CAPITAL CASE

No. 13-5086

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE HOWELL,

Petitioner

vs.

STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

---

* Paul R. Bottei
Amy D. Harwell
Kelley J. Henry

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

* Counsel of Record

CAPITAL CASE
QUESTIONS PRESENTED

1. a. In proceedings under Atkins v. Virginia, 536 U.S. 304 (2002), does the Sixth Amendment require a state to prove the absence of mental retardation (intellectual disability) beyond a reasonable doubt to a jury, because death is not within the permissible range of sentences for a person who is intellectually disabled?

b. Should this Court grant certiorari, vacate, and remand for further consideration of Howell's Sixth Amendment claim in light of Alleyne v. United States, 570 U.S. ____ (June 17, 2013)?

2. Does it violate the Eighth Amendment and *Atkins* for a state court to determine a petitioner's I.Q. without appropriately applying scientifically reliable standards for the assessment of intellectual functioning such as the Standard Error Of Measurement (SEM) of I.Q. tests or the "Flynn Effect," a recognized phenomenon requiring the downward adjustment of raw I.Q. scores to reflect the petitioner's actual I.Q.?

3. Do the Eighth Amendment and *Atkins* allow a state to use standards for assessing adaptive deficits that contravene scientifically accepted clinical practice and that focus on an individual's abilities rather than his actual deficits, when such deficits satisfy clinical standards for intellectual disability?

4. Does it violate due process and/or equal protection under the Fourteenth Amendment for a state supreme court to require consideration of SEM and the Flynn Effect in some *Atkins* cases but to refuse their consideration to Michael Howell?

TABLE OF CONTENTS

QUESTIONS PRESENTED I

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Tennessee Has Place Upon Howell The Burden Of Proving Intellectual Disability By A Preponderance Of The Evidence and Denied Him a Jury Trial, Even Though Death Is Not Within The Permissible Range Of Sentences For Persons Who Are Intellectually Disabled 2

II. Tennessee's Determination Of Howell's Intelligence Quotient Is Unscientific And Unreliable 3

A. Using Scientifically Valid Instruments, Generally Accepted Protocols, and Sound Clinical Judgment Four Preeminent National Experts Agree Mr. Howell Is Intellectually Disabled 3

B. Howell's Experts Complied With Nationally Recongnized Clinical Standards In The Determination Of I.Q. 5

C. The Tennessee Courts Accepted And Credited The Opinion Of An Admitted Non-Expert To Discount The Reliability Of The I.Q. Score Obtained By Howell On The Test Administered By The Witness 7

D. The Trial Court Found That Howell Was Not Intellectually Disabled After Explicitly Refusing To Consider The Standard Error Measurment ("SEM") Of The Intelligence Tests Or The Flynn Effect 8

III. Tennessee's Determination Of Howell's Adaptive Deficits Is Unscientific And Unreliable 8

A. Howell's Proof Clearly Demonstrated Significant Adaptive Deficits From Early Childhood 9

B. The Tennessee Courts Credited Non-Scientific Testimony Of Criminal Activity In Rebuttal Of Howell's Compelling Proof Of Adaptive Deficits 12

IV. The Tennessee Courts Violated Due Process And/Or Equal Protection By Refusing To Order The Consideration Of SEM And The Flynn Effect 13

REASONS FOR GRANTING THE WRIT 14

I. In Conflict With This Court's *Apprendi* Line Of Cases, Including Its Recent Decision In Alleyne v. United States, 570 U.S. ___ (June 17, 2013), Tennessee Denied Mr. Howell A Jury Trial On The Essential Element Of The Crime Of Capital Murder, Death Eligibility, And Placed An Unconstitutional Burden Upon Howell To Prove His Death Ineligibility 14

II. In Conflict With *Atkins* And The Rulings Of Other Lower Courts, The Lower Courts Here Ailed To Properly Apply SEM, The Flynn Effect, And Clinically Appropriate Standards For Assessing Adaptive Deficits 18

A. Although Consideration Of Tests' Standard Error Of Measurement (SEM) Ensures Reliability In Any *Atkins* Proceeding, SEM Is Considered In Some Jurisdictions But Rejected In Others 18

1. Standard Error Of Measurement 18

2. There Is Conflict In The Lower Courts Regarding Consideration Of SEM In *Atkins* Proceedings 20

B. The States Also Take Divergent Approaches To Consideration Of The "Flynn Effect" Which, When Properly Considered, Ensures Accuracy In The Assessment Of Intellectual Disability 23

C. This Court Should Grant Ceriorari To Reconcile Divergent Approaches Toward Using SEM And The Glynn Effect When Measuring Intellectual Functioning 25

D. This Court Should Grant Ceriorari To Ensure That Clinically Sound Definitions Of Adaptive Deficits Inform The Eighth Amendment *Atkins* Inquiry 27

III. Tennessee Has Arbirarily Refused To Apply Reliable Definitions Of Intellectual Disability To Michael Howell, While Requiring Their Application To Similarly-Situated Petitioners, In Violation Of Equal Protection 30

A. Unlike Similarly-Situated *Atkins* Claimants In Tennessee, Michael Howell Has Been Denied Application Of Appropriate, Reliable Standards For Assessing Intellectual Disability 30

B. Michael Howell Has Been Denied Due Process And Equal Protection Of The Laws 32

CONCLUSION 33

TABLE OF AUTHORITIES

Alleyne v. United States, 570 U.S. ___ (June 17, 2013) ..... *passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) 16

Atkins v. Virginia, 536 U.S. 304 (2002) 2, 20

Beck v. Alabama, 447 U.S. 625 (1980) 20

Black v. Bell, 664 F.3d 81 (6th Cir. 2011) 27

Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) 27

Cherry v. State, 959 So.2d 702 (Fla. 2007) 24

Coleman v. State, 341 S.W.3d 221 (Tenn. 2011) 15, 33

Commonwealth v. Williams, 2013 Penn. Lexis 110 (Pa. 2013) 23

Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993) 20

Ex Parte Briseno, 135 S.W.3d 1 (Tex.Crim.App. 2004) 30, 32

Franqui v. State, 59 So.3d 82 (Fla. 2011) 24

Green v. Johnson, 515 F.3d 290(4th Cir. 2008) 27

Hicks v. Oklahoma, 447 U.S. 343 (1980) 36

Holladay v. Allen, 555 F.3d 1346 (11th Cir. 2009) 27

Howell v. State, 151 S.W.3d 450 (Tenn. 2004) 1, 15

Howell v. State, 2011 Tenn.Crim.App.Lexis 447 *34-35, 53 (June 14, 2011) 3

Howell v. State, 2011 Tenn.Crim.App.Lexis 447 *48 30

Howell v. State, No. W2009-02426-CCA-R3-PD (Tenn. Crim. App. June 14, 2011) ... 1

Howell v. State, No. W2009-02426-SC-R11-PD (Tenn. Jan. 29, 2013) 1

Howell v. Tennessee, No. 12A987 (Apr. 12, 2013) 1

In Re Mathis, 483 F.3d 395 (5th Cir. 2007) 27

Keen v. State, 2012 Tenn.Lexis 932 34

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 36

People v. Superior Court (Vidal), 40 Cal. 4th 999 (2013) 23

Ring v. Arizona, 536 U.S. 304 (2002) 2

Sattazahn v. Pennyslvania, 537 U.S. 101 (2003) 16

Smith v. State, 245 P.3d 1233 (Okla. Crim. App. 2010) 27

Smith v. State, 357 S.W.3d 322 (Tenn. 2011) 34

State v. Anderson, 996 So.2d 973 (La. 2008) 23

State v. Williams, 831 So.2d 835 (La. 2002) 23

Thomas v. Allen, 607 F.3d 749 (11th Cir. 2010) 27

Thorson v. State, 76 So.3d 667 (Miss. 2011) 27

Van Tran v. State, 2006 Tenn.Crim.App.Lexis 899 30

Willowbrook v. Olech, 528 U.S. 562 (2000) 36

Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010) 27

Zant v. Stevens, 462 U.S. 862 (1983) 16

CONSTITUTIONAL AND STATUTORY PROVISIONS

Tenn. Code Ann. § 39-13-202(b) 15

Tenn. Code Ann. § 39-13-203(b) 15-16

U.S. Const. Amend. VI 1

U.S. Const. Amend. VIII 1

U.S. Const. Amend. XIV 1

28 U.S.C. § 1257 1

OTHER AUTHORITIES

AAMR/AAIDD's *Mental Retardation: Definition, Classification and Systems of Supports* (10th ed. 2002) 4

Diagnosis And Classification Of Intellectual Disability, 11th ed. (AAIDD: Washington, D.C., 2010) 21

Intellectual Disability: Definition Classification, and Systems of Supports (11th ed.), American Association Of Intellectual And Developmental Disabilities (Washington D.C.: 2010) 31

CITATIONS TO OPINIONS BELOW

The original opinion of the Tennessee Supreme Court is reported as Howell v. State, 151 S.W.3d 450 (Tenn. 2004). A18-A35. The opinion of the Tennessee Court of Criminal Appeals following remand is unpublished. Howell v. State, No. W2009-02426-CCA-R3-PD (Tenn. Crim. App. June 14, 2011); A3-A17. The subsequent order of the Tennessee Supreme Court denying application for permission to appeal is unreported. Howell v. State, No. W2009-02426-SC-R11-PD (Tenn. Jan. 9, 2013); A2. The Tennessee Supreme Court's recent order denying rehearing is likewise unreported. No. W2009-02426-SC-R11-PD (Tenn. Jan. 29, 2013); A1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257. The Tennessee Supreme Court denied application for permission to appeal on January 9, 2013 and denied rehearing on January 29, 2013. On April 12, 2013, Justice Kagan granted an extension of time, until and including June 28, 2013, within which to file a petition for writ of certiorari. Howell v. Tennessee, No. 12A987 (Apr. 12, 2013)(Kagan. J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall been committed."

U.S. Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I.
Tennessee Has Placed Upon Howell The Burden Of Proving Intellectual Disability By A Preponderance Of The Evidence and Denied Him a Jury Trial, Even Though Death Is Not Within The Permissible Range Of Sentences For Persons Who Are Intellectually Disabled

Michael Howell has maintained that under Atkins v. Virginia, 536 U.S. 304 (2002) and Ring v. Arizona, 536 U.S. 304 (2002), the Sixth Amendment prevents his execution absent a jury finding, beyond a reasonable doubt, that is he is not mentally retarded/intellectually disabled. The Tennessee Supreme Court has rejected Howell's claim.

The Tennessee Supreme Court asserted that "the lack of mental retardation does not operate as 'the functional equivalent of an element of a greater offense' that subjects the defendant to a greater penalty and which must be proved by the State beyond a reasonable doubt." Howell, 151 S.W.3d 450, 466 (Tenn. 2004); A29-A30. In the Tennessee Supreme Court's view, "mental retardation works to reduce the maximum possible sentence, based upon the jury's verdict, from death to life imprisonment. Therefore, it is not an element of the offense and is not required to be proven by the State nor found by a jury." Id. at 467; A30.

The Tennessee Supreme Court remanded for further proceedings on Howell's *Atkins* claim, but in doing so, it placed the burden of proof on Howell to prove the existence of mental retardation by a preponderance of the evidence and denied him a jury trial. On remand, the trial court concluded that Howell had not satisfied this burden, and on appeal, the Tennessee Court of Criminal Appeals affirmed, applying this same burden. Howell v. State, 2011 Tenn.Crim.App.Lexis 447 *34-35, 53 (June 14, 2011); A12. The Tennessee Supreme Court denied application for permission to appeal. A2.

As Howell demonstrates *infra*, the Tennessee Supreme Court misunderstands the process of death eligibility. A finding of eligibility is a gateway that the state must pass through before a murder defendant may be selected for death. It is not the other way around, as the lower court seems to believe. In addition, the burden of proof applied by the Tennessee courts conflicts with this Court's *Apprendi* decisions, including Alleyne v. United States, 570 U.S. ___ (June 17, 2013). As more fully explained *infra*, this Court should therefore, at a minimum, grant Howell's petition, vacate, and remand for further consideration in light of *Alleyne*.

II.
Tennessee's Determination Of Howell's Intelligence Quotient Is Unscientific And Unreliable

While in *Atkins* this Court left to the states the task of establishing the criteria by which intellectual disability would be determined, that determination must still comport with due process and fundamental fairness. The approach adopted by the State of Tennessee in Howell's case allowed for an unreliable evaluation of the evidence, flying in the face of due process, the need for heightened reliability in the imposition of any death sentence, and fundamental fairness.

A. Using Scientifically Valid Instruments, Generally Accepted Protocols, and Sound Clinical Judgment Four Preeminent National Experts Agree Mr. Howell Is Intellectually Disabled

Four preeminent, nationally recognized experts in the field of intellectual disability testified that Mr. Howell meets all three of Tennessee's statutory criteria for intellectual disability (functional IQ of 70 or below, deficits in adaptive behavior, and onset prior to age 18). Mr. Howell presented witnesses who were exceptionally well-qualified, reliable, and based their opinions on accurate information and scientifically valid principles:

Dr. Stephen Greenspan is a pioneer in the field of intellectual disability, being cited more often than any other source in the definitive treatise on intellectual disability, the AAMR/AAIDD's *Mental Retardation: Definition, Classification and Systems of Supports* (10th ed. 2002) and having received that organization's highest honor for his work in the field of intellectual disability. (MRPC, p. 237).

Dr. James Flynn, originator of the eponymous "Flynn Effect" is an expert in the field of intelligence testing and norm obsolescence, because of his groundbreaking research on the science of intelligence testing. Dr. Flynn and his research are cited by legions of publications relating to intelligence testing, most notably by the Psychological Corporation, the publisher of the WAIS, and American Association on Intellectual and Developmental Disabilities. (MRPC, p. 322).

Dr. Dan Grant, a board certified neuropsychologist, trained with David Wechsler (originator of the Wechsler intelligence scales) and Alan Kaufman and has published regarding the assessment of adaptive behavior. (MRPC, p. 101). Dr. Grant has extensive experience in diagnosing persons with intellectual disability, including in a prison setting for the State of Georgia.

Dr. George Woods, a neuropsychiatrist who is a member of the American Psychological Association division specializing in intellectual disability, has a clinical practice, approximately fifteen percent of which are people with a diagnosis of intellectual disability. (MRPC, p. 15).

Drs. Grant, Greenspan, and Woods each declared that, to a reasonable degree of

medical certainty, Mr. Howell meets each prong of Tennessee's statutory definition of intellectual disability. (MRPC, pps. 224, 309, 81). In forming their opinions, Drs. Grant, Greenspan and Woods reviewed the I.Q. testing done by other experts, and Drs. Grant and Greenspan also administered their own testing. Each doctor reviewed comprehensive records of Mr. Howell's medical, social, educational, and institutional history. From this history, they highlighted several key facts which supported or confirmed their diagnosis: Mr. Howell was in special education (MRPC, p. 208, *see also* MRPC Exhibit 41: Affidavit of (special education teacher) Gail Bridges); Mr. Howell's academic records are replete with failure by Mr. Howell - he failed first grade, was socially promoted in fourth grade, and failed the ninth grade two times (MRPC, p. 208); and while already behind other children of his age, Mr. Howell failed to perform at grade level even on years he was not retained. (MRPC, p. 209). Mr. Howell's younger siblings had to help him dress himself (MRPC Exhibit 26: Testimony of (sister) Brenda Hunter); he never lived independently (MRPC, p. 306); he had only menial jobs; and he was routinely injured or fired from those jobs. (Id., *see also* MRPC Exhibit: 36-8).

B. Howell's Experts Complied With Nationally Recognized Clinical Standards In The Determination Of I.Q.

Mr. Howell's witnesses complied with the nationally recognized clinical standards for the assessment of intellectual disabilities. Howell's experts used objective standardized testing instruments in conjunction with clinical judgment, and confirmed their results with reference to Howell's social history and adaptive deficits. In doing so, each concluded that Michael Howell meets the first prong of *Atkins*, which requires substandard intellectual functioning.

In 2002, Dr. Grant administered the Stanford-Binet-IV to Mr. Howell, who received a scaled score of 62 (Flynn-corrected to 56, *see* MRPC Exhibit 35, Report of Dr. James Flynn), which is clearly within the mentally retarded range (whether Flynn-corrected or raw). (MRPC, p. 165). Dr. Grant also administered the Comprehensive Test of Non-Verbal Intelligence (CTONI) and Mr. Howell received a score of 67, which is within the mentally retarded range. Id. Dr. Grant also administered the WAIS-III to Mr. Howell and received a score of 73. (MRPC, p. 164). Dr. Flynn testified that because of the time between the norming of the WAIS-III and Mr. Howell's test, that score should be adjusted 2.10 points to correct for norm obsolescence, also known as the Flynn Effect. Id. Dr. Flynn's report further explains that during the norming of the WAIS-III a sub-standard sample was used which inflated I.Q.s by 1.65 points, which means that corrected for these errors, Mr. Howell's I.Q. on the WAIS-III administered by Dr. Grant was 69.25. Id. Dr. Grant clearly testified that it is his opinion to a reasonable degree of medical certainty that Mr. Howell is mentally retarded under the provisions of the Tennessee statute. (MRPC, pp. 174, 221).

Dr. Greenspan's test of Mr. Howell's intelligence corresponds with the results obtained by Dr. Grant and the state's expert. (MRPC, p. 297). Though Dr. Greenspan only administered a screening test for I.Q., he testified that his result on that test, the Reynolds Intellectual Assessment Scale (RIAS) of a 49, was congruent with the results he was provided from other administrations of I.Q. instruments to Mr. Howell. Id. Further, Dr. Greenspan's tests of Mr. Howell's adaptive functioning provided further verification and validation of the scores obtained by Drs. Grant and the state's expert witness.

C. The Tennessee Courts Accepted And Credited The Opinion Of An Admitted Non-Expert To Discount The Reliability Of The I.Q. Score Obtained By Howell On The Test Administered By The Witness

Though the state's sole witness admitted that he was not an expert in "mental retardation" the Tennessee courts credited his opinion over the scientifically supported testimony of Howell's experts. By his own testimony, the state's witness did not possess the specialized training and experience necessary to have the clinical judgment of an expert in intellectual disability necessary to evaluate Mr. Howell's effort or performance on such testing. His only formal training in assessment for intellectual disability was in graduate school, decades prior to the hearing. (MRPC, p. 403 *et seq.*) The witness' lack of qualifications were obvious: he admitted his ignorance regarding the primary psychological organization in the field of mental retardation, the AAIDD, its definition of retardation, and its Users' Guide for Practitioners; he has not published a single article in the field of intellectual disability; has not conducted any research in intellectual disability; and is not a member of the APA. Id. The witness testified that the last training he had in the assessment of intellectual disabilities was in the 1970s, before the standard of care included assessment of adaptive deficits, the second prong of Tennessee's statutory definition. Id. Despite the state's expert's lack of expertise, the trial court credited both his assessment of the I.Q. score he obtained from his testing of Mr. Howell and his unscientific approach to the determination of adaptive deficits.

Mr. Howell scored a 66 on the WAIS-III administered by the state's witness (MRPC, 378). The obtained score is squarely within the range of intellectual disability under any state's definition. Perversely, the only "clinical judgment" that the trial court allowed to shape its opinion was that of the admitted non-expert in the field of intellectual disability,

who testified that the 66 was, in his opinion, not a valid score,[1] even though he conceded that Mr. Howell was not malingering.(MRPC, p. 443).

D. The Trial Court Found That Howell Was Not Intellectually Disabled After Explicitly Refusing To Consider The Standard Error Measurment ("SEM") Of The Intelligence Tests Or The Flynn Effect

Ultimately, the trial court refused to properly consider either SEM or the Flynn Effect, thereby discounting the testimony of Howell's experts. The trial court specifically stated that "the 'Flynn Effect' should not be considered by this Court when determining whether petitioner meets the first prong of the statutory definition." Trial Court Order, p. 22. It reiterated: "This Court declines to consider petitioner's Flynn adjusted I.Q. scores in determining whether petitioner has met his burden of demonstrating he is mentally retarded under Tennessee's statute. This Court also declines to consider any downward departure for standard errors of measurement . . . ." Id., p. 25. The court then found that Howell did not have an I.Q. below 70. Id., p. 32. The Court of Criminal Appeals affirmed.

III.
Tennessee's Determination Of Howell's Adaptive Deficits Is Unscientific And Unreliable

Compounding the failure to properly assess Howell's I.Q., Tennessee courts also relied on unscientific and clinically inappropriate *ad hoc* assessment of adaptive deficits, finding that the mountain of evidence of adaptive deficits was rebutted by evidence of

[1] The witness based his opinion on the fact that Howell was slow and deliberate on a test that was timed. He did not tell Howell that the test was timed or that the interpretation of the results of the task would be based on the length of time it took Howell to complete the task. Though it took Howell a significant period of time to complete the task, his answers were all correct. The witness testified that this performance by Howell meant that he did not put forth his best effort. The witness was never able to explain, if Howell wasn't malingering, which he plainly was not, this instance of taking time to get the task right meant that Howell was not putting forth effort.

Howell's criminal activity.

A. Howell's Proof Clearly Demonstrated Significant Adaptive Deficits From Early Childhood

Michael Howell has long been unable to engage in the everyday activities that most people take for granted. From an early age, he was "different," continually lagging behind his peers (MRPC Exhibit 31). He had blatant deficits in adaptive behavior that set him apart from everyone else. In fact, not only that did Michael Howell struggle miserably in school (MRPC Exhibit 18) and later through a series of menial jobs (MRPC Exhibits 36-38), but he generally couldn't perform simple tasks without inviting failure. Documented deficits in adaptive behavior shaped Michael Howell's life from his from early childhood and are consistent with a finding of intellectual disability under the Tennessee statute.

Howell has been intellectually disabled since he was a small child, if not since birth. (MRPC, 81 et seq., 308 et seq.). Even a brief glimpse into his life reveals both the causes and effects of intellectual disability. His mother's pregnancy featured a long series of factors directly linked to intellectually disabled children including maternal hypertension, maternal malnutrition, maternal youth, maternal poverty, maternal lack of education, domestic violence, lack of prenatal care, prenatal malnutrition, and chronic stress. (MRPC, p. 67). After Mr. Howell was born, he faced additional risks for intellectual disability: the family often was without food, and Mr. Howell's father often abused Mrs. Howell physically. (MRPC Exhibit 27, Testimony of(brother) David Howell; Exhibit 31, Testimony of (mother) Emily Clutts; Exhibit 32, Testimony of (sister) Barbara Lawrence; MRPC, pp. 73-80). As a small child, Mr. Howell also suffered from horrible headaches that caused him to bang his head against things, including the refrigerator. (MRPC Exhibits 25, 31). Mr. Howell's

intellectually disabled younger sister, Brenda, remembers having to help Mr. Howell dress himself (MRPC Exhibit 26).

Mr. Howell did horribly in school. He failed the first grade. He was socially promoted in fourth grade, and repeated the ninth grade – twice – failing even his second attempt. (MRPC, p. 208).While already behind other children of his age, Mr. Howell failed to perform at grade level even in the grades that he did not fail. (MRPC, p. 209). Though Mr. Howell left school prior to the implementation of the 1975 federal law requiring individualized special education plans for intellectually disabled children, Mr. Howell was in special education classes. (MRPC, p. 208; *see also* Exhibit 41, Affidavit of Gail Bridges). Each of Mr. Howell's siblings who were in school after the passage of the special education act, were found to be intellectually disabled. Mr. Howell's intellectual disability was not formally assessed under the new federal law, because he quit school after he failed ninth grade the second time, the very year that the Act took effect. At the end of Mr. Howell's second attempt to pass ninth grade, he ranked one-hundred and fifth in a class of one-hundred and six students. (MRPC, p. 210).

Mr. Howell suffered numerous and significant head injuries throughout his developmental period, prior to age eighteen. In one such incident, while working with his father and brother on a garbage truck, Mr. Howell failed to observe safety precautions and was hit in the head by part of the garbage truck door (MRPC Exhibit 27 at p. 657; Exhibit 31 at p.1480; Exhibit 32 at p 1474). This injury fractured Mr. Howell's skull and knocked him out. (Id.). In addition, as his brother Richard Howell testified, Richard hit Mr. Howell on the head with a tire jack when Mr. Howell was seventeen years old. (MRPC Exhibit 29 at p137). This injury caused Mr. Howell to lose consciousness. (MRPC Exhibit 31).

While his brain was still developing and prior to turning eighteen, Mr. Howell began to use drugs, further compromising his intellectual functioning. (MRPC, pp. 78-79). According to his brother Richard, Mr. Howell huffed glue and both snorted and injected cocaine. (MRPC Exhibit 29 at, p. 134). As Dr. Woods testified, drug use can "exacerbate mental retardation. And it can cause types of brain damages that ... would end up with scores consistent with mental retardation." (MRPC, p. 96).

Mr. Howell managed to find employment as an unskilled laborer a number of times, though his work history is notable for two primary characteristics: 1) he obtained jobs with the help of other people and 2) his on-the-job-incompetence nearly always resulted in him hurting himself. Mr. Howell's father helped Mr. Howell to find employment, including work on a garbage truck. It was on that truck that Mr. Howell received a head injury because he was unable to follow safety precautions. (See MRPC Exhibit 37, Affidavit of (employer) Gene Carnell; Exhibit 38, Records of Injury on Dixie Carriers Barge). Jay Kellis, who employed Mr. Howell's intellectually disabled brother David, declined to offer Mr. Howell work after he witnessed Mr. Howell's girlfriend filling out his job application. (MRPC Exhibit 36, "I decided not to employ him because I didn't need another employee who couldn't read and write."). In addition to the injuries he suffered on the garbage truck, Mr. Howell was also seriously injured when he was hit on the head with a steel cable while working on a barge for Dixie Carriers. (MRPC Exhibit 38).

Mr. Howell's scores on three generally accepted and objective instruments which measure adaptive deficits all placed him the intellectually disabled range. The evidence as outlined, including Mr. Howell's placement in special education, all point to the fact that Mr. Howell meets the onset before age 18 prong of the definition.

B. The Tennessee Courts Credited Non-Scientific Testimony Of Criminal Activity In Rebuttal Of Howell's Compelling Proof Of Adaptive Deficits

The evidence in the record is that it is generally accepted that criminal behavior is not scientifically competent, reliable proof of adaptive behavior. Despite clear expert testimony that Howell's crime was replete with the misperceptions and lack of judgment typical of a person with intellectual disabilities, the Tennessee courts nevertheless denied relief, relying on the skills necessary for shooting a gun, fleeing a homicide scene, and changing a license plate. The Tennessee courts favored a non-scientific assessment of these behaviors over the standardized tests and clinical judgment of Howell's experts which were based upon science and research.

The Tennessee courts predicated the finding that Mr. Howell is not intellectually disabled on Howell's criminal behavior, based on the state's (non)expert's introduction of Mr. Howell's criminal activity into the computation. Though the state's expert admitted that he was not an expert in intellectual disability and had never been trained in the assessment of adaptive deficits, he opined that Mr. Howell's supposed criminal acumen rebutted the evidence of serious deficits in Howell's functioning. The Tennessee courts adopted the (non)expert's thinking. Reliance on the assessment of criminal behavior by a non-expert in no way insures the reliability called for in resolving an Eighth Amendment claim.

Dr. Greenspan testified that criminal behavior should never be considered in the determination of adaptive deficits and that the consideration of such is not generally accepted in the field of intellectual and developmental disability. (MRPC, p. 274). His testimony was supported by The AAIDD User's Guide which was admitted into evidence. (MRPC Exhibit 45: AAIDD User's Guide at p.22). Despite this clear, scientific admonition,

the Tennessee courts substituted the state's admittedly non-expert opinion for the scientifically supported expert position of Dr. Greenspan, Dr. Grant, and the AAIDD.

As Dr. Greenspan explained, the AAIDD prohibits the use of criminal behavior evidence in the assessment of adaptive behavior, because "you don't typically have enough information on a micro-level that is the very specific situation regarding the exact demands and the level of cognitive skills required to deal with those demands." (MRPC, p. 274). He expounded, "someone may appear to have competent behavior such as holding up a liquor store, for example, may - it may not have required all that much in the way of intelligence and it may have been done poorly. Which is often the case when somebody winds up getting killed." (MRPC, p. 275). Despite this expert testimony, the trial court adopted the state's (non)expert's unscientific and uneducated view and supported its finding of, for lack of a better term, adaptive normality, with an analysis of Mr. Howell's crime.[2]

IV.
The Tennessee Courts Violated Due Process And/Or Equal Protection By Refusing To Order The Consideration Of SEM And The Flynn Effect

The Tennessee Supreme Court has twice reviewed Michael Howell's case. In the original review, the Court created new law in Tennessee, requiring an evidentiary hearing as to intellectual disability in a Motion to Re-Open Post-Conviction Relief upon

---

[2] The Tennessee court's spotty post-hoc review of Mr. Howell's crime compounded its error. Disregarding respected scientific protocol that specifies that criminal behavior is irrelevant to the assessment of adaptive deficits, the Tennessee courts recited the facts from the reported appellate opinion as proof of Howell's adaptive abilities. Measuring his abilities, of course, is not the question. The question is one of adaptive **deficits**. Missing from the post-conviction court's analysis is discussion of any number of matters which confirm adaptive deficits , such as the fact that Howell stole a truck from his employer that would quickly be reported as stolen. Howell's actions, when viewed globally, support rather than rebut the results of the Howell's experts' standardized testing.

presentation of a "colorable claim" of intellectual disability. Howell v. State, 151 S.W.3d 450 (Tenn. 2004). In that same opinion, however, the Tennessee court held that Tennessee courts *could not* consider the standard error of measurement of standardized tests:

> In the present case, we find the language of the statute perfectly clear and unambiguous-to be considered mentally retarded, a defendant must have an I.Q. of seventy or below. The statute makes no reference to a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy. Therefore, we decline to "read in" such provisions, as the petitioner would have us to do, in order to extend the coverage of the statute.

Id. at 458. Such remained the law of the state until the issuance of Coleman v. State, 341 S.W.3d 221 (Tenn. 2011), in which the Tennessee Supreme Court stated that SEM and/or the Flynn Effect are proper considerations in the assessment of intellectual disability. As noted *supra*, however, the trial court (relying on pre-*Coleman* standards) explicitly stated that it was refusing to consider SEM or the Flynn Effect, as Howell had requested.

Despite the progress to bring Tennessee into line with scientifically reliable clinical standards for the assessment of intellectual disability made in Coleman, the Tennessee courts have refused to extend the rule of *Coleman* to Mr. Howell. Howell v. State, No. W2009-02426-SC-R11-PD (Tenn. Jan. 9, 2013); No. W2009-02426-SC-R11-PD (Tenn. Jan. 29, 2013).

REASONS FOR GRANTING THE WRIT

I. In Conflict With This Court's *Apprendi* Line Of Cases, Including Its Recent Decision In Alleyne v. United States, 570 U.S. ___ (June 17, 2013), Tennessee Denied Mr. Howell A Jury Trial On The Essential Element Of The Crime Of Capital Murder, Death Eligibility, And Placed An Unconstitutional Burden Upon Howell To Prove His Death Ineligibility

In Sattazahn v. Pennyslvania, 537 U.S. 101 (2003), this Court made clear that the crime of capital murder includes the factors which make a murder defendant eligible for the

death penalty. Absent a finding of death eligibility, this Court has consistently held that a murder defendant may not be subjected to a capital sentence. See Zant v. Stevens, 462 U.S. 862 (1983). Apprendi v. New Jersey, 530 U.S. 466 (2000) held that any fact that increases the penalty for a crime must be pleaded in the indictment and found by a jury beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584 (2002), this Court clarified that *Apprendi* applies with equal force to the penalty phase of a capital trial.

This Court further explained the meaning of the *Apprendi* line of cases in Alleyne v. United States. In *Alleyne* this Court emphasized that *"The legally prescribed [sentencing] range is the penalty affixed to the crime"* and any "fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." Alleyne, 570 U.S. at ____ (slip op. at 11)(emphasis supplied). "When a finding of fact *alters* the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent of a new offense and *must be submitted to the jury.*" Id. at ____ (slip op. at 14)(emphasis supplied). Any factfinding that "alters the prescribed range of sentences to which a criminal defendant is exposed" must be submitted to a jury and found beyond a reasonable doubt. Id. at ____ (slip op. at 11).

In Tennessee, "[N]o defendant with mental retardation at the time of committing first degree murder shall be sentenced to death." Tenn. Code Ann. §39-13-203(b). This means that the range of punishment for Howell, if intellectually disabled, was from life imprisonment to life imprisonment without parole. Tenn. Code Ann. §39-13-202(b).

Applying *Alleyne* to Michael Howell's case, one sees that, depending upon the facts, he was subject to either of two distinct sentencing ranges for his offense. This is so because there were two different prescribed sentencing ranges, depending upon the actual offense

(non-capital or capital) for which he might be convicted:

> Because Tennessee law (Tenn. Code Ann. §39-13-203) and *Atkins* prohibit death for an intellectually disabled offender, in Michael Howell's case, the first "prescribed range" for a conviction of first-degree murder was "Life to Life Without Parole" with the "ingredient[s] of" that offense (Alleyne, 570 U.S. at ____ (slip op. at 11)) comprising two distinct elements: (1) a first-degree murder; (with or without a finding of an aggravating circumstance); and (2) Howell being a mentally retarded/intellectually disabled offender.
>
> The second "prescribed range" was "Life to Death," with the "ingredients" or elements of that different, more serious offense being distinct factfindings of: (1) a first-degree murder; (2) an aggravating circumstance; and (3) an offender who is not intellectually disabled.

Alleyne makes clear that *offenses are defined by their sentencing ranges.* Alleyne, 570 U.S. at ____ (slip op. at 7)(historically, sentencing ranges linked to particular facts constituting elements of the crime). For at common law, any fact "essential to the penalty . . . was an element of the offense." Id. at ____ (slip op. at 8). The existence of two different sentencing ranges, therefore, is the hallmark of two distinct offenses. See Alleyne, 570 U.S. at ____ (slip op. at 16-17)(sentencing range of five-years to life imprisonment comprised different offense from offense marked by sentencing range of seven-years to life).

That is precisely the situation here. Given the operation of Tennessee law and *Atkins*, Michael Howell could not be placed into the second, greater sentencing range allowing death as a possible punishment absent a factfinding that he is not a mentally

retarded. Only with this particular finding could he possibly be sentenced to death, for with a contrary finding, he was only subject to the lesser sentencing range of life-to-life-without-parole. Because a finding that he was not mentally retarded was required to place him in the greater sentencing range exposing him to death, *Alleyne* confirms that, for Howell to be sentenced to death, a jury had to make that finding and do so beyond a reasonable doubt.

Given the different sentencing ranges attaching to different fact-finding scenarios in Michael Howell's case, *Apprendi*, *Ring*, and *Alleyne* make clear that Howell was denied his Sixth Amendment right to jury trial when the state placed upon Howell the burden of proving retardation/intellectual disability by a preponderance of the evidence. Under the Sixth Amendment, the burden of proving the absence of retardation lay with the state – beyond a reasonable doubt. Especially where the risk of an erroneous retardation finding will lead to the execution of someone whom the Eighth Amendment categorically exempts from execution, the Sixth Amendment demands that Howell not be executed.[3]

Because the judgment of the Tennessee courts conflicts with *Apprendi*, *Ring*, and *Alleyne*, and because the lower courts have not had the opportunity to apply the intervening decision in *Alleyne* to Michael Howell's case, this Court should grant certiorari and reverse, or instead grant certiorari, vacate the judgment below, and remand for further consideration in light of *Alleyne*.

---

[3] *Alleyne* affirms that the Sixth Amendment does not apply to fact findings that may "influence[] judicial discretion" to select a sentence. Alleyne, 570 U.S. at ____ (slip op. at 15). That is not the case here, however. A finding *vel non* of intellectual disability involves no element of discretion whatsoever. If the offender is retarded, there is no discretion to sentence the offender to death. He must be sentenced to a lesser sentence.

II. In Conflict With *Atkins* And The Rulings Of Other Lower Courts, The Lower Courts Here Failed To Properly Apply SEM, The Flynn Effect, And Clinically Appropriate Standards For Assessing Adaptive Deficits

In Atkins v. Virginia, 536 U.S. 304 (2002), this Court left implementation of its holding to the states, citing established clinical definitions of intellectual disability (Id. at 308 n.3) while noting that statutory definitions "generally conform to the clinical definitions." Id. at 317 n. 22. While the implementation was left to the states, *Atkins* assumed the clinical diagnostic criteria would set the floor, not the ceiling, for intellectual disability determinations. *Atkins* never contemplated that states could ignore standard clinical practice and instead use unreliable conjecture for determining I.Q. Compare Daubert v. Merrell-Dow Pharmaceuticals, 509 U.S. 579 (1993). Indeed, this Court's Eighth Amendment jurisprudence emphasizes that imposition of a capital sanction requires process that is highly reliable. See e.g., Beck v. Alabama, 447 U.S. 625 (1980).

When rejecting Michael Howell's *Atkins* claim, the lower courts failed to adhere to reliable standards of practice. Not only did the lower courts refuse to appropriately consider SEM and the Flynn Effect, they assessed adaptive deficits using standards that are rejected in clinical practice because they are unreliable. With the lower courts having used unreliable means of assessing Michael Howell's intellectual disability, this Court should grant certiorari and reverse, emphasizing that *Atkins* and the Eighth Amendment require a highly reliable, clinically-sound assessment of intellectual disability.

A. Although Consideration Of Tests' Standard Error Of Measurement (SEM) Ensures Reliability In Any *Atkins* Proceeding, SEM Is Considered In Some Jurisdictions But Rejected In Others

1. Standard Error Of Measurement

No I.Q. test can (or does) perfectly measure an individual's true I.Q. There is always

variability in any individual's score over more than one administration of a test, such variability being measured by the Standard Error of Measurement, or SEM, of any given test. As the American Association on Intellectual and Developmental Disabilities (AAIDD) explains:

> The results of any psychometric assessment must be evaluated in terms of the accuracy of the instrument used and such is the case with the assessment of intelligence. An I.Q. score is subject to variability as a function of a number of potential sources of error, including variations in test performance, examiner's behavior, cooperation of test taker, and other personal and environmental factors. Thus, variation in scores may or may not represent the individual's actual or true level of intellectual functioning. The term *standard error of measurement*, which varies by test, subgroup, and age group, is used to quantify this variability and provide a stated statistical confidence interval within which the person's true score falls.

Diagnosis And Classification Of Intellectual Disability, 11th ed. (AAIDD: Washington, D.C., 2010), p. 36.

The SEM of standardized I.Q. tests is generally 3-5 points. Id. This means that an individual's *actual* I.Q. realistically falls within a band of scores plus or minus 3-5 points from the measured score. Given the inherent imprecision of any I.Q. test, AAIDD emphasizes that consideration of SEM is vital to any reliable assessment of intellectual disability:

> For well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3 to 5 points. As reported in the respective test's standardization manual, the test's standard error of measurement can be used to establish a statistical confidence interval around the obtained score. . . .
>
> Understanding and addressing the test's standard error of measurement is a *critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual functioning*.

Id. (emphasis supplied).

In its Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV, TR), the American Psychiatric Association (APA) wholeheartedly agrees. SEM must be considered when assessing intellectual disability:

> Significantly subaverage intellectual functioning is defined as an I.Q. of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing I.Q., although this may vary from instrument to instrument (e.g., a Wechlser I.Q. of 70 is considered to represent a range of 65-75). Thus it is possible to diagnose Mental Retardation in individuals with I.Q.s between 70 and 75 who exhibit significant deficits in adaptive behavior.

DSM-IV-TR, pp. 41-42 (American Psychiatric Association: Washington, D.C., 2000). In fact, testmakers themselves agree that SEM must be considered.[4]

2. There Is Conflict In The Lower Courts Regarding Consideration Of SEM In *Atkins* Proceedings

Applying SEM is thus a reality in psychometrics, recognized as a standard for clinical practice. Accordingly, for purposes of deciding *Atkins* claims, any number of states have required or permitted consideration of SEM. Oklahoma demands consideration of SEM by statute. See e.g., 21 Okla. Stat. §701.10b(c)(requiring consideration of standard error of measurement). Louisiana likewise mandates consideration of SEM in *Atkins* proceedings:

> Regardless of the standard deviation used, the assessment of intellectual functioning through the primary reliance on I.Q. tests *must be tempered with attention to possible errors in measurement. Errors in measurement as well as true changes in performance outcome should be considered in interpreting I.Q. test results.* The concept of standard error of measurement (SEM) is an aid. One SEM is plus or minus a specified number of I.Q. points. Thus, an I.Q. [score] of 70 could range from 66 to 74, assuming an SEM of 4.

State v. Williams, 831 So.2d 835, 853 n. 26 (La. 2002)(emphasis supplied). See State v.

---

[4] For example, the Wechlser test manuals inform test administrators of the applicable SEM.

Anderson, 996 So.2d 973, 989 (La. 2008)(I.Q. test score of 73 placed defendant within range of those mentally retarded, given standard error of measurement). Similarly, Pennsylvania considers SEM in *Atkins* proceedings. Commonwealth v. Williams, 2013 Penn. Lexis 110 (Pa. 2013)(SEM of specific assessment instrument appropriately considered in assessment of intellectual disability). California acknowledges SEM as a fact of life in the arena of intelligence testing. People v. Superior Court (Vidal), 40 Cal. 4th 999, 1006 n.4 (2013) ("Every intelligence test has a standard error of measurement (SEM), a range lying around the tested score within which the true I.Q. is likely to lie.")

Unfortunately for Michael Howell, the Tennessee Supreme Court concluded that the SEM of Michael Howell's test scores could not be considered. As the Tennessee Supreme Court stated:

> The statute makes no reference to a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy. Therefore, we decline to 'read in' such provisions . . . to extend the coverage of the statute. . . .
>
> The legislature, if it had desired, was free to include provisions establishing a range of I.Q. scores that would take into account measurement errors in the testing process, It could also have chosen to exclude any reference to specific scores altogether. It did neither.

Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004). Based upon the Tennessee Supreme Court's ruling in Howell's case, the trial court and the Court of Criminal Appeals refused to appropriately consider SEM of Howell's I.Q. tests when determining Howell's actual I.Q. derived from such tests. A23 (original Tennessee Supreme Court decision refusing to allow consideration of SEM); A13 (Court of Criminal Appeals on remand).[5]

---

[5] As noted *infra*, the Tennessee Supreme Court has since concluded that such an interpretation and application of *Howell* is incorrect, but has nevertheless sanctioned the (continued...)

Thus, even though Howell's score of 73 on the WAIS-III actually *does* place him within the realm of those intellectually disabled within the meaning of *Atkins* (because application of SEM would place the score in a range starting at 68), the Tennessee courts simply ignored this truth when assessing Michael Howell's *Atkins* claim.

Howell's situation is not unique. Florida – which itself has one of the largest death rows in the nation – clings to the unscientific position that SEM is not relevant. Like the lower courts here, Florida erroneously believes that the SEM of standardized tests has no place in the assessment of an individual's true I.Q. even though SEM has *everything* to do with an individual's actual I.Q. Florida has rejected the notion that "standard error of plus or minus five points should be taken into account" when assessing individual's true I.Q. Cherry v. State, 959 So.2d 702 (Fla. 2007). Instead, just like the Tennessee courts did here, Florida has imposed a "strict cut-off score of 70 or below on an approved standardized test in order to establish significantly subaverage intellectual functioning." Franqui v. State, 59 So.3d 82 (Fla. 2011).

SEM, therefore, has been rendered irrelevant to *Atkins* determinations in some jurisdictions, even as it is highly relevant in others. Because consideration of SEM ensures reliability in the determination of intellectual disability, this Court should grant certiorari to harmonize the practices in the various states, lest petitioners like Michael Howell be executed *despite* their intellectual disability, merely because courts erroneously believe that a raw I.Q. test score higher than 70 *ipso facto* do not satisfy the requirements of *Atkins*.

---

[5](...continued)
lower courts' failure to consider SEM in Michael Howell's case.

B. The States Also Take Divergent Approaches To Consideration Of The "Flynn Effect" Which, When Properly Considered, Ensures Accuracy In The Assessment Of Intellectual Disability

As already noted, the accuracy of I.Q. tests is likewise subject to the so-called "Flynn Effect," a phenomenon first identified by psychologist James Flynn, who recognized years ago that I.Q. norms – and norms for I.Q. tests – actually change over time. This is because the knowledge base of the population as a whole increases over time, not because their IQ rises. Because the test norms are based on a stagnant point in time, but the population is not stagnant, Flynn discovered that to properly determine an individual's actual I.Q. (in relation to the population as a whole) one must adjust a raw I.Q. test score to reflect norms that exist when the test is *administered* – not norms that existed when the test was first issued, which are now obsolete.

Flynn has established that as time progresses, norms on I.Q. tests must be adjusted downward 3 points per decade in order to reflect the individual's true place on the bell curve *when the test is taken*. Thus, for example, an individual who takes a particular I.Q. test the year of its issuance and scores a 70 does not require any adjustment to determine actual I.Q., because the score is based upon then-existing norms that are accurate. An individual who takes that identical I.Q. test 10 years later, however, and receives a raw score of 70 must have his or her score adjusted to reflect updated norms, which would make the individual's true I.Q. 67 (not taking into account SEM or any other factors). Given the Flynn Effect, an individual who scores 110 on an obsolete 30-year-old I.Q. test is statistically just of average intelligence, with an actual I.Q. of 100. In other words, the more outdated the test taken by an individual, the more inflated that person's raw score will be, and the more the raw score must be adjusted so as to reflect the individual's actual I.Q.

Like SEM, however, the lower courts have viewed the Flynn Effect in differing ways. To ensure accuracy in the determination of intellectual disability, some courts have required its consideration when assessing the existence of intellectual disability. Black v. Bell, 664 F.3d 81 (6th Cir. 2011)(consideration of Flynn Effect is important); Thomas v. Allen, 607 F.3d 749, 757 (11th Cir. 2010); Winston v. Kelly, 592 F.3d 535, 557 (4th Cir. 2010); Holladay v. Allen, 555 F.3d 1346, 1357 (11th Cir. 2009)(district court appropriately considered Flynn Effect when assessing intellectual disability). Other courts, however, have rejected its consideration. Green v. Johnson, 515 F.3d 290, 300 n. 2 (4th Cir. 2008); In Re Mathis, 483 F.3d 395, 398 n. 1 (5th Cir. 2007); Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005); Smith v. State, 245 P.3d 1233, 1237 n. 6 (Okla. Crim. App. 2010)(because Oklahoma statute explicitly requires consideration of SEM but does not mention Flynn Effect, Flynn Effect "is not a relevant consideration in the mental retardation determination for capital defendants"); See also Thorson v. State, 76 So.3d 667 (Miss. 2011)(taking no position on Flynn Effect, because such testimony was admitted without objection).

Failure to consider the Flynn Effect subjects a criminal defendant, like Howell, whose Flynn-adjusted score places him in the intellectually disabled range, is arbitrary and capricious. Dr. Flynn made the point in his testimony here, and it is repeated in the literature.[6] The point is actually illustrated here. When Howell was tested with the most up

---

[6]Dr. Flynn testified, "Take a pair of male identical twins both of whom as adults committed a capital offense. In 1992 at school, one took the then new WISC-III whose norms were only 3 year out of date. The three-year lag between 1989, when the sample was tested and 1992, when the test was published and taken, only inflated his I.Q. by a point. Assume he gets an I.Q. score of 69 (adjusted score 68). In 1992, his twin happens to attend a different school. It is less well financed and has to use up its stock of the old WISC-R, which was normed in 1972. Now there is a 20-year lag between when the test was normed (continued...)

to date Wechsler test, his obtained score was well below 70. But because he was tested previously with tests whose norms were obsolete and because the Tennessee Courts refused to account for norm obsolescence, he was found to not have the requisite intellectual deficits on those outdated tests. The result is perverse. And unconstitutional.

Given the states' divergent approaches to applying the Flynn Effect, in some states, *Atkins* claims are being determined using inflated I.Q. scores which fail to precisely reflect the individual's true I.Q., while in those other jurisdictions where the Flynn Effect has been acknowledged, *Atkins* determinations are not being skewed by inaccurate test results.

C. This Court Should Grant Certiorari To Reconcile Divergent Approaches Toward Using SEM And The Flynn Effect When Measuring Intellectual Functioning

The problem with a court failing to consider SEM is that such failure results in inaccurate *Atkins* determinations. The problem with a court failing to consider the Flynn Effect (as occurred here) is that such a failure likewise leads to inaccurate assessments of intellectual functioning. When a court takes into account both SEM and the Flynn Effect, the determination of intellectual functioning becomes highly accurate. But when a court refuses or fails to consider both SEM and the Flynn Effect, the resulting *Atkins* determination becomes doubly unreliable and unworthy of the Eighth Amendment.

Consider the following. Two defendants in two different states take the same I.Q. test and each receives an identical raw score of 72. The SEM of the test is 5, and the age of the

---

[6](...continued)
and when the test was taken. The second twin performs exactly as well as the first, but his I.Q. is inflated by 6 points and he gets a 74 (adjusted score also 68). So who lives or dies is determined by the school psychologist's budget."(MRPC Exhibit 35: Report of Dr. James Flynn).

test is 10 years, such that applying the Flynn Effect, the raw score would need to be adjusted lower by 3 points. Comparison among jurisdictions reveals: (1) in some jurisdictions, the defendant/petitioner would be found not mentally retarded as a matter of law because his I.Q. was above 70; (2) in other jurisdictions, the defendant/petitioner would be *found* to meet the intellectual disability prong of *Atkins*, while (3) in still other jurisdictions, there court would have to determine whether the I.Q. test score which was scientifically ambiguous, established either significantly subaverage I.Q. or its absence. *Atkins* ought not permit the Eighth Amendment to be subject to such vagaries.

RAW SCORE OF 72, SEM Of 5, 10-Year-Old Test

Jurisdiction	Raw Score	I.Q. In Jurisdiction Applying **Neither SEM Nor Flynn Effect**	I.Q. In Jurisdiction Applying **Only SEM**	I.Q. In Jurisdiction Applying **Only Flynn Effect**	I.Q. In Jurisdiction Applying **Both SEM And Flynn Effect**
1	72	**72** = Fails To Satisfy *Atkins*			
2	72		**67-77 (72 +/- 5)** = May Or May Not Satisfy *Atkins*		
3	72			**69 (72 - 3)** = Satisfies *Atkins*	
4	72				**64-74 (69 +/- 5)** = May Or May Not Satisfy *Atkins*

This example underlines the need for this Court to ensure the accuracy and reliability of *Atkins* determinations across jurisdictional boundaries and throughout the nation. To ensure uniformity in the application of *Atkins*, this Court should therefore grant certiorari to provide guidance to the lower courts concerning the appropriateness and need to apply

SEM and/or the Flynn Effect as means of securing highly reliable determinations of intellectual disability, which *Atkins* requires.

D. This Court Should Grant Certiorari To Ensure That Clinically Sound Definitions Of Adaptive Deficits Inform The Eighth Amendment *Atkins* Inquiry

Quite apart from the lower courts' erroneous assessment of Michael Howell's intellectual functioning, the lower courts also undertook an analysis of "adaptive deficits" which does not comport with clinical practice or the Eighth Amendment. Rather than relying on standards of clinical practice for assessing the existence of adaptive deficits – such as those from the AAIDD – the Court of Criminal Appeals instead applied "exceedingly subjective" criteria drawn from Texas in Ex Parte Briseno, 135 S.W.3d 1 (Tex.Crim.App. 2004) and adopted by Tennessee in Van Tran v. State, 2006 Tenn.Crim.App.Lexis 899. See Howell v. State, 2011 Tenn.Crim.App.Lexis 447 *48, *citing Briseno* and *Van Tran*; A15.

There are, however, at least three fundamental flaws in that approach under the Eighth and Fourteenth Amendments:

First, *Atkins* and the Eighth Amendment do not allow the courts to make up standards that are at odds with clinical practice, especially where standards for clinical practice ensure reliability in the assessment of adaptive deficits, and where such governing standards were identified in *Atkins* itself. See Atkins, 536 U.S. at 308 n.3 (noting AAIDD (formerly AAMR) clinical definitions of intellectual disability, including deficits in adaptive behavior requiring limitations in two skill areas).

Second, when one applies the AAIDD clinical definitions[7] (or any other clinical

[7]Clinical standards of the AAIDD provide that adaptive deficits may be found if on (continued...)

definitions for that matter), Michael Howell *does* indeed have deficits in adaptive behavior. Not only did the trial court find that Howell has deficits in functional academics (Trial Court Opinion, p. 35), Howell presented uncontested proof from Dr. Stephen Greenspan, Ph.D., and Dr. Daniel Grant, Ph.D., establishing that Howell suffers additional adaptive deficits in (among others) areas of communication, self-care, and health and safety. Compare Atkins, 536 U.S. at 308 n.3. In fact, on tests of adaptive deficits, Howell consistently showed adaptive deficits, including in the areas of language (score of 66 on Peabody Picture Vocabulary Test), managing money (score of 55 on Independent Living Scales, ILS), health and safety (55 on ILS), and social adjustment (55 on ILS). Trial Court Opinion, p. 11. See also Trial Court Opinion, p. 14 (Dr. Greenspan's testimony regarding adaptive deficits). Howell thus clearly satisfies well-settled clinical standards for adaptive deficits, and it was Eighth Amendment error for the lower courts to conclude otherwise. Howell's performance on the Vineland-II – which was evaluated with reference to Mr. Howell's functioning when he was 17 years old – showed clear deficits in adaptive functioning: in conceptual adaptive/communication skills he scored a 61, in practical adaptive/daily living skills he scored a 48, on socialization he scored a 51 for a composite,

---

[7](...continued)
standard measurements of adaptive deficits, an individual has "significant limitations in adaptive behavior" demonstrated by "performance that is approximately two standard deviations below the mean of either (1) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills. The assessment instrument's standard error of measurement must be considered when interpreting the individual's obtained scores." *Intellectual Disability: Definition Classification, and Systems of Supports* (11th ed.), American Association Of Intellectual And Developmental Disabilities, p. 43 (Washington D.C.: 2010).

standardized score of adaptive ability of 51, clearly in the mentally retarded range. (MRPC, p 304). Howell thus clearly satisfies well-settled clinical standards for adaptive deficits, and it was Eighth Amendment error for the lower courts to conclude otherwise.

Third, the adaptive deficit standards adopted from Texas from Ex Parte Briseno, 135 S.W.3d 1 (Tex.Crim.App. 2004) fundamentally misapprehend the nature of adaptive deficits because they focus on areas of ability while simply ignoring areas of *disability* – which abound in Michael Howell's case.[8] They also focused on behavior that may occur rarely, rather than Howell's typical performance (both strengths and weaknesses) in the relevant domains of adaptive behavior. By applying *Briseno* and thereby ignoring Howell's clear weaknesses and adaptive deficits as shown under clinical standards, the Tennessee courts have failed to provide a fundamentally reliable assessment of adaptive deficits, something the Eighth and Fourteenth Amendments require.

As is the case with the Tennessee courts' failure to apply reliable standards for assessing intellectual functioning, Tennessee has likewise failed to apply reliable, clinically-sound standards for assessing adaptive deficits. Consequently, Michael Howell has been denied a reliable *Atkins* determination under the Eighth Amendment. This Court should grant certiorari to also ensure compliance with *Atkins*, which entitles Howell to a reliable, clinically sound determination of his adaptive deficits – not the lopsided determination which occurred here through the application of Texas' clinically-unreliable standard in

---

[8] Also, they focus on criminal behavior which, as Dr. Greenspan explained, does not provide legitimate grounds for assessing adaptive deficits. See Trial Court Opinion, p. 14.

Briseno.

III.
Tennessee Has Arbitrarily Refused To Apply Reliable Definitions Of Intellectual Disability To Michael Howell, While Requiring Their Application To Similarly-Situated Petitioners, In Violation Of Equal Protection

When originally considering Michael Howell's case, the Tennessee Supreme Court refused to allow consideration of SEM. Since that time, however, the Tennessee Supreme Court has reversed course, not only about consideration of SEM, but also about consideration of the Flynn Effect. Yet while Tennessee now requires application of these standards to *Atkins* claimants, it refused to apply these standards to Michael Howell. This constitutes a violation of due process and equal protection under the Fourteenth Amendment.

A. Unlike Similarly-Situated *Atkins* Claimants In Tennessee, Michael Howell Has Been Denied Application Of Appropriate, Reliable Standards For Assessing Intellectual Disability

Seven years after it originally considered Howell's case in 2004, but while Howell's case was pending in the Court of Criminal Appeals, the Tennessee Supreme Court reversed course and adopted a more scientifically-accurate approach to intellectual disability determinations. Thus, in Coleman v. State, 341 S.W.3d 221 (Tenn. 2011), the Tennessee Supreme Court emphasized that a trial court must assess a petitioner's intellectual functioning based upon "reliable practices, methods, standards, and data that are relevant" to the field of intellectual disability, including "a particular test's standard error of measurement" and the "Flynn Effect," among others. Coleman, 341 S.W.3d at 242 & n. 55. The Tennessee Supreme Court thus remanded so that Coleman's *Atkins* claim could be considered in light of the standards discussed in its opinion. Id. at 258 (remanding). With

the trial court having applied an incorrect legal standard, Coleman wasgranted application of the standards enunciated in *Coleman*.

Later, in Smith v. State, 357 S.W.3d 322 (Tenn. 2011), where the trial court had not had the benefit of this Court's decision in *Coleman*, the Tennessee Supreme Court remanded Smith's *Atkins* claims for "a new hearing to determine whether he is intellectually disabled" in light of the standards enunciated in *Coleman*. Id. at 353-355. Exactly as occurred in Michael Howell's case, the trial court had earlier refused to consider the standard error of measurement (SEM). Id. at 354. Because *Coleman* made clear that the trial court had "misapplied the applicable legal standard when" it held that SEM could not be considered, the Tennessee Supreme Court remanded so that the trial court could conduct a hearing "under the legal standard espoused in *Coleman*." Id. at 355. Because Smith, like Coleman, had been denied relief using an incorrect legal standard, he was granted the right to proper application of the standards enunciated in *Coleman*.

Then, in Keen v. State, 2012 Tenn.Lexis 932, the Tennessee Supreme Court reiterated the proper legal standards to be applied to any *Atkins* claim, which included SEM and the Flynn Effect. See Keen, *supra*. Ultimately, Keen was denied access to the Tennessee post-conviction process for other reasons.[9]

Thus, of all the *Atkins* petitioners who have come before the Tennessee courts seeking

---

[9] In *Keen*, the Tennessee Supreme Court declared that its holding in Coleman was not new, but rather a clarification of what it meant when it decided Howell's case in 2004. In so doing, the Court acknowledged that every lower court who had dealt with *Atkins* determinations since *Howell* uniformly misunderstood its holding in *Howell*. Ironically, Howell argued to the trial court and on appeal that the Tennessee lower courts were misapplying the 2004 *Howell* decision. His arguments, which carried the day in *Coleman*, fell on deaf ears in his own case.

a full and fair hearing under *Coleman*, Michael Howell is the lone petitioner who has been denied application of *Coleman*. This is so even though there is no question, as explained in *Keen* and *Coleman*, that the trial court clearly erred by, *inter alia*, refusing to consider SEM and the Flynn Effect in Howell's case.

This is especially troubling where Michael Howell specifically argued below that *Coleman* and/or *Keen* apply to his case and require appropriate consideration of SEM and the Flynn Effect. Howell's entreaties, however, have fallen on deaf ears in the Tennessee courts. As a result, while Coleman and Smith have been granted consideration of SEM and the Flynn Effect, it is Michael Howell alone who has been refused application of the standards which Tennessee has applied to other similarly-situated *Atkins* claimants.

B. Michael Howell Has Been Denied Due Process And Equal Protection Of The Laws

Coleman, Smith, and Howell are all similarly situated. There is no compelling justification – let alone a reasonable justification – for treating Michael Howell differently from Coleman and Smith. This is especially true when Howell's very life is at stake and where the purpose of *Coleman* was to correct the misapplication of *Howell* to *Atkins* case in Tennessee. The inequity is apparent. Both Coleman and Smith have since been sentenced to life. Howell remains on death row.

Under the circumstances, Tennessee's actions must satisfy a heightened level of scrutiny, especially where Howell's fundamental right to life is at issue. See M.L.B. v. S.L.J., 519 U.S. 102, 115 (1996)(heightened scrutiny applies to equal protection claim involving fundamental rights or interests). There is no justification for treating Howell differently. Thus, the Tennessee courts' failure to give Howell a hearing under *Coleman* – as it has for

Coleman and Smith– constitutes a violation of the equal protection of the laws, in violation of the Fourteenth Amendment. Willowbrook v. Olech, 528 U.S. 562 (2000). Indeed, Howell is a "class of one" who alone has been denied the application of the revised standards contained in *Coleman*, a violation of equal protection. Id.

Likewise, any failure to apply or to adhere to *Coleman* and *Keen* likewise constitutes a denial of Michael Howell's right to due process under the Fourteenth Amendment as well: (1) Any unfair, disparate judicial treatment of Howell *vis-a-vis* other *Atkins* claimants constitutes a violation of due process; and (2) Michael Howell has a protected liberty interest in the proper application of *Coleman* and *Keen*, which cannot be denied by the state courts' failure to apply *Coleman* and/or *Keen* under the circumstances. Hicks v. Oklahoma, 447 U.S. 343 (1980).

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

Paul R. Bottei
Amy D. Harwell
Kelley J. Henry

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Certificate of Service

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, James Gaylord, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 27th day of June, 2013.

Paul R Bottei