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Are Intellectually Disabled Individuals Still at Risk of Capital Punishment After *Hall v. Florida*? The Need for a Totality-of-the-Evidence Test to Protect Human Rights in Determining Intellectual Disability

I. Introduction

Capital punishment of the intellectually disabled draws international attention as a human rights issue.[1] The U.N. Commission on Human Rights encouraged nations "neither to impose the death penalty on, nor execute, 'a person suffering from any form of mental disorder.'"[2] This Note focuses on capital punishment of the intellectually disabled in the United States in light of the U.S. Supreme Court's decision in *Hall v. Florida*.[3]

The Court has not set forth bright-line rules for defining and evaluating intellectual disability, leaving individual states to adopt their own procedures and "introducing variability into an already challenging area of law."[4] In *Hall*, the Court provided some guidance for states and more protection for intellectually disabled defendants in capital cases by striking down a Florida law that required a fixed intelligence quotient (IQ) test score of seventy or below before a defendant could present additional evidence of intellectual disability.[5] While the *Hall* ruling marked significant progress for the rights of the intellectually disabled, the Court did not go far enough: it should have established a comprehensive test requiring courts to consider all of a defendant's evidence of an intellectual disability when determining whether a defendant qualifies to proceed with an intellectual-disability defense.

II. Law Before the Case

The Eighth Amendment bans the infliction of cruel and unusual punishment.[6] The Cruel and Unusual Punishment Clause, the common term for this portion of the Eighth Amendment, has been incorporated to the

1. James Welsh, *Medicine, Mental Health, and Capital Punishment*, *in* MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 264, 274 (Michael Dudley, Derrick Silove & Fran Gale eds., 2012).

2. *Id.* at 266.

3. 134 S. Ct. 1986 (2014).

4. Welsh, *supra* note 1, at 274.

5. 134 S. Ct. at 1990.

6. U.S. CONST. amend. VIII.

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states via the Fourteenth Amendment's Due Process Clause.[7] Because the Supreme Court has not precisely defined what constitutes cruel and unusual, states face the challenge of determining which forms of state-sanctioned punishment fall under that umbrella. One area the Court has addressed, however, is how "cruel and unusual" applies to intellectual disability.[8]

The landmark case expanding Eighth Amendment protection for intellectually disabled[9] defendants in capital cases is *Atkins v. Virginia*.[10] The *Atkins* Court held that capital punishment of the intellectually disabled violates the Eighth Amendment's ban on cruel and unusual punishment.[11] In *Atkins*, the petitioner received the death penalty for abducting, robbing, and then shooting a man.[12] The petitioner had an IQ of fifty-nine, and a psychological expert declared him intellectually disabled.[13] On appeal, the petitioner claimed he could not receive the death penalty because of his mental disability.[14]

The *Atkins* Court examined the policy reasons behind banning capital punishment of the intellectually disabled.[15] Most importantly, the Court recognized that criminals with intellectual disabilities lack the same level of culpability characteristic of criminal conduct that warrants capital punishment.[16] States' concern for protecting the intellectually disabled also influenced the *Atkins* decision.[17] The Court acknowledged the trend among states to abolish capital punishment for the intellectually disabled, even though states prioritized anticrime legislation.[18] Furthermore, the Court noted that executing the intellectually disabled does not serve the objectives of deterrence or retribution, the two common justifications for the death

7. Cooper Indus., Inc. v. Leatherman Tool Grp., 532 U.S. 424, 433-34 (2001) (citing Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)); Robinson v. California, 370 U.S. 660, 667 (1962).

8. *E.g.*, Atkins v. Virginia, 536 U.S. 304 (2002).

9. The *Atkins* Court used the term "mentally retarded" to refer to the same status as intellectually disabled. Because "mentally retarded" has been replaced with "intellectually disabled," Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2644 (2010), this Note uses "intellectually disabled" throughout.

10. 536 U.S. 304.

11. *Id.* at 321.

12. *Id.* at 307.

13. *Id.* at 308-09.

14. *Id.* at 310.

15. *Id.* at 306-07.

16. *Id.* at 306.

17. *Id.* at 315-16.

18. *Id.*

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penalty.[19] Finally, the Court expressed concern that an intellectually disabled defendant lacks the capacity to assist in, and may even undermine, her own defense.[20] Due to such unique concerns associated with intellectually disabled defendants, the Court concluded that execution of the intellectually disabled constitutes cruel and unusual punishment.[21]

Although the *Atkins* Court declared the intellectually disabled ineligible for the death penalty, it did not answer the question presented in *Hall*: how should courts determine who qualifies as intellectually disabled?[22] The Court neither articulated a standard definition for intellectual disability nor established a test for determining whether a defendant has a deficient intellectual capacity.[23] Without these guidelines, a court is unable to determine whether an individual lacks sufficient intellectual competence for the purposes of death-penalty eligibility. Because there is no uniform test, states have discretion in implementing the ban on capital punishment of the intellectually disabled.[24] Ultimately, states exercise this discretion with little guidance from the Supreme Court.[25]

The *Atkins* Court relied on the clinical definitions of intellectual disability crafted by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association (APA).[26] The APA released the newest edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) in 2013 (the year before the *Hall* decision), which provides the modern, medically accepted definition of intellectual disability.[27] Intellectual disability is defined as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[28] To be considered intellectually disabled,

19. *Id.* at 318-19.

20. *Id.* at 320-21.

21. *Id.* at 321.

22. Hall v. Florida, 134 S. Ct. 1986, 1993 (2014).

23. Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L. REV. 685, 685 (2009).

24. Kathryn Raffensperger, Comment, Atkins v. Virginia*: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 740-41, 743 (2012).

25. *Id.*

26. Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 874 (2012).

27. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013).

28. *Id.*

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an individual must satisfy three requirements: (1) deficits in intellectual functioning, as confirmed by clinical and standardized testing; (2) deficits in adaptive functioning, manifested by activities of independent living; and (3) onset of these deficits during the developmental period of life.[29]

States have used these clinical definitions in drafting rules to determine intellectual disability in capital cases.[30] The Florida statute at issue in *Hall* utilizes the common clinical definitions for intellectual disability: significantly subaverage intellectual functioning along with deficits in adaptive functioning manifested by age eighteen.[31] Despite compliance with clinical standards, Florida's definition of subaverage intellectual functioning sparked controversy. The relevant language of the statute states:

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.[32]

In addressing intellectual deficiency, the statute does not expressly require or reject the inclusion of the standard error of measurement (SEM). The SEM refers to the margin of error or imprecision in a given IQ test, usually a five-point range.[33] Because of the statute's silence on the SEM, the Florida Supreme Court in *Cherry v. State* interpreted the statute to require a strict IQ cutoff of seventy, or two standard deviations below the mean score of 100.[34] The court held that Cherry was not intellectually disabled for the purposes of capital punishment because his IQ score of seventy-two was above the seventy-point cutoff.[35] If the margin of error had been taken into account, Cherry would have qualified as intellectually disabled because a five-point difference would have put his IQ at sixty-seven, which is below the seventy-point cutoff. The dispute in *Hall* centered on the Florida Supreme Court's interpretation of the statute rather than the statute's express language.[36]

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29. *Id.*

30. Usman, *supra* note 26, at 877-78.

31. FLA. STAT. § 921.137(1) (2013).

32. *Id.*

33. Hall v. Florida, 134 S. Ct. 1986, 1995 (2014); AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.

34. 959 So. 2d 702, 712-13 (Fla. 2007) (per curiam), *overruled by Hall*, 134 S. Ct. 1986.

35. *Id.* at 714.

36. *See* 134 S. Ct. at 1994.

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III. Statement of the Case

A. Facts

Freddie Hall was convicted and sentenced to death in Florida for murdering a twenty-one-year-old pregnant woman and a sheriff's deputy.[37] To support Hall's defense that he could not receive the death penalty due to his intellectual disability, he provided evidence from his former teachers, an attorney in a previous matter, and his attorney for the present murder case showing that he was mentally delayed and unable to assist in defending his case.[38] Hall's siblings also testified that he had suffered extreme child abuse at the hands of his mother due to his intellectual disability.[39] Notwithstanding this evidence, the jury voted to give Hall the death penalty, and the sentencing court adopted the jury's decision.[40]

The Supreme Court of Florida upheld the sentence because Hall failed to present evidence of an IQ score of seventy or below, as required to proceed with an intellectual-disability defense in Florida.[41] Hall presented nine IQ scores ranging from a score of sixty to a score of eighty, but the court refused to allow all of them to be submitted into evidence for unexplained evidentiary reasons.[42] Only scores above seventy were considered.[43] The Florida Supreme Court interpreted the statute to bar a defendant from introducing additional evidence of an intellectual disability without first providing an IQ test score of seventy or below.[44] Thus, the court upheld the seventy-point threshold.[45]

B. Issue

The issue on appeal to the U.S. Supreme Court was whether the Florida statute requiring a defendant to produce a fixed IQ test score of seventy or below before pursuing an intellectual-disability defense in a capital case was constitutional under the Eighth Amendment.[46] The case turned on how

37. *Id.* at 1990.
38. *Id.* at 1990-91.
39. *Id.* at 1991.
40. *Id.*
41. *Id.* at 1992.
42. *Id.*
43. *Id.*
44. *Id.* at 1994.
45. *Id*. at 1992.
46. *Id.* at 1994.

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to define intellectual disability and how to determine whether a criminal defendant was intellectually disabled in the wake of *Atkins*.[47]

C. Holding

The U.S. Supreme Court considered current medical practices in attempting to define and establish a test for determining intellectual disability.[48] Because the Florida Supreme Court did not account for the SEM in IQ testing or allow Hall to introduce other evidence relevant to intellectual ability, the U.S. Supreme Court held that Hall lacked a sufficient opportunity to prove his intellectual disability.[49]

In a five-to-four decision, the Court held that Florida's statute was unconstitutional.[50] Hall's central holding is recognized to be: "[W]hen 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."[51] Because the Florida statute allowed capital punishment of defendants claiming intellectual disability solely based on an IQ test score—without accounting for the test's margin of error or considering other evidence—the statute violated the constitutional ban on cruel and unusual punishment.[52] The Court reversed and remanded the Florida Supreme Court's decision.[53]

Current literature discussing *Hall* focuses on the potential implications of the Court's use of a consensus among the states as a basis for regulating criminal procedure.[54] The Court noted that Hall would not be automatically eligible for capital punishment in forty-one states because they did not impose a strict IQ cutoff score.[55] While this Note briefly addresses the relevance of such a trend in the context of modern views on human

47. *Id.* at 1993.

48. The Court "define[d] intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning . . . and onset of these deficits during the developmental period." *Id.* at 1994.

49. *Id.* at 2000-01.

50. *Id.* at 1990.

51. *Id.* at 2001; *see also* Bidish J. Sarma, *How* Hall v. Florida *Transforms the Supreme Court's Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISCOURSE 186, 190 (2014), http://www.uclalawreview.org/pdf/discourse/62-10.pdf; Leading Case, Hall v. Florida, 128 HARV. L. REV. 271, 274-75 (2014).

52. *Hall*, 134 S. Ct. at 2001.

53. *Id.*

54. Sarma, *supra* note 51, at 188; Leading Case, *supra* note 51, at 276.

55. *Hall*, 134 S. Ct. at 1997.

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dignity,[56] the major focus of this Note is the need for an appropriate, uniform test to determine whether a capital defendant claiming an intellectual disability is, in fact, intellectually disabled.

IV. Analysis

Rather than requiring a certain IQ test score, even accounting for the SEM, courts should employ a totality-of-the-evidence test to determine whether a defendant in a capital case is intellectually disabled. This test would allow a defendant to present all of his evidence showing an intellectual disability without first providing a certain IQ test score. For example, the defendant could produce eyewitnesses, expert testimony, academic evidence, and any other admissible form of evidence, and a court would then determine intellectual ability after reviewing all of the evidence together.

A low IQ test score is, of course, strong evidence of an intellectual disability, but it should not be the sole determining factor of a person's intellectual ability—or lack thereof—when a person's life hangs in the balance. The "DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone."[57] The totality-of-the-evidence test is proper because it provides greater protection for human rights, allows for the consideration of other important factors that indicate intellectual disability, and upholds principles of federalism.

A. The Totality-of-the-Evidence Test Protects Human Rights

Over time, American society's view of the intellectually disabled has drastically changed from disdain to understanding. In the early twentieth century, intellectually disabled individuals were feared and even presumed to be criminals.[58] While the public denigration of the intellectually disabled lasted until the 1950s, intellectually disabled defendants received little to no protection in criminal proceedings well into the late 1980s.[59] The plight of intellectually disabled defendants improved by the 1990s when several

56. *See infra* Section IV.A.I and note 62.

57. AM. PSYCHIATRIC ASS'N, DSM-5 INTELLECTUAL DISABILITY FACT SHEET 1 (2013), http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf.

58. Usman, *supra* note 26, at 865.

59. *Id.* at 869-71.

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states enacted legislation to prevent these individuals from receiving the death penalty.[60]

The United States, however, lagged behind international standards for human rights with respect to the intellectually disabled. As early as 1999, the U.N. Commission on Human Rights called for all nations that impose the death penalty to refrain from executing any person with a mental disorder.[61]

By exempting the intellectually disabled from capital punishment in *Atkins* and barring automatic eligibility for the death penalty based on a strict IQ threshold in *Hall*, the U.S. Supreme Court finally focused on protecting the human rights of the intellectually disabled. The totality-of-the-evidence test advances the human rights policies in *Atkins* and *Hall* because it promotes the inherent dignity of all persons and comports with the deterrent and retributive justifications for capital punishment.

1. The Test Promotes the Inherent Dignity of All Persons

Requiring states to employ the totality-of-the-evidence test to determine whether a defendant in a capital case is intellectually disabled prioritizes protection of the dignity of intellectually disabled defendants. Among other objectives, "[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[62] Respect for human dignity can hardly be accomplished when a court refuses to give a defendant a full and fair opportunity to present evidence of her disability. Furthermore, the reach of the Eighth Amendment is determined by "evolving standards of decency that mark the progress of a maturing society."[63]

By the time the Court decided *Atkins*, a national trend had emerged in favor of protecting the intellectually disabled from capital punishment, and American society considered intellectually disabled lawbreakers to be "less culpable than the average criminal."[64] Furthermore, the *Hall* Court emphasized that the states' rejection of strict IQ cutoffs showed that such limited protection for the intellectually disabled failed to comport with American society's idea of what is "proper or humane."[65]

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60. *Id.* at 872.

61. Economic and Social Council Res. 1999/61, ¶ 3(e) (Apr. 28, 1999).

62. Roper v. Simmons, 543 U.S. 551, 560 (2004).

63. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

64. *Id.* at 316.

65. Hall v. Florida, 134 S. Ct. 1986, 1998 (2014).

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The totality-of-the-evidence test reduces the likelihood of a defendant being sentenced to death when he lacks the requisite culpability. Because the test would allow a capital defendant every opportunity to present any evidence relevant to an intellectual-disability defense—regardless of an IQ score—the test operates in the defendant's favor. The totality-of-the-evidence test would err on the side of caution in capital cases by making it easier for a defendant to admit evidence of an intellectual disability and rendering an intellectually disabled defendant less likely to be executed. Current Eighth Amendment jurisprudence[66] and modern standards of humanity[67] demand a test for determining intellectual disability that prevents an intellectually disabled defendant from slipping through the cracks of the justice system and receiving the death penalty.

2. The Test Comports with the Deterrent and Retributivist Justifications for Capital Punishment

Proportionality is the touchstone of just punishment in the Eighth Amendment context.[68] Punishment that is disproportionate to the crime is excessive and barred under the Eighth Amendment.[69] The U.S. Supreme Court has "explained 'that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[70] Because capital punishment is the harshest legal sanction in the American criminal justice system, it is limited to "a narrow category of the most serious crimes."[71] The death penalty is considered an excessive infliction of pain and suffering and is unconstitutional unless justified by an important social purpose.[72]

The two main theories of justification for capital punishment are deterrence and retribution.[73] According to retribution theory, capital punishment is justified because the criminal deserves it.[74] Likewise, a person who does not deserve capital punishment should not receive the

66. *Id.* at 1990; *Atkins*, 536 U.S. at 321.

67. Welsh, *supra* note 1, at 273 (arguing that "[i]nternational standards" promote ending the death penalty for the intellectually disabled).

68. *Atkins*, 536 U.S. at 311.

69. *Id.*

70. *Id.* (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

71. *Id.* at 319.

72. *See* Enmund v. Florida, 458 U.S. 782, 798 (1982) (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)).

73. Christopher Adams Thorn, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 200 (1983).

74. *Id.* at 201.

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death penalty.[75] In contrast to retribution, deterrence theory is based on utilitarian principles, and it focuses on the benefits to society that occur as a result of discouraging other potential offenders from committing capital offenses.[76] "More particularly, the deterrence theory proposes that 'increases in the severity of penalties or the certainty of their imposition on offenders who are detected will reduce crime by those who are not directly sanctioned.'"[77] While deterrence theory is forward looking in that it only demands punishment for a crime if punishment would likely deter others from committing that crime in the future, retribution theory is retrospective in that it punishes a convicted offender because he had committed a crime.[78]

Capital punishment of the intellectually disabled cannot be justified under retribution theory in light of the diminished culpability of an intellectually disabled offender.[79] Under retribution theory, the severity of punishment for a crime depends on the offender's culpability.[80] The death penalty is reserved for only the most serious crimes committed with "a consciousness materially more 'depraved' than that of any person guilty of murder."[81] Even the culpability of an average murderer does not warrant the death penalty.[82] The *Atkins* Court found that intellectually disabled individuals lack sufficient ability to reason, process information, control impulses, or act pursuant to premeditation.[83] It logically follows, therefore, that intellectually disabled offenders are less capable of understanding their crimes.[84] Such deficiencies reduce an intellectually disabled person's culpability for committing a crime.[85]

Notwithstanding mental impairments, intellectually disabled individuals may be convicted for serious crimes such as murder but still lack the

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75. *See id.* at 206.

76. *See id.* at 200-01.

77. *Id.* at 200 (quoting PANEL ON RES. ON DETERRENT & INCAPACITATIVE EFFECT, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 19 (1978)).

78. *Id.* at 201.

79. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

80. *Id.*

81. *Id.* (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

82. *Id.*

83. *Id.* at 318.

84. Lise E. Rahdert, Hall v. Florida *and Ending the Death Penalty for Severely Mentally Ill Defendants*, 124 YALE L.J. F. 34, 34-35 (2014), http://yalelawjournal.org/forum/hall-v-florida-and-ending-the-death-penalty-for-severely-mentally-ill-defendants.

85. *Atkins*, 536 U.S. at 318.

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culpability necessary to receive the death penalty.[86] The culpability of an average, nondisabled murderer does not justify capital punishment, and mental deficiencies prevent an intellectually disabled murderer's culpability from rising even to that average level.[87] Execution of an intellectually disabled individual, therefore, does not advance the goals of retribution because an intellectually disabled offender's culpability does not rise to the severity of that of the most depraved criminals.[88]

Executing an intellectually disabled offender also does not increase deterrence because there is likely no premeditation or morally culpable, deliberate behavior to deter.[89] Moreover, intellectually disabled defendants are not likely to comprehend the risk of a capital sentence for committing a crime and thus cannot be deterred by the threat of receiving the death penalty.[90] Capital punishment of the intellectually disabled, therefore, does not further the goals of either retribution or deterrence theory.[91]

The totality-of-the-evidence test is the best method for reducing the risk that intellectually disabled offenders will face excessive and unjustified criminal punishment. The *Hall* Court's holding was based on the concern that Florida's procedure for determining whether a defendant has an intellectual disability "creates an unacceptable risk that persons with intellectual disability will be executed . . . ."[92] Thus, as Florida has demonstrated, giving states broad discretion to establish their own procedures for determining a defendant's intellectual capacity in a capital case does not always provide sufficient protection for the intellectually disabled. Likewise, the method of using an IQ test score—even with the SEM included—creates the risk that an intellectually disabled person will be subject to capital punishment because a person may be intellectually disabled despite scoring above seventy on an IQ test.[93] In contrast, the totality-of-the-evidence test would reduce such risk by making an IQ test score only one of several factors used to determine intellectual capacity. The test accounts for the complexity of intellectual disability by placing equal emphasis on evidence of adaptive functioning (the ability to function

86. *Id.* at 319.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 320.
91. Rahdert, *supra* note 84, at 35.
92. Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
93. *See id.* at 1995.

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in society) and intellectual functioning so that no single factor is determinative of the existence of intellectual disability.

B. The Totality-of-the-Evidence Test Allows for Consideration of Other Important Factors Along with IQ Test Scores in Determining Intellectual Disability

The clinical definitions of intellectual disability require evaluation of proof beyond an IQ score alone to determine whether an individual is intellectually disabled.[94] The most common definition of intellectual disability combines the factors emphasized by the APA and the AAIDD into a three-prong test: (1) deficits in intellectual functioning; (2) deficits in adaptive functioning; and (3) onset during the developmental period.[95] Because an IQ score only indicates deficits in intellectual functioning,[96] other evidence should be considered to account for the other two prongs.

1. Deficits in Intellectual Functioning

The Florida statute struck down in *Hall* is problematic not for its definition of intellectual disability but for its application of the three-prong test.[97] The first prong of the clinical test for intellectual disability is used consistently among the states, but the method of applying it varies. Both the AAMR[98] and the APA agree that people with intellectual deficits or subaverage intellectual functioning receive scores of approximately two standard deviations below the mean on standardized intelligence tests, including the SEM.[99] Measuring an individual's intelligence through IQ tests is the most common way to evaluate intellectual functioning;[100] however, there are many flaws in IQ testing that render it inadequate as the sole basis for determining whether a defendant is eligible for capital punishment.[101]

IQ testing is not precise.[102] The margin of error is meant to account for testing variability in relation to factors such as the type of test, the particular

94. AM. PSYCHIATRIC ASS'N, *supra* note 27, at 33.
95. Usman, *supra* note 26, at 878.
96. *See* AM. PSYCHIATRIC ASS'N, *supra* note 27, at 33.
97. *Hall*, 134 S. Ct. at 2007-10.
98. 93 AM. JUR. *Trials* § 8 (2004). The AMMR tenth edition was in use prior to the name change to AAIDD.
99. *Id.*; AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.
100. White, *supra* note 23, at 692.
101. *See, e.g.*, Usman, *supra* note 26.
102. *Id.* at 896.

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examiner, and the interpretation of the test results.[103] Moreover, "Cultural and linguistic diversity needs to be taken into consideration, plus differences in sensory, motor, and communication factors."[104] For example, individuals who do not speak English as a first language may be at a disadvantage in IQ testing because the tests are written in English and contain content reflecting "white, middle-class culture" with which minority defendants may not be familiar.[105] Even the type of test and time of day the test is administered can significantly affect an individual's score.[106] The danger in imposing a fixed IQ cutoff is that these factors—which can have a significant effect on the test-taker's results—are not considered.[107] Ultimately, "While some states have heeded the scientific community's clear precautions and avoided fixed IQ cutoffs, far too many have not."[108]

Although the Supreme Court in *Hall* properly reversed the Florida Supreme Court, it did not go far enough to protect the Eighth Amendment rights of the intellectually disabled. Because the *Hall* Court's holding was limited to the state court's failure to account for the margin of error in IQ testing, *Hall* would still allow courts to consider IQ testing conclusive evidence of intellectual ability so long as they account for the margin of error. The Court did not declare unconstitutional a requirement that an IQ score be within the margin of error before a defendant can present further evidence of intellectual disability. The first prong of the clinical three-prong test, therefore, must be satisfied before a defendant can present evidence to meet the second and third prongs. Because a particular IQ score, even considering the margin of error, fails to account for the other two prongs of the clinical test, the Court should have rejected IQ scores as conclusive evidence of intellectual ability.

Under the totality-of-the-evidence test, IQ scores would not, by themselves, be conclusive. Rather, defendants claiming intellectual disability would be allowed to present evidence to support each of the three prongs of the clinical intellectual-disability test simultaneously, and courts

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103. *See* White, *supra* note 23, at 694.

104. Norman Abeles, *In the Public Interest: Intellectual Disability, the Supreme Court, and the Death Penalty*, 65 AM. PSYCHOLOGIST 743, 744 (2010).

105. White, *supra* note 23, at 696 (quoting Linda Krauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins v. Virginia, 11 WIDENER L. REV. 121, 129 (2004)).

106. *Id.* at 694.

107. *See id.* at 694-95.

108. *Id.* at 695.

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would then weigh all of the evidence—regardless of the outcome of an IQ test. Unlike Florida's application of the clinical three-prong test, a defendant would not be forced to meet the first prong by producing a certain IQ score before being allowed to present evidence for the other two prongs. Courts could, therefore, assign equal weight to the adaptive-functioning prong instead of only considering the intellectual-deficit prong. This test would provide for a more accurate and comprehensive review of a defendant's intelligence level and his ability to function in mainstream society.

2. Deficits in Adaptive Functioning

IQ test scores are relevant for analyzing the first prong of the intellectual-disability test but "may be insufficient to assess reasoning in real-life situations and mastery of practical tasks."[109] Adaptive functioning relates to a person's ability to function in everyday life.[110] The APA defines adaptive functioning as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background."[111] This prong requires analysis of adaptive reasoning in conceptual, social, and practical domains.[112] According to the DSM-5, a person is deficient in adaptive functioning when at least one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community."[113] Due to the variety and complexity of relevant factors, test scores are insufficient indicia of adaptive functioning.[114] Rather, evidence from informants close to the defendant and evaluations from mental health professionals are necessary to assess adaptive functioning.[115]

A thorough investigation into adaptive functioning is critical to determine whether a person is intellectually disabled. "People with mental retardation are complex human beings who likely have certain gifts as well as limitations."[116] A person who performs above the cutoff score on an IQ

109. AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.
110. *Id.*; White, *supra* note 23, at 699.
111. AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.
112. *Id.*
113. *Id.* at 38.
114. White, *supra* note 23, at 700.
115. *See* AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.
116. White, *supra* note 23, at 702 (quoting AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 8 (10th ed. 2002)).

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test—which may be imprecise to begin with—may still be intellectually disabled due to inability to function independently in the community.[117] Additionally, the DSM-5 determines the severity of intellectual disability based on adaptive functioning rather than IQ score.[118] Courts, therefore, cannot accurately determine how severely a defendant is intellectually impaired without reviewing evidence of adaptive functioning.

The *Hall* Court recognized the significance of these other factors when determining intellectual disability. In dicta, the Court noted that Florida's IQ cutoff prevents defendants from introducing "substantial and weighty evidence" of adaptive functioning.[119] "This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70."[120] Recognition of adaptive functioning's importance suggests the Court's acceptance of the clinical framework for evaluating intellectual disability and, perhaps, alludes to its willingness to impose a more comprehensive test on all lower courts in the future.[121] Applying such a test in *Hall*, for example, would have allowed for evidence of adaptive functioning *including* clinical assessments as well as testimony from teachers, family members, and Hall's attorney—all of which would have been highly probative of intellectual ability, regardless of his IQ scores. If the Florida Supreme Court had considered this evidence on equal footing with evidence of Hall's intellectual functioning, it may have found him intellectually disabled.

3. Onset During the Developmental Period

The clinical definitions of intellectual disability require that the deficits in intellectual and adaptive functioning begin before a certain age.[122] Both the AAIDD and the APA require onset before the age of eighteen.[123] Though not mentioned in *Atkins*, the American Psychological Association offers a similar definition of intellectual disability, except that it extends the required onset period to age twenty-two.[124] This third prong was not an

117. *See* AM. PSYCHIATRIC ASS'N, *supra* note 27, at 37.
118. *Id.* at 33.
119. Hall v. Florida, 134 S. Ct. 1986, 1994 (2014).
120. *Id.*
121. Sarah E. Warlick & Ryan V.P. Dougherty, Hall v. Florida *Reinvigorates Concept of Protection for Intellectually Disabled but Are the States Sidestepping the Supreme Court's Ruling?*, CRIM. JUST., Winter 2015, at 4, 5.
122. *See* AM. PSYCHIATRIC ASS'N, *supra* note 27, at 33.
123. Usman, *supra* note 26, at 875-76.
124. *Id.* at 876-77.

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issue in *Hall* because the Court primarily focused on determining the process for meeting the first prong of the intellectual-disability test.[125]

Under the totality-of-the-evidence test, however, the age of onset would be considered along with the other two prongs. Because the AAIDD and the APA require onset before age eighteen,[126] the required age for onset under the totality-of-the-evidence test could appropriately be set at eighteen. Hall likely could have satisfied this prong under the totality-of-the-evidence test because he produced school records indicating his intellectual disability and testimony from his siblings regarding signs of intellectual disability during his youth.[127]

The age of onset prong is significant because it is one factor for distinguishing between intellectual disability and mental illness.[128] *Hall* does not address capital punishment of the mentally ill. Unlike the intellectually disabled, mentally ill defendants are not immune from capital punishment under the Eighth Amendment.[129] This Note does not address what would happen in the case of a defendant who developed a mental disability after the developmental period.

C. The Totality-of-the-Evidence Test Is Consistent with Principles of Federalism

Federalism is a principle in American government focused on maintaining balance between federal and state authority.[130] The Tenth Amendment reserves for the states powers that are not delegated by the Constitution to the federal government.[131] States retain the authority to administer criminal justice within their borders.[132] Federalism is relevant in the context of capital punishment of the intellectually disabled because the federal government is regulating an area of law traditionally reserved to the states.

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125. 134 S. Ct. at 1994.

126. Usman, *supra* note 26, at 875-76.

127. *Hall*, 134 S. Ct. at 1990-91.

128. *See* Usman, *supra* note 26, at 876-77.

129. Rahdert, *supra* note 84, at 36.

130. *See* Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 522 (2000).

131. U.S. CONST. amend. X.

132. Oregon v. Ice, 55 U.S. 160, 168 (2009).

1. The Totality-of-the-Evidence Test Would Set a New Minimum Level of Protection for Defendants Seeking Mitigation of a Capital Sentence Due to Intellectual Disability

Although it may appear from decisions such as *Atkins* and *Hall* that the federal government has intruded upon the right of the states to administer criminal justice, the Supreme Court has merely set constitutional boundaries within which the states must operate in order to comply with due process. "The protections in the Federal Constitution provide a constitutional floor such that the Federal Constitution establishes a minimum level of protection to citizens of all states . . . ."[133] Thus, states may provide more protection to citizens than required by the Constitution, but not less.[134]

The *Hall* Court provided guidance to states on where the constitutional floor lies for capital punishment of the intellectually disabled by declaring that Florida's fixed IQ requirement fell below the floor.[135] The Court did not, however, set forth a bright-line rule; rather, it left with the states the authority to continue regulating this issue, provided state protection for the intellectually disabled does not fall below the new floor set in *Hall*.[136]

Requiring states to implement the totality-of-the-evidence test would raise the constitutional floor above the level set in *Hall*. Under the totality-of-the-evidence test, accepting an IQ score, even including the margin of error, as conclusive evidence of intellectual ability would fall below the constitutional floor. States would thus retain the authority to enact their own working definitions of intellectual disability and to craft procedures for determining which defendants are intellectually disabled as long as defendants were afforded the minimum protection of courts considering all of the available evidence.

2. Hall*'s Potential Impact on Oklahoma*

Hall may invalidate state statutes that require a fixed IQ score as a prerequisite to an intellectual-disability defense. Oklahoma's relevant statute expressly prevents a criminal defendant who scores a seventy-six or above on an IQ test from being considered intellectually disabled.[137] In

133. 16 AM. JUR. 2D *Constitutional Law* § 88 (2013).
134. *Id.*
135. *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
136. *Id.* at 2001.
137. 21 OKLA. STAT. § 701.10b(C) (2011).

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theory, therefore, *Hall* casts doubt upon the constitutionality of Oklahoma's treatment of capital defendants asserting an intellectual-disability defense.

In practice, however, *Hall* has provided little help to defendants asserting an intellectual-disability defense in state courts.[138] Several state and federal courts have refused to apply *Hall* in capital cases by distinguishing it on the grounds that their state has not formally adopted a strict IQ cutoff requirement or that the jury was instructed on the SEM.[139] Because Oklahoma's IQ threshold is six points higher than the seventy-point cutoff in *Hall*, Oklahoma courts may succeed in distinguishing Oklahoma's statute from the Florida statute rejected in *Hall*. Even if Oklahoma's statute is deemed constitutional under *Hall*, the statute would not satisfy the totality-of-the-evidence test because Oklahoma assigns too much weight to IQ test scores in determining intellectual ability.

a) Oklahoma's Statute on Execution of the Intellectually Disabled Could Be Invalidated After Hall

The Oklahoma statute governing execution of the intellectually disabled, title 21, section 701.10b, is outdated. Oklahoma still uses the term "mentally retarded" rather than the modern medical term "intellectually disabled."[140] Under Oklahoma law, "'Mental retardation' or 'mentally retarded' means significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning."[141] In several respects, the statute also resembles the Florida statute found to be unconstitutional in *Hall*. Oklahoma law states:

> An intelligence quotient of seventy (70) or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of eighteen (18) years. In determining the intelligence quotient, the standard measurement of error for the test administrated shall be taken into account. However, in no event shall a defendant who has

138. Warlick & Dougherty, *supra* note 121, at 5.
139. *Id.* at 6.
140. 21 OKLA. STAT. § 701.10b(A)(1).
141. *Id.*

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> received an intelligence quotient of seventy-six (76) or above . . . be considered mentally retarded . . . .[142]

From a textual standpoint, the statute contains provisions that comport with *Hall* as well as portions that could be rendered unconstitutional. The statute bars any defendant scoring a seventy-six or above on an IQ test from being considered intellectually disabled.[143] The seventy-six-point IQ threshold acts as the same barrier to asserting an intellectual-disability defense as the seventy-point cutoff in *Hall*. Unlike in *Hall*, however, the Oklahoma statute expressly requires other factors beyond a mere IQ test score to be considered.[144] The Oklahoma statute also explicitly requires courts to account for the SEM of IQ testing.[145] Although the statute may appear constitutional on its face, judicial interpretation can render it unconstitutional in practice if courts require a fixed IQ score before a defendant may present other evidence, as the Florida Supreme Court did in *Hall*.[146] An examination of Oklahoma case law is necessary to determine whether the Oklahoma statute, as applied to specific cases, violates the Eighth Amendment under *Hall*.

In *Murphy v. State*, the Oklahoma Court of Criminal Appeals applied *Atkins* to establish a definition for intellectually disabled.[147] According to *Murphy*, a defendant is considered intellectually disabled upon a showing of three factors: (1) subaverage intellectual functioning; (2) that is manifested before age eighteen; and (3) significant limitations in adaptive functioning in at least two out of a list of specified skill areas.[148] Furthermore, the defendant bears the burden of proving intellectual disability by a preponderance of the evidence, and at least one IQ test score of seventy or below is required as evidence before proceeding with an intellectual-disability defense.[149]

The court of criminal appeals elaborated on the test for determining intellectual disability in *Blonner v. State*.[150] The *Blonner* court overruled *Murphy* and established new procedures for *Atkins* hearings, which are held

142. *Id.* § 701.10b(C).
143. *Id.*
144. *Id.*
145. *Id.*
146. *See* Hall v. Florida, 134 S. Ct. 1986, 1994 (2014).
147. 2002 OK CR 32, ¶ 31, 54 P.3d 556, 567, *overruled by* Blonner v. State, 2006 OK CR 1, 127 P.3d 1135.
148. *Id.*
149. *Id.* ¶ 31, 54 P.3d at 568.
150. 2006 OK CR 1, 127 P.3d 1135.

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to determine whether a defendant is intellectually disabled.[151] The court, however, affirmed much of the working definition of intellectually disabled set forth in *Murphy*.[152] Under *Blonner*, a defendant claiming an exemption from capital punishment due to an intellectual disability must still produce an IQ test score of seventy or below, but courts must account for the margin of error in IQ testing.[153] Supposing a five-point margin of error, an IQ score of seventy-five or below would fall within the range showing intellectual disability; but a defendant who scores higher than seventy-five on an IQ test is barred from introducing further evidence of intellectual disability by the seventy-six-point cutoff.[154]

In sum, the court interpreted the intellectual disability statute to impose the same IQ requirement of seventy or lower as the Florida statute in *Hall* but with consideration of the margin of error.[155] Oklahoma's inclusion of the SEM *may* prevent *Hall* from invalidating the statute, or *Hall* may render the statute unconstitutional due to the explicit seventy-six-point threshold. While Hall's precise effect has yet to be determined, what is clear is that the Oklahoma judiciary's interpretation of the statute—characterized by a disproportionate focus on IQ scores—fails the totality-of-the-evidence test.

b) Oklahoma Assigns Too Much Weight to IQ Test Scores in Capital Cases

Oklahoma courts have held that IQ tests are determinative evidence that a defendant is *not* intellectually disabled.[156] Post-*Blonner*, the *Murphy* defendant's intellectual-disability claim was set for retrial and finally decided in 2012.[157] Because Murphy submitted IQ test scores above seventy-six, he failed to meet the statutory requirement for intellectual disability.[158] Murphy then challenged the constitutionality of the statutory bar to an intellectual-disability defense to capital murder based on a single IQ test score of seventy-six or above.[159] He argued that the seventy-six-point cutoff is an arbitrary restriction on pursuing an intellectual-disability defense.[160] The court showed deference to the state legislature and

151. *Id.* ¶ 5, 127 P.3d at 1139.
152. *Id.* ¶ 9, 127 P.3d at 1140.
153. *Id.* ¶ 6, 127 P.3d at 1139-40.
154. *Id.*
155. *See id.*
156. *Id.*
157. Murphy v. State, 2012 OK CR 8, ¶ 3, 281 P.3d 1283, 1287.
158. *Id.* ¶ 27, 281 P.3d at 1291-92.
159. *Id.* ¶ 31, 281 P.3d at 1292.
160. *Id.*

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presumed the statute was constitutional.[161] Thus, the court upheld the statute, finding that the seventy-six-point limit was consistent with the Supreme Court's rationale in *Atkins* and did not violate due process.[162]

The Oklahoma Court of Criminal Appeals again used IQ test scores as conclusive evidence in *Smith v. State*.[163] In *Smith*, the petitioner sought post-conviction relief after he was sentenced to death for first-degree murder.[164] Smith alleged that his sentence was unconstitutional and that he should not receive the death penalty because he was intellectually disabled.[165] To show his mental disability, Smith provided IQ test scores of seventy-six, seventy-nine, and seventy-one, along with reports from a psychiatrist and two psychologists.[166] Smith contended that his scores met the statutory requirement for intellectual disability because they fell within the relevant range when the margin of error is considered.[167] The court, however, interpreted Oklahoma law to mean that, although the law requires that "an I.Q. score near the cutoff of 70 be treated as a range bounded by the limits of error, it also directs unequivocally that no such treatment be afforded to scores of 76 or above," in accordance with section 701.10b.[168] Because Smith provided scores of seventy-six and seventy-nine, the margin of error was not considered, and the scores were considered conclusive evidence that he was not intellectually disabled.[169] This consideration of IQ test scores as conclusive evidence of intellectual capacity violates the totality-of-the-evidence test because it excludes evidence of adaptive functioning and the age of onset.

The future of Oklahoma law governing capital punishment of the intellectually disabled remains uncertain. Courts may find Oklahoma's statute constitutional under *Hall* because the statute requires inclusion of the SEM. The *Smith* court, however, interpreted the statute to impose a strict cutoff IQ score of seventy-six.[170] The court refused to consider the SEM or review further evidence because the defendant produced an IQ score of seventy-six.[171] Thus, the court essentially imposed an outright bar

161. *Id.* ¶ 32, 281 P.3d at 1292.
162. *Id.* ¶¶ 37, 40, 281 P.3d at 1293.
163. 2010 OK CR 24, 245 P.3d 1233.
164. *Id.* ¶ 1, 245 P.3d at 1234.
165. *Id.* ¶ 2, 245 P.3d at 1235.
166. *Id.* ¶ 6, 245 P.3d at 1236.
167. *Id.* ¶ 10, 245 P.3d at 1237.
168. *Id.*
169. *Id.* ¶ 11, 245 P.3d at 1237.
170. *Id.*
171. *Id.*

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to a defendant's ability to offer evidence of deficits in adaptive functioning and age of onset if he scored a seventy-six or higher on an IQ test.[172] Oklahoma courts, therefore, only consider the SEM for IQ scores below seventy-six.[173] This selective inclusion of the SEM is exactly the type of inconsistent state procedure that puts intellectually disabled defendants at risk of capital punishment. Oklahoma law thus serves as a prime example of the need for a uniform test to ensure courts consider all of the evidence of a defendant's intellectual ability as opposed to a single number.

V. Conclusion

The *Hall* Court expanded Eighth Amendment protection for intellectually disabled defendants, but further safeguards are necessary. While the Court reduced the scope of states' authority to establish procedures for determining a capital defendant's intellectual capacity, it still did not set forth a bright-line test for determining intellectual disability. To avoid risking the lives of intellectually disabled defendants through inconsistent state procedures, the totality-of-the-evidence test should be imposed. The test would offer increased protection by allowing defendants to present all evidence of intellectual disability. An IQ test score—by itself—would no longer be determinative. The totality-of-the-evidence test provides a holistic view of a defendant's intellectual capacity and helps prevent the unconstitutional punishment of those lacking the requisite criminal culpability for the death penalty.

Ruthie Stevens

172. *Id.*
173. *Id.*

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