No. 11-7574

IN THE

# Supreme Court of the United States

DONALD WILLIAM DUFOUR,

*Petitioner,*

*v.*

STATE OF FLORIDA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO FLORIDA SUPREME COURT**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## MOTION OF AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the American Association on Intellectual and Developmental Disabilities ("AAIDD") respectfully moves for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari*. Petitioner has consented to the filing of this brief, but counsel for Respondent has withheld consent.

As described in the first section of the attached brief entitled "Interest of *Amicus Curiae*," the AAIDD is the largest and oldest professional organization in the field of intellectual and developmental disabilities. The AAIDD provides authoritative guidance regarding the definition and classification of intellectual disability (also known as mental retardation) and support systems recommended for people living with these disabilities.

The Florida Supreme Court's decision in this case is premised on a scientifically unsound conception of mental retardation. And the approach to analyzing mental retardation claims in the capital context suggested by this decision functionally eviscerates the substantive right, memorialized in this Court's decision in *Atkins v. Virginia*, insulating persons with mental retardation from execution. Because the AAIDD exists to champion the rights of persons with intellectual and developmental disabilities and is the leading authority on the clinical definition and classification of such disabilities, the *amicus* has a strong interest in seeing this Court review the decision below.

As an organization that promulgates the most current and authoritative information on defining, classifying, and diagnosing intellectual disabilities, the AAIDD is uniquely suited to articulate how the decision below rests on a fallacious understanding of mental retardation. Accordingly, the AAIDD respectfully requests that the Court grant leave to file the attached brief as *amicus curiae.*

December 27, 2011

Respectfully submitted,


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## INTEREST OF *AMICUS CURIAE*[1]

The American Association on Intellectual and Developmental Disabilities ("AAIDD"), formerly the American Association on Mental Retardation ("AAMR"), has appeared as *amicus curiae* in numerous cases involving mental retardation[2] and the legal rights of those with intellectual disability, including the seminal case *Atkins v. Virginia*, 536 U.S. 304 (2002). Moreover, this Court has repeatedly employed the AAIDD's definition of mental retardation in adjudicating legal issues. *See id.*; *see also Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 n.9 (1985).

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1. Consistent with Supreme Court Rule 37.2, counsel for all parties received notice, at least ten days before the due date, of the AAIDD's intent to file this *amicus curiae* brief. Counsel for Petitioner consented; counsel for Respondent withheld consent. Pursuant to Rule 37.6, the AAIDD confirms that no counsel for any 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 other than the AAIDD, its members, or its counsel.

2. Many clinicians, following the AAIDD's lead, now use the term "intellectual disability" rather than "mental retardation." *See* Robert L. Schalock, *et al.*, *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007) (explaining that name changed but clinical definition of the medical condition to which the term refers remained unchanged). This brief refers to "mental retardation" because that is the term used in *Atkins* and by the Florida legislature.

Founded in 1876, the AAIDD is the nation's oldest and largest professional organization in the field of intellectual and developmental disabilities. For over 80 years, the AAIDD has educated the public about the scientific consensus regarding mental retardation. Professionals in every state use the AAIDD's manuals and diagnostic methodology to assess intellectual disability. The AAIDD has a vital interest in ensuring that (1) all individuals with mental retardation receive the rights and protections required by law; and (2) courts and administrative agencies employ accepted scientific principles in assessing mental retardation. Therefore, the AAIDD has a strong interest in seeing *Atkins* claims adjudicated in accordance with generally accepted clinical standards.

## SUMMARY OF ARGUMENT

The Florida Supreme Court's decision below severely threatens the right announced in *Atkins v. Virginia*: that under the Eighth Amendment individuals with mental retardation may not be executed. *Atkins*' directive that states develop their own procedural mechanisms for identifying persons with mental retardation was not a license to make an end-run around the categorical ban on executing such persons. In determining who has mental retardation and thus who is categorically exempt from the death penalty, *Atkins* requires states to apply standards that generally conform to the accepted scientific approach. At a minimum, *Atkins* directed states to adopt procedures that would exempt those individuals fairly characterized as having mental retardation under the AAIDD/AAMR's and the American Psychiatric Association's ("APA") definitions.

Some states, including Florida, are approaching *Atkins* claims in a manner utterly at odds with the clinical consensus regarding mental retardation. While Florida's statutory definition of mental retardation comports with the national scientific consensus, Florida's highest court has interpreted that statute so as to permit fact-finders to make subjective, unsound assessments that disregard fundamental scientific and clinical precepts about intellectual disability.

Having crafted its own idiosyncratic method for assessing mental retardation, the Florida Supreme Court applied that unsound method to Petitioner Dufour's *Atkins* claim. The lengthy *per curiam* decision, which garnered a bare majority, reflects significant misconceptions regarding mental retardation. *See Dufour v. State*, 69 So. 3d 235 (Fla. 2011) (4-3 decision with 1 of 4 justices in majority concurring only in the result and 3 justices dissenting). *Dufour* also evidences the considerable procedural roadblocks being imposed on those seeking to exercise the substantive right that *Atkins* guaranteed.

This Court granted the writ in *Panetti v. Quarterman* to ensure that the substantive right recognized in *Ford v. Wainwright* was not rendered a nullity in practice. Likewise, the Court should grant the writ here to instruct states that fact-finding procedures antithetical to the germane science are unconstitutional.

## REASONS TO GRANT THE PETITION

### I. FLORIDA SHOULD BE DIRECTED TO APPROACH *ATKINS* CLAIMS IN ACCORDANCE WITH GENERALLY ACCEPTED SCIENTIFIC PRACTICE AND TO REMOVE UNCONSTITUTIONAL PROCEDURAL ROADBLOCKS TO THE SUBSTANTIVE RIGHT ANNOUNCED IN *ATKINS*

In *Atkins v. Virginia*, this Court held that executing individuals with mental retardation violates the U.S. Constitution's Eighth Amendment. 536 U.S. 304, 321 (2002). *Atkins* further directed the states to adopt measures for ascertaining mental retardation that "generally conform to the clinical definitions set forth" in *Atkins* itself. *Id.* at 317 n.22. Specifically, this Court embraced two essentially identical clinical definitions, which define mental retardation as a disability characterized by (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills, and (3) onset before age eighteen. *See* AAMR, *Mental Retardation: Definition, Classification and Systems Supports* 1 (9th ed. 1992) [hereafter "AAMR 1992"]; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000) [hereafter "DSM-IV-TR"]; *see also Atkins*, 536 U.S. at 308 n.3. The authoritative definition in the AAIDD's most recent manual is unchanged except that it substitutes "intellectual disability" for the term "mental retardation." *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) [hereafter "AAIDD 2010"].

Simply because *Atkins* does not include a comprehensive enforcement roadmap does not mean states were given carte blanche. Because mental retardation is a medical condition, this Court quite sensibly directed states to implement procedures reflecting the national medical consensus. *See Atkins*, 536 U.S. at 308 n.3 (quoting AAMR 1992 and DSM-IV). This Court should grant the writ to address whether Florida—or any state—may employ an idiosyncratic, judge-made, and extraordinarily restrictive understanding of mental retardation that deprives qualified persons of *Atkins*' protection.

### A. *Atkins* Claims Must Be Assessed Pursuant To Generally Accepted Clinical Definitions Set Forth By The AAIDD And The APA

The first two prongs of the three-part clinical definition of mental retardation—the only two that the court below addressed—were misconstrued and misapplied in this case, moving Florida's *Atkins* jurisprudence further afield from established science.

#### 1. The Clinical Consensus Requires Assessing Intellectual Functioning Through Standardized IQ Tests Considered In Light Of The Test's Standard Error Of Measurement And Clinical Judgment Regarding The Specific Instruments Used

The majority ultimately found that the trial court had erred in assessing Mr. Dufour's intellectual functioning but it relied on an incorrect premise that creates an unreasonably high risk that persons clinicians would diagnose with mental retardation are executed.

Measuring "intellectual functioning" is the first of three steps in making a diagnosis of mental retardation. *See* AAIDD 2010 at 6. One criterion to measure intellectual functioning is a properly administered, standardized IQ test. An individual is generally thought to have significant limitations in intellectual functioning if the person's score is approximately two or more standard deviations below the mean. *Id.* at 35. The AAIDD has long emphasized that the upper boundary of intellectual functioning indicating mental retardation is best described as a *range*, not as an exact numerical cutoff: "If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below." AAMR 1992 at 14 n.20; *see also Atkins*, 536 U.S. at 309 n.5 (citing 2 B. Sadock & V. Sadock, *Comprehensive Textbook of Psychiatry* 2952 (7th ed. 2000)) (recognizing upper IQ range for mental retardation is generally 70-75). The upper boundary remains flexible to ensure greater precision because a range, rather than a hard cutoff, better reflects the statistical variance inherent in all intelligence tests and "the role of clinical judgment in weighing the factors that contribute to the validity and precision of a diagnostic decision." AAIDD 2010 at 40.

In short, mental health experts employ IQ tests to diagnose significant limitations in intellectual functioning, recognizing that there is no "hard and fast cutoff point" for making a mental retardation diagnosis and that no score can be properly assessed in a vacuum. AAIDD 2010 at 35. For instance, IQ scores must always be considered in light of the test's standard error of measurement or "SEm," a statistical concept that adjusts for the fact that a precise IQ score is always an unknown because no standardized test is devoid of error. *Id.* at 36. Both the AAIDD's and the APA's definitions of mental retardation stress the SEm's

importance. *Id.* at 36, 48-49; DSM-IV-TR at 41-42. Failing to take the SEm into account in scoring and interpreting any kind of psychological test is "a clear departure from accepted professional practice." Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 836 (2007).

Because of the many challenges involved in measuring intelligence and interpreting IQ scores, the AAIDD advises that assessment "should be conducted on an individual basis and be carried out in strict guidance of accepted professional practice." AAIDD 2010 at 42. Sound clinical judgment should not be usurped by well-meaning, but misguided, judicial discretion.

The Florida Supreme Court continues to insist on a rigid IQ cutoff of 70—although the Florida statute that defines mental retardation and bars imposing the death penalty on persons with mental retardation does not include such a cutoff. *See* Fla. Stat. § 921.137(1) (2006) [hereafter "Florida's MR statute"]. A legal test of mental retardation that applies a rigid IQ cutoff is inconsistent with the scientific consensus and, thus, contrary to *Atkins*' mandate.

### 2. The Clinical Consensus Requires Assessing Adaptive Behavior Based On Objective Measurements, Not By Weighing Deficits Against Strengths

The second prong of the clinical definition requires that an individual have significant limitations in adaptive behavior. This requirement is designed to ensure that an IQ score reflects a real-world disability, not merely a testing anomaly. This aspect of the clinical inquiry focuses on whether the individual's reduced intellectual functioning has had a significant impact on the individual's practical functioning.

Like everyone else, individuals with mental retardation differ substantially from one another in terms of strengths and weaknesses. *See Cleburne*, 473 U.S. at 445 (noting persons with mental retardation display "wide variation in the[ir] abilities and needs."). Indeed, a fundamental precept in the field of intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths." AAIDD 2010 at 1, 7, 11. From a definitional perspective, an individual's particular strengths are only relevant to assessing corresponding weaknesses. DSM-IV-TR at 47.

There is no list of strengths or abilities that would categorically preclude a diagnosis of mental retardation. Instead, clinicians consider evidence of *deficits* in three skill areas: (1) conceptual skills, which include language skills, the use of money, time and number concepts; (2) social skills, which include interpersonal relationships, self-esteem, gullibility, and the ability to follow rules; and (3) practical skills, which include personal hygiene, eating, housekeeping, transportation, and occupational skills.

AAIDD 2010 at 44. The dispositive focus is on *limitations* in one of these three areas—conceptual, social, or practical skills—or an overall score on a standardized measure of these skill areas considering the assessment instrument's SEm. *Id.* at 43. Importantly, the AAIDD instructs that significant limitations in adaptive deficits are "not outweighed by the potential strengths in some adaptive skills." *Id.* at 47.

Stereotypes and lay assumptions about people with mental retardation can distort individual assessment. Therefore, the AAIDD recommends that adaptive behavior be assessed primarily through standardized instruments. *Id.* These tests generally involve interviews with, or questionnaires completed by, third-parties. "[R]espondents should be very familiar with the person and have known him/her for some time and have had the opportunity to observe the person function across community settings and times." *Id.* The most appropriate respondents are generally "parents, older siblings, other family members, teachers, employers, and friends." *Id.* The AAIDD also advises that test results be considered in tandem with other relevant data—such as school records, employment history, and previous evaluations. *Id.* Different sources of data are "essential to provide corroborating information that provides a comprehensive picture of the individual's functioning." *Id.*; *see also* AAIDD, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 18, 22, 86 (10th ed. 2007) [hereafter "AAIDD User's Guide"].

Many of the skills relevant to assessing adaptive behavior are not measurable in prisons, such as self-direction, community resources, and leisure skills.

Further, a person with mental retardation is likely to appear to have stronger adaptive behavior in the structured prison environment than in society, possibly inflating scores. AAIDD User's Guide at 14-15. The AAIDD/AAMR has thus long instructed that strengths and deficits must be assessed in the context of the individual's community environment. *See* AAMR 1992. Therefore, experts conducting *Atkins* evaluations should focus on information relating to the defendant's adaptive skills *before* incarceration, not in circumstances of legal restraint. AAIDD User's Guide at 14-15.

Assessments that rely on false assumptions—*e.g.*, that all people with mental retardation are incapable of performing certain tasks or that evidence of skills acquired in prison can negate considerable evidence of adaptive deficits throughout childhood—are not tethered to appropriate scientific mooring.

### B. The Florida Supreme Court's Approach To Mental Retardation Is Incompatible With Accepted Clinical Practice

The Florida Supreme Court has progressively deviated from the accepted clinical understanding of mental retardation, culminating in a peculiarly tortured approach here. Therefore, this case is an apt vehicle to instruct lower courts about what fidelity to *Atkins* entails. If the decision below is left unaddressed, death-eligibility in Florida will be based on the same false stereotypes that have burdened people with mental retardation for generations. *See Cleburne*, 473 U.S. at 438 (observing history of "unfair and often grotesque mistreatment").

Florida's three-part statutory definition of mental retardation is not the problem. The statute essentially tracks the AAIDD and DSM-IV-TR definitions endorsed in *Atkins*. *See* Fla. Stat. § 921.137(1) (defining mental retardations as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."). Notably, Florida's MR statute does *not*: (1) include an IQ cutoff or (2) invite courts to weigh adaptive deficits against skills. Yet the *Dufour* majority has made these misguided concepts the basis for assessing *Atkins* claims under Florida law.

1. The Florida Supreme Court Has Adopted A Rigid IQ Cutoff In Conflict With Accepted Scientific Practice

Any qualified clinician reading Florida's MR statute should understand that, in defining "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score," the statute does not imply any "hard and fast cutoff point" for making a mental retardation diagnosis. AAIDD 2010 at 35. Correlating "significantly subaverage general intellectual functioning" to a specific IQ cutoff conflicts with accepted scientific practice. AAIDD 2010 at 31, 35; *see also* Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. Am. Acad. Psychiatry Law 304, 305-06 (2004) (stating APA's position that "incorporation of a specific cutoff score is inappropriate").

The Florida Supreme Court has, however, read a rigid IQ cutoff into the statutory definition. *See, e.g., Cherry v. Florida*, 959 So. 2d 702, 713-14 (Fla. 2007) (applying arbitrary cutoff of 70 and rejecting *Atkins* claim based on IQ score of 72 without considering adaptive-deficits prong); *see also Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *Nixon v. State*, 2 So. 3d 137, 142-46 (Fla. 2009). The approach in cases such as *Cherry*, *Jones*, and *Nixon*, where the court imposed an arbitrary IQ cutoff without accounting for the SEm, is at odds with accepted professional practice. A rigid cutoff is, therefore, contrary to this Court's mandate that states, while free to establish their own procedural rules, must use standards that adhere to the scientific and clinical definitions of mental retardation. *Atkins*, 536 U.S. at 317 n.22.

Most states have rejected the notion of a rigid IQ cutoff in making mental retardation determinations. *See, e.g.*, *People v. Vidal*, 155 P.3d 259 (Cal. 2007) (rejecting bright-line IQ cutoff and interpreting state's statutory definition of mental retardation to require a complete factual analysis). Florida's highest court, however, has dogmatically adhered to the notion of a cutoff of 70 since 2007 despite ample criticism from the scientific community. *See, e.g.*, *Joint Position Statement of AAIDD and The ARC*, *available at* http://www.aaidd.org/ content_158.cfm? (last visited Dec. 12, 2011) (noting that, because "[s]tates may use non-clinicians who are not knowledgeable about intellectual disabilities to make such determinations. . . . defendants may not have their intellectual disabilities identified because of states' unfair and inaccurate procedures.").

### 2. The Florida Supreme Court Promulgates The Unacceptable Practice Of Discounting Adaptive Deficits By Weighing Them Against Unrelated Skills

A slim majority of the court below affirmed the trial court's decision to reject Mr. Dufour's *Atkins* claim by improperly using evidence of skills that Mr. Dufour reputedly possessed to discount the evidence of his adaptive deficits. The fallacious premise underlying the majority's conclusion is that, if evidence shows that a person has any skills, they cannot have mental retardation. The scientific community roundly rejects such a concept.

Florida has been proceeding down this path—decoupling its *Atkins* jurisprudence from accepted clinical understanding and practice—for some time now. In *Brown v. State*, 959 So. 2d 146, 150 (Fla. 2007), the Florida Supreme Court erroneously concluded that the defendant could not have mental retardation because such a diagnosis "was contradictory to the evidence that [the applicant] was engaged in a five-year intimate relationship prior to the crime, that he had his driver's license and drove a car, and that he was employed in numerous jobs including as a mechanic." Yet people with mental retardation can have romantic relationships and marry, obtain a license and drive, and secure employment; suggesting otherwise rests only on prejudice and conjecture.[3]

3. *See, e.g.*, Alliance for Full Participation, non-profit organization founded by AAIDD and other leading national associations committed to the full community participation of people with intellectual disability, website *available at* http://www.allianceforfullparticipation.org/index.php?start=5 (last visited Dec. 12, 2011).

### C. The Florida Supreme Court's Bare Majority Opinion In This Case Represents An Analytical Approach Inconsistent With Accepted Clinical Practice

As the three *Dufour* dissenters note: courts, "in [their] emerging jurisprudence on the evaluation of mental retardation in connection with the death penalty, must be certain that [they] are utilizing objective and scientifically acceptable measures for evaluation of both IQ and deficits in adaptive behavior." 69 So. 3d at 256 (Pariente, J., concurring in part and dissenting in part). The approach to *Akins* claims endorsed by the *Dufour* majority does not do so. If left unchecked, this unsound and unconstitutional approach effectively gives Florida the means to exclude nearly every capital defender with mental retardation from *Atkins*' protection.

#### 1. The Majority's Revised Opinion Correctly Found Significant Limitations In Intellectual Functioning But Relied On Fallacious Reasoning

The *Dufour* majority correctly concluded that the trial court's evaluation of Mr. Dufour's IQ scores was patently erroneous.[4] But the majority's opinion rests on

4. According to the court, Mr. Dufour's Full Scale IQ scores on the WAIS-III were: 67, 62, and 74; and evidence suggested administrative irregularities in the procedure that produced the highest score. 69 So. 3d at 246. The trial court accepted the 67 score and then inexplicably concluded that, because "the band of confidence" was still "above the *Cherry* cut-off score of 70," Mr. Dufour did not have significant limitations in intellectual functioning. *Id.*

an unsound statutory interpretation that "'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below." *Id.* at 246. That imposition on Florida's MR statute is contrary to the contemporary scientific consensus. The majority's insistence that the "plain language" of the statute requires importing a specific IQ into the statute is perplexing. *See id.* at 247. If state law is to comply with *Atkins* by reflecting accepted professional practice, neither courts nor legislatures can impose a rigid IQ cutoff that does not account for the SEm and other relevant psychometric factors. Although the *Dufour* majority ultimately reached the correct result as to Mr. Dufour's intellectual functioning, it did so while reaffirming a line of cases endorsing an artificial IQ cutoff at odds with the scientific consensus, an approach that should be rejected.

### 2. After Finding The Trial Court Had Erred In Assessing The First Prong, The Majority Improvised A New, Unsound Approach To Adaptive Deficits To Affirm The Trial Court's Profoundly Flawed *Atkins* Assessment

The AAIDD agrees with the *Dufour* dissenters and with the Petitioner that the new standard proffered by the *Dufour* majority for assessing adaptive functioning is inconsistent with the established scientific understanding. *See* 69 So. 3d at 255-56 ("Because of significant errors in the trial court's evaluation of Dufour's IQ and adaptive functioning, we should remand to the trial court for a reevaluation of the evidence regarding the IQ and adaptive functioning prongs using the correct legal standards."). The majority's adaptive deficits analysis is unsound for at least three distinct reasons: (a) it offsets evidence of

deficits with evidence of unrelated skills; (b) it ignores a highly qualified clinician's objective assessment; and (c) it discounts all of the adaptive-deficits evidence based on an "alternative explanation" hypothesis that has no scientific basis.

### a. The majority improperly used evidence of unrelated skills to discount evidence of adaptive deficits

The majority endorsed the trial court's indiscriminate approach to adaptive functioning, which lumped evidence of Mr. Dufour's substantial adaptive deficits together with unrelated adaptive skills that the court found he possessed:

> Mr. Dufour does not read or write much, if at all. He does not play chess in the Department of Corrections. He does not have good hygiene habits. In the past, he drove a car and possessed a driver's license. He participated in teaching a small engine repair class while in prison in the 1970's. He could be good with children. He was capable of interacting in social situations, and could be friendly and engaging. He appeared to understand discussions with his trial counsel.

*Id.* at 258 (dissent quoting trial court opinion); *see also id.* at 241-44 (majority recounting only some adaptive-functioning evidence). This approach to assessing adaptive deficits is defective because strengths in other areas do not cancel out evidence of deficits. *See* AAIDD 2010 at 47 (instructing that adaptive deficits are "not outweighed by the potential strengths in some adaptive skills.").

Both the AAIDD and the DSM-IV-TR direct clinicians to focus on *deficits* because, as a leading expert in the field has explained, "[t]he skills possessed by individuals with mental retardation 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, 21 n.29 (2003).

The *Dufour* majority's approach to the adaptive-deficit evidence involves selective weighing of what it describes as "conflicting" evidence. 69 So. 3d at 248. The majority first loads the dice through remarkable understatement: characterizing evidence of serious deficits in conceptual skills as mere "limitations with regard to reading and inadequacies in spelling and grammar." *Id.* at 250. The majority then contrasts the evidence it soft-pedaled with the state's evidence that Mr. Dufour served "as an aide in an engine repair class" in prison, speculating—because the record does not provide these details—that he "prepar[ed] and execut[ed] lesson plans," which the majority then concludes "alone were reflective of his cognitive ability as a fully-functioning, contributing member of society." *Id.* The majority does not explain how evidence that Mr. Dufour failed second grade and was thereafter socially promoted until he dropped out of school as a seventeen-year-old eighth-grader is somehow canceled out by evidence that, later in the structured prison environment, Mr. Dufour was an aide for an engine repair class. *See id.* at 249. Instead, the majority relies extensively on its own independent, non-record research

about an unspecified version of the GED that Mr. Dufour took in prison. *Id.* at 250-52.[5] The majority concludes that the ability to master such a "rigorous test" rebuts Mr. Dufour's "assertions" of "poor academic performance" throughout his childhood. *Id.* at 251. In sum, the majority erroneously suggests that the ample, objective evidence—for example, that Mr. Dufour had "many failing grades throughout his education"—is somehow outweighed by evidence of modest accomplishments years later in prison. *Id.* at 242.

The *Dufour* majority's analysis embraces a fundamental error perpetrated by the trial court: that adaptive deficits can be permissibly "weighed" against (and discounted by) unrelated abilities. Yet the AAIDD diagnostic manual identifies as a fundamental assumption that "limitations often co-exist with strengths" in individuals with mental retardation. AAIDD 2010 at 7, 11. And while clinicians look at skills in certain areas to see if a deficit exists, evidence of skills in other areas does not indicate an absence of adaptive deficits generally. *Id.* at 47. As the *Dufour* dissenters correctly note, "a court cannot reject a determination that deficits exist simply because a defendant has strengths in certain other areas." 69 So. 3d at 257.

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5. As the *Dufour* dissent explains, the majority improperly

> utilize[d] non-record evidence of the specific requirements and difficulty of the GED given to Dufour in order to refute the existence of Dufour's adaptive functioning deficits. This evidence concerning how rigorous the specific version of the GED that Dufour took was neither presented nor argued by the State . . . .

69 So. 3d at 256.

The majority's interest in whether Mr. Dufour may have developed a modicum of skills in the highly structured prison environment is irrelevant to the clinical assessment. *See* AAIDD User's Guide at 14-15; *see also* John M. Fabian, *Life, Death, and IQ; It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5 J. Forensic Psychol. Prac. 1, 13-14 (2005) (identifying special problems associated with relying on lay opinion of prison officials regarding adaptive deficits). What matters is whether the evidence shows (1) significant limitations in intellectual functioning, (2) significant deficits in adaptive behavior expressed in conceptual, social, and/or practical adaptive skills, and (3) manifestation of the disability before age 18. AAIDD 2010 at 1; DSM-IV-TR at 41.

**b. The majority did not consider the clinical judgment of a highly qualified expert**

A competent assessment of intellectual disability requires experienced clinical judgment in the field of mental retardation. *See* AAIDD 2010 at 85-103 (emphasizing clinical judgment as key component in responsible assessments of intellectual disability). The expertise of skilled professionals is, therefore, crucial to implementing *Atkins* fairly. Determining which offenders are entitled to *Atkins*' protection should not be based on casual examination, impressionistic observations, or selective consideration of relevant data. *See id.* at 91-92 (describing common errors that undermine the quality, validity, and precision in the clinical assessment process); *see also* Caroline Everington & Denis W. Keyes, Mental Retardation, 8 *The Forensic Examiner* 31 (1999)

(describing critical considerations to ensure reliable assessments in the criminal justice context).

Evident in *Atkins* itself was the problem of dueling experts arguing to juries about the meaning of intellectual functioning and adaptive behavior history. *See* 536 U.S. at 308-09 n.4, n.5, n.6. Therefore, in *Atkins* this Court directed states to look to the widespread clinical consensus regarding mental retardation in deciding how assessments should be made. *See id.* at 318.

In *Dufour*, neither the trial court nor the majority properly credited the testimony of the most qualified mental retardation expert who gathered extensive objective data to assess Mr. Dufour's adaptive deficits. *See* 69 So. 3d at 256-61 (dissent describing Dr. Keyes' testimony, how state's expert did not necessarily contradict it, and how trial court and majority failed to give it any discernible consideration). As Petitioner explains, Dr. Denis Keyes has decades of experience in the field. He specializes in mental retardation and mental retardation assessment. He reviewed Mr. Dufour's IQ scores, school records, social history interviews. He was the only expert to conduct objective testing in accordance with AAIDD guidelines in assessing Mr. Dufour's adaptive deficits; and he testified that all of Mr. Dufour's adaptive-functioning scores were more than two standard deviations below the mean in light of the relevant SEm. Yet the majority did not mention, let alone, evaluate, this testimony or the trial court's inexplicable failure to give it any real weight.

Although the trial court stated that Dr. Keyes provided a "great deal of substantive information about mental retardation" and found his opinion "very useful

in arriving at a legal conclusion," the trial court, without explanation, concluded that Dr. Keyes' expert opinion was ultimately "unpersuasive." *Id.* at 259. The majority did not acknowledge this significant disconnect, but merely noted that Dr. Keyes was among the experts who testified regarding the mental retardation assessment and that the trial court had found "the diagnoses of mental retardation by Drs. McClain and Keyes were not persuasive." *Id.* at 246. The majority thereby invites fact-finders to substitute their lay opinion for a clinician's judgment absent even the pretext of a basis for doing so. *See id.* at 246, 239-55.

**c. The majority endorsed a scientifically illegitimate "alternative explanation" hypothesis to dismiss ample evidence of Mr. Dufour's adaptive deficits**

The majority further exposes its significant misapprehension of the appropriate analysis in embracing the trial court's speculation that an "alternative explanation" for some of Mr. Dufour's adaptive deficits may exist. *See id.* at 248, 252. The fact that rampant childhood abuse or early drug use may have contributed to Mr. Dufour's diminished functioning is beside the point. Neither Florida's MR statute nor any reputable clinical manual suggests that a mental retardation diagnosis is somehow contingent upon what may have *caused* adaptive deficits. Instead, both Florida's MR statute and definitive manuals like the AAIDD's require only that the individual possess significant adaptive functioning deficits. *See* Fla. Stat. § 921.137(1); AAIDD 2010 at 43.

The trial court and the majority confuse adaptive deficits with the condition's underlying etiology. "Mental retardation" does not cause intellectual or adaptive deficits; mental retardation is a descriptive diagnosis based on the presence of those limitations. The potential causes are multi-factorial and difficult to ascertain—ranging from organic brain disorders, drug abuse, pre- or post-natal malnutrition, environmental factors, etc. AAIDD 2010 at 60. The etiology remains unknown in approximately 40% of cases. DSM-IV-TR at 49. What may have caused a person's mental retardation does not disqualify that person from being diagnosed with mental retardation.

Further, nothing in *Atkins* suggests that capital defendants with mental retardation only qualify for an exemption from execution after demonstrating the cause of their mental retardation and then a fact-finder concluding that the cause is acceptable based on some undefined subjective standard. Instead, as the *Dufour* dissenters note, this approach amounts only to "a significant and unnecessary roadblock" for those asserting *Atkins* claims. 69 So. 3d at 261.

### D. Where States Have Adopted Procedures That Obstruct Individuals' Ability To Exercise Substantive Constitutional Rights This Court Has Intervened

The Court should grant the writ here, as it did in *Panetti v. Quarterman*, 551 U.S. 930 (2007). In agreeing to hear *Panetti*, this Court recognized that some states had abused the leeway given to them in *Ford v. Wainwright*, 477 U.S. 399, 417 (1986), to adopt "appropriate" procedures to "enforce" an Eighth Amendment right. Likewise,

some states, like Florida, have misconstrued *Atkins* as a license to make enforcement of the Eighth Amendment right announced in *Atkins* a pyrrhic victory.

In *Atkins*, this Court did more than prohibit the execution of persons with mental retardation. As it had in *Ford*, this Court commanded states to "develop[] appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317. Specifically, this Court imposed an affirmative duty to "develop[] appropriate ways to enforce" the substantive right of persons with mental retardation to exemption from execution. *Id.* *Atkins* also explained that "appropriate ways" for assessing the key fact—which specific people have mental retardation—must be grounded in generally accepted scientific principles. *Id.* at 317 n.22.

Legal rights often turn on the fact-finding process. Therefore, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520 (1958). And "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Id.* at 520-21. The process whereby a state finds the fact of mental retardation cannot be constitutional if the process fails to safeguard the substantive right at stake: exemption from execution. And as this Court has often emphasized, the importance of a right that is, quite literally, a matter of life or death can hardly be overstated.[6] Hence, enforcing "the Eighth Amendment

6. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J. plurality opinion) ("When the choice is between life and death,

requires a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).

Where a state's fact-finding procedures, "in their natural operation," transgress a substantive constitutional right those procedures are unconstitutional. *See Bailey v. Alabama*, 219 U.S. 219, 239, 245 (1911) (holding states cannot transgress substantive constitutional rights indirectly through procedures that impinge on those rights); *Speiser*, 357 U.S. 513 (imposing limits on state procedural rules that impinged on substantive rights). As this Court explained in *Ford*, "the lodestar of any effort to devise a procedure" to enforce a substantive constitutional right "must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging the accuracy in the factfinding determination." 477 U.S. at 417; *see also Panetti*, 551 U.S. at 950-52 (finding considerable defects in state's approach to enforcing *Ford*'s constitutional ban on executing the insane).

As this Court has long recognized, "a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Bailey*, 219 U.S. at 239. Yet that is precisely what the Florida Supreme Court's post-*Atkins* jurisprudence has done: through a forced statutory construction, it has created an indirect mechanism for the state to transgress *Atkins*' mandate.

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th[e] risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

Florida is not the only state promulgating law that ignores the germane science and thus creates an unreasonably high risk that individuals with mental retardation will be executed. *See, e.g.*, *Lizcano v. State*, No. AP-75879, 2010 WL 181772 (Tex. Crim. App. May 5, 2010); *Hill v. Humphrey*, -- F.3d --, 2011 WL 5841715 (11th Cir. Nov. 22, 2011). But *Dufour* constitutes an especially egregious instance of a procedure that is essentially at war with the authoritative science and affords a means to reject every mental retardation claim.

The *Dufour* majority's approach amounts to little more than a "finagle's constant"—a specious formula that permits a fact-finder to conclude, under any and all circumstances, that someone does not have mental retardation. The majority has authorized executing a person whose legitimate IQ scores were 67 and 62 and whose significant adaptive deficits were evident well before age 18. The *Dufour* majority has done so by ignoring the generally accepted science expressly approved in *Atkins*.

## CONCLUSION

*Dufour* exemplifies a disturbing, post-*Atkins* trend where outlier states like Florida are interpreting *Atkins* as a license to eviscerate the substantive right *Atkins* itself announced. Permitting this trend to continue unchecked means turning the clock back on significant progress on behalf of persons to whom the AAIDD has long been committed. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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