No. 18-8386

IN THE

Supreme Court of the United States

MICHAEL APELT,

Petitioner,

v.

CHARLES L. RYAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of intellectually disabled ("ID") individuals due to their diminished moral culpability. Ample evidence shows that both State and Federal courts are struggling to apply scientifically accepted medical standards in making ID determinations, with many courts, including the courts below, relying on factors that are contrary to scientifically accepted clinical standards. Accordingly:

Under *Atkins*, should the lower courts in capital cases be permitted to rely on evidence that is not based on scientifically accepted clinical standards for accurately identifying ID individuals?

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INTEREST OF *AMICUS CURIAE*

The Federal Republic of Germany submits this *amicus curiae* brief in support of Petitioner, Michael Apelt.[1]

Mr. Apelt is a German citizen facing the death penalty in Arizona. Germany has a constitutional obligation to protect German citizens abroad;[2] this is especially true when they face execution. Germany's concern here is amplified because it appears from the Record below that Mr. Apelt suffers from mild intellectual disability, a scientifically well-defined condition that gravely affects Mr. Apelt's adaptive functioning, behavior control, and ability to reason.[3] He therefore does not act with the same level of moral culpability that characterizes the most serious criminal conduct.

Like the United States, Germany is founded on principles of liberty, democracy, respect for human rights, fundamental freedoms, and the rule of law. These principles

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1. Counsel of record for the parties received timely notice of the intent to file this *amicus* brief and have consented in writing to its filing. No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. This brief was paid entirely by *Amicus Curiae* and/or its counsel.

2. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 1980, 90 ILR 386, 396–97 (Ger).

3. Some authorities refer to an intellectually disabled person as "mentally retarded." More recent authorities, however, use the phrase "intellectually disabled" to refer to the identical condition. This brief will use "intellectually disabled" unless necessary to quote another authority directly.

demand that punishment be proportional to culpability—an idea that comports with this Court's rulings that certain scientifically defined mental impairments affecting culpability render the death penalty constitutionally inappropriate. Germany has great respect for the United States, its people, its government, and its commitment to the rule of law. It is that respect that motivates the need for review by this Court here.

SUMMARY OF ARGUMENT

Evolving standards of decency compelled this Court to prohibit the execution of intellectually disabled ("ID") persons in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), because they do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct. The decision to overturn *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), and impose a categorical prohibition rather than leave this decision to judges and jurors was driven by the fact that most people with ID are not readily identifiable to the lay person. Indeed, 85% of people with ID suffer from so-called "Mild ID," a condition defined by life-long cognitive and adaptive deficits that coexist with pockets of adaptive strengths. The existence of these strengths—which typically relate to practical, every-day life skills that can be learned through imitation and repetition—does not mean a person is any less intellectually disabled, but it can make people with Mild ID *appear* superficially "normal," while masking their limitations in engaging in abstract thinking, learning from experience, controlling their impulses, and foreseeing the consequences of their actions—all factors relevant to avoiding criminal conduct. Because of their deficits, people with ID by definition do not act with the level of moral culpability that characterizes

the most serious adult criminal conduct. In *Atkins*, this Court recognized that people with Mild ID should not face the death penalty solely because their condition may exist alongside a bundle of practical skills that do not diminish their ID condition.

Atkins relied on scientifically-accepted clinical definitions of ID to delineate the group shielded from execution due to reduced moral culpability. An inescapable corollary of relying on a clinical definition of ID is that determining who falls into it cannot be done by relying on non-scientific methods or "common sense" based upon widespread stereotypes about what such individuals can and cannot do. To get this right, qualified professionals must use scientifically-recognized clinical tools. In fact, standards that have remained consistent since *Atkins* establish that identifying people with ID requires a comprehensive evaluation by qualified professionals using valid and reliable diagnostic tests and protocols. In particular, the scientific community has not wavered since *Atkins* in its longstanding emphasis on (i) qualified professionals administering accepted standardized measures; (ii) avoiding using or "weighing" strengths to offset relative deficits (which is not scientifically accepted or valid); and (iii) rejecting the use of lay stereotypes as incompatible with the clinical definition of ID.

Notwithstanding the consistency of scientific standards, State and Federal courts have struggled to apply these approaches when confronted with non-scientific methods and lay stereotypes that can be used by proffered experts to argue in favor of the death penalty. In the seventeen years since *Atkins*, courts have varied widely in their approach to weighing medical evidence

of ID. While some courts have used clinical evidence to identify defendants with ID, other courts have instead relied on demonstrably non-scientific evidence in making ID determinations. This case is a perfect example of a persistent problem. The Record makes clear that Mr. Apelt has an IQ well below 70 (a fact the Ninth Circuit acknowledged and the State's expert did not contest). But, the courts below then ignored Record evidence showing that the State's expert—whose testimony was credited by the courts—did not follow controlling clinical guidelines in assessing whether Mr. Apelt has ID. In particular, the courts below relied exclusively on evidence of Mr. Apelt's adaptive strengths and the facts of his crime to conclude he did not have ID. This is precisely the outcome prohibited by *Atkins*.

The scattered and arbitrary way in which the lower courts continue to apply *Atkins* presents a substantial federal question. Inconsistent approaches to accepted scientific guidelines for assessing ID creates arbitrary outcomes and repeatedly forces this Court to provide guidance to fix the most egregious cases. Certiorari should be granted because it is now clear that further clarity is needed to ensure that courts approach ID-related evidence in a fair and consistent manner that is consistent with the moral culpability issues central to the ID determination. Whatever one feels about the appropriateness of the death penalty, all can agree that it must never be applied in an arbitrary manner, and that it must always be pinned to moral culpability.

ARGUMENT

I. The Moral Culpability of Individuals with So-Called "Mild" ID Was At The Heart of This Court's Decision in *Atkins*

Evolving standards of decency compelled this Court to prohibit the execution of intellectually disabled ("ID") persons in *Atkins* v. *Virginia*, because they do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct. 536 U.S. 304, 306 (2002). The prohibition against executing the intellectually disabled was animated by the unique vulnerabilities faced by people with so-called "Mild ID," whose deficits in reasoning and judgment coexist with adaptive strengths that mask their condition. In *Atkins*, this Court recognized that the death penalty should not be applied simply because the cognitive and behavioral impairments of individuals with Mild ID may exist alongside areas of adequate functioning.

A. People with Mild ID have deficits that are directly relevant to moral culpability for criminal conduct.

ID is a life-long condition characterized by significant deficits in intellectual and adaptive functioning. ID is categorized into mild, moderate, severe and profound categories, based on IQ levels.[4]

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4. The "mild" category includes IQ levels of 50-55 to 70; the moderate category includes IQ levels of 35-40 to 50-55; the severe category includes individuals with IQ scores of 20-25 to 35-40; the profound category includes individuals with IQ levels below 20-25. Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 41, 42 (4th ed. text revision 2000) [hereinafter *DSM-IV-TR*].

People with Mild ID comprise 85% of all intellectually disabled individuals.[5] Their level of intelligence is in the bottom 2% of the general population.[6] Like other intellectually disabled people, they have "persistent developmental challenges in the use of abstract thought and complex judgment."[7] Although they "understand basic concepts of right and wrong . . . [they are] impaired in their ability to understand moral principles and exercise abstract reasoning and judgment, in decisions about lawful and unlawful behaviors."[8] They struggle to read social cues, interpret facial expressions, and understand the feelings of others.[9] They are less able than average adults to learn from experience, engage in logical reasoning, and control their impulses. *Atkins*, 536 U.S. at 318. They exhibit cognitive rigidity,[10] and struggle to adapt

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5. *DSM-IV-TR* at 41-42.

6. Sarah E. Wood et al., *A Failure to Implement: Analyzing State Responses to the Supreme Court's Directives in* Atkins *v.* Virginia *and Suggestions for a National Standard*, 21 Psychiatry, Psychol. & L. 16, 20 (2014).

7. Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124, 133 (2009).

8. *Id.*

9. Tom Gumpel, *Social Competence and Social Skills Training for Persons with Mental Retardation: An Expansion of a Behavioral Paradigm*, 29 Educ. & Training in Mental Retardation & Developmental Disabilities 194, 195 (1994).

10. Karen L., Salekin, et al., *Offenders With Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. Mental Health Research in Intellectual Disabilities 97, 99 (2010).

to changing demands, make good decisions, and engage in meaningful planning for the future.[11] As this Court recognized in *Atkins*, these deficiencies go to the heart of moral culpability. *Id.* at 318 nn. 23-24 (citing research).

B. People with Mild ID face entrenched stereotypes in the criminal justice system about ID.

Stereotypes of ID "held by judges, juries, and (some) experts, are . . . more appropriate to moderate or severe ID, where behavioral and physical characteristics are obvious and limitations are fairly global."[12] By contrast, individuals with Mild ID do not appear or behave the way that the general public might expect from the intellectually disabled, because their deficits in judgment and complex reasoning coexist with some areas of adequate functioning, particularly in the domain of everyday skills.[13] Indeed, even mental health professionals are prone to fall into these stereotypes. Accordingly the scientific community in the AAMR manual has long emphasized that "within an individual, limitations *often coexist with strengths*."[14]

Specifically, individuals with Mild ID can escape identification because they can attain practical skills that

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11. *Id.* at 99.

12. Stephen Greenspan, *Homicide Defendants with Intellectual Disabilities: Issues in Diagnosis in Capital Cases*, 19 Exceptionality 219, 220 (2011).

13. Wood, *supra* note 6, at 19.

14. Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports*, 74 (10th ed. 2002) [hereinafter *AAMR Manual*].

can be learned through repetition and do not require abstract understanding.[15] For example, they can attain "basic literacy, typically reading at about the fourth grade level, with some reading as high as the sixth grade level."[16] "Most are capable of driving competently and many can pass the written driver's license examination. Many can also secure employment and economic self-support, typically in low-level jobs that do not require complex reasoning and decision making."[17]

These basic skills do not enable individuals with Mild ID to succeed at more complex, high-order tasks. For example, while they can often "recognize denominations of money and make simple purchases . . . they often have problems counting change and budgeting money."[18] However, they do allow individuals with Mild ID to appear superficially "normal" to the general public, as well as to medical professionals unfamiliar with ID.[19]

C. People with Mild ID are uniquely vulnerable in the criminal justice system.

Because their cognitive and adaptive deficits coexist with strengths that make them seem "normal," individuals

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15. Salekin, *supra* note 10, at 99.

16. *DSM-IV-TR* at 43; *see also* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009).

17. Reschly, *supra* note 7, at 124, 133.

18. Salekin, *supra* note 10, at 100.

19. J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 Applied Neuropsychology 135, 136 (2009).

with Mild ID are uniquely vulnerable to criminal conduct, especially as compared to individuals with moderate or severe ID. Initially, their seemingly normal outward presentation makes them less likely to be identified as having a disability and needing social support.[20] But absent support, "they have a poor employment potential and are at increased risk of for engaging in criminal activity."[21] Moreover, their limitations in reasoning, and a desire to fit into a group make them more likely to be susceptible to the negative influences of others.[22]

Sadly, the known characteristics of individuals with Mild ID also make them vulnerable to abuse, which can further their journey into criminal activity.[23] This was certainly the case here, where Mr. Apelt suffered horrific abuse by his father as a child and until his father's death in 1977. *See* Excerpts of Record, *Apelt* v. *Ryan*, No. 15-99013 (9th Cir. Mar. 9, 2016), ECF No. 6, at 532-34 ("Dkt. 6"); *see also* Pet. 19, 25-26; Pet. App. 30a-31a, 122a (summarizing evidence of abuse). At the same time, Mild ID then prevents sufferers from extricating themselves from their negative environments, compounding their risk of getting caught up in the criminal justice system.[24]

Once in the justice system, individuals with Mild ID have problems understanding their rights and the

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20. Salekin, *supra* note 10, at 100-101.

21. *Id.* at 100.

22. *Id.* at 99, 101.

23. Greenspan, *supra* note 12, at 233.

24. Salekin, *supra* note 10, at 99, 101.

seriousness of their charges.[25] Their suggestibility and tendency to acquiesce makes them prone to involuntary confessions, and their limitations make it difficult for them to work effectively with attorneys to put on a strong defense.[26] Indeed, as recognized in *Atkins*, in the context of capital cases ID defendants are at a special risk of execution. 536 U.S. at 321 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

D. *Atkins* focused on hard science in recognizing the unique vulnerability of people with Mild ID.

The central question in *Atkins* was whether the Constitution prohibits the execution of defendants who, like Atkins, suffer from Mild ID. 536 U.S. at 307, 309 (defendant's IQ of 59 fell within Mild ID). In concluding that it does, this Court relied on decades of scientific research establishing that *all* individuals with ID by definition do not act with sufficient moral culpability to warrant the death penalty. *See id.* at 319.

This Court also held that a blanket prohibition on executing people with ID was required to ensure that all intellectually disabled people—not just those who are easily identifiable—received the protection of *Atkins*. In so ruling, this Court recognized the challenges faced by judges and juries in identifying defendants with ID. *Id.* at 317. Long-standing medical consensus confirms the wisdom of this ruling. As the APA's *amicus* brief in *Atkins*

25. *Id.* at 103-04.

26. *Id.* at 97.

explained, identifying people with ID requires evaluation by qualified professionals *using valid and reliable* tests and protocols—and professionals lacking the appropriate expertise are likely to miss ID (and particularly Mild ID).[27]

E. *Atkins* showed that Clinical Definitions come with Clinical Diagnostic tools that are essential for evaluating Mild ID.

This Court's decision in *Atkins* relied on leading clinical definitions of ID to delineate the group to be shielded from execution due to reduced moral culpability. 536 U.S. at 317-18. These universally accepted definitions of ID are based upon recognized, substantial, and life-long cognitive and behavioral deficits that can only can be identified using standard clinical diagnostic tools.

Indeed, an inescapable corollary of relying on a clinical definition is that, in turn, such reliance requires the use of scientifically recognized clinical tools, as opposed to stereotypes or non-scientific methods. For example, in *Hall* v. *Florida*, this Court confirmed that courts cannot rely on an inflexible IQ cutoff of 70 as dispositive of an individual's intellectual functioning while ignoring the test's standard error of measurement ("SEM"). *See* 572 U.S. 701, 713-14 (2014). As explained in *Hall*, "A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself." *Id.* at 713. In *Moore* v. *Texas*, this Court

27. Brief of Am. Psych. Ass'n. et al. as *Amici Curiae* in Support of Petitioner, at 24, *Atkins* v. *Virginia* (No. 00-8452). Subsequent reference to the APA's *amicus* briefs filed in this Court will be cited as "[case name] APA Br."

confirmed that, in considering whether an individual suffers from significant adaptive deficits (the second prong of the two-prong clinical definition of ID), courts are *not* permitted to rely on evidence of adaptive "strengths" or behavioral improvements in prison to determine the presence of adaptive deficits. 137 S. Ct. 1039, 1043, 1050 (2017).

Moore recognized that scientifically recognized principles have established that ID is *not* a balancing test. Rather it is a condition that exists once some number of defined factors are shown to exist. That is, the existence of strengths in other areas emphatically does *not* render a person free of ID—it only may serve to mask the nature and depth of that ID. *See id.*

Accordingly, and consistent with *Atkins*, this Court rejected the use of arbitrary evaluative tools that do not apply established medical guidelines for clinically defining ID. *See Hall*, 572 U.S. at 720 (confirming that the clinical definition of ID is "a fundamental premise of *Atkins*"). To prevent courts from making determinations of ID on the basis of lay stereotypes, those determinations must be made in accordance with clinical guidelines, which offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians . . . ." *Moore*, 137 S. Ct. at 1052. These guidelines mandate that ID—and especially Mild ID—can only be accurately identified by (i) qualified professionals experienced in the area of ID, (ii) conducting a complete ID evaluation, and (iii) applying valid, reliable, and scientifically grounded diagnostic tools.[28]

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28. *Atkins* APA Br. 15.

II. Even Though The Medical Science Has Remained Consistent, Ample Evidence Now Exists That State and Federal Courts Are Struggling to Properly Apply *Atkins*

With respect to ID as understood in *Atkins*, the two main diagnostic manuals—the AAIDD Manual and the DSM—distill the best scientific practices for diagnosis.[29] While particular diagnostic methods have been refined over time and the standardized instruments continue to improve, the medical consensus regarding *how to properly* diagnose ID *has remained remarkably consistent* over time. Unfortunately, the lower courts have nonetheless struggled to apply these scientific approaches when confronted with lay stereotypes and non-scientific methods and opinions that often are used to argue in favor of the death penalty.

A. The scientifically-accepted standards for ID have remained consistent since *Atkins*.

This case does not demand the formulation of new or difficult standards. Indeed, to the contrary, while specific diagnostic tools have been refined over time, the scientifically-accepted standards for identifying individuals with ID have remained remarkably consistent since *Atkins*. The best measure of this consistency are the *amicus* filings of the American Psychiatric Association ("APA") in *Atkins*, *Hall*, and *Moore*.

Thus, the APA filings have consistently reiterated the unanimous professional consensus for evaluating

29. *Atkins* APA Br. 2 n. 8.

deficits in intellectual and adaptive functioning. In assessing how the lower courts have struggled with identifying ID defendants, it is particular important to note the medical community's longstanding emphasis on (i) administration of current standardized measures by qualified professionals, *see Atkins* APA Br. 3-4, 15, 24; *Hall* APA Br. 6, 19; *Moore* APA Br. 11-13; *Moore II* APA Br. 9; (ii) avoidance of overemphasizing strengths *and* "weighing" strengths against relative deficits, *see Atkins* APA Br. 6; *Moore* APA Br. 13, 18; *Moore II* APA Br. 4-6; and (iii) rejection of lay stereotypes as incompatible with the clinical definition of ID, *see Moore* APA Br. 17-18, 24; *Moore II* APA Br. 4-6.

Tellingly, these are precisely the areas where the lower courts have struggled in applying *Atkins*—including the courts below in this case.

B. State and Federal Courts are not basing findings of moral culpability on scientifically recognized standards of ID.

In the seventeen years since *Atkins*, State and Federal courts have struggled with how to weigh medical evidence of disability.[30] While some courts have used clinical evidence to identify defendants with ID,[31] other courts

30. John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm & Mary Bill of Rights J. 393 (2015) (surveying twelve years of *Atkins* jurisprudence).

31. *See, e.g.*, *Holladay* v. *Allen*, 555 F.3d 1346, 1357-58 (11th Cir. 2009); *Walker* v. *True*, 399 F.3d 315, 323 (4th Cir. 2004); *United States* v. *Roland*, 281 F. Supp. 3d 470 (D.C.N.J. 2017).

have instead relied on demonstrably non-scientific factors in making ID determinations. Specifically, courts have allowed ID determinations to be based on:

- Strict IQ cutoffs that disregard the standard error of measurement.[32]
- Short form tests and screening tests that were not designed to measure IQ.[33]
- Tests to determine malingering that were not designed to properly evaluate individuals suffering from ID.[34]

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32. *See Cherry* v. *State*, 959 So. 2d 702, 712-13 (Fla. 2007); *Hall* v. *State*, 109 So. 3d 704, 707, 709 (Fla. 2012).

33. *See Henderson* v. *Director*, No. 1:06-CV-507, 2013 U.S. Dist. LEXIS 127922*, at *40-41 (E.D. Tex. Sept. 6, 2013) (State's expert testified that the highest IQ score is the most reliable because "you can't fake knowing the answer"); *Anderson* v. *State*, 163 S.W.3d 333, 355-56 (Ark. 2004) (relying on a ten-question questionnaire that provided estimated IQ scores, as well as expert testimony extrapolating an estimated IQ range from scores on the Wide Range Achievement Test [WRAT], which is not a test designed to measure IQ).

34. *Wright* v. *State*, 213 So. 3d 881, 898 (Fla. 2017) (considering the results of a Validity Indicator Profile ("VIP") test indicating that Wright was malingering even though the VIP is not normed for individuals with ID). As a general matter, although multiple instruments exist to assess malingering, there is clinical disagreement about their utility for assessing malingering by individuals with ID. *See State* v. *Scott*, 233 So. 3d 253, 261 (Miss. 2017) (admitting expert opinion that multiple consistent IQ scores in the ID range ruled out the possibility of malingering, and noting that "[b]oth [expert for the State and for the Defendant] claimed no

- Arbitrary IQ score adjustments, untethered to medical evidence.[35]

- Arbitrary rejection of past evidence of ID and of the clinically established fact that ID manifests before eighteen.[36]

Other courts have ignored scientifically recognized standards by making findings on the absence of deficits in adaptive functioning based on factors that do not rule out those deficits (*i.e.*, they have weighed factors one against the other, which is not scientifically appropriate), including by:

- Refusing to consider medical histories, behavioral record, school tests and reports, and testimony of family members and friends.[37]

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malingering test has been "normed" for the intellectually disabled"). Experts look instead to consistency of scores across multiple testing instruments to rule out malingering, due to the complexity of achieving a consistent score consistent with of Mild ID on multiple tests, especially if those tests are separated by time. *Id.* at 262. This approach has been accepted by multiple jurisdictions. *See id.* at 262 n. 15 (collecting cases).

35. *State* v. *Were*, 890 N.E.2d 263, 293 (Ohio 2008) (rejecting an *Atkins* claim where defendant offered an IQ score of 69 because of expert testimony that the test scores should be adjusted due to "cultural bias").

36. *Williams* v. *Mitchell*, 792 F.3d 606, 617 (6th Cir. 2015) (noting that the lower court "rejected outright any pre-1989 evidence from its analysis of Williams's intellectual functioning and adaptive skills, despite finding this same evidence showed that Williams was intellectually disabled before he turned eighteen").

37. *Id.* at 609.

- Considering the facts of the crime (including whether they demonstrate planning or deception).[38]

- Considering adjustment to prison life, including evidence of employment, gang membership, reading books or magazines, acting "normal" and being polite.[39]

- Considering stereotypes about what people with ID can do, including evidence that a defendant could, read, write and do basic math;[40] maintain personal hygiene;[41] drive on occasion;[42] was appropriately groomed and had a driver's license;[43] and maintained relationships with women.[44]

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38. *See, e.g.*, *Walker* v. *Kelly*, 593 F.3d 319, 324-25 (4th Cir. 2010), *cert. denied*, 560 U.S. 921 (2010).

39. *See, e.g.*, *Walker*, 593 F.3d at 325-27; *State* v. *Hill*, 894 N.E.2d 108, 124-25 (Ohio Ct. App. 2008); *Ex parte Briseno*, 135 S.W.3d 11, 18 (Tex. Crim. App. 2004).

40. *See, e.g.*, *Lane* v. *State*, 169 So. 3d 1076, 1091 (Ala. Crim. App. 2013) (noting that defendant "was able to write and read and put words together in a coherent matter").

41. *See, e.g.*, *Walker*, 593 F.3d at 319.

42. *See, e.g.*, *Dufour* v. *State*, 69 So. 3d 235, 258 (Fla. 2011) (noting that "[i]n the past, [the defendant] drove a car and possessed a driver's license").

43. *See, e.g.*, *Branch* v. *State*, 961 So. 2d 659 (Miss. 2007).

44. *See, e.g.*, *Walker*, 593 F.3d at 326 (noting defendant's "ability to ingratiate himself to women and establish intimate relationships with them in a relatively short period of time as evidence of his social skills").

These non-scientific approaches create two serious problems. First, they reveal that in disputes over ID—and particularly Mild ID—parties will revert to non-scientific factors to make their case.[45] But this places the lower courts in the untenable position of analyzing the death eligibility of defendants who may not have the moral culpability to support the imposition of the death penalty in the first place. This then creates the second problem: This Court has been left to continuously step in to guide the lower courts by correcting only the most egregious cases.

In both *Hall* and *Moore*, this Court recognized that the lower courts had deviated from accepted diagnostic guidelines in ways that created a high risk that defendants with ID would face execution—in *Hall*, by ignoring the SEM of IQ tests, and in *Moore*, by relying on stereotypes of what people with ID can do as a basis for finding a lack of ID. In both cases, this Court recognized that failure to apply scientifically-mandated standards runs the risk that ID defendants who lack the requisite moral culpability will nonetheless be executed. *See Moore*, 137 S. Ct. at 1051-52; *Hall*, 572 U.S. at 710. Indeed, *Moore* required a second review because it was clear that, on remand, the Texas court had repeated its prior errors by (i) once again relying on Moore's adaptive strengths and behavioral improvements made in prison to conclude that he lacked deficits in adaptive functioning, (ii) considering that "emotional problems"—a risk factor for ID—could be an alternative to an ID diagnosis; and (iii) continuing to rely on the so-called *Briseno* factors. *Moore*, 139 S. Ct. at 669, 670-71.

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45. *See, e.g.*, *Anderson*, 163 S.W.3d at 355-56.

C. As in *Moore II*, this Court could summarily reverse the Ninth Circuit for ignoring established science in its decision.

Here, as in *Moore*, the courts below consistently ignored record evidence showing that scientifically accepted guidelines were not followed in assessing whether Mr. Apelt is ID. This error alone would mandate summary reversal so that the Ninth Circuit (or the District Court) could consider and properly apply the scientifically accepted standards relating to ID, which bear directly on moral culpability.

The Record before the Ninth Circuit showed that the State's expert, Dr. Moran, performed an evaluation that ignored scientifically-accepted clinical standards. In particular:

- ***Dr. Moran based his conclusion about Mr. Apelt's IQ on a single test result, that even he conceded was unreliable.*** Dr. Moran did not contest the validity of the defense's IQ tests, which showed a full-scale IQ of 61 and 65 for Mr. Apelt (which would support Mild ID). In contesting that Mr. Apelt had subaverage intellectual function before the age of 18, Dr. Moran testified that his conclusion was based *solely* on a single score of 88 on a group IQ test dating from Mr. Apelt's childhood. Dkt. 6 at 692. But all three experts for the State (*including* Dr. Moran) agreed that this score was suspect and likely a result of measurement error.

- ***Dr. Moran did not administer a single standardized instrument***. Instead of following

scientifically-accepted practice, Dr. Moran interviewed Mr. Apelt for two hours, only using questions that he hand-picked from one of the standard instruments. But, the AAMR explicitly states that this instrument cannot be used to diagnose ID.[46] Dr. Moran conceded that his use of this particular standard test instrument did not meet clinical standards and was not scientifically valid. In any event, Dr. Moran then cut his interview short because he believed Mr. Apelt was malingering, but made no effort to verify his intuition by administering any accepted measure for malingering (not even the one he claimed was valid).

- ***Dr. Moran relied on Mr. Apelt's strengths to conclude that he had no adaptive function deficits***. The medical consensus is clear that clinicians cannot rely on evidence of adaptive strenghts, past criminal conduct, or past verbal behavior, to rule out ID. But at trial, these factors were the *only* ones Dr. Moran offered. He never contested the validity of the adaptive function tests administered by the defense experts (described below).

46. *AAMR Manual* at 89 ("The Residential and Community version, ABS-RC:2, was developed to be appropriate for individuals through 79 year of age, but norms are not available for adultes with typical functioning . . . the ABS-RC:2 does not fit the psychometric criteria proposed in this 2002 manual for a diagnosis of mental retardation. It has a long history, however, of providing excellent information for planning supports . . . .").

- ***Dr. Moran justified his conclusions by the very stereotypes that animated the need for* Atkins.** Dr. Moran testified that the main characteristics of people with ID are that (i) their deficits become apparent to anyone speaking with them after a short time, and (ii) they "appear naïve, gullible, and easily exploited." Dkt. 6 at 832-33. According to Dr. Moran, Mr. Apelt and his brother did not fit the bill because they were like "the wolves in sheep's clothing." He referred to ID as a "six hour disorder" and testified that it only manifested during school hours. *Id.* at 698. He concluded that Mr. Apelt's characteristics were more consistent with Antisocial Personality Disorder ("APD") because of the "predatory" nature of Mr. Apelt's behavior. This, despite the fact that the DSM-IV states that APD cannot rule out a diagnosis of ID.[47]

Dr. Moran was not the first expert hired by the State. The state initially retained Dr. Kury. *See* Excerpts of Record, *Apelt* v. *Ryan*, No. 15-99013 (9th Cir. Oct. 13, 2016), ECF No. 23, at 1971-74 ("Dkt. 23"). Dr. Kury performed eight individual IQ tests and found a range of scores, with a median IQ of 65 (which would support Mild ID). *See id.* at 1994-95, 2005, 2032. After an initial draft of his report opined that Mr. Apelt had ID, the State asked Dr. Kury to remove the adaptive functioning analysis from his report, leaving only the results of his IQ testing. *Id.* at 2062-63, 2096. The State then hired Dr. Moran.

By contrast, the experts who testified for the defense, Dr. Kury and Dr. Ruff, hewed closely to accepted

47. *See* DSM-IV-TR at 47.

medical guidelines. Dr. Ruff conducted two evaluations of Mr. Apelt, which corroborated Dr. Kury's findings. Specifically:

- Dr. Ruff first evaluated Mr. Apelt in 2000. At the time he determined that Mr. Apelt had an IQ of 61, and based on neuropsychological tests and a thorough review of Mr. Apelt's records, he issued a report providing a diagnostic impression that Mr. Apelt had "mental retardation, severity unspecified." Pet. App. 137a.

- Dr. Ruff then re-evaluated Mr. Apelt in 2006. He administered two of the clinically-accepted standardized instruments for testing adaptive function and found that Mr. Apelt exhibited significant deficits in four out of eleven adaptive function domains (only two are needed to support a finding of ID): (1) social/interpersonal skills; (2) use of community resources; (3) functional academic skills; and (4) work. *See* Pet. App. 169a-171a; Dkt. 6 at 526.

Notwithstanding Dr. Moran's deviations from scientifically-accepted clinical tools and methods, the State court credited Dr. Moran's testimony as supporting a finding that Mr. Apelt does not have ID, and specifically rejected Dr. Ruff's findings *because* he focused *too much* on Mr. Apelt's deficits. The Ninth Circuit repeated that error.

As in *Hall* and *Moore I* and *II*, the lower courts here have premised their holdings as to death eligibility on non-scientific analyses that demonstrably deviate from standards recognized in *Atkins*. On that basis alone,

this Court could summarily reverse the decision below, and instruct the Ninth Circuit to remand the case to the District Court for reconsideration in light of the scientific standards recognized in *Atkins*, *Hall*, and *Moore I* and *II*.

III. The Scattered and Arbitrary Way in which Courts Continue to Apply *Atkins* Presents a Substantial Federal Question

This Court's teaching on the death penalty has made two principles crystal clear. First, the death penalty must never be applied in an arbitrary manner. *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Monge* v. *Cal.*, 524 U.S. 721, 732 (1998) ("Because the death penalty is unique 'in both its severity and its finality' we have recognized an acute need for reliability in capital sentencing proceedings.") (quoting *Locket* v. *Ohio*, 438 U.S. 586, 604 (1978)). Second, defendants lacking the requisite moral culpability may not be subject to the death penalty. *See Tison* v. *Ariz.*, 481 U.S. 137, 156 (1987) ("A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime."). Yet, as explained above, there now is ample evidence that the lower courts are applying haphazard approaches to ID evidence, which, in turn, is yielding arbitrary results in which ID individuals are subject to execution.[48] This risks undermining central tenets of this Court's death penalty jurisprudence and presents a substantial federal question.

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48. *See* Blume et al., *supra* note 30.

In short, certiorari should be granted because clarity in how the lower courts should determine whether a defendant has ID is crucial to ensuring that punishment is proportional to the blameworthiness of the offender. Specifically, as in other situations involving expert testimony, this Court must set forth a fair and consistent way for the lower court to approach evidence relating to ID. By providing this type of guidance, this Court would be true to the principles enunciated in *Atkins* and *Roper*, and also would avoid the need to micro-manage how State and Federal courts administer and assess death penalty sentencing.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Certiorari and reverse the Ninth Circuit's decision.

Respectfully submitted,

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