The settlement agreement with Cleveland (found here), which addressed a wider array of problems in the Cleveland Police Department, has similar provisions for reforming police responses to persons in mental health crisis, including the creation of a Mental Health Response Advisory Committee, the hiring of a Crisis Intervention Coordinator, the training of all officers in proper mental health crisis response and the enhanced specialized training of a group of "specialized CIT officers."

The Evolution of a New Standard for Law Enforcement Conduct

It appears, then, that the Department of Justice, through its civil rights investigations and settlement actions, is helping to fashion a new standard of practice in law enforcement's understanding of, and interventions with, individuals with mental illness, and, with that new standard of practice, a new understanding of what the Fourth Amendment requires in regard to the use of force by police. Given what the public is now learning about the actual use of deadly force by police departments across the country, particularly in police encounters with African Americans and with people who have mental illness, the need for such a new standard is becoming increasingly clear. Virginia localities are among those still needing this change. As an example, a year ago the fatal shooting by a Norfolk police officer of a man with serious mental illness prompted department-wide CIT training by the Norfolk police to improve officers' response to persons with mental illness.[4]

To date, no new guidance for law enforcement in this challenging area of practice has been provided by the U.S. Supreme Court. The oral argument before the Supreme Court in March in the *Sheehan* case suggests that the Supreme Court may not yet see a need for new and clearer Fourth Amendment (and ADA) standards in regard to law enforcement's encounters with persons with mental illness. As the fatal shootings by police of persons with mental illness seem to continue unabated across the country, it appears certain that cases will arise in which the Court will again be asked to rule on the standard of conduct required of officers by the ADA and the Fourth Amendment in encounters with persons with mental illness. It can only be hoped that the Supreme Court extends to the victims in those future cases the same regard for their humanity as the 9th Circuit Court of Appeals extended to Teresa Sheehan, and as the Department of Justice appears to be extending to persons with mental illness in jurisdictions throughout the nation. Much depends upon it.

II. Commentary

The Constitutional Importance of Conforming to Accepted Professional Practice in Adjudicating Claims of Intellectual Disability in Capital Cases: A Comment on *Hall v. Florida*, 134 S. Ct. 1986 (2014)

[4] That shooting also resulted in the indictment of the officer by a special grand jury for voluntary manslaughter.

Richard J. Bonnie

In *Atkins v. Virginia*, 535 U.S. 304 (2002), the Supreme Court held that the Fourteenth and Eighth Amendments to the U.S. Constitution forbid the execution of individuals with intellectual disabilities. After that decision, Freddie Lee Hall asked a Florida state court in a post-conviction proceeding to vacate his death sentence based on evidence that he had an IQ of 71. Hall v. Florida, 134 S.Ct.1986, 1988 (2014). The state court denied his petition, holding that the relevant Florida statute required a petitioner to show that he had an IQ of 70 or below before being allowed to present mitigating intellectual disability evidence. The Florida Supreme Court affirmed, upholding the constitutionality of the Florida statute. Hall v. State, 109 So. 3d. 704 (2013).

The Florida statute at issue defined "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test"— i.e. 70 or below. Florida treated 70 as a mandatory cutoff, meaning that if a petitioner tested above that number "sentencing courts [could not] consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." Hall v. State, 134 S.Ct. 1986, 1994 (2014).

Acknowledging the "inherent error in IQ testing," the Supreme Court reversed the Florida Supreme Court, holding the strict 70 point cutoff unconstitutional because it created an unacceptable risk that persons with intellectual disabilities would be executed in violation of the Eighth and Fourteenth Amendments. In closing, the Supreme Court stated that a bright-line cutoff rule "is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, [a bright-line cutoff] not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning."

In the course of its opinion, the Supreme Court lists Virginia as being one the states that had unconstitutionally drawn a clear IQ cut-off at 70, based on the decision of the Virginia Supreme Court in *Johnson v. Virginia*, 591 S.E. 2d 47, 59 (2004). For our Virginia readers, I would like to summarize the historical record bearing on the issue decided by the Virginia Supreme Court in *Johnson.* I respectfully contend that the Court's decision in *Johnson* misinterpreted the relevant language in the statute. Moreover, it is important for trial courts to understand the determinative role played by scientific knowledge and accepted professional practice in the adjudication of *Atkins* claims.

The Virginia statute governing the adjudication of *Atkins* claims was drafted by the Crime Commission based on a report prepared by an expert Clinical Advisory Group (CAG) that I chaired for the Crime Commission. In an article published in the *University of Richmond Law Review* in 2007, Katherine Gustafson and I reviewed the drafting

history and the relevant scientific and professional literature, showing that the statutory language referring to IQ testing was intended to incorporate standard professional practice, including recognition of the standard error of measurement in interpreting IQ scores. *See* Richard J. Bonnie and Katherine Gustafson, *Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICHMOND L. REV 811 (2007). Excerpts from that article follow (original footnotes omitted):

Interpretation of IQ Scores

According to the definition of mental retardation in the Virginia statute, "significantly subaverage intellectual functioning" must be "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."[5] In addition, the statute directs that "[t]esting of intellectual functioning shall be carried out in conformity with accepted professional practice."[6] These two provisions are perhaps the most important provisions in the statute because they import standard practices of administering, scoring, and interpreting IQ tests into the law. ...

For the purposes of this section regarding the interpretation of IQ scores, we will assume that "significantly subaverage intellectual functioning" ... is operationalized as a score of 70 or below on a specific IQ test. That is often the case, given that a score of 70 is typically two standard deviations below the mean on a test designating a score of 100 as the mean. This assumption, and the question of whether the law should explicitly establish a cut-off IQ score for mental retardation (as many states do), will be discussed later in this paper. ...

All measurement, both physical and psychological, has some potential for error. For example, when someone's height is being measured, the result will be influenced by many factors including the particular tool being used, the eyesight of the measurer, the care taken by the measurer, and whether the person being measured is wearing shoes or slouching. Psychological testing has even greater potential for error because it is more subjective. Error may be introduced by the examiner making a timing mistake, failing to record responses, over-prompting, mishandling stimuli objects, or neglecting to repeat parts of the instructions. Error may also be introduced by the defendant's mood and general health, luck, or other undetermined factors. In any kind of measurement there are always tradeoffs between cost and accuracy.

Standard error of measurement (SEM) helps to quantify the errors in

[5] VA. CODE ANN. § 19.2-264.3:1.1(A).
[6] VA. CODE ANN. § 19.2-264.3:1.1(B)(1).

intelligence tests in order to facilitate the most accurate interpretation and presentation of scores. Both the [American Association on Mental Retardation (AAMR)][7] and the [American Psychiatric Association (APA)] definitions of mental retardation stress the importance of considering SEM when evaluating IQ scores. SEM varies between measures and between age groups within each measure. Each measure is accompanied by a table of calculated SEMs by age group. Generally, SEM is estimated to be between three and five points for well-standardized IQ tests. ...

[T]he SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests. The importance of the SEM is so well-established in the field that it would be superfluous to direct experts to take it into account in a statute governing *Atkins* evaluations and adjudications, and most state laws say nothing about it. Nonetheless, in its effort to provide as much guidance as possible to courts, the proposal drafted by the Clinical Advisory Group explicitly stated that SEM must be considered in *Atkins* cases, as did the initial drafts of the bill in the *Atkins* subcommittee. In the course of the subcommittee and Crime Commission deliberations, prosecutors proposed that specific reference to SEM be omitted on the ground that this would simplify the scientific language of the bill. However, the CAG representatives urged the subcommittee and the Crime Commission to retain the SEM language in order to emphasize that any IQ score actually represents a range of possible scores. The Crime Commission proposal as passed by the Senate included the CAG's reference to the SEM in the definition of mentally retarded:

> "Mentally retarded" means a disability . . . characterized . . . by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning carried out in conformity with accepted professional practice, that is at least 2 standard deviations below the mean, *considering the standard error of measurement for the specific instruments used....*

However, the reference to the SEM was deleted from the version of the *Atkins* bill passed by the House of Delegates and was then omitted in the bill approved by the joint conference committee. [Together with other Crime Commission drafters of the bill, I] decided to acquiesce in this amendment on the ground that the omitted language, though desirable, was not necessary. As noted above, the requirement that intellectual functioning be assessed in conformity with accepted professional practice mandates the consideration of the SEM. As a matter of professional practice, experts will have to testify

[7] Since publication of the quoted article, the AAMR has revised its name to American Association on Intellectual and Developmental Disabilities.

about why they think a particular score indicates that a defendant's performance on a specific measure was at least two standard deviations below the mean. Ensuring that forensic experts and lawyers sufficiently understand the importance and effects of SEM thus becomes a matter of training. ...

Cut-Off Scores

For purposes of the preceding discussion of the role of standard error of measurement..., and other factors affecting the interpretation of IQ scores, we have assumed that "significantly subaverage intellectual functioning" is operationalized as scoring 70 or below on a specific IQ test. While this is a useful assumption to make when explaining the effects of factors like standard error of measurement, a score of 70 or below (or any other specific cut-off score) should not be embraced by courts or state legislatures as a part of the definition of mental retardation. Instead, a significant limitation in intellectual functioning should be defined as performance that is at least two standard deviations below the mean, as both the AAMR and the APA recommended, and the Virginia statute provides.

The *standard deviation* measures the variation of scores in comparison to the mean score of the population on which the test has been normed. Two-thirds of the population will have scores falling within one standard deviation on either side of the mean, and 95 percent of the population will have scores falling within two standard deviations on either side of the mean. The [Wechsler Adult Intelligence Scale—Third Edition] and the [Stanford-Binet Intelligence Scales, 5th Edition] both have a mean score of 100 and a standard deviation of 15. Two-thirds of the population will thus have a score between 85 and 115 (one standard deviation) and 95 percent of the population will have a score between 70 and 130 (two standard deviations). Consequently, an IQ score of 70 is sometimes used as a proxy for a score two standard deviations below the mean, but the score of 70 should not be reified.

Standard deviations should be used in the definition and diagnosis of mental retardation instead of cut-off scores for a number of reasons. First, different IQ tests use different scoring norms, meaning that the mean score does not necessarily have to be set at 100. ... Second, different IQ tests may have different standard deviations. ... Third, a fixed cut-off score would ignore the fact that different IQ tests have different standard errors of measurement (SEM). Given the inevitable presence of some measurement error, each IQ score should actually be viewed as a range of possible scores. ... Fourth, IQ tests are generally most accurate with respect to people who fall within two standard deviations of the mean. Since people with mental retardation by definition fall outside this group, their scores are somewhat less trustworthy than those closer to the mean. Although this decrease in confidence as IQ scores approach high or low extremes certainly does not discredit the validity of extreme scores, it does highlight the importance of viewing the diagnosis of