

**CAPITAL CASE
No. 14-7506**

IN THE
Supreme Court of the United States

ABELARDO ARBOLEDA ORTIZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF OF *AMICI CURIAE*
THE ARC OF THE UNITED STATES
AND THE BAZELON CENTER FOR
MENTAL HEALTH LAW
IN SUPPORT OF PETITIONER**

SHIRA T. WAKSCHLAG
Counsel of Record
MARTHA E. FORD
THE ARC OF THE UNITED STATES
1825 K Street, NW
Suite 1200
Washington, DC 20006
(202) 534-3708
Wakschlag@TheArc.org
Counsel for Amici Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
I. THE CONSTITUTION PROHIBITS THE EXECUTION OF INDIVIDUALS WITH INTELLECTUAL DISABILITY. THE EVIDENCE PRESENTED IN THIS CASE SUPPORTS THE CONCLUSION THAT MR. ORTIZ MEETS THE CRITERIA OF INTELLECTUAL DISABILITY. THEREFORE, HIS EXECUTION IS PROHIBITED BY THE CONSTITUTION.....	4
II. IN DETERMINING WHETHER INTELLECTUAL DISABILITY IS PRESENT, <i>HALL</i> AND <i>ATKINS</i> REQUIRE THIS COURT TO CONSIDER THE CONSENSUS OF THE SCIENTIFIC COMMUNITY.....	6
A. The Definition of Intellectual Disability.....	6
III. THE EVIDENCE HAS ESTABLISHED THAT MR. ORTIZ MEETS THE CRITERIA OF INTELLECTUAL DISABILITY	11
A. All of Mr. Ortiz’s IQ Scores Meet the Criteria of Intellectual Disability	11

TABLE OF CONTENTS—Continued

	Page
B. Both Formal Testing and Social History Evidence Support the Conclusion that Mr. Ortiz has Significant Adaptive Behavior Deficits Consistent with Intellectual Disability.....	13
C. The Evidence Presented Supports the Conclusion that Signs of Intellectual Disability Appeared During Mr. Ortiz’s Developmental Period	15
IV. IT IS IMPERATIVE THAT COURTS CONSIDER ONLY ADAPTIVE <i>DEFICITS</i> —NOT ADAPTIVE STRENGTHS—IN MAKING A DETERMINATION OF INTELLECTUAL DISABILITY	16
A. The District Court Erred in Relying on Irrelevant Testimony Emphasizing Adaptive Strengths Without Considering Relevant Testimony Emphasizing Adaptive Deficits	16
B. Courts Must Consider Only Adaptive Deficits—not Adaptive Strengths—when Making a Determination of Intellectual Disability	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	<i>passim</i>
<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014).....	<i>passim</i>
<i>Ortiz v. United States</i> , 664 F.3d 1151 (8th Cir. 2011).....	18
<i>United States v. Bourgeois</i> , C.A. C-07-223, 2011 WL 1930684 (S.D. Tex. May 19, 2011)	18-19
CONSTITUTION	
U.S. Const. amend. VIII.....	2, 5
U.S. Const. amend. XIV	2, 4
STATUTE	
Rosa’s Law, 124 Stat. 2643	5
COURT FILING	
Petition of Abelardo Arboleda Ortiz for a Writ of Certiorari, Case No. 14-7506 (Dec. 11, 2014).....	<i>passim</i>
OTHER AUTHORITIES	
American Association on Intellectual and Developmental Disabilities, <i>Intellectual Disability: Definition, Classification, and Systems of Supports</i> (11th ed. 2010)	<i>passim</i>
American Psychiatric Association, <i>Diagnos- tic and Statistical Manual of Mental Disorders</i> (5th ed. 2013).....	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page(s)
James W. Ellis, <i>Mental Retardation and the Death Penalty: A Guide to State Legislative Issues</i> , 27 <i>Mental & Physical Disability L. Rep.</i> 11 (2003).....	19-20, 21
S.A. Richardson, M. Katz, & H. Koller, <i>Patterns of Leisure Activities of Young Adults with Mental Retardation</i> , 97 <i>Am. J. Mental Retardation</i> 431 (1993)	20
R. Schalock et al., “The Renaming of <i>Mental Retardation</i> : Understanding the Change to the Term <i>Intellectual Disability</i> ,” 45 <i>Intellectual & Developmental Disabilities</i> 116 (2007)	5
Marc J. Tasse, <i>Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases</i> , 16 <i>Applied Neuropsychology</i> 114 (2009).....	9

INTEREST OF *AMICI*¹

Amici are national organizations in the field of intellectual disability.

THE ARC OF THE UNITED STATES (hereinafter “The Arc”), founded in 1950, is the nation’s largest community-based organization of and for people with intellectual and developmental disabilities. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Through its National Center for Criminal Justice and Disability, The Arc serves as a national clearinghouse for information, training, and advocacy on the topic of people with intellectual and developmental disabilities as victims, witnesses and suspects or offenders of crime. The Arc also provides an array of services and support for families and individuals and includes 140,000 members affiliated through 700 state and local chapters across the nation. The Arc has appeared as *amicus curiae* in this Court in a variety of cases involving intellectual and developmental disabilities, including *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014). The Arc has a vital interest in ensuring that all individuals with intellectual and developmental

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

disabilities receive the protections and supports provided by law and that courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual and developmental disabilities.

THE BAZELON CENTER FOR MENTAL HEALTH LAW (hereinafter “The Bazelon Center”) is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, legislative and administrative advocacy, and public education, The Bazelon Center advances the rights of individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, family life, and community living. It also works to ensure fair treatment of individuals with mental disabilities in the criminal justice system.

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986 (2014), this Court clearly prohibited the execution of individuals with intellectual disability, stating that such a practice would violate the Eighth and Fourteenth Amendments to the United States Constitution. The evidence presented in this case supports the conclusion that Mr. Ortiz meets the criteria of intellectual disability. Therefore, his execution is prohibited by the Constitution. In implementing this Court’s decisions in *Atkins* and *Hall*, both judges and clinicians must carefully evaluate whether a defendant satisfies the clinical definition of intellectual disability according to the consensus of the scientific community.

This process involves evaluating the individual’s intellectual ability, functional impairments, and the

time of onset of the disability. Like everyone else, individuals with intellectual disability differ substantially from one another. For each person with intellectual disability there will be things he or she cannot do but also many things he or she *can* do. Because the mixture of skill strengths and skill deficits varies widely among persons with intellectual disability, there is no clinically accepted list of common, ordinary strengths or abilities that preclude a diagnosis of intellectual disability. Thus, in assessing an individual's adaptive behavior—the aspect of intellectual disability at issue in this case—the focus must be on *deficits*. Adaptive strengths are irrelevant to this analysis.

The evidence that has been presented in this case supports the conclusion that Mr. Ortiz undoubtedly meets the criteria of intellectual disability according to the well-established guidelines of the scientific community: (1) all of Mr. Ortiz's IQ scores are consistent with intellectual disability; (2) both formal testing and social history evidence support the conclusion that Mr. Ortiz has significant adaptive behavior deficits consistent with intellectual disability; and (3) the evidence presented supports the conclusion that Mr. Ortiz's impairments originated in the developmental period.

In finding that Mr. Ortiz is not an individual with intellectual disability, the district court mistakenly relied on irrelevant testimony regarding Mr. Ortiz's adaptive strengths rather than relevant testimony regarding his adaptive deficits, thereby rejecting the scientific community's well-established guidelines governing intellectual disability. Broad acceptance of the district court's mistaken reasoning would deprive

individuals with intellectual disability of the protections and supports to which they are entitled under state and federal law and the U.S. Constitution.

The district court's decision and the Eighth Circuit Court of Appeals' subsequent refusal to grant Mr. Ortiz a Certificate of Appealability are thus at odds with the fundamental principles guiding the assessment of a person for intellectual disability and this Court's decisions in *Hall* and *Atkins*. Further guidance is therefore needed for courts evaluating an individual's adaptive behavior when making a determination of intellectual disability.

For the foregoing reasons, *amici* urge this Court to grant Mr. Ortiz's petition for certiorari to review the Eighth Circuit's decision allowing the unlawful execution of Mr. Ortiz.

ARGUMENT

I. THE CONSTITUTION PROHIBITS THE EXECUTION OF INDIVIDUALS WITH INTELLECTUAL DISABILITY. THE EVIDENCE PRESENTED IN THIS CASE SUPPORTS THE CONCLUSION THAT MR. ORTIZ MEETS THE CRITERIA OF INTELLECTUAL DISABILITY. THEREFORE, HIS EXECUTION IS PROHIBITED BY THE CONSTITUTION.

This Court has unequivocally held that “the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). As this Court has explained: “No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the

Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.” *Id.* at 1992 (citing *Atkins*, 536 U.S. at 317, 320). While courts may punish offenders with intellectual disability who meet the legal requirements for criminal responsibility, they may not administer “the law’s most severe sentence” to such offenders. *Id.* at 1993 (citing *Atkins*, 536 U.S. at 306, 318).

Both parties have introduced objective evidence supporting the conclusion that Mr. Ortiz—a federal prisoner awaiting execution—meets the criteria of an individual with intellectual disability.² As described in more detail below, this evidence demonstrates that: (1) all of Mr. Ortiz’s I.Q. scores fall within the range of intellectual disability; (2) a standardized measure of adaptive behavior administered by the prosecution’s expert and additional social history evidence confirmed that Mr. Ortiz has significant limitations in adaptive behavior consistent with intellectual disability; and (3) there is no dispute that signs of intellectual

² *Amici* use the term “intellectual disability” in place of “mental retardation” except when directly quoting others. Although the latter term appears in the recorded evidence and some relevant case law, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As this Court stated in *Hall v. Florida*: “Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.” 134 S. Ct. 1986, 1990 (2014) (citing Rosa’s Law, 124 Stat. 2643 (changing entries in the U.S. Code from “mental retardation” to “intellectual disability”); R. Schalock et al., “The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*,” 45 *Intellectual & Developmental Disabilities* 116 (2007); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013)).

disability originated in Mr. Ortiz's childhood. However, in violation of *Atkins* and *Hall*, both the district court and the Eighth Circuit Court of Appeals chose not to consider this evidence.

II. IN DETERMINING WHETHER INTELLECTUAL DISABILITY IS PRESENT, *HALL* AND *ATKINS* REQUIRE THIS COURT TO CONSIDER THE CONSENSUS OF THE SCIENTIFIC COMMUNITY.

A. The Definition of Intellectual Disability.

In determining whether an individual has intellectual disability, a court must ensure that its determination is informed by relevant scientific findings. As this Court stated in *Hall*: "It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability...is informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. The framework governing an intellectual disability diagnosis is outlined below.

As defined by the American Association on Intellectual and Developmental Disabilities (hereinafter "AAIDD") and the American Psychiatric Association (hereinafter "APA"), "intellectual disability" has three basic elements: (1) significant impairments in intellectual functioning as measured by IQ testing; (2) adaptive behavior deficits in real-world skills and abilities; and (3) onset of the disability before the individual becomes an adult. See AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* at 1 (11th ed. 2010) [hereinafter AAIDD,

2010 Manual];³ APA, *Diagnostic and Statistical Manual of Mental Disorders* at 33 (5th ed. 2013) [hereinafter APA, *DSM-5*].⁴ This Court relied on these three factors in reversing the Florida Supreme Court’s decision in *Hall* and remanding the case for further proceedings consistent with this analysis. 134 S. Ct. at 1994.

With regards to the first prong of the intellectual disability definition, the purpose of IQ testing is to determine whether the disability that an individual experiences involves limitations in intellectual ability. “Significant limitations in intellectual functioning” indicates that an individual’s measured intelligence falls approximately two standard deviations below the mean. *See AAIDD, 2010 Manual* at 27. This definition does not indicate a “hard and fast cutoff point/score” and, as noted above, limitations in intellectual

³ “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.”

⁴ “Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met: (A) Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing; (B) Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community; (C) Onset of intellectual and adaptive deficits during the developmental period.”

functioning reflect only one of three criteria used to establish an intellectual disability diagnosis. *Id.* at 35. On tests with a standard deviation of 15 and a mean of 100, an individual with a score between 65-75 (70 +/- 5) would be considered in the intellectual disability range. APA, *DSM-5*, at 37. *See also Hall*, 134 S. Ct. at 1995 (citing same).

The second prong of an intellectual disability diagnosis that is the focus of this case involves adaptive behavior deficits in real-world skills and abilities. “Adaptive behavior” refers to the “collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.” AAIDD, *2010 Manual* at 45. The scientific community categorizes adaptive behavior deficits into three skill domains: conceptual, social, and practical. *Id.* at 1. *See also APA, DSM-5* at 33.⁵ For an intellectual disability diagnosis, an individual must have significant limitations in at least one of the three domains or have significant overall impairment. AAIDD, *2010 Manual* at 43.

In addition to the use of a standardized measure of adaptive behavior to examine limitations in these three domains, information derived from an individual’s

⁵ The conceptual domain involves “competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others.” The social domain involves “awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others.” The practical domain involves “learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others.” APA, *DSM-5* at 37.

social history must be considered. *Id.* at 49-50. Because stereotypes and misconceptions about people with intellectual disability can distort individual assessment, the scientific community recommends consulting as many relevant sources generated outside of the formal assessment context as possible. This includes evidence such as school records, Social Security records, driving records, employment history, medical records, and social and family histories. *Id.* at 47-49.

An evaluator must also conduct clinical interviews with the individual's relatives, friends, teachers, and employers to obtain qualitative information regarding adaptive behavior. See Marc J. Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 *Applied Neuropsychology* 114, 118 (2009). Different sources of data are "essential to providing corroborating information that provides a comprehensive picture of the individual's functioning." AAIDD, *2010 Manual* at 47. A comprehensive review is particularly important when clinical judgment is being exercised retrospectively as part of legal proceedings. *Id.* at 96.

Evidence of an individual's impaired adaptive functioning is central to the understanding of intellectual disability and cannot be ignored. As this Court explained in *Hall*:

[A]n individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability...In the context of a formal assessment, "the existence of concurrent deficits in intellectual and

adaptive functioning has long been the defining characteristic of intellectual disability.”

134 S. Ct. at 1991, 1994 (citing APA, *DSM-5* at 37; Brief for American Psychological Association et al. as *Amici Curiae* at 11).

This aspect of intellectual disability is often observed before any IQ test is administered and consideration of it helps to ensure that the flaws inherent in IQ testing do not lead to misdiagnoses. As noted by the APA:

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.

APA, *DSM-5*, at 37. It is these functional limitations that create a “special risk of wrongful execution” for individuals with intellectual disability. *Hall*, 134 S. Ct. at 1993 (citing *Atkins*, 536 U.S. at 320-21).

Individuals with intellectual disability—like everyone else—differ substantially from one another. For each person with intellectual disability there will be things he or she cannot do but also many things he or she *can* do. Indeed, one of the fundamental precepts in the intellectual disability field is that “[w]ithin an individual, limitations often coexist with strengths.” AAIDD, *2010 Manual* at 1. Because the mixture of skill strengths and skill deficits varies widely

among persons with intellectual disability, there is no clinically accepted list of common, ordinary strengths or abilities that preclude a diagnosis of intellectual disability. Thus, the focus in assessing an individual's adaptive behavior must be on *deficits*. Adaptive strengths are irrelevant to this analysis.

The third prong of the intellectual disability diagnosis—whether an individual's intellectual disability originated in childhood—is not at issue in this case.

In sum, in implementing this Court's decisions in *Hall* and *Atkins*, judges must carefully evaluate whether a defendant satisfies the three prongs of the clinical definition of intellectual disability discussed above in light of scientific understanding surrounding an intellectual disability diagnosis. This process requires attention to the measurement of intellectual ability in the form of IQ testing, an evaluation of the functional impairments the individual experiences in his or her daily life, and a determination of whether the individual's intellectual disability originated in childhood. The adaptive prong of the intellectual disability diagnosis is the focus of this case.

III. THE EVIDENCE HAS ESTABLISHED THAT MR. ORTIZ MEETS THE CRITERIA OF INTELLECTUAL DISABILITY.

A. All of Mr. Ortiz's IQ Scores Meet the Criteria of Intellectual Disability.

All of Mr. Ortiz's IQ test results meet the first element of an intellectual disability diagnosis. As noted above, an individual who receives a score at or below 65-75 on a given IQ test is considered to be in the intellectual disability range. APA, *DSM-5* at 37.

Mr. Ortiz's IQ test scores, enumerated below, were all well within or below this range. As detailed in Mr. Ortiz's petition to this Court, he received the following scores on the four IQ tests he participated in:

- Wechsler Adult Intelligence Scale, Third Edition (hereinafter "WAIS-III") (Spanish version) – 54
- Bateria Woodcock-Munoz Revisada – 44-50
- Bateria III Woodcock-Munoz – General Intellectual Ability – 70 (60)⁶
- Comprehensive Test of Non-Verbal Intelligence – 47-51

Petition of Abelardo Arboleda Ortiz for a Writ of Certiorari, Case No. 14-7506 (Dec. 11, 2014) (hereinafter "Petitioner's Brief") at 4 (citing JA 2780, 4335, 4339).

Dr. Carmen Inoa Vazquez, the Government's expert psychologist, also administered the Mini-Mental Status Exam (Spanish version) to Mr. Ortiz on which he scored 18 out of 30 points (where the score to differentiate individuals with intellectual disability from the general population is approximately 23.2 points). *Id.* at 5 (citing JA 4334). Thus, it is undisputed that Mr. Ortiz's intellectual functioning as measured by IQ scores is consistent with intellectual disability.

⁶ As noted in Petitioner's Brief, Dr. Vazquez "failed to use the appropriate, updated scoring standards that were published the year before she testified to the results on the Bateria III, so reported Mr. Ortiz's score as 70. Using the proper scoring standards, Mr. Ortiz's results on the Bateria III actually yielded 60." Petitioner's Brief at 4, n. 7.

B. Both Formal Testing and Social History Evidence Support the Conclusion that Mr. Ortiz has Significant Adaptive Behavior Deficits Consistent with Intellectual Disability.

The evidence presented by experts in this case supports the conclusion that Mr. Ortiz has significant adaptive deficits that are consistent with intellectual disability. As noted above, an individual meets the adaptive deficit criterion for an intellectual disability diagnosis if he or she has significant deficits in one of the three adaptive behavior domains—conceptual, practical, or social—or overall deficits that indicate significant impairment. AAIDD, *2010 Manual* at 43. This can be determined through an evaluation of both formal testing and social history evidence.

As described in more detail in Mr. Ortiz’s petition, all of Mr. Ortiz’s scores on the Adaptive Behavior Assessment System, Second Edition (hereinafter “ABAS-II”) administered by Dr. Vazquez demonstrated adaptive deficits consistent with intellectual disability. Petitioner’s Brief at 5-6 (citing JA 4339-4341, 4358-4366, 4828). While Dr. Vazquez made numerous scoring errors the first two times she reported Mr. Ortiz’s results, even the erroneous scoring indicated a diagnosis of intellectual disability. *Id.* at n. 9, n.10.

Social history evidence, which is just as, if not more, important than Dr. Vazquez’s formal assessment, further supports the conclusion that Mr. Ortiz has significant adaptive deficits consistent with intellectual disability. Both Dr. Ricardo Weinstein, an expert psychologist for the defense, and Dr. Vazquez testified that Mr. Ortiz was illiterate in both Spanish

and English. Dr. Vazquez also reported that Mr. Ortiz:

could not tell time using a clock with hands, do calculations, recognize all the letters in the alphabet, locate dates on a calendar, keep score when playing games, balance a check-book, or order a meal in English at a restaurant before his incarceration, and that he had difficulty following directions in games and activities.

Id. at 5 (citing JA 4329, 4339-4341, 4358-4366). Further, Mr. Ortiz remained “heavily dependent” on his girlfriends to take care of him and relied on friends for assistance with life tasks while in prison. *Id.*

More specifically, Mr. Ortiz’s significant limitations in the conceptual domain included, among other things, that he: (1) never learned to read or write in any language; (2) was delayed in learning to speak, by comparison to his younger half-brother; (3) could not learn his own five-digit telephone number until he was 15 years old; (4) could not be trusted as a child to remember what he was sent to a neighborhood store to buy; (5) could not manage money; and (6) had great trouble learning in school, repeatedly failing the first grade before dropping out even though other siblings raised in the same household did quite well in school.

In the social domain, Mr. Ortiz’s significant limitations included, among other things, that he: (1) hid under the bed to avoid having to go to school because he was teased severely for being slow; (2) had difficulty relating to his peers; and (3) was naïve and frequently behaved in a way that made him vulnerable to manipulation by others.

In the practical domain, Mr. Ortiz's significant limitations included, among other things, that he: (1) was delayed by comparison to other children in learning how to use the toilet; (2) was unable to learn basic construction work from his father; (3) only had one job as a mechanic's helper; (4) never lived alone in Colombia or the United States; and (5) depended on others to help meet his basic needs. *Id.* at 1-2 (citing JA 2781, 2788-2789, 2798-2799, 3148, 3262, 3448-3449, 3460-3461, 3477-3478).

This extensive social history evidence of significant deficits in adaptive functioning beginning in childhood and continuing into adulthood, coupled with Mr. Ortiz's adaptive deficit scores on the ABAS-II test, strongly support the conclusion that Mr. Ortiz has significant limitations in adaptive behavior that are consistent with intellectual disability.

C. The Evidence Presented Supports the Conclusion that Signs of Intellectual Disability Appeared During Mr. Ortiz's Developmental Period.

The evidence presented demonstrates clearly that Mr. Ortiz's adaptive deficits were present from early childhood, thereby meeting the third prong of the intellectual disability diagnosis. As described in more detail in Mr. Ortiz's petition, both the mitigation specialist who testified at the *Atkins* hearing and Dr. Weinstein interviewed members of Mr. Ortiz's family of origin who reported substantial developmental delays originating in childhood. *Id.* at 6.

IV. IT IS IMPERATIVE THAT COURTS CONSIDER ONLY ADAPTIVE *DEFICITS*—NOT ADAPTIVE STRENGTHS—IN MAKING A DETERMINATION OF INTELLECTUAL DISABILITY.

A. The District Court Erred in Relying on Irrelevant Testimony Emphasizing Adaptive Strengths Without Considering Relevant Testimony Emphasizing Adaptive Deficits.

In presenting evidence of Mr. Ortiz’s adaptive behavior, Dr. Vazquez mistakenly focused on irrelevant information regarding Mr. Ortiz’s reported adaptive strengths rather than the presence of significant adaptive deficits, employing inaccurate stereotypes that grossly overestimated Mr. Ortiz’s abilities and reflected a fundamental misunderstanding of the nature of intellectual disability. Despite the fact that her own tests and observations of Mr. Ortiz provided ample evidence of the presence of intellectual disability, Dr. Vazquez concluded that Mr. Ortiz did not have intellectual disability and testified that the fact that Mr. Ortiz’s test scores and behavior deficits were diagnostic of intellectual disability did not indicate that Mr. Ortiz *actually* had intellectual disability. *Id.* at 9 (citing JA 3346).

In reaching this conclusion, Dr. Vazquez explained that Mr. Ortiz was not an individual with intellectual disability but, rather, simply never had the opportunity to learn. In her words, “not having given [sic] an opportunity to learn is not the same as not being capable of learning due to cognitive defects.” *Id.* at 10 (citing JA 4344-4345). As detailed in Mr. Ortiz’s petition, Dr. Vazquez erroneously found that Mr. Ortiz’s strengths precluded a diagnosis of intellectual

disability. *Id.* (citing JA 4340-4341). Dr. Vazquez mistakenly dismissed Mr. Ortiz’s numerous and substantial adaptive behavior deficits enumerated above by explaining that this was standard behavior for “poor Latino immigrants” rather than behavior consistent with intellectual disability. *Id.* at 10-11 (citing JA 4341). As noted above, whatever “strengths” Mr. Ortiz possessed are not relevant to a determination of whether Mr. Ortiz has intellectual disability.

In stark contrast, Dr. J. Gregory Olley—a second expert psychologist for the defense who submitted an affidavit to the district court—and Dr. Weinstein argued that the adaptive behavior limitations Mr. Ortiz demonstrated are significant by any measure and could not be explained away based on poor socialization, limited educational opportunities, or the supposed “strengths” Dr. Vazquez described. *Id.* at 11 (citing JA 3044).

Beginning in the developmental period, Mr. Ortiz, as described in detail above, demonstrated significant limitations in all three domains. In the conceptual realm, he had enormous difficulty learning in virtually every sphere of life—to speak (only after considerable delay), to read and write, to recall sequences of digits like phone numbers, to recall small everyday tasks and errands. He was unable to learn academically, repeatedly failing the first grade. In the social realm, he was naïve and gullible to manipulation by others. He was unable to figure out how to deal with difficult social situations, such as the teasing and abuse by other children at school. In the practical realm, he was delayed in toileting, he could not learn or perform jobs that required the integration of various smaller skills, like building construction, and he never lived alone. In sum, Mr. Ortiz has very significant limitations in

adaptive behavior that are clearly consistent with intellectual disability as defined by the scientific community.

However, based on Dr. Vazquez's misguided testimony instructing the court to focus on adaptive strengths in making an intellectual disability determination, the district court rejected the evidence of Mr. Ortiz's significant limitations in adaptive behavior because the behavior Mr. Ortiz *could* engage in reinforced the court's mistaken view of a person with intellectual disability. *Id.* at 12 (citing A-061-62). On appeal to the Eighth Circuit, three separate *amicus* briefs were submitted in support of Mr. Ortiz by the Republic of Colombia, AAIDD and The Arc jointly, and Concerned Experts in MR/ID. These briefs strongly criticized the conclusions of Dr. Vazquez and the district court and included affidavits from several experts in the field of intellectual disability in both Colombia and the United States. *Id.* at 15-16.

The Eighth Circuit considered only the portion of this new evidence correcting an erroneous statement that Mr. Ortiz had obtained a driver's license. However, it allowed the district court to consider all of the additional evidence on remand, at the district court's discretion. The Eighth Circuit reached no conclusion on Mr. Ortiz's *Atkins* claim. *Ortiz v. United States*, 664 F.3d 1151, 1165-66 (8th Cir. 2011). The Eighth Circuit did, however, express agreement with the district court's conclusion in dicta, stating that while "[t]he mental health community [may] ignore[] an individual's strengths when looking at adaptive functioning...[t]he law makes a holistic view of an individual, recognizing that a few reported problems may not negate an inmate's ability" to function in other ways. *Id.* at 1168-69 (citing *United States v. Bourgeois*,

No. C.A. C-07-223, 2011 WL 1930684, at *31-32 (S.D. Tex. May 19, 2011)).

On remand, the district court erroneously refused to consider this additional evidence, stating that it remained “firmly convinced” that Mr. Ortiz was not an individual with intellectual disability and that the record was “replete with evidence” supporting this conclusion. Petitioner’s Brief at 16-17 (citing A-050-52). Subsequently, the district court, Eighth Circuit, and *en banc* courts all denied Mr. Ortiz’s request for a Certificate of Appealability. *Id.* at 17 (citing A-047, 02, 01).

B. Courts Must Consider Only Adaptive Deficits—not Adaptive Strengths—when Making a Determination of Intellectual Disability.

The fundamental misunderstanding of intellectual disability upon which Dr. Vazquez and, in turn, the district court and the Eighth Circuit operated is false and harmful and demonstrates the need for further guidance to courts in evaluating an individual for intellectual disability. AAIDD instructs that significant deficits in adaptive skills are “not outweighed by the potential strengths in some adaptive skills.” AAIDD, *2010 Manual* at 47.

Both AAIDD and the APA direct clinicians to focus only on adaptive *deficits*—not adaptive strengths—because, “[t]he skills possessed by individuals with [intellectual disability] vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying.” James W. Ellis, *Mental Retardation and the Death*

Penalty: A Guide to State Legislative Issues, 27 Mental & Physical Disability L. Rep. 11, 13, n. 29 (2003). From a definitional perspective, an individual's particular strengths are relevant only to assess corresponding weaknesses.

As explained above, and as testified to by Drs. Olley and Weinstein, individuals with intellectual disability are often capable of doing a variety of things independently, despite simultaneously demonstrating significant adaptive behavior deficits. AAIDD explains:

Those with ID [intellectual disability] who have higher IQ scores struggle in society. This is true despite the fact that all individuals with ID [intellectual disability] typically demonstrate strengths in functioning alongside relative limitations...Although many of these individuals will need supports, some may be able to live independently, at least for part of the time. Documented successful outcomes of individuals with appropriate supports contrast sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children or are good citizens.

AAIDD, *2010 Manual* at 151. See also S.A. Richardson, M. Katz, & H. Koller, *Patterns of Leisure Activities of Young Adults with Mental Retardation*, 97 Am. J. Mental Retardation 431, 431-32 (1993) (noting that individuals with mild intellectual disability "are members of families, have friends, work, marry, and have children.").

Several factors aggravate the challenges of people with mild intellectual disability: "expectations for performance are higher...the tasks given to them are

more demanding because of the higher expectations; and a failure to meet those expectations is frequently met by others blaming the individual or the individual blaming him or herself.” AAIDD, *2010 Manual* at 153. Precisely because people with intellectual disability, like all people, often do some things better than others, the focus of the inquiry into limitations in adaptive behavior must and can only be on the limitations. *Id.* at 7. *See also* Ellis, *Mental Retardation and the Death Penalty, supra*, at 13, n. 29 (given that the “sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences...the presence of confirming deficits must be the diagnostician’s focus”).

Accordingly, the views expressed by Dr. Vazquez that were adopted by the district court and upheld by the Eighth Circuit—that people with intellectual disability cannot engage in self-care, care of others, or activities of daily living and cannot understand, appreciate, or act appropriately during legal proceedings—are simply mistaken and based on false stereotypes and a fundamental misunderstanding of the nature of intellectual disability. In rejecting Mr. Ortiz’s claim, the district court erred in employing reasoning contrary to the well-established standards of the scientific community, enumerated above, that govern the diagnosis of intellectual disability.

In the face of robust evidence demonstrating that Mr. Ortiz’s IQ scores and adaptive behavior deficits were both clearly consistent with intellectual disability, the district court discounted this evidence and focused instead on irrelevant testimony regarding Mr. Ortiz’s purported adaptive strengths, thereby leading to the mistaken conclusion that Mr. Ortiz is not an

individual with intellectual disability. This conclusion is unfounded and erroneous.

Courts cannot be permitted to dismiss considerable evidence of significant adaptive behavioral deficits (presented here by widely recognized experts in the field of intellectual disability) simply because there is simultaneous evidence that the individual demonstrated some adaptive strengths, such as the ability to form social relationships or function somewhat independently. The presence of such strengths is irrelevant to the analysis, as explained by Drs. Olley and Weinstein.

As has been demonstrated, people with intellectual disability can function well and independently in certain contexts and do things like secure employment, have romantic relationships, engage in rational thought, plan, and display verbal coherence, while having concurrent deficits in other areas. For the district court to suggest otherwise without considering expert testimony reflecting the definition of intellectual disability within the scientific community is unfounded and in violation of *Hall* and *Atkins*.

CONCLUSION

As this Court wrote in *Hall*: “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” 134 S. Ct. at 2001. Mr. Ortiz has more than met this burden.

The evidence presented in this case supports the conclusion that Mr. Ortiz meets the definition of intellectual disability according to the well-established guidelines of the scientific community. All of Mr. Ortiz’s IQ scores fall within the intellectual

disability range, he has demonstrated substantial deficits in adaptive behavior, and his impairments originated in the developmental period.

The district court erred in relying on irrelevant testimony regarding Mr. Ortiz's adaptive strengths rather than relevant testimony regarding his deficits that reflected the consensus of the scientific community. The district court's decision and the Eighth Circuit's refusal to grant Mr. Ortiz a Certificate of Appealability are thus at odds with the fundamental principles guiding the assessment of a person for intellectual disability in violation of *Hall* and *Atkins*. Broad acceptance of the district court's mistaken reasoning would deprive individuals with intellectual disability of the protections and supports to which they are entitled under state and federal law and the U.S. Constitution. Further guidance is therefore needed for courts evaluating an individual's adaptive behavior when making a determination of intellectual disability.

For the foregoing reasons, *amici* urge this Court to grant Petitioner's request for certiorari to review the decision of the Eighth Circuit.

Respectfully submitted,

SHIRA T. WAKSCHLAG

Counsel of Record

MARTHA E. FORD

THE ARC OF THE UNITED STATES

1825 K Street, NW

Suite 1200

Washington, DC 20006

(202) 534-3708

Wakschlag@TheArc.org

Counsel for Amici Curiae

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