Assessing Adaptive Functioning in Death Penalty Cases after *Hall* and DSM-5

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DSM-5 and *Hall v. Florida* (2014) have dramatically refocused attention on the assessment of adaptive functioning in death penalty cases. In this article, we address strategies for assessing the adaptive functioning of defendants who seek exemption from capital punishment pursuant to *Atkins v. Virginia* (2002). In particular, we assert that evaluations of adaptive functioning should address assets as well as deficits; seek to identify credible and reliable evidence concerning the developmental period and across the lifespan; distinguish incapacity from the mere absence of adaptive behavior; adhere faithfully to test manual instructions for using standardized measures of adaptive functioning; and account for potential bias on the part of informants. We conclude with brief caveats regarding the standard error of measurement (SEM) in light of *Hall*, with reference to examples of ordinary life activities that directly illuminate adaptive functioning relevant to capital cases.

J Am Acad Psychiatry Law 44:96–105, 2016

In *Atkins v. Virginia* (2002),[1] the Supreme Court of the United States ruled that persons convicted of a capital offense are ineligible for the death penalty (DP) if they had a diagnosis of what was then termed "mental retardation" (MR). In 2013, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5)[2] recast MR as "intellectual disability" (ID; also termed "intellectual developmental disorder") and substantially deemphasized the role of the Intelligence Quotient (IQ). The following year, in *Hall v. Florida*.[3] the Supreme Court opined that trial courts must consider the error rate (e.g., standard error of measurement, SEM) inherent in intelligence test scores when interpreting IQ data. The Court also underscored the rights of defendants to introduce evidence of adaptive functioning despite the presence of IQ scores arguably incompatible with an ID diagnosis.

The Court neither defined ID nor defined procedures for assessing it, explicitly leaving those matters to the states. Each state's definition of ID includes three broad criteria (i.e., poor performance on IQ tests, deficient adaptive functioning, and onset of disability before age 18), but the specific parameters for each vary across jurisdictions. Some states rely on case law (e.g., in Pennsylvania, *Commonwealth v. Miller*[4]), others have crafted statutory definitions, and yet others have no controlling statute at all. Only nine states have statutes or case law delineating a "bright line" for specific death-ineligible IQ scores.

In the 14 years since *Atkins*, controversies surrounding IQ testing have come to the forefront of scholarly literature, legal theory, pleadings, evidentiary hearings, and expert testimony. Now, more than ever, the courtroom is a high-profile forum for debates about the nature and measurement of intelligence. Courts hear a great deal of testimony and consider innumerable affidavits about wide-ranging statistical and psychometric questions, including ad-

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Disclosures of financial or other potential conflicts of interest: None.

equacy of standardization samples, compromises to test reliability, performance validity testing, practice effects, shifts in group IQ score means over time, and the role of SEM when interpreting test results.

The Supreme Court ruling in *Hall* dramatically changed the focus of such conversations.[5,6] In 1978, Freddie Lee Hall kidnapped, beat, raped, and murdered Karol Hurst, who was 21 years old and pregnant. Later that day, Mr. Hall and an accomplice drove to a convenience store with the intent to rob it. There, a confrontation with law enforcement led to the death of Deputy Lonnie Coburn. Mr. Hall underwent nine forensic mental health evaluations over four decades, yielding various IQ scores between 60 and 80.

At that time, Florida did not include ID as a statutory mitigator, but Mr. Hall's initial appeal affirmed his right to introduce nonstatutory mitigation, inclusive of ID. At resentencing, a jury heard testimony of low IQ scores and impaired adaptive functioning, but was not persuaded and recommended the DP, a recommendation that the judge adopted.

After *Atkins*, Mr. Hall attained a third sentencing and offered evidence of an IQ score of 71. The court ruled that since he had not proffered an IQ score low enough to satisfy the strict 70-or-under requirement of Florida's bright-line statute, adaptive functioning evidence was deemed inadmissible. The Florida Supreme Court agreed.

Mr. Hall's case ultimately made it to the Supreme Court, where his arguments found favor. The Court, in *Hall*, held that:

> [t]he SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies [Ref. 3, 1995].

Quoting from a brief submitted on Mr. Hall's behalf, the Court found that "[b]y failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus'" (Ref. 3, p 2000). When the IQ score falls within the range of the SEM ". . . the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits" (Ref. 3, p 2000). The Court remanded the case for further proceedings.

Impact of *Hall*

The Supreme Court's ruling in *Hall* is procedural in nature, requiring courts ". . . to take into account the standard error of measurement" (Ref. 3, p 2000). It does not determine that Freddie Lee Hall was shown to have ID. It does not dictate how states should evaluate ID. It does not require specific confidence intervals as multipliers for the SEM nor that any numerical value be subtracted from IQ scores to derive a new score based on the SEM or any other rationale (e.g., the "Flynn effect").[7] It does not assert that *Hall* applies retroactively to any other defendant who was given the DP. It simply says that dignity, duty, and the Constitution require courts to account for the SEM and that the introduction of evidence of adaptive functioning is not barred by an IQ score in the controversial range.

Hall has had an impact on forensic mental health evaluations both conceptually and practically. Conceptually, this decision legally enshrines the notion that all IQ scores have a bidirectional range of potential scoring error (SEM). Practically, it affords defendants the opportunity to present adaptive functioning evidence without fear of automatic exclusion because of overly mechanistic IQ score requirements.

Hall relies, in part, on the SEM to open the door to evidence regarding adaptive functioning with IQ scores in the controversial range. However, application of the SEM does not ensure a finding of ID. It creates an unforeseen hazard for defendants with IQ scores a few points below 70, because the ruling acknowledges the bidirectional nature of the SEM. It is conceivable that a defendant with an IQ score of 67 could be found eligible for the DP on the basis of the determination in *Hall* that IQ tests contain inherent error and that the true score could be higher than the actual test results. Other appellate courts ruled that unilaterally lowering IQ scores based on the SEM is inherently speculative because the same statistical theory could be used to raise the obtained score.[8,9]

It is worth emphasizing that the ramifications of *Hall* neither supplant a state's *Atkins*-derived authority to define ID nor dictate how evaluators should assess it. It does not require evaluators (or courts) to apply the SEM unidirectionally and does not mandate the provision of a caveat based on confidence intervals (e.g., 90% or 95%).

Hall also does not automatically affect the validity of previously ID-based determinations, as "a new

rule is not 'made retroactive' unless the Supreme Court holds it to be retroactive" (Ref. 10, p 663), and the Court did not specify that *Hall* would apply retroactively, even though it did have the legal means to do so, had it wished.[11] *Hall* now extends to current and future defendants the opportunity to put on evidence of adaptive functioning, even when the IQ test evidence does not, for example, fall two standard deviations below the mean.

Adaptive Functioning Assessment with the Advent of *Hall* and DSM-5

DSM-5 played a prominent role in the appellant's briefs and arguments in *Hall*. One month after the release of DSM-5, counsel for Mr. Hall filed a petition for *certiorari*, asserting that Florida's statute, without justification, establishes a scientifically unsupported and inflexible "bright-line" IQ score that would lead to the cruel and unusual execution of a defendant with ID.

Mr. Hall's advocates found support in changes in the DSM-5 diagnostic criteria. In addition to the titular update (MR became ID), DSM-5 designates ID severity more with respect to adaptive functioning than to IQ scores.

Such changes have ample precedent. No two versions have been the same in the six iterations of DSM since its advent. The definition in the first edition of the DSM (DSM-I)[12] made no mention of adaptive functioning. The second edition (DSM-II) made only oblique reference to "developmental history and present functioning" (Ref. 13, p 14). The first particularization of "adaptive functioning" did not surface in the nosological enterprise until the third edition (DSM-III; Ref. 14, p 8), some three decades after DSM-I. The fourth edition (DSM-IV)[15] introduced greater specificity to the adaptive-functioning criterion, but IQ scores still determined the level of severity of MR. DSM-5 is just the current rendering in a 60-year history of ever-shifting definitions.[16] The historical malleability of MR/ID criteria has never been ascribed convincingly to any specific advancement in either assessment tools or evidence-based theoretical perspectives, leaving the impression that the current reconstruction may be as much a function of social sensitivities as of any other consideration.

There is some risk in tethering legal definitions to transitory clinical criteria, particularly as law and psychology do not evolve at the same pace. For example, the court in the aforementioned Pennsylvania case of *Commonwealth v. Miller*[4] held, relevant to *Atkins*, that the then-current MR criteria should be determinative. In support of its assertions, *Miller* cited the 10th edition of a manual published by the American Association on Mental Retardation (AAMR)[17] as well as the DSM-IV, both of which have now been superseded. In *Atkins*, the Court carved out a DP exemption for persons with MR, a now-discarded term, the functional definition of which arguably has changed. Further, DSM-5 declares that "IQ measures are less valid in the lower end of the IQ range" (Ref. 2, p 33). This assertion could make it more difficult for defendants given the DP to prove that low obtained scores approximate their true score.

Neither *Hall* nor DSM-5 originated a significant role for the assessment of adaptive functioning. They simply redirected attention to what for some time has been customary practice.

Strategies for Assessing Adaptive Functioning

Any assessment of adaptive functioning must give sufficient consideration to assets and deficits alike. Single-hypothesis testing (i.e., inventorying only assets or deficits) creates an impression of social advocacy, as opposed to objective evaluation. Such practice departs from DSM-5, the latest publications of the American Association on Intellectual and Developmental Disabilities (AAIDD, the AAMR's successor),[18,19] and all other established frameworks.

Evaluators should distinguish between the affirmative presence of maladaptive behavior (e.g., criminal conduct, substance abuse, self-injurious behavior, aggression, stereotypes, and property destruction) and essential deficiencies in adaptive functioning. Maladaptive behaviors represent a separate, independent construct unrelated to adaptive functioning for ID assessment purposes. Maladaptive behavior may co-occur in persons who have no mental disorder or a disorder distinguishable from ID.[20]

Confirmatory bias, anchored in *a priori* beliefs inclined toward or prejudiced against an ID finding, has no place in assessment of adaptive functioning. An ill-considered result-driven agenda is evident in the following type of specious reasoning: "Persons with ID show certain adaptive deficits; the defendant shows those deficits, therefore the defendant is a person with ID." This argument is subject to challenge on several grounds. Not all persons with ID show the

same deficits. Some persons without ID show those deficits. The absence of those particular deficits is not proof of the absence of ID. Evaluators who seek out only indicia of adaptive assets open themselves to the same criticism.

As with IQ scores, appraisals of adaptive functioning lack a truly defensible bright line that demarcates those with and without ID. Deficits exist on a continuum, as acknowledged by a variety of influential resources including DSM-5, AAIDD,[18] the Social Security Administration,[21] the Adaptive Behavior Assessment System-3 (ABAS-3),[22] and the Supports Intensity Scale.[23] This phenomenon exemplifies the disparate constructions of reality used by law as opposed to psychology: the former deals with dichotomies and reasonable certainties, whereas the latter struggles with the vicissitudes of sliding scales, probabilities, and "subtle and shifting gradation" (Ref. 24, p 716).

By way of further example, in *Hall*, the Court defined "deficits in adaptive functioning" as "the inability to learn basic skills and adjust behavior to changing circumstances" (Ref. 3, p 1994). This legal perspective of ID is consistent with the psychological definition of ID, in that the condition is permanent and incurable, such that if it eventually transpired that there remained no qualifying "deficits," then ID was never present in the first place.

If the evaluator concludes that ID is present and passes muster in light of *Hall*, then it is not enough merely to have catalogued the presence or absence of certain skill sets. The evaluator is likely to be expected to show that the defendant is unable to learn basic life skills and also unable to adjust his performance in response to changing circumstances. Further, the evaluator must consider that failure to demonstrate certain skills at a specific time is not, in and of itself, dispositive of significant deficits in adaptive functioning; there must be proof that the person is unable to perform such tasks when needed. For example, many intellectually and cognitively intact persons opt not to engage in certain basic tasks in their daily activities, electing instead to delegate those tasks to others.

Assessment of adaptive functioning must take into account three broad skill domains: conceptual, social, and practical adaptive. Given the lifelong nature of ID, the evaluator must consider two time frames: the defendant's adaptive functioning before age 18 (sometimes referred to as "during the developmental period") and throughout adulthood. To prove disability during the developmental period, an assessment must yield sufficiently reliable evidence of deficits in intellectual functioning (confirmed by clinical assessment and individualized intelligence testing) and "deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility" (Ref. 2, p 33). Whereas DSM-IV[15] and the Fourth Edition, Text Revision (DSM-IV-TR)[25] required a showing of impairment in two domains, DSM-5 lowered the bar to deficits in only a single area of functioning. Although ID need not have been diagnosed during childhood, the evaluator must show sufficient credible and reliable evidence relevant to both IQ and adaptive functioning during the developmental period.[20]

Relying on school records generated during the developmental interval can complicate matters in several ways. Many are no longer available. Some gloss over deficits to avoid stigmatizing the individual with a disability-oriented label. Others, conversely, over-emphasize or outright exaggerate deficits to secure services for the student and funding for the school. In many instances, commentary relevant to adaptive functioning is limited to teachers' observations that are offered without input from the primary caregivers or mental health professionals. State educational authorities have the opportunity in some jurisdictions to revise ID criteria, similar to what has occurred with progressive iterations of the DSM, resulting in ID determinations that are based on the prevailing definition of the day and the state in which the student resided. In addition, inconsistencies between educational and legal definitions of ID may complicate analysis. Given these limitations, the conclusions in archival school records about the presence or absence of ID have prompted some professionals to recommend giving greater weight to objective test scores than to special education designations, particularly in older school records.[26]

Strategies for assessing adaptive domains include interviewing informed persons, reviewing relevant records, and, unless not feasible, directly administering standardized measures of adaptive functioning. When applying measures of this type, the evaluator should ensure that the instrument is appropriate in light of cultural and demographic considerations and is administered in accordance with test manual in-

structions. For example, the Adaptive Behavior Assessment System, Third Edition (ABAS-3), requires that persons serving as respondents "have had frequent, recent, prolonged contact with the individual (e.g., most days, over the last few months, for several hours each day)" (Ref. 22, p 9). The ABAS-3 also recommends using multiple informants to provide a comprehensive assessment across a variety of settings, rather than relying on input from a single third party.

None of the generally accepted measures should be used solely for the purpose of retrospective assessment. Relying on the remote memory of a teacher or family member to assess adaptive functioning with the ABAS-3 25 years later is not consistent with the test's standardization. Further, the ABAS-3 does not assume that the absence of performance of certain tasks is evidence of incapacity. It asks respondents to rate the extent to which the individual "is able" to perform tasks "when needed" (Ref. 22, p 11). The evaluator cannot assume that defendants are unable to perform an adaptive task simply because they have not performed a chore, when day-to-day activities have not, in fact, required it. Finally, neither the ABAS-3 nor any generally accepted measure provides bright-line cutoffs; instead, they use Likert-type ratings (e.g., "not able," "never/almost never when needed," "sometimes when needed," "always/almost always when needed").

Similar cautions apply to other standardized instruments, including the Vineland Adaptive Behavior Scales-II[27] and the Scales of Independent Behavior-Revised (SIB-R).[28] Both rely on input from persons close to the defendants and who possess present personal knowledge of their adaptive functioning. Again, retrospective assessment with these instruments departs from their intent and standardization process.

As in all forensic matters, the evaluator has a responsibility to consider the potential for bias on the part of informants. Advocates for or against a particular conclusion reflect a result-driven agenda rather than an objective report of defendants' functional behavior in their ordinary settings. Toward that end, the forensic professional should appraise informants' inclinations to favor a particular outcome. Even when standardized inventories such as the ABAS-3 are used, family members and friends may feign a portrayal of the defendant as having been grossly impaired in childhood.[29] The evaluator would ideally be able to specify for the court the extent to which the informants' motivation to aid a friend or family member in avoiding the DP may have colored recollection of a loved one's adaptive behavior. It may be useful to pursue a line of inquiry about any contemporaneous action the informants took to remediate a disability when the defendant was a child. Those who now say that they witnessed serious limitations and took no action until decades later when the DP is on the line may have less credibility than those who advocated for special services during the developmental period.

By the same token, if correctional officers or victims serve as informants, the evaluator should consider the extent to which the informants' views were colored by *a priori* beliefs or compromised by insufficient observational opportunities.[20] If these persons describe strong adaptive assets, such as crafting letters or *pro se* pleadings, the evaluator can inquire whether the informants accounted for assistance that the defendant might have received from other prisoners or attorneys. The overarching consideration is to give the trier of fact a fair and valid representation of the defendant's assets and deficits for adaptive tasks, when life circumstances require the independent performance of those tasks.

While inventories of adaptive functioning (e.g., ABAS 3, SIB-R, and Vineland-II) are standardized and structured, they have limitations with respect to norming relevant to the age group most likely to face capital punishment, potential for feigning (assets and deficits), and timing of data collection. The SIB-R norm group contains only 205 adults who received the full SIB-R. The Vineland-II reports test-retest reliability for only 63 persons in the adult age group (22–71 years old) and presents no survey form inter-interviewer reliability coefficients for persons over 18. Interrater reliability for the Teacher Rating Form hit an age ceiling of 19, substantially limiting its utility for persons old enough to face the death penalty. The ABAS-3 Adult Form (Rated by Others) reflects a more robust cohort of 851 persons in the standardization group. It earned test-retest reliability of 0.88 (corrected *r*, ages 16–89; General Adaptive Composite (GAC), excluding work).

The previous iteration of the ABAS (i.e., ABAS-II) and the current SIB-R are susceptible to feigning, but neither has a validity scale that assesses intentional misrepresentations. The former is more vulnerable to educative coaching, making it an easier target for exaggeration than the latter.[29] Replications of this

research with the new ABAS-3 and the forthcoming Vineland-3 are not yet available.

The timing of data collection is important for technical and substantive reasons. Neither the SIB-R nor the ABAS-3 is designed for retrospective analysis. When assessing for an *Atkins* exemption, evaluators depart from test standardization if they ask current informants to complete an adaptive behavior inventory by estimating the defendant's capacity many years ago. If adaptive behavior measures from a defendant's developmental period appear in the archives, the forensic psychologist should be alert to the possibility of under-reported deficits by the youngster's loved ones, who wanted him to appear in the social mainstream to avoid a stigmatizing label, or by teachers who might have had very limited opportunity to observe the student. Conversely, intentionally inflated reports of deficits should be considered if the rater was advocating for the evaluee's access to services and benefits. Contemporaneous assessment of adult capital defendants is also an opportunity to exaggerate deficits to avoid risk of execution. Other collateral informants take the opposite tact by overstating their loved ones' adaptive assets in an effort to humanize the defendants in the eyes of the judge or jury.

Inventories of adaptive behavior are not determinative of any clinical or legal question. They generate hypotheses that have to be considered in light of the totality of the findings. Objective behavioral indicia of defendants' capacities are often the most useful source for assessing adaptive behavior, because those bellwethers are memorialized in the ordinary course of life.

The aforementioned cultural and demographic considerations do not, of course, apply merely to the forensic evaluator's choice and interpretation of standardized assessment measures. Interviews with criminal defendants and other informed persons can easily be confounded by the same missed cues, inadvertent slights, and unheeding superimposition of parochial values that stand to erode the validity of any other clinical or forensic undertaking. Acknowledging allegedly broad differences between various groups is insufficient as a metric for attaining and developing cultural competency. It remains a crucial aspect of assessing the presence or absence of intellectual disability "not to overgeneralize cultural information or stereotype groups in terms of fixed cultural traits" (Ref. 2, p. 749).

Behavior as Direct Evidence

Behavior often speaks more eloquently than self-reporting. There is risk in excessive reliance on an adult defendant's distant memory of childhood capacities, particularly when the potential for execution looms. Conversely, risk also resides in reliance on the defendant's contemporaneous declaration of capacity as uttered during the developmental period. Many youngsters (and average functioning adults) overstate their prowess to gain peer acceptance. Thus, evaluators should be wary when reviewing archival records in which, as a youngster, the individual claimed certain skill sets in the absence of proof by performance. Some individuals may be inclined to hide their deficits through silence, false assertions, or other strategies, to mask incapacities. Some adult defendants may also downplay limitations while incarcerated, because they want to blend in with the prison population without appearing vulnerable.

The "cloak of competence"[30] refers to the observation that some persons with intellectual disability deny the reality of their deficits in an effort to convince themselves and others that they possess the requisite capacities to function within the social mainstream. Application of the cloak-of-competence concept to criminal defendants has to be tempered by the facts that underpinned the original sample, which drew exclusively from former inpatients of Pacific State Hospital (PSH), most of whom are not representative of many of today's defendants who are given the DP. On average, the males in the study cohort resided at PSH for 6,935 days (19 years). It is unlikely that today's defendants with the DP have been in any ID facility that long, if ever. The staff of PSH proselytized their inpatients with ID to believe they were capable and normal, to make each patient feel that he was not as limited as the other patients and perhaps did not belong in the hospital. As a result, the residents were led to think that they did not have ID. Some of today's ID advocates in *Atkins* cases champion defendants who have been sentenced to death by taking quite the opposite tack: advancing the belief that the defendant has few capabilities.

Performance of daily tasks, when the activity is needed, provides more direct evidence than does self-reporting. A recent federal appellate opinion[31] affirmed a Texas Court of Criminal Appeals ruling that the subjective nature of these criteria justifies considerable latitude for trial judges to rely on their own

interpretations of defendants' adaptive behavior and courtroom testimony and potentially to afford such interpretations greater weight than expert witness opinions and underlying scientific evidence.[32]

Behavioral evidence lies, in part, in the degree to which individuals demonstrated adaptation to life in the community before incarceration. Ecologically valid assessments would consider the defendants' performance in their native surroundings, bearing in mind that poverty, poor schools, family dysfunction, and deficient social supports are not, in and of themselves, dispositive of any individual's internal adaptive capacity. An assessment of community adjustment should include consideration of such factors as criminal adaptation; affirmative efforts to pass the driver's license examination; skill in driving without having obtained a license; securing employment, even if temporary entry-level and under-the-table work; injuries on the job caused by adaptive deficits; use of electronic communications (e.g., cell phone, pager, tablet, and Internet); document generation (e.g., applications, emails, leases, and letters); ability to babysit competently, give others advice, and prepare meals; securing transportation, even when not driving or using public means; and appreciating the value of material goods and services, even in the absence of a bank account.

Assessing Adaptive Functioning During Incarceration

Once incarcerated, inmates may continue to exercise judgment and demonstrate capability in those areas of functioning that remain within their personal discretion. Being in a controlled prison environment does not diminish the rich information available for a comprehensive assessment of adaptive functioning. Although prison life differs in many ways from circumstances in the larger community, both settings require adaptive behavior. It is not reasonable to dismiss assessment of incarcerated persons' adaptive behavior under the claim that the prison setting is a social anomaly, atypical, too structured or artificial, particularly in light of the fact that, in 2013, the population of U.S. state and federal prisons (exclusive of local jails)[33] exceeded the populations of 11 different states.[34] Arguably, adjustment to prison requires greater adaptive flexibility because of its precipitous onset, as opposed to the more gradual, developmental, and supported enculturation to life in the larger community.

The thorough evaluator will assess whether defendants ever presented evidence pertinent to the following civil legal competencies: necessity to have a payee for Social Security, incapacity for medical decision-making, need for guardian or conservator, assignment of power of attorney because of incapacity as opposed to mere unavailability, or civil commitment due to incapacity to care for self. In the criminal context, the evaluator should review, when feasible, information revealing whether defendants ever raised a theory of incapacity with respect to *Miranda* waivers, proceeding *pro se*, trial competence, capacity to testify, competence to enter a plea, forwarding an insanity defense, or waiving appeal rights.

In some instances, the limitations of prison life require greater adaptive skill than life in the community, where options and opportunities for accommodation are more plentiful. A nonexhaustive inventory of adaptive tasks during past and present incarcerations includes managing visitors and phone lists, generating correspondence, authoring appeals of institutional violations, lodging grievances, citing the inmate manual, requesting resources (e.g., library, minister, and supervising correctional officer), requesting specific medical care, applying for relocation within prison, balancing a canteen account, ordering and confirming receipt of commissary items, using electronic devices (e.g., small TV purchased from commissary), modifying materials for different purposes (e.g., converting earbud wire to TV antenna), placing extramural orders (e.g., books and magazines), memorizing as many as 22 digits to place a call from jail, using prison print and electronic media, accessing legal resources, instructing persons in the community to carry out directives on the inmate's behalf, performing prison jobs, maintaining cell hygiene, learning to communicate with other inmates (e.g., talking through ductwork, sending messages similar to Morse Code via tapping on bars and pipes, and "fish-lining"), bargaining with correctional officers and inmates for privileges, memorizing schedules (recreation, medical appointments, barbershop, canteen delivery, visitation, TV shows, library hours, and correctional officer shifts), adapting to changes in routine (e.g., special holiday commissary orders, cell shake-downs, and housing lockdowns), improvising scarce resources (e.g., designing and creating tattoos from sharpened staples and self-crafted ink), and assessing and adapting to the wide-

ranging personalities of other inmates and correctional officers, in order to navigate the social nuances with an eye toward self-advocacy.

When assessing for practical adaptive behavior during incarceration, the psychologist should look beyond mere self-report from the impaired defendant who might simply want to blend into the inmate culture by giving the appearance of quiet capability. The forensic practitioner should explore whether defendants authored the petitions, correspondence, complaints, and appeals of institutional disciplinary actions attributed to them. In some instances, less capable inmates bargain with more skilled peers to write on their behalf. The psychologist should exercise similar prudent skepticism before presuming significant deficits in social and conceptual reasoning simply because defendants respond positively to structure and routine and strive to comply with rules to keep a low profile. Intelligent and capable inmates also find safety and security by following rules and avoiding conflict as a means of self-preservation.

Adaptive functioning is not limited to legal or moral decisions, nor is it determined by successful outcomes flowing from judgment and choice. Well-educated, highly skilled, intellectually gifted people with many years of specialized experience make mistakes that, in retrospect, seem inexplicably criminal, amoral, or otherwise ill conceived. They err in setting priorities and in assessing the likelihood of outcomes on Wall Street, in real estate, in relationships, and in betting on the "next big thing." By the same token, defendants' folly and failed forecasts are not presumptive evidence of substantial deficits in adaptive functioning. Gullibility is not the exclusive province of persons with ID. Innumerable ordinary adults routinely fall victim to scams of all types. Being a follower rather than a leader is not indicative of ID *per se*; among ordinary adults, there are far more of the former than the latter.

Performance as Direct Evidence: Case Example

Whereas *Hall* asserts that IQ scores of defendants who have received the DP should not bar their opportunity to introduce evidence concerning adaptive functioning, the appellate case of *Walker v. Kelly*[35] stood for the inverse proposition: that evidence of adaptive functioning can be sufficiently compelling to sideline the technical debates over IQ scores. Mr. Walker sought a DP exemption after *Atkins*. He offered evidence intended to show significant limitations in practical adaptive capacities exemplified by incapacity to perform the basic tasks incidental to an independent life (e.g., renting an apartment, managing money, and paying bills), seeming inability to obtain a driver's license, dependence on others for transportation, never taking a public bus, incapacity to grasp simple directions, and inability to maintain steady employment and self-support.

In contrast, several capacities also came into evidence. It was noted, for example, that he was able to use a pager, rent a motel room, borrow a car, drive himself to a different region of the state independently without a driver's license, and return the car safely. He provided effective care for his girlfriend's child, prepared appealing meals, maintained an apartment adequately for himself, and communicated his needs and concerns adequately while in prison. Although he never obtained mainstream employment, he typically quit his jobs and was never fired because of any incapacity.

The Fourth Circuit affirmed the death sentence by saying: "Although Walker devotes much of his appeal to the district court's analysis of the I.Q. prong, it is unnecessary for us to address those arguments because we conclude that the court did not clearly err in rejecting his claim on the adaptive prong" (Ref. 35, p 323).

Practice Implications

The ruling in *Hall* is significant if it affects even one case. As a practical matter, it is not likely to have the broad impact of *Atkins*, because among the nine bright-line states, only six have executed as many as one person in the past decade.[36] Of the four bright-line states with multiple executions, ID has not always been in controversy, and when it has been, the Supreme Court did not issue a writ on the basis of its reasoning in *Hall*.

For forensic evaluators in *Atkins*-related cases, the procedural nature of the *Hall* decision presents two principal emphases. First, it does not change the definition of ID, and second, it does not prescribe new assessment methods. It simply allows for the presentation of adaptive functioning, even when obtained IQ scores are in the controversial range.

A thorough evaluation of adaptive behavior begins with no presumptions or confirmatory bias, relies on interviews with informed persons, entails an objec-

tive and thorough review of legal and personal records, and calls for the use of standardized measures of adaptive behaviors when they can be administered consistent with the inventories' standardization procedures. Evaluators must search diligently for both adaptive assets and deficits in performing tasks that are necessary to ordinary life in the defendant's environment. Because direct evidence is more telling than that which passes through filters that are potentially compromised by bias or prejudice, more valid evidence is often found in the capabilities that defendants demonstrated in their native community and while incarcerated.

With respect to an isolated consideration of the SEM, intellectual integrity and service to the court require acknowledgment that the theoretical true score could lie equidistant below and above the obtained score. Defendants bear the burden of proof when seeking an *Atkins* exemption. After *Hall* and DSM-5, just as a person with an IQ score a few points above 70 may be able to prove ID, those scoring a few points below 70 may not.

Mental health professionals functioning in a forensic capacity in DP cases with an ID component have an obligation to assist the trier of fact with solid scientific procedures and reliable findings, rather than to advocate for a specific legal outcome. Neither *Hall* nor DSM-5 alters the evaluator's responsibility when assessing adaptive functioning in *Atkins* cases. Neither touchstone empowers the evaluator to justify changing (as opposed to explaining) an earned score with reference to the SEM, Flynn effect, practice effect, or any other argument. Neither authority supports selective attention to the evidence or dismissing credible performance evidence, simply because an outlier finding fails to conform to the desired conclusion. The responsibility remains to undertake a thorough and credible evaluation without regard to the potential legal conclusion and to present the findings and opinions to the trier of fact who alone bears the responsibility for determining ID and the applicability of the DP exemption.

References

1. Atkins v. Virginia, 536 U.S. 304 (2002)
2. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Washington, DC: American Psychiatric Association, 2013
3. Hall v. Florida, 134 S. Ct. 1986 (2014)
4. Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005)
5. Guyer M, Fluent T: Intellectual disability, IQ measurement error, and the death penalty. J Am Acad Psychiatry Law 42:521–3, 2014
6. Cooke BK, Delalot D, Werner TL: Hall v. Florida: capital punishment, IQ, and persons with intellectual disabilities. J Am Acad Psychiatry Law 43:230–4, 2015
7. Flynn JR: WAIS-III and WISC-III: IQ gains in the United States from 1972–1985: how to compensate for obsolete norms. Percept Mot Skills 86:1231–1239, 1998
8. Hedrick v. True, 443 F.3d 342 (4th Cir. 2006)
9. Walton v. Johnson, 440 F.3d 160 (4th Cir. 2006)
10. Tyler v. Cain, 533 U.S. 656 (2001)
11. Teague v. Lane, 489 U.S. 288 (1989)
12. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, First Edition. Washington, DC, 1952
13. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Second Edition. Washington, DC: American Psychiatric Association, 1968
14. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Third Edition. Washington, DC: American Psychiatric Association, 1980
15. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. Washington, DC: American Psychiatric Association, 1994
16. Hagan LD, Guilmette TJ: DSM-5: challenging diagnostic testimony. Int J Law Psychiatry 42–43: 128–34, 2015
17. Luckasson R, Borthwick-Duffy S, Buntinx, WHE, *et al*: Mental retardation: definition, classification, and systems of supports (ed 10). Washington DC: American Association on Mental Retardation, 2002
18. Schalock R, Borthwick-Duffy S, Bradley V, *et al*: Intellectual disability: definition, classification, and systems of supports (ed 11). Washington, DC: American Association on Intellectual and Developmental Disabilities, 2010
19. Polloway EA, ed: The Death Penalty and Intellectual Disability. Washington, DC: American Association on Intellectual and Developmental Disabilities, 2015
20. Tassé MJ: Adaptive behavior assessment and the diagnosis of mental retardation in capital cases. Appl Neuropsychol 16:114–123, 2009
21. Social Security Administration: Disability evaluation under Social Security: DI 22510.021. Consultative examination report content guidelines: mental disorders. Washington, DC: Social Security Administration, 2006
22. Harrison PL, Oakland T: Adaptive behavior assessment system (ed 3). Torrance, CA: Western Psychological Services, 2015
23. Thompson JR, Bryant BR, Campbell EM, *et al*: Supports Intensity Scale: User's Manual. Washington, DC: American Association on Mental Retardation, 2004
24. Stamper v. Commonwealth, 324 S.E.2d 682 (Va. 1985)
25. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. Washington, DC: American Psychiatric Association, 2000
26. Reschley DJ: Documenting the developmental origins of mild mental retardation. Appl Neuropsychol 16:124–134, 2009
27. Sparrow SS, Cicchetti, DV, Balla, DA: Vineland-II: Vineland Adaptive Behavior Scales (ed 2). Minneapolis, MN: Pearson Assessments, 2005
28. Bruininks RH, Woodcock R, Weatherman RF, *et al*: The Scales of Independent Behavior, Revised (SIB-R). Itasca, IL: Riverside Publishing, 1996
29. Doane BM, Salekin KL: Susceptibility of current adaptive behavior measures to feigned deficits. Law & Hum Behav 33:329–343, 2009
30. Edgerton RB: The Cloak of Competence: Stigma in the Lives of the Mentally Retarded (Revised and Updated). Berkeley, CA: University of California Press, 1993

31. Matamoros v. Stephens, 783 F.3d 212 (5th Cir. 2015)
32. Kohberger C, Noffsinger S: Determining intellectual disability in a post-Atkins death penalty case. J Am Acad Psychiatry Law 43: 526–529, 2015
33. Carson AE: Prisoners in 2013. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, September 2014. Available at http://www.bjs.gov/content/pub/pdf/p13.pdf. Accessed August 30, 2015
34. U.S. Census. Annual estimates of the resident population: April 1, 2010 to July 1, 2013; 2013 population. Available at: http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2014_PEPANNRES&src=pt. Accessed January 20, 2016
35. Walker v. Kelly, 593 F.3d 319 (4th Cir. 2010)
36. Death Penalty Information Center. Available at http://www.deathpenaltyinfo.org/node/5741. Accessed January 20, 2016