tutes discrimination under the Americans With Disabilities Act.

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A Single IQ Score Over 70 Supports Finding of No Intellectual Disability, Despite Conflicting Test Results and Expert Testimony

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The Defendant is not Entitled to *Habeas* Relief on his Intellectual Disability Claim, Because he did not Meet the Burden of Rebutting the Presumed Correctness of the State Court's Decision that he did not have an Intellectual Disability

In O'*Neal v. Bagley*, 728 F.3d 552 (6th Cir. 2013), the Sixth Circuit Court of Appeals affirmed a district court's denial of *habeas corpus*. The appeals court ruled, despite three separate IQ scores below 70, that because of conflicting expert witness testimony, the defendant did not rebut by clear and convincing evidence the state court's factual finding that he did not have an intellectual disability. Thus, he was ineligible for relief from execution under *Atkins v. Virginia,* 536 U.S. 304 (2002).

Facts of the Case

In September 1993, James O'Neal moved into a Cincinnati home with his wife, her four children, and his two sons from prior relationships. Mrs. O'Neal demanded that he and his sons leave after a physical altercation on December 7, 1993. On December 11, 1993, Mr. O'Neal broke in, shot Mrs. O'Neal to death, tried to shoot her son, and fled. He later surrendered. Forensic evidence linked his gun to the shooting and he confessed to the crimes.

At trial, conflicting expert witness testimony from psychologists was presented, as well as results of several IQ tests. Mr. O'Neal scored below 70 on three separate IQ tests between 1968 and 2004 and scored 71 on a fourth in 1994. In addition, the defense expert who examined and administered the 2004 test to Mr. O'Neal gave testimony supporting his opinion that the defendant had significant limitations in academic and social skills. The expert diagnosed mild to borderline intellectual disability.

Another expert witness psychologist, who evaluated Mr. O'Neal before trial and administered the 1994 IQ test, opined that Mr. O'Neal functioned higher than his IQ suggested and did not have an intellectual disability. A third psychologist, who reviewed both experts' evaluations and several other records, but did not examine Mr. O'Neal, opined that Mr. O'Neal's sub-70 IQ scores did not offset a lack of significant deficits in his adaptive functioning, as established by employment, military history, and parenting. The court ultimately agreed.

Mr. O'Neal was convicted on several counts including aggravated murder with death penalty specifications. On direct review the Supreme Court of Ohio affirmed his conviction and sentence. Mr. O'Neal exhausted his state appeals. His postconviction petition regarding the question of intellectual disability under the *Atkins v. Virginia* decision was denied. Mr. O'Neal claimed that he had an intellectual disability and was therefore ineligible for execution, on the basis of low scores on several IQ tests, significant limitations in his academic and social skills, and school records showing onset of the disability before age 18.

The state appellate court faulted the trial court for applying an improper IQ standard, but affirmed the factual determination because it was supported by "reliable, credible evidence," rendering any error "harmless." The court affirmed that Mr. O'Neal did not have significantly subaverage intellectual function on the basis of an IQ score higher than 70 and the finding that he did not have limitations in two or more adaptive skills.

In 2002, Mr. O'Neal filed a federal petition for *habeas corpus*. The district court granted a certificate of appealability on 4 of 18 claims raised, one of which addressed intellectual disability.

Ruling and Reasoning

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. § 2254 (d)(2) states that a defendant is entitled to *habeas* relief only if he can establish that the state appel-

late court unreasonably determined the facts in light of the evidence presented to it. In addition, the petitioner bears the "burden of rebutting the presumption by clear and convincing evidence" (28 U.S.C. § 2254(e)(1)). The state appellate court affirmed that the trial court's determination that Mr. O'Neal did not have an intellectual disability was supported by "reliable, credible evidence." That was the last reasoned state court decision on the merits. Under the AEDPA, that determination is given deference by the federal court in a *habeas corpus* proceeding.

In *Atkins*, the Supreme Court of the United States held that executing those with intellectual disabilities is cruel and unusual punishment under the Eighth Amendment. Defining intellectual disability was left to the states.

In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Supreme Court of Ohio established that an individual has an intellectual disability if he has "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18" (*Lott*, p 1014). It noted in addition that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70" (*Lott*, p 1014).

A failure to satisfy any one of the three criteria defeats an *Atkins* claim in Ohio. An IQ above 70 places the burden on the defendant to prove that he has an intellectual disability.

The Sixth Circuit majority acknowledged that Mr. O'Neal provided expert witness evidence of significant limitations in academic and social skills, and another expert identified "significant deficits in several conceptual areas." However, the latter expert placed Mr. O'Neal's function in the borderline range of practical adaptive skills and attributed his social problems to drug abuse and personality disorder instead of specific cognitive deficits.

The Sixth Circuit ruled that "it is not enough on *habeas* review that the evidence presented, selectively read, at times supports his mental retardation claim" (*O'Neal*, p 563). Mr. O'Neal failed "to adequately undermine by clear and convincing evidence the state court's factual findings to the contrary" (*O'Neal*, p 563). The court stated that although the expert witness testimony and IQ scores could lead many reasonable people to conclude that Mr. O'Neal had an intellectual disability under Ohio law, it could just as easily be concluded that he did not have such a disability on the basis of the record, when read as a whole.

Dissent

In dissent, Justice Merritt criticized the majority's dismissal of Mr. O'Neal's intellectual disability defense because the justices deferred to the state court's "findings," since this was a *habeas corpus* proceeding. He argued that the state court's opinion did not warrant deference, because it was contrary to scientific opinion, specifically the presumption that a single "over-70 IQ score" is factual evidence for an Ohio presumption of normal intellectual ability.

Justice Merritt argued that the majority discounted testimony given by the defense expert that the IQ of 71 was an outlier based on an old test that became a 67 on the updated version. He also argued that a one-test cutoff went against the current conceptualization of intellectual disability that includes adaptive function, as defined by the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities. Finally, the judge argued that the prosecution's expert selectively ignored the portions of Mr. O'Neal's history that showed that, despite obtaining employment and joining the military, he ultimately functioned poorly in those pursuits. Consequently, the finding did not comply with the standards established by modern scientific opinion required by *Atkins.* "A state court opinion that defies both modern scientific opinion and applicable language in *Atkins* deserves no deference" (*O'Neal*, p 567).

Discussion

What constitutes intellectual disability in the context of competence to be executed is a topic that was just addressed by the United States Supreme Court in *Hall v. Florida*, No. 12–10882 (U.S. May 27, 2014) (discussed below in "Intellectual Disability, IQ Measurement Error, and the Death Penalty"), decided after this Ohio case. In that case, the Supreme Court, in a 5-to-4 decision, held that Florida's threshold of requiring a defendant to show an IQ score of 70 or below before being permitted to present any additional evidence of adaptive function was unconstitutional. The Court's rationale was that Florida's threshold rule disregards established medical practice by taking the IQ score as final and conclusive evidence of intellectual capacity, disregards the known standard error of measurement (SEM) in IQ

tests, and bars further relevant evidence related to adaptive function.

Presentation of evidence of adaptive function was not barred in *O'Neal*, and ultimately this decision may be unaffected by *Hall*. Regardless, the *Hall* holding raises the question of what weight should be given to an IQ score that falls within the standard error of measurement of a threshold score, similar to the question raised in *O'Neal*. The *Hall* case means that future hearings about *Atkins* eligibility in marginal cases are likely to be contested, with experts disagreeing about both IQ scores and adaptive functioning.

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Misdiagnosed Learning Disability and the Individuals with Disabilities Education Act

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Student Sues School District Alleging Failure to Assure Proper Diagnosis and Discrimination after an Earlier Diagnosed Learning Disability Is Later Found to be Erroneous

In *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248 (3rd Cir. 2013), a student (S.H.) was judged by the school district to have a learning disability, but the decision was later found to be erroneous. The student, through her mother, filed suit against the Lower Merion (Pennsylvania) School District (hereafter, School District), alleging violations of the Individuals with Disabilities Education Act (IDEA), § 504 of the Rehabilitation Act (RA), and § 202 of the Americans with Disabilities Act (ADA). S.H. alleged that the School District violated its duty to ensure that S.H. was properly assessed as not disabled and sought compensatory education under the IDEA and compensatory damages under the RA and ADA.

Facts of the Case

S.H. began receiving Title I services (instruction made available through the federally funded Elementary and Secondary Education Act Title I intended to provide assistance to students who do not meet state academic standards) through the Lower Merion School District to improve academic performance in the first grade. In the fourth grade, S.H.'s mother, Ms. Durrell, consented for two evaluations to determine S.H.'s eligibility and need for special education services. The school counselor finished the evaluation for special education services at the beginning of S.H.'s fifth-grade year, determined that S.H. had a learning disability in reading and math, and recommended special instruction. Although S.H. voiced her unhappiness with the disability designation and stated she that did not belong in special education, Ms. Durrell signed the evaluation reports, indicating agreement with the recommendations.

In the seventh grade, Ms. Durrell sent an e-mail to the School District requesting individual instruction with a reading specialist for S.H. In the eighth grade, due to special education requirements, S.H. did not have time to take science and Spanish. Before ninth grade, the School District sent Ms. Durrell a list of suggested classes for S.H. Although Ms. Durrell had the option of picking different classes, she elected not to do so. Toward the end of S.H.'s ninth grade year, the School District, with Ms. Durrell's consent, issued an evaluation, which indicated that S.H. had a learning disability and still needed special education in reading and math. Ms. Durrell requested, when S.H. was in the 10th grade, that the School District remove S.H. from the instructional support lab (ISL) and place her in study hall. The School District made that change within two days. That same month, Ms. Durrell requested by e-mail that additional individual instruction be given to S.H., which the School District provided. Later the same month (November 2009), Ms. Durrell filed a Due Process Complaint Notice in which she requested an Independent Education Evaluation (IEE) for S.H. The IEE, which was completed in S.H.'s 10th-grade year (January 2010), revealed that S.H.'s IQ was 100. The report also stated that data used in the 2004 report did not support the School District's conclusion that S.H. had a learning disability. According to the 2010 report, the designation of S.H. as having a learning disability was erroneous. In April 2010, the School District removed S.H. from special education, and she received no special education in her junior and senior years.