No. 12-10882

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

vs.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Whether the Eighth Amendment requires Florida to use a clinical definition of mental retardation, including incorporation of "standard error of measurement" for intelligence tests, in its framework for identifying which offenders are exempt from the death penalty under *Atkins* v. *Virginia*.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The defendant in this case asks this Court to transform into a constitutional mandate the details of determining whether a given defendant at the borderline of retardation falls slightly on one side or the other of the line. Such micromanagement of state sentencing practice is a grave threat to the finality of judgments. Making such rules by the slow and uncertain mechanism of case law would require repeated relitigation of cases as new rules trickle out, thereby threatening the rights of murder victims' families to see justice carried out within a reasonable time. Such a result would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Freddie Lee Hall has committed acts of great violence on four separate occasions. The trial judge in the present case described the offense for which he is sentenced to death.

> "On February 21, 1978, Freddie Lee Hall kidnapped Karol Lea Hurst from the parking lot of a grocery store as she was carrying her packages to her car. He drove her, in her own car, some 18 miles away into another county and into the woods a quarter of a mile off the paved road. There, in the front seat of her car, he forced her to remove her clothes and then he raped her. He listened to her cry, and he listened to her beg for her life and the life of her unborn child. He watched her write a check for him to cash in return for her life. Then he beat her—so hard that it tore the flesh of her neck and shoulders through the fabric of her denim jacket. And then he killed her by firing a bullet into the back of her head, either pulling the trigger himself or encouraging another to do it in his place. There is no evidence that has been presented to this

> Court that reasonably mitigates the aggravated nature of this act. The aggravating circumstances of this case clearly 'outweigh' the mitigating factors." J. A. 60-61.

Ten years before this crime, Hall committed assault with intent to commit rape. J. A. 31. In the months following this crime, he murdered one peace officer in the performance of his duty and shot at another. J. A. 31.

Hall's original death sentence was affirmed on appeal, but it was later overturned because of "a significant change in the law" occurring long after his trial, see *Hall* v. *State*, 541 So. 2d 1125, 1126 (Fla. 1989), namely this Court's decision in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987).

Hall was resentenced to death in 1991, after the trial judge considered his mitigating evidence, including his mental capacity evidence, J. A. 39-45, and found it was clearly outweighed by the aggravating factors in the passage quoted above.

After many more years of litigation, in 2009 the circuit court held a hearing on Hall's claim to be mentally retarded and therefore exempt from the death penalty under the Eighth Amendment and Florida law. The properly documented IQ tests given to Hall all had scores above 70. The scores were 71, 76, 79, 80, and 72. J. A. 107-108. One test in the records indicated a score of 69, but it was too poorly documented to be considered reliable. J. A. 105-107. The trial court found that Hall had not met either the subaverage intellectual functioning prong or the adaptive deficit prong of the definition of retardation. J. A. 111-112.

On appeal, the Florida Supreme Court reiterated its holding that "a firm cutoff of 70 or below" on an IQ test is required to meet the first prong of the definition of

retardation. See *Hall* v. *State*, 109 So. 3d 704, 707 (2012).

SUMMARY OF ARGUMENT

In evaluating arguments concerning *Atkins* v. *Virginia*, it is important to keep in mind that *Atkins* itself is a rigid cutoff rule in considerable tension with fundamental aspects of this Court's capital sentencing jurisprudence. Since 1976, the Court has held that states are constitutionally required to weigh mitigating circumstances against the aggravating ones and forbidden to give one aggravating factor decisive weight. Yet *Atkins* requires exactly what is forbidden in the other direction, sweeping aside all considerations of how horrible, how depraved, or how premeditated the actual crime may be, instead giving controlling weight to sweeping generalizations about retarded persons that may or may not apply to the individual defendant. A negative *Atkins* finding in a borderline case, where these generalizations are at their weakest, leads only to an individualized sentencing hearing. It is not a result that requires extraordinary efforts to avoid.

Definitions of mental conditions crafted for clinical purposes are not controlling of legal issues in any other area of criminal law. The clinical definition of retardation is based as much on policy and advocacy as it is on science, and it should not be deemed to establish a constitutional standard.

The Standard Error of Measurement (SEM), properly understood, tells us more than just a range of possible "true scores" for a given test score. It tells us about the distribution of probabilities within that range. A test score above 70 establishes a prima facie case that the defendant does not meet the first prong of the definition. If a state wishes to foreclose the use of soft and

subjective evidence to rebut that objective case, that is within the legislative authority as understood with regard to other mental issues in criminal law.

ARGUMENT

I. The *Atkins* rule itself is a rigid cutoff rule, and it must be applied with full awareness of its limitations and its tension with this Court's individualized sentencing jurisprudence.

Petitioner complains that Florida's rule is a rigid cutoff. See Brief for Petitioner 24. There are also complaints in this case that Florida's rule restricts consideration of relevant evidence. See Brief for Former Judges *et al.* as *Amici Curiae* 14. In evaluating these complaints, it is worth keeping in mind that *Atkins* v. *Virginia*, 536 U. S. 304 (2002), itself is a rigid cutoff rule that precludes consideration of highly relevant aspects of the defendant's culpability for the crime, in considerable tension with the principles that this Court has held are constitutionally required in capital sentencing.

For nearly four decades now, this Court has insisted that individualized sentencing is a constitutional imperative in capital cases. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (lead opinion). States have been constitutionally forbidden from identifying a single factor and deciding in advance that the presence of this factor requires a death sentence without that individualized consideration. Even in the exceptionally compelling circumstance of a life-sentenced murderer who kills again within prison, the Court insisted that the Constitution requires consideration of the individual circumstances of the particular case. See *Sumner* v. *Shuman*, 483 U. S. 66, 80-82 (1987).

In *Penry* v. *Lynaugh*, 492 U. S. 302, 322-323 (1989), this Court recognized that mental retardation was a powerful mitigating factor with regard to a defendant's culpability, and it deserved to be weighed in the balance with the other factors. Giving it conclusive weight by itself, however, was not warranted, in part because of the wide variations in abilities among persons who might qualify for the "retarded" label. See *id*., at 338 (opinion of O'Connor, J.) (quoting AAMR Manual).[2] Both holdings were consistent with the theme of individualized sentencing that has been a central pillar of this Court's capital sentencing jurisprudence from *Woodson* forward.

In *Atkins*, the Court changed course, in part by accepting as if universally true of all retarded persons the sweeping generalities rejected in *Penry*. See 536 U. S., at 318-321. The *Atkins* opinion notwithstanding, it surely is not true that *all* persons diagnosable as retarded *always* act on impulse rather than premediation, *always* follow others rather than lead or act alone, and are *necessarily* so cognitively deficient as to be undeterrable. See Mossman, *Atkins v. Virginia*, A Psychiatric Can of Worms, 33 N. M. L. Rev. 255, 273 (2003). In essence, the *Atkins* Court engaged in the same kind of sweeping generality in disregard of the facts of individual cases that this Court forbade the states to employ in *Sumner*.

There seems to be an implicit theme running through the briefing supporting the Petitioner that, having once been decided, the *Atkins* rule should now be sanctified and fortified without any regard for whether the underlying constitutional principles

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2. Part IV-C of the opinion is not the opinion of the Court, but it is the opinion concurring in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

actually support the proposed buttresses. To the extent that *Atkins* rests on a generalized characterization of persons with retardation, those sweeping assumptions are at their weakest in the very cases at issue here: the ones near the borderline of qualification for the diagnosis. To the extent that *Atkins* rests on a consensus of the American people that persons with retardation should never be executed regardless of their crimes, that finding of consensus is extremely doubtful as applied to persons at the borderline that most laymen would not recognize as retarded. See *Ex parte Briseno*, 135 S. W. 3d 1, 5-6 (Tex. Crim. App. 2004); see also Covarrubias, Lives in Defense Counsel's Hands: The Problem and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants, 11 Scholar 413, 440 (2009) (noting most laypersons think of retarded persons as far more disabled than the mildly retarded actually are).

Finally, it is important to bear in mind that a finding that a person does not qualify for the categorical exemption of *Atkins* does not mean that person will necessarily be sentenced to death. The procedural part of *Penry* is still the law, and capital defendants are still entitled to its protection. Before a murderer can be sentenced to death, he is entitled to a weighing by the sentencer of the aggravating and mitigating facts of his individual case, and his actual mental impairment is a powerful factor in that determination. In such a proceeding, the question of whether an impaired defendant falls slightly on one side or the other side of the retardation line is immaterial. Between *Penry* and *Atkins*, such defendants were sometimes referred to as "retarded" by courts properly weighing their impairments without concern for precise line-drawing. See, *e.g.*, *Bobby* v. *Bies*, 556 U. S. 825, 828 (2009).

The *only* consequence of a negative *Atkins* finding is that the defendant receives an individualized determi-

nation of whether his impairment plus any other mitigation does or does not outweigh the aggravating circumstances of his offense and prior offenses, rather than an outcome mechanically determined by a single factor, ignoring all others. This is not a result that calls for going to extraordinary lengths to avoid, particularly in a borderline case where the rationale for the *Atkins* rule is weakest. On the contrary, this is the path that is *most* likely to lead to a just result in the case. With unbiased justice as the goal, it makes perfect sense to reserve the rigid cutoff rule of *Atkins* for cases where it clearly applies and let the doubtful cases go to individualized sentencing with consideration of all the circumstances.

II. In cases near the borderline, a State may legitimately substitute a more objective definition for the subjective one used in clinical practice.

A. Rules of Law v. Clinical Diagnoses.

In most contexts, *amicus* American Psychiatric Association is adamantly opposed to treating people as a legally distinct class based on a clinical diagnosis. Among the reasons for this position is the variation among individuals that this Court noted in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See *supra*, at 6; see also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 442-443 (1985).

> "Moreover, categorical distinctions based on mental disorder are tantamount to class discrimination because they assume that everyone who has received a particular diagnosis or treatment is identical. In fact, individuals with the same diagnosis or receiving the same treatment may manifest different kinds of symptoms; even when the symptoms are

> the same, they may vary widely in their severity." American Psychiatric Association, Position Statement on Discrimination Against Persons With Previous Psychiatric Treatment, 154 Am. J. Psychiatry 1042 (1997).

Along the same lines, the APA's current Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") contains a "Cautionary Statement for Forensic Use of DSM-5," including this observation:

> "However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual development disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilia disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability)." *Id*., at 25.

The previous edition similarly noted, "The clinical and scientific considerations involved categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxvii (4th ed. 1994) ("DSM-IV").

In most contexts, the mismatch is obvious. For example, the insanity defense in federal criminal law requires a finding that "the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U. S. C. § 17(a). A diagnosis of schizophrenia, see DSM-5, at 99, may be relevant to the determination, but the diagnostic criteria do not match the elements of the defense.

Binding the constitutional rule of *Atkins* to the clinical definition of mental retardation would be particularly inappropriate because this diagnosis is different from a typical medical diagnosis and even from many psychiatric ones. For most disorders, health professions have a keen interest in scientifically precise and accurate diagnosis because it is essential to providing the patient with safe and effective treatment. If a disease is caused by an infecting microbe, a physician must know which one in order to prescribe a medication that actually attacks that microbe. A psychiatrist must accurately diagnose mental disorders to know whether to prescribe an antipsychotic medication or an antidepressant one.

There is no similar constraint on the definition of mental retardation because the diagnosis has generally been used to decide on the provision of supports rather than treatment in the medical sense. The problem of definition is explored from several perspectives in a book published by *amicus* American Association on Intellectual and Developmental Disabilities, then known as American Association on Mental Retardation: H. Switzky & S. Greenspan (eds.) What Is Mental

Retardation? Ideas for an Evolving Disability in the 21st Century (rev. ed. 2006).[3]

> "[Mental retardation], particularly mild MR, is a socially constructed disability category rather than a naturally constructed quasi-medical category. . . .
>
> The term 'disability' originated in the vocational rehabilitation field and is used to indicate that a person needs significant short- or long-term supports in order to be able to hold down a job, if he can at all. It is, thus, a bureaucratic category, usually defined by a committee, which may be influenced by political and economic considerations as much as by 'science,' and *the decision as to where to draw the line* between disability and nondisability, based on an estimate of the amount of supports needed to function normally, *is relatively arbitrary*." Greenspan, Mental Retardation in the Real World: Why the AAMR Definition Is Not There Yet, in WIMR 171 (emphasis added); see also Mossman, 33 N. M. L. Rev., at 265 ("line . . . is a changing and arbitrary one").

Amicus American Bar Association insists the definitions promulgated by "mental disability organizations" are "scientifically recognized" and waxes indignant that the State of Florida has the effrontery to disagree. See Brief for the American Bar Association as *Amicus Curiae* 13-14. In reality, the details of the definition are supported by little science. Critics of the "paradigm shift" in the definition of mental retardation since the 1990s have noted the lack of empirical evidence, see, *e.g.*, Baumeister, Mental Retardation: Confusing

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3. This book is cited below as "WIMR." The subtitle alone is a strong argument against adopting the definition *de jour* as a constitutional mandate. See Brief for Respondent 25-32.

Sentiment with Science, in WIMR at 96, and the influence of advocacy motives.

> "We are solemnly alerted by the Committee [citation] that the paradigm shift 'necessitates . . . significant changes in one's thinking' [citation] and that service delivery now focuses on 'strengths and capabilities of the person, normalized and typical environments, integrated services with supports, and the empowerment of individuals served' [citation]. Quite apart from the obvious imprecision of all this grandiose terminology (or utter inanity, such as 'empowerment'), *blatant and outright advocacy has no standing in construction of a clinical nosology*, no matter how philosophically honorable and well intentioned in principle." *Id*., at 109-110 (emphasis added); see also MacMillan, Siperstein, & Leffert, Children with Mild Mental Retardation: A Challenge for Classification Practices—Revised, in WIMR at 200 ("designed for the goal of advocacy of a particular ideology").

The psychological association *amici* note that there has been a trend away from reliance on IQ tests in recent years, Brief for American Psychological Association *et al*. as *Amici Curiae* ("APA Brief") 13, but conspicuously absent from their argument is any grounding in solid science for the shift. This is a "trust us, we are the experts" argument. But experts often have agendas, and these associations consistently support the defendant in criminal matters, manipulating their positions as needed to reach the Politically Correct result. See *Roper* v. *Simmons*, 543 U. S. 551, 617-618 (2005) (Scalia, J., dissenting); Mossman, 33 N. M. L. Rev., at 271 (contrasting APA positions in *Atkins* and *Kansas* v. *Hendricks*). There is no reason to trust them and much reason not to.

The definitions, and indeed even the name, of the condition at issue here have varied widely over the years and between organizations because there is little scientific basis for drawing the line at a particular place, no treatment decision to serve as a check, and heavy influence of advocacy motives to affect government decisions. Those decisions have always included the provision of educational and other support services. Since *Atkins*, they now include the decision of whether to hold murderers who rape and torture fully responsible for their crimes, a just result that the associations which write the definitions uniformly oppose. Those definitions should therefore not be elevated to a constitutional mandate, overriding the decision of the people as expressed through the legislative process.

B. Scores, SEM, and the Prima Facie Case.

Amici APA *et al*. explain that in clinical practice a test with an established Standard Error of Measurement (SEM) can be understood to establish a confidence interval around the observed score within which the "true score" may lie. See APA Brief 22-23. That is true enough as far as it goes. Just leaving it at that is potentially misleading, though, because the statistically unsophisticated reader may get the impression that the true score is equally likely to be found anywhere in that interval. That is not remotely close to correct. The true score is very likely at or close to the observed score. The chance of it being in the "tails" is remote, and the chance of it being specifically in the low-end tail is only half of that.

"A *true score* represents that part of an examinee's observed score uninfluenced by random events." Harvill, NCME Instructional Module: Standard Error of Measurement, 10 Educational Measurement: Issues and Practice 33, 33 (Summer 1991). For a theoretical

examinee with a theoretical true score, if we could give many repeated examinations without corrupting the test, *e.g.*, through the practice effect, the observed scores would be distributed approximately along the familiar bell-shaped normal curve, with the true score at the peak. The SEM tells us the width of the curve. See *id.*, at 35.

For the theoretical examinee with a true score of T, the probability of getting an observed score of X or less can be determined by calculating z = (X - T)/SEM and looking up the probability "from the normal curve table in the back of any statistics text." *Id.*, at 36. Using the same formula in the other direction, to estimate the probability distribution of true scores for a given observed score, is not strictly correct, but it is a reasonable approximation sufficient for the present illustrative purpose. See *id.*, at 37.

Table 1 shows the probability, using the above approximation, that an examinee with IQ test scores from 65 to 75 has a true score less than or equal to 70.

Table 1.

Test v. True IQ Probabilities		
Test Score X	**z = (70-X)/2.16**	**Probability T <= 70**
65	2.31	99.0%
66	1.85	96.8%
67	1.39	91.8%
68	0.93	82.4%
69	0.46	67.7%
70	0.00	50.0%
71	-0.46	32.3%
72	-0.93	17.6%
73	-1.39	8.2%
74	-1.85	3.2%
75	-2.31	1.0%

This table is based on an SEM of 2.16 for the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV). See APA Brief 23. With a test score of 71, it is twice as likely the true score is above 70 as below 70. With a test score of 72, the chance of a true score at or below 70 has dropped below 18%. At 75, the chance is a mere 1%.

Stated in terms of legal adjudication rather than clinical diagnosis, a test score above 70 establishes a prima facie case that the defendant's intellectual functioning is not two standard deviations below the population mean, and therefore he does not qualify for the first prong of the retardation test. The question for state lawmakers to decide is whether to allow this objective prima facie case to be rebutted with the much softer and much more subjective evidence of an evaluation of adaptive functioning. The question for this Court to decide is whether to take this decision out of the hands of state lawmakers and declare it to be embodied in the Eighth Amendment.

For other substantive mental state questions, this Court has generally recognized that the states have broad latitude, even where the question has federal constitutional implications. See Brief for Respondent 23-25 (competence for execution). At times, states have decided to limit consideration to more objective indicia of mental state than might theoretically seem appropriate. For example, in *Montana* v. *Egelhoff*, 518 U. S. 37 (1996), this Court upheld a law that precluded a criminal defendant from showing that he was too drunk to form the mental state required for the crime. For another example, at one time it was common for drunk driving laws to provide that a given blood alcohol level raised a presumption of intoxication, but the defendant could introduce other evidence to prove that he was not actually intoxicated. See *Burg* v. *Municipal Court*, 35

Cal. 3d 257, 262-263, 673 P. 2d 732, 735 (1983). These laws proved inadequate. "Celerity and certainty of punishment were frustrated by the ambiguity of the legal criteria; no matter what his blood-alcohol level, a defendant could escape conviction merely by raising a doubt as to his intoxication." *Id*., at 263, 673 P. 2d, at 735. States responded by establishing the blood-alcohol level itself as the definition of the crime, *id*., at 263-264, 673 P. 2d, at 735-736, and such laws are constitutional. See *id*., at 266-273, 673 P. 2d, at 737-742. The State of Florida has sound reasons for preferring an objective measure, see Brief for Respondent 48-49, and this choice should be within its authority to make even though it produces a different result in a few borderline cases where the justification for the *Atkins* rule is the weakest.

CONCLUSION

The decision of the Supreme Court of Florida should be affirmed.

January, 2014

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation