No. 08-1749
D.C. Case Nos. 04-8001-CV-W-GAF

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARBOLEDA A. ORTIZ,

Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
Hon. GARY A. FENNER, United States District Judge, presiding

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AND THE ARC OF THE UNITED STATES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed without leave of court, pursuant to Federal Rule of Appellate Procedure 29(a), because all parties have consented to its filing. **The American Association on Intellectual and Developmental Disabilities** (AAIDD), was formerly known as the American Association on Mental Retardation (AAMR), and appeared under that name as amicus curiae in numerous cases, including *Atkins v. Virginia*, 536 U.S. 304 (2002). Founded in 1876, AAIDD is the oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities. For more than 80 years, AAIDD has defined what it means to have intellectual disabilities ormental retardation.[1] These definitions have been commonly accepted within the scientific community,[2] and are employed by

[1] The term "mental retardation" has become the subject of considerable discussion recently among professionals in the field. Increasingly, those professionals employ the term "intellectual disability" in place of "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 the change in terminology within the Association involves no substantive change in the definition). The definition of "intellectual disability" is identical to the previous definition of "mental retardation." *See* AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (11th ed. 2010) [hereafter AAIDD 2010]. This brief will refer to "mental retardation," since that is the term employed in *Atkins*.

[2] Since 1961, AAIDD has regularly published diagnostic manuals that set forth a consensus definition of the level of functioning that constitutes mental retardation

(continued...)

government agencies and courts in determining whether individuals have mental retardation. *See, e.g., Atkins*, 504 U.S. at 308 n. 3.

AAIDD has a vital interest in ensuring that: (1) all individuals with intellectual disabilities receive the protections and supports provided by law for people with mental retardation; and (2) courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual disability and mental retardation.

The Arc of the United States, through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Consequently, The Arc of the United States also has a vital interest in ensuring that all individuals with mental retardation receive the protections and supports that they are entitled to under federal and state law.

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[2](...continued)
and the means by which this level of functioning is measured. Stephen Greenspan & Harvey N. Switzky, *Forty-Four Years of AAMR Manuals*, in WHAT IS MENTAL RETARDATION? 3-28 (Harvey N. Switzky & Stephen Greenspan, eds. 2006). In its Diagnostic and Statistical Manuals on Mental Disorders, the American Psychiatric Association has followed the successive definitions of mental retardation adopted by the AAIDD. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF PSYCHIATRIC DISORDERS 48 (4th ed. Text rev 2000).

ARGUMENT

On December 12, 2007, United States District Court Judge Gary Fenner issued a written decision denying Mr. Ortiz's claim that he has mental retardation and is therefore exempt from execution. Order Denying Movant's 28 U.S.C. § 2255 Motion, at 1-12, *Ortiz v. United States*, No. 4:04-cv-8001 (W.D.Mo. 2007) (hereafter Order). In that order, the district court denied Ortiz's claim despite the fact that all objective data – introduced by the defense *and* the prosecution – pointed to the conclusion that Ortiz is a person with mental retardation.[3] All of Ortiz's IQ scores fell within the range of mental retardation. A standardized measure of adaptive behavior administered by the prosecution's expert yielded results consistent with mental retardation. Additional social history evidence confirmed that Ortiz has significant limitations in adaptive behavior. Finally, there was no dispute that Ortiz's intellectual impairments originated in childhood.

In rejecting Ortiz's claim, the district court was misled by the government's expert to employ reasoning contrary to the scientific standards that govern the

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[3] Mental retardation is defined by three elements: significant limitations in intellectual functioning, significant limitations in adaptive behavior, and manifestation of the disability during the developmental period (typically, before the age of 18). AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002) [hereafter AAMR 2002]; American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF PSYCHIATRIC DISORDERS, FOURTH EDITION, TEXT REVISION 41 (2000) [hereafter DSM IV-TR]. *See* AAIDD 2010 at 1.

diagnosis of mental retardation. The district court discounted the consistent results of the multiple IQ tests given to Mr. Ortiz based on the prosecution expert's erroneous view that Ortiz's national origin and lack of schooling meant that the IQ testing did not accurately assess his intellectual functioning. The district court employed inaccurate stereotypes that grossly underestimate the abilities of individuals with mild mental retardation, and focused on the presence of alleged adaptive strengths rather than the presence or absence of adaptive deficits. In short, the district court erroneously discounted the robust evidence of significantly limited intellectual functioning, resorted to false stereotypes to determine what it means to have mental retardation, and erroneously found that Ortiz does not have mental retardation.

A. Basic Principles Governing the Assessment of Mental Retardation

The AAIDD definition of mental retardation is the starting point for any discussion of appropriate diagnosis or classification. The three-prong definition provides: "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." AAMR 2002 at 1;[4] *see* AAIDD 2010 at 1.

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[4] This definition encompasses the same group of individuals as previous definitions and is reflected in the American Psychiatric Association's DIAGNOSTIC

(continued...)

The first prong involves "significant limitations" in intellectual functioning. This requires that the measured intelligence of the individual fall approximately two standard deviations below the mean.[5] The measurement of intellectual functioning is evaluated through careful assessment of the individual's scores on IQ tests.

The second prong of the definition requires that an individual have significant limitations in adaptive behavior. This requirement is designed to make sure that the individual's IQ score is a reflection of a real-world disability, and not merely a testing anomaly. The focus of the clinical inquiry regarding this second prong is to determine whether there are significant things that the individual being evaluated cannot do that someone without his disability can do. Individuals who have mental retardation – like everyone else – differ substantially from one another. For each person with mental

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[4](...continued)
AND STATISTICAL MANUAL OF MENTAL DISORDERS. *See* DSM-IV-TR at 41.

[5] The Court in *Atkins* noted that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. at 309 n.5 (citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (Benjamin J. Sadock, MD & Virginia A. Sadock, MD, eds., 7th ed. 2000)). The same requirement that measured intelligence fall within a range below an IQ of 70 to 75 also was found in previous editions of the AAMR manual. *See, e.g.*, AAMR 1992 at 14 (defining significantly subaverage intellectual functioning as "approximately 70 to 75 or below"). It is also consistent with the requirements of the American Psychiatric Association's diagnostic manual. *See* DSM-IV-TR at 41-42. *Accord* American Psychological Association, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 15 (John W. Jacobson and James A. Mulick eds., 1996).

retardation, there will be things he cannot do, but also things he *can* do. Indeed, one of the fundamental precepts in the field of mental retardation is that "[w]ithin an individual, limitations often coexist with strengths." AAIDD 2010 at 1; AAMR 2002 at 1. Because the mixture of skill strengths and skill deficits varies widely among persons with mental retardation, there is no clinically accepted list of common, ordinary strengths or abilities that preclude a diagnosis of mental retardation. Thus, the focus in assessing an individual's adaptive behavior must be on *deficits* in adaptive behavior, rather than strengths.[6]

The third prong of the definition requires that the disability manifest during the individual's childhood, prior to the age of eighteen.

The Supreme Court has correctly observed that diagnosing whether an individual has mental retardation is less complex than the diagnosis of many forms of mental illness. *Heller v. Doe*, 509 U.S. 312, 321-22 (1993). Indeed, there are objective measures of intellectual functioning (IQ tests), as well as a history of

[6] Assessment is conducted through the use of standardized instruments for measuring adaptive behavior, which are normed on the general population (including people with and without disabilities), AAIDD, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 13 (2007) [hereafter, AAIDD User's Guide], in combination with information gleaned from "a thorough social history," *id*. at 18, which includes "a longitudinal evaluation of adaptive behavior that involves multiple raters, very specific observations across community environments (especially in regard to social competence), school records, and ratings by peers during the developmental process." *id*. at 22.

performance, behavior, and observations by others regarding deficits in adaptive skills. These factors not only lend themselves to clarity in diagnosis but are also crucial to prevent stereotypes about people who have mental retardation from clouding or distorting individual assessment.[7]

[7] The problems caused by stereotyping have long been recognized in the field of mental retardation. *See, e.g.*, Michael S. Sorgen, *The Classification Process and its Consequences, in* THE MENTALLY RETARDED CITIZEN AND THE LAW 215, 215-16 (Michael Kindred et al., eds., 1976). False stereotypes have played a major role in buttressing the cruel and discriminatory treatment that individuals with mental retardation have too often received. *See generally City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) ("[A] history of unfair and often grotesque mistreatment."); James W. Trent, Jr., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES (1994) (describing the evolving definition of mental retardation and the stereotypes associated with developmental disability). False stereotyping prompted leaders of our field in the eugenics era to claim, for example, that "[t]he feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs ... They cause unutterable sorrow at home and are a menace and danger to the community." Walter Fernald, *The Burden of Feeblemindedness*, 17 J. PSYCHO-AESTHENICS 87, 90 (1912). History has thoroughly discredited such views. It is similarly false to assume or conclude that every person who has mental retardation possesses the same lack of skills or abilities.

B. All of the Objective Data Collected by The Experts Who Have Evaluated Mr. Ortiz Point to the Conclusion That He Has Mental Retardation

Under the standards established by the AAIDD, mental retardation is largely measured through the use of objective criteria. Measured by these objective criteria, Mr. Ortiz has mental retardation.

1. Ortiz's IQ scores fall within the range of mental retardation

Consistent with AAIDD's standards, the assessment of whether an individual has significant limitations in intellectual functioning, "should be measured using individually administered standardized psychological tests … administered by appropriately trained professionals." AAMR 2002 at 52. *Accord,* AAIDD 2010 at 41-42. As Dr. John Gregory Olley[8] noted in a declaration in Ortiz's case, the parties' experts administered four full-scale IQ tests to Ortiz. Evidentiary Hearing Exhibit 11. At the request of Mr. Ortiz's counsel, Dr. Ricardo Weinstein administered a Spanish language version of the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) and a Spanish language version of the Woodcock-Johnson Tests of Cognitive Ability, the Bateria Woodcock-Munoz Revisada (W-M-R). At the request of the government,

[8] Dr. Olley, one of the leading national experts in mental retardation, is President of Division 33 of the American Psychological Association, which focuses on intellectual and development disabilities.

Dr. Carmen Vazquez administered a Comprehensive Test of Non-Verbal Intelligence (C-TONI) and the Bateria III Woodcock-Munoz (W-M-III).

All of Ortiz's IQ test results met the first element of mental retardation. Ortiz's WAIS-III score of 54, his C-TONI scores of 51 and 54, his W-M-R score of 44 through 50, and his reported W-M-III score of 70[9] are *all at or below* the cutoff score for significant limitations in intellectual functioning. Beyond any doubt, the measure of Ortiz's intellectual functioning meets the standards for the first element of mental retardation commonly accepted by the scientific community.

2. Ortiz's adaptive deficit scores fall within the range of mental retardation

Dr. Vazquez administered the Adaptive Behavior Assessment System, Second Edition (ABAS-II) directly to Ortiz. Order at 10. The ABAS-II administered by Dr. Vazquez to Ortiz in prison yielded several scores that placed him within the range of mental retardation. As Dr. Olley noted in his declaration, Ortiz's scores of 63 in conceptual functioning, 70 in social functioning, and his general adaptive composite score of 71 all fell within the range of significant impairment. Evidentiary Hearing

[9] In fact, it appears that Dr. Vazquez erred in her scoring of the W-M-III, and that Ortiz's score was actually 60. Dr. Vazquez rescored the W-M-III in 2007 but failed to apply the correct norms when doing so. *See* Declaration of Kevin McGrew, Ph.D., attached to Brief of Amici Curiae Concerned Experts in Mental Retardation/Intellectual Disability, filed in this matter before this Court.

Exhibit 11 [Olley Declaration, ¶ 14.] A score of 70 or lower in conceptual, social, or practical functioning, or a general composite score within the range of error for the cutoff of 70 satisfies the overall requirement of significant deficits in adaptive functioning.

AAIDD advises that significant limitations in adaptive behavior should be assessed, in significant part, through the use of standardized measures. AAIDD 2010 at 43; AAMR 2002 at 76. The fact that the sole adaptive behavior measure placed Ortiz's functioning in the range of mental retardation is thus highly significant.[10]

3. Social history evidence supports the conclusion that Ortiz has significant adaptive deficits

Under AAIDD's standards, individuals meet the adaptive deficit criterion if they have significant deficits in one of three adaptive behavior domains: practical,

[10] If anything, the administration of the ABAS-II with Mr. Ortiz, rather than with people who knew Mr. Ortiz, likely *overstated* Ortiz's adaptive skills. The administration of the ABAS-II directly with Mr. Ortiz required him to engage in a process of self-rating. In making retrospective assessments, AAIDD has counseled clinicians to "[r]ecognize that self-ratings have a high risk of error in determining 'significant limitations in adaptive behavior.'" AAIDD User's Guide at 21. This is because "(a) people with MR/ID are more likely to attempt to look more competent and 'normal' than they actually are...; (b) people with MR/ID typically have a strong acquiescence bias or inclination to say yes or agree with the authority figures...; and (c) MR/ID is a social status that is closely tied to how a person is perceived by peers, family members, and others in the community." *Id*. at 21-22 (citations omitted). The operation of these factors likely caused Mr. Ortiz to overstate his adaptive skills.

social, or conceptual behavior, or overall deficits in the range of significant impairment. AAIDD 2010 at 43; AAMR 2002 at 76. In addition to the use of a standardized measure of adaptive behavior to examine limitations in these three domains, AAIDD calls for evaluation of information derived from the client's social history, AAIDD User's Guide at 18, 22, because "the individual's adaptive behavior should be evaluated using multiple respondents and multiple sources of converging data." AAIDD 2010 at 49-50. The defense expert, Dr. Ricardo Weinstein, examined the data from Mr. Ortiz's social history and found convergent validity with Ortiz's scores on the ABAS-II.

In evaluating the data derived from Ortiz's social history, Dr. Weinstein correctly focused on significant deficits in Ortiz's adaptive functioning within the context of his culture and family. One of the fundamental principles of mental retardation evaluation is that "[v]alid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors." AAIDD 2010 at 1; AAMR 2002 at 8. As the 2010 Manual explains "[f]or the purposes of diagnosis, it is also important to identify factors that typically affect the learning or performing of adaptive skills." AAIDD 2010 at 52. These factors include the cultural context of the individual, how an individual's adaptive behavior compares to that of their peers, and the opportunities an individual has had to participate in community life. *Id.* at 52-53.

In examining the data from Mr. Ortiz's social history, Dr. Weinstein relied on a telephone interview (from Colombia) with Ortiz's father, the affidavit of mitigation specialist Dhyana Fernandez, who spent time in Colombia interviewing numerous people who knew Ortiz as he was growing up (Evidentiary Hearing Exhibit 33 (hereafter Fernandez Aff.)), the ABAS-II administered by Dr. Vazquez, and interviews with Mr. Ortiz. *See* Evidentiary Hearing Exhibit 23-2 at 11. Dr. Weinstein found significant limitations in all three domains of adaptive behavior,[11] whether gauged by Mr. Ortiz's local culture in Colombia or by his functioning in the United States during his adulthood.

Ortiz's significant limitations in the **conceptual domain** included that he:

- never learned to read or write in any language (Evidentiary Hearing Transcript (hereafter EHT), at 44, 54, 346);
- was delayed in learning to speak, by comparison to his younger half-brother (Fernandez Aff. at ¶ 18);

[11]AAIDD categorizes deficits in adaptive behavior into three broad categories called domains: conceptual, social, and practical skills. AAIDD 2010 at 1; AAMR 2002 at 1. For the diagnosis of mental retardation, it is required that the individual have significant limitations in one of the domains, or significant overall impairment. AAIDD 2010 at 43. Mr. Ortiz demonstrates deficit in all three domains. The APA definition of mental retardation categorizes adaptive behavior in a longer list of 11 skill areas, and requires that the individual have deficits in at least two of these areas. DSM-IV-TR at 41. Mr. Ortiz has deficits in as many as nine of the APA's categories of skill areas. For a chart correlating the AAIDD domains and the longer list of skill areas, see AAMR 2002 at 82. See also AAIDD 2010 at 44.

- could not learn his own five-digit telephone number in Colombia until he was 15 years old (EHT 351);
- could not as a child be trusted to remember what he was sent to a neighborhood store to buy (EHT 351, Fernandez Aff. at ¶¶ 19-21);
- could not manage money (EHT 351-52, 368); and
- had great trouble learning in school – repeatedly failing the first grade before dropping out (EHT 43), even though other siblings raised in the same household did quite well in school (EHT 342-3, 345, 353).

Ortiz's significant limitations in the **social domain** included that he:

- hid under the bed to avoid having to go to school because he was teased severely for being slow (EHT 345-46);
- had difficulty relating to his peers (EHT 54); and
- was naive and frequently behaved in a way that made him vulnerable to manipulation by others. EHT 44.

Ortiz's significant limitations in the **practical domain** included that he:

- was delayed by comparison to other children in learning to use the toilet (EHT 54);
- was unable to learn basic construction work from his father (Fernandez Aff. at ¶ 22);

- only had one job, as a mechanic's helper (EHT 367);
- never lived alone in Colombia or the United States (EHT 352);
- and depended on others to help meet his basic needs (Fernandez Aff. at ¶ 31).

Many of Mr. Ortiz's limitations were observed by comparison to his peers or to other children in his family. Thus, this evidence was not distorted by cultural differences. Moreover, two observations by people in Colombia confirmed quite clearly that Mr. Ortiz had significant limitations in his adaptive behavior. His family recognized that he was slower than other children (Fernandez Aff. at ¶ 31), and his caregivers described him as very slow to learn new things. *Id*. at ¶ 17.

This evidence of significant deficits in adaptive functioning, beginning in childhood and continuing into adulthood, together with Ortiz's adaptive deficit scores on the ABAS-II, support only one conclusion: Mr. Ortiz has significant limitations in adaptive behavior.

4. The parties do not dispute that Ortiz's cognitive deficits originated in childhood

Because mental retardation is a developmental disorder, the final diagnostic criterion is that the cognitive deficits of mental retardation originated in childhood. As the evidence demonstrated, Ortiz's adaptive deficits were present from early childhood.

C. The Government's Expert Misled the District Court to Adopt Reasoning Contrary to the Scientific Standards That Govern the Diagnosis of Mental Retardation

1. Against scientific principles, the District Court discounted the consistent results of the multiple IQ tests given to Mr. Ortiz

The district court erroneously found that the evaluation of Mr. Ortiz was complicated by various sociocultural factors, including that he is a native of Colombia, that his primary language is Spanish, and that he is unable to read or write in either language. Order at 5. The court concluded that the defense expert, Dr. Weinstein, failed to account adequately for these differences with respect to the IQ testing, but that the government expert, Dr. Vazquez, did account for such differences. However, the record reveals Dr. Vazquez misled the court into discounting the IQ testing data based on unfounded suppositions about the effect of Mr. Ortiz's socio-cultural differences.

A central tenet in the diagnosis of mental retardation is that cultural differences must be taken into account in the assessment. "A valid assessment takes into account an individual's cultural background and differences in communication." AAIDD 2010 at 1; AAMR 2002 at 8. In keeping with this, when "cultural diversity and/or linguistic factors…impact or affect the information needed for decision," AAIDD User's Guide at 22, AAIDD recommends six principles to guide the assessment:

1. Use research-based knowledge to incorporate currently available measures and strategies or use professional standards to develop needed data-collection techniques.

2. Use multiple data sources (e.g., personal appraisal or functional assessment) to obtain the necessary data.

3. Show clearly that the obtained data is aligned with the critical question(s) asked.

4. Use assessment instruments that are sensitive to diversity, have norms that are based on diverse groups, and have acceptable psychometric properties.

5. Investigate and understand culture, the degree of acculturation, and the language of the individual.

6. Do not allow cultural or linguistic diversity to overshadow or minimize actual disability.

AAIDD User's Guide at 22-23.

The collective process of evaluation by government and defense experts in Mr. Ortiz's case satisfied these guidelines. The results of this process demonstrate with a good deal of clarity that Mr. Ortiz has significant limitations in intellectual functioning. The government's expert, Dr. Vazquez, however, backed away from these results on the basis of flawed and unfounded assertions.

The first two guidelines – using research-based knowledge and professional standards to develop data collection techniques, and using multiple data sources – were satisfied by the array of IQ assessment instruments used here. All four of the tests are highly respected, reliable instruments designed to yield valid results

consistent with professional standards. The Spanish language version of the WAIS-III (administered by Dr. Weinstein) and the two Spanish language versions of the Woodcock-Johnson Tests of Cognitive Ability – the Bateria Woodcock-Muñoz Revisada (administered by Dr. Weinstein) and the Bateria III Woodcock- Muñoz (administered by Dr. Vazquez) – are instruments of choice for a native-Spanish-speaker. Employment of the Comprehensive Test of Non-Verbal Intelligence as the fourth instrument was a good choice for a person living in a foreign culture.

This array of tests also satisfied the fourth guideline. All four instruments have been normed on diverse groups, and their psychometric properties are at the highest level among the measures of intelligence for obtaining valid and reliable results. There are no better tests for accurately measuring intellectual functioning and for obtaining similar results among different testers. Moreover, these versions of the tests were standardized on Spanish-speaking people, and for this reason have taken into account whatever sociocultural factors can be accounted for within a diverse Spanish-speaking population.

Based on the testimony of Dr. Vazquez, the district court determined that "[t]he Spanish version of the WAIS-III does not appear to have norms that scientifically apply to someone of Ortiz's background and status," and in particular, the court was "not satisfied substituting norms based on a United States population is sufficient to

make the WAIS-III a reliable instrument for assessing Ortiz's intellectual capabilities given his lack of acculturation and illiteracy." Order at 6.

The court was misled into making these findings. The WAIS-III *and* both versions of the Bateria were normed on a Spanish-speaking sample population of the United States. Dr. Vazquez testified that the norming sample for the WAIS-III, however, excluded people who were illiterate and less acculturated. EHT 284-85. This is not a matter accepted within the community of mental retardation professionals in the United States, and it is not a reason to prefer the Bateria over the WAIS-III for an evaluation of a person such as Mr. Ortiz. All three instruments were normed on a cross section of the Spanish-speaking population of the United States, and both have thus taken into account, to the extent possible, the diversity of this heterogeneous population.

More significantly, the results Mr. Ortiz obtained on these tests were, for purposes of examining the intellectual functioning prong of mental retardation, *the same*. Mr. Ortiz's general intellectual ability score on the Bateria administered by Dr. Vazquez was reported as 70.[12] This score, on its face, meets the definition of significant limitations in intellectual functioning. All the other full-scale equivalent

[12] As we explained in note 9, *supra*, Dr. Vazquez used outdated norms on the Bateria at the time she re-scored the test prior to her testimony. Had she used the proper norms, Ortiz's score would have been 60.

IQ scores, which were lower than 70, met that definition as well. This fact demonstrates that the four IQ tests given to Mr. Ortiz satisfy the third guideline from the AAIDD User's Guide for the evaluation of someone like Mr. Ortiz – "the obtained data is [clearly] aligned with the critical question(s) asked." AAIDD User's Guide at 22.

All four of the IQ tests given to Mr. Ortiz showed that he is a person who has significant impairments in intellectual functioning as that term is defined in the mental retardation literature. The series of tests administered to Mr. Ortiz follow the six guidelines set out by AAIDD. It is of critical note that the tests resulted in converging data. Mr. Ortiz's scores on all four tests were within the range of mental retardation under AAIDD's first prong. Therefore, because all the tests results aligned, they are accurate measurements of Mr. Ortiz's intellectual functioning.[13]

The fifth guideline requires evaluators to "[i]nvestigate and understand the culture, the degree of acculturation, and the language of the individual." AAIDD User's Guide at 23. Dr. Vazquez noted, as matters of culture and acculturation, that

[13] Dr. Vazquez, and in turn the district court, Order at 10, questioned whether Mr. Ortiz was putting forth his best effort on the IQ tests she gave him. Her testimony showed, however, that the only test on which he may not have cooperated fully was the C-TONI. EHT 256, 264. No genuine question was raised about his putting forth his best effort on the other IQ tests or on the standardized measure of adaptive behavior, the ABAS-II. Given the uniform alignment of the IQ test scores at 70 or below, there is no real question that malingering or non-cooperation was an issue.

Mr. Ortiz was illiterate and lacked any education, and for that reason even though his IQ score on the Bateria III, as she reported it, was a 70, this score did not satisfy the intellectual functioning prong of mental retardation. In effect, she argued that his "real" functioning was higher. The court accepted her reasoning, but this reasoning was contrary to established principles in the field of mental retardation.

A lack of education, along with factors such as family poverty, social deprivation, abandonment and abuse, and inadequate childcare, are recognized as "risk factors," which can *cause* mental retardation. AAIDD 2010 at 58-62 (including Table 6.1); AAMR 2002 at 125-28. Risk factors fall into four categories: biomedical, social, behavioral, and educational. AAIDD 2010 at 60-61. Educational factors relate to the "availability of educational supports that promote mental development and the development of adaptive skills." *Id*. at 61.

Thus, rather than being a basis for minimizing the significance of an IQ score of 70 – as Dr. Vazquez argued – Ortiz's lack of education *enhanced* the likelihood that he would *have* mental retardation. Here it is plain that Mr. Ortiz's lack of education went hand-in-hand with other risk factors to cause his limitations in intellectual functioning, for by the time he went to school as a young child, he could not learn – trying and failing four times to pass the first grade. Mr. Ortiz's illiteracy is a function of his intellectual limitation that has been clearly manifested since childhood and is not merely a result of lack of education.

For these reasons, the sixth guideline from AAIDD puts into proper perspective the mis-evaluation of Mr. Ortiz by Dr. Vazquez. The User's Guide warns practitioners not to "allow cultural or linguistic diversity to overshadow or minimize actual disability." *Id*. at 23. This is precisely what Dr. Vazquez did. Dr. Vazquez mistook diversity – lack of formal education, resulting illiteracy, and poor acculturation – as factors minimizing Mr. Ortiz's limitations, rather than as factors causing or produced by his limitations. There was no scientific basis for her views.

2. In analyzing adaptive behavior, the district court employed inaccurate stereotypes that grossly underestimate the abilities of individuals with mild mental retardation, and focused on the presence of alleged adaptive strengths rather than the presence or absence of adaptive deficits

As we noted in an earlier section of the brief, stereotypes about people with mental retardation have abounded for centuries. Some of these stereotypes are obvious and offensive – for example, Fernald's 1912 reference to people with mental retardation, *supra*, as "a parasitic, predatory class, never capable of self-support or of managing their own affairs...[who]…are a menace and danger to the community." However, other stereotypes are more subtle and, thus, far more insidious. The latter infected Dr. Vazquez's understanding of the adaptive behaviors of people with mental retardation, and in turn, sanctioned the district court's own stereotypes. This process

led to a wholesale failure to consider the evidence of very significant limitations in Mr. Ortiz's adaptive behavior.

The stereotypes that framed Dr. Vazquez's understanding were expressed most succinctly in her amended report concerning Mr. Ortiz. Evidentiary Hearing Exhibit 8 (Amended Report by Dr. Vazquez, November 9, 2007). Dr. Vazquez observed that "self care, daily living, and communication skills" "cannot be performed independently by an individual with mental retardation or limited cognitive functioning." Exhibit 8 at 13-14. In keeping with these views, Dr. Vazquez found that Mr. Ortiz did not have mental retardation, because he "is able to care for his hygiene" and "it did not appear he had to be told to do so," Exhibit 8 at 19, "has had several girlfriends and has fathered two children" and exhibited "a certain level of insight, and appropriate adult-like behavior," *id*., and "managed the complexity of an airport environment, exited the airplane, and met a taxi outside of the terminal." *Id*. at 20. Acknowledging that Ortiz did have some assistance with the air travel – "he indicated that Shaunte took him to the airport, and that his friend Fabio arranged for him to take a taxi from the airport" – Dr. Vazquez noted Mr. Ortiz nevertheless "exited the plane alone and was able to independently find the taxi that was waiting for him in Kansas City." *Id*. at 4. On a more conceptual level, Dr. Vazquez noted that since Ortiz recognized that he faced a death sentence and was imprisoned, this

"indicate[d] an awareness and appreciation of the severity of his current situation not found in the MR population in general." *Id*. at 16.

Tellingly, Dr. Vazquez referred to people with mental retardation as "people that have mental defects," EHT 191, and as "totally mentally defective." EHT 211. Use of such terms is not only outdated and pejorative, it also reflects the stereotypical misunderstanding of people with mental retardation that is evinced by her other observations. Dr. Vazquez apparently believes that no one with mental retardation can function independently, appreciate the circumstances that they face when they face grave criminal charges, or communicate effectively.

Dr. Vazquez's views apparently coincided with the district court's views, because the court indicated its agreement with Dr. Vazquez that people with mental retardation simply cannot perform the activities of daily living that Mr. Ortiz could perform. Order at 8, 9, 11. The court also observed that a person with mental retardation cannot appear as Mr. Ortiz did pretrial and at trial – giving a videotaped interview that "did not indicate any suggestion of mental retardation," and showing "no indication [at trial] of an inability to act in an appropriate fashion or to effectively interact with counsel or the Court." Order at 11.

In short, the district court rejected the evidence of significant limitations in adaptive behavior because the behavior Mr. Ortiz could engage in collided with the

court's stereotyped view of a person with mental retardation, reinforced by Dr. Vazquez's own stereotypes.

The stereotypes upon which Dr. Vazquez and the district court operated are false. Mental retardation literature is rich with descriptions of the varying and various capabilities of people with mental retardation. For example, the American Psychological Association explains:

> People classified [in the highest functioning group of people with mental retardation] evidence small delays in the preschool years but are often not identified until after school entry, when assessment is undertaken following academic failure or emergence of behavior problems. Modest expressive language delays are evident during early primary school years, with the use of two to three word sentences common. During the later primary school years, these children develop considerable expressive speaking skill, engage with peers in spontaneous interactive play, and can be guided into play with larger groups. During middle school, they develop complex sentence structure, and their speech is clearly intelligible. The ability to understand simple number concepts is also present, but practical understanding of the use of money may be limited. By adolescence, normal language fluency may be evident. Reading and number skills will range from first to sixth grade level, and social interests, community activities, and self-direction will be typical of peers, albeit as affected by pragmatic academic skill attainments ... [F]or a large proportion of these adults, persistent low academic skill attainment limits their vocational opportunities. However, these people are generally able to fulfill all expected adult roles.

American Psychological Association, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 17-18 (John W. Jacobson & James A. Mulick, eds., 1996). The American Psychiatric Association agrees in virtually identical terms. *See* DSM-IV-TR at 43.

These observations are fully in keeping with the experience of *amici*. While people with mild mental retardation will "[l]ikely ... [have] some learning difficulties in school[,] [m]any adults will be able to work and maintain good social relationships and contribute to society." AAMR 2002 at 104. In short, "[p]ersons with mild retardation function in all adult roles – they are members of families, have friends, work, marry, and have children." S.A. Richardson, M. Katz, & H. Koller, *Patterns of Leisure Activities of Young Adults With Mental Retardation*, 97 AM. J. MENTAL RETARDATION 431, 431-42 (1993).

Accordingly, the views of Dr. Vazquez and the district court are simply mistaken. Their belief that people with mental retardation cannot engage in self-care, care of others, daily living, and communication, and cannot understand, appreciate, and act appropriately during legal proceedings is based on a false stereotype. Their belief that because Mr. Ortiz could do these things, he does not have mental retardation is uninformed and erroneous.

Precisely because people with mental retardation, like all people, often do some things better than others things, *see* AAIDD 2010 at 7, the focus of the inquiry into limitations in adaptive behavior must, and can only, be on the limitations. Since "[t]he sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences[,] ... the presence of confirming deficits must be the diagnostician's

focus." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 18 n.25 (2003) (emphasis added).

For these reasons, defense expert Dr. Ricardo Weinstein's analysis of Mr. Ortiz's adaptive behavior was fully consistent with clinical understanding of mental retardation. The district court's determination that Dr. Weinstein's testimony failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), is clearly erroneous. And the district court's conclusion that Dr. Vasquez's testimony satisfied those requirements stands *Daubert* and the science of mental retardation on its head. Contrary to the district court, Dr. Weinstein's analysis passed *Daubert.* Dr. Vazquez's did not.

The limitations that Dr. Weinstein focused on in Mr. Ortiz's adaptive behavior are, by any measure in the field of mental retardation, significant. During his developmental period, Mr. Ortiz had significant limitations in conceptual behavior. He had enormous difficulty learning in virtually every sphere of life – to speak (only after considerable delay), to read and write, to recall sequences of digits like phone numbers, to recall small everyday tasks and errands. He was unable to learn academically, repeatedly failing the first grade. During the developmental period, he also had significant limitations in social behaviors, though not as many limitations as in conceptual behaviors. He was naive and gullible to manipulation by others. He

was unable to figure out how to deal with difficult social situations such as the teasing and abuse by other children at school. During his developmental years, Mr. Ortiz also had significant limitations in practical skills. He was delayed in toileting. He could not learn and perform jobs that required the integration of various smaller skills, like building construction. He never lived alone. In sum, Mr. Ortiz had very significant limitations in adaptive behavior.

CONCLUSION

All objective data lead to the conclusion that Arboledo Ortiz is a person with mental retardation. The district court's decision is thus at odds with the fundamental principles guiding the assessment of a person for mental retardation. Broad acceptance of the district court's reasoning would deprive many individuals with intellectual disabilities of the protections and supports that they are entitled to under state and federal law. For this reason, *amici curiae* AAIDD and The Arc of the United States urge this Court to reverse the judgment of the district court.

March 29, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), counsel for Amici Curiae American Association on Intellectual and Developmental Disabilities and The Arc of the United States hereby certify that this brief complies with the word limit requirements contained in Federal Rules of Appellate Procedure 29(c)(4), 29(d) and 32(a)(7). The word count of this brief, including headnotes, footnotes and quotations, is 6,434 words. As required by Local Rule 28A(c), this document was prepared using the Wordperfect X3 word processing program, and the word count referenced above was obtained from the word count feature utilized by that program.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28A(d)

Pursuant to Local Rule 28A(d), counsel for Amici Curiae American Association on Intellectual and Developmental Disabilities and The Arc of the United States hereby certify that they have furnished to the Court and counsel for both parties a CD-ROM disk containing an electronic copy of this brief in PDF format. No other documents or files are contained on this disk. As required by the Local Rule, the version of this document contained on the disk was created by printing to PDF from the original word-processing file. Counsel have scanned the PDF file copied to these disks and it is virus-free.

March 29, 2010

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No. 08-1749
D.C. Case Nos. 04-8001-CV-W-GAF

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARBOLEDA A. ORTIZ,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

CERTIFICATE OF SERVICE

I am over the age of eighteen years and am not a party to the within-entitled action. My business address is: Office of the Federal Defender, 801 I Street, Third Floor, Sacramento, CA 95814.

On March 29, 2010, I served **BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AND THE ARC OF THE UNITED STATES IN SUPPORT OF PETITIONER** by placing two copies and a CD-ROM disk in a postage-paid envelope addressed to each person(s) hereinafter listed and by depositing said envelope in the United States Mail.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29 day of March, 2010, at Sacramento, California.

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