Supreme Court Strikes Down Florida Scheme for Determining Intellectual Disability Claims: An Analysis of the Decision in Hall v. Florida, No.12 - 10882

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In 2002 the Supreme Court of the United States held that the execution of a person suffering from what the court has finally recognised ought more properly to be described as "intellectual disability" rather than "mental retardation", was unlawful because it breached the prohibition in the Eighth Amendment on cruel and unusual punishments applied to the States by the Fourteenth Amendment. The reader may care to pause and consider how it was that this conclusion was not reached before the third year of the 21st century. Be that as it may, the decision of the Supreme Court in *Atkins v. Virginia*[1] was a landmark decision in the Court's Eighth Amendment jurisprudence. In keeping however with the Court's constitutional position, the decision in Atkins did not seek to proscribe how the States were to identify those who were exempt from execution by virtue of suffering intellectual disability. Florida defined "intellectual disability" as requiring an IQ test score of 70 or below. As a result, when appellant Freddie Lee Hall presented evidence including an IQ test score of 71, the State court denied his motion for relief from his death sentence. On further appeal the Florida Supreme Court rejected Hall's claim holding the State's 70-point threshold constitutional.

In October 2013, a *writ of certiorari* was granted and on 27th May 2014 the US Supreme Court reversed the decision of the Florida Supreme Court holding that Florida's scheme, whereby any prisoner showing evidence of an IQ score of more than 70 was prohibited from adducing further evidence in support of his claim to be suffering from intellectual disability, was unconstitutional.

In February 1978, Freddie Lee Hall and an accomplice committed two dreadful offences. Together they kidnapped, beat, raped and finally killed a 21 year old woman who was pregnant. Then, on the way to robbing a convenience store they killed a sheriff's deputy who challenged them. Freddie Hall was sentenced to death at his trial. For his crimes he deserves no sympathy and some will say even his intellectual deficits should count for little by way of mitigation but like all defendants Freddie Hall is entitled to a fair trial and the constitutional protections afforded to all those accused of crime set out in the 6th and 14th Amendments to the Federal Constitution. If he suffers from intellectual disability that may render him ineligible for the death penalty he is surely entitled to have that claim properly adjudicated on by the State courts.

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When Hall was first sentenced, the US Supreme Court had not yet ruled that the Eighth Amendment prohibits States from imposing the death penalty on persons with intellectual disability.[2] Furthermore, at the time, Florida law did not consider intellectual disability as a statutory mitigating factor. After the Supreme Court held that capital defendants must be permitted to present non-statutory mitigating evidence in death penalty proceedings[3], Hall was resentenced. Hall then presented substantial and unchallenged evidence of intellectual disability. School records indicated that his teachers identified him on numerous occasions as "mentally retarded." A number of medical clinicians testified that, in their professional opinion, Hall was "significantly retarded," was "mentally retarded," and had levels of understanding "typically seen with toddlers." Hall's siblings testified that there was something "very wrong" with him as a child. Hall was "slow with speech and . . . slow to learn." He "walked and talked long after his other brothers and sisters," and had "great difficulty forming his words." The evidence showed that Hall had a very unhappy and violent home life and that he was regularly beaten by his mother. Notwithstanding this seemingly powerful mitigation evidence Hall was again sentenced to death.

Following the 2002 decision of the US Supreme Court in *Atkins v. Virginia* that the Eighth Amendment prohibited the execution of persons with intellectual disability, Hall filed a motion claiming that he had intellectual disability and could not be executed. After a delay of some five years Florida held a hearing to consider Hall's motion. Hall again presented evidence of intellectual disability, including an IQ test score of 71. In response, Florida argued that Hall could not be found intellectually disabled because Florida law requires that, as a threshold matter, Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability. The Florida Supreme Court rejected Hall's appeal and held that Florida's 70-point threshold was constitutional[4].

The judgment of the US Supreme Court began by reviewing the Constitutional position. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment applies those restrictions to the States[5]. "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[6]

The Eighth Amendment prohibits certain punishments as a categorical matter.

Contrary to the Originalist interpretation of the Federal Constitution strongly supported by the minority of the Court, in the opinion of the majority, the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[7] To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society."[8] "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force." The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized[9]. No person may be sentenced to death for a crime committed as a juvenile[10]. And, as relevant for this case, persons with intellectual disability may not be executed.[11]

The Supreme Court then considered the rationale of sentencing and pointed out that no penological purpose is served by

executing a person with intellectual disability.[12] To do so contravenes the Eighth Amendment, because imposing the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. The Court noted that "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."[13] Passing over rehabilitation which, self-evidently, is not an applicable rationale for the death penalty,[14] the Court considered that so far as deterrence is concerned, those with intellectual disability are, by reason of their condition, likely to be unable to make the calculated judgments that are the premise for the deterrence rationale. Such persons have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[15] Retributive values, the Court explained, are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.[16]

A further reason, noted by the Supreme Court for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. Such persons face the 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.[17] Whilst this cannot exempt this group from being tried and if necessary punished, it does mean that they may not receive the law's most severe sentence.[18]

The question presented for the Court's consideration in the present case was how intellectual disability should be defined in order to implement the above principles and the holding of *Atkins*. To determine if Florida's cut-off rule is valid involves consideration of the psychiatric and professional studies that seek to explain the purpose and meaning of IQ scores and to determine how the scores relate to the holding of *Atkins*. This in turn should lead to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule. That understanding should inform the Court's determination whether there is a consensus that instructs how to decide the specific issue presented in this case. Finally, the Supreme Court must express its own independent determination reached in light of the instruction found in those sources and authorities.

To the dismay of the minority who considered this approach to lack legitimacy, the Court then considered at some length the views of the medical community, recognising the experience and expertise of this community in the diagnosis of intellectual disability.[19] In particular, the court noted that it was proper to consult such experts on the issue at stake in this case, namely who qualifies as intellectually disabled. As explained in *Atkins,* the medical community defines intellectual disability according to three criteria: significantly sub-average intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behaviour to changing circumstances), and onset of these deficits during the developmental period.[20]

The Supreme Court noted that on its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*. The relevant Florida statute defines intellectual disability for the purposes of an *Atkins* proceeding as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the period from conception to age 18."[21] The statute further defines "significantly sub-average general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." The mean IQ test score is 100. The concept of standard

deviation describes how scores are dispersed in a population. Standard deviation is distinct from standard error of measurement, a concept which describes the reliability of a test and is discussed further below. The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs "two or more standard deviations from the mean" will score approximately 30 points below the mean on an IQ test, *i.e.* a score of approximately 70 IQ points.

On its face, said the Court, this statute could be interpreted consistently with *Atkins* and with the conclusions the Court reached in the instant case. Nothing in the statute precluded Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. The problem has arisen because the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.[22] That strict IQ test score cut-off of 70 is the issue in this case.

Nothing in the statute precluded Florida from taking into account the IQ test's standard error of measurement.

As a result of this mandatory cut-off, sentencing courts in Florida cannot consider even 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, behavioural records, school tests and reports, and testimony regarding past behaviour and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.[23]

Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. Each IQ test has a "standard error of measurement," often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanour; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing.

The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For the purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. A score of 71, for instance, is generally considered to reflect a range approximately between 66 and 76. Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a

complicated endeavour. In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Despite these professional explanations, Florida law used the test score as a fixed number, thus barring further consideration of other evidence bearing on the question of intellectual disability. For professionals to diagnose, and for the law then to determine whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below, the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing.

Having thus considered the expert views of the medical community the Supreme Court then considered what was to be learned from the practice of other States apart from Florida. The Court noted that 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. This calculation provides "objective indicia of society's standards" in the context of the Eighth Amendment.[24] The Court noted that only the Kentucky and Virginia Legislatures have adopted a fixed score cut-off identical to Florida's.[25] Alabama also may use a strict IQ score cut-off at 70, although not as a result of legislative action.[26] Since the Petitioner in the present case was not questioning the rule in States which use a bright-line cut-off at 75 or greater, they were not included alongside Florida in this analysis.

In addition to these States, Arizona, Delaware, Kansas, North Carolina, and Washington have statutes which could be interpreted to provide a bright-line cut-off leading to the same result that Florida mandates in its cases.[27] That these state laws might be interpreted to require a bright-line cut-off does not mean that they will be so interpreted, however.[28] Arizona's statute appears to set a broad statutory cut-off at 70,[29] but another provision instructs courts to "take into account the margin of error for a test administered."[30] How courts are meant to interpret the statute in a situation like Hall's is not altogether clear. The principal Arizona case on the matter, *State v. Roque*,[31] states that "the statute accounts for margin of error by requiring multiple tests," and that "if the defendant achieves a full-scale score of 70 or below on any one of the tests, then the court proceeds to a hearing."[32] But that case also notes that the defendant had an IQ score of 80, well outside the margin of error, and that all but one of the sub-parts of the IQ test were "above 75."

Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question.[33] Delaware has executed three individuals in the past decade, while Washington has executed one person, and has recently suspended its death penalty. None of the four individuals executed recently in those States appears to have brought a claim similar to that advanced here.

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Thus, at most nine States mandate a strict IQ score cut-off at 70. Of these, four States (Delaware, Kansas, North Carolina, and Washington) appear not to have considered the issue in their courts. On the other side of the argument stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years.[34] In those States, of course, a person in Hall's position could not be executed even without a finding of intellectual disability. Thus 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.

However, these aggregate numbers are not the only considerations bearing on a determination of consensus. Consistency of the direction of change is also relevant.[35] Since *Atkins*, many States have passed legislation to comply with the constitutional requirement that persons with intellectual disability not be executed. Two of these States, Virginia and Delaware, appear to set a strict cut-off at 70, although as discussed, Delaware's courts have yet to interpret the law. In contrast, at least 11 States have either abolished the death penalty or passed legislation allowing defendants to present additional evidence of intellectual disability when their IQ test score is above 70.

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Since *Atkins*, five States have abolished the death penalty through legislation.[36] In addition, the New York Court of Appeals invalidated New York's death penalty under the State Constitution in 2004, see *People v. LeValle*,[37] and legislation has not been passed to reinstate it. And when it did impose the death penalty, New York did not employ an IQ cut-off in determining intellectual disability.[38] In addition to these States, at least five others have passed legislation allowing a defendant to present additional evidence of intellectual disability even when an IQ test score is above 70.[39] And no State that previously allowed defendants with an IQ score over 70 to present additional evidence of intellectual disability has modified its law to create a strict cut-off at 70.[40]

In summary therefore, the Supreme Court noted that every state legislature to have considered the issue after *Atkins*, apart from Virginia's, and whose law has been interpreted by its courts has taken a position contrary to that of Florida. Indeed, the Florida Legislature, which passed the relevant legislation prior to *Atkins*, might well have believed that its law would not create a fixed cut-off at 70. The staff analysis accompanying the 2001 bill states that it "does not contain a set IQ level . . . . Two standard deviations from these tests is approximately a 70 IQ, although it can be extended up to 75."[41] But the Florida Supreme Court interpreted the law to require a bright-line cut-off at 70,[42] and the US Supreme Court was bound by that interpretation. However the Court went on to point out that the rejection of the strict 70 cut-off in the vast majority of States and the "consistency in the trend,"[43] toward recognizing the SEM "provide strong evidence of consensus that our society does not regard this strict cut-off as proper or humane".

The Supreme Court in *Atkins* acknowledged the inherent error in IQ testing. It is true that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation" falls within the protection of the Eighth Amendment.[44] In *Atkins,* the Court stated:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in Ford v. Wainwright with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'[45]

The Court acknowledged that the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. However, said the

Court, *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.

In fact the *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cut-off at 70. The *Atkins* Court first cited the definition provided in the DSM-IV: "'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70."[46] The Court later noted that "an IQ between 70 and 75 or lower . . . is typically considered the cut-off IQ score for the intellectual function prong of the mental retardation definition."[47] Furthermore, immediately after the Court declared that it left "to the States the task of developing appropriate ways to enforce the constitutional restriction"[48] the Court stated in an accompanying footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions."

Thus *Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. In the words of *Atkins,* those persons who meet the "clinical definitions" of intellectual disability "by definition . . . have 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."[49] Thus, they bear "diminish[ed] . . . personal culpability." The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins.* And those clinical definitions have long included the SEM.[50]

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In the US Supreme Court, Florida's argument was that the current Florida law was favourably cited by the *Atkins* Court.[51] However whilst accepting that *Atkins* did refer to Florida's law in a citation listing States which had outlawed the execution of the intellectually disabled[52], the Court clearly felt that fleeting mention could not be taken to signal the Court's approval of Florida's current understanding of the law. As discussed above, when *Atkins* was decided the Florida Supreme Court had not yet interpreted the law to require a strict IQ cut-off at 70. That new interpretation runs counter to the clinical definition cited throughout *Atkins* and to Florida's own legislative report indicating this kind of cutoff need not be used.

Furthermore said the Court, Florida's argument also conflicts with the logic of *Atkins* and the Eighth Amendment. If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. The Supreme Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability.

Whilst the Court acknowledged that the actions of the States and the precedents of the Court "give us essential instruction,"[53] the Court went on to say that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[54] The exercise of that independent judgment is the Court's judicial duty.[55] Exercising that judgment the Supreme Court held that the Florida statute, as interpreted by its courts, is unconstitutional.

The Court also acknowledged the important contribution made by the views of medical experts. Whilst these views do not dictate the Court's decision, the Court does not

disregard these informed assessments.[56] It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And 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.

By failing to take into account the SEM and setting a strict cut-off at 70, Florida "goes against the unanimous professional consensus." Florida was unable to point to a single medical professional who supports this cut-off. The DSM-5 repudiates it: "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks."[57] This statement well captures the Court's independent assessment that an individual with an IQ test score "between 70 and 75 or lower," may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.

The flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning.[58] SEM is not a concept peculiar to the psychiatric profession and IQ tests. It is a measure that is recognized and relied upon by those who create and devise tests of all sorts.[59] This awareness of the IQ test's limits is of particular importance when conducting the conjunctive assessment necessary to assess an individual's intellectual ability.

Intellectual disability, said the Supreme Court, is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied scepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.[60] The Supreme Court agreed with the medical experts that 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.

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It is not sound to view a single factor as determinative of a conjunctive and interrelated assessment. The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

Concluding the judgment of the majority Kennedy J noted that Florida was seeking to execute a man because he scored a 71 instead of 70 on an IQ test. Florida he said, was one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70."[61] Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a

sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

The judgment noted that the death penalty is the gravest sentence society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes the Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States, said the Court, are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Accordingly, the judgment of the Florida Supreme Court was reversed, and the case was remanded for further proceedings not inconsistent with this opinion.

The judgment of the Supreme Court takes the decision in *Atkins* one stage further on. Whilst it remains a matter for the States to decide how to determine a claim by an inmate that he suffers from intellectual disability such as to preclude a sentence of death in his case, this decision makes it clear that no State can prevent an inmate from presenting other evidence of intellectual deficit in support of his contention merely because he has presented an IQ score in excess of 70. An inmate who presents an IQ score below 75 must be allowed to present such evidence. On the other hand there would appear to be nothing in the judgment that would prevent Florida or the other offending States from simply shifting the cut-off point to 75. Since such a decision would appear to take account of the SEM, it would not offend against the Court's reasoning.

Freddie Lee Hall is not yet out of the woods. This judgment says nothing about the merits of his claim to be intellectually disabled. It merely, albeit rather importantly, allows him the chance, previously denied him, to present such evidence to the Florida courts.

[1] 536 U.S. 304 (2002).
[2] *See Penry v. Lynaugh,* 492 U.S. 302, 340 (1989).
[3] *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).
[4] 109 So. 3d, at 707-708.
[5] *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (*per curiam*).
[6] *Roper, supra*, at 560; *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man").
[7] *Weems v. United States*, 217 U.S. 349, 378 (1910).
[8] *Trop*, *supra*, at 101.
[9] *Ibid.*
[10] *Roper*, *supra*, at 578.
[11] *Atkins*, 536 U.S., at 321.
[12] *Ibid.*, at 317, 320.
[13] *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).
[14] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).
[15] *Atkins*, 536 U.S., at 320.
[16] *Ibid.,* at 319.
[17] *Ibid.*, at 320-21.
[18] *Ibid.*, at 318.
[19] After referring to *Atkins* and other previous authorities Alito J writing a dissenting judgment in which the Chief Justice, and Scalia and Thomas JJ joined, said that "In these prior cases, when the Court referred to the evolving standards of a maturing "society," the Court meant the standards of *American society as a whole*. Now, however, the Court strikes down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA)."
[20] *See id.,* at 308.
[21] Fla. Stat. §921.137(1) (2013).
[22] *See Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007) (*per curiam*).
[23] *See* APA Brief 15-16 ("[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist"); DSM-5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score").
[24] *Roper*, 543 U.S. at 563.
[25] Ky. Rev. Stat. Ann. §532.130(2)(Lexis Supp. 2013); *Bowling v. Commonwealth*, 163 S. W. 3d 361, 375 (Ky. 2005); Va. Code Ann. §19.2-264.3:1.1 (Lexis Supp. 2013); *Johnson v. Commonwealth*, 267 Va. 53, 75, 591 S. E. 2d 47, 59 (2004), vacated and remanded on other grounds, 544 U.S. 901 (2005).
[26] *See Smith v. State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008) ("The Alabama Supreme Court . . . did not adopt any 'margin of error' when examining a defendant's IQ score").
[27] *See* Ariz. Rev. Stat. Ann. §13-753(F) (West 2013); Del. Code Ann. Tit. 11, §4209(d)(3) (2012 Supp.); Kan. Stat. Ann. §76-12b01 (2013 Supp.); N. C. Gen. Stat. Ann. §15A-2005 (Lexis 2013); Wash. Rev. Code §10.95.030(2)(c) (2012).
[28] *See, e.g., State v. Vela*, 279 Neb. 94, 126, 137, 777 N. W. 2d 266, 292, 299 (2010) (Although Nebraska's statute specifies "[a]n intelligence quotient of seventy or below on a reliably administered intelligence quotient test," "[t]he district court found that [the defendant's] score of 75 on the [IQ test], considered in light of the standard error of measurement, could be considered as subaverage general intellectual functioning for purposes of diagnosing mental retardation").
[29] Ariz. Rev. Stat. Ann. §13-753(F) (West 2013).
[30] *Id.* at §14-753(K)(5).
[31] 141 P. 3d 368, (Ariz 2006).
[32] *Id.* at 403.
[33] *See Atkins*, 536 U.S., at 316 ("[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States . . . continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States").
[34] *See Roper,* 543 U.S., at 574 ("[The] Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty").
[35] *See id.,* at 565-66 (quoting *Atkins*, *supra*, at 315).
[36] *See* 2012 Conn. Pub. Acts no. 12-5; Ill. Comp. Stat. ch. 725, §119-1 (West 2012); Md. Correc. Servs. Code Ann. §3-901 *et seq.* (Lexis 2008); N. J. Stat. Ann. §2C:11-3(b)(1) (West Supp. 2013); 2009 N. M. Laws ch. 11, §§5-7.
[37] 3 N. Y. 3d 88, 817 N. E. 2d 341 (2004).
[38] N. Y. Crim. Proc. Law Ann. §400.27(12)(e) (West 2005).
[39] *See* Cal. Penal Code Ann. §1376 (West Supp. 2014) (no IQ cutoff); Idaho Code §19-2515A (Lexis Supp. 2013) ("seventy (70) or below"); Pizzutto v. State, 146 Idaho 720 , 729, 202 P. 3d 642, 651 (2008) ("The alleged error in IQ testing is plus or minus five points. The district court was entitled to draw reasonable inferences from the undisputed facts"); La. Code Crim. Proc. Ann., Art. 905.5.1 (West Supp. 2014) (no IQ cutoff); Nev. Rev. Stat. §174.098.7 (2013) (no IQ cutoff); Utah Code Ann §77-15a-102 (Lexis 2012) (no IQ cutoff). The U.S. Code likewise does not set a strict IQ cutoff. *See* 18 U.S.C. §3596(c).
[40] *Cf. Roper*, *supra*, at 566 ("Since *Stanford v. Kentucky*, 492 U.S. 361 (1989), no State that previously prohibited capital punishment for juveniles has reinstated it").
[41] Fla. Senate Staff Analysis and Economic Impact Statement, CS/SB 238, p. 11 (Feb. 14, 2001).
[42] *See Cherry*, 959 So. 2d, at 712-13.
[43] *Roper*, *supra*, at 567.
[44] *Bobby v. Bies*, 556 U.S. 825, 831 (2009).
[45] 536 U.S., at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399 , 416-417 (1986); citation omitted).
[46] 536 U.S., at 308, n. 3 (citing Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)).
[47] 536 U.S., at 309, n. 5.
[48] *Id.*, at 317.
[49] *Id.*, at 318.
[50] *See* Diagnostic and Statistical Manual of Mental

Disorders 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior").

[51] Brief for Respondent 18 ("as evidence of the national consensus, the court specifically cited Florida's statute at issue here, which has not substantively changed").

[52] 536 U.S., at 315.

[53] *Roper*, 543 U.S., at 564.

[54] *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

[55] *See Roper*, *supra*, at 574 ("[T]o the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions" (citation omitted).

[56] *See Kansas v. Crane*, 534 U.S. 407, 413 (2002) ("[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . .").

[57] DSM-5, at 37.

[58] *See* APA Brief 24 ("[I]t is standard pyschometric practice to report the 'estimates of relevant reliabilities and standard errors of measurement' when reporting a test score"); *ibid.* (the margin of error is "inherent to the accuracy of IQ scores"); Furr, Psychometrics, at 119 ("[T]he standard error of measurement is an important psychometric value with implications for applied measurement").

[59] *Id.*, at 118 (identifying the SEM as "one of the most important concepts in measurement theory").

[60] *See* APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid").

[61] 536 U.S., at 308, n. 3.