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Support HB 1720 – Bring Virginia's death penalty in line with the Constitution

HB 1720 would amend Virginia's intellectual disability threshold vis-à-vis eligibility for the death penalty to account for the IQ test's standard error of measurement. In *Atkins v. Virginia*[1] the U.S. Supreme Court ruled that executing people with mental retardation violated the Eighth Amendment prohibition against cruel and unusual punishment. 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 mental retardation are not executed. Last year the U.S. Supreme Court found Florida's intellectual disability threshold to be unconstitutional. Virginia uses the same threshold.

This bill simply brings Virginia in line with the U.S. Supreme Court's decision in *Hall v. Florida*.[2] In *Hall*, the U.S. Supreme Court found that Florida's use of a hard 70 IQ cutoff was unconstitutional. While Virginia's statute does not preclude it from considering an IQ test's standard error of measurement, the Supreme Court of Virginia has interpreted the current statute to mean "the maximum score for a classification of mental retardation is an I.Q. score of 70."[3] Thus, Virginia uses the same hard 70 IQ cutoff that the Court found unconstitutional in *Hall*. This bill simply remedies this deficiency.

The flaw in Virginia's threshold is the result of the inherent error in IQ tests themselves. An IQ score is an approximate value. It does not reflect a final and infallible assessment of an individual's intellectual functioning. As the U.S. Supreme Court said in *Hall,* the standard error of measurement is "a statistical fact reflecting the test's inherent imprecision and acknowledging that an individual score is best understood as a range, e.g., five points on either side of the recorded score." 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. Thus, Virginia's use of a hard 70 IQ cutoff ignores this inherent error.

The American Bar Association recommended amending Virginia's IQ threshold. As the ABA recommended in its 2013 assessment of Virginia's capital punishment system, "[w]hether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than seventy-five should be imposed in this regard."[4] This bill simply reflects best practice.

HB 1720 simply reflects a respect for the U.S. Constitution.

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[1] Atkins v. Virginia, 536 U.S. 304 (2002).
[2] Hall v. Florida, 134 S.Ct. 1986 (2014).
[3] Winston v. Warden, No. 052501, 2007 WL 678266, at *15 (Va. Mar. 7, 2007).
[4] American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Virginia Death Penalty Assessment Report* (Aug. 2013) at 380, available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf.