No. 12-10882

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

ERIC C. PINKARD
Counsel of Record
LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL
3801 Corporex Park Dr.
Suite 210
Tampa, FL 33619
pinkard@ccmr.state.fl.us
(813) 740-3544

MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE P.A.
320 West Jefferson St.
Tallahassee, FL 32301

SETH P. WAXMAN
DANIELLE SPINELLI
MEGAN BARBERO
DANIEL T. DEACON
MATTHEW GUARNIERI
THOMAS G. SPRANKLING*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

QUESTION PRESENTED

Whether Florida's statutory scheme for identifying defendants with mental retardation in capital cases—which, as interpreted by the Supreme Court of Florida, categorically bars defendants who do not have an intelligence quotient (IQ) test score of 70 or below from demonstrating mental retardation and precludes consideration of the standard error of measurement for IQ tests—violates the Eighth Amendment prohibition on the execution of persons with mental retardation as articulated in *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIALS, REGULATIONS, AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 12-10882

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

INTRODUCTION

Petitioner Freddie Lee Hall was convicted and sentenced to death in 1978 for his part in the abduction and murder of a twenty-one-year-old pregnant woman. Hall was, and is, a person with mental retardation.[1]

Hall's family recognized his disability when he was a small child. His elementary school teachers repeatedly classified him as "[m]entally retarded" and in need of

[1] The term "intellectual disability" has replaced the term "mental retardation." *See* Schalock *et al.*, *The Renaming of* Mental Retardation, 45 Intell. & Developmental Disabilities 116, 116 (2007). To be consistent with *Atkins* and the record in Hall's case, however, this brief generally uses the term "mental retardation."

a "[s]pecial teacher." JA528. For decades, psychiatrists and psychologists have consistently diagnosed him with mental retardation. Indeed—before this Court decided *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and Hall's mental retardation became a constitutional barrier to his execution—the Florida courts found that Hall had been "mentally retarded his entire life." JA46 (italics omitted). Yet Hall faces execution because his obtained IQ test scores, while within the clinically recognized range for a diagnosis of mental retardation, are above a rigid cutoff point of 70 established by the Florida Supreme Court—a cutoff point the court has admitted is inconsistent with accepted clinical practice. Florida's rule cannot be reconciled with this Court's holding in *Atkins* that the Eighth Amendment forbids putting to death persons who, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, … do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306.

Hall suffers from precisely such disabilities, and has since early childhood. He has very limited intellectual functioning and short-term memory, he experienced serious childhood developmental delays, and he has a profound speech impediment that makes it difficult for him to communicate with others. Hall failed in school and dropped out of high school after several years of being "socially promoted." To this day, he is illiterate and cannot perform basic arithmetic. He has never been able to cope with the basic day-to-day requirements of adult life. When he occasionally found work as an unskilled laborer, he could not hold onto his wages, which he would give away to his "friends." His family described him as gullible and a follower. Even as an adult, he preferred the company of young children

because he could not understand adult conversation and activities. His trial counsel testified that Hall was unable to assist in his own defense.

In short, Hall has "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," *Atkins*, 536 U.S. at 318—diminished capacities that *Atkins* held require that persons with mental retardation be exempt from the death penalty.

Yet the Florida Supreme Court refused to consider this abundant evidence of mental retardation, on the ground that, to be diagnosed with mental retardation under Florida's capital statutory scheme, Fla. Stat. § 921.137 (2012), a defendant must show that he obtained a score of 70 or below on an IQ test. JA121-123; *Cherry* v. *State*, 959 So. 2d 702, 712-713 (Fla. 2007) (per curiam). That rigid IQ test score cutoff is flatly inconsistent with the universally accepted clinical definition of mental retardation and with basic statistical principles, which recognize that any IQ test score must be interpreted in light of the standard error of measurement (SEM) inherent in the test.

Simply put, IQ test scores are not perfect measures of a person's intellectual ability. It is thus well-established—as this Court itself recognized in *Atkins*, 536 U.S. at 309 n.5—that a person who obtains an IQ test score between 70 and 75 may be diagnosed with mental retardation, depending on the other clinical evidence supporting the diagnosis. Hall is an example: He has been consistently diagnosed with mental retardation while obtaining IQ test scores in the low 70s. Under Florida's rule, however, defendants like Hall, who

have mental retardation according to the accepted clinical definition of the condition, are nonetheless categorically excluded from the constitutional protection against execution of persons with mental retardation.

Florida's clinically arbitrary bright-line rule—under which a person with an IQ test score of 71 may be executed notwithstanding a consistent diagnosis of mental retardation—flouts the constitutional principles this Court recognized in *Atkins*. As this Court made clear, States have leeway to adopt appropriate procedures to enforce *Atkins*'s constitutional guarantee. Nothing in *Atkins*, however, authorizes the States to narrow the substantive scope of the constitutional right itself by defining mental retardation in a way that excludes defendants who qualify for a diagnosis of mental retardation under accepted clinical standards. Yet that is precisely what Florida has done here. The Florida Supreme Court's judgment should be reversed.

OPINIONS BELOW

The opinion of the Florida Supreme Court (JA115-146) is reported at 109 So. 3d 704 (Fla. 2012). The order denying rehearing (JA147) is unreported. The opinion of the trial court (JA98-114) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment on December 20, 2012 (JA7, JA115) and denied a timely petition for rehearing on March 8, 2013 (JA7, JA147). The petition for a writ of certiorari was filed on June 6, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 921.137, Florida Statutes (2012) and Rule 3.203, Florida Rules of Criminal Procedure are set forth in full at 1a-10a.[2] In pertinent part, Section 921.137 provides:

> (1) As used in this section, the term "mental retardation" 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 the purpose 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. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

---

[2] Section 921.137 was amended in 2013 to replace "mental retardation" with "intellectual disability." 2013 Fla. Laws ch. 2013-162, § 38; *see also supra* n.1.

> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

STATEMENT

A. Hall's Lifelong Mental Retardation

The court that sentenced Freddie Lee Hall to death following his resentencing in 1991 found that "Hall has been mentally retarded his entire life." JA46. It also found, among other things, that Hall "suffered from organic brain damage" (*id.*); "suffered tremendous physical abuse and torture as a child" (JA48); was "illiterate" (JA50); and "was unable to cope" with day-to-day life (*id.*). Indeed, abundant evidence elicited at Hall's resentencing and in the *Atkins* proceedings below, including testimony from the numerous psychiatrists and psychologists who evaluated Hall and from many members of his family, compels those conclusions.

Shortly after his birth in 1945, Hall's family knew that something was "very wrong" with him. JA466. Hall differed from other children; he was "slow with [his] speech and … slow to learn." JA490; *see also* JA466-467. As one of Hall's siblings explained, "[h]e was a person who couldn't think. He couldn't understand[.]" JA492. From the very beginning, Hall's "mind wasn't right." JA471. Hall suffered significant developmental delays: He "walked and talked long after his other brothers and sisters." JA461; *see also* JA466-467, JA489-490. And even when he started speaking, he had "great difficulty" forming words. JA467; *see also* JA490. When he succeeded, his speech impediment was so pronounced that his family could barely understand him. JA467.

Hall received no help for his developmental problems at home, where he and his sixteen siblings were "raised under the most horrible family circumstances imaginable." JA53; *see also* JA18-21. Hall and his brothers and sisters often "work[ed] fourteen hours a day in the fields" and then "c[a]me home to empty dinner plates." JA20. Starved by their mother, they survived by begging for food. JA464, JA469. Hall's mother also viciously abused her children, and Hall himself received the worst of the abuse because he was "'slow.'" JA20. He was beaten "ten or fifteen times a week sometimes." JA461; *see also* JA477. An older brother recounted that "a lot of things that [Hall] … was accused of [by his mother], he didn't do, and he couldn't defend himself." JA491; *see also* JA19-20.[3]

Hall's school records confirm what his family already knew—his intellectual functioning was very limited, and he could never keep up with his peers. Indeed, Hall's teachers repeatedly classified him as "mentally retarded"—in fourth grade, in sixth grade, in seventh grade, and again in eighth grade. JA483, JA528. His teachers also noted that his "mental maturity is far below his chronological age," that he was "extra slow in comprehension" and "slow in all of his work." JA528; *see also* JA482, JA483. Hall's grades were never good, but they became progressively worse as he grew older, dropping from mostly Cs, Ds, and Fs to nearly all Fs. JA434. Although Hall's teachers recommended that he be placed with a "special teacher," there is no indication

[3] Among other torments, "Hall's mother tied him in a 'croaker sack,' swung it over a fire, and beat him." JA73. At night, Hall's mother "would strap him to his bed … with a rope thrown over a rafter. In the morning, she would … hoist[] him up and whip[] him with a belt, rope, or [cord]." JA20.

that he ever was, or that he received any special help at all. JA483. Hall advanced to the eleventh grade only because he was "'socially promoted,'" and dropped out without ever having learned to read and write or to master basic arithmetic. JA383, JA435.

As an adult, Hall never successfully lived independently. JA435. He was unable to master even basic day-to-day living skills. He could not cook for himself or clean his own clothes and did not bathe regularly. JA201, JA213, JA217-218. He had difficulty understanding adult conversation and activities and spent most of his time alone or with his young nephews and nieces. JA469, JA493-494.

Unsurprisingly, Hall had difficulty finding and holding a job. He managed to find menial, unskilled labor, working for short stints—six months at the longest—as a rock miner and a fruit picker in a crew run by his brother. JA199, JA215, JA435. But he had trouble performing even the most basic job-related tasks. JA200, JA202. Hall also had difficulty managing the limited money he earned. JA216, JA464, JA469-470. If he was paid by "three or four o'clock Friday afternoon," he might not even have "one quarter" left by Saturday morning. JA200. Described as "gullible and easily influenced," he lost money gambling and by "giving … money to anyone who paid attention to him." JA470; *see also* JA464. As one psychologist who evaluated him put it, "Hall never really functioned as an adult." JA527.

B. Offense, Conviction, And Sentencing

In February 1978, twenty-one-year-old Karol Hurst, who was seven months pregnant, was abducted from a grocery store parking lot, beaten and raped, and

then killed with a single gunshot wound to the head. JA9; *Ruffin* v. *State*, 397 So. 2d 277, 278 (Fla. 1981) (per curiam). The only eyewitnesses to the crime were Hall and his co-defendant, Mack Ruffin. *See* JA9. Hall admitted forcing his way into Mrs. Hurst's car and driving her to the remote location in the woods where she was killed, but maintained he did not rape or shoot Mrs. Hurst. *Id.* Tried separately, Hall and Ruffin were each convicted of murder. JA63. Ruffin, who does not have mental retardation, ultimately received a life sentence. *Id.* n.1. Hall was sentenced to death. JA63.[4]

Hall appealed his conviction and sentence, contending, among other things, that the prosecution had not presented any evidence that he had shot Mrs. Hurst. The Florida Supreme Court affirmed, reasoning that there was sufficient evidence from which the jury could have concluded that Hall aided and abetted the murder and was thus equally responsible. JA10.

C. The Florida Supreme Court's Remand For Resentencing And Presentation Of Mitigating Evidence Of Mental Retardation

At the time of Hall's original capital sentencing, mental retardation was not a statutory mitigating factor in Florida, *see* JA16, and this Court had not yet held that capital defendants in Florida must be permitted to present non-statutory mitigating evidence in the penal-

---

[4] After Mrs. Hurst was shot, Ruffin and Hall drove her car to a convenience store that they planned to rob. JA9; *see also Ruffin*, 397 So. 2d at 278-279. During a struggle outside the store, one of them shot and killed a deputy sheriff. JA9. Hall and Ruffin were tried together for that killing and convicted of first-degree murder. JA8 n.1. Hall's conviction was later reduced to second-degree murder due to insufficient evidence of premeditation. JA65.

ty phase of a capital trial, *see Hitchcock* v. *Dugger*, 481 U.S. 393, 398-399 (1987).

After this Court's decision in *Hitchcock*, Hall filed a motion to vacate his sentence pursuant to Florida Rule of Criminal Procedure 3.850. JA15. At the Rule 3.850 hearing, Hall presented substantial non-statutory mitigating evidence of his mental retardation and the brutal abuse he and his siblings suffered. As the Florida Supreme Court noted in summarizing that evidence, several experts testified regarding Hall's "very low intellectual level" and organic brain damage. JA18; *see also* JA19. In addition, the evidence showed that "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded. This retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him. [Hall was] [c]onstantly beaten because he was 'slow' or because he made simple mistakes[.]" JA20. Concluding that "[a]ll of this expert and lay evidence proves or tends to prove a host of nonstatutory mitigating circumstances," the Florida Supreme Court vacated Hall's death sentence and remanded for resentencing. JA21.

D. Evidence Of Mental Retardation Presented At Hall's Resentencing

At the resentencing hearing in December 1990 (JA30), Hall presented uncontroverted evidence of his mental retardation.

Testimony of Hall's family. Hall's family testified in detail regarding Hall's childhood disabilities. For example, Hall's brother James testified that "from a child" Hall "was slow with speech" and "slow to learn." JA489, JA490. He "couldn't talk as the others could," and would "pound on something" in frustration at not

being able to "get his words out." JA490. "He was a person who couldn't think. He couldn't understand …. He tried but … he couldn't get it. It just wasn't there." JA492. Hall's brother Lugene Ellis testified similarly that Hall "didn't understand like the rest of us"; "his mind didn't function like the rest of us." JA495. Other family members and a former neighbor corroborated and expanded on this testimony. *See, e.g.*, JA484-485, JA493-494. Hall's school records, indicating that his teachers repeatedly identified him as "mentally retarded," were also placed into evidence. JA528, JA482-483.

Testimony of Hall's former counsel. Hall's former lawyers also testified. Richard Hagin, who defended Hall in a 1968 case that resulted in a conviction of assault with intent to commit rape, testified that Hall was the only criminal defendant he had ever represented who he believed was not guilty, but that Hall was not sufficiently intelligent to assist in his own defense. JA479. Hagin "[c]ouldn't really understand anything [Hall] said" and, when he asked Hall to write down questions to ask the witnesses, Hall could not. JA480. Similarly, Hall's trial counsel in the Hurst case testified that Hall could not assist in his defense because he had "a mental … level much lower than his age," that at best Hall's understanding was similar to counsel's four-year-old daughter, and at worst counsel "could not communicate with [Hall] at all." 1991 Record on Appeal, Vol. IX, at 1567.

Testimony of clinicians who evaluated Hall. Hall also presented evidence from a number of clinicians who had evaluated him. All agreed that Hall had mental retardation. Dr. Dorothy Lewis, a psychiatrist and professor of psychiatry at New York University, testified that she led a group of clinicians, including a neurologist, a neuropsychologist, a professor specializing in

learning disabilities, and a graduate student in psychology, who performed an in-depth evaluation of Hall in 1986. JA499. Dr. Lewis noted that Hall "had not had a thorough assessment before that time." *Id.*[5] Based on the results of the assessment, Dr. Lewis concluded that Hall was "extremely impaired psychiatrically, neurologically and intellectually." JA500.

Reviewing the specific tests the group conducted, Dr. Lewis noted that a graduate student had administered the Wechsler Adult Intelligence Scale—Revised (WAIS-R), on which Hall scored 80, putting him "on the borderline of retarded." JA501; *see also* JA446. The student found that Hall was "intellectually limited" and showed "signs of brain damage." JA501. An electroencephalogram showed that Hall had abnormal brain waves, indicating brain dysfunction. JA502. The learning disabilities specialist, Dr. Barbara Bard, found that Hall could not read and that his math abilities were "below the first grade level." JA503. Dr. Bard con-

[5] Hall had taken two earlier IQ tests. In 1968, Hall scored 76 on a Beta Test, a non-verbal group test, *see* Fabian *et al.*, *Life, Death, and IQ*, 59 Clev. St. L. Rev. 399, 413 (2011), administered by the state Department of Corrections. JA443. In 1979, a Department of Corrections psychologist administered a Kent Test, on which Hall scored 79. JA445. The Kent test is "not a commercially available instrument." *Dimas-Martinez* v. *State*, 385 S.W.3d 238, 255-256 (Ark. 2011) (citing psychologist and noting that the "Kent Test ha[s] not been shown to have any reliability or validity or to have any ability to accurately predict intellectual functioning"). The Wechsler tests—the Wechsler Adult Intelligence Scale (WAIS) and Wechsler Intelligence Scale for Children (WISC)—are widely considered the "gold standard" in IQ testing. *See, e.g.*, Hunt, *Human Intelligence* 12-13 (2011). Indeed, Florida law does not currently permit the use of the Kent or Beta tests to determine mental retardation for *Atkins* purposes, instead requiring Wechsler or Stanford-Binet tests. Fla. Admin. Code Ann. r. 65G-4.011(1).

cluded that Hall "is probably incapable of even the most … basic living skills which incorporate math and reading." *Id.* The neurologist, Dr. Jonathan Pincus, found that Hall "shows evidence of … probabl[e] retardation." JA504. The neuropsychologist, Dr. Ellis Richardson, found that Hall had "a borderline intellectual ability" and that his test results were indicative of "serious brain impairment." JA505.

Finally, Dr. Lewis herself evaluated Hall and found him to be "brain damaged," with "severe learning disabilities." JA505. Indeed, Hall "is so [perva]sively damaged that to call it a learning disability doesn't do justice to him." JA509. She also found that Hall showed signs of mental illness. JA507. Dr. Lewis testified that, based on the evaluation as a whole, she believed Hall was "significantly retarded," to the extent that he "would have great difficulty taking care of himself." *Id.*

Dr. Bard testified that she had evaluated Hall as part of Dr. Lewis's team. JA496; *see also* JA502. On a test of academic skills, Hall scored at the level of a first-grader, "consistent with the profile of a mentally retarded adult." JA497. He was unable to look at a sequence of pictures and tell a story—something children can typically do. *Id.* Dr. Bard noted Hall's severe speech impediment and opined that it was "neurologically based." JA498.

Dr. Jethro Toomer, a psychologist, also evaluated Hall, independently of Dr. Lewis's team. Dr. Toomer administered an intelligence test, the Revised Beta Examination, on which Hall obtained a score of 60 (the lowest possible score), in the range of mental retardation. JA512; *see also* JA389 ("Beta I.Q. of less than 60"), JA409. Based on this and other tests and his in-

terview of Hall, Dr. Toomer concluded that Hall was "mentally retarded" and that the mental retardation was "longstanding." JA517.

Dr. Kathleen Heide, a criminologist and mental health counselor, also evaluated Hall independently and explained that "he functions on a level that's much younger than one would expect even of an adolescent" and that his understanding of himself and his behavior was what "we see … typically with toddlers." JA522, JA523. She testified that Hall's "way of seeing things [is] very limited. He [is] also very impulsive. This is somebody who is not capable of long-term planning…. [He] is somebody who could be carried along by events." JA523.

E. Hall Is Again Sentenced To Death Notwithstanding A Finding That He "Has Been Mentally Retarded His Entire Life"

The jury recommended death by a vote of 8 to 4, and the trial court adopted the jury's recommendation. JA26, JA61. The court readily acknowledged that "substantial evidence … support[s] [a] finding" that "Freddie Lee Hall has been mentally retarded his entire life." JA46.[6] But the court stated that it was unable to quantify the mitigating significance of Hall's mental retardation. JA46-47. Ultimately, the court concluded that "learning disabilities, mental retardation, and other mental difficulties … cannot be used to

[6] The court also found "uncontroverted" evidence of Hall's organic brain damage and "overwhelming" evidence of "abuse and torture as a child" and "tremendous emotional deprivation and disturbance throughout his life." JA46, JA47, JA48 (italics omitted).

justify, excuse or extenuate [Hall's] moral culpability." JA56.

The Florida Supreme Court affirmed. The majority did not dispute the trial court's finding that Hall had mental retardation but concluded that this did not "provide[] a pretense of moral or legal justification" for his crime and was entitled to "little weight" as mitigating evidence. JA69, JA71. Then-Chief Justice Barkett dissented. Because "a mentally retarded person such as Freddie Lee Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior," she would have held that executing persons with mental retardation violated the Florida Constitution's prohibition on cruel or unusual punishment. JA76-77.[7]

---

[7] Hall filed a Rule 3.850 motion seeking to vacate his new death sentence, arguing, among other things, that his mental retardation rendered him incompetent to proceed with the resentencing. JA83. At the evidentiary hearing on this claim, two additional psychologists who had evaluated Hall testified. Dr. Harry Krop, who evaluated Hall in 1990, found that he had an IQ of 73 and "probable brain damage," but was competent to be resentenced. JA84. Dr. Mark Zimmerman, who evaluated Hall in 1995, "found that Hall's IQ was 74 and that he was mentally retarded and brain damaged." JA85. Dr. Zimmerman believed that Hall was incompetent in 1995 but could not determine whether he was incompetent at his resentencing in 1990. *Id.* The trial court concluded that "[w]hile there is no doubt that [Hall] has serious mental difficulties [and] is probably somewhat retarded," he was competent to be resentenced. JA87. The Florida Supreme Court affirmed (JA91), although two justices wrote separately to state that they believed imposition of the death penalty on Hall was disproportionate in light of his mental retardation (JA91-97).

F. Post-*Atkins* Litigation And The Florida Supreme Court's Adoption Of An IQ Test Score Cutoff Of 70

In 2002, this Court held that the "mentally retarded should be categorically excluded from execution." *Atkins* v. *Virginia*, 536 U.S. 304, 318 (2002). The Court explained that the "diminished capacities" of persons with mental retardation "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" undermined the traditional justifications for the death penalty and made it more likely that persons with mental retardation would be wrongfully convicted and executed. *Id.* at 318-319, 321.

The year before *Atkins* was decided, Florida enacted a statute prohibiting the execution of persons with mental retardation, defined as "[1] significantly subaverage general intellectual functioning [2] existing concurrently with deficits in adaptive behavior and [3] manifested during the period from conception to age 18." Fla. Stat. § 921.137(1).[8] In turn, "significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the [relevant Florida] rules." *Id.* On its face, that definition is consistent with clinical

[8] Although Section 921.137 applies by its terms only to defendants sentenced after its effective date, the Florida Supreme Court determined, following *Atkins*, that Florida Rule of Criminal Procedure 3.203 allows defendants sentenced to death prior to the statute's enactment to challenge their sentences under the statutory standard. *See Brown* v. *State*, 959 So. 2d 146, 147 n.1 (Fla. 2007) (per curiam).

definitions of mental retardation—which, taking measurement error into account, provide that IQ scores in the range of approximately 70 to 75 can represent performance two standard deviations below the mean (*see infra* Part II.A)—and does not set a rigid IQ cutoff.[9]

The Florida Supreme Court has nonetheless interpreted section 921.137 as barring anyone who does not have an obtained IQ test score of 70 or under from demonstrating mental retardation and as forbidding consideration of measurement error. *See Cherry* v. *State*, 959 So. 2d 702 (Fla. 2007) (per curiam). Cherry involved a defendant with an obtained IQ test score of 72. *Id.* at 711. The Florida Supreme Court acknowledged that, under the standard clinical definitions of mental retardation, Cherry's score should have been interpreted in accordance with the standard error of measurement associated with the particular test at issue, *id.* at 712-713, which would have yielded a range of 67 to 77—a range in which a psychiatrist or psychologist would investigate a person's adaptive functioning before deciding whether to diagnose him or her with mental retardation. Nevertheless, the court held that the statute "does not use the word approximate, nor does it reference the SEM" and that the statute's "plain meaning" therefore barred the court from considering anything other than the obtained IQ test score itself. *Id.* at 713. Cherry's score of 72 was thus the end of the

---

[9] Indeed, the legislative staff analysis accompanying the law stated: "The bill does not contain a set IQ level …. Two standard deviations from these tests is *approximately* a 70 IQ, *although it can be extended up to 75*. The effect in practical terms will be that a person that has an IQ of around 70 or less will likely establish an exemption from the death penalty." Fla. S. Staff Analysis, CS/SB 238, at 11 (Feb. 14, 2001) (emphases added).

analysis, and the court refused to consider other evidence of Cherry's mental retardation. *Id.* at 713-714.

G. Hall's Motion For *Atkins* Relief Is Denied Despite Overwhelming Evidence Of Mental Retardation

In 2004, Hall filed a motion under Florida Rule of Criminal Procedure 3.203, which establishes a process for *Atkins* claims; a hearing was held on the motion in 2009. *See* JA148-380. In light of *Cherry*, at the outset of the hearing the trial court granted the State's motion in limine and required Hall to establish, by clear and convincing evidence, an obtained IQ test score of 70 or below before he could present any evidence regarding his adaptive functioning. JA168.

Hall's evidence. At the hearing, in addition to testimony from his family, Hall presented testimony from, *inter alia*, Dr. Krop, *see supra* n.7, and Dr. Greg Prichard. Dr. Krop, relying on his 1990 evaluation of Hall, as well as Hall's previous evaluations, testified that Hall was "functionally retarded," with a "mental age of around 13." JA243; *see also* JA399. Dr. Krop noted that all of Hall's IQ scores, with the exception of the 80 he received on a test administered by a graduate student, fell "within the range of mental retardation." JA245.[10] Dr. Prichard testified that he had reviewed Hall's prior evaluations and that he had himself evaluated Hall and administered an IQ test, the WAIS-III,

[10] Another psychologist who evaluated Hall noted that the score of 80 should be viewed skeptically: "The error of measurement [on that test] was and is beyond the expected area of random error and would suggest that there was a specific, non random, reason for the elevation; I would strongly suspect the reason would be … that a student provided the results and she had … no supervision on premises." JA424.

on which Hall scored 71. JA324. He explained that "when a person has an I.Q. of between 65 and 75," a clinician must determine whether "those cognitive limitations create deficits in the person's ability to adapt" before determining whether the person has mental retardation. JA326.

In light of the court's ruling on the motion in limine, Hall's counsel proffered Dr. Prichard's testimony that he had assessed Hall's adaptive limitations, in part by interviewing family members. Dr. Prichard concluded that Hall had "significant adaptive deficits" in "virtually every domain measured." JA331. Based on his own assessment and an extensive review of Hall's records and previous testing results, Dr. Prichard concluded that, as a clinical matter, "Hall [met] the three prongs required for a diagnosis of mild mental retardation." JA345.[11]

The State's response. The State made no attempt to rebut Dr. Krop's and Dr. Prichard's diagnoses of mental retardation. Instead, it contended that their diagnoses were irrelevant because *Cherry* had held that an obtained IQ test score of 70 or under was required. As the prosecutor put it: "Dr. Prichard is reciting a clinician's approach to mental retardation, which I submit is not relevant to this proceeding. Because under the law, if an I.Q. is above 70, a person is not men-

[11] In addition to the tests discussed above, Dr. Prichard considered the results of a WAIS-IV test administered by Dr. Joseph Sesta in 2008, on which Hall scored 72. JA364. Dr. Prichard also considered the results of testing conducted in 2001 by the late Dr. Bill Mosman, in which Hall obtained a score of 69 on the WAIS-III. JA105, JA413, JA449-450. The trial court excluded Dr. Mosman's report from evidence on the ground that, after Dr. Mosman's death, Hall's counsel had been unable to provide the State with the raw data underlying the report. JA106.

tally retarded[.]" JA278-279; *see also, e.g.*, JA327 ("[M]y position is that once the witness testified that his I.Q. test of Mr. Hall revealed a full-scale I.Q. of 71, that the inquiry under Florida law is over."). The court agreed, at one point commenting: "I'm certainly not going to go anywhere near the DSM [the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*]. That's way beyond my field, and I won't even attempt to tell you what that means or says or requires. But legally, I think we all know what the rule and the statute call for." JA341.

The trial court's ruling. The trial court denied Hall's motion. Pointing to Hall's obtained IQ test scores, the court found that Hall was unable to demonstrate "an I.Q. score of 70 or lower." JA107. On that basis, the court concluded that Hall failed to satisfy the "significantly subaverage general intellectual functioning" prong of the mental retardation definition, and that because "all three prongs … must be met," Hall's "mental retardation claim fail[ed] as a matter of law." JA108, JA109. Despite having granted the State's motion in limine to exclude evidence regarding the remaining two prongs, the court went on to find that Hall could not show deficits in adaptive behavior "existing concurrently" with subaverage intellectual functioning. JA109-111. The court interpreted "concurrently" to mean that Hall had to present evidence of deficits in adaptive behavior that existed at the same time his IQ was tested, which would have required assessing his adaptive functioning in prison. Since Hall failed to present such evidence, the court reasoned that he could not meet the adaptive behavior prong. JA111. The court also found that Hall could not satisfy the third prong—manifestation prior to age 18—because his IQ was not tested before age 18. JA112-113.

The Florida Supreme Court's ruling. On appeal, a divided Florida Supreme Court affirmed. The court reaffirmed its holding in *Cherry* that the "plain language" of the statute requires a "firm IQ cutoff of 70," rejecting Hall's argument that accepted clinical practice requires consideration of the standard error of measurement. JA122, JA123. The court also rejected Hall's argument that the trial court improperly limited his introduction of evidence regarding adaptive functioning, reasoning that "because a defendant must establish all three elements of such a claim, the failure to establish any one element will end the inquiry." JA125. The court accordingly did not address the trial court's conclusions regarding adaptive behavior and onset before age 18.

In a concurring opinion, Justice Pariente found it "[u]nquestionabl[e]" that "clinical definitions of mental retardation recognize the need for application of the SEM and the use of clinical judgment." JA132. But "unless this Court were to recede from *Cherry*," "a plain-language interpretation of Florida's bright-line cutoff score of 70 will remain the rule of law in this state." JA133. Justice Pariente predicted that "[a]t some point in the future, the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded. However, until that time, this Court is not at liberty to deviate from the plain language of section 921.137[(1)]." JA135.

Two Justices dissented. Justice Labarga "wr[ote] to express [his] deep concern with the fact that even though Hall was found to be retarded long before the Supreme Court decided *Atkins*, and even though the evidence was presented below that he remains retarded, we are unable to give effect to the mandate of *At-*

kins under the definition of 'mental retardation' set forth in section 921.137(1)." JA135-136. He observed that Florida's statutory scheme "creates a significant risk that a defendant who has once been found to be mentally retarded may still be executed," in contravention of *Atkins*. JA137. Noting *Atkins*'s directive that States craft "appropriate" procedures to enforce its constitutional holding, Justice Labarga explained that, in his view:

> [T]he imposition of an inflexible bright-line cutoff score of 70 … is not in every case an appropriate way to enforce the restriction on execution of the mentally retarded…. The Supreme Court barred execution of mentally retarded individuals based in part on the evolving standards of decency in our maturing society, and those standards should include thoughtful consideration of all the factors that mental health professionals consider in determining whether an individual is mentally retarded, without application of an inflexible, oftentimes arbitrary, bright-line cutoff IQ score.

JA140.

Justice Perry also dissented, urging that "[i]f the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed." JA141. Recounting the voluminous evidence of Hall's disability, Justice Perry stated that "Hall is a poster child for mental retardation claims." JA143. "[T]he record here clearly demonstrates that Hall is mentally retarded." *Id.* Yet because Hall obtained IQ test scores above 70, "[t]he current interpretation of the statutory scheme will lead to the execution of a retarded man in this case." JA146. "Hall had been found by

the courts to be mentally retarded before the [Florida] statute was adopted. Once the statute is applied, Hall morphs from someone who has been 'mentally retarded his entire life' to someone who is statutorily barred from attempting to demonstrate … deficits in adaptive functioning to establish retardation…. [T]his cannot be in the interest of justice." *Id.*

SUMMARY OF ARGUMENT

In 2002, this Court held that the execution of persons with mental retardation violated the Eighth Amendment's prohibition on cruel and unusual punishment, concluding that a national consensus had developed against the practice. *Atkins* v. *Virginia*, 536 U.S. 304, 315-316 (2002). The Court explained that the "diminished capacities" of persons with mental retardation undermined the traditional justifications for the death penalty and increased the likelihood that such persons would be wrongfully executed. *Id.* at 318-321. In describing the contours of that constitutional guarantee, the Court cited two authoritative clinical definitions of mental retardation, *id.* at 308 n.3, 317 n.22, both of which require clinicians to take the standard error of measurement inherent in IQ tests into account in interpreting IQ scores and diagnosing mental retardation.

Although *Atkins* reserved to States the power to "'develop appropriate ways to enforce th[is] constitutional restriction,'" 536 U.S. at 317, nothing in *Atkins* suggests that States have the authority to redefine mental retardation and thus alter the constitutional restriction itself. Permitting that would circumvent the rule announced in *Atkins* and allow the execution of persons who meet the clinical definitions of mental retardation. That conclusion is confirmed by this Court's decisions in *Ford* v. *Wainwright*, 477 U.S. 399 (1986),

and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). As in *Atkins*, *Ford* announced that a class of persons—those who are insane at the time they are to be executed—may not constitutionally be put to death, leaving it to the States to develop "appropriate" ways to enforce that restriction. 477 U.S. at 416 (plurality opinion). *Ford* itself makes clear, and *Panetti* reaffirmed, that the power to craft appropriate means of enforcing a constitutional protection is not the power to narrow or redefine the constitutional protection itself. States are limited to developing procedures to vindicate such substantive constitutional rights, not to impair them.

Yet Florida's rigid IQ test score cutoff does just that. Rather than enforcing the prohibition on executing persons with mental retardation set out in *Atkins*, the Florida Supreme Court has redefined mental retardation so that it means something different—and narrower—than this Court's decision contemplated. Under Florida's rule, defendants who do not have an obtained IQ test score of 70 or below always fall outside *Atkins*'s protections, regardless of the measurement error inherent in all IQ tests. That is so even if—as here—clinicians have uniformly diagnosed a defendant as having mental retardation. And such defendants are precluded from introducing any evidence—no matter how compelling—of the deficiencies in functioning that render unconstitutional the execution of persons with mental retardation.

The professional clinical organizations whose definitions this Court relied on in *Atkins* agree that Florida's method is not clinically justifiable: In diagnosing mental retardation, clinicians *must* take into account a given IQ test's standard error of measurement. That is necessary because no IQ test is a perfect measure of intellectual ability. The best any test can do, even

when correctly administered, is to provide a certain level of confidence, as a statistical matter, that a person's "true" IQ score—the score he or she would obtain on a hypothetical test with no measurement error—is within a particular range. For most IQ tests, if they are up-to-date and correctly administered and scored, chances are approximately 95% that a person's "true" IQ score is within a range of about ± 5 points from his or her obtained score. Thus, a score of 70 is best interpreted as representing a high likelihood that the person's "true" score is between 65 and 75. For that reason, both leading clinical organizations agree that a person with an obtained IQ test score of up to 75 can be diagnosed with mental retardation if that person displays limitations in adaptive functioning and an onset of disability before age 18.

Florida's insistence on using obtained IQ test scores to determine eligibility for execution, while instructing courts to ignore the measurement error inherent in those scores, thus violates basic statistical and clinical understandings of what IQ scores do and do not mean. And by categorically excluding defendants who would be deemed to have mental retardation as a clinical matter from *Atkins*'s protections, it impermissibly narrows the scope of the constitutional guarantee *Atkins* recognized.

The predictable consequence of Florida's rule is that persons with mental retardation will be executed. Without this Court's intervention, that will happen here. The evidence is overwhelming that Freddie Lee Hall has mental retardation. His teachers classified him as "mentally retarded" 60 years ago, and he has been diagnosed with mental retardation repeatedly over the course of several decades. Indeed, before *Atkins* was decided, the Florida courts agreed that Hall

had been "mentally retarded his entire life," JA46, a finding that while not issue-preclusive after *Atkins*, *see Bobby* v. *Bies*, 556 U.S. 825, 836 (2009), is, to say the least, telling. But Hall is now subject to execution because the Florida Supreme Court has decided that no defendant with an obtained IQ test score over 70 can have mental retardation. That result cannot be squared with the Constitution.

ARGUMENT

I. *ATKINS* MAKES CLEAR THAT THE EIGHTH AMENDMENT FORBIDS EXECUTION OF PERSONS MEETING THE CLINICAL DEFINITION OF MENTAL RETARDATION

A. *Atkins* Relied On The Clinical Definition Of Mental Retardation In Describing The Constitutional Prohibition

1. In *Atkins* v. *Virginia*, 536 U.S. 304, 316 (2002), this Court held that the Eighth Amendment categorically bars imposition of the death penalty on persons with mental retardation and that "a national consensus has developed against it." *See also id.* at 321 (concluding that "such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender"). Noting that eighteen of the death-penalty States and the federal government had enacted explicit statutory prohibitions against the execution of persons with mental retardation, the Court concluded that "the large number of States prohibiting the execution of mentally retarded persons … provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 315-316. And that "legislative judgment reflects a much broader social and profes-

sional consensus" against imposition of the death penalty on persons with mental retardation. *Id.* at 316 n.21.

In concluding that execution of persons with mental retardation is an unconstitutional sanction, the Court explained that the "characteristics of mental retardation" diminish the personal culpability of defendants with mental retardation, undermine the retribution and deterrence justifications for the death penalty, and raise a "special risk of wrongful execution." *Atkins*, 536 U.S. at 317, 321.

First, the Court recognized that "[m]entally 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." *Atkins*, 536 U.S. at 318. Those "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish the[] personal culpability" of persons with mental retardation. *Id.*; *see also Miller* v. *Alabama*, 132 S. Ct. 2455, 2463 (2012) (citing *Atkins* and explaining that the Court has "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"); *Kennedy* v. *Louisiana*, 554 U.S. 407, 420 (2008) (executions of "mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime").

Second, the Court determined that, given these deficiencies, "there is a serious question as to whether either justification that [this Court] ha[s] recognized as a

basis for the death penalty"—namely, retribution and deterrence—applies to persons with mental retardation. *Atkins*, 536 U.S. at 318-319. "[T]he lesser culpability of the mentally retarded offender" takes away the retributive justification for imposition of the death penalty, which is warranted only for crimes arising from "a consciousness materially more depraved" than that of the "average murderer." *Id.* at 319 (internal quotation marks omitted). Nor would "executing the mentally retarded … measurably further the goal of deterrence." *Id.* at 320. "[T]he same cognitive and behavioral impairments that make these defendants less morally culpable … also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.*; *see also Roper* v. *Simmons*, 543 U.S. 551, 563 (2005) ("The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect.").

Third, the "lesser ability" of defendants with mental retardation meaningfully to assist their counsel and to control their demeanor in court—as well as the potentially "two-edged" nature of mental retardation, which could increase the likelihood of a finding of future dangerousness—creates a "special risk" that the death penalty will be imposed where it is not justified. *Atkins*, 536 U.S. at 320, 321.

2. In describing mental retardation, the Court relied on the definitions of mental retardation promulgated by the American Association on Mental Retardation (AAMR), now the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA). *Atkins*, 536

U.S. at 317 n.22; *see also id.* at 308 n.3 (citing AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992), and APA, *Diagnostic and Statistical Manual of Mental Disorders* 42-43 (4th ed. 2000) ("*DSM-IV*")). These two clinical definitions, which did not differ substantively in any meaningful way, each incorporated three prongs: (1) "'significantly subaverage'" intellectual functioning; (2) limitations in adaptive functioning; and (3) onset before age 18. *Id.* at 308 n.3. The Court explained that while "[t]he statutory definitions of mental retardation" established by the States in banning execution of persons with mental retardation were "not identical," they "generally conform[ed] to the clinical definitions." *Id.* at 317 n.22. Florida's statutory prohibition, for example, was enacted in 2001 and is on its face consistent with the clinical definitions the Court relied on in *Atkins*, *see* Fla. Stat. § 921.137(1) (2012), although the Florida Supreme Court's interpretation of the statute is not, *see infra* Part II.B.

The Court recognized in *Atkins* that neither the AAIDD nor the APA clinical definition set a rigid IQ cutoff of 70 for diagnosing mental retardation. Rather, the Court explained that "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5 (citing 2 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 2952 (Sadock & Sadock eds., 7th ed. 2000)). Similarly, the Court noted that "'[m]ild' mental retardation is typically used to describe people with an

IQ level of 50-55 to *approximately* 70." *Id.* at 308 n.3 (emphasis added) (citing *DSM-IV* at 42-43).[12]

B. *Atkins* Does Not Permit States To Establish Definitions Of Mental Retardation That Exclude Persons Who Meet The Clinical Definition

In giving content to the constitutional prohibition it described, *Atkins* thus relied on the established clinical definitions of mental retardation. That makes sense, because mental retardation is a clinical condition, and one whose basic parameters have been well-settled for decades, *see infra* Part II.A. Nothing in *Atkins* suggests that States are free to narrow the scope of the constitutional guarantee it set out simply by redefining

---

[12] As the Court noted in *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989), individuals who are "profoundly or severely retarded" are unlikely to be convicted; thus, "most retarded people who reach the point of sentencing are mildly retarded." *See also* Patton & Keyes, *Death Penalty Issues Following* Atkins, 14 *Exceptionality* 237, 238 (2006) ("[A]lmost all capital cases with an *Atkins* claim involve individuals whose levels of intellectual and adaptive functioning fall in, at, or near the mild range."). As *Atkins* recognized, however, "mild" mental retardation is not a trivial or insignificant disability. *See* 536 U.S. at 309 n.5; *see also, e.g.*, AAIDD, *User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 14 tbl. 3.1 (2012) (identifying characteristics of persons with intellectual disability with higher IQ scores, including "[i]mpaired social judgment …, lessened interpersonal competence and decision making skills, … increased vulnerability and victimization," "gullibility … and/or naiveté or suggestibility," and "difficulties in making sense of the world through … planning, problem solving, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience"); JA507 (psychiatrist's testimony that what is referred to as "mild retardation is really not [a] mild" disability).

what it means to have mental retardation, as Florida has done here.

To be sure, *Atkins* observed that "[n]ot 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." 536 U.S. at 317. And this Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 405, 416 (1986) (plurality opinion)). *Atkins* thus directs States to develop appropriate *procedures* to determine whether a particular defendant who "claim[s] to be mentally retarded" in fact has mental retardation—that is, to "'enforce the constitutional restriction.'" *Id.* But *Atkins* does not permit States to alter the *substantive* definition of mental retardation and thereby override, rather than enforce, the constitutional restriction. If, for instance, a State defined mental retardation to require an IQ score below 50—a definition which would exclude at least 85% of the population with mental retardation, *see DSM-IV* at 43, no one could doubt that such a definition would not be an "appropriate way[] to enforce" *Atkins*'s constitutional guarantee.

This reading of *Atkins* is confirmed by the Court's decisions in *Ford*, 477 U.S. 399, and *Panetti* v. *Quarterman*, 551 U.S. 930 (2007). In *Ford*, as in *Atkins*, the Court recognized that the Eighth Amendment imposed a substantive prohibition against execution of a particular group: in *Ford*, those who are insane at the time the sentence is to be carried out (as Justice Powell's concurring opinion defined it, "those who are unaware of the punishment they are about to suffer and why they are to suffer it," 477 U.S. at 422 (concurring in part and concurring in judgment)). As in *Atkins* (which cited

Ford for this proposition, *Atkins*, 536 U.S. at 317), the Court in *Ford* "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction" on the execution of the insane, 477 U.S. at 416 (plurality opinion). *Ford* made clear, however, that the leeway it was providing to States dealt with "the State's *procedures* for determining sanity." *Id.* (emphasis added). *Ford* nowhere suggests that States may redefine or narrow the constitutional protection at issue. To the contrary, States may develop procedures only to the extent that those procedures do not impair the substantive constitutional right. Indeed, in *Ford* itself, this Court held that Florida's procedure for determining sanity failed adequately to protect the Eighth Amendment right at stake. *Id.* at 417-418 (plurality opinion); *see also id.* at 424 (Powell, J., concurring in part and concurring in judgment).

This Court's decision in *Panetti* reinforces the conclusion that States may not adopt standards that fail adequately to protect a substantive constitutional right against execution. *Panetti* presented a question analogous to that raised here: whether the Fifth Circuit's definition of insanity, which asked only whether a prisoner knew that he was to be executed and knew the State asserted that it was because of the crime he committed—and, if the prisoner did know that, precluded consideration of further evidence of insanity—was consistent with the Eighth Amendment guarantee recognized in *Ford*. 551 U.S. at 956, 958. This Court concluded that it was not: "The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reasons for a punishment or the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate." *Id.* at 959 (citation omitted). Thus, although

Ford left it to States to develop appropriate *procedures* to effectuate the Eighth Amendment bar on executing the insane, it did not permit redefining "insanity" in a way that put the principles underlying that bar at risk.

Similarly, here, the Florida Supreme Court has adopted a definition of mental retardation that asks only whether the defendant has scored 70 or below on an IQ test—and, if not, precludes consideration of any other evidence of mental retardation, no matter how compelling—while forbidding the fact-finder to consider the test's inherent measurement error, as accepted clinical practice requires. The question presented is whether that definition adequately implements the constitutional principles set out in *Atkins*. As discussed in more detail below, because Florida's definition of mental retardation excludes persons who meet the clinical definition of the disability recognized in *Atkins*, it exceeds the leeway granted to States to develop appropriate procedures to enforce *Atkins*'s holding and violates the substantive Eighth Amendment guarantee *Atkins* articulated.

II. FLORIDA'S IQ TEST SCORE CUTOFF OF 70 IS INCONSISTENT WITH ACCEPTED CLINICAL PRACTICE AND WITH THE CONSTITUTIONAL PRINCIPLES SET OUT IN *ATKINS*

The Florida Supreme Court has interpreted the State's statutory prohibition on execution of persons with mental retardation as establishing a fixed IQ test score cutoff of 70. *See Cherry* v. *State*, 959 So. 2d 702, 713 (Fla. 2007) (per curiam). If a defendant's IQ test score is above 70, in the Florida courts' view, he is, by definition, "not mentally retarded." *Id.* at 714. In determining whether an individual satisfies this IQ test score cutoff, the Florida Supreme Court has expressly

refused to take into account the standard error of measurement, even though it is universally accepted clinical practice to do so. *Id.* at 712; *see also* JA124. Accordingly, in Florida, an obtained IQ test score of 71—notwithstanding that it is clinically indistinguishable from a score of 70, in light of the inherent measurement error in the test—bars a defendant from presenting any evidence of limitations in adaptive functioning. That is so no matter how compelling that evidence may be, and no matter how many psychologists may have diagnosed the defendant as having mental retardation in accordance with accepted clinical practice.

Florida's rule is neither clinically nor legally justifiable. Universally accepted clinical practice forbids excluding a diagnosis of mental retardation by reference to an obtained IQ test score alone without regard to measurement error, while precluding consideration of evidence of adaptive limitations. And the certain effect of Florida's rule will be the execution of persons who have mental retardation under the established clinical definition of the condition.

A. The Generally Accepted Clinical Definition Of Mental Retardation Rejects Use Of A Rigid IQ Test Score Cutoff Of 70

1. In *Atkins*, this Court relied on the clinical definition of mental retardation established by the AAMR (now the AAIDD) and the APA. 536 U.S. at 308 n.3. Those clinical definitions "have not changed substantially" in several decades, and the current definitions have the same essential criteria as the definitions the Court relied on in *Atkins*. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 6, 7 (11th ed. 2010) ("*AAIDD Manual*"); *see also*

APA, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("*DSM-5*").

The current AAIDD definition of intellectual disability provides: "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 Manual* 1. The APA's definition is nearly identical: "Intellectual disability … is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." *DSM-5* at 33. Both the AAIDD and the APA provide additional guidelines for the two substantive criteria—intellectual functioning and adaptive behavior—and explain how those criteria should be assessed.

The AAIDD provides that "[t]he 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score that is *approximately* two standard deviations below the mean, *considering the standard error of measurement* for the specific instruments used and the instruments' strengths and limitations." *AAIDD Manual* 31 (emphases added).[13] The current APA definition likewise specifically provides that an IQ score must account for measurement error within a range of ± 5 points: "Individuals with intellectual disability have scores of ap-

[13] In the past, the AAIDD has defined intellectual functioning in terms of an IQ score rather than a standard deviation from the mean, but in doing so it has recognized that the criterion is satisfied at a score of "approximately 70 to 75 or below" (1992) or noted that the "upper limit [of 70] is intended as a guideline and could be extended to 75 or more" (1983). *AAIDD Manual* 10.

proximately 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)." *DSM-5* at 37.

2. The clinical definitions of the intellectual functioning prong thus make clear that obtained IQ test scores are approximations and that the diagnostic criteria for mental retardation must take into account the standard error of measurement. There is good reason for this, inherent in the nature of IQ tests: Measuring a person's intellectual functioning presents distinct challenges given the nature of intelligence and questions about whether it can be reduced effectively to a single score. *See generally* Mackintosh, *IQ and Human Intelligence* 3 (2d ed. 2011) (surveying different definitions of intelligence); *AAIDD Manual* 32-34. Thus, although "intellectual functioning is currently best represented by IQ scores when they are obtained from appropriate, standardized and individually administered assessment instruments," such scores are "far from perfect." *AAIDD Manual* 31.

Modern IQ tests do not purport to measure intelligence as an absolute matter. *See* Kaufman, *IQ Testing 101* at 125 (2009). Rather, they measure only *relative* intelligence as compared to one's peers. *See* Mackintosh 33-34. Thus, when individual editions of IQ tests are developed, they are administered to a large group of people, carefully chosen to be representative of the population. *See* Kaufman 125-127; *see also* Psychological Corp., *WAIS-III/WMS-III Technical Manual* 19-35 (1997). And tests must periodically be renormed in order to ensure that they continue to reflect the performance of a representative group. *WAIS-III Technical Manual* 8-9. The performance of the group defines the

mean score for the test; individual IQ scores simply represent how far a person's IQ deviates from that mean (for that reason, they are sometimes referred to as "deviation" scores). *See* Mackintosh 33.

IQ tests are designed so that the mean score is 100—an arbitrary number chosen for convenience. *See* Kaufman 107. Again, the average performance of the group against which the test is normed defines what is necessary to score 100. IQ scores have an approximately normal distribution; that is, if the scores of a representative group of the population are graphed, the result will be the familiar bell-shaped curve, showing that people most commonly score near the mean of 100 and that scores become increasingly less common the farther they are from the mean. *See id.* 108.

The distance of a particular person's score from the mean is sometimes expressed in terms of standard deviations. Typically, as with Wechsler tests, the standard deviation from the mean is 15. Kaufman 107. Because IQ scores are approximately normally distributed, about two-thirds of all people score within one standard deviation of the mean, or between 85 and 115. *Id.* 108. Over 95% of all people score within two standard deviations of the mean, or between 70 and 130. *Id.* Only about 2.3% of people score more than two standard deviations below the mean. *Id.* As noted above, *see supra* pp. 35-36, both the AAIDD and the APA definitions of intellectual disability use performance two standard deviations below the mean as a rough proxy for significantly subaverage intellectual functioning. *AAIDD Manual* 31; *DSM-5* at 37.

Both organizations, however, recognize that whether an individual has significant limitations in intellectual functioning "cannot be viewed as only a sta-

tistical calculation." *AAIDD Manual* 35. As the AAIDD makes clear:

> 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 …. Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used[.]

Id. (emphasis added); *see also DSM-5* at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance.").

The developers of IQ tests also recognize the critical role of clinical judgment in interpreting scores, calling clinicians "themselves … the cornerstone of any assessment." *WAIS-III Technical Manual* 3; *see also* Psychological Corp., *WAIS-IV Technical and Interpretive Manual* 3 (2008). And the *WAIS-III Technical Manual* instructs clinicians to "view each examinee as unique and take into account nonintellective factors and other life-history information when interpreting the test results." *WAIS-III Technical Manual* 2.

3. Clinical judgment in interpreting obtained IQ test scores is critical because no IQ test is a perfect measure of a person's intelligence or even of his or her "true" IQ test score.[14] A particular obtained IQ test

[14] "True" IQ score is a statistical concept. A person's "true" score is simply the "hypothetical" score he or she would receive on a particular IQ test "if the test were perfectly reliable." *WAIS-IV Technical Manual* 41.

score may overstate or understate a person's true score for several reasons. *See WAIS-IV Technical Manual* 41. One reason is simply the influence of chance: A person may guess or fail to guess the correct answer to a particular item. Kaufman 138. A person's performance is also likely to fluctuate due to personal circumstances that do not bear on intelligence, such as whether he or she was in good health when the test was administered. *See* AAIDD, *User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 22 (2012). Testing conditions, including the environment or location of the test, may also affect a person's score. *Id.* So may an examiner's demeanor. Kaufman 139. In addition, while IQ test scoring is as objective as possible, there are situations in which examiners must use judgment in order to score a particular response. *Id.* 138-139.[15]

To account for the variability introduced by these known issues, each IQ test has its own standard error of measurement, which is calculated by the test designers. *AAIDD Manual* 36. The SEM is used to determine a confidence interval surrounding an obtained score and to estimate the probability that a person's true IQ test score falls within a certain range. *See* Aiken, *Assessment of Intellectual Functioning* 42 (2d ed. 1996); Kaufman 141-143; *WAIS-IV-Technical Manual* 46; *WAIS-III Technical Manual* 53. Those intervals "express test score precision and serve as reminders that measurement error is inherent in all test scores

[15] For instance, Wechsler tests ask people to define certain words and provide examples of 2-point, 1-point, and no-point responses, but an examiner must use his or her judgment to score a response that is not among the listed examples. Kaufman 138-139.

and that observed test scores are only estimates of true ability." *WAIS-IV Technical Manual* 46.

Generally, an obtained score plus or minus approximately one SEM yields a confidence interval equating to a 66% probability that a person's true IQ test score falls within that range. *AAIDD Manual* 36. So, for example, if a person scores 70 on an IQ test with an SEM of 2.5 points, the person's score can be more accurately expressed as falling within a band, or confidence interval, of 67.5 to 72.5, representing an approximately two-thirds chance that the person's true score is within that range. To obtain greater confidence that the true score falls within the range, the range must be expanded. Typically, an obtained score plus or minus approximately two SEMs will yield a 95% confidence interval. *Id.* Thus, in the example above, the chances are approximately 95% that the person's true score is within two SEMs of 70, or 65 to 75.[16] In Hall's case, for example, his most recent IQ test score, a 72 on the WAIS-IV, is more appropriately expressed in terms of a 95% probability that his true score lies between 68 and 76.[17]

To assess intellectual functioning accurately, a clinician *must* take account of the SEM and resulting con-

---

[16] These numbers are illustrative only. Confidence intervals for specific scores must be derived from the SEM associated with the particular testing instrument. *See WAIS-IV Technical Manual* 46.

[17] This number is derived from the WAIS-IV's average Full-Scale SEM of 2.16. *See WAIS-IV Technical Manual* 45. The WAIS-IV also allows practitioners to calculate a confidence interval using a slightly different method, which results in a 95% confidence interval of 68 to 77 for an obtained score of 72. *See id.* 46; Psychological Corp., *WAIS-IV Administration and Scoring Manual* 224 tbl. A.7 (2008).

fidence intervals. Both the AAIDD and the APA "support the best practice" of reporting IQ test scores with their associated confidence intervals based on the SEM. *AAIDD Manual* 36; *see DSM-5* at 37. And both professional organizations stress that such reporting is a "critical consideration" in the "appropriate use of intelligence tests" that "must be part of any decision concerning the diagnosis of ID [intellectual disability]." *AAIDD Manual* 36; *see DSM-5* at 37; *see also* Bonnie & 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. Rich. L. Rev. 811, 835 (2007); *WAIS-IV Technical Manual* 41 ("The reliability of a test should always be considered when interpreting obtained test scores and differences between an individual's test scores on multiple occasions.").[18]

4. Using an IQ test score cutoff of 70 that does not permit consideration of the SEM will inevitably exclude from *Atkins*'s protections persons who truly have men-

[18] The SEM is an inherent feature of all IQ tests, including tests that were recently normed against a representative population and correctly administered. Other factors can also affect the reliability of IQ scores. *See generally AAIDD Manual* 37-41 (describing several such factors). For example, some testing instruments are more reliable than others. *DSM-5* at 37 ("Invalid scores may result from the use of brief intelligence screening tests or group tests[.]"); *AAIDD Manual* 41; *see supra* n.5. In addition, "scoring errors on IQ tests are common, even among experienced examiners." Macvaugh & Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 156 (2009); *see also* Kaufman & Lichtenberger, *Assessing Adolescent and Adult Intelligence* 198 (3d ed. 2006) (noting that in one study "the ranges of the [obtained] IQs were huge, reflecting an abominable number of scoring errors").

tal retardation. As the AAIDD explains, "AAIDD … *does not* intend for a fixed cutoff point to be established for making the diagnosis" because "[a] fixed point cut-off score is not psychometrically justifiable." *AAIDD Manual* 40 (emphasis in original). The APA has similarly concluded that use of "a specific cut-off score is inappropriate, not only because different tests have different scoring norms, but also because designating a specific score ignores the standard error of measurement and attributes greater precision to these measures than they can support." Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 28 Mental & Physical Disability L. Rep. 11, 11 (2004); *see also DSM-5* at 37.

That does not mean that a properly administered, valid IQ test can *never* rule out mental retardation. But, in light of the measurement error in all IQ tests, if a person's obtained IQ test score on such a test is 75 or below, accepted clinical practice requires examining the person's adaptive functioning before ruling out a diagnosis of mental retardation. *See, e.g.*, Macvaugh & Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 147 (2009) (noting that because of the SEM, it is "possible to diagnose mental retardation based on an IQ score of 75 or below, as long as there is evidence of related deficits in adaptive behavior"); *DSM-5* at 37*; AAIDD Manual* 35-36; Aiken 277. As the AAIDD and APA both recognize, a fixed IQ test score cutoff of 70 prematurely ends the clinical inquiry and improperly excludes persons whose deficits in intellectual and adaptive functioning would qualify them for a diagnosis of mental retardation.

B. Florida's Rule Is Inconsistent With Clinical Practice, Places It In The Minority Of Jurisdictions, And Creates An Unacceptable Risk That Persons With Mental Retardation Will Be Executed

1. Florida's statute barring execution of persons with mental retardation could be interpreted consistently with the accepted clinical practice described above. The statute defines mental retardation (now "intellectual disability") as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla. Stat. § 921.137(1). "'[S]ignificantly subaverage general intellectual functioning[]' … means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the [Florida] Agency for Persons with Disabilities." *Id.* And the legislative staff analysis accompanying the law stated that "[t]he bill does not contain a set IQ level …. Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75." Fla. S. Staff Analysis, CS/SB 238, at 11 (Feb. 14, 2001).

The Florida Supreme Court, however, has interpreted the statute to require "a firm cutoff of 70 or below to qualify as mentally retarded," and to forbid consideration of the SEM, even though considering the SEM is necessary to an accurate determination of whether a person's IQ is in fact two standard deviations below the mean. JA119, JA121-123; *see also*, *e.g.*, *Cherry*, 959 So. 2d at 712-713. In other words, if a person's obtained IQ test score is 71 or above, Florida's interpretation of the statute mandates the legal conclusion that the individual is not a person with mental retardation, regardless of any clinical diagnosis or other evi-

dence establishing mental retardation. *See Cherry*, 959 So. 2d at 714 (because "Cherry's IQ score of 72 does not fall within the statutory range[,] … Cherry is not mentally retarded," and "we do not consider the two other prongs of the mental retardation determination").

In *Cherry*, the Florida Supreme Court acknowledged that its interpretation of the statute was inconsistent with accepted clinical practice for diagnosing mental retardation, quoting the trial court's comment that "'the +/–5 standard of error is a universally accepted given fact and, as such, should logically be considered, among other evidence, in regard to the factual finding of whether an individual is mentally retarded.'" 959 So. 2d at 712. But the Florida Supreme Court accepted the trial court's reasoning that "the statute does not use the word approximate, nor does it reference the SEM." *Id.* at 713. Since then, the Florida Supreme Court has consistently reaffirmed its position that the "plain language" of the Florida statute requires a strict IQ test score cutoff of 70. JA124 (collecting cases); *see also, e.g.*, *Franqui* v. *State*, 59 So. 3d 82, 94 (Fla. 2011) (per curiam); *Nixon* v. *State*, 2 So. 3d 137, 142-143 (Fla. 2009) (per curiam); *Jone*s v. *State*, 966 So. 2d 319, 329 (Fla. 2007) (per curiam).

2. Other death-penalty jurisdictions have rejected a rigid IQ test score cutoff of 70 as inconsistent with the clinical definition of mental retardation, either through express legislative enactments requiring consideration of the SEM or through judicial decision. *See, e.g.*, Okla. Stat. tit. 21, § 701.10b(C) ("In determining the intelligence quotient, the standard measurement of error for the test administ[er]ed shall be taken into account."); *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) ("Psychologists and other mental health professionals are flexible in their assessment of mental retar-

dation; 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." (citing AAMD, *Classification in Mental Retardation* 23 (Grossman ed., 1983))); *Pruitt* v. *State*, 834 N.E.2d 90, 106 (Ind. 2005) ("IQ tests are … not conclusive on either the subject's IQ or the ultimate question of mental retardation."); *State* v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) ("I.Q. scores are not exact and represent a range, generally considered to be five points in either direction, in which the actual score falls.").[19]

Several States, no doubt recognizing the statistical limitations of IQ measurements, regard test scores only

---

[19] *See also* Ariz. Rev. Stat. Ann. § 13-753(K)(5) ("The court in determining the intelligence quotient shall take into account the margin of error for the test administered."); *State* v. *Maestas*, 299 P.3d 892, 948 (Utah 2012) ("IQ scores are just one factor to be considered" and "courts should carefully consider other relevant evidence," "particularly … when the defendant's IQ score falls in the range spanning the cusp of clinical mental retardation"); *Ybarra* v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (some "'individuals with IQs between 70 and 75' fall into the category of subaverage intellectual functioning" "[b]ecause 'there is a measurement error of approximately 5 points in assessing IQ'"); *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) ("a fixed cutoff is inconsistent with established clinical definitions" and "IQ test scores are insufficiently precise to utilize a fixed cutoff in this context"); *Commonwealth* v. *Miller*, 888 A.2d 624, 631 (Pa. 2005) ("[W]e do not adopt a cutoff IQ score."); *Stripling* v. *State*, 401 S.E.2d 500, 504 (Ga. 1991) ("At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate."); *see also United States* v. *Davis*, 611 F. Supp. 2d 472, 475 (D. Md. 2009) ("A 'significant' limitation in intellectual functioning is best represented by an IQ score that is approximately two standard deviations below the mean as measured by appropriate instruments, and in consideration of the standard error of measurement (SEM)."). The relevant state statutes and judicial interpretations are set forth in Appendix B (11a-52a).

as establishing a presumption of retardation (or lack thereof) that can be rebutted in an individual case upon consideration of other clinical factors. *E.g.*, Neb. Rev. Stat. § 28-105.01(3) (IQ score of "seventy or below … shall be presumptive evidence of intellectual disability"); Ark. Code Ann. § 5-4-618(a)(2) ("There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.").

Florida is in a small minority of States that appear to have adopted a rigid IQ test score cutoff of 70 or to have suggested that courts may apply such a cutoff without consideration of the SEM. *See Smith* v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005); *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated and remanded on other grounds*, 544 U.S. 901 (2005); *cf. Pizzuto* v. *State*, 202 P.3d 642, 651 (Idaho 2008) (stating that the legislature "required that [IQ] be 70 or below" but permitting courts to draw "reasonable inferences" regarding SEM).[20]

---

[20] Courts in a number of States have not yet construed their statutory definitions of subaverage intellectual functioning or determined whether state law permits consideration of the SEM and the exercise of clinical judgment in interpreting borderline scores in the death-penalty context. *See, e.g.*, Conn. Gen. Stat. § 1-1g(c) ("more than two standard deviations below the mean") (repealing death penalty for new offenses, An Act Revising the Penalty for Capital Felonies, Conn. Pub. Act No. 12-5, §§ 2-3 (Apr. 25, 2012)); Del. Code Ann. tit. 11, § 4209(d)(3)(d)(3) ("70 or below"); Kan. Stat. Ann. § 76-12b01(i) ("two or more standard deviations from the mean"); N.C. Gen. Stat. § 15A-2005(a)(1)(c) ("70 or below"); Wash. Rev. Code § 10.95.030(2)(c) ("seventy or below"). Some of these States do not commonly employ capital punishment or have abolished it for new offenses (or altogether) and thus will have little or no opportunity to construe the statutory definitions at issue. *Cf.*

Indeed, Florida's definition of mental retardation for purposes of imposing the death penalty is inconsistent with its own recognition in other contexts that a strict IQ test score cutoff is inconsistent with accepted clinical practice. In defining eligibility for vocational rehabilitation services, Florida regulations explain that "[t]he DSM defines the upper range of intellectual disability (also referred to as mental retardation) as an IQ of 70 plus or minus five (5). This means that an individual may be diagnosed as mildly intellectually disabled with an IQ as high as 75 if there are significant adaptive functioning deficits." Fla. Admin. Code Ann. r. 6A-25.005(10)(b); *see also id.* 65G-4.017(3)(a) (defining eligibility for behavioral services without reference to an IQ test score cutoff and cautioning that "[a] single test or subtest should not be used alone to determine eligibility"); JA191 (Dr. Valerie McClain testifying that, for purposes of developmental services eligibility, a clinician has discretion to diagnose a person scoring in the low-to-mid 70s with mental retardation).

3. The procedure followed in Florida and the few other States that set a rigid IQ test score cutoff of 70 in capital cases presents an unacceptable risk that persons with mental retardation will be put to death. Approximately 2.3% of the population has an IQ of 70 or below. Simply by virtue of the shape of the bell curve, more than half of those people—and an even larger proportion of capital defendants with mental retardation, *see supra* n.12—will fall into the 65 to 70 range.[21] For per-

---

Atkins, 536 U.S. at 316 (observing that States with few executions have "little need to pursue legislation barring the execution of the mentally retarded" and thus their silence should not be interpreted as condoning the practice).

[21] With a normally distributed population, 1.29 percent of the population will obtain an IQ test score between 65 and 70. These

sons in that group, there is a substantial risk that the measurement errors described above will yield an obtained IQ test score above 70 notwithstanding that the person's "true" score would place him or her two standard deviations below the mean, *i.e.*, in the accepted range for mental retardation.

Focusing solely on an obtained IQ test score in isolation has negative consequences apart from failing accurately to predict a person's "true" IQ score. Mental retardation is not merely equivalent to a low IQ score. Rather, under both the AAIDD's and the APA's definitions, a person must demonstrate that his or her intellectual deficits are accompanied by substantial limitations in adaptive functioning, which "refer[s] to how well a person meets community standards of personal independence and social responsibility." *DSM-5* at 37; *see also AAIDD Manual* 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."). In some ways, limitations in adaptive functioning may be the more significant component of mental retardation. As the APA explains:

> 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 are-

---

numbers are derived from a standard normal distribution table, which is widely available. *See, e.g.*, *Standard Normal Distribution*, http://www.stat.tamu.edu/~lzhou/stat302/standardnormaltable.pdf (last visited Dec. 16, 2013).

> as of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score.

DSM-5 at 37. The level of support people with mental retardation require is thus determined by their level of adaptive functioning and not their IQ scores. *Id.* 33; *see also* APA, *DSM-5 Intellectual Disability Fact Sheet* 1-2, http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf (last visited Dec. 16, 2013) (noting that IQ test scores should not be "overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels. This is especially important in forensic cases[.]").

This Court recognized in *Atkins* that persons with mental retardation have lesser culpability, and may not constitutionally be put to death, because of their "diminished capacities … to communicate, to abstract from mistakes and learn from experience, … to control impulses, and to understand the reactions of others." 536 U.S. at 318. Yet, under Florida's rule, a person without an obtained IQ test score of 70 or below is precluded from presenting evidence of such diminished capacities, no matter how severe they may be, and notwithstanding a clinical diagnosis of mental retardation. That is consistent neither with accepted clinical practice nor with the Constitution.

III. There Is No Genuine Dispute That Under Accepted Clinical Standards, Hall Has Mental Retardation

The facts of this case make plain what is at stake. There is no genuine dispute that, when assessed according to accepted clinical standards, Hall has mental retardation. If he and others who are similarly disabled can nonetheless be executed based on a rigid IQ test

score cutoff that ignores the standard error of measurement inherent in IQ test scores, the constitutional guarantee recognized in *Atkins* will be significantly impaired.

As the Florida courts recognized, "Hall has been mentally retarded his entire life." JA46. He could not learn in school; he could not speak in a way others could understand; he could not read or write; he had few friends among his peers; and he bore an outsize share of the brutal torture directed at the children by their mother both because he could not accomplish the tasks she set and because he could not articulate any defense. After he was grown, Hall could not adequately perform even unskilled labor, he could not manage money, and he could not cook or clean for himself. Into his adulthood, Hall retained the limited understanding and the coping skills of a young child.

Hall's teachers easily recognized his disability, classifying him as "mentally retarded" no fewer than four times during his elementary school years. JA528. And virtually every psychologist or psychiatrist who conducted intelligence testing on Hall has diagnosed him as having mental retardation, beginning long before this Court's decision in *Atkins*. That is not surprising: All but one of Hall's IQ test scores on the "gold standard" testing instruments—the Wechsler tests—are consistent in clustering in the high 60s to low 70s: 69 on the WAIS-III, 71 on the WAIS-III, 72 on the WAIS-IV, 73 on the WAIS-R, and 74 on the WAIS-R. JA 85, JA104-105, JA108.[22] All of those scores are with-

[22] The one outlier, a score of 80 on the WAIS-R, is discussed above, *see supra* pp. 12 & 18 n.10.

in the 95% confidence interval for a "true" score of 70, or two standard deviations below the mean.

Those scores alone, of course, are insufficient to yield a diagnosis of mental retardation. But they would prompt any competent clinician, following the guidelines established by the AAIDD and APA, to investigate adaptive behavior. And the many clinicians who diagnosed Hall as having mental retardation did so based on ample evidence of his profound adaptive deficits—the very same adaptive deficits that this Court held in *Atkins* render execution a disproportionate punishment for persons with mental retardation, *see* 536 U.S. at 318, but that Florida barred Hall from establishing. This Court should reverse Florida's unscientific—and unconstitutional—rule and direct the Florida courts to consider that evidence:

- "Hall's functioning is, by and large, at the first grade level.... [He] is severely learning disabled." JA384 (Dr. Lewis).
- "Mr. Hall is an illiterate adult. His mathematical abilities are virtually non-existent. He is probably incapable of even the most basic living skills which incorporate math and reading … His speech is often incomprehensible and his use and understanding of language [are] no better than a nine year old[]." JA383 (Dr. Bard).
- "[Hall's] behavior [is] symptomatic of serious mental deficits. His history is characterized by poor social achievement, poor socialization and a poor environment incapable of providing sufficient nurturing. He is unable to reason abstractly … or to project consequences and [he is] easily influenced." JA392 (Dr. Toomer).

- "Mr. Hall … has difficulties in receptive and expressive language but he has even more serious and severe difficulties in written language…. [He] has severe deficits in both Community and Domestic areas of functioning … [and] across the board deficits in Interpersonal Relationships, Coping Skills, and Time Structuring. [His adaptive functioning score] is over 3 standard deviations lower than what would be expected … in a non-retarded individual." JA417 (Dr. Mosman). "Mr. Hall will continue to function [at the level] of a child who is not even a teenager." JA430.
- "[T]here is a plethora of evidence that Mr. Hall [is] mentally retarded .... He was slow reaching developmental milestones, could not learn to read or write, was gullible and easily led, communicated poorly, was considered mentally retarded throughout school, failed a military exam because of cognitive difficulties, was considered inadequate and cognitively inferior in [the Department of Corrections], could not obtain a driver's license, demonstrated gross deficits in adaptive skills, and consistently has been characterized as brain damaged, dull, and retarded by the vast majority of professionals who have evaluated him." JA454 (Dr. Prichard).

In short, if left uncorrected, the Florida Supreme Court's ruling will permit the execution of a person who clinicians have recognized (JA455) "is mentally retarded, has always been mentally retarded, and will be mentally retarded for the remainder of his life."

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

ERIC C. PINKARD
Counsel of Record
LAW OFFICE OF THE
CAPITAL COLLATERAL
REGIONAL COUNSEL
3801 Corporex Park Dr.
Suite 210
Tampa, FL 33619
pinkard@ccmr.state.fl.us
(813) 740-3544

MARK E. OLIVE
LAW OFFICES OF
MARK E. OLIVE P.A.
320 West Jefferson St.
Tallahassee, FL 32301

SETH P. WAXMAN
DANIELLE SPINELLI
MEGAN BARBERO
DANIEL T. DEACON
MATTHEW GUARNIERI
THOMAS G. SPRANKLING*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

* *Admitted to practice in the State of California. Supervision by members of the firm who are members of the District of Columbia Bar.*

DECEMBER 2013

APPENDIX

APPENDIX A

STATUTES AND RULES

Fla. Stat. § 921.137 (2012)—Imposition of the Death Sentence upon a Defendant with Mental Retardation Prohibited

(1) As used in this section, the term "mental retardation" 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 the purpose 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. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing

notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental

retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise mental retardation as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant has mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) The state may appeal, pursuant to s. 924.07, a determination of mental retardation made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.

Fla. R. Crim. P. 3.203 (2004)—Defendant's Mental Retardation As a Bar to Imposition of the Death Penalty*

(a) Scope. This rule applies in all first-degree murder cases in which the state attorney has not waived the death penalty on the record and the defendant's mental retardation becomes an issue.

(b) Definition of Mental Retardation. As used in this rule, the term "mental retardation" 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 the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B–4.032 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

(c) Motion for Determination of Mental Retardation as a Bar to Execution: Contents; Procedures.

(1) A defendant who intends to raise mental retardation as a bar to execution shall file a written

---

* In 2009, Rule 3.203 was "amended to correct technical issues." *In re Amendments to Fla. R. Crim. P.*, 26 So. 3d 534, 536 (Fla. 2009); *see also Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So. 2d 563, 569-572 (Fla. 2004) (adopting original version).

motion to establish mental retardation as a bar to execution with the court.

(2) The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint an expert chosen by the state attorney if the state attorney so requests. The expert shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(3) If the defendant has not been tested, evaluated, or examined by one or more experts, the motion shall state that fact and the court shall appoint two experts who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.

(4) Attorneys for the state and defendant may be present at the examinations conducted by court-appointed experts.

(5) If the defendant refuses to be examined or fully cooperate with the court appointed experts or the state's expert, the court may, in the court's discretion:

(A) order the defense to allow the court-appointed experts to review all mental health reports, tests, and evaluations by the defendant's expert;

(B) prohibit the defense experts from testifying concerning any tests, evaluations, or examinations of the defendant regarding the defendant's mental retardation; or

(C) order such relief as the court determines to be appropriate.

(d) Time for filing Motion for Determination of Mental Retardation as a Bar to Execution.

(1) *Cases in which trial has not commenced.* In all cases in which trial has not commenced on October 1, 2004, the motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or if the trial is set earlier than 90 days from October 1, 2004, at such time as is ordered by the court.

(2) *Cases in which trial has commenced on October 1, 2004.* In all cases in which trial has commenced on October 1, 2004, the motion shall be filed and determined before a sentence is imposed.

(3) *Cases in which a direct appeal is pending.* If an appeal of a circuit court order imposing a judgment of conviction and sentence of death is pending on October 1, 2004, the defendant may file a motion to relinquish jurisdiction for a mental retardation determination within 60 days of October 1, 2004. The motion shall contain a copy of the motion to establish mental retardation as a bar to execution and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable

grounds to believe that the defendant is mentally retarded.

(4) *Cases in which the direct appeal is final; contents of motion; conformity with Florida Rule of Criminal Procedure 3.851.*

(A) A motion for postconviction relief seeking a determination of mental retardation made by counsel for the prisoner shall contain a certification by counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is mentally retarded.

(B) If a death sentenced prisoner has not filed a motion for postconviction relief on or before October 1, 2004, the prisoner shall raise a claim under this rule in an initial rule 3.851 motion for postconviction relief.

(C) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

(D) If a death-sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court but the prisoner has not filed an appeal on or before October 1, 2004, the prisoner shall file a supplemental motion in the circuit court raising the mental retardation claim. The prisoner's time for filing an appeal of the ruled-upon postconviction mo-

tion is stayed until the circuit court rules upon the mental retardation claim.

(E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

(F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

(e) Hearing on Motion to Determine Mental Retardation. The circuit court shall conduct an evidentiary hearing on the motion for a determination of mental retardation. At the hearing, the court shall

consider the findings of the experts and all other evidence on the issue of whether the defendant is mentally retarded. The court shall enter a written order prohibiting the imposition of the death penalty and setting forth the court's specific findings in support of the court's determination if the court finds that the defendant is mentally retarded as defined in subdivision (b) of this rule. The court shall stay the proceedings for 30 days from the date of rendition of the order prohibiting the death penalty or, if a motion for rehearing is filed, for 30 days following the rendition of the order denying rehearing, to allow the state the opportunity to appeal the order. If the court determines that the defendant has not established mental retardation, the court shall enter a written order setting forth the court's specific findings in support of the court's determination.

(f) **Waiver.** A claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements.

(g) **Finding of Mental Retardation; Order to Proceed.** If, after the evidence presented, the court is of the opinion that the defendant is mentally retarded, the court shall order the case to proceed without the death penalty as an issue.

(h) **Appeal.** An appeal may be taken by the state if the court enters an order finding that the defendant is mentally retarded, which will stay further proceedings in the trial court until a decision on appeal is rendered. Appeals are to proceed according to Florida Rule of Appellate Procedure 9.140(c).

(i) **Motion to Establish Mental Retardation as a Bar to Execution; Stay of Execution.** The filing of a motion to establish mental retardation as a bar to execution shall not stay further proceedings without a separate order staying execution.

APPENDIX B

REPRESENTATIVE STATUTES AND CASES ADDRESSING DEFINITIONS OF MENTAL RETARDATION OR INTELLECTUAL DISABILITY FOR DEATH PENALTY PURPOSES*

ALABAMA

No statutory provision.

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002):

> [A] defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior.

Smith v. *State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008):

> In summary, Smith urges this Court to adopt a "margin of error" when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in *Perkins* did not adopt any "margin of error" when examining a defendant's IQ score. If this Court were to adopt a "margin of error" it would, in essence, be expanding the definition of mentally retarded[.]

---

* States marked with an asterisk have eliminated the death penalty (prospectively or entirely) since adoption of the definitions excerpted in this appendix.

ARIZONA

Ariz. Rev. Stat. Ann. § 13-753:

A. In any case in which the state files a notice of intent to seek the death penalty, a person who is found to have an intellectual disability pursuant to this section shall not be sentenced to death but shall be sentenced to life or natural life.

B. If the state files a notice of intent to seek the death penalty, the court, unless the defendant objects, shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures. The prescreening psychological expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing of the defendant. …

C. If the prescreening psychological expert determines that the defendant's intelligence quotient is higher than seventy-five, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has an intellectual disability. …

D. If the prescreening psychological expert determines that the defendant's intelligence quotient is seventy-five or less, the trial court, within ten days of receiving the written report, shall order the state and the defendant to each nominate three experts in

intellectual disabilities, or jointly nominate a single expert in intellectual disabilities. …

E. … [E]ach expert in intellectual disability shall examine the defendant using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has an intellectual disability. Within fifteen days of examining the defendant, each expert in intellectual disabilities shall submit a written report to the trial court that includes the expert's opinion as to whether the defendant has an intellectual disability. …

F. If the scores on all the tests for intelligence quotient administered to the defendant are above seventy, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has an intellectual disability. …

G. … A determination by the trial court that the defendant's intelligence quotient is sixty-five or lower establishes a rebuttable presumption that the defendant has an intellectual disability. …

* * *

K. For the purposes of this section, unless the context otherwise requires:

1. "Adaptive behavior" means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibil-

> ity expected of the defendant's age and cultural group.
>
> * * *
>
> 3. "Intellectual disability" means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.
>
> * * *
>
> 5. "Significantly subaverage general intellectual functioning" means a full scale intelligence quotient of seventy or lower. The court in determining the intelligence quotient shall take into account the margin of error for the test administered.

State v. *Roque*, 141 P.3d 368, 403 (Ariz. 2006) (citation omitted):

> The statute does not refer to individual IQ subtests or indices, but rather employs a single "intelligence quotient" as an initial measure of "significantly subaverage general intellectual functioning." This number refers to the full-scale IQ …. In addition, the statute accounts for margin of error by requiring multiple tests. If the defendant achieves a full-scale score of 70 or below on any one of the tests, then the court proceeds to a hearing.

ARKANSAS

Ark. Code Ann. § 5-4-618:

> (a)(1) As used in this section, "mental retardation" means:
>
> (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and
>
> (B) A deficit in adaptive behavior.
>
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.
>
> (b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.
>
> * * *

Rankin v. *State*, 948 S.W.2d 397, 404 (Ark. 1997):

> [U]nder § 5-4-618(a)(2) … a defendant is entitled to the presumption [of mental retardation] only if his IQ is 65 or below. …
>
> We reject Mr. Rankin's suggestion that the Trial Court was obligated … to "reduce" [the defendant's] scores by the possible three-point margin of error or "average" them together in some way.

CALIFORNIA

Cal. Penal Code § 1376:

(a) As used in this section, "intellectual disability" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age.

* * *

(c) In the event the hearing is conducted before the court prior to the commencement of the trial, the following shall apply:

(1) If the court finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and the criminal trial thereafter shall proceed as in any other case in which a sentence of death is not sought by the prosecution. …

* * *

(d) In the event the hearing is conducted before the jury after the defendant is found guilty …, the following shall apply:

(1) If the jury finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and shall sentence the defendant to confinement in the state prison for life without the possibility of parole.

* * *

In re Hawthorne, 105 P.3d 552, 557 (Cal. 2005) (citations omitted):

> [A] fixed cutoff is inconsistent with established clinical definitions and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing. Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment. Finally, IQ test scores are insufficiently precise to utilize a fixed cutoff in this context.

COLORADO

Colo. Rev. Stat. § 18-1.3-1101(2):

> "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

Colo. Rev. Stat. § 18-1.3-1103:

> A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant …. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

CONNECTICUT*

Conn. Gen. Stat. § 1-1g:

> (a) For the purposes of sections 17a-210b and 38a-816, "mental retardation" means a significant limitation in intellectual functioning and deficits in adaptive behavior that originated during the developmental period before eighteen years of age.
>
> (b) For the purposes of section[] … 53a-46a …, "intellectual disability" has the same meaning as "mental retardation" as defined in subsection (a) of this section.
>
> (c) As used in subsection (a) of this section, "significant limitation in intellectual functioning" means an intelligence quotient more than two standard deviations below the mean as measured by tests of general intellectual functioning that are individualized, standardized and clinically and culturally appropriate to the individual; and "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group as measured by tests that are individualized, standardized and clinically and culturally appropriate to the individual.

Conn. Gen. Stat. § 53a-46a(h):

> The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the of-

fense … the defendant was a person with intellectual disability, as defined in section 1-1g[.]

DELAWARE

Del. Code Ann. tit. 11, § 4209(d)(3):

a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that the defendant had a serious intellectual developmental disorder at the time the crime was committed. Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

   1. Whether the defendant has a significantly subaverage level of intellectual functioning;

   2. Whether the defendant's adaptive behavior is substantially impaired; and

   3. Whether the conditions described in paragraphs (d)(1) and (d)(2) of this section existed before the defendant became 18 years of age.

* * *

c. … If the Court finds that the defendant has established by clear and convincing evidence that the defendant had a serious intellectual developmental disorder at the time the crime was committed, notwithstanding any other provision of this section to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without

benefit of probation or parole or any other reduction. …

d. When used in this paragraph:

1. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety;

2. "Serious intellectual developmental disorder" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age; and

3. "Significantly subaverage intellectual functioning" means an intelligent quotient of 70 or below obtained by assessment with 1 or more of the standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

FLORIDA

Fla. Stat. § 921.137 (2012):[†]

> (1) As used in this section, the term "mental retardation" 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 the purpose 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. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.
>
> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

* * *

[†] In the current version of the statute, references to "mental retardation" have been replaced with references to "intellectual disability."

Cherry v. *State*, 959 So. 2d 702, 712-713 (Fla. 2007):

> Both section 921.137 and rule 3.203 provide that significantly subaverage general intellectual functioning means "performance that is two or more standard deviations from the mean score on a standardized intelligence test." One standard deviation on the WAIS–III, the IQ test administered in the instant case, is fifteen points, so two standard deviations away from the mean of 100 is an IQ score of 70. As pointed out by the circuit court, the statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear.

GEORGIA

Ga. Code Ann. § 17-7-131:

> (a) For purposes of this Code section, the term:
>
> * * *
>
> (3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.
>
> * * *
>
> (j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the

> crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

Stripling v. *State*, 401 S.E.2d 500, 504 (Ga. 1991) (citation omitted):

> "Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."

IDAHO

Idaho Code Ann. § 19-2515A:

> (1) As used in this section:
>
> (a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limi-

tations in adaptive functioning must occur before age eighteen (18) years.

(b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

* * *

(3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed. The jury shall not be informed of the mental retardation hearing or the court's findings concerning the defendant's claim of mental retardation.

* * *

Pizzuto v. *State*, 202 P.3d 642, 651 (Idaho 2008) (citation omitted):

> [W]hen enacting Idaho Code § 19-2515A(1), 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. Although Pizzuto argued that the district court should infer that Pizzuto's actual IQ was lower than his test score, the court could just as reasonably have inferred that it was higher. The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts. It would be just as reasonable to infer that Pizzuto's IQ on December 12, 1985, was 77 as it would be to infer that it was 67.

ILLINOIS*

725 Ill. Comp. Stat. 5/114-15:

* * *

(d) In determining whether the defendant is intellectually disabled, the intellectual disability must have manifested itself by the age of 18. IQ tests and psychometric tests administered to the defendant must be the kind and type recognized by experts in the field of intellectual disabilities. In order for the defendant to be considered intellectually disabled, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work. An intelligence quotient (IQ) of 75 or below is presumptive evidence of an intellectual disability.

* * *

(f) If the court determines at a pretrial hearing or after remand that a capital defendant is intellectually disabled, and the State does not appeal pursuant to Supreme Court Rule 604, the case shall no longer be considered a capital case and the procedural guidelines established for capital cases shall no longer be applicable to the defendant. …

INDIANA

Ind. Code § 35-36-9-2:

> As used in this chapter, "individual with mental retardation" means an individual who, before becoming twenty-two (22) years of age, manifests:
>
> (1) significantly subaverage intellectual functioning; and
>
> (2) substantial impairment of adaptive behavior;
>
> that is documented in a court ordered evaluative report.

Ind. Code § 35-36-9-6:

> If the court determines that the defendant is an individual with mental retardation under section 5 of this chapter, the part of the state's charging instrument … that seeks a death sentence against the defendant shall be dismissed.

Ind. Code § 35-36-9-7:

> If a defendant who is determined to be an individual with mental retardation under this chapter is convicted of murder, the court shall sentence the defendant under IC 35-50-2-3(a) [providing for a fixed term of imprisonment between forty-five and sixty-five years, with the advisory sentence being fifty-five years].

Pruitt v. *State*, 834 N.E.2d 90, 106 (Ind. 2005):

> IQ tests are only evidence; they are not conclusive on either the subject's IQ or the ultimate question of mental retardation.

KANSAS

Kan. Stat. Ann. § 21-6622:

* * *

(f) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is a person with intellectual disability, the court shall sentence the defendant as otherwise provided by law, and no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed hereunder.

* * *

(h) As used in this section, "intellectual disability" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01, and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

Kan. Stat. Ann. § 76-12b01:

When used in this act:

* * *

(d) "Intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.

* * *

> (i) "Significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary.
>
> * * *

State v. *Backus*, 287 P.3d 894, 905 (Kan. 2012):‡

> Backus' school records indicated that his test scores from 1993, 1999, and 2003 did not qualify him for special education services. More to the point, Backus' test score did not meet the statutory definition of mentally retarded because it was not two standard deviations or more below the mean. Accordingly, the district court did not err in finding insufficient reason to believe that Backus was mentally retarded.

KENTUCKY

Ky. Rev. Stat. Ann. § 532.130(2):

> A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a defendant with a serious intellectual disability. "Significantly subaverage general intellectual

‡ The Supreme Court of Kansas has not construed the State's statutory definition of intellectual disability in a capital case. *Backus* is not a capital case but construed an identical definition. *See Backus*, 287 P.3d at 904 (citing Kan. Stat. Ann. § 21-4634(h) (now codified at Kan. Stat. Ann. § 21-6622(h))); *see also* 2010 Kan. Sess. Laws ch. 136, § 262 (recodification).

functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

Ky. Rev. Stat. Ann. § 532.135:

* * *

(4) … If it is determined the defendant is an offender with a serious intellectual disability, he shall be sentenced as provided in KRS 532.140.

Ky. Rev. Stat. Ann. § 532.140:

(1) … [N]o offender who has been determined to be an offender with a serious intellectual disability under the provisions of KRS 532.135, shall be subject to execution. …

* * *

Bowling v. *Commonwealth*, 163 S.W.3d 361, 375 (Ky. 2005) (footnote omitted):

Both the potential margin of error and the "Flynn effect" were known at the time our statutes were enacted. The General Assembly chose not to expand the mental retardation ceiling by requiring consideration of those factors, but instead, like most other states that quantify the definition, chose a bright-line cut-off ceiling of an IQ of 70, a generally recognized level at which persons are considered mentally retarded.

LOUISIANA

La. Code Crim. Proc. Ann. art. 905.5.1:

> A. Notwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death.
>
> * * *
>
> H. (1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.
>
> * * *

State v. *Dunn*, 41 So. 3d 454, 470 (La. 2010) (footnote omitted):

> As discussed previously, I.Q. scores are not exact and represent a range, generally considered to be five points in either direction, in which the actual score falls. Even within said range, there is still only a 95% confidence level the subject's true I.Q. is represented. As part of the representation for the *Atkins* hearing, the defendant was tested three times, and received I.Q. scores of 69, 75, and 75. The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired.

MARYLAND*

Md. Code Ann., Crim. Law § 2-202(b):

* * *

(1) In this subsection, a defendant is "mentally retarded" if:

(i) the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and an impairment in adaptive behavior; and

(ii) the mental retardation was manifested before the age of 22 years.

(2) A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole … if the defendant:

* * *

(ii) proves by a preponderance of the evidence that at the time of the murder the defendant was mentally retarded.

MISSISSIPPI

No statutory provision.

Chase v. *State*, 873 So. 2d 1013, 1029 n.20 (Miss. 2004) (en banc) (citation omitted):

> [T]he cutoff score for the intellectual functioning prong of the test is 75. Thus, defendants with an IQ of 76 or above do not qualify for Eighth Amendment *Atkins* protection.

MISSOURI

Mo. Rev. Stat. § 565.030:

* * *

4. … The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

   (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded[.]

* * *

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

* * *

Goodwin v. *State*, 191 S.W.3d 20, 30-31 (Mo. 2006) (en banc) (footnote omitted):

> In fact, Goodwin has eight independent intelligence tests spread over twenty years that indicated that Goodwin is not retarded. Only one of these tests is even arguably within a five-

point margin of error attributed to the Wechsler scale, and it is inadequate to raise a triable issue of fact. Goodwin cannot make the initial showing of "significantly subaverage intellectual functioning" as demonstrated by his IQ, which places him consistently in the mid-seventies to eighties.

NEBRASKA

Neb. Rev. Stat. § 28-105.01:

* * *

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with an intellectual disability.

(3) As used in subsection (2) of this section, intellectual disability means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of intellectual disability.

* * *

State v. *Vela*, 777 N.W.2d 266, 304-305 (Neb. 2010) (footnote omitted):

[T]he [district] court found that Vela's full-scale score of 75 on the WAIS-III should be considered, in light of the standard error of measurement, to include a "range between 75 and 70." … The State argues that although the district court properly "relied upon an unchallenged IQ score of 75, which is the highest pos-

sible score professionally considered to possibly raise a question of mental retardation," it should not have considered the range of scores produced by the standard error of measurement when determining whether Vela had established that he had significantly subaverage general intellectual functioning. Because, as explained below, we agree with the district court that Vela failed to show deficits in his adaptive behavior and thus is not a person with mental retardation, we decline to address the State's argument.

NEVADA

Nev. Rev. Stat. § 174.098:

* * *

6. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed to the Supreme Court pursuant to NRS 177.015.

7. For the purposes of this section, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

Ybarra v. *State*, 247 P.3d 269, 274 (Nev. 2011) (en banc) (citations omitted):

> The first concept—significant limitations in intellectual functioning—has been measured in large part by intelligence (IQ) tests. Because "there is a measurement error of approximately 5 points in assessing IQ," which may vary depending on the particular intelligence test given, the clinical definitions indicate that "individuals with IQs between 70 and 75" fall into the category of subaverage intellectual functioning. Although the focus with this element of the definition often is on IQ scores, that is not to say that objective IQ testing is required to prove mental retardation. Other evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records.

NEW JERSEY*

No statutory provision.

State v. *Jimenez*, 908 A.2d 181, 184 n.3 (N.J. 2006) (citation omitted):

> Both the trial court and the Appellate Division accepted the definition of mental retardation found in the DSM-IV as the standard to be met when an *Atkins* claim is raised. That standard has not been challenged by the defendant or the State. … Because the DSM-IV definition recognizes a measurement error of five points in assessing I.Q., persons with I.Q.s between 70 and 75 who exhibit significant deficits in adaptive behavior may be mentally retarded. Moreover, impairments in adaptive functioning,

and not low I.Q., are generally the presenting indicators of mental retardation. Persons with mild mental retardation I.Q. levels of 50-55 to approximately 70 represent the largest subgroup (about 85%) of the mentally retarded.

NEW MEXICO*

N.M. Stat. Ann. § 31-20A-2.1:

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

* * *

NEW YORK*

N.Y. Crim. Proc. Law § 400.27(12)(e):

The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing

without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. … For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

NORTH CAROLINA

N.C. Gen. Stat. § 15A-2005:

(a)(1) The following definitions apply in this section:

a. Mentally retarded.—Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning.—Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning.—An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed

> psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.
>
> (b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.
>
> * * *

State v. *Locklear*, 681 S.E.2d 293, 311 (N.C. 2009) (citations omitted):

> [T]he jury often has the unenviable task of identifying "gray area" defendants; that is, those offenders who are not *clearly* mentally retarded but who may nevertheless present enough evidence of mental retardation to render them ineligible for the death penalty. Notably, the defendant's burden of production and persuasion to show mental retardation to the jury at the sentencing stage is lower than that required at the pretrial hearing stage. The defendant must only "demonstrate mental retardation to the jury by a preponderance of the evidence." The lesser burden of proof indicates legislative awareness of "gray area" defendants and lawmakers' intent to protect against the inadvertent execution of mentally retarded offenders.

OHIO

No statutory provision.

State v. *Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam) (citation omitted):

> While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

OKLAHOMA

Okla. Stat. tit. 21, § 701.10b:

> A. For purposes of this section:
>
> 1. "Mental retardation" or "mentally retarded" means significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning;
>
> 2. "Significant limitations in adaptive functioning" means significant limitations in two or more of the following adaptive skill areas; communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills and work skills; and
>
> 3. "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.
>
> B. Regardless of any provision of law to the contrary, no defendant who is mentally re-

tarded shall be sentenced to death; provided, however, the onset of the mental retardation must have been manifested before the defendant attained the age of eighteen (18) years.

C. … An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years. In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account.

However, in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.

* * *

E. The district court shall conduct an evidentiary hearing to determine whether the defendant is mentally retarded. If the court determines, by clear and convincing evidence, that the defendant is mentally re-

> tarded, the defendant, if convicted, shall be sentenced to life imprisonment or life without parole. …
>
> * * *

Smith v. *State*, 245 P.3d 1233, 1237 (Okla. Crim. App. 2010):

> [W]hile the language of section 701.10b directs that an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above. … By directing that no defendant be considered mentally retarded who has received an I.Q. score of 76 or above on *any* scientifically recognized standardized test, the Legislature has implicitly determined that any scores of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70.

Murphy v. *State*, 281 P.3d 1283, 1288 (Okla. Crim. App. 2012):

> The Legislature has given capital defendants in Oklahoma the benefit of the standard measurement of error for the intelligence quotient test administered.

PENNSYLVANIA

No statutory provision.

Commonwealth v. *Miller*, 888 A.2d 624, 630, 631 (Pa. 2005) (citations omitted):

> Limited or subaverage intellectual capability is best represented by IQ scores, which are approximately two standard deviations (or 30 points) below the mean (100). The concept should also take into consideration the standard error of measurement (hereinafter "SEM") for the specific assessment instruments used. The SEM has been estimated to be three to five points for well-standardized measures of general intellectual functioning. Thus, for example, a subaverage intellectual capability is commonly ascribed to those who test below 65-75 on the Wechsler scales. …
>
> * * *
>
> [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.

SOUTH CAROLINA

S.C. Code Ann. § 16-3-20:

* * *

> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigat-

ing circumstances which may be supported by the evidence:

* * *

(b) Mitigating circumstances:

* * *

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

* * *

Franklin v. *Maynard*, 588 S.E.2d 604, 605 (S.C. 2003) (per curiam) (footnote omitted):

> We find it inappropriate to create a definition of mental retardation [for purposes of *Atkins*] different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10) (2003) (mental retardation is a statutory mitigating circumstance). Section 16-3-20(C)(b)(10) defines mental retardation as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

SOUTH DAKOTA

S.D. Codified Laws § 23A-27A-26.1:

> Notwithstanding any other provision of law, the death penalty may not be imposed upon

any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.

S.D. Codified Laws § 23A-27A-26.2:

As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning.

TENNESSEE

Tenn. Code Ann. § 39-13-203:

(a) As used in this section, "intellectual disability" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with intellectual

> disability at the time of committing first degree murder shall be sentenced to death.
>
> * * *

Coleman v. *State*, 341 S.W.3d 221, 241 (Tenn. 2011):

> The statute does not require a "functional intelligence quotient *test score* of seventy (70) or below." Because the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded that the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below.

TEXAS

No statutory provision.

Ex parte Briseno, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) (citation omitted):

> Psychologists 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. Furthermore, IQ tests differ in content and accuracy.

UTAH

Utah Code Ann. § 77-15a-101(1):

> A defendant who is found by the court to be mentally retarded as defined in Section 77-15a-102 is not subject to the death penalty.

Utah Code Ann. § 77-15a-102:

> As used in this chapter, a defendant is "mentally retarded" if:
>
> (1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and
>
> (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

State v. *Maestas*, 299 P.3d 892, 948 (Utah 2012), *cert. denied*, 133 S. Ct. 1634 (2013) (footnote omitted):

> But we note that IQ scores are just one factor to be considered in determining if the defendant has [significantly subaverage general intellectual functioning]. The testing instrument or other circumstances may result in an IQ score that does not truly reflect a defendant's intellectual functioning. Thus, courts should carefully consider other relevant evidence of intellectual impairment. This is particularly true when the defendant's IQ score falls in the range spanning the cusp of clinical mental retardation.

VIRGINIA

Va. Code Ann. § 19.2-264.3:1.1:

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

> "Mentally retarded" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include infor-

> mation from multiple sources. The Commissioner of Behavioral Health and Developmental Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.
>
> * * *

Johnson v. *Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated and remanded on other grounds*, 544 U.S. 901 (2005):

> The record also shows that Johnson was administered two standardized tests, commonly known as I.Q. tests, which met the descriptive criteria of Code § 19.2-264.3:1.1(A)(i). His scores of 75 and 78 on these I.Q. tests exceed the score of 70 that the General Assembly has chosen as the threshold score below which one may be classified as being mentally retarded.

WASHINGTON

Wash. Rev. Code § 10.95.030:

> * * *
>
> (2) … In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual dis-

abilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

UNITED STATES

18 U.S.C. § 3596(c):

> Mental capacity.—A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

Ortiz v. *United States*, 664 F.3d 1151, 1168 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 2763 (2013):

> Ortiz is correct in his assertion that his test scores, viewed in isolation, could support a finding of mental retardation. But such test scores are imprecise and standing alone cannot support a diagnosis. Instead, qualified experts must interpret those results for the subject individual. *See Wiley* v. *Epps*, 625 F.3d 199, 215, 217 (5th Cir. 2010) (explaining "'[t]he calculation of a person's IQ score is imprecise at best and may come down to a matter of the examiner's judgment'" …).

United States v. *Davis*, 611 F. Supp. 2d 472, 475 (D. Md. 2009) (citation omitted):

> A "significant" limitation in intellectual functioning is best represented by an IQ score that is approximately two standard deviations below the mean as measured by appropriate instruments, and in consideration of the standard error of measurement (SEM). Most standardized IQ assessment tests are normalized so that the average score is 100 with a standard devia-

tion of 15. Therefore, an IQ score two standard deviations below the mean—the benchmark for mental retardation—is approximately 70. However, the SEM in IQ assessments is approximately 5 points, therefore raising the operational definition of mental retardation to 75.

Vocational Plans	Educational Plans	Work Away From Home	Travel and Vacation Experiences	Special Interests and Hobbies	Home Room Teacher

15. G ANCE AND COUNSELING

Teacher or Counselor	SPECIAL INTERESTS, OBSERVATIONS, SUGGESTIONS, AND RECOMMENDATIONS	FOLLOW-UP	Date
N. d. Johnson	His mental maturity [illegible] far below his chronological age	Providing [illegible] that will [illegible] his mental achievement.	5/20/52
N. F. Johnson	I have found Freddie to be very inattentive and extra slow in comprehension. He is slow in all of his work.	Special teacher	
E. D. Lipp			
E. P. Morse	Mentally retarded.		6/20/55
G. Cato W.	Freddie is slow in all phases of work.	Mentally maladjusted	
W. C. Gainey	Mentally Retarded	Special teacher	
E. P. Morse	Mentally retarded	" "	5/31/5[illegible]
E. E. Abney	" "		