

**In The  
Supreme Court of the United States**

—◆—  
ABELARDO ARBOLEDA ORTIZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

—◆—  
**AMICUS CURIAE BRIEF OF THE BAR COUNCIL  
OF MALAYSIA, BRITISH INSTITUTE FOR  
LEARNING DISABILITY, DISABILITY ACTION,  
FORENSIC PSYCHIATRY CHAMBERS,  
HUNGARIAN ASSOCIATION FOR PERSONS WITH  
INTELLECTUAL DISABILITY, MAMH: EUROPEAN  
ASSOCIATION OF INTELLECTUAL DISABILITY  
MEDICINE, MENTAL HEALTH EUROPE,  
THE PARIS BAR, PENUMBRA, ROYAL COLLEGE  
OF PSYCHIATRISTS, THE SPANISH SOCIETY  
FOR INTERNATIONAL HUMAN RIGHTS, AND  
WORLD PSYCHIATRIC ASSOCIATION AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

—◆—  
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**AMICUS CURIAE BRIEF ON  
BEHALF OF PETITIONER ORTIZ  
STATEMENT OF INTEREST<sup>1</sup>**

Amici Curiae represent psychiatric, psychological, medical, legal and social organizations and members around the globe who come together to express common concerns about this case and its negative impact on individuals with intellectual disabilities.

**1. Bar Council of Malaysia**

The Malaysian Bar is a statutory body created by Section 41 of the Legal Profession Act 1976, and has a membership of over 16,000 members (Advocates and Solicitors). The Malaysian Bar's objectives and powers are set out in Section 42 of the 1976 Act and the Malaysian Bar is enjoined by Section 42(1)(a) to "uphold the cause of justice without regard to its own interest or that of its members, uninfluenced by fear or favour." The Bar Council is the executive body of the Malaysian Bar and encourages the use of validated scientific and medical methodologies, including in determinations of intellectual disability.

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<sup>1</sup> This brief is submitted pursuant to Supreme Court Rule 37 with the consent of Petitioner, Abelardo Arboleda Ortiz, and of Respondent, the United States of America. The parties were given timely notice. This brief has been written by the signatories hereto. Neither Petitioner nor counsel for Petitioner has contributed any funds for the preparation or production of this brief.

## **2. British Institute for Learning Disability (BILD)**

BILD is the largest national voluntary membership organization in intellectual disabilities in the UK. Founded in 1971, BILD is one of the leading learning disabilities organizations in the UK and is well known internationally as a trusted source of information for those that work with people with learning disabilities: clinicians; academics; providers of services; and organizations in the public, private and voluntary sectors.

## **3. Disability Action**

Disability Action works to ensure that people with disabilities attain their full rights as citizens, by supporting inclusion, influencing government policy and changing attitudes in partnership with disabled people. Disability Action represents the views of our 100 member groups, working to bring about positive change to the social, economic and cultural life of people with disabilities and consequently to our entire community.

## **4. Forensic Psychiatry Chambers**

Forensic Psychiatry Chambers is a group of experienced psychiatrists providing high quality psychiatric advice and reports to the legal profession. Forensic Psychiatry Chambers comprises independent practitioners offering legal professionals a unique level of collective knowledge and experience. Members have experience of working in all levels

of court and tribunals up to and including the UK Supreme Court and the Judicial Committee of the Privy Council. Members have experience of working on death penalty cases of individuals with intellectual disability in various countries around the world.

**5. Hungarian Association for Persons with Intellectual Disability (ÉFOÉSZ)**

ÉFOÉSZ is the umbrella body of persons with intellectual disabilities and their families in Hungary representing 22,000 members. Our mission is to guarantee that human rights, social security and inclusion are ensured to all people with intellectual disabilities without discrimination. Besides advocacy work, we maintain a wide range of services: we manage support services related to transport, employment, living, legal advice, education and training.

**6. MAMH, European Association of Intellectual Disability Medicine**

MAMH, European Association of Intellectual Disability Medicine, is an organization of medical doctors committed to high quality health care and to reducing inequalities for persons with intellectual disability within Europe, based on the UN Convention on the Rights of Persons with Disabilities and the Manifesto: Basic standards of health care for persons with intellectual disability.

## **7. Mental Health Europe (MHE)**

An umbrella organization, MHE represents associations, organizations and individuals active in the field of mental health and well-being in 30 European countries, including users and ex-users of mental health services, volunteers and professionals. MHE's core objective is to ensure that the human rights of persons with mental health problems are fully respected.

## **8. The Paris Bar**

The Paris Bar comprises 25,000 members. Traditionally, the Paris Bar is often approached when human rights are in danger. In the field of human rights defense, the Paris Bar cooperates and exchanges information with numerous human rights associations. The Paris Bar also cooperates with numerous organizations in France and across Europe on behalf of its members to defend their use of validated scientific and medical methodologies, including determinations of intellectual disability in appropriate cases. The actions undertaken by the Paris Bar are particularly aimed to support lawyers and the freedom, independency and dignity of our profession.

## **9. Penumbra**

Penumbra is a charity established in 1985 to support people with mental health problems in Scotland. We work to promote mental health, to prevent mental illness, to support people in their recovery and promote the

rights of people with a disability to equal protection under the law.

#### **10. Royal College of Psychiatrists**

The Royal College of Psychiatrists is an independent professional membership organization and registered charity representing over 15,000 psychiatrists in the UK and internationally. The core purposes of the Royal College of Psychiatrists are to:

Set standards and promote excellence in psychiatry and mental healthcare;

Lead, represent and support psychiatrists;

Work with patients, care-givers and other organizations interested in delivering high quality mental health services.

The main specialties in psychiatry are represented by College Faculties, Sections and Special Interest Groups. The College has a Faculty dedicated to intellectual disability.

#### **11. The Spanish Society for International Human Rights Law**

The Spanish Society for International Human Rights Law promotes, among academia, public institutions, international organizations and civil society, international human rights law values. Thus ensuring States' compliance with decisions and recommendations adopted by the international human rights bodies and mechanisms, including the protections



and legal rights of persons with intellectual disabilities.

## **12. World Psychiatric Association (WPA)**

The WPA is an association of national psychiatric societies aimed at increasing knowledge and skills necessary for work in the field of mental health and the care for the mentally ill. Its member societies are presently 135, spanning 117 different countries and representing more than 200,000 psychiatrists. It has 65 scientific sections, aimed at disseminating information and promoting collaborative work in specific domains of psychiatry. It has produced several educational programs and series of books. It has developed ethical guidelines for psychiatric practice, including the Madrid Declaration (1996).



### **SUMMARY OF ARGUMENT**

Amici's brief and arguments are premised on the Statement of the Case and Facts in the Petition for Certiorari, along with its accompanying record, which we take to be an accurate reflection of the record as it relates to the testing and opinions of Mr. Ortiz's intellectual and adaptive functioning.

Amici urge the Court to consider widely accepted international mental health practices and mental health opinions when applying the Eighth Amendment's clause prohibiting cruel and unusual punishment

and the Fourteenth Amendment's equal protection clause. International standards align with the United States regarding the protections afforded to individuals with intellectual disabilities and their reduced degree of culpability in criminal conduct assessment. In criminal cases where severe punishments are at issue, the special protections afforded to persons suffering from an intellectual disability are at their most relevant application and the medical scientific standards for properly testing and determining intellectual disability are at their sharpest focus. Correct application of the best available testing using the most reviewed and accepted standards of analysis and diagnosis are critical.



## ARGUMENT

### **I. DISREGARDING VALID IQ TESTS RESULTS BECAUSE THERE IS NO "NORM" FOR THE NATIONALITY OR SPECIFIC CLASSIFICATION OF THE DEFENDANT IS CONTRARY TO ESTABLISHED MENTAL HEALTH RESEARCH AND PRACTICES AND CREATES UNFAIR, UNIQUE, AND INSURMOUNTABLE BARRIERS TO FOREIGN NATIONALS UNDER THE *ATKINS V. VIRGINIA* CRITERIA.**

Fundamental to the concerns of Amici is the determination made by the District Court to reject

the valid data from the IQ test known as the WAIS – III. In the *Atkins*<sup>2</sup> hearing to determine if Mr. Ortiz suffered from intellectual disability the prosecution’s mental health expert, Dr. Vazquez, opined that the WAIS – III (Spanish version) test, with a full scale score of 54, was invalid. Dr. Vazquez based her opinion on the fact that the WAIS – III was not assessed against a normative population of Colombians but rather was assessed against U.S. norms. (A003395, H. Tr. at 285)<sup>3</sup> These representations were accepted by the District Court and formed an important basis for its opinion that Mr. Ortiz was not intellectually disabled.

The Brief of the Petitioner and the Amicus Brief of the Republic of Colombia submitted to the Eighth Circuit provide ample evidence that a Colombian normative population to assess against does not exist and the accepted practice in the Colombian mental health community is to assess against U.S. norms.<sup>4</sup> Indeed, the accepted practice around the world with Amici’s members, when a mental health test has not

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<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (“clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”).

<sup>3</sup> Ortiz *Atkins* hearing record transcript.

<sup>4</sup> See: Declaration of Dr. Erika Arias, accompanying the Brief of the Republic of Colombia as *Amicus Curiae* in Support of Petitioner, Eighth Circuit Case: 08-1749, filed 31 March 2010 Entry ID 3650258.

been normed to a specific population, is to use the norm of the country in which the person is present or, failing that, the U.S. normative population is the most commonly used. The WAIS – III test using U.S. norms is highly regarded, in part because its norm is regularly tested and adjusted as required to maintain its relative accuracy.

The scientific and legal community recognize that a precise determination of IQ is beyond any known test but acknowledge widely that established IQ testing is accurate within a standard error of measurement (SEM) of approximately five points. *Hall v. Florida*, 134 S. Ct. 1986, 1995, 1999 (2014). The mean IQ test score is 100 with a standard deviation of approximately 15 points. An individual with a score two standard deviations from the mean (70) would accurately have a range score of 65 to 75 and be considered of sub-average intellectual functioning warranting further testing for adaptive deficits and evidence of onset before age 18. *Hall*, 134 S. Ct. at 1999.

Mr. Ortiz had a WAIS – III test full scale score of 54, with the SEM of 49 to 59, approximately three standard deviations below the U.S. mean, yet the District Court accepted the opinion that this score should be rejected as inaccurate because it was not tested against a non-existent Colombian norm. It should be noted that the District Court made no finding of intellectual deficit even though Mr. Ortiz scored 70 or below on *three* other highly regarded

intelligence tests including the Bateria-III, which was chosen and administered by the government's own expert. It is unclear then what evidence, if any, the District Court would ever have accepted as proof of a foreign national's subaverage intelligence. The District Court's finding should be rejected not only because it has no rational scientific or legal basis but more importantly because it sets a dual standard for intellectual disability determinations that significantly prejudices any individual from a country, ethnicity or socio-economic background that has no tested and validated "norm" for the IQ tests.

For a significant number of nations and population groups specific norms for IQ testing do not exist. The Amici work in these countries and with individuals from numerous population groups across the globe. In many cases a norm for the nationality or population group of the person being examined is not essential as the U.S. norms provide a sufficient benchmark for the mental health testing, analysis, and rendering of accurate professional opinions. The absence of a specific IQ test norm does not mean that IQ tests are not used.

It is also not difficult to see where the discriminatory practice applied in Mr. Ortiz's case will fall the hardest: on individuals from countries which are in conflict or post conflict, economically and educationally disadvantaged, small in population or with a significant non-major language speaking population. The decisions below mean individuals from

populations without an established “norm” to be tested against have virtually no ability to meet the first prong of the three-part intellectual disability test. This will expose them to significant legal results, including the death penalty, while individuals with a “norm” group have the possibility to be considered less culpable, including exclusion from capital punishment. The dual standard resulting from the opinions below would be against any medically or scientifically accepted practice known to Amici, be discriminatory, and violate the equal protection clause of the U.S. Constitution.

**II. USING CULTURAL STEREOTYPES AND BIASES TO DISREGARD RELEVANT FAMILY HISTORY AND EARLY ADOLESCENT BEHAVIORS, WHICH DEMONSTRATE ADAPTIVE BEHAVIOR DEFICITS CONSISTENT WITH INTELLECTUAL DISABILITY, CREATES UNFAIR, UNIQUE, AND INSURMOUNTABLE BARRIERS TO DETERMINATIONS OF INTELLECTUAL DISABILITY UNDER THE *ATKINS V. VIRGINIA* AND *HALL V. FLORIDA* CRITERIA.**

Amici promote scientific and medically accepted good practices around the globe with our primary work locations in Europe. Our working environment is a collection of many countries, large and small, with many cultures and languages and a constant

influx of immigrants. In the past decades European mental health experts have had to address and work against many cultural stereotypes and biases. It would be naive to think that none exist anymore, but it would be unheard of today, and completely unacceptable, for stereotypes and biases to form any part of a proper mental health opinion. As human rights, especially civil and political ones, are universal, allowing a State to make distinctions based on national stereotypes would be contrary to accepted international standards. To base a life and death decision, such as eligibility for the death penalty, on archaic and unfounded stereotypes as occurred in this case shocks the conscience of Amici and its members. Yet, that is what the record of this case, attached as part of the petition for certiorari, demonstrates.

Dr. Vazquez opined, and the District Court accepted, that:

Many of the behaviors that were described as indicative of dependency . . . are very typical of behaviors exhibited by many immigrants in similar circumstances. . . . It is not unusual for poor Latino immigrants to share living expense, rather than living by themselves. They save money under a mattress, rather than in a bank, language problems require that others help them to pay their bills and they tend to stay within their own group as much as possible. (A004341, at 15.)

Individually, any one or more of these acts could occur by choice by anyone in the U.S. or Europe and not be indicative of an intellectual disability. However, given the convergence of the very low IQ test scores of Mr. Ortiz along with his individual developmental history and family accounts of significant developmental delays in growing up, the dismissal of this important evidence as “typical for poor Latinos” is shocking to Amici.

This constellation of evidence should compel any mental health examiner to explore further and examine all mental health testing in a comprehensive manner. In this case the mental health testing reveals the WAIS-III (Spanish Version) IQ Full Scale score of 54 referenced above, the Bateria Woodcock-Muñoz Revisada Basic Cognitive Ability score of 44-50, Comprehensive Test of Non-Verbal Intelligence (C-TONI) scores of 47, 51, and 51, in addition to a Bateria III Woodcock-Muñoz General Intellectual Ability test score of 70 (improperly scored; the proper score is 60). These scores have convergent validity and are well within the diagnostic limits for intellectual disability (even if the Bateria-III score is not corrected). Amici in their collective experiences are of the opinion that any person with scores this low is presumptively a person with intellectual disability; that is, these scores are more than two standard deviations below the norm for virtually any population.

Amici do not know of a valid methodology to dismiss as normal the supporting adaptive behavior



evidence in light of these scores, no matter what culture or group the subject is compared against. This is further affirmed when coupled with developmental delays Mr. Ortiz is reported to have displayed. Thus, a diagnosis of intellectual disability for a person from any culture should only be rejected if adaptive functioning is demonstrated to be uniformly (*i.e.*, across skill sets), consistently (*i.e.*, across the subject's life) and significantly above scientifically-standardized adaptive expectations.

As this Court states in *Hall v. Florida*, “the legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.” 134 S. Ct. at 2000. This framework must be scrupulously and professionally followed by all mental health professionals if the courts are to have confidence in their legal determinations. Nowhere is this more essential than in capital punishment litigation. “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.” *Id.* at 2001.

When professional mental health experts conduct competing examinations in litigation it is natural that they can come to different conclusions due to the variables in scientific inquiry and analysis. However, when the analysis of the data and variables is biased by stereotyping and prejudices, the diagnostic framework essential to the courts’ legal determinations fails. When a jurist feels comfortable making or

adopting such unfounded assumptions patently based on stereotyping, the individual is confronted with an unfair and often an insurmountable barrier, leading an intellectually disabled person to an unconstitutional death sentence.



## CONCLUSION

In *Atkins v. Virginia*, this Court held “that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”<sup>5</sup> This Court guided the lower courts in making this determination with its analysis of the determinations of intellectual disability:

. . . . clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.<sup>6</sup>

The District Court rejected, and the Eighth Circuit affirmed, the clinically sound and scientifically valid determinations of sub-average intellectual functioning by adopting false reasoning of invalidity due to the non-existence of a Colombian nationals

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<sup>5</sup> 536 U.S. 304 at 321 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

<sup>6</sup> *Id.* at 318.

“norm”. The U.S. norm used was the correct norm and the most commonly used norm by Amici around the globe. Likewise, the courts rejected properly conducted tests and research that demonstrated significant limitations in adaptive skills, including manifestation before age 18, by adopting reasoning based on stereotypes and biased conjecture.

Amici respectfully submit that neither of the lower courts’ reasoning has any scientific validity and adopts culturally biased reasoning that Amici and their members have long rejected for any part of the medical and scientific determinations of intellectual disability. Amici see the decisions below as setting a dangerous precedent, one that could be used against foreign nationals from around the globe, particularly those from regions traditionally suffering from stereotyping, prejudice and discrimination.

Amici respectfully request that this Court grant the Petitioner’s Writ of Certiorari to ensure that these errors do not become the standard of practice by courts judging *Atkins* claims of foreign nationals.

Respectfully submitted,

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