ALFRED BOURGEOIS
APPLICATION FOR EXECUTIVE CLEMENCY
ORAL PRESENTATION REQUESTED

Alfred Bourgeois, an intellectually disabled man scheduled to be executed on December 11, 2020, respectfully petitions the Attorney General to exercise his authority under 28 C.F.R. § 1.6 to cause investigations to be made into the newly arisen questions about the cause of death and Mr. Bourgeois's culpability, and into the still unaddressed question of Mr. Bourgeois's intellectual disability under current diagnostic standards. Mr. Bourgeois further petitions the Attorney General to consider the results of these investigations, together with the oral and written presentations made by Mr. Bourgeois's counsel, and to recommend to the President of the United States that Mr. Bourgeois's requests for clemency should be granted.

Mr. Bourgeois respectfully petitions the President of the United States to exercise his authority under Article II, Section 2 of the United States Constitution to grant Mr. Bourgeois a ninety-day reprieve to permit full and fair investigation, presentation, and supplementation of his clemency claims to the Attorney General and to the President. Mr. Bourgeois further petitions the President to commute his sentence of death.

I. BACKGROUND

On July 25, 2019, the government scheduled Mr. Bourgeois's execution for January 13, 2020, at the same time that it scheduled the executions of four other federal inmates. In September 2019, Mr. Bourgeois submitted a petition to have his death sentence commuted due to his intellectual disability. The petition noted that, to date, no court had considered his intellectual disability under current diagnostic standards, but that a habeas petition on that ground was then pending in the United States District Court for the Southern District of Indiana.

In November 2019, the United States District Court for the District of Columbia stayed

the scheduled federal executions, including Mr. Bourgeois's, in consolidated lethal injection litigation. Mr. Bourgeois's execution date passed and, pursuant to 28 CFR § 1.10, his clemency petition was withdrawn on January 27, 2020. At that time, the Office of the Pardon Attorney advised that "if a new date of execution is set, [Mr. Bourgeois] may submit a new application, or [counsel] may submit a new application on his behalf."[1]

Thereafter, the United States District Court for the Southern District of Indiana stayed Mr. Bourgeois's execution in light of his "strong showing" that he is intellectually disabled under current diagnostic standards.[2] On appeal, however, a panel of the United States Court of Appeals for the Seventh Circuit ruled that Mr. Bourgeois's intellectual disability was irrelevant because no judicial remedy was available through habeas corpus. That ruling took effect on December 1, 2020 when, over the dissent of two judges, the Seventh Circuit Court of Appeals denied rehearing en banc.

On November 20, 2020, while the district court's stay was still in effect,[3] the Government announced that it would execute Mr. Bourgeois on December 11, 2020.

II. SUMMARY

Substantial recent developments warrant investigation and consideration in connection with this clemency petition. First, new scientific evidence indicates that the victim's death was not the result of physical abuse or violence—the very basis of Mr. Bourgeois's death sentence. Rather, the child's death was most likely caused by severe dehydration resulting from the ingestion of large amounts of sea water. This new evidence is extensive, is supported by the recent review of two experts, and refutes the government's theory that Mr. Bourgeois beat his

[1] A1.
[2] *Bourgeois v. Warden*, No. 19-cv-00392-JMS-DLP, 2020 WL 1154575, at *3–5, *6 (S.D. Ind. March 10, 2020).
[3] Pursuant to the Seventh Circuit's decision, the district court vacated that stay on December 3, 2020.

daughter to death.[4] In recent communications following review of this new evidence, the Government's forensic pathologist exhibited hesitancy about the conclusions she had reached at the time of trial related to the cause of death, and a willingness to consider the opinion of another neuropathologist.[5] Mr. Bourgeois requests that the Attorney General's investigation include procuring such an opinion from an independent neuropathologist. Unless and until this evidence is adequately developed and considered, Mr. Bourgeois's death sentence must not be carried out.

Second, the Seventh Circuit's recent decision has completely shut the courthouse doors to Mr. Bourgeois, despite his "strong showing" that he is intellectually disabled. The absence of a judicial remedy for Mr. Bourgeois makes it incumbent upon the Attorney General to investigate and consider his intellectual disability in light of current diagnostic standards, including by procuring the opinion of an independent mental health expert. Because such consideration will lead to the inexorable conclusion that Mr. Bourgeois is intellectually disabled, his death sentence should be commuted.

III. NEW EVIDENCE WARRANTS A FULL INVESTIGATION AND POSTPONEMENT OF MR. BOURGEOIS'S EXECUTION.

Mr. Bourgeois's daughter JG fell unconscious while the family, who were traveling together in Mr. Bourgeois's semi-truck, was briefly stopped at the Corpus Christi Naval Air Station. JG died the next day in the hospital. Mr. Bourgeois was federally charged with premeditated murder, based on the Government's theory that he caused JG's death by beating her while on the naval base. This theory was critical both to proving that JG was murdered and because federal jurisdiction depended on whether the injury resulting in death "was inflicted" within the federal government's territorial jurisdiction.[6]

[4] A2–44; A45–48.
[5] A48 ¶ 9.
[6] 18 U.S.C. § 3236.

At trial, the Government presented the testimony of forensic pathologist Elizabeth Rouse, M.D., D.V.M. Dr. Rouse conducted an autopsy, during which she identified a "large, fresh, subdural hemorrhage" on the victim's brain, as well as retinal hemorrhaging, and concluded that the death was a homicide.[7] Six weeks later, neuropathologist Kathleen Kagan-Hallet, M.D., examined autopsy materials and described the subdural hematoma (or hemorrhage) observed at the autopsy as "thin"; she indicated that the injury was approximately ten days old at the time of death.[8] She also noted infarcts—tissue death caused by decreased blood flow—that were at least seven days old.[9] Despite Dr. Kagan-Hallet's findings that the hematoma was ten days old, Dr. Rouse told the jury that the cause of death was a subdural hematoma sustained sometime in the "few days" before death.[10] The jury was not told of Dr. Rouse's error; Dr. Kagan-Hallet did not testify at trial, and Dr. Rouse was not asked about any of her findings. In fact, defense counsel did not pose any questions regarding whether the timing of the injury identified by Dr. Rouse as the cause of death correlated with the Government's theory of the case.

During habeas review, Dr. Rouse acknowledged that the subdural hematoma was "not a large collection of blood," and maintained only that it "contributed to" death.[11] Dr. Rouse proffered a new theory as to the cause of death, specifically, "a complex constellation of things going in response to" and a "constellation of injuries" that all resulted from "the blunt closed head injury" that occurred on the naval base.[12] After being questioned about the timing of the brain injuries, Dr. Rouse then agreed with a theory proposed by the judge, who interjected to suggest that the beating on the naval base was the "coup de grace" that caused the pre-existing

[7] A61–62.
[8] A63.
[9] A64.
[10] A61–62
[11] A66–67.
[12] *Id.*

injuries to prove fatal.[13]

Neuropathologist Roland Auer, M.D., Ph.D., who has over thirty-five years' experience in forensic pediatric and adult neuropathology, recently examined the medical evidence in this case and concluded that JG did not die of traumatic injury at all, but from neurologic conditions stemming from her ingestion of salt water and untreated, severe dehydration. *See infra* § III.B. Dr. Auer specifically found that JG died from venous sinus thrombosis ("VSS"), which involves blood clots in the venous sinuses, and from cerebral edema, which involves fluid build-up in and around the brain.[14] These conditions resulted from JG's untreated hypernatremia, a concentration of sodium in the blood caused by severe dehydration, with onset occurring ten days prior to her death.[15]

Dr. Auer also concluded that: (1) there were no head injuries of the type that would be expected from a physical force sufficient to cause death; and (2) there was no medical evidence of "recent" brain damage. Counsel shared Dr. Auer's conclusions with a second expert, Jane W. Turner, M.D., Ph.D., who has over twenty years' experience and is board certified in anatomic and clinical pathology and forensic pathology by the American Board of Pathology, and certified as a child death pathologist by the State of Missouri.[16] Upon review of the relevant evidence, Dr. Turner agreed with all of Dr. Auer's conclusions.[17] The new medical evidence refutes Dr. Rouse's changing medical theories that support her conclusion that a head injury on the naval base caused JG's death and, at minimum, merits further investigation.[18]

[13] A69–70.
[14] A2–3, A16–18, A36–38.
[15] A36–38.
[16] A45 ¶¶ 1, 3.
[17] A46 ¶ 4.
[18] *Id.*

A. New Medical Evidence Demonstrates That Death Was Not Caused By a Recent Traumatic Head Injury.

Dr. Auer found that "there is no evidence of repeated blows to the head," and noted the absence of any "findings that would be expected from [a fatal] blow" to the head, such as "epidural hemorrhage or a large subdural hemorrhage."[19] He also stressed the absence of skull fractures, explaining that it is "difficult to deliver a fatal blow with no skull fracture" in a "two-year-old girl," especially when the skull is as thin as that observed in the autopsy.[20] And the "small bruises under the scalp" could have just as easily resulted from the extended resuscitation performed on the child after she fell unconscious.[21] In fact, none of the brain injuries Dr. Rouse identified in the autopsy were likely caused by blunt force trauma. As Dr. Auer explained, these injuries were likely caused by VSS. Upon review of Dr. Auer's opinions and the relevant evidence, Dr. Turner agreed with "all of Dr. Auer's findings, including his determination that the most likely cause of death in this case was cerebral sinovenous thrombosis and cerebral edema caused by hypematremia that onset some ten says prior to death."[22]

In his report, Dr. Auer systematically rejected each of Dr. Rouse's conclusions that the injuries she identified were caused by blunt force trauma. For example, addressing Dr. Rouse's initial theory that head trauma caused the subdural hematoma and resulted in death, Dr. Auer explained that VSS causes subdural hematomas, forty percent of which are atraumatic.[23] Dr. Auer likewise refuted Dr. Rouse's statement that hemorrhage in the retina could only be the result of "trauma to the brain."[24] As Dr. Auer explained, damage to neurons and brain tissue is "typically hypoxic (due to lack of oxygen) rather than traumatic," and there are "many other

[19] A29, 35.
[20] A13.
[21] A35.
[22] A46 ¶ 4.
[23] A34.
[24] A66, 68.

causes of retinal hemorrhages" that are not traumatic, including intracranial pressure and hypoxia, both of which were well documented in JG's medical records.[25]

Dr. Auer dismissed Dr. Rouse's contention that the venous infarctions were, in truth, a "sinus contusion infarct," dismissing the term as "oxymoron[ic]," and noting that he had never encountered the term in his thirty-five years as a vascular researcher and neuropathologist.[26] As Dr. Auer explained, sinuses do not bruise, so there is no such thing as a sinus contusion. And infarcts describe dead and dying tissue, which *prevents* the flow of blood; contusions, on the other hand, "*require* blood flow in order to leak."[27] Thus, an injury cannot be both a contusion and an infarct at the same time.

Dr. Auer also contradicted Dr. Rouse's later contention that any blood clots, which she had failed to identify in her autopsy report, must have resulted from head trauma at the naval base. Dr. Auer explained that VSS "is a form of stroke that is . . . rarely associated with trauma," and stems "from some disorder of blood coagulation, largely dehydration."[28] Thus, traumatic head injury, like the one Dr. Rouse relied on to explain the thrombus, "usually do[es] not give rise to thrombi but rather give[s] rise to bleeding."[29]

Finally, the one "general agreement" among all the experts during the pendency of this case has been that cerebral edema was the cause of death.[30] And, as Dr. Auer explains, cerebral edema "does not develop instantaneously, irrespective of cause."[31] Even when edema is caused by lethal head injuries, "the individual keeps breathing" and "[a]pnea comes days later . . . when

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[25] A31.
[26] A26.
[27] *Id.*
[28] A22.
[29] A34.
[30] A9 (noting that the radiological report found "cerebral edema without fracture," and all the CT findings are nontraumatic).
[31] A29.

cerebral edema has developed and/or herniation occurs," not immediately after the injury as Dr. Rouse has theorized.[32] Thus, the most likely cause of death was a non-traumatic injury, occurring some ten days prior to death, resulting in VSS and cerebral edema.

B. Additional Evidence Supports the Finding That JG's Death Was Caused By Hypernatremic Dehydration.

Approximately ten days before her death, JG was at the beach, during which she was totally submerged in sea water several times, and ingested substantial amounts of salt water.[33] As JG left the beach, she "kept losing her balance," "tripping," and was unable to stand.[34] Later that day, her stomach swelled, and she vomited sea water.[35] For several days afterward, she travelled in a truck without air-conditioning through the Florida and Louisiana summer.[36] These events—swallowing large amounts of sodium in seawater, followed by periods during which the child was unable to stand, compounded by the hot weather and extreme dehydration—caused JG to suffer hypernatremia.[37] Left untreated, hypernatremia can cause brain edema resulting in death. As JG drank fluids in the days following the beach incident, the water intake caused her brain to retain water and swell. As swelling continued untreated, it eventually caused her brain, specifically the cerebellum, to flow into the spinal cord and press against the medulla oblongata, causing her breathing and heart to stop.[38] This condition, and not a traumatic head injury, was the actual cause of her death.

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[32] A32.
[33] A33–34.
[34] A4.
[35] *Id.*
[36] *Id.*
[37] A33–34.
[38] A35.

C. In Recent Communications, Government Pathologist Dr. Rouse Exhibited Hesitancy About Her Conclusions as to Cause of Death, and Expressed a Willingness to Consider the Opinion of Another Neuropathologist.

In November 2020, Dr. Turner discussed the new evidence with Dr. Rouse.[39] In the course of these discussions, Dr. Turner provided Dr. Rouse with a letter from Dr. Auer outlining his opinions.[40] On December 2, 2020, following Dr. Rouse's review of Dr. Auer's findings, Dr. Turner had a "lengthy conversation" with Dr. Rouse. Dr. Rouse stated that she "did not disagree" that JG suffered venous thrombosis, occurring more than a week before death, or that the venous thrombosis was possibly caused by the ingestion of salt water.[41] Dr. Rouse also stated that all of JG's injuries predated the date of the alleged fatal head trauma, except for "a small amount of fresh blood in the brain and superficial bruising"; she acknowledged that the amount of fresh blood "was too small to have caused death."[42] She also did not disagree that the superficial bruising may have resulted from resuscitation attempts and/or from the thrombus.[43] Nonetheless, Dr. Rouse continued to think death was caused by a fatal head trauma based on her stated recollections that JG's blood had been found on the windshield of Mr. Bourgeois's truck; but no such evidence is part of the record in this case.[44]

According to Dr. Turner, Dr. Rouse "harbors some hesitancy about the conclusions she reached in this case," and "repeatedly expressed a willingness to consider the opinion of another neuropathologist."[45]

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[39] A46 ¶ 5.
[40] A47 ¶¶ 6–7.
[41] A47, ¶ 8.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] A48, ¶ 9.

D. Other Scientific Evidence Undermines the Government's Case Against Mr. Bourgeois.

The Government argued for a death sentence on the basis of its inflammatory narrative that Mr. Bourgeois systematically abused and sexually assaulted JG before delivering a fatal blow when he slammed her head against the windshield of the truck. But just as its evidence of violent head trauma has not stood the test of time, so too its evidence of sexual assault does not withstand scrutiny.

While JG was hospitalized, a sexual abuse nurse examined her and determined that there were no signs of sexual abuse.[46] This conclusion was confirmed during the autopsy.[47] At trial, however, the Government offered three experts to support its allegation of sexual abuse: pediatrician Scott Benton, FBI forensic serologist Caroline Zervos, and FBI forensic DNA examiner Anthony Onorato. The experts testified that rectal swabs taken from the victim had been tested and were positive for semen. These experts' conclusions, however, derived from a single forensic test meant to detect a specific antigen ("p30") found in semen, and from the experts' mistaken belief that the antigen is found only in males.[48]

The FBI has since abandoned the p30 test as incapable of reliably detecting semen. And even according to the FBI's protocols at the time, the p30 test was not capable of confirming the presence of semen in Mr. Bourgeois's case, contrary to the Government witnesses' misrepresentations. But the jury did not hear these facts. For instance, the jury did not hear that, in truth, the p30 protein can be found in female sources, including female urine and serum.[49] The

[46] A74.
[47] A51.
[48] While Dr. Benton, a pediatrician, also testified that the autopsy photos showed trauma in the vagina, indicative of sexual assault, this post-hoc examination of autopsy photos was directly contradicted by two experts—the Government's forensic pathologist and a nurse specifically trained to look for evidence of sexual abuse—each of whom physically examined JG and saw no evidence of sexual trauma.
[49] A87–92.

jury likewise never heard that the p30 test results in this case—which were first disclosed to the defense during post-conviction proceedings—showed only a "weak positive," which could be a false positive due to bacterial proteins found in the rectal swab.[50] Nor did the jury hear that the FBI's own serological protocols for the identification of semen in place in 2002 *required* a finding of sperm in cases involving "borderline levels of p30," which would include the "weak positive" result obtained here.[51] And while the jury did learn that an examination for sperm was negative, they were also incorrectly told, without objection or rebuttal, that this is normal because sperm rapidly degrade,[52] when in truth, "sperm are incredibly tough and durable," and can be detected "decades" after an offense.[53]

The FBI has now entirely abandoned the p30 test for semen, even where levels of the protein are high. In 2012, the FBI downgraded the p30 test to being merely "presumptive" rather than confirmatory for the presence of semen.[54] In 2015, the FBI removed p30 testing from its manual altogether as a method for detecting the presence of semen, presumptively or otherwise.[55] And the current FBI manual excludes the p30 test as a way of detecting the presence of semen, limiting the available tests to either the identification of a sperm cell, or a combination of acid phosphatase and either DNA and sperm.[56] All of the FBI's currently accepted indicators for the presence of semen were negative in Mr. Bourgeois' case.

The Government's narrative that Mr. Bourgeois sexually assaulted his daughter before killing her was crucial to the prosecution, and devastating to Mr. Bourgeois's arguments that his

[50] A93, 95–96.
[51] A298.
[52] A98–99.
[53] A81–83 (describing Dr. Benton's testimony that it was normal to fail to detect sperm in the rectal swab, despite the presence of semen, "totally erroneous").
[54] A284.
[55] A291.
[56] A294–97.

life should be spared. We now know that the witnesses' testimony that results from the p30 test confirm the presence of semen, and thus that a sexual assault took place, was scientifically inaccurate and in direct violation of FBI protocols then and now.

We also know the FBI does not even consider a *positive* p30 test to *presumptively* indicate the presence of semen.[57] And, yet, based *on weak and uncorroborated* results from that same test, Mr. Bourgeois's jury was repeatedly told that forensic science had *proven* that he sexually assaulted his daughter. As a result, the jury who convicted Mr. Bourgeois and sentenced him to death was never informed that the p30 results, which the Government represented scientifically "confirmed" the presence of semen, could actually do no such thing.

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Dr. Rouse's hesitancy about her findings, and her willingness to consider the opinion of another neuropathologist based on Dr. Auer's contrary findings, underscore the serious doubts about the evidence on which Mr. Bourgeois's conviction and sentence depend. Taken together, these challenges to the scientific evidence, which the Government offered to prove the cause of death, the time the fatal injury occurred, and that sexual abuse preceded death, undermine the Government's narrative that Mr. Bourgeois engaged in long-term systemic and sexual abuse of his daughter before delivering a final, fatal blow on federal land.[58]

There is no doubt that Mr. Bourgeois has been painted as a monster by the Government. But, as outlined above, there is tremendous doubt whether the tools, methods, and medical opinions at trial captured anything like a truthful narrative. Stripped of the incendiary color

[57] Mr. Bourgeois requested information from the FBI to ascertain when and why the p30 test had been eliminated from FBI protocols. Despite inquiries to the FBI laboratory examiner who testified in Mr. Bourgeois's case, inquiries to the prosecutors who handled his case, and FOIA requests, the information Mr. Bourgeois seeks related to why p30 testing had been eliminated from FBI protocols has not been disclosed.

[58] The Government's remaining forensic evidence not addressed here—related to alleged bite marks and close-up photographs of injuries—has already been challenged in earlier proceedings, and, regardless, is insufficient on its own to establish both the jurisdiction and factual basis necessary for a capital conviction.

provided by this challenged evidence, we are left with a much different picture. Rather than pursuing a rushed and emotionally-charged execution, continuing the mistakes of those who have gone before, the Government should fully investigate the new evidence in this case, and the President should postpone Mr. Bourgeois's execution until this evidence can be fully and fairly developed and considered.

IV. MR. BOURGEOIS IS INTELLECTUALLY DISABLED, YET NO COURT HAS CONSIDERED HIS INTELLECTUAL DISABILITY UNDER CURRENT DIAGNOSTIC STANDARDS.

A. Mr. Bourgeois Is Intellectually Disabled.

As detailed extensively in the habeas petition appended hereto, Mr. Bourgeois meets the three prongs of the medical definition of intellectual disability: subaverage intellectual functioning, adaptive deficits, and onset before age eighteen.[59]

First, Mr. Bourgeois has deficient intellectual functioning. He has been IQ tested twice in his lifetime. His scores of 70 and 75 both fall within the presumptive range for intellectual disability.[60] That these IQ tests validly measured Mr. Bourgeois's intellectual functioning is confirmed by the consistency between the full-scale scores he received on each test, as well as the constancy in the overall pattern of correct and incorrect answers on each test,[61] his history of impaired functioning,[62] and the manner in which he presented during his clinical interviews.[63]

Second, Mr. Bourgeois has significant deficits in adaptive functioning.[64] The adaptive

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[59] *See* A313 ¶ 19.
[60] A314–17 ¶¶ 20–30. Clinically accepted standards also mandate correction for the "Flynn Effect," a widely recognized testing phenomenon that causes IQ scores to inflate at a rate of 0.3 points for every year that has passed since the test was developed. Mr. Bourgeois's scores of 75 and 70, as well as his Flynn-corrected scores of 67 and 68, fall within the range for intellectual disability.
[61] A317–18 ¶ 31.
[62] A323–40 ¶¶ 44–81.
[63] A317–18 ¶ 31.
[64] The American Association on Intellectual and Developmental Disabilities defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in their everyday lives." A318–19 ¶ 33. The American Psychiatric Association defines adaptive deficits as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." *Id*.

deficits prong is satisfied if there is a significant limitation in one of three types of adaptive behavior—conceptual, social, or practical.[65] Mr. Bourgeois has significant deficits in all three domains. Specifically, in the conceptual domain, Mr. Bourgeois has had lifelong deficits in his academic functioning, executive functioning and self-direction, memory, and communication.[66] In the social domain, Mr. Bourgeois was a slow and awkward child who had difficulty playing with the other children, fitting in, and coping with rejection; his social abilities did not improve with age.[67] His practical deficits include a lifelong inability to follow simple directions and a consistent need to rely on family and friends to perform daily life activities.[68] In support of the intellectual-disability claim in his postconviction proceedings under 28 U.S.C. § 2255, Mr. Bourgeois presented evidence from clinical psychologist Victoria Swanson, Ph.D., who conducted a broad-based adaptive behavior assessment of Mr. Bourgeois, considering formal testing; records; third-party interviews with family members, former neighbors, and former colleagues; testimony; the reports of the defense and the Government mental health experts; the video recordings of the evaluations conducted by the Government's experts; and her own clinical evaluation of Mr. Bourgeois. Based on her evaluation, Dr. Swanson concluded that Mr. Bourgeois suffers from significant adaptive deficits. Each of Dr. Swanson's conclusions is supported by extensive lay-witness evidence, records, and formal testing.[69]

Third, evidence of Mr. Bourgeois's intellectual disability has existed since his early childhood. People who have known Mr. Bourgeois since childhood attest that, throughout his youth and into adulthood, he exhibited intellectual and adaptive impairments that affected all

[65] A319 ¶ 34.
[66] *See* A323–31 ¶¶ 45–61.
[67] *See* A331–32 ¶¶ 62–67.
[68] *See* A333–36 ¶¶ 68–72.
[69] *See* A323–40 ¶¶ 45–81.

facets of his life.[70] Based on interviews with these people and other sources, Dr. Swanson concluded that "it is absolutely clear that the onset of Mr. Bourgeois's deficiencies in both his intellectual and adaptive functioning began before age 18 and continued into adulthood."[71]

Finally, Mr. Bourgeois's diagnosis is corroborated by the presence of a number of recognized risk factors for intellectual disability in his life history, including low socioeconomic status, neglect and impaired parenting, family heredity risk, child abuse, sexual abuse, and a history of learning disabilities.[72] Mr. Bourgeois grew up in an impoverished, isolated neighborhood on the banks of the Mississippi River, which consisted of a one-lane dirt road and approximately twenty homes, none of which were connected to a sewage line.[73] The few families that made up the community had all lived there for five generations or more, and could trace their lineage back to "slave time."[74] Alfred's upbringing was chaotic and dysfunctional: his mother was an alcoholic[75] and overwhelmed with raising seven children born in a time span of under nine years;[76] his older brother, born with cerebral palsy, was profoundly intellectually disabled and required significant extra care, for which the family received no outside services;[77] and Alfred's father played no role in his life, despite living in the same community.[78] Young Alfred suffered serious physical abuse at the hands of his mother, who regularly whipped her son with an extension cord while he stood naked in the tub, leaving him bruised and bloody.[79] Once

[70] *See* A340–41 ¶ 83.
[71] *See id.*
[72] Although no etiology is required to establish a diagnosis of intellectual disability, the presence of risk factors can corroborate a diagnosis of intellectual disability and explain its origins. *See* A341 ¶ 84.
[73] *See* A445–46.
[74] *Id.*
[75] A446.
[76] *Id.*
[77] *Id*.
[78] A443.
[79] A446–47.

she used a meat cleaver to cut off the tip of Alfred's finger while the family ate dinner.[80] By the time Alfred was six or seven years old, an elderly neighbor, Miss Mary, had taken Alfred in to save him from the abuse he was experiencing at home.[81] While in this supposedly "safe" home, Alfred was raped for many years by Miss Mary's son.[82] Moreover, Miss Mary's home was only a few hundred yards away from Alfred's mother's home, and he continued to be exposed to physical abuse at her hands.[83] The proximity of the two homes also served as a constant and devastating reminder of his mother's abuse and abandonment.[84] Finally, young Alfred required speech therapy and had significant problems in learning, leading him to perform poorly in school and struggle to master even basic tasks such as tying his shoes and counting money.[85]

B. No Court Has Ruled on Mr. Bourgeois's Intellectual Disability Under Current Diagnostic Standards.

In the § 2555 proceedings, the district court evaluated Mr. Bourgeois's intellectual limitations under a non-clinical approach, expressly departing from the criteria used by the medical community in diagnosing intellectual disability.[86] For instance, the court chose to credit its own armchair assessment of Mr. Bourgeois's conduct to determine that his "true" intellectual functioning did not satisfy the IQ component for intellectually disability, despite the fact that all of his IQ scores fall within the presumptive range. Invoking commonly held, but erroneous, stereotypes of intellectually disabled persons, the court found Mr. Bourgeois's low intellectual functioning to be belied by the fact that he "answer[ed] the questions asked of him, engage[d] in conversation, [and] ha[d] logical thoughts"; worked as a truck driver; had a "well-groomed

[80] *Id.*
[81] A454.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] A323–33 ¶¶ 45, 68.
[86] *See United States v. Bourgeois*, No. C-02-CR-216, 2011 WL 1930684 (S.D. Tex. May 19, 2011).

appearance"; and did not "operate as a child."[87] Yet the leading diagnostic manuals in the field recognize that intellectually disabled persons, among other things, do not "look and talk differently" from the general population, can acquire the "vocational and social skills necessary for independent living," can "do complex tasks," and can "get driver's licenses, buy cars, or drive cars."[88]

The court also expressly rejected the scientifically accepted approach to evaluating adaptive functioning, which recognizes that intellectually disabled persons—like all persons—have areas of strengths and weaknesses, and therefore focuses on evidence of adaptive deficits.[89] Instead, the court applied a "legal approach" to the adaptive-behavior assessment and found that Mr. Bourgeois's purported strengths cancelled out the evidence of his many significant deficits.[90] Moreover, the "strengths" cited by the court—which included the fact that, as an adult, Mr. Bourgeois knows "his ABCs"—are entirely consistent with a medical diagnosis of intellectual disability.[91] Also contrary to medical standards was the court's treatment of risk factors, including Mr. Bourgeois's "unstable home life" and "the hampering effects of a deprived home environment," as alternate *explanations for* Mr. Bourgeois's deficits, as opposed to *contributors to* his intellectual disability.[92]

In 2017, the United States Supreme Court invalidated the same non-clinical approach taken by the district court in Mr. Bourgeois's case, holding that courts are required to apply the medical community's scientific standards when assessing a claim of intellectual disability.[93]

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[87] *See Id.* at *22–29.
[88] *See* A321 ¶ 41. These manuals also caution against the very type of lay assessment conducted by the court, requiring that diagnosticians employ "judgment rooted in a *high level of clinical expertise* and experience and judgment that emerges directly from *extensive training, experience with the person, and extensive data*." A322 ¶ 42.
[89] *Bourgeois*, 2011 WL 1930684, at *33–34.
[90] *Id.*
[91] *See* A319–21 ¶¶ 38, 41.
[92] A320–41 ¶¶ 40, 84.
[93] *Moore v. Texas*, 137 S. Ct. 1039, 1049–53 (2017); *see also Moore v. Texas*, 139 S. Ct. 666, 670–72 (2019).

Following that decision, Mr. Bourgeois requested permission to file a second habeas petition[94] and obtain judicial review of his intellectual disability claim according to constitutionally-mandated criteria. However, the Fifth Circuit Court of Appeals denied his request on procedural grounds,[95] even though the same court has granted the same opportunity to other, similarly-situated prisoners.[96]

C. The Only Court That Sought to Review Mr. Bourgeois's Claim under Current Standards Found a Strong Showing That He is Intellectually Disabled.

Mr. Bourgeois sought habeas review pursuant to 28 U.S.C. § 2241 in the Southern District of Indiana, challenging his eligibility for execution on the ground that he is intellectually disabled.[97] After initial review of his proffer, the district court issued a stay finding a "strong showing" that Mr. Bourgeois is intellectually disabled under current diagnostic standards.[98] The court sought to hold an evidentiary hearing to conclusively determine the issue, but, on appeal, the Seventh Circuit ordered Mr. Bourgeois's petition be dismissed on procedural grounds. Mr. Bourgeois then filed a petition for writ of certiorari in the United States Supreme Court, together with a stay motion, which remains pending.[99]

The only court to review the evidence of Mr. Bourgeois's intellectual disability under scientifically-valid standards and constitutionally-mandated criteria has thus concluded that Mr. Bourgeois has made a "strong showing" that he is intellectually disabled, staying his execution.

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[94] A federal prisoner may not file a second or successive motion for postconviction relief without permission from the appropriate court of appeals. *See* 28 U.S.C. 2255(h).
[95] *In re Bourgeois*, 902 F.3d 446 (5th Cir. 2018).
[96] *See, e.g.*, *Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 232 (5th Cir. 2017); *In re Johnson*, No. 19-20552, 19-70013, 2019 WL 3814384, at *5–6 (5th Cir. Aug. 14, 2019).
[97] *See* A299–473.
[98] *Bourgeois*, No. 19-cv-00392-JMS-DLP, 2020 WL 1154575, at *3–5.
[99] Mr. Bourgeois has every reason to believe that the Supreme Court will stay his execution and provide him meaningful merits review of his intellectual-disability claim. However, given the truncated timeframe created by the Government's decision to schedule his execution with just three weeks' notice, Mr. Bourgeois files this clemency petition despite this pending litigation out of an abundance of caution.

The Seventh Circuit, nonetheless, vacated that stay, concluding that an earlier § 2255 court's determination that Mr. Bourgeois is not intellectually disabled bars any further review of his disability, despite the fact that the § 2255 court's decision expressly departed from the criteria used by the medical community in diagnosing intellectual disability.[100]

Without a grant of executive clemency, Mr. Bourgeois will be executed despite his intellectual disability. This would be a profound injustice. As the United States Supreme Court has recognized, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses" people who are intellectually disabled "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[101] Mr. Bourgeois meets the three prongs of intellectual disability under current clinical definitions: subaverage intellectual functioning, adaptive deficits, and onset before age eighteen. Yet, the jury that sentenced Mr. Bourgeois to death never learned that he is intellectually disabled.

Under these circumstances, the Attorney General should authorize an inquiry into Mr. Bourgeois's intellectual disability under current clinical standards; should recommend that the President reprieve Mr. Bourgeois's execution long enough to permit full consideration of his intellectual disability; and should recommend that the President commute Mr. Bourgeois's sentence to life imprisonment.

V. CONCLUSION

"[C]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411–12 (1992). Clemency is "the 'fail-safe' in our criminal justice system." *Id*. at 415. Executive clemency is vital here to prevent the worst miscarriage of

[100] *Bourgeois v. Watson*, 977 F.3d 620, 634–38 (7th Cir. 2020).
[101] *Atkins*, 536 U.S. at 306.

justice—the wrongful execution of Alfred Bourgeois.

Mr. Bourgeois would not be the first capital prisoner to receive executive clemency on the grounds of intellectual disability. In November 2016, Arboleda A. Ortiz petitioned for commutation of his death sentence on the basis of his intellectual disability and other mitigating evidence never presented to his jury. President Obama granted the petition on January 17, 2017.[102] Nor would Mr. Bourgeois be the first capital prisoner to receive a reprieve to allow time to make certain that a scheduled execution does not transgress the Constitution. In December 2000, Juan Raul Garza received a six-month reprieve to allow the Administration time to gather "more information" and conduct a "broader analysis" of the constitutional questions raised in his clemency petition.[103]

Mr. Bourgeois requests the same relief: that the President of the United States exercise his constitutional clemency authority by granting a reprieve to allow the time necessary to review the evidence that undermines the validity of Mr. Bourgeois's conviction and sentence, and by commuting Mr. Bourgeois's death sentence.

Additional time to investigate and present evidence in support of clemency is especially necessary here. The hurried scheduling of this execution, during the final weeks of this Administration, provides fewer than three weeks' notice for Mr. Bourgeois to prepare and submit his clemency application, and for the executive branch to meaningfully investigate and review it. These would be difficult tasks under even normal circumstances, but here COVID-19 infection rates are surging across the country. Over fourteen million people are currently infected, rapidly

[102] President Obama Grants Commutations and Pardons, Press release, Jan. 17, 2017, https://obamawhitehouse.archives.gov/the-press-office/2017/01/17/president-obama-grants-commutations-and-pardons.
[103] Statement on the Decision to Stay the Execution of Juan Raul Garza, The American Presidency Project, Dec. 7, 2000, https://www.presidency.ucsb.edu/documents/statement-the-decision-stay-the-execution-juan-raul-garza

increasing weekly infection rates are at over a million,[104] and there are over 225,000 cases among the national prison population,[105] increasing at a weekly rate of six percent. This includes eighty-four inmates and three staff members currently infected at USP-Terre Haute[106] where Mr. Bourgeois is confined, and where his execution is scheduled to take place. Considering the constellation of erroneous and misleading factors that contributed to Mr. Bourgeois's conviction and sentence; the abbreviated time to complete ongoing investigation and litigation, and to finalize a clemency petition; and the restrictions and limitations imposed by a once-in-a-century, world-wide pandemic, Mr. Bourgeois's sentence of death is precisely the type of injustice that clemency is meant to rectify.

Respectfully submitted,

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[104] Centers for Disease Control and Prevention, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.
[105] Marshall Project, A State-by-State Look at Coronavirus in Prisons, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.
[106] Federal Bureau of Prisons, COVID-19 Cases, https://www.bop.gov/coronavirus/.