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Intellectual Disability: The Death Penalty and Atkins v. Virginia: Not the Solution, but the Beginning of the Solution… and the Beat Goes on! (Part II)

By Anthony P. Wartnik

As indicated in Part I (Forensic Scholars Today, 2018, Volume 4, Issue 3), the U.S. Supreme Court barred the execution of individuals who have an intellectual disability (formerly referred to as mentally retarded). The Court left it to the states to define what that means and the procedures for enforcing its decision (Atkins v. Virginia, 536 U.S. 304, 2002). This created more problems than solutions regarding enforcement of the court ordered prohibition.

ATKINS V. VIRGINIA: MORE PROBLEMS THAN SOLUTIONS

Several problems must be resolved in defining intellectual disabilities, and state statutes reflect some variation on them (Bonnie, 2004). The first question was whether it, in the context used by the court, should be defined in terms of a clinical diagnosis or of diminished capacity to engage in mental tasks thought to be especially relevant to the assessment of criminal responsibility (Bonnie, 2004). Almost every state statute established following the Atkins ruling took the diagnostic approach rather than the diminished capacity approach, but the APA Council on Psychiatry and the Law (the Council) believed that a diminished-capacity approach was inconsistent with the Supreme Court's reasoning in Atkins.

The Court's opinion repeatedly described its holding as barring execution of "mentally retarded offenders." The excluded category is defined diagnostically (not in terms of diminished capacity) in 17 of the 18 state statutes and the federal statute to which the Court refers in concluding that a national consensus has emerged against execution of the mentally retarded (Bonnie, 2004). In a particularly pertinent passage, Justice Stevens noted that "(t)o the extent that there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are, in fact, retarded" (Ref. 1, p. 317), not whether defendants who are should be executed. In short, if a state were to define the excluded category in a way that allowed a person with an undisputed diagnosis of intellectually challenged to be sentenced to death and executed, the Eighth Amendment would forbid the execution, and the statute would be unconstitutional as applied to that case (Bonnie, 2004).

The second question, assuming a diagnostic approach is taken, revolved around the fact that there are two main sources of definitional guidance: the manual of the American Association of Mental Retardation (AAMR) and the APA's Diagnostic and Statistical Manual. Although these two manuals use somewhat different language, they are conceptually equivalent. Each defines

mental retardation as causing significant limitations in intellectual functioning and in adaptive behavior and as having developmental onset before the age of 18 years. The Council proposed alternatives, using the operative language of each of these two definitions (Bonnie, 2004).

The Council's proposal, based on its conclusion that the Atkins holding called for the clinical diagnostic approach rather than the diminished capacity approach, created a key difficulty for those involved in legislative drafting. This created the third question, the issue becoming one of whether "significant limitation in intellectual functioning" should be defined in terms of performance on so-called "IQ" tests and, if so, whether the definition should include specific reference to a cutoff score, as some state laws do. In the Council's view, incorporation of a specific cutoff score was inappropriate not only because different tests have different scoring norms, but also because designating a specific score ignores the standard error of measurement and attributes greater precision to these measures than they can support. Thus, the Council defined a "significant limitation in intellectual functioning" as performance at least two standard deviations below the mean on an approved test rather than a specific cutoff score (Bonnie, 2004).

The result was the publication of the DSM-IV diagnostic criteria, which defined significantly subaverage intellectual functioning as "an IQ of approximately 70 or below on an individually administered IQ test" (Ref. 6, p. 46; emphasis added). The accompanying text makes it clear that the score of 70 meant to be an approximation of a score two standard deviations below the mean, taking into account the standard error of measurement, for the particular instrument being used (Bonnie, 2004).

The next question, and the greatest challenge, was how to define a "significant limitation in adaptive behavior" because the DSM-IV and the AAMR definitions used different language to operationalize the concept of adaptive functioning in terms of specific adaptive tasks (Bonnie, 2004).

The final dilemma that arose from the diagnostic approach endorsed in Atkins was the Council's inclusion of developmental origin in its definition of mental retardation, the "cutoff" at age 18. This likely resulted from the fact that the Supreme Court's decision to bar death sentences for persons with mental retardation was grounded in presumed deficits in moral reasoning arising from disordered development. Of course, one should keep in mind the fact that none of the statutes on which the Supreme Court had relied in Atkins included conditions acquired during adulthood and such cases did not often arise (Bonnie, 2004). However, in many states, an accused who suffers a brain injury as an adult that causes adaptive or cognitive impairment can claim the defense of diminished capacity. Nevertheless, as noted in Part I, one state established a cutoff at 22 years of age, four states do not include an age cutoff in their definitions, four other states appear to be open-ended as to this element.

The problems or issues described above presented significant challenges for state legislatures tasked with the responsibility to establish definitions for intellectual disability and the legal systems and methodology for the enforcement of the Supreme Court's order.

. . . AND THE BEAT GOES ON!

The earliest recorded execution of a juvenile was the 1642 hanging of Thomas Granger in Plymouth Colony. He was sentenced to death for the crime of bestiality, having engaged in sexual encounters with a variety of farm animals when he was 16 years of age (Scott, 2005).

In 1988, the Supreme Court held that it was cruel and unusual punishment to execute a child under the age of 16 for murder in Thompson v. Oklahoma (1988). Resolution of this question would turn on the Court's assessment or analysis of "the evolving standards of decency that mark the progress of a maturing society," the concept first established by the Supreme Court in the case of Trop v. Dulles (1958). In essence, whether or not a punishment is considered cruel and unusual is partly related to the acceptance of the punishment by our society as one that is just and appropriate (Scott, 2005).

A plurality of the Court reasoned that no state with a juvenile death penalty statute outlining a minimum age for execution had set that age at less than 16 years. In addition, the Court commented that the American Bar Association and the American Law Institute, respected professional organizations, and civilized nations that share our Anglo-American heritage had expressed the view that executing juveniles less than 16 years old at the time of their crimes offended civilized standards of decency. The Court also noted that juries rarely imposed the death penalty on offenders less than 16 years old. Up to this time, the punishment of juveniles by execution was a longstanding practice in our nation's history. Of note is the fact that Justice O'Connor voted with the majority. She based her opinion not on evolving standards of decency that mark the progress of a maturing society. She did so because the relevant Oklahoma statute did not expressly state a minimum age for capital punishment, thereby making it theoretically possible for youth of any age to be executed.

The Supreme Court ruling in Atkins was handed down in 2002, but it wasn't until 2014 that the Supreme Court decided to revisit its decision and to address the problems the various state interpretations of it created. Still, in the intervening years between the rendering of the Atkins decision and the Supreme Court's revisiting of it, the court did hand down decisions that addressed the Eighth Amendment's cruel and unusual punishment issues and the Sixth Amendment's right to trial by jury. These decisions, perhaps, provide some insight as to how the Court would later resolve the debate over how to assess intellectual disability in death penalty cases.

The question of whether the same analysis applies equally to someone committing a capital offense between the ages of 16 and 18, as the Court had applied to those under the age of 16 years, was not addressed until two years after the Atkins decision in the case of Roper v. Simmons (2005). The issue in Roper, whether execution of an individual under the age of 18 years, a juvenile at the time of commission of a capital crime, constitutes cruel and unusual punishment had been at the forefront for 25 years. If so, then it was in violation of the Eighth Amendment and its Fourteenth Amendment application to the states (Scott, 2005).

Sixteen-year-old Christopher Simmons told friends he wanted to break into a home, rob, tie up, and throw the occupant from a bridge. Later, he committed a burglary and robbery, tied the actual victim up with duct tape, binding her hands and covering her eyes with it. At the bridge, he tied her hands and feet with electrical wire, wrapped her entire face with the duct tape and, while she was still alive, threw her off the bridge trestle and into the river below because "I recognized her from a car accident and feared she had recognized me, as well." His counsel asked the jury to consider Simmons' age as a mitigating factor, noting that juveniles were not legally allowed to drink, serve on a jury, or see certain movies because they were not considered old enough to assume these responsibilities.

In the year following his conviction and sentence to death, the U.S. Supreme Court rendered its decision in Atkins. On his appeal, Simmons argued that the Supreme Court's reasoning in Atkins for prohibiting imposition of the death penalty on those with intellectual disabilities should also be applied to juveniles. The Missouri Supreme Court agreed. On certiorari, the Court granted the State's petition. The Supreme Court, in a 5-4 decision, subsequently affirmed the Missouri Supreme Court's decision based on the evolving standards of a maturing society and its conclusion that execution of juveniles offended civilized standards of decency. The Court was concerned that juries were susceptible to being inappropriately influenced by the severity of the crime to ignore the perpetrator's immaturity and thus vote for the death penalty. The Court issued a "bright line" decision, barring the execution of all juveniles regardless of the actual level of maturity.

The majority in Roper emphasized that 30 states prohibited the execution of juveniles and the practice was infrequent in those states that did not prohibit it. The majority cited it's reasoning in Atkins regarding the reservation of the death penalty for offenders who had committed a serious crime and whose extreme culpability warranted execution in support of its tradition that imposition of the death penalty should be morally proportional to the culpability of the offender. The Court likened the deficits suffered by individuals with intellectual disabilities to those of juveniles in comparison to the assumed maturity of adults without mental challenges regarding blameworthiness and accountability. It also noted the high risk that a jury, faced with the facts of a particularly brutal crime, would be unable to consider fairly any mitigating arguments regarding the juvenile's immaturity and vulnerability. The Court also commented that, due to diminished culpability caused by juvenile immaturity, two social purposes served by the death penalty, retribution and deterrence, had less application to juveniles when compared to adults. Finally, to support its assertion that it was difficult to determine if a youth's antisocial behavior was due to the transient immaturity of youth versus a permanently corrupt character, the majority noted the difficulty experienced by expert psychologists in distinguishing between those two groups and the diagnostic exclusion of antisocial personality disorder in those under age 18, as defined by the DSM.

Justice O'Connor, who had voted with the majority in Thompson to bar execution of youth under the age of 16 due to the lack of a minimum age in the relevant Oklahoma statute, dissented in

Roper because she believed that the "bright line" drawn by the majority inappropriately protected those 16- and 17-year-olds who were mature beyond their chronological age.

BLAKELY V. WASHINGTON AND THE SIXTH AMENDMENT

Just short of one year before the Roper decision, the U.S. Supreme Court rendered an opinion on a Sixth Amendment controversy in a non-capital punishment case, Blakely v. Washington (2004). This case did not involve intellectual disabilities, and it did not relate otherwise to the issues in Atkins or Roper. It's relevance to our discussion is the fact that it was ignored almost nine years later in a death penalty case involving a similar issue and demonstrates the tortuous route that the Court was taking in resolving important Sixth and Eighth Amendment issues.

Blakely involved a defendant's sentencing under the State of Washington's statutory Standard Sentencing Range system. The sentencing range is based on the defendant's prior criminal history and the seriousness of the crime for which the sentence is to be imposed. The trial judge is required to impose a sentence within the standard sentencing range unless there is a substantial and compelling reason to do otherwise based on the presence of either mitigating or aggravating factors or circumstances that outweigh the other. Blakely was charged with first-degree kidnapping of a minor but pleaded guilty to the reduced charge of second-degree kidnapping involving domestic violence and the use of a firearm. This was done in order to avoid sex offender registration upon release from prison that was mandated for the kidnapping of minors. The trial judge, finding that the defendant acted with "deliberate cruelty" in the commission of the crime, imposed an exceptional sentence that exceeded the standard range called for in the case.

The Supreme Court ruled in Blakely that the exceptional sentence, based on a judicial finding of "deliberate cruelty," was unconstitutional and in violation of the Sixth Amendment right to trial by jury pursuant to its prior ruling in Apprendi v. New Jersey (2000). The Court concluded that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt unless the accused has admitted to the aggravating factor or circumstance. In this case, Blakely, in entering his guilty plea to the second-degree kidnapping involving domestic violence, did not admit to acting with "deliberate cruelty" in committing that crime. The Court stated:

Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the federal Farmer (Jan. 18, 1788, reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur(ing) to the people at large, their just and rightful control in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control … in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to

the Abbe' Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (Boyd, 1958).

WOODWARD V. ALABAMA: THE SIXTH AMENDMENT RIGHT TO JURY TRIAL AND THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

In 2013, the U.S. Supreme Court had the opportunity to reinforce its landmark decisions in Apprendi and Blakely when it was asked to grant a petition for a writ of certiorari filed by Mario Dion Woodward, who had been sentenced to death (Woodward v. Alabama, 2013). Had the Court granted the petition, it would have slammed the door shut on a judicial practice authorized by the Alabama Legislature that potentially could result in the further doing of mischief to the mandate established in Atkins. However, the Court summarily rejected the petition, side-stepping consideration and resolution of the issue presented on its merits. This led to publication of an opinion submitted by Justice Sotomayor and joined in by Justice Breyer, dissenting from the Court's denial of certiorari. The Court decided to publish this dissenting opinion, one of the very few times in the history of the U.S Supreme Court that any opinion has been published in response to a summary action taken by the Court.

The jury convicted Woodward of capital murder, and after concluding that the aggravating circumstances committed in the commission of the crime were outweighed by the mitigating circumstances, voted 8 to 4 against the death penalty. Instead, the jury voted in favor of life in prison without the possibility of parole. The trial judge, operating under a state law that made the jury's verdict advisory, considered aggravating circumstances that the prosecutor had not provided to the jury, reversed the jury's verdict, and sentenced Woodward to death.

Alabama was the only state in which judges had imposed the death sentence contrary to jury verdicts. Since the adoption of the statute in question, Alabama trial judges have imposed death sentences on 95 defendants in contrary to a jury's verdict. Forty-three of these defendants were still on death row at the time the petition for certiorari was filed with the Supreme Court. Justice Sotomayor's dissenting opinion was based on her deep concerns about whether this practice offends the Sixth and Eighth Amendments. She was troubled by the fact that trial judges in Alabama might be responding to fears that the electorate, irate over decisions not to override jury verdicts of life in prison and impose death sentences, would turn them out of office when they came up for re-election. In support of her position, Justice Sotomayor cited to the major cases on death penalty law, Atkins and Roper, and on the right to jury trial, the Apprendi decision and Ring v. Arizona (2002). In Apprendi, she referenced:

When a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, "we explained, 'that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Regarding Ring, citing Apprendi, "[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Justice Sotomayor went on to say:

Two years later, we applied the Apprendi rule in Ring v. Arizona to invalidate Arizona's capital sentencing scheme, which permitted the trial judge to determine the presence of aggravating factors required for imposition of the death penalty. 536 U.S. at 609. We made it clear that [c]apital defendants, no less than noncapital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment.

Unfortunately, her dissenting opinion failed to identify the Blakely decision, which in the opinion of this author, was the strongest and most recent pronunciation on point. Like Woodward, Blakely dealt with the right to have a jury, not a judge, rule on alleged aggravating factors or circumstances in order to impose a sentence above the statutory maximum. Justice Sotomayor did, however, identify the type of judicial decision making as a result of the Alabama statute that this author fears can lead to judicial mischief in derogation of the Atkins mandate. She cited numerous instances where Alabama trial judges overrode unanimous jury verdicts of life in prison and judicially imposed the death penalty without stating the basis for doing so. The trial judge disagreed with the jury's weighing of the aggravating and mitigating circumstances, which included mitigation testimony regarding Woodward being abused by his father, and concluded that the jury had it wrong because, in the judge's view, the aggravating factors "far outweighed" the mitigating factors.

Justice Sotomayor's response was, "In other words, the judge imposed the death penalty on Woodward because he disagreed with the jury's assessment of the facts." More to the point, Justine Sotomayor concluded with, "Today, Alabama stands alone: No other State condemns prisoners to death despite the considered judgment rendered by a cross-section of its citizens that the defendant ought to live. And Apprendi and its progeny have made abundantly clear the sanctity of the jury's role in our system of criminal justice." If judicial override statutes are permitted, what is to stop a trial judge who either doesn't understand or has a bias from disregarding the presence of the disability and then overriding the jury verdict to impose the death penalty?

ATKINS V. VIRGINIA REVISITED: HALL V. FLORIDA (2014), BRUMFIELD V. CAIN (2015), AND MOORE V. TEXAS (2017): THE SEM TRILOGY

HALL V. FLORIDA

It took 13 years for the U.S. Supreme Court to re-visit its decision in Atkins and begin addressing the many questions that had been left for the states to sort out. Hall v. Florida (2014) was the case that triggered this process. Florida's statute was interpreted by the Florida Supreme Court to require that the defendant produce evidence of a full-scale IQ score of 70 or below before it could consider any additional intellectual disability evidence, such as the presence of adaptive behavioral deficits. Because Hall's full-scale IQ score was determined to

be 71, the Florida trial court, based on the pertinent statute and its Supreme Court interpretation, refused to admit and consider the additional intellectual disability evidence that was offered by the defendant.

The U.S. Supreme Court ruled that the Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons," citing Roper v, Simmons, at 560, restating what it said in Atkins, that the Eighth Amendment "prohibits the execution of persons with intellectual disability. No legitimate penological purpose is served by executing the intellectually disabled," and that "prohibiting such executions" also protects the integrity of the trial process for individuals who face "a special risk of wrongful execution because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel."

In determining whether the Florida definition implements the above stated principles and the Atkins holding, the Court emphasized it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores and how the scores relate to Atkins. It also considered how the several states have implemented Atkins.

The Hall court then found that Florida's rule, as interpreted by the Florida Supreme Court, disregards established medical practice by failing to recognize and give force to the Atkins court's acknowledgement of the inherent error of measurement (SEM) in IQ testing. The Court also was troubled by the fact that the Florida rule failed to follow the substantial guidance that the Atkins decision provided on the definition of intellectual disability. It noted that, since Atkins, 11 states have either abolished the death penalty or passed legislation allowing defendants to present intellectual disability evidence when the IQ score is above 70. Only two states established a strict 70 IQ standard. The opinion indicates that every single legislature, save one, to have considered the issue after Atkins and whose law has been interpreted by its courts has taken a position contrary to Florida's. Reaffirming that Atkins left it to the states to define mental handicaps and to determine how best to implement the method of enforcing the Atkins protection against execution of individuals with intellectual disabilities, the Court also reminded us that it did not give the states unfettered discretion to define the full scope of the constitutional protection. It said, "Clinical definitions for intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70, and which have long included the SEM, were a fundamental premise of Atkins," concluding with:

When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. The legal determination of intellectual disability is distinct from a medical diagnosis but is informed by the medical community's diagnostic framework, which is of particular help here where no alternative intellectual disability definition is presented, and where this Court and the States have placed substantial reliance on the medical profession's expertise.

BRUMFIELD V. CAIN

Thirteen months after its ruling in Hall, the Supreme Court issued its opinion in Brumfield v. Cain (2015). This decision reinforced the Atkins and Hall mandate regarding the importance of the SEM in the determination of the presence of an intellectual disability. Brumfield had been convicted of murder and sentenced to death in Louisiana prior to the Supreme Court holding in Atkins that the Eighth Amendment prohibits execution of the intellectually disabled.

Implementing the Atkins mandate, the Louisiana Supreme Court, in State v. Williams (2002), determined that an evidentiary hearing is required when a defendant "provide[s] objective factors" sufficient to raise a "reasonable ground" to believe that he has an intellectual disability, which the court defined as "(1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage."

Following publication of the Williams decision, Brumfield amended his pending state postconviction petition to raise an Atkins claim. He sought an evidentiary hearing, pointing to evidence introduced at sentencing that he had an IQ of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having a learning disability, and had been placed in special education classes in the fifth grade. The trial court dismissed his petition without holding a hearing or granting funds to conduct additional investigation, finding that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he presented no evidence of adaptive impairment.

Brumfield sought federal habeas relief. The District Court found that the state court's rejection of Brumfield's claim was both "contrary to or involved an unreasonable application of clearly established Federal law, as determined by" the Supreme Court and based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. The District Court then concluded that Brumfield was, in fact, intellectually disabled. The Fifth Circuit Court of Appeals reversed the District Court, finding that Brumfield's petition failed to satisfy federal habeas requirements.

The U.S Supreme Court disagreed with the Circuit Court. It concluded, in light of the evidence presented by Brumfield, the fact that the record includes some contrary evidence cannot be said to foreclose all reasonable doubt as to his intellectual disability. The Court determined that, because Brumfield's trial occurred before Atkins, the trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not an issue. It indicated that the District Court determined Brumfield to be intellectually disabled based on the extensive evidence it received during the habeas evidentiary hearing, saying, "This evidence included the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70."

The Court held that:

. . . This evidence was entirely consistent with intellectual disability . . . To qualify as "significantly subaverage in general intellectual functioning" in Louisiana, "one must be more than two standard deviations below the mean for the test of intellectual functioning." Williams, 831 So.2d, at 853 (internal quotation marks omitted). On the Wechsler scale for IQ—the scale employed by Dr. Bolter—that would equate to a score of 70 or less. See id., at 853-854.

As the Louisiana Supreme Court cautioned in Williams, however, an IQ test result cannot be assessed in a vacuum. In accord with sound statistical methods, the court explained; "[T]he assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement." Ibid. Thus, Williams held, "although Louisiana's definition of significantly subaverage intellectual functioning does not specifically use the word 'approximately," because of the SEM [standard error of measurement] any IQ test score has a margin of error and is only a factor in assessing mental retardation.' Id., at 855, n. 29.

Accounting for this margin of error, Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability . . . this Court observed in Atkins that 'an IQ between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition.' 536 U.S.___ at 309, n. 5. Indeed, in adopting these definitions, the Louisiana Supreme Court anticipated our holding in Hall v. Florida, 572 U.S.___ (2014) that it is unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70 . . . To conclude, as the state trial court did, that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.

Finally, the Court also concluded that the state trial court's conclusion that the record failed to raise any question as to Brumfield's impairment . . . in adaptive skills was also unreasonable because it failed to evaluate his ability to function across a variety of dimensions (domains). The Court found there was evidence of deficits in at least three of them, based on premature and low birth rate, removal from school in the fifth grade and hospitalization due to behavior, placement in special education classes, seizure activity, learning disability related to some type of slowness in motor development, and some type of physiological problem. The Court also took issue with the trial court's conclusion that evidence that Brumfield suffered from an antisocial personality disorder was inconsistent with the areas of adaptive impairment or intellectual disability, since the DSM-IV (at 47) did not exclude it, and the AAMR (at 172) noted that individuals with intellectual disability also tend to have a number of other mental health disorders, including personality disorders.

TEXAS V. MOORE

Moore was convicted of murder and sentenced to death for shooting a night clerk during a botched robbery. A state habeas court subsequently determined that he qualified as intellectually disabled, applying Atkins, concluded that his death penalty was in violation of the

Eighth Amendment as "cruel and unusual punishment." The habeas court's analysis included consideration of current medical diagnostic standards as set-out in the AAIDD-ll (previously the AAMR) manual and the DSM-5. Moore's IQ test scores, six of them that averaged 70.66 after adjustment for the SEM, and the testimony from mental health professionals led the court to the conclusion that Moore suffered mild intellectual disability due to significant adaptive deficits in the three skill sets (conceptual, social, and practical). The habeas court sent the case back to the Texas Court of Appeals (CCA) with a recommendation to re-sentence Moore consistent with the presence of an intellectual disability. The CCA rejected the habeas court's analysis, claiming it was inconsistent with the requirements of the CCA's decision in Ex parte Briseno (2004) which adopted the definition and standards of assessing intellectual disability contained in the (ninth) edition of the AAMR manual (AAMR-9th), predecessor to the current AAIDD-II manual.

The U.S. Supreme Court held that the CCA over-emphasis of Moore's adaptive functioning strengths, that is, ability to live on the streets (eating food from garbage cans, even after two bouts of food poisoning), mowing lawns, and playing pool for money was misplaced. The medical community focuses the adaptive functioning inquiry on adaptive deficits. It also took issue with the CCA's stressing Moore's improved behavior in prison, a controlled setting, which clinicians caution against doing. The Court also rejected the CCA's discounting of the potential impact of maltreatment and trauma during Moore's childhood with regard to alleged intellectual disability when the medical community, in fact, considers these experiences as high-risk factors for intellectual disability. The same was the case with regard to the CCA's view that co-existing mental or physical impairments such as ADHD, depressive and bi-polar disorders, and autism are necessarily causes of adaptive deficits to the exclusion of intellectual disability as a co-morbidity, the opposite of the position taken by mental health professionals. Finally, the Court concluded that the CCA's attachment to the seven Briseno evidentiary factors impeded the assessment of Moore's adaptive functioning. It found that "by design and in operation, the lay perceptions advanced by Briseno creat[e] an unacceptable risk that persons with intellectual disability will be executed."

The Court emphasized the habeas court's finding that Moore's adaptive functioning performance fell roughly two standard deviations below the mean in all three skill categories. It reinforced the holding in Hall that a state cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70. It found the CCA's conclusion that Moore's IQ scores established he is not intellectually disabled is irreconcilable with Hall and Brumfield, which instruct that where an IQ score is close to but above 70, courts must account for the test's "standard error of measurement." The Court refers to Hall:

For purposes of most IQ tests, the imprecision in the testing "means that an individual's score is best understood as a range of scores on either side of the recorded score . . . within which one may say an individual's true IQ score lies." . . . A test's standard error of measurement "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."

. . . Moore's score of 74, adjusted for the standard error of measurement, yield's a range of 69 to 79, see 470 S.W. 3d, at 519, as the state's retained expert acknowledged . . . Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning . . . But the presence of other sources of imprecision in administering the test to a particular individual, cannot narrow the test-specific standard-error range.

. . . In requiring the CCA to move on to consider Moore's adaptive functioning in light of his IQ evidence, we do not suggest that "the Eighth Amendment turns on the slightest numerical difference in IQ score" . . . Hall invalidated Florida's strict IQ cutoff because the cutoff took "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence" . . . Here by contrast, we do not end the intellectual disability inquiry one way or the other based on Moore's IQ score. Rather, in line with Hall, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual functioning deficits.

The Court made it clear as to where the emphasis must focus when conducting the intellectual disability assessment, quoting from the DSM-5, at 33, 38, indicating that the inquiry should focus on "[d]eficits in adaptive functioning", that deficits in only of the three adaptive-skills domains suffice to show adaptive deficits. Citing from the Brumsfield slip opinion at 15, the Court stated, " Intellectually disabled persons may have strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation," quoting AAMR, Mental Retardation; Definition, Classification, and Systems Supports 8 (10th ed. 2002).

The most informative and illuminating commentary by the Court in Moore, the one with which I conclude this part of our discussion of the SEM trilogy, is found at page 15 (*slip op.*) where the court discusses the defect in the CCA's reliance on Briseno,

After observing that persons with "mild" intellectual disability might be treated differently under clinical standards than under Texas's capital system, the CCA defined its objective as identifying the *"consensus of Texas citizens"* on who "should be exempted from the death penalty." *Briseno*, 135 S.W. 3d, at 6 (emphasis added). Mild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities, see Hall, 572 U.S., at __-__ (slip op., at 17-18); Atkins, 536 U.S., at 308, and n. 3; AAIDD-II, at 153, and states may not execute anyone in "*the entire category* of [intellectual disability] offenders." Roper, 543 U.S. at 563-564 (emphasis added); see *supra*, at 9.

Skeptical of what it viewed as "exceedingly subjective" medical and clinical standards, the CCA in *Briseno* advanced lay perceptions of intellectual disability. *Briseno* asks, for example, "Did those who knew the person best during the developmental stage — his family, friends, teachers, employers, authorities — think he was intellectually disabled at that time? If so, did they act in accordance with that determination?" Addressing those questions here, the CCA referred to

Moore's education in "normal classrooms during his school career," his father's reactions to his academic challenges, and his sister's perceptions of Moore's intellectual abilities. 470 S.W. 3d, at 526-527. But the medical profession has endeavored to counter lay stereotypes of the intellectually disabled. See AAIDD-II et al, as *Amici Curiae* 9-14, and nn.11-15. Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.

WHAT DOES THE FUTURE HOLD?

In concluding Part II, I want to identify three decisions that have been published in the last 10 months and involve issues that may provide the foundation for a future "update" to our discussion should they ultimately reach the U.S. Supreme Court.

The first case is Quince v. State of Florida (April 12, 2018). In 1980, Kenneth Quince was convicted and sentenced to death after pleading guilty to first-degree murder and burglary of a dwelling. The Supreme Court of Florida affirmed the death sentence. In 2004, Quince filed a motion for post-conviction relief to vacate his death sentence on the ground that he is intellectually disabled and therefore ineligible for the death penalty per Atkins. In 2008, the trial court heard evidence regarding all three prongs of the intellectual disability standard. It denied the motion based on a failure to meet the significantly subaverage general intellectual functioning prong, which was affirmed on appeal. In 2014, the United States Supreme Court handed down the Hall decision overruling the Florida Supreme Court's strict IQ test score interpretation of the Florida Statute. Quince then contended that the court should apply the Flynn effect to the SEM adjustment of the IQ test scores and find him developmentally disabled, relying on the evidence from the 2008 hearing.

The SEM adjustment alone did not lower his adjusted IQ scores sufficiently even with his adaptive deficits. The trial court refused to take the Flynn effect into consideration. The Florida Supreme Court affirmed the trial court on the basis that Hall does not mention the Flynn effect and does not require its application to all IQ scores in Atkin cases. The Court said there was no "medical practice" of reducing IQ scores pursuant to the Flynn effect since it remains disputed by medical experts, which "renders the rationale of Hall wholly inapposite."

This raises an interesting question. If and when the Flynn effect obtains broad medical and clinical acceptance, will or can it be combined with the SEM adjustment so as to increase or broaden the test-specific standard-error range? See the Court's discussion in Moore when it said, "But the presence of other sources of imprecision in administering the test to a particular individual, cannot narrow (emphasis added) the test-specific standard-error range."

The second case is *Ex parte* Lane (Lane v. State of Alabama, September 14, 2018). This case is not likely to go to the U.S. Supreme Court due to the fact that the Alabama Supreme Court ruled in favor of Lane reversing his death sentence. One of the facts in Lane that was not an issue that was raised in the case and, as a result not before the Court for consideration may also come up in a future case. The jury in Lane rendered a 10-2 verdict recommending that the trial judge sentence Lane to death. This was the flip side of the verdict recommendation of life in

prison without the possibility of parole, which was set-aside by the Alabama trial judge, who then sentenced Woodward to death. This presents an issue that could possibly come up in a future case as to whether a jury verdict recommendation under the Alabama statute that is not unanimous meets the "beyond a reasonable doubt" requirement of Apprendi, Ring and Blakely.

The third case is Williams v. Stirling, (U.S. Court of Appeals, 4th Cir., January 28, 2019). Williams was convicted and sentenced to death for the kidnap and murder of his ex-girlfriend one morning in 2003. He gave a statement in which he confessed. After exhausting his state court remedies, Williams sought habeas corpus in the U.S. District Court for South Carolina. The District Court granted the petition, finding that his trial counsel had provided ineffective assistance of counsel by not investigating and presenting evidence at the penalty phase trial that he had Fetal Alcohol Syndrome ("FAS"). The State appealed and the 4th Circuit Court of Appeals affirmed the District Court, finding that trial counsel had enough information that it was required to investigate for the presence of FAS.

Trial counsel were aware of claims that William's mother was an alcoholic who drank during her pregnancy and were aware of the American Bar Association's position that FASD should thus be investigated. In addition, expert witnesses who assessed Williams in preparation for the penalty phase for neurological and psychological issues concluded he suffered neurological impairments as the result of frontal lobe damage and consequently had learning difficulties, bipolar, and obsessive-compulsive disorder. An MRI was recommended; however, counsel waited until the week before the trial to have one administered, a delay of many months.

During the penalty phase, counsel presented mitigating evidence of William's troubled childhood, including his mother's alcoholism, mental illness, and school difficulties, but did not ask the defense experts about FAS, its cause and effect, or nexus between his condition and his criminal behavior. All of this was discussed by the Court in the context of mitigation. However, "cause and effect," when connected with whether a defendant was capable of the mens rea necessary for the commission of murder, also has implications as to whether all the elements of the crime are proven. Finally, the combination of mental illness, the SEM impact on IQ test scores, and the severity of adaptive deficits could readily turn this case into one for intellectual disability assessment, a subject for future discussion.

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Judge Anthony P. Wartnik served as a trial judge in the state of Washington for 34 years from 1971 to 2005. He started dealing with cases involving FAS and FAE in the mid-1990s, chaired his court's multi-disciplinary task force on the creation of protocols for evaluating competency to stand trial of youth with organic brain damage, and chaired the Governor's Advisory Panel on FAS/FAE. Following retirement in January 2005, Wartnik served as a consultant to the Fetal Alcohol and Drug Unit (FADU) at the University of Washington School of Medicine. He is nationally and internationally recognized as an expert on FASD and the law, has authored and co-authored numerous published articles and book chapters, and serves as an adjunct professor for graduate students at Concordia University, St. Paul in Minnesota.

References

AAMR-9

AIDD-II

American Psychiatric Association (1994). Diagnostic and statistical manual of mental disorders, 4th ed. Washington, DC; Author.

American Psychiatric Association (2013). Diagnostic and statistical manual of mental disorders, 5th ed. Washington, DC; Author.

Apprendi v. New Jersey, 530 U.S. 466 (2000).

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

Blakely v. Washington, 542 U.S. 296 (2004).

Bonnie, R.J. (2004). The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia. *The Journal of the American Academy of Psychiatry and the Law 32*, 304-308.

Brumfield v. Cain, 576 U.S. ___ (2015).

Ex parte Briseno, 135 S.W. 3d 1 (2004).

Ex parte Lane, *Slip Op.* (Alabama, 9/14/2018).

Hall v. Florida,572 U.S. ___ (2014).

Moore v. Texas, 581 U.S. ___ (2017).

Quince v. Florida, *Slip Op*. (Florida, April 12, 2018).

Ring v. Arizona, 536 U.S. 584 (2002).

Roper v. Simmons, 543 U.S. 551 (2005).

Scott, C. L. (2005). Roper v. Simmons: Can juvenile offenders be executed?. *Journal of the American Academy of Psychiatry and the Law Online*, 33(4), 547-552.

State v. Williams, 831 So 2d 835 (Louisiana, 2002).

Thompson v. Oklahoma, 487 U.S. 815 (1988).

Trop v. Dulles, 356 U.S. 86 (1958).

Williams v. Stirling, *Slip Op*. (U.S Court of Appeals, 4th Circ., January 29, 2019).

Woodward v. Alabama, 571 U.S. ___, 134 S.Ct. 405 (2013).