

CRIMINAL JUSTICE SYSTEM

People with intellectual and/or developmental disabilities¹ (I/DD) have the right to justice and fair treatment in all areas of the criminal justice system, and must be afforded the supports and accommodations required to make justice and fair treatment a reality.

ISSUE

When individuals with intellectual and/or developmental disabilities (I/DD) become involved in the criminal justice system as victims, witnesses, suspects, defendants, or incarcerated individuals, they face fear, prejudice, and lack of understanding. Attorneys, judges, law enforcement personnel (including school-based security officers), first responders, forensic evaluators, victim advocates, court personnel, correctional personnel, criminal justice policy-makers, and jurors may lack accurate and appropriate knowledge to apply standards of due process in a manner that provides justice for individuals with I/DD. These individuals are:

- *Unrecognized as having a disability.* Individuals with I/DD are frequently undiagnosed or misdiagnosed, especially by evaluators, including law enforcement personnel, who are not trained in assessment of individuals with intellectual disability and who do not recognize common characteristics such as individuals' attempts to hide their disability. Defendants with I/DD are often denied a fair evaluation of whether they are entitled to legal protection as having I/DD on the basis of false stereotypes about what individuals with I/DD can and cannot understand or do.
- *Victimized at high rates.* Individuals with I/DD are significantly more likely to be victimized (at least two times more likely for violent crimes and four to ten times for abuse and other crimes), yet their cases are rarely investigated or prosecuted because of discrimination, devaluation,

¹ "People with intellectual disability (ID)" refers to those with "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", as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) in its manual, *Intellectual Disability: Definition, Classification, and Systems of Supports* (Schalock et al., 2010), and the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), published by the American Psychiatric Association (APA, 2013). "People with developmental disabilities (DD)" refers to those with "a severe, chronic disability of an individual that- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments; (ii) is manifested before the individual attains age 22; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity: (I) Self-care, (II) Receptive and expressive language, (III) Learning, (IV) Mobility, (V) Self-direction, (VI) Capacity for independent living, (VII) Economic self-sufficiency; and (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated," as defined by the Developmental Disabilities Assistance and Bill of Rights Act 2000. In everyday language people with ID and/or DD are frequently referred to as people with cognitive, intellectual and/or developmental disabilities.

prejudice that they are not worthy of protection, and mistaken stereotypes that none can be competent witnesses. Their victimization comes in many forms including violence, oppression, financial exploitation, sexual exploitation, and human trafficking;

- *Denied redress.* Individuals with I/DD are subject to routine denial of opportunities for legal redress because of outdated and stereotyped views of their credibility, their competence to testify, or their need for advocacy, supports, and accommodations;
- *Denied due process.* Individuals with I/DD are often denied due process and effective, knowledgeable advocacy and legal representation at each stage of the proceedings; and
- *Discriminated against in sentencing, confinement, and release.* Individuals with I/DD are subject to abuse and exploitation when incarcerated and denied either alternatives to incarceration or appropriate habilitation programs that would address their intellectual disability, and/or behavior, and help them return safely to the community. When incarcerated, individuals with I/DD often serve extended time because they do not understand or cannot meet steps to reduce time and secure an earlier release.

When individuals with I/DD or their families come into contact with the criminal justice system, they find few organized resources for information, training, technical assistance, referral, and supports. Moreover, people living with I/DD who enter the criminal justice system encounter unique problems not faced by their nondisabled peers, such as:

- Failing to have their disability correctly identified by authorities who lack the expertise to discern the presence and nature of their disability (especially when the disability is denied by the person or somewhat hidden);
- Giving incriminating statements or false “confessions” because the individual is manipulated, coerced, misled, confused by either conventional or inappropriately used investigative techniques, or desires to please the questioner;
- Experiencing inappropriate assessments for competency to stand trial even when the individual cannot understand the criminal justice proceeding or is unable to assist their lawyer in their own defense;
- Being inappropriately placed in long-term institutions and subject to inappropriate one-size-fits-all “competency training” designed for people with other disabilities or no disabilities; and

- “Waiving” rights unknowingly when warnings such as *Miranda* are given without accommodating the person’s I/DD.

While the Supreme Court ruled in *Atkins v. Virginia*² that it is a violation of the Eighth Amendment ban on cruel and unusual punishment to execute people with intellectual disability, states continue to play a major role in applying the term and in deciding the process for consideration of a defendant’s intellectual disability. Laws vary from state to state on how a defendant proves the presence of intellectual disability. States also vary widely regarding whether it is the judge or jury who decides if the defendant has intellectual disability. States sometimes inappropriately appoint people who are not knowledgeable about intellectual disability to conduct “assessments” for intellectual disability or to offer “a diagnosis” that they are not professionally trained or qualified to provide. As a result, defendants may not have their intellectual disability correctly identified because of a state’s unfair and inaccurate procedures. The Supreme Court ruled again in *Hall v. Florida*³ in 2014, reaffirming the *Atkins* decision and denying states’ use of strict IQ cutoffs to diagnose intellectual disability.

POSITION

People with intellectual and/or developmental disabilities must receive justice in the criminal justice system, whether as victims, witnesses, suspects, defendants, or incarcerated individuals.

As victims, witnesses, suspects, defendants, or incarcerated individuals, they must:

- Be protected by laws and policies that ensure their right to justice and fair treatment;
- Be treated fairly by personnel who are knowledgeable and trained about I/DD, including all attorneys (prosecution and defense), judges, law enforcement personnel (including school-based security officers), first responders, forensic evaluators, victim advocates, court personnel, correctional personnel, criminal justice policy-makers, and jurors;
- Be informed about and have access to appropriate sentencing alternatives to incarceration, and be provided the supports and accommodations to

² *Atkins v. Virginia*, 536 U.S. 304 (2002). The term “mental retardation” was used in the *Atkins* decision banning execution of people with intellectual disability (ID) and, though outdated, was still used in some state legal and criminal justice systems until the U.S. Supreme Court’s decision in *Hall v. Florida*. The outdated term has appeared, therefore, in many legal decisions and briefs, including *amicus* (“friend of the court”) briefs. The Arc and AAIDD support the modern terminology of ID and urge courts to follow the Supreme Court’s lead in adopting this modern terminology.

³ *Hall v. Florida*, ____ U.S. ____ (2014)

enter alternatives;

- Receive supports and accommodations to effectively participate in all stages of legal proceedings for which they are competent;
- Have necessary supports and accommodations available so that their testimony is heard and fairly considered when they are victims;
- Have access to victim supports and compensation as appropriate;
- Have access to, and the right to present, expert evaluations and testimony by professionals with training, experience, and expertise in their disability;
- Have an advocate, in addition to their lawyer, who has specialized, disability-related expertise;
- Have their conversations with their advocate covered under, or treated similarly to, attorney-client privilege; and
- As a suspect, be protected from harm, self-incrimination, and exploitation at all stages of an investigation and prosecution, including when they are questioned, detained, and incarcerated.

When sentenced, individuals with I/DD also must:

- Have available reasonable and appropriate supports, accommodations, treatment, and education, as well as alternatives to sentencing and incarceration that include community-based corrections; and
- Have access to well-trained probation and parole officers who will treat them fairly based on their individual disability and their need for the supports and accommodations necessary to re-enter society, including those that will enable people to re-establish Medicaid Waiver services, SSI, housing, education, and job supports.

When death penalty is an issue, individuals with intellectual disability also must:

- Continue to be exempt from the death penalty because existing case-by-case determinations of competence to stand trial, criminal responsibility, and mitigating factors at sentencing have proved insufficient to protect the rights of individuals with intellectual disability;
- Have access to expert witnesses and professionals who are knowledgeable about, as well as trained and experienced in, intellectual disability and

who can accurately determine the presence and effects of intellectual disability; and

- Have their intellectual disability determined by state procedures that are accurate and fair. Those state procedures must be consistent with the national standards on making an intellectual disability determination and ensure that people with intellectual disability are not executed.

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