June 4, 2014

SCOTUS: EIGHTH AMENDMENT
75 IS THE NEW 70!!
STATES ARE NOT FREE TO INTERPRET *ATKINS*[1] into oblivion
Florida statute struck down which prevented consideration of other evidence of retardation with an IQ score of over 70

Hall v. Florida, Kennedy,5/27/14, dissent Alito, Roberts, Scalia and Thomas. The State's threshold requirement of an IQ score of 70 was unconstitutional. The Eighth Amendment reaffirms the government duty to respect the duty of all persons; no legitimate penological purpose exists to execute the intellectually disabled. Such also protects the integrity of the trial process for the intellectual disabled[2]. This opinion relies heavily on the psychiatric/professional community and their studies which the dissent heavily criticizes. "Society relies upon medical and professional expertise to define and explain the mental condition at issue". Florida's rule (as interpreted by their Supreme Court) disregards established medical practice by taking an IQ test as conclusive and ignoring its range of error and its limitations[3]. It is extremely important to look at adaptive deficits as well and a bright line rule that prevents that due to an IQ score of 70 violates the 8th Amendment. Direction of change in the States is to abolish bright line IQ test scores (and in fact to abolish the death penalty altogether). When an IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. This case is important because there is evidence of planning of this agg robb/murder which Cochran and Alcala would use to blow an *Atkins* claim out of the water and in fact the TCT in this case stated the fact that a planned convenience store robbery coupled with a car theft contradicted the evidence of retardation. The majority opinion also looks at the defendant's horrific childhood although it is not strictly relevant to their analysis. The 70 score is arrived at by computing two or more standard deviations from the mean of 100. The Supreme Court does not like mandatory cut offs that prohibit as a bright line rule the consideration of individualizing sentencing information. (See case following). The IQ test itself may be flawed. It appears the majority would set a cut off with an IQ of 75 due to the limitations in IQ testing and the SEM. [standard error in measurement]. Perhaps the most important part of the opinion is that States do not have "unfettered discretion to define the full scope of the constitutional protection." and "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." And finally, "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." The strong four judge dissent claims this case expands *Atkins* so much that it over-rules some of its holdings. Criticizes the reliance on professional societies especially that fly by night American Psychiatric Association. The fact that a lot of states have abolished the death penalty says nothing about how they would

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[1] Atkins v. Virginia,*536 U.S. 304, 321 (2002)*
[2] *More likely to give false confessions, poor witnesses, do poor job of assisting their counsel.*
[3] *Much about both of those things in the majority opinion.*

administer that if they did have it. Thinks the IQ test is more important than that silly old adaptive function requirement.[4] Janet's thoughts: I wish I had this opinion on the last cert petition I wrote on a death case. It shows awareness that the States interpret the Constitutional protections set forth in SCOTUS precedent into oblivion in order to protect their death sentences. I have seen Judges Cochran and Alcala of the TCCA engraft an ugly fact exception to the 8th Amendment which perhaps this opinion gives some ammunition to attack.

EIGHTH AMENDMENT

Miller v. Alabama, SCOTUS, (June 25, 2012),(Kagan). 132 S. Ct. 2455; 183 L.Ed 2d 407 (2012). The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. The case contains extremely generous language on the harsh realities of life in prison and the importance of individualized sentencing.

DOUBLE JEOPARDY
FIFTH AMENDMENT LIVES
State could not find their witnesses despite a multitude of resetting

Martinez v. Illinois, per curiam, 5/27/14, jury was sworn, the State refused to participate thinking they could circumvent the jeopardy bar[5]. Nope, "jeopardy attaches when the jury is enpaneled and sworn". *Crist v. Bretz,* 437 U. S. 28, 35 (1978). Jury sworn, state refused to participate, defendant moved for and was granted a directed verdict which is a judicial acquittal. State appealed the denial of their continuance. Jeopardy attached in this case ,as in every case, when the jury was sworn even though the State chose not to participate in the trial. And as such, the double jeopardy clause barred Martinez's retrial because the directed verdict was an acquittal. An acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. *Evans v. Michigan*, 586 U. S. ____ , ____(2013)(slip op., at 4-5). A footnote suggest potential limitations where the TCT lacks jurisdiction, where the acquittal was obtained by fraud or corruption, or where the prosecutor did not have an opportunity to dismiss the charges to avoid the consequences of empaneling the jury. Even if the TCT had chosen to dismiss the case or declare a mistrial rather than granting Martinez's motion for directed verdict, the Double Jeopardy Clause would probably still bar his retrial. *Downum v. United States*, 372 U. S. 734 (1963). *Arizona v. Washington*, 434 U.S. 497, 508 n. 24 (1978).

SCOTUS
QUALIFIED IMMUNITY
PRESIDENTIAL SAFETY TRUMPS FIRST AMENDMENT

Wood v. Moss, Ginsburg, 5/27/14,unanimous, President Bush changed his plans. Okay to move the protestors and not move the supporters. Really fact intensive discussion. Usually the secret service wins these things . . .

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[4] *Coincidentally the client's family, friends and teachers testify about the adaptive deficits while the state's expert testifies about the IQ test.*

[5] *We did not get our continuance, we are taking our marbles and going home.*

SCOTUS
TENTH AMENDMENT[6]

Legislation to enable international treaty against chemical warfare does not touch class a assaults involving two women fighting over some guy that probably is not even worth it

Bond v. United States, Roberts, 6/2/14, Some chick put some nasty stuff designed to cause rashes and itching on her husband's pregnant girlfriend's stuff. Pg GF had to wash her thumb. State declined to prosecute because this is crap. Feds picked it up and she got some serious time. This opinion starts with a compelling discussion of the use of mustard gas in WWI and interprets the statute to avoid discussing the Tenth Amendment issue directly. But basically says : this is not the kind of conduct the statute is designed to address, this is the state's problem not the feds, these really were not chemical weapons if we interpret the statute like this everyone who has vinegar in their house is in violation of this law. This fact pattern does not involve terrorism. "The global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard. "

SCOTUS
1983 NO EXCESSIVE FORCE UNDER 4TH/14TH AMENDMENT

Plumhoff v. Rickard, 5/27/14, high speed car crash, cops killed both driver and his passenger after firing about 15 rounds into their vehicle. Important holding is reasonable to use this kind of force to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders (and LE) –even if it places the fleeing motorist at risk of serious injury or death. Police need not stop shooting until they perceive the threat has ended. Passenger's presence does not bear on this, his family needs to bring their own suit.

TCCA: THE GREAT WRIT
MALFEASANCE LAB TECH

Ex parte Leroy Edward Coty, Hervey, Publish, 6/4/14. No. WR-79,318-02, Relief denied despite the horrible lab tech but some awesome law made by the brilliant appellate lawyer Bob Wicoff to assist the rest of our clients.[7] When an applicant alleges a due process violation predicated on the malfeasance of a forensic laboratory technician, that applicant's claim should be analyzed using a modified false-evidence analysis. The applicant can prevail by establishing an inference of falsity and that the false evidence was material to the applicant's conviction. *Ex parte Coty*, 418 S. W. 3d 597, 605 (Tex. Crim. App. 2014). An inference of falsity is established when: (1) technician is a state actor (2) who has committed multiple instances of intentional misconduct (3) same tech (4) that type of misconduct would have affected the evidence in the applicant's case and (5) the tech handled the applicant's evidence within the same time period of time as the misconduct. In this case there was another tech in addition to the awful Salvador that dealt with the evidence, there are photos/videos of the evidence, Salvador did not have access to a bunch of cocaine on that day to borrow to use in this case, positive field test, canine alert.

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[6] *The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the People.*

[7] *I had the pleasure of seeing oral arguments on this case and really spectacular job was done at arguments and with the briefing.*

TEXAS CONSTITUTION SINGLE SUBJECT RULE[8]
EIGHTH AMENDMENT

Ex parte Richard Dewayne Jones, No. PD-1158-13, an amendment to the evading arrest statute[9] to address evading with a motor vehicle and with tire deflation devices. Single subject requirement not violated as it addresses protecting LE and the community from those that evade in motor vehicle throwing tire deflation devices behind them as they go. Because the penalties for the offenses pertain to motor vehicles they have a single subject and relate either directly or indirectly to evading arrest they have a mutual connection to one another.

STATE PLAYS RACE CARD TO WIN
VOIR DIRE : BATSON
JURY MISCONDUCT:READING PAPER/MID TRIAL PUBLICITY
TRIAL PROCEDURE :READ BACK
GRUESOME PHOTOS
VICTIM FAMILY IN COURT, TRE 614 TCCP 36.03
GANG EVIDENCE
PRIOR UNCOUNSELED MISDEMEANORS
VIDEO VOIR DIRE[10]

Harris v. State*, No. AP- 76, 810, Cochran, unanimous, No. AP-76, 810, DNP, Defendant poured out on 40 points of error(most of which were actually quite good) and a 132 page brief. Reminding me of , what Justice Stevens said to the denial of the cert. petition in* Kelly v. California[11]*, the fact that "death is different" is fast becoming a justification for applying "a* lesser *standard of scrutiny" in capital cases. To establish a* Batson[12] *violation[13] (1) the opponent of the strike must establish a* prima facie *showing of racial discrimination; (2) the proponent of the strike must then articulate a race neutral explanation and(3) the TCT must decide whether the opponent has proven purposeful racial discrimination.[14] It does not matter how many African American jurors that are struck but rather the relation between the entire qualified panel and the number of jurors of a particular race that were struck.[15] The issue is not whether the juror is death-qualified or even strongly in favor of the death penalty, but rather whether the prosecutor struck her because of her race. TCCA defers to TCT findings as to the credibility and demeanor of the prosecutor.[16] The State must merely present a facially valid race-neutral explanation for its strikes. A race*

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[8] *Section 35 of the Texas Constitution, no bill ought to contain more than one subject.*
[9] *Tex. Penal Code 38.04 (b)(2) (A).*
[10] *Defendant loses see,* Massey v. State*, 933 S. W. 2d 141, 151 (Tex. Crim. App. 1996).*
[11] *555 U. S. 1020, 1023; 172 L. Ed. 445; (2008) citing* McCleskey v. Kemp*, 481 U. S. 279, 347-348; 107 S. Ct. 1756; 95 L. Ed. 262 (1987) (dissenting opinion).*
[12] Batson v. Kentucky*, 476 U.S. 79 (1986).*
[13] *Counsel must object that the prosecutor has exercised his peremptory challenges in a racially discriminatory manner before the jury is sworn and the venire panel is discharged.* Williams v. State*, 712 S. W. 2d 835 (Tex. App. – Corpus Christi, 1986).*
[14] Purkett v. Elem*, 514 U.S. 765, 767 (1995);* Young v. State*, 283 S. W. 3d 854, 866 (Tex. Crim. App. 2009).*
[15] Woodward v. Epps*, 580 F. 3d 318, 339 (5th Cir. 2009) –although the state struck 100% of the black jurors, that fact alone does not support a finding of discrimination. For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. The number of strikes used to excuse minority jury members is irrelevant on its own. See also,* Watkins v. State*, 245 S. W. 3d 444, 451-452, (Tex. Crim. App. 2008).*
[16] *This is where the death is different –rubber stamp conviction thing kicks in—normally the TCCA is happy to re-do fact findings. See also* Herron v. State*, 86 S. W. 3d 621, 630-31 (Tex. Crim. App. 2002).*

neutral explanation may not be persuasive or even plausible to satisfy Batson*. It does not need to be reasonable, but must be genuine. It can be silly or superstitious.*[17] *The ultimate plausibility of that analysis is to be considered as part of the third step of the analysis, in which the TCT determines whether the opponent of the strike has satisfied his burden of persuasion to establish by preponderance of the evidence that the strike was indeed the product of the proponent's purposeful discrimination.* Purkett v. Elem*, 514 U.S. 765,769 (1995). TCT did not err in denying MNT when one of the jurors read a newspaper article about THIS case and TOLD the other jurors that he had done so. The TCT had admonished the jurors not to do stuff like this. Claims asserting prejudice from mid-trial publicity are considered by assessing two factors: (1) was news coverage prejudicial (2) has the publicity in fact reached the jurors.* [18] *Because the news stories in questions just repeated the evidence that the jury had already heard—not prejudicial. The actual newspaper reading juror was dismissed and replaced with an alternate and the other jurors were questioned individually and nothing would affect their duty to be fair and impartial in this case. To show that a read back of testimony which is not responsive to the jurors request is reversible error must show harm.* [19] *If testifying witnesses remain in the courtroom that are also members of the decedent's family the case must be analyzed under TCCP 36.03 not TRE 614 as TCCP 36.03 trumps TRE 614. To exclude such witnesses an offer of proof must be made by the defendant to justify their exclusion – show that," the testimony of the witness would be materially affected if the witness hears the other testimony at trial." Gang evidence and pretty much everything else the state wants to put on in punishment admissible.*[20]

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[17] Hernandez v. New York*, 500 U.S. 352,365(1991).*Grant v. State*, 325 S. W. 3d 655, 658-60(Tex. Crim. App. 2010).*Mathis v. State*, 67 S. W. 3d 918, 924-25 (Tex. Crim. App. 2002).*Watkins v. State*, 245 S. W. 3d 444, 447 (Tex. Crim. App. 2008).*

[18] Ladner v. State*, 868 S. W. 2d 417, 423 (Tex. App. –Tyler1993, pet. ref'd.)*United States v. Manzella*, 782 F. 2d 533, 541-44 (5th Cir. 1986). 46 A.L.R. 4th 11 (1986 & Supp. 2014).*

[19] Brown v. State,*870 S. W. 2d 53, 55 (Tex. Crim. App. 1994),* Iness v. State*, 606 S. W. 2d 306, 314 (Tex. Crim. App. 1980).*

[20] *See,* Davis v. State*, 329 S. W. 3d 798, 805-6 (Tex. Crim. App. 2010);* Vasquez v. State*, 67 S. W. 3d 229, 239-240 (Tex. Crim. App. 2002);* Mason v. State, *905 S. W. 2d 570, 577 (Tex. Crim. App. 1995).*