COMMENT

MATCHING THE TRAJECTORY OF THE SUPREME COURT ON THE INTELLECTUAL DISABILITY DEFENSE: A RECOMMENDATION FOR THE STATES

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Like many of the provisions found within the Bill of Rights, the Eighth Amendment’s prohibition against “cruel and unusual punishments” has become a household phrase. While inherently very memorable and quotable, the types of punishment actually prohibited by the Eighth Amendment’s “cruel and unusual” language have been subject to hundreds of years of statutory and judicial interpretation. In 2014, the Supreme Court of the United States addressed one particular aspect of Eighth Amendment jurisprudence in *Hall v. Florida*¹: the intellectual disability defense.² In *Hall*, the Court struck down a Florida statute which prohibited criminal defendants facing capital punishment from invoking the intellectual disability defense if they had an IQ greater than seventy.³

The Court’s decision in *Hall* is just the most recent in a line of cases defining the intellectual disability defense. While at first glance *Hall* might seem like a logical extension of its predecessors, when viewed in light of the surrounding case law and the status of intellectual disability statutes around the country, the decision actually creates uncertainty as to the future shape of the intellectual disability defense. Thus, it is essential for the states to review their own intellectual disability defenses to ensure compliance with *Hall* and the developing trend in intellectual disability defense jurisprudence. Once the requirements of the Court’s decision in *Hall* are fully

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² *Id.* at 1990.

³ *Id.* at 2001.
understood, as well as the reasoning behind that decision, states would be well served in adopting an intellectual disability defense statute similar to California’s statute.

I. CAPITAL PUNISHMENT PRIOR TO THE INTELLECTUAL DISABILITY DEFENSE

Compared to many of the other amendments that make up the Bill of Rights, the text of the Eighth Amendment is relatively succinct, stating plainly that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Eighth Amendment represents an important, self-imposed restraint on governmental power, which demonstrates that it is “the duty of the government to respect the dignity of all persons,” including criminals. Based on the Eighth Amendment’s prohibition of cruel and unusual punishment, Justice Brennan wrote that any punishment that was “degrading to human dignity[,] . . . inflicted in a wholly arbitrary fashion[,] . . . patently unnecessary,” or “rejected [by] society” was to be considered constitutionally impermissible.

Historically, a convicted defendant’s intellectual disability was not considered an absolute defense against a sentence of capital punishment. In Penry v. Lynaugh, the defendant was charged with rape and murder and was subsequently convicted and sentenced to death. However, Penry, the defendant, had been clinically diagnosed as mentally retarded from a young age, most likely due to organic brain damage caused by trauma during birth. Psychologists gave Penry several IQ tests over the course of his life, with results indicating an IQ of somewhere between fifty and sixty-three, which was indicative of “mild to moderate retardation.” The defendant’s expert witness, a clinical psychologist, testified that Penry had the intelligence of a six-and-one-half-year-old and the social maturity of a nine- or ten-year-old. At sentencing, Penry argued that the Eighth Amendment’s prohibition of cruel and unusual punishment

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4 U.S. CONST. amend. VIII.
8 Penry, 492 U.S. at 307, 311.
9 Id. at 307.
10 Id. at 307–08.
11 Id. at 308.
should preclude the jury from invoking capital punishment. The trial court rejected this defense and the jury sentenced Penry to death. On appeal, the Supreme Court rejected the contention that it was cruel and unusual to execute a mentally retarded defendant. While the Justices recognized that “mental retardation is a factor that may well lessen a defendant’s culpability for a capital offense,” the Court did not accept the conclusion that the intellectual disability of a defendant like Penry could be raised as an absolute defense against capital punishment.

However, the decision in Penry was far from unanimous. In his dissent, Justice Brennan wrote that the majority was correct in upholding the principle that sentencing certain classes of offenders to death can violate the Eighth Amendment “[if] it ‘makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering’ or [if] it is ‘grossly out of proportion to the severity of the crime.’” Disagreeing with the majority, Brennan argued that simply using a defendant’s intellectual disability as a mitigating factor in sentencing was insufficient to satisfy the constitutional protections of the Eighth Amendment. Instead, Brennan concluded that it would be unconstitutional to execute the intellectually disabled because such a sentence would run afoul of the Constitution’s implicit requirement “that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty.” The concerns of Justice Brennan and the dissenters in Penry drew the attention of the Court and were revisited thirteen years later.

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12 Id. at 311.
13 Id.
14 Id. at 338. Older cases often refer to the intellectually disabled by variations of the now disfavored term “mentally retarded.” The terms “intellectually disabled” and “mentally retarded,” and the variations thereof, can effectively be used interchangeably. See Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (changing entries in the U.S. Code from “having mental retardation” to “having intellectual disabilities”). For the purposes of this article, the term “intellectually disabled” will be used except when referring to historical facts, legislation, and court decisions.
15 Penry, 492 U.S. at 340.
16 Id. at 343 (Brennan, J., dissenting) (alteration in original) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
17 Penry, 492 U.S. at 346–47 (Brennan, J., dissenting).
18 Id. at 347.
II. THE CREATION OF THE INTELLECTUAL DISABILITY DEFENSE

The intellectual disability defense against capital punishment was not established until 2002 in Atkins v. Virginia. The Supreme Court was once again faced with a criminal defendant who was intellectually disabled and had been sentenced to death for his crimes by the State of Virginia. Defendant Atkins was described as “mildly mentally retarded” at trial by a forensic psychologist, and it was established that he had an IQ of fifty-nine. Faced with strong public opinion on the issue and the Court’s own concerns found in the Penry dissent, the Court overruled their previous decision and held that the intellectually disabled should be categorically excluded from capital punishment.

The Court held that imposing the death penalty on the intellectually disabled was not justified by either of the societal goals of capital punishment, specifically “retribution and deterrence of capital crimes by prospective offenders.” Retribution requires punishing a defendant based on his or her culpability, and the Court held that the intellectually disabled simply do not have the same personal culpability as the non-intellectually disabled, undermining the retributive aim of capital punishment. Furthermore, the Court held that exempting the intellectually disabled from capital punishment would not undermine the goal of deterrence, stating that “it is the same cognitive and behavioral impairments that make these defendants less morally culpable . . . that also make 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.” Since the execution of the intellectually disabled would not serve either of the goals of capital punishment, the Court concluded that, in light of “evolving standards of decency,” the Eighth Amendment categorically prohibits sentencing the intellectually disabled to death.

20 Id.
21 Id. at 310.
22 Id. at 308–09.
24 See Atkins, 536 U.S. at 320–21.
25 Id. at 318–19 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).
26 Atkins, 536 U.S. at 319.
27 Id. at 320.
28 Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 406 (1986)) (internal quotation marks omitted).
III. BRIDGING THE GAP BETWEEN ATKINS V. VIRGINIA AND HALL V. FLORIDA

In Atkins, the Court also noted that its conclusion that the Eighth Amendment categorically prohibited executing the mentally disabled was consistent with a consensus of state legislatures.\(^29\) At the time of Atkins, many state legislatures across the country had already adopted statutes that prohibited the execution of intellectually disabled defendants.\(^30\) Georgia was the first state to enact such a prohibition after an outpouring of public protest surrounding the execution of an intellectually disabled defendant in 1986.\(^31\) Many states followed suit, both in response to the protests in Georgia as well as the Supreme Court’s decision in Penry.\(^32\) Maryland was the next state to follow Georgia in adopting an intellectual disability defense statute in 1989,\(^33\) with many more states passing similar legislation in the following years.\(^34\)

After the ruling in Atkins, states were required to modify their criminal laws to include the intellectual disability defense reflecting the new development in Eighth Amendment jurisprudence. However, the Court provided little guidance to the states to assist with “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”\(^35\) Predictably, this led to great variation in state intellectual disability statutes. Thus, while the ruling in Atkins represented a tremendous development in addressing the cruel and unusual punishment concerns surrounding the execution of the intellectually disabled, the decision by its very nature left open the possibility that the issue might need to be addressed again in the future.

\(^{29}\) Atkins, 536 U.S. at 315–16.
\(^{30}\) Id. at 313–15.
\(^{32}\) Atkins, 536 U.S. at 313–15.
\(^{33}\) MD. CODE ANN., Art. 27, § 412(f)(1) (repealed 2002); Atkins, 536 U.S. at 314.
\(^{34}\) See, e.g., ARK. CODE ANN. § 5-4-618(b) (2015); COLO. REV. STAT. § 16-9-401 (repealed 2002); TENN. CODE ANN. § 39-13-203(b) (2015); Atkins, 536 U.S. at 314.
IV. THE COURT REVISITS THE INTELLECTUAL DISABILITY DEFENSE

A. The Case of Hall v. Florida

The Supreme Court revisited the issue of the intellectual disability defense in the 2014 case of Hall v. Florida. The circumstances surrounding Hall were nothing short of tragic. Along with an accomplice, defendant Hall was charged and convicted at trial of the brutal kidnapping, assault, rape, and murder of a young, pregnant newlywed in 1978. Hall was also charged and convicted of the murder of a sheriff’s deputy who attempted to arrest Hall and his accomplice as they attempted to rob a convenience store shortly after the murder. Hall was sentenced to death for both crimes in 1981, although his sentence for the murder of the deputy was later reduced due to insufficient evidence of premeditation. As a defense against the imposition of the death penalty, Hall offered evidence of his intellectual disability as a mitigating factor, even though Florida state law did not directly contemplate such evidence. At the time of Hall’s sentencing, the Supreme Court had not issued its ruling in Atkins, and thus on appeal the Florida Supreme Court affirmed the imposition of the death penalty even after allowing evidence of Hall’s intellectual disability to be offered in an attempt to mitigate his sentence, as per the precedent in Penry and Hitchcock.

However, in 2004, Hall filed an appeal to stay his execution based on the then recent Supreme Court ruling in Atkins. Again, Hall claimed that his intellectual disability prohibited the State of Florida from executing him based on the Eighth Amendment’s protection against cruel and unusual punishment. By 2004, the State of Florida had already adopted a statute that effectively mirrored the Court’s ruling in Atkins. Under title 47, section 921.137 of the Florida Code, the “mentally retarded” could not be sentenced to death upon conviction of a capital felony. To be considered “mentally

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37 Id. at 1990.
38 Id.
39 Id.
41 Hall, 134 S. Ct. at 1990–91; Hitchcock, 481 U.S. at 398–99 (holding that defendants could present non-statutory mitigating evidence at death penalty hearings).
43 Id.
retarded” under the statute, a defendant must possess “significantly subaverage general intellectual functioning,” as evidenced by scoring two or more standard deviations from the mean score of a standardized intelligence (IQ) test.\textsuperscript{45} The mean score on an IQ test is 100 and a standard deviation is approximately fifteen points, meaning the Florida statute categorized those who scored approximately seventy or below as mentally retarded.\textsuperscript{46} The Florida Supreme Court interpreted the statute as establishing a strict cutoff score of seventy or below (even if within the margin of error) for defendants seeking to avoid capital punishment under section 971.137.\textsuperscript{47}

Over his lifetime, Hall took nine IQ tests, and his scores ranged from sixty to eighty.\textsuperscript{48} At sentencing, however, the court excluded two of Hall’s scores “for evidentiary reasons, leaving only scores between 71 and 80.”\textsuperscript{49} On appeal, the Florida Supreme Court upheld the constitutionality of the strict cutoff requirement of section 921.137 and thus denied Hall’s appeal because he did not qualify as mentally retarded, specifically because he failed to prove he had an IQ of seventy or below, as required by Florida law.\textsuperscript{50} Hall then appealed to the United States Supreme Court alleging a violation of his Eighth Amendment rights based on the strict IQ cutoff established by the Florida statute as interpreted by the Florida Supreme Court, and the United States Supreme Court granted certiorari in 2013.\textsuperscript{51}

In \textit{Hall}, the Supreme Court took the opportunity to fully explore and clarify the Eighth Amendment protection they enumerated in \textit{Atkins}.\textsuperscript{52} At issue was whether Florida’s bright-line rule for determining intellectual disability was compatible with the principles and concerns, which led to the Court’s decision in \textit{Atkins}.\textsuperscript{53}

The Supreme Court recognized that the research and opinions of medical experts were influential on state courts and legislatures when addressing the topic of intellectual disability.\textsuperscript{54} Thus, the Court

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\item \textsuperscript{45} FLA. STAT. ANN. § 921.137(1) (LexisNexis 2004) (current version at FLA. STAT. § 921.137(1) (2015)).
\item \textsuperscript{46} \textit{Hall}, 134 S. Ct. at 1994.
\item \textsuperscript{47} See Cherry v. State, 959 So. 2d 702, 712, 713, 714 (Fla. 2007), abrogated by \textit{Hall}, 134 S. Ct. at 1995.
\item \textsuperscript{48} \textit{Hall}, 134 S. Ct. at 1992; Brief for Respondent at 8, \textit{Hall}, 134 S. Ct. 1986 (No. 12-10882).
\item \textsuperscript{49} \textit{Hall}, 134 S. Ct. at 1992.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}; Brief for Petitioner at 33, \textit{Hall}, 134 S. Ct. 1986 (No. 12-10882).
\item \textsuperscript{52} \textit{Hall}, 134 S. Ct. at 1992–93.
\item \textsuperscript{53} \textit{Id.} at 1993.
\item \textsuperscript{54} \textit{Id.}
began its analysis in *Hall* with an extensive examination of the nature of IQ tests and characteristics of intellectual disability.\(^{55}\) The Court concluded that the Florida statute’s strict cutoff for the intellectual disability defense conflicted with established medical practice in two key ways—namely, that such a cutoff failed to take into account other evidence indicative of intellectual disability, and that such a strict cutoff also failed to recognize that IQ tests by their very nature are imprecise instruments.\(^{56}\)

In regards to evidence of intellectual disability, the Florida statute and the Florida Supreme Court’s subsequent interpretation of the statute prohibited any such evidence from being offered except for proof of an IQ of seventy or below.\(^{57}\) Florida’s blanket prohibition of all relevant evidence other than an IQ test ran afoul of the medical community’s accepted opinion on diagnosing intellectual disability—namely, that a person’s inability to adapt to social and cultural environments can be a strong indicator of intellectual disability but is something that is not revealed on an IQ test.\(^{58}\) Adaptive behavioral problems are generally established by evidence found in a person’s medical history, behavior record, school records, or demonstrated by testimony regarding his or her past behavior and social circumstances.\(^{59}\) Relied upon by the Court, the latest version of the Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) states that “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.”\(^{60}\) Thus, the Supreme Court had reason to be concerned that Florida prohibited such evidence of adaptive behavior problems from being introduced as part of an intellectual disability defense, especially because such problems could be indicative of a defendant’s far more severe intellectual disability than otherwise would be demonstrated by IQ tests alone.

Furthermore, the Supreme Court took issue with Florida’s strict cutoff for the intellectual disability defense because the law required IQ tests to be treated as if they were exact measurements of a defendant’s intellectual abilities or disabilities.\(^{61}\) While the Florida

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\(^{55}\) *Id.* at 1993–94.

\(^{56}\) *Id.* at 1995.

\(^{57}\) *Id.* at 1994 (citing Cherry v. State, 959 So. 2d 702, 712–13 (Fla. 2007)).

\(^{58}\) *Hall*, 134 S. Ct. at 1994–95.

\(^{59}\) *Id.* at 1994.

\(^{60}\) *Id.* at 1995 (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) [hereinafter DSM-5]. (alteration in original))

The law treated IQ test results as a fixed score in order to compare the results to a strict cutoff, IQ results should properly be considered as a range of scores. Just like with any method of gathering statistical data, IQ test results are given a “standard error of measurement” (“SEM”), “reflect[ing] . . . the inherent imprecision of the test itself.” Scientifically, it is simply impossible to state with certainty that a person’s IQ represents an absolutely accurate indication of their intellectual capabilities. According to the DSM-5, “IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.” In fact, the range of scores created by the SEM represent to what degree of confidence the administrators of the IQ test can have in determining the test-taker’s “true” IQ.

Just like any standard deviation, a person’s recorded IQ test result plus or minus one SEM allows an evaluator to state with sixty-eight percent confidence that the person’s actual IQ falls within that range, while a range of plus or minus two SEM would allow for ninety-five percent confidence. The average SEM for a standard IQ test is 2.30 across all age groupings. An administrator of an IQ test can state with ninety-five percent confidence that a person’s actual IQ falls within a range of 9.20, while they can only state with sixty-eight percent confidence that it falls within a range of 4.60. For example, in Hall’s case, a proper reading of his IQ test result of seventy-one would indicate with ninety-five percent confidence that his actual IQ was somewhere in the range of sixty-six to seventy-six, and indicates with sixty-eight percent confidence that his actual IQ was between sixty-eight-and-one-half and seventy-three-and-one-half.

However, Florida’s law did not even take into consideration the SEM inherent in all IQ tests and instead considered each defendant’s recorded IQ as an accurate reflection of their intellectual capabilities with 100% confidence. The Supreme Court found this to be a troubling departure from established medical opinion. The Court
adopted the position that “[i]ntellectual disability is a condition, not
a number,” and held that “[c]ourts must recognize, as does the
medical community, that the IQ test is imprecise.”72

B. The Status of the Intellectual Disability Defense at the Time of
Hall v. Florida

After concluding that Florida’s law did not conform to prevailing
medical science, the Supreme Court surveyed the intellectual
disability laws of other states in order to determine if such
disagreement between the law and medical opinion was widespread
throughout the country.73 As stated previously, after ruling in Atkins,
the Court left to the states “the task of developing appropriate ways
to enforce the constitutional restriction upon [their] execution of
sentences.”74 The Court itself recognized that there was “serious
disagreement” between the states as to “determining which offenders
[were] in fact retarded.”75 This resulted in a fair amount of diversity
among state intellectual disability statutes.

In addition to Florida, both Kentucky and Virginia had also
codified their intellectual disability defenses to include a strict cutoff
requirement.76 Furthermore, the Alabama Supreme Court interpreted their state’s intellectual disability statute as precluding
any consideration of a “margin of error.”77 Other states, including
Arizona, Delaware, Kansas, North Carolina, and Washington, have
intellectual disability laws that the Supreme Court considered to be
open to interpretation as to whether there was a strict cutoff
requirement present.78 For example, the Arizona intellectual

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72 Id. at 2001.
73 Id. at 1996–98.
75 Hall, 134 S. Ct. at 2003 (Alito, J., dissenting) (quoting Atkins, 536 U.S. at 317) (internal quotation marks omitted).
76 KY. REV. STAT. ANN. § 532.130(2) (West 2004) (“A defendant with significant subaverage
intellectual functioning existing concurrently with substantial deficits in adaptive behavior and
manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a
seriously mentally retarded defendant. ‘Significantly subaverage general intellectual
functioning’ is defined as an intelligence quotient (I.Q.) of seventy (70) or below.”); VA. CODE
ANN. § 19.2-264.3:1.1(A) (2004) (“Mentally retarded’ means a disability, originating before the
age of 18 years, characterized concurrently by (i) significantly subaverage intellectual
functioning as demonstrated by performance on a standardized measure of intellectual
functioning administered in conformity with accepted professional practice, that is at least two
standard deviations below the mean [i.e. 70 or below] and (ii) significant limitations in adaptive
behavior as expressed in conceptual, social and practical adaptive skills.”).
78 Hall, 134 S. Ct. at 1996. See ARIZ. REV. STAT. ANN. § 13-753(F) (2014); DEL. CODE ANN.
The Intellectual Disability Defense

Disability statute contains an explicitly stated cutoff requiring an IQ of seventy or below for defendants seeking to avoid the death penalty. The Arizona statute also requires courts to consider the margin of error inherent in IQ tests. However, the Arizona Supreme Court interpreted the margin of error in IQ tests as requiring defendants to undergo multiple tests rather than requiring that each IQ result be considered a range rather than a fixed score. This interpretation of IQ results by the Arizona Supreme Court is inconsistent with the medical view that each individual test result should be considered a range of scores.

Conversely, a vast majority of the states that still impose capital punishment have incorporated acknowledgement of the inexactness of IQ tests into their intellectual disability laws. The Court noted that this majority of state legislatures and courts indicated an “objective indicia of society’s standards,” a factor in evaluating the constitutionality of punishment under the Eighth Amendment. The Court in Furman v. Georgia wrote that it would be incredibly unlikely for the Supreme Court to ever have to rule on a law that imposed a punishment that was “clearly and totally rejected throughout society,” as no state legislature should ever have created the law in the first place. For example, while Nebraska’s intellectual disability statute specifies an apparent cutoff score for the...
intellectual disability defense, courts in Nebraska have interpreted the statute as requiring the IQ results to “be considered, in light of the standard error of measurement.” Some states were much more direct in rejecting bright-line cutoffs for their intellectual disability defense. For example, in California, the statute governing the intellectual disability defense makes no reference to required IQ test results. Instead, a defendant is considered intellectually disabled in California if they demonstrate “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age,” as determined by testimony given by a qualified expert given before a special hearing before either a judge or a jury. Similarly, both Louisiana and Utah do not set an IQ cutoff in their respective intellectual disability defense statutes. The United States Code also mirrors the majority position of states in that it also does not include a strict IQ cutoff for the federal intellectual disability defense.

The recent historical trend in state intellectual disability statutes is also clearly in opposition to strict IQ score cutoffs. Since the Supreme Court’s decision in Atkins, every state legislature that has addressed the intellectual disability defense has decided against implementing a strict IQ score cutoff. This trend, along with the vast majority of states already rejecting strict IQ score cutoffs, led the Supreme Court to the conclusion that the societal consensus was that

86 NEB. REV. STAT. § 28-105.01(3) (LexisNexis 2012) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of [intellectual disability].”), repealed by 2015 Neb. Laws 268.
87 State v. Vela, 777 N.W.2d 266, 304 (Neb. 2010).
89 PENAL § 1376(a), (b)(1).
90 LA. CODE CRIM. PROC. ANN. art. 905.5.1(D) (2014) (“Once the issue of intellectual disability is raised by the defendant, and upon written motion of the district attorney, the defendant shall provide the state, within time limits set by the court, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any defense expert in forming the basis of his opinion that the defendant has an intellectual disability.”); UTAH CODE ANN. § 77-15a-102 (LexisNexis 2015) (“[A] defendant is ‘mentally retarded’ if: (1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning . . . are both manifested prior to age 22.”), amended by 2016 Utah Laws Ch. 115 (H.B. 252).
91 18 U.S.C. § 3596(c) (2013) (“A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.”).
intellectual disability defenses should take into account standard error of measurement and that strict cutoffs like Florida’s were neither “proper [nor] humane.”

V. THE IMPACT OF HALL V. FLORIDA ON STATE INTELLECTUAL DISABILITY DEFENSE STATUTES

Upon surveying the various states and their intellectual disability defense statutes and considering the Eighth Amendment issues Florida’s strict IQ score cutoff posed, the Supreme Court concluded that the Florida law was unconstitutional. The Court held that the strict cutoff neither conformed to accepted medical science and psychological diagnosis techniques, nor did it conform to society’s apparent view of what punishment should be considered proper and humane. States whose intellectual disability defense statutes fail to conform to the Supreme Court’s ruling in Hall now face the task of adapting their statutes so as to be constitutional. However, much like the Court’s lack of guidance for states after the ruling in Atkins, the Court has once again given very little guidance to the individual states regarding the implementation of this new intellectual disability defense precedent.

Obviously, the twelve states that already require that standard error measurement be taken into account when using IQ tests to determine a defendant’s level of intellectual disability appear to conform to the Court’s ruling in Hall. Given that, the Court used these states’ statutes and judicial precedents as part of the basis for deciding that a strict IQ test result cutoff was unconstitutional, the Court clearly believed that these states adequately protect the Eighth Amendment rights of the intellectually disabled. Thus, these states, which include California, Idaho, Louisiana, Nevada, and

93 Id.
94 Id. at 2000.
95 Id.
96 And, perhaps even more obvious, so do the nineteen states that have already abolished the death penalty in its entirety. These states include Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. States With and Without the Death Penalty. DEATH PENALTY INFO. CRT., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Mar. 4, 2016). In addition to these nineteen states that have outright abolished the death penalty, Oregon’s governor suspended the death penalty in his state and called for capital punishment reform. Press Release, Oregon Governor John Kitzhaber, Governor Kitzhaber Issues Reprieve—Calls For Action on Capital Punishment (Nov. 22, 2011), http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=589.
Utah, are not required to take any steps in response to the Court’s ruling in *Hall*.

However, the ten states, Florida included, that do not take into account standard error of measurement clearly do not conform to the new Supreme Court precedent of *Hall*, and thus they are faced with the task of modifying their intellectual disability statutes in order to be considered constitutional. These states include, at least by the calculation of Justice Alito in his dissenting opinion, Alabama, Arizona, Delaware, Florida, Idaho, Kansas, Kentucky, North Carolina, Virginia, and Washington. Some of these states, such as Idaho, appear to establish a strict IQ cutoff based on judicial interpretation, which means that the unconstitutionality of their intellectual disability defense statutes might be rectified fairly easily by judicial reinterpretation informed by the Supreme Court’s decision in *Hall*. For example, the Supreme Court of Idaho now must clarify its former precedent and unequivocally require the standard error of measurement to be considered in intellectual disability defenses, and if so, the Idaho statute would not even necessarily need to be amended by the Idaho legislature. However, given that the plain language of the Idaho intellectual disability statute seems to establish a strict cutoff IQ score of 70 or below, it would be quite understandable if the Idaho legislature nonetheless chose to amend the language of the statute.

Like Idaho, Alabama also established a strict cutoff score for the intellectual disability defense via judicial interpretation rather than legislative action. Unlike Idaho, however, the Alabama Legislature has yet to codify the intellectual disability defense into

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98 See id. at 1997–98.
99 Id. at 1996; Id. at 2004 & n.4 (Alito, J., dissenting). The only difference between the majority opinion’s calculation of the number of states that did not require the consideration of the standard error of measurement and the dissenting opinion’s calculation is the inclusion of Idaho, based on the dissent’s argument that “the [Idaho] legislature did not require that the IQ score be within five points of 70 or below,” meaning that the legislature did not require such consideration by the courts. Id. at 2004 n.4 (Alito, J., dissenting) (emphasis added) (quoting Pizzuto v. State, 202 P.3d 642, 651 (Idaho 2008)) (internal quotation marks omitted). The majority opinion, on the other hand, counted Idaho among the states that do take into account standard errors of measurement based on the fact that the Idaho Supreme Court stated that “[t]he alleged error in IQ testing is plus or minus five points,” yet unfortunately did not clearly state whether this interpreted the Idaho statute as requiring that margin of error to be considered. See id. at 1997–98 (majority opinion) (citing Pizzuto, 202 P.3d at 651).
100 Id. at 2004 n.4 (Alito, J., dissenting) (citing Pizzuto, 202 P.3d at 651).
101 Idaho CODE § 19-2515A(1)(b) (2015) (“Significantly subaverage general intellectual functioning’ means an intelligence quotient of seventy (70) or below.”).
This means that the Alabama Supreme Court could either reverse its holding in *Ex parte Perkins* or the Alabama State Legislature could finally codify the United States Supreme Court’s precedent in *Atkins* into an intellectual disability statute that would conform to the ruling in *Hall*.

Most of the other explicitly non-conforming states established the strict IQ score cutoff for its intellectual disability defense via statute. For example, both Kentucky and Virginia adopted nearly identical statutory strict IQ score cutoffs to Florida. Again, it would be possible for these states to conform to the *Hall* precedent via judicial interpretation of these statutes if at the very least their state supreme courts interpret the statutes as requiring the consideration of standard error of measurement. Such will likely be the case in Idaho. As mentioned previously, the majority in *Hall* wrote that the Idaho statute’s language, which seemingly established a strict IQ cutoff point of “seventy (70) or below,” was redeemed by judicial interpretation that “[t]he alleged error in IQ testing is plus or minus five points” and that the courts are “entitled to draw reasonable inferences from the undisputed facts.” While the dissent disagreed with this understanding of the Idaho Supreme Court’s interpretation, the majority position in *Hall* at least made it

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103 Smith, 71 So. 3d at 17.
104 Ky. Rev. Stat. Ann. § 532.130(2) (West 2015) (“A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a defendant with a serious intellectual disability. ‘Significantly subaverage general intellectual functioning’ is defined as an intelligence quotient (I.Q.) of seventy (70) or below.”).
105 Va. Code Ann. § 19.2-264.3:1.1(A) (2015) (“Mentally retarded’ means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.”).
106 Fla. Stat. § 921.137(1) (2015) (“As used in this section, the term ‘intellectually disabled’ or ‘intellectual disability’ means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term ‘significantly subaverage general intellectual functioning,’ for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term ‘adaptive behavior,’ for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.”).
107 See supra note 100–01 and accompanying text. The dissenting opinion considered Idaho to be among the states which did not require the standard error of measurement to be taken into account. *Hall v. Florida*, 134 S. Ct. 1986, 2004 (2014) (Alito, J., dissenting).
clear that even a state statute whose plain language establishes a strict IQ cutoff point can be brought into compliance with the ruling in *Hall* given adequate judicial interpretation.

Thus, even for states like Florida, Kentucky, and Virginia, whose statutory language creates a strict IQ cutoff point, all that might be required is a state judicial interpretation of those statutes that implements the Eighth Amendment protections stated in *Hall*. Again, in the interest of clarity and expediency, it might be preferable for the legislatures of such states to amend their statutory codes to remove the unconstitutional strict IQ score cutoffs rather than wait for a challenge to the law to provoke judicial reinterpretation and implementation of the *Hall* precedent. For example, on January 14, 2015, the Virginia State Legislature introduced a house bill to amend the language of the statutory definition of “mentally retarded” to require that all IQ test scores must be considered as a range of scores taking into account the standard error of measurement.109 The Kentucky State Legislature has attempted to adapt to the recent ruling in *Hall* by introducing an amendment to raise the IQ score requirement of their intellectual disability statute from seventy or below to seventy-five or below, but also allowing defendants to establish their intellectual disability by means of “other competent evidence.”110

VI. A RECOMMENDATION TO UNDECIDED STATES FOR IMPLEMENTING THE *HALL V. FLORIDA* PRECEDENT

While the abstract principles espoused by *Atkins* might not have been enough to spur into action the nine states that had not yet made their position clear on strict IQ cutoffs, the comparatively definitive ruling in *Hall* is far more likely to produce specific results in those states.111 Indeed, since the Supreme Court was very clear that state intellectual disability defense laws that did not take into account the standard error of measurement were prohibited by the Eighth Amendment,112 the states have been left with less autonomy in determining what sort of intellectual disability defense laws they will choose to adopt.

The best option for the non-conforming states or the undecided

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states would be to adopt a statute similar to California’s intellectual disability defense statute. As mentioned previously, the California statute does not take into account an IQ score cutoff when determining eligible defendants.\footnote{See CAL. PENAL CODE § 1376(a) (West 2015).} In California, the state is precluded from pursuing the death penalty for a defendant who is determined to be intellectually disabled, as per the precedent in \textit{Atkins}.\footnote{PENAL § 1376(c)(1).} The relevant California statute broadly defines “intellectual disability” as “the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age.”\footnote{PENAL § 1376(a).} Rather than relying on IQ score cutoffs to make the determination of intellectual disability, the statute requires that a hearing be held upon the defendant’s application for an order requesting such a hearing.\footnote{PENAL § 1376(b)(1).} Assuming the defendant provides the court with a declaration by a qualified expert stating that the defendant is intellectually disabled, a hearing is held before either a judge or a jury in order to make the final determination of the defendant’s intellectual disability.\footnote{Id.} Such a hearing can occur either prior to the commencement of the trial or after the jury has found the defendant guilty, provided certain special exceptions apply.\footnote{Id.} At the hearing, both the defense and the prosecution are given the chance to present evidence on the issue, offer rebuttal evidence, and offer closing arguments.\footnote{PENAL § 1376(b)(2), (3).} The defense bears the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled.\footnote{PENAL § 1376(b)(3).} Either the judge or a unanimous jury then makes the determination whether the defendant is intellectually disabled.\footnote{Id.}

The California statute and procedure for determining a defendant’s intellectual disability is an excellent post-\textit{Hall} model for other states for two key reasons. Rather obviously, the first reason is that the California statute is already known to be compliant with the Court’s ruling in \textit{Hall}. The Court in \textit{Hall} specifically cited the California statute when listing the states that already rejected strict IQ score cutoffs in favor of less rigid requirements.\footnote{Hall v. Florida, 134 S. Ct. 1986, 1997 (2014).}
the list of states that had rejected strict IQ score cutoffs, California included, as part of the basis for declaring such cutoffs unconstitutional, the Court implicitly gave its approval to those states’ statutes and laws.\textsuperscript{123} Thus, a statute modeled off the California statute would almost certainly pass constitutional muster in the eyes of the \textit{Hall} Court.

The second reason the California statute should be used as a model for other states is that the process it creates for determining whether a defendant is intellectually disabled is suitably individualized so as to adequately embody the complexity of mental health issues. The very reason that the Court rejected strict IQ score cutoffs was that they were far too rigid and did not reflect the reality “that an individual’s intellectual functioning cannot be reduced to a single numerical score.”\textsuperscript{124} Mental health diagnosis and treatment is specific to the patient, and laws should be drafted accordingly. By creating a procedure in which both sides may present evidence, testimony, and arguments before a judge or jury, the California statute makes great effort to ensure that the determination of whether a defendant is intellectually disabled is a truly individualized determination. Such an individualized determination stands in stark contrast with the strict IQ cutoff score requirements, which the Supreme Court unequivocally declared unconstitutional in \textit{Hall}.\textsuperscript{125} By avoiding the shortcomings of reliance on rigid interpretations of IQ test results, individualized determinations of intellectual disability both more closely tracks prevailing medical science, as well as forestalls any constitutional issues raised by the Eighth Amendment and the cruel and unusual treatment of prisoners. Adoption of a California-style intellectual disability defense would also mean that states would be less likely to have to revisit the issue in the future, as the protections provided by an individualized hearing are more in line with the general trend in capital punishment jurisprudence towards heightened protections for defendants and the declining use of the death penalty as a whole.\textsuperscript{126}

Such individualized hearings are already used in the criminal justice system in similar circumstances. For example, in \textit{Dusky v.}

\begin{footnotes}
\item[123] See \textit{id.} at 1997–98.
\item[124] \textit{Id.} at 1995.
\item[125] \textit{Id.} at 2001.
\end{footnotes}
United States, another case involving the intellectually disabled, the Supreme Court reaffirmed the requirement that a defendant must be mentally competent to stand trial, and also reaffirmed that such a determination is properly made during an evaluation and hearing. According to the Court in *Dusky*, under 18 U.S.C. § 4244, a court may order a post-trial mental evaluation of the defendant and a hearing in order to determine the defendant’s competency to stand trial as well as the appropriateness of committing the defendant to a medical facility rather than imprisonment.

Many states require competency hearings for intellectually disabled defendants. New York requires that a criminal court order an examination of a defendant whenever the court is of the opinion that the defendant is an “incapacitated person.” Even if the New York Criminal Court receives psychological reports that the defendant is not an “incapacitated person,” the court must, upon motion of the defendant or the prosecution, or sua sponte at its own discretion, conduct a hearing to determine the defendant’s mental capacity to stand trial. In fact, nearly every state has some form of hearing to determine whether an intellectually disabled defendant is competent to stand trial. Even the State of Florida provides for...
a competency hearing for its criminal defendants. Thus, it seems only logical for defendants invoking the intellectual disability defense to have the right to a full hearing on that issue, given that many states already provide for such a hearing when determining a defendant’s competency to stand trial, an issue that similarly hinges upon very difficult and personalized mental health diagnosis.

However, it would be remiss to fail to recognize that the California method for evaluating intellectually disabled defendants is not competent. If the defendant is not represented by counsel, the court shall appoint counsel. At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant. CAL. RULES OF PROCEDURE & INFORMAL ADMINISTRATIVE REGS. § 2.5(e) (West 2015) (“In determining if a defendant is mentally incompetent, the court may recess the determination in the report, unless the examiner’s presence is waived by the defendant and the state. Any member of the clinical team shall be considered competent to testify as to the team’s determinations. A defendant and the defendant’s counsel may waive the court hearing only if the examiners, in the written report, determine without qualification that the defendant is competent. Nothing in this subsection shall limit any other release or use of information from said database permitted by law.”).
without its drawbacks. Most concerning is that the California method is much more time consuming and judicially involved than the Florida method. The Florida statute simply set an IQ score cutoff for the intellectually disability defense and courts could rely on defendants’ past IQ test results in order to determine whether they met that bright-line requirement. While the Florida criminal courts were involved in the final determination of whether a defendant was intellectually disabled, no specific evidentiary or adversarial hearing for the purposes of determining the availability of the intellectual disability defense was required under Florida state law. Under the California method, such a hearing is required whenever a defendant attempts to raise the intellectual disability defense. While one of the reasons that the California method is preferable is the fact that it provides for highly individualized consideration of a defendant’s intellectual disability, this highly individualized consideration also theoretically makes the California method much more burdensome on the judicial system, especially when compared to Florida’s strict cutoff method. While this might seem like a fairly minor practical concern in the face of the serious constitutional rights in jeopardy, it is nonetheless a consideration that states will have to take into account when modernizing their intellectual disability defense statutes.

VII. THE CONTINUING DEVELOPMENT OF THE INTELLECTUAL DISABILITY DEFENSE

The body of law that constitutes the intellectual disability defense to capital punishment has had a long and dynamic history. Pre-\textit{Atkins}, the Eighth Amendment was not interpreted to provide the intellectually disabled any protection from capital punishment. \textit{Atkins} thus represents one of many defining moments in Supreme Court jurisprudence: an original amendment to the Constitution was reinterpreted in order to effectively create an entirely new constitutional protection.

However, like many new developments in constitutional law, even after the new principle was established by the Court, the process of defining and fully realizing the new precedent took many years and

\begin{itemize}
  \item \textit{See, e.g., id.}
  \item \textit{See} Penal \& 1376(b)(1).
  \item \textit{See} discussion supra Part VI.
  \item \textit{See} discussion supra Part I.
\end{itemize}
many disputed cases. While Atkins represented a monumental leap forward for the rights of the intellectually disabled, the Court’s ruling did not provide much specific guidance for the implementation and protection of those newly realized rights.

The decision in Hall represents the Court’s most recent attempt to guide states in implementing the Eighth Amendment’s prohibition against the execution of the intellectually disabled as proscribed by Atkins. Indeed, the decision in Hall was a necessary step in the development of the jurisprudence of the intellectual disability defense. In striking down Florida’s intellectual disability statute and declaring fixed IQ score cutoffs unconstitutional, the Court sent a clear message that intellectual disability defense laws that violated the spirit of the Eighth Amendment and failed to prevent the cruel and unusual punishment of the intellectually disabled would not be tolerated.

In order to ensure compliance with the Court’s ruling in Hall, states should consider adopting intellectual disability statutes similar to California’s statute. Not only did the Court specifically cite to California’s statute as an example of a suitable implementation of the Atkins ruling, the procedure implemented by the California statute also most closely addresses the innate concerns surrounding the legal treatment of the intellectually disabled. Taking the opposite approach of the Florida statute, which set a strict IQ score cutoff for the intellectual disability defense with no accounting for margin of error, the California statute instead implements a highly individualized assessment in order to determine the applicability of the intellectual disability defense. Instead of purely relying on IQ test scores, the California statute does not even directly reference IQ test scores at all; rather, defendants in California seeking to invoke the intellectual disability defense to capital punishment have the right to a hearing in order to present evidence of their intellectual disability to a judge or jury. Unlike the states that currently use strict IQ score cutoffs for their intellectual disability defenses, California addresses the legal treatment of the intellectually disabled in perhaps the best possible way: by evaluating defendants on a case-by-case basis so that the highly difficult and individualized process

139 See discussion supra Part IV(A).
141 Id. at 1997.
142 See discussion supra Part VI.
143 See CAL. PENAL CODE §§ 1376(b)(1)–(3) (West 2015).
144 PENAL § 1376(b)(1).
of mental health diagnosis is not simply reduced to a single number. In light of the medical consensus on mental health conditions and the statistical uncertainty surrounding IQ test results,\textsuperscript{145} it is only proper that the law reflects these realities. The diagnosis of mental health conditions is simply not an exact science, and as the Court in \textit{Hall} stated: “[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability.”\textsuperscript{146}

States with strict cutoffs for their intellectual disability defense have cause to be concerned about the risk of injustice being inflicted upon intellectually disabled defendants in their jurisdictions, in addition to the high cost and burden of death penalty appeals based on the recent ruling in \textit{Hall}. Given the Court’s ruling in \textit{Hall} and the Court’s rejection of a bright-line test for intellectual disability, states should seriously consider using California’s statute as a model for the intellectual disability defense in the future. While the intellectual disability defense can trace its roots all the way back to the Eighth Amendment to the Constitution, the jurisprudence surrounding the defense is constantly progressing, and the Court’s decision in \textit{Hall} is simply the latest development in the evolution of one of the protections the law provides.

\textsuperscript{145} See discussion \textit{supra} Part IV(A).