**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1987-CF-856**

FRANK A. WALLS,
Defendant.

**DEFENDANT'S MOTION *IN LIMINE* REGARDING
THE STANDARD OF PROOF FOR AN INTELLECTUAL DISABILITY CLAIM**

COMES NOW, the Defendant, FRANK A. WALLS, by and through his undersigned counsel and files this Motion *in Limine* regarding the standard of proof for a claim of intellectual disability as a bar to the imposition of a death sentence. Mr. Walls hereby moves this Court for an Order adopting the preponderance of the evidence standard when makes its determination of whether or not Mr. Walls is intellectually disabled. In support thereof, Mr. Walls states as follows:

The Eighth Amendment ban on executing intellectually disabled persons was established in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court found that, due to their diminished culpability, executing the intellectual disabled did not advance any penological goal justifying the imposition of the death penalty. *Id*. at 318. The Court relied on four factors in finding that intellectual disabled persons are less morally culpable and less amendable to deterrence: difficulties in understanding and processing information; inability to learn from experience; ineptitude in logical reasoning; and impossibility of controlling impulses. *Id*. at 319-20. If the death penalty does not serve penological aims, it is nothing more than, "the purposeless and needless imposition of pain and suffering." *Id*. at 319 (*citing Enmund v. Florida*, 458 U.S. 728 (1982), *citing Coker v. Georgia*, 433 U.S. 584 (1977)). Exempting the intellectually disabled from the death

penalty protects the integrity of the trial process. *Hall v. Florida*, 572 U.S. 701, 701 (2014). The intellectually disabled face a heightened risk of wrongful execution because they give false confessions, are poor witnesses, and are less able to give meaningful assistance to counsel. *Id*.

Under Florida law, a person is ineligible for a death sentence if he is found to have significantly subaverage general intellectual functioning (IQ) and deficits in adaptive behavior which manifested in the period between conception and age 18. *See*, Fla. Stat. Ann. § 921.137 (1). "Significantly subaverage general intellectual functioning" is defined as "two or more standard deviations from the mean score on a standardized intelligence test." *Id*. The Supreme Court of the United States has held that courts must take into account the standard error of measurement (SEM) of plus or minus 5 points when considering a qualifying IQ score. *Hall*, 572 U.S. at 723. The defendant bears the burden of proof on each element of the Florida statute by clear and convincing evidence. Fla. Stat. Ann. § 921.137(4).

Years before *Atkins* established an Eighth Amendment ban on the execution of the intellectually disabled, the Supreme Court of the United States considered the burden of proof that applies to a determination of trial competency. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Under an Oklahoma statute, a defendant was presumed competent unless he was able to prove his own incompetence by clear and convincing evidence. *Id*. at 350. The "standard of proof, as … embodied in the Due Process Clause … is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." *Id*. at 362 (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). The higher the burden of proof, the more a party bears a risk of an erroneous conclusion. *Id*. at 362. The practice of requiring clear and convincing proof imposes a significant risk of an error. *Id*. at 363. For a defendant, the consequences of an erroneous determination are dire because a defendant who is "more likely than not" incompetent

would be tried and executed under the clear and convincing evidentiary standard. *Id*. at 364. The same is true under Florida's statutory scheme for recognizing intellectual disability that would bar the imposition of a serious and final penalty. *See Hall*, 572 U.S. at 724 ("[t]he death penalty is the gravest sentence our society may impose."); *Furman v. Georgia*, 408 U.S. 238, 251 (1972) (Douglas, J., concurring) ("no punishment could be invented with so many inherent defects … the poor, the sick, the ignorant, the powerless … are executed).

The intellectually disabled are no less deserving of constitutional protection than the incompetent. Florida's clear and convincing standard in determinations of intellectual disability as a bar to the death penalty is unconstitutional under *Cooper v. Oklahoma*, 517 U.S. 348 (1996) and *Atkins v. Virginia*, 536 U.S. 304 (2002). Florida law creates an insurmountable hurdle for capital defendants with intellectual disabilities, and creates a risk that intellectually disabled persons will be executed in violation of the Supreme Court of the United States' precedent in *Moore*,[1] *Hall*, and *Atkins*, as well as in violation of the procedural due process protections and cruel and unusual punishment standards of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution. By utilizing the clear and convincing standard of evidence, rather than the preponderance of the evidence standard for intellectual disability determinations, Florida law guarantees that people who are more likely to be intellectual disabled than not intellectually disabled will be executed. *See* Fla. Stat. Ann. § 921.137(4); *Salazar v. State*, 188 So. 3d 799, 811-12 (Fla. 2016). Florida's statute fails to protect intellectually disabled people, like Mr. Walls, from illegal execution and is at odds with almost every other jurisdiction in the nation.

Mild intellectual disability, a medical standard subject to numerical ranges, standards of

[1] *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore* I) and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore* II).

error, and analysis of deficits over broad categories of adaptive functioning, is rarely, if ever, clear and convincing. *See generally*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V") at 33-40. Eighty to ninety percent of all intellectual disability cases are in which the individual has an IQ score in the higher-end of the range, or in other words, has "mild" intellectual disability. American Association on Intellectual and Developmental Disabilities ("AAIDD"), Intellectual Disability: Definition, Classification, and Systems of Supports, 11th Edition (2010), at 151. Mild intellectual disability is more difficult to diagnose because people with mild intellectual disability have some capabilities and their disabilities are more subtle. *See generally, id*. at 151-62. Yet, the clichés persist. The AAIDD has identified pervasive stereotypes that "interfere with justice" in an intellectual disability diagnosis which are: that the intellectually disabled talk differently; cannot do complex tasks; cannot get driver's licenses; cannot support their families; cannot romantically love or be loved; cannot acquire any vocational or social skills; and do not have any strengths in their functioning. *See*, AAIDD, User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports (2010). The clear and convincing standard reinforces the stereotypes of the past in which the intellectually disabled are drooling and readily identifiable upon first glance. The clear and convincing standard of evidence ensures that a subtle diagnosis of mild intellectual disability will not meet the terms of Florida's statute, and as such it is unconstitutional.

States across the nation have considered the evidentiary standards for finding intellectual disability and there is no uniform standard for the burden of proof. *See* Timothy R. Saviello, The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases, 20 Berkeley J. Crim. L. 163, 224 (2015) (a wide disparity exists because the Supreme Court has

declined to establish procedural guidelines for the states to effectuate their mandate in Atkins). Of the twenty-nine states[2] with capital punishment, the vast majority use the preponderance of the evidence standard to determine intellectual disability. Only four states, Arizona, Colorado, North Carolina, and Florida currently use the clear and convincing standard. Ariz. Rev. Stat. Ann. § 13-753(G) (2011); Colo. Rev. Stat. § 18-1.3-1102 (2012); N.C. Gen. Stat. § 15A-2005(c) (2015); *see Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (invalidating Delaware's death penalty scheme, including the clear and convincing standard in Del Code Ann. Tit. 11, § 4209 (d)(3)(b)); *see also* S. 95, 71st General Assembly, 1st Sess. (Colo. 2017) (bill proposed to repeal the death penalty). Colorado, however, has a governor-imposed moratorium on the execution of *any* individual sentenced to death.

The clear and convincing standard is not used in any other context within Florida criminal law. For example, a defendant's affirmative defenses may be proven by a preponderance standard. *See* Fla. Stnd. Jury Instr. 3.6 (n); §§ 499.03(1), 893.13(6) (a); *Herrera v. State*, 594 So. 2d 275 (Fla. 1992); *State v. Cohen*, 545 So. 2d 894 (Fla. 4th DCA 1989). The Florida Supreme Court has also held in some statutory circumstances that once a defendant shows an affirmative defense may exist, the burden shifts to the government to prove the nonexistence of the defense beyond a reasonable doubt. *See* intro. to Fla. Stnd. Jury Instr. 3.6. In the balancing of mitigating and aggravating factors in Florida's capital sentencing scheme, the prosecution must prove aggravating factors beyond a reasonable doubt, whereas the defense bears the burden of proving mitigating factors by a preponderance of the evidence standard only. Fla. Stnd. Jury Instr. 7.11; § 921.141 ("you must … determine whether the aggravating factors[s] … have been proven beyond a reasonable doubt … the defendant need only establish a mitigating circumstance by the greater

[2] Four of these states, California, Colorado, Oregon, and Pennsylvania, have Governor-imposed moratoriums on the execution of individuals sentenced to death.

weight of the evidence, which means …more likely than not..."). Florida's scheme singles out the intellectually disabled for disparate treatment in violation of the constitutional guarantee of due process.

Florida accepts the highest tolerance for error in its entire criminal statutory scheme, aside from the presumption of reasonable doubt afforded to all, in its determination of intellectual disability of capital defendants. This creates an unacceptable risk of error as well as the statistical probability that people who are intellectual disabled will be executed, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. Kathryn Raffensperger, 90 Denv. U. L. Rev. 739, 748 (2012) ("oftentimes, the standard [of proof] alone will ultimately determine" a person's eligibility for a death sentence). *See* Natalie Pifer, The Scientific and the Social in Implementing *Atkins v. Virginia*, 41 Law and Social Inquiry 1036, 1051 (2016) ("the nuances inherent to the scientific understanding of intellectual disability are not easily imported to the bright lines law prefers to operationalize in the extreme punishment context"). The clear and convincing standard of proof accomplishes indirectly what Florida can no longer do directly under the *Atkins* standard: execute the intellectually disabled. As in *Cooper*, the rights of the intellectually disabled, firmly established in *Atkins*, *Moore*, and *Hall*, far outweigh Florida's interest in the efficient execution of its capital sentencing scheme.

The application of a clear and convincing standard for determining intellectual disability has life and death significance in this case. This Court should determine whether or not Mr. Walls is intellectually disabled by a preponderance of the evidence.

WHEREFORE, Mr. Walls hereby respectfully requests this Court to adopt preponderance of the evidence as the standard by which to determine whether Mr. Walls has demonstrated his intellectual disability at the forthcoming evidentiary hearing on same, presently scheduled to be held from March 23-30, 2019.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been served electronically upon the Clerk of the Circuit Court, the Honorable William F. Stone, Circuit Judge (frannie.natalie@aflcourts1.gov; courtteam@okaloosaclerk.com); Assistant Attorney General Charmaine Millsaps (charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com) and Assistant State Attorneys Diane Stefani and John Molchan (jmolchan@osa1.org; dstefani@osa1.org; dhassebrock@osa1.org; dmoffitt@osa1.org; and oka-div002@osa1.org) on this 16th day of August, 2019.

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