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 FLORIDA SUPREME COURT

MOTION OF PROFESSORS ADAM LAMPARELLO AND CHARLES MACLEAN FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(b), Professors Adam Lamparello and Charles MacLean respectfully move to file the attached brief as *amicus curiae* in support of neither party. Counsel for Petitioner Freddie Hall has withheld consent, and counsel for Respondent State of Florida has not responded to our request for consent.

Adam Lamparello and Charles MacLean are assistant professors of law at Indiana Tech Law School in Fort Wayne, Indiana. Professor Lamparello practices, teaches, and publishes in the areas of criminal and constitutional law. His scholarly publications address, among other things, the impact that brain impairments such as frontal lobe disorder have upon impulse control and moral reasoning.

Professor MacLean is a former Chief Prosecutor at the Winona County Attorney's Office in Winona, Minnesota, where he prosecuted violent felonies, provided legal advice to government personnel, and spoke widely on topics involving criminal procedure. Professor MacLean was an Assistant Professor of Law at Lincoln Memorial University's Duncan School of Law in Nashville, Tennessee, Saint Mary's University in Winona, Minnesota, William Mitchell College of Law in St. Paul, Minnesota, and Winona State University in Winona, Minnesota. Professor MacLean has taught courses in criminal law, the death penalty, and trial and appellate advocacy. Professor MacLean also

edited and published a book on capital punishment in 2013.

Professors Lamparello and MacLean believe that this case presents the court with an opportunity to clarify *Atkins v. Virginia* and provide additional guidance to the states regarding the processes for determining whether a defendant is intellectually disabled.

Based on their experience as practitioners and scholars, Professors Lamparello and MacLean believe that Fla. Stat. § 921.137(1), which the Florida Supreme Court has interpreted as barring evidence of adaptive disability for defendants with an IQ of 70 or above, is inconsistent with *Atkins*.

As discussed in the attached brief, *Atkins* identified three areas of cognitive functioning that are relevant to a determination of intellectual disability: subaverage intellectual functioning, evidence of adaptive disability, and onset prior to the age of eighteen. Professors Lamparello and MacLean believe that this three-pronged definition appropriately reflects the fact that intellectual disability is not adequately captured by an IQ score alone. Thus, interpreting Section 921.137(1) to include an "IQ cutoff," is contrary to both *Atkins* and the individualized consideration that this Court's death penalty jurisprudence demands.

Professors Lamparello and MacLean base their conclusion on modern scientific evidence concerning intellectual disability and on an analysis of the Court's precedent prior to and following *Atkins*.

Accordingly, Professors Lamparello and MacLean respectfully request that the Court grant the motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

Table of Authorities v

Interest of the *Amicus Curiae* 1

Summary of the Argument 1

Argument 7

Atkins Implicitly Requires that Intellectual Function and Adaptive Behavior Be Considered in the Determination of Intellectual Disability 7

A. Under *Atkins*, Mental Disability is Much More than an IQ Score 7

B. An IQ Cutoff Precludes Probative Evidence of Intellectual Disability .. 9

1. In the Juvenile Context, Diminished Culpability is Not Based on IQ 9

2. An IQ Cutoff Prohibits Some Defendants from Demonstrating Intellectual Disability 13

3. Hall's Case Underscores the Problems with IQ Cut-Offs ... 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) .....ii, 1-5, 7-9, 11, 13, 15-17

Eddings v. Oklahoma,
455 U.S. 104 (1982) 12

Enmund v. Florida,
458 U.S. 782 (1982) 9

Ex Parte Briseno,
135 S.W.3d 1 (Tex. Crim. App 2004)..... 14-15

Ford v. Wainwright,
477 U.S. 399 (1986) 7

Graham v. Florida,
560 U.S. 48 (2010) 9, 10, 12

Gregg v. Georgia,
428 U.S. 153 (1976) 9

Hall v. State,
109 So. 3d 704 (2012) 5, 11, 12, 16, 17

Hearn v. Quarterman, No. 3:04-CV-0450-D, 2008 WL
679030 (N.D. Tex. March 13, 2008) 14-15

Miller v. Alabama,
132 S. Ct. 2455 (2012) 1, 9, 12

O'Neal v. Bagley,
728 F.3d 552 (6th Cir. 2013) 4, 5

Penry v. Lynaugh,
492 U.S. 302 (1989) 7

Ring v. Arizona,
536 U.S. 548 (2002) 3

Roper v. Simmons,
543 U.S. 551 (2005) 1, 7, 9, 10, 11-12, 13

Thompson v. Oklahoma,
487 U.S. 815 (1988) 9

Trop v. Dulles,
356 U.S. 86 (1958) 3

Van Tran v. State,
66 S.W.3d 790 (Tenn. 2001) 2

Statutes

Fla. Stat. § 921.137 .....ii, 1-5, 11-12, 14-17

U.S. Const. amend. V..... 5

U.S. Const. amend. VIII 5

U.S. Const. amend. XIV..... 5

Other Authorities

Diagnostic and Statistical Manual of Mental
Disorders 37 (5th ed. 2013) 5

Geraldine W. Young, "A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability," 65 VAND. L. Rev. 615 (2012) 5, 6

John Fabian, "Forensic Neuropsychological Assessment and Death Penalty Litigation," THE CHAMPION, Apr. 2009 10

Mental Retardation: Definition, Classification, and Systems of Supports 80 (10th ed. 2012) 4

Note, "Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard," 23 HEALTH MATRIX 317 2

Peggy M. Tobolowsky. "A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation," 39 HASTINGS CONST. L.Q. 1 (2011) 2

Richard J. Bonnie, Katherine Gustafson, "The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessment and Adjudications of Mental Retardation in Death Penalty Cases," 41 U. RICH. L. REV. 811 (2007) 6

INTEREST OF THE AMICUS CURIAE[1]

Professors Lamparello and MacLean seek to aid the Court in arriving at a just result that balances the Petitioner's interests in liberty and fairness with Respondent's interest in the orderly administration of criminal law. In so doing, they have an interest in the sound development of law in this area, and the equitable administration of justice.

SUMMARY OF THE ARGUMENT

The tension in this case is between bright-line rules and deference to state legislatures. The tiebreaker, Professors Lamparello and MacLean submit, is "individualized consideration."[2]

Section 921.137(1)[3] adopts language that arguably complies with *Atkins v. Virginia*,[4] but has been interpreted in a manner that violates *Atkins.* In

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[1] Counsel for Petitioner has withheld consent in this matter, and counsel for Respondent has not replied to our request for consent, which was sent to counsel for both parties on December 4, 2013. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Indiana Tech Law School provides financial support for faculty research and scholarship, which facilitated the filing of this brief. (The Law School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*). Otherwise, no person or entity other than the *amicus curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Miller v Alabama, 132 S. Ct. 2455, 2469-70 (2012) (a juvenile case); Roper v Simmons, 543 U.S. 551, 572 (2005) (a juvenile case).

[3] Fla. Stat. § 921.137(1) (2012).

[4] 536 U.S. 304 (2002).

Hall, the Florida Supreme Court interpreted 921.137(1) to contain an "IQ cutoff" of 70. As such, if a defendant does not score below 70 on an IQ test,[5] Section 921.137 precludes consideration of adaptive function,[6] which was expressly recognized in *Atkins,* and is well-recognized in the scientific community, as germane to a finding of intellectual disability. Florida's cutoff is particularly troublesome given that an IQ of up to 75 constitutes evidence of subaverage intellectual functioning. *Atkins*, 536 U.S. at 309, n. 5.

By adopting the definition of mental retardation used by most clinicians, *Atkins* implicitly requires that adaptive function, *e.g.,* social and interpersonal skills, be considered in the intellectual disability determination. And for good reason. Adaptive functioning is part of a modern understanding of intellectual disability—relied upon in *Atkins*—that recognizes the link between real-world functioning and intellectual disability.

The Florida Supreme Court's interpretation of Section 921.137(1), however, allows an IQ score to

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[5] IQ tests are typically given on the Wechsler and Stanford Binet Intelligence Scales. *See* Peggy M. Tobolowsky. *"A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation,"* 39 HASTINGS CONST. L.Q. 1, 7 (2011).

[6] Adaptive functioning generally refers to limitations in at least two of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Note, *"Defining Intellectual Disability and establishing a Standard of Proof: Suggestions for a National Model Standard,"* 23 HEALTH MATRIX 317, 330 (quoting Van Tran v. State, 66 S.W.3d 790, 785 (Tenn. 2001)).

end the inquiry and exclude adaptive behavior from consideration. Neither *Atkins* nor the due process guarantees under the Fifth and Fourteenth Amendments contemplate a system where one factor works to exclude the others. This is particularly true when at least one of the other factors—adaptive behavior—is arguably more probative than a single number or test.

Thus, even if the current interpretation of Section 921.137(1) does not violate the letter of *Atkins,* which charged states with developing procedures for determining intellectual disability, it certainly violates its spirit, which called for a more individualized—and comprehensive—scheme. 536 U.S. 304, 318 (2002).

Since "[d]eath is different," the process for determining who can be executed should also be different. *Ring v. Arizona,* 536 U.S. 548, 606 (2002 (citation omitted). Put differently, "evolving standards of decency as evidenced by a maturing society" contemplate not only the right result, but the proper path to that result. *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958). When interpreted in this context, the Florida Supreme Court's interpretation of Section 921.137(1) does not withstand the reasoning in *Atkins,* the changes it sought to achieve, and the safeguards it endeavored to create.

The problem with IQ cutoffs is caused by IQ measurement itself. Like bright-line rules themselves, IQ is admittedly arbitrary. For that and other reasons, an IQ cutoff of 70 over-values the significance of an IQ score, and under-values other

areas of intellectual function that relate directly to culpability and moral responsibility. *See, e.g., O'Neal v. Bagley,* 728 F.3d 552, 565 (6th Cir. 2013) (Merritt, J., dissenting) ("[t]he American Association on Mental Retardation specifically cautions against a fixed cutoff…[the] imbalance between intelligence and adaptive behavior does not represent the current conceptualization of mental retardation") (quoting Mental Retardation: Definition, Classification, and Systems of Supports 80 (10th ed. 2012)).

There is, of course, a place for bright-line rules. In the death penalty context, categorical rules such as an IQ cutoff can withstand constitutional scrutiny if they protect individuals who *should not be executed*, even if such a rule would encompass defendants who otherwise *could have been executed*. An over-inclusive rule, however, imprecise, still protects those that it was intended to protect. It errs on the side of caution.

To the contrary, a bright-line rule that protects defendants who *should not be executed*, but allows other defendants—who may be similarly or, worse, *more* impaired than those in the protected class—*to be executed,* does the opposite. In this situation, the bright-line rules protects only a portion of the class to which *Atkins* spoke. Given the considerations expressed in *Atkins*, erring on the side of caution is the proper way to realize individualized consideration.

In this regard, the Florida Supreme Court's interpretation of Section 921.137(1) is unjust. It represents a "dogged adherence to a bright-line cutoff

of a 70 on an IQ test," and does not reflect "the current understanding that a broader approach produces a more accurate assessment of mental retardation than a heavy reliance on IQ scores."[7] *Hall v. State*, 109 So. 3d 704, 718 (2012) (Perry, J. dissenting); *O'Neal,* 728 F.3d at 565 (Merrit, J., dissenting) (reflecting the Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013)).

The Florida court's interpretation is, therefore, contrary to *Atkins,* the Eighth Amendment's Cruel and Unusual Punishment Clause, and the liberty interests contained within the Fifth and Fourteenth Amendments to the United States Constitution. *See,* U.S. Const. amends. V, VIII, and XIV, cl. 1.

Importantly, Professors Lamparello and MacLean respectfully submit that this Court should issue a narrow ruling that clarifies *Atkins* and results in a more balanced approach to mental disability determinations under Florida law. Under prong one, a strict IQ cutoff of 70 should not be used to determine sub-average intellectual functioning, even though sub-average functioning itself is admittedly defined as two standard deviations from the average score. [8] This ignores the fact that IQ is an approximation (and typically expressed as a

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[7] Geraldine W. Young, *"A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability,"* 65 VAND. L. REV. 615, 648 (2012) ("no real difference exists between IQ scores of 69 and 71").

[8] Section 921.137(1) defines sub-average intellectual functioning as "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."

range), disregards the statistical insignificance of a 1 or 2 point difference in an IQ score, and fails to account for the "Flynn effect."[9]

Amici are not positing that IQ is irrelevant, but that its use becomes problematic when it is relied on to effectively preclude a more searching and individualized inquiry of intellectual disability.[10] Bright line rules have their place, but not when they are used in a manner that makes death *less* different, and makes the execution of those with intellectual disabilities *more* likely.

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[9] Young, *supra* note 7, at 644-45, 648 (2012) ("IQ scores are relative, not absolute, measurements that serve as 'approximate' indicators of a person's IQ," and do not take into account the well-known "Flynn effect.").

[10] To be clear, adaptive behavior is distinct from intellectual capacity, and not among the skills measured by administration of standard intelligence tests. *See* Richard J. Bonnie, Katherine Gustafson, *"The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessment and Adjudications of Mental Retardation in Death Penalty Cases,"* 41 U. RICH. L. REV. 811 845-46 (2007) (Adaptive behavior was added to the AAMR definition in 1959 in order to reflect the social characteristics of mental retardation, to reduce reliance on IQ scores in diagnoses and incorporate evidence of functioning in the real world, and to decrease the number of people falsely identified as having mental retardation").

ARGUMENT

ATKINS IMPLICITLY REQUIRES THAT INTELLECTUAL FUNCTION AND ADAPTIVE BEHAVIOR BE CONSIDERED IN THE DETERMINATION OF INTELLECTUAL DISABILITY

A. UNDER *ATKINS,* MENTAL DISABILITY IS MUCH MORE THAN AN IQ SCORE.

In *Atkins,* this Court held, in light of "our 'evolving standards of decency,'" that "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321.[11] The Court found, *inter alia,* that the intellectually disabled were *less culpable* than other offenders, and thus not among those who commit 'a narrow category of the most serious crimes' and whose *extreme culpability* makes them 'the most deserving of execution.' " *Roper v. Simmons,* 543 U.S. 551, 568 (2005) (quoting *Atkins,* 536 U.S. at 319)) (emphasis added).

This holding, however, did not resolve the confusion "in determining which offenders are in fact retarded." 536 U.S. at 317. That task was left to the states. *See id.* (quoting *Ford v. Wainwright,* 477 U.S. 399, 416-17 (1986)) ("we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences") (brackets in original).

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[11] The Court's proportionality analysis also takes into account evidence of a national consensus, where the Court looks to, among other things, state legislative enactments across the country. *See Penry v. Lynaugh,* 492 U.S. 302, 331 (1989).

Atkins did not, however, thrust the states into uncertain terrain. The majority's opinion adopted clinical definitions of mental retardation, which "require *not only* subaverage intellectual functioning, but *also* significant limitations in *adaptive skills* such as communication, self-care, and self-direction that became manifest before age 18." 536 U.S. at 318 (emphasis added). In so doing, the majority construed intellectual disability broadly:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to *control impulses*, and to understand the reactions of others.

Id. (emphasis added).

As the Court's discussion reveals, reduced culpability was the *sine qua non* of its proportionality analysis, and the driving force underlying its adoption of a categorical rule prohibiting execution of the intellectually disabled. *See id.* at 318 ("[t]heir deficiencies do not warrant an exemption from

criminal sanctions, but they do diminish their personal culpability").[12]

B. An IQ Cutoff Precludes Probative Evidence of Intellectual Disability

1. In the Juvenile Context, Diminished Culpability is Not Based on IQ.

Lest there be any uncertainty, cases in *Atkins'* wake confirm the emphasis upon diminished culpability. *See, e.g., Thompson v. Oklahoma,* 487 U.S. 815 (1988) (prohibiting the execution of a minor who was under the age of 16 when the crime was committed); *Roper,* 543 U.S. at 551 (2005) (execution of individuals who were under 18 at the time of the crime's commission is prohibited by the Eighth and Fourteenth Amendments); *Graham v. Florida,* 560 U.S. 48 (2010) (the Eighth Amendment prohibits the imposition upon juveniles of life without parole); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In none of these cases was IQ the basis for sparing juveniles the death penalty. Nor should that be the case here.

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[12] The Court also suggested that neither retribution nor deterrence would be served by executing the intellectually disabled. *See Atkins,* 536 U.S. at 318 (*citing Gregg v. Georgia,* 428 U.S. 153, 183 (1976)) ("[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals,' it 'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment." (quoting *Enmund v. Florida,* 458 U.S. 782, 798 (1982)).

In *Roper,* for example, the Court's adoption of a bright-line rule prohibiting the execution of juveniles relied upon scientific and sociological evidence demonstrating reduced culpability. *See Roper,* 543 U.S. at 569. The Court found, for example, that juveniles possess a "lack of maturity and a more underdeveloped sense of responsibility," which often results in "impetuous and ill-considered actions and decisions." *Id.*

Moreover, the Court found that juveniles experience "vulnerability and comparative *lack of control* over their immediate surroundings," and an "impetuousness and recklessness that may dominate in younger years." *Id.* at 570-71 (emphasis added); *see also Graham,* 132 S. Ct. at 2467 (citing "irresponsibility," recklessness," impetuousness," as reason to prohibit sentences of life without parole to for juveniles).

This, of course, did not mean that juveniles were *intellectually disabled*, but it "rendered suspect any conclusion that a juvenile falls among the worst offenders." *Id.* at 570. In the adult context, should a defendant score above a 70 on the Wechsler Adult Intelligence Scale, all of this evidence of other—and perhaps more relevant—impairments is rendered moot.[13]

Roper's reasoning applies by analogy to adults who are—or may be—intellectually disabled. In fact,

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[13] *See e.g.,* John Fabian, *"Forensic Neuropsychological Assessment and Death Penalty Litigation,"* THE CHAMPION, Apr. 2009, at 24, 25, *available at* http://www.nacdl.org/public.nsf/$$searchChampion.

Section 921.137(1) includes within its definition of adaptive behavior "the effectiveness with which an individual meets the standards of … social responsibility." Where a defendant scores above 70 on an IQ test, however, Section 921.137, operates to preclude consideration of the very factors, such as impulse control and appreciation of the consequences of one's actions, that supported a categorical bar to the execution of minors. *See Roper,* 543 U.S. at 569-70. This flies in the face of *Roper,* which was not based on age *per se,* but on certain underlying characteristics about a group of offenders in a particular age group.

This case is no different—except that the number is based an IQ score, not a birth certificate. The critical distinction is that *Roper's* bright-line rule served a protective, even if potentially over-inclusive, function. In *Hall,* the IQ cutoff will most certainly increase the likelihood that a mentally disabled defendant will be executed. This strikes at the heart of what *Atkins* sought to protect.

Of course, while adults and juveniles are fundamentally different,[14] there is a small but legally significant overlap between juveniles and *intellectually disabled* adults that IQ cannot capture. For example, in adults, brain impairments such as frontal lobe disorder, which cause impulse control problems, are similar to the impetuousness that results from juveniles having "less experience with

[14] In *Roper,* the Court explained that "the character of a juvenile is not as well formed as that of an adult. The personality traits are more transitory, less fixed." 543 U.S. at 569.

control over their environment." *Roper,* 543 U.S. at 569.

Thus, assuming, *arguendo,* that a defendant possesses these and possibly other cognitive deficits, they should be included in the intellectual disability calculus. They should not depend on whether a defendant scored a 69, 71, or 75 on the Wechsler Adult Intelligence Scale. Just as a juvenile's individual "background and mental and emotional development" must be considered to assess culpability, so too must the defendant who claims intellectual disability. *Miller,* 132 S. Ct. at 2467 (*quoting Eddings v. Oklahoma,* 455 U.S. 104, 116 (1982)). Section 921.137(1) permits such consideration—but only sometimes, and that is the problem. Like juveniles, adults with adaptive or developmental disabilities can—and often are—"less deserving of the most severe punishments." *Graham,* 560 U.S. at 68 (basing its finding of diminished culpability on psychology and developments in brain science). Under Florida's scheme, those who are "less deserving" may—and likely will—be executed. As the dissent below noted, "the current interpretation of the statutory scheme will lead to the execution of a retarded man."[15]

Section 921.137(1), lacks the type of individualized consideration that this Court requires in the death penalty context. For that reason, it is neither "arbitrary nor unnecessary" to hold that

[15] 109 So.3d at 720 (Perry, J., concurring in part and dissenting in part).

Section 921.137(1)'s IQ cutoff is inconsistent with *Atkins* and does not comport with due process of law.

To be sure, in *Roper,* this Court held that the differences between juvenile and adult offenders were "too marked and well understood to risk allowing a youthful person to receive the death penalty." *Roper,* 543 U.S. at 572-73. The same is true here. *Intellectually disabled* adults are fundamentally different from *non-disabled adults*, making individualized consideration not only probative, but constitutionally imperative. Unlike *Roper,* however, this case involves the un-drawing of an unconstitutional line.

2. An IQ Cutoff Prohibits Some Defendants from Demonstrating Intellectual Disability.

Intellectually disabled defendants face particular challenges at trial, thus requiring the state to draft a statute with an eye toward inclusion, not exclusion. *See Atkins,* 536 U.S. at 317 ("some characteristics of mental retardation undermine the strength of the *procedural protections* that our capital jurisprudence steadfastly guards") (emphasis added).

As the *Atkins* Court held, "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. All the more reason, therefore, to implement procedures that err on the side of caution, even if some offenders are unintended

beneficiaries. The Florida Supreme Court interpreted Section 921.137(1) to do less, not more.[16]

Stated simply, the states should enact procedures that identify adults who are less culpable, *not merely less intelligent.* That requires more than an IQ score.

To be clear, being *intelligent enough*—having an IQ score over 70—should not automatically mean that *you can never be considered intellectually disabled.* Likewise, a defendant might score *below* the cutoff but not necessarily be intellectually disabled. For that reason, individualized consideration requires courts to consider the additional factors, such as adaptive disability, that were enunciated in *Atkins* and recognized as relevant by the mental health community. An IQ cutoff prohibits this inquiry.

In *Hearn v. Quarterman,* for example, the Northern District of Texas rejected the state's argument that "mental retardation begins with IQ's of 70 or below." No. 3:04-CV-0450-D, 2008 WL 679030 at *4 (N.D. Tex. March 13, 2008). The court held as follows:

> Texas courts have in fact held otherwise. Although noting that "significantly subaverage intellectual functioning is defined as an IQ of about 70 or below," the Texas Criminal Court of Appeals…explained that

> "[p]sychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded." Although it is not clear on what other (non-IQ) basis the intellectual functioning prong can be established, or whether there is an IQ threshold above which a diagnosis of mental retardation is precluded, *Briseno* appears to suggest that *clinical judgment, beyond strict adherence to IQ test results, can support a diagnosis of mental retardation*

Id. at *4 (*quoting Ex Parte Briseno,* 135 S.W.3d 1, 7 n.24 (Tex. Crim. App 2004) (emphasis added). The court also cited the American Association of Mental Retardation's three-pronged diagnostic principles, which were relied upon in *Atkins,* and "do not intend there to be a fixed IQ cutoff point." *Id.* at *4. Instead, they "emphasize the importance of exercising clinical judgment in determining how to interpret and apply the three definitional prongs to diagnosing mental retardation each individual case." *Id.*

The Florida Supreme Court's interpretation of Section 921.137(1) might pass muster if IQ tests identified sub-average *adaptive skills*.[17] They do not.

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[17] Section 921.137(1) defines adaptive behavior as "the effectiveness or degree with which an individual meets the

What an IQ test cannot measure, however, should not be the basis upon which to execute an individual who, if given the opportunity to present evidence of adaptive deficits, might be among those that *Atkins* intended to spare.

An IQ score, while relevant, does not give us the whole picture. Thus, it should not automatically foreclose preclusion of additional testimony regarding adaptive deficits, such as impulse control.[18] This would, in effect, ignore the definition of intellectual disability that *Atkins*—and most clinicians—endorse. Yet, this is precisely what Section 921.137 does—as the dissent below acknowledged. *See Hall*, 109 So. 3d at 718 (Perry, J. concurring in part and dissenting in part) ("the [Florida Supreme] Court was constrained by the language of the statute and found that an IQ higher than 70 failed to meet the first prong of section 921.137(1), and that no further inquiry was necessary").

3. Hall's Case Underscores the Problems with IQ Cut-Offs.

Professors Lamparello and MacLean express no opinion as to how a court would—or should—rule if Hall's entire background were considered regardless of his IQ—which has fluctuated below and above the statutory threshold.

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standards of personal independence and social responsibility expected of his or her age, cultural group, and community."

Based upon the evidence, however, it appears that, had the Florida Supreme Court—or Section 921.137(1)—authorized a more individualized inquiry, it would have been faced with a mountain of evidence that Hall suffered from organic brain damage, emotional disturbances, physical abuse, mental illness, torture as a child, and learning disabilities; if the *Hall* opinion were affirmed, none of this evidence could even be considered. *Id.* at 718-19.

Arguably, therefore, Hall's background reveals disabilities in "reasoning, judgment, and control of…impulses," which Atkins held to be indicative of those who "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 719 (Perry, J., concurring in part and dissenting in part) (*quoting Atkins,* 536 U.S. at 306).

This is precisely why the dissent criticized the Florida Supreme Court's "dogged adherence to a bright-line cutoff of a 70 on an IQ test" as leading to an "absurd result." *Id.* at 720. That approach establishes a "threshold for the courts *to even consider retardation*," which in this case prohibited Hall from "attempting to demonstrate *concurrent deficits in adaptive functioning to establish retardation.*" *Id.* at 720 (emphasis added).

Ultimately, the Florida Supreme Court's interpretation renders *Atkins* more illusory than real. As the dissent noted, "[i]f the bar against

executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed." *Id.* at 718.[19]

Professors Lamparello and MacLean respectfully submit that "evolving standards of decency as evidenced by a maturing society" require courts to correct injustices as new information arises. In the context of intellectual disability, it has.

[19] That the defendant may nonetheless use evidence of intellectual disability in mitigation does not render the Florida courts' interpretation of Section 921.137(1) constitutional. *See Atkins,* 536 U.S. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury").

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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