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INTEREST OF AMICI CURIAE

The American Association on Mental Retardation, The Arc of the United States, and The Arc of Arizona, amici curiae, are national professional and voluntary organizations in the field of mental retardation.

The American Association on Mental Retardation (AAMR) (formerly the American Association on Mental Deficiency), founded in 1876, is the nation's oldest and largest interdisciplinary organization in the field of mental retardation. The AAMR is an internationally-recognized researcher and educator on the diagnosis and support of individuals with cognitive disabilities. Among its most important professional activities is the production and periodic updating of a manual of terminology and classification for use by clinical experts in the field.¹ Currently in its tenth edition, this manual provides the primary definition of mental retardation. Its commentary presents the current consensus and is the most authoritative analysis of the application of that definition and source of professional guidance for the evaluation of individuals who may have mental retardation. *See* AAMR, *Mental Retardation* (10th ed. 2002).

The Arc of the United States (formerly the Association for Retarded Citizens of the United States), through its approximately 900 state and local

¹ Other organizations, such as the American Psychiatric Association, have followed the AAMR's lead with similar definitions in their manuals.

chapters, including **The Arc of Arizona**, is the largest voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults who have mental retardation and their families.

Amici have long been assisting legislators and judges in shaping public policy and legal protections for people with mental retardation. Through their state and local chapters, they have actively participated in the formulation of legislation in Arizona and other states concerning defendants with mental retardation. *See* J. Ellis, *Disability Advocacy and the Death Penalty*, 33 N.M. L. Rev. 173 (2003). They also have participated as amici curiae before the United States Supreme Court concerning this issue. *E.g.*, Brief of Amici Curiae AAMR, The Arc of the United States, et al., *Atkins v. Virginia*, 536 U.S. 304 (2002). Amici have been actively involved in assisting legislatures and courts in the implementation of the Supreme Court's *Atkins* decision. *E.g.*, Brief of Amici Curiae AAMR and The Arc of the United States, *In re Hawthorne*, 105 P.3d 552 (Cal. 2005).

INTRODUCTION

Clinical experts are regularly called upon to perform assessments of defendants who may have mental retardation. They do so by applying the generally accepted definition of mental retardation using standardized tests and their experience and judgment. Rather than address whether Michael and Rudi Apelt have mental retardation, an issue of fact disputed by the parties and their

respective expert witnesses, amici focus on the accepted definition of mental retardation, its proper application through the exercise of clinical judgment by qualified experts in the field, and relevant implications for judicial management of *Atkins* hearings such as the one at issue in this special action. Amici hope this proves helpful to the Court in its task of providing guidance to lower courts that have the initial responsibility of fact-finding and accurately assessing the merits of individual *Atkins* claims brought by capital defendants in Arizona.

ARGUMENT

I. THE GENERALLY ACCEPTED CLINICAL DEFINITION OF MENTAL RETARDATION HAS THREE ESSENTIAL ELEMENTS.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth Amendment prohibits the execution of any individual who has "mental retardation." The Court left to the states, in the first instance, "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317. This "task" necessarily requires legislatures and courts to consider, in the first instance, how to define the condition known as "mental retardation." *See id.* at 317 n.22.

The definition of mental retardation has been revised from time to time as researchers and clinicians have developed a greater understanding of the condition. Amici have been at the forefront of this evolution through their efforts to refine the diagnosis and support individuals with mental retardation. The AAMR has

updated its definition of mental retardation ten times since 1908 to remain current with new information or breakthroughs in clinical and scientific research. The definition of mental retardation has been consistent since 1992.

Although the Supreme Court in *Atkins* did not prescribe any particular approach to effectuate its decision, it did recognize the AAMR's 1992 definition of mental retardation as authoritative:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. at 309 n.3 (quoting AAMR, *Mental Retardation* (9th ed. 1992)). The three elements of the 1992 definition -- (i) intellectual functioning, (ii) adaptive skills, and (iii) age of onset -- have been and remain primary considerations in clinical assessments by clinical experts in the mental retardation field.

In 2001, the Arizona legislature largely adopted the AAMR's 1992 definition of mental retardation, then the most current definition available, for purposes of pre-conviction proceedings after the effective date of the statute. *See State v. Dann*, 206 Ariz. 371, 375 n.3, 79 P.3d 58, 62 n.3 (2003) (discussing legislative history); Ariz. Rev. Stat. Ann. § 13-703.02(K)(2) (West Supp. 2005) ("Mental retardation' means a condition based on a mental deficit that involves significantly

subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen." In response to *Atkins*, the Arizona legislature amended Section 13-703.02 to apply to all capital sentencing proceedings. See *State v. Dann*, 206 Ariz. at 375 n.3, 79 P.3d at 62 n.3 (citing Ariz. Rev. Stat. Ann. § 13-703.02(J)).

The AAMR subsequently refined its definition of mental retardation to reflect a decade of significant developments in the field and current scientific consensus. AAMR, *Mental Retardation* (10th ed. 2002). The 2002 edition of *Mental Retardation* maintains the three essential elements embodied in both Section 13-703.02(K)(2) and the 1992 edition, and further elaborates five critical assumptions necessary for proper application of the definition:

MENTAL RETARDATION:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

The following five assumptions are essential to the application of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

AAMR, *Mental Retardation* 1 (10th ed. 2002).

Numerous federal appellate and state supreme courts around the country since have adopted the AAMR's 2002 definition when considering claims of mental retardation. *See, e.g., In Re Hawthorne*, 105 P.3d 552, 556-57 (Cal. 2005); *Pruitt v. State*, 834 N.E.2d 90, 107 (Ind. 2005); *State v. Harris*, 859 A.2d 364, 446 (N.J. 2004); *State v. Dunn*, 831 So. 2d 862, 881 (La. 2002); *In re Hearn*, 418 F.3d 444, 445 (5th Cir. 2005). Likewise, the superior court applied the AAMR's 2002 definition for purposes of deciding pretrial motions in the proceedings below.² Order at 5-6 n.3, *State v. Apelt*, No. CR 14946 (Ariz. Super. Ct. Pinal County July 21, 2005) (order on parties' pre-hearing evidentiary motions).

² The State's proffered expert cites the 2002 edition of *Mental Retardation* as an authoritative source for his report. (App. to Rudi Apelt's Resp. to Pet. for Special Action, Ex. H at 2-3 (Report of John A. Moran, Ph.D.) (Dec. 16, 2005)).

The AAMR's 2002 definition reflects current scientific consensus in the mental retardation field and it explains the proper application of the definition set forth in Section 13-703.02(K)(2). Amici therefore respectfully submit the Court should recognize the AAMR's 2002 definition in the context of *Atkins* proceedings such as this one to ensure that Section 13-703.02 is applied in a manner consistent with current scientific consensus in the mental retardation field. *Cf. State v. Grell*, 205 Ariz. 57, 64, 66 P.3d 1234, 1241 (2003) ("The trial court should use *Atkins* as a guide and should, insofar as is practical in the post-trial posture of this case, follow the procedures established in A.R.S. section 13-703.02.")

We now turn to the three essential elements of the definition of mental retardation.

A. Significant Limitations In Intellectual Functioning

A clinical assessment of whether a defendant has mental retardation typically begins with a measurement of any impairment of intellectual (or cognitive) functioning. The degree of impairment necessary to satisfy the first element of the mental retardation definition is "significantly subaverage general intellectual functioning." Ariz. Rev. Stat. Ann. § 13-703.02(K)(2). This term of art has a specific clinical meaning in the mental retardation field. For decades, the term "significantly subaverage" has been used by clinical experts to describe the level of impairment found in individuals whose performance on standardized

intelligence (or IQ) tests places them two standard deviations below the mean (i.e., the lowest two and a half or three percent of the population). AAMR, *Mental Retardation* 14 (10th ed. 2002).³ Individuals who score in this range have substantial cognitive impairment.

As the Supreme Court recognized in *Atkins*, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. Some claims for Eighth Amendment protection will fail because the defendant's intellectual functioning is not "significantly subaverage." Although mental retardation professionals diagnose the presence or absence of "significantly subaverage general intellectual functioning" using intelligence tests, it is not possible to identify a "fixed cutoff point for making the diagnosis of mental retardation." AAMR, *Mental Retardation* 58 (10th ed. 2002).

Clinical standards offer guidance for establishing which defendants satisfy the intellectual functioning element of the mental retardation definition. In terms of numerical measurements, two standard deviations below the mean has been identified as "an IQ standard score of approximately 70 to 75 or below, based on assessment that includes one or more individually administered general

³ See also AAMR, *Mental Retardation* 5 (9th ed. 1992); American Association on Mental Deficiency, *Classification in Mental Retardation* 11 (8th ed. 1983).

intelligence tests developed for the purpose of assessing intellectual functioning." AAMR, *Mental Retardation* 5 (9th ed. 1992); accord AAMR, *Mental Retardation* 14, 58 (10th ed. 2002). The Arizona legislature likewise defined "significantly subaverage" intellectual functioning as "a full scale intelligence quotient of seventy or lower," but required that courts "shall take into account the margin of error for the test administered." Ariz. Rev. Stat. Ann. § 13-703.02(K)(4). The margin of error is significant, because it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, mental retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. See AAMR, *Mental Retardation* 57, 80 (10th ed. 2002).⁴

The particular circumstances of an individual's testing, the differences among IQ instruments, and the attendant margin of error, mean the upper boundary of mental retardation can never be fixed at a precise IQ score. "The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement." AAMR, *Mental Retardation* 57 (10th ed.

⁴ Accord American Psychiatric Ass'n ("APA"), *Diagnostic and Statistical Manual of Mental Disorders* 41-42 (4th ed. text revision 2000).

2002). One reason for this is relatively minor differences among IQ instruments, including their scoring methodology. An "important source of possible variation lies in test content differences across different scales and between different age levels on the same scale. ... Variations also may be attributed to differences in the standardization samples, to changes between different editions of the same scale, to shifts to an alternative scale as an individual's chronological age increases, and to variances in the person's abilities or performance." AAMR, *Mental Retardation* 59 (10th ed. 2002).⁵ Courts should be careful to ensure, therefore, that each IQ score has been "validated with additional test scores or evaluative information." AAMR, *Mental Retardation* 5 (9th ed. 1992).

The determination of whether an individual has significantly subaverage general intellectual functioning is not indeterminate or unmanageable, nor is the boundary of mental retardation subject to manipulation. Although this issue does not admit of a rigid rule involving a single, one-size-fits-all IQ score, experienced clinicians in the field of mental retardation bring their experience and judgment to the task and reach an individualized determination regarding a particular defendant. In cases in which clinical experts disagree on the extent of a

⁵ *Accord* American Psychological Ass'n, *Manual of Diagnosis and Professional Practice in Mental Retardation* 27 (Jacobson & Mulick eds. 1996) ("Each intelligence or cognitive measure will differ in the clarity with which its structure permits isolation of specific cognitive functions.").

