

***Alfredo R. Prieto requests that the Governor grant a temporary reprieve of his execution scheduled for October 1, 2015. Mr. Prieto should be allowed to pursue his claims that he is a person with intellectual disability and, therefore, ineligible for execution. He has never received a full and fair determination on this issue, despite the fact that significant evidence supports his claim.***

For the reasons stated below, Mr. Prieto has requested that he be transferred to California pursuant to the 2006 Executive Agreement between the Commonwealth of Virginia and the State of California, in order for him to appear in legal matters pending in California and to pursue appellate issues under consideration there. A reprieve and transfer would allow the California courts to determine whether a hearing on Mr. Prieto's intellectual disability will be conducted.

The Commonwealth improperly restricted the determination of Mr. Prieto's intellectual disability, contrary to the express direction of the law. This improper restriction was imposed at significant expense to Mr. Prieto, denying him fair consideration of evidence that society's final and most severe sanction could not be imposed on him.

In 2008, jurors at Mr. Prieto's capital trial determined that he was not a person with intellectual disability.<sup>1</sup> However, the definition of intellectual disability imposed by Virginia law in 2008, and followed by jurors at Mr. Prieto's trial, prohibited a finding of intellectual disability if the defendant had a full-scale intelligence quotient (IQ) score above 70. The prosecutor's expert scored Mr. Prieto's IQ at 73, prohibiting a finding of intellectual disability under Virginia law.

This practice of applying a "bright line" IQ test score to prohibit a finding that a person has intellectual disability—used only in Virginia and Florida—was found to be unconstitutional by the Supreme Court of the United States in 2014 in *Hall v. Florida*. According to *Hall*, "persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."

Even though Virginia law imposed an erroneous and unconstitutional definition of intellectual disability in the 2008 determination, Mr. Prieto cannot now have an evaluation made in Virginia under a constitutional definition of intellectual disability. The Supreme Court of Virginia and the federal courts in Virginia have refused to provide Mr. Prieto an assessment that meets constitutional standards, finding that procedural rules have left them without jurisdiction or authority to provide or address such an evaluation.

An assessment of Mr. Prieto's intellectual disability, however, can be made—and has been sought—in Mr. Prieto's pending habeas case in California. The request has been fully briefed and is ripe for decision by the California courts. A determination that Mr. Prieto is a person with intellectual disability made in a California proceeding would supply the determination Virginia courts are powerless to make; it also would constitutionally prohibit execution.

Clear precedent exists for the Governor to grant Mr. Prieto's requested reprieve.

In 2005, Governor Mark Warner commuted the death sentence of Robin Lovitt to life without possibility of parole. The Governor did not doubt Lovitt's guilt at the time. He was concerned, however, that the clerk of the court where Lovitt's trial occurred had thrown out all of the evidence from the trial.

---

<sup>1</sup> The Supreme Court of Virginia vacated this jury's judgment because they were provided unconstitutional sentencing verdict forms.

<sup>2</sup> Weinstein represented that the EWIPA III was a Spanish translation of the Wechsler Adult Intelligence Scale III (WAIS III), published in Mexico. He testified that he gave Prieto the EWIPA III because

Governor Warner proclaimed that his intervention was appropriate where, “the actions of an agent of the Commonwealth, in a manner contrary to the express direction of the law, comes at the expense of a defendant facing society’s most severe and final sanction.” The Governor found that action was required in order to adhere to a commitment that “[t]he Commonwealth must ensure that every time this ultimate sanction is carried out, it is done fairly.” A reprieve and transfer are even more justified in Mr. Prieto’s circumstances, where the Commonwealth imposed an unconstitutionally restrictive definition of intellectual disability in order to deny Mr. Prieto’s claim that he is intellectually disabled, and where the Commonwealth’s procedural rules disable courts in the Commonwealth from now providing a determination using a constitutional definition of intellectual disability.

In 2007, Governor Tim Kaine granted a temporary reprieve to Christopher Scott Emmett to give the Supreme Court of the United States the opportunity to determine whether or not it would grant certiorari review in the case. The Supreme Court had denied Emmett a stay of execution by a 5-4 vote; if the four justices who voted for a stay also voted in favor of granting certiorari review, their four votes would be enough to grant full merits review to Emmett’s case. In other words, four votes were enough to get Emmett review and potentially relief, but not enough to protect him from execution. The Governor’s temporary reprieve allowed the justices adequate time to come to a decision about Emmett’s request for merits review.

Justice Stevens and Ginsburg issued a statement about the circumstances presented in Emmett’s execution, observing that the compressed timeframe within which Virginia set Emmett’s execution date made it “impossible for us to consider the merits of the petition in the normal course.” They noted that, “the Governor of Virginia, recognizing that basic fairness demands that capital defendants be given the opportunity to complete the legal appeals process prior to execution, granted [Emmett] a reprieve to afford us the opportunity to give the petition the careful consideration that it clearly merited.” *Emmett v. Kelly*, 552 U.S. 942 (2007).

Governor Kaine twice granted temporary reprieves to Percy Levar Walton, so that officials could try to assess whether Walton was so mentally ill that he was not competent to be executed. The Governor first granted a six-month reprieve, followed by an 18-month reprieve. Then-Attorney General McDonnell strongly opposed the reprieves. He claimed Walton’s mental health status was fully adjudicated by the courts and Walton was “not incompetent or mentally retarded.” In court proceedings, the Attorney General insisted that, although Walton had for years done little more than pace his cell mumbling to himself, and had no possessions other than packets of salt, pepper, and sugar, there was nothing wrong with him and he was just a young man who had realized his life was not turning out as he had hoped.

After the Governor’s reprieve, Walton was diagnosed and treated for severe schizophrenia. When two years of treatment failed to improve Walton’s mental health, the Governor commuted his sentence to life without possibility of parole.

As in these other instances, the Governor’s intervention in Mr. Prieto’s case is necessary and appropriate. Mr. Prieto’s execution should not be allowed to go forward until he has been allowed an opportunity for a determination of his intellectual disability that satisfies standards guaranteed by the Constitution.

### ***Significant Evidence That Alfredo Prieto Is A Person With Intellectual Disability***

Mr. Prieto has presented significant evidence that he meets Virginia’s definition of person with intellectual disability. To demonstrate that he is a person with intellectual disability (“ID”), a capital defendant in Virginia must show by a preponderance of evidence that: before age 18; he had significantly subaverage intellectual functioning as demonstrated by performance on a standardized

measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean; and he had significant limitations in adaptive behavior as expressed in conceptual, social, and practical skills. Code of Virginia, § 19.2-264.3:1.1.

Alfredo Prieto's history and background show that he exhibited signs of his intellectual disability early in his youth and throughout his difficult childhood in El Salvador. Alfredo Prieto, known as "Freddy," was an especially shy, timid, and slow boy. As a child, family members described that, "Freddy was still different from the rest. He wasn't complete. No matter how often I would explain things to him or show him how to do something, Freddy just couldn't understand." Alfredo was "different than his siblings and other kids his age." And, he "did not develop like the other children": "[f]or example, when Freddy was 13 years old, he used to play with toy cars my children had grown out of when they were little children." He often sat by himself, staring blankly at nothing. He could not understand the rules of simple children's games. When he was a teenager, he thought the make-believe monster stories his older brother told him were true, even though the other children knew they were fiction. He struggled to learn the alphabet, with his homework, and with reading and simple mathematics. Other evidence, including descriptions of Alfredo's exposure prenatally and as a child to toxic pesticides and evidence of organic brain damage, combine with descriptions of Alfredo's childhood behavior to demonstrate that his intellectual disability manifested long before he turned 18.

**A. Standardized Intelligence Testing Indicates Mr. Prieto Functions In The Range Of A Person With Intellectual Disability.**

At Mr. Prieto's 2008 trial, Dr. Ricardo Weinstein testified that Prieto's full scale IQ score was 66, but that his true score was much lower, taking into consideration the standard error of measurement and the Flynn Effect (a documented phenomenon noting a gradual increase in the general population's average IQ scores over time, increasing at a rate of approximately .33 points per year in the United States).<sup>2</sup> On a separate nonverbal IQ test given by Weinstein, Alfredo received a consistent score of 64.

The Commonwealth presented evidence that Mr. Prieto was not "mentally retarded" at the 2008 trial, including evidence that Prieto achieved a full-scale score of 73 on the WAIS III. Under Virginia law at the time, an IQ score over 70 prohibited a finding that a capital defendant was a person with intellectual disability, a bright-line cutoff. Prosecutors also argued that the test administered to Prieto by Dr. Weinstein was not an approved test (as required by Code § 19.2-264.3:1.1), that it was not scored in conformity with established practices, and that it is not acceptable professional practice to modify an individual's score by accommodating for the standard error of measurement or the Flynn Effect.

Jurors at the 2008 trial found that Prieto was not a person with intellectual disability. The Supreme Court of Virginia vacated the jurors' sentencing decision because the Commonwealth provided jurors with invalid sentencing verdict forms. The Court ordered a re-sentencing trial, which took place in 2010. The issue of whether Prieto was a person with intellectual disability was not presented to jurors at the 2010 resentencing.

In subsequent post-conviction proceedings in state court, Prieto claimed his execution was

---

<sup>2</sup> Weinstein represented that the EWIPA III was a Spanish translation of the Wechsler Adult Intelligence Scale III (WAIS III), published in Mexico. He testified that he gave Prieto the EWIPA III because Spanish was Prieto's primary language. Weinstein scored Prieto's test against American norms, rather than the Mexican norms established for the EWIPA III, because the Mexican norms were unreliable. *See* (Declaration of Stephen Greenspan, Ph.D.).

forbidden because he is a person with intellectual disability and requested an opportunity to prove this. In addition to the testing which measured Prieto's IQ, testing by Dr. Inés Monguió showed significantly low scores on measures of executive function; the DSM5, a diagnostic manual, indicates this can be even more diagnostically indicative of ID than a full-scale IQ score. (Declaration of Stephen Greenspan, Ph.D.). However, the Supreme Court of Virginia ruled in 2013 that procedural restrictions prevented any Virginia court from considering this claim.

In 2014, the Supreme Court of the United States found that a rule foreclosing further investigation of a capital defendant's intellectual disability if his IQ score was more than 70 created an unacceptable risk that persons with intellectual disability would be executed, in violation of the Eighth Amendment. *Florida v. Hall*, 134 S. Ct. 1986 (2014). People with intellectual disability can achieve IQ scores as high as 75. The "bright line" IQ score rules were constitutionally offensive because they prevented further investigation and an accurate determination of ID, and "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." 134 S. Ct. at 1992. The Court noted that Florida and Virginia were the only two states that imposed such bright line rules for determining intellectual disability, and found the rules unconstitutional.

Dr. Stephen Greenspan, an expert whose work is the most cited authority in the two main diagnostic manuals regarding ID, found that Mr. Prieto's performance "overwhelmingly" supports the conclusion that the intellectual functioning prong for finding a person to have intellectual disability has been met. (Declaration of Stephen Greenspan, Ph.D.).

## **B. Mr. Prieto's Behavior Indicates That He Functions In The Range Of A Person With Intellectual Disability.**

Adaptive behavior is the collection of skills "that have been learned and are performed by people in their everyday lives." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* ("AAIDD 2010") 43 (11<sup>th</sup> Ed. 2010). A person with intellectual disability has "significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills."<sup>3</sup> Va. Code § 19.2-264.3:1.1. Although a finding of intellectual disability requires deficits in only one skills area, there is substantial evidence that Alfredo demonstrates deficits in all three domains.

### **i.) Deficits In Conceptual Skills**

---

<sup>3</sup> The Code of Virginia, § 19.2-264.3:1.1(B)(2), provides that:

Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

Code of Virginia, § 19.2-264.3:1.1(B)(2).

Based on descriptions of Alfredo’s behavior and functioning during his youth, Alfredo consistently has exhibited limitations in conceptual skills, which are defined as skills related to language, reading and writing, and number concepts. *See AAIDD (2010)* at 44. When Alfredo was in the 4th grade, he still did not know the alphabet. He fell behind in his schoolwork, could barely make his grades, and was out-performed by children younger than him. At school, Alfredo got picked on for not being as smart as the other students, and not learning things as quickly as other students. His cousin used to tease Alfredo by saying that he should bring gifts to the teachers so they would pass him.

Family members describe Alfredo’s struggles with mathematics, reading, and writing. He tried to read the newspaper but he “was very slow” and “it was very difficult for him to pronounce the words;” it took “a lot of effort for him to write something.” He couldn’t learn how to multiply and divide numbers. Alfredo had trouble with his homework, even when someone tried to help him—“[i]t is not that Freddy didn’t try, he simply lacked intelligence for it.” He eventually became too frustrated with trying to learn and stopped doing his homework, and quit school altogether.

Prieto’s deficits in conceptual skills were also noted by his former teacher and indicated in his records.<sup>4</sup> Mitchell Hovey, Prieto’s teacher at Pomona High School, explained that Prieto struggled to understand and retain “basic language and math skills.”<sup>5</sup> At 16 years old, Alfredo was not able to do addition, subtraction, multiplication, or division; Alfredo’s older brother, who Hovey also taught, did not have the same struggles. Alfredo’s writing was not legible and his writing patterns were “scattered and unorganized.” He made slow progress, had trouble following directions—even when Hovey repeated them—and was just “unable to learn.” Alfredo was putting forth a good effort in school, so Hovey tried to encourage him by giving grades of “C” and “D,” rather than “F,” because Hovey did not want Alfredo to drop out of school. Although Alfredo would have qualified for Special Education because he was so far below his grade level, he was placed in the English as a Second Language (ESL) program and not in Special Education because he was not proficient in English and would not have been able to get language support in the Special Education classes.

The fact that Prieto’s abilities fell far below grade level are borne out by the assessment done at the California Youth Authority (CYA) in 1985, when Prieto was nineteen years old. It measured his overall abilities (in his native language) at a fourth-grade level.

## ii.) *Deficits In Social Skills*

Social skills include matters relating to interpersonal relations, responsibility, self-esteem, gullibility, naïveté, ability to conform to rules and laws, avoiding victimization, and social problem solving. *AAIDD (2010)* at 44. Alfredo has demonstrated significant limitations in these skills.

As a child, Alfredo had difficulty interacting with his peers, and was quiet and withdrawn. According to a childhood playmate, the other children,

had to work to get Freddy to play the games . . . . When he was having a difficult understanding [sic], we would try to help him, such as finding a better hiding spot. Often

---

<sup>4</sup>Alfredo’s passing grades in El Salvador do not mean he had conceptual skills. As his aunt, an elementary school teacher in El Salvador described, at the time Alfredo was in school, social promotion was not unusual, and students were graded in groups. In addition, students who did not talk in class or cause problems (and were quiet like Alfredo) would have been rewarded with good grades.

times, Freddy would become sad and run away. We would find him by himself, playing with marbles. . . . He would stand there looking at us run towards our next playing spot and would then withdraw in frustration watching us play from a far. I can picture him under a tree and sitting on a rock all by himself with a blank stare in his eyes.

Alfredo kept to himself, and was often alone while the other children played. Although Alfredo was lonely and wanted friends, he only had his brothers and sisters.

Alfredo could not understand the rules of the games the other children played. Before every game, someone had to explain the rules to Alfredo. He could not play hide-and-seek—he “was always the first one to be found even though we helped him by giving him ideas as to where to hide. He would hide behind places where he could still be seen, usually nearby where the person was counting.” Then, he could not find anyone when it was his turn to seek. He was confused by soccer—he forgot whose team he was on and kicked the ball to the wrong person, ran to the opposite end of the field, or forgot to pass the ball. Family members recalled that, even once he became a teenager, Alfredo played with toy cars “like a little kid.”

Alfredo also had difficulty communicating. For example, a relative described that Alfredo, often stutter[ed] and lost track of what he was trying to say so he would give up frustrated and would stop talking. . . . he would sometimes point or nod his head instead of talking while scratching his head and making funny faces as if confused. The words he used were either wrong or he would mispronounce them. . . . I hate to say it but we would always laugh at him.

When Alfredo got older, his speaking improved but he still stuttered a lot and cut off the end of words. He did not initiate conversations, and “would just stare or smile.”

Unlike the other children, Alfredo could not distinguish between fictional stories and reality. He believed everything he was told—even silly, unbelievable stories. For example, his older brother told ghost stories about scary spirits who came out of the river. Most of the kids realized at a young age that the stories were make-believe, but Alfredo thought the stories were real into his teenage years. In fact, Alfredo was so afraid of these fictional characters that he did not want to go to the outhouse by himself.

Alfredo just followed others’ directions, and was “easily influenced;” he never decided what to do on a particular day. He followed his siblings and did what they told him to do. If there were problems with other children, Alfredo was incapable of defending himself and had to turn to his siblings for help.

Alfredo also had trouble making friends, and interacting with girls. He was “very unsophisticated and also very lonely.” Even after Alfredo was married at seventeen, he still behaved like a kid rather than a married adult.

### **iii.) *Deficits In Practical Skills***

Alfredo also had deficits across the practical skills domain, which includes activities of daily living, occupational skills, and skills required to maintain safe environments. *See AAIDD (2010)* at 44.

Alfredo was incapable of performing the activities necessary to care for himself. For example, he could not prepare food, and went hungry unless someone else made him food. As a child and adolescent, Alfredo did not have appropriate hygiene. He did not wear shoes or a shirt, brush his teeth, comb his hair, or bathe regularly.

Alfredo had trouble with even “basic practical skills.” Unlike his siblings, Alfredo could not go to the store by himself without making errors. For example, when he was between 10 and 12 years old,

Alfredo could not bring back everything he was supposed to, even if given a written list with the item, quantity, and price, and he could not return with the correct change.

Unlike his siblings, Alfredo could not learn to use the tools that were necessary to helping with daily chores. The other children could learn how to use the tools by watching others; people gave Alfredo special lessons but he still could not learn to use them. He could not distinguish between regularly-used tools like a hammer and screwdriver. He could not learn to tie a knot. Alfredo's uncle described trying to teach Alfredo to use a shovel by demonstrating, but, "[n]o matter how many times I showed him, Freddy would always put the bottom hand on top of the shovel rather than hold it underneath."

As a young teenager, Alfredo could not help with the family business selling firewood like his siblings and cousins. Even though prices were marked on the firewood bundles, Alfredo's uncle described that Alfredo, "didn't know how much money customers gave him. Sometimes they would take advantage of Freddy and take another bundle." Although Alfredo's brother had learned to drive by the age of 14, Alfredo could only put the car into first gear and go about a half a block; he'd say "Look at me, I'm driving, I'm driving." Alfredo's older brother observed that Alfredo, "couldn't seem to learn how" to do these activities—"it seemed as though the words never went into his brain." Even when he was taught, Alfredo's aunt noted he could not learn how to "become independent" in the same way the other children did.

**iv.) *Standardized Measure Of Adaptive Functioning***

Prior to Alfredo's 2008 trial, Dr. Weinstein administered a standardized adaptive behavior evaluation (the Adaptive Behavior Assessment Scales-Second Edition [ABAS-II]) to Alfredo's maternal aunt. She was an elementary school teacher in El Salvador who spent time with Alfredo and his siblings during Alfredo's childhood. Dr. Weinstein found Alfredo's scores to be consistently in the "Extremely Low" range, and at least two standard deviations below the mean. Alfredo's composite score was in the 0.2% rank. Dr. Weinstein used the test as confirmation of his assessments of Alfredo, which had included interviews of family and friends who observed Alfredo in a community setting before he turned 18.<sup>6</sup> Dr. Stephen Greenspan reviewed Dr. Weinstein's evaluation, noting that the AAIDD and DSM5 standards require a standard score at or below approximately 70 on one of four scales; "Mr. Prieto far exceeded that standard, receiving scores of 70 or below on all four sub-scales, most significantly on the Composite (overall) index," on which he received a score of 57.

**v.) *Evidence Offered By The Prosecution Regarding Adaptive Behavior Does Not Preclude A Finding Of Intellectual Disability.***

At Alfredo's 2008 trial, prosecutors relied upon a 2007 report of Dr. Leigh Hagan, which included an extensive—though repetitive—catalog of specific "findings" Dr. Hagan listed to opine that Alfredo's adaptive functioning "does not reach the requisite threshold for MR." Because Alfredo has not received a hearing or determination of his intellectual disability since the 2008 trial, Hagan's findings were relied upon in subsequent proceedings, including by the United States Court of Appeals for the Fourth Circuit. That Court found that "evidence of Prieto's adaptive functioning deficits is at best inconclusive." *Prieto v. Zook*, 791 F.3d 465, 472 (4th Cir. 2015).

---

<sup>6</sup> Although the Virginia statute implies a formal measure of adaptive behavior should be used, Dr. Hagan did not use such a measure.

The prosecution used Hagan’s report to argue that Alfredo’s strengths—like speaking English and Spanish, having driver’s licenses or intimate relationships, working menial jobs, or filing prison grievances—precluded a finding that Alfredo has adaptive functioning deficits. However, medical professionals and the Supreme Court now have recognized that it is improper to point to specific strengths while ignoring deficits in evaluating adaptive functioning limitations, because it is a fundamental precept in assessing intellectual disability to acknowledge that strengths can exist with weaknesses, and it is the weaknesses that are important in evaluating deficits in functioning. *See AAIDD (2010)* at 47; *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015).

Dr. James Patton, an expert with more than 40 years of experience in the field of intellectual disability and developer of standardized assessment measurements, explains that a person “can still qualify as having deficits in adaptive behavior and meet ‘the adaptive functioning criterion],” even when he possesses relative strengths. He describes that, “[t]he defining quality for meeting the second prong of the definition of intellectual disabilities is NOT the absence of adaptive strengths but the PRESENCE of significant adaptive deficits.” (Declaration of James A. Patton).

Professor James W. Ellis, a law professor at the University of New Mexico and the former president of the AAIDD who argued the *Atkins* case in the Supreme Court, has explained that:

[a]ny valid diagnostic evaluation must document those things an individual cannot do in everyday life—clinical standards do not permit any so-called “balancing” of deficits against an individual’s abilities or strengths. Balancing deficits and strengths is unworkable because clinicians universally recognize that weaknesses in functioning almost always co-exist with relative strengths.

According to Dr. Greenspan, Hagan’s report fails to acknowledge that:

the majority of people with ID, such as the 80% or more that live in the community, are not globally impaired but can do many things. What causes them to be viewed correctly as having ID is that there are some critical things—reflecting their absence of judgment and general intelligence—that they *cannot* do, and the risks and vulnerabilities that these deficiencies create that require special supports or protections.

There are a number of additional reasons Hagan’s findings cannot be relied upon to conclude that Alfredo cannot qualify as a person with intellectual disability. Many of the examples used were based on direct reports of Alfredo, with no apparent corroboration. As Dr. Edward Polloway, an expert in the field of special education/disabilities and editor of the AAIDD’s *The Death Penalty and Intellectual Disability*, explains, relying upon an individual’s self-report is problematic because individuals with intellectual disability are commonly poor reporters due to “masking,” or attempting to look more capable than they are, and because individuals with intellectual disability have a strong bias towards acquiescence. (Affidavit of Edward A. Polloway); (Affidavit of James R. Patton).

In addition, many of the strengths noted by Hagan refer to Alfredo’s functioning in a prison setting. Adaptive behaviors of many individuals with intellectual disability look better in prison, because the environment is highly structured, and individuals with intellectual disability are able to learn how to work in the system, particularly when in the same structured environment for a significant period of time. *See* (Affidavit of James R. Patton); (Declaration of Stephen Greenspan, Ph.D.); (Affidavit of Edward A. Polloway). By 2007, Alfredo had been incarcerated for almost 20 years. Investigation of support systems is important because supports can also help individuals with intellectual disability succeed in attempts to navigate the system. *See* (Affidavit of James R. Patton); (Affidavit of Edward A. Polloway); (Declaration of Stephen Greenspan, Ph.D.); *cf.* (Affidavit of Susan Herrero) (while in prison in California, Alfredo “had received significant assistance drafting complaints, grievances, letters, pleadings”); (Declaration of Craig Harbaugh); (Declaration of Statia Peakheart). For example, the



investigator and lawyers working on Alfredo's case provided assistance in drafting the complaints, grievances, and other materials Alfredo submitted to the prison and the courts about prison conditions.

Dr. Greenspan explains, “[o]ne way of describing an adult with ID is as someone who does not progress beyond a mental age of 11 or 12.” James Ellis describes that, “[p]rofessional standards do not permit diagnosticians to ignore the requirements of the clinical definition of intellectual disability and substitute stereotypes in their place.”<sup>7</sup> Many of the strengths cited by Hagan in support of his finding that Alfredo did not meet the threshold for intellectual disability are actually *not* inconsistent with behavior of individuals in society with mild intellectual disability.

For example, Hagan noted that Alfredo had opened a bank account. A national study cited by expert Dr. Polloway found that approximately 40.5% of youth with intellectual disability who were out of high school had a savings account, and 26.3% reported having a checking account. (Affidavit of Edward A. Polloway). Hagan also noted that Alfredo had obtained a driver's license; the same national report found that 34.8% of out-of-high-school youth with intellectual disability had a driver's license or permit, (Affidavit of Edward A. Polloway). *See also* (Affidavit of James A. Patton). Hagan relied on Prieto's using the library cart and reading, but Dr. Greenspan clarifies, a “majority of people at the upper range of the ID spectrum . . . can and do learn to read.” (Declaration of Stephen Greenspan, Ph.D.). They also are able to do things like use a dictionary, a skill typically taught to students before seventh grade. As the Arc of Virginia notes in a letter to the Governor in support of Prieto's request for a reprieve, “[m]any examples of behaviors alleged to exceed ‘the threshold contemplated’ for people with ID to achieve reflect the exceptional ignorance and bias we have tried to overcome since the days when people with ID was referred to as ‘imbeciles,’ ‘morons,’ or ‘retards.’”

In addition, Hagan relied heavily on the fact that Alfredo could communicate in both English and Spanish. Experts in intellectual disability and bilingualism note that Hagan's report and assumptions about bilingualism and intellectual ability “appear to reflect commonly held misconceptions and unsubstantiated assumptions that a person with an intellectual disability is not capable of becoming bilingual.” In fact, a high percentage of successful *Atkins* petitions involve individuals whose first language is not English but who learned English skills. Research shows that individuals with ID learn multiple languages. For example, case studies include a young woman with an IQ of 71 who acquired Italian, English, and French, and a young man with an IQ of 67 able to translate in English from 13 languages. According to experts in the field, many of the examples of Alfredo's performance used by Hagan are within the expected range of language use by an individual with a mild intellectual disability. (Affidavit of Shernaz B. García and Audrey A. Trainor). It is notable that, as Alfredo's high school ESL teacher, Dr. Hovey, described, Alfredo did not acquire English skills quickly, or as easily as others such as his older brother did. People with ID can acquire skills, like a second language, but Dr. Greenspan notes “it typically takes them much longer to do so.”

Finally, it is important to note that Hagan's report focuses almost exclusively on Alfredo's current functioning, and his behavior after incarceration. Intellectual disability is developmental, and must be manifested prior to the age of 18 years old. (Affidavit of Edward A. Polloway); *see also* Va. Code §19.2-264.3:1.1. It is not appropriate to base an assessment of adaptive deficits predominantly on adaptive functioning after the age of 18. (Affidavit of James R. Patton). *See AAIDD (2010)* at 7 (“life

---

<sup>7</sup> This is related to the reason “clinical experts have explicitly rejected looking to the facts of a crime to determine whether they are consistent with a finding of intellectual disability.” *See AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 18, 20 (2012).

functioning of [a] person with ID generally will improve”).

Because Alfredo’s federal habeas counsel did not present evidence to the federal courts beyond the evidence presented at his 2008 sentencing, and he was denied the opportunity for a hearing and development of additional evidence, the Fourth Circuit based its opinion on Hagan’s conclusions in finding that the evidence of adaptive functioning “is at best inconclusive.” *Prieto v. Zook*, 791 F.3d 465, 472 (4th Cir. 2015). Because of this, the opinion included many of the same errors found in Hagan’s report. For example, the Court mentioned evidence that Prieto had written his own prison grievances and *pro se* legal challenge, *id.* at 471, although evidence, including statements from his lawyers, shows that Mr. Prieto received help and support from his attorneys in drafting these complaints. The Court also relied on Hagan’s conclusions that were inaccurate for the reasons discussed above.

**C. A Reprieve Is Needed For Mr. Prieto To Receive A Full And Fair Determination Of His Intellectual Disability.**

The Supreme Court has held that the Eighth Amendment forbids executing persons with intellectual disability because persons with intellectual disability do not act with the level of moral culpability that characterizes the most serious adult criminal conduct, due to their disabilities in reasoning, judgment and impulse control, among other considerations. However, Mr. Prieto has not been given the opportunity to receive a professionally appropriate and constitutionally sound assessment of his intellectual disability. All of Mr. Prieto’s standardized IQ scores are within the range expected of a person with intellectual disability and there is significant evidence of his deficits in adaptive functioning, and he should be given a fair opportunity to show that the Constitution prohibits his execution.

In ruling on Mr. Prieto’s federal habeas petition, the Fourth Circuit found:

[a]fter *Hall*, it is clear that the Supreme Court of Virginia’s prior interpretation of the first prong of the Virginia statute violates the Eighth Amendment. . . . But the fact that Virginia operated under an unconstitutional definition of “intellectual disability” at the time of Prieto’s sentencing does not resolve the *Atkins* inquiry if, as the state habeas court and the district court held, Prieto has procedurally defaulted that claim.

*Prieto v. Zook*, 791 F.3d at 468. Although the Court recognized that prior proceedings had been conducted using an unconstitutional standard, it also acknowledged that the Court was powerless to correct this injustice. The Court compounded the injustice, however, in denying Mr. Prieto the opportunity for further factual development and using the evidence presented at Mr. Prieto’s 2008 trial, developed prior to the decision in *Hall*.

Habeas petitions are under consideration in the Supreme Court of California and the federal district court in California, asking them to order an evidentiary hearing on the issue of Mr. Prieto’s ID, so that the court could make a full and fair determination of Mr. Prieto’s intellectual disability. Because Mr. Prieto can only receive a full and fair determination of his intellectual disability in California, the Governor should grant a temporary reprieve of the October 1, 2015, execution, and allow such a determination to proceed, in accordance with the Executive Agreement between the Commonwealth of Virginia and the State of California.

***In the circumstances described above, the Governor’s intervention to forestall the scheduled execution of Mr. Prieto on October 1, 2015, at 9:00 p.m., under the powers vested in him by the Constitution of the Commonwealth of Virginia, is necessary and appropriate to ensure that the ultimate sanction is carried out fairly.***