Supreme Court Upholds Right of Capital Defendant to a Hearing on His Intellectual Disability Claim

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On 18th June 2015 the Supreme Court of the United States handed down its decision in *Brumfield v Cain*. In a term during which the Court gave a landmark ruling in *Obergefell v Hodges*[1], as well as holding lethal injection itself to be constitutional[2], a case concerning one man on Louisiana's death row may appear unimportant. However, this case is significant for a number of reasons, not least that the Supreme Court's decision may save that man's life. The majority, in remitting the case for a hearing Brumfield had previously been denied, send the message that 'if you're a judge and someone comes to you with meaningful evidence of a constitutional violation[3]' you cannot disregard it. Of still broader application is the insight the Court's Opinions offer into the current Court's views on the death penalty and criminal justice more broadly.

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Factual and Procedural Background

In 1995 a Louisiana jury convicted Kevan Brumfield of the murder of Corporal Betty Smothers and sentenced him to death[4]. In 2002, whilst his state post-conviction proceedings were on going, the US Supreme Court handed down in its decision in *Atkins v Virginia*[5].

In *Atkins* Justice Stevens ruled that 'in light of . . . "evolving standards of decency"' the Eighth Amendment 'places a substantive restriction on the State's power to take the life[6]' of an intellectually disabled offender[7]. Any such individual already sentenced to death would necessarily have this penalty commuted to life.

Intellectual Disability

Intellectual disability is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) as a 'disability characterized by significant limitations in both intellectual functioning and in adaptive behaviour, which covers many everyday social and practical skills. This disability originates before the age of 18'[8]. A significant limitation in intellectual functioning is generally indicated by an IQ score of around 70, up to as high as 75, and relevant conceptual, social and practical skills include language and literacy, social problem solving and self-direction[9]. However, these factors are not exhaustive and the AAIDD 'stresses that additional factors must be taken into account, such as the community environment typical of the individual's peers and culture. Professionals should also consider linguistic diversity and cultural differences in the way people communicate, move, and behave[10]'. Also, as would prove significant in Brumfield's case 'assessments must also assume that limitations in individuals often coexist with strengths, and that a person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period'. [11]

Atkins v Virginia

The Eighth Amendment to the US Constitution states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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In *Trop v Dulles* Chief Justice Warren set out the 'basic concept underlying' this provision as 'nothing less than the dignity of man…the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'[12]. The Supreme Court in *Atkins*, observed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures[13]'. It noted that a large number of States now prohibited the execution of the intellectually disabled, and that the 'consistency in the direction of change[14]' was compelling.

Having identified this consensus Justice Stevens then set out two reasons why the Court should support it. The first relied upon the justifications for the death penalty elucidated by the Supreme Court in *Gregg v Georgia*[15]. Ending a four year moratorium it itself had imposed, the Court identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty[16]. Unless its imposition on the intellectual disabled could be said to advance these purposes it would be nothing more than 'needless imposition of pain and suffering[17]'.

Regards retribution, the concept of 'just deserts[18]', Stevens noted that intellectually disabled offenders have 'diminished capacities' to 'learn from experience' and 'to engage in logical reasoning[19]'. They are followers, not leaders, and act on impulse rather than pursuant to a pre-meditated plan[20]. Their culpability is such that they must be held to account for their crimes, but it is diminished in comparison to other capital offenders[21].

This propensity to act on impulse and 'the diminished ability to understand and process information'[22] also affects the efficacy of the deterrence purpose. It is less likely that intellectually disabled offenders will be able to understand the possibility of execution as a penalty and modify their conduct accordingly[23].

These cognitive and behavioural impairments also provided the basis for Justice Stevens' second reason. An intellectually disabled offender is at greater risk of a death sentence, in cases where there are compelling factors calling for life:

> '*not only by the possibility of false confessions, but also by the lesser ability of [intellectually disabled] defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors[24]'.*

They may be less able to give meaningful assistance to their counsel and are typically poor witnesses. In addition, their demeanour gives the impression that they lack remorse for their crimes[25].

As such, in line with the 'evolving standards of decency' found within the Eight Amendment, the Court imposed a blanket prohibition on the execution of the intellectually disabled[26].

Atkins in Louisiana

Whilst the Court found there to be a consensus regards the exemption, they also found 'serious disagreement . . . in determining which offenders'[27] fall within this category. The court adopted a definition of intellectual disability mirroring those employed by the American Association on Mental Retardation[28] and the American Psychiatric Association[29], but, as was its approach to insanity in *Ford v Wainright*, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction[30]'.

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Whilst awaiting legislative intervention, the Louisiana Supreme Court undertook this task in *State v Williams*[31]. The court first made clear that there was no automatic right to a hearing on the issue of intellectual disability and that, as with the matter of pre-trial competency, 'there must be sufficient evidence to raise a reasonable doubt as to such capacity'. This test in effect required the defendant to 'come forward with *some evidence* to put his mental condition at issue'[32], a low threshold to meet[33].

The State Court

Brumfield thus amended his state conviction petition, asserting that he had enough evidence as to raise a reasonable doubt with regard to the issue of intellectual disability and that he was thus entitled to a hearing. It should be reiterated that Brumfield never asked the state court to find him intellectually disabled, he merely asserted that there was sufficient evidence in the record to warrant further investigation. He also added a request for funding, so that he might seek expert evidence to develop his claim.

However, in a portion of judgment of little over a page in length, 'without holding an evidentiary hearing or granting funds', or the time[34], 'to conduct additional investigation[35]' the State judge rejected Brumfield's *Atkins* claim. In a passage much quoted as Brumfield's case moved through the federal appeals system the court stated:

'I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [sic] testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report. "Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out."[36]

The evidence to which the judge refers is that which was adduced at the penalty phase of Brumfield's trial. In mitigation the defence had called Dr Guin, a social worker and Dr Bolter a clinical neuropsychologist, who also quoted from the report of Dr Jordan, a psychologist[37].

The Legal Issues

Federal court

It was this evidence which came before Judge Brady in the US District Court for the Middle District of Louisiana. Brumfield had filed a federal writ of habeas corpus asking that Court to find him intellectually disabled and ineligible for the death penalty. In order to make such a finding Brady would have to grant and conduct the hearing on Brumfield's *Atkins* claim which had previously been denied by the state court.

Because Brumfield's eligibility for an *Atkins* hearing had already been adjudicated by the state court, the federal court's ability to reconsider the issue was constrained by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). This Act limits 'the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner[38].'"

§ 2254(d)(2)

AEDPA § 2254(d) provides that

> *'An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings[39]'*

unless the adjudication falls within one of the two situations which follow.

The situation on which the Supreme Court focused is reasoning is found in § 2254(d)(2):

> '*the adjudication…resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'.*

On this point Judge Brady in the federal district court ruled that the factual determination at issue, whether Brumfield had put forward enough evidence to meet the threshold under *Williams,* had indeed been unreasonable. Brady relied on various grounds, some of which would be revisited by the Supreme Court, including the absence of the *Atkins* decision at the time of trial[40], that the evidence used by the state court to reach its decision was not 'on its own terms' related to intellectual disability[41] and that under Louisiana law 'using pre-Atkins sentencing evidence related to competency cannot be permitted when deciding an Atkins issue[42]'.

At the evidentiary hearing therefore granted by the federal court, Brumfield diligently built upon the 'some evidence' already present in the record[43], adducing reports and testimony by various psychologists[44] who concluded that he was intellectually disabled. The District Court agreed, and ordered that Louisiana was permanently enjoined from executing Brumfield[45].

§ 2254(d)(1)

The District Court would also have allowed a hearing under § 2254(d)(1). This section provides that an application for a writ of habeas corpus may be granted when the adjudication of the state court:

> *'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'*

The clearly established federal law at issue in this instance was that which concerned the funding for which Brumfield had also made a claim in his state post conviction petition.

Under *Ake v Oklahoma* 'when an indigent capital defendant shows that his mental condition will be a "significant factor" at trial or sentencing, the centrality of expert testimony in evaluating insanity requires a state to assure access to a mental health expert[46]. Similarly, under *Ford v Wainwright* 'due process guarantees to capital defendants asserting an insanity defense the opportunity to present expert testimony in opposition to the state's contrary evidence. Otherwise, the state denies the defendant his constitutionally guaranteed "opportunity to be heard" and "invites arbitrariness and error."'[47]

In his Brief Brumfield asserted that, in determining his claim for a hearing on intellectual disability before allowing him the funding to develop it, these Supreme Court rulings were violated and thus the state court decision was contrary to clearly established federal law.

Although § 2254(d)(1) was not ultimately the basis on which the majority founded their Opinion[48], the denial of funding warrants a little more consideration here. This is not least because of the unfortunately unique situation in which Brumfield found himself at the time of his state post-conviction petition.

As set out in an amicus brief submitted by Chief Justice Calegero, the Louisiana Association of Criminal Defense Lawyers and the Promise of Justice Initiative, of the nineteen defendants prosecuted prior to *Atkins* in Louisiana, whose claims of intellectual disability were then addressed on direct appeal or post-conviction, it was only Brumfield who was not provided with funding to develop and present his[49]. Brumfield's conviction and state proceedings occurred at a time when 'Louisiana recognized the need for funding in post-conviction assistance but before that funding became readily available'[50] Whilst, to simplify a complex problem, the other defendants secured funding through various state funded capital defender offices[51] Brumfield was represented by pro bono counsel.

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That Brumfield's case could, as a result, have fallen through the cracks in Louisiana's system despite having, as the Supreme Court have affirmed, an arguable *Atkins* claim is alarming.

The Fifth Circuit

The State appealed the District Judge's ruling under AEDPA, which the Fifth Circuit Court of Appeals reversed as regards both § 2254(d)(1) and (2)[52]. The Court rejected the notion, in relation to d(1), that any of the Supreme Court's precedents 'required a state court to grant an Atkins claimant the funds necessary to make a threshold showing of intellectual disability[53]'. It further held, regards d(2) its 'review of the record persuade[d] [it] that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing."[54]

As such Brumfield petitioned for, and was granted, certiorari to the United States Supreme Court.

The Supreme Court

Scope

The issue at stake in *Brumfield* was a narrow one compared, for example, to *Glossip* where the decision impacted upon every man, and woman, currently incarcerated on death row in the USA. The issue in *Brumfield* was simply whether one individual should have had a hearing exempting them alone from the death penalty.

This was of issue to the Justices in oral argument. Chief Justice Roberts was concerned to establish 'whether it is simply whether the facts in your particular case lead to a particular result, or if there is some general legal rule that you're arguing for[55]' and earlier Justice Alito forced concurrence from Petitioner's counsel to his statement that 'the answer to the first question', initially presented on certiorari of whether it was unconstitutional to regard *any* pre-*Atkins* penalty phase as determinative of an *Atkins* claim, 'is no[56]'.

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The reality is, of course, that in a country as vast as the United States the nine Justices of the Supreme Court cannot provide one final appeal in every case. It is also true that the questions presented to the Court on certiorari were much broader than its final holding[57]. However, that Brumfield's case would have concluded without recourse to the Supreme Court, is also a frightening prospect.

The majority

Justice Sotomayor gave the Opinion of the Court, joined by Justices Ginsburg, Breyer, Kagan and Kennedy, setting out the task to which it was directing its attention:

> *'In conducting the §2254(d)(2) inquiry, we, like the courts below, "look through" the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an Atkins evidentiary hearing. . . . Like Brumfield, we do not question the propriety of the legal standard the trial court applied[58]'.*

Rather, the Supreme Court were to decide whether the factual determination that Brumfield had failed to make a threshold showing of intellectual disability under *Williams* was unreasonable. If this were the case the federal court was correct in granting Brumfield a hearing on his *Atkins* claim, and the case would be remanded back to the Fifth Circuit for this matter to once again be heard[59].

The Supreme Court isolated the 'two underlying factual determinations on which the trial court's decision was premised[60]': 'that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment'[61]. It noted that 2254(d)(2) was the appropriate provision under which to do so

> '*because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting Brumfield's Atkins claim, but with the underlying factual conclusions the court reached when it determined that the record evidence was inconsistent with intellectual disability'[62].*

The standard which the Court applied in determining unreasonableness was a high one:

> '§2254(d)(2) requires that we accord the state trial court substantial deference. If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" (quoting Rice v. Collins, 546 U. S. 333, 341–342 (2006))'[63].

However, Sotomayor notes that examination of the record before the State Court still 'compels us to conclude that both of its critical factual determinations were unreasonable'[64].

IQ and intellectual functioning

At Brumfield's trial Dr Bolter had testified that the defendant had 'scored 75 on an IQ test and may have scored higher on another test'[65]. To the state court this 'necessarily precluded[66]' the possibility that he possessed sub average intelligence and thus satisfied the first prong of Louisiana's test for intellectual disability.

However, this reasoning was flawed for a number of reasons. The test, set out in *Williams*, is that 'one must be more than two standard deviations below the mean for the test of intellectual functioning[67]'. On the scale employed by Bolter[68] this would be a score of 70 or less. The Supreme Court set out, that although

> *'[s]ignificantly 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." . . . Accounting for this margin of error, Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability[69]'.*

This analysis is consistent with the clinical practitioners texts on which the *Williams* and *Atkins* courts both relied.[70]

Further, the court also referred to its holding in *Hall v Florida* 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[71]. If, once the SEM has been applied, the individual's IQ is adjudged to be 75 or below the court or professional must 'consider factors indicating whether the person had deficits in adaptive functioning' before making a final decision or diagnosis on ID[72].

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The presence of the 'little bit higher IQ[73]', of over 75, in the record was fiercely contested. It was said by Dr Bolter to be found by Dr Jordan, and yet the latter never testified at trial. As such, it is not clear whether his report ever made it into the material which would have eventually come before the state judge determining Brumfield's post conviction petition[74]. However, even assuming that the State judge did have the benefit of such a report the Supreme Court held that the state court 'could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence[75]'.

Adaptive deficits

As regards Brumfield's adaptive functioning the Court noted that Louisiana has in fact adopted three tests to evaluate adaptive impairment. The Court utilised that most favourable to the state, contained in *Williams*:

> *'Under that standard, an individual may be intellectually disabled if he has "substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care. (ii) Understanding and use of language. (iii) Learning. (iv) Mobility. (v) Self-direction. (vi) Capacity for independent living."' [76]*

Applying that test 'the state court record contained sufficient evidence to raise a question as to whether Brumfield met these criteria'. For example, in her testimony Dr Guin had noted that even as a child Brumfield demonstrated 'slower responses than normal babies," and that "they knew that something was wrong at that point."'. One report, which she reviewed, from a facility that treated Brumfield as a child "questioned his intellectual functions," and opined that "he probably had a learning disability related to some type of slowness in motor development, some type of physiological [problem].[77]" Dr Bolter observed how 'his low intellect manifested itself in a fourth-grade reading level—and he reached that level . . . only with respect to "simple word recognition," and not even comprehension.[78]'

The other prong of the ID analysis, set out by the AAID above, is etiology: that the intellectual disability must have been developmental and manifested itself before the age of 18. The state court did not make a finding on this issue and there is 'thus no determination on that

point to which a federal court must defer[79]'. However, 'the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood[80]'.

Anti-social personality and criminal behaviour: dual diagnosis

The state court also appeared to rely on assumptions outside of the three prongs of the diagnostic criteria outlined in *Williams*.

First, state court placed heavy reliance on the fact that 'Dr. Bolter had described Brumfield as someone with "an antisocial personality."' However, to conclude from this that Brumfield could not be intellectually disabled was clearly an unreasonable factual determination:

> *'The DSM–IV—one of the sources on which the Williams court relied in defining intellectual disability— provides: "The diagnostic criteria for [intellectual disability] do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder." DSM–IV, at 47; see also AAMR, at 172'*[81]

Facts of the crime

Second, much was also made by the State in its Brief[82], and in the courts below, of the allegedly sophisticated nature of the crime. Although the state court did not explicitly refer to this in its judgment the relevant facts would have been in the record before it, and thus Sotomayor also addressed this issue:

> '*the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns. But cf. AAMR, at 8 (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")*[83]'

Prior to *Atkins* defence lawyers did not always use intellectual disability as a mitigating factor

Pre-*Atkins*

The Supreme Court also raised a point not acknowledged by the state court, but relied upon by the federal court, as regards the impact of *Atkins'* non-existence at the time of Brumfield's trial.

> *'At his pre-Atkins trial, Brumfield had little reason to investigate or present evidence relating to intellectual disability. In fact, had he done so at the penalty phase, he ran the risk that it would "enhance the likelihood . . . future dangerousness [would] be found by the jury." Atkins, 536 U. S., at 321*[84]'.

Prior to *Atkins* defence lawyers did not always use intellectual disability as a mitigating factor, the increased impulsivity for example exhibited by those offenders, may actually have given the state support for the assertion that they were more likely to commit further violent crime.

In light of all these considerations the Court reiterates once again that:

> *'[I]n seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a "reasonable doubt" as to his intellectual disability to be entitled to an evidentiary hearing'*[85].

This reasonable doubt was amply evidenced, the factual determination made was thus unreasonable, and the Supreme Court remanded Brumfield's case back to the Fifth Circuit for a hearing on the substantive issue of his intellectual disability.

The Supreme Court and the Death Penalty

Justice Thomas

In a case dealing primarily with issues of legal procedure Justice Thomas' dissent was

remarkable for the vitriolic tone it adopted towards the defendant. Thomas, joined for all but one Part by Chief Justice Roberts and Justices Scalia and Alito, adjudged the decision of the state court not to be unreasonable and as such would uphold the Fifth Circuit's decision to render the evidentiary finding of the District Court null and void.

The very beginning of Thomas' judgment is notable for the manner in which it approaches the concept of federal collateral review. This, he asserts, 'interrupts the enforcement of state criminal laws and undermines the finality of state court judgment'. Brumfield, he says, 'has spent the last 20 years engaged in a ceaseless campaign of review proceedings[86]'. That Brumfield is merely asserting the procedural rights to which he is entitled does not appear to be of concern. This disdain for Brumfield's perceived litigious nature, and indeed it appears Brumfield himself, sets the tone of and heavily informs his judgment. Indeed, his analysis of the law appears to be supplementary to those matters which he deems to be of greater importance.

AEDPA

On the law Thomas does little more than set out the evidence which was before the State court and conclude, without significant analysis or engagement with accepted clinical definitions of intellectual disability, that this rendered the State court's decision reasonable[87]. His own analysis of 2254(d)(2), absent his critique of the majority, runs to only two of his twenty pages of dissent.

With regards to the issue of Brumfield's anti-social behaviour disorder he merely states Dr Bolter's diagnosis without further elaboration, ostensibly in the belief that this diagnosis alone discredits Brumfield's claim to be intellectually disabled. However, absurdly, he goes on to state that the fact 'the majority disputes "[t]he relevance of this diagnosis", *ante* at 14, does not make it any less supported by the record'[88].

Here Thomas betrays his fundamental misunderstanding of the matters at issue in this case. At the conclusion of his dissent he states: 'the facts upon which the state court rejected his claim are amply supported by the record and thus not unreasonable[89]'. Yet, the factual determination to which the review is properly directed is that of whether the *Williams* threshold was met by this evidence. The existence of this information in the record, despite perhaps the report of Dr Jordan, was never disputed by the parties. The matter of contention was whether the evidence warranted a hearing. Thomas criticises the majority for recasting 'legal determinations as factual ones'[90], and yet just because the *Williams* threshold is established as a point of law does not mean that the underlying judgment of whether it is met is not factual.

Non-legal comment

However, although concerning, this misinterpretation of the point at issue is not the most remarkable element of Thomas' dissent.

He opens his judgment with a graphic account of the murder of Betty Smothers, noting this was necessary because the majority 'devotes a single sentence to a description of the crime'[91]. However, the majority had done so because this ultimately bears, at most, little relevance to the question which they were asked to determine. By contrast, Thomas is eager to include such facts, having, it appears, decided that the purpose of his dissent is to persuade its readers that Brumfield is entitled neither to their compassion, nor the assistance of the legal system.

His attempt to demonise Brumfield continues when he talks in detail about the impact of Ms Smother's death on her family, the time Brumfield spent in four or five group homes' which 'educated him in the criminal lifestyle[92]' and the felonies, alleged or proven, which followed[93]. In this endeavour he goes as far as to affix a picture of the victim to his dissent, and to post Brumfield's confession tape to the Supreme Court's website[94].

However, the element of his dissent most ill suited to a case of this nature in a nation's highest court, was Part I-C. Here, Thomas attempts to rebut the suggestion that Brumfield's crime could have been the result of his 'disadvantaged background' by undertaking a comparison with Warwick Dunn, Betty Smother's eldest son who went on to have a fantastically successful NFL career[95]. Dunn, Thomas recounts, 'quickly stepped into the role of father figure to his younger siblings[96]', 'kept his mothers pearl

earrings, stained with her blood from the night she was murdered[97]' and, as a football star, 'traveled overseas to visit our Armed Forces'[98].

Putting aside the complete irrelevance of these matters to whether Kevan Brumfield is intellectually disabled, it should be noted that Dunn was exceptionally lucky to be endowed with a skill which could lift him and his siblings out of poverty, and that many others in his situation could not have achieved the success he was able. To this Part Justices Scalia, Roberts and Alito refused to join, and the two latter Justices issued their own short dissent, identifying Part I-C as superfluous to the legal analysis in the case[99].

It is surely ridiculous, however, even to those supportive of the death penalty, to expect a man sentenced to die to do anything other than fight for his life.

The Supreme Court and the death penalty

Brumfield's case is telling, therefore, of the dramatically divergent views of the Court on issues of criminal justice and sentencing.

Sotomayor and the majority adopt a detached tone, focused upon the issues for determination in the case, and ensure that a petitioner who, although convicted of a serious crime, receives the protections to which they are entitled by law. As their Opinion concisely sets out:

> *We do not deny that Brumfield's crimes were terrible, causing untold pain for the victims and their families. But we are called upon today to resolve a different issue. There has already been one death that society rightly condemns. The question here is whether Brumfield cleared AEDPA's procedural hurdles, and was thus entitled to a hearing to show that he so lacked the capacity for self-determination that it would violate the Eighth Amendment to permit the State to impose the "law's most severe sentence," Hall, 572 U. S., at __ (slip op., at 7), and take his life as well*[100]*'.*

Thomas and his allies, however, adopt a far more emotive and retributive tone, suggesting, it seems, that those who have committed the most serious criminal offences are to be regarded as having surrendered their protections under the law.

Thomas' dissent exhibits certain parallels in both these respects with Scalia's concurring Opinion in *Glossip v Gross* where he also critiques those seeking to appeal their death sentence suggesting, in fact, that to be sentenced to death is preferable to life: for 'the capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.[101]' However, it is interesting to note that, whilst not joining with Alito and Roberts in highlighting its irrelevance, even Scalia did not actually join with Thomas in Part I-C.

Yet, whilst it is commendable that these three Justices stopped short of supporting this element of the dissent, the same tone and punitive zeal was present throughout, no less so in the Parts to which they joined. In particular they assent to Thomas' critique of Brumfield's on-going attempts to appeal his sentence. It is surely ridiculous, however, even to those supportive of the death penalty, to expect a man sentenced to die to do anything other than fight for his life.

Another interesting issue to consider is the role of Justice Kennedy in this case. Kennedy was willing to join with the Court's liberals on this issue, when he was not in *Glossip,* offering a defendant procedural protection but not complete exemption from execution by lethal injection. Their Opinion in this case was notably more restrained in tone, when compared to Breyer and Ginsburg's assault[102] on the death penalty itself or Sotomayor's evocations of inmates being 'burned at the stake[103]' in *Glossip*.

However, Kennedy does perhaps offer some hope for those criminal defendants seeking recourse to Washington DC, at least those who are intellectually disabled, in that here he stands behind clear constitutional protection for such offenders and, it should be recalled, authored the majority Opinion in *Hall*. Whether he will

continue to hold such influence over the coming judicial terms, in light of an imminent election and an aging bench, remains to be seen.

Conclusion

Ultimately, the ruling in *Brumfield v Cain* will have the greatest impact on Kevan Brumfield himself. That *Atkins* was decided thirteen years ago, so that very few similar cases will now be decided post-trial, only reinforces that point.

However, the life of an individual should not require anything less than the careful, logical, and exclusively legal, reasoning expected of the Court in its wider reaching cases. That four of the nine Justices of the Supreme Court were willing to deny Brumfield the chance to fully investigate his constitutional claim on the basis of flawed legal reasoning and a gratuitous retelling of the facts, is troubling. That they would criticise his pursuit of this hearing through the appeals system is even more so. To borrow a phrase from Justice Thomas: Brumfield, and the other men and women held on death row in the USA, 'not to mention our legal system – deserve better[104]'.

1 576 U.S. __ (2015) ruling that the right of same sex couples to marry is protected by the US Constitution.
2 *Glossip v Gross* 576 U. S. __ (2015).
3 '*Cpl. Betty Smothers' murderer wins U.S. Supreme Court decision, chance to get off death row*', Times Picayune, June 18, 2015.
4 *Brief of Petitioner*, Page 24.
5 536 U.S. 304 (2002).
6 Ibid. at 321 (quoting *Ford v Wainwright* 477 U. S. 399(1986), at 405, wherein the Court had similarly held the Amendment to prohibit the execution of those labelled 'insane').
7 The term employed at the time was 'mental retardation'. This article shall follow the approach of the majority in *Brumfield* and adopt the modern term 'intellectual disability'.
8 http://aaidd.org/intellectual-disability/definition .
9 Ibid.
10 Ibid.
11 Ibid.
12 356 U.S. 86 (1958) *at 100-101.*
13 536 U.S. 304 (2002) at 312.
14 Ibid. at 315.
15 *Gregg v Georgia* 428 U.S. 153 (1976).
16 Ibid. at 183.
17 *Enmund v Florida 458 U. S. 782 (1982) at 798.*
18 536 U.S. 304 (2002) at 319.
19 Ibid. at 318.
20 Ibid.
21 Ibid.
22 Ibid. at 320.
23 Ibid.
24 Ibid. at 320-321.
25 Ibid.
26 Ibid. at 321.
27 Ibid. at 317.
28 Now the AAIDD.
29 536 U.S. 304 (2002) at 308.
30 Ibid. at 317.
31 2001–1650 (La. 11/1/02), 831 So. 2d 835.
32 Emphasis added.
33 *Brumfield v Cain* 576 U. S. __ (2015) at 15.
34 Ibid. at 4.
35 Ibid.
36 Ibid.
37 Ibid. at 3-4.
38 *Cullen v. Pinholster,* 563 U. S. 170, __ (2011) (slip op., at 8).
39 28 U. S. C. §2254.
40 *Case 3:04-cv-00787-JJB-CN 02/23/12, Middle District of Louisiana* at 17.
41 Ibid. at 19.
42 Ibid. at 21.
43 563 U. S. 170, __ (2011) (slip op., at 13) (which recognised that federal habeas courts may "take new evidence in an evidentiary hearing" when §2254(d) does not bar relief).
44 *Case 3:04-cv-00787-JJB-CN 02/23/12, Middle District of Louisiana* at 26-45.
45 Ibid. at 62.
46 470 U.S. 68 (1986) at 83-84; *Brief of Petitioner* at 21.
47 477 U.S. 399 (1986) at 424; *Brief of Petitioner* at 22.
48 '*Response, Brumfield v. Cain*', Christy H. DeSanctis, Geo. Wash. L. Rev. Docket (June 23, 2015): '[T]he majority incorporated the fact that the denial of funding to develop a claim of ID contributed to the unreasonableness of the determination of the facts'.
49 *Brief amici curiae of Chief Justice Pascal F. Calogero, Jr., et al* at 4-5.
50 Ibid. at 27.
51 Ibid. at 5.
52 (2014) 744 F.3d 927, at 927.
53 Ibid. at 925–926.
54 Ibid. at 926.
55 *Transcript of Oral Argument*, at 20-21.
56 Ibid. at 8: acknowledging that if a defendant were university educated with an exceptionally high IQ further investigation would not be warranted.
57 *Brief of Petitioner*, at i.
58 576 U. S. __ (2015), at 7.
59 Ibid. at 6.
60 Ibid. at 7.
61 Ibid.
62 Ibid. It was suggested in the dissent that the majority were 'recasting legal determinations as factual ones'.
63 576 U. S. __ (2015), at 8.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid. at 9.
68 Wechsler scale for IQ.
69 576 U. S. __ (2015), at 9.
70 The sources on which Williams relied in defining subaverage intelligence both describe a score of 75 as being consistent with such a diagnosis. See American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) at 59, and *Diagnostic and Statistical Manual of Mental Disorders* (rev. 4th ed. 2000) at 41-42.
71 572 U. S. __, __ (2014) (slip op., at 12).
72 Ibid. Further the Flynn effect, a phenomenon which the District Court addressed but the Supreme Court did not, provides that over time the mean IQ scores of the American public on any given test increase. This phenomenon requires that IQ scores from tests taken in the past be subject to a downward adjustment to account for the subsequent IQ rise of the public which the older test itself does not capture. Under this effect Brumfield's score of 75 at trial would be adjusted to 70 (*Brief of Petitioner,* at 14).
73 *Brumfield v Cain* 576 U. S. __ (2015), at 4.
74 *Transcript of Oral Argument*, at 12 -14.
75 576 U. S. __ (2015) at 11.
76 831 So. 2d, at 854 (quoting then La. Rev. Stat. Ann. §28:381(12) (repealed 2005)).
77 576 U. S. __ (2015), at 13.
78 Ibid.
79 Ibid. at 18.
80 Ibid.
81 Ibid. at 14.
82 *Brief of Respondent*, at 1-3.
83 576 U. S. __ (2015), at 15.
84 Ibid. at 16.
85 Ibid. at 15.
86 576 U. S. __ (2015) (Dissent of Justice Thomas*,* at 9).
87 Ibid, at 13-14.
88 Ibid, at 14.
89 Ibid, at 24.
90 Ibid, at 15.
91 Ibid, at 2.
92 He appears unmoved by the abuse which he himself cites, and which drove Brumfield into these, by no means necessarily criminal, homes.
93 576 U. S. __ (2015) (Dissent of Justice Thomas*,* at 5).
94 Whether this footage shows a killer with no conscience or a teenager intimidated by a room filled with police officers, guns visible on their hips, is something for the viewer to judge: http://www.supremecourt.gov/media/media.aspx .
95 *Running for My Life: My Journey in the Game of Football and Beyond,* W. Dunn and D. Yaeger (2009).
96 576 U. S. __ (2015) (Dissent of Justice Thomas, at 7).
97 Ibid. at 8.
98 Ibid.
99 576 U. S. __ (2015) (Dissent of Justice Alito, at 1).
100 576 U. S. __ (2015), at 18-19.
101 576 U. S. __ (2015) (Concurring Opinion of Justice Scalia, at 3).
102 An attack both compelling and comprehensive in its scope: 576 U. S. __ (2015) (Dissent of Justice Breyer).
103 576 U. S. __ (2015) (Dissent of Justice Sotomayor, at 2).
104 576 U. S. __ (2015) (Dissent of Justice Thomas, at 27).