In the Supreme Court of Georgia

Case No. S20P0937

WILLIE WILLIAMS PALMER,

Appellant,

vs.

THE STATE OF GEORGIA,

Appellee.

BRIEF FOR AMICI CURIAE
THE ARC OF THE UNITED STATES, THE ARC OF GEORGIA, AND THE GEORGIA ADVOCACY OFFICE

Andrew J. King
Georgia Bar. No. 926908
Fisher Broyles LLP
945 East Paces Ferry Road NE, Suite 2000
Atlanta, GA 30326
(404) 890-5581
Andrew.king@fisherbroyles.com

Laurence S. Shtasel*
Heidi G. Crikelair*
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5500
shtasel@blankrome.com
hcrikelair@blankrome.com

Shawna J. Henry*
501 Grant Street, Suite 850
Pittsburgh, PA 15219
(412) 932-2805
shenry@blankrome.com
**Pro Hac Vice Applications Pending*

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The Arc of the United States: Founded in 1950, The Arc of the United States ("The Arc") has grown to become the Nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc's mission is to promote and protect the human rights of people with intellectual and developmental disabilities and actively support their full inclusion and participation in the community throughout their lifetimes.

The Arc is deeply invested in ensuring that people with intellectual and developmental disabilities receive the rights and protections to which they are entitled by law. Since its inception, The Arc has played a key role in legislation to establish federal disability rights laws, such as the Individuals with Disabilities Education Act ("IDEA"), the Rehabilitation Act of 1973, and the Americans with Disabilities Act ("ADA"). The Arc has also led multiple public policy efforts to establish, expand, and maintain critical federal programs such as Medicaid, Social Security, Supplemental Security Income, and the Affordable Care Act.

Throughout its history, The Arc and its chapters have used litigation to advance the rights of people with intellectual and developmental disabilities. Cases brought by The Arc and its chapters in the 1970s, including *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and *Halderman v. Pennhurst*, 74-1345 (E.D. Pa.) (more than 28 opinions issued during extensive litigation), led to critical protections

for people with intellectual and developmental disabilities in schools and institutions, and paved the way for IDEA and the ADA. More recently, The Arc has brought litigation in Georgia and West Virginia to enforce the rights of students with disabilities receiving a separate and unequal education to ensure they receive the supports they need to thrive in their neighborhood schools; and in the District of Columbia it challenged the District's failure to provide community-based supports for an individual with intellectual disability who remained confined in federal prison despite having been found incompetent to stand trial.

Since 1950, The Arc has also participated in a wide variety of amicus briefs in jurisdictions throughout the country to advance the rights of people with intellectual and developmental disabilities in all aspects of life, including community integration, fair housing, employment, education, criminal justice, parenting, self-determination, and healthcare. The Arc has also joined numerous amicus briefs before the U.S. Supreme Court including *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017) and *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176 (1999).

As relevant to Mr. Palmer's case, The Arc has long advocated under the Eighth Amendment for the prohibition on the execution of people with intellectual

disability[1] ("ID") and has appeared as amicus curiae in a variety of cases involving ID and the death penalty, including *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*").

The Arc of Georgia: The Arc of Georgia, an affiliate of The Arc of the United States, serves Georgians with intellectual and developmental disabilities through 12 local chapters throughout the state. In 1988, together with The Arc of the United States, The Arc of Georgia played a key role in securing Georgia's decision to prohibit the execution of individuals with ID thirteen years before the U.S. Supreme Court established a constitutional exemption in *Atkins*. The Arc of Georgia has insisted that Georgia's burden of proof creates a grave risk that individuals with ID will be executed in violation of the United States Constitution. Indeed, The Arc of Georgia has been among the leaders in a coalition advocating for legislation to change Georgia's standard for *Atkins* relief from "beyond a reasonable doubt" to a constitutionally permissible burden.[2]

The Georgia Advocacy Office: The Georgia Advocacy Office ("GAO") is

[1] *Criminal Justice System*, The Arc, https://thearc.org/position-statements/criminal-justice-system/

[2] *Real Communities: Intellectual Disability and the Death Penalty in Georgia*, Georgia Council on Developmental Disabilities (Jan. 8, 2016), https://gcdd.org/blogs/2865-real-communities-intellectual-disability-and-the-death-penalty-in-georgia.html.

the appointed Protection and Advocacy System for the State of Georgia. GAO's mission is to work with and for oppressed and vulnerable individuals in Georgia who are labeled as disabled or mentally ill to secure their protection and advocacy.

In light of their missions, The Arc, The Arc of Georgia, and GAO (collectively, "Amici") all have a strong interest in seeing Georgia return to its position as a leader with respect to safeguarding the constitutional rights of defendants with ID.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia was the first state in the Nation to establish a prohibition against executing individuals with ID[3] thirteen years before the U.S. Supreme Court established a constitutional exemption in *Atkins*, and its leadership on the issue is to

[3] Clinicians and professionals in the field now employ the term "intellectual disability" or "ID." Robert L Schalock, et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability,* 45 Intell. & Developmental Disabilities 116 (2007). This brief uses these terms in place of "mental retardation" except where directly quoting statutes or other sources. Although the latter term appears in some relevant case law and scholarly articles, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As the U.S. Supreme Court stated in *Hall*: "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon." 134 S. Ct. at 1990 (citing Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability")).

be commended.[4] The Georgia statute at issue, O.C.G.A § 17-7-131, was originally designed to address pleas of insanity at the guilt phase of a criminal trial. Georgia codified its 1988 bar on executing people with ID in this section of the Georgia Code, which resulted in a requirement that the jury find "*beyond a reasonable doubt"* that the defendant is guilty of the crime charged *and* has ID. O.C.G.A § 17-7-131(j).[5] Despite Georgia's early leadership on the issue, since *Atkins* not a single defendant in Georgia has been held to be exempt from execution due to ID pursuant to O.C.G.A. § 17-7-131.[6] As set forth below, this onerous burden of "beyond a reasonable doubt" is inconsistent with the clinical diagnostic process and encourages jurors to default to stereotypes about people with ID.[7]

Mr. Palmer's case demands a reexamination and repudiation of Georgia's unconstitutional requirement that defendants must prove their diagnosis of ID "beyond a reasonable doubt" to be exempt from execution. While Georgia was the

---

[4] *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 560 (2017) (hereinafter cited as "*Empirical Assessment*"); Lauren A. Ricciardelli & Kevin M. Ayres, *The Standard of Proof of Intellectual Disability in Georgia: The Execution of Warren Lee Hill*, 27 J. Disability Pol'y Stud. 158, 158 (2016).

[5] *See also Empirical Assessment* at 557.

[6] *See Empirical Assessment* at 604.

[7] *See* AAIDD, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 16 (10th ed. 2007) (explaining that individuals with ID who have IQs at the higher range of the diagnosis "while meeting the three criteria of [ID], manifest subtle limitations that are frequently difficult to detect ....").

first state to prohibit the sentencing of individuals with ID to death, it is (and has always been) the only state to require that defendants establish ID "beyond a reasonable doubt." While this Court has previously declined to find Georgia's standard unconstitutional, more recent decisions by the U.S. Supreme Court necessitate a different outcome in this case.

Since this Court last examined Georgia's statute in 2011, the U.S. Supreme Court has mandated that, post-*Atkins*, states cannot ignore clinical science or impose procedures that create an "unacceptable level of risk" that individuals with ID will be executed. Consideration of the facts of Mr. Palmer's case, combined with recently published empirical data, demonstrate conclusively that Georgia's burden of proof creates precisely such a constitutionally unacceptable risk. Indeed, Georgia cannot point to a single capital defendant post-*Atkins* who has been exempted from execution pursuant to O.C.G.A § 17-7-131.

The beyond a reasonable doubt burden is inconsistent with the clinical process of diagnosing ID. Understanding what ID is, how it manifests, and the clinical tools used to diagnose it are critical to understanding why Georgia's beyond a reasonable doubt requirement creates a constitutionally unacceptable risk that defendants who have legitimate claims of ID will nonetheless be sentenced to death. Moreover, the burden imposed by Georgia is even more unconscionable in light of the pervasive, inaccurate, and harmful stereotypes regarding ID that are held by many laypeople,

including jurors.

Mr. Palmer's case, in which the jury heard evidence of his ID that was extensive, well-documented, and *unrebutted*, highlights the grave danger posed by Georgia's statute, which fails to protect the constitutional rights of "the entire category of [intellectually disabled] offenders." *Moore I*, 137 S. Ct. at 1052 (quotation omitted)). This Court should re-examine Georgia's burden of proof requirement for a claim of ID in *Atkins* cases, and take action to protect the constitutional rights of Mr. Palmer and *all* capital defendants in Georgia who have ID.

ARGUMENT

I. GEORGIA'S BEYOND A REASONABLE DOUBT STANDARD CREATES AN UNACCEPTABLE RISK -- INDEED, A LIKELIHOOD -- THAT INDIVIDUALS WITH INTELLECTUAL DISABILITY WILL BE EXECUTED BECAUSE THAT BURDEN UNDERMINES CLINICAL SCIENCE.

A. The Supreme Court has Provided A Clear Mandate to States Regarding the Diagnosis of Intellectual Disability in *Atkins* Cases Since this Court Last Examined the Constitutionality of Georgia's Burden of Proof.

When the United States Supreme Court found that the Eighth Amendment bars the execution of people with ID, it did so not only based on the consensus of the legislatures of 18 states (including Georgia) that executing people with ID is intolerable, but also because it recognized:

> [B]y definition [people with ID] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . [T]hey often act on impulse rather than pursuant to a premeditated plan, and [] in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 122 S. Ct. at 2250-51.

Since *Atkins*, the U.S. Supreme Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), and *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"). These recent decisions affirm and amplify the Supreme Court's reasoning in *Atkins*. While states may develop appropriate methods of *enforcing Atkins* protection, such methods cannot operate to *narrow* the class of people with ID. *See Hall*, 134 S. Ct. at 1998 ("[] *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.").

"Georgia is currently—and has always been—the only state to impose a beyond the reasonable doubt standard in determining intellectual disability in a capital case[.]" *Empirical Assessment* at 560; *see also* Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High Is Too High?*, 20 Berkeley J. Crim. L. 163, 198 (2015) (hereinafter cited as "Savilleo, *Standard of Proof*"); O.C.G.A. §17-7-131(c)(3) and (j). This

Court (over vigorous dissent) has twice upheld this burden as constitutional in *Head v. Hill*, 277 Ga. 255, 260-63 (2003), and in *Stripling v. State*, 289 Ga. 370, 371 (2011). However, the U.S. Supreme Court's most recent *Atkins* jurisprudence makes clear that Georgia's beyond a reasonable doubt burden of proof is *not* an "appropriate method" of enforcing *Atkins* protection, because it does not "afford protection to the entire category of offenders [with ID,]" *Moore I*, 137 S. Ct. at 1052 (quotation omitted), and also operates to thwart the clinical diagnosis of ID.

Read together, *Hall*, *Moore I*, and *Moore II* "emphasize that the Eighth Amendment requires adhering to the contemporary clinical understanding of [ID] that is reflected in the clinical literature and in the judgments by the professional associations of those who study and work in the field of [ID]." James W. Ellis, et al., *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1316 (2018) (hereinafter cited as "*Evaluating ID*"); *Moore II*, 139 S. Ct. at 670-71 (reversing the Texas court's finding that Mr. Moore did not have ID after chastising it for repeatedly failing to adhere to clinical science). Policies or procedures that fail to adhere to clinical understandings of ID "*create*[] *an unacceptable risk* that persons with ID will be executed" and are therefore unconstitutional. *Hall*, 134 S. Ct. at 1990 (emphasis added); *Moore I*, 137 S. Ct. at 1044 (same); *see also Moore II*, 139 S. Ct. at 670 (explaining that the Texas courts' previous manner of adjudicating ID "had no grounding in prevailing medical

practice" and improperly "invited 'lay perceptions of [ID]' and 'lay stereotypes' to guide assessment of [ID]" which "creat[ed] an unacceptable risk that persons with [ID] [would] be executed'") (internal citations omitted).

Highlighting the severity of the risk of unconstitutional executions, a recent exhaustive review of Georgia's capital jury trials since 1988 concluded that post-*Atkins* "no defendant facing the death penalty in Georgia" has ever achieved exemption from execution based on ID pursuant to Georgia's statute. *Empirical Assessment* at 553-54. This zero-percent success rate exists despite numerous factual records in which evidence of ID was uncontested or in which every clinician ultimately agreed that the individual met the criteria for an ID diagnosis. *See, e.g.*, *id.* at 585-600.

For example, Mr. Palmer's evidence of ID was unrebutted. Every clinician who has evaluated Mr. Palmer agrees that he has ID, ultimately including the expert hired by the prosecution. These evaluations took place throughout Mr. Palmer's life. As set forth in more detail in Appellant's brief, Mr. Palmer received a score of 67 on an IQ test administered when he was in fourth grade. And as an adult, Mr. Palmer applied for Social Security on the grounds of physical disability, but the evaluator recognized that Mr. Palmer clearly had ID, and he received benefits on the basis of ID. The record in this case has a remarkably robust and consistent body of evidence.

To understand why no defendant, including Mr. Palmer, has succeeded in

carrying the beyond a reasonable doubt burden of proof in Georgia, this Court must understand what ID is, how it manifests -- particularly in people with so-called "mild" ID[8] -- and how it is diagnosed by clinicians. This information, and the U.S. Supreme Court's rulings in *Hall* and *Moore I* and *Moore II,* lead inevitably to the conclusion that the beyond a reasonable doubt burden of proof improperly "invite[s] 'lay perceptions of [ID]' and 'lay stereotypes' to guide assessment of [ID]" and thereby creates an "unacceptable risk" that individuals with ID will be executed in Georgia in contravention of *Atkins* and its progeny. *Moore II*, 139 S. Ct. at 669 (citing *Moore I*, 137 S.Ct. at 1051). This Court should therefore reject the beyond a reasonable doubt burden of proof for ID claims in *Atkins* cases as unconstitutional.

B. Experienced Clinicians Diagnose Intellectual Disability by Carefully Analyzing Three Prongs in Light of Clinical Judgment.

Intellectual disability is a permanent condition in which individuals have significant problems in thinking and reasoning, as well as significant issues with

[8] "Mild" is a comparative term sometimes used to identify individuals with ID whose IQ falls at the higher range of diagnosis. People whose ID is termed mild have significant limitations in intelligence and functioning as compared to the average person. Their limitations are "mild" only in comparison to people with "moderate," "severe," and "profound" ID. People with those latter conditions generally require intensive assistance with basic daily tasks such as eating, dressing, and bathing. *See Evaluating ID* at 1319-1321.

functioning in their everyday lives.[9] Individuals with ID struggle to "adapt or adjust to the requirements of daily life." *Hall*, 134 S. Ct. at 1991.

Consistent with clinical standards, Georgia defines ID as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." O.C.G.A. §17-7-131(a)(3).[10] This statutory definition aligns with the clinical consensus that ID is comprised of three prongs: (1) significant impairments in intellectual functioning, as measured by IQ testing; (2) adaptive behavior deficits in conceptual, social, and/or practical skills; and (3) the onset of the disability before age 18.[11] The U.S. Supreme Court has repeatedly held that this definition is appropriate for courts to use in assessing whether an individual should be constitutionally exempt from the death penalty as a result of having ID. *Atkins*, 122 S. Ct. at 2250; *Hall*, 134 S. Ct. at 1993-94; *Moore I*, 137 S. Ct. at 1044.

While many lay people, including jurors, hold stereotypes about the appearance and functioning of people with ID, contrary to those assumptions each

---

[9] *See, e.g.*, AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010) (hereinafter cited as "AAIDD, 2010"); *Evaluating ID* at 1389.

[10] O.C.G.A. §17-7-131 uses the term "mentally retarded," however, for the reasons set forth *infra*, Amici have substituted the term ID.

[11] *See, e.g.*, AAIDD, 2010; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (hereinafter cited as "APA, DSM-5").

individual with ID, like everyone else, has characteristics in which strengths coexist with deficits.

Evaluations of ID in *Atkins* cases require clinicians versed and experienced in conducting ID diagnoses. Their evaluation requires careful consideration of information gathered from numerous sources relevant to each of the three diagnostic prongs. Clinicians must also draw on knowledge, experience, and clinical understanding of the nature of ID and how it manifests. Put another way, a clinician's experience and judgment, rooted in an understanding of the diagnostic process and after considering extensive data, is critical to a proper diagnosis of ID. *See*, *e.g.*, AAIDD, *User's Guide: To Accompany the 11th Edition of Intellectual Disability: Definition, Classification and Systems of Supports* 9 (2012) ("Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data."); Saviello, *Standard of Proof* at 198 (explaining "the clinical experience and interpretive judgment of the diagnostician are integral to the ultimate diagnosis").

1. Impaired Intellectual Functioning Is Typically Measured By IQ Testing, Which Is Inherently Imprecise.

The first prong of the definition requires that an individual have "significantly subaverage general intellectual functioning[.]" O.C.G.A. §17-7-131(a)(3). This is usually measured by administering a valid intelligence quotient ("IQ") test.

Generally speaking, IQ tests are designed to measure what an individual has learned over time, thereby revealing the subject's ability or capacity to learn and process information. *See* Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence*, 23 (3d ed. 2006); Anne Anastasi & Susana Urbina, *Psychological Testing* 296 (7th ed. 1997).

The measurement of intelligence refers to a person's mental abilities as compared to their peers. An IQ score shows an individual's performance on a battery of standardized tests in comparison to a group of people who reflect the demographic composition of the United States in terms of gender, race, and age. *See Evaluating ID* at 1347-48. An IQ score reflecting average intelligence is 100, with one standard deviation being about 15 points in either direction. *See id*. at 1348. This means that, statistically, 68.8% of test takers receive IQ scores between 85 and 115. To meet the definition of ID, a person's IQ score must fall at least *two* standard deviations below the mean of the test (i.e., 100), which in most cases is a score no higher than approximately 75. *See id*. Only about 2-3% of the population have IQ scores that are this low. *See generally*, Muriel D. Lezak, et al., *Neuropsychological Assessment* (5th ed. 2012).

There are a variety of tests designed to measure intelligence, but two of the most highly regarded tests used today are the Wechsler Adult Intelligence Test – 4th Edition ("WAIS-IV") and the Stanford Binet – Fifth Edition (SB-5). The WAIS-IV

and the SB-5 are a collection of 10 subtests that measure multiple dimensions of intelligence based on contemporary research and an increasing sophistication in psychological measurement. *See Evaluating ID* at 1348-57. Both test batteries are designed to delineate the cognitive strengths and weaknesses of all individuals including those with ID.

Administering and interpreting IQ testing, which has been utilized for more than 100 years, requires the professional judgment of trained and licensed psychologists or other clinicians.[12] IQ tests, like many psychological instruments, are inherently imprecise because they must be read "not as a single fixed number but as a range." *See, e.g.*, *Hall*, 134 S. Ct. at 1995 (citations omitted). To address this concern, psychologists have developed a specific tool called the "standard error of measurement" or SEM. Edward J. Slawski, *Error of Measurement*, in 1 *Encyclopedia of Human Intelligence* 395 (Robert J. Sternberg ed., 1994).[13] The SEM

[12] AAIDD, 2010 at 40 ("As discussed in reference to the operational definition of significant limitations in intellectual functioning, the intent of using approximately two standard deviations below the mean is to reflect the role of clinical judgment in weighing the factors that contribute to the validity and precision of a diagnostic decision."); APA, DSM-5 at 337 ("Clinical training and judgment are required to interpret test results and assess intellectual performance."). *See generally* Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* (2d ed. 2014).

[13] Psychologists do not use the word "error" in the way it is employed in ordinary language, i.e., as a synonym for "mistake." The SEM is not a "mistake" in the sense that mistakes are avoidable, nor is it an "error" that can be "fixed." Rather, "error" is a term of art that describes the inevitable imprecision of any psychometric measurement. *See* Earl Hunt, *Human Intelligence* 313 (2011).

is essentially a quantification of how likely it is that the score of a particular test administered on a particular day is a truly accurate measure of the individual's intellectual ability.[14] "The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Hall*, 134 S. Ct. at 1995. This can confuse jurors – and result in unconstitutional outcomes for defendants with ID – because jurors often have little understanding of statistical concepts. As explained in the leading treatise on neuropsychological testing, understanding IQ scores is complicated by the "natural assumption that if one measurement is larger than another, there is a difference in the quantity of whatever is being measured. . . . [T]wo different numbers need not stand for different quantities but

[14] Domenic V. Cicchetti, *Guidelines, Criteria, and Rules of Thumb for Evaluating Normed and Standardized Assessment Instruments in Psychology*, 6 Psychological Assessment 284, 285 (1994) ("The standard error of measurement defines that amount of test-retest variability that is expected to occur on the basis of the inherent imprecision of the assessment instrument itself."); Robert M. Thorndike & Tracy Thorndike-Christ, *Measurement and Evaluation in Psychology and Education* 132 (8th ed. 2010) ("Another way to view the standard error of measurement is as an indication of how much a person's score might change on retesting. Each person's score on the first testing includes some amount of error."); David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence 211, 243 (3d ed. 2011) ("An estimate based on a sample is likely to be off the mark, at least by a small amount, because of random error. The standard error gives the likely magnitude of this random error, with smaller standard errors indicating better estimates."); Gary Groth-Marnat, *Handbook of Psychological Assessment* 15 (5th ed. 2009) ("The logic behind the SEM is that test scores consist of both truth and error. Thus, there is always noise or error in the system, and the SEM provides a range to indicate how extensive that error is likely to be.").

may be chance variations in the measurement of the same quantity." Lezak at 200-01.

Additionally, IQ test results can be affected by the way in which a test is administered—*e.g.*, how much time is allotted for questions or the rapport between the test taker and administrator. Even small errors in administering and/or scoring IQ tests may skew the results. Additionally, clinicians acknowledge that IQ scores on some less robust tests, such as group tests and screening tests, may be unreliable, and overstate intelligence, particularly in people who may have ID.[15]

As a result, an individual with ID can achieve a numerical score on an IQ test that a layperson, including a juror or a prosecutor, may (incorrectly) believe is impossible for someone with ID. Prosecutors can exploit these imprecisions as well

---

[15] *See, e.g.*, John R. Slate, et al., *Practitioners' Administration and Scoring of the WISC-R: Evidence That We Do Err*, 30 J. School Psychology 77, 81 (1992) ("The frequent mistake of 'generosity' in assigning points may reflect a sincere desire to help a child/client that creates a subtle pressure to 'read into answers.'"); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill of Rights J. 467, 474 (2014) ("A commonly observed error is the reliance on screening or group-administered intelligence tests that do not provide accurate measures of IQ. . . . Group-administered paper and pencil tests, such as the *Beta III*, used in correctional settings, are also inappropriate for diagnosis as they do not yield accurate scores. In the case of group-administered tests, there is the additional risk that the individual received additional help or copied the responses of others."); AAIDD, 2010 at 41 ("For evaluating whether or not a person meets the significant limitations in intellectual functioning criterion for a diagnosis of ID, one should employ an *individually administered*, standardized instrument that yields a measure of general intellectual functioning.") (emphasis added).

as jurors' commonly held misconceptions about IQ scores and stereotypes by suggesting to a jury that a score which, considering these imprecisions, is within the range of ID should raise a "doubt" in the mind of the jury regarding a defendant's claim. For example, a hypothetical defendant with a reported IQ score over 75 may nonetheless have significantly subaverage intellectual functioning (as required in prong 1), because that score may be due to administration or scoring errors, to the use of a short, group, or other less-reliable test, or to other testing problems. *See Evaluating ID* at 1347-66.

2. The Assessment of Adaptive Functioning Involves Clinical Expertise and a Careful Analysis of an Individual's *Deficits*.

The second prong of the analysis concerns an individual's adaptive functioning—i.e., the individual's problems in functioning in everyday life. *Evaluating ID* at 1329. The assessment of adaptive functioning requires a careful analysis by clinicians with expertise in diagnosing ID.[16]

[16] *See, e.g.*, Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124, 132 (2009) ("No single information element or source is ever sufficient to diagnose MMR [mild mental retardation] developmentally or during the adult years. Even a very low score on a single measure of general intellectual functioning is never sufficient. All valid MMR diagnoses require consideration of a broad variety of information. Four types of information should be considered: (a) tests given directly to the individual, (b) observations of the individual in relevant settings, (c) records from all available sources, and (d) interviews with relevant persons.") (hereinafter cited as "Reschly, *Developmental Origins*").

Clinicians assessing adaptive behavior deficits must make a "wide[]-ranging inquiry" as to whether "there are sufficient limitations in [an] individual's functioning under ordinary circumstances." *Evaluating ID* at 1332 (emphasis omitted). The goal is to assess an individual's "actual everyday functioning." *Id*. at 1333 (emphasis omitted). Therefore clinicians must focus their adaptive behavior inquiry on "how an individual performed (or failed to perform) tasks in general society." *Id*. at 1334; *see also Moore I*, 137 S. Ct. at 1050.

As a result, evaluating this second prong of the determination of ID typically requires extensive information-gathering from those who knew the individual *prior* to incarceration. *See, e.g.*, *Moore I*, 137 S. Ct. at 1050 ("Clinicians, however, caution against reliance on adaptive strengths developed in a controlled setting, as a prison surely is.") (internal quotation omitted); *Moore II*, 139 S. Ct. at 670-71.[17] This makes

[17] Caroline Everington, et al., *Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated*, *in* The Death Penalty and Intellectual Disability 201, 202 (Edward A. Polloway ed., 2015) ("[A] satisfactory assessment of AB is not possible in a prison context because the individual has no opportunities to demonstrate the presence or absence of adaptive skills typical in day-to-day life. Inmates do not cook, choose clothing, or make independent choices about their day-to-day existence. By design, correctional settings remove virtually all personal control from the individual, and, as such, practical behaviors pertinent to the diagnosis cannot be demonstrated."); Gilbert S. Macvaugh & Mark D. Cunningham, Atkins v. Virginia*: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & Law 131, 161 (2009) ("Institutional adaptation should generally not be regarded as dispositive of adaptive functioning in the open community. In such situations, forensic examiners should clearly state the limitations of retrospective

assessing adaptive functioning difficult and highly variable depending on the availability of accurate witnesses to a defendant's pre-incarceration behavior, further accentuating the inappropriateness of a beyond a reasonable doubt burden of proof. Where a defendant's school records are incomplete or non-existent; where a defendant attended a school that did not maintain special education programs; where a defendant comes from a broken home and parents and relatives are unavailable to describe core behavioral abilities; where steady employment records are missing and witnesses unavailable, *etc.*, it may be difficult to present to a jury a comprehensive portrait of a defendant's adaptive behavior deficits. Moreover, the risk factors for ID include, among other things, poverty, trauma, and abuse. AAIDD, 2010 at 60. The beyond a reasonable doubt standard, combined with the practical problems inherent in gathering the records and information, creates a constitutionally unacceptable risk of executing people with ID.

Furthermore, properly assessing this prong requires consciously focusing *solely* on an individual's *deficits. Evaluating ID* at 1335-36*; Moore I*, 137 S. Ct. at 1043 (explaining "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*") (emphasis in original). In other words, in the diagnosis of ID clinicians focus only on what the individual *cannot* do—an approach which may

---

assessments of adaptive functioning.") (hereinafter cited as "Macvaugh, *Forensic Practice*").

seem "counterintuitive to many people," including jurors. *Evaluating ID* at 1335-36*; see also Moore II*, 139 S. Ct. at 670-71 (criticizing the Texas Court of Criminal Appeals for improperly "again rel[ying] less upon the adaptive *deficits* to which the trial court had referred than upon Moore's apparent adaptive *strengths*" in contravention of clinical science) (emphasis in original).

Strengths are not relevant to an adaptive functioning assessment because every person with ID, like every person without ID, has *both* strengths and weaknesses. *See, e.g.*, Martha E. Snell, et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intell. & Developmental Disabilities 220, 220 (2009) ("[A]ll individuals with intellectual disability typically demonstrate strengths in functioning along with relative limitations.") (hereinafter cited as "Snell, *Characteristics*"). Jurors may believe, incorrectly, that strengths displayed by a defendant should make them question the credibility of an ID diagnosis—even though strengths are clinically irrelevant in arriving at a diagnosis. The danger of jurors being misled or confused by the clinical requirements of the adaptive behavior analysis, when combined with the pervasiveness of harmful stereotypes regarding ID, further renders a beyond a reasonable doubt standard unacceptably likely to result in the unconstitutional execution of those with ID.

3. Onset During the Developmental Period Requires Retrospective Analysis and the Informed Interpretation of Records.

Finally, clinicians have to determine whether deficits originated during an individual's developmental years.[18] This necessarily means that a clinician has to engage in a retrospective assessment, gathering information – if it even exists – from a variety of records and from individuals who knew the defendant in his developmental years. Depending on the age of the defendant at the time of incarceration, this can involve looking back several decades. As was the case with the second prong, the difficulties presented by historical fact gathering make a beyond a reasonable doubt standard constitutionally unacceptable.

In sum, requiring an individual to establish all three prongs beyond a reasonable doubt, as Georgia's statute currently requires, creates a constitutionally unacceptable risk that an individual with ID will be executed.

[18] *See, e.g.*, APA, DSM-5 at 33 ("Intellectual disability . . . is a disability with onset during the developmental period . . . ."). Critically, there is no requirement "that there have been IQ tests or formal assessments of adaptive deficits while the individual was a child." *Evaluating ID* at 1338.

II. PERVASIVE, HARMFUL STEREOTYPES REGARDING INTELLECTUAL DISABILITY FURTHER INCREASE THE RISK THAT INDIVIDUALS WITH INTELLECTUAL DISABILITY WILL BE EXECUTED CONTRARY TO CONSTITUTIONAL PROTECTIONS.

In addition to having to prove all three prongs beyond a reasonable doubt, the work of explaining a diagnosis of ID, particularly mild ID, to juries is complicated by the fact that people often hold any number of harmful stereotypes. *See, e.g.*, *Moore I*, 137 S. Ct. at 1051-52 (explaining that "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled" and that such "stereotypes, much more than medical and clinical appraisals, should spark skepticism"). One of the most pervasive and harmful beliefs is that all individuals with ID can be identified by readily observable physical traits and behaviors and will clearly "present" as people with ID. This belief is contradicted by clinicians, who have made it clear:

> In fact, we cannot 'see' the offender with ID any more obviously than we can 'see' the offender without ID. There are no labels on their backs, and there are often no obvious signs that they are impaired enough to warrant attention. That said, underneath what appear to be typical offenders lie true differences in cognitive abilities that can dramatically affect their ability to function within the criminal justice system.

Karen L. Salekin, et al., *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessmen*t, 3 J. Mental Health Res. In Intell.

Disabilities 97, 110 (2010). Nevertheless, many people, even those with the best of intentions, incorrectly believe that they can "tell" either by observing or by interacting with an individual whether that person has ID.[19]

Moreover, statistically, individuals with ID who have higher IQs – those with so-called mild ID -- constitute 80-90% of all those with ID. *See*, *e.g.*, Snell, *Characteristics* at 220. These individuals make up the vast proportion of individuals with ID in the criminal justice system. *See* Macvaugh, *Forensic Practice*, at 142 (stating that "virtually all" capital offenders with ID "are within the mild category"); Reschly, *Developmental Origins* at 125 (explaining that death penalty appeals involving ID claims "virtually always" involve mild ID). Contrary to many lay people's belief, "[m]ost of these individuals are physically indistinguishable from the general population because no specific physical features are associated with intellectual disability at higher IQs." Snell, *Characteristics* at 220.

In addition, and also contrary to widely held popular beliefs, there are no "definite behavioral features [] specifically associated with intellectual disability with higher IQs." *Id.* That said, individuals with ID frequently, "tend to do what others want in an effort to be accepted or liked by them." *Id.* at 226. A "cardinal

[19] *See generally* Andrea D. Lyon, *But He Doesn't* Look *Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DePaul L. Rev. 701, 713-17, App'x at 718-19 (2008).

feature" of ID is gullibility, which can result in individuals with ID being "talked into doing things without understanding the potential consequences." *Id.* They are also often naïve and "overly trusting of others" and this "naiveté" or "suggestibility" combined with "gullibility may increase [an individual with ID's] risk of making poor decisions." *Id.*

Individuals with ID can often be taught to engage in routine aspects of daily life, including securing and maintaining employment, living in an apartment, participating in meaningful relationships, using public transportation, and even driving a car, doing basic housecleaning, writing checks, and the like. Indeed, clinical literature is abundantly clear that many of the people who have been properly diagnosed with ID can perform one or more of these tasks.[20]

In the instant case, for example, Mr. Palmer was periodically employed, married, and fathered a child—all of which are behaviors inconsistent with lay stereotypes of ID but not inconsistent with a diagnosis of ID. As clinicians have explained:

> Whereas many of these individuals 'living "independently" predictably will need support in relation

[20] *See, e.g.*, Schalock, *Clinical Judgment* at 38–39; Roger J. Stancliffe & K. Charlie Lakin, *Independent Living*, *in* Handbook of Developmental Disabilities 429, 430 (Samuel L. Odom et al. eds., 2007); Snell, *Characteristics* at 221. For a detailed description of some of the tasks of daily living that people with ID can learn to do, see *Evaulating ID* at 1403-1404 & nn.380-83 and sources therein.

> to specific issues' (*e.g.*, housing employment, transportation, health services [citation]), some individuals in this group 'may develop homes and home lives independent of a formal agency support once the time comes for them to live separately from their families' [citation]. These documented outcomes contrast sharply with the incorrect stereotypes that these individuals cannot have friends, jobs, spouses, or children or be good citizens.

See Snell, *Characteristics* at 221. More importantly, these and other similar types of "strengths may confound a layperson or a professional with limited clinical experience with individuals who have mild [ID]." Marc J. Tassé, *Adaptative Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009).

Further complicating things, the clinical literature has maintained for decades that individuals with ID, especially those with higher IQs, frequently seek to mask their limitations and weaknesses from others. *See, e.g.*, Robert B. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967); Snell, *Characteristics* at 226 ("Individuals with [ID] may go to great lengths to hide their limitations, consuming significant effort to attempt to appear as their often-mistaken image of competent."). This is a result of the intense stigma that can be associated with being perceived or "labeled" as a person with ID. *See Evaluating ID* at 1368. This "masking" behavior can have the effect of disguising substantial limitations in understanding and functioning and may mislead jurors.

Jurors may believe, incorrectly, that an individual's strengths or their general affect necessarily creates reasonable doubt concerning a diagnosis of ID. Misguided reliance on lay perceptions and stereotypes, rather than clinical science, in diagnosing ID in *Atkins* cases was condemned in *Moore I* and *Moore II*. *See Moore I*, 137 S. Ct. at 1051; *Moore II*, 139 S. Ct. at 679. For all of these reasons, requiring an individual to establish ID beyond a reasonable doubt creates a dangerous and unacceptable risk that an individual with ID will be executed.

III. MR. PALMER'S CASE HIGHLIGHTS THE GRAVE RISK OF EXECUTING INDIVIDUALS WITH INTELLECTUAL DISABILITY CREATED BY THE BURDEN OF PROOF PLACED ON THEM BY O.C.G.A. § 17-7-131.

The record in the case at bar exemplifies the unacceptable risk posed by Georgia's burden of proof to individuals with ID. The prosecution sought and obtained a death penalty verdict twice.[21] Yet, evidence of Mr. Palmer's ID has been *unrebutted* by the State.[22] In fact, *every* expert who has evaluated Mr. Palmer agrees

[21] Mr. Palmer's case has been tried three times; however, the first trial ended in a mistrial as a result of the prosecution's failure to disclose an exculpatory witness statement. *See* T28:506. For ease of reference, citations to the transcript in this brief are conformed to Appellant's brief.

[22] Further underscoring the problem with Georgia's burden of proof, prior to Mr. Palmer's incarceration, the federal government awarded Mr. Palmer Social Security disability benefits *on the basis of [ID]*. *See* T52:1968.

that he has ID.[23]

As set forth in detail in Appellant's brief, IQ tests, including one administered in elementary school, have repeatedly revealed that Mr. Palmer's IQ is well within the range of ID. There is also substantial evidence of adaptive functioning deficits, with one expert determining that Mr. Palmer has deficits in eight out of the eleven areas of adaptive functioning analyzed. *See* T53:2122. Among other things, Mr. Palmer could not tell his shoes apart until he was 9 or 10 years old and was unable as a teenager to read a clock. *See, e.g.*, T54:2368, T52:2113. Moreover, school records establish that his ID was present during his developmental years. *See, e.g.*, T53:2107, T53:2123. As a result, Mr. Palmer readily satisfies all three clinical criteria: (1) his IQ has repeatedly tested within the range of ID; (2) he has significant adaptive functioning impairments; and, (3) the condition manifested before the age of 18. Nevertheless, despite presenting decades of consistent testing and records in support of his claim, Mr. Palmer has been unable to satisfy Georgia's burden of proof. Under the teaching of *Atkins*, *Hall*, and *Moore*, this outcome -- whereby Georgia will permit the execution of an individual with ID -- is in direct violation of the United States Constitution and cannot stand.

[23] As set forth in detail in Appellant's brief, Mr. Palmer has been evaluated by five different experts over a span of more than 30 years. Despite their differences in testing and approaches to evaluation, all of them agree with a diagnosis of ID.

CONCLUSION

For all of the reasons set forth above, Georgia's burden of proof deprives people with ID, including Mr. Palmer, from obtaining the federal constitutional protection established in *Atkins*, and upon which the U.S. Supreme Court elaborated in *Hall*, *Moore I*, and *Moore II*. This Court must act to eliminate this unconscionable risk and permit capital defendants in Georgia to "have a *fair opportunity* to show that the Constitution prohibits their execution." *Hall*, 134 S. Ct. at 2001 (emphasis added). As it now stands, Georgia's burden of proof presents a grave risk that defendants with ID will be executed in violation of the United States Constitution.

Respectfully submitted, this 6th day of July, 2020.

/s/ Andrew J. King, Esq.
Andrew J. King
Georgia Bar. No. 926908
Fisher Broyles LLP
945 East Paces Ferry Road NE, Suite 2000
Atlanta, GA 30326
(404) 890-5581
Andrew.king@fisherbroyles.com

Laurence S. Shtasel*
Heidi G. Crikelair*
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5500
shtasel@blankrome.com
hcrikelair@blankrome.com

Shawna J. Henry*
501 Grant Street, Suite 850
Pittsburgh, PA 15219
(412) 932-2805
shenry@blankrome.com
**Pro Hac Vice Applications Pending*