenport* precludes the use of § 2241 for claims based on a constitutional case. *Poe,* 834 F.3d at 773 ("*Poe* contends that [*Brown v.*] *Caraway* misreads *Davenport*, asserting that *Davenport* does not actually preclude use of § 2241 for a constitutional case. This contention is meritless."); *Fulks,* 2019 WL 4600210, at *10 ("Constitutional claims, unlike statutory claims, do not reveal 'some kind of structural problem with § 2255' that forecloses a single round of judicial review.") (quoting *Webster,* 784 F.3d at 1136).[12] A claim based on a new constitutional rule does not fall within the savings clause because § 2255(h) already provides a remedy where such a claim arises after a direct appeal and first § 2255 motion. *Poe*, 834 F.3d at 773; 28 U.S.C. § 2255 (h)(2)). The savings clause therefore allows a claim to proceed under § 2241 only when it is based on a new rule of statutory law. *Fulks*, 2019 WL 4600210, at *10 ("Fulks cannot meet this factor, as he relies on *Hall* and *Moore* (which applies *Atkins* and *Madison (*which applies *Ford*). All of these cases involve Eighth Amendment claims, not statutory ones.").

[12] As this District observed in *Fulks, Hall*—on which *Moore I* is based—was decided before *Webster*. If reliance on *Hall* was all that was required to meet the savings clause, the Seventh Circuit could have said so, but it did not. *Fulks,* 2019 WL 4600210, at *11. "It cannot be," as Bourgeois contends, "that one need only invoke [*Moore I* and *Moore II*] to proceed under § 2241." *Id.*

Nor does Bourgeois meet *Davenport*'s second prong, which requires that his claim rely on a "new rule [that] applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding." *Beason,* 926 F.3d at 35. First, *Atkins* was decided at the time Bourgeois was convicted, and Bourgeois made his *Atkins* claim at his first § 2255 proceeding. Second, *Moore* did not establish a new rule or break any new ground beyond *Atkins'* holding that "[c]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills" and that State standards conform to clinical definitions of intellectual disability. 536 U.S. at 318; *see Hall,* 572 U.S. at 719-20. The Supreme Court reaffirmed in *Hall* and *Moore* that borderline intellectual testing cases require consideration of the adaptive functioning criteria, *Atkins'* second criteria. *Moore II,* 139 S. Ct. at 668 (citing *Moore I,* 581 U.S. at ---, 137 S. Ct. at 1048-50). Third, the Supreme Court did not and has not declared *Moore* as a new rule applied retroactively to AEDPA cases. *See Shoop v. Hill,* 139 S. Ct. 504, 507-08 (2019) (holding that, under AEDPA, the Supreme Court's opinion in *Moore I* was not clearly established federal law when an Ohio state court rejected Hill's *Atkins* claim in 2009); *see*

Cain v. Chappell, 870 F.3d 1003, 1024 n.9 (9th Cir. 2017) ("*Moore* itself cannot serve as 'clearly established' law at the time the state court decided Cain's claim."), *cert. denied,* 139 S. Ct. 455 (2018).

Bourgeois claims that he raises a new *Atkins* claim that was previously unavailable at the time of his first § 2255 motion because *Moore I* and *Moore II* establish new "legal and factual bases." *Moore I* and *Moore II* were derived directly from *Atkins*; the Supreme Court merely "expounded on the definition of intellectual disability" in *Hall* and *Moore. Hill,* 139 S. Ct. at 507. *"Moore* cannot apply retroactively." *In re Bowles,* 935 F.3d 1210, 1220 (11th Cir. 2019), *application for stay of execution and petition for writ of habeas corpus denied,* No. 1956-82, 2019 WL 3976202 (Aug. 22, 2019). In *Atkins,* the Supreme Court "declared 'a rule of general application ... designed for the specific purpose of evaluating a myriad of factual contexts.'" *Smith v. Sharp,* 935 F.3d 1064, 1084-85 (10th Cir. 2019) (quoting *Chaidez v. United States,* 568 U.S. [342,] 348 [(2013)]." "The application of this general rule to *Hall,* [ ] *Moore I* [ ], and *Moore II* cannot be understood to 'yield[ ] a result so novel that it forges a new rule, one not dictated by precedent', [given] the Court's proclamation in *Hall* that '*Atkins* ... provide[s] substantial guidance on

the definition of intellectual disability.'" *Smith,* 935 F.3d at 1084 (internal citation omitted).

Bourgeois may not proceed under § 2241 by filing a previously adjudicated *Atkins* claim under the guise of purportedly "new legal bases" forged by *Moore I* and *Moore II* and "new factual bases" from published updates to AAIDD-11 (11th ed. 2010) in AAIDD-2012 and AAIDD-2015, and to DSM-5.[13] *See In re Jones*, 830 F.3d at 1297. Again, while Bourgeois asserts *Moore I* and *Moore II* as new legal bases for his intellectual disability claim, the Supreme Court merely "expounded on the definition of intellectual disability" in *Hall* and *Moore*. *Hill,* 139 S. Ct. at 507; *see Atkins*, 536 U.S. at 308 n.3; *Hall,* 572 U.S. at 710; *Moore I,* 137 S. Ct. at 1045; *Moore II,* 149 at 668. Bourgeois does not rely on a new rule that could not have been invoked in his first § 2255 motion.[14]

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[13] The "American Association on Intellectual and Developmental Disabilities," AAIDD, published the 11th edition of its diagnostic manual, "Intellectual Disability: Definition, Classification, and Supports," in 2010. The American Psychiatric Association published DSM-5, "Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition," on May 18, 2013.

[14] Should the Supreme Court declare *Hall* and *Moore* to announce new, retroactive rules of constitutional law, Bourgeois could raise his claim in a second and subsequent motion under § 2255. See 28 U.S.C. § 2255(h)(2). In the absence of such declaration by the Supreme Court, the Fifth Circuit denied Bourgeois' request for a successive § 2255 motion based on § 2244(b)(1) and not § 2255(b)(2). *Bourgeois,* 902 F.3d at 447-48.

Simply because Bourgeois may be barred from filing a second § 2255(a) motion does not render § 2255 inadequate or ineffective to test the fundamental legality of his sentence. "'To hold otherwise ... would be to nullify the limitations on successive petitions." *Garza,* 253 F.3d at 921; *In re Davenport*, 147 F.3d at 608 (rejecting the argument that "when the new limitations [on second or successive motions] prevent the prisoner from obtaining relief under 2255, his remedy under that section is inadequate and he may turn to 2241," with this explanation). Section 2255 provides a remedy for new retroactive constitutional rules; as such, those types of cases do not and would not fall under § 2255(e)'s savings clause. *See Fulks,* 2019 WL 4600210, at *8-17.

9. The *Webster* standard does not allow Bourgeois' *Atkins* claim to proceed under § 2241.

In *Webster,* Seventh Circuit announced a three-part test for determining whether a claim of newly discovered evidence can satisfy the savings clause: "First, the evidence sought to be presented must have existed at the time of the original proceedings." 784 F.3d at 1140 n.9. "Second, the evidence must have been unavailable at the time of trial despite diligent efforts to obtain it. Third, and most importantly, the

evidence must show that the petitioner is constitutionally ineligible for the penalty he received." *Id.*

Bourgeois does not meet *Webster*'s three-part test. Bourgeois' claim of "new factual bases" is based on new AAIDD and APA diagnostic standards, not newly discovered, previously existing evidence that his counsel did not uncover before trial despite diligent efforts. "These updated standards are not newly *discovered* evidence that [Bourgeois] specifically is intellectually disabled." *Fulks,* 2019 WL 4600210, at *13. "[T]hey are instead newly *created* standards used to assess whether anyone is intellectually disabled[,]" not newly discovered evidence that existed before Bourgeois' trial or at the time of his first § 2255 proceeding. *Id.* Second, *Webster* requires that the newly discovered evidence must have existed, but been unavailable, at the time of the original proceedings. *Webster,* 784 F.3d at 1140 n.9. The AAIDD 11th Edition was published in 2010 and consulted by Judge Jack in the § 2255 order rejecting Bourgeois' *Atkins* claim. *Bourgeois,* 2011 WL 1930684, at *22-23 n.27. The 2012 and 2015 updates to AAIDD 11th Edition and the DSM-5 manual (published on May 18, 2013) were not created until after Bourgeois' 2007-2011 § 2255(a) proceeding. *Fulks,* 2011 WL 1930684, at

*13. Assuming these publications could constitute newly discovered evidence—and they do not—, the Seventh Circuit made clear in *Webster* "that later developed evidence is insufficient" because otherwise there would never be any finality. *Fulks,* 2011 WL 1930684, at *14 (*commenting on Webster,* 784 F.3d at 1140). To accept Bourgeois' approach would permit him to "refile his claims with each revision of the medical standards governing the diagnosis of intellectual disability" forever forestalling a final decision in this case, precisely the tactic rejected in *Fulks.* 2011 WL 1930684, at *14.

10. Bourgeois' § 2241 motion is an abuse of the writ and premised on a theory at odds with *Teague.*

Bourgeois does not claim that his sentence violated *Atkins* at the time it was imposed. (Petition, p. 72 ¶156). He agrees that he fully adjudicated his *Atkins* claim at his first § 2255 proceeding. He claims instead that he is intellectually disabled under current diagnostic standards and precluding him from raising his "revised" *Atkins* claim leads to an intolerable result—the execution of a categorically exempted individual.

As discussed above, Bourgeois does not present any new rule of law or newly discovered evidence that renders the remedy under § 2255

inadequate or ineffective test the fundamental legality of his death sentence. The Supreme Court has not declared *Moore* a new rule of constitutional law retroactively applied to AEDPA cases. And the development of new diagnostic standards does not constitute newly discovered evidence.

Based on Seventh Circuit precedent applied to the facts of this case, Bourgeois' *Atkins* claim, which failed under § 2255, cannot merit consideration or relief in this Court. Bourgeois' attempt to circumvent § 2255(h) amounts to an invitation to abuse the writ under pre-AEDPA law. *See Roundtree,* 910 F.3d at 313-14 ("An attempt to relitigate a theory, in the absence of an intervening change of law, was taken as a paradigm abuse of the writ.").[15] "[I]n addition to performing any analysis

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15 "Until 1996, when the Antiterrorism and Effective Death Penalty Act (AEDPA) amended § 2255, a petition could be filed in the sentencing court at any time—and multiple petitions could be filed, provided they did not abuse the writ. The 1996 Act added § 2255(f), which set a one-year time limit on petitions but also restarts the time if the Supreme Court changes the law with retroactive effect (§ 2255(f)(3)). The 1996 Act also added § 2255(h), which limits second or subsequent petitions. Neither of these changes affected Roundtree, who was able to use extra time under § 2255(f)(3) to file his initial § 2255 motion in Iowa. What he now wants is to use § 2241 in circumstances that would have been called an abuse of the writ before the 1996 Act replaced that common-law doctrine with § 2255(f) and (h). An attempt to relitigate a theory, in the absence of an intervening change of law, was taken as a paradigm abuse of the writ. See, e.g., *Salinger v. Loisel*, 265 U.S. 224, 44 S.Ct. 519, 68 L.Ed. 989 (1924); *Wong Doo v. United States*, 265 U.S. 239, 44 S.Ct. 524,

required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* [*v. Lane,* 489 U.S. 288 (1989)] analysis when the issue is properly raised by the state." *Horn v. Banks,* 536 U.S. 266, 272 (2002); *Van Daalwyk v. United States,* 21 F.3d 179, 180 (7th Cir. 1994) (holding retroactively principles articulated in *Teague* apply to collateral challenges to federal convictions).

In any event, *Teague* bars Bourgeois' reliance on *Moore* to revitalize his *Atkins* claim. *Moore* did not announce a new rule that could apply retroactively under *Teague. Smith v. Ala. Dep't of Corr.*, 924 F.3d at 1337-39. In *Atkins,* the Supreme Court left the task of defining intellectual disability to individual states and legislatures. *Id.,* 536 at 317; *Smith,* 924 F.3d at 1337. In *Hall,* the Court clarified that state court's intellectual disability determination should be "informed by the medical community's diagnostic framework." 572 U.S. at 721. "This

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> 68 L.Ed. 999 (1924); *Sanders v. United States*, 373 U.S. 1, 17–18, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). The 1996 changes were designed to curtail relitigation of collateral attacks, yet Roundtree wants something that would have been unavailable even before 1996.—That's not permissible. See *In re Page*, 179 F.3d 1024 (7th Cir. 1999), which says that arguments that would have abused the writ before 1996 also cannot be raised after the amendments.

Roundtree, 910 F.3d at 313-14.

meant . . . that courts must consider the standard error inherent in IQ tests," and that "defendants be allowed to present additional evidence of intellectual disability, including testimony on adaptive deficits." *Smith,* 924 F.3d at 1337 (citing *Hall,* 572 U.S. at 723; *Moore I,* 137 F.3d at 105). The Court expanded on *Hall* in *Moore, "*reiterating that state courts do not have 'unfettered discretion'" in assessing intellectual disability and "cannot disregard current clinical and medical standards." *Id.* at 1337 (citing *Moore I,* at 1050-51). In *Moore I,* the Court "clarified ... the focus of the adaptive functioning inquiry should be an individual's adaptive deficits—not adaptive strengths," *Moore I,* 137 U.S. at 1050–51, a point reemphasized in *Moore II,* 139 U.S. at 668-69.

"New constitutional rules are generally not retroactive for cases on federal habeas review." *Smith,* 924 F.3d 1337 (citing *Teague,* 489 U.S. at 288). "To determine whether a rule is retroactive, [this Court] first decide[s] if it is a new rule," that is, "breaks new ground or imposes a new obligation on the States or the Federal Government," or when "the result was not dictated by [prior] precedent." *Id.* (quoting *Teague,* 489 U.S. at 301). If the rule is indeed new, then the question is "whether it falls into one of *Teague*'s two exceptions to the general bar on retroactivity:" (1)

"substantive rules of constitutional law that place an entire category of primary conduct beyond the reach of the criminal law, including 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense,'" *id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)), or (2) "'watershed rules of criminal procedure'" that are necessary to the fundamental fairness of criminal proceedings," *id.* (citing *Teague,* 489 U.S. at 311–12.

Bourgeois' claim does not fall under either of *Teague's* exceptions. To the extent he argues that *Moore* effectively expands the class of persons who are ineligible for execution by requiring consideration of the medical community's current clinical standards, this decision is procedural, not substantive:

> Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," while procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant's culpability." *Montgomery v. Louisiana*, --- U.S. ---, 136 S. Ct. 718, 729–30 [ ] (2016) (internal quotation marks omitted). . . .
>
> . . . While *Moore* may have the effect of expanding the class of people ineligible for the death penalty, it merely defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty. *Moore* thus announced a new rule, but it is procedural, not substantive."

924 F.3d at 139.

To fall within *Teague's* procedural exception, "a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction [or sentence], and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *Smith,* 924 F.3d at 1339 (quoting *Tyler*, 533 U.S. at 665). As the Eleventh Circuit holds, "[o]nly *Gideon v. Wainwright*, 372 U.S. 335 [ ] (1963), which extended the right to counsel to criminal defendants, has been declared the kind of procedural rule that altered the 'bedrock procedural elements' essential to the fairness of a proceeding." 924 F.3d at 1339-40 (listing Supreme Court cases rejecting retroactivity under *Teague's* second exception that do not have the "primacy" or "centrality" of *Gideon*). *Moore* provides guidance for complying with *Atkins,* but it "cannot [be said] that *Moore* altered the bedrock procedural elements essential to the fairness of a criminal proceeding in the way that the *Gideon* rule did." *Smith,* 924 F.3d at 1339-40. As such, Bourgeois cannot meet the requirements of *Teague*'s second exception for *Moore* to be applied retroactively.

11. Bourgeois cannot relitigate his *Atkins* claim under 28 U.S.C. § 2241 by making his 28 U.S.C. § 2255 remedy inadequate.

The relief Bourgeois requests is (i) a stay of execution pending a final disposition of his *Atkins* claim in district court, (ii) amendment of his claim if necessary, and (iii) an evidentiary hearing to be conducted on the merits of his *Atkins* claim. As discussed, though Bourgeois seeks to characterize his *Atkins* claim as new (or at least revised), in reality he seeks to relitigate his same 2010 *Atkins* claim in this § 2241 habeas petition. But Bourgeois does not allege or provide any newly discovered evidence related to his *Atkins* claim that was not already presented to and considered by the district court at his first § 2255 proceeding. In substance, what Bourgeois requests is that this Court re-evaluate and reweigh *all* of the evidence considered by the district court in determining on the merit that he is not *Atkins* intellectually-disabled and constitutionally exempt from execution.

Moreover, the Southern District of Texas judge's legal and factual *Atkins* determinations are not unreasonable merely because the Supreme Court, a circuit court, or this Court "would have reached a different conclusion in the first instance." *Brumfield v. Cain,* --- U.S. ---, 135 S. Ct.

2269, 2277 (2015). "If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's ... determination." *Wood v. Allen,* 558 U.S. 290, 301 (2010) (quoting *Rice v. Collins,* 546 U.S. 333, 341-42 (2006) (internal marks omitted)).

This Court, like the Supreme Court on review of the State's factual determination in *Brumfield,* cannot second guess factual and legal findings and conclusions made by the district court, who presided over and considered all evidence at Bourgeois' capital murder trial and collateral proceedings, made veracity and credibility determinations based on expert and lay witness testimony, and determined Bourgeois' *Atkins* claim on the merits. *Bourgeois,* 2011 WL 1930684, at * 1-46. The district court afforded Bourgeois the opportunity to present evidence and argue his position without imposing any limitation. The court conducted a full-scale comprehensive week-long evidentiary hearing addressing his *Atkins* claim. The court "liberally allowed Bourgeois to develop the factual basis for his post-conviction claims, including through the presentation of testimony and evidence in several hearings." *See Bourgeois,* 2011 WL 1930684, at *1. This Court cannot second-guess the

decision of the United States District Court for the Southern District of Texas to believe one witness' testimony over another's, nor can it discount a witness's testimony that supports the court's *Atkins* factual findings and final intellectual disability determination.

This Court should also be reluctant to set aside factual findings that are based upon the district court's determination of the credibility of witnesses. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeal may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

Bourgeois, who is represented by the same Federal Defender who represented him on his first § 2255 motion in the Southern District of Texas, on appeal from the denial of § 2255 relief to the Fifth Circuit, and on petition for certiorari review, could have but did not appeal the district court's *Atkins* determination on any ground. Habeas is an extraordinary remedy. *Webster* holds that, as a rule, the remedy afforded by § 2255

largely replaced § 2241; that it "functions as an effective substitute for the writ of habeas corpus" and not an "in addition to." *Webster,* 784 F.3d at 1124. Bourgeois "cannot be permitted to lever his way into section 2241 by making his section 2255 remedy inadequate, here by failing to appeal from the denial of his section 2255 motion." *Morales v. Bezy,* 499 F.3d 668, 672 (7th Cir. 2007); *see Hernandez v. Fed. Corr. Inst.,* No. 08-C-499, 2008 WL 2397546, at *1 (E.D. Wis. June 10, 2008) ("Because he did not even litigate his § 2255 motion through the appellate stage, he is hard-pressed to suggest that the relief available under § 2255 was somehow inadequate."). Nothing prevented Bourgeois from challenging on appeal the district court's factual and legal determinations as an unreasonable application of *Atkins,* or from challenging the underlying factual evidence and credibility determinations supporting the court's findings as clear and convincing error. And neither *Hall* nor *Moore* can be understood to yield a result so novel that it Bourgeois could not have advanced his legal theories earlier on appeal from the district court's denial of his *Atkins* claim.

B. THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS APPLIED THE AAIDD'S AND APA'S DEFINITION OF INTELLECTUAL DISABILITY IN THE AAIDD 11TH EDITION AND DSM-IV-TR, THE DIAGNOSTIC GUIDES CURRENT AT THE TIME OF BOURGEOIS' § 2255 PROCEEDING.

The Supreme Court in *Atkins* held that the Eighth Amendment forbids execution of an individual who has intellectual disability. 536 U.S. at 321. *Atkins,* however, left the task of developing appropriate ways to enforce this constitutional restriction upon execution of sentences to the states. 536 U.S. at 317. Twelve years later in *Hall,* the Supreme Court addressed "how intellectual disability must be defined in order to implement ... the holding of *Atkins.*" *Hall,* 572 U.S. at 709. On specifics, the Court in *Hall* confirmed that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but informed by the medical community's diagnostic framework"—that is, by analyzing the criteria set by *Atkins*. *Hall,* 572 U.S. at 709-10; *Moore I,* 137 S. Ct. at 1039 (setting forth the same three criteria); *Fulks,* 2019 WL 4600210, at *6. The Court in *Hall* held that Florida's rule restricting *Atkins* to defendant's with an "IQ test score of 70 or less" "violated the Eighth Amendment because it treated an IQ score higher than 70 as conclusively

disqualifying and thus prevented consideration of other evidence of intellectual disability, such as evidence of 'deficits in adaptive functioning over [the defendant's] lifetime." *Shoop,* 139 S. Ct. at 507 (quoting *Hall,* 572 U.S. at 704, 724).

Three years later in *Moore,* the Court applied *Hall,* again instructing that adjudications of intellectual disability should be "informed by views of medical experts," and that courts 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 I*, 137 S. Ct. at 1050. The Court made clear in *Moore I* that courts should not disregard the medical community's current standards in favor of applying a judicially-created standard based on outdated standards, as the Texas Court of Criminal Appeals did in Moore's case. *Moore I,* 137 S. Ct. at 1052-53; *see Fulks*, 2019 WL 4600210, at *6. In *Moore II,* as it did in *Hall* and *Moore I,* the Court directed courts to the AAIDD 11th edition and DSM-5 for consultation and guidance.

In line with *Atkins* and *Hall,* the United States District Court for the Southern District of Texas properly concluded in Bourgeois' § 2255

litigation that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within the *Atkins* compass." *Bourgeois*, 2011 WL 1930684, at *23 (citing *Bobby v. Bies,* 556 U.S. 825, 830 (2009)); *Hall,* 572 U.S. at 718; *Fulks,* 2019 WL 4600210, at *6 ("'*Atkins* largely left to the [sovereign] the job of developing criteria to determine' which prisoners have an intellectual disability and thus cannot receive a death penalty.") (citing *McManus v. Neal,* 779 F.3d 634, 650 (7th Cir. 2015)). Observing a "welter of uncertainty follow[ed] *Atkins,"* the district court confirmed what the Supreme Court held in *Atkins* and later made more certain in *Moore*: the "psychological profession generally agrees as to what standards govern a diagnosis of mental retardation." *Bourgeois*, 2011 WL 1930684, at *23, 24 n.29.

The district court correctly held that *Atkins* did not delegate to the psychologists the determination of whether an inmate was categorically exempt from execution, but left "the contours of the constitutional protection to the courts." *Id.* at * 24. Conforming with the Supreme Court's later decisions in *Hall* and *Moore,* the district court consulted, relied on, and adhered to the AAIDD and APA's clinical definition of

intellectual disability/mental retardation contained in AAIDD-11 (2010) and DSM-IV-TR (2000) in making its *Atkins* determination on Bourgeois' intellectual-disability claim. The court recognized that the AAIDD and APA provided equally valid definitions of intellectual disability/mental retardation shown by *Atkins* and then confirmed by *Hall* and *Moore*. *Id.* The two leading medical experts who testified at the § 2255 hearing on Bourgeois' intellectual-disability claim did not describe any meaningful distinction between the various editions as to the substance of what constitutes mental retardation/intellectual disability. Dr. Swanson, Bourgeois' expert, relied on the AAIDD-11 definition. *Id.* at *23 n.27. Dr. Price, the government's expert, relied on the DSM-IV definitions; he explained the AAIDD-11 is "a restatement of the same thing' without 'significant differences.'" *Id.* Judge Jack "refer[red] to the 11th edition when referring to the evidence in this case." *Id.* She used the term "mental retardation" throughout her opinion because the APA had not yet adopted the term "intellectual disability." *Id.* at 23 n.27, 24 n.28.

Whether through prescience or thorough research of substantive *Atkins* and/or *Atkins*-related procedural issues developing in federal and state courts at that time, the district court analyzed intellectual

disability under *Atkins* according to the APA's definition of intellectual functioning deficits in the DSM-5, prior to the Supreme Court's decisions in *Hall* and *Moore I.* The first *Atkins* criteria of intellectual disability defined by the medical community is "*significantly* subaverage intellectual functioning." *Fulks,* 2019 WL 4600210, at *6 (citing *Hall,* 572 U.S. at 710). Justice Alito explained in his dissent in *Hall* that the intellectual functioning and adaptive deficits prong of *Atkins* "are meant to show distinct components of intellectual disability": "intellectual functions" include "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience." *Hall,* 572 U.S. at 737 (J. Alito dissenting, with the Chief Justice, J. Scalia, and J. Thomas concurring) (citing to DSM-5, at 33) ("Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standard testing.") The district court comprehensively analyzed and evaluated that criteria as defined by the medical community. *Bourgeois*, 2011 WL 1930684, at *25-31.

The district court found the medical experts scored Bourgeois' Full Scale IQ range at 70 to 75, the presumptive range accepted by the medical community as a qualifying score for a diagnosis of mental retardation. The court accepted testimony that Bourgeois' base IQ could be five points higher or lower using the medical community's standard error of measurement. *Id.* at 25 & n.31-34. The court did *not* interpret *Atkins* more narrowly than the Supreme Court intended by holding that an individual with a test score above 70 to 75, including a score within the margin of error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. *Bourgeois*, 2011 WL 1930684, at 26. Instead, the court expressly observed that *Atkins* did not establish a cut-off score that exempts a person from execution or categorically qualifies him for execution. *Id.* at *26 ("Federal law does not require a court to find [an inmate] to be mentally retarded because the low end of [his] confidence level was below 70, just as it would not be required to find that [he] could be executed on the basis that the high end of this band fell above 70.") (internal citation and marks omitted); *see Hall,* 572 U.S. at 717-18.

Bourgeois' claim that the district court violated *Moore I* and current diagnostic standards because it refused to apply the "Flynn Effect" is incorrect. (Petition, p. 60 ¶134). The court expressly cited the AAIDD 11th edition as informing that "'best practices require *recognition* of a potential Flynn Effect when older editions of intelligence tests (with corresponding older norms) are used in the assessment of an IQ score." *Bourgeois*, 2011 WL 1930684, at *26 n.37 (emphasis in original) (citing AAIDD 11th, at 37). The court found, based on Dr. Swanson's and Dr. Moore's testimony, that the evidence in Bourgeois' case did not show "a consensus among psychologists that would require the adoption of the Flynn Effect as a legal method to lower an inmate's Full Scale IQ score." *Id.* Dr. Swanson, Bourgeois' expert, agreed the "Flynn Effect" was primarily a term used in the courtroom. *Id.* Dr. Swanson testified the Flynn Effect would place Bourgeois' IQ score to a "'true score ... somewhere between 68 and 70," but qualified that the Flynn Effect was "not relevant" because Bourgeois' scores satisfied *Atkins* in and of themselves. *Id.*

The district court correctly determined that whether Bourgeois had significantly subaverage intellectual functioning is a question of fact that

the district court decides. *Bourgeois*, 2011 WL 1930684, at *26. Bourgeois' attorneys in fact conceded the district court must look at the IQ scores "but then reach its own determination of whether he has significantly subaverage intelligence." *Id.* Contrary to Bourgeois' present claim, the district court did not disregard Bourgeois' Full Scale IQ test scores, rely on various unscientific stereotypes, or rely on its own "armchair assessment" in applying *Atkins*.

Instead, the court credited Dr. Price and Dr. Moore's assessment of Bourgeois' intellectual functions based on IQ scores evaluated in conjunction with considerations listed in the DSM-5: "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standard testing." DSM-5, p. 33. Dr. Price testified that he did not trust that the IQ testing adequately measured Bourgeois' "true level" of intellectual functioning based on a variety of factors that may compromise the validity of his test scores and/or caused the testing to underestimate his intellectual level—such as Bourgeois' poor testing performance, idiosyncratic abilities, lackluster effort and carelessness in testing, cultural deprivation, and others. *Id.* at 27-29. Dr. Price testified

it was "'very unusual' that the results of Bourgeois' academic achievement scores administered by Bourgeois' experts (Dr. Gelbort, Dr. Weiner, and Dr. Swanson) showed high-school age proficiency higher than his IQ scores." *Id.* at 29.

Importantly, Dr. Price concluded, based on his clinical assessment, individualized testing, and review of the expert medical reports, that Bourgeois' "cognitive abilities exceeded his measured cognitive intelligence." *Id.* at 27. The district court credited Dr. Price's and Dr. Moore's judgment based on the evidence viewed in proper context. For instance, Dr. Price and Dr. Moore found that Bourgeois was able "to concentrate for a length of time," *id.*; "to read and understand and conceptualize some of the things that he was able to talk about," *id;* write in a very detailed and communicative manner, expressing himself in complete thoughts ("his sentence structure, his syntax ... he can communicate when he writes;" he "can express himself in complete thoughts, and very detailed complete thoughts"; his "vocabulary is good," his "ideas are complex[,] the sentences are often compound, [h]e's able to follow a flow of thoughts, communicated his ideas effectively," he's

"certainly seems to be a vigilant record keeper, well aware of dates and perhaps locations.") *Id.*

Dr. Price further assessed that Bourgeois "had graduated from high school [a childhood friend told Dr. Moore that he had attended college classes], had worked for years as an over-land trucker, bought a house, managed his own finances, wrote intricate and detailed letters, communicated without difficulty, participated actively in his own defense, and otherwise carried himself without any signs of intellectual impairment." *Id.* at 29. Referring directly to AAIDD-11 in conjunction with Dr. Price's and Dr. Moore's assessment of Bourgeois' intellectual functioning, the court rejected Bourgeois' experts' conclusion that he only performed his job with a system of supports in place. *Id.* & n.44. "Dr. Price credibly explained that 'it's highly inconsistent for him to have had a job as a cross-country truck driver and perform as he did, just totally inconsistent with mental retardation.'" *Id.* at 29.

Dr. Price's and Dr. Moore's clinical assessment, individualized testing, and professional judgment was that: "Bourgeois' writings show an ability to observe the world around him, process relevant information, form strategy, and communicate his thoughts to others. His letter

exceeds the complexity and sophistication of someone operating at a grade-school level. Bourgeois' own writings discount the possibility that he is mentally retarded."[16] *Id.* at *30. The district court's findings regarding Bourgeois' personal interaction with the bench were not just "lay assessments" Bourgeois' "true" intellectual abilities, as the defendant now suggests. The findings gave credence to Dr. Price's and Dr. Moore's "clinical judgment" that Bourgeois was not significantly subaverage in intellectual functioning based on their professional and individualized standard assessment testing and interviews. *Id.* at *30-31. The court rejected as incredible Dr. Swanson's assessment that Bourgeois "functions in about the 'lowest two percent of the population'" (i.e., "operates as a child") in view of conflicting evidence and competing

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[16] The district court gave representative examples of Bourgeois' personal writings to his attorneys early in this case:

> I, Alfred Bourgeois, have every intention of winning my case. I have been falsely arrested, and please take your time and read this letter real well. This will explain how we can win this case in the death of my child, [JG1999]." (DE 598 at 148). In another letter he asked: Dear Mr. Gilmore, I want a copy of your strategy on my case. I want to know how you plan to attack my case and what you think the outcome will be. I would appreciate if you could put together a brief memorandum in support of me, Alfred Bourgeois, your Defendant, and position regarding my trial." (DE 598 at 151).

Bourgeois, 2011 WL 1930684, at *30 n.45.

clinical judgments made by the other experts. *Bourgeois,* 2011 WL 1930684, at *30-31. Moreover, the district court's observations that Bourgeois actively participated in his defense and understood the proceedings, intelligently assessed the circumstances he faced and formulated strategy,[17] *is relevant* as supported by factual evidence. *Compare Moore II,* 139 S. Ct. at 671 ("[T]he [CCA] emphasized Moore's capacity to communicate, read, and write based in part on *pro se* papers Moore filed in the court. [*T*]*hat evidence is relevant,* but it lacks convincing strength without a determination about whether Moore wrote the papers on his own...") (emphasis added).

In making the *Atkins* determination the district court did precisely the two things that *Hall* and *Moore* direct: afforded Bourgeois the opportunity to present his evidence and argument on *Atkins'* three-part

[17] "During trial, Bourgeois communicated with the Court on several occasions. The Court viewed his testimony before the jury in both phases of trial. The Court had sufficient interaction with Bourgeois to make a lay assessment of whether he functions at the low level described by his expert witnesses. Bourgeois never gave the Court any impression that he functioned at an intellectual level equal to that of a child. He completely understood the proceedings against him, intelligently assessed the circumstances he faced, actively participated in his defense, formulated strategy, intelligently communicated his versions of events, cogently answered questions put to him, and otherwise appeared to have an adequate level of intelligence. Based on this Court's own observations, the testimony that Bourgeois has significant intellectual limitations is not credible or persuasive." *Bourgeois,* 2011 WL 1930684, at *30.

criterion without limitation. And, after finding that Bourgeois' IQ test score fell within a presumptive range accepted by the medical community as a qualifying score for a diagnosis of mental retardation (but that a fuller view of his abilities does not correspond to a finding of significant intellectual limitations), the court continued its inquiry into *Atkins'* adaptive deficits criteria. *Bourgeois,* 2011 WL 1930684, at *31.

Moreover, the district court did not rely on judicially-created *Briseno*[18] factors that formed the basis of the error explored in Moore *I* and *Moore II*. Nor did it employ any facsimile of the *Briseno*-test applied by the CCA in *Moore*. As it did with *Atkins'* intellectual functioning criteria, it scrupulously applied the AAIDD's and APA's definition of intellectual disability in the AAIDD-11 and DSM-IV-TR editions to *Atkins'* second criteria: adaptive deficits, "the inability to learn basic skills and adjust behavior to changing circumstances," *Hall,* 572 U.S. at 710, "assessed using both clinical and individualized ... measures," *Moore II,* 139 S. Ct. at 668; *see Bourgeois,* 2011 WL 1930684, at *31 & n.48. [19]

[18] *Ex Parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004).

[19] *See Bourgeois,* 2011 WL 1930684, at *31 & n.48:

> "The AAIDD and APA definitions for mental retardation both break the adaptive-limitations inquiry into subcategories of deficiencies. The

The record does not support Bourgeois' global claim that the district court counteracted his adaptive deficits by overemphasizing adaptive strengths and unscientific stereotypes of intellectually disabled individuals. The court carefully examined the experts' clinical reports pertaining to Bourgeois' adaptive skills and adaptive deficits within the medical community's diagnostic framework. The Court determined Dr. Swanson and Dr. Moore came to diametrically opposed conclusions about Bourgeois' adaptive skills. *Id.* at *33. The court credited Dr. Moore's assessment and judgment that Bourgeois did not qualify as mentally

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> AAIDD evaluates "significant limitations ... in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." AAMR 11th at 1.[48] The APA looks for 'significant limitations in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.' DSM–IV–TR at 41. While collapsing the adaptive deficits into distinct subgroups, the APA and AAIDD approaches apparently capture the same range of functional aptitude."
>
> [48]The AAIDD 11th gives examples of multidimensional representative skills within the three categories: (1) conceptual skills involve "language; reading and writing; and money, time, and number concepts"; (2) social skills mean "interpersonal skills, social responsibility, self-esteem, gullibility, naivete (i.e., wariness), follows rules/obeys laws, avoid being victimized, and social problem solving"; and (3) practical skills include "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." AAIDD 11th at 44.

retarded within the diagnostic framework. The court reasonably viewed the inquiry as requiring it to probe more deeply "into the accuracy of reported deficiencies" and verify the reliability of data underlying the experts' findings of adaptive deficits. *Id.* at *33. In this regard, the court conducted a *very* extensive and comprehensive review of both doctor's reports and testimony, and examined the veracity and reliability of clinical data underlying them. *Id.* at *33-44; *see id.* at *33-37 ("Assessment by Testing Instruments"), *37-39 ("Lay Accounts of Bourgeois' Functioning"), *40-44 ("Bourgeois' Adaptive Abilities"), *44-46 "Manifestations of Limitation Before Age 18"). The court referred two focal points in the AAIDD 11th when assessing the credibility and reliability of Dr. Swanson's and Dr. Moore's adaptive skill reports: that the AAIDD "adopts an underlying 'assumption' in the definition of mental retardation that 'within an individual, limitations often coexist with strengths," *id.* at *32 (citing AAIDD 11th at 1), and, to that end, the AAIDD instructs "for clinicians to assess the reliability of any respondent providing adaptive behavior information," *id.* at *34 (citing AAIDD 11th at *47).

The court did not find that Bourgeois perceived adaptive strengths counteracted the evidence of his adaptive deficits, as Bourgeois argues in his habeas petition. The court critically analyzed the diametrically opposed conclusions by the medical experts, assessed the credibility and accuracy of their assessments and reports based on the evidence, and examined the veracity of the evidence underlying their professional judgment. In that context, the court found the "record show[ed] strengths that more than coexist with weaknesses, they call into question the depth and accuracy of reports of those weaknesses." *Id.* at *44. The court found that Dr. Swanson for failed to assess the validity and credibility of lay witnesses, *id.* *40, and rejected her clinical assessment based on failure "to make a full review of available evidence relating to Bourgeois' adaptive abilities," *id.,* at *44. The court considered Dr. Swanson's failure to administer Vineland/ ABAS-II testing to multiple respondents and basing her assessments on someone who had observed Bourgeois for only a short period of time at the age of 7, and not when he was closer to age 18, and who gave conflicting test answers. Dr. Moore ascertained that the conflicting answers Ms. Franks gave undermined the reliability of her testing. *Id.* at *35-36.

The court credited Dr. Moore's administering the test to multiple respondents who observed Bourgeois closer to age 18 and older, verifying the accuracy of the supporting data, discounting questionable testing, and basing his assessment only on verified testing. The court found that this "more credibly measured Bourgeois' functioning." *Id.* at *35-37. The court credited Dr. Moore's testimony, "while [Bourgeois]' functioning may have been relatively impaired in his early childhood, he appears to have developed greater independence of functioning by the time he finished high school." *Id.* at *44. The court found that "[n]one of the responses in Dr. Moore's testing suggested a significant impairment." *Id.* at *37.

Consistent with AAIDD guides, the court reasonably assessed and weighed the reliability of competing lay testimony. For example, defense witnesses testified that Bourgeois, could not tie his shoes or button his clothes as a child, had trouble learning to drive a truck, and had accidents. Government sponsored witnesses testified that Bourgeois had a "very professional appearance," was a competent to above-average truck driver, and navigated throughout the country without difficulty. *Id.* at *37-39. Accordingly, the court found that Bourgeois' academic

test score, his meticulous financial tracking, his fastidious record keeping, his cogent letter writing, and his competent spelling did not persuasively reflect adaptive deficits. *Id.* at 41-44. Bourgeois' employment as a commercial truck driver, entailing cross-country routes, for decades without accident, was inconsistent with mental retardation. *Id.* at *41-44.

Based on Dr. Price's and Dr. Moore's testimony, diagnostic assessment, and professional judgment, the court reasonably found the evidence "failed to point to any pronounced intellectual impairment before Bourgeois' eighteenth birthday;" that "Bourgeois has not shown that he is now, was at the time of the crime, or was during the developmental period, mentally retarded." *Id.* at *44. Based on the evidence presented, Bourgeois did not make "a convincing showing that he suffers from significant adaptive deficits that would serve as a predicate for mental retardation." *Id.*

III.

UNITED STATES' OPPOSITION TO MOTION FOR STAY OF EXECUTION

Bourgeois' execution is scheduled for January 13, 2020. Bourgeois moves to stay his execution pending this Court's final disposition of his

Atkins claim. The uncontroverted facts are that Bourgeois adjudicated his *Atkins* claim in his first § 2255 proceeding and the district court denied his claim on the merits. *United States v Alfred Bourgeois,* No. 2:02-cr-216, No. 2:07-cv-223, 2011 WL 1930684, *1 (S.D.Tex. May 19, 2011), *COA denied,* No. 11-70024, 537 F. App'x 604 (5th Cir. Aug. 5, 2013), *cert. denied,* 135 S. Ct. 46 (2014). The decision of the Southern District of Texas is final under 28 U.S.C. § 2244(a), (b)(1), and (b)(2). As briefed, on the facts of this case 28 U.S.C. § 2241 does not provide Bourgeois a viable avenue for habeas relief in the Southern District of Indiana on the successive *Atkins* claim that he raises in this habeas petition.

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Bourgeois does not demonstrate a significant possibility of success on the merits of his *Atkins* claim. The Supreme Court has not declared *Moore I* and *Moore II* a new rule retroactively applicable under the AEDPA, and he does not meet the statutory requirements under 28 U.S.C. § 2255(e)

to proceed under 28 U.S.C. § 2241. Bourgeois does not meet the Seventh Circuit's tests under *Davenport* and *Webster* to proceed under § 2241 in this habeas petition. Nor does his claim fall within any *Teague* exception for purposes of § 2241. There is no reasonable probability that four Justices will consider his *Atkins* claim sufficiently meritorious to grant certiorari. This is not a close case that the equities favor the granting of relief. As stated, Bourgeois was afforded full adjudication of the merits of his *Atkins* claim at his first § 2255(a) proceeding, and the order of the United States District Court for the Southern District of Texas denying Bourgeois habeas relief is final.

The United States has a strong interest in enforcing Bourgeois' death sentence imposed by the jury on March 25, 2004, for the savage and horrific premediated murder of his two-year old daughter. Bourgeois does not claim that his sentence violated *Atkins* at the time the jury unanimously imposed it, Dkt. 1, p. 71 ¶156; he does not fall within a class of persons the Eighth Amendment categorically exempts from execution. "Equity must take into consideration the [United] States' strong interest in proceeding with its judgment." *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992). The public interest mandates

that Bourgeois' scheduled execution on January 13, 2020, be enforced by the United States. This Court should deny Bourgeois' motion for stay of execution on grounds that there is no public interest or constitutional basis to grant it.

CONCLUSION

For the foregoing reasons, Bourgeois' petition for writ of habeas corpus and motion to stay execution should be denied with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 18, 2019, a copy of the foregoing Return to Order to Show Cause was filed electronically. Notice of this will be sentence to the following parties by operation of the Court's electronic filing system:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

ALFRED BOURGEOIS, Petitioner, V. SUPERINTENDENT, USP-Terre Haute, UNITED STATES OF AMERICA, Respondents.	:	CIVIL ACTION (Capital Habeas Corpus) Case No. 2:19–cv–00392–JMS–DLP **CAPITAL CASE** **EXECUTION SCHEDULED FOR** **JANUARY 13, 2020**

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

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Dated: November 15, 2019

PRELIMINARY STATEMENT

Petitioner Alfred Bourgeois shall be referred to as Petitioner or Mr. Bourgeois. Respondents shall be referred to as the Government. Mr. Bourgeois's August 15, 2019, Petition for Writ of Habeas Corpus Pursuant ("Petition") shall be cited as "Pet." followed by the relevant page or paragraph number(s). The Government's October 15, 2019, Response shall be cited as "GR" followed by the relevant page number(s).

With this Reply Brief, Petitioner is filing a supplement to Appendix A, which was filed with the Petition on August 15, 2019. The supplemental appendix is entitled "Appendix A, Vol. II," and the page numbers continue sequentially from the last page of the initial volume. Cites to both volumes of Appendix A shall be referred to by the initial "A" and relevant page number. Relevant transcripts from Petitioner's § 2255 level proceedings are provided in Appendix B, filed with the Petition, and cites to pages from the transcript shall be referred to as "Tr.," followed by the relevant date and page number.

All other citations are either self-explanatory or will be explained.

All emphasis in this Petition is supplied unless otherwise indicated.

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INTRODUCTION

In his Petition, Mr. Bourgeois establishes that he is intellectually disabled ("ID") under the medical community's diagnostic standards and thus his execution is barred by *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny. Mr. Bourgeois also establishes that he is entitled to review of his *Atkins* claim under these standards prior to his scheduled execution on January 13, 2020, as the plain language of the Federal Death Penalty Act ("FDPA") and numerous Supreme Court decisions categorically ban *the carrying out of an execution* on an intellectually disabled person. The Government does not dispute that an ID person is entitled to prove he is categorically ineligible for death at the time of his execution. It only challenges Mr. Bourgeois's ability to bring his *Atkins* claim under 28 U.S.C. § 2241, relying on various unconvincing arguments.

First, the Government contends that § 2241 is not available to Mr. Bourgeois because the facts underlying his jurisdictional claim do not precisely align with the facts presented in either *In re Davenport*, 147 F.3d 605 (7th Cir. 1998), or *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015). Yet the Seventh Circuit has never held, or even suggested, that these two cases represent the only circumstances under which the 28 U.S.C. § 2255(e) Savings Clause is available; a petitioner need only show that § 2255 is "inadequate or ineffective" to challenge his conviction or sentence. And, just as the *Davenport* court found § 2255 to be inadequate where it denies the defendant the ability to challenge his imprisonment for a "nonexistent offense," *Davenport*, 147 F.3d at 611, and the *Webster* court found § 2255 to be inadequate as it prevented Mr. Webster from challenging his constitutionally prohibited sentence, § 2255 is inadequate here:

- *Atkins* was unavailable to Mr. Bourgeois at the time of his initial § 2255 proceedings because then-binding Fifth Circuit jurisprudence rejected the medical community's approach to ID in favor of a "legal" approach that employed the same unscientific standards and practices invalidated in *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore–I*").

- Indeed, unlike the *Atkins* claim at issue in this Court's recent § 2241 decision in *Fulks v. Krueger*, there is *no doubt* that the district court that reviewed Mr. Bourgeois's initial *Atkins* claim ("District Court" or "§ 2255 Court") did so using "factors that the Supreme Court subsequently deemed inappropriate in *Moore*."[1]

- Mr. Bourgeois has established that, when his *Atkins* claim is analyzed under the medical community's diagnostic standards as now required by *Moore–I*, he is indisputably ID. *See* Pet. § III.

- Nevertheless, Mr. Bourgeois is now precluded from bringing a second § 2255 motion to obtain review of his sentence under constitutionally-mandated standards due to the procedural language of AEDPA's strict relitigation bar.

Accordingly, Mr. Bourgeois has established that he is intellectually disabled and constitutionally exempt from execution, but without an avenue under § 2255 to vindicate his claim for relief. Just as it did in *Webster*, this constitutes a structural defect that allows him to pass through the Savings Clause.

The Government attempts to distinguish *Webster*, in part, by stating that unlike Mr. Bourgeois who previously raised an *Atkins* claim, Mr. Webster could not have raised his *Atkins* claim in his initial § 2255. In fact, however, Mr. Webster not only raised an *Atkins* claim in his initial § 2255 proceedings, he, like Mr. Bourgeois, also unsuccessfully sought authorization to re-raise that claim in a successor petition. And—just as it does here—the Government argued in *Webster* that the petitioner's prior *Atkins* litigation precluded him from proceeding under § 2241. The Seventh Circuit rejected that argument, allowing Mr. Webster to use § 2241 to bring—and ultimately prevail on—his successive *Atkins* claim. The Government also attempts to distinguish

[1] No. 2:15–cv–33–JRS–MJD, 2019 WL 4600210, *16 n.9 (S.D. Ind. Sept. 20, 2019). In *Fulks*, the petitioner sought to bring an *Atkins* claim for the first time under § 2241, explaining that his claim was not viable under the legal and diagnostic regime in effect at the time of his initial § 2255 motion. Yet the Court found this premise to be too speculative, as it "would require the Court to assess the evidence supporting Mr. Fulks' *Atkins* claim, *then speculate how another federal court would have treated that evidence*." *Id.* at *16. Here, the Court need not engage in any such speculation: it was not until *Moore–I* invalidated the Fifth Circuit's unscientific approach to ID that *Atkins* became available to Mr. Bourgeois.

Webster on the ground that it involved newly discovered evidence. But, as nothing in *Webster* limits § 2241 relief to *Atkins* claims that are procedurally and factually identical to Mr. Webster's, the Government's distinction is meaningless. In *Webster*, the Seventh Circuit rejected the proposition that the language of § 2255(h)(1) could render an *Atkins* claim "beyond the scope of the savings clause" and "create the possibility of an unconstitutional punishment." *Webster*, 784 F.3d at 1139. The same reasoning applies here, as the procedural barrier created by the § 2255(h) relitigation bar is all that prevents Mr. Bourgeois from challenging the constitutionality of his upcoming execution under clinical diagnostic standards. As the *Webster* court explained, Mr. Webster could proceed under § 2241 because the wording of § 2255(h) foreclosed his ability to challenge "a particular sentence [that] was *constitutionally forbidden*." *Id.* at 1138. Mr. Bourgeois should be allowed to do the same.

The Government also argues that Mr. Bourgeois is precluded from proceeding under § 2241 because he purportedly received a reliable judicial determination when he litigated his *Atkins* claim in his initial § 2255 proceedings. The success of this argument depends on the Government establishing—as it attempts to do in Section B of the Response—that the § 2255 District Court's adjudication of Mr. Bourgeois's claim is consistent with *Moore–I*'s requirement that *Atkins* be assessed according to diagnostic standards. But again, applying then-binding Fifth Circuit jurisprudence, the District Court repeatedly and expressly eschewed the medical standards for ID in favor of an unscientific "legal" approach when it reviewed Mr. Bourgeois's *Atkins* claim. The Government's attempts to argue otherwise are unconvincing.

In light of the difficulty of showing that the District Court complied with diagnostic standards, the Government also challenges Mr. Bourgeois's right to rely on *Moore–I* and *Moore*

v. Texas, 139 S. Ct. 666 (2019) ("*Moore–II*"), and the diagnostic standards they require, in his § 2241 petition. But, contrary to the Government's arguments:

- Mr. Bourgeois cannot be barred from obtaining judicial review of his *Atkins* claim under medical standards, as the execution of an ID person is constitutionally prohibited, meaning that procedural barriers to relief that would normally be permissible are themselves constitutionally invalid;

- Mr. Bourgeois could not have relied on the principles enunciated in *Moore–I* and *Moore–II* in his first § 2255 motion because, prior to *Moore–I* holding that courts are *required* to apply current medical standards in the evaluation of *Atkins* claims, Mr. Bourgeois had no authority to challenge settled Fifth Circuit that supported the use of non-scientific factors in the disposition of an such claims;

- Mr. Bourgeois can rely on constitutional cases in support of his § 2241 petition, as he need only show § 2255 is inadequate or ineffective; and

- Allowing Mr. Bourgeois to rely on new diagnostic standards would not forever forestall a final decision in this case, or open the floodgates to endless *Atkins* litigation from other capital petitioners. Mr. Bourgeois is perhaps the only § 2255 litigant who raised a timely and meritorious *Atkins* claim, but was denied relief on the basis of circuit jurisprudence subsequently invalidated by *Moore–I*. This is not a claim like the one presented in *Fulks*, in which the petitioner conceded that he would not have been ID under diagnostic standards in effect at the time of his § 2255 proceedings. Here, Mr. Bourgeois has established that, if his claim is assessed under the medical community's diagnostic standards—as of 2011 or as of today—he is undeniably ID. This is a rare case indeed.

Nor is the Government able to persuasively argue that Mr. Bourgeois's Petition is an abuse of the writ or that it is barred by *Teague v. Lane*, 489 U.S. 288 (1989), as nothing in the jurisprudence relied upon by the Government actually supports either of these claims. Mr. Bourgeois's Petition is not an abuse of the writ because it relies on a change in the law that occurred after his initial § 2255 proceedings. And *Teague* is irrelevant to each of Mr. Bourgeois's two bases for § 2241 jurisdiction. In any event, regardless of the jurisdictional basis for Mr. Bourgeois's Petition, *Teague* is a judge-made, prudential doctrine that was announced well before the decision in *Atkins* and as such it cannot be applied to bar review of his claim that he is categorically exempt from execution.

Finally, the Government completely fails to challenge Mr. Bourgeois's claim that he is entitled to § 2241 review because he challenges the execution of his sentence, as well as its imposition. In addition to the prohibition on the carrying out of an execution of the intellectually disabled set forth by *Atkins* and its progeny, Mr. Bourgeois was sentenced under the FDPA, which expressly mandates that a "sentence of death shall not be *carried out* upon a person who *is* mentally retarded." 28 U.S.C. § 3596(c). This language calls for an inquiry necessarily governed by the present, including the prisoner's present-day functioning as measured by present-day diagnostic standards, rather than standards applicable at the time the sentence was imposed. And, as the Seventh Circuit has recognized, § 2241 confers habeas jurisdiction where a federal prisoner is challenging not the validity but the execution of his sentence.

Hence, whether because he satisfies the § 2255(e) Savings Clause, or because he is challenging the execution of his sentence, Mr. Bourgeois is entitled to litigate the merits of his *Atkins* claim and establish that he is intellectually disabled and cannot constitutionally be executed on January 13, 2020.

I. MR. BOURGEOIS IS ENTITLED TO REVIEW UNDER 28 U.S.C. § 2241 BECAUSE HE SATISFIES THE 28 U.S.C. § 2255(E) SAVINGS CLAUSE.

The Government acknowledges that a federal prisoner is entitled to § 2241 review under the Savings Clause when the remedy under § 2255 is "inadequate or ineffective to test the legality of his" sentence. GR at 41 (citing § 2255(e)). Yet the Government contends that Mr. Bourgeois is precluded from proceeding under § 2241 because: (i) his claim does not precisely fit within the facts of prior cases in which the Seventh Circuit has found the savings clause applicable; and (ii) he "fully adjudicated" the same *Atkins* claim he now presents and received a "reliable judicial determination" of that claim in his initial § 2255 proceedings. *See* GR at 5–8. The Government errs on both counts.

A. Section 2255 Is "Inadequate or Ineffective" to Test Mr. Bourgeois's Claim of Categorical Ineligibility for Execution.

As set forth in his Petition, Mr. Bourgeois's initial § 2255 *Atkins* claim was denied in 2011 under an approach to *Atkins* found to be unconstitutional in *Moore–I*. Following the *Moore–I* decision, Mr. Bourgeois sought authorization from the Fifth Circuit to file a second petition under § 2255(h)(2). *See* Pet. ¶¶ 9–11. The circuit panel did not deny that Mr. Bourgeois qualifies as ID under the diagnostic standards required under *Moore–I*. Nor did it dispute that *Atkins* could be "newly available" to a petitioner who had been unable to successfully raise an ID claim earlier due to Fifth Circuit jurisprudence that has since been overruled. To the contrary, the Fifth Circuit subsequently reaffirmed that "it is correct to equate legal availability" under § 2255(h)(2) with changes in the standards by which an *Atkins* claim is assessed. *In re Johnson*, No. 19–20552, 19–70013, 2019 WL 3814384, at *5–6 (5th Cir. Aug. 14, 2019). Nevertheless, the panel denied Mr. Bourgeois's application on the ground that he was procedurally barred from re-litigating his *Atkins* claim under 28 U.S.C. § 2244(b)(1). *In re Bourgeois*, 902 F.3d 446 (5th Cir. 2018).[2] Mr. Bourgeois then filed his § 2241 Petition with this Court, arguing that the Fifth Circuit's interpretation of § 2255(h)[3] precludes review of his death sentence under current constitutional standards, despite that same opportunity having been given to other, *less diligent* prisoners, and despite the categorical bar against executing an intellectually disabled person.

[2] 28 U.S.C. § 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."

[3] Section 2255(h) states that "[a] second or successive motion must be certified as provided in section 2244." As explained in the Petition, Mr. Bourgeois argued in his application that the § 2244(b)(1) re-litigation bar is expressly limited to petitions brought by state prisoners under § 2254, but the Fifth Circuit rejected this argument. *See* Pet. ¶ 10.

1. Mr. Bourgeois's claim need not fit within the facts of *Davenport* or *Webster* to be cognizable under § 2241.

The Government recognizes that the Seventh Circuit has found § 2241 review appropriate in a number of different settings. *See* GR 51–56. Nevertheless, the Government argues that Mr. Bourgeois's *Atkins* claim is barred because it "does not fall within either of the narrow paths for § 2241 relief set forth by the Seventh Circuit in *Davenport* and *Webster*." GR at 6. But as this Court recently acknowledged, "[t]he Seventh Circuit has never held that the Savings Clause is only met in the specific circumstances in which it has so found." *Fulks*, 2019 WL 4600210, at *14. To the contrary, *Webster* made clear that the only requirement for establishing § 2241 jurisdiction through the savings clause is that there be "some kind of structural problem with section 2255." *Webster*, 784 F.3d at 1136.

Notably, the Government defeats its own "*Davenport*-or-*Webster*" argument in acknowledging that § 2241 was available to the petitioner in *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001), a case that involves no factual overlap with either *Davenport* or *Webster*. In *Garza*, the petitioner sought to raise a claim under § 2241 based on the ruling of an international treaty body issued after his § 2255 proceedings concluded. In analyzing the jurisdictional issue, the *Garza* court recognized generally that there are "circumstances" in which "the operation of the successive petition rules absolutely prevent[] the petitioner from ever having an opportunity to raise a challenge to the legality of his sentence." *Id.* at 922. One such circumstance was *Davenport*, which involved a retroactive change in statutory law, and another was Mr. Garza's case. *Id.*; *see also Webster*, 784 F.3d at 1137 (describing *Garza* as "*one illustration* of a situation in which petitioner was entitled under the savings clause to use section 2241 to attack a sentence"); *Poe v. Lariva*, 834 F.3d 770, 772 (7th Cir. 2016) (referring to a new retroactive

statutory rule as just "*[o]ne circumstance* under which this court has permitted resort to § 2241").

Citing *Fulks*, the Government attempts to distinguish Mr. Bourgeois's § 2241 *Atkins* claim from *Garza*, stressing that it was "literally impossible" for Mr. Garza to have raised his claim earlier as the factual predicate did not yet exist. GR at 54 (citing *Fulks*, 2019 WL 4600210, at *4). But *Fulks* is distinguishable. There, the petitioner sought to bring an *Atkins* claim for the first time under § 2241, explaining that his claim was not viable under the legal and diagnostic regime in effect at the time of his initial § 2255 motion. Yet the Court found this premise to be too speculative, as it "would require the Court to assess the evidence supporting Mr. Fulks' *Atkins* claim, *then speculate how another federal court would have treated that evidence*." *Id.* at *16. The Court went on to stress that "this speculative analysis would not be required had Mr. Fulks raised an *Atkins* claim in his § 2255 when he had the opportunity to do so," in which case the Court "would not have to speculate how another court would have treated a wide-range of evidence regarding Mr. Fulks' alleged intellectual disability." *Id.* at *16, n.9. Here, by contrast, the District Court that denied Mr. Bourgeois's prior *Atkins* claim did so under Fifth Circuit precedent that made it "literally impossible" for his claim to succeed. It was not until *Moore–I* invalidated that jurisprudence that Mr. Bourgeois could raise his current claim.

In short, in *Davenport*, *Webster*, and *Garza*, the Seventh Circuit allowed claims to proceed under § 2241 because the petitioner identified a structural problem that rendered § 2255 "inadequate or ineffective" to test the petitioner's claim. In none of these cases did the petitioner present the same factual scenario as any other case in which the court found jurisdiction under § 2241. Here, Mr. Bourgeois has established that developments occurring after his trial and § 2255 proceedings show that he is categorically ineligible for execution. Yet because § 2255(h)

does not account for claims of categorical ineligibility from execution, "as a structural matter," Mr. Fulks's challenge to his sentence "cannot be entertained by use of the 2255 motion." *Webster*, 784 F.3d at 1139. Just as in Mr. Webster's case, "[t]o hold otherwise would lead . . . to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.*

2. Mr. Bourgeois may proceed under § 2241 because he presents a structural error with § 2255.

The Government also argues that § 2255 is not inadequate or ineffective "simply because Bourgeois may be barred from filing a second § 2255 motion." GR at 49–50. Yet Mr. Bourgeois's claim is not premised on the mere fact that his successor application was denied. Rather, just like the petitioner in *Webster*, Mr. Bourgeois argues that § 2255, as interpreted by the Fifth Circuit, is inadequate or ineffective because a "glitch" in the wording of § 2255(h) precludes him from challenging the fundamental legality of his death sentence. *See Webster v. Lockett*, Case 2:12–cv–00086–JPH–MJD, ECF Doc. 1 at 30 (filed Apr. 6, 2012).

The Government attempts to distinguish *Webster*, in part, by stating that Mr. Webster "could not have used" *Atkins* in his first § 2255. GR at 55. In fact, Mr. Webster not only raised an *Atkins* claim in his initial § 2255 proceedings, he also unsuccessfully sought authorization to re-raise that claim in a successor petition. And—just as it does here—the Government argued in *Webster* that the petitioner's prior *Atkins* litigation precluded him from proceeding under § 2241. *See Webster v. Lockett*, Case 2:12–cv–00086–JPH–MJD, ECF Doc. 17 at 12 (filed Aug. 7, 2012) ("The remedy provided in section 2241 does not become available to Webster simply because he cannot meet the requirements for filing a successive section 2255 motion."). Of course, the

Seventh Circuit rejected that argument, allowing Mr. Webster to use § 2241 to bring—and ultimately prevail on[4]—his successive *Atkins* claim. *See Webster*, 784 F.3d at 1138–39.

The Government also attempts to distinguish *Webster* on the ground that it involved newly discovered evidence. *See* GR at 31–32. But again, nothing in *Webster* limits § 2241 relief to *Atkins* claims that are procedurally identical to Mr. Webster's, i.e., those that involve new facts that the claimant could not have reasonably discovered earlier. As with the previous § 2241 cases on which *Webster* relied, *Webster* itself is "best underst[ood] . . . as [an] appropriate application[] of the law to the facts before the court." 784 F.3d at 1137.

Looking to the reasoning (as opposed to the facts) behind *Webster*, the Government's distinction between Mr. Webster's case and that presented by Mr. Bourgeois is meaningless. In *Webster*, the petitioner filed a § 2241 petition raising an *Atkins* claim based on newly discovered evidence establishing his intellectual disability. He argued that § 2255 was ineffective to prove he was categorically ineligible for execution because the language of § 2255(h)(2) limits successors based on new evidence to those establishing innocence of *the offense*. The Seventh Circuit agreed, explaining there is a "lacuna in the statute" for the "narrow set of cases" involving claims of categorical ineligibility for execution. *Webster*, 784 F.3d at 1138. The *Webster* court went on to reject the proposition that the procedural language of § 2255 could render an *Atkins* claim "beyond the scope of the savings clause" and "create the possibility of an unconstitutional punishment." *Id.* at 1139.

The same reasoning applies here. The relitigation bar in § 2244(b)(1) was enacted as part of AEDPA, i.e., before any categorical exclusion against execution of the intellectually disabled existed. Thus, Congress could not have contemplated the situation in which Mr. Bourgeois now

[4] *See Webster*, 2019 WL 2514833, at *1 (granting relief on remand).

finds himself: categorically exempt from a death sentence, but without recourse under § 2255 to prevent his unconstitutional execution. The particular provision of AEDPA that placed him in this position is irrelevant. As the *Webster* court explained, Mr. Webster could proceed under § 2241 because the wording of § 2255(h) foreclosed his ability to challenge "a particular sentence [that] was *constitutionally forbidden*." *Id.* at 1138. Mr. Bourgeois should be allowed to do the same.

B. Mr. Bourgeois Has Never Received Judicial Review of His *Atkins* Claim Under Constitutionally-Mandated Diagnostic Standards.

In addition to challenging that Mr. Bourgeois has established a structural defect with § 2255 within the meaning of prior Seventh Circuit jurisprudence, the Government argues that Petitioner is unable to make use of the Savings Clause because "he fully adjudicated" his *Atkins* claim in first § 2255 proceeding. GR at 5. But as explained in Mr. Bourgeois's Petition and below, his claim is that he is intellectually disabled under the medical community's diagnostic standards, which then-binding Fifth Circuit jurisprudence precluded the District Court from considering at the time of its 2011 decision denying *Atkins* relief.

The Government tries to argue otherwise, even claiming that the court "prescien[tly]" applied diagnostic criteria that were not published until two years *after* the court penned its decision. *See* GR at 79 (referring to the standards set forth in the DSM–5).[5] It is absurd to state

[5] As explained in the Petition, the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA") are the leading diagnostic authorities in the field of intellectual disability. *See* Pet. ¶ 5; *see also Moore–I*, 137 S. Ct. at 1053 (citing the current manuals from the APA and the AAIDD as offering the best available description of how mental disorders are expressed and can be recognized by trained clinicians."). The AAIDD published the most recent edition of its manual entitled *Intellectual Disability: Definition, Classification, and Systems of Supports Definition Manual*, in 2010 ("AAIDD–10"). The AAIDD is also publisher of the *User's Guide: Intellectual Disability, Definition, Classification, and Systems of Supports*, the most recent edition of which was issued in 2012; and *The Death Penalty and Intellectual Disability*, issued in 2015. The most

that the District Court followed diagnostic criteria that did not exist at the time of Mr. Bourgeois's § 2255 proceedings. But the court did not even apply the diagnostic standards that were current as of 2011; to the contrary, it deliberately rejected them. Hence, the review that Mr. Bourgeois now seeks in this Court is not simply an attempt to relitigate or appeal the § 2255 Court's denial of relief. It is a request to receive review of his *Atkins* claim—for the first time—under the medical community's standards for diagnosing ID, as required by Supreme Court jurisprudence, before he is unconstitutionally executed on January 13, 2020.

1. The § 2255 District Court's opinion cannot be considered a "reliable judicial determination" of Mr. Bourgeois's claim in the wake of *Moore–I*.

According to the Government, Mr. Bourgeois's *Atkins* claim "began . . . in the Southern District of Texas and ends there," GR at 2, as the § 2255 Court has already reliably adjudicated the claim. The success of this argument depends on the Government establishing—as it attempts to do in Section B of the Response—that the § 2255 Court's adjudication of Mr. Bourgeois's claim is consistent with *Moore–I*'s requirement that *Atkins* be assessed according to diagnostic standards. But, unlike in *Fulks*, there is *no doubt* in this case that the § 2255 Court "applied factors that the Supreme Court subsequently deemed inappropriate in *Moore*." *Fulks*, 2019 WL 4600210, *16 n.9. Indeed, the District Court repeatedly and expressly eschewed the medical standards for ID in favor of a "legal" approach grounded in erroneous stereotypes of the intellectually disabled. The Government's attempts to establish otherwise are unconvincing.

First, the Government contends that the District Court complied with the principles announced in *Moore–I*, and even complied with diagnostic standards that had not yet been published, simply because the court recognized that ID is assessed under three prongs (i.e.,

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recent edition of the APA's guidelines is found in the Diagnostic and Statistical Manual of Mental Disorders—5th Edition ("DSM–5").

subaverage intellectual functioning, adaptive deficits, and onset before age eighteen). *See, e.g.*, GR at 79–80 ("Conforming with the Supreme Court's later decisions in *Hall* [*v. Florida*, 572 U.S. 701 (2014)] and *Moore*, the district court consulted, relied on, and adhered to the AAIDD and APA's clinical definition of intellectual disability/mental retardation contained in AAIDD–11 (2010) and DSM–IV–TR (2000)[[6]] in making its *Atkins* determination."); *id.* at 79 ("Whether through prescience or thorough research of substantive *Atkins* and/or *Atkins*-related procedural issues developing in federal and state courts at that time, the district court analyzed intellectual disability under *Atkins* according to the APA's definition of intellectual functioning deficits in the DSM–5."). But *Moore–I* and *Moore–II*, make clear that applying the clinical definition of intellectual disability is much more than simply reaching opinions on the three prongs of the diagnosis. Indeed, for both rounds of review in Bobby Moore's case, the CCA made findings on all three prongs of ID. However, because the CCA assessed those three prongs with reference to standards that violated the "medical community's diagnostic framework," the Supreme Court held that Texas's approach to the *Atkins* analysis "creat[ed] an unacceptable risk that persons with intellectual disability will be executed." *Moore–I*, 137 S. Ct. at 1048, 1053. The same is true here.

Second, the Government denies that the District Court "disregard[ed] Bourgeois' Full Scale IQ test scores, rel[ied] on various unscientific stereotypes, or rel[ied] on its own 'armchair assessment'" in assessing whether Petitioner satisfies prong one. GR at 83. Unfortunately for the Government, the plain language of the District Court's opinion repeatedly and unambiguously proves otherwise, as summarized in the following chart:

[6] The DSM–IV–TR is the fourth edition of the APA's Diagnostic and Statistical Manual, published in 2000, and was the current version of the DSM at the time of Mr. Bourgeois's § 2255 proceedings.

Government Response	District Court Opinion
The court did not "disregard Bourgeois' Full Scale IQ test scores."	"The psychological profession allows any score falling along that range [of 70–75] to qualify for a diagnosis of mental retardation. . . . Courts, however, endeavor to determine whether a borderline score represents an intelligence capacity above or below the mental-retardation threshold. In the legal context, whether an inmate had significantly subaverage intellectual functioning is a question of fact that the Court decides." *See, e.g.*, *Bourgeois*, 2011 WL 1930684, at *26. "[A]ll cases in which the Fifth Circuit has found that an inmate warrants *Atkins* relief have involved at least one base score below 70 without adjustment." *Id.*
The court did not "rely on various unscientific stereotypes."	"Bourgeois' behavior and characteristics are inconsistent with an IQ that would fall below 70" because, inter alia: • he "lived a life which, in broad outlines, did not manifest gross intellectual deficiencies," *id*. at *22; • he "worked for many years as a long haul truck driver . . . bought a house, purchased cars, and handled his own finances," *id.* at *29; and • "otherwise carried himself without any sign of intellectual impairment," *id*.
The court did not "rely on its own 'armchair assessment.'"	"Notably, this Court's interactions with Bourgeois have provided an important point of observation. During trial, Bourgeois communicated with the Court on several occasions. The Court viewed his testimony before the jury in both phases of trial. The Court had sufficient interaction with Bourgeois to make a lay assessment of whether he functions at the low level described by his expert witnesses." *Id.* at *30. "Based on this Court's own observations, the testimony that Bourgeois has significant intellectual limitations is not credible or persuasive." *Id.* "The Court has viewed many hours of video from the examination by Dr. Price and Dr. Moore. Bourgeois answers the questions asked of him, engages in conversation, has logical thoughts, and does not otherwise give any impression of mental retardation." *Id.* at *28.

The Government attempts to explain away the plain language quoted above by casting the District Court's prong-one conclusion as merely the product of its crediting the Government's experts (Drs. Price and Moore) over those presented by petitioner (Drs. Gelbort, Weiner, and Swanson). *See, e.g.*, GR at 83 (court did not rely on stereotypes, but rather "credited Dr. Price and Dr. Moore's assessment of Bourgeois'[s] intellectual functions based on IQ scores evaluated in conjunction with considerations listed in the DSM–5"); GR at 91 (court "critically analyzed the diametrically opposed conclusions by the medical experts, assessed the credibility and accuracy of their assessments and reports based on the evidence, and examined the veracity of the evidence underlying their professional judgment").

This argument ignores that the District Court relied on its own lay assessment of Mr. Bourgeois's functioning. *See supra*. Yet even assuming the Court's conclusions were presented only as credibility determinations, *Moore–II* makes clear that a court cannot circumvent the application of medical criteria by couching its decision in terms of "credibility." *See Moore–II*, 139 S. Ct. at 670 (recognizing that CCA purported to abandon *Briseño* factors and base its post-*Moore–I* denial of relief on finding that the state's expert was more credible, but finding the CCA nevertheless repeated same practices invalidated in *Moore–I*). That is precisely what the District Court did here, as each of the credibility determinations cited by the Government is either founded on a misrepresentation of the record and/or itself involves a violation of diagnostic criteria.

For instance, as already discussed in Mr. Bourgeois's Petition, the court supported its decision to ignore Petitioner's presumptively-qualifying IQ scores based, in part, on Dr. Price's contra-diagnostic testimony concerning Mr. Bourgeois's lack of education and his "cultural deprivation." *See, e.g.*, Pet. ¶ 133 (explaining that, per *Moore–I* and diagnostic guidelines, Mr.

Bourgeois's limited education and lack of stimulation are factors that make intellectual disability more, not less, likely). Additionally, as the Government highlights, the District Court cites to Dr. Price's testimony that "it was 'very unusual' that the results of Bourgeois's academic achievement scores . . . showed high-school age proficiency higher than his IQ scores." GR at 83–84 (citing *Bourgeois* at * 29). In fact, twelve of Mr. Bourgeois's thirteen scores on the Woodcock–Johnson III ("WJ–III") were in the impaired range.[7] As set forth in the Petition:

> Petitioner's individual achievement test scores on the WJ–III include: story recall at a kindergarten level; applied problem solving at a second grade level; oral comprehension and passage comprehension at a third grade level; writing samples and understanding directions at a fourth grade level; calculation, reading fluency, and writing fluency at a fifth grade level; and math fluency at a sixth grade level. *See* A0240. The only tests on which he scored above a sixth grade level—letter-word identification (eighth grade) and spelling (thirteenth grade)—are tests that implicate mere rote learning, as opposed to any problem solving, analysis, or higher-level thinking.

See Pet. ¶ 50. Hence, the only "high school range" score Mr. Bourgeois received was for spelling. Although Dr. Moore testified otherwise, he was discussing the "scaled score" column of the test results, rather than the "age and grade equivalent" column, despite acknowledging that the then-current version of the DSM described the level of functional academics achievable by a person with ID in terms of grade level, not standard score. Tr. 9/24/10 at 180–85; *see also* DSM–IV–TR at 43 ("[B]y their late teens," individuals with mild intellectual disability could "acquire academic skills up to approximately the sixth-grade level.").[8] And even looking to the "scaled

[7] Both the Government and defense experts agreed that the WJ–III was the most comprehensive of the achievement tests administered. *See* Tr. 9/23/10 at 265 (Price); Tr. 9/10/10 (p.m.) at 46–47 (Gelbort); Tr. 9/20/10 at 44 (Swanson).

[8] As discussed in the Petition, the DSM–5 does away with any specific grade cut-off, describing the level of functioning necessary for significant impairments in the conceptual domain as follows: "For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive

score" column, Dr. Moore conceded on cross that Mr. Bourgeois had five scores that are "two standards deviations below the mean," including broad Math, Brief Math, Story Recall, Applied Problems, and Story Recall Delay—all of which implicate higher-level thinking as opposed to rote memorization. *Id.* at 181–82. Under diagnostic standards—then and now—this constituted evidence of impairment and was consistent with ID. Accordingly, the District Court had no basis for crediting Dr. Price's testimony that Mr. Bourgeois's IQ scores were inconsistent with his achievement testing.

More generally, the Government claims that the District Court "credited Dr. Price's and Dr. Moore's judgment" of Mr. Bourgeois's intellectual functioning "based on the evidence viewed in proper context." GR at 84. However, the Government immediately goes on to cite many of the erroneous stereotypes that these experts used to support their opinions, including Mr. Bourgeois's ability to "read and understand and conceptualize *some* of the things that he was able to talk about," that he "express[ed] himself in complete thoughts," "often" wrote "compound sentences," "communicated his ideas effectively," and worked as a truck driver. GR at 84–85. None of these "skills" is inconsistent with a diagnosis of ID, and all reflect the types of erroneous stereotypes of ID condemned in *Moore–I* and diagnostic guidelines. *See* Pet. ¶¶ 41, 129–31.[9]

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function . . ., and short-term memory, as well as functional use of academic skills (e.g., reading, money management) are impaired." A0076 (DSM–5 at 34).

[9] That the Government quotes these purported "strengths" in its briefing to support the argument that the District Court applied clinical standards demonstrates a profound lack of understanding on the part of the Government regarding the diagnostic criteria and the Court's holdings in *Moore–I* and *Moore–II*. The same is true regarding the Government's favorable citation to Dr. Price's opinion that Mr. Bourgeois's low IQ scores could be explained by his limited education and "cultural deprivation." GR at 83.

By contrast, Mr. Bourgeois's prong-one experts, Drs. Wiener and Gelbort, supported their conclusions as to the validity of Petitioner's IQ scores, in part, with reference to the consistency between the full-scale scores he received on each test, as well as the consistency in the overall pattern of correct and incorrect answers on each test. *See, e.g.*, Tr. 9/10/10 at 32 (Dr. Gelbort explaining it would be very difficult for an individual to "feign bad" in the same way on two tests administered three years apart); Tr. 9/20/10 at 223–25, 229 (Dr. Weiner testifying similarly); *see also Webster v. Lockett*, No. 2:12–v–86–WTL–MJD, 2019 WL 2514833, *7 (S.D. Ind. June 18, 2019) (citing, in support of finding petitioner's IQ tests scores valid, expert testimony that "it would be 'extremely difficult' to consistently fake IQ scores" across multiple tests). And, contrary to the District Court's assertion that Dr. Gelbort relied on the "naked IQ scores" for his opinion of Mr. Bourgeois's functioning, *Bourgeois*, 2011 WL 1930684, at *25, Dr. Gelbort in fact testified that he also considered the neuropsychological and achievement testing administered to Mr. Bourgeois, as well as historical records and the manner in which he presented in his evaluations by Dr. Gelbort and Government experts, *see* Tr. 9/10/10 at 26, 28–30, 38–39. The court's only reason for discrediting Dr. Gelbort's testimony rests on a mischaracterization of the record and a disregard of diagnostic standards. *See Bourgeois*, at *26 (misrepresenting Dr. Gelbort's testimony as to whether he was willing to consider Mr. Bourgeois's "courtroom behavior" in his assessment and ignoring that diagnostic standards preclude reliance on verbal behavior and prison functioning in the diagnosis of ID).

In light of the foregoing, there is no support for the Government's claim that the § 2255 Court's prong-one determination is based on a proper credibility finding that is consistent with diagnostic standards.

Third, even given the District Court's express rejection of diagnostic standards and extensive reliance on non-clinical factors in the evaluation of prong one, the Government ultimately claims that the court "did precisely the two things that *Hall* and *Moore* direct" a court to do in assessing intellectual functioning:

> [The Court] afforded Bourgeois the opportunity to present his evidence and argument on *Atkins*' three-part criterion without limitation. And, after finding that Bourgeois' IQ test score fell within a presumptive range accepted by the medical community as a qualifying score for a diagnosis of mental retardation (but that a fuller view of his abilities does not correspond to a finding of significant intellectual limitations), the court continued its inquiry into *Atkins*' adaptive deficits criteria.

GR at 87–88.

Yet *Moore–I* does not merely require the presentation of evidence and argument on "*Atkins*' three-part criterion without limitation." Rather, *Moore–I* "made clear . . . that courts should not disregard the medical community's current standards in favor of applying a judicially-created standard." GR at 77. And, with respect to prong-one specifically, *Moore–I* rejected the argument that a court could "properly consider[] factors unique" to the petitioner in order to disregard "the lower end of the standard-error range" for his IQ scores, *Moore–I*, 137 S. Ct. at 1049, which is precisely what the District Court did in Mr. Bourgeois's case. Rather, *Moore–I* held that "the presence of other sources of imprecision in administering the test to a particular individual, cannot *narrow* the test-specific standard-error range." *Id.* (internal citations omitted) (emphasis in original).

Furthermore, *Moore–I* held that, where a petitioner's IQ score falls within the presumptive range for ID, the court cannot "end the intellectual-disability inquiry" based on that score, but instead that the reviewing court was required to find prong one to be established and move on to prong two. *Moore–I*, 137 S. Ct. at 1050; *see also id.* at 1049 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's

adaptive functioning."). Like the CCA in *Moore*, the District Court here expressly found that Mr. Bourgeois had failed to meet prong one, and it also held that *this finding alone* "*doom[ed]*" his *Atkins* claim. *Bourgeois*, 2011 WL 1930684, at *31. This violated *Moore–I*[10] and diagnostic standards, which *require* that courts find prong one satisfied and proceed to prong two "where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore–I*, 137 S. Ct. at 1049–50. The mere fact that the court conducted a prong-two assessment "in the interests of justice," *Bourgeois*, 2011 WL 1930684, at *31, does not render the court's approach compliant with *Moore–I*.

Fourth, the Government denies that the District Court relied on the "judicially-created *Briseño* factors that formed the basis of the error explored in *Moore I* and *Moore II*" or "any facsimile of the *Briseño*-test applied by the CCA in *Moore*." GR at 88 (referring to the standards first set forth in *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by Moore–I*, 137 S. Ct. 1039). The Government's position is contradicted by the fact that many of the examples of behavior the District Court found inconsistent with a diagnosis of ID directly implicate at least one of the invalidated *Briseño* factors. *See* Pet. ¶ 142. It is also contradicted by the District Court's conclusions that Mr. Bourgeois "never gave the Court any impression that he functioned at an intellectual level *equal to that of a child*," and that ID-range functioning "*should be obvious*." *Id.* at *31, n.42. Such comments demonstrate a view of intellectually disabled persons directly on par with the view that led to creation of the *Briseño* factors in the first place. As explained in the Petition, the CCA in *Briseño* explicitly stated that its goal was to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a

[10] The *Moore–II* Court did not address prong one, as the CCA focused only on prong two in re-evaluating Mr. Moore's claim on remand following *Moore–I*. *See Moore–II*, 139 S. Ct. at 670.

person should be exempted from the death penalty," *Briseño*, 13 S.W.3d at 6, and pointed to the fictional character "Lennie" from John Steinbeck's *Of Mice and Men* as someone who "might" be considered by Texans to be entitled to *Atkins* relief. *Id.* The CCA then went on to invent the *Briseño* factors as a way for courts to determine if a particular defendant's functioning was sufficiently close to that of Lennie, in which case the defendant would be entitled to *Atkins* relief.

Here, the mere fact that the District Court did not directly cite to the now-overruled *Briseño* decision does not mean that its adaptive-behavior assessment was any less rooted in the "lay stereotypes of the intellectually disabled" that caused the Supreme Court to reverse the CCA's decisions in *Moore–I* and *Moore–II*. *Moore–I*, 137 S. Ct. at 1052.[11] Indeed, in *Moore–II*, the Supreme Court found that the CCA had continued to effectively employ certain *Briseño* factors, despite expressly claiming that it had abandoned reliance on them when assessing Mr. Moore's *Atkins* claim on remand. *See Moore–II*, 139 S. Ct. at 670–72.

Fifth, the Government denies "Bourgeois' global claim that the district court counteracted his adaptive deficits by overemphasizing adaptive strengths and unscientific stereotypes of intellectually disabled individuals." GR at 89. It supports this position, in part, by noting that the court "referred" to the fact that "the AAIDD–2010 adopts an underlying 'assumption' in the definition of mental retardation that 'within an individual, limitations often coexist with strengths." GR at 90 (citing *Bourgeois* at *32). Incredibly, however, the Government fails to mention that the court *immediately thereafter* stated:

> The Fifth Circuit, however, teaches that the *Atkins* inquiry should not be so narrow as to ignore that which an inmate can do, even if the psychological profession approaches the issue differently. . . . The law makes a holistic view of an individual, recognizing that a few reported problems may not negate an inmate's ability to

[11] As explained in the Petition, the District Court did cite to numerous Fifth Circuit decisions denying habeas relief to Texas prisoners whose *Atkins* claims had been rejected in state court, including those denied relief under the *Briseño* factors. Pet. ¶¶ 126–27.

> communicate, to abstract from mistakes, to learn from experience, to engage in logical reasoning, and to have healthy relationships with others. Accordingly, *the federal inquiry into adaptive deficits takes on a much different flavor than that done by mental health professionals*.

Bourgeois, 2011 WL 1930684, at *32; *see also id.* at *33 ("The law will compare the deficiencies to positive life skills, presuming that adaptive successes blunt the global effect of reported insufficiencies.").

Undeterred by the court's plain language, the Government also contends that, in practice, "[t]he court did not find that Bourgeois[']s perceived adaptive strengths counteracted the evidence of his adaptive deficits." GR at 91. Once again, the Government ignores the District Court's own words:

> The evidentiary hearing and record create a complex picture of Bourgeois' life, resulting in an entangled mosaic of strengths and limitations. . . . This Court's task in reviewing *Atkins*['s] second prong is to decide whether, on a global level, those problems amount to significant deficits in adaptive functioning. As previously mentioned, *this Court's review differs from that employed by the psychological community. The Court . . . compares the alleged deficiencies against his whole life experienc*e. . . .
>
> Bourgeois has not made a convincing showing that he suffers from significant adaptive deficits that would serve as a predicate for mental retardation. *The record shows strengths that more than coexist with weaknesses, they call into question the depth and accuracy of reports of those weaknesses*. The Court finds that Bourgeois has not shown substantial adaptive deficits by a preponderance of the evidence.

Bourgeois, 2011 WL 1930684, at *40, 44.

As it does in defense of the court's prong-one analysis, the Government attempts to reframe the court's findings as the product of a credibility determination among competing experts. Again, this ignores that the District Court expressly relied on its own lay assessment of Mr. Bourgeois's functioning. *See, e.g.*, *Bourgeois*, 2011 WL 1930684, at *43 ("This Court's observation of Bourgeois, both in the courtroom and in his video recordings, does not suggest

any impairment in the social domain."); *id.* at n.42 (Bourgeois "never gave the Court any impression that he functioned at an intellectual level equal to that of a child.").

And again, the Government ignores that the District Court's credibility determinations are unsupported by the diagnostic criteria. For instance, the Government first cites to the court's finding that Dr. Swanson failed to "make a full review of available evidence relating to Bourgeois's adaptive abilities." GR at 91. However, as discussed in the Petition, the court discounted Dr. Swanson's conclusion precisely because, unlike Dr. Moore, Dr. Swanson complied with diagnostic criteria. *See* Pet. ¶ 139. For instance, the court criticized Dr. Swanson for focusing on adaptive deficits rather than adaptive strengths, despite the court having acknowledged the medical community does the same. *See id.* Additionally, the court criticized Dr. Swanson for "refus[ing] to factor Bourgeois' long colloquies with the Court" into its assessment, even though Dr. Swanson explained that the AAIDD–2010 precludes reliance on "verbal behavior to infer level of adaptive behavior or about having ID." *Bourgeois*, at *42 n.69; Tr. 9/20/10 at 174. More generally, the court complained that a "persistent feature of the testimony from Bourgeois' experts"—including Dr. Swanson—"was a failure to consider fully his alleged intellectual limitations against the whole background of his life." *Bourgeois*, at *29. The court based this conclusion on the fact that "testimony from various individuals questioned his intellect when younger, [but] those who knew him as an adult did not suspect that he was mentally retarded." *Id.* However, *Moore–I* expressly struck down the *Briseño* factor that instructed courts to consider whether the person's "family, friends, teachers, [and] employers" thought he was ID. *Moore–I*, 137 S. Ct. at 1051 (citing *Briseño*, 135 S.W.3d at 8); *see also id.* ("[T]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled.").

The Government also cites to the District Court's decision to credit the scores obtained by Dr. Moore's administration of the ABAS to "multiple respondents"—Mr. Bourgeois's sister, Michelle Armont; co-workers Danny Clark and Rhonda Davis; and friend Nathaniel Banks—over the scores obtained by Dr. Swanson's administration of the Vineland and ABAS to Beverly Frank. GR at 91–92.

The Government's reliance on the ABAS scores argument also runs contrary to diagnostic standards. As noted in the Petition, even under ideal circumstances, formal adaptive behavior testing is far less reliable that IQ, achievement, or neuropsychological testing. For this reason, formal tests of adaptive behavior such as the ABAS are not meant to be the sole basis for an adaptive behavior assessment, but one piece of data alongside collateral reports from witness, record review, and more reliable neuropsychological and achievement testing. *See* Pet. at ¶¶ 77–81 (citing the AAIDD–10 and DSM–5).

In this case, the circumstances are not ideal. All formal adaptive behavior tests are designed for the contemporaneous assessment of the individual in question—meaning the report is asked about the individual's functioning right now. In an *Atkins* case, by necessity, all formal adaptive behavior instruments must be administered retrospectively—meaning the reporter is asked about the individual's functioning in the past. This departure from the test protocol undermines the reliability of the results. *See* Pet. ¶ 77. Experts for both parties, as well as the District Court, acknowledged the shortcomings with the formal adaptive behavior testing in this case. *Id.*; *Bourgeois*, 2011 WL 1930684, at *33. The Government's attempt to rely on this testing now runs contrary to the diagnostic standards and the testing protocol upon which the tests were based.

However, even assuming, *arguendo*, that the tests were appropriately relied on by the Government, these test results *supported* a finding of intellectual disability as the only one of Dr. Moore's respondents who produced valid results returned scores in the intellectually disabled range. The ABAS–II consists of a series of questions regarding the functioning of the individual being assessed. The respondents (including the respondents used by Dr. Moore), are required to answer each one of these questions, even if they are guessing and do not know what the answer to that question is. If a respondent provides more than three guess in any one of the ten skill areas addressed by the ABAS–II, then the validity of that respondent's answers are in question and the administrator is instructed to interview the respondent as to the reason for the guesses and consider if the respondent has sufficient knowledge for the administration of the ABAS–II to proceed or the test administration should be abandoned. Harrison, P. L. & Oakland, T., *Manual: Adaptive Behavior Assessment System–2d Ed.*, The Psychological Corporation (2003) at 23.

Here, where more than three guesses in one skill area would have been cause for concern, Mr. Clark, Ms. Davis, and Mr. Banks exceeded the three-guess threshold in eight of ten areas (Clark and Davis) or seven of ten areas (Banks). Moreover, Dr. Moore failed to perform the required follow-up interviews on the reason for the large number of guesses on any of these respondents. In the end, the two respondents who were able to validly assess Mr. Bourgeois's adaptive behavior under diagnostic standards—Ms. Armont and Ms. Frank—each placed him in the impaired range for all three domains of functioning and the composite score.[12] And Dr. Swanson's explanation that she did not administer additional formal testing because she was

[12] Ms. Armont's scores were as follows: General Adaptive Composite: 61, Conceptual: 55, Social: 60, Practical: 70. Ms. Frank's scores on the Vineland were General Adaptive Composite: 66; Communication (Conceptual): 69; Socialization (Social): 66; Daily Living Skills (Practical): 66.

unable to find another reporter with enough knowledge of Mr. Bourgeois's life to merit such testing, aside from Ms. Armont (who had already been given testing by Dr. Moore), is supported by Dr. Moore's results. *See* Tr. 9/20/10 at 154–56. Hence, the District Court's decision to credit Dr. Moore's testing and disregard that conducted by Dr. Swanson violated diagnostic standards and was merely another manifestation of its unscientific approach to ID.

It is also worth noting that the ABAS's ten skill areas correspond to the ten areas that the DSM–IV–TR used to measure adaptive functioning[13] and under that definition, Mr. Bourgeois need only have demonstrated deficits in *two* of the ten areas to satisfy prong two. *See* DSM–IV–TR at 41. Thus, even if the testing results of Mr. Clark, Ms. Davis, and Mr. Banks were treated as valid, the fact that they were unable to knowledgeably assess Mr. Bourgeois's functioning in the majority of skill areas makes those test results *irrelevant* to a clinical diagnosis of ID.

Finally, the Government contends that the District Court's prong-two analysis was a product not only of its crediting Dr. Moore over Dr. Swanson, but also of the court "reasonably assess[ing] and weight[ing] the reliability of competing lay testimony." GR at 92. However, because all of the Government's lay witnesses were colleagues of Mr. Bourgeois who knew him only in a work setting,[14] and because Mr. Bourgeois need have only established adaptive deficits

[13] As the District Court explained, at the time of Mr. Bourgeois's § 2255 proceedings, the AAIDD and APA used different "subcategories of deficiencies" under prong two, but the two approaches "capture the same range of functional aptitude." *Bourgeois*, 2011 WL 1930684, at *31.

[14] As noted above, because Mr. Bourgeois was only required to establish deficits in two of the DSM–IV–TR's ten skill areas, or one of the AAIDD's three types of adaptive behavior (conceptual, social, or practical), the fact that the Government's lay witnesses knew him only in a work setting severely limited the relevance of their testimony. These witnesses' testimony was also limited by the fact that none knew Mr. Bourgeois during the developmental period, particularly given that all of the experts agreed Mr. Bourgeois had become skilled at masking his deficits by the time he reached adulthood. *See* Pet. § III.C.3.d.

in one of the three AAIDD domains or two of the APA's ten skill areas, even if the District Court had fully credited the testimony of each of the Government's lay witnesses, Mr. Bourgeois would still meet the definition of intellectual disability.

2. Mr. Bourgeois's current *Atkins* claim relies on the application of the medical community's diagnostic standards, which was not available to him at the time of his initial § 2255 proceedings.

Given the impossibility of demonstrating that the § 2255 District Court's decision complies with *Moore–I* and *Moore–II*, the Government alternatively argues that Mr. Bourgeois's Petition should be rejected because it is simply an improper attempt to relitigate or appeal the § 2255 Court's 2011 denial of relief. *See, e.g.*, GR at 72 ("[T]hough Bourgeois seeks to characterize his *Atkins* claim as new (or at least revised), in reality he seeks to relitigate his same 2011 *Atkins* claim in this § 2241 habeas petition."); *id.* ("[T]he Southern District of Texas judge's legal and factual *Atkins* determinations are not unreasonable merely because the Supreme Court, a circuit court, or this Court 'would have reached a different conclusion in the first instance.'"). But Mr. Bourgeois does not dispute that the District Court's legal analysis was compelled by Fifth Circuit precedent valid at the time of its decision. Indeed, that is precisely the reason that Mr. Bourgeois did not seek a Certificate of Appealability on his *Atkins* claim. *See* Pet. ¶¶ 125–26 (describing Fifth Circuit's pre-*Moore–I* jurisprudence); *see also Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 231 (5th Cir. 2017) (recognizing that Fifth Circuit jurisprudence at the time of petitioner's initial habeas made an *Atkins* claim "unviable"). Rather, Mr. Bourgeois argues that he is constitutionally entitled to review of his *Atkins* claim under *Moore–I*, and that his claim relies on the application of standards not available under Fifth Circuit jurisprudence binding at the time of his § 2255 proceedings. And the Government's arguments against application of these current standards are unpersuasive.

a. Mr. Bourgeois is entitled to *Atkins* review under diagnostic and legal standards constitutionally-mandated at the time of his execution.

The Government's argument that Mr. Bourgeois has received his one and only shot at *Atkins* relief ignores that Supreme Court jurisprudence dating back to *Atkins* prohibits the *execution* of the intellectually disabled. In *Atkins*, the Court concluded that "[capital] punishment is excessive and that the Constitution 'places a substantive restriction on the State's power *to take the life*' of a mentally retarded offender." *Atkins*, 536 U.S. at 320 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986), which likewise categorically prohibits the *execution* of a particular class of capital prisoners); *id.* at 321 ("We are not persuaded that the *execution of mentally retarded* criminals will measurably advance the deterrent or the retributive purpose of the death penalty.").

In the years that followed, the Supreme Court repeatedly confirmed that *Atkins* prohibited the *execution* of the intellectually disabled, not just the imposition of the death sentence on intellectually disabled defendants. In 2005, when announcing a categorical ban on the execution of individuals who committed crimes as juveniles, the Supreme Court noted that *Atkins* bars "the *execution* of a mentally retarded person." *Roper v. Simmons*, 542 U.S. 551, 559 (2005). In 2014, the Supreme Court rejected practices relating to the interpretation of intelligence testing in *Atkins* proceedings that violated diagnostic standards because those invalid practices would create in an "unacceptable risk that persons with intellectual disability will be *executed*." *Hall*, 572 U.S. at 704 (emphasis added). In 2015, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), again confirmed that "[i]n [*Atkins*], this Court recognized that the *execution* of the intellectually disabled contravenes the Eighth Amendment's prohibition on cruel and unusual punishment" and that the "Eighth Amendment places a *substantive restriction* on the State's power to *take the life* of a mentally retarded offender." *Id.* at 2273–74 (emphasis added, internal citations and quotations omitted).

Finally, in 2017, *Moore–I* rejected invalid diagnostic practices, again because the use of such practices "creat[ed] and unacceptable risk that persons with intellectual disability will be *executed*." *Moore–I*, 137 S. Ct. at 1044 (quoting *Hall*, *supra*) (emphasis added).

The Government's argument also violates the right, created by *Moore–I*, to receive an *Atkins* adjudication under *current* diagnostic standards. As discussed in the Petition, *Moore–I* overturned the Texas CCA's outdated approach to ID, holding that courts must apply the "medical community's current standards" in making an *Atkins* determination. *Moore–I*, 137 S. Ct. at 1053. Citing manuals from the APA and AAIDD, *Moore–I* held that "[r]eflecting improved understanding over time, . . . current manuals offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* (internal quotations omitted). In accordance with this holding, *Moore–I* did not assess the CCA's post-conviction assessment of Mr. Moore's intellectual functioning based on the clinical definitions that were in place at the time of trial, but the diagnostic authorities that were present at the time *Moore–I* was litigated. *Id.* at 1050–53.[15]

That Supreme Court jurisprudence categorically bars the *execution* of the intellectually disabled, as opposed to simply the *imposition* of a death sentence on someone who is ID, is significant. Procedural barriers that would normally be permissible become constitutionally invalid if they permit an unconstitutional *execution* to occur. The Seventh Circuit described this dynamic in *Webster v. Daniels*:

> In Webster's case, the problem is that the Supreme Court has now established that the Constitution itself forbids the execution of certain people: those who satisfy the criteria for intellectual disability that the Court has established, and those who were

[15] As discussed below, this Court likewise applied current diagnostic standards—as opposed to the standards applicable at the time of trial or § 2255 proceedings—in reviewing Bruce Webster's *Atkins* claim under § 2241. *See Webster*, 2019 WL 2514833, at *3 (citing *Moore–I*, 137 S. Ct. at 1045); *see also infra* § I.B.2.a.

> below the age of 18 when they committed the crime.[] In virtually all other situations, Congress has almost unlimited discretion to select the penalty, or the range of penalties, that go along with a particular crime. If Congress selects 20 years, but because of some error that went undetected through direct appeals and an initial motion under section 2255 the defendant receives 25 years, there is no doubt a problem, but it is likely not one of constitutional dimension. Congress could have chosen 25 years to begin with, and the defendant would have had nothing to complain about.

784 F.3d 1123, 1139 (7th Cir. 2015).

The Seventh Circuit went on to describe the "'Kafkaesque' nature of a procedural rule that, if construed to be beyond the scope of the savings clause, would (or could) lead to an unconstitutional punishment." *Id*. at 1139. It accordingly recognized that, where (as here) a "structural problem" with § 2255 prevents a petitioner from establishing that he is categorically exempt from execution, the petitioner may bring a § 2241 petition. *Id*. "To hold otherwise," the Seventh Circuit explained, "would lead in some cases . . . to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.*; *see also id.* (noting that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence").

b. *Moore–I* and *Moore–II* changed the legal landscape governing *Atkins* litigation in the Fifth Circuit, thereby making *Atkins* newly available to him.

The Government also insists that Mr. Bourgeois could have relied on the principles enunciated in *Moore–I* and *Moore–II*, "in his first § 2255 motion," which was filed in 2007. GR at 63; *see also* GR at 75 ("[N]either *Hall* nor *Moore* can be understood to yield a result so novel that Bourgeois could not have advanced his legal theories earlier on appeal from the district court's denial of his *Atkins* claim."). But the Government defeats its own argument in its attempt to defend the § 2255 Court's contra-diagnostic analysis of Mr. Bourgeois claim in 2011. Specifically, in Section B of its Response, the Government repeatedly points out that the *Atkins* decision did not prescribe any particular approach to the assessment of ID. *See, e.g.*, GR at 77–

78 ("[T]he [District Court] properly concluded . . . that *Atkins* 'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within the *Atkin*s compass.'"); *id.* at 78 ("The district court correctly held that *Atkins* did not delegate to the psychologists the determination of whether an inmate was categorically exempt from execution, but left 'the contours of the constitutional protection to the courts.'"). As the Government concedes, *Atkins* did not mandate the application of diagnostic standards in the assessment of ID. That is precisely why the Government is *incorrect* when it argues that § 2241 is unavailable to Mr. Bourgeois because he could have appealed the District Court's "factual and legal determinations as an unreasonable application of *Atkins*." GR at 75. Prior to *Moore–I*, which *mandates* application of medical standards in the evaluation of *Atkins* claims, Mr. Bourgeois has no authority to challenge settled Fifth Circuit that supported the use of non-scientific factors in the disposition of an *Atkins* claim.

At the very least, there is no question that prior to *Moore–I*, the Fifth Circuit[16] applied the same contra-diagnostic standards that the CCA had applied in the case of Bobby Moore. *See* Pet. § IV.A.2. Indeed, when this Court reviewed Bruce Webster's § 2241 *Atkins* claim on remand in 2019, it applied the principles enunciated in *Moore–I* and reached starkly different conclusions than those reached by the Northern District Court of Texas and Fifth Circuit in Mr. Webster's § 2255 proceedings. *See Webster*, 2019 WL 2514833. For instance, in *Webster*, the § 2255 court supported its conclusion that Mr. Webster did not satisfy prong two by citing to testimony of his purported adaptive strengths and relying largely on erroneous stereotypes of ID. *See Webster v.*

[16] As explained in the Petition, § 2241 is available to petitioners if circuit precedent would have required the district court and appellate panel to erroneously reject petitioner's claim at the time of his § 2255 motion. *See* Pet. § IV.A.2 (citing *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998)).

United States, 4:00–CV–1646, 2003 WL 23109787, at *14 (N.D. Tex. Sept. 30, 2003), *aff'd* 392 F.3d 787 (5th Cir. 2004). By contrast, as required by *Moore–I*, this Court focused on adaptive deficits and gave no weight to evidence of purported strengths that are entirely consistent with a diagnosis of ID:

> The Government has pointed to evidence that Webster does exhibit areas of strength, including, but not limited to, his *musical ability, excellent hygiene, ability to drive, achievement test scores, and ability to engage in conversation*. . . . However, in accordance with guidance from the medical community and as instructed by the Supreme Court, the Court has focused its adaptive-functioning inquiry on adaptive deficits.

Webster, 2019 WL 2514833, at *10; *see also* Pet. § IV.A.2 (describing that the Government presented similar evidence of purported strengths in Mr. Bourgeois's case, which the District Court improperly found defeated his ID claim). The § 2255 court in *Webster* had also relied on testimony of petitioner's adaptive functioning from prison guards and Government experts who had evaluated Mr. Webster while incarcerated. *See Webster*, 2003 WL 23109787, at *13–14. This Court, however, gave "little weight" to evidence of Mr. Webster's adaptive functioning in prison, citing *Moore–I* for the proposition that "[c]linicians . . . caution against reliance on adaptive strengths developed in a controlled setting, as a prison surely is." *Id.* (citing *Moore–I*, 137 S. Ct. at 1050) (internal quotation marks omitted).

Mr. Webster also presented newly discovered evidence in support of his § 2241 *Atkins* claim. But, according to the Government, "much of what he produce[d] [was] cumulative to evidence produced at trial," and in any event, the "newly available evidence ha[d] insufficient gravitas to raise doubt about earlier fact-finding." *See Webster v. Lockett*, Case 2:12–cv–00086–JPH–MJD, ECF Doc. 17 at 11, 14 (filed Aug. 7, 2012). Hence, the application of diagnostic criteria as newly required by *Moore–I*, rather than the unscientific standards applied under pre-*Moore–I* Fifth Circuit jurisprudence, had a significant impact on Mr. Webster's ultimate success

in this Court. The results will be the same in Petitioner's case if he is permitted to proceed under § 2241.

Lastly, while the Government cites to *Shoop v. Hill*, 139 S. Ct. 504, 508 (2019), to support its claim that Mr. Bourgeois could have relied on *Moore–I* and *Moore–II* in 2011, *see* GR at 62, *Shoop* actually *defeats* the Government's argument. There, the Sixth Circuit had cited *Moore–I* in granting habeas relief to a petitioner under 28 U.S.C. § 2254 on the grounds that the state court's pre–*Moore–I* denial of *Atkins* relief unreasonably "overemphasized Hill's adaptive strengths" and "relied too heavily" on prison functioning. *Shoop*, 139 S. Ct. at 506. The Supreme Court reversed, explaining:

> Although the Court of Appeals asserted that the holding in *Moore* was "merely an application of what was clearly established by *Atkins*," the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed "mental retardation." While *Atkins* noted that standard definitions of mental retardation included as a necessary element "significant limitations in adaptive skills . . . that became manifest before age 18," *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States.

Id. at 508 (internal citations omitted). In other words, the *Shoop* Court *rejected* the proposition advanced by the Government here, which is that *Moore–I* added nothing novel to *Atkins*. And in any event, *Shoop* was limited to the narrow question of whether *Moore–I* constitutes clearly established federal law for purposes of a § 2254(d) analysis, and does not address the issue of whether the petitioner may be constitutionally executed, which is the only issue relevant here.

c. Constitutional cases involving a categorical ban against execution may provide the basis for § 2241 jurisdiction.

Next, the Government contends that Mr. Bourgeois cannot rely on *Moore–I* and *Moore–II* as bases for § 2241 jurisdiction because they are "constitutional cases," as opposed to changes in statutory law. *See* GR at 60 ("Constitutional claims, unlike statutory claims, do not reveal 'some kind of structural problem with § 2255' that forecloses a single round of judicial review.")

(quoting *Fulks*, 2019 WL 4600210, at *10). In support of this position, the Government argues that if a petitioner could rely on a new, non-retroactive constitutional case to establish § 2241 jurisprudence, Bruce Webster would have simply relied on the Supreme Court's decision in *Hall v. Florida*, as opposed to newly discovered evidence. GR at 60 n.12. But the *Hall* decision relates specifically to the prong-one component of an ID analysis, whereas Mr. Webster's initial § 2255 *Atkins* claim was denied on the basis of prong two. *See Webster*, 784 F.3d at 1132 (noting that in Mr. Webster's initial § 2255 proceedings, the Fifth Circuit "was willing to accept that Webster had a low I.Q.," but "found that the government's evidence of his adaptive functioning had effectively countered those numbers"); *id.* at 1143 (noting that, contrary to the situation in *Hall*, the main area of dispute between the parties was primarily adaptive functioning, and describing Mr. Webster's case as "*the reverse* of the of the one the Supreme Court discussed in *Hall*"). Thus, *Hall* played no role in *Webster* not because it is a "constitutional case," but because *Hall* was of no use to Mr. Webster. Meanwhile, *Webster* *did* involve a constitutional case to the extent that, like Mr. Bourgeois, the Mr. Webster sought to relitigate a previously-unavailable claim under *Atkins* and its progeny.

The Government also cites to *Poe*, 834 F.3d at 772, in support of its claim that a constitutional case cannot be used to satisfy the Savings Clause. *See* GR at 60. But the *Poe* holding is based on the fact that petitioner could have brought his § 2241 claim under § 2255 but for his own failure to comply with the statute of limitations. Thus, as in other Seventh Circuit cases, *see* Pet. ¶¶ 104–09 & *supra* § I.A, the *Poe* court did not base its jurisdictional ruling on any particular characterization of the petitioner's argument; it merely considered whether the petitioner was able to establish that, *as a structural matter*, he was precluded from bringing his § 2241 claim under § 2255. *Poe*, 834 F.3d at 774 (distinguishing Mr. Poe's case from that of Mr.

Webster on the ground that Poe "was unable to bring his *Richardson* claim because *he* filed the wrong petition under § 2241 and his subsequent petition under § 2255 was untimely") (emphasis in original). Here, Mr. Bourgeois raises a claim of categorical exemption from execution that, like Mr. Webster's and in contrast to Mr. Poe's, could not have been successfully raised in § 2255 proceedings and could not be raised in a successor § 2255 motion.

d. The application of current diagnostic standards will not "forever forestall[] a final decision" in Mr. Bourgeois's case.

Next, the Government argues that Mr. Bourgeois should not be allowed to rely on new diagnostic standards as a basis for § 2241 jurisdiction because doing so "would permit him to 'refile his claims with each revision of the medical standards governing the diagnosis of intellectual disability' forever forestalling a final decision in this case." GR at 66 (citing *Fulks*, 2011 WL 1930684, at *14). But Mr. Bourgeois does not ask for § 2241 review based solely on his status as an intellectually disabled person. He bases his request for review on the fact that he is perhaps the only § 2255 litigant who raised a timely and meritorious *Atkins* claim, but was denied relief on the basis of circuit jurisprudence subsequently invalidated by *Moore–I*.

Notably, the Government also raised the specter of unending litigation in opposing this Court's jurisdiction under § 2241 in the *Webster* case:

> Webster has had the opportunity for one round of effective collateral review. If he is correct that he must be permitted a second chance to prove his mental retardation because of "new evidence," then will he be permitted a third or fourth chance if he produces still more evidence. For example, if Webster takes another IQ test or has another expert evaluate his adaptive skills, what prevents him from claiming that he must be allowed to proceed under section 2241 once again because he has "new evidence"?

Doc. 17 at 10. The Seventh Circuit rejected this argument based on a finding that Mr. Webster's case presented unique circumstances in that the new evidence existed at the time of trial, could not have been discovered by diligent trial counsel, and bore "directly on the constitutionality of

the death sentence." *Webster*, 784 F.3d at 1140 (noting that it "will be a rare case" that meets these requirements, "but not impossible").

Mr. Bourgeois also presents a "rare case." This is not a claim like the one presented in *Fulks*, in which the petitioner conceded that he would not have been ID under diagnostic standards in effect at the time of his § 2255 proceedings. *Fulks*, 2019 WL 4600210, at *11. Here, Mr. Bourgeois has established that, if his claim is assessed under the medical community's diagnostic standards—as of 2011 or as of today—he is undeniably ID. Yet the framework of § 2255 has no mechanism under which he can vindicate his claim.

C. Mr. Bourgeois's Petition Is Neither an Abuse of the Writ Nor Barred by *Teague*.

Lastly, the Government argues that Mr. Bourgeois's Petition is an abuse of the writ and premised on a theory at odds with *Teague v. Lane*, 489 U.S. 288 (1989). GR at 66–71. This argument suffers from several flaws.

1. Mr. Bourgeois's petition is not an abuse of the writ.

First, the Government cites to *Roundtree v. Krueger*, 910 F.3d 312 (7th Cir. 2018), to argue that Mr. Bourgeois's petition constitutes an abuse of the writ. Yet *Roundtree* provides no support for the Government's position. There, the petitioner successfully filed a second § 2255 motion in the Eighth Circuit based on a new retroactive rule of law, but was denied relief because his claim was procedurally defaulted. *Id.* at 312–13. Mr. Roundtree then raised the same claim in the Seventh Circuit under § 2241. After observing that § 2255 is "inadequate or ineffective" when it cannot be used to address novel legal developments, the Seventh Circuit dismissed the petition because Mr. Roundtree relied on no such new law. Rather, he was attempting to relitigate the exact same claim that was resolved in his § 2255 proceedings. *See id.* at 313 (finding nothing in Seventh Circuit jurisprudence that "permits relitigation under § 2241

of a contention that was actually resolved in a proceeding under § 2255, *unless the law changed after the initial collateral review*"). *Id.* at 313. In short, Mr. Roundtree's § 2241 petition was dismissed because he did not "contend that the law has changed in the slightest after the Eighth Circuit rejected his contentions," and his "problem [lay] not in § 2255 but in his own failure to object at trial." *Id.* at 313–14.

By contrast, Mr. Bourgeois's claim very clearly relies on changes in the law that postdate his initial collateral review; he cites to *Moore–I* and *Moore–II* throughout his Petition to establish that *Atkins* was not available to him until the Supreme Court invalidated the Fifth Circuit jurisprudence applicable at the time of his initial § 2255 proceedings. And, unlike Mr. Roundtree, Mr. Bourgeois is not precluded from obtaining successive § 2255 relief based on a procedural default, but rather because he was *too diligent* in bringing an *Atkins* claim at a time when Fifth Circuit jurisprudence made that claim unviable. *See* Pet. ¶ 10.

2. *Teague* is not relevant to either of Mr. Bourgeois's jurisdictional arguments.

Next, the Government argues that "*Teague* bars Bourgeois' reliance on *Moore* to revitalize his *Atkins* claim," as "*Moore* did not announce a new rule that could apply retroactively under *Teague*." GR at 68. As an initial matter, the Government cites to nothing to support the notion that *Teague* applies to claims brought under § 2241. *See* GR at 68 (citing *Horn v. Banks*, 536 U.S. 266 (2002), which holds federal courts must conduct *Teague* review in § 2254 cases if the state so requests, and *Van Daalwyk v. United States*, 21 F.3d 179, 180 (7th Cir. 1994), which holds that *Teague* is applicable to collateral challenges to federal convictions under § 2255).

In any event, Mr. Bourgeois has never argued that *Moore–I* is a new retroactive rule; he did not raise that argument in his petition for authorization to file a second § 2255 motion in the

Fifth Circuit, and he does not raise it now. Rather, his argument is that *Moore–I* made *Atkins*—which is indisputably retroactive—newly available to him by invalidating the Fifth Circuit precedent that had precluded him from successfully raising an *Atkins* claim in his initial § 2255 proceedings. *See* Pet. ¶ 10. The Fifth Circuit has permitted other, less diligent petitioners to raise untimely *Atkins* claims in successive petitions based on nearly identical theories, but Mr. Bourgeois was denied the same opportunity under § 2255 for procedural reasons. *See id.* (citing *In re Cathey*, 857 F.3d at 231–32 and *In re Johnson*, 2019 WL 3814384, at *5–6). Mr. Bourgeois then filed his § 2241 Petition with this Court, arguing that he is intellectually disabled and constitutionally exempt from execution, but without an avenue under § 2255 to vindicate his claim for relief.

In *Cathey*, the Fifth Circuit rejected an argument similar to the one the Government makes here, although the issue there was not *Teague*, but whether petitioner could bring a successor *Atkins* claim under § 2244(b)(2)(A).[17] Mr. Cathey relied on a change in the Fifth Circuit's approach to the intellectual-functioning prong of ID, announced in *In re Salazar*, 443 F.3d 430 (5th Cir. 2006), to argue that *Atkins* was "newly available" to him within the meaning of AEDPA. The state opposed this theory on the ground that circuit law did "not represent a new rule of constitutional law recognized by the Supreme Court" that would allow Mr. Cathey to escape the bar on successive petitions. The Fifth Circuit disagreed, explaining that Mr. Cathey was not arguing that *Salazar* was "a new rule of constitutional law for § 2244(b)(2) purposes," but rather was using the new law "to support his contention" that any *Atkins* claim filed in his initial habeas petition would have been "unviable." *In re Cathey*, 857 F.3d at 231.

[17] 28 U.S.C. § 2244(b)(2)(A) allows state prisoners to bring a successive § 2254 petition where the "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

The same is true here: Mr. Bourgeois relies on *Moore–I*, which overruled the "legal" approach to ID employed by the Fifth Circuit at the time of his initial § 2255 proceedings, to support his contention that *Atkins* was previously unavailable to him.[18] Thus, Mr. Bourgeois is entitled to review of his newly-viable *Atkins* claim, and he has established that he is unable to obtain this review under § 2255 due to a structural problem with the statute, allowing him to pass through the Savings Clause and proceed under § 2241. *Teague* is irrelevant to this argument.

Nor does *Teague* bar Mr. Bourgeois from relying on *Moore–I* and *Moore–II* to establish that, under the medical community's diagnostic standards, he is intellectually disabled and categorically exempt from execution. Indeed, after determining that § 2241 jurisdiction was appropriate, the Seventh Circuit in *Webster* expressly directed this Court to consider Mr. Webster's claim on remand "under *Atkins* and *Hall*," even though *Hall* has not been declared retroactive by the Supreme Court. *Webster*, 784 F.3d at 1146. Furthermore, when this Court analyzed Mr. Webster's claim in 2019, it did so under the standards articulated in *Moore–I*, without any discussion of retroactivity or *Teague*. *See Webster*, 2019 WL 2514833, *3–11.[19] Similarly, once the Fifth Circuit had ruled that *Atkins* was "newly available" to the petitioner in

[18] In *Cathey*, the state also challenged the notion that *Atkins* was "unavailable" to Mr. Cathey in 2004 just because his claim would have been meritless under then-binding Fifth Circuit jurisprudence. The Fifth Circuit again disagreed, explaining that the "argument assumes the conclusion: that claims are 'available' despite being meritless." *In re Cathey*, 857 F.3d at 231; *see also id.* ("[T]he State's contention that a claim's legal availability 'does not depend on its prior success in lower courts' is not sound in the context of this particular *Atkins* claim.").

[19] Notably, the Government also applied *Moore–I* in the Proposed Findings of Fact and Conclusions of Law it submitted to this Court on remand in *Webster*, also without any discussion of retroactivity or *Teague*. *See Webster*, Case 2:12–cv–00086, ECF Doc. 195 (filed May 24, 2019).

Cathey, it conducted a prima facie merits determination of Mr. Cathey's *Atkins* claim under the standards of *Hall* and *Moore*. *In re Cathey*, 857 F.3d at 236–40.

Teague is also irrelevant to Mr. Bourgeois's alternative basis for § 2241 jurisdiction, which is that he is entitled to review under § 2241, as opposed to § 2255, because his challenge goes not only to the imposition of his sentence,[20] but also to the *execution* thereof. *See* Pet. ¶¶ 155–59. The Seventh Circuit has repeatedly held § 2241 is the appropriate vehicle for such claims. *See id.* (citing *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003), and *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998)).

The *Teague* doctrine was animated by "interests of comity and finality." *Teague*, 489 U.S. at 308. As the Supreme Court explained in announcing the rule:

> In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Id. at 310 (internal citations omitted). Neither of these concerns is implicated by Mr. Bourgeois's claim that he may challenge the *execution* of his sentence under § 2241, which is an argument that rests on constitutional and federal statutory law prohibiting the Government from carrying out an execution on an individual who is intellectually disabled at the time of that execution. *See infra* § II. Indeed, this jurisdictional basis could be sustained under the FDPA alone, as it

[20] In its Response, the Government misleadingly states that "Bourgeois does not claim that his sentence violated *Atkins* at the time it was imposed," citing to the portion of Mr. Bourgeois's Petition setting for his alternative basis for jurisdiction. *See* GR at 66 (citing Petition, p. 72 ¶156). In fact, as made clear in the Petition, Mr. Bourgeois challenges *both* the imposition *and* the execution of his death sentence.

precludes the "carrying out" of an execution against a person who "is" ID, and the *Teague* rule applies to new rules of constitutional law only. *See* 18 U.S.C. § 3596(c); *see also infra* § II.

3. *Teague* cannot preclude review of Mr. Bourgeois's claim that he is categorically ineligible for execution under the Constitution.

Regardless of the jurisdictional basis for Mr. Bourgeois's Petition, *Teague* cannot be applied here. *Teague* is a judge-made, prudential doctrine that was announced well before the decision in *Atkins*. *See Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (stating that "*Teague* is plainly grounded" in the authority of federal courts "to adjust the scope of the writ in accordance with equitable and prudential considerations"). And "the problem is that the Supreme Court has now established that the Constitution itself forbids the execution of certain people," including "those who satisfy the criteria for intellectual disability." *Webster*, 784 F.3d at 1139.

As described above, *see supra* § I.B.2.a, the *Webster* court determined that, although Congress has virtually unlimited discretion to set sentences for federal crimes and therefore can statutorily preclude collateral challenges to those sentences, this is not the case where the sentence is constitutionally prohibited. *Id.* at 1139 (stressing that "a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence"). While *Teague* is a judge-made rule as opposed to a statutory one, the result is the same: applying *Teague* to foreclose Mr. Bourgeois's claim of categorical ineligibility from execution would result in the same "Kafkaesque" scenario as allowing the procedural language of § 2255(h) to foreclose Mr. Webster's claim. Thus, just as the Seventh Circuit rejected the Government's argument in *Webster* that the wording of § 2255(h) could render an *Atkins* claim "beyond the scope of the savings clause" and "create the possibility of an unconstitutional punishment," *id.*, this Court should reject the argument that *Teague* could do the same. *Cf. Hall*, (striking down Florida statute imposing strict IQ cut-off because the rule "create[d] an unacceptable risk that persons

with intellectual disability will be executed, and thus [was] unconstitutional"); *Moore–I*, 137 S. Ct. at 1044 (rejecting invalid diagnostic practices because the use of such practices "creat[ed] and unacceptable risk that persons with intellectual disability will be executed").

II. THE GOVERNMENT HAS NOT CHALLENGED THAT MR. BOURGEOIS MAY PROCEED UNDER § 2241 BECAUSE HE CHALLENGES THE EXECUTION, AS WELL AS THE IMPOSITION, OF HIS SENTENCE.

Despite submitting a lengthy Response opposing Mr. Bourgeois's Petition, the Government completely fails to challenge Mr. Bourgeois's claim that he is also entitled to review under § 2241 because his challenge goes not only to the imposition of his sentence, but also to the *execution* thereof. *See* Pet. ¶¶ 155–59.

As stated above, the plain language of the FDPA and of numerous Supreme Court decisions dating back to *Atkins* categorically bans *the carrying out of an execution* on an intellectually disabled person. *See* Pet. ¶¶ 156–57; *see also* 18 U.S.C. § 3596(c) ("A sentence of death *shall not be carried out* upon a person who *is* mentally retarded."); *supra* § I.B.2.b (summarizing Supreme Court jurisprudence). What is more, Congress forbids not only the *execution* of the intellectually disabled, but, more precisely, the imposition of that penalty against any person who "is" of that category. 18 U.S.C. § 3596(c). Petitioner's claim is that he "is" intellectually disabled and therefore ineligible for execution at this time, and therefore, that the legal measure of his disability under the Eighth Amendment must be the measure that applies today, which rests on the clinical standards of specialists in the field rather than the lay standards of judges, jurors, or even a prisoner's co-workers or jailers. *See Moore–I*, 137 S. Ct. at 1053.

The Government not only admits, but insists, that *Moore–I* has not been declared retroactive by the Supreme Court, and that Petitioner cannot seek relief in the form of a successive petition under 28 U.S.C. § 2255. *See* GR at 6–7, 61–63. But that is the point: Petitioner brings a compelling claim that he "is" intellectually disabled and that the Constitution

and the laws of the United States forbid his execution. This is necessarily a challenge to the *execution* of his death sentence rather than its *imposition*. *Compare* 18 U.S.C. § 3596(c) ("A sentence of death *shall not be carried out*. . . ."), *with* 28 U.S.C. § 2255(a) ("A prisoner . . . claiming the right to be released upon the ground that the sentence *was imposed* in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.").

Finally, as discussed above, *Atkins* categorically prohibits the *execution* of the intellectually disabled, and this holding has been repeatedly reaffirmed by the Supreme Court. *See supra* § I.B.2. Construing any *Atkins* challenge as a challenge to the *imposition* of the petitioner's death sentence would necessarily exclude challenges from petitioners like Mr. Bourgeois who were determined not to be ID under the legal standards prevailing at the time of § 2255 proceedings, but are ID under current standards. And this would create the precise situation that both the Supreme Court and the Seventh Circuit have sought to avoid: an unacceptable risk that an intellectually disabled person will be executed. *See Moore–I*, 137 S. Ct. at 1043; *Hall*, 572 U.S. at 704; *Webster*, 784 F.3d at 1139.

III. MR. BOURGEOIS IS ENTITLED TO A STAY OF EXECUTION.

Petitioner's request for a stay is simple: the Court should delay Mr. Bourgeois's imminent execution to allow for full and fair review of his *Atkins* claim under constitutionally-mandated diagnostic standards. In his Motion for Stay of Execution, Petitioner established that he meets each of the factors governing such requests: (i) a significant possibility of success on the merits; (ii) irreparable harm will result in the absence of the stay; (iii) the balance of harms is

in favor of the moving party; and (iv) the public interest supports a stay. The Government's Response in no way diminishes these arguments.

First, the Government repeats the same unconvincing allegations discussed above, namely that Mr. Bourgeois cannot proceed under § 2241 because he "does not meet the tests under either *Davenport* or *Webster*;" that Mr. Bourgeois already received a reliable judicial determination on his *Atkins* claim in his initial § 2255 proceedings; and that in any event he is not entitled to review of his claim under the medical community's diagnostic standards because *Moore–I* and *Moore–II* are not retroactively applicable. GR at 93–95. For all of the reasons discussed in the Petition and this Reply, these arguments do not weigh against Mr. Bourgeois's right to review under § 2241 or his likelihood of success on the merits of his *Atkins* claim.

The Government also asserts that it "has a strong interest in enforcing Bourgeois' death sentence," but as the Supreme Court has recognized, "[n]o legitimate penological purpose is served by executing a person with intellectual disability." *Hall*, 134 S. Ct. at 1992.

Finally, the Government incorrectly asserts that "Mr. Bourgeois does not claim that his sentence violated *Atkins* at the time the jury unanimously imposed it,"[21] and that "he does not fall within a class of persons the Eighth Amendment categorically exempts from execution." GR at 95. In fact, Mr. Bourgeois's claim is that he is now and has at all times been ID under the medical community's diagnostic standards. He has never been given the opportunity to establish the merits of that claim under the appropriate scientific standards, and is entitled to a stay of his execution so that he may do so now.

[21] As explained above, the Government misleadingly bases this argument on Mr. Bourgeois's claim that he is entitled to review under § 2241 based on the execution, *as well as the imposition*, of his death sentence. *See supra* n.20.

REQUEST FOR ORAL ARGUMENT

Counsel for Mr. Bourgeois respectfully requests the opportunity to argue the pending petition for writ of habeas corpus and motion for stay of execution, in light of the factual and legal complexity surrounding the issues involved in this death penalty proceeding, and in particular, the questions concerning the Court's jurisdiction and authority to resolve the merits of Petitioner's claim and to stay, and ultimately prohibit, an execution that would violate the Eighth Amendment as well as Congress's directive that "a sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c).

CONCLUSION

For the reasons above and in his Petition, Mr. Bourgeois requests that the Court provide the following relief:

A) That an evidentiary hearing be conducted on the merits of Petitioner's claims, any procedural issues, and all disputed issues of fact;

B) That leave to amend this Petition be granted, if necessary, after further fact development through investigation and an evidentiary hearing;

D) That Petitioner be allowed a reasonable time to file a memorandum of law in support of this Petition following any further fact development or following the denial of fact development; that the Government be allowed a reasonable time to respond; and that Petitioner be allowed a reasonable time to reply;

E) That oral argument be held on the pending petition for writ of habeas corpus and motion for stay of execution; and

F) That habeas relief from Petitioner's sentence of death be granted.

Respectfully submitted,

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Dated: November 15, 2019

CERTIFICATE OF SERVICE

I, Peter Williams, hereby certify that on this 15th day of November, 2019, a copy of the forgoing was served via ECF filing on the following people:

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Special Assistant United States Attorney
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/s/ Peter Williams
Peter Williams

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS

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cians an opportunity to document factors that may have played a role in the etiology of the disorder, as well as those that might affect the clinical course. Examples include genetic disorders, such as fragile X syndrome, tuberous sclerosis, and Rett syndrome; medical conditions such as epilepsy; and environmental factors, including very low birth weight and fetal alcohol exposure (even in the absence of stigmata of fetal alcohol syndrome).

Intellectual Disabilities

Intellectual Disability (Intellectual Developmental Disorder)

Diagnostic Criteria

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

Note: The diagnostic term *intellectual disability* is the equivalent term for the ICD-11 diagnosis of *intellectual developmental disorders.* Although the term *intellectual disability* is used throughout this manual, both terms are used in the title to clarify relationships with other classification systems. Moreover, a federal statute in the United States (Public Law 111-256, Rosa's Law) replaces the term *mental retardation* with *intellectual disability,* and research journals use the term *intellectual disability.* Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups.

Specify current severity (see Table 1):

317 (F70) Mild
318.0 (F71) Moderate
318.1 (F72) Severe
318.2 (F73) Profound

Specifiers

The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required. Moreover, IQ measures are less valid in the lower end of the IQ range.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder)

Severity level	Conceptual domain	Social domain	Practical domain
Mild	For preschool children, there may be no obvious conceptual differences. For school-age children and adults, there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (e.g., reading, money management), are impaired. There is a somewhat concrete approach to problems and solutions compared with age-mates.	Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers' social cues. Communication, conversation, and language are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in age-appropriate fashion; these difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others (gullibility).	The individual may function age-appropriately in personal care. Individuals need some support with complex daily living tasks in comparison to peers. In adulthood, supports typically involve grocery shopping, transportation, home and child-care organizing, nutritious food preparation, and banking and money management. Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills. Individuals generally need support to make health care decisions and legal decisions, and to learn to perform a skilled vocation competently. Support is typically needed to raise a family.

TABLE 1 *Severity levels for intellectual disability (intellectual developmental disorder) (continued)*

Severity level	Conceptual domain	Social domain	Practical domain
Moderate	All through development, the individual's conceptual skills lag markedly behind those of peers. For preschoolers, language and pre-academic skills develop slowly. For school-age children, progress in reading, writing, mathematics, and understanding of time and money occurs slowly across the school years and is markedly limited compared with that of peers. For adults, academic skill development is typically at an elementary level, and support is required for all use of academic skills in work and personal life. Ongoing assistance on a daily basis is needed to complete conceptual tasks of day-to-day life, and others may take over these responsibilities fully for the individual.	The individual shows marked differences from peers in social and communicative behavior across development. Spoken language is typically a primary tool for social communication but is much less complex than that of peers. Capacity for relationships is evident in ties to family and friends, and the individual may have successful friendships across life and sometimes romantic relations in adulthood. However, individuals may not perceive or interpret social cues accurately. Social judgment and decision-making abilities are limited, and caretakers must assist the person with life decisions. Friendships with typically developing peers are often affected by communication or social limitations. Significant social and communicative support is needed in work settings for success.	The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas, and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed, and ongoing supports will typically occur for adult-level performance. Independent employment in jobs that require limited conceptual and communication skills can be achieved, but considerable support from co-workers, supervisors, and others is needed to manage social expectations, job complexities, and ancillary responsibilities such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can be developed. These typically require additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.

TABLE 1 Severity levels for intellectual disability (intellectual developmental disorder) *(continued)*

Severity level	Conceptual domain	Social domain	Practical domain
Severe	Attainment of conceptual skills is limited. The individual generally has little understanding of written language or of concepts involving numbers, quantity, time, and money. Caretakers provide extensive supports for problem solving throughout life.	Spoken language is quite limited in terms of vocabulary and grammar. Speech may be single words or phrases and may be supplemented through augmentative means. Speech and communication are focused on the here and now within everyday events. Language is used for social communication more than for explication. Individuals understand simple speech and gestural communication. Relationships with family members and familiar others are a source of pleasure and help.	The individual requires support for all activities of daily living, including meals, dressing, bathing, and elimination. The individual requires supervision at all times. The individual cannot make responsible decisions regarding well-being of self or others. In adulthood, participation in tasks at home, recreation, and work requires ongoing support and assistance. Skill acquisition in all domains involves long-term teaching and ongoing support. Maladaptive behavior, including self-injury, is present in a significant minority.
Profound	Conceptual skills generally involve the physical world rather than symbolic processes. The individual may use objects in goal-directed fashion for self-care, work, and recreation. Certain visuospatial skills, such as matching and sorting based on physical characteristics, may be acquired. However, co-occurring motor and sensory impairments may prevent functional use of objects.	The individual has very limited understanding of symbolic communication in speech or gesture. He or she may understand some simple instructions or gestures. The individual expresses his or her own desires and emotions largely through nonverbal, nonsymbolic communication. The individual enjoys relationships with well-known family members, caretakers, and familiar others, and initiates and responds to social interactions through gestural and emotional cues. Co-occurring sensory and physical impairments may prevent many social activities.	The individual is dependent on others for all aspects of daily physical care, health, and safety, although he or she may be able to participate in some of these activities as well. Individuals without severe physical impairments may assist with some daily work tasks at home, like carrying dishes to the table. Simple actions with objects may be the basis of participation in some vocational activities with high levels of ongoing support. Recreational activities may involve, for example, enjoyment in listening to music, watching movies, going out for walks, or participating in water activities, all with the support of others. Co-occurring physical and sensory impairments are frequent barriers to participation (beyond watching) in home, recreational, and vocational activities. Maladaptive behavior is present in a significant minority.

Diagnostic Features

The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5). Clinical training and judgment are required to interpret test results and assess intellectual performance.

Factors that may affect test scores include practice effects and the "Flynn effect' (i.e., overly high scores due to out-of-date test norms). Invalid scores may result from the use of brief intelligence screening tests or group tests; highly discrepant individual subtest scores may make an overall IQ score invalid. Instruments must be normed for the individual's sociocultural background and native language. Co-occurring disorders that affect communication, language, and/or motor or sensory function may affect test scores. Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning.

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

Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical. The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The *practical domain* involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders influence adaptive functioning.

Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment. When standardized testing is difficult or impossible, because of a variety of

factors (e.g., sensory impairment, severe problem behavior), the individual may be diagnosed with unspecified intellectual disability. Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.

Criterion B is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A. Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

Associated Features Supporting Diagnosis

Intellectual disability is a heterogeneous condition with multiple causes. There may be associated difficulties with social judgment; assessment of risk; self-management of behavior, emotions, or interpersonal relationships; or motivation in school or work environments. Lack of communication skills may predispose to disruptive and aggressive behaviors. Gullibility is often a feature, involving naiveté in social situations and a tendency for being easily led by others. Gullibility and lack of awareness of risk may result in exploitation by others and possible victimization, fraud, unintentional criminal involvement, false confessions, and risk for physical and sexual abuse. These associated features can be important in criminal cases, including Atkins-type hearings involving the death penalty.

Individuals with a diagnosis of intellectual disability with co-occurring mental disorders are at risk for suicide. They think about suicide, make suicide attempts, and may die from them. Thus, screening for suicidal thoughts is essential in the assessment process. Because of a lack of awareness of risk and danger, accidental injury rates may be increased.

Prevalence

Intellectual disability has an overall general population prevalence of approximately 1%, and prevalence rates vary by age. Prevalence for severe intellectual disability is approximately 6 per 1,000.

Development and Course

Onset of intellectual disability is in the developmental period. The age and characteristic features at onset depend on the etiology and severity of brain dysfunction. Delayed motor, language, and social milestones may be identifiable within the first 2 years of life among those with more severe intellectual disability, while mild levels may not be identifiable until school age when difficulty with academic learning becomes apparent. All criteria (including Criterion C) must be fulfilled by history or current presentation. Some children under age 5 years whose presentation will eventually meet criteria for intellectual disability have deficits that meet criteria for global developmental delay.

When intellectual disability is associated with a genetic syndrome, there may be a characteristic physical appearance (as in, e.g., Down syndrome). Some syndromes have a *behavioral phenotype*, which refers to specific behaviors that are characteristic of particular genetic disorder (e.g., Lesch-Nyhan syndrome). In acquired forms, the onset may be abrupt following an illness such as meningitis or encephalitis or head trauma occurring during the developmental period. When intellectual disability results from a loss of previously acquired cognitive skills, as in severe traumatic brain injury, the diagnoses of intellectual disability and of a neurocognitive disorder may both be assigned.

Although intellectual disability is generally nonprogressive, in certain genetic disorders (e.g., Rett syndrome) there are periods of worsening, followed by stabilization, and in

others (e.g., San Phillippo syndrome) progressive worsening of intellectual function. After early childhood, the disorder is generally lifelong, although severity levels may change over time. The course may be influenced by underlying medical or genetic conditions and co-occurring conditions (e.g., hearing or visual impairments, epilepsy). Early and ongoing interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate. Thus, it is common practice when assessing infants and young children to delay diagnosis of intellectual disability until after an appropriate course of intervention is provided. For older children and adults, the extent of support provided may allow for full participation in all activities of daily living and improved adaptive function. Diagnostic assessments must determine whether improved adaptive skills are the result of a stable, generalized new skill acquisition (in which case the diagnosis of intellectual disability may no longer be appropriate) or whether the improvement is contingent on the presence of supports and ongoing interventions (in which case the diagnosis of intellectual disability may still be appropriate).

Risk and Prognostic Factors

Genetic and physiological. Prenatal etiologies include genetic syndromes (e.g., sequence variations or copy number variants involving one or more genes; chromosomal disorders), inborn errors of metabolism, brain malformations, maternal disease (including placental disease), and environmental influences (e.g., alcohol, other drugs, toxins, teratogens). Perinatal causes include a variety of labor and delivery-related events leading to neonatal encephalopathy. Postnatal causes include hypoxic ischemic injury, traumatic brain injury, infections, demyelinating disorders, seizure disorders (e.g., infantile spasms), severe and chronic social deprivation, and toxic metabolic syndromes and intoxications (e.g., lead, mercury).

Culture-Related Diagnostic Issues

Intellectual disability occurs in all races and cultures. Cultural sensitivity and knowledge are needed during assessment, and the individual's ethnic, cultural, and linguistic background, available experiences, and adaptive functioning within his or her community and cultural setting must be taken into account.

Gender-Related Diagnostic Issues

Overall, males are more likely than females to be diagnosed with both mild (average male:female ratio 1.6:1) and severe (average male:female ratio 1.2:1) forms of intellectual disability. However, gender ratios vary widely in reported studies. Sex-linked genetic factors and male vulnerability to brain insult may account for some of the gender differences.

Diagnostic Markers

A comprehensive evaluation includes an assessment of intellectual capacity and adaptive functioning; identification of genetic and nongenetic etiologies; evaluation for associated medical conditions (e.g., cerebral palsy, seizure disorder); and evaluation for co-occurring mental, emotional, and behavioral disorders. Components of the evaluation may include basic pre- and perinatal medical history, three-generational family pedigree, physical examination, genetic evaluation (e.g., karyotype or chromosomal microarray analysis and testing for specific genetic syndromes), and metabolic screening and neuroimaging assessment.

Differential Diagnosis

The diagnosis of intellectual disability should be made whenever Criteria A, B, and C are met. A diagnosis of intellectual disability should not be assumed because of a particular

genetic or medical condition. A genetic syndrome linked to intellectual disability should be noted as a concurrent diagnosis with the intellectual disability.

Major and mild neurocognitive disorders. Intellectual disability is categorized as a neurodevelopmental disorder and is distinct from the neurocognitive disorders, which are characterized by a loss of cognitive functioning. Major neurocognitive disorder may co-occur with intellectual disability (e.g., an individual with Down syndrome who develops Alzheimer's disease, or an individual with intellectual disability who loses further cognitive capacity following a head injury). In such cases, the diagnoses of intellectual disability and neurocognitive disorder may both be given.

Communication disorders and specific learning disorder. These neurodevelopmental disorders are specific to the communication and learning domains and do not show deficits in intellectual and adaptive behavior. They may co-occur with intellectual disability. Both diagnoses are made if full criteria are met for intellectual disability and a communication disorder or specific learning disorder.

Autism spectrum disorder. Intellectual disability is common among individuals with autism spectrum disorder. Assessment of intellectual ability may be complicated by social-communication and behavior deficits inherent to autism spectrum disorder, which may interfere with understanding and complying with test procedures. Appropriate assessment of intellectual functioning in autism spectrum disorder is essential, with reassessment across the developmental period, because IQ scores in autism spectrum disorder may be unstable, particularly in early childhood.

Comorbidity

Co-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population. The prognosis and outcome of co-occurring diagnoses may be influenced by the presence of intellectual disability. Assessment procedures may require modifications because of associated disorders, including communication disorders, autism spectrum disorder, and motor, sensory, or other disorders. Knowledgeable informants are essential for identifying symptoms such as irritability, mood dysregulation, aggression, eating problems, and sleep problems, and for assessing adaptive functioning in various community settings.

The most common co-occurring mental and neurodevelopmental disorders are attention-deficit/hyperactivity disorder; depressive and bipolar disorders; anxiety disorders; autism spectrum disorder; stereotypic movement disorder (with or without self-injurious behavior); impulse-control disorders; and major neurocognitive disorder. Major depressive disorder may occur throughout the range of severity of intellectual disability. Self-injurious behavior requires prompt diagnostic attention and may warrant a separate diagnosis of stereotypic movement disorder. Individuals with intellectual disability, particularly those with more severe intellectual disability, may also exhibit aggression and disruptive behaviors, including harm of others or property destruction.

Relationship to Other Classifications

ICD-11 (in development at the time of this publication) uses the term *intellectual developmental disorders* to indicate that these are disorders that involve impaired brain functioning early in life. These disorders are described in ICD-11 as a metasyndrome occurring in the developmental period analogous to dementia or neurocognitive disorder in later life. There are four subtypes in ICD-11: mild, moderate, severe, and profound.

The American Association on Intellectual and Developmental Disabilities (AAIDD) also uses the term *intellectual disability* with a similar meaning to the term as used in this

manual. The AAIDD's classification is multidimensional rather than categorical and is based on the disability construct. Rather than listing specifiers as is done in DSM-5, the AAIDD emphasizes a profile of supports based on severity.

Global Developmental Delay

315.8 (F88)

This diagnosis is reserved for individuals *under* the age of 5 years when the clinical severity level cannot be reliably assessed during early childhood. This category is diagnosed when an individual fails to meet expected developmental milestones in several areas of intellectual functioning, and applies to individuals who are unable to undergo systematic assessments of intellectual functioning, including children who are too young to participate in standardized testing. This category requires reassessment after a period of time.

Unspecified Intellectual Disability (Intellectual Developmental Disorder)

319 (F79)

This category is reserved for individuals *over* the age of 5 years when assessment of the degree of intellectual disability (intellectual developmental disorder) by means of locally available procedures is rendered difficult or impossible because of associated sensory or physical impairments, as in blindness or prelingual deafness; locomotor disability; or presence of severe problem behaviors or co-occurring mental disorder. This category should only be used in exceptional circumstances and requires reassessment after a period of time.

Communication Disorders

Disorders of communication include deficits in language, speech, and communication. *Speech* is the expressive production of sounds and includes an individual's articulation, fluency, voice, and resonance quality. *Language* includes the form, function, and use of a conventional system of symbols (i.e., spoken words, sign language, written words, pictures) in a rule-governed manner for communication. *Communication* includes any verbal or nonverbal behavior (whether intentional or unintentional) that influences the behavior, thoughts, or attitudes of another individual. Assessments of speech, language and communication abilities must take into account the individual's cultural and language context, particularly for individuals growing up in bilingual environments. The standardized measures of language development and of nonverbal intellectual capacity must be relevant for the cultural and linguistic group (i.e., tests developed and standardized for one group may not provide appropriate norms for a different group). The diagnostic category of communication disorders includes the following: language disorder, speech sound disorder, childhood-onset fluency disorder (stuttering), social (pragmatic) communication disorder, and other specified and unspecified communication disorders.

Intellectual Disability

Definition, Classification, and Systems of Supports

THE 11TH EDITION OF THE AAIDD DEFINITION MANUAL

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CHAPTER 6

ROLE OF ETIOLOGY IN THE DIAGNOSIS OF INTELLECTUAL DISABILITY

Etiology represents a multifactorial construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that interact across time and affect the individual's overall functioning. Diagnostic assessment and classification of the etiology consists of a description of all of the risk factors that are present in a particular individual and that contribute to the individual's present functioning and potential diagnosis of intellectual disability. Genotype-phenotype correlations may be useful, but caution is needed when applying these data to individual circumstances.

OVERVIEW

In this chapter we describe the multifactorial nature of the etiology of *intellectual disability* (ID) and how etiology is determined and classified based on biomedical, social, behavioral, and educational risk factors. The five sections of the chapter cover (a) the importance of etiology, (b) the multifactorial nature of etiology, (c) etiologic assessment, (d) etiologic diagnosis and classification, and (e) etiology and performance. These five sections incorporate genetic research advances and research about behaviors that are associated with specific etiologies. Additionally, the system for etiologic diagnosis and classification presented in the chapter is consistent with the multidimensional approach to ID presented in this *Manual* and facilitates the design and implementation of strategies for prevention and support (see chapter 10).

IMPORTANCE OF ETIOLOGY

Consideration of the etiology of ID is important for several reasons. Chief among these are the following:

1. The etiology may be associated with other health-related problems that may influence physical and psychological functioning.

2. The etiology may be treatable, which could permit appropriate treatment to minimize or prevent ID.
3. Accurate information is needed for the design and evaluation of programs to prevent specific etiologies of ID.
4. Comparison of individuals for research, administrative, or clinical purposes may depend on formation of maximally homogeneous groups composed of individuals with the same or similar etiologies.
5. The etiology may be associated with a specific behavioral phenotype that allows anticipation of actual, potential, or future functional support needs.
6. Information about the etiology facilitates genetic counseling and promotes family choice and decision making, including preconception counseling.
7. Individuals and families can be referred to other persons and families with the same etiologic diagnosis for information and support.
8. Knowing the etiology facilitates self-knowledge and life planning for the individual.
9. Understanding the etiology may clarify clinical issues for service providers.
10. Clarification of biomedical, social, behavioral, and educational risk factors that contribute to the etiology offers opportunities for prevention of the disability.

Performing a diagnostic evaluation to determine the etiology may be questioned by some providers. They may argue that the cost of testing is excessive and that the results will not change the individual's treatment. If the parents do not plan to have any more children, they may argue that testing for an inherited disorder is pointless. When the individual with ID is an adult, the parents may no longer have any interest in finding the etiology. Adult service providers may feel that the etiology is irrelevant to the development of the individual's plan of supports and services. These objections can be answered by considering the reasons for establishing the etiology listed earlier, and the cost of diagnostic testing can often be justified in specific situations. For example, knowing that an adult with cognitive decline has Down syndrome should alert the provider to look for hypothyroidism or depression. Knowing that a child with cognitive decline has Angelman syndrome should alert the provider to look for subclinical seizures. Knowing that an individual with new neurological findings has tuberous sclerosis should alert the provider to look for the characteristic brain tumor associated with this diagnosis. Knowing that an adult man has fragile X syndrome should alert the provider to offer genetic testing to the man's sisters who may be carriers and could have affected sons. Knowing that a child has a particular condition allows the family to search the Internet and to contact other families affected by this diagnosis, thereby learning more about it than their health care provider may know. These examples illustrate why testing to establish the etiologic diagnosis may be important for many individuals with ID.

MULTIFACTORIAL NATURE OF ETIOLOGY

In this chapter we build on the approach to etiology described in previous AAMR *Manuals* (Luckasson et al., 1992, 2002). Etiology is conceptualized as a multifactorial

construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that interact across time, including across the life of the individual and across generations from parent to child. This construct replaces prior approaches that divided the etiology of ID into two broad types: ID of biological origin and ID due to psychosocial disadvantage (Grossman, 1983). The two-group approach (biological and cultural-familial) was defended on the basis of developmental theory (Hodapp, Burack, & Zigler, 1990). Different developmental pathways were associated with ID due to identified biological disorders compared to ID for which no organic etiology is apparent (due to cultural-familial factors or psychosocial disadvantage). These researchers recommended a biological or genetic classification of etiology, in which there is either a demonstrated biological cause or there is not. This approach is consistent with the approach presented in this chapter. In fact, the risk factor approach can be seen as a fine-tuning of the developmental (two-group) approach. What was called "ID of biological origin" can be seen as involving individuals for whom biomedical risk factors predominate, while "ID of cultural-familial origin" can be seen as involving individuals for whom social, behavioral, or educational risk factors predominate.

The two-group distinction is often blurred in real life, however. The multiple risk factor approach correctly notes that biomedical risk factors may be present in persons with ID of cultural-familial origin, and social, behavioral, and educational risk factors may be present in persons with ID of biological origin. For example, individuals with the same biomedical genetic etiology often vary widely in functioning, presumably as the result of other modifying risk factors. The multiple risk factor approach to etiology thus is the logical extension of previous work in this area and provides a more comprehensive explanation of the many interacting causes of impaired functioning in persons with ID (Chapman, Scott, & Stanton-Chapman, 2008).

There has been an explosion of new genetic information in the past decade (cf. Butler & Meaney, 2005). This explosion has led some to consider the etiology of ID primarily in genetic terms. The recommendations of the American College of Human Genetics for the etiologic evaluation of ID (Curry, Stevenson, Aughton, & Byrne, 1997) emphasized genetic testing, as did the recommendations of the Committee on Genetics of the American Academy of Pediatrics (Moeschl & Shevell, 2006). The Child Neurology Society's practice parameter on the evaluation of children with global developmental delay (Shevell et al., 2003) also emphasized biomedical causes and included evidence-based recommendations for genetic testing. Although in a recent textbook on ID, Harris (2006) mentions AAIDD's multifactorial risk factor approach presented in the 2002 *Manual* (Luckasson et al.), the author discusses in depth primarily genetic and other biomedical causes.

Clearly, genetics cannot explain the cause of ID in every case. Individuals may be born with perfectly normal DNA and still develop ID due to a birth injury, malnutrition, child abuse, or extreme social deprivation. Understanding the cause of ID in these cases requires consideration of other biomedical, behavioral, and social risk factors. The guidelines reviewed above all note that even the most extensive and up-to-date genetic and biomedical testing will identify an etiology in less than half of all cases. Indeed, even if one could measure the entire genome in patients with ID (which should become

feasible within the next 10 years), the results would not explain the cause when ID is due primarily to social or behavioral risk factors. On the other hand, at least one or more of the risk factors shown in Table 6.1 will be found in every case of ID. Thus a multifactorial approach to etiology (which incorporates all of the above genetic and biomedical testing,

TABLE 6.1
Risk Factors for Intellectual Disability

Timing	Biomedical	Social	Behavioral	Educational
Prenatal	1. Chromosomal disorders 2. Single-gene disorders 3. Syndromes 4. Metabolic disorders 5. Cerebral dysgenesis 6. Maternal illnesses 7. Parental age	1. Poverty 2. Maternal malnutrition 3. Domestic violence 4. Lack of access to prenatal care	1. Parental drug use 2. Parental alcohol use 3. Parental smoking 4. Parental immaturity	1. Parental cognitive disability without supports 2. Lack of preparation for parenthood
Perinatal	1. Prematurity 2. Birth injury 3. Neonatal disorders	1. Lack of access to prenatal care	1. Parental rejection of caretaking 2. Parental abandonment of child	1. Lack of medical referral for intervention services at discharge
Postnatal	1. Traumatic brain injury 2. Malnutrition 3. Meningoencephalitis 4. Seizure disorders 5. Degenerative disorders	1. Impaired child-caregiver interaction 2. Lack of adequate stimulation 3. Family poverty 4. Chronic illness in the family 5. Institutionalization	1. Child abuse and neglect 2. Domestic violence 3. Inadequate safety measures 4. Social deprivation 5. Difficult child behaviors	1. Impaired parenting 2. Delayed diagnosis 3. Inadequate early intervention services 4. Inadequate special education services 5. Inadequate family support

as well as consideration of all of the other potential risk factors that might be operative) provides the most thorough way to evaluate the etiology of ID in a particular case.

The multifactorial approach to etiology presented in this chapter expands the list of causal factors in two directions: types of factors and timing of factors. The first direction expands the types or categories of factors into four groupings:

1. *Biomedical*: biologic processes, such as genetic disorders or nutrition
2. *Social*: social and family interaction, such as stimulation and adult responsiveness
3. *Behavioral*: potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse
4. *Educational*: availability of educational supports that promote mental development and the development of adaptive skills

The second direction concerns the timing of the occurrence of causal factors according to whether these factors affect the parents of the person with ID, the person with ID, or both. This aspect of causation is termed *intergenerational* to describe the influence of factors present during one generation on the outcome in the next generation. The modern concept of intergenerational effects must be distinguished from the historical concept that ID was related to "weak genes" due to psychosocial, cultural, or familial factors (Scheerenberger, 1983). This modern concept recognizes that reversible environmental factors in the lives of some families may be related to the etiology of ID and stresses that the understanding of these factors should lead to enhanced individual and family supports. Because of the relationship to prevention and supports, these intergenerational effects are considered further in chapter 10 (see Table 10.1 in particular).

Table 6.1 lists risk factors for ID by category and by the time of occurrence of the risk factor in the life of the individual. Unlike classification systems based primarily on biomedical conditions (such as the *ICD-10* [World Health Organization, 1993]), the classification system outlined in Table 6.1 represents a multifactorial approach to the etiology of ID. It incorporates biomedical risk factors but places them in context by including other risk factors that may be of equal or greater importance in determining the individual's level of functioning. The list of risk factors in Table 6.1 is not exclusive and can be expanded as new risk factors are discovered. Research should result in continual revision and updating of these specific risk factors, but the basic structure of the table should be relevant for the foreseeable future.

Because ID is characterized by impaired functioning, its etiology is whatever caused this impairment in functioning. A biomedical risk factor may be present but by itself may not cause ID (as, for example, when a patient with a genetic disorder has average intelligence). Any risk factor causes ID only when it results in impaired functioning sufficient to meet the criteria for a diagnosis of ID as described in this *Manual*. Table 6.1 emphasizes that the impairment of functioning that is present when an individual meets the three criteria for a diagnosis of ID usually reflects the presence of several risk factors that interact over time. Thus, the search for the etiology of ID in a particular individual must consist of a search for all of the risk factors that might have resulted in impaired functioning for that person. This search involves obtaining as much historical medical

information as possible, performing psychological and physical examinations, and pursuing sufficient laboratory investigations to consider reasonable possibilities.

Etiologic Assessment

Medical History

Diagnostic assessment begins with a complete history and physical examination to uncover all of the potential risk factors that may be present in each of the four categories shown in Table 6.1. The medical history begins at conception and includes detailed information about the prenatal, perinatal, and postnatal periods. Information needed about the prenatal period includes maternal age; parity and health (including maternal infections such as hepatitis, HIV, rubella, cytomegalovirus, group B streptococcus, etc.); the adequacy of maternal nutrition; the amount and quality of prenatal care (including results of prenatal screening, ultrasound examinations, and amniocentesis if performed); maternal use of drugs, alcohol, and other substances; maternal exposure to potential toxins or teratogens (such as lead or radiation); and occurrence of any significant maternal injuries during the pregnancy. Information needed about the perinatal period includes growth status at birth (gestational age at birth, birthweight, length, and head circumference); labor and delivery experiences (including onset, duration, route of delivery, presence of fetal distress prior to delivery, Apgar scores after birth, need for resuscitation); and the occurrence of any neonatal disorders after birth (such as seizures, infections, respiratory distress, brain hemorrhage, and metabolic disorders). Information needed about the postnatal period includes the history of any significant head injuries, infections, seizures, toxic and metabolic disorders (such as lead poisoning), significant malnutrition or growth impairment, and any indication of loss of previously acquired developmental skills that could indicate the presence of a progressive or degenerative disorder or a disorder on the autism spectrum.

A detailed family history is necessary to identify potential genetic etiologies (Curry et al., 1997). A detailed three-generation pedigree is recommended that includes information about the health status, medical and psychological disorders, and level of functioning of all known relatives. In particular, relatives who were affected by conditions that may be associated with ID (such as autism) or who were diagnosed with ID should be noted. Additional records concerning these individuals may be requested to provide further details. The occurrence of ID in other family members does not necessarily imply a genetic mechanism however. Multiple individuals in a family may be affected by fetal alcohol syndrome, for example, or ID in a relative may be due to childhood infections or head trauma. Results of genetic testing performed previously on any relatives should be sought and examined for completeness because testing performed more than 5 to 10 years earlier may have missed conditions diagnosable with current methods.

Psychosocial Evaluation

The psychosocial evaluation includes detailed information about the individual, family, school or work setting, and community or cultural milieu. Information about the psychosocial environment is needed to evaluate possible social, behavioral, and educational risk factors that may have contributed to the occurrence of ID. When an intergenerational perspective is used, information is needed about the parents' social, educational, and psychological history. Information is also needed about the structure, stability, and functioning of the immediate and extended family of the person with ID. Information about the roles and expectations of the person with ID and relatives within the extended community or culture may also be useful. The sociocultural milieu in which the individual develops is important because it may influence the psychosocial environment, including the local community; the country of origin; and specific ethnic, cultural, or religious factors that may affect environmental experiences and interactions.

The developmental history of the individual with ID includes early milestones, such as the age when the person started walking or talking. The age at entry into the educational system, the adequacy of the educational experience, and the duration of formal education should also be noted. The occurrence of other mental disorders, such as attention deficit/hyperactivity disorder, specific learning disability, or anxiety disorder should be noted because this may provide clues to a behavioral phenotype associated with a specific etiology.

Evaluation of the psychosocial environment may not yield any relevant information about causal factors in a particular individual. Even when the etiology appears straightforward, however, psychosocial factors may prove to be contributory. Reflecting the multiple risk factor approach to causation, known biomedical factors may be affected by social, behavioral, or educational factors. The ultimate etiology of ID in such cases reflects the interaction of all of these factors. For example, whether or not an individual with fetal alcohol syndrome develops ID may be influenced by environmental influences in early childhood, and the individual's level of functioning will likely reflect the adequacy of educational interventions.

Physical Examination

The physical examination serves several distinct purposes. The usual purpose is to assist in the diagnosis of a medical problem, such as pneumonia or back pain, for which the individual has sought attention and that may require specific medical treatment. The purpose considered in this chapter is to assist in the identification of the etiology of ID. A single physical examination may serve both purposes, but the conceptual distinction between them needs to be retained.

The physical examination may provide evidence of an obvious etiology, such as Down syndrome. More often, however, it will provide only supportive evidence for an etiology suspected from other data (such as spastic diplegia associated with a history of premature birth), or it will not provide any useful information about etiology at all. For most

individuals whose etiology of ID is obscure or unknown, the physical examination may well be normal or noncontributory. Thus, one cannot expect to discover the etiology solely from the physical examination in most cases. Physical examination is necessary, but it is only one component in the diagnostic assessment and in many cases will not be the most important component.

Information needed from the physical examination includes measurements of growth (height, weight, and head circumference), which should be plotted against age on graphs that are appropriate for the individual's status. Additional measurement of specific body structures (such as the distance between the eyes or the arm span) also may be useful (Jones, 2005). Detailed examination of the head, eyes, ears, nose, throat, glands, heart, blood vessels, lungs, abdomen, genitalia, spine, extremities, and skin should be conducted. Any major or minor malformations should be noted (Jones, 2005). A detailed neurologic examination should include evaluation for any focal or generalized deficits (Campbell, 2005). Specific neurologic findings will rarely indicate the etiology directly, but certain findings (such as hypotonia, tremor, or ataxia) could be important clues to the etiology. In some instances, examination of parents, siblings, or other relatives may be helpful.

Laboratory Investigation

All of the data derived from the history and physical examination is then evaluated to determine whether additional laboratory testing is indicated. Table 6.2 provides a guide to the evaluation of these data. In some cases the diagnosis may be fairly obvious (e.g., when the child meets all of the clinical criteria for fetal alcohol syndrome). In most cases, however, the available data are sufficient only to provide clues or ideas about the etiology that warrant further investigation. When the etiology is not obvious, it is often helpful to list the most likely possibilities. This list, which is often referred to as *the differential diagnosis of the problem*, can be considered as a series of hypotheses regarding possible etiologies. For example, the clinical finding of microcephaly (small head) may suggest several hypotheses, such as cerebral malformation or birth injury. Clinicians can then identify a strategy for testing each hypothesis to increase or decrease the probability of it being correct. In the example of microcephaly, a hypothesis of cerebral malformation might be tested by looking for other malformations, performing neuroimaging (CT or MRI scanning of the brain) or pursuing genetic testing for a chromosome disorder. A hypothesis of birth injury might be tested by examining birth records and determining whether the head circumference was normal at birth. This example is not intended to be a complete analysis of the possible causes of microcephaly. It is described here only to illustrate the process of generating and testing hypotheses regarding possible etiologies.

The purpose of evaluating several competing hypotheses is to optimize the probability of making the correct diagnosis. In some cases, the evaluation of these hypotheses will consist of obtaining additional historical information or more extensive physical examination. In many cases, however, the evaluation will necessitate the performance of properly selected laboratory tests and procedures. Table 6.2 suggests some laboratory tests

Table 6.2
Hypotheses and Strategies for Assessing Etiologic Risk Factors

Onset	Hypothesis	Social
Prenatal	Chromosomal or single gene disorder	Extended physical examination Referral to clinical geneticist Chromosomal and DNA analyses
	Syndrome disorder	Extended family history and examination of relatives Extended physical examination Referral to clinical geneticist
	Inborn error of metabolism	Newborn screening using tandem mass spectrometry Analysis of amino acids in blood, urine, and/or cerebrospinal fluid Analysis of organic acids in urine Blood levels of lactate, pyruvate, very long chain fatty acids, free and total carnitine, and acylcarnitines Arterial ammonia and gases Assays of specific enzymes in cultured skin fibroblasts Biopsies of specific tissue for light and electron microscopy and biochemical analysis
	Cerebral dysgenesis	Neuroimaging (CT or MRI)
	Social, behavioral, and environmental risk factors	Intrauterine and postnatal growth Placental pathology Detailed social history of parents Medical history and examination of mother Toxicological screening of mother at prenatal visits and of child at birth Referral to clinical geneticist
Perinatal	Intrapartum and neonatal disorders	Review of maternal records (prenatal care, labor, and delivery) Review of birth and neonatal records

Table 6.2 (*continued*)

Onset	Hypothesis	Social
Postnatal	Head injury	Detailed medical history Brain X-rays and neuroimaging
	Brain infection	Detailed medical history Cerebrospinal fluid analysis
	Demyelinating disorders	Neuroimaging Cerebrospinal fluid analysis
	Degenerative disorders	Neuroimaging Specific DNA studies for genetic disorders Assays of specific enzymes in blood or cultured skin fibroblasts Biopsies of specific tissue for light and electron microscopy and biochemical analysis Referral to clinical geneticist or neurologist
	Seizure disorders	Electroencephalography Referral to clinical neurologist
	Toxic-metabolic disorders	See "Inborn errors of metabolism" above Toxicological studies Lead and heavy metal assays
	Malnutrition	Body measurements Detailed nutritional history Family history of nutrition
	Environmental and social disadvantage	Detailed social history History of abuse or neglect Psychological evaluation Observation in new environment
	Educational inadequacy	Early referral and intervention records Review of educational records

and procedures that might be helpful in evaluating the hypotheses listed in the table. This table should not be considered complete or prescriptive because the evaluation must be tailored to the facts in an individual case. The clinician is responsible for identifying the appropriate hypotheses, devising strategies for testing them, and evaluating the results of whatever tests and procedures are performed.

Reasonably current guidelines have been published to assist clinicians in selecting appropriate laboratory tests (Moeschler & Shevell, 2006; Shevell et al., 2003). These guidelines are generally valid but need to be updated in light of subsequent research. Two areas of investigation deserve special comment. Chromosomal microarray technology (comparative genomic hybridization) is continually improving, and patients who were studied even a few years ago may need to be studied again using the newer techniques. Eventually (probably within the next 10 years), the technology will be available to sequence the entire human genome as a routine clinical test in a particular case. Genetic technology is already ahead of clinical knowledge (i.e., we can test for things we do not yet completely understand), so clinicians should be careful when assessing all of this information.

Several computerized databases exist that provide a list of possible etiologies when all of the available clinical data for a particular individual are entered. These proprietary databases are updated continually and are generally utilized by clinical geneticists. The National Library of Medicine maintains an online database that is open to the public called "Online Mendelian Inheritance in Man" that contains up-to-date genetic information about many disorders that can cause ID. Indeed, the pace of genetic research is such that any guidelines will be outdated by the time they are published, and referral to a clinical geneticist is often the best way to ensure an up-to-date evaluation of genetic etiologies.

Intellectual disability begins before age 18, but individuals with ID may first present a need for services during adulthood. If the diagnosis of ID was not made previously, it may be difficult to gather all of the relevant information needed to make the diagnosis in an adult (see chapter 8 for guidelines regarding a retrospective diagnosis). This is also true for assessment of the etiology in such cases. Much of the information described here, such as details of the pregnancy, birth history, early developmental milestones, and family functioning during childhood, as well as details of the family history or pedigree, may simply be unavailable. Similar problems often arise when individuals present a need for services following immigration from another country. The physical examination becomes more important as the clinician looks for clues about the etiology. The list of possible hypotheses or differential diagnosis becomes longer and more tentative when the available data are limited. Laboratory tests and procedures are often needed to examine these hypotheses. In the end many risk factors may be more suspected than confirmed, and a degree of uncertainty or imprecision about the etiologic diagnosis may be expected.

Etiologic Diagnosis and Classification

The formulation of an etiologic diagnosis follows from the multifactorial model shown in Table 6.1. All of the information derived from the history, examinations, and laboratory testing is evaluated carefully. These data are then organized into risk factor categories (biomedical, social, behavioral, and educational), and a judgment is made as to whether the risk factors were present before (prenatal), during (perinatal), or after (postnatal) the individual's birth. All relevant risk factors are identified, including those that are thought to be most important (such as trisomy 21 or Down syndrome) as well as those that are thought to be less important (such as social deprivation or lack of timely educational intervention). The presence of interactions between risk factors are then evaluated and described. Etiologic diagnosis and classification thus consists of a comprehensive list of all of the risk factors and interactions among risk factors for which the available data provide sufficient evidence. In some cases this list may be fairly short and tentative, while in other cases it may be long and confirmed. Most cases will fall somewhere in the middle. Nonetheless, at least one reasonably plausible risk factor will usually be present in every case if sufficient diligence is applied. This multifactorial, etiologic diagnostic, and classification system for determining the etiology thereby eliminates the category of ID of unknown cause.

An example of what such an etiologic diagnosis might look like for a child with fetal alcohol syndrome (as well as other issues) would likely include the following risk factors:

- Biomedical risk factors might include the presence of fetal alcohol syndrome and congenital heart disease.
- Social risk factors might include family poverty, homelessness, and inadequate parenting skills.
- Behavioral risk factors might include parental substance abuse and abuse or neglect of the child.
- Educational risk factors might include lack of adequate early intervention services.
- Interactions among risk factors might include maternal poverty and substance abuse causing lack of prenatal care and fetal alcohol syndrome, and homelessness causing lack of adequate early intervention services.

This example is considered further in chapter 10 (see Table 10.2). The intent of this multifactorial approach to etiology is to describe all of the risk factors that contribute to the individual's present functioning. This approach then allows providers to identify strategies for supporting the individual and the family so that these risk factors might be prevented or ameliorated.

USER'S GUIDE

INTELLECTUAL DISABILITY

Definition, Classification, and Systems of Supports

11TH EDITION

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FOSTERING JUSTICE WHEN DEALING WITH FORENSIC ISSUES

Clinicians in the field of ID may be involved in forensic issues that arise when persons with ID are involved with the civil or criminal justice system. The more common of these forensic issues center around personal competence, guardianship, property and financial management, victimization in crime, or accusations of committing a crime. This section of the *User's Guide* discusses best practices and clinical judgment guidelines that address how clinicians can foster justice when dealing with these forensic issues. These practices and guidelines relate to: (1) interpreting assessment information, (2) understanding foundational aspects of ID that are critically important in fostering justice for people with ID, and (3) overcoming common stereotypes.

Interpreting Assessment Information

There are five critical areas involving the valid interpretation of assessment information that have emerged from clinical experiences dealing with forensic issues. These five areas involve understanding the following: (1) the concept of a confidence interval (CI), (2) the concept of a cutoff score, (3) that corrections need to be made in an obtained IQ score if the score was based on aging norms (i.e., the Flynn effect; Flynn, 2006), (4) the influence of practice effects on test results, and (5) the potential effect on test results attributable to faking.

Confidence interval (CI). A score obtained on a standardized psychometric instrument that assesses intellectual functioning or adaptive behavior is not absolute because of variability in the obtained score because of factors such as limitations of the instrument used, examiner's behavior and expertise, personal factors (e.g., health status of the person), or environmental factors (e.g., testing environment or testing location). Thus, an obtained score may or may not represent the individual's actual or true level of intellectual functioning or adaptive behavior because of these aforementioned factors. *Standard error of measurement (SEM),* which varies by test, subgroup, and age group, is used to quantify the variability that is attributable to the test itself and *provides the basis for establishing a statistical CI within which the person's true score is likely to fall.*

- For well-standardized measures of general intellectual functioning, the SEM is approximately 3 to 5 points. As reported in the respective test's standardization manual, the test's SEM can be used to establish a *statistical confidence interval (CI) around the obtained score.* From the properties of the normal curve, a range of confidence can be established with parameters of at least one standard error of measurement (i.e. scores of about 66 to 74, 66% probability) or parameters of two standard error of measurement (i.e. scores of about 62 to 78, 95% confidence).
- For well-standardized measures of adaptive behavior the SEM for obtained scores is comparable to that of standardized tests of intelligence. Thus, the use of plus/minus one standard error of measurement yields a statistical confidence interval (around the obtained score) within which the person's true score will fall 66% of the time; the use of plus/minus two standard error of measurement yields a sta-

tistical confidence (around the obtained score) in which the person's true score will fall 95% of the time. Thus, an obtained score on an adaptive behavior scale should be considered as an approximation that has either a 66% or 95% likelihood of accuracy, depending on the confidence interval used. There is no evidence suggesting that the population mean on standardized tests of adaptive behavior is increasing at a rate comparable to that observed on standardized tests of intelligence (i.e., Flynn effect). Because of the differences in test construction and administration between intellectual functioning and adaptive behavior, practice effect is not an issue with standardized adaptive behavior scales. One source of measurement error may be specific to measures of adaptive behavior and that is the concern that individuals may exaggerate their adaptive skills when asked to self-report their adaptive behavior. For this reason, numerous sources (e.g. Edgerton, 1967; Finlay & Lyons, 2002; Greenspan & Switzky, 2006; Schalock et al., 2010) have recommended against relying on self-reported measures of adaptive behavior when ruling-in or -out a diagnosis of ID.

Cutoff score. A cutoff score is the score(s) that determines the boundaries of the "significant limitations in intellectual functioning and adaptive criteria" for a diagnosis of ID.

- For both criteria, the cutoff score is approximately 2 standard deviations (SD) below the mean of the respective instrument, considering the SEM (see *Confidence interval*) for the specific instrument used, and the strengths and limitations of the instrument.
- A fixed point cutoff for ID is not psychometrically justifiable. The diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination.

Flynn Effect. The *Flynn Effect* refers to the increase in IQ scores over time (i.e., about 0.30 points per year). The Flynn Effect effects any interpretation of IQ scores based on outdated norms. Both the 11th edition of the manual and this *User's Guide* recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted (Fletcher et al., 2010; Gresham & Reschly, 2011; Kaufman, 2010; Reynolds et al., 2010; Schalock et al., 2010). For example, if the Wechsler Adult Intelligence Scale (WAIS-III; 1997) was used to assess an individual's IQ in July, 2005, the population mean on the WAIS-III was set at 100 when it was originally normed in 1995 (published in 1997). However, on the basis of Flynn's data (2006), the population mean on the WAIS-III Full-Scale IQ corrected for the Flynn Effect would be 103 in 2005 (9 years $\times$ 0.30 = 2.7). Hence, using the significant limitations of approximately 2 SDs below the mean, the Full-Scale IQ cutoff would be approximately 73 and not approximately 70 (plus or minus the SEM).

Practice effect. The practice effect refers to gains in IQ scores on tests of intelligence that result from a person being tested on the same instrument. The established clinical best practice is to avoid administering the same intelligence test within a year to the same individual because it will often lead to an overestimation of the examinee's true intelligence.

Claims of faking. Sometimes in a contested legal case an allegation of intentional "faking bad" is made, asserting that the individual is attempting to gain a benefit by deliberately faking a disability. Such claims of faking, when they are made, are usually in cases involving mental disorders because mental illness can have a later-life onset, subjective symptoms, and waxing and waning symptoms.

Allegations that an individual is intentionally faking bad, by faking ID, occur in some legal cases. The cases in which such allegations occur are cases in which rights such as eligibility for financial supports or exemption from the death penalty would come into play if the individual has an ID (Keyes, 2004). The term *malingering* is often used to refer to "faking bad." The *DSM-IV-TR* (APA, 2000) defined malingering as intentionally and purposefully feigning an illness to achieve some recognizable goal or tangible benefit (e.g., feigning ID to be spared the death penalty). Such allegations that a person is faking ID must be analyzed cautiously, however, for several reasons. First, the elements required for a diagnosis of ID must have been present from an early age (ID must originate before the age of 18), so there is almost always a documented lifetime history, usually beginning at birth or early childhood and extending through the school years, of significant limitations in intellectual functioning and adaptive behavior. Second, in cases in which an earlier diagnosis of ID cannot be documented because the individual grew up in another country and/or there are no assessment records, a clinician may conduct or access a current assessment of intellectual functioning and adaptive behavior, including a history, to determine current functioning, and together with clinical judgment make a retrospective diagnosis if indicated. Third, the more common faking direction when an individual with ID attempts to fake is to "fake good" so as to hide their ID and try to convince others that he or she is more competent (Edgerton, 1967).

Claims of faking ID in an individual should be addressed by a clinician in ID conducting a thorough evaluation for ID using the diagnostic and clinical strategies outlined in the 11th edition of the AAIDD manual and in this *User's Guide.* The authors of this *User's Guide* are aware of the concern that some (e.g., Doane & Salekin, 2008) have expressed about the potential to feign deficits on currently used adaptive behavior scales. Clinicians need to be aware of this potential and ensure that they interview multiple individuals who know the person well and who have had the opportunity to directly observe the person engaging in his or her typical behaviors across multiple contexts (i.e., home, community, school, and work).

Clinicians who similarly attempt to use specific "malingering" tests in individuals with ID must use considerable caution because of two factors: (1) the lack of a research base supporting the accuracy of such tests for persons with ID (Hayes et al., 1997; Hurley & Deal, 2006); and (2) the documented misuse of common malingering tests even when the test manual explicitly precludes use with individuals with ID (Keyes, 2004). Standardized assessment instruments used to inform the clinician whether the person is putting forth his or her best effort (i.e., malingering) have not, for the most part, been normed for persons with ID (MacVaugh & Cunningham, 2009). In addition, recent studies have documented unacceptable error rates (i.e., false positive for malingering) when used with persons with IQ scores from 50 to 78 (Dean et al., 2008; Hurley & Deal, 2006). Thus, the assessment of "faking bad" with individuals with low IQs (i.e., below 80) should be conducted with great prudence when relying on standardized measures that are not strictly normed or validated with persons being assessed for ID.

Foundational Aspects of ID

Terminology and concepts used within one field or profession (such as ID) are frequently not understood clearly by members of another field or profession. As a result, confusion and misunderstanding can occur within the courtroom and impact legal decisions. Successfully addressing forensic issues requires that all key players understand the following foundational aspects of ID that are critically important in fostering justice for people with ID. First, limitations in the individual's present functioning must be considered within the context of community environments typical of the individual's age peers and culture. Thus, the standards against which the individual's functioning are compared are typical community-based environments, not environments that are isolated or segregated by ability or current placement. Typical community environments include homes, neighborhoods, schools, businesses, and other environments in which people of similar age ordinarily live, play, work, and interact.

Second, within an individual, limitations often coexist with strengths. Individuals may have capabilities and strengths that are independent of ID such as strengths in social or physical capabilities, some adaptive-skill areas, or in one aspect of an adaptive skill in which they otherwise show an overall limitation. Third, ID is not the same as an LD. An ID is characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18 (Schalock et al., 2010, p. 1). In distinction, a learning disability (LD) is characterized by a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia (34 CFR sec. 300.8 [10]).

The fourth critically important foundational aspect is that adaptive behavior is conceptually different from maladaptive or problem behavior. This is true despite the fact that many adaptive behavior scales contain assessment of problem behavior, maladaptive behavior, or emotional competence. To be specific, (1) there is general agreement that the presence of clinically significant levels of problem behaviors found on adaptive behavior scales does not meet the criterion of significant limitations in adaptive functioning, (2) behaviors that interfere with the person's daily activities, or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior, and (3) the function of problem behavior may be to communicate an individual's needs, and in some cases, may even be considered an adaptive response to environmental conditions.

Overcoming Common Stereotypes

Stereotypes are not unique to persons with ID. Indeed, most individuals or groups who are perceived as different on some basis are stereotyped based on the perceiver's mental model or image of such persons or groups. In reference to persons with ID, historical terminology contributes to stereotyping as reflected in such terms as idiot, imbecile, or moron. Physical appearance can also contribute to stereotypes as reflected in the state-

ment that "if you don't have the look (as in Down syndrome) then you are not intellectually disabled." It should be noted that the vast majority of persons with an ID have no dysmorphic feature and generally walk and talk like persons without an ID.

Regardless of their origin, a number of incorrect stereotypes can interfere with justice. These incorrect stereotypes must be dispelled:

- Persons with ID look and talk differently from persons from the general population
- Persons with ID are completely incompetent and dangerous
- Persons with ID cannot do complex tasks
- Persons with ID cannot get driver's licenses, buy cars, or drive cars
- Persons with ID do not (and cannot) support their families
- Persons with ID cannot romantically love or be romantically loved
- Persons with ID cannot acquire vocational and social skills necessary for independent living
- Persons with ID are characterized only by limitations and do not have strengths that occur concomitantly with the limitations

These incorrect stereotypes are unsupported by both professionals in the field and published literature. Stereotypes are best addressed by understanding the characteristics of persons with ID, and especially those common characteristics of persons with ID with higher IQs that were summarized in Tables 3.1 and 3.2.

SCORE REPORT

Name: Bourgeois, Alfred
Date of Birth: 08/20/1964
Age: 45 years, 0 months
Sex: Male
Date of Testing: 08/19/2009

School: n/a
Teacher: n/a
Examiner: Victoria C. Swanson, PhD

TABLE OF SCORES
Woodcock-Johnson III Normative Update Tests of Achievement (Form A)
WJ III NU Compuscore and Profiles Program, Version 3.1
Norms based on age 45-0

CLUSTER/Test	Raw	W	AE	EASY to (based on age)	DIFF	RPI	SS (68% Band)	GE
ORAL LANGUAGE (Std)	-	494	8-6	6-5	12-9	71/90	80 (76-85)	3.1
LISTENING COMP	-	497	9-5	7-11	11-10	43/90	85 (83-87)	4.1
BRIEF ACHIEVEMENT	-	515	11-7	10-3	13-5	16/90	85 (83-86)	6.2
TOTAL ACHIEVEMENT	-	506	10-10	9-5	12-10	32/90	81 (80-82)	5.4
BROAD READING	-	507	11-2	9-8	13-1	22/90	83 (81-84)	5.8
BROAD MATH	-	497	9-5	8-6	10-9	15/90	68 (66-71)	4.1
BROAD WRITTEN LANG	-	513	12-8	10-7	16-6	69/90	92 (90-94)	7.2
BRIEF READING	-	512	11-4	10-0	13-3	19/90	85 (83-86)	5.9
BRIEF MATH	-	493	9-2	8-5	10-0	5/90	70 (67-73)	3.8
MATH CALC SKILLS	-	507	11-1	9-7	13-5	58/90	82 (79-85)	5.7
WRITTEN EXPRESSION	-	500	10-3	8-8	12-6	54/90	85 (82-88)	4.9
ACADEMIC FLUENCY	-	502	10-11	8-11	13-4	54/90	83 (80-85)	5.5
ACADEMIC APPS	-	489	8-7	7-10	9-8	7/90	74 (72-76)	3.2
Letter-Word Identification	62	530	13-5	11-11	15-2	23/90	90 (89-92)	8.0
Reading Fluency	43	498	10-8	8-6	12-10	30/90	81 (78-83)	5.3
Story Recall	-	491	6-2	3-7	10-7	70/90	66 (57-76)	K.9
Understanding Directions	-	498	9-9	7-10	14-1	71/90	89 (85-93)	4.4
Calculation	20	511	10-10	9-10	12-4	44/90	82 (78-86)	5.5
Math Fluency	78	504	11-9	8-10	15-8	70/90	82 (80-84)	6.3
Spelling	48	539	30	15-10	>30	89/90	99 (97-102)	13.0
Writing Fluency	18	504	10-8	9-2	12-6	61/90	89 (85-93)	5.2
Passage Comprehension	28	494	8-10	7-11	10-5	16/90	80 (78-83)	3.5
Applied Problems	28	476	8-1	7-7	8-8	0/90	63 (60-66)	2.8
Writing Samples	14-C	497	9-9	8-1	12-6	46/90	85 (82-89)	4.4
Story Recall-Delayed	-	483	4-3	<3-5	5-9	51/90	57 (41-72)	<K.0
Oral Comprehension	18	496	9-3	8-0	10-11	19/90	83 (80-86)	3.9