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-

able pretrial clinical record documenting mental disabilities, his defense attorney did not seek a fitness-to-stand-trial hearing. Mr. Newman appealed his conviction claiming ineffective assistance of counsel. Failing in the state appellate courts, he petitioned the federal district court for *habeas* relief, which was granted. The state appealed to the circuit court of appeals, which affirmed the district court in *Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013). The issue before the circuit court was whether the pretrial evidence of Mr. Newman's disabilities was so compelling in demonstrating ineffective assistance of counsel that it overcame the substantial deference given to state court rulings in federal *habeas* review. Also addressed was the question of whether a long-delayed postconviction psychological assessment was relevant evidence concerning Mr. Newman's pretrial mental status.

Facts of the Case

In July 2001, Mr. Newman, then 16 years old, was arrested for killing Andrew Dent in Chicago. Mr. Newman's mother hired defense attorney Michael Johnson, and on their first meeting, Mr. Johnson was given many records demonstrating that Mr. Newman had mental and cognitive deficits. Those records included a school psychology report showing that Mr. Newman's IQ was 62 and that he read at the first-grade level, and a Social Security Administration report showed a diagnosis of intellectual disability. Tried as an adult in 2002, he was convicted of first-degree murder and sentenced to 47 years in state prison. Mr. Newman appealed to the Illinois Court of Appeals.

His appeal claimed ineffective assistance of counsel, citing his defense attorney's failure to seek a fitness-to-stand-trial hearing and failure to conduct an investigation based on his medical and educational records related to his competency to stand trial. His state appeal petition contained numerous clinical and educational records and psychological assessments. Central among them was a 2005 evaluation report from psychologist Antoinette Kavanaugh, PhD, who conducted two clinical interviews with him totaling five hours, administered psychological tests, reviewed his academic and psychological records, and interviewed his mother, as well as several educational specialists who had worked directly with him at various times in his life.

Dr. Kavanaugh found Mr. Newman to be burdened with many cognitive deficits. His full-scale IQ was 54, he was "moderately to mildly [intellectually disabled]," his "cognitive deficits [were] readily apparent," and this "should have been apparent to anyone who attempted to have a conversation with [him] and posed questions to him that required more than a yes or no answer" (*Newman*, p 923). Dr. Kavanaugh opined that Mr. Newman was not fit to stand trial at the time of this 2005 evaluation and would not have been fit to stand trial at the time of his 2002 trial. Included in the appeal petition was his mother's affidavit that she had provided to Mr. Johnson "a stack of medical records, psychological evaluations, and school evaluations, all regarding [Mr.] Newman's disability" (*Newman*, p 924).

Despite this record and without an evidentiary hearing, the state appeals court affirmed his conviction. The state court concluded that Mr. Newman "failed to demonstrate that a *bona fide* doubt as to his fitness to stand trial existed at the time of trial" (*People v. Newman*, No. 1-06-1977, slp op. at 10 (Ill. App. Ct. Sept. 4, 2007)). Most notable was the court's dismissal of Dr. Kavanaugh's report, concluding that it was "irrelevant in terms of considering whether [Mr. Newman] was unfit at the time of trial because the evidence must be considered in light of the facts known at the time of trial" (*People v. Newman*, No. 1–06-1977, slip op. at 11 (Ill. App. Ct. Sept 4, 2007)). The state appeals court applied *Strickland*'s two-prong test for assessing a claim of ineffective assistance of counsel: a showing of objectively inadequate representation and clear prejudice to the petitioner as a result of that inadequate representation (*Strickland v. Washington*, 466 U.S. 668 (1984)). The appeals court concluded that Mr. Newman was fit to stand trial in 2002 and thus suffered no prejudice. Therefore it had no reason to consider *Strickland's* first prong, the adequacy of his trial counsel.

Mr. Newman filed a federal *habeas* petition in the district court. In 2011 the district court held an evidentiary hearing where Dr. Kavanaugh, and the state's expert, psychiatrist Stafford Henry, MD, testified. Dr. Kavanaugh reported on her extensive evaluation conducted in 2005 and gave her opinion that both then and in 2002, Mr. Newman was unfit to stand trial and would not have been able to assist his counsel in his own defense or understand the nature of the proceedings. At variance to other witnesses,

Dr. Henry opined that Mr. Newman was malingering; that there was no evidence of a cognitive deficit; that Mr. Newman understood the nature and purpose of the proceedings against him; that he was able to assist in his own defense in 2002; and that he was fit to stand trial. Dr. Henry's opinions were based on an interview conducted with Mr. Newman in 2010, which, as the circuit court would later note, was eight years after the trial, as opposed to three years after the trial in Dr. Kavanaugh's evaluation. Attorney Johnson testified that in 2002 he had no reason to investigate his client's cognitive abilities or his fitness to stand trial.

After the evidentiary hearing, the district court granted Mr. Newman's petition for a writ of *habeas corpus*. It found that Mr. Newman's claim of ineffective assistance of counsel was clearly established and that he was clearly prejudiced by that. It also found that the state courts had made clear errors of law and of fact sufficient to overcome the high deference afforded state courts in federal *habeas* review. Illinois then appealed to the Circuit Court of Appeals for the Seventh Circuit.

Ruling and Reasoning

The federal circuit court affirmed the district court's grant of Mr. Newman's *habeas corpus* petition. The court reviewed the state's evidentiary record as well as the further evidence developed at the district court's evidentiary hearing in 2011 and held that Mr. Newman had prevailed on both prongs of the *Strickland* test (i.e., that he had been prejudiced by inadequate representation of counsel). The court found clear legal error in the state court's making a finding of no prejudice without first having considered the claim of counsel's deficient performance. In the court's words:

> In sum, the state court's denial of Newman's petition was based on an unreasonable determination of the facts in light of the evidence presented. The state court did not address *Strickland*'s first prong—deficient performance. Thus, as the state concedes, the district court properly evaluated that prong *de novo*, and it found that Johnson's performance in failing to investigate Newman's fitness and seek a fitness hearing was constitutionally deficient [*Newman*, p 932].

The court also found clear error in the state court's conclusion that Dr. Kavanaugh's 2005 evaluation and report was irrelevant to the question of Mr. Newman's fitness to stand trial in 2002.

> Indeed, the clear and convincing evidence demonstrates that Newman [has an intellectual disability]. By ignoring Kavanaugh's key expert evidence that Newman was moderately to mildly [intellectually disabled], the state appellate court's application of *Strickland* was unreasonable and its factual determinations as to Newman's mental limitations and fitness were also unreasonable [*Newman*, p 930].

The court held that defense counsel clearly failed in his duty to investigate his client's fitness to stand trial and to seek a fitness-to-stand-trial hearing.

The court concluded that it was highly probable that if adequate representation had been provided, Mr. Newman would have been found unfit to stand trial. In sum, the court found that the state court had made substantial factual and legal errors and was clearly erroneous in denying Mr. Newman's claim of constitutionally inadequate representation. Thus, *habeas* relief was warranted and granted.

Discussion

A critical holding in *Newman* is the federal circuit court's reversal of the state appeals court's finding that the Kavanaugh Report of 2005 was irrelevant to the question of Mr. Newman's fitness to stand trial in 2002. Dr. Kavanaugh had concluded in 2005 that he was unfit in 2002 and was still so in 2005 when she evaluated him. The state appeals court applied the federal standard of review in denying Mr. Newman's claim for *habeas* relief. That standard is set out in The Antiterrorism and Effective Death Penalty Act (AEDPA §2254 (d) (1996)) and instructs that initial review of the correctness of a denial must be based only on the record available to the trial court at the time of trial. The state appeals court had concluded that since Dr. Kavanaugh's evaluation was conducted in 2005, it had no relevance concerning Mr. Newman's fitness in 2002. The federal court found this to be clear error and found instead that Dr. Kavanaugh's postdiction opinions were relevant and instructive to what was or should have been apparent to both the defense attorney and the trial judge at the time of the trial, because data that Dr. Kavanaugh reported would have been available at the time of the trial. Thus, the federal circuit court found that Mr. Newman did not have adequate legal representation and that, contrary to state court findings, he was indeed prejudiced by that inadequate representation, and that in turn merited the grant of his *habeas* relief.

This holding is important because it recognizes the relevance, legitimacy, and admissibility of long-delayed clinical evaluations, not just for fitness to stand trial but also as they bear on other forensic matters, such as competency to execute a will, waiver of *Miranda* rights, and psychological autopsies. Es-

pecially instructive are the reasons that the court gave weight to the evaluation and opinions of Dr. Kavanaugh: that she had done extensive record review, had employed psychological testing, had interviewed various persons who had knowledge of Mr. Newman contemporaneous with the relevant periods in question, had spent much time in interviewing him, and had used testing for malingering.

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Intellectual Disability Bars the Death Penalty

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The Determination of Intellectual Disability Requires Courts to Consider General Intellectual Functioning, Adaptive Functioning, and the Timing and Onset of Those Deficits

In *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013) the court reviewed Andrew Sasser's third death penalty appeal of his 1994 capital murder conviction. He applied for a federal *habeas* petition in 2000 after a failed direct appeal in 1995 and an unsuccessful attempt at postconviction relief in the Arkansas Supreme Court in 1999. While his petition was pending in the Eight Circuit, the United States Supreme Court barred execution of individuals with intellectual disability in *Atkins v. Virginia*, 536 U.S. 304 (2002). The circuit court then remanded the petition to the district court to determine whether *Atkins* made Mr. Sasser ineligible for the death penalty. Without a hearing, the district dismissed his petition, finding a procedural default in his claim. On further appeal, the Eight Circuit reversed and remanded to the district court which, after a two-day evidentiary hearing, found that Mr. Sasser had no intellectual disability under Arkansas state law and *Atkins.* Mr. Sasser again appealed to the Eighth Circuit.

Facts of the Case

On July 12, 1993, Mr. Sasser murdered Jo Ann Kennedy in Garland City, Arkansas, while she was working at the E-Z Mart Convenience Store. He was charged and convicted of capital felony murder. A series of appeals ensued, to include an amended challenge in 2003, asking whether *Atkins* made the intellectual disability provision of the Arkansas death penalty statute (Ark. Code Ann. § 5-4-618 (1993)) unconstitutional. Upon first appeal to the Eighth Circuit, the case was remanded to the district court to decide the claim of intellectual disability in light of *Atkins*. When the district court dismissed the claim as procedurally barred, it was again appealed to the Eight Circuit, which remanded to the trial court for an evidentiary hearing, stating that *Atkins* created a "new federal constitutional right. . .separate and distinct from preexisting Arkansas statutory right" (*Sasser*, p 838).

During the two-day evidentiary hearing, several witnesses testified concerning whether Mr. Sasser had an intellectual disability. The defense expert, Dr. Jethro Toomer, testified that Mr. Sasser's IQ scores, along with pertinent qualitative factors, were suggestive of meeting the criteria for intellectual disability at the time of the offense. He explained that Mr. Sasser's IQ in 1994 was 79, but should be corrected for the Flynn Effect (Flynn J R: Massive IQ gains in 14 nations. . . *Psychol Bull* 101:171–91, 1987), a phenomenon that results in inflated IQ scores when individuals are scored on outmoded scoring standards. He further testified that a 2010 IQ score of 83 was consistent with research showing that incarceration leads to improved verbal reasoning. Dr. Toomer noted Mr. Sasser's history of inability to live independently and difficulty performing simple jobs as also consistent with intellectual disability.

The state's witness, Dr. Roger Moore, testified that Mr. Sasser did not meet the criteria of intellectual disability under Ark. Code Ann. § 5-4-618. Dr. Moore argued against correction for the Flynn Effect. He testified that the cutoff score for intellectual disability was 70 and noted that Mr. Sasser demonstrated evidence of adaptive functioning, such as cooking for himself, traveling independently, holding a job, maintaining two significant relationships, and fathering a child.

Long before *Atkins*, Arkansas enacted a statutory provision barring the execution of individuals with intellectual disabilities (Ark. Code. Ann. § 5-4-618 (1993)), and the Arkansas Supreme Court has interpreted its standards as consistent with the ruling in *Atkins* (*Anderson v. State*, 163 S.W.3d 333 (Ark.