DEATH PENALTY CASE
No. 88-S-1479

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSSEE

BYRON BLACK,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

Intellectual Disability Petition
Pursuant to Tennessee Code Annotated § 39-13-203

PETITIONER'S BRIEF

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I. Introduction

> We reiterate our commitment "to the principle that Tennessee has no business executing persons who are intellectually disabled."

Payne v. State, 493 S.W.3d 478, 486 (Tenn. 2016) (quoting *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012)). First in *Keen* and subsequently in *Payne*, the Tennessee Supreme Court invited the legislature to fix the procedural void that prevented individuals like Keen and Payne (and Black) from having their claims of intellectual disability heard under modern constitutional standards. *Payne*, 493 S.W.3d at 492; *Keen*, 398 S.W.3d at 613.

> We encourage the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed.

Payne, 493 S.W.3d at 492. Three years after *Payne*, the Tennessee Court of Criminal Appeals observed that the legislature had not yet acted, and that a different death row inmate had no procedural remedy, whatsoever, for vindication of his claim of intellectual disability. *Dellinger v. State*, No. E201800135CCAR3ECN, 2019 WL 1754701, at *6 (Tenn. Crim. App. Apr. 17, 2019). The CCA then reiterated the requests of the Tennessee Supreme Court that the legislature create a new retroactive procedure, as persons who are "indeed intellectually disabled . . . deserve to be heard." *Id.*

The legislature created the requested retroactive remedy, and via subsection (g) made it apply to men like Payne (who has already received relief)[1], Keen and

[1] On November 18, 2021, the State of Tennessee conceded that Pervis Payne is intellectually disabled. 30th Judicial District Case No. 87-04409, 04410, State's

Dellinger (who both have petitions pending), and Byron Black. Tenn. Code Ann. § 39-13-203(g) (2021).

Against this backdrop, it would be incongruous to interpret the statute to deny relief to individuals like Mr. Black—who were subjected to prior unconstitutional standards, and who have never had their claims adjudicated under the standards required by the United States Supreme Court. Such an interpretation is inconsistent with the requests of the courts, the text of the statute, and the intent of the legislature. Such an interpretation would mean that the defendants in the cases cited above, would be denied the very remedy that the legislature created for them. That is absurd.

It would be equally absurd to contend that the issue determined in 2004 is the same issue that is to be determined today. Rather, radically different, judicially created legal standards were applied in 2004 to adjudicate whether Mr. Black was "mentally retarded." Today, constitutional standards that are informed by the medical community's diagnostic framework must be applied to the very different question of whether he is intellectually disabled. *Moore v. Texas (Moore-II)*, 139 S. Ct. 666 (2019); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brumfield v. Cain*, 576 U.S. 305 (2015); *Hall v. Florida,* 572 U.S. 701 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); American Association on Intellectual and Developmental Disability,

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Notice, Nov. 18, 2021. On November 23, 2021, the Criminal Court accepted this concession after enumerating the proof that supported Mr. Payne's claim, and in light of the United States Supreme Court's controlling precedents of *Atkins*, *Hall*, and *Moore*. The State's Notice, and the Court's Order are found as items 12 and 13 in the appendix to this brief.

Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports (12 ed. 2021) (AAIDD-12); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5).

And to complete a trilogy of the absurd, it would be absurd to ignore the ever growing factual record that demonstrates beyond any doubt that Mr. Black is intellectually disabled. Submitted along with this brief, is the February 28, 2022 report of Dr. Susan Vaught.[2] In 2004, she testified that Mr. Black was not mentally retarded. Today she concludes:

> Byron Black does meet criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability. This represents a change in my 2003 opinion, based on new information in his record, the ability to review his performance at multiple points in time across multiple practitioners, changes in scientific knowledge and standards of practice, and changes in diagnostic criteria.

Dr. Susan Vaught, Rpt., Feb. 28, 2022, at 6. Equally important are Dr. Daniel Martell's August 25, 2020, report, and his December 13, 2021, supplement.[3] Dr. Martell, like Dr. Vaught, has regularly testified as an expert for the State in capital prosecutions. He was the State's lead expert in the Paul Reid capital murder trials, testifying at the capital sentencing phase, and also regarding Mr. Reid's competency to stand trial, and later to waive post-conviction relief. *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 504 (Tenn. 2013); *State v. Reid*, 213 S.W.3d 792, 809–10 (Tenn. 2006). Dr. Martell evaluated Mr. Black, reviewed the comprehensive record, and

[2] As an aid to this Court, all of the various reports and declarations that have been developed since the 2004 litigation are attached as an appendix to this brief.
[3] Dr. Martell's supplement was requested specifically to address questions raised by the District Attorney General.

concluded that Mr. Black is intellectually disabled. Martell Reports, Aug. 25, 2020 & Dec. 13, 2021.

Dr. Vaught and Dr. Martell are only the most recent experts to recognize that under appropriate scientific standards, as enunciated by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA, publisher of the DSM series), Mr. Black is intellectually disabled.

To summarize Mr. Black's argument: (1) the intent of Tennessee Code Annotated § 39-13-203 was to afford individuals like Mr. Black a hearing, where the medical community's diagnostic framework, and the constitutional protections recognized by the United States Supreme Court would be faithfully applied. (2) Prior proceedings from 2004 applied radically different, judicially created standards to determine the issue of "mental retardation," and never addressed the issue of whether Mr. Black is intellectually disabled under constitutional standards. (3) The factual record developed since 2004, but never considered by any court, is overwhelming: Mr. Black is intellectually disabled. For these reasons sub-section (g)(2) does not preclude further review.

II. Tennessee Code Annotated § 39-13-203 (2021) was passed, at the request of the Tennessee Supreme Court, so that individuals like Mr. Black would have one fair constitutional hearing on their claim of intellectual disability.

Following the requests of the Tennessee Supreme Court in *Payne* and *Keen,* and the prodding of the Court of Criminal Appeals in *Dellinger*, the legislature amended Tennessee Code Annotated § 39-13-203 so that Tennessee's intellectual

disability definition would be consistent with the constitutional standards established by the United States Supreme Court, and so that individuals who had not yet had a constitutionally adequate intellectual disability hearing would have their day in court.

Two provisions of the new statute most clearly demonstrate the legislature's goals. First, they eliminated any reference to a bright-line IQ score requirement of 70 or below; today the relevant question is simply whether a defendant has "significantly subaverage general intellectual functioning." Tenn. Code Ann. § 39-13-203(a)(1). This is a sea change from the old, unconstitutional bright line requirement of a raw, unadjusted IQ score of 70 or less that was in effect when Mr. Black had his mental retardation hearing.[4] *See Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004). Second, in sub-section (g) the legislature provided a retroactive route for any defendant "who has been sentenced to the death penalty prior to [May 11, 2021] and whose conviction is final on direct review." This retroactive procedure is exactly what the courts had requested in *Dellinger, Payne* and *Keen*.

These two changes must be viewed in concert—especially in a case like that of Mr. Black. Sub-section (a)(1) explicitly removed an unconstitutional element from

[4] It was a radical departure from the Tennessee Supreme Court's last authoritative intellectual disability decision, as well. *Coleman v. State* had loosened the strictest application of the 70 IQ requirement, as it permitted—but did not require—the consideration of the standard error of measurement and other adjustments, but it continued to uphold the old version of Tenn. Code Ann. § 39-13-203(a)(1) and the requirement that a defendant be shown to have a specific IQ score of 70 or less. 341 S.W.3d 221, 247 (Tenn. 2011). Only as of May 11, 2021 is Tennessee's unconstitutional bright line requirement finally abolished.

our statue—an element that was essential to the analysis employed by this Court in 2004. Sub-section (g)(1) explicitly permits retroactive application of the now constitutional statute. Sub-section (g)(2) would only prevent Mr. Black from a hearing under (g)(1) if revised to read: "A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits *in a prior hearing on a different issue using unconstitutional standards that this law now repudiates.*" Mr. Black does not believe that the legislature intended for the courts to graft such a clause on to (g)(2). *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 857 (Tenn. 2010) (refusing to "casually engraft" a meaning not apparent from the statute). Indeed, a court should "be circumspect about adding words to a statute that the General Assembly did not place there." *Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011)

In enacting sub-section (g)(1) the legislature undoubtedly intended that the relevant legal standard for evaluating a claim of intellectual disability be the modern constitutional and scientific standard—as opposed to the standard, if any, that existed at the time of the defendant's crime. Obviously, if old standards were applied, then someone like Mr. Black (or Mr. Payne who has already received relief) would be without recourse, as the mentally retarded could constitutionally receive the death penalty at the time of their crimes, trials and sentencings. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). Thus, sub-section (g)(1) clearly contemplates a new hearing, under current constitutional, medically-informed standards. Logically, sub-section (g)(2) only prohibits relitigation if a defendant has already had a hearing under the

constitutional, medically-informed standards that Tennessee enacted as of May 11, 2021.

This interpretation of sub-section (g)(2) is not only logical, it avoids constitutional conflict. "In construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993). When a court is "faced with two equally plausible interpretations, one of which poses constitutional concerns, the canon of constitutional avoidance directs [the court] to adopt the other interpretation." *Moorcroft v. Stuart*, No. M201302295COAR3CV, 2015 WL 413094, at *10 (Tenn. Ct. App. Jan. 30, 2015) (citing *Clark v. Martinez*, 543 U.S. 371, 38091 (2005)). A court "must construe a statute so as to avoid a constitutional conflict if any reasonable construction exists that satisfies the Constitution's requirements." *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 522 (Tenn. 2005) (citing *Davis-Kidd*, 866 S.W.2d at 529).

Any interpretation that precludes review of Mr. Black's intellectual disability would be constitutionally infirm. The Supreme Court has recognized that the intellectually disabled "face a special risk of wrongful execution" and the failure to afford due consideration of an intellectual disability "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317, 321. The Tennessee Supreme Court, following the dictates of the Eighth Amendment, has twice committed to the principle that "Tennessee has no

business executing persons who are intellectually disabled." *Payne,* 493 S.W.3d at 486; *Keen*, 398 S.W.3d at 613. As such, any interpretation of (g)(2) that denies Mr. Black his Eighth Amendment right to an intellectual disability determination that is informed by the medical community's diagnostic framework, and that complies with the constitutional standards of *Moore-II, Moore, Brumfield, Hall,* and *Atkins,* would run afoul of the canon of constitutional avoidance.[5]

The only reasonable reading of (g)(2) is that it precludes relitigation of the "issue of whether the defendant has an intellectual disability" if and only if that specific issue has actually been determined under the constitutional, medically-informed standards embraced by the May 11, 2021 amendment. Such an interpretation is compelled by the clear legislative intent to create a procedural vehicle for individuals to raise legitimate claims of intellectual disability but who were precluded from doing so because of the existence of a prior unconstitutional standard and no available procedural remedy.

III. The issue of mental retardation litigated in 2004 is not the same as the issue of intellectual disability that must be decided today.

The "issue" of whether Mr. Black has an intellectual disability has never been determined. In 2004 this Court faced a very different issue, was Mr. Black "mentally

[5] Such an interpretation would also run afoul of the less commonly invoked maxim of law *ubi jus ibi remedium*: "Where the interpretation of a law is doubtful, it is against the policy of the law and all the traditions of the Courts to give it such a construction as must necessarily defeat a remedy." *Pond v. Trigg*, 52 Tenn. 532, 537 (1871); Blackstone's adage that "it is a general and indisputable rule, that where there is a legal right, there is a legal remedy." appears particularly apt to this case. William Blackstone, *Commentaries on the Law of England, Book III Of Private Wrongs* 23 (1768.)

retarded?" In answering that question this Court applied judicially created legal standards that were directly contrary to the constitutional and scientific standards used to determine intellectual disability today. Subsequent appellate and habeas courts that reviewed this Court's initial opinion continued to apply the same basic legal standards from 2004.[6] Those standards were contrary to *Atkins, Hall, Brumfield, Moore,* and *Moore-II*, they were not informed by the medical community's diagnostic framework, they relied on lay stereotypes, and they ignored the relevant manuals defining intellectual disability published by the AAIDD and APA. Under Tennessee Code Annotated § 39-13-203, as already explained, Mr. Black is entitled to one full and fair hearing where the "issue" of intellectual disability is determined under the proper constitutional standards.

Tennessee courts often must decide whether an issue has been previously determined. Tennessee law holds that that "when an issue has been actually and necessarily determined in an earlier proceeding between the parties, that determination is conclusive against the parties in subsequent proceedings." *Mullins v. State*, 294 S.W.3d 529, 534 (Tenn. 2009) (citing *King v. Brooks,* 562 S.W.2d 422, 424 (Tenn. 1978); *Shelley v. Gipson*, 400 S.W.2d 709, 711–12, 714 (Tenn. 1966). This is the doctrine of issue preclusion, or collateral estoppel.[7]

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[6] To be clear, the only merits opinion that ever happened in this case was this Court's finding in 2004 that Mr. Black was not mentally retarded. Everything that followed was some level of deferential review.

[7] This doctrine is similar to claim preclusion/*res judicata*, and in all ways relevant to this case they are identical. *See State v. Thompson*, 285 S.W.3d 840, 848 (Tenn. 2009) (distinguishing between collateral estoppel, and *res judicata*). However, as we are

A few basic rules of issue preclusion clearly apply to our present situation. First, the doctrine only applies if the issue previously determined is *identical* to the present issue; mere similarity is insufficient. *Mullins,* 294 S.W.3d at 535 (citing *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 787 (Tenn. Ct. App. 2007)).

Second, "different legal standards as applied to the same set of facts create different legal issues.'" *Beaty v. McGraw*, 15 S.W.3d 819, 827 (Tenn. Ct. App. 1998) (overruled on other grounds); *see also Reid v. State*, No. M2009-00128-CCA-R3PD, 2011 WL 3444171, at *30 (Tenn. Crim. App. Aug. 8, 2011), *aff'd sub nom. Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013) (recognizing that a determination of incompetency under one standard did not preclude a different determination under a different standard: "the applicable legal standard must also be identical"); *State v. Hameed*, No. M200900152CCAR9CD, 2010 WL 3582485 (Tenn. Crim. App. Sept. 15, 2010) ("the custody issue litigated and decided on its merits in juvenile court was not identical to the issue of whether Hameed committed the criminal offenses of aggravated child abuse and aggravated child neglect."); *see also State v. Pursell*, No. M200801625CCAR9CD, 2009 WL 2216562, at *6 (Tenn. Crim. App. July 23, 2009).

Third, "[t]he relitigation of an issue of law between the same two parties is not precluded when a new determination is warranted in order to take account of an intervening change in the applicable law or to avoid the inequitable administration of the law." *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 179 (Tenn. Ct. App. 2000)

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dealing with identity of "issues" not of "claims," collateral estoppel is the better comparator.

(citing Restatement (Second) of Judgments § 28 (Am. L. Inst. 1982)).

Fourth, changed facts that "alter the parties' legal rights and relations" create new issues, not subject to preclusion. *White v. White*, 876 S.W.2d 837, 839–40 (Tenn. 1994); *see also Strawter v. Mueller Co.*, No. E2015-02374-SC-R3-WC, 2016 WL 7322800, at *5 (Tenn. Workers Comp. Panel Dec. 16, 2016); *Bridgestone/Firestone*, 495 S.W.3d 257, 270 (Tenn. Ct. App. 2015).

Fifth (and for our purposes, dispositive), issue preclusion is an affirmative defense that is waived if not raised.[8] *Napolitano v. Bd. of Pro. Resp.*, 535 S.W.3d 481, 497, n.9 (Tenn. 2017). That is, in criminal matters, issue preclusion and claim preclusion are both affirmative defenses that must be pled (and proven) by the moving party. *Thompson*, 285 S.W.3d at 849; *State v. Scarbrough*, 181 S.W.3d 650, 655 (Tenn. 2005); *State v. Huskey*, 66 S.W.3d 905, 926 (Tenn. Crim. App. 2001). "Failure to plead and prove an affirmative defense constitutes a waiver of the defense." *Smith v. State*, 873 S.W.2d 5, 6 (Tenn. Crim. App. 1993) (state failed to plead statute of limitations, and waived defense); *see also Newsome v. State*, 995 S.W.2d 129, 133 (Tenn. Crim. App. 1998) ("Although it appears from the record that the appellant's petition was filed beyond the one year statute of limitations applicable to *writs of error coram nobis,* the statute of limitations is an affirmative defense which must be specifically plead [*sic*] or is deemed waived."); *Smith v. State*, 6 S.W.3d 512, 515 (Tenn. Crim. App. 1999) (state failed to plead defense of waiver, and thus waived

[8] Counsel will not belabor this point, but as the State of Tennessee agrees that (g)(2) does not apply, any hypothetical defense under (g)(2) is waived.

waiver on appeal).

All five of these basic rules demonstrate why the issue addressed in 2004 is not the issue to be decided today, and thus should not be barred by (mis)application of sub-section (g)(2).

A. The legal standards applied in Mr. Black's "mental retardation" litigation were radically different from the modern constitutional standards that must be applied under Tennessee Code Annotated § 39-13-203 to determine whether he is intellectually disabled.

This Court determined that Mr. Black was not "mentally retarded" because he failed to prove that (1) he had an IQ score that was 70 or less prior to age 18, and (2) he could not "behave so as to adapt to surrounding circumstances" prior to age 18. *Black,* slip op., at 31–32. This Court did not apply medically informed constitutional standards to decide whether Mr. Black had deficits in intellectual functioning and adaptive behavior that manifested during the developmental period, prior to age 22. *Id.*

1. The Court applied an unconstitutional bright line 70 IQ score before age 18 requirement, and unscientific rules for its determination.

In 2004, this Court employed the following legal standards to determine intellectual functioning during the developmental period: (1) Mr. Black needed to prove that his IQ score was 70 or less prior to age 18 (this bright line requirement has since been found unconstitutional),[9] (2) group administered tests of aptitude given during Mr. Black's school years, and a screening test given by Dr. Anchor were

[9] The constitutional standards established by *Atkins, Hall, Brumfield, Moore,* and *Moore-II*, as informed by the medical community's diagnostic framework, will be set-forth in § III.B, below.

considered to be IQ tests (they are not), (3) group administered tests of aptitude given during Mr. Black's school years and a screening test given by Dr. Anchor were given equal weight to individually administered, psychometrically valid, comprehensive tests of general intellectual functioning[10] (they should not be), (3) no standard error of measurement (SEM) was considered (it must be), (4) norm obsolescence (the Flynn effect) was discussed, but not applied (it must be), (5) a score of 73 on Mr. Black's very first comprehensive IQ test (WAIS-R, given by Dr. Blair in 1993) was viewed as being contrary to a finding of mental retardation (it rang the bell). *Id.* at 21–26, 30–31.

Ultimately, this Court weighed the three group-administered screening tests, one Shipley-Hartford screening test, and two comprehensive IQ tests that resulted in scores of 73 and 76 (WAIS-R from 1993 and 1997) *against* two comprehensive IQ tests that resulted in scores of 69 and 57 (WAIS-III and Stanford-Binet from 2001) and found that it was "simply not believable" that Mr. Black had an IQ of 70 or less, prior to age 18. A clinically reliable analysis pursuant to *Atkins, Hall, Brumfield, Moore,* and *Moore-II* would have found that all four comprehensive IQ tests strongly supported a finding of intellectual disability, while the screening and group administered tests were of no value at all. *Id.* at 31.

Subsequent tiers of review all continued to follow this same basic analysis. The Court of Criminal Appeals (CCA) made clear that "an I.Q. score of seventy . . . is a

[10] Modern standards require that IQ be determined using "individually administered, psychometrically valid, comprehensive tests of general intellectual functioning." AAIDD-12, at 29; *see also* DSM-V, at 37. This language is a mouthful, and for brevity counsel will henceforth generally call such tests "**comprehensive IQ tests**."

'bright line cutoff' that must be met." *Black v. State*, No. M2004-01345-CCA-R3PD, 2005 WL 2662577, at *12, 14 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006) (citing *Howell*, 151 S.W.3d at 458–59). No allowance could be made for "any standard [error] of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered to be mentally retarded." *Id.* (quoting *Howell*, 151 S.W.3d at 456). And like this Court, the CCA treated group administered aptitude tests to be equivalent to, and worthy of the same weight as, comprehensive IQ tests. *Id.* at *13. The CCA stressed that "[i]n 2001, Petitioner scored below seventy for the first time." *Id.* The CCA believed that Dr. Blair's first-ever application of an individually administered, psychometrically valid, comprehensive test of general intellectual functioning which generated a score of 73 was *contrary* to a finding of mental retardation. *Id.* at *13–14.

During federal habeas review,[11] the Sixth Circuit Court of Appeals recognized

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[11] Federal habeas review should not be considered a determination on the merits. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 333 n.5 (1979) (Stevens, J. concurring)). In order to obtain relief, "[t]he state-court error must amount to an obvious and extreme constitutional malfunction." *Jones v. Bell*, 801 F.3d 556, 564 (6th Cir. 2015). The burden for obtaining relief "is an extremely high bar because habeas relief is an 'extraordinary remedy.'" *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 621 (1998)). Even the grant of habeas corpus relief by a federal court rests on decidedly narrow authority. *Fay v. Noia*, 372 U.S. 391, 430–31 (1963) ("Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.") (overruled on other grounds).

The federal courts that heard Mr. Black's habeas corpus case by design and structure considered his case in the context of our federal system, which establishes

that the legal standards applied by this Court in 2004, and the CCA in 2005, were contrary to the legal standards set-forth by the Tennessee Supreme Court in 2011 in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). *Black v. Bell*, 664 F.3d 81, 92–101 (6th Cir. 2011). The Sixth Circuit found that it was error to fail to *consider* the SEM and the Flynn effect. *Id.* at 96 (emphasis added). However, the Sixth Circuit did not require a court to apply either the SEM or the Flynn effect: "although evidence of the Flynn Effect or the SEM may be introduced into the record, neither of these factors may impact the court's ultimate determination of the defendant's specific I.Q. score." *Id.* Similarly, the Sixth Circuit did not reject Tennessee's bright line requirement that an expert testify that Mr. Black have a specific IQ score that was either 70 or below, or above 70, prior to age 18. *Id.* at 95–96. And, the Sixth Circuit continued to (mis)perceive three different groups of "IQ" scores as worthy of equal consideration:

> (1) tests that were administered while Black was in elementary school, with the scores ranging from 83 to 97; (2) tests that were taken in preparation for Black's trial and during his first round of post-conviction proceedings, from 1988 to 1997, which ranged from 73 to 76; and (3) tests that were administered in 2001 by Black's experts who testified at his *Atkins* hearing, which ranged from 57 to 69.

Id. at 87. The Sixth Circuit recognized that there was a dispute about how to weigh these scores, and whether the WAIS-R scores of 73 and 76 should be adjusted downwards. *Id.*, at 87–88. But, it did not resolve this dispute, let alone recognize that the medical community's diagnostic framework rejected the group-administered

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the primacy of state courts reviewing state convictions. *Engle v. Isaac*, 456 U.S. 107, 128 (1982) ("[T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law."). The federal court refusal to extend an extraordinary remedy and invade the prerogatives of the state courts is not an adjudication on the merits.

tests as unreliable, and would find the 73 (and the 76, following Flynn adjustment) to clearly establish "significantly subaverage general intellectual functioning."[12]

On remand, the United States District Court applied the same basic rules as this Court, while undertaking "a de novo review of the *evidence admitted at the post conviction proceeding in state court*." *Black v. Colson*, No. 3:00-0764, 2013 WL 230664, at *6 (M.D. Tenn. Jan. 22, 2013) (emphasis added). Omitted from consideration was the robust adaptive behavior assessment from Dr. Greenspan, new evidence of adaptive behavior deficits, and the expert opinion of Dr. Marc Tasse explaining how the 2004 analysis was in contravention of clinical and medical standards.[13] The district court framed the first question it had to answer as whether "the Petitioner has shown: 'Significantly subaverage general intellectual functioning *as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below*, . . . manifested during the developmental period, or by eighteen (18) years of age.'" *Id.* at *6 (emphasis added). That is, the court, again, applied the bright line IQ requirement. And like this Court it believed that the group-administered tests, plus the Shipley-Hartford screen and the WAIS-R scores of 73 and 76 outweighed Mr. Black's WAIS-III and Stanford-Binet: "the Petitioner did not score 70 or below on an IQ test until 2001, when he was approximately 45 years old." *Id.* at *14.

On appellate review, the Sixth Circuit determined that the District Court had not committed "clear error" regarding its IQ before age 18 analysis. *Black v.*

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[12] Again, the correct constitutional standards established by *Atkins*, *Hall*, *Brumfield*, *Moore* and *Moore-II* will be discussed in § III.B.

[13] *See* Appendix items 5-11.

Carpenter, 866 F.3d 734, 743–45 (6th Cir. 2017). Reversal was only permitted if the Sixth Circuit was "left with the definite and firm conviction that a mistake has been committed. If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 744 (citing *Caver v. Straub*, 349 F.3d 340, 351 (6th Cir. 2003)). Yet again, the Sixth Circuit framed the legal standard as one involving a bright line IQ requirement: "did Mr. Black "have significantly subaverage general intellectual functioning as evidenced by a functional IQ *score* of seventy or lower before he turned eighteen." *Id.* (emphasis added).

2. The court applied a judicially-created, layperson-derived definition of deficits in adaptive behavior.

This Court's adaptive behavior analysis did not survive federal habeas review. The Sixth Circuit initially held that this Court had erroneously focused on Mr. Black's strengths, as opposed to his weaknesses. *Black*, 664 F.3d at 99. Subsequently, during the second round of habeas review, the Sixth Circuit declined to decide whether the District Court had "clearly erred" in opining that Mr. Black did not have adaptive deficits prior to age 18. *Black*, 866 F.3d at 750 ("we need not analyze whether Black has the requisite deficits in adaptive behavior").

Regardless, the legal standard applied by this Court and the CCA was a judicially created one, based on lay stereotypes, that is not at all similar (let alone identical) to the medically-informed standards required for a constitutionally adequate determination.

This Court observed that, as of 2004, the term "deficits in adaptive behavior"

had not been defined by the Tennessee legislature. *Black*, slip op., at 7.[14] Thus, the Court applied a definition created by the Tennessee Supreme Court: "we construe the term in its ordinary sense, to mean the inability of an individual to behave so as to adapt to surrounding circumstances." *Id.* at 7, 27 (quoting *State v. Smith*, 893 S.W.2d 908, 918 (Tenn. 1994)).

The Court's analysis, accordingly, focused on strengths not deficits including: (1) Mr. Black was toilet trained, (2) he could read and write,[15] (3) he "appeared to have completed the twelfth grade and/or graduated,"[16] (4) he played football (albeit only on defense, as he could not learn offensive plays), (5) he owned a car and kept it clean, (6) he married and had a child, and (6) he was friendly. *Id.* at 28–30. The Court quoted from Dr. Grant's report wherein he discussed the administration of the Independent Living Scale (a quantified assessment of adaptive deficits) on which Mr. Black scored a 73 (two standard deviations below the mean), *id.* at 14, but the Court

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[14] In fact, however, it had been defined by the American Association on Mental Retardation (AAMR), now known as the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA).

[15] Albeit the school records introduced at hearing reflect that in December of 1969, when he was a 13 year-old 7th grader (having been held back in the 2nd grade) he was reading at a 4th grade level. These records are reproduced at item 14 in the appendix filed along with this brief.

[16] The same school records reflect that Mr. Black only took 4 classes as a 10th grader, receiving semester grades of D- and D in English, D+/D- in Mathematics, D-/C in Printing, an A+ on one semester of PE, and a D- in one semester of Health. As an 11th grader his class load was reduced to only 3 classes a year, with grades of C/B in English, D/C- in Social Studies, and C+/C+ in Printing; finally as a 12th grader he again was only a half-time student with three classes, receiving a C/C- in English, D+/C in "Com.,Tp.Sip.", and C/C in Printing. That is he never took math after 10th grade, and by his 12th grade year was barely taking an academic course load at all.

never referenced this score in the section of the order discussing adaptive deficits, *id.* at 27–30, nor when it reached its conclusions regarding adaptive behaviors. *Id.* at 31–32. The Court's analysis on this prong is plainly contrary to constitutional commands of *Hall, Brumfield, Moore* and *Moore-II*, as it focused on perceived strengths, and lay stereotypes of what mentally retarded persons can and cannot do, while it largely ignored objective expert analysis. *Id.* at 27–32. More importantly, the analysis undertaken in 2004 simply did not apply the same legal standards as must be applied pursuant to Supreme Court precedent.

On appeal, the CCA, like this Court, emphasized Mr. Black's perceived strengths, including but not limited to (irrelevant) factors such as his ability to father a child, his friendliness, his avoidance of trouble at school, and his ability to clean his car. *Black*, 2005 WL 2662577, at *15. The Sixth Circuit, on habeas review, held that the CCA's "conclusory reliance on the record as a whole and the ambiguity of the conflicting evidence make the CCA's errors in assessing Black's adaptive deficits extend to the determination of whether these adaptive deficits manifested themselves by the time Black was age 18." *Black*, 664 F.3d at 99.

B. Modern constitution standards that are informed by the medical community's diagnostic framework, as required by *Atkins, Hall, Brumfield, Moore*, and *Moore-II*, must be applied.

The legislature answered the Tennessee Supreme Court's requests in *Payne* and *Keen* and modernized our intellectual disability statute, so that whether Mr. Black has intellectual disability can be determined under scientifically reliable standards, as required by *Atkins*, *Hall*, *Brumfield, Moore* and *Moore-II*. Most importantly, the Tennessee legislature intentionally deleted the bright line 70 IQ

requirement from Tenn. Code Ann. §39-13-203(a)(1), so that the first prong of our new definition may be met with proof that the defendant has "significantly subaverage intellectual functioning." In the following sections, counsel will address the legal standards that apply to this intellectual disability petition—standards that are radically different from the standards employed during the 2004 "mental retardation litigation." *Beaty*, 15 S.W.3d at 827; *Reid*, 2011 WL 3444171, at *30. These standards are "informed by the medical community's diagnostic framework." *Moore*, 138 S. Ct. at 1048 (citing *Hall*, 572 U.S. at 721). And they rely upon "the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD."[17] *Id.* (citing *Hall,* 572 U.S. at 722–23).

1. **The modern definition of "significantly subaverage intellectual functioning": requires consideration SEM; a single qualifying score on an individually administered, psychometrically valid, comprehensive test of general intellectual functioning satisfies this standard; and group-administered tests and screening tests should not be considered.**

Atkins recognized that an "IQ between 70 and 75 or lower, . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.*, at 309 n.5.[18] In reaching this conclusion the Supreme Court followed the standards set-forth by the American Association on Mental Retardation (AAMR), which is now the American Association on Intellectual and

[17] DSM-5 is presently being revised; the AAIDD-11 has been updated with the AAIDD-12.

[18] Mr. Black's individually administered, psychometrically valid, comprehensive test of general intellectual functioning produced a score of 73, within the range recognized by *Atkins*, but not recognized by the outdated Tennessee statutory interpretation applied by this Court in 2004.

Developmental Disabilities (AAIDD), and the standards set-forth by the American Psychiatric Association, the publisher of the DSM series. *Id.* at 309 n.3.

In *Hall v. Florida* the Supreme Court held that the Eighth Amendment prohibits unscientific bright-line IQ score requirements, and instead, that the full IQ range with the standard error of measurement must be considered—as this is what science requires. 572 U.S. at 712–13. The *Hall* court explained:

> The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Hall, 572 U.S. at 713–14.

Mr. Hall had four valid IQ scores of 71, 72, 73 and 80.[19] *Id.* at 734 n.9. In 2016, the Florida Supreme Court removed Hall from death row, finding that under the proper scientific and constitutional standards he was intellectually disabled. *Hall v. State*, 201 So. 3d 628 (Fla. 2016)

Atkins and *Hall* were applied to the facts in *Brumfield v. Cain*, 576 U.S. 305, 314–15 (2015): "[a]ccounting for this margin of error, Brumfield's reported IQ test

[19] Not to put too fine a point on it, but Hall's scores were significantly higher than Mr. Black's raw scores on comprehensive IQ tests. (73, 76, 69, 57, 67).

result of 75 was squarely in the range of potential intellectual disability." The Supreme Court flatly rejected Louisiana's basis for denying Brumfield an intellectual disability hearing, which was that he had "scored 75 on an IQ test and may have scored higher on another test." *Id.* at 314.

> These scores, the state court apparently believed, belied the claim that Brumfield was intellectually disabled because they necessarily precluded any possibility that he possessed subaverage intelligence—the first of the three criteria necessary for a finding of intellectual disability. But in fact, *this evidence was entirely consistent with intellectual disability*.

Id. (emphasis added). Subsequently, the Fifth Circuit Court of Appeals upheld a finding that Mr. Brumfield was intellectually disabled. *Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015). In so doing the court focused on Mr. Brumfield's first valid IQ score of 75 on the WAIS-R in 1995. *Id.* at 1059.

In *Moore* the Supreme Court reiterated the preeminent role science has in defining intellectual disability:

> States have some flexibility, but not "unfettered discretion," in enforcing *Atkins*' holding. If the States were to have complete autonomy to define intellectual disability as they wished, we have observed, *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. The medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, current manuals offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians."

Moore, 137 S. Ct. at 1052–53 (internal citation and quotation marks omitted).

Today, the AAIDD-12 and DSM-5 set forth the most current scientific standards for the intellectual disability prong. Relevantly, both require that the SEM be applied, and that IQ be viewed as a range—such that a score that is approximately

two-standard deviations below the mean satisfies prong one. AAIDD-12, at 29; DSM-5, at 37.[20] Both AAIDD-12 and DSM-5 recognize the Flynn effect and both recommend a "correction of the full-scale IQ score of 0.3 points per year since the test norms were collected." AAIDD-12, at 42; DSM-5, at 37. Thus, while only one score is required to satisfy prong one, both the AAIDD and APA would adjust Mr. Black's "high" score of 76 into the intellectual disability range, as well.[21] Both manuals also recognize that test scores may be inflated due to practice effects. AAIDD-12, at 43, DSM-5, at 37.[22]

Finally, but very importantly to our case, both the DSM-5 and AAIDD-12—and the courts that apply the relevant science—reject the use of group-administered tests to assess intellectual functioning.

The AAIDD-12 states that full-scale IQ is:

> most accurately assessed and represented using a current reliable, valid, individually administered, comprehensive, and standardized test that yields a full-scale IQ score. In implementing this best practice, we endorse using Floyd et al.'s (in press) guideline for selecting a comprehensive test of general intelligence. Such a test should: (a) include at least six subtests, and (b) sample at least three (preferably more) CHC broad strata abilities.

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[20] There are no bright line rules regarding IQ scores. Rather, most individually administered, psychometrically valid, comprehensive tests of general intellectual functioning have a standard error of measurement of 5, so that a 75 produces a range of scores between 70 and 80, which satisfies the intellectual functioning prong under AAIDD, APA and constitutional standards. *See Atkins*, 536 U.S. at 309, n. 5.

[21] Dr. Martell applied the Flynn to adjust all of Mr. Black's scores on comprehensive IQ tests so that they are correctly interpreted to be between 53 and 71, with the following scores: 1993 WAIS-R = 69, 1997 WAIS-R = 71, 2001 WAIS-III = 67, 2001 Stanford-Binet = 53, 2021 WAIS-IV = 67. Martell Rpt. Aug. 25, 2020, at 12-13.

[22] Mr. Black's IQ easily satisfies the relevant requirements without exploring practice effects, thus for sake of "brevity" counsel will not discuss practice effect further in this Brief.

AAIDD-12, at 29. Similarly, the APA states:

> Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence.

DSM-5, at 37. Multiple courts, applying these scientific standards have recognized that group administered screening tests like the Otis and Lorge-Thorndike cannot be relied upon to determine a defendant's intellectual disability. *Pruitt v. Neal*, 788 F.3d 248, 267 (7th Cir. 2015); *United States v. Montgomery*, No. 2:11-CR-20044-JPM-1, 2014 WL 1516147, at *39 (W.D. Tenn. Jan. 28, 2014); *Hines v. Thaler*, 456 F. App'x 357, 367–70 (5th Cir. 2011) ("Otis-Lennon is a brief, group-administered, verbal IQ test used as a screening tool, not a tool for diagnosing mental retardation."); *Porterfield v. State*, No. W2012-00753-CCA-R3PD, 2013 WL 3193420, at *24 (Tenn. Crim. App. June 20, 2013).

In *Montgomery*, the District Court recognized that both "the DSM–V and the AAIDD Manual emphasize the necessity of assessing prong one through the use of standardized, individually administered intelligence tests." *Montgomery*, 2014 WL 1516147, at *38. The court specifically found that the "Otis-Lennon is a group-administered test that is given in the school setting as a screening measure and focuses primarily on verbal skills." *Id.* at *39. For this reason, "federal courts have . . . recognized that the Otis–Lennon test is an improper tool to assess intellectual functioning under prong one." *Id.* at *40.

In *Porterfield,* the post-conviction court applied the relevant science to reject scores in the intellectually disabled range that were produced by the Lorge-Thorndike

and Beta[23] tests, "because they are group administered tests and, therefore, not suitable testing measures for determining intellectual functioning." *Portfield*, 2013 WL 3193420, at *24. A similar (adverse to the defendant) result was reached in *Hines*, where the state court "discounted the results of two Otis–Lennon Mental Ability tests, which were administered by [school district] counselors when petitioner was in grade school and yielded full-scale I.Q. scores of 68 and 73, respectively, because the Otis–Lennon test is a brief, group-administered, verbal IQ test and not a tool for diagnosing retardation." *Hines*, 456 F. App'x at 367 (internal citation and quotation marks omitted).

To summarize, the modern legal standard for prong one (and to be applied to age of on-set under prong three) has the following elements:

1. Does the defendant have a full-scale IQ that is approximately two-standard deviations below the mean that was obtained on an individually administered, psychometrically valid, comprehensive test of general intellectual functioning?

2. In determining whether the defendant's full-scale IQ meets the requisite standard, a court must apply the Flynn effect, and the practice effect.

3. IQ must be viewed as being within a range bordered by the Standard Error of Measurement (SEM).

4. Group-administered tests, like the Otis and Lorge-Thorndike, and basic screening tests like the Shipley-Hartford should not be used to determine (or rule out)

[23] The opinion is not clear, but this would appear to be the Otis-Beta.

intellectual disability; a court must focus on scores obtained on individually administered, psychometrically valid, comprehensive tests of general intelligence (like the Weschler and Stanford-Binet series of tests).

2. Modern adaptive deficit standards reject lay stereotypes; instead they focus on expert assessments and objective measurement.

The DSM-5 and AAIDD-12 require assessment of an individual's adaptive functioning in relation to three separate domains: conceptual, social, and practical, and they hold that the adaptive deficits prong is satisfied when "at least one domain of adaptive functioning is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." DSM-5, at 38; AAIDD-12, at 31. The AAIDD-12 recommends the use of standardized adaptive behavior instruments that produce a score "that is approximately 2 standard deviations or more below the mean." *Id.*[24]

The United States Supreme Court had repeatedly ruled that these scientific standards, and not judicially created ones, must be applied when assessing adaptive deficits. *Moore-II*, 139 S. Ct. at 668 (applying the three domain, two-standard deviation definition from AAIDD-11); *Moore*, 137 S. Ct. at 1051 (Texas erred in emphasizing judge created factors over clinical factors, which created "an

[24] Such scores were generated by Dr. Grant in relation to the 2004 hearing, using the Independent Living Scales, which generated scores in the low-70s. Grant Affid. at 9, ¶ 23. Subsequently, Dr. Stephen Greenspan gave the Street Survival Skill Questionnaire to Mr. Black, and administered the Vineland-II twice, once to childhood friend, Rossi Turner, and once to his two sisters; all of Dr. Greenspan's testing produced scores in multiple domains that were two or more standard deviations below the mean. Greenspan Dec., March 13, 2008, at 16-19.

unacceptable risk that persons with intellectual disability will be executed."). In both *Moore-II,* and *Moore* the Supreme Court made clear that "lay perceptions of intellectual disability" and "lay stereotypes" that had "no grounding in prevailing medical practice" should never be used to determine adaptive deficits. *Moore-II*, 139 S. Ct. at 669; *Moore*, 137 S. Ct. at 1051.

3. The developmental period now goes until age 22; it is scientifically appropriate to use valid modern intelligence tests to make a retrospective diagnosis; also proper to recognize that IQ, remains stable throughout life.

The Supreme Court made clear in *Hall, Brumfield, Moore* and *Moore-II* that modern science must be applied when determining intellectual disability, and that courts must be informed by the relevant manuals published by the AAIDD and APA. This is, of course, the reason for the legislative change.

Tennessee Code Annotated § 39-13-203(a)(3) defines the third prong in the disjunctive: "The intellectual disability must have manifested during the developmental period, *or* by eighteen (18) years of age." The AAIDD now defines the developmental period to last until age 22. AAIDD-12, at 1, 5, 13–14, 16-17, 21, 32–33, 38, 41–42.

The AAIDD recognizes that in many situations (including but not limited to capital cases) it is necessary for experts to make a retrospective diagnosis after an individual has reached age 22. AAIDD-12, at 41. The AAIDD-12 also recognizes that this can be done based on testing that is performed much later in an individual's life. AAIDD-12, at 41–42. Albeit, as with the general intellectual functioning prong, the AAIDD advises that "standardized and individually administered comprehensive

intelligence tests" should be used, and scores should adjusted for the Flynn effect (0.3 points per year since norms were established). AAIDD-12, at 42.

Finally, consistent with the expert reports submitted in this case, *see* Dr. Martell, Supplemental Report, Dec. 13, 2021, at 6–7, it is appropriate to determine an individual's IQ during the developmental period based on comprehensive IQ tests given in adulthood. AAIDD-12, at 41-42. Multiple courts have recognized this truth in the last decade while finding that defendants were ineligible for the death penalty. *Brumfield*, 808 F.3d at 1065 ("Although none of the IQ tests was administered to Brumfield prior to the age of 18, Greenspan testified that IQ scores remain stable over time"); *United States v. Smith*, 790 F. Supp. 2d 482, 504 (E.D. La. 2011) ("With IQ, which is a relatively stable, immutable trait, the problems associated with retrospective diagnosis mostly disappear."); *United States v. Hardy*, 762 F.Supp.2d 849, 881–82 (E.D. La. 2010) (same).

C. The mental retardation issue addressed in 2004 is not the intellectual disability issue that must be decided, today.

The judicially created legal standards applied in 2004 to decide whether Mr. Black was "mentally retarded" are radically different from the standards that must be applied to the modern, constitutional, medically-informed intellectual disability determination. Thus, the issues are not the same. *Beaty*, 15 S.W.3d at 827; *Hameed*, at *10; *Reid,* at *30.

Tennessee Code Annotated § 39-13-203(g)(2) only prevents relitigation of an *issue* that has previously adjudicated on the merits, but as should now be clear, the *mental retardation issue* addressed previously is not identical (or even similar) to the

intellectual disability issue that the Court faces today. *Mullins*, 294 S.W.3d at 535-36; *Patton*, 242 S.W.3d at 787. Above, Mr. Black has set-out the extreme differences in the relevant legal standards, and those differences, alone, make clear that the issues are not the same. However, multiple additional considerations also lead to this conclusion: (1) as set-forth in Section II, above, the logical and constitutional interpretation of (g)(2) makes clear it does not apply to individuals like Mr. Black, (2) the prior proceeding happened in a radically different context, (3) the facts are radically changed.

1. Fundamentally a Motion to Re-Open Post-Conviction Proceedings is not the same as a Criminal Court determination of Intellectual Disability.

The prior mental retardation finding was made in relation to a Motion to Re-Open Post-Conviction Proceedings under Tennessee Code Annotated § 40-30-117. There is no right to effective assistance of counsel at post-conviction proceedings. *Stokes v. State,* 146 S.W.3d 56, 57 (Tenn. 2004); *House v. State*, 911 S.W.2d 705, 706 (Tenn. 1995). All defendants who are raising intellectual disability claims pre-conviction, pursuant to Tennessee Code Annotated § 39-13-203, are indisputably entitled to effective assistance of counsel, and, Mr. Black submits, he is as well.[25]

[25] The Virginia Supreme Court in examining a similar statutory structure held that the "unitary criminal procedure for determining mental retardation, along with consideration of the constitutional protection such determinations are designed to afford, indicate that the General Assembly intended that all claims remanded, pursuant to Code § 8.01–654.2, be treated as criminal proceedings. Therefore, we hold that the proceedings to determine the mental retardation of a person sentenced to death, undertaken upon remand of a case to the circuit court pursuant to Code § 8.01–654.2, are criminal in nature. *Any person whose claim is so remanded shall be afforded, in such proceeding, the same rights as those afforded to a defendant in a*

Post-conviction proceedings are civil in nature. *Reid v. State*, 197 S.W.3d 694, 700 (Tenn. 2006). Conversely, Tennessee Code Annotated § 39-13-203 was placed by the legislature in the Criminal Code. As the Court of Criminal Appeals held in both *Hameed* and *Pursell*, different proceedings with different standards create different issues. *Hameed*, at *13; *Pursell,* at *6.

2. The facts have been significantly developed since 2004.

An issue has not been previously determined if the relevant facts have changed. *Strawter*, 2016 WL 7322800, at *5; *Huggins v. McKee*, 403 S.W.3d 781, 787 (Tenn. Ct. App. 2012); *Bridgestone/Firestone*, 286 S.W.3d at 905–06; *White*, 876 S.W.2d at 839–40.

The appendix filed contemporaneously with this brief contains all the expert and witness reports and declarations that have been developed since the 2004 post-conviction hearing. Headlining the appendix is Dr. Susan Vaught's detailed analysis of modern scientific standards, and the evidentiary record, which led her to reconsider her 2004 opinion that Mr. Black was not mentally retarded. Today she unequivocally concludes that "Mr. Black does meet the criteria established in the 2021 changes to § 39-13-203 for diagnosis of intellectual disability." Vaught Rpt., Feb. 28, 2022.

Equally important are Dr. Daniel Martell's[26] August 25, 2020, report, and his

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criminal sentencing proceeding. Burns v. Commonwealth, 688 S.E.2d 263, 268 (Va. 2010) (emphasis added).

[26] As was noted in the Introduction, Dr. Martell has been frequently employed as an expert witness by the State of Tennessee. In Davidson County, this very district attorneys' office relied upon him at sentencing and competency phases in the Paul Reid capital murder prosecutions. *Reid ex rel. Martiniano*, 396 S.W.3d at 504; *Reid*, 213 S.W.3d at 809–10.

December 13, 2021, supplement.[27] Dr. Martell personally evaluated Mr. Black over two days in December of 2019, reviewed the comprehensive record, and has unequivocally concluded that Mr. Black is intellectually disabled. Martell Reports, Aug. 25, 2020 & Dec. 13, 2021.

Dr. Vaught and Dr. Martell corroborate and ratify the expert conclusions reached by Dr. Tasse, Dr. Greenspan, Dr. Grant, Dr. Gur, Dr. Globus, and Dr. van Eys. The conclusions of Dr. Tasse and Dr. Greenspan, like those of Dr. Vaught and Dr. Martell have never been considered by this Court, before.[28] The never before considered adaptive deficit declarations from Rossi Turner, Freda Whitney, Melba Corley and Gaye Nease provide real world examples of the deficits that Dr. Grant and Dr. Greenspan objectively identified in their four administrations of adaptive deficit assessments (ILS, SSSQ and Vineland-II, twice).[29]

The facts that have been developed by present counsel properly address the modern legal standards required by *Hall, Brumfield, Moore* and *Moore-II*, such that the issue to be determined today is factually distinct from the issue decided in 2004. *Strawter*, 2016 WL 7322800, at *5; *Huggins*, 403 S.W.3d at 787; *Bridgestone/Firestone*, 286 S.W.3d at 905–06; *White*, 876 S.W.2d at 839–40. The new facts, when viewed through modern legal standards, demonstrate that Mr. Black is

[27] Dr. Martell's supplement was requested specifically to address questions raised by the District Attorney General.
[28] This Court, of course, considered Dr. Vaught's 2004—and now retracted—conclusion that Mr. Black was not mentally retarded.
[29] Every single adaptive deficit instrument ever applied has demonstrated deficits in one or more domains of adaptive behavior. *See* Greenspan Dec. July 10, 2019, at 12-13.

indisputably intellectually disabled.[30]

IV. Conclusion

The United States Supreme Court made clear in *Hall, Brumfield, Moore* and *Moore-II* that the determination of intellectual disability must be informed by the medical community's diagnostic framework, and that judicially created rules, and bright line cut-offs like those used by the Tennessee courts for decades are unconstitutional. But, Tennessee did not have any statutory remedy available, so individuals like Mr. Black (and Dellinger, Payne and Keen) were denied the opportunity for constitutional relief.

Seeing this unconstitutional void, the Tennessee Supreme Court "encourage[d] the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed." *Payne*, 493 S.W.3d at 492; *Keen*, 398 S.W.3d at 613. The Supreme Court issued this request because they were committed "to the principle that Tennessee has no business executing persons who are intellectually disabled." *Payne,* 493 S.W.3d at 486 (quoting *Keen,* 398 S.W.3d at 613).

In 2021 the legislature responded and amended Tennessee Code. Annotated § 39-13-203 so that men like Byron Black could have a constitutional and scientifically valid determination of their claims of intellectual disability. Mr. Black now seeks to exercise his right to this new, legislatively created remedy, so he may vindicate his

[30] The new facts would have satisfied the old legal standards, AND the old facts, would have satisfied the new constitutional legal standards.

Eighth Amendment right to be free from cruel and unusual punishment.

For all of the reasons that have been set-forth, above, it would be contrary to *Payne* and *Keen*, contrary to legislative intent, and contrary to the Constitution, to interpret sub-division (g)(2) so that it denied Mr. Black his one constitutional and scientifically valid hearing on his claim of intellectual disability. Rather, sub-division (g)(1) was clearly enacted so that men like Mr. Black (and Payne, Keen and Dellinger) could have their day in court.

Respectfully submitted this the 9th day of March, 2022,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief, along with the appendix and all attachments, was sent via email and US Post, to Glenn Funk, the District Attorney General for Davidson County, Tennessee, 226 2nd Avenue North, Suite 500, Washington Square, Nashville, Tennessee 37201-1649, this the 9th day of March, 2022.

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