Notes

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Aligning the Criminal Justice System with the Mental Health Profession in Response to *Hall v. Florida*

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Intellectual disability is a condition, not a number.
—Justice Kennedy[1]

INTRODUCTION

In the United States, approximately 6.5 million people are afflicted with an intellectual disability.[2] Intellectually disabled persons represent 4%–10% of the prison population.[3] An intellectually disabled person experiences limited cognitive functioning and abilities, which impinges upon the person's communication, social, and self-sufficiency skills.[4] While intellectually disabled persons generally understand the difference between right and wrong and are capable of standing trial, their impairments lead them to have a diminished personal culpability for their actions since "they often act on impulse rather than pursuant to a premeditated plan, and . . . in group settings they are followers rather than leaders."[5] As a result, intellectually disabled persons may be more susceptible to committing and assisting in criminal activity to feel accepted and create friendships.[6] Yet, these intellectually disabled individuals generally face significant

1 Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

2 *What is Intellectual Disability?*, SPECIAL OLYMPICS, http://www.specialolympics.org/Sections/Who_We_Are/What_Is_Intellectual_Disability.aspx (last visited Feb. 4, 2016).

3 Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects*, THE ARC (Aug. 2009), http://www.thearc.org/document.doc ?id=3664.

4 SPECIAL OLYMPICS, *supra* note 2.

5 Atkins v. Virginia, 536 U.S. 304, 318 (2002).

6 Davis, *supra* note 3.

disadvantages in the criminal justice system since they "are more likely to be arrested, convicted, sentenced to prison and victimized in prison."[7]

The U.S. Supreme Court sought to acknowledge these disadvantages in *Atkins v. Virginia*, where it held that the execution of intellectually disabled persons is unconstitutional.[8] For a capital defendant presenting a defense of intellectual disability, "the finding of mental retardation is like a dispositive mitigating factor."[9] The defendant's intellectual disability claim does not enhance the penalty for the alleged crime he faces.[10] Instead, a finding of intellectual disability limits the defendant's maximum penalty to a term of imprisonment.[11] Further, under *Atkins*, intellectual disability is not limited to those with extreme cognitive impairment.[12] Rather, intellectual disability extends to defendants with lower cognitive functioning. As such, capital defendants eligible to be spared the death penalty are those who experience "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[13]

In 2014, in *Hall v. Florida*, the Court broadened the impact of the *Atkins* case. Freddie Hall, a man allegedly burdened by a violent and abusive childhood,[14] and his accomplice were charged with killing a pregnant woman with the intent of using her vehicle to commit a robbery.[15] Thereafter, in the process of the robbery, Hall was involved in the murder of a sheriff's deputy.[16] Hall was subsequently sentenced to death for both murders.[17] In response, Hall presented a defense of intellectual disability.[18] The Court confronted the issue of whether a rigid IQ requirement of 70 should be the sole determinant of an

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7 *Id.*

8 *Atkins*, 536 U.S. at 321.

9 State v. Jimenez, 908 A.2d 181, 190 (N.J. 2006).

10 *Id.*

11 *Id.*

12 93 AM. JUR. TRIALS *Capital Cases Involving Mental Retardation* § 4, Westlaw (database updated Oct. 2015).

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

14 Hall v. Florida, 134 S. Ct. 1986, 1991 (2014).

15 *Id.* at 1990.

16 *Id.*

17 *Id.*

18 *Id.*

individual's eligibility to pursue his intellectual disability defense, thereby standing as a potential bar to prevent a capital defendant from submitting further evidence.[19]

The Court held that Florida's IQ cutoff for determining a defendant's eligibility to be spared the death penalty due to intellectual disability is unconstitutional under the Eighth Amendment.[20] The Court also asserted that due to the intrinsic impreciseness of IQ tests, ranges of IQ scores should be considered in evaluating an individual for intellectual disability.[21] However, the Court provided little guidance for how state legislatures should reform their intellectual disability statutes to avoid the fate of Florida's inflexible interpretation.

This Note outlines the legal, moral, and social implications of the *Hall* decision. Additionally, it provides possible responses to the questions left unanswered by *Hall* regarding the need to remedy the relationship between the intellectually disabled community and the criminal justice system. Part I provides the Florida Supreme Court's interpretation of its statutory definition of "intellectual disability." Part II explores the procedural history of *Hall* and elaborates on Freddie Hall's troubled childhood. The depiction of Hall's childhood demonstrates the type of evidence that would be barred by failing to fulfill the Florida IQ requirement. Part III outlines the U.S. Supreme Court's holding and rationale. In *Hall*, the Court rejected Florida's rule that the defendant must first fall below a strict IQ threshold before being allowed to present additional evidence of intellectual disability.[22] The Court reasoned that the rule was inconsistent with medical professionals' opinions,[23] violated each American citizen's Eighth Amendment rights,[24] and that "every state legislature . . . has taken a position contrary to that of Florida."[25]

Part IV illustrates the consequences of the *Hall* decision. *Hall* places pressure on the Florida legislature and other states to develop a more sound interpretation of intellectual disability and to consider other measures of intellectual functioning besides an IQ test. Additionally, the decision may also have immediate consequences for inmates on death row that have the potential to bring intellectual disability claims.

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19 *Id.*

20 *Id.* at 2001.

21 *Id.*

22 *Id.*

23 *Id.* at 1995.

24 *Id.* at 1992–93.

25 *Id.* at 1996–98.

Lastly, Part V provides recommendations that states can use when reconsidering their intellectual disability statutes to ensure consistency with the *Hall* decision. The suggestions include implementing a factors-based test, developing the three branches of learning to better understand the complexities of intellectual disability, creating a more comprehensive test based on the Diagnostic Adaptive Behavior Scale, and establishing a panel of medical and mental health professionals to evaluate capital defendants.

I
FLORIDA LAW

Chapter 921, section 137 of the Florida Statutes, which defines the parameters where imposition of the death sentence upon an intellectually disabled person is prohibited, states:

> (1) As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. 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. . . .[26]

The Florida Supreme Court clarified the statutory definition in *Cherry v. Florida*, finding that in order for a defendant to be recognized as intellectually disabled, the defendant must satisfy three prongs: (1) deficient intellectual functioning; (2) significant adaptive behavior limitations; and (3) these deficits must be present before the defendant is eighteen years old.[27] Satisfying the first prong depends on a defendant's performance on an IQ test.[28] Accordingly, the Florida Supreme Court narrowly interpreted section 921.137(1) to mean that any defendant whose IQ score is greater than 70 is not characterized as being intellectually disabled.[29] Consequently, that defendant is barred from presenting further evidence of his limited adaptive behavior—the second prong—to demonstrate his intellectual disability claim.[30]

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[26] FLA. STAT. § 921.137(1) (2015).

[27] *See* Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007).

[28] *Id.* at 711–13.

[29] *Id.* at 712–13.

[30] *Id.* at 714.

Although the Florida Supreme Court acknowledged the "universally accepted given fact" that IQ is reported as a range of scores and a +/–5 standard of error is considered when determining if an individual is intellectually disabled, the Court still imposed the bright-line, 70-point cutoff.[31] Thus, *Hall* considers the constitutionality of Florida's strict IQ threshold as determinative of a defendant's intellectual disability claim.

II
FACTS OF *HALL*

On February 21, 1978, Freddie Hall and his accomplice, Mack Ruffin, accosted Karol Hurst, a seven-month-pregnant, twenty-one-year-old housewife, in a grocery store parking lot in Sumter County.[32] With the intention of using Hurst's car to commit a robbery, Hall and Ruffin forced Hurst into her car and drove to a wooded area.[33] Thereafter, Hall alleged that, "Ruffin beat, sexually assaulted, and shot Mrs. Hurst."[34]

Hall and Ruffin proceeded to a convenience store in Hernando County, where their presence raised the store clerk's suspicions and the clerk alerted the sheriff's office.[35] Prior to Deputy Lonnie Coburn's arrival, Hall and Ruffin exited the store, and shortly thereafter, the clerk heard a gunshot and discovered Deputy Coburn dead behind the store.[36] Although Deputy Coburn's weapon was missing, the weapon found to have killed Hurst was discovered under the deputy's body.[37] Hall and Ruffin fled the scene in Hurst's vehicle, but after law enforcement pursued the men, Hall and Ruffin abandoned the car and fled on foot.[38] Law enforcement soon apprehended the men and discovered Deputy Coburn's pistol, as well as Hurst's handbag and groceries, in the abandoned car.[39]

The circuit court convicted Hall for first-degree murder of both Hurst and Deputy Coburn.[40] Hall was sentenced to death for each

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[31] *Id.* at 712–13.

[32] Hall v. State (*Hall I (Hurst)*), 403 So. 2d 1321, 1323 (Fla. 1981).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1322; Hall v. State (*Hall I (Coburn)*), 403 So. 2d 1319, 1321 (Fla. 1981).

murder; he subsequently appealed both convictions.[41] The sentence for Deputy Coburn's death was later reduced due to insufficient evidence to sustain the conviction.[42] Nonetheless, the Florida Supreme Court affirmed Hall's conviction and sentence for the murder of Hurst.[43] In September 1982, Hall's death warrant was signed, scheduling him for execution.[44] Following Hall's first sentencing, the U.S. Supreme Court held in *Hitchcock v. Dugger* that defendants must be provided the opportunity to present nonstatutory mitigating evidence in death penalty proceedings.[45] Thereafter, Hall petitioned the court for a writ of habeas corpus, claiming that the death sentence proceedings afforded to him violated the *Hitchcock* ruling.[46] The Florida Supreme Court denied Hall's petition because even though the jury and court had only considered the statutorily enumerated mitigating circumstances, any sentencing proceeding errors were harmless.[47] Hall filed a subsequent motion to vacate his sentence, alleging "that his sentencing proceeding was fundamentally flawed under the *Hitchcock* ruling."[48]

Accordingly, the Florida Supreme Court considered nonstatutory mitigating evidence presented by Hall at the 3.850 hearing to determine if a *Hitchcock* error had occurred.[49] This evidence was based on affidavits from both experts and nonexperts, which Hall had used in an attempt to prove his intellectual disability and incompetency to stand trial.[50] Dr. George Barnard advised that while Hall was competent to stand trial, there was evidence of a "long history of drug and alcohol abuse, child abuse amounting to torture, organic brain damage possibly resulting from severe, repeated head trauma suffered as a child and adolescent, and a very low intellectual level."[51] Hall was also determined to be an illiterate adult that "suffered from extreme mental and emotional disturbance, compounded significantly by substance

41 *Hall I (Hurst)*, 403 So. 2d at 1322–23; *Hall I (Coburn)*, 403 So. 2d at 1319.

42 *Hall I (Coburn)*, 403 So. 2d at 1321.

43 *Hall I (Hurst)*, 403 So. 2d at 1325.

44 Hall v. State (*Hall III*), 541 So. 2d 1125, 1126 (Fla. 1989).

45 Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987).

46 Hall v. Dugger (*Hall II*), 531 So. 2d 76, 77 (Fla. 1988).

47 *Id.*

48 *Hall III*, 541 So. 2d at 1126.

49 *Id.* Florida Rule of Criminal Procedure 3.850 governs motions to vacate, set aside, or correct sentences.

50 *Id.*

51 *Id.* at 1126–27.

abuse throughout his life and at the time of the offense," according to psychologist and American Board of Professional Psychology diplomate, Dr. Jethro Toomer.[52] Furthermore, psychiatrist Dr. Dorothy Lewis concluded that Hall's condition was consistent with schizophrenic disorder and Hall's "violent child abuse, organic brain damage, paranoia, and continued substance abuse all contributed to Hall's conduct at the time of the murder."[53]

Hall was one of seventeen siblings, and the affidavits submitted by some of Hall's siblings depict the Hall children's upbringing as one subjected to poverty, violence, brutality, and parents who relentlessly fought with dangerous weapons.[54] Thus, "Hall's childhood was marked by an existence which can only be described as pitiful," and both his siblings and teachers characterized Hall as "mentally retarded."[55] Despite Hall's deficits, Hall's mother did not sympathize with him but instead gave his father and neighbors "permission to beat Hall whenever they deemed [punishment] proper."[56] For instance, "Hall's mother would strap him to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or chord."[57] Consequently, the Florida Supreme Court agreed that a *Hitchcock* error had occurred.[58] The court then vacated Hall's death sentence and remanded the case to the trial court to conduct a new sentencing proceeding before a new jury, where Hall could present nonstatutory mitigating evidence of his intellectual disability.[59]

Upon remand and consideration of the aforementioned nonstatutory mitigating evidence, the circuit court again sentenced Hall to death.[60] Despite the circuit court concluding that there was significant evidence to support Hall's claim that he had been characterized as mentally retarded for his entire life, the court could not disregard Hall's moral culpability for the crimes committed on the basis of his mental difficulties.[61] The Florida Supreme Court affirmed the circuit court,

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52 *Id.* at 1127.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 1126.
59 *Id.* at 1128.
60 Hall v. Florida, 134 S. Ct 1986, 1991 (2014).
61 *Id.*

resentencing Hall to death.[62] When Hall sought post-conviction relief, the circuit court denied Hall such relief[63] and the Florida Supreme Court affirmed.[64]

In 2002, the U.S. Supreme Court held in *Atkins* that the Eighth Amendment's prohibition on cruel and unusual punishment bans the execution of intellectually disabled defendants.[65] The Court reasoned that "death is not a suitable punishment for a mentally retarded criminal" and it is not likely "that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty."[66] As a result of the *Atkins* decision, states were responsible for defining intellectual disability.[67]

On November 30, 2004, Hall filed a motion alleging that he was intellectually disabled under *Atkins* and could not be executed.[68] Hall reasoned that the Florida statute, which set an IQ score of 70 points as a minimum to determine intellectual disability, was unconstitutional and could not properly gauge his mental capacity.[69] After a lengthy delay, on March 27, 2008, the Florida Supreme Court held an evidentiary hearing to consider Hall's motion, which claimed that he is intellectually disabled based on *Atkins*.[70] At the hearing, Hall presented evidence to demonstrate his intellectual disability and his IQ test result of 71.[71] Furthermore, Hall "allege[d] that his IQ should be read as a range of scores from 67 to 75 and that this Court's adoption of a firm cutoff of 70 or below to qualify as mentally retarded misapplie[d] the Supreme Court's ruling in *Atkins* and fail[ed] to reflect an understanding of IQ testing."[72] The Florida Supreme Court denied Hall's appeal and held that Florida's 70-point threshold to determine

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62 Hall v. State (*Hall IV*), 614 So. 2d 473, 479 (Fla. 1993).

63 Hall v. State (*Hall V*), 742 So. 2d 225, 225 (Fla. 1999).

64 *Id.* at 230.

65 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

66 *Id.*

67 *Id.* at 317.

68 Hall v. State (*Hall VI*), 109 So. 3d 704, 706–07 (Fla. 2012), *rev'd*, 134 S. Ct. 1986 (2014).

69 *Id.* at 707.

70 *Id.*

71 *Id.*

72 *Id.*

intellectual disability was constitutional.[73] The U.S. Supreme Court granted certiorari.[74]

III
HOLDING AND RATIONALE OF *HALL*

In a 5-4 ruling, the U.S. Supreme Court held Florida's bright-line rule invalid under the Eighth Amendment's prohibition on cruel and unusual punishment.[75] The Court rejected Florida's rule because it (1) disregards the views of medical professionals;[76] (2) violates each American citizen's inherent right to dignity as a human being;[77] and (3) fails to coincide with other states' interpretations.[78]

A. Florida's Rule Does Not Comply with Medical Professionals' Views

First, Florida's rule, section 921.137(1), does not comply with the views of the medical professionals who design, administer, and analyze the IQ test. Due to the impreciseness of IQ tests, these medical professionals reason that IQ scores should be assessed as a range, not a single, fixed number.[79] The Court cited the American Psychological Association's (APA) amicus brief at length throughout its opinion to illustrate how Florida's rigid IQ threshold "creates an unacceptable risk that persons with intellectual disability will be executed."[80] The APA asserted that IQ scores are subject to variability due to external factors that are separate from the test taker's ability.[81] Accordingly, a capital defendant who takes an IQ test multiple times is susceptible to test practice effects, meaning he is likely to learn to perform the tasks, thus jeopardizing the accuracy of such intelligence tests.[82] In turn, "[t]his

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[73] *Id.* at 707–08.

[74] Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

[75] *Id.* at 2001.

[76] *Id.* at 1995.

[77] *Id.* at 1992–93.

[78] *Id.* at 1998.

[79] *Id.* at 1995.

[80] *Id.* at 1990.

[81] Brief of American Psychological Association et al. as Amici Curiae Supporting Petitioner at 22, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882) [hereinafter APA Brief].

[82] John Matthew Fabian et al., *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 416 (2011).

variation reduces the reliability of the scores produced by the testing instrument because it reduces the confidence a clinician has that the score accurately reflects the test taker's true abilities."[83] For instance, Freddie Hall took the IQ test nine times over the course of forty years, resulting in scores between 60 and 80 points.[84] Consequently, Hall's vast range in test results seems to undermine the IQ test's reliability as a determining factor of intellectual disability.

In order to account for the IQ test's variability in results and compute the test's reliability, which includes its precision, consistency, and repeatability, the clinician calculates the test's standard error of measurement (SEM).[85] The SEM calculates the statistical confidence interval in which the test taker's score falls.[86] According to the American Association on Intellectual and Developmental Disabilities (AAIDD) Manual, an individual severely lacking intellectual functioning abilities is defined by test results that fall within two standard deviations below the mean.[87] However, an IQ test result falling within two standard deviations below the mean is not a rigid cutoff for classifying an individual's cognitive abilities.[88] Thus, "[r]eporting the range within which the person's true score falls, rather than only a score, underlies both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices."[89]

Moreover, the U.S. Supreme Court established that the Florida Supreme Court's narrow interpretation of section 921.137(1) conflicts with accepted medical practice.[90] Florida's inflexible rule "takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence" and relies on the defendant's IQ score, while refusing to recognize that this score is an imprecise measurement.[91]

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83 APA Brief, *supra* note 81, at 22.

84 *Hall*, 134 S. Ct. at 1992.

85 APA Brief, *supra* note 81, at 23.

86 *Id.*

87 *Id.* at 24.

88 *Id.*

89 *Id.*

90 Hall v. Florida, 134 S. Ct. 1986, 1995 (2014).

91 *Id.*

The AAIDD establishes that "[g]enerally, an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning."[92] Also, the AAIDD confirms that while an IQ score is one way to measure intellectual functioning, it is not the only method.[93] By limiting a defendant's ability to present evidence of his alleged intellectual disability based on a strict IQ cutoff, this prevents sentencing courts from considering "substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances."[94] For instance, a defendant who earns an IQ score above 70 may still be properly diagnosed as intellectually disabled if he exhibits significant adaptive functioning limitations.[95] Thus, that defendant's "actual functioning is comparable to that of individuals with a lower IQ score."[96]

B. Florida's Rule Infringes upon Capital Defendants' Eighth Amendment Rights

Second, the Court reasoned that the Florida Supreme Court's interpretation of section 921.137(1) infringes upon an individual's Eighth Amendment rights because it (1) does not serve a legitimate penological purpose[97] and (2) fails to protect the veracity of the trial process.[98] Imposing the death penalty on an intellectually disabled person equates to the harshest punishment and, as a result, violates that individual's inherent dignity as a human being.[99]

"The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."[100] In criminal law, there are three justifications for punishment:

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92 *Definition of Intellectual Disability*, AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/intellectual-disability/definition#.VGfnLJPF-1J (last visited Feb. 5, 2016).

93 *Id.*

94 *Hall*, 134 S. Ct. at 1994.

95 *Id.* at 1994–95.

96 *Id.* at 1995 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 37 (5th ed. 2013)).

97 *Id.* at 1992.

98 *Id.* at 1993.

99 *Id.* at 2001.

100 *Id.* at 1992.

rehabilitation, deterrence, and retribution.[101] While rehabilitation cannot justify the death penalty,[102] sentencing an intellectually disabled person to death serves neither a deterrent nor retributive value either. Deterrence is "the interest in preventing capital crimes by prospective offenders."[103] With respect to intellectually disabled defendants, deterrence does not support the death penalty because intellectually disabled individuals lack the capacity to engage in logical reasoning.[104] Due to the inability to engage in logical reasoning, an intellectually disabled individual is unable to process information and acknowledge that his actions may result in such severe sanctions.[105] Accordingly, an intellectually disabled person is powerless to alter his behavior to avoid such punishment since he is unable to appreciate the likely consequences of his actions.[106]

Furthermore, executing an intellectually disabled defendant does not serve a retributive purpose.[107] Retribution is described as "the interest in seeing that the offender gets his 'just deserts.'"[108] Thus, to determine if imposing the death penalty has retributive value, one must ascertain whether the death penalty is the appropriate punishment for the defendant's past criminal offenses. For that reason, imposing the extreme sanction of the death penalty on an intellectually disabled defendant is not justified by a retributive purpose because an intellectually disabled defendant has a lower moral culpability than the "average murderer."[109]

Additionally, Florida's bright-line rule increases the likelihood that intellectually disabled persons will be executed, which damages the integrity of the trial process.[110] According to *Atkins*, intellectually disabled individuals "face a special risk of wrongful execution" because they are inclined to confess to crimes they did not commit and often fail to give their counsel meaningful assistance.[111] While it is permissible for an intellectually disabled defendant to stand trial and be

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101 Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

102 *Hall*, 134 S. Ct. at 1992–93.

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

104 *Hall*, 134 S. Ct. at 1993 (citing *Atkins*, 536 U.S. at 320).

105 *Id.*

106 *Id.*

107 *Atkins*, 536 U.S. at 319.

108 *Id.*

109 *Hall*, 134 S. Ct. at 1993 (quoting *Atkins*, 536 U.S. at 319).

110 *Id.*

111 *Id.* at 1993 (quoting *Atkins*, 536 U.S. at 320–21).

punished for his criminal actions, the defendant should not be subjected to the most severe sentence: the death penalty.[112]

C. Other States' Interpretations of Evaluating Intellectual Disability of Capital Defendants Conflicts with Florida's Interpretation

Third, in making its decision, the Court considered other states' varied interpretations of how intellectual disability should be evaluated. "A significant majority of States implement the protections of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustment."[113] The sizable amount of states that consider the impreciseness of IQ scores influenced the Court's decision that Florida should also afford defendants a sufficient opportunity to provide proof when bringing intellectual disability claims.[114]

In nineteen states and the District of Columbia, the death penalty has been abolished in full or for new offenses.[115] Additionally, Oregon and Washington have imposed a moratorium on the death penalty.[116] The Court expounds on the idea that "in 41 States an individual in Hall's position—an individual with an IQ score of 71—would not be deemed automatically eligible for the death penalty."[117] Consequently, had Hall committed the offense in one of the states where the death penalty has been abolished or suspended, he would not have been sentenced to death, even if the Court was unable to find that Hall possessed an intellectual disability. The Court rendered the *Hall* decision in consideration of the majority of states' rejection of death penalty sentencing and the increasing recognition of SEM, which furthers the idea that a strict IQ score cutoff is improper.[118]

Through the *Hall* decision, the U.S. Supreme Court concluded that Florida's statutory definition of intellectual disability, which requires satisfaction of an IQ score of 70 or below to present additional evidence

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112 *Id.* (citing *Atkins*, 536 U.S. at 306, 318).

113 *Id.* at 1996.

114 *Id.* at 1996–98.

115 *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Feb. 5, 2016).

116 Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/12/us/washington-governor-jay-inslee-suspends-death-penalty.html?_r=1.

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

118 *Id.* at 1998.

of deficient adaptive behavior, is unconstitutional.[119] This decision furthered *Atkins*' precedent that it is unconstitutional to execute the intellectually disabled, emphasized the mental health profession's perspective, and considered the statute's social and moral consequences.

IV
IMPLICATIONS OF *HALL*

The implications of the *Hall* decision could potentially impact state legislatures' development and interpretation of intellectual disability definitions, as well as courts' caseloads of intellectual disability defense claims to death penalty sentencing. Further, *Hall* could have immediate consequences for inmates currently on death row.

A. States Remain Tasked with Defining the Scope of Intellectual Disability Definition

The U.S. Supreme Court rejected Florida's bright-line IQ score cutoff, a cutoff that essentially created a blanket restriction on capital defendants' ability to present further evidence of intellectual disability.[120] Furthermore, *Hall* created a precedent that standard of error measurements should be taken into account when assessing mental capability to account for IQ testing imprecisions.[121] Now, states retain the task of defining the scope of intellectual disability while ensuring compliance with both *Hall* and the constitutional restriction on imposing death penalty sentences on intellectually disabled persons.[122] In doing so, states must avoid implementing IQ score cutoffs that set a blanket restriction on adaptive functioning evidence while also taking into account the impreciseness inherent in IQ testing.

However, the Court's decision does not provide a clear direction for states as they alter or reformulate their statutes defining intellectual disability. This lack of clarity is likely to result in confusion. For example, the Court's ruling did not eliminate the possibility that states can still use IQ scores as part of the analysis of a defendant's intellectual functioning. Additionally, the Court does not explicitly

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119 *Id.* at 2001.

120 *Id.*

121 *Id.* at 2000.

122 *Id.* at 2001.

confirm whether a state is permitted to set a fixed score, such as 75 or above, and use this score as a measure of intellectual ability.

Instead, the Court only narrowly stresses that the use of IQ scores must account for the "inherent imprecision" of such scores.[123] Although the Court does not clearly specify how the states should account for such imprecisions, it is likely that states will begin to implement other clinical tests or assessments to evaluate a defendant's intellectual disability. For instance, in response to America's drug crisis, the first drug court was established in Miami-Dade County, Florida, in 1989, which "combin[ed] drug treatment with the structure and authority of the judge."[124] Due to the effectiveness of drug courts on lasting lifestyle and behavioral changes,[125] other problem-solving courts have been developed based on the drug court model.[126] While mental health court is not an institution currently flourishing in the criminal justice system, the National Association of Drug Court Professionals perceives that it is a promising program.[127] The mental health courts that currently exist are voluntary programs that "divert select defendants with mental illnesses into judicially supervised, community-based treatment."[128] Thus, it is possible that states will begin to implement more widespread use of mental health courts in order to create a more balanced approach to remedying the medical and legal difficulties of sentencing intellectually disabled defendants.

Furthermore, states will most likely continue to rely on the expertise of mental health professionals to conform their intellectual disability standards to the current norms of mental health studies. This continued reliance on mental health professionals is evidenced by courts' usage of experts in criminal cases.[129] For instance, in *Ake v. Oklahoma*, the Court held that an indigent criminal defendant has a right to a state-provided psychiatric evaluation and the assistance necessary to

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123 *Id.* at 2001.

124 *History: Justice Professionals Pursue a Vision*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history (last visited Feb. 5, 2016).

125 *Id.*

126 *Problem Solving Courts: Addressing a Spectrum of Issues. . .* , NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org/learn/what-are-drug-courts/models/problem-solving-courts (last visited Feb. 5, 2016).

127 *Id.*

128 *Id.*

129 W. Neil Gowensmith et al., *Forensic Mental Health Evaluations: Reliability, Validity, Quality, and Other Minor Details*, THE JURY EXPERT: THE ART & SCI. OF LITIG. ADVOC., Jan./Feb. 2013, at 1, http://www.thejuryexpert.com/2013/01/forensic-mental-health-evaluations-reliability-validity-quality-and-other-minor-details/.

establish an effective defense based on his mental condition.[130] The Court noted that in cases where a defendant's mental health is "seriously in question[,] . . . a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success."[131] As a result of the *Ake* decision, the Court established a mental health expert's potential role in providing a defendant with "[m]eaningful access to justice."[132] Furthermore, the American Bar Association (ABA) also recognizes the role of mental health experts in the criminal process.[133] The ABA acknowledges that mental health experts serve the administration of criminal justice by providing expert opinions and testimony relating to their scientific, evaluative, consultative, treatment, and habilitation roles.[134] More specifically, the ABA standards also provide that the judicial, legal, and mental health agencies and organizations "have an obligation to work cooperatively to monitor the interdependent performance within the criminal process of their members and constituents and to improve the overall quality of the administration of justice in criminal cases involving mental health and mental retardation issues."[135] Accordingly, the prominence and usefulness of mental health experts in criminal proceedings substantiates the idea that such experts will help state legislatures scrutinize procedures and determine the most viable intellectual disability definition. Thus, despite legal professionals' limited understanding of mental health, experts' unique knowledge of the complexities of psychology will ensure that intellectually disabled persons will be better served by the criminal justice system.

B. The Confusion and Slippery Slope of the Hall *Decision*

The *Hall* case may lead to a slippery slope of increased litigation and disagreement regarding intellectual disability–assessment standards. The dissent indicates that the Court was essentially "adopt[ing] a uniform national rule that is both conceptually unsound and likely to

130 Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985).

131 *Id.*

132 *Id.* at 77.

133 *See Mental Health, Mental Retardation, and Criminal Justice: General Professional Obligations*, A.B.A., http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited Feb. 5, 2016).

134 *Id.* at Standard 7-1.1.

135 *Id.* at Standard 7-1.2.

result in confusion."[136] Additionally, the dissent opines that the Court departs from Eighth Amendment case law, which focuses on objective factors to diagnose intellectual disability.[137] As a result, the dissent disapproves of the Court's reliance on the views of professional associations since the validity of their findings regarding intellectual disability are constantly changing.[138]

Thus, the slippery-slope effect of the *Hall* decision directs our attention and fears about the instant case to future problematic cases.[139] The ambiguous holding may lead to a slippery slope, where defendants whose IQ scores are 76 or higher will attempt to bring claims that their test score should not be conclusive evidence of intellectual functioning. Furthermore, increased litigation may be spurred by capital defendants' recognition that the judiciary may not be a suitable entity for determining which professional organization's views the courts should defer to. If a rigid cutoff is not implemented, it is probable that the floodgates for intellectual-disability claims will open and capital defendants will demand more comprehensive mental health evaluations. In effect, this will force state legislatures to continually return to the drawing board to create a new intellectual disability standard.

C. Hall*'s Impact on Current Death Row Inmates*

The *Hall* decision has practical implications as well. Eliminating the bright-line IQ threshold may clear the pathway for death penalty inmates to pursue their intellectual disability claims. For example, in two current Virginia cases, two defendants who previously raised intellectual disability claims on their road to death row are asserting that the *Hall* decision aids their claims.[140] Yet, a judge from Georgia's Towaliga Judicial Circuit recently ruled that death row inmate Warren Lee Hill failed to meet the state's requirement to prove intellectual disability beyond a reasonable doubt as to bar execution.[141] Based on

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136 Hall v. Florida, 134 S. Ct. 1986, 2002 (2014) (Alito, J., dissenting).

137 *Id.*

138 *Id.* at 2006.

139 *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 369 (1985).

140 Robert Barnes & Matt Zapotosky, *Supreme Court Strikes Down Florida Law on Intellectually Disabled Death Row Inmates*, WASH. POST (May 27, 2014), http://www.washingtonpost.com/politics/supreme-court-strikes-florida-law-on-intellectually-disabled-death-row-inmates/2014/05/27/45cda4f4-e5ab-11e3-8f90-73e071f3d637_story.html.

141 Bradley McAllister, *Georgia Judge Denies Death Row Inmate's Challenge to State Intellectual Disability Standard*, JURIST (Oct. 2, 2014), http://jurist.org/paperchase/2014/10/judge-denies-inmates-challenge-to-intellectual-disability-burden-of-proof.php.

Hall, which focuses on the impreciseness of psychiatric diagnoses, Georgia's high standard for proving intellectual disability could potentially be deemed an impossible standard to meet, and reduced accordingly.

However, the actual number of inmates eligible to qualify for new hearings is unclear. While one article asserts that "[a]n estimated 10 to 20 inmates could be eligible,"[142] another article published by the same newspaper claimed that "[t]he ruling affects roughly 30 death row inmates."[143] Despite the lack of clarity over the actual number of inmates eligible for new hearings, death row inmates from states that fail to go beyond using a single IQ test result to determine intellectual disability may be able to seek reconsideration of their sentences.[144] Thus, the ruling in *Hall* may allow certain capital defendants to pursue their intellectual disability claims in order to avoid death penalty sentencing.

V
SUGGESTIONS FOR THE FUTURE

The *Hall* decision has carved increased access for defendants to raise intellectual disability claims and has forced states to reconsider their interpretation of intellectual disability statutes regarding IQ scores. The following suggestions outline methods that states can use to resolve evidentiary problems of identifying defendants who are intellectually disabled, which include considering intellectual functioning factors, implementing revised diagnosis methods, and establishing a panel composed of mental health professionals to provide an impartial and thorough evaluation of capital defendants. Each of the suggestions involve melding the most current findings in mental health science with the criminal justice system since "[m]any *Atkins* cases [which involve capital defendants claiming intellectual disability as a defense to the death penalty] turn on unscientific expert opinion, stereotype, and mischaracterization of the disability."[145]

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142 Lizette Alvarez & John Schwartz, *I.Q. Cutoff Ruling May Spare Some Inmates on Death Row*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/us/supreme-court-strikes-down-floridas-strict-iq-cutoff-for-executions.html?_r=0.

143 Lizette Alvarez & John Schwartz, *On Death Row With Low I.Q., and New Hope for a Reprieve*, N.Y. TIMES (May 30, 2014), http://www.nytimes.com/2014/05/31/us/on-death-row-with-low-iq-and-new-hope-for-a-reprieve.html.

144 *Id.*

145 Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in* Atkins *Proceedings*, CHAMPION, Jan./Feb. 2014, at 44.

A. Briseno *Factors to Guide Courts in Assessing Adaptive Functioning of Capital Defendants*

Texas courts have used seven nonscientific factors, termed *Briseno* factors, to guide sentencing courts as to the types of evidence that a court may consider when assessing adaptive functioning.[146] The *Briseno* factors are a unique approach because Texas is the sole state that insists on considering additional factors, some unrelated to the original crime, to test for intellectual functioning.[147] Accordingly, the *Briseno* factors permit the execution of a defendant if "the court determines the criminal offense required forethought, planning and complex execution."[148] The *Briseno* factors were developed based on the AAIDD's clinical standards and are as follows:

> • Did those who knew the [defendant] best during the developmental stage . . . think he was mentally retarded at the time, and, if so, act in accordance with that determination?
>
> • Has the [defendant] formulated plans and carried them through or is his conduct impulsive?
>
> • Does [defendant's] conduct show leadership or does it show that he is led around by others?
>
> • Is [defendant's] conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> • Does [defendant] respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
>
> • Can [defendant] hide facts or lie effectively in his own or others' interests?
>
> • Putting aside any heinousness or gruesomeness surrounding the capital offence, did the commission of that offense require forethought, planning, and complex execution of purpose?[149]

Although the *Hall* Court evaluated the first prong of the intellectual disability definition—intellectual functioning, as opposed to adaptive functioning, as assessed under the *Briseno* factors—a similar approach could be taken to examine intellectual functioning. Because intellectual

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146 *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

147 *Intellectual Disabilities: Texas Stands Alone in Its Unusual Test of Mental Retardation and Exemption from Execution*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/intellectual-disabilities-texas-stands-alone-its-unusual-test-mental-retardation-and-exemption-execu (last visited Feb. 5, 2016).

148 *Id.*

149 *Briseno*, 135 S.W.3d at 8–9.

functioning refers to general mental capacity, such as learning, reasoning, and problem solving, a set of factors could also be developed to personalize and further develop the meaning of IQ test results. Unlike a standardized IQ test, administered to evaluate an individual's intellectual functioning and resulting in a test score composed of a single number as a means to gauge one's intellect, the *Briseno* factors merely act as a guideline to evaluate adaptive functioning.

If Texas implemented Florida's rigid IQ requirement to evaluate a capital defendant's intellectual functioning, that requirement could potentially bar his adaptive functioning from being assessed under the *Briseno* factors. To avoid this blanket restriction on proving adaptive functioning, states could broaden the analysis of the intellectual functioning prong. For instance, to supplement his IQ results, the defendant could be questioned to determine how his intellectual functioning relates to the original crime committed. By assessing the defendant's intellectual functioning based on *Briseno*-style factors, this would allow the court to have a better understanding of the defendant's ability to reason, plan, and communicate in the commission of the crime. Ultimately, this could provide the court with a more balanced evaluation.

Alternatively, the intellectual and adaptive functioning prongs could be merged. Instead of viewing the prongs as separate, and the fulfillment of the intellectual functioning prong as a requirement to analyze adaptive functioning, both intellectual and adaptive functioning could be evaluated together. For example, a court could consider the defendant's IQ range for intellectual functioning and balance the defendant's IQ range with his adaptive functioning, gauged under the *Briseno* factors. Thus, a defendant that exhibits a higher IQ, but severely lacks adaptive functioning skills under the *Briseno* factors, could still be considered intellectually disabled. Similarly, a defendant that has a low IQ, yet has sufficient adaptive functioning to make him culpable of the criminal offense committed, could be considered mentally fit to be sentenced to death. Consequently, this approach would allow the court to utilize a test that balances intellectual and adaptive functioning in determining a defendant's intellectual disability. Furthermore, merging the prongs is also fair to the defendant because sufficient intellectual functioning based on an IQ score will not pose as a blanket restriction to assessing the adaptive functioning prong.

B. Developing the Three Branches of Learning to Attain a More Accurate Gauge of Intellectual-Disability Diagnosis

The most commonly administered IQ test is the Wechsler Adult Intelligence Scale (WAIS) test,[150] which measures verbal comprehension, perceptual reasoning, working memory, and processing speed.[151] While the WAIS test is expansive and tests both verbal and spatial functioning, the test does not evaluate the three types of learning that intellectually disabled persons are troubled by: academic, experiential, and social learning.[152]

First, academic learning includes useful skills and knowledge obtained through formal education, including reading, writing, and math.[153] Second, experiential learning occurs though cause and effect, where an individual learns to avoid a painful experience or to be intrigued by a rewarding experience.[154] Third, social learning is developed through an individual's observation of other people interacting in social situations, which may include social customs such as greeting someone by shaking his hand.[155] Beyond learning problems, intellectually disabled individuals also experience limited emotional functioning. Thus, an intellectually disabled person often exhibits a "child-like innocence, trust, wonder, and sincerity," and this emotional immaturity makes them more "vulnerable to victimization and cruelty."[156]

Factors relating to the three branches of learning could thus be developed to more effectively evaluate the defendant and determine the extent of his intellectual disability. And while academic learning can be sufficiently evaluated by a standardized test, experiential and social learning cannot. Indeed, although the WAIS test includes picture completion and arrangement, block design, digit symbol, and object

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150 John M. Grohol, *IQ Test*, PSYCHCENTRAL, http://psychcentral.com/encyclopedia/2010/what-is-an-iq-test/ (last visited Feb. 5, 2016).

151 Maheen Chaudhry & Rebecca Ready, *Differential Effects of Test Anxiety & Stress on the WAIS-IV*, 24 J. YOUNG INVESTIGATORS 60, 60 (2012), http://www.jyi.org/wp-content/uploads/Differential-Effects-of-Test-Anxiety-Stress-on-the-WAIS-IV.pdf.

152 Tammy Reynolds et al., *Intellectual Functioning (Mental Abilities)*, CMTY. COUNSELING SERVS., INC., http://www.communitycounselingservices.org/poc/view_doc.php?type=doc&id=10326&cn=208 (last visited Feb. 5, 2016).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

assembly,[157] this performance scale is too narrow to assess an individual's propensity to learn social customs and to avoid or pursue painful or rewarding experiences, respectively. Unlike academic learning, social and experiential learning are unique to each individual and cannot be accurately measured by the WAIS test. Hence, it is recommended that simulations be developed where the administrator can assess the test taker's actual reaction to social situations involving other people. Additionally, when state legislatures are developing revised definitions of intellectual disability and evaluation methods, they should consider the defendant's experiential- and social-learning capacity.

Because intellectual disability diagnosis focuses on the interaction between the person and his environment, it is necessary "to examine an individual's intellectual disability as it manifests within the particular context of interest and with respect to the functional demands of that person's social environment."[158] Merely focusing on the sufficiency of a defendant's academic skills, which include knowledge, vocabulary, and mathematics, does not justify treating intellectually disabled persons differently during capital punishment sentencing.[159] Thus, creating a more extensive test that emphasizes actual social interactions, rather than relying on IQ tests and subjective question-based evaluations, could provide both states and courts with a more thorough understanding of intellectual disability.

C. Developing a More Comprehensive Test Based on the Diagnostic and Statistical Manual of Mental Disorders *and Diagnostic Adaptive Behavior Scale*

Furthermore, courts may reference the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), which has a revised diagnosis of intellectual disability.[160] Unlike older editions, the DSM-5 focuses on evaluating conditions that address the impact of an intellectual disability on a person's functioning and includes critical improvements to encourage a more comprehensive patient

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157 JEROME M. SATTLER & JOSEPH J. RYAN, ASSESSMENT WITH THE WAIS-IV 56 (Sally Lifland & Quica Ostrander eds., 2009).

158 Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203, 1211 (2008).

159 *Id.* at 1212.

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

assessment.[161] Moreover, courts may also be interested in the AAIDD's new Diagnostic Adaptive Behavior Scale (DABS). This assessment was developed to diagnose intellectual disability and determine eligibility for "[s]pecific treatment within the criminal justice system."[162] DABS will provide a comprehensive, standardized evaluation of an individual's adaptive behavior.[163] Three domains are evaluated to assess an individual's intelligence, which include conceptual, social, and practical.[164] To analyze the individual's three domains, both clinical assessment and standardized testing of intelligence are emphasized. Additionally, "[t]he DABS focuses on the critical 'cut-off area' for the purpose of ruling in or ruling out a diagnosis of intellectual disability or related developmental disability."[165]

While the "cut-off area" may seem rigid, like Florida's intellectual disability statute, the DABS is a standard developed by the AAIDD with the intent of being used by mental health professionals, which include "school psychologists, forensic psychologists, clinical psychologists, psychometricians, social workers, occupational therapists, and pediatricians, as well as officials in disability-related government agencies."[166] Lastly, unlike the Florida statute deemed unconstitutional in *Hall*, DSM-5 and DABS emphasizes that the severity of impairment is based on adaptive functioning, rather than intellectual functioning alone.

D. Implementing a Mental Health and Medical Professional Panel to Provide the Courts with Explanations Regarding Intellectual Disability and Recommendations Pertaining to Diagnosis

Based on *Hall*, it appears that the Court has and will continue to take a positive view of psychiatric and mental health professionals, most notably the American Psychiatric Association. In regard to the views of medical experts, Justice Kennedy asserts that "[t]hese views do not

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161 *Id.*

162 *FAQ on AAIDD's New Diagnostic Adaptive Behavior Scale*, AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES, https://aaidd.org/intellectual-disability/diagnostic-adaptive-behavior-scale/faqs#.VsFP75MrJol (last visited Feb. 14, 2016).

163 *Diagnostic Adaptive Behavior Scale*, AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/diagnostic-adaptive-behavior-scale#.VkBF4K6rSuV (last visited Feb. 5, 2016).

164 *Id.*

165 *Id.*

166 *Id.*

dictate the Court's decision, yet the Court does not disregard these informed assessments."[167] Despite the Court's claim that its judgment was not determined by medical experts, the Court concedes that "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework," and that "the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession."[168] Accordingly, the Court cites the APA's amicus brief at length[169] and considers the medical community's perspective in rendering its decision. Consequently, to evaluate whether an individual is intellectually disabled, it would be advantageous to create a panel composed of medical and mental health professionals to analyze capital defendants' intellectual disability claims.

In 1876, the American Association on Mental Retardation (AAMR) was founded in an effort "to promote the systematic study and classification of mental retardation and advocacy for those affected."[170] Currently, the AAMR continues to be "the most influential professional organization in the field,"[171] and its contributions to scholarly and clinical findings are unprecedented. The APA has also proved influential in the field of intellectual disability studies and "reflect[s] the psychiatric profession's consensus on the diagnostic features of mental retardation."[172] Because an intellectual disability diagnosis is expansive and is characterized by significant limitations in both intellectual functioning and adaptive behavior,[173] gathering input from a range of professionals from the various subsets of psychology is beneficial to develop a thorough and informed analysis. Hence, the panel could be composed of an array of mental health professionals belonging to the aforementioned associations.

Mental health professionals will be able to provide valuable insight that is not provided by a standardized IQ test. The AAIDD emphasizes that additional factors must be accounted for when assessing

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167 Hall v. Florida, 134 S. Ct. 1986, 2000 (2014).

168 *Id.*

169 *Id. passim*.

170 93 AM. JUR. TRIALS 1, *supra* note 12, at § 6.

171 *Id.*

172 *Id.*

173 AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES, *supra* note 92.

intellectual disability, which include "community environment typical of the individual's peers and culture," as well as "linguistic diversity and cultural differences in the way people communicate, move, and behave."[174] By having a panel consisting of mental health experts specializing in various subsets of psychology, this will provide courts with a more individualized evaluation of each defendant. Further, implementing a panel to help determine a defendant's mental capacity will help to maintain a more impartial assessment, as opposed to an expert witness called by a single party. Although courts are responsible for sentencing and are the ultimate decision makers in determining whether a defendant is considered intellectually disabled, a panel would be beneficial since medical and mental health professionals reflect the society's best understanding of the fields that they represent.

Writing for the dissent in *Hall*, Justice Alito strongly criticized the majority's reliance on current medical theories.[175] Justice Alito asserted that the "views of professional associations often change" and force courts "to judge the validity of each new change."[176] In spite of the dissent's criticism of the volatility of relying on medical experts, the presence of mental health experts in courtrooms for criminal proceedings is frequent. For example, assistance by mental health experts is authorized by the statutes or case precedent in most states; regularly considered by criminal courts in case adjudication; and often acquired by defense attorneys, prosecutors, and defendants claiming intellectual disability.[177]

State statutory provisions for mental health expert assistance to criminal defendants seem to have, expressly or implicitly, two objectives: (1) to provide a broad plan of criminal defenses by providing mental health expertise to defendants financially unable to obtain such services; and (2) to give assistance to trial courts in adjudication and disposition of cases in which questions of mental aberration arise.[178]

While mental health expert assistance may be either defense-related, court-related, or both, implementing a panel of mental health and medical professionals would likely serve both of these purposes. A

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174 *Id.*

175 Hall v. Florida, 134 S. Ct. 1986, 2006 (2014) (Alito, J., dissenting).

176 *Id.*

177 Pamela Casey & Ingo Keilitz, *An Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management*, 34 N.Y.L. SCH. L. REV. 19, 22 (1989).

178 *Id.* at 25.

panel will not only guarantee capital defendants access to competent mental health professionals, but will also guide courts in rendering decisions regarding intellectual disability claims.

Furthermore, Justice Alito's apprehension of relying on mental health professionals due to the risk of potential changes in professional views does not outweigh the consequences of not considering these viewpoints. Despite Justice Alito's fear of unpredictable changes in the mental health community regarding intellectual disability diagnosis, considering a panel's findings would allow the courts to make decisions pertaining to capital defendants that align with the most up-to-date diagnostic methods.

To avoid confusion over appointing members to the panel, the legislature could develop requisite qualifications for the experts. These qualifications would ensure that the expert is competent—meaning that he has certain educational credentials and experience—and is independent—meaning that he is not an advocate for the prosecution any more than he is for the defense.[179] Furthermore, by creating a panel whose members are subject to a specific term and hail from various respected professional associations, this will make certain that the members' opinions reflect the most recent and reliable mental health standards.

While states still maintain the freedom to create and enforce their own definitions of intellectual disability, this freedom continues to be diminished by decisions such as *Hall*. In an effort to comply with the *Hall* decision, state legislatures must develop fair definitions and procedures for determining whether defendants are eligible to be recognized as intellectually disabled in the criminal justice system. To avoid the same fate as the rigid Florida rule, states do not have to completely abandon standardized IQ tests, but states should supplement these tests to remedy their intrinsic impreciseness and to account for additional environmental factors. By melding the criminal justice system's inclination to enforce inflexible standards with the mental health professional community's continuously developing guidelines, this will afford defendants a greater degree of personalized evaluation.

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[179] *See generally id.* at 48–49.

CONCLUSION

In John Steinbeck's classic novel *Of Mice and Men*, Steinbeck emphasizes how, despite the physical strength of a man, Lennie, he remained powerless due to his intellectual circumstances.[180] After Lennie accidentally kills a puppy and a woman, Steinbeck illustrates, "Lennie went back and looked at the dead girl. The puppy lay close to her. Lennie picked it up. 'I'll throw him away,' he said. 'It's bad enough like it is.'"[181] While Lennie knows that he has done a bad thing, his innocence, stemming from his intellectual disability, prevents him from understanding the severity of the woman's death compared to that of the puppy. Steinbeck's 1937 fictional novel draws upon the focal point of the 2014 *Hall* opinion. Intellectual disability is variable and often factors into an individual's propensity to engage in criminal activity. It is therefore difficult to diagnose intellectual disability and determine the effect of reduced mental capacity on a defendant's culpability.

The *Hall* case seeks to remedy the inadequate understanding of the effect of intellectual disability on criminal behavior. This case not only attempts to strike a balance between the intellectually disabled community and the criminal justice system, but also solidifies the importance of mental health professionals in intellectual-disability determinations. *Hall*, however, unclearly dictates how state legislatures should proceed to modify their intellectual-disability statutes, besides ruling that a 70-point threshold is too rigid and thus unconstitutional. While state legislatures will likely have to create a new standard for determining whether a defendant is intellectually disabled on a trial and error basis, it is apparent that the intellectually disabled community will be provided with more individualized mental health evaluations. This change may remedy the disadvantages in the criminal justice system that these individuals have faced in the past.

Justice Kennedy wrote, "Intellectual disability is a condition, not a number."[182] Because the once coveted standardized IQ test is slowly becoming merely a factor and not determinative of mental capacity, it is time to align the criminal justice system with interests of the mental health profession. Some may be fearful of the often-changing findings in mental health science and the resulting volatile effect on states' intellectual disability definitions. These changes, however, must be

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180 JOHN STEINBECK, OF MICE AND MEN 92 (Penguin Books 1993) (1937).

181 *Id.*

182 Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

accounted for in trying and sentencing intellectually disabled defendants to avoid cruel and unusual punishments. Thus, the state legislatures should model their definitions of intellectual disability on current mental health findings because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue"[183] and to provide a more complete and impartial mental health assessment of capital defendants.

[183] *Id.* at 1993.