affirmative defenses of "mental disease or defect," but also to diminished-capacity defenses such as voluntary intoxication. "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him" (*Cheever*, p 601). The Court stated that Fifth Amendment jurisprudence does not allow a defendant to avoid cross-examination; instead the Court views the defense expert as the voice of the defendant. However it cautioned, rebuttal testimony should not exceed areas covered by the defense expert; indeed, Federal Rule of Criminal Procedure 12.2 makes clear that the rebuttal testimony cannot exceed the scope of the defense expert's testimony.

While allowing a limited scope of rebuttal, the Court noted that expert testimony cannot be used to rebut the defendant's own testimony. Thus, expert testimony from a compelled mental examination of a defendant cannot be introduced except as a rebuttal. "We held in *Estelle* that under the Fifth Amendment, when a criminal defendant 'neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,' his compelled statements to a psychiatrist cannot be used against him" (*Cheever*, p 600).

The holding in *Cheever* alerts forensic psychiatrists to the proper scope of rebuttal testimony and the importance of knowing the scope of an opposing expert's testimony. *Cheever* also reaffirms the importance of giving an examinee appropriate disclosure and warning at the beginning of a forensic evaluation. *Cheever* also offers caution to defense attorneys to make judicious use of mental health evaluation referrals.

Further, the case gives insight into the Court's view of mental state nomenclature. In *Cheever*, the Court cited its previous decision in *Buchanan* to assert that there is little constitutionally relevant distinction between "mental illness and mental defect" as against merely abnormal mental states. Whereas the Kansas Supreme Court read its statute on waiver of confidentially as requiring a specific claim of mental illness or defect, the Supreme Court chose to read those terms expansively. This broadening is presaged in an earlier decision of the Court:

> The term "mental illness" is devoid of any talismanic significance; the fact that a state civil commitment statute uses the term "mental abnormality" rather than the term "mental illness" as a prerequisite for commitment is a matter of the state legislature's choice; legal definitions which must take into account such questions as individual responsibility and competency need not mirror those advanced by the medical profession. [*Kansas v. Hendricks*, 521 U.S. 346 (1997), p 358].

Thus, in *Kansas v. Hendricks*, the Court showed skepticism toward narrow psychiatric terminology, dismissing the precision of terms sought by the Kansas Supreme Court, which had held the state's Sexually Violent Predator statute unconstitutional because it used "mental abnormality" rather than "mental illness" as a basis for involuntary civil commitment. *Cheever* continues this broad legal view of psychiatric terminology.

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Intellectual Disability, IQ Measurement Error, and the Death Penalty

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The U.S. Supreme Court Holds That Use of A Bright-Line IQ Score Violates the Eighth Amendment

Freddie Hall, who had been sentenced to death in Florida, filed an *Atkins*-based claim of intellectual disability and challenged a Florida statute that set an IQ of 70 or less as a necessary condition for such a designation. In his last state court appeal, he presented with an IQ of 71. The Florida Supreme Court upheld his death sentence and he appealed to the U.S. Supreme Court. The issue presented to the Court was whether the measurement error (SEM) inherent in standard intelligence testing should be constitutionally recognized and that a 95 percent confidence interval around the IQ score 70 should replace the use of a bright-line IQ score of 70. In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court held that the SEM must be recognized when assessing intellectual disability and found Florida's bright-line statute unconstitutional.

Facts of the Case

On February 21, 1978, Freddie Hall and an accomplice, Mack Ruffin, kidnapped, raped, and murdered a young woman. Soon after, as they attempted a store robbery, they encountered and struggled with a deputy sheriff whom they shot and killed. Mr. Hall and Mr. Ruffin fled in a car; they were pursued by deputies and captured very soon after. The murdered deputy's gun was found in their car; the gun that killed the young woman was found under the deputy's body. The next day, Mr. Hall while in custody, disclosed to a deputy the kidnapping, assault, and killing of the young woman. He claimed that Mr. Ruffin had committed the assault, rape, and killing.

Mr. Hall was tried for the premeditated murder of the young woman, found guilty, and sentenced to death. (Mr. Ruffin and Mr. Hall were also convicted of the murder of the deputy and both received the death penalty. Mr. Hall's death penalty for that case was subsequently reduced to second-degree murder (*Hall v. State*, 403 So.2d 1319 (Fla. 1981)).

Following the 2002 *Atkins* decision, in which the Supreme Court held that imposition of the death penalty on those with intellectual disability is a cruel and unusual punishment, Mr. Hall obtained an evidentiary hearing on his claim of intellectual disability. He presented expert testimony including three IQ scores by three examiners: 73, 80, and 71. The hearing judge, finding no score of 70 or less, as required by Florida law, affirmed Mr. Hall's death penalty. Mr. Hall again appealed to the Florida Supreme Court, claiming that *Atkins* rendered Florida's bright-line intellectual disability/death penalty statute unconstitutional (*Hall v. State*, 109 So.3d 704 (Fla. 2012)). He argued for a range of values centered around 70 to take account of the clinically recognized standard error of measurement (SEM) associated with IQ tests. The Florida Supreme Court rejected his appeal, upheld the bright-line cutoff of 70, and held that if the intellectual deficit condition in the statute (Fla. Stat. § 921.137 (2012)) was not met, then other elements of the intellectual disability diagnosis (i.e., adaptive deficits) need not be considered. With his IQ of 71, the court affirmed his death sentence.

Mr. Hall appealed to the U.S. Supreme Court.

Ruling and Reasoning

In considering Mr. Hall's appeal of Florida's bright line of IQ 70 or less, the Court noted that the clinical definitions of intellectual disability set out by the APA's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), and by the American Association on Intellectual and Developmental Disabilities eschew a bright line and consequently incorporate the SEM of IQ tests into the judicial assessment of intellectual disability, granting this statistical construct constitutional status. The Court, noting the inevitable element of error in IQ testing, recognized that persons presenting with obtained scores above 70 might well have true IQ scores of 70 or less. The Court concluded that not recognizing this would sometimes impose the death penalty on those intended to be shielded by *Atkins.* The Court dealt with its previous deference given to state definitions in *Atkins* (2002) by noting that *Atkins* had laid out some contours to the states' discretion by having made reference to clinical definitions of intellectual disability. With this, the Court held that greater deference would be accorded to the clinicians' definitions and assessments of intellectual disability as against the states' use of bright lines.

The Court also grounded striking down Florida's intellectual disability/death penalty statute on its finding that, after *Atkins*, there has been a trend across the states to require consideration of SEM. "The rejection of a strict 70-point cutoff in the vast majority of States and a 'consistency in the trend' toward recognizing the SEM provide strong evidence of consensus that society does not regard this strict cutoff as proper or humane" (*Hall*, p 1013).

Finding this, the Court reversed the decision of the Florida Supreme Court and remanded the matter to the state court for further proceedings. Because the Florida courts had ended their inquiry into Mr. Hall's claim of intellectual disability by first applying the bright line and finding him not meeting it, they did not consider the other elements of the diagnosis, namely "deficits in adaptive behavior" manifested before the age of 18 years. Thus, if Florida wishes again to seek the death penalty, Mr. Hall will have another day in court.

Dissent

A vigorous dissent by Justice Alito, joined by three other justices, was highly critical of the majority's deference to "professional associations," particularly to the American Psychiatric Association, which had filed an *amicus* brief (APA Brief 13, joined by several mental health associations), on which the Court re-

lied heavily in defining what would count as death-sparing intellectual disability. The dissent argued that shaping and interpreting legislation is a legal matter properly left to legislatures and courts.

Justice Alito wrote:

> 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)" [*Hall*, p 1027, citations omitted, emphasis in original].

The dissent also critically notes the problems related to the evolution of clinical definitions of intellectual disability:

> The Court's reliance on the views of professional associations will also lead to serious practical problems. I will briefly note a few. First, because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation. This danger is dramatically illustrated by the most recent publication of the APA, on which the Court relies. This publication fundamentally alters the first prong of the longstanding, two-pronged definition of intellectual disability that was embraced by *Atkins* and has been adopted by most States [*Hall*, p 1031].

The dissent argued that reliance on a bright line avoids the forensic uncertainties created by changing clinical concepts.

Discussion

The United States Supreme Court has set out an evolving path that bars imposition of the death penalty on certain groups of persons who have diminished capacity. The Eighth Amendment's prohibition against cruel and unusual punishment has been the guide along that path. Protected groups include minors, those who are incompetent or insane, and most recently those who are deemed "intellectually disabled" (Rosa's Law, 20 U.S.C. §1140(2)(A) (2010) changed all references to mental retardation in Federal law to references to intellectual disability and changed all references to a mentally retarded individual to an individual with an intellectual disability). Thus in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held the imposition of the death penalty on the "mentally retarded" to be a cruel and unusual punishment, but gave only broad guidelines to the states as to what defines intellectual disability for purposes of capital punishment sentencing. The vagaries of the several states' definitions of intellectual disability and the mental health professions' advocacy of psychometric and definitional flexibility led to *Hall* as the most recent landmark along that path. *Hall* advances a progressive limitation on imposition of the death penalty: a limitation that once again relies on a psychologically informed understanding of criminal culpability. The great reliance that the *Hall* Court placed on clinical judgment to assist in determining a defendant's death eligibility ensures that clinical expertise will play an ever-larger role in capital sentencing. It seems that the stage is set for potentially endless rounds of fierce and robust jousting of the mental health experts. For example, moving from a bright-line IQ cutoff score and placing greater emphasis on clinical judgments opens the door to long-standing debates concerning the psychometric assessment of intelligence (as with the forensic implications of the Flynn Effect) and even debates as to what constitutes intelligence (i.e., is it best understood as Spearman's single factor, *g*, or instead as a multiple trait construct that resists easy assessment?).

The relaxing of the definition of intellectual disability, the placing of greater emphasis on the clinical assessment of limitations in adaptive behavior, and the growing forensic reference to neuroscience and brain imaging findings will present many challenges to forensic psychiatry as inevitably the field is drawn deeper into the arena of life or death sentencing.

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Determination of Fitness to Stand Trial and Ineffective Assistance of Counsel

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Defense Counsel's Failure to Seek a Hearing on Defendant's Fitness to Stand Trial Constitutes Ineffective Assistance of Counsel and Warrants Granting of *Habeas* Relief

Melvin Newman was convicted in state court of first-degree murder. Although there was a consider-