
**“MOORE” THAN JUST A NUMBER: WHY
IQ CUTOFFS ARE AN
UNCONSTITUTIONAL MEASURE FOR
DETERMINING INTELLECTUAL
DISABILITY**

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INTRODUCTION

“Yeah,” said George. “I’ll come. But listen, Curley. The poor bastard’s nuts. Don’t shoot ‘im. He di’n’t know what he was doin’.”

– John Steinbeck, *Of Mice and Men*¹

Bobby James Moore was twenty years old when he “fatally shot a store clerk” while robbing a grocery store in April 1980.² On paper, this is a tragic felony murder, but behind the scenes lies a different story. Bobby was not a typical twenty-year-old; he did not understand “the days of the week, the months of the year, [or] the seasons.”³ Bobby could barely tell time, and he could not understand standard measurements or that subtraction is the opposite of addition.⁴ Bobby suffered an “abuse-filled childhood.”⁵ Bobby dropped out of high school due to “his limited ability to read and write,” and he lived on the streets after being kicked out of his home for being “stupid.”⁶ Bobby is intellectually disabled, and despite the evidence put forth demonstrating his disability, he was sentenced to death pursuant to a set of factors used by a Texas court; these factors are largely based on stereotypes and caricatures from literature.⁷ As the United States Supreme Court decided in 2017, this was a gross violation of the Eighth Amendment’s protection against cruel and unusual punishment to rely on “wholly nonclinical”⁸ factors rather than the “medical community’s diagnostic framework.”⁹

Mental health and the criminal justice system consistently interact when it comes to theories of punishment and culpability. When they clash, the crime often takes center stage, while the mental health of the defendant remains ignored. Individuals suffering from intellectual disabilities, mental disorders, or both are treated unfairly as criminal defendants when their conditions, consisting largely of impairments of the ability to make rational decisions, are not taken into serious consideration at sentencing. Courts,

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1. JOHN STEINBECK, *OF MICE AND MEN* 263 (Penguin Books 1993) (1937).
 2. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).
 3. *Id.* at 1045.
 4. *Id.*
 5. *Id.* at 1047.
 6. *Id.* at 1045.
 7. *See id.* at 1044. *See also Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).
 8. *Moore*, 137 S. Ct. at 1053.
 9. *Id.* (citation omitted).

legislatures, and the public generally have struggled to understand criminal defendants with intellectual disabilities. It was not until 2002 that the United States Supreme Court ruled it unconstitutional to execute intellectually disabled persons in the landmark decision *Atkins v. Virginia*.¹⁰ The Court found there is a “national consensus” that people who suffer from “mental retardation”¹¹ should be exempt from the death penalty.¹² Before *Atkins* was decided in 2002, at least forty-four people who would have been exempt under *Atkins* were executed.¹³

Like many prior landmark decisions, states resisted *Atkins* because of its failure to define “intellectual disability” and the fact that it left to the states “the task of developing appropriate ways to enforce the constitutional restriction.”¹⁴ Several states took this opportunity to implement harsh IQ cutoffs for determining intellectual disability in capital cases.¹⁵ Many states passed legislation prior to *Atkins* defining intellectual disability as requiring an IQ score of below seventy, and following *Atkins*, these states began denying its exemption to any claimants with IQ scores of seventy or above. Twelve years after *Atkins*, the Supreme Court addressed the issue of IQ cutoffs in *Hall v. Florida*, in which the Court concluded that Florida’s cutoff “disregards established medical practice[s]” and that when a defendant’s IQ falls in a certain margin of error, the defendant must be able to present additional evidence of adaptive deficits.¹⁶ *Hall* reinforced the need to focus on adaptive behavior in addition to IQ, but again, the states still had discretion over how to consider the behavior. Then came *Moore v. Texas*, the most striking example post-*Hall* that there remains a long-standing misperception of intellectual disabilities.

Before reaching the Supreme Court, the Texas Court of Criminal Appeals (“CCA”)¹⁷ denied Bobby James Moore’s habeas petition claiming exemption from the death penalty under *Atkins*. The CCA relied on its prior

10. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

11. *Id.* at 316-17. At the time the Supreme Court first heard cases on this issue, the terminology used was “mental retardation,” however today the DSM-5 has changed the term to “intellectual disability.” See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-5].

12. *Atkins*, 536 U.S. at 316-17.

13. Denis Keyes, William Edwards & Robert Perske, *People with Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, 40 MENTAL RETARDATION 243 (2002).

14. *Atkins*, 536 U.S. at 316-17 (citation omitted).

15. *States that Have Changed Their Statutes to Comply with the Supreme Court’s Decision in Atkins v. Virginia*, DEATH PENALTY INFO. CTR., (Mar. 2, 2018), <https://deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia>.

16. *Hall v. Florida*, 134 S. Ct. 1986, 1995, 2001 (2014).

17. The CCA is Texas’s court of last resort in criminal cases. See TEX. CONST. art. V, § 5.

decision in *Ex Parte Briseno*, in which it determined a defendant was essentially not disabled enough for death penalty exemption, contrasting with the classic example of a character with a severe disability, Lennie in John Steinbeck's *Of Mice and Men*.¹⁸ The CCA in *Briseno* held that "[m]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt [from the death penalty]," but because the petitioner did not fall in the category of "severely mentally retarded" like Lennie would, he was denied exemption from the death penalty.¹⁹

Reasoning based on a literary character is dangerous, and, as this Note will argue, intellectual disabilities cannot be boiled down to stereotypes or an isolated number from an IQ test. This Note will look to recent court decisions, state statutes, and literature from the psychological and psychiatric communities, and it will evaluate the Supreme Court's decision in *Moore v. Texas* overturning the CCA. It will further consider what the Supreme Court's decision could mean not only for the future of intellectually disabled defendants, but also for defendants with mental illnesses facing the death penalty.

Part I of this Note focuses on the legal background pre- and post-*Atkins* and how courts have treated individuals with intellectual disabilities. It will examine attempts to define "mental retardation" for the purpose of exemption under *Atkins* by looking at how various literatures, state statutes, lower court decisions, and how clinicians define it. Part II then focuses on the recent Supreme Court case on this issue, *Moore v. Texas*. Lastly, Part III discusses *Moore*'s future implications on the ability of intellectually disabled persons to argue that without *Hall* and *Moore* applying retroactively or a specific holding from the Court regarding the unconstitutionality of IQ cutoffs, such persons will continue to have their constitutional rights violated.

18. See *Ex parte Briseno*, 135 S.W.3d 1, 5–6 (Tex. Crim. App. 2004).

19. See *id.*

I. BACKGROUND

A. CREATING A CONSTITUTIONAL EXEMPTION FOR THE INTELLECTUALLY DISABLED

The Eighth Amendment prohibits the infliction of cruel and unusual punishment.²⁰ Initially, this prohibited archaic punishments that were considered "cruel and unusual" when the Bill of Rights was adopted, but the Supreme Court has since recognized it encompasses the "evolving standards of decency that mark the progress of a maturing society."²¹ In addressing these "evolving standards," the Court has looked to evidence from society's current views on punishment, most often found in state legislation and data from jury sentencing.²² Since the adoption of the Bill of Rights, the Eighth Amendment has been expanded to prohibit the execution of juveniles,²³ individuals deemed incompetent at the time of execution,²⁴ and the "mentally retarded."²⁵ All three protected classes represent important facets within the complexity of the death penalty issue; however, this Note focuses on the latter: how the Eighth Amendment has come to prohibit the execution of individuals with "mental retardation."

The Supreme Court has come a long way in its treatment of the intellectually disabled in regards to the death penalty since its first decision on the matter in *Penry v. Lynaugh*.²⁶ Decided in 1989, this was the first time the Court addressed the issue of whether the Eighth Amendment's prohibition against cruel and unusual punishment exempts intellectually disabled individuals from execution. The Court held that executing the "mentally retarded" did not violate the Eighth Amendment, but based its decision largely on the fact that only two states at the time (Georgia and Maryland) banned executions of "mentally retarded" criminals.²⁷ The Court found that this was not sufficient evidence of a "national consensus" that the practice violated "standards of decency."²⁸

Just as the states began to change their position on the issue, so did the Supreme Court. Following the decision in *Penry*, sixteen states across the country enacted statutes like those in Georgia and Maryland from the period

20. U.S. CONST. amend. VIII.

21. *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989).

22. *Id.* at 331.

23. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005).

24. *See Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

25. *See Atkins v. Virginia*, 536 U.S. 304, 316–17 (2002).

26. *Penry*, 492 U.S. at 333–34.

27. *Id.*

28. *Id.*

of 1990 to 2002, totaling eighteen states with exemptions for the mentally disabled when *Atkins* was decided.²⁹ Even more significant is the fact that no states passed legislation enforcing the power to execute intellectually disabled individuals in this time period.³⁰ This shift in the national consensus, arising from the states, changed the way the Court viewed intellectual disabilities. The same year the eighteenth state enacted legislation exempting the “mentally retarded,” the Supreme Court handed down its landmark decision *Atkins v. Virginia*, in which it held it is unconstitutional and a violation of the Eighth Amendment to execute people with “mental retardation.”³¹

Atkins was largely based on this shift in national consensus (demonstrated by state’s enacting laws banning the execution of “mentally retarded” individuals), which the Court found to provide “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”³² Eighteen states is still short of half the country, but the Court found it significant that in the states that still allowed the execution of intellectually disabled offenders, actually carrying out the practice is rare.³³ In fact, only five states executed individuals with an IQ of less than seventy between the time *Penry* and *Atkins* were decided.³⁴

In addition to a shifting national consensus, the Court considered two goals of the criminal justice system—retribution and deterrence—and evaluated how executing the petitioner in *Atkins* would serve either of those interests.³⁵ First, with respect to retribution, the Court reasoned that a defendant deemed “mentally retarded” acts with a “lesser culpability” than the average person guilty of murder, and thus a death sentence would be disproportional and would not serve the interests of retribution.³⁶ Secondly, with respect to deterrence, the Court found that capital punishment would serve as a deterrent only for potential murderers with a “cold calculus that

29. See *Atkins*, 536 U.S. at 314–15. The seventeen states listed include: Kentucky and Tennessee in 1990; New Mexico in 1991; Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994; New York in 1995, Nebraska in 1998; South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina, and Texas. When *Atkins* was decided, Texas had just passed a similar bill, and both Virginia and Nevada had similar bills passed in at least one house, but it was not yet law in these states. *Id.*

30. See *id.* at 315–16.

31. See *id.*

32. *Id.*

33. See *id.* (noting that New Hampshire and New Jersey were two states that continued to allow execution sentences, but had not actually carried one out in decades).

34. *Id.*

35. *Id.* at 318–20.

36. *Id.* at 319.

precedes the[ir] decision" to kill.³⁷ The theory behind deterrence rests upon the notion that the severity of the punishment, in this case death, will dissuade criminal conduct.³⁸ That is simply not true for individuals with "mental retardation," as the Court found that it makes one "less likely . . . [to] process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."³⁹ This is also true in reverse: exempting individuals with "mental retardation" will not lessen the deterrent effect on those unprotected. Given that, in *Atkins*, the individual had an IQ of fifty-nine, as well as clinician testimony and school records supporting a finding of "mental retardation," it is not likely others would attempt to claim "mental retardation" falsely to gain exemption without such evidence.

The core of the *Atkins* decision is its recognition that intellectually disabled individuals are less culpable because of their cognitive and behavioral impairments. This creates a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses . . ."⁴⁰ Not only does this impairment affect an individual's decisionmaking throughout the circumstances of their crime and lead to a failure to appreciate risks and consequences, but also it can inhibit one's ability to receive proper counsel, resulting in deficient due process.⁴¹

The Court in *Atkins* felt secure in its decision given the supportive national consensus, but did note that to the extent there is any disagreement, it will be in "determining which offenders are in fact retarded."⁴² This prediction by the Court anticipated the ambiguity and difficulty states have had post-*Atkins* in determining which defendants qualify as "mentally retarded" to be exempt from execution. Thus, while *Atkins* serves as a momentous step for intellectually disabled defendants, it leaves uncertainty on how to properly protect such individuals from execution by failing to define "mental retardation." It left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon . . . [its] execution of sentences,"⁴³ meaning that the states retained discretion in determining the criteria for who exactly is "mentally retarded" for purposes of a death penalty exemption under *Atkins*.

37. *Id.* (citation omitted).

38. *Id.* at 320.

39. *Id.*

40. *Id.*

41. *See id.* at 320–21.

42. *Id.* at 317.

43. *Id.* (citation omitted).

B. DEFINING “MENTAL RETARDATION” AFTER *ATKINS*

The Supreme Court’s reasoning for leaving the definition of “mental retardation” ambiguous is that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”⁴⁴ The Court appears to refrain from defining “mental retardation” to avoid a categorical ban that would exempt some individuals who claim to be intellectually disabled, but actually are not impaired to the extent that it diminishes their culpability. The Court did however explain that the medical community defines “mental retardation” per three criteria: (1) significantly subaverage intellectual functioning,⁴⁵ (2) deficits in adaptive functioning,⁴⁶ and (3) that these deficits manifest prior to age eighteen.⁴⁷

1. Significantly SubAverage Intellectual Functioning

The American Association on Mental Retardation (“AAMR”) defines “significantly subaverage” intellectual functioning as having an IQ of about seventy or below.⁴⁸ An IQ can be obtained by one or more of the standardized, individually administered intelligence tests, such as the Wechsler Adult Intelligence Scales (WAIS), Wechsler Intelligence Scales for Children (WISC), the Otis-Lennon Mental Ability Test (OLMAT) and the Stanford-Binet-V (SB-V).⁴⁹ The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, fifth edition, (“DSM-5”) has recognized there is a measurement error of approximately five points in assessing IQ.⁵⁰ DSM-5’s guidelines ensure that no one would be diagnosed with an IQ lower than seventy if no significant defects in adaptive functioning are shown, however, that also makes it possible “to diagnose Mental Retardation in individuals with IQ’s between [seventy] and [seventy-five] who exhibit significant deficits in adaptive behavior.”⁵¹ The DSM-5

44. *Id.*

45. Examples of “deficits in intellectual functions” can be demonstrated by the level of an individual’s “reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience.” DSM-5, *supra* note 11, at 33.

46. Limitations in adaptive skills refer to “the inability to learn basic skills and adjust behavior to changing circumstances.” *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014).

47. *Atkins*, 536 U.S. at 318.

48. AM. ASS’N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 41 (11th ed. 2010) [hereinafter AAIDD].

49. See Bryan Lester Dupler, *Capital Cases Involving Mental Retardation*, in 93 AMERICAN JURISPRUDENCE TRIALS 1, §§ 17–19 (Westlaw 2018) (2004).

50. DSM-5, *supra* note 11, at 37.

51. Dupler, *supra* note 49, § 11.

also designates classifications of mental retardation into degrees: "profound (IQ below 20–25), severe (IQ 20–25 to 35–40), moderate (IQ 35–40 to 50–55), and mild (IQ 50–55 to 70–75)."⁵² Approximately 85% of all intellectually disabled persons, and the "overwhelming majority of capital defendants with mental retardation," fall in the mild range.⁵³ Only 3–4% fall in the "severe mental retardation" category,⁵⁴ where Lennie from *Of Mice and Men* would likely fall. There are several moral and practical implications of setting a strict IQ cutoff at seventy for defendants bringing *Atkins* claims that will be discussed in Part IV.

2. Adaptive Behavior Criteria

The American Association on Mental Deficiency ("AAMD") defines significant impairments on adaptive functioning as "limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."⁵⁵ In other words, this analysis focuses generally on ordinary skills the typical individual possesses to function in everyday life. The level of everyday adaptive functioning is compared "to an individual's age, gender, and socioculturally matched peers."⁵⁶

The AAIDD and DSM-5 sum this up in three adaptive-behavior skills: conceptual, social, and practical.⁵⁷ The conceptual domain, also called academic domain, involves, among other abilities, competence in functions such as memory, language, reading, writing, math, problem solving, and ability to form judgment in novel situations.⁵⁸ The social domain focuses on personal interactions and how one reacts to them. This domain includes: awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; ability to make friends and judge social situations.⁵⁹ Lastly, the practical domain focuses on the individual's ability to live a productive life in the world by evaluating self-management, ability to care for oneself, ability to adhere to school or job responsibilities, and

52. *Id.* § 12 (citation omitted) (Persons with mild retardation "typically develop social and communication skills during the preschool years . . . have minimal impairment in sensorimotor areas, and often are not distinguishable from children without mental retardation until a later age.' They can acquire basic academic skills up to about the sixth grade level.").

53. *Id.*

54. *Id.*

55. AAIDD, *supra* note 48, at 3, 11.

56. DSM-5, *supra* note 11, at 37.

57. AAIDD, *supra* note 48, at 44; DSM-5, *supra* note 11, at 37.

58. DSM-5, *supra* note 11, at 37.

59. *Id.*

ability to manage money, among other skills.⁶⁰ The DSM-5 recommends gathering evidence of skills deficits in these domains by various means, such as looking into educational, developmental, and medical history.⁶¹

3. Manifesting Before Age Eighteen

The third, and least litigated, factor of the definition of intellectual disability requires that the disability “manifest[s] before age 18.”⁶² The DSM-5 requires evidence of both intellectual and adaptive deficits, the first two prongs, to be shown during this “developmental period.”⁶³ In most *Atkins* claims this is not as vigorously litigated, as courts often review evidence of childhood environment, medical histories, behavioral records, school records, and testimony of behavior from those who knew the individual as a child.⁶⁴

A recent Sixth Circuit decision arising out of Tennessee provides an example of how this third requirement can impact an *Atkins* claim. There, an *Atkins* claimant’s school records indicated IQ scores from eighty-three to ninety-seven from ages seven to thirteen years old, yet at age forty-five he was receiving scores of fifty-seven and sixty-nine.⁶⁵ Those scores were not evidence of lifelong “mental retardation,” manifesting during childhood, and because all of his scores before he turned eighteen were higher than seventy (even considering the Flynn effect and other deviations), the defendant’s *Atkins* challenge was rejected.⁶⁶

4. State Interpretations of the Factors: *Ex parte Briseno*

One of the most blatant departures from the principles established in *Atkins*—*Ex parte Briseno*—came out of Texas in 2004. Jose Garcia Briseno sought state habeas relief, “alleging he was mentally retarded and . . . exempt from execution” for the murder he was sentenced to death for in 1991.⁶⁷ The Texas legislature had not adopted a statute implementing *Atkins*, so the Texas Criminal Court of Appeals (“CCA”) took matters into its own hands, resulting in a wholly nonclinical approach that evaluated what became known as the *Briseno* factors.

60. *Id.*

61. Dupler, *supra* note 49, § 11.

62. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

63. DSM-5, *supra* note 11, at 33.

64. *See* *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014); *Moore v. Texas*, 137 S. Ct. 1039, 1055–56 (2017).

65. *Black v. Carpenter*, 866 F.3d 734, 738 (6th Cir. 2017).

66. *Id.* at 748–49.

67. *Ex parte Briseno*, 135 S.W.3d 1, 1 (Tex. Crim. App. 2004).

In the absence of any state statute, the CCA looked at the DSM-IV,⁶⁸ bills the Texas Legislature had passed, relevant case law, and finally the AAMR. First, the court examined the DSM-IV and found that mental health professionals define intellectual disability “broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support.”⁶⁹ The broad range of intellectual disabilities is shown by “[t]he DSM-IV categoriz[ing] the mentally retarded into four subcategories: mildly retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded.” The court noted that “mental retardation is not necessarily a lifelong disorder” given that many individuals fall into the “mildly mentally retarded” category.⁷⁰ Further, due to the broad categorization and range of IQ numbers, the court was unsure whether the petitioner’s disability was severe or long-standing enough for exemption.

The only other source the CCA looked to was Texas House Bill 236, passed by the 77th Legislature in 2001, “before the *Atkins* decision was announced.”⁷¹ House Bill 236 would have prohibited the execution of intellectually disabled defendants, adopting the definition of “mental retardation” found in Texas Health and Safety Code Section 591.003(13).⁷² However, House Bill 236 “was vetoed by the Governor,” and subsequently “[t]he 78th Texas Legislature did not pass a statute implementing *Atkins*.”⁷³

The CCA thus adopted the definition set by the AAMR, the same criteria *Atkins* discusses, including the requirement that the defendant’s “adaptive deficits” are related to the intellectual disability.⁷⁴ The CCA settled on this definition because it closely resembles the definition under the Texas Health and Safety Code: “[i]ntellectual disability” means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.⁷⁵

68. At the time *Briseno* was decided in 2004, DSM-5 was not yet published and DSM-IV was the current edition.

69. *Briseno*, 135 S.W.3d at 6.

70. *Id.* at 5–6 (citation omitted).

71. *Id.* (citation omitted).

72. *Id.* (“‘Mental Retardation’ means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.”).

73. *Id.* at 6–7. Texas did however make another attempt with Tex. H.B. 614, 78th Leg., R.S. (2003), but its definition of “mental retardation” did not significantly differ from Tex. H.B. 236, 77th Leg., R.S. (2001), and “[n]either of [the] bills addressed the issue of determining mental retardation claims on a post-conviction habeas corpus writ brought by inmates sentenced to death before the Supreme Court decision in *Atkins*.” See *id.* at 7 n.22.

74. *Id.* at 7–8, 13.

75. Tex. Health & Safety Code Ann. § 591.003(7-a) (West 2015).

Despite adopting the same definition, state courts could vary wildly in determining what is considered “significantly subaverage” functioning.

Indeed, unlike any other jurisdiction, the CCA adopted a narrower focus than what mental health professionals recommend by looking to the “level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”⁷⁶ The CCA said unless the defendant seems retarded enough to the average person in Texas, they will not be exempt. The court cited *Atkins*, that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”⁷⁷ The CCA took this phrase and ran with it, interpreting it to allow the execution of persons whose disability falls in the mild range—the largest portion of intellectually disabled criminal defendants and the range in which the *Atkins* claimant fell. The fact that Texas did not yet have any statutory provisions applying *Atkins* further allowed the court to ignore the holding in *Atkins* and create its own “factors” test not based on any clinical determination.⁷⁸

The *Briseno* court argued that adaptive behavior criteria are “exceedingly subjective” and thus set out a list of seven evidentiary factors to guide the determination of whether a defendant is considered intellectually disabled under *Atkins*:⁷⁹

- [1.] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- [2.] Has the person formulated plans and carried them through or is his conduct impulsive?
- [3.] Does his conduct show leadership or does it show that he is led around by others?
- [4.] Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- [5.] Does he respond coherently, rational, and on point to oral or written questions or do his responses wander from subject to subject?
- [6.] Can the person hide facts or lie effectively in his own or others’ interests?

76. *Briseno*, 135 S.W.3d at 6.

77. *Id.* at 5 (quoting *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

78. *See id.* at 6.

79. *Id.* at 8.

[7.] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?⁸⁰

The court applied these factors to the defendant-petitioner in *Briseno* to determine that he “did not prove, by a preponderance of the evidence, that he had significant limitations in adaptive functioning.”⁸¹ They found that stories of him running away from home to escape the beatings from his great-grandma signified “good survival skills,” that officers testified his “behavior seemed ‘normal’ and ‘appropriate’ in prison,” and his own testimony seemed “clear, coherent and responsive.”⁸² As later held in *Moore v. Texas*, these types of factors cannot provide an adequate basis for determining adaptive behavior because they overemphasize the strengths without considering the deficits.⁸³ Several courts in Texas since *Briseno* have dissented from the application of the factors as “decidedly non-diagnostic,” giving Texas judges “amorphous latitude . . . to supply the normative judgment to say, in essence, what mental retardation means in Texas . . . for Eighth Amendment purposes.”⁸⁴

After *Briseno*, it is estimated that Texas executed thirty to forty people with strong claims of intellectual disability relying on the nonclinical “we know it when see it approach” that was “as meaningless as answers given by a Magic 8 Ball.”⁸⁵ After the progressive step the Court took in *Atkins*, *Briseno* ran afoul the long-standing principle that the Eighth Amendment protects “evolving standards of decency that mark the progress of a maturing society,” making clear that *Atkins* was just one battle won in the fight for the constitutional rights of intellectually disabled persons.⁸⁶

C. SETTING THE STAGE FOR *MOORE*

In 2014, ten years after *Briseno*, the Supreme Court revisited the issue in *Hall v. Florida*, holding that a Florida capital punishment law requiring an individual claiming an intellectual disability to score seventy or below on

80. *Id.* at 8–9.

81. *Id.* at 14.

82. *Id.* at 15, 18.

83. *Moore v. Texas*, 137 S. Ct. 1039, 1059–60 (2017).

84. Brief for the American Civil Liberties Union & the ACLU of Texas as Amici Curiae Supporting Petitioner at 28, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15-797) [hereinafter ACLU] (citation omitted).

85. Robin M. Maher, *Moore v. Texas: The Supreme Court Limits State Discretion to Make the ‘Protection of Human Dignity’ a Reality for the Intellectually Disabled*, GEO. WASH. L. REV. ON THE DOCKET (Apr. 9, 2017), <http://www.gwlr.org/moorevtexas>.

86. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citation omitted).

an IQ test violates the Eighth and Fourteenth Amendments of the Constitution.⁸⁷ Freddie Lee Hall was convicted of two murders in 1978, a jury sentenced him to death, and both the Court of Appeals and Florida Supreme Court affirmed concluding that his intellectual disability could not justify or excuse his moral culpability based their interpretation of a Florida statute.⁸⁸ While the Florida statute appeared nearly identical to the three criteria in *Atkins*, it went further by defining “significantly subaverage” intellectual functioning as “performance that is two or more standard deviations from the mean score on a standardized intelligence test.”⁸⁹ The standard deviation is fifteen points, two deviations is then thirty points, but the Florida Supreme Court interpreted the statute as creating a strict IQ cutoff of seventy.⁹⁰

When Hall was first sentenced, the Supreme Court had not yet decided *Atkins*, thus, in 2004, Hall filed a motion claiming an intellectual disability that would have exempted him from the death penalty pursuant to *Atkins*.⁹¹ It took five years for Florida to hold a hearing considering his motion, and when they finally did, he presented evidence that his IQ score was seventy-one.⁹² Notably, Hall actually received nine IQ tests over forty years ranging from scores of sixty to eighty, but the scores below seventy were excluded for “evidentiary reasons.”⁹³ Under the Florida Supreme Court’s analysis, a score of seventy-one put Hall above the mandatory cutoff, and thus other evidence could not be considered.⁹⁴

The Supreme Court noted that Florida’s mandatory IQ cutoff disregards the medical practice because it treats IQ as “conclusive evidence” of an individual’s intellectual functioning, without considering other evidence of deficiencies in adaptive behavior.⁹⁵ In fact, the very professionals who create and run IQ tests are in consensus that they “should be read not as a single fixed number but as a range.”⁹⁶ This is because each test has a “standard

87. Hall v. Florida, 134 S. Ct. 1986, 1990 (2014). The Court uses “intellectual disability” to mean the same as “mental retardation,” and noted that the change in terminology is used by professionals and approved by DSM-5. *Id.*

88. *Id.* at 1991.

89. *Id.* at 1994 (citation omitted).

90. *See id.* (“[The Florida Supreme Court] has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.”).

91. *Id.* at 1990–92.

92. *Id.* at 1992.

93. *Id.*

94. *Id.* at 1994.

95. *Id.* at 1995.

96. *Id.*

error of management” (“SEM”),⁹⁷ reflecting the inconsistency and imprecision of the test. For individuals like Hall with an IQ of seventy, considering the SEM places him in a range between sixty-six and seventy-six.⁹⁸ The SEM also applies to an individual like Hall—who has taken multiple tests—and must be applied to each one separately.

Turning now to the Eighth Amendment analysis of whether there is a national consensus that the practice of IQ cutoffs violates standards of decency, the Court found a “significant majority of States implement the protections of *Atkins* by taking the SEM into account,” reflecting the “error inherent” in using the test.⁹⁹ Additionally, only two other states had “adopted a fixed score cutoff identical to Florida’s” at the time of this decision.¹⁰⁰ There are however, nine states with statutes that could be interpreted as requiring bright-line cutoffs of seventy, but the Court found that four of them have not had courts rule on the issue.¹⁰¹ In stark contrast, eighteen states have abolished the death penalty altogether and at least five states have passed legislation permitting a defendant bring a claim under *Atkins*, despite an IQ above seventy.¹⁰² For all of these reasons, the Court rejected the strict cutoff.¹⁰³ Rather, the Court found significant evidence must be considered: “social and cultural environment, including medical histories, behavioral records, school test and reports, and testimony regarding past behavior and family circumstances.”¹⁰⁴

After disregarding the strict cutoff under Florida’s statute, the Court’s analysis considered Hall’s school records, and testimony from his teachers, his lawyer, medical clinicians, and his family, finding them to be “substantial and unchallenged evidence of intellectual disability.”¹⁰⁵ The Court went

97. *Id.* The SEM is considered “[o]ne of the most important concepts in measurement theory,” because “[a]n individual’s IQ test score on any given exam may fluctuate” for several reasons including: the person’s health, how many tests they have taken in the past and thus can remember how to do well on them, the environment they take the test in, the behavior of the examiner administering it, the “subjective judgment involved in scoring certain questions,” and even simple luck. *Id.*

98. *Id.*

99. *Id.* at 1996.

100. *Id.* (citations omitted). However, the Court notes that “Arizona, Delaware, Kansas, North Carolina, and Washington have statutes which could be interpreted to provide a bright-line cutoff leading to the same result that Florida mandates in its cases.” *Id.*

101. *Id.* at 1997.

102. *Id.*

103. *See id.* at 1998 (citation omitted) (“The rejection of the strict 70 cutoff in the vast majority of States and the ‘consistency in the trend,’ toward recognizing the SEM provide strong evidence of consensus that our society does not regard this strict cutoff as proper or humane.”).

104. *Id.* at 1994.

105. *See id.* at 1990–91 (discussing how Hall’s teachers described him as “mentally retarded,” his lawyer testified that he “[c]ouldn’t really understand anything [Hall] said” and compared him to his four-

beyond the IQ test's simple number by delving into the defendant's childhood. The opinion cites several different testimonies that demonstrated his intellectual disability. For example, his siblings testified there was "something 'very wrong' with him as a child," and he was "slow with speech and . . . slow to learn."¹⁰⁶ Strikingly, his mother "would strap [Hall] to his bed at night . . . [and] awaken [him] by hoisting him up and whipping him with a belt, rope, or cord" and on one occasion she "buried him in the sand up to his neck to 'strengthen his legs.'"¹⁰⁷ In light of the powerful evidence presented, the Court found that "Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe."¹⁰⁸

The Court's reasoning in *Hall* is significant because it acknowledges that a person is more than just a number.¹⁰⁹ Not only is an important constitutional protection against cruel and unusual punishment at stake, but also the rights of a group of individuals who have long suffered due to the stigma of their intellectual disabilities. What is at stake here is not automatically excusing anyone with an intellectual disability from punishment, but rather ensuring that an individual has the opportunity to present evidence of his disability, including deficits in adaptive behavior. Florida's decision to execute Hall because his IQ score was one point above the cutoff was an extreme circumstance, and the Court properly championed the rights of intellectually disabled persons in its opinion. However, its ruling only invalidated the Florida statute under the Eighth Amendment; thus the Court has not yet categorically banned state reliance on IQ tests.

II. MORE PROTECTION UNDER *MOORE*?

Two years after *Hall v. Florida*, on June 6, 2016, the Supreme Court granted certiorari in its most recent case regarding the intellectually disabled, *Moore v. Texas*.¹¹⁰ The Supreme Court granted certiorari, taking up the specific issue of whether it violates the Eighth Amendment under *Hall* and *Atkins* to prohibit the use of current medical standards on intellectual disability and instead require the use of outdated medical standards in determining whether an individual can be exempt from the death penalty. The main issue is whether medical definitions govern how courts rule, or

year-old daughter, and medical clinicians testified that he was "significantly retarded.").

106. *Id.* at 1991.

107. *Id.*

108. *Id.*

109. *Id.* at 1990–91 ("This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.").

110. *Case Files: Moore v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/moore-v-texas> (last visited May 24, 2018).

whether courts have discretion to develop the legal standard on their own.

In 1980, Bobby James Moore and two accomplices attempted to rob a grocery store. Moore was meant to be a look-out guard positioned at the front booth with a shotgun, but when he approached the booth, he shot and killed an employee.¹¹¹ Moore was "convicted of capital murder and sentenced to death."¹¹² Moore brought habeas petitions in both state and federal courts, and the U.S. Court of Appeals for the Fifth Circuit found Moore received ineffective assistance of counsel during his trial and sentencing because his attorney failed to develop or present mitigating or exculpatory evidence.¹¹³ After a new state court sentencing hearing in February 2001, Moore was sentenced to death again.

Because *Moore v. Texas* came out of the CCA in Texas, it evaluated Moore's intellectual functioning pursuant to the *Briseno* factors. The CCA found Moore failed to meet the *Briseno* factors and again imposed a death sentence.¹¹⁴ In doing so, the CCA reversed a lower court ruling that followed the scientific diagnostic criteria set by medical professionals, which had found that Moore did have an intellectual disability.¹¹⁵ Texas is the only state that followed the *Briseno* factors, allowing the CCA the flexibility to interpret the three prongs in whichever way it felt the majority of Texas citizens would. Thus, the CCA side-stepped *Atkins* and deemed Moore not intellectually disabled enough under *Briseno*. This decision was made in the face of showing a history of intellectual disability that had been documented throughout Moore's childhood. This included testimony from a clinical neuropsychologist that Moore's "'mental age' at the time of the offense was no greater than fourteen years" and he had a "lack of impulse control and a diminished ability to think through the consequences of his actions."¹¹⁶ Since Moore had the same cognitive functioning of a fourteen-year-old, he had the same "diminished capacity"¹¹⁷ to make decisions that makes juveniles less culpable than adults. The Supreme Court has held juveniles less culpable than adults for several reasons, including a susceptibility to peer pressures and influence by others.¹¹⁸

111. *Ex parte Moore*, 470 S.W.3d 481, 490 (Tex. Crim. App. 2015), *cert. granted in part sub nom Moore v. Texas*, 136 S. Ct. 2407 (2016), *vacated and remanded by* 137 S. Ct. 1039 (2017).

112. *Id.* at 484.

113. *Id.*

114. *See id.* at 489.

115. *Id.* at 528.

116. *Id.* at 495, 506.

117. *Id.* at 542.

118. *Miller v. Alabama*, 567 U.S. 460, 476–78 (2012) (discussing the hallmark features of youth which include immaturity, impetuosity, failure to appreciate risks and consequences, and what the child's

Demonstrating his intellectual limitations, testimony at a 2014 evidentiary hearing revealed that “when [Moore] was in second and third grade, he could not tell a \$1 bill from a \$5 or \$10 bill.”¹¹⁹ Further, Moore’s siblings testified about the “neglectful, physically and verbally abusive alcoholic” father they had.¹²⁰ According to their testimony, Moore received the harshest beatings and was thrown out of the house at age fourteen because he could not spell and his father “thought he was stupid.”¹²¹ This testimony was corroborated by a neighbor who could attest to witnessing the beatings as well as Moore’s “haggard” and bruised appearance.¹²² Experts acknowledged that emotional disturbances and environmental conditions like that of Moore’s upbringing can adversely impact an individual’s learning ability and IQ scores.¹²³

Resulting from his childhood hardships at home, Moore “dropped out of school around age fifteen or sixteen” and “started living ‘a street life.’”¹²⁴ Part of this new life included “smoking marijuana and taking 7 to 14 Quaalude pills per day.”¹²⁵ Moore led a troubled life as a teenager, part of which stemmed from his intellectual challenges. He stated that due to “his inability to read or write,” he skipped school starting as early as fourth grade.¹²⁶ After reviewing Moore’s entire record, Dr. Borda, the clinical neuropsychologist who originally reviewed his case, stated in a 2013 affidavit that Moore “met the criteria for a[n] intellectual-disability diagnosis.”¹²⁷

The CCA in *Ex parte Moore* began its analysis first by evaluating Moore’s “significantly sub-average” intellectual functioning, as laid about by *Atkins*, but added that this is “generally shown by an IQ of 70 or less.”¹²⁸ As mentioned previously, IQ scores can vary significantly over the years, but they can also vary given the type of test administered. These cases can become particularly confusing for both judges and the public alike, given that there are so many different clinical and technical ways to determine IQ. Moore had taken several IQ tests, varying in form, and the scores before the

family and home environment is like from which they cannot usually extricate themselves).

119. *Moore*, 470 S.W.3d at 509–10.

120. *Id.* at 495.

121. *Id.* at 496.

122. *Id.*

123. *Id.* at 515.

124. *Id.* at 506.

125. *Id.*

126. *Id.* at 507.

127. *Id.* at 511.

128. *Id.* at 486, 513.

court in its deliberation were: seventy-seven on the OLMAT at age twelve, fifty-seven on the Slosson at age thirteen, seventy-eight on the WISC at age thirteen, seventy-one on an abbreviated WAIS-R at age thirty, seventy-four on a complete WAIS-R at age thirty, eighty-five on the RCPM at age fifty-four, and fifty-nine on the WAIS-IV at age fifty-four.¹²⁹ Dr. Borda identified the score of fifty-seven as the "first and most accurate assessment" and discounted the score of seventy-eight on the WISC because it "should be adjusted to 70 for the Flynn Effect."¹³⁰ The Flynn Effect is a phenomenon in which IQ of the general population is estimated to increase at a rate of three points per year, so IQ tests must be renormed.¹³¹ Dr. Borda provided opinions as to each score and why it was not reliable and asserted that Moore was "'very limited' to begin with," so being in harsh environmental conditions likely adversely affected Moore's learning ability and IQ scores.¹³²

The CCA next found that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning," he still could not win an *Atkins* claim because he did not prove the second prong, limitations on adaptive functioning by a preponderance of the evidence.¹³³ The state pointed to Moore's job mowing grass and "hustling pool" as evidence of money skills, knowledge, and "self-direction" to obtain a job, however expert Greenspan did not find any of those as "adaptive" behavior.¹³⁴ Moore's school records reflect poor grades, below-grade-level scores on academic achievement tests, and as early as kindergarten, he was considered potentially intellectually disabled.¹³⁵ The court found a "far more credible" forensic psychologist, Compton, who testified that Moore did exhibit some deficits in academic and social-interaction skills during his developmental period, but was at too high a level of adaptive functioning to support an intellectual disability diagnosis.¹³⁶ Compton further pointed to the

129. *Id.* at 514.

130. *Id.*

131. *See Dupler, supra* note 49, § 18.

132. *Moore*, 470 S.W.3d at 515.

133. *Id.* at 520.

134. *Id.* at 520–21 (Greenspan also denied the following as evidence of adaptive skills: "(1) in preparation for his new punishment trial, consulting with counsel about whether to inform the jury that he had been on death row; (2) concealing a shotgun in a shopping bag when entering a store to rob it; (3) attempting to conceal his appearance during the offense by wearing a wig and sunglasses, and after the offense, changing his appearance by shaving his head; (4) arguing with accomplices over how to divide the proceeds of the crime; (5) deciding to stipulate that he had prior criminal convictions ... (6) writing four letters to his appellate lawyer ... [(7)] hustling pool; and [(8)] working as a barber and a porter in prison.").

135. *See id.* at 526.

136. *Id.* at 524, 526.

advances Moore made while on death row as evidence that his early life problems were not caused by a disability, but derived from his difficult childhood.¹³⁷ Considering the *Briseno* factors, the court ultimately found that there was not enough evidence of adaptive behavior deficits due to Moore's ability to lie, and his "forethought, planning, and moderately complex execution of purpose."¹³⁸

The American Civil Liberties Union ("ACLU") argued in its amicus brief in support of the petitioner in *Moore* that given current clinical standards, the *Briseno* factors cannot stand. In its brief, the ACLU argued that the *Briseno* factors are based on a stereotyped view of intellectual disability derived from the character of Lennie in John Steinbeck's *Of Mice and Men*, and that in practice, it subjects defendants with mild intellectual disability to the death penalty, thus violating the Constitution's ban on cruel and unusual punishment.¹³⁹

The Texas court's "flawed interpretation" of *Atkins* allows the execution of those who fall in the mild intellectual disability range with significant deficits in adaptive behavior, but whose IQ scores are above the threshold of seventy for exemption.¹⁴⁰ The *Briseno* court mistakenly turned to the character Lennie, largely representative of a stereotype, for guidance in creating its factors and thus relied closely on a fictional character rather than clinical findings.¹⁴¹ The ACLU points out how dangerous *Briseno*'s holding is because it allows the state to execute individuals with mild intellectual disability, even under *Atkins*, and the "overwhelming majority" of intellectually disabled persons "fall in the mild range."¹⁴² Even more shocking is that the individuals who fall in the more severe disability range, "rarely, if ever, have the capacity to commit capital crimes."¹⁴³ In *Atkins*, the defendant-petitioner on death row was "mildly mentally retarded."¹⁴⁴ For these reasons, the brief persuasively calls into question both *Briseno*'s reasoning and conclusion. Although *Atkins* left to the states how to implement the decision, that does not allow the states to make their own determination as to what the Eighth Amendment encompasses and certainly does not allow for concluding a person is not disabled enough on the basis

137. *Id.* at 526.

138. *Id.* at 527.

139. *See* ACLU, *supra* note 84, at 3–6.

140. *See id.* at 2.

141. *See id.* at 19–24 (discussing each factor and how they were modeled after the character Lennie to exemplify a stereotype based off someone with severe disability).

142. *Id.* at 9.

143. *Id.*

144. *Atkins v. Virginia*, 536 U.S. 304, 308 (2002).

of stereotypical ideas. *Hall* made clear that the inquiry should be informed by the medical community's framework and clinical standards. The medical community and clinical authorities agree that "an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist."¹⁴⁵

In oral argument on November 29, 2016, counsel for Petitioner Moore argued that *Hall* prohibits lower courts from ignoring current medical standards, like the court in *Briseno* did.¹⁴⁶ Texas, on the other hand, argued the Court's long-standing view is that there is subjectivity in the medical diagnosis, and the habeas judge erred by employing the current standard rather than following the *Briseno* factors.¹⁴⁷

Petitioner Moore's counsel further argued that even if the *Briseno* factors are an acceptable framework, the CCA erroneously applied them in two ways. First, the court did not factor in the standard error of measurement in IQ tests. When it accepted Moore's score of seventy-four as valid, the CCA treated it as a decisive number rather than applying the standard error of five points, which would bring his score down to sixty-nine and within the range for an intellectual disability.¹⁴⁸

Second, Moore's counsel argued that the CCA erroneously applied the adaptive-function prong. They pointed out that it is undisputed in the record that Moore exhibited signs of his disability that would support this prong; at age thirteen he could not understand the days of the week, months, seasons, how to tell time, and even lacked basic math skills such as subtraction, addition, and units of measurement.¹⁴⁹ Texas emphasized how the CCA believed Moore's "strengths" outweighed his deficits, highlighting his ability to mow grass and play pool for money.¹⁵⁰ Again, Texas' conclusion is contradicted by clinical standards which state that "adaptive skill limitations often coexist with strengths."¹⁵¹ This argument speaks to the misunderstanding and stereotype that individuals who are not of the "severely mentally retarded" category are not intellectually disabled. Texas grasped for evidence that Moore could function normally in everyday life,

145. *Hall v. Florida*, 134 S. Ct. 1986, 1994–95 (2014).

146. Transcript of Oral Argument at 9–11, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15–797) [hereinafter Transcript] (explaining that the *Briseno* court viewed the medical standards that were current at the time of its decision as "exceedingly subjective," and instead came up with nonclinical factors based on "lay stereotypes").

147. *Id.* at 11–12.

148. *Id.* at 16–17.

149. *Id.* at 20.

150. *Ex parte Moore*, 470 S.W. 3d 481, 520 (Tex. Crim. App. 2015).

151. AAIDD, *supra* note 48, at 45.

when in reality many individuals who fall in the “mildly mentally retarded” category hold jobs and appear to function normally in certain aspects of their lives.

Texas also defended the CCA’s decision by questioning how Moore became disabled. It pointed to poor nutrition, poverty, his history of poor academic performance, and depression while on death row to ultimately argue that these are not attributable to intellectual functioning, but rather are evidence of lack of a good home environment.¹⁵² This argument is directly contradicted by current medical standards which state that intellectual disability can be derived from multiple causations. For instance, the AAMR advocates that etiology has a role in the diagnosis. The etiology approach is a multifactorial construct consisting of four categories: biomedical, social, behavioral, and educational.¹⁵³ The AAMR cites as “risk factors” for a disability, the exact reasons Texas argued are not evidence of an intellectual disability; these include malnutrition, family poverty, child abuse and neglect, and institutionalization among others.¹⁵⁴

In oral argument, counsel for Texas argued that because the DSM-5 states there is an “imperfect fit” between the two concepts of subaverage intellectual functioning and adaptive behavior, states do not have to “adopt the positions of current medical organizations.”¹⁵⁵ This argument supports adhering to the *Briseno* factors instead to help clarify the prongs set out by the DSM-5. However, the danger of adhering to the *Briseno* factors is that they are based on a “consensus of Texas citizens,”¹⁵⁶ and thus based on the layperson’s stereotyped view of intellectual disability. Arguing that the *Briseno* factors trump clinical consensus violates *Atkins*. The entire basis for the *Atkins* decision was a shifting national consensus, based on clinical findings and the medical community because “[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions.”¹⁵⁷ If the three prongs are based entirely on clinical definitions, how then can a court conclude that they are free to ignore clinical consensus on how to apply those prongs? The Supreme Court’s decision in *Atkins* suggests an intent to follow the evolving standards of the medical community, and nowhere does the Court condone following the lay persons’ view, which has no basis in comparison to a professional clinical judgment.

152. Transcript, *supra* note 146, at 17.

153. AAIDD, *supra* note 48, at 61.

154. *Id.* at 60.

155. Transcript, *supra* note 146, at 30–31.

156. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

157. *Hall v. Florida*, 134 S. Ct. 1986,1999 (2014) (citation omitted).

Bobby James Moore ultimately prevailed, with Justice Ginsburg writing the 5-3 decision vacating the CCA's judgment on March 28, 2017.¹⁵⁸ The majority opinion emphasized that although the states are tasked with deciding how to enforce *Atkins*, their discretion is not "unfettered" and the decision must be "informed by the medical community's diagnostic framework."¹⁵⁹ First, in considering IQ score, the Court held CCA's conclusion—that Moore's IQ scores establish he is not intellectually disabled—is "irreconcilable with *Hall*," which mandates that when an IQ score is close to and above seventy, "courts must account for the test's standard error of measurement."¹⁶⁰ The standard error of measurement ("SEM") is particularly important because it "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."¹⁶¹ Accounting for the SEM, Moore's score of seventy-four actually yields a range of sixty-nine to seventy-nine, because it can be plus or minus five points either way.¹⁶² Justice Ginsburg's opinion emphasizes the importance that "the Eighth Amendment [does not turn] on the slightest numerical difference in IQ score"¹⁶³ and reinforces the importance of considering adaptive behavior deficits, not strengths, when the IQ is around this range. The CCA erred by "overemphasiz[ing] Moore's perceived adaptive strengths" such his lawn mowing and time living on the streets.¹⁶⁴ The medical consensus is to focus on deficits, not strengths.¹⁶⁵

Chief Justice Roberts, writing for the dissent, agrees with the majority that the *Briseno* factors are an "unacceptable method," but dissents because he believes "clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."¹⁶⁶ In the dissent's view, it is the evolving standards of decency that matters for Eighth Amendment, not a medical assessment.

Despite Chief Justice Roberts best efforts, *Moore* held that courts must follow the medical community consensus in determining intellectual disability—SEMs must be considered, and adaptive strengths cannot be overemphasized. However, Part III will argue that without the retroactive

158. See generally *Moore v. Texas*, 137 S. Ct. 1039 (2017).

159. *Id.* at 1047 (citation omitted).

160. *Id.* at 1049.

161. *Id.* (citation omitted). See also AAIDD, *supra* note 48, at 22-23; DSM-5, *supra* note 11, at 37.

162. *Moore*, 137 S. Ct. at 1060.

163. *Id.* at 1061.

164. *Id.* at 1050.

165. AAIDD, *supra* note 48, at 47 ("[S]ignificant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.").

166. *Moore*, 137 S. Ct. at 1054 (Roberts, J., dissenting).

effect of *Moore* or *Hall* and without a ban on IQ cutoffs, this decision may not fully protect future intellectually-disabled defendants or reach those currently sitting on death row.

III. ARGUMENT

Bobby James Moore received his justice in *Moore v. Texas*, but where does that leave the remaining intellectually-disabled persons sitting on death row? Will future intellectually-disabled criminal defendants be given the same treatment without a bright-line rule from the Court on IQ cutoffs? Although *Moore* represents a triumphant moment in the judicial system's effort to understand mental deficiencies, these two major questions remain given the majority in *Moore* again left the states some discretion in determining when a defendant is intellectually disabled enough to qualify for the *Atkins* exemption. This Note will explore (1) whether *Moore* and *Hall* can be given retroactive effect, (2) whether a ban on harsh IQ cutoffs is possible to protect current and future intellectually disabled claimants, and (3) how evidence of mental illness must be more seriously considered along with intellectual disability for death penalty exemption.

A. RETROACTIVITY

States have always resisted complying with Supreme Court ruling they dislike, often finding ways to limit the decisions' impact. One way lower courts can side-step a Supreme Court decision is to argue that the decision does not apply retroactively. Post-*Moore*, lower courts have begun pointing to retroactivity as a reason to continue to deny *Atkins* claims. For example, only a few months after *Moore* was decided, a federal court in Alabama held *Moore* is not retroactive, but rather is a mere, new application of *Hall*.¹⁶⁷ There, petitioner Smith argued that the Alabama court unreasonably applied federal law by failing to apply the SEM adjustment to his IQ score.¹⁶⁸ The Alabama court reasoned that because *Moore* had not been decided when the Alabama Court of Criminal Appeals entered its decision, there was no error in failing to consider the SEM when examining Smith's IQ scores.¹⁶⁹ Without applying the SEM, if an IQ score does not go below seventy, the Alabama court can consider a claimant's adaptive strengths more convincing than the deficits. Alabama viewed *Moore* as simply cautioning against over-emphasis of adaptive strengths, and with neither *Moore* or *Hall* being

167. See *Smith v. Dunn*, No. 2:13-CV-00557-RDP, 2017 U.S. Dist. LEXIS 113862, at *10-13 (N.D. Ala. July 21, 2017). An appeal has been filed to the Eleventh Circuit.

168. *Id.* at *3.

169. *Id.* at *10-13.

retroactive,¹⁷⁰ the court dismissed petitioner’s claim despite evidence that his IQ scores ranged from as low as sixty-four to seventy-five.¹⁷¹ Petitioner Smith filed an appeal in the U.S. Court of Appeals for the Eleventh Circuit on November 9, 2017 and is currently awaiting review. The Supreme Court in *Moore* and its line of precedents aim to uphold and protect the Eighth Amendment right against cruel and unusual punishment. Yet despite holding in *Moore* that the SEM and adaptive deficits must be considered, individuals are being denied that right because they happen to appear before a court that does not agree with the Supreme Court. The Eighth Amendment applies to all, and when states to continue to uphold harsh IQ cutoffs of seventy, it goes against the premise that the Court is the “supreme law of the land.” One solution, if possible, is for the Supreme Court to give retroactive effect to *Hall* and *Moore*.

The framework for retroactivity in cases on federal collateral review was established in 1989 in *Teague v. Lane*.¹⁷² As a general matter, “a new constitutional rule of criminal procedure does not apply . . . to convictions that were final when the new rule was announced.”¹⁷³ *Teague* recognizes two categories of rules that are not subject to this bar: new substantive rules of constitutional law and new “watershed rules of criminal procedure.”¹⁷⁴ Substantive rules include those “forbidding criminal punishment of certain primary conduct” and those “prohibiting a certain category of punishment for a class of defendants because of their status or offense.”¹⁷⁵ This Note seeks to determine whether *Moore* and *Hall* are new substantive rules qualifying as an exception to *Teague*.

The Supreme Court has done this before. In 2011, the Court held in *Miller v. Alabama* that mandatory life without the possibility of parole for juvenile homicide offenders violates the Eighth Amendment, and such a sentence is disproportionate for all but the “rare juvenile offender whose crime reflects irreparable corruption.”¹⁷⁶ In the wake of *Miller*, it was unclear whether its holding could be applied retroactively to juvenile offenders whose convictions were final when *Miller* was decided. In 2016, the Court came back to the issue in *Montgomery v. Louisiana* to clarify that *Miller* is retroactive because the Constitution requires state collateral review courts to give retroactive effect when a new substantive rule of constitutional law

170. *Id.* at *13–16.

171. *Smith v. State*, 112 So. 3d 1108, 1128–29 (Ala. Crim. App. 2012).

172. *See Teague v. Lane*, 489 U.S. 288, 300 (1989).

173. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (discussing *Teague*, 489 U.S. at 307).

174. *Id. See also Teague*, 489 U.S. at 311.

175. *Montgomery*, 136 S. Ct. at 728 (citation omitted).

176. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

controls the outcome of a case.¹⁷⁷ Because *Miller* concluded a “sentence of life without parole is disproportionate for the vast majority of juvenile offenders,” not giving it retroactivity raised a “grave risk that many are being held in violation of the Constitution.”¹⁷⁸ In comparison, the vast majority of intellectual disabled persons fall on the “mild” range (IQ 50–55 to 70–75). Applying the SEM to the 70–75 range could protect individuals whose range goes as high as eighty in one direction, and as low as sixty-five in the other. Like the juveniles *Montgomery* sought to protect, mildly intellectually disabled persons with IQ scores of 70–75 are being denied rights under *Atkins*, *Hall*, and *Moore* in states that cut off protection at seventy, leaving them at a “grave risk” of being detained in violation of the Constitution. *Montgomery* clarified that when a State enforces a penalty barred by the Constitution, the sentence is unlawful.¹⁷⁹ Here, if states like Alabama are continuing to enforce statutes with IQ cutoffs set at seventy, they are enforcing penalties barred by the Constitution given the Court’s holding in *Hall* that it violates the Eighth Amendment not to consider adaptive behavior when defendants are in the range “close to, but above, 70.”¹⁸⁰ Like how *Miller*’s rule controls the outcome of juvenile life without parole cases, *Hall* and *Moore* now control the outcome of *Atkins* claims with new guidance on how to determine intellectual disability.

The Kentucky Supreme Court agrees and in 2016 held that *Hall* should be applied retroactively because “[i]t is ‘a substantive restriction on the State’s power to take the life’ of individuals suffering from intellectual disabilities.”¹⁸¹ The Kentucky Supreme Court reasoned that *Hall* is a “directive that not only proscribes intellectually disabled people from being put to death, but defines the manner in which the mental deficiencies of offenders must be evaluated.”¹⁸² Kentucky’s emphasis that following *Hall*, there is a new method to evaluate intellectually disabled defendants fits within *Montgomery*’s holding that a new substantive rule exists when it controls the outcome of a case. *Hall* rejected the bright-line cutoff of seventy because it “create[d] an unacceptable risk that persons with intellectual disability will be executed” and was an unconstitutional violation of the Eight Amendment.¹⁸³ *Hall*’s requirement to consider the SEM and its rejection of an IQ cutoff would change the outcome of many

177. *Montgomery*, 136 S. Ct. at 729.

178. *Id.* at 736.

179. See *infra* Section III.B for a full discussion on state statutes similar to Alabama’s.

180. *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017).

181. *White v. Commonwealth*, 500 S.W.3d. 208, 215 (Ky. 2016).

182. *Id.*

183. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

cases where a defendant with IQ scores between seventy and seventy-five brings an *Atkins* claim in a state like Alabama that employs a harsh cutoff of seventy.

If a petitioner with scores ranging from sixty-four to seventy-five brings a claim in Florida, under *Hall* courts would be required to consider adaptive deficits. If a petitioner with the same scores brings this claim in Alabama, under its current law the claim likely would be denied in part because *Hall* and *Moore* are not retroactive. Inconsistency as such among the states results in similarly situated persons receiving vastly different treatment. The decision between life and death for an individual with an intellectual disability should not hinge on whether they are in a state that follows the clinical approach of following the SEM or not.

The argument against retroactivity should not be overlooked. There is a persuasive point that *Hall* and *Moore* cannot be applied retroactively because they announce procedural rules rather than substantive rules. In *Montgomery*, Louisiana noted that *Miller* did not categorically bar a penalty for a class of offenders or type of crime, but only mandated a process to follow by creating a set of factors courts must consider when sentencing juveniles to life without parole. Although it was a losing argument for Louisiana, here lower courts might argue that *Atkins* barred a penalty for the class of intellectually disabled persons constituting a substantive rule, but *Hall* and *Moore* do not bar a penalty for a class, but provide guidance to courts on how to make the intellectual disability finding, and thus mandate a process as a procedural rule. It could be argued that *Hall* and *Moore* did not place any punishment beyond the State’s power to impose—and this power rests solely with the states. This argument brings the question of whether defendants who are “close to, but above 70” can be considered a “class of defendants.” Nowhere in *Hall* did the Court say how far above seventy this class could include. The Court applied the SEM to Bobby James Moore’s IQ of seventy-four, so is that where it stops? Applying the SEM, the majority explained it can go five points in either direction, rendering Moore with a range of 69–79. If this means someone with a score of seventy-nine could still be considered intellectually disabled, perhaps the solution is to consider defendants who fall between seventy and seventy-nine a class of persons in need of protection from an unconstitutional death sentence.

The argument against retroactivity also stresses that retroactivity may lead to an increase in frivolous intellectual disability claims. *Atkins* recognized that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders,” so the question about which group of intellectually disabled individuals there exists

a national consensus prohibiting execution is a valid concern.¹⁸⁴ The worry is that courts will receive an influx of frivolous or dishonest habeas petitions alleging intellectual disability. Frivolous litigation, however, is not likely a threat. A recent study found that from the time of *Atkins* in 2002, through the end of 2013, only 371 death row inmates or capital defendants claimed intellectual disability.¹⁸⁵ This study calculated the filing rate of these 371 persons to be “only approximately 7.7% of persons whose lives could potentially be spared by a determination of intellectual disability”—a fairly consistent number over the ten years since *Atkins*.¹⁸⁶ The empirical evidence from this study “also refutes any concern that significant numbers of frivolous claims would be filed.”¹⁸⁷ Given that *Atkins* did not generate much frivolous litigation, it follows that if retroactive, *Hall* and *Moore* would continue the trend of allowing justice for the true claims of those intellectually disabled still on death row, without generating many frivolous claims.

Moore may not need to be applied retroactively if is viewed as simply dealing with the narrow circumstance of Texas’s reliance on nonclinical factors. Yet how many cases in the above study were denied because courts relied too heavily on adaptive strengths rather than deficits like *Moore* now demands? There is arguably a subset of cases, which were denied pre-*Moore* and could now be granted post-*Moore*, that will not see justice because courts are not treating *Moore* as retroactive. Through 2013, the study found that 31% of all unsuccessful cases were denied for failure on prong one, significantly subaverage intellectual functioning, and 12% were unsuccessful for lack of adaptive deficits.¹⁸⁸ Of those who lost on prong one, 71% had an average IQ score over seventy-five, while the successful cases had an average score of sixty-eight.¹⁸⁹ However, of the successful cases finding intellectual disability, “46% of the [claimants] had at least one IQ score over seventy-five, and 20% [had] one or more IQ scores over 80.”¹⁹⁰ It is important to note that these cases were decided before *Moore* held that the SEM must be applied to the overall scores. Of the 71% with an average over 75, it is possible there are cases with scores between seventy-six and

184. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

185. John H. Blume, et al., *A Tale of Two (And Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court’s Creation of a Categorical Bar*, 23 WM. & MARY BILL OF RTS. J. 393, 396 (2014).

186. *Id.* at 396–97.

187. *Id.* at 397.

188. *Id.* at 400–01.

189. *Id.* at 402.

190. *Id.* at 404.

seventy-nine, a range that when the SEM is applied, falls within the same range that *Hall* and *Moore* protect.

Many intellectually disabled defendants, like in *Moore*, have a range of IQ scores over time, but demonstrate adaptive deficits that must be considered and not ignored merely because some of the scores are above seventy. Bobby James Moore had an average IQ of seventy-four, but the Court refrained from setting a bright-line rule for IQ scores. On one hand, it could be argued that courts have been generally doing it right, and there is no need for *Moore* to apply retroactively because the majority of denied cases were above seventy-four. On the other hand, there is still the 29% who had IQ scores below seventy-five, and it is possible that several of those cases were close calls involving evidence of adaptive deficits not properly considered. If states like Alabama continue to render decisions that fly in the face of *Hall* and *Moore*, the goals the two cases aimed to accomplish will be continuously undermined.

Finding intellectual disability is not a black-and-white issue. With *Moore* requiring application of the SEM and *Hall* rejecting a harsh IQ cutoff of seventy, it is evident that *Atkins* claims require case-by-case analysis and that this is not too much to ask considering the relatively low number of claims being brought. The response to this complex analysis is to not continue allowing states to implement harsh IQ cutoffs of seventy. The variety of IQ scores, adaptive deficits, childhood trauma, and mental illnesses from which defendants suffer cannot be boxed into one number. For these reasons, IQ cutoffs, like in *Hall*, should be banned nationwide by giving *Hall* and *Moore* retroactive effect.

B. CURRENT STATES WITH IQ CUTOFFS

Texas provided one example of how states made it more challenging for claimants to prevail on an *Atkins* claim with its nonclinical *Briseno* factors, but state statutes with IQ cutoffs persist post-*Moore*. Side-stepping *Moore* by treating it as not retroactive, states with IQ cutoffs are free to ignore the SEM, adaptive deficits, and claims of those who do not have overall IQ scores below seventy. Although *Moore* applied the SEM to Moore's score of seventy-four, yielding a sufficient range of sixty-nine to seventy-nine, the Court refrained from making a categorical holding as to constitutionality of IQ cutoffs. The Court left it open to the states to decide what a sufficient IQ score is. The opinion makes clear that the SEM should be considered plus and minus five points in both directions, but does not explain whether it should be applied to all IQ scores in a claimant's life. This leaves the question on where to draw the line with IQ scores. Although *Hall*

held that the cutoff of seventy was unacceptable in Florida, the Court did not make the decision retroactive, as discussed in Section III.A. As a result, states still enforce statutes with unconstitutional IQ cutoffs—even after *Moore*.

Several states have already taken the general position that “[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue.”¹⁹¹ Currently, eleven states have statutes with IQ cutoffs in their definition of intellectual disability: Arizona, Arkansas, Kentucky, New Mexico, Nebraska, North Carolina, South Dakota, Tennessee, Washington, Idaho, and Oklahoma.¹⁹² Of those eleven, all set the significantly subaverage functioning level at an IQ of seventy and below aside from Arkansas, which states that there is a “rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.”¹⁹³ The Ohio Supreme Court held “that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.”¹⁹⁴

Although state statutes and procedures post-*Atkins* differ, if a significant number of states come to a consensus that an IQ cutoff is not sufficient by itself, it could prove to be as influential as the “national consensus” was in *Atkins*’s overturning *Penry*. Of the eleven states with IQ cutoffs, several courts have started departing from their bright-line rules. Arizona’s statute was directly called into question by *Hall*, which explained that although it has the bright-line set at seventy, another provision of the statute “instructs courts to ‘take into account the margin of error for a test administered.’”¹⁹⁵ *Hall* cited what it called the “principal Arizona case on the matter” where a defendant had an IQ score of eighty, and “all but one of the sub-parts of the IQ test were ‘above 75.’”¹⁹⁶

191. *State v. Lott*, 779 N.E.2d 1011, 1014 (2002) (citing *Murphy v. State*, 54 P.3d 556, 568, 573–74 (Okla. Crim. App. 2002)).

192. See ARIZ. REV. STAT. ANN. § 13-735(F) (2017) (validity called into question by *Hall v. Florida*, 134 S. Ct. 1986, 1996–97 (2014)); ARK. CODE ANN. § 5-4-618(a)(2) (2017); IDAHO CODE § 19-2515A(1)(b) (2017); KY. REV. STAT. ANN. § 532.130(2) (West 2017) (limited by *White v. Commonwealth*, 500 S.W.3d 208, 214 (2016) (holding in light of *Hall*, “trial courts in Kentucky must consider an IQ test’s margin of error” as well as “additional evidence of intellectual disability”)); NEB. REV. STAT. § 28-105.01(3) (2017); N.M. STAT. ANN. § 31-9-1.6(E) (2018); N.C. GEN. STAT. § 15A-2005(a)(1)(c) (2017); OKLA. STAT. tit. 21, § 701.10b(A)(3) (2017); S.D. CODIFIED LAWS § 23A-27A-26.2 (2017); TENN. CODE ANN. § 39-13-203(a)(1) (2017); WASH. REV. CODE § 10.95.030 (2017) (held unconstitutional on other grounds by *State v. Bassett*, 198 Wash. App. 714 (2017)).

193. ARK. CODE ANN. § 5-4-618 (2017).

194. *Lott*, 779 N.E.2d at 1014.

195. *Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014) (citation omitted).

196. *Id.* at 1996–97 (citation omitted).

In a case remanded from the Eighth Circuit, a United States District Court in Arkansas on March 2, 2018, performed a thorough analysis to determine the intellectual disability of a defendant claiming an *Atkins* exemption because a diagnosis “cannot be justified solely on the basis of a fixed score.”¹⁹⁷ The court applied both the Flynn Effect and the SEM and considered all evidence of petitioner’s childhood, education, employment, financial abilities, and personal relationships.¹⁹⁸ Although the court ultimately did not find a “*significant* subaverage general intelligence” and upheld the 1993 Arkansas statute,¹⁹⁹ its analysis demonstrates a promising acceptance of *Moore*. Alternatively, the Supreme Court of Tennessee, before *Moore* was decided, held in 2011 that determining a defendant’s functional intelligence is “not limited to raw scores.”²⁰⁰ The court required expert testimony to assist the determination and a “full and fair consideration” to all evidence, including the results of *all* IQ tests administered to a defendant.²⁰¹ To help inform its decision, the Tennessee Supreme Court reviewed all cases involving the relevant statute and found that neither litigants nor Tennessee courts in general have been limiting their consideration to raw IQ test scores, and there are even cases in which the State has argued and presented evidence challenging the accuracy of scores.²⁰²

An IQ score must not be the only factor considered and cannot be the only deciding factor for whether an individual qualifies for exemption under *Atkins*. “Because intelligence tests are indirect rather than direct measures of intelligence, experts in the field recognize that they, like other measures of human functioning, are not ‘actuarial determination[s],’ that these tests cannot measure intelligence with absolute precision and that these tests contain a potential for error.”²⁰³ Indeed, as experts have recognized, it is dangerous to rely solely on IQ tests for proof of intellectual disability. Commonly used tests “in the public domain . . . are administered in a group setting with poor or non-existent test control,” and the test itself can be “sketchy” or “based on obsolete norms.”²⁰⁴ The DSM-5 stresses that “clinical judgment is [required] in interpreting the results.”²⁰⁵ Since 1959,

197. Sasser v. Kelley, No. 4:00-CV-04036, 2018 WL 1147102, *10–12 (W.D. Ark. Mar. 2, 2018).

198. *Id.*

199. *Id.* at *12.

200. Coleman v. State, 341 S.W.3d 221, 221, 224 (Tenn. 2011).

201. *Id.* at 241–42 (citation omitted).

202. *Id.* at 247–48.

203. *Id.* at 245 (citation omitted).

204. Dupler, *supra* note 49, § 15.

205. DSM-5, *supra* note 11, at 37.

clinicians have considered a person's adaptive behavior in addition to IQ scores due to a decreasing confidence in the scores as the sole measure.²⁰⁶ This suggests that in death penalty cases involving *Atkins* claims, courts should evaluate adaptive behavior on a case-by-case basis, rather than implement a categorical ban like the one states are trying to impose on defendants with IQs above seventy.

In the year since *Moore* was decided, the Supreme Court has remanded several cases for additional consideration in light of *Moore*.²⁰⁷ If this is to be a continuing trend, for pure judicial economy reasons it would make sense to have *Hall* and *Moore* apply retroactively. In October 2017, the United States Supreme Court ordered the Florida Supreme Court to reconsider, in light of *Moore*, a decision denying death-row inmate Tavares Wright's intellectual disability claim.²⁰⁸ All of Wright's nine IQ tests yielded scores of seventy-five or above²⁰⁹ and the Supreme Court of Florida listed several adaptive strengths such as Wright's job as a grocery clerk, job in prison, ability to write cards, cleanliness, and understanding of social interactions²¹⁰—yet the Supreme Court found this was insufficient under *Moore*. This was the “sixth time the Court has vacated a state or federal court's rejection of an intellectual-disability claim” and remanded for reconsideration under *Moore*.²¹¹

The Supreme Court also vacated a decision of the Alabama Court of Criminal Appeals (“CCA”) in May 2017 for Taurus Carroll because Alabama had overemphasized Carroll's “adaptive strengths—that he had passed a GED exam . . . and . . . held . . . a job in the prison kitchen.”²¹² On remand, the court reconsidered evidence that Carroll was in special education as a child, twice failed first and eighth grade, had an absent father, and experienced physical and sexual abuse as young as age seven.²¹³

206. AAIDD, *supra* note 48, at 43–44.

207. See generally Long v. Davis, 663 Fed. Appx. 361 (5th Cir. 2016), *judgement vacated*, 138 S. Ct. 72 (2017); Weathers v. Davis, 659 Fed. Appx. 778 (5th Cir. 2016), *judgement vacated*, 138 S. Ct. 315 (2017); Martinez v. Davis, 653 Fed. Appx. 308 (5th Cir. 2016), *judgement vacated*, 137 S. Ct. 1432 (2017); Henderson v. Stephens, 791 F.3d 567 (5th Cir. 2015), *judgement vacated*, 137 S. Ct. 1450 (2017).

208. *Supreme Court Directs Florida to Reconsider Intellectual Disability Decision in Death Penalty Case*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6902> (last visited May 14, 2018) [hereinafter *Florida*, DEATH PENALTY INFO.]. See also Wright v. State, 213 So. 3d 881 (Fla. 2017), *cert. granted, vacated*, 138 S. Ct. 360 (2017).

209. *Wright*, 213 So. 3d at 897.

210. *Id.* at 899–901.

211. *Florida*, DEATH PENALTY INFO. CTR., *supra* note 208.

212. *Supreme Court Tells Alabama to Reconsider the Factors It Has Used to Determine Intellectual Disability*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6756> (last visited May 24, 2018).

213. *Carroll v. State*, No. CR-12-0599, 2017 WL 6398236, at *4–5 (Ala. Crim. App. Dec. 15, 2017).

However, the Alabama CCA again denied Carroll's claim of intellectual disability, citing evidence that he had a good memory, knew dates and times of day, and had adequate school records, despite an IQ score of seventy-one that would adjust to sixty-six to seventy-six with the SEM.²¹⁴ Despite succeeding on prong one, Carroll lost his claim on prong two's adaptive functioning requirement. The Alabama CCA pointed to the fact that in high school, Carroll was given the Wechsler Intelligence Scale for Children twice and received scores of eighty-five and eighty-seven.²¹⁵

A recent report from 2017 revealed that almost all twenty-six men scheduled for execution in Ohio over the next three years suffer from mental, emotional, or cognitive impairments or limitations; "at least 11 have evidence of intellectual disability, borderline intellectual disability, or a cognitive impairment, including brain injury."²¹⁶ Stanley Fitzpatrick, sentenced to death for murder committed at nineteen, not only suffered from hallucinations that the devil appeared to him and he "saw demons," but he also had a "devastatingly low [IQ of] 69."²¹⁷ Fitzpatrick's death sentence was affirmed by the Ohio State Supreme Court in 2004, but his defense lawyers never introduced his low IQ during the penalty phase, and neither did they pursue evaluations to argue that he qualified as intellectually disabled.²¹⁸ James Frazier failed first grade, was a "slow learner," attended "special classes," dropped out of high school, and has an IQ of seventy-two.²¹⁹ Frazier was brought up in a household with a weekly wage of \$64, with no supervision, and he was sexually abused as a child. Frazier's *Atkins* claim was denied by the Supreme Court of Ohio in 2007.²²⁰ James Derrick O'Neal had a reported IQ score of sixty-four at age fourteen, with three other scores of sixty-three, sixty-seven, and seventy-one.²²¹ O'Neal's death sentence was affirmed by the Supreme Court of Ohio in 2000, two years before *Atkins* was decided, and he currently sits on death row. David Sneed suffers from both mental illness and impaired intellectual functioning, about which two psychiatrists testified at the penalty phase "combined to prevent

214. *Id.* at *5–6.

215. *Id.* at *6.

216. *New Report: Prisoners on Ohio's Execution List Defined by Intellectual Impairment, Mental Illness, Trauma, and Young Age*, FAIR PUNISHMENT PROJECT (Aug 29, 2017) <http://fairpunishment.org/prisoners-on-ohios-execution-list>.

217. *Id.* Pre-*Atkins*, Fitzpatrick's lawyers did not assert the defense of intellectual disability in the last review of his case. *See also* *State v. Fitzpatrick*, 810 N.E.2d 927, 932 (2004).

218. Fair Punishment Project, *supra* note 216.

219. *Id.*

220. *State v. Frazier*, 873 N.E.2d 1263, 1263 (2007).

221. Fair Punishment Project, *supra* note 216. *See also* *State v. O'Neal*, 721 N.E.2d 73 (Ohio 2000).

him from appreciating the criminality of his actions.”²²² Sneed’s conviction was affirmed by the Supreme Court of Ohio in 1992, and he currently sits on death row. Lastly, Angelo Fears, with an IQ of seventy-five, family history of mental illness, and traumatic childhood of beatings, sits on death row following an affirmation of his sentence by the Ohio Supreme Court in 2008.²²³

These cases represent complex issues—the presence of mental illness, childhood trauma, and drug use, along with evidence of intellectual disability—but all together they show that the process of finding an *Atkins* exemption cannot be merely a numbers game. Based on the cases above, Ohio does not give proper consideration, as required by *Moore*, to other factors when IQ scores are above seventy. It is wholly inconsistent with *Moore* to count evidence of mental illness or trauma against a finding of intellectual disability. In *Moore*, the majority found that the CCA had erred in failing to appreciate his childhood trauma and requiring a showing that Moore’s adaptive deficits were not related to a “personality disorder.”²²⁴ It is now recognized that “many intellectually disabled people also have other mental or physical impairments” such as depression, bipolar disorder, and autism.²²⁵

Neither the AAMR nor the DSM diagnostic criteria intend that a fixed IQ cutoff be used to diagnose intellectual disabilities, given the known measurement of errors. *Hall* and *Moore* make clear that when an individual is “close to, but above, 70, courts must account for the test’s standard error of measurement.”²²⁶ The difficulty lies with how far from seventy scores can deviate or how many can be over seventy when there are multiple IQ scores over the developmental period, but a bright-line rule is not the answer.

C. A SHIFTING NATIONAL CONSENSUS AGAINST THE DEATH PENALTY

The issue of how to determine intellectual disability for the purposes of *Atkins* rests on the fundamental idea that those individuals are less culpable due to their diminished capacity.²²⁷ Culpability is at the center of the analysis

222. Fair Punishment Project, *supra* note 216. *See also* State v. Sneed, 584 N.E.2d 1160 (Ohio 1992).

223. Fair Punishment Project, *supra* note 216. *See also* Fears v. Bagley, No. 1:01-cv-183, 2008 WL 2782888 (S.D. Ohio July 15, 2008), *aff’d*, 462 F. App’x 565 (6th Cir. 2012).

224. Moore v. Texas, 137 S. Ct. 1039, 1051 (2017).

225. *Id.* (citation omitted).

226. *Id.* at 1049.

227. *Atkins v. Virginia*, 536 U.S. 304, 349–50 (2002) (Scalia, J., dissenting) (citation omitted) (“[T]he ‘diminished capacities’ of the mentally retarded raise a ‘serious question’ whether their execution contributes to the ‘social purposes’ of the death penalty, viz., retribution and deterrence.”).

for death penalty purposes, so it is necessary to take a step back and look at the arguments in favor and against the death penalty in general, without narrowing it to the intellectually disabled. The Supreme Court has expressed a trend away from imposing the death penalty, and today "academic defenders of the death penalty are few and far between."²²⁸ Simply put, the death penalty is "almost universally agreed . . . at worst barbaric and at best a waste of money."²²⁹

The few academic defenders of the death penalty take the position that the death penalty, in certain cases, can be "morally required . . . to prevent the taking of innocent lives."²³⁰ This argument assumes the death penalty has a deterrent effect. A study in 2003 found that "each execution prevents some eighteen murders, on average," which supports defenders of the death penalty and the theory of deterrence.²³¹ As discussed in Part II, deterrence is not necessarily at play when criminal defendants are intellectually disabled, and in the last decade, opinions have changed and new studies have come out. In fact, a 2012 report by the National Research Council found that studies claiming the death penalty has a deterrent effect on murder rates have "fundamental flaws" and should not be relied on for policy decisions.²³²

Further, simply because the death penalty fits a theory of punishment does not mean it can be justified all things considered. For instance, torture could potentially "fulfill the purposes of punishment," but as many Americans agree, it "might not be permissible on other moral [or] legal grounds."²³³ While the death penalty may fit a theory of punishment in general terms, here, in the case of intellectually disabled persons, it does not because of their inability to consider the risks and consequences of their

228. Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 596 (2013).

229. *Id.*

230. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705, 711 (2005) (citing a study used from 3,054 U.S. counties between 1977 and 1996, in which it was "found that the murder rate is significantly reduced by both death sentences and executions," and that "each execution results in eighteen fewer murders"). See also Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) (arguing "that capital punishment has a strong deterrent effect").

231. See Sunstein & Vermeule, *supra* note 230, at 706.

232. See COMM. ON DETERRENCE AND THE DEATH PENALTY, NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 4 (Daniel S. Nagin & John V. Pepper eds., 2012). The study provides three reasons for why these studies are fundamentally flawed: (1) they ignore impact of noncapital punishment; (2) the studies use unrealistic assumptions to model potential murderers' responses to the possibility of the death penalty; and (3) the statistical models assume (without reason) that the effect will be the same across states and years. See generally *id.*

233. Flanders, *supra* note 228, at 598.

actions, resulting in their overall diminished culpability. To otherwise justify the death penalty for intellectually disabled defendants is to move outside the theories of punishment, against *Atkins*' position that "[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'"²³⁴ By failing to consider adaptive behavior in determining exemption under *Atkins*, states are failing to uphold *Atkins* by allowing individuals like Stanley Fitzpatrick, James Frazier, and the others on Ohio's death row to be subjected to needless pain and suffering.

Because the death penalty does not contribute to the goals of deterrence or retribution as applied to intellectually disabled, it must go beyond these theories as the Court did in *Atkins* by considering the national consensus. States are trending away from executing criminal defendants and are abolishing capital punishment altogether. The numbers are striking. In 2012, forty-three executions took place, thirty-nine in 2013, thirty-five in 2014, and twenty-eight in 2015.²³⁵ Only twenty individuals were executed in 2016.²³⁶ Further, the number of death sentences per year has also dropped dramatically from 279 in 1999, to only thirty-one in 2016.²³⁷ These statistics encompass all criminal defendants and could include murderers and rapists with IQs well over seventy and the ability to fully understand the consequences of their actions, yet states are trending against sentencing those individuals to death. If states are shifting that way, they certainly should agree that defendants with even lesser culpability should not be executed either.

D. EXPANDING THE EXEMPTION

With a constitutional ban on executing intellectually disabled persons, it follows that there should be a serious conversation regarding the execution of mentally ill defendants to find an avenue for exemption other than the rarely used insanity defense.

Following the Court's decision in *Atkins*, the American Bar Association ("ABA") has taken several steps towards enforcing and expanding its precedential value. The ABA established a Task Force on Mental Disability

234. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (citation omitted).

235. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., (Mar. 17, 2018), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

236. *Id.*

237. *See id.*

and the Death Penalty, which deliberated from 2003 to 2005.²³⁸ The Task Force was comprised of roughly twenty-four lawyers and mental health practitioners, as well as members of the American Psychiatric Association and American Psychological Association. The Task Force successfully put together a proposal which became the ABA's official recommendation on the death penalty exemption post-*Atkins*.²³⁹ The ABA formally takes a position that goes beyond the scope of *Atkins*, calling for exemption from the death penalty of not only individuals with an intellectual disability, but also those with serious mental illnesses.²⁴⁰ The ABA put forth this recommendation in its 2006 122A Recommendation, outlining two scenarios in which defendants should not be executed: those with "significant limitations in both intellectual functioning and adaptive skills," and those with "severe mental disabilities."²⁴¹ The language from the Recommendation is as follows:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury;
2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.²⁴²

The first paragraph is essentially the ABA's definition of "mental retardation" as taken from the American Association of Mental Retardation, and is thus in line with *Atkins* except that it also encompasses dementia and traumatic brain injury. This highlights an important and often overlooked problem in the three-prong criteria set out for defining an intellectual disability: the requirement that the deficiencies manifest prior to eighteen does not consider later dementia or brain injury. For instance, what happens to a defendant who grew up at a normal level of intellectual functioning, but was in a car accident *after* turning eighteen in which they suffered traumatic

238. SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, ET AL., AM. BAR ASS'N, RECOMMENDATION 3 (AM. BAR ASS'N 2006) <http://www.deathpenaltyinfo.org/documents/122AReport.pdf>.

239. *See id.*

240. *Id.* at 3–5.

241. *Id.*

242. *Id.* at 1, 20.

brain injury rendering them unable to function at the same level? This recommendation would serve as an important step towards expanding protection to those rare individuals who suffer from late on-set deficiencies.

The second paragraph, strikingly, is an unprecedented call for exemption of defendants with severe mental disorders or disabilities. The ABA elaborates that this narrowly refers to only those with “severe” disorders, meaning those disorders that mental health professionals would consider to be on “Axis I diagnoses.”²⁴³ Among these “include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders,” all of which are associated with delusions, hallucinations, disorganized thinking, and disruption of consciousness, memory, and perception of the environment.²⁴⁴ Although this is seemingly a shift towards a more inclusive mental health law system, the ABA was sure to impose limitations in its recommendation by requiring a “significant impairment” requirement for individuals with severe mental disorders or disabilities. This “requires that the disorder significantly impair cognitive or volitional functioning *at the time of the offense*.”²⁴⁵

The recommendation is in line with the goals of the criminal justice system. Defendants with established disorders that are considered “severe” enough to fall on the “Axis I diagnoses” certainly lack the ability to make rational decisions in comparison to the average offender without a mental disorder. In fact, the effect that a serious mental disorder has on a person’s culpability is essentially the same as the effect that being a juvenile or having an intellectual disability has on a person’s culpability. If the individual meets the “significant impairment” requirement discussed above, then the individual certainly lacked proper decision-making abilities at the time of their offense. Thus, like the Court reasoned in *Roper* and *Atkins*, punishing a person with lesser or low culpability due to a mental disorder does not properly serve the goals of deterrence since they lack the capacity to understand what they did or lacked the capacity to fully understand the consequences of their actions at the time of their offense.

Expanding the exemption to serious mental disorders is also important because the “scientific and clinical definitions emphasize that individuals with mental retardation often have mental disorders as well.”²⁴⁶ This was an

243. *Id.* at 5, 7.

244. *Id.* at 7.

245. *Id.* (emphasis added).

246. John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 692 (2009).

issue in *Williams v. Quarterman*, where an individual meeting the IQ cutoff of seventy faced a different problem: the Fifth Circuit interpreted evidence of his social and practical skill deficits as "bizarre and antisocial conduct," demonstrating characteristics that are "just as easily seen as attention-getting behaviors as they are evidence of mental retardation."²⁴⁷ The Fifth Circuit found that these characteristics "could be explained by anti-social personality rather than mental retardation."²⁴⁸ This is clearly not in line with the rationale the Supreme Court has been implementing in its series of cases, from *Roper* to *Moore*, because someone exhibiting effects of both an intellectual disability and mental disorder absolutely lacks the mental culpability necessary to impose the death penalty. To discount an intellectual disability due to evidence of mental illness would be a grave practice threatening the constitutional rights and liberty of a class which has long suffered under perpetuated stereotypes of mental disability and illness.

CONCLUSION

The Supreme Court in *Moore* reinforced the long-standing theme that "[t]o enforce the Constitution's protection of human dignity, we look to the evolving standards of decency that mark the progress of maturing society."²⁴⁹ Intellectual disability involves complex factors that cannot be reduced to a single IQ score. An evaluation of state statutes, current litigation, and the Supreme Court's stance since *Atkins* reveals a trend away from bright-line IQ rules of seventy, and towards taking a holistic, case-by-case approach to *Atkins*' claims. The individuals who need protection—whom *Atkins* seeks to protect—are the "mildly retarded" individuals who live successfully in the community, either independently or in supervised settings, and who have jobs, families, maintain a home, and even raise children. A mere number cannot define whether someone is intellectually disabled;²⁵⁰ "[t]he term 'intellectual disability' does not refer to a single disorder or disease, but rather to a heterogeneous set of disabilities that affect the level of a person's functioning in defined domains."²⁵¹ These are people who engage in actions with lesser culpabilities than normal-level-

247. *Id.* (citation omitted).

248. *Id.*

249. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017).

250. DSM-5, *supra* note 11, at 37. ("IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score.")

251. *Coleman v. State*, 341 S.W.3d 221, 230 (Tenn. 2011) (citation omitted).

functioning people, but who are not recognized as needing protection because of lasting stereotypes that intellectually disabled persons are only the severe, Lennie character types.