NO. 89590-2

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION
OF
CECIL EMILE DAVIS

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND DISABILITY RIGHTS WASHINGTON IN SUPPORT OF RECONSIDERATION

Nancy L. Talner, WSBA #11196
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Stacy W. Marchesano, WSBA #41119
Garvey Schubert Barer
1191 Second Avenue, Suite 1800
Seattle, WA 98101
(206) 464-3939
ACLU-WA Cooperating Attorney

David Carlson, WSBA #35767
Disability Rights Washington
315 5th Avenue South, Suite 850
Seattle, WA 98104
(206) 324-1521

Attorneys for Amici Curiae

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I. Identity and Interest of Amici Curiae

Please see the Amici Curiae Motion filed with this brief.

II. Issues Addressed by Amici

Amici file this brief pursuant to RAP 12.4(i) to address the soundness of certain legal principles announced in the Court's Opinion dismissing Mr. Davis' Personal Restraint Petition. The brief addresses the ways in which *Hall v. Florida*, 134 S. Ct. 1986, 2001, 188 L.Ed.2d 1007 (2014), and *Moore v. Texas*, 137 S. Ct. 1039, 197 L.Ed.2d 416 (decided March 28, 2017, yet not cited in this Court's ruling in *In re Davis*, 188 Wn.2d 356, 395 P.3d 998 (May 18, 2017)), render Washington's death penalty scheme unconstitutional generally, and the unconstitutionality of imposing the death penalty against Mr. Davis, who is a person with intellectual disability (ID), as evidenced by the existing record and further bolstered by the additional evidence submitted by Mr. Davis' substitute counsel in support of the Motion for Reconsideration.

III. Argument

A. Death is Different and the Constitutional Problems with the Death Penalty Manifested Here Warrant Reconsideration

This Court's reconsideration of Mr. Davis' PRP—including the need to clarify how Washington courts must deal with death-eligible defendants with ID and whether RCW 10.95.030(2) is constitutional post-*Hall* and post-*Moore*—is critically important. In *Hall*, the U.S. Supreme

Court expressly called out Washington's statute as potentially problematic based on the same infirmities that existed in Florida's statute, and in *Moore* the Court again expressed concern with the kind of methods used here to determine whether the ID exception applies in a death penalty case. The *Davis* case fits squarely within the concerns raised by the *Hall* and *Moore* rulings and presents the first and best opportunity for this Court to correct any deficiencies in how Washington's statute is applied to persons like Mr. Davis, who has concurrent deficiencies in intellectual and adaptive functioning, but whose IQ scores appeared to the trial court to straddle 70.

It is in the gray area of ID—including individuals with mild ID whose test scores may be flawed, when assessed out of the bounds of clinical expertise and without reliance on the clinical and medical community standards of assessment—where Washington courts must ensure society's most vulnerable individuals are appropriately protected against cruel and unusual punishment. Ensuring compliance with this constitutional protection is particularly important in this death penalty case. This Court has long acknowledged that death is different (as the concurrence here recognized, "this is not an ordinary case."). *Davis*, 188 Wn.2d at 382 (Gordon McCloud, J., concurring). The record contains evidence that Mr. Davis was a person with ID at the time of the crime and his ID manifested during his childhood. Yet, despite the evidence of ID,

he is subject to the ultimate penalty—death. See Motion for Reconsideration, pp. 10-11 (*citing* App. 3-7). This is unconstitutional punishment under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), *Hall*, and *Moore*. This Court should grant reconsideration and permit Mr. Davis the opportunity to fully develop and present the evidence in support of his disability.

B. Washington's Death Penalty Statute is Unconstitutional Under *Hall* and *Moore*

When a death sentence is contemplated for an individual with indicators of ID, a bright-line IQ score threshold is impermissible because one point can mean the difference between life and death. The U.S. Supreme Court has concluded that such sentencing schemes are inconsistent with modern scientific standards and do not afford the constitutional protections required by the Eighth Amendment. ID is not about a number; it is a condition. *Hall*, 134 S. Ct. at 2001 (*citing* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013), at 37).

All of the U.S. Supreme Court's recent cases on point support the unconstitutionality of Washington's death penalty statute and its treatment of ID. In *Atkins*, the U.S. Supreme Court unequivocally foreclosed the execution of persons with ID who have impaired ability to reason or control impulses to such an extent that the deterrent and retributive effects

of the death penalty are nonexistent. In doing so, the Court recognized that the Eighth Amendment accounts for evolving standards of decency. *Atkins*, 122 S. Ct. at 2252. *Atkins* left it up to the states to determine how to define ID. *Id.* at 2250.

In *Hall*, the U.S. Supreme Court provided guidance on the bases for how states must define ID to comply with *Atkins* and concluded that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of ID, including testimony regarding adaptive deficits." *Hall*, 134 S. Ct. at 2001. In reaching its conclusion, the U.S. Supreme Court explicitly rejected the use of a strict bright-line IQ test as a threshold in determining ID and admonished that a strict IQ cutoff is not regarded by society as "proper or humane." *Id.* at 1998. In determining "who qualifies as intellectually disabled, it is proper to consult the medical community's opinions," placing "substantial reliance on the expertise of the medical profession." *Hall*, 134 S. Ct. at 1993, 2000. *Hall* flatly prohibits reducing the constitutional protections required by *Atkins* to a rigid formulaic rule.

Washington was one of a handful of states whose statute for establishing ID was called into question by the *Hall* decision because Washington's statute mirrors the bright-line IQ score deficiencies found in Florida's statute. *Id*. at 1996. The Court observed that Florida's approach disregarded the "unanimous professional consensus" in the medical field

that IQ scores should be read not as a single fixed number but as a range quantified by the standard error of measurement. *Id.* at 2000. *Hall* acknowledges that states are laboratories for experimentation, but cautioned that those experiments may not deny the basic dignity the Constitution protects. *Id.* at 2001.

Shortly after the *Hall* decision, and less than two months *before* this Court denied Mr. Davis' PRP, the U.S. Supreme Court confirmed in *Moore* that the benchmark for determining ID must be based not on the standards enacted by state legislatures, but instead must be in accordance with the standards adopted by medical professional organizations. *Moore*, *supra*. The landscape of death penalty jurisprudence for individuals with ID has shifted significantly since Mr. Davis filed his PRP.

In *Moore*, the U.S. Supreme Court affirmed its decision in *Hall*, overturning as unconstitutional the lower court's rejection of an ID defense in a death penalty case on the basis that the lower court had erroneously relied upon standards no longer employed by the medical community. The Court recognized that determination of ID "must be 'informed by the medical community's diagnostic framework'" and confirmed that the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD User's Guide—should be the basis for the diagnostic framework for assessing ID. *Moore*, 137 S. Ct. at 1048. The Court explained that states do not have unfettered discretion

in implementing *Atkins*' holding, and emphasized that *Hall* and current medical standards greatly constrain states' leeway in this area. *Id*. at 1052-53. In short, state courts do not have "leave to diminish the force of the medical community's consensus." *Id.* at 1044 (internal citation omitted).

The forms of impairment associated with ID at issue in *Atkins*, *Hall*, and *Moore* provide compelling grounds for reconsideration in Mr. Davis' case. There are a multitude of ways in which a defendant with ID may be unable to advocate for their own well-being, even with the help of counsel.[1] These deficits pose substantial barriers to justice. The integrity of the criminal justice system is compromised when determinations of ID, particularly in a death penalty case, are influenced by outdated or unfounded scientific standards. *Moore, supra*.

Mr. Davis' intellectual disabilities present a complex clinical determination arising from several co-occurring disabilities that reduce his ability to exercise reason and impulse control. His IQ scores straddle the 70 threshold, but are plainly below that threshold when the standard error of measurement and the Flynn effect are taken into account.[2] The trial court did not properly consider the evidence of Mr. Davis' ID under the standards required by *Hall* and *Moore*. Now there is additional evidence of

[1] Defendants may mask their disability, find it difficult to recall information to aid counsel, have difficulty answering open-ended questions, act as if they understand an attorney when in fact they may not, adapt to answers in favor of what they believe the attorneys or opposing counsel want them to say, provide irrelevant answers regarding the facts of the crime, or fail to properly monitor defense counsel's performance for their own defense. *See* Br. of American Bar Association as Am. Cur. Supp. Pet., *Hall*, 134 S. Ct. 1986.
[2] *See* Motion for Reconsideration for further explanation.

Mr. Davis' ID, which this Court should take into consideration before it sanctions the ultimate punishment.

C. Significant Procedural Flaws Warrant Reconsideration

Procedural deficiencies also warrant a fresh look at Mr. Davis' PRP. *See Davis*, 188 Wn.2d at 387-88 (Gordon McCloud, J., concurring) (presentation of the "ineffective assistance of counsel claims in this death penalty PRP might be wanting" and the *Hall* claim "raises a similar red flag"). Justice Gordon McCloud noted that "Davis would be entitled to a new hearing on intellectual disability if he could show a possibility of prevailing under *Hall's* standard." *Id.* (*citing Brumfield v. Cain*, 135 S. Ct. 2269, 2281-82, 192 L.Ed.2d 356 (2015)). The standard in *Moore* must also be considered. The Court should not approve putting Mr. Davis to death while these procedural questions remain.

Mr. Davis' substitute counsel, who are experienced PRP and death penalty lawyers, have submitted evidence in support of the Motion for Reconsideration that shows why Mr. Davis would prevail under the proper, post-*Hall* and *Moore* standards. The evidence, and its applicability to this Court's consideration of whether Mr. Davis is a person with an ID under these standards, support this Court's reconsideration for the reasons fully briefed in the Motion for Reconsideration.

After *Atkins*, there is consensus that a person with an ID may not be executed under our society's standards of decency. This Court should

grant reconsideration and fully review the available evidence to determine if Mr. Davis is ineligible for the death penalty. The risk of disregarding the evidence that Mr. Davis is a person with ID and getting it wrong is too great.

D. The Death Penalty is Unconstitutionally Arbitrary, Infected with Racial Bias, and Irreconcilable with Evolving Standards of Decency

This Court is currently grappling with the fundamental inequities of the gravest sentence in Washington in *State v. Gregory*, Washington Supreme Court Case No. 88086-7. The issues in *Gregory* will necessarily impact Mr. Davis, particularly given that Mr. Davis, like Mr. Gregory, is a black man accused of committing a capital crime in Pierce County, one of the rich Washington counties that is both known for zealously seeking the death penalty and having the financial means to carry it out.[3] A death sentence predicated on the geography and race of the defendant rather than the gravity of the crime and the circumstances of the accused's life is not constitutionally sound.

Washington proscribes cruel punishment, which includes not only "certain modes of punishment" but also "disproportionate sentencing." *State v. Manussier*, 129 Wn.2d 652, 676, 921 P.2d 473 (1996).

[3] Pierce County prosecutors have sought the death penalty in forty-five percent of aggravated murder cases in Washington State. Katherine Beckett & Heather Evans, The Role of Race in Washington State Capital Sentencing, 1981- 2014, at 20, available at https://lsj.washington.edu/sites/lsj/files/research/capital_punishment_beckettevans_10-1.6.14.pdf.

Disproportionate sentencing prohibits both "random arbitrariness and the imposition of the death sentence based on race." *State v. Gentry*, 125 Wn.2d 570, 633, 888 P.2d 1105 (1995).

As amici curiae pointed out in *Gregory*, there are many reasons why the death penalty is arbitrary and should be abolished, including that "[b]lack defendants in the State of Washington are four and a half times more likely than white defendants to receive a sentence of death." Am. Br. of ACLU, et al., *Gregory*, p. 1. Further, in Washington, "one can escape the death penalty by committing one's crime in a poor county instead of a rich one." *Id.* at 2. Moreover, the infrequent application of the death penalty has ceased to amount to a credible deterrent or measurably contribute to any other end of punishment in the criminal justice system. *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 311, 92 S. Ct. 2726, 2763, 33 L. Ed. 2d 346 (1972)) (White, J., concurring).

> As was the case at the time of *Furman*, impermissible factors far divorced from the nature of the crime(s) and the circumstances of the accused's life continue to serve as the sole predictors of who lives and who dies. Geography, race, economics, and other irrelevant or impermissible factors drive capital sentencing in Washington…[T]he result is a failed system, a broken system—one that is neither reliable in its imposition nor meaningful in the penological results it achieves.

Am. Br. of ACLU, et al., *Gregory*, pp. 4-5.

Even if the evidence did not support that Mr. Davis is a person with ID, imposing the death penalty on *any* person no longer comports

with societal standards. The U.S. Supreme Court in *Atkins* recognized that policies of national disability organizations, international law, public opinion, and state statutes serve as persuasive evidence that evolving standards of civilized society have shifted public sentiment away from supporting the gravest sentence our society may impose. *Atkins*, 536 U.S. at 314-15; *Hall*, 134 S. Ct. at 2001. Statewide,[4] national[5] and international[6] policy have followed suit. The death penalty is no longer considered a permissible practice in effectuating criminal justice, particularly as applied to individuals with ID. It is indefensible to permit a capital sentencing scheme that unfailingly results in arbitrary sentences devoid of any legitimate penological purpose.

IV. Conclusion

For the reasons stated in the Motion for Reconsideration and herein, reconsideration should be granted.

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[4] Washington Governor Inslee announced in 2014 that he will not sign death warrants in capital cases during his term in office due to concerns about inequalities and injustices in the system. *See* Gov. J. Inslee Announces Capital Punishment Moratorium, *available at* http://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium (last visited Sept. 5, 2017).

[5] The dramatically decreased use of the death penalty in recent decades across all states, "the result of a long, consistent national march away from capital punishment," is meticulously set forth in the Amicus Brief filed by ACLU, et al., in *Gregory*, *supra*, pp. 31-34.

[6] Only three countries have a record of executing individuals with intellectual disabilities, including Japan, Kyrgyzstan, and the United States. *International Human Rights Law*, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, p. 18 (March 2001) *available at* https://www.hrw.org/sites/default/files/reports/ustat0301.pdf (last visited Sept. 5, 2017). The U.N. Commission on Human Rights adopted resolutions in 2000 to urge member states to abandon the death penalty for a person suffering from any form of mental disorder. *Id.*

Respectfully submitted on September 8, 2017.

By: s/ Stacy Marchesano

Stacy W. Marchesano, WSBA #41119
GARVEY SCHUBERT BARER
ACLU-WA Cooperating Attorney

Nancy L. Talner, WSBA #11196
ACLU OF WASHINGTON
FOUNDATION

David Carlson, WSBA #35767
DISABILITY RIGHTS WASHINGTON

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 8, 2017, I electronically filed the foregoing document using the Washington State Appellate Courts' E-Filing Portal, which will serve the document on Deputy Prosecuting Attorney Kathleen Proctor and all other registered parties of record. I further certify I have mailed the document to Cecil Emile Davis, DOC #920371, at the Washington State Penitentiary, IMU N-D-5, 1313 N. 13th Ave., Walla Walla, WA 99362.

s/ *Vickie L. Owen*
Vickie L. Owen
Legal Assistant
Garvey Schubert Barer

GARVEY SCHUBERT BARER

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- smarchesano@gsblaw.com
- suzie_strait@fd.org

Comments:

Sender Name: Vickie Owen - Email: vowen@gsblaw.com
Filing on Behalf of: Stacy Wilson Marchesano - Email: smarchesano@gsblaw.com (Alternate Email:)

Address:
1191 Second Avenue, Suite 1800
Seattle, WA, 98101
Phone: (206) 464-3939

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