

No. 12-10882

IN THE
Supreme Court of the United States

FREDDIE LEE HALL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Writ of Certiorari to the
Supreme Court of Florida
in a Capital Case**

**BRIEF OF *AMICI CURIAE* THE AMERICAN
ASSOCIATION ON INTELLECTUAL AND
DEVELOPMENTAL DISABILITIES, THE ARC
OF THE UNITED STATES, THE NATIONAL
DISABILITY RIGHTS NETWORK, DISABILITY
RIGHTS FLORIDA, AND THE BAZELON
CENTER FOR MENTAL HEALTH LAW
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI*¹

Amici are professional and voluntary organizations in the field of intellectual disability.²

THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (AAIDD) (formerly named the

¹ This brief was written entirely by counsel for *amici*, as listed on the cover. No counsel for either party authored this brief in whole or in part, and neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the members of the organizational *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have given written consent to the filing of this brief, and those documents have been filed with the Clerk's Office.

² Clinicians and professionals in the field now employ the term *intellectual disability* (ID). This change in terminology alters neither the clinical definition of the disability nor the size and identity of the group of individuals who have it. See Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 *Intellectual & Developmental Disabilities* 116, 116 (2007); American Association on Intellectual and Developmental Disabilities, *User's Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 72 (2012) ("The term *intellectual disability* covers the same population of individuals who were diagnosed previously with mental retardation . . ."); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("Thus, *intellectual disability* is the term in common use by medical, educational, and other professions and by the lay public and advocacy groups."). This brief refers to *mental retardation* as a synonym for intellectual disability because both *Atkins v. Virginia*, 536 U.S. 304 (2002), and Florida law employ that term.

American Association on Mental Retardation), founded in 1876, is the nation's oldest and largest organization of professionals in the field of intellectual disability (mental retardation). Primarily focused on clinical, psychological, scientific, educational, and habilitative issues, AAIDD also has a longstanding interest in legal issues that affect the lives of people with intellectual disability. AAIDD has appeared as *amicus curiae* in this Court in a variety of cases involving mental disability, including *Atkins v. Virginia*, 536 U.S. 304 (2002). AAIDD has formulated the most widely-accepted clinical definition of intellectual disability, which was noted by this Court in *Atkins*, 536 U.S. at 308 n.3 (2002). See AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010). Both as the formulator of the clinical definition of mental retardation and as an interdisciplinary membership organization concerned with maintaining appropriate professional standards in the diagnosis of mental retardation, AAIDD and its members have a strong interest in the manner in which *Atkins* claims are evaluated by the courts.

THE ARC OF THE UNITED STATES is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities. It provides an array of services and support for families and individuals and includes 140,000 members affiliated through 700 state and local chapters across the nation. The Arc is devoted to ensuring the civil

rights of and promoting and improving supports and services for all people with intellectual and developmental disabilities. The Arc also participated as *amicus curiae* in *Atkins v. Virginia*.

THE NATIONAL DISABILITY RIGHTS NETWORK (NDRN) is the membership association of protection and advocacy (P&A) agencies, which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities.

DISABILITY RIGHTS FLORIDA is a not-for-profit corporation serving as Florida's federally-funded protection and advocacy system for individuals with disabilities. Disability Rights Florida's mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as legal and legislative strategies. Specifically, on behalf of persons with intellectual or developmental disabilities, Disability Rights Florida is authorized by federal law to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State . . ." 42 U.S.C. § 15043(a)(2)(A) (2011). Disability Rights Florida has represented and continues to represent persons

with disabilities in individual actions, class actions, and systemic relief initiatives affecting all such individuals. The protection and advocacy system is unique in its authority to protect and advocate for the legal and human rights of persons with disabilities and its presence will provide a necessary perspective to assist the Court in this matter.

THE BAZELON CENTER FOR MENTAL HEALTH LAW is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, legislative and administrative advocacy, and public education, the Bazelon Center promotes equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, community living, voting, and family rights.

SUMMARY OF ARGUMENT

In implementing this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), both judges and clinicians must carefully evaluate whether a defendant satisfies the clinical definition of mental retardation. This process requires attention to both the measurement of intellectual ability (IQ testing) and the functional impairment experienced in the individual's abilities in life.

After decades of intensive study, mental disability professionals have a substantial understanding of what an individual's score on an IQ test can tell us and what it cannot. There is a strong

consensus among psychologists, psychiatrists, and other clinicians, as well as their professional associations, that imposing an arbitrary IQ cutoff score of 70 is wholly inconsistent with our scientific understanding of these instruments.

Florida courts responsible for adjudicating *Atkins* cases are precluded from fairly evaluating *all* of the essential evidence that has probative value in making that determination. Evidence about a defendant's impaired adaptive functioning—in this case, clearly impaired starting in childhood—cannot be ignored merely because of a judicially-imposed rule which is neither clinically nor scientifically justified.

In *Atkins*, this Court invited States to devise “appropriate procedures to enforce the constitutional restriction” against executing individuals with mental retardation. *Atkins*, 536 U.S. at 317. The Florida Supreme Court's arbitrary rule prevents consideration of relevant evidence and excludes from the Constitution's protection a considerable portion of those persons who have mental retardation. It therefore cannot be deemed “appropriate.” Effectively reducing the group of individuals entitled to that protection by means of an arbitrary rule can hardly be deemed to be “enforcement” of the right that this Court announced.

ARGUMENT**I. THE EIGHTH AMENDMENT PROHIBITS STATES FROM EXECUTING ANY PERSON WITH MENTAL RETARDATION.**

It is unconstitutional to execute any individual with mental retardation.

When this Court reached that conclusion more than a decade ago, it explained that it had done so for two principal reasons. First, there was a national consensus that imposing the death penalty on a person with mental retardation was unacceptable. In the span of just thirteen years following the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), sixteen more States had enacted statutes to protect individuals with an intellectual disability from execution. *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002). When evaluated with further evidence of public opinion and professional judgments about the practice found in survey results and the resolutions of relevant professional organizations, it was clear that the execution of any person with mental retardation had become almost universally recognized as an unacceptable practice.³

³ *Atkins*, 536 U.S. at 317 n.21 (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); accord U.N. Comm’n on Hum. Rts., *Human Rights Resolution 2005/59: The Question of the Death Penalty*, para. 7(c), E/CN.4/RES/2005/59 (Apr. 20, 2005), <http://www.refworld.org/docid/45377c730.html> (last visited Dec. 13, 2013).

Second, the Court also concluded that the judgments expressed in legislation were consistent with its own “independent evaluation” of the constitutional principles involved. *Atkins*, 536 U.S. at 321. Because of the nature of intellectual disability, the Court concluded that executing individuals with mental retardation would not “measurably contribute[]” to the criminal law’s purposes of retribution or deterrence, and, as a result, would be constitutionally unacceptable punishment. *Atkins*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)). In addition, that same “reduced capacity of mentally retarded offenders” increases the potential for wrongful imposition of the death penalty, or even wrongful conviction. *Atkins*, 536 U.S. at 320. The Court made particular note of defendants’ impaired ability to assist defense counsel, as well as the disconcerting propensity of some defendants with intellectual disability to confess to crimes they did not commit.⁴ *Atkins*, 536 U.S. at 320–21.

Having found that the execution of any individual with mental retardation is cruel and unusual punishment, the Court left “to the State[s]

⁴ Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *Psychological Science in the Public Interest* 33, 53 (2004) (“The disproportionate numbers of mentally retarded individuals in the population of proven false confessors suggests that they are also at risk in the interrogation room.”); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891, 920 (2004). See generally Margaret Edds, *An Expendable Man: The Near-Execution of Earl Washington, Jr.* (2003).

the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). At its heart, the case at bar raises the question of whether that authorization to the States permits Florida to define mental retardation in such an arbitrary manner that it violates the Constitution’s “substantive restriction on the State’s power to take the life of a mentally retarded offender.” *Atkins*, 536 U.S. at 321 (internal quotation marks omitted).

II. THE DIAGNOSIS OF MENTAL RETARDATION, WHICH INCLUDES BOTH SUB-AVERAGE INTELLECTUAL FUNCTIONING AND DEFICITS IN ADAPTIVE BEHAVIOR, MUST COMPORT WITH SCIENTIFIC UNDERSTANDING.

A. The Definition of Mental Retardation (Intellectual Disability).

The phenomenon of intellectual disability has been recognized throughout history,⁵ and although various descriptions have been formulated over the ages, the current clinical understanding of mental retardation reflects a commonly accepted consensus that has endured for more than half a century. The definition has three basic elements: (1) significant impairments in intellectual functioning, as measured by IQ testing; (2) deficits in real-world skills and

⁵ See, e.g., Nigel Walker, 1 *Crime and Insanity in England* 35–37 (1968).

abilities resulting from the disability (adaptive behavior deficits); and (3) onset of the disability before the individual became an adult.⁶ While there are minor variations in the precise terms that are used to describe these elements,⁷ they all describe

⁶ The third prong of the definition, manifestation during the developmental period (i.e., at birth or in childhood), is not at issue in this case. *See* JA528.

⁷ As defined by the AAIDD:

Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) [hereinafter *AAIDD, 2010 Manual*].

The American Psychiatric Association has adopted similar language in defining “Intellectual Disability (Intellectual Developmental Disorder)”:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

- A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

the same basic phenomenon,⁸ and identify the same group of individuals as persons having mental retardation.

B. The Role of IQ Testing.

“Significantly subaverage intellectual functioning,” *Atkins*, 536 U.S. at 308 n.3, is an essential component of the clinical definition, and thus the diagnosis, of mental retardation. “Significantly subaverage” is a term of art indicating that the individual’s measured intelligence falls approximately two standard deviations below the mean. (It is generally accepted that this means that

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) [hereinafter APA, *DSM-5*]; see also American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 13 (John W. Jacobson & James A. Mulick eds., 1996).

⁸ Similarly, there is no substantive difference between the current AAIDD and American Psychiatric Association definitions and the then-current versions cited by the Court in *Atkins*. *Atkins*, 536 U.S. at 308 n.3.

fewer than three percent of the population could be classified as having mental retardation.) This reduced mental functioning is measured by IQ testing. Developed in the early years of the twentieth century, and continually refined and improved,⁹ these psychometric instruments are our best tool for obtaining an objective, quantitative measure of intellectual functioning.

The concept of “intelligence” came more sharply into focus when IQ tests became available. These instruments can be thought of as measuring what the individual has learned over time, and thus reflect his or her ability or capacity to learn.¹⁰ The psychologist who developed one of the most commonly-used IQ tests noted 75 years ago, “Intelligence is the aggregate or global capacity of the individual to act purposefully, to think rationally and to deal effectively with his environment.”¹¹

⁹ See John D. Wasserman, *A History of Intelligence Assessment: The Unfinished Tapestry*, in *Contemporary Intellectual Assessment: Theories, Tests, and Issues* 3, 3–55 (Dawn P. Flanagan & Patti L. Harrison eds., 3d ed. 2012); Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 3–7 (3d ed. 2006); Anne Anastasi & Susana Urbina, *Psychological Testing* 32–38 (7th ed. 1997). For discussion of the development of IQ testing in America, see Leila Zenderland, *Measuring Minds: Henry Herbert Goddard and the Origins of American Intelligence Testing* (1998).

¹⁰ Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 23 (3d ed. 2006); Anne Anastasi & Susana Urbina, *Psychological Testing* 296 (7th ed. 1997).

¹¹ David Wechsler, *The Measurement of Adult Intelligence* 3 (1st ed. 1939). *Accord* AAIDD, *2010 Manual*, *supra* note 7, at

The role of IQ testing in the diagnosis of mental retardation is to ensure that the disability that an individual experiences is accompanied by limitations in mental functioning. Impairment of intellectual ability that falls short of the requirement of two standard deviations below the mean, standing alone, is insufficient to support a conclusion that an individual has mental retardation. As the AAIDD classification manual cautions, subaverage intellectual functioning “is a necessary but insufficient criterion to establish a diagnosis” of mental retardation.¹²

C. The Role of Deficits in Adaptive Functioning.

It has long been recognized that measurement of IQ, standing alone, is insufficient to justify a diagnosis of mental retardation,¹³ but rather must be

32 (“Individuals vary in their ability to understand complexities and reason, adapt to the environment, and use thought to solve problems.”).

¹² AAIDD, *2010 Manual*, *supra* note 7, at 41. “The intent of this definition is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion of ID. . . . In addition, significant limitations in intellectual functioning is only one of the three criteria used to establish a diagnosis of ID.” *Id.* at 35.

¹³ See, e.g., Rick Heber, *A Manual on Terminology and Classification in Mental Retardation*, 64 *American Journal of Mental Deficiency* (Monograph Supp.) 1. 55–56 (Sept. 1959) (“*Measured intelligence* cannot be used as the sole criterion of mental retardation since intelligence test performances do not always correspond to level of deficiency in total adaptation.”) (italics in original). See generally Kazuo Nihira, *Adaptive Behavior: A Historical Overview*, in *Adaptive Behavior and its*

accompanied by substantial deficits in adaptive skills. A focus on what an individual is unable to do, or unable to do well, is central to the understanding of mental retardation as a disability.¹⁴ In areas outside of the criminal justice system, such as education and disability services, this helps ensure that poor test takers are not incorrectly diagnosed as having mental retardation. In the *Atkins* context, it is the *functional* limitations imposed by that disability, not the number on an IQ score, that “diminish [these defendants’] personal culpability,” *Atkins*, 536 U.S. at 318, and increase the “risk of wrongful execution.” *Id.* at 320–21.

Often, as was abundantly clear in this case, the functional disability of mental retardation is observed and identified before any IQ test is administered.¹⁵ Although there will be cases of valid mental retardation diagnoses of adults whose childhood evidence is less stark than in this case, the

Measurement: Implications for the Field of Mental Retardation 7, 7–12 (Robert L. Schalock ed., 1999); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 *Applied Neuropsychology* 114, 115–17 (2009).

¹⁴ AAIDD, *2010 Manual*, *supra* note 7, at 45 (“Adaptive behavior as defined in this Manual is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.”).

¹⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed., text rev. 2000) (“Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation.”).

third prong of the clinical definition requires some manifestation of the disability before an individual becomes an adult. But whatever the sequence in arriving at a diagnosis in an individual case, it is the *functional impairment* that is central to our understanding of intellectual disability, and central to why that diagnosis matters.¹⁶

D. The Issue of “Measurement of Error” in Determining a Person’s IQ.

As noted earlier, IQ tests were first devised and administered over 100 years ago. Our scientific understanding of these instruments evolved over the century, but became substantially more advanced over the last few decades. Psychologists and other clinicians now have an increasingly clear view of the strengths and limitations of the IQ tests, as well as their proper administration and interpretation.¹⁷

¹⁶ APA, *DSM-5*, *supra* note 7, at 37 (“IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”).

¹⁷ An indication of the intensity of the professional feedback and review of the instruments is the plethora of scholarly articles and books analyzing and criticizing various aspects of the tests and suggesting improvements. For example, the Wechsler instruments have engendered “several thousand publications” of clinical commentary. Anne Anastasi & Susana Urbina, *Psychological Testing* 215 (7th ed. 1997). These comments, critiques, and testing results are then evaluated and

Although IQ tests have become more refined and sophisticated, the interpretation of their results still requires experienced and knowledgeable professional judgment of psychologists or other clinicians.¹⁸

Each of the major psychometric instruments commonly used to measure intelligence has been pretested and normed on the relevant populations

incorporated into later iterations of the instrument. *See* American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 42 (1999) (“Tests and their supporting documents (e.g., test manuals, technical manuals, user’s guides) are reviewed periodically to determine whether revisions are needed.”).

¹⁸ AAIDD, *2010 Manual*, *supra* note 7, at 40 (“As discussed in reference to the operational definition of significant limitations in intellectual functioning, the intent of using approximately two standard deviations below the mean is to reflect the role of clinical judgment in weighing the factors that contribute to the validity and precision of a diagnostic decision.”); AAIDD, *User’s Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 9 (2012) (“Clinical judgment is a special type of judgment rooted in a high level of clinical expertise and experience; it emerges directly from extensive data.”); APA, *DSM-5*, *supra* note 7, at 37 (“Clinical training and judgment are required to interpret test results and assess intellectual performance.”); American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 131 (1999) (Comment to Standard 12.1) (“Test interpretation in this context requires professionally responsible judgment that is exercised within the boundaries of knowledge and skill afforded by the professional’s education, training, and supervised experience.”). *See generally* Robert L. Schalock & Ruth Luckasson, *Clinical Judgment* (2005).

prior to its publication.¹⁹ After assessing the validity and reliability of a particular IQ test,²⁰ its developers also establish the degree of precision (and imprecision) that will be encountered by clinicians in administering the test to individuals, along with

¹⁹ Richard W. Woodcock, *Norms*, in 2 *Encyclopedia of Human Intelligence* 770, 770 (Robert J. Sternberg ed., 1994) (“*Norm tables* provide the examiner with information to convert the raw score into one or more *derived scores* that provide a more meaningful basis for describing performance on a test.” (italics in original)). For any particular instrument, it is essential that the population sample from which the norming is derived must be representative of the overall population. *Id.* at 774; American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 51 (1999) (“It is then important that the norms be based on a technically sound, representative, scientific sample of sufficient size.”).

²⁰ Gary Groth-Marnat, *Handbook of Psychological Assessment* 15 (5th ed. 2009) (“Whereas reliability addresses issues of consistency, validity assesses what the test is to be accurate about.”); Pamela A. Moss, *Validity*, in 2 *Encyclopedia of Human Intelligence* 1101, 1101 (Robert J. Sternberg ed., 1994); Cecil R. Reynolds, *Reliability*, in 2 *Encyclopedia of Human Intelligence* 949, 949 (Robert J. Sternberg ed., 1994); *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 211, 227–29 (Federal Judicial Center & National Research Council of the National Academies eds., 3d ed. 2011) (“Reliability is necessary but not sufficient to ensure accuracy. In addition to reliability, validity is needed. A valid measuring instrument measures what it is supposed to.” *Id.* at 228.); American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 9–17 (1999).

standards for its administration and the proper scoring of results.²¹

As with any measurement in any area of our lives, ascertaining an individual's IQ necessarily includes a degree of imprecision. Rather than ignore this potential for imprecision, or make claims for a greater level of certainty than the scientific facts warrant, psychologists and other clinicians have addressed the issue directly. "Because all measurement in science is imperfect, psychologists have developed mathematical theories to assist them in determining how well tests measure psychological traits or characteristics."²² This recognition has produced a specific tool, which is known as the "standard error of measurement," or SEM.²³

²¹ American Educational Research Association, American Psychological Association & National Council on Measurement in Education, *Standards for Educational and Psychological Testing* 37–41 (1999).

²² Edward J. Slawski, *Error of Measurement*, in 1 *Encyclopedia of Human Intelligence* 395, 395 (Robert J. Sternberg ed., 1994).

²³ Psychologists do not use the word "error" in the way it is employed in ordinary language, i.e., as a synonym for "mistake," perhaps connoting something amenable to correction through better effort. The SEM is not a "mistake" in the sense that mistakes are avoidable, nor is it an "error" that can be "fixed." Rather, "error" is a term of art that describes the inevitable imprecision of any psychometric measurement. See Earl Hunt, *Human Intelligence* 313 (2011) ("Any measurement contains two elements, a 'true value' and a residual term. While the residual term is frequently referred to as 'error,' it is not necessarily error in the sense of a mistake. It refers to the sum of all influences on the measured variable that are statistically independent of the true value.").

The standard error of measurement is essentially a quantification of the likelihood that the score that was achieved on a particular administration of a test on a particular day was a truly accurate measure.²⁴ Since it is not possible to evaluate that accuracy through repetition of the testing, the statistical tool of SEM quantifies the evaluator's level of confidence in the score. Viewed another way, the SEM represents the professionally-required level of modesty about the precision and accuracy of the results of a particular individual's test.

²⁴ Domenic V. Cicchetti, *Guidelines, Criteria, and Rules of Thumb for Evaluating Normed and Standardized Assessment Instruments in Psychology*, 6 *Psychological Assessment* 284, 285 (1994) ("The standard error of measurement defines that amount of test-retest variability that is expected to occur on the basis of the inherent imprecision of the assessment instrument itself."); Robert M. Thorndike & Tracy Thorndike-Christ, *Measurement and Evaluation in Psychology and Education* 132 (8th ed. 2010) ("Another way to view the standard error of measurement is as an indication of how much a person's score might change on retesting. Each person's score on the first testing contains some amount of error."); David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence* 211, 243 (Federal Judicial Center & National Research Council of the National Academies eds., 3d ed. 2011) ("An estimate based on a sample is likely to be off the mark, at least by a small amount, because of random error. The standard error gives the likely magnitude of this random error, with smaller standard errors indicating better estimates."); Gary Groth-Marnat, *Handbook of Psychological Assessment* 15 (5th ed. 2009) ("The logic behind the SEM is that test scores consist of both truth and error. Thus, there is always noise or error in the system, and the SEM provides a range to indicate how extensive that error is likely to be.").

The general scientific principles underlying the standard error of measurement apply fully to the use of IQ testing to determine whether an individual has mental retardation. Indeed, taking it into account is essential for the accurate assessment of intellectual disability. “[T]he assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement.”²⁵ There is a strong consensus among clinicians that the SEM must always be taken into account when assessing whether the results of an individual’s testing satisfy the first prong of the definition of mental retardation.²⁶

²⁵ American Association on Mental Retardation, *User’s Guide: Mental Retardation: Definition, Classification and Systems of Supports* 12 (2007).

²⁶ See, e.g., AAIDD, *2010 Manual*, *supra* note 7, at 36 (“Understanding and addressing the test’s standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual functioning.”); APA, *DSM-5*, *supra* note 7, at 37 (“Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 (70 ± 5).”); Samuel M. Turner et al., *APA’s Guidelines for Test User Qualifications: An Executive Summary*, 56 *American Psychologist* 1099, 1101 (2001) (“Test users should understand issues of test score reliability and measurement error as they apply to the specific test being used”); Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 *J. Forensic Psychol. Prac.* 1, 6 (2008) (“There is no finite score that can represent one’s intellectual functioning with 100% accuracy. There is always a measurement error.”);

III. DIAGNOSING MENTAL RETARDATION
REQUIRES CAREFUL CONSIDERATION
OF ALL THE RELEVANT EVIDENCE
ABOUT AN INDIVIDUAL, NOT JUST AN IQ
SCORE.

Clinicians in the field of intellectual disability agree that determining whether an individual has mental retardation involves evaluation of both intellectual functioning and adaptive deficits.²⁷

John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony* 70 (2000) (“[D]ue to a generally estimated five-point margin of error in standardized intelligence testing, a person with a measured IQ as high as 75 could be deemed to have met the diagnostic criteria for mental retardation, if requisite functional shortcomings are also noted.”); Gilbert S. Macvaugh III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 147 (2009) (“Reports of IQ scores obtained by a capital defendant should include a description of these scores in light of the SEM at an identified confidence interval.”); Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811, 836 (2007) (“The main point here is that the SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests.” (emphasis in original)).

²⁷ Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 336 (3d ed. 2006) (“Thus, because of the differences between intelligence and adaptive behavior, the IQ profile of an individual should not be examined without the coinciding data from adaptive behavior measures.”).

Diagnosing an individual who may have intellectual disability requires a psychologist or other mental disability professional to consider both the results of IQ testing and the evidence of that individual's actual functioning in the world. Aided by the testimony of those professionals, courts with the responsibility for deciding *Atkins* cases must then evaluate the same evidence, and determine whether the defendant "fall[s] within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317.

There are no easy short-cuts available to courts in making this decision—a decision with a defendant's life in the balance. Both for clinicians and for courts, this involves weighing all the relevant evidence. "The diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination." AAIDD, *User's Guide: Intellectual Disability: Definition, Classification and Systems of Supports* 23 (2012). This means that the courts must give careful consideration to evidence concerning both intellectual functioning and deficits in adaptive functioning.

In evaluating whether a defendant's intellectual functioning satisfies that component of the definition, a court must view all the available evidence, and must do so in light of scientific understanding about the tests that have been administered. "A fixed point cutoff score for ID is not psychometrically justifiable." AAIDD, *2010 Manual*, *supra* note 7, at 40.

Similarly, evidence about whether the individual had deficits in adaptive behavior cannot be ignored by a court on the basis of an artificial requirement concerning IQ scores. After all, it is just those real-world functional limitations that led to both the national consensus and this Court's judgment in *Atkins*.

Only after such a full and unfettered evaluation, can a court determine whether a defendant should receive the “substantive” protection that the Constitution guarantees. *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

IV. FLORIDA'S ARBITRARY REFUSAL TO ALLOW TRIAL COURTS TO CONSIDER THE SCIENCE OF IQ TESTING AND THE CLINICAL UNDERSTANDING OF MENTAL RETARDATION RISKS THE EXECUTION OF DEFENDANTS WHO ARE PROTECTED BY THE EIGHTH AMENDMENT.

Most States have adopted procedures in a manner consistent with the substantive constitutional protection recognized in *Atkins*.²⁸ But

²⁸ Several States have enacted statutes that include a specific IQ score, but use that score as a rebuttable presumption about whether a defendant has mental retardation. *E.g.*, Neb. Rev. Stat. § 28-105.01(3) (2008 & Supp. 2013) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability.”). Other States clearly allow consideration of evidence of SEM, or establish a higher IQ score than 70 in order to allow for consideration of factors like SEM.

Florida (along with, at most, a small handful of other States) has prevented a fair consideration of whether defendants have mental retardation by erecting a barrier to fair adjudication in the form of an artificial ceiling on IQ scores.²⁹

E.g., Okla. Stat. tit. 21, § 701.10b(C) (Supp. 2014) (“In determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account.”). Still other States, which have no IQ score in their statutes, or which have no statute, have explicitly rejected a hard cap on IQ scores. *See, e.g., Commonwealth v. Miller*, 888 A.2d 624, 630–31 (Pa. 2005) (“The concept should also take into consideration the standard error of measurement (hereinafter ‘SEM’) for the specific assessment instruments used. . . . [W]e do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”). Finally, a number of States have not yet addressed the issue.

²⁹ There appear to be, at most, five States (Florida, Alabama, Virginia, Idaho, and Kentucky) that impose an inflexible ceiling at an IQ score of 70.

Although it is less than perfectly clear, it is possible that the list of States that insist on a rigid cap which excludes evidence such as SEM may be even smaller:

In Idaho, the statute requires an IQ score of “seventy (70) or below.” Idaho Code Ann. § 19-2515A(1)(b) (2004). In the only reported case interpreting the statute, the Idaho Supreme Court upheld the trial court’s dismissal of a defendant’s claim to protection under the statute, and noted that “the legislature did not require that the IQ score be within five points of 70 or below. It required that it be 70 or below.” *Pizzuto v. State*, 202 P.3d 642, 651 (Idaho 2008). But the court, apparently seeing no evidence that the defendant was within the class protected by the statute, held that “[t]he district court was entitled to draw reasonable inferences from the undisputed facts.” *Id.* at 651. In rejecting a federal challenge to the Idaho Supreme Court

V. WHEN THIS COURT ENTRUSTED THE STATES WITH DEVELOPING APPROPRIATE PROCEDURES IN *ATKINS*, IT DID NOT INVITE THEM TO LIMIT THE SUBSTANTIVE CONSTITUTIONAL PROTECTION TO ONLY SOME OF THE DEFENDANTS WHO HAVE MENTAL RETARDATION.

Having concluded that the execution of any individual with mental retardation constitutes cruel and unusual punishment, this Court, in *Atkins*, entrusted to the States “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Atkins*, 536 U.S. at 317 (internal quotations marks omitted). Allowing the States to establish their own procedures for the enforcement of the “substantive restriction on the State’s power to take the life of a mentally retarded offender,” *Atkins*, 536 U.S. at 321

decision, the Court of Appeals characterized the state court as “only implicitly consider[ing] the standard error of measurement (SEM).” *Pizzuto v. Blades*, 729 F.3d 1211, 1223 (9th Cir. 2013).

In Kentucky, the statute references an IQ “of seventy (70) or below.” Ky. Rev. Stat. Ann. § 532.130(2) (LexisNexis 2012). In a series of cases, the Kentucky Supreme Court rejected constitutional challenges to that provision of the statute, but in a footnote to its most recent decision (the individual facts of which the court described as “not even a close case,” *Bowling v. Commonwealth*, 377 S.W.3d 529, 539 (Ky. 2012)), it mentioned changes in scientific understanding of IQ testing, and concluded, “This highlights the need for us to consider the AAMR Guideline revisions *in the context of an actual case or controversy*.” 377 S.W.3d at 541 n.24 (emphasis added).

(internal quotation marks omitted), permitted them to incorporate the protection of those defendants into the design of each State's statutory and rule-based system for conducting criminal cases. As the Court noted, "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317.

Obviously, the Court did not demand (nor did it expect) perfect uniformity of procedures among the States. But the commitment in *Atkins* of the responsibility for devising procedures most certainly was *not* an invitation for any State to substantially reduce the number of individuals entitled to constitutional protection by means of arbitrarily barring a fair adjudication of whether or not they have mental retardation.

There is no need for this Court to micromanage the precise terminology of the States' definitions, nor is it necessary to dictate every detail of the procedures to be employed in adjudicating individual cases. See, e.g., *Panetti v. Quarterman*, 551 U.S. 930 (2007). But the *appropriate* procedures the Court called for must be procedures that both comport with the clinical understanding of intellectual disability and protect "the entire category of mentally retarded offenders . . ." *Roper v. Simmons*, 543 U.S. 551, 563 (2005). The States were charged to adopt procedures that are appropriate "to enforce the constitutional restriction" which is at the heart of *Atkins*, 536 U.S. at 304 (emphasis added). It can hardly be said to "enforce"

a guarantee when a State procedurally excludes a substantial segment of the group constitutionally entitled to its protection.

Under Florida's scheme, a capital defendant whose intelligence actually meets the accepted definition (two standard deviations below the mean) may not receive fair consideration of the full body of evidence demonstrating the true extent of his disability.³⁰

Despite testimony below that "mental retardation is considered to be a range or band of scores, not just one score or a specific cutoff for mental retardation" and that "no one IQ score is exact or succinct, that there's always some variability and some error built in," *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007), the Florida Supreme Court held that the "plain meaning" of the statute was that "[u]nder Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below." *Id.* at 713. And, having held that the first prong of the definition required meeting a cutoff score of 70, the court went

³⁰ The text of the Florida statute does not dictate this result. *See* Fla. Stat. Ann. § 921.137(1) (2006 & Supp. 2014) ("As used in this section, the term 'intellectually disabled' or 'intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term 'significantly subaverage general intellectual functioning,' for purposes of this section, means performance that is *two or more standard deviations from the mean score* on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." (emphasis added)).

on to hold that since the defendant “does not meet the first prong” of the definition, “we do not consider the two other prongs of the mental retardation determination.” *Id.* at 714. The court has subsequently emphasized that the “strict cut-off IQ score of two standard deviations from the mean score . . . is *exactly 70*,” *Franqui v. State*, 59 So. 3d 82, 91 (Fla. 2011) (emphasis added), and that “[t]he law is also established that where a defendant does not meet the first prong, the court *will not consider* the other two prongs.” *Id.* (emphasis added).³¹

There is, of course, a superficial attraction to imposing a rigid and arbitrary “bright line,” in order to ease the task of courts that have the responsibility for adjudicating individual cases. But as this Court noted in the same Term that it decided *Atkins*, “the Constitution’s safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.” *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The same is true regarding intellectual disability. Mere convenience for the judicial system cannot be allowed to restrict the scope of the Constitution’s substantive protection, nor can it be used to preclude a fair evaluation of whether an individual is entitled to that protection.

Florida refuses to allow the full evaluation of evidence of a defendant’s disability in cases where the IQ score falls outside of an artificially-drawn boundary. Fact-finders are forbidden from even

³¹ Other States with an IQ score in their statutes have found ways to avoid this harsh result. *See supra* note 28.

considering evidence of the functional impairment in the life of an individual whose measured intelligence may well be two standard deviations below the mean but which does not meet the arbitrary and scientifically unjustifiable ceiling of a score of 70.

The Constitution forbids such an “arbitrary and capricious application” of the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

CONCLUSION

For the foregoing reasons, *amici* urge the reversal of the judgment of the Florida Supreme Court.

Respectfully submitted,

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