



September 23, 2015

The Honorable Terry McAuliffe  
Governor, Commonwealth of Virginia  
1111 East Broad Street  
Richmond, VA 23219

Dear Governor McAuliffe,

Mr. Alfredo Prieto is scheduled to be executed by the Commonwealth on October 1, 2015. We write respectfully to request that you delay Mr. Prieto's execution and agree to transfer Mr. Prieto back to California, where he has motions currently pending in a California court to determine whether he is a person with intellectual disability and is therefore ineligible for the death penalty.

In *Atkins v. Virginia* the U.S. Supreme Court ruled that executing anyone with an intellectual disability (then referred to as "mental retardation") violates the Eighth Amendment prohibition against cruel and unusual punishment.<sup>1</sup> Under the ruling, states that have the death penalty are under a constitutional mandate to craft legislation and other procedures to ensure that people with intellectually disabilities are not executed.<sup>2</sup> At the time of Mr. Prieto's trial, Virginia law required a capital defendant's IQ scores to be 70 or below in order to find intellectual disability.<sup>3</sup> Last year the U.S. Supreme Court found in *Hall v. Florida* that the use of a bright-line 70 IQ cutoff is unconstitutional.<sup>4</sup> Because Mr. Prieto was tried before *Hall* was decided, the Commonwealth sentenced Mr. Prieto to death under an unconstitutional definition that used a bright-line test to define intellectual disability.

An IQ score is an approximate value. As the U.S. Supreme Court said in *Hall*, "IQ test scores should be read not as a single fixed number but as a range," generally +5 points.<sup>5</sup> 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 intellectual disability, including testimony regarding adaptive deficits. Mr. Prieto submitted three IQ scores to the court, 64, 66, and 73.<sup>6</sup> Prosecutors claimed the two scores below 70 were invalid. The jury agreed and sentenced Mr. Prieto to death, relying on Mr. Prieto's third IQ score of 73 and the Commonwealth's hard 70 IQ cutoff. Mr. Prieto's high score of 73 is, however, within the margin of error noted by the U.S. Supreme Court.<sup>7</sup> Thus, Mr. Prieto should have had the opportunity to

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<sup>1</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>2</sup> *Atkins*, 536 U.S. at 321.

<sup>3</sup> *Winston v. Warden*, No. 052501, 2007 WL 678266, at \*15 (Va. Mar. 7, 2007) (Supreme Court of Virginia interpreted the existing statute to mean "the maximum score for a classification of mental retardation is an I.Q. score of 70.")

<sup>4</sup> *Hall v. Florida*, 134 S.Ct. 1986 (2014).

<sup>5</sup> *Hall*, 134 S.Ct. at 1995.

<sup>6</sup> IQ of 64 & 66 see Ricardo Weinstein, Expert Report; IQ of 73 see Leigh Hagan, Expert Report.

<sup>7</sup> *Hall*, 134 S.Ct. at 1995.

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present additional evidence of intellectual disability, including testimony regarding adaptive deficits. Because Virginia law prohibits a defendant from raising even a constitutional claim more than 21 days after the original trial, Mr. Prieto has no way, under Virginia law, to present evidence showing that he is a person with intellectual disability who cannot be executed constitutionally.

The ACLU of Virginia opposes the death penalty. But, while Virginians may differ on whether the death penalty is cruel and unusual punishment, we should all agree that if the death penalty exists then its application should be fair, accurate, and constitutional. In Mr. Prieto's case there are serious concerns about the process. We find particularly offensive the flaws in the standards and procedures that prevent individuals like Mr. Prieto from getting a judicial hearing on the basic constitutional question of whether he is a person with intellectual disability.

It is inexcusable for Virginia to deny Mr. Prieto the opportunity to challenge in our Virginia courts the fundamental constitutional issue in his case. Because Mr. Prieto was extradited to Virginia from California where he is facing other charges, it is possible, however, for him to get a full and fair determination of his intellectual disability in the California courts before which those charges are still pending. The extradition agreement that brought Mr. Prieto from California to Virginia anticipated and authorizes his return for legal proceedings in California.

As Governor, you have the power to ensure that the Commonwealth does not execute a person with intellectual disability. You may authorize a temporary delay in the date of execution in Virginia so that Mr. Prieto can be transferred back to California to get a fair hearing on the question of his intellectual disability. The decision to grant Mr. Prieto a temporary delay of execution to permit this important constitutional question to be resolved in a court of law is the Commonwealth's minimum duty under the U.S. Constitution. The alternative is to commute Mr. Prieto's death sentence to life without parole.

At its core, the decision you are asked to make in this case is not about where one stands on the issue of capital punishment. It is about whether the Commonwealth will ensure a fair, accurate, and constitutional capital punishment process for so long as the death penalty exists in the Commonwealth.

We urge you to grant Mr. Prieto a delay of execution and extradition to California for a determination of whether he is a person with intellectual disability or to commute his death sentence to life without parole. Justice demands no less.

Thank you for your time and attention.

Best regards,



Claire G. Gastañaga,  
Executive Director

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