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Brief of Amicus Curiae, The American Association on Intellectual and Developmental Disabilities, The Arc of the United States, The National Disability Rights Network, Disability Rights Florida, and The Bazelon Center for Mental Health Law in support of Petitioner

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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 OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Florida scheme for identifying mentally retarded defendants in capital cases violates *Atkins v. Virginia*, 536 U.S. 304 (2002).

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the American Bar Association (the "ABA") respectfully submits this brief in support of Petitioner. While the ABA takes no position on the death penalty *per se*, the ABA asserts that before any defendant claiming mental retardation should be eligible for the death penalty, the defendant should be entitled to establish, pursuant to a constitutionally appropriate test, that both his or her level of intellectual functioning and conceptual, social and practical adaptive skills fall within the definitions used by recognized mental disability organizations for determining mental retardation.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include prosecutors, public defenders and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. Its members also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of the positions in it.

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. The ABA has long taken a special interest in the equitable treatment of individuals with mental retardation and mental disabilities and, since at least 1961, has published numerous books and studies on mental disability law.[3]

In addition to its focus on the treatment of individuals with mental disabilities, the ABA has an equally well-established concern that the death penalty be enforced with appropriate procedural protections and in a fair and unbiased fashion, and in a manner that minimizes the risk that innocent persons may be executed. In 1986, the ABA founded

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[3] These publications include:

- Starting in 1961, the ABA issued several editions of *The Mentally Disabled and the Law*, a comprehensive and detailed overview of state laws in a wide variety of areas affecting people with mental disabilities, including criminal justice issues.
- In 1973, the ABA formed its Commission on Mental and Physical Disability Law (now known as the Commission on Disability Rights) which, since 1976, has published the *Mental & Physical Disability Law Reporter*, a widely respected journal in the field of disability law.
- In the early 1980s, in collaboration with disability and clinical professional organizations, the ABA conducted an interdisciplinary study of criminal justice issues affecting defendants with mental disabilities, resulting in the *Criminal Justice Mental Health Standards*, which were subsequently incorporated into the *ABA Standards for Criminal Justice.*
- In 1982, the ABA published *Disabled Persons and the Law: State Legislative Issues*, which included proposed model statutes for the states, with particular attention to individuals with mental retardation.

the ABA Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death penalty jurisdictions.[4] And, in 1989, the ABA adopted policy stating "that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed." ABA Policy No. 110 (adopted Feb. 1989).[5] This definition was: "Mental retardation refers to significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."[6] The ABA reaffirmed this position in 1997, when it adopted policy supporting a suspension of executions until states had implemented a number of reforms, including "preventing execution

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[4] Information on the ABA Death Penalty Representation Project may be found at: http://www.americanbar.org/groups/committees/death_penalty_representation.html.

[5] ABA House of Delegates Resolution 110 (1989), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1989_my_110.authcheckdam.pdf. ABA policy must be adopted by vote of the ABA's House of Delegates ("HOD"). Today, the HOD includes more than 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.americanbar.org/groups/leadership/house_of_delegates.html.

[6] ABA House of Delegates Resolution 110 (1989), *supra* note 5 (quoting American Association on Mental Retardation, CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed., 1983)).

of mentally retarded persons." ABA Policy No. 107 (adopted Feb. 1997).[7]

Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), the ABA:

- In 2003, revised the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*"), to emphasize the importance for counsel working with mental disability professionals to understand potential issues of mental retardation, and to collect, develop and present evidence regarding the client's mental retardation, cognitive limitations and learning disabilities, which are relevant to potential defenses;[8]
- In 2003, published *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, which included model legislation

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[7] ABA House of Delegates Resolution 107 (1997), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1997_my_107.authcheckdam.pdf.

[8] *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf; *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 2003 revisions, *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.pdf. The *ABA Guidelines* were first adopted in 1989 to "amplify previously adopted Association positions on effective assistance of counsel in capital cases," and to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 1989.

showing how states could implement the *Atkins* decision;[9]

- In 2003, established, through its Section on Individual Rights and Responsibilities ("IR&R"), the Task Force on Mental Disability and the Death Penalty ("Task Force"), which was composed of 24 lawyers and mental health practitioners and academics, including members of the American Psychiatric Association and the American Psychological Association, to examine the imposition of the death penalty on persons with mental retardation and other mental, psychological, or psychiatric conditions and limitations;[10]
- In 2006, adopted as policy the conclusion of IR&R's Task Force that defendants "should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation . . . ;"[11] and
- Between 2006 and 2013, through the ABA's Death Penalty Due Process Review Project,

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[9] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2003), *available at* www.deathpenaltyinfo.org/documents/MREllisLeg.pdf.

[10] *See* ABA House of Delegates Resolution 122A (2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf (adopting the Task Force's proposal).

[11] *Id.*

> conducted assessments of the operation of the death penalty in twelve states, including Florida, that together represent almost 65% of the executions that have been carried out since *Gregg v. Georgia*, 428 U.S. 123 (1976). These assessments include analyses of whether a state has implemented procedures and properly trained counsel to determine whether a capital defendant or death row inmate has mental retardation and thus cannot be subject to the death penalty.[12]

Based on these and other examinations by the ABA of the issues involved in the application of the death penalty to individuals with mental retardation, the ABA submits this *amicus* brief to assist the Court in considering whether Florida has established a constitutionally reliable test for determining whether a defendant who has asserted mental retardation should nevertheless be eligible for the death penalty.

SUMMARY OF ARGUMENT

In *Atkins*, this Court concluded that a national consensus had developed against the execution of persons with mental retardation and that such executions violated the Eighth Amendment. The Court also stated that the national consensus suggests that some characteristics of mental retardation, such as disabilities in the areas of reasoning, judgment, and control of impulses, undermine the procedural protections of our capital punishment jurisprudence and can jeopardize the reliability and fairness of

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[12] A copy of all assessments may be found at: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments.html.

capital proceedings against defendants with mental retardation.

Although the *Atkins* Court left to the states the task of determining whether a defendant has mental retardation, the Court noted its approval of state statutory definitions that generally conform to the clinical definitions of professional mental disability organizations, such as the American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly the American Association on Mental Retardation (AAMR)) and the American Psychiatric Association (APA).[13]

In the eleven years since *Atkins* was decided, states have taken differing approaches to fulfilling this mandate. Many of these states have followed *Atkins*' guidance and have implemented tests that, consistent with the definitions used by recognized mental disability organizations, consider assessments of both an individual's intellectual functioning (*i.e.*, IQ tests), including the standard margin of error or specific facts about the administration and scoring of the test, and an individual's conceptual, social and practical skills.

Florida courts, however, have adopted a test that individuals who have a raw IQ score above 70 do not have mental retardation, without consideration of the standard margin of error or factors including cognitive and behavioral impairments that are encompassed in the definitions of mental disability professionals. In

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[13] The AAIDD defines mental retardation as "a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills." *Definition,* AAIDD*, available at* http://aaidd.org/intellectual-disability/definition#.UrJVfNJDs2c.

doing so, Florida has erected a test with no foundation in scientifically recognized definitions that prevents an accurate assessment of whether a defendant has mental retardation and allows for the execution of individuals with mental retardation who would not be executed in states that have followed *Atkins*' guidance. This, the ABA asserts, is an arbitrary and capricious application of the death penalty that denies the constitutional protection mandated by *Atkins* for the full range of defendants with mental retardation.

ARGUMENT

FLORIDA SHOULD NOT BE PERMITTED TO UNDERMINE *ATKINS V. VIRGINIA* BY ERECTING A TEST THAT PREVENTS ACCURATE ASSESSMENT OF A DEFENDANT'S MENTAL RETARDATION.

A. The Rights of Defendants with Mental Retardation Warrant the Utmost Constitutional Protection.

In *Atkins*, the Court held that the execution of defendants with mental retardation violated the Eighth Amendment and that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This holding was based on a "national consensus" against the execution of these defendants, which provided "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* at 316. In addition, the Court was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty." *Id.* at 321. As the Court

explained, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. And, "the same cognitive and behavioral impairments that make these defendants less morally culpable" make it less likely that the possibility of execution will act as a deterrent. *Id.* at 320.

In addition, the Court stated that the national consensus "suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* at 317. These characteristics, such as "disabilities in the areas of reasoning, judgment, and control of their impulses," moreover, "can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* at 306-07.

The ABA respectfully asserts that any defendant claiming mental retardation should be entitled to establish "the lesser culpability of the mentally retarded offender," *id.* at 319, pursuant to a constitutionally appropriate test that evaluates both the defendant's level of intellectual functioning and his or her conceptual, social and practical adaptive skills. As is well established in the legal literature and by the ABA's work in this field, defendants with mental retardation may:

- mask their disability, making it difficult for counsel to realize that the client is an individual with mental retardation;[14]

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[14] *See*, *e.g.*, *ABA Guidelines*, Guideline 10.5 ("Relationship with the Client"), Commentary at 1009 n.183 (overcoming barriers to

- find it difficult to recall information that will aid counsel, or have difficulty answering open-ended questions;[15]
- act as if they understand their attorneys, adapt responses in favor of what they believe attorneys want them to say, or provide answers that are unrelated to the actual facts of the crime;[16] and

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communication and establishing rapport with defendant are critical to effective communication and to obtain vital information, an important example of which is the fact that the client is mentally retarded – a fact that the client may conceal with great skill, but one which counsel absolutely must know) (citing James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985) and *Atkins*, 536 U.S. at 321). *See also* Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITIES L. REP. 529, 531 (1998); Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 97, 99-100 (Ronald W. Conley, et al., eds., 1992).

[15] *See* Ellis & Luckasson, *supra* note 14, at 428-29. ("Because few mentally retarded people are able to determine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts."); *see also* Robert Perske, UNEQUAL JUSTICE 15-16 (1991).

[16] *See* Ellis & Luckasson, *supra* note 14, at 428-29. ("Clients with mental retardation tend to act as though they understand their attorneys when they do not, and to bias their responses in favor of what they believe their attorneys want them to say in the direction of concrete, though inaccurate, responses.").

- be unable to monitor defense counsel's performance or involve themselves in the defense strategy, as they do not comprehend the criminal justice process.[17]

Florida's test does not provide adequate protection against any of these risks to the procedural protections of our capital jurisprudence or to "the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.* at 306-07. As discussed below, Florida's assumption that a defendant with severe social, cognitive, or behavioral impairments is capable of meaningfully participating in his or her defense solely because he or she has an IQ test result above 70 is scientifically unjustifiable and results in an arbitrary and capricious application of the death penalty.

B. Florida's Test Undermines *Atkins*.

In *Atkins*, the Court left to the "[s]tates the task of developing appropriate ways to enforce the constitutional restriction" on execution of those who suffer from mental retardation. 536 U.S. at 317. The Court, however, did not suggest that states could undermine *Atkins* through the use of tests that do not comport with scientific consensus, and accordingly, do not afford the protection of the Eighth Amendment to

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[17] *See* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 423 (1990) ("fairness of adjudication in most cases involving defendants with mental retardation depends largely on the ability and inclination of the attorney to recognize and to compensate for the client's limitations" and "the risks of inadequate representation are magnified when the client has mental retardation . . . because the client is in no position to monitor the attorney's performance even in a superficial way").

the full range of individuals with mental retardation. Untethered from scientifically accepted definitions of mental retardation, Florida's test results in individuals with mental retardation in Florida being excluded from constitutional protection properly afforded to them in other jurisdictions.

1. Florida's Test Ignores *Atkins*' Guidance on the Use of Scientifically Accepted Definitions of Mental Retardation.

Implicit in the Court's delegation to the states was the Court's guidance that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth [by the AAMR (now the AAIDD) and the APA]." *Id.* at 317 n.22 (citing *id.* at 309 n.3). These "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction . . . ." *Id.* at 318.

In the eleven years since *Atkins*, the vast majority of states have implemented rules that are consistent with the definitions used by mental disability professionals in considering a defendant's intellectual functioning. Many states, for example, allow courts to consider the standard margin of error or specific facts about the administration and scoring of IQ tests.[18] A

[18] For example, the Supreme Court of Tennessee has held that a defendant's raw IQ test scores are not to be treated at "face value" and has permitted defendants to introduce evidence regarding these scores, including margins of error. *See Coleman v. State*, 341 S.W.3d 221, 242, 247 (Tenn. 2011). *See also State v. Pruitt*, 2013 WL 5530772, at *17 (Tenn. 2013) (stating that experts may testify to the AAIDD recognized "challenges to the reliability and validity of I.Q. test scores, among which are the

number of other states have recognized that a conclusion regarding whether an individual has mental retardation requires a multi-faceted analysis.[19] As the Pennsylvania Supreme Court stated in *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005), "[i]t is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation."

In contrast, Florida's test relies only on a raw IQ score and ignores both the standard margin of error and the relevant scientific evidence of mental retardation (such as adaptive skills) that are included

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standard error of measurement, the Flynn Effect, and the practice effect."). Similarly, the Supreme Court of Indiana considered both margins of error associated with a defendant's tests and expert testimony regarding the test's administration. *State v. Pruitt*, 834 N.E.2d 90, 104-06 (Ind. 2005). Arizona's statutory definition of mental retardation similarly takes into account the "margin of error for the test administered." Ariz. Rev. Stat. Ann. § 13-753(K)(5).

[19] *See*, *e.g.*, *Rogers v. State*, 653 S.E.2d 31, 35 (Ga. 2007) (stating that "Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*" and that "there are no 'hypertechnical' requirements that a defendant have certain test scores in order to be found mentally retarded"); *Goodwin v. State*, 191 S.W.3d 20, 30 (Mo. 2006) (applying definition of mental retardation from DSM-IV in evaluating whether defendant had "significantly subaverage intellectual functioning"); *Commonwealth v. Miller*, 888 A.2d 624, 629-32 (Pa. 2005) (consistent with the AAIDD and APA definitions, court would "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"); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (an IQ test is "one of the many factors that need to be considered" and alone is "not sufficient to make a final determination on the issue [of mental retardation]").

in the definitions adopted by mental disability organizations. With no foundation in scientifically recognized definitions, Florida's rigid test necessarily excludes individuals with mental retardation whom the Court expressly intended to receive constitutional protection.

This type of nullification has been rejected by this Court, which has held that this Court's decisions "can neither be nullified openly and directly by state legislators . . . nor nullified indirectly . . . through evasive schemes . . . ." *Cooper v. Aaron*, 358 U.S. 1, 17, 18 (1958). *See also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

2. By Preventing Accurate Assessment of a Defendant's Mental Retardation, Florida's Test Results in the Arbitrary and Capricious Imposition of Death Sentences.

Florida's failure to adopt a scientifically-based definition of mental retardation means that the same individual could be eligible for the death penalty in Florida, but not in another state that defines mental retardation in a scientifically valid manner.

Indeed, under Florida's test, the courts below were foreclosed from considering both Mr. Hall's IQ score as a range, based on the standard error of measurement, and his deficits in adaptive behavior, as set out in the definitions of the AAIDD and APA. Instead, they were required to consider only whether Mr. Hall's IQ score was below a bright-line cut-off of 70. *See Hall v. State*, 109 So.3d 704, 719-20 (Fla. 2012) (Perry, J.,

dissenting).[20] In contrast, in *State v. Gumm*, the Court of Appeals of Ohio affirmed the trial court's determination that a defendant successfully established mental retardation through expert evidence concerning the standard error of measurement, where the defendant had IQ test scores ranging between 67 and 79. 864 N.E.2d 133, 136-40 (Ohio Ct. App. 2006).[21]

While *Atkins* left the states leeway in determining mental retardation, Florida's rigid and unscientific test is not consistent with *Atkins*, nor is it consistent with basic notions of fairness. *See Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005) ("Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum. The Eighth Amendment must have the same content in all United States jurisdictions."); Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L.J. 1203, 1230 (2008) ("Rigid rules that result in arbitrary decisions—such as Florida's categorical refusal to consider the standard error of measurement-promote unfairness and undercut the public's trust in our system of justice."); *cf. Kennedy v.*

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[20] *See also* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT 368 (Sept. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf.

[21] *See also* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT 371-72 (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/ohio_chapter13.authcheckdam.pdf.

Louisiana, 554 U.S. 407, 447 (2008) (discussing the need to avoid "arbitrary and capricious application" of the death penalty).

This Court's holding in *Atkins* is clear—the execution of an individual with mental retardation violates the Eighth Amendment. 536 U.S. at 321. As results from the ABA's Death Penalty Due Process Review Project—and this case—have shown, however, *Atkins*' holding has not guaranteed that individuals with mental retardation will not unlawfully be found eligible for the death penalty when a state's definition of mental retardation is not in accord with scientific understanding of mental retardation.[22] In disregarding *Atkins*' guidance concerning the definitions used by recognized mental disability organizations in determining whether an offender has mental retardation, Florida has erected a test that prevents accurate assessment and poses the grave—and unacceptable—risk that individuals with mental retardation will be unconstitutionally executed. This, the ABA asserts, results in an arbitrary and capricious application of the death penalty that denies the constitutional protection mandated by *Atkins* for all defendants with mental retardation.

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[22] *See* ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, *supra* note 20.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the American Bar Association respectfully submits that the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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