Boston College Law Review

Volume 63 | Issue 1 Article 7

1-27-2022

Executing Defendants with Intellectual Disabilities: Unconstitutional in Theory, Persistent in Practice

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EXECUTING DEFENDANTS WITH INTELLECTUAL DISABILITIES: UNCONSTITUTIONAL IN THEORY, PERSISTENT IN PRACTICE

Abstract: In 2002, in *Atkins v. Virginia*, the Supreme Court abolished the death penalty for defendants with intellectual disabilities. The Court held that executing individuals with intellectual disabilities is cruel and unusual punishment, violating the Eighth Amendment. The Court afforded the states the power to define intellectual disability for the purpose of death penalty eligibility. Post-*Atkins* cases reveal that the states have composed superficial and oversimplified definitions of intellectual disability. State definitions lack consistency and include nonclinical standards. As a result, courts continue to sentence defendants with intellectual disabilities to death. This Note argues that states should adopt a uniform definition of intellectual disability for the purpose of death penalty eligibility and proposes a model standard in line with clinical standards.

INTRODUCTION

The state of Arizona recently declined to sentence Apolinar Altamirano, an individual with an intellectual disability, to death.[1] Mr. Altamirano has an

[1] Associated Press, *Court Declines to Revive Death Penalty Bid Against Immigrant*, U.S. NEWS (Aug. 25, 2021), https://www.usnews.com/news/best-states/arizona/articles/2021-08-25/court-declines-to-revive-death-penalty-bid-against-immigrant [https://perma.cc/FDB5-STKK]. After a trial court found that Apolinar Altamirano was ineligible for the death penalty because he had an intellectual disability, the Supreme Court of Arizona concluded that the trial judge failed to assess whether the defendant had an intellectual disability in accordance with Arizona's controlling statute. State *ex rel.* Montgomery v. Kemp, 469 P.3d 457, 463 (Ariz. 2020) (concluding that the trial judge failed to assess whether the defendant had an intellectual disability in accordance with Arizona's controlling statute, and remanding the case); Defendant's Supplemental Brief at 19, State *ex rel.* Montgomery v. Kemp, 469 P.3d 457 (Ariz. 2020) (No. CR-19-0274), 2019 WL 9463806 at *19 (arguing that the lower court judge appropriately found that the defendant had proved he had an intellectual disability); Associated Press, *Bid Fails to Revive Death Penalty for Immigrant in 2015 Mesa Store Clerk Killing*, AZCENTRAL (Feb. 9, 2021), https://www.azcentral.com/story/news/local/phoenix/2021/02/09/bid-fails-revive-death-penalty-apolinar-altamirano-2015-mesa-killing/4453444001/ [https://perma.cc/6QZ7-KUYN] (explaining that the Arizona Court of Appeals had deferred to the lower court judge's determination that the evidence had sufficient credibility to justify a finding of intellectual disability). On remand, the lower court again found that Mr. Altamirano was ineligible for the death penalty due to his intellectual disability. *See* Associated Press, *Bid Fails to Revive Death Penalty for Immigrant in 2015 Mesa Store Clerk Killing*, *supra* (concluding that the defendant was unable to meet the standards of independence, pursuant to the relevant Arizona statute). Although the state continued to seek the death penalty against the defendant, the defense argued that the court should not consider the prosecutors' new arguments because the prosecutors did not previously raise them. *See* Jacques Billeaud, *Prosecutors Make Another Death Penalty Bid Against Immigrant*, ASSOCIATED PRESS (Mar. 29, 2021), https://

intelligence quotient (IQ) of seventy, indicating that his reasoning skills are impaired.[2] When Mr. Altamirano attended school, he faced difficulties following instructions and performing well academically.[3] Although Mr. Altamirano was previously employed as a plumber, he lacked the technical skills to pro-

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apnews.com/article/arizona-phoenix-immigration-us-supreme-court-shootings-4cc1a858cf0a2d3b7440db4f1d0bebb3 [https://perma.cc/YB3E-H9LQ] (recounting that the state contended that the intellectual disability inquiry entails comparing the defendant's adaptive skills to that of peers similar in age, education, and geographical background). Following the lower court's second ruling, the Court of Appeals rejected the state's request for the death penalty. Associated Press, *Court Declines to Revive Death Penalty Bid Against Immigrant*, *supra*.

[2] Defendant's Supplemental Brief, *supra* note 1, at 19. An intelligence quotient (IQ) score is "a number . . . determined by one's performance on a standardized intelligence test relative to the average performance of others of the same age." *IQ*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/IQ [https://perma.cc/4D3T-DD4M]. Psychologists administer IQ tests to evaluate an individual's intelligence by "measur[ing] aspects of visual-spatial processing and auditory processing, as well as short-term memory, and processing speed." *See* Scott Barry Kaufman, *What Do IQ Tests Test?: Interview with Psychologist W. Joel Schneider*, SCI. AM. (Feb. 3, 2014), https://blogs.scientificamerican.com/beautiful-minds/what-do-iq-tests-test-interview-with-psychologist-w-joel-schneider/ [https://perma.cc/9BJE-R6PY] (describing the components of a precise IQ test). Mr. Altamirano's IQ test suggests that he has limitations in intellectual functioning. *See What Is Intellectual Disability?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/intellectual-disability/what-is-intellectual-disability [https://perma.cc/B47P-YAHH] (noting that IQ scores between seventy and seventy-five typically indicate significant limitations in intellectual functioning, but that "IQ score[s] must be interpreted in the context of the person's difficulties in general mental abilities").

[3] State's Petition for Review of a Special Decision of the Court of Appeals at 10–11, State *ex rel.* Montgomery v. Kemp, 469 P.3d 457 (Ariz. 2020) (No. CR-19-0274), 2019 WL 5067680 at *10–11. The state argued that these weaknesses occurred during Mr. Altamirano's childhood and that adaptive skills are measured based on what is "expected of the defendant's *age* and cultural group." *Id.* at 6 (emphasis added). Thus, the State asserted, Mr. Altamirano merely failed to surpass certain milestones of child development and truly does not have an intellectual disability. State's Supplemental Brief to the Petition for Review of a Special Action Decision of the Court of Appeals at 13, State *ex rel.* Montgomery v. Kemp, 469 P.3d 457 (Ariz. 2020) (No. CR-19-0274), 2019 WL 506768 at *13. Although it is not uncommon for children and adults of average intelligence to struggle to focus and perform well in school, individuals with intellectual disabilities overcome these difficulties and develop new skills at a slower rate than individuals without intellectual disabilities. *See Signs & Symptoms of Intellectual Disability*, MILLCREEK OF MAGEE TREATMENT CTR., https://www.millcreekofmagee.com/disorders/intellectual-disability/signs-causes-symptoms/ [https://perma.cc/9BLC-6PYF] (elaborating on what traits differentiate individuals with intellectual disabilities from those without). Mr. Altamirano's difficulties as a child were so extensive that his second grade teacher thought that he should have been in a special education class. State's Petition for Review of a Special Decision of the Court of Appeals, *supra*, at 10–11.

vide adequate service to his customers.[4] Mr. Altamirano also has limitations in his abilities to communicate with others and establish friendships.[5]

In 2015, Arizona indicted Mr. Altamirano for first-degree murder and sought the death penalty.[6] During an evidentiary hearing regarding Mr. Altamirano's eligibility for the death penalty, the trial court found that Mr. Altamirano had an intellectual disability and was therefore ineligible for the death penalty.[7] In 2020, after the Arizona Court of Appeals rejected the state's request for the death penalty, the Supreme Court of Arizona reviewed the state's appeal claiming that the trial court had erroneously determined that Mr. Altamirano had an intellectual disability.[8] The Supreme Court of Arizona held that although the trial judge had reviewed Mr. Altamirano's conceptual, social, and practical strengths and weaknesses, the trial judge had failed to consider properly Mr. Altamirano's ability to "meet society's expectations" of him.[9] The court noted that the Arizona statute governing determinations of intellectual disability for the purpose of death penalty eligibility required such a consideration by the trial court.[10] Moreover, the Arizona Supreme Court ruled that Arizona's statute comported with constitutional requirements regarding capital punishment for defendants with intellectual disabilities.[11] Consequently, the court reversed and

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[4] State's Petition for Review of a Special Decision of the Court of Appeals, *supra* note 3, at 11. Specifically, Mr. Altamirano lacked "specialized skills" to provide service in "plumbing, electrical work, and flooring." *Id.* Despite these professional hardships, the state pointed out that Mr. Altamirano was able to learn two languages, own and manage properties, teach construction skills to his stepson, and travel between Mexico and the United States since he was fourteen years old. *See* State's Supplemental Brief to the Petition for Review of a Special Action Decision of the Court of Appeals, *supra* note 3, at 13 (arguing that such activities "certainly required sophisticated problem-solving skills").

[5] State's Petition for Review of a Special Decision of the Court of Appeals, *supra* note 3, at 13. The judge noted that these weaknesses were based on evidence that Mr. Altamirano "was a troublemaker and would not follow directions at school as a child, . . . threw fits [as a child] when he did not get enough food, . . . [and] had few friends as an adult and child." *Id.* (emphasis omitted).

[6] *Kemp*, 469 P.3d at 459. Mr. Altamirano was indicted for first-degree murder because he killed another person with a gun. *Id.*

[7] *Id.*

[8] *Id.* The State alleged that the trial court did not make its finding based on Arizona's "statutory definition of intellectual disability, which requires an overall assessment of Altamirano's ability to meet society's expectations of him." *Id.* The Arizona Court of Appeals denied the state's bid because "the judge [had] discussed both adaptive weaknesses *and* adaptive strengths" and the court had "heard competent lay and expert testimony to support an intellectual disability finding." *Id.*

[9] *Id.* at 463; *see infra* note 28 and accompanying text (defining adaptive behavior as "the collection of conceptual, social, and practical skills" that people learn and utilize daily).

[10] *Kemp*, 469 P.3d at 463; *see* ARIZ. REV. STAT. § 13-753(K)(1) (2021) (explaining that limitations in adaptive behavior affect "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group").

[11] *Kemp*, 469 P.3d at 463. The court stated that determinations of death penalty eligibility in Arizona were based on current medical standards because Arizona's statute "require[d] experts evaluating a defendant's intellectual disability to have at least five years' experience in testing, evaluating, and diagnosing intellectual disabilities." *See id.* at 462 (noting that the Arizona statute therefore complied

remanded the matter to the trial court for a new hearing to determine whether Mr. Altamirano had an intellectual disability as defined by the Arizona statute.[12] Following this ruling, the trial court concluded that Mr. Altamirano did not have the ability to "meet society's expectations" of him and was, therefore, ineligible for the death penalty.[13] By incorporating a nonscientific standard into a definition that should be comprised of only clinical standards, the Supreme Court of Arizona's ruling and Arizona's statutory definition of intellectual disability are in direct conflict with the Supreme Court's rulings.[14]

This Note argues that states must provide additional protections for defendants with intellectual disabilities to prevent states from sentencing defendants with intellectual disabilities to death.[15] Part I provides an overview of intellectual disability and the death penalty.[16] Part I also explains why defendants with intellectual disabilities are ineligible for the death penalty under the Supreme Court's decision in 2002 in *Atkins v. Virginia*, and details the process by which states determine whether a defendant has an intellectual disability.[17] Part II illustrates how, despite this prohibition, courts continue to sentence defendants with intellectual disabilities to death.[18] Finally, Part III argues that states should adopt a uniform definition of intellectual disability for the purpose of

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with the Supreme Court's decisions in *Moore v. Texas* (*Moore I*) and *Moore v. Texas* (*Moore II*) requiring such determinations to rely on "current medical standards").

[12] *Id.* at 463.

[13] Associated Press, *Bid Fails to Revive Death Penalty for Immigrant in 2015 Mesa Store Clerk Killing*, *supra* note 1.

[14] *See Capital Case Roundup—Death Penalty Court Decisions the Week of August 17, 2020*, DEATH PENALTY INFO. CTR. (Aug. 19, 2020), https://deathpenaltyinfo.org/stories/capital-case-roundup-death-penalty-court-decisions-the-week-of-august-10-2020-1 [https://perma.cc/5QB3-6TVT] (suggesting that Arizona's definition of intellectual disability is nonscientific because the clinical community, which diagnoses intellectual disability, does not make such diagnoses based on whether an individual can "meet society's expectations" as the statute requires).

[15] *See infra* notes 20–222 and accompanying text (exploring the intersection of intellectual disability and the death penalty). This Note is limited to a discussion of the death penalty in the United States. *See infra* notes 20–222 and accompanying text. This Note uses the term intellectual disability, which officially replaced the term "mental retardation" in 2017. *See* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (instructing federal agencies to use the terms intellectual disability and "individual with an intellectual disability" instead of mental retardation and mentally retarded); Karen Toth, Nina de Lacy & Bryan H. King, *Intellectual Disability*, *in* DULCAN'S TEXTBOOK OF CHILD AND ADOLESCENT PSYCHIATRY 105 (Mina K. Dulcan ed., 2d ed. 2015) (elaborating that Rosa's law mirrored a revolution in terminology already under way in various professionals and organizations, including the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association, before Congress signed the law into legislation in 2010). The term intellectual disability is preferable to mental retardation because it is less offensive and better reflects the significance of adaptive behaviors in the intellectual disability inquiry. Robert L. Schalock, Ruth A. Luckasson & Karrie A. Shogren, *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 118 (2007).

[16] *See infra* notes 20–125 and accompanying text.

[17] *See infra* notes 20–125 and accompanying text.

[18] *See infra* notes 126–183 and accompanying text.

death penalty eligibility and proposes a model standard in line with clinical standards.[19]

I. The Evolution of Intellectual Disability in Death Penalty Law

Following the Supreme Court's decision in 2002, in *Atkins v. Virginia*, courts are not permitted to sentence defendants with intellectual disabilities to death because it would be "cruel and unusual punishment" to execute such individuals.[20] Section A of this Part discusses the various clinical definitions of intellectual disability.[21] Section B of this Part reviews the current research on intellectual disability.[22] Section C of this Part surveys state definitions of intellectual disability for the purpose of death penalty eligibility.[23] Section D of this Part outlines the history of the death penalty.[24] Finally, Section E of this Part examines the evolution of the categorical intellectual disability exception to the death penalty.[25]

A. Defining Intellectual Disability

Because there is no universally established biomarker of intellectual disability, the scientific community must rely on individualized clinical assessments to determine whether an individual has an intellectual disability.[26] Three

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[19] *See infra* notes 184–222 and accompanying text.

[20] 536 U.S. 304, 321 (2002); *see infra* notes 114–125 and accompanying text (explaining the Court's decision in *Atkins v. Virginia*).

[21] *See infra* notes 26–31 and accompanying text.

[22] *See infra* notes 32–48 and accompanying text.

[23] *See infra* notes 49–82 and accompanying text.

[24] *See infra* notes 83–102 and accompanying text.

[25] *See infra* notes 103–125 and accompanying text.

[26] *See* Frank J. Symons & Jane Roberts, *Biomarkers, Behavior, and Intellectual and Developmental Disabilities*, 118 Am. J. on Intell. & Developmental Disabilities 413, 414 (2013), https://www.researchgate.net/publication/259768406_Biomarkers_Behavior_and_Intellectual_and_Developmental_Disabilities [https://perma.cc/8HAM-6GR3] (explaining that attempts to assess intellectual disability using a biomarker are "in their infancy"); Nat'l Acads. of Scis., Eng'g & Med., Mental Disorders and Disabilities Among Low-Income Children 8 (Thomas F. Boat & Joel T. Wu eds., 2015) (advising that "[t]here are no laboratory tests" for intellectual disability). The term "biomarker" combines the words "biological" and "marker" to refer to "[a] characteristic that is objectively measured and evaluated as an indicator of normal biological processes . . . ." *See* Biomarkers Definitions Working Group, *Biomarkers and Surrogate Endpoints: Preferred Definitions and Conceptual Framework*, 69 Clinical Pharmacology & Therapeutics 89, 91 (2001) (explaining that, for example, an elevated level of blood sugar is a biomarker of diabetes mellitus). A health care professional conducts an individualized clinical assessment of a patient by making a clinical judgment of the patient's ability to function. R.L. Schalock, R. Luckasson & M.J. Tassé, Am. Ass'n on Intell. & Developmental Disabilities, Twenty Questions and Answers Regarding the 12th Edition of the AAIDD Manual: Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports 5 (2021). Rather than administer a single dispositive test, professionals make clinical judgments about functioning based on their expert opinions, clinical training,

diagnostic and classification systems—the American Association on Intellectual and Developmental Disabilities (AAIDD), the Diagnostic and Statistical Manual on Mental Disorders (*DSM*), and the American Psychological Association (APA)—provide the current clinical standards of intellectual disability in the United States.[27] Though these three systems have slight variations in each of their definitions, the definitions are closely related and focus on three interconnected factors.[28] The AAIDD defines intellectual disability as a disability that emerges prior to the age of twenty-two and involves "significant limita-

and comprehensive evaluation of their patients' symptoms, behaviors, and other relevant information. *Id.*

[27] *See* Jennifer LaPadre & John L. Worrall, *Determining Intellectual Disability in Death Penalty Cases: A State-by-State Analysis*, 3 J. CRIM. JUST. & L., no. 2, 2020, at 1, 19 (observing that the AAIDD, American Psychiatric Association (APA-MD), and APA are the three definitive sources for a clinical definition of intellectual disability). The APA-MD publishes the *DSM*, which is currently in its fifth edition (*DMS-5*). *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions [https://perma.cc/KX5H-J4T4]. The APA-MD is an association of psychiatrists whereas the APA is comprised of psychologists, and although both psychiatrists and psychologists treat patients for psychiatric illnesses and other disorders—such as intellectual disability—only psychiatrists are medical doctors who can prescribe medications. *The Differences Between Psychology and Psychiatry*, PSYCHOLOGY.ORG (Sept. 29, 2021), https://www.psychology.org/resources/differences-between-psychology-and-psychiatry/ [https://perma.cc/H3P4-Y9PV]. Both psychiatrists and psychologists use the *DSM-5* to diagnose mental disorders. *See DSM-5: Frequently Asked Questions*, *supra* (explaining that "health care professionals" throughout the United States use the *DSM-5* as an "authoritative guide" to diagnose mental disorders). The AAIDD is an organization specifically concerned with intellectual and developmental disorders, which are distinct from psychiatric disorders. *See* Tanya St. John, *What Is the Difference Between Mental Illness, Developmental Disability, and Intellectual Disability?*, ARUNDEL LODGE (Jan. 3, 2017), https://www.arundellodge.org/what-is-the-difference-between-mental-illness-developmental-disability-and-intellectual-disability/ [https://perma.cc/NG64-4PPA] (explaining how and why intellectual disabilities are unique).

[28] *See infra* notes 29–31 and accompanying text (describing the AAIDD, APA-MD, and APA's definitions of intellectual disability and identifying that all refer to intellectual functioning, adaptive behavior, and age at onset of disability). Professionals assess intellectual functioning by evaluating an individual's "general mental capacity, such as learning, reasoning, problem solving, and so on." *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/intellectual-disability/definition [https://perma.cc/UDS7-9HU5]. Professionals may also use an IQ test to measure intellectual functioning. *See id.* (explaining that an IQ score between seventy and seventy-five generally reflects limited intellectual functioning or disability). Adaptive behavior, which is also used to determine the presence of an intellectual disability, "is the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives." *Id.* Examples of conceptual skills include understanding how to read, write, count money, and tell time. *Id.* Social skills refer to effectively interacting with others, having a sense of self-worth, not being easily tricked, and adhering to social rules and the law. *Id.* Practical skills include taking care of oneself, following a schedule, using money responsibly, and understanding how to use the telephone and travel. *Id.* Similar to professionals' approach to evaluating patients' intellectual functioning, health care professionals may utilize standardized tests to assess limitations in adaptive functioning. *Id.* Finally, the age at onset of disability prong requires that the individual demonstrated signs of having an intellectual disability by a certain point in their life. *Id.*; *see also infra* note 29 (explaining that, although the AAIDD's manual (*AAIDD*), *DSM-5*, and APA all have designated age at onset as during the developmental period, the AAIDD and APA specify that the developmental period ends before twenty-two years).

tions" in "intellectual functioning" and "adaptive behavior."[29] Similarly, the fifth version of the *DSM* (*DSM-5*) construes intellectual disability as a disorder that originates "during the developmental period" and that concerns "deficits" in "both intellectual and adaptive functioning."[30] Finally, the APA defines intellectual disability as "a developmental disability" that develops before twenty-two years of age with "mild to profound limitations in cognitive function" and "adaptive behavior."[31]

B. Consulting the Experts: Intellectual Disability Research

Health care professionals utilize intellectual disability research to evaluate accurately whether an individual has an intellectual disability.[32] Incorporating

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[29] *Definition of Intellectual Disability*, *supra* note 28 (emphasis omitted). Notably, the AAIDD and APA's definitions necessitate that an individual's intellectual disability manifest before the individual turns twenty-two years old. *Compare id.* (defining age at onset of intellectual disability as appearing during the developmental period, specifically before twenty-two years of age), *and Intellectual Disability*, AM. PSYCH. ASS'N, https://dictionary.apa.org/intellectual-disability [https://perma.cc/86WH-RUCC] (categorizing intellectual disability as a developmental disability), *and Developmental Disability*, AM. PSYCH. ASS'N, https://dictionary.apa.org/developmental-disability [https://perma.cc/6ET2-L3MQ] (elaborating that developmental disabilities emerge before twenty-two years), *with* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5, at 33 (5th ed. 2013) [hereinafter DSM-5] (defining the age at onset of intellectual disability as during the "developmental period"). The AAIDD advises professionals to recognize that individuals with intellectual disabilities often have both limitations and strengths, and that their ability to function in life is enhanced with constant personalized support. *See Definition of Intellectual Disability*, *supra* note 28 (emphasizing that professionals can only determine the presence of an intellectual disability after conducting a multifaceted evaluation).

[30] DSM-5, *supra* note 29, at 33. The APA-MD categorizes intellectual disability as a subset of neurodevelopmental disorders. *Id.* at 31. Intellectual disability may co-exist with other neurodevelopmental disorders, mental health disorders, and medical conditions. *What Is Intellectual Disability?*, *supra* note 2. Consequently, professionals face diagnostic challenges when an individual has multiple conditions. *Id.* Unlike the AAIDD and APA, the APA-MD further defines the condition of intellectual disability using a system of severity levels. DSM-5, *supra* note 29, at 33–36. The *DSM-5*'s levels of severity range from mild, moderate, severe, to profound. *Id.* Professionals determine how severe an intellectual disability is based on the extent of the individual's adaptive impairments, rather than on the individual's IQ scores, because the severity of adaptive deficits informs professionals of how much support the individual needs to function in their life. *Id.* at 33. There is no consensus as to when the developmental period, which lasts approximately from childhood to adolescence, ends, although the clinical community estimates that it may end when the person is around nineteen years of age. *Diagnostic Criteria for Intellectual Disabilities: DSM-5 Criteria*, MENTALHELP.NET, https://www.mentalhelp.net/intellectual-disabilities/dsm-5-criteria/ [https://perma.cc/HD5S-ZWCL]; Canadian Paediatric Soc'y, *Age Limits and Adolescents*, 8 PAEDIATRICS CHILD HEALTH 577, 577 (2003).

[31] *See Intellectual Disability*, *supra* note 29 (categorizing intellectual disability as a developmental disability); *Developmental Disability*, *supra* note 29 (explaining that developmental disabilities manifest before twenty-two years of age). An individual with an intellectual disability has a diminished ability "to acquire skills typical for one's age group as a child or necessary for one's later independent functioning as an adult." *Intellectual Disability*, *supra* note 29.

[32] *See infra* notes 32–48 and accompanying text (discussing how research complements the AAIDD, Diagnostic and Statistical Manual on Mental Disorders (*DSM*), and APA general definitions of intellectual disability).

research into individualized clinical assessments is valuable because such research employs the scientific method, which allows evaluators to implement impartial, evidence-based approaches into their assessments.[33] Clinicians also rely on findings from research for more context about what intellectual functioning, adaptive functioning, and age at onset of disability mean.[34] Thus, research on intellectual disability guides clinicians to assess more accurately deficits in intellectual and adaptive functioning and to diagnose individual patients correctly.[35] Clinicians concentrate on the intellectual and adaptive deficits associated with intellectual disability because such deficits impact the patient's ability to live independently and behave in a manner consistent with societal expectations.[36] The *DSM-5* provides the most research-backed guid-

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[33] *Science of Psychology*, AM. PSYCH. ASS'N, https://www.apa.org/action/science [https://perma.cc/7KFB-N2V9]. The scientific method requires researchers to make observations, develop questions, and form conclusions through controlled and recorded investigations. *Scientific Method*, BRITANNICA, https://www.britannica.com/science/scientific-method [https://perma.cc/B34T-WMJN] (Oct. 15, 2021). Throughout the process, scientists collect and analyze data to generate explanations and theories. *Id.* An "evidence-based practice" entails combining "the best available research with clinical expertise" so that a clinician can investigate their question, such as whether their patient has an intellectual disability. *Policy Statement on Evidence-Based Practice in Psychology*, AM. PSYCH. ASS'N (Aug. 2005), https://www.apa.org/practice/guidelines/evidence-based-statement [https://perma.cc/RLP2-GVYQ].

[34] *See* Robert L. Schalock, Ruth Luckasson, Marc J. Tassé & Miguel Angel Verdugo, *A Holistic Theoretical Approach to Intellectual Disability: Going Beyond the Four Current Perspectives*, 56 INTELL. & DEVELOPMENTAL DISABILITIES 79, 82, 84 (Apr. 2018) (characterizing the operational definition of intellectual disability as deficits in intellectual functioning and adaptive functioning that developed during the developmental period); *Definition of Intellectual Disability*, *supra* note 28 (identifying problem-solving skills and compliance with the law as examples of intellectual and adaptive functioning, respectively); DSM-5, *supra* note 29, at 37 (labeling complex thinking and empathy as features of intellectual and adaptive functioning); *Intellectual Disability*, *supra* note 29 (specifying that the ability to create plans and regulate emotions are illustrative of intellectual and adaptive functioning).

[35] Schalock et al., *supra* note 34, at 85. Following a diagnosis, a clinician may classify someone with an intellectual disability into a sub-group to improve their understanding of what that individual needs to function in daily life. *See* SCHALOCK, *supra* note 26, at 3 (noting that the objective of classification is "to organize information to better understand a person"). To classify an individual into a sub-group, clinicians must describe the individual's intellectual and adaptive functioning with specificity. Schalock et al., *supra* note 34, at 85. This requires that clinicians take contextual factors into account because intellectual "disability is a multidimensional phenomenon influenced by risk factors or the interaction of risk factors." *See id.* (explaining that in the context of intellectual disability, a "multidimensional" approach involves considering the individual's "health status . . . legal status . . . [and] eligibility for services and supports").

[36] Schalock et al., *supra* note 34, at 79. "Contextual variables," such as health status and legal status, impact an individual's limitations in intellectual and adaptive functioning. *Id.* at 79, 85. A clinician can help their patient mitigate the disadvantages associated with having an intellectual disability by establishing a support system. *See* SCHALOCK ET AL., *supra* note 35, at 4 (describing a support system as an "interconnected network" of ideas, strategies, and solutions to stimulate the patient's growth, passions, and well-being). Additionally, clinicians will, at times, retrospectively evaluate a patient to determine whether the patient had an undiagnosed intellectual disability during their developmental period. *See id.* at 2 (instructing that, by carefully inspecting the patient's "educational, medical, and social history," a clinician may make a retrospective diagnosis of intellectual disability of a

ance to help professionals accurately assess individuals' intellectual limitations.[37]

To measure an individual's intellectual functioning, clinicians focus on the individual's ability to rationalize, resolve problems, conceptualize, opine, learn from guidance or exposure, and understand.[38] The patient's ability to comprehend verbal cues, remember information long enough to use it, interpret and use visual information, use basic math skills to solve real-world problems, think abstractly, and be confident in their ability to accomplish tasks successfully are also relevant to a clinician's diagnosis.[39] Clinicians can measure these skills by administering intelligence tests.[40] The *DSM-5* warns, however, that an IQ test score may be inaccurate if the tested individual has another disorder affecting their ability to communicate with others, understand language, or use sensory and motor skills.[41]

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patient who is older than twenty-two years and was not officially diagnosed with an intellectual disability in the past).

[37] *See infra* notes 38–48 and accompanying text (discussing the *DSM-5*'s diagnostic features of intellectual disability). The *DSM-5* comments that the "essential features" of intellectual disability are deficits in intellectual and adaptive functioning that developed during the developmental period. DSM-5, *supra* note 29, at 37. Moreover, the *DSM-5* provides numerous specific features that are indicative of such deficits, such as inadequate memory or financial irresponsibility. *See id.* (referencing "working memory" and "money management" as features of intellectual functioning and adaptive functioning); Nelson Cowan, *Working Memory Underpins Cognitive Development, Learning, and Education*, 26 EDUC. PSYCH. REV. 197, 197 (2014) (describing working memory as necessary for the temporary collection and manipulation of information).

[38] DSM-5, *supra* note 29, at 37.

[39] *See id.* (pinpointing "verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy" as significant aspects of intellectual functioning).

[40] *Id.* IQ scores between sixty-five and seventy-five can fall within the realm of intellectual disability. *Id.* Clinicians are hesitant, however, to rely too heavily on IQ scores as indicative of intellectual disability. *Id.* IQ tests are useful to approximate how well a patient understands language and the concepts of time and money, but IQ scores may not accurately reflect a patient's ability to apply their reasoning skills in real life or successfully complete practical activities. *See id.* (advising that verbal comprehension and quantitative reasoning are facets of intellectual functioning) (noting that "IQ test scores are approximations of" verbal comprehension and quantitative reasoning but cautioning that IQ tests "may be insufficient to assess reasoning in real-life situations and mastery of practical tasks"). There is at least a 95% chance that individuals who score at least two standard deviations below the mean on an IQ test have a below-average IQ. *See* Andy Kiersz, *Here's What Nerds Mean When They Say 'Standard Deviation,'* INSIDER (Dec. 2, 2014), https://www.businessinsider.com/standard-deviation-2014-12 [https://perma.cc/S5KH-WJVE] (defining "[s]tandard deviation" as "a measure of how far away individual measurements tend to be from the mean value of a data set"); T.D.V. SWINSCOW & MICHAEL J CAMPBELL, STATISTICS AT SQUARE ONE 13 (9th ed. 1977) ("By putting one, two, or three standard deviations above and below the mean we can estimate the ranges that would be expected to include about 68%, 95%, and 99.7% of the observations.").

[41] DSM-5, *supra* note 29, at 37. Examples of disorders that often co-occur with intellectual disability include depression, bipolar disorder, anxiety, attention-deficit/hyperactivity disorder, and autism. *Id.* at 40.

An individual has typical adaptive functioning if they meet society's standards of independence and responsibility appropriate for their age and sociocultural background.[42] Adaptive functioning deficits can affect a person's conceptual, social, and practical skills.[43] Conceptual skills include, for example, having a solid memory and being able to speak, read, write, and solve problems, all of which are useful for academic pursuits.[44] Social skills involve recognizing personal feelings, acknowledging the feelings of others, and fostering friendships.[45] Finally, practical skills entail abilities such as taking care of oneself and financial responsibility.[46]

A diagnosis of intellectual disability is proper if an individual has impaired intellectual and adaptive functioning during their developmental period, which spans across childhood and adolescence.[47] Ultimately, the *DSM-5* and other clinical associations proscribe this three-pronged approach—replete with specific examples of deficits—to determine whether an individual has an intellectual disability.[48]

C. A Survey of State Standards for Determining Intellectual Disability

The twenty-seven states that permit the death penalty have centered their definitions of intellectual disability around three criteria: intellectual functioning, adaptive functioning, and age at onset of disability.[49] By constructing def-

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[42] *Id.* at 37.

[43] *Id.*

[44] *See id.* (identifying "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgement in novel situations" as examples of conceptual skills).

[45] *See id.* (commenting that "awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgement" are social skills relevant to the intellectual disability inquiry).

[46] *See id.* (including "learning and self-management" skills throughout life, such as "personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization," as examples of practical skills).

[47] *Id.* at 37–38

[48] *See id.* at 37 (identifying intellectual functioning, adaptive functioning, and age at onset of disability as the three elements to determining the presence or absence of intellectual disability); *Definition of Intellectual Disability*, *supra* note 28 (same); *Intellectual Disability*, *supra* note 29 (same).

[49] *See infra* notes 51–82 and accompanying text (outlining the three prongs that constitute states' definitions of intellectual disability); *State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/8HQ6-NEZA] (listing the twenty-seven states that continue to sentence defendants to death). States fashioned their definitions of intellectual disability based on the AAIDD, *DSM-5*, and APA's definitions. *See supra* notes 29–31 and accompanying text (providing the AAIDD, *DSM-5*, and APA's definitions of intellectual disability based on intellectual functioning, adaptive functioning, and age at onset of intellectual disability). Recently, the Supreme Court overruled the Kentucky definition of intellectual disability, and Kentucky is waiting on proposed legislation. *See* Woodall v. Commonwealth, 563 S.W.3d 1, 2, 3 (2018) (holding that Kentucky Revised Statute § 532.130(2) was unconstitutional on its face because it contained an outdated standard requiring a defendant to have an IQ score no higher than seventy in order to qualify as

initions around such criteria, the states purport to provide their courts with a clinical guideline for determining whether a defendant has an intellectual disability and is therefore ineligible for the death penalty.[50]

The states have various definitions of intellectual functioning.[51] Twenty-four of the state death penalty statutes use the phrase "significantly subaverage general intellectual functioning," or similarly broad language, to define intellectual functioning.[52] Two states—Louisiana and Montana—use language that is distinct from that of other states.[53] Louisiana is the only state to specify what

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having an intellectual disability). The Supreme Court also recently found that the Florida definition of intellectual disability unconstitutional as applied. Hall v. Florida, 572 U.S. 701, 710, 711 (2014) (holding that Florida's interpretation of its statutory definition of intellectual disability was unconstitutional because the state utilized a fixed IQ score cutoff to evaluate defendants' intellectual disability claims). This Note does not review Kentucky's definition of intellectual disability. *See infra* notes 49–82 and accompanying text (providing an overview of *constitutional* statutory standards of intellectual disability).

[50] *See* LaPadre & Worrall, *supra* note 27, at 19 (explaining that "[t]he initial definitions of intellectual disability in the state statutes are similar and *seem to follow the clinical definitions closely, for the most part*") (emphasis added); *see also* Atkins v. Virginia, 536 U.S. 304, 308 n.3, 317 n.22 (2002) (noting that at the time, statutory definitions of intellectual disability were not uniform among states, but "generally conform[ed]" to AAIDD and APA clinical definitions).

[51] *Compare* ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021) (describing the intellectual functioning prong of intellectual disability merely as "[s]ignificantly below-average general intellectual functioning"), *with* LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (2021) (identifying specific deficits in intellectual functioning associated with intellectual disability), *and* MONT. CODE. ANN. §§ 46-19-201, 46-14-102, 53-20-202(3) (2021) (defining "developmental disability" as encompassing intellectual disability for the purpose of death penalty eligibility).

[52] *Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017); ALA. CODE § 15-24-2(3) (2021); ARIZ. REV. STAT. § 13-753(K)(3) (2021); ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021); CAL. PEN. CODE § 1376(a)(1) (West 2021); FLA. STAT. § 921.137(1) (2021); GA. CODE ANN. § 17-7-131(a)(2) (2021); IDAHO CODE § 19-2515A(1)(a) (2021); IND. CODE § 35-36-9-2(1) (2021); KAN. STAT. ANN. § 76-12b01(d) (2021); MISS. CODE ANN. § 41-21-61(g) (2021); MO. REV. STAT. § 565.030(6) (2021); NEB. REV. STAT. § 28-105.01(3) (2021); NEV. REV. STAT. § 174.098(7) (2021); N.C. GEN. STAT. § 15A-2005(a)(1)(A) (2021); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2021); OKLA. STAT. tit. 21, § 701.10b(A)(1) (2021); OR. REV. STAT. § 427.005(10)(a) (2021); 50 PA. CONS. STAT. § 4102 (2021); S.C. CODE ANN. § 16-3-20(C)(b)(10) (2021); S.D. CODIFIED LAWS § 23A-27A-26.2 (2021); TENN. CODE ANN. § 39-13-203(a)(1) (2021); UTAH CODE ANN. § 77-15a-102(1) (2021); WYO. STAT. ANN. § 25-5-102(b)(xx) (2021). States that require defendants' intellectual functioning to be significantly subaverage mirror the language from the AAIDD's definition of intellectual disability. *See Definition of Intellectual Disability*, *supra* note 28 ("Intellectual disability is a disability characterized by *significant limitations* in both intellectual functioning and adaptive functioning.") (emphasis added).

[53] *Compare* ARK. CODE. ANN. § 5-4-618(a)(1)(A) (characterizing the first prong of intellectual disability as "[s]ignificantly below-average general intellectual functioning"), *with* LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (specifying that limitations in intellectual functioning may appear in behaviors "such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience"), *and* MONT. CODE. ANN. §§ 46-19-201 (requiring that the "mental fitness" of a defendant sentenced to death be assessed if "there is good reason to suppose that the defendant lacks mental fitness"); *see also* § 46-14-102 ("Evidence that the defendant suffered from a mental disease or disorder or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."); § 53-20-202(3) (defining developmental disability as "attributable to intellectual disability, cerebral palsy, epilepsy, autism, or any

kind of intellectual functioning deficits may indicate the presence of an intellectual disability, such as limitations in experiential learning, thinking about complex ideas in novel ways, and forethought.[54] The Montana statute notes that the state may not seek a death sentence for defendants deficient in "mental fitness," which may be due to a developmental disability.[55] Additionally, the Montana Code defines "developmental disability"—a disability attributable to intellectual disability, among others—in its title on social services rather than in its title on criminal procedure.[56] This provision in Montana's social services title, which does not address intellectual functioning, is the only link between intellectual disability and the death penalty.[57] Thus, as compared to the other states, Montana provides little guidance regarding what constitutes an intellectual disability or diminished intellectual functioning for criminal defendants.[58]

States take four approaches to supplementing their definitions of intellectual disability with IQ scores.[59] First, many states utilize IQ scores as one of the various indicators of intellectual disability, although twelve do not.[60] Sec-

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other neurologically disabling condition closely related to intellectual disability," and requiring that the disability manifested prior to eighteen years of age).

[54] *See* LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (classifying "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience" as aspects of intellectual functioning). Louisiana's definition of intellectual functioning is taken verbatim from the *DSM-5*. *Compare* DSM-5, *supra* note 29, at 33 ("Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgement, academic learning, and learning from experience . . . "), *with Definition of Intellectual Disability*, *supra* note 28 (commenting that intellectual functioning refers to skills such as "reasoning, problem solving, and so on").

[55] MONT. CODE. ANN. §§ 46-19-201, 46-14-102 .

[56] MONT. CODE. ANN. § 53-20-202(3). Developmental disability also encompasses "cerebral palsy, epilepsy, autism, or any other neurologically disabling condition related to intellectual disability." *Id.*

[57] *Id.* Moreover, the connection between the death penalty and defendants with intellectual disabilities in Montana's statutory scheme is already attenuated; § 46-19-201 instructs that when a capital defendant's mental fitness is in question, § 46-14-102 governs how courts evaluate the defendant's mental fitness. MONT. CODE. ANN. §§ 46-19-201, 46-14-102. In turn, § 46-14-102 directs the inquiry to § 53-20-202 based on a definition of developmental disability, which merely references intellectual disability without more. MONT. CODE. ANN. § 46-14-102; *see* MONT. CODE. ANN. § 53-20-202(3) (declining to further define intellectual disability as it relates to deficits in intellectual functioning and adaptive functioning).

[58] *Compare* MONT. CODE. ANN. § 46-19-201 (providing no context to define or guide the state's intellectual disability inquiry), *with* ARK. CODE. ANN. § 5-4-618(a)(1)(A) (explaining that intellectual disability includes diminished intellectual functioning), *and* LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (offering various examples of how deficits in intellectual functioning may manifest).

[59] *Compare* ARIZ. REV. STAT. § 13-753(K)(5) (instructing that an IQ score of seventy or below is evidence of subaverage intellectual functioning), *with* KAN. STAT. ANN. § 76-12b01(i) (relying on IQ scores at least two standard deviations below the mean to indicate intellectual disability), *and* ALA. CODE § 15-24-2(3) (referencing IQ scores as a valuable tool in the intellectual disability inquiry without specifying a fixed IQ score or range), *and* ARK. CODE. ANN. § 5-4-618(a)(2) (identifying an IQ score of sixty-five or below as demonstrative of deficits in intellectual functioning).

[60] *See* CAL. PEN. CODE § 1376 (West 2021) (declining to include an IQ cutoff); GA. CODE ANN. § 17-7-131 (2021) (same); IND. CODE § 35-36-9-2 (same); MISS. CODE ANN. § 41-21-61 (same); MO.

ond, nine states suggest that an IQ score of seventy or below demonstrates a deficit in intellectual functioning.[61] Third, two states—Kansas and Florida—instruct that an IQ score at least two standard deviations below the mean IQ score is evidence of deficient intellectual functioning.[62] These states utilize IQ

REV. STAT. § 565.030 (same); MONT. CODE. ANN. § 53-20-202(3) (same); NEV. REV. STAT. § 174.098 (same); OHIO REV. CODE ANN. § 5123.01 (same); 50 PA. CONS. STAT. § 4102 (same); S.C. CODE ANN. § 16-3-20 (same); UTAH CODE ANN. § 77-15a-102 (same); WYO. STAT. ANN. § 25-5-102 (same). Although California does not include an IQ score cutoff for intellectual disability, the statute does require that the "results of a test measuring intellectual functioning shall not be changed or adjusted based on race, ethnicity, national origin, or socioeconomic status." CAL. PEN. CODE § 1376(g). In the past, many courts would upwardly adjust minority defendants' IQ scores based on experts' arguments that minority defendants do not perform as well on IQ tests as compared to non-minority defendants. *See* Robert M. Sanger, *IQ Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87, 111–12 (2015) (explaining that minority defendants were thus eligible for the death penalty solely due to IQ score adjustments). Notably, experts made claims about adjusting IQ scores for race without credible support and courts accepted these claims without discussing the merits. *See id.* at 111–12, 146 (concluding that adjusting IQ scores based on ethnicity and race "is logically, clinically, and constitutionally unsound"). States that rely on IQ scores to determine deficits resemble the AAIDD's approach to intellectual functioning because the AAIDD explains that IQ scores between seventy and seventy-five are one indicator of limited intellectual functioning. *Compare Definition of Intellectual Disability*, *supra* note 28 (referring to IQ scores in its definition of intellectual functioning as a factor), *with* DSM-5, *supra* note 29, at 33 (determining the severity of intellectual disability based on the severity of an individual's adaptive functioning without relying on intellectual functioning or IQ scores), *and Intellectual Disability*, *supra* note 29 (defining intellectual functioning without any mention of IQ scores).

[61] *Ex parte* Briseno, 135 S.W.3d 1, 7 n. 24 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017); ARIZ. REV. STAT. § 13-753(K)(5); IDAHO CODE § 19-2515A(1)(b); N.C. GEN. STAT. § 15A-2005(a)(1)(c); NEB. REV. STAT. § 28-105.01(3); OKLA. STAT. tit. 21, § 701.10b(A)(3); OR. REV. STAT. § 427.005(10)(a); S.D. CODIFIED LAWS § 23A-27A-26.2; TENN. CODE ANN. § 39-13-203(a)(1). States that use IQ scores of seventy or below resemble the AAIDD's approach to IQ scores, but are more restrictive than the AAIDD's definition because the AAIDD considers IQ scores up to seventy-five. *Definition of Intellectual Disability*, *supra* note 28. Notably, Arizona includes a provision that if a convicted defendant scored higher than seventy-five on a prescreening IQ test, the defendant is not barred from introducing other evidence of intellectual disability or deficits in intellectual functioning during the penalty phase at sentencing. ARIZ. REV. STAT. § 13-753(C). Alternatively, the Nebraska statute establishes a presumption of intellectual disability if a defendant presents evidence of an IQ score of seventy or below. NEB. REV. STAT. § 28-105.01(3) (2021). Nebraska's standard therefore follows the medical community's understanding that an IQ score below seventy constitutes sufficient evidence of deficits in intellectual functioning. NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 26, at 169. The Oregon statute notes that a defendant scoring between seventy-one and seventy-five on an IQ test may still have deficits in intellectual functioning if they experience significant adaptive difficulty. OR. REV. STAT. § 427.005(10)(b). Conversely, the Oklahoma statute prohibits a court from finding that a defendant with an IQ test score of seventy-six or above has an intellectual disability. OKLA. STAT. tit. 21, § 701.10b(C). Similarly, South Dakota's statute provides a presumption that a defendant does not have an intellectual disability if the defendant has an IQ score above seventy. S.D. CODIFIED LAWS § 23A-27A-26.2.

[62] FLA. STAT. § 921.137(1); KAN. STAT. ANN.§ 76-12b01(i). The mean of an IQ test, such as the Wechsler Adult Intelligence Scale or the Stanford-Binet test, refers to the average score on that particular IQ test. *See* Kendra Cherry, *How Average IQ Scores Are Measured*, VERYWELLMIND (June 4, 2020), https://www.verywellmind.com/what-is-the-average-iq-2795284 [https://perma.cc/M895-9ZNG] (explaining that because the mean score on these tests is around one hundred, people who receive scores between ninety and one hundred nine have average intelligence).

scores to assess intellectual functioning, but do not rely on a particular score—instead, whether an IQ score is indicative of deficits in intellectual functioning depends on the mean IQ score.[63] Alternatively, Alabama and Louisiana require standardized intelligence testing to measure whether a defendant has subaverage intellectual functioning.[64] These two states, however, do not explicitly reference a required IQ score or range.[65] Louisiana further states that "clinical assessment[s]" are central to determining whether a defendant has a disability.[66] Lastly, Arkansas is the only state that uses the lowest IQ score among the states—sixty-five—to satisfy the intellectual functioning prong of intellectual disability.[67]

State definitions of adaptive functioning are the most variable, as compared to their definitions of intellectual functioning and age at onset of disability.[68] Seventeen states require generally that defendants have impairments in adaptive behavior to satisfy the second intellectual disability prong.[69] Four of

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[63] FLA. STAT. § 921.137(1); KAN. STAT. ANN. § 76-12b01(i).

[64] ALA. CODE § 15-24-2(3); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a). Both the Alabama and Louisiana codes provide that subaverage intellectual functioning must be "measured by appropriate standardized testing instruments," but neither statute specifies which standardized tests are suitable. ALA. CODE § 15-24-2(3); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a).

[65] ALA. CODE § 15-24-2(3); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (2021). In 2004, in *State v. Manning*, the Supreme Court of Louisiana acknowledged that the defendant's IQ score between seventy and eighty demonstrated that he had below average intelligence, but ultimately affirmed the defendant's death sentence because his IQ score did not indicate that he had serious deficits in intellectual functioning. 885 So. 2d 1044, 1075, 1107, 1114 (La. 2004). Thus, it is unclear under the Alabama and Louisiana standards how low an IQ score must be to suggest that a defendant has significant limitations in intellectual functioning. *See id.* (rejecting the position that an IQ score between seventy and eighty was low enough to provide evidence of an intellectual disability); ALA. CODE § 15-24-2(3) (2021) (instructing that intelligence tests are central to the intellectual disability inquiry, but declining to pinpoint a particular IQ score or range); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a) (same).

[66] LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(a). This language closely mirrors the scientific community's directive that health care professionals ought to use their clinical judgment to conduct individualized clinical assessments. *See* SCHALOCK, *supra* note 26, at 5 (noting the necessity for clinicians to make individualized assessments of patients to determine the presence of intellectual disability).

[67] *See* ARK. CODE. ANN. § 5-4-618(a)(2) (stating that an IQ score of sixty-five creates a "rebuttable presumption of intellectual disabilit[y]").

[68] *See infra* notes 69–75 and accompanying text (describing states' statutory descriptions of adaptive skills relevant to the intellectual disability inquiry). As with intellectual functioning, Montana does not clarify whether intellectual disability entails impaired adaptive functioning. MONT. CODE. ANN. § 53-20-202(3).

[69] *Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017); ALA. CODE § 15-24-2(3) (2021); ARIZ. REV. STAT. § 13-753(K)(3) (2021); ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021); CAL. PEN. CODE § 1376(1) (West 2021); FLA. STAT. § 921.137(1) (2021); GA. CODE ANN. § 17-7-131(a)(2) (2021); IND. CODE § 35-36-9-2(2) (2021); KAN. STAT. ANN. § 76-12b01(d) (2021); NEB. REV. STAT. § 28-105.01(3) (2021); NEV. REV. STAT. § 174.098(7) (2021); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2021); OR. REV. STAT. § 427.005(10)(a) (2021); S.C. CODE ANN. § 16-3-20(C)(b)(10) (2021); S.D. CODIFIED LAWS § 23A-27A-26.2 (2021); TENN. CODE ANN. § 39-13-203(a)(2) (2021); WYO. STAT. ANN. § 25-5-102(b)(xx)

these states explain that limitations in adaptive behaviors affect whether an individual can be self-sufficient while also acting in the best interests of society.[70] Six states provide a list of adaptive behaviors in which a defendant must have substantial limitations to qualify as having an intellectual disability.[71] These behaviors include the ability to communicate with others, function independently, and live safely.[72] Separately, the Louisiana statute states that adaptive deficits must impact the defendant's ability to live independently and interact with others in various settings.[73] Thus, Louisiana suggests that deficiencies in adaptive skills reflect an inability to live independently and socialize appropriately as expected for one's age and in one's culture.[74] Lastly, Utah in-

(2021). Three of these states qualify that a defendant's deficits in adaptive skills must be significant to meet the requirement. *See* ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021) (requiring "significant . . . impairment"); IND. CODE § 35-36-9-2(2) (2021) (specifying that the impairment must be "substantial"); OR. REV. STAT. § 427.005(10)(a) (2021) (noting that adaptive impairments must be "significant").

[70] *See* OR. REV. STAT. § 427.005(1) (2021) ("'Adaptive behavior' means the effectiveness or degree with which [the defendant] meets the standards of personal independence and social responsibility expected [of that defendant's] age and cultural group."); *see also* ARIZ. REV. STAT. § 13-753(K)(1) (2021) (providing a similar explanation but with different wording and organization); KAN. STAT. ANN. § 76-12b01(a) (2021) (same); FLA. STAT. § 921.137(1) (2021) (same).

[71] IDAHO CODE § 19-2515A(1)(a) (2021); MISS. CODE ANN. § 41-21-61(g) (2021); MO. REV. STAT. § 565.030(6) (2021); N.C. GEN. STAT. § 15A-2005(a)(1)(b) (2021); OKLA. STAT. tit. 21, § 701.10b(A)(2) (2021); 50 PA. CONS. STAT. § 4102 (2021).

[72] *See* IDAHO CODE § 19-2515A(1)(a) (2021) ("communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety"); MISS. CODE ANN. § 41-21-61(g) (2021) (providing a similar set of adaptive behaviors but with different wording and organization); MO. REV. STAT. § 565.030(6) (2021) (same); N.C. GEN. STAT. § 15A-2005(a)(1)(b) (2021) (same); OKLA. STAT. tit. 21, § 701.10b(A)(2) (2021) (same); 50 PA. CONS. STAT. § 4102 (2021) (providing substantively similar statutory language). Mississippi's statute also states that the claimed deficits in adaptive functioning, as well as intellectual functioning, must "pose[] a substantial likelihood of physical harm to [the defendant] or others . . . ." MISS. CODE ANN. § 41-21-61(f) (2021). The adaptive behaviors provided in these statutes are the same skills listed in the AAIDD's definition of adaptive functioning. *Definition of Intellectual Disability*, *supra* note 28. Note that these states require defendants to present evidence of deficits in at least two areas, a qualification not necessitated by the AAIDD. *Compare* MISS. CODE ANN. § 41-21-61 (2021) (instructing that a defendant must demonstrate limitations in at least two adaptive behaviors to satisfy the adaptive functioning prong of intellectual disability), *with Definition of Intellectual Disability*, *supra* note 28 (requiring substantial deficits in adaptive behavior without specifying how many deficits an individual must have).

[73] LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1)(b) (2021). Specifically, the statute instructs that subaverage adaptive skills must "limit functioning in one or more activities of daily life including . . . communication, social participation, and independent living, across multiple environments such as home, school, work, and community." *Id.* Consequently, a defendant's deficits in adaptive functioning must be pervasive. *See id.* (requiring that subaverage adaptive skills negatively affect multiple areas of a defendant's life).

[74] *See id.* ("Deficits in adaptive functioning . . . result in failure to meet developmental and sociocultural standards for personal independence and social responsibility . . . .").

dicates that poor reasoning skills or an inability to control emotions and behaviors demonstrate deficits in adaptive functioning.[75]

The age by which a defendant's intellectual disability must have developed varies slightly across state statutes.[76] Eleven death penalty state statutes require documentation that a defendant's intellectual disability had developed by the time they were eighteen years old.[77] Eight statutes instruct that an intellectual disability must have manifested during a defendant's developmental period, though these states do not specify when the developmental period occurs.[78] Two states require that a defendant's intellectual and adaptive deficiencies appeared during the developmental period but before eighteen years of age.[79] These states seem to suggest that the developmental period ends before a person turns eighteen years old.[80] Three states do not identify a specific point by which a defendant's deficits in intellectual functioning and adaptive skills must have developed.[81] Finally, two states require that a defendant's deficits in intellectual and adaptive functioning developed prior to twenty-two years of age.[82]

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[75] UTAH CODE ANN. § 77-15a-102(1) (2021). Under Utah's statutory scheme, a defendant may offer evidence of deficits in "reasoning or impulse control" as evidence of subaverage adaptive functioning. *Id.*

[76] *See infra* notes 77–82 and accompanying text (explaining how state statutes differ based on age at onset of intellectual disability).

[77] *Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017); ARIZ. REV. STAT. § 13-753(K)(3) (2021); FLA. STAT. § 921.137(1) (2021); IDAHO CODE § 19-2515A(1)(a) (2021); IND. CODE § 35-36-9-2 (2021); MISS. CODE ANN. § 41-21-61(g) (2021); MO. REV. STAT. § 565.030(6) (2021); MONT. CODE. ANN. § 53-20-202(3) (2021); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2021); OKLA. STAT. tit. 21, § 701.10b(B) (2021); OR. REV. STAT. § 427.005(10)(a) (2021).

[78] ALA. CODE § 15-24-2(3) (2021); CAL. PEN. CODE § 1376(a)(1) (West 2021); GA. CODE ANN. § 17-7-131(a)(2) (2021); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2021); NEV. REV. STAT. § 174.098(7) (2021); OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2021); S.C. CODE ANN. § 16-3-20(C)(b)(10) (2021); WYO. STAT. ANN. § 25-5-102(b)(xx) (2021). The age at onset requirement in these state statutes mirrors the *DSM-5*'s age at onset requirement. DSM-5, *supra* note 29, at 38.

[79] ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021); TENN. CODE ANN. § 39-13-203(a)(3) (2021).

[80] *Compare* ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021) (indicating a specific age at which the developmental period ends), *and* TENN. CODE ANN. § 39-13-203(a)(3) (2021) (same), *with* ALA. CODE § 15-24-2(3) (2021) (declining to explain when the developmental period ends), *and* GA. CODE ANN. § 17-7-131(a)(2) (2021) (same), *and* LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2021) (same), *and* NEV. REV. STAT. § 174.098(7) (2021) (same), *and* OHIO REV. CODE ANN. § 5123.01(N) (LexisNexis 2021) (same).

[81] KAN. STAT. ANN. § 76-12b01 (2021); NEB. REV. STAT. § 28-105.01 (2021); S.D. CODIFIED LAWS § 23A-27A-26.2 (2021).

[82] 50 PA. CONS. STAT. § 4102 (2021); UTAH CODE ANN. § 77-15a-102(2) (2021). The age at onset requirement in these statutes mirrors the AAIDD's requirement. *Definition of Intellectual Disability*, *supra* note 28.

D. A Brief Overview of the Death Penalty

A court may impose a death sentence, capital punishment, upon a defendant who has been convicted of a capital offense.[83] The federal or state government is then authorized to execute that defendant.[84] The most common capital offense for which a defendant receives the death penalty is first-degree murder.[85] Currently, the United States military, United States federal government, and twenty-seven states authorize capital punishment.[86] Governors of three of

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[83] *See* TRACY L. SNELL, U.S. DEP'T OF JUST., NCJ 300381, CAPITAL PUNISHMENT, 2019—STATISTICAL TABLES, at 3 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cp19st.pdf [https://perma.cc/CR5W-SKQW] (defining "[s]entence of death" as "[a] sentence imposed by a court for a capital offense which authorizes the state to execute a convicted offender"). Legislatures prescribe which crimes constitute a capital offense. *See id.* at 2 (defining "[c]apital offense" as "[a] criminal offense punishable by death"). In 1976, in *Woodson v. North Carolina*, the Supreme Court ruled that a death sentence may not be made mandatory for defendants convicted of capital crimes. *See* 428 U.S. 280, 293, 295, 301 (1976) (holding unconstitutional a mandatory death sentence statute for first-degree murder because "evolving standards of decency" indicated that such a scheme was "unduly harsh and remarkably rigid"). The Court cited a 1949 study that recommended that juries have the option to choose between the death penalty and a life sentence. *Id.* at 299. Significantly, both the study and the Court in *Woodson* discussed how juries tended to not convict defendants for capital offenses for which the death penalty was mandatory based on the belief that many guilty defendants were not deserving of death. *Id.* Rather, a death sentence was appropriate only when the grievous circumstances of the particular crime outweigh circumstances that "excuse the crime or the [defendant's] behavior." CONST. RTS. FOUND., A HISTORY OF THE DEATH PENALTY IN AMERICA 2 (2012), https://www.crf-usa.org/images/pdf/HistoryoftheDeathPenaltyinAmerica.pdf [https://perma.cc/V4RA-SSPE] (defining "aggravating circumstances" as those facts "which ma[ke] the crime seem worse" and "mitigating circumstances" as those "which tend[] to excuse the crime or the criminal's behavior" (emphasis omitted)); *see Woodson*, 428 U.S. at 296–97 (citing Williams v. New York, 337 U.S. 241, 247 (1949) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.")).

[84] *See* SNELL, *supra* note 83, at 2 (defining "[c]apital punishment" as "[t]he process of sentencing convicted offenders to death for the most serious crimes and carrying out that sentence"). Authorized methods of execution include lethal injection, electrocution, lethal gas, hanging, and firing squad. *Methods of Execution: Lethal Injection Is the Most Widely-Used Method of Execution, but States Still Authorize Other Methods, Including Electrocution, Gas Chamber, Hanging, and Firing Squad*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/AC98-XRBZ]. The primary method of execution is lethal injection. *Id.* Executions by lethal injection often inflict extreme agony upon the executed defendant and are frequently botched. *See* Julia Eaton, Note, *"Warning: Use May Result in Cruel and Unusual Punishment": How Administrative Law and Adequate Warning Labels Can Bring About the Demise of Lethal Injection*, 59 B.C. L. REV. 355, 357, 361 (2018) (explaining that when an executioner fails to administer the chemical drugs in accordance with protocol, the execution becomes botched because the execution is prolonged or the inmate experiences "immense pain and suffering" before dying).

[85] SNELL, *supra* note 83, at 2; *see id.* at 8–9 app. tbls. 2 & 3 (listing all state and federal offenses eligible for the death penalty, including "perjury resulting in execution of an innocent person," "[e]spionage," and "[g]enocide").

[86] *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx [https://perma.cc/34JX-LPK5]. This Note discusses state capital punishment, rather than federal capital punishment, because state executions are more common than federal executions. *See Federal Death Penalty: The Federal Government Can Seek Death Sentences for a Limited Set of Crimes, but Federal Executions Are Much*

those states—California, Oregon, and Pennsylvania—have placed moratoria on the death penalty, temporarily prohibiting the use of capital punishment in all cases.[87]

The Sixth Amendment guarantees procedural rights to defendants and dictates the province of the jury in criminal prosecutions.[88] Specifically, the Sixth Amendment provides that in criminal prosecutions, including capital punishment cases, the defendant is entitled to an impartial jury.[89] The jury, not the judge, must make factual determinations to support the imposition of a death sentence.[90] Additionally, the jury must explicitly impose a death sentence upon the defendant, rather than recommend capital punishment to the judge.[91]

Rarer Than State Executions, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty [https://perma.cc/5AJ9-HSJM] (explaining that there have been only sixteen federal executions "in the modern era," thirteen of which took place between July 2020 and January 2021). This Note also does not discuss the United States military's use of the death penalty, as "[t]here have been no [military] executions in the modern era of the death penalty." *See Military: People Serving in the Military Are Subject to a Separate System of Laws, Courts, and Procedures—Including Those Regarding Capital Punishment*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/military [https://perma.cc/465W-X8AN]. This Note does not comment on whether the death penalty is unconstitutional, although there are many scholarly works exploring why the United States should abolish the death penalty completely. *See, e.g.*, John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 327 (2009) (describing modern efforts to abolish the death penalty as "yet another step in the direction of a more civilized and humane world" and analogizing abolition to the United States' ratification of the United Nations "conventions barring genocide, slavery, torture, and other forms of cruel and degrading punishments"); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 478 (2005) (arguing that "[c]apital punishment degrades dignity . . . because it unnecessarily extinguishes human life in the presence of viable alternatives").

[87] *See State by State*, *supra* note 49 (noting that California, Oregon, and Pennsylvania currently have gubernatorial moratoria placed on the death penalty).

[88] *See* U.S. CONST. amend. VI (mandating criminal jury trials and associated procedural rights). Procedural rights include the guarantee of a "speedy and public trial" in which the defendant knows "the nature and cause of the accusation," has the opportunity to confront witnesses, and is represented by an attorney. *Id.*

[89] *See id.* (providing that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury"). An impartial jury must set aside their personal beliefs and resist outside influences in order to deliver a verdict consistent with the evidence offered at trial. *See* United States v. Orenuga, 430 F.3d 1158, 1162 (D.C. Cir. 2005) (considering whether jury selection was unconstitutional because the defendant was prohibited from asking potential jurors if they believed that the defendant's legal strategy was a permissible defense).

[90] Ring v. Arizona, 536 U.S. 584, 609 (2002). In 2002, in *Ring v. Arizona*, the Supreme Court considered a case in which the trial judge sentenced the defendant to death despite the jury's finding that the defendant was ineligible for the death penalty. *Id.* at 594, 597. The jury had declared that the defendant was ineligible for the death penalty because, although they found him guilty of felony murder, they did not conclude that it was premeditated murder. *Id.* at 592. Arizona law permitted the judge to conduct an additional hearing where the judge could sentence the defendant to death, regardless of the jury's finding, if the judge made a factual finding that there were aggravating circumstances warranting the death penalty. *Id.* at 589, 592–93; *see also* CONST. RTS. FOUND., *supra* note 83 (defining "aggravating circumstances" as those "which ma[ke] the crime seem worse" (emphasis omitted)). The judge conducted the additional hearing and sentenced the defendant to death because

The Eighth Amendment and its prohibition of cruel and unusual punishment governs substantive issues regarding capital punishment.[92] In accordance with the Eighth Amendment, the death penalty is a legally appropriate punishment only if sentencing a particular defendant to death would not constitute cruel and unusual punishment.[93] In 1958, in *Trop v. Dulles*, the Supreme Court held that the standard for determining whether a punishment is "cruel and unusual" depends on "the evolving standards of decency that mark the progress of a maturing society."[94] Historically, the public's perception of whether a pun-

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he found that the one present mitigating circumstance did not "call for leniency" given the two present aggravating circumstances. *See Ring*, 536 U.S. at 594–95 (explaining that the only mitigating circumstance included the defendant's "'minimal' criminal record," and that the aggravating circumstances included the fact that the defendant had murdered the driver of an armored bank van specifically to steal money and that the defendant's actions—particularly "expressing pride in his marksmanship"—were abhorrent). The Court held that allowing a judge to make the factual determination of death penalty eligibility violated the Sixth Amendment. *Id.* at 607, 609 (noting that "[t]he founders of the American Republic" did not intend to leave the factfinding for death penalty eligibility to the discretion of a judge (quoting Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring))).

[91] Hurst v. Florida, 577 U.S. 92, 94 (2016). In 2016, in *Hurst v. Florida*, the Supreme Court reviewed a Florida sentencing scheme in which the jury could act in an advisory capacity and recommend the death penalty to the judge, but the judge was the ultimate decision-maker for whether the defendant could be sentenced to death after weighing the aggravating and mitigating factors. *Id.* at 95–96. The Court held that such a scheme violated the Sixth Amendment because the jury's recommendation was not binding and it was the judge, not the jury, who conducted the specific factfinding of death penalty eligibility. *See id.* 98–99 (applying the *Ring* Court's analysis instructing that it is improper for states to require judges, rather than juries, to take on the role of factfinding in the death penalty eligibility inquiry).

[92] *See infra* notes 93–102 and accompanying text (outlining various substantive Eighth Amendment issues with the death penalty, such as cruel and unusual punishment, moral culpability, and theories of punishment).

[93] *See* U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments"). "[U]nnecessary and wanton infliction of pain," physical or otherwise, constitutes "cruel and unusual punishment" under the Eighth Amendment. *See* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)) (holding that a prisoner was not subjected to cruel and unusual punishment because the prison doctors had exercised their medical judgement to not order additional X-rays or treatment after seeing the prisoner seventeen times across three months). The Eighth Amendment's prohibition of cruel and unusual punishment protects convicted defendants by establishing limits on the criminal process. Ingraham v. Wright, 430 U.S. 651, 667 (1977). The Eighth Amendment places different kinds of limitations on punishment:

> First, it limits the kinds of punishment that can be imposed on those convicted of crimes, . . . second, it proscribes punishment grossly proportionate to the severity of the crime, . . . and third, it imposes substantive limits on what can be made criminal and punished as such.

Id. (citations omitted).

[94] Trop v. Dulles, 356 U.S. 86, 101 (1958). In 1958, in *Trop*, the Supreme Court noted that although the Court had not described "[t]he exact scope of the constitutional phrase 'cruel and unusual,' . . . [t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 99–100. Thus, the Court indicated that whether the death penalty is cruel and unusual may change over time. *See Capital Punishment*, THEFREEDICTIONARY, https://legal-dictionary.thefreedictionary.com/Evolving+Standards+of+Decency [https://perma.cc/T8GZ-WPFP] ("[W]hat may have been constitutionally permissible when the Eighth Amendment was ratified in 1791 might be cruel and

ishment is acceptable informs courts' evaluations of whether a punishment is cruel and unusual.[95] Generally, the public places value in punishment that is proportionate to a defendant's crime.[96] Accordingly, a defendant's punishment must match the public's assessment of their moral culpability for the crime committed.[97]

Two theories of punishment also inform courts as to whether the death penalty is an appropriate punishment.[98] First, capital punishment serves a retributive purpose if the death penalty is the only suitable response to a defendant's actions.[99] Second, capital punishment serves a deterrent purpose if the threat of death discourages would-be offenders from committing a particular crime.[100] Thus, if the death penalty does not further the goals of either of these theories of punishment in a particular case, then the death penalty is theoreti-

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unusual now, if application of the death penalty in particular cases offends the 'evolving standards of decency' test."). Courts determine whether the death penalty is a cruel and unusual punishment by "examin[ing] prevailing opinions among state legislatures, sentencing juries, judges, scholars, the American public, and the international community." *Id.*

[95] *Gregg*, 428 U.S. at 173. In 1976, in *Gregg*, the Supreme Court held that sentencing a defendant to death does not always constitute cruel and unusual punishment, declining an opportunity to declare all capital punishment unconstitutional. *Id.* at 187. The Court emphasized that courts should defer to the legislature on the matter because the legislature reflects "the judgment of the representatives of the people" as well as "contemporary standards." *Id.* at 175.

[96] *Id.* at 173. The Court stated that the severity of punishment should be comparable to the severity of the crime and should not be "random or arbitrary." *Id.* at 206.

[97] *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (stating that "punishment must be tailored to . . . personal responsibility and moral guilt"). In 1982, in *Enmund v. Florida*, the Supreme Court held that sentencing the defendant to death was excessive because the defendant had neither committed nor intended to commit the two killings that transpired during the robbery he had committed. *Id.*

[98] *See Gregg*, 428 U.S. at 183 (observing that the two primary punishment rationales behind the death penalty are retribution and deterrence); *infra* notes 99–101 and accompanying text (explaining the rationales that justify use of the death penalty).

[99] *See Gregg*, 428 U.S. at 183, 184 (noting that retribution is not inconsistent with the Eighth Amendment's goal of protecting human dignity). Retribution is based in proportionality and calls for serious punishments in response to serious crimes. *See Retribution*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In a more neutral sense, something justly deserved."). Under retributive theory, the death penalty is an appropriate response to severe crimes because "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 184.

[100] *Gregg*, 428 U.S. at 183, 184. Deterrence is "the prevention of criminal behavior by fear of punishment." *Deterrence*, BLACK'S LAW DICTIONARY, *supra* note 99. Although the effect of the death penalty as a deterrent is a subject of active debate, the Supreme Court concluded that courts "may nevertheless assume safely that there are murderers . . . for whom . . . the death penalty undoubtedly is a significant deterrent." *Gregg*, 428 U.S. at 184, 185; *see also* Michael Vitiello, *A Healthy Dose of Agnosticism About the Death Penalty*, 51 TEX. TECH. L. REV. 57, 60 (2018) (noting that reasons to be skeptical of the deterrent effect of the death penalty include: most criminology experts do not believe that the death penalty functions as a substantial deterrent of crime, homicide rates in non-death penalty states are not higher than rates in death penalty states, and crime has declined over the past two decades despite the Supreme Court's narrowing of circumstances in which the death penalty is an appropriate punishment).

cally improper.[101] With these considerations in mind—cruel and unusual punishment, moral culpability, and the theories of retribution and deterrence—the Supreme Court abolished the death penalty for two categories of people: juveniles and defendants with intellectual disabilities.[102]

E. Atkins v. Virginia*: A Seminal Decision*

Executing defendants with intellectual disabilities was permissible in the United States until 2002.[103] For example, in 1989, in *Penry v. Lynaugh*, the Supreme Court considered the case of a defendant in his early twenties convicted of capital murder and sentenced to death.[104] The defense argued that the death penalty constituted cruel and unusual punishment because of the defendant's intellectual disability—evidenced by expert testimony that the defendant had brain damage, a low IQ, limited mental capacity, and limited social awareness.[105] The defendant further argued that *all* defendants with such impairments do not have the requisite moral culpability to justify the death penalty as a proportional punishment for the crimes they committed.[106] The state present-

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[101] *See Gregg*, 428 U.S. at 183–86 (explaining that the death penalty is warranted in cases in which the penalty serves the goals retribution and deterrence). Because "it is essential in an ordered society that . . . citizens . . . rely on legal processes rather than self-help to vindicate their wrongs," the death penalty functions as "an expression of society's moral outrage at particularly offensive conduct." *Id.* at 183.

[102] *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) (abolishing the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (abolishing the death penalty for defendants with intellectual disabilities); *see also infra* notes 114–125 (providing an in-depth examination of the Court's decision in *Atkins*).

[103] *Compare* Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (holding that the Eighth Amendment did not prohibit executing defendants with intellectual disabilities), *abrogated by Atkins* 536 U.S. 304, *with Atkins*, 536 U.S. at 321 (abolishing the death penalty for defendants with intellectual disabilities as cruel and unusual punishment).

[104] *Penry*, 492 U.S. at 308, 310, 311. The defendant raped, hit, and used scissors to stab the victim, who, before dying, provided the local sheriffs with a description of her assailant, leading to the defendant's arrest and confession. *Id.* at 307.

[105] *Id.* at 307–08, 311. A clinical psychologist testified at a pre-trial competency hearing that the defendant had an intellectual disability. *Id.* at 307. Specifically, the psychologist stated that the defendant's neural function was impacted by brain damage that he sustained at birth. *Id.* Additionally, the defendant had previously scored between fifty and sixty-three on IQ tests and scored fifty-four during the psychologist's testing. *Id.* at 307–08. Because of the defendant's limited mental capacity, the psychologist concluded that he had the level of "learning [and] the knowledge" comparable to a typical six-and-a-half-year-old child. *Id.* at 308. Additionally, because of the defendant's limited social awareness, the psychologist opined that his "social maturity, or ability to function in the world, was that of a 9 or 10-year-old." *Id.*

[106] *Id.* at 328–29. Moral culpability is the "[m]oral blameworthiness" of a defendant or "[t]he mental state that must be proved for a defendant to be held liable for a crime." *Culpability*, BLACK'S LAW DICTIONARY, *supra* note 99.

> [B]ecause of "disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect," [defendants with intellectual disabilities] cannot act with the level of moral cul-

ed dueling expert testimony that, although the defendant did have mental limitations, he also had the ability to understand his actions when he committed the crime.[107]

In *Penry*, the Court held that the Eighth Amendment did not prohibit states from executing defendants with intellectual disabilities.[108] The Court explained that despite the expert evidence, the defendant's demonstrated ability to consult rationally with his lawyer and understand the court proceedings indicated that the defendant possessed the mental capacity to understand the consequences of his actions.[109] Additionally, the Court concluded that the jury's determination that the defendant was not insane suggested that the defendant could distinguish between right and wrong and change his behavior to follow the law.[110] Moreover, the Court rejected the defendant's argument that the nation had come to an agreement that executing defendants with intellectual disabilities constituted cruel and unusual punishment.[111] At the time, only the

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> pability that would justify imposition of the death sentence. Thus, . . . execution of [defendants with intellectual disabilities] convicted of capital offenses serves no valid retributive purpose.

Penry, 492 U.S. at 336–37 (citations omitted) (recounting clinical associations' arguments in support of the defendant's ineligibility for the death penalty).

[107] *Penry*, 492 U.S. at 309. The state offered expert testimony from a psychiatrist who opined that although the defendant had a low IQ score, that did not mean that the defendant was unable to understand his surroundings or the consequences of his actions. *Id.* In doing so, the expert implied that the defendant had the requisite moral culpability to receive the death penalty. *Id.*; *see* Enmund v. Florida, 458 U.S. 782, 801 (1982) (instructing that "personal responsibility and moral guilt" dictate which punishments are appropriate for a given defendant). The expert psychiatrist also testified that the defendant "was not suffering from any mental illness or defect at the time of the crime, and that he knew the difference between right and wrong and had the potential to honor the law." *Penry*, 492 U.S. at 309. Here, the expert's opinion discussed standards relevant to insanity but not intellectual disability. *Compare Insanity Defense*, BLACK'S LAW DICTIONARY, *supra* note 99 (noting that insanity is "[a]n affirmative defense alleging that a mental disorder caused the accused to commit the crime"), *and Appreciation Test*, *id.* (explaining that one test for insanity entails determining whether the defendant's mental disorder rendered them unable to "appreciat[e] the wrongfulness of the[ir] conduct" while committing the crime), *with Definition of Intellectual Disability*, *supra* note 28 (characterizing intellectual disability as involving deficits in intellectual and adaptive functioning, rather than a question of recognizing right from wrong).

[108] *Penry*, 492 U.S. at 338. The Court declined to create a categorical exemption from capital punishment for defendants with intellectual disabilities because although such defendants share common deficits, they also differ in how their deficits impact their "cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.*

[109] *Id.* at 333. The Court indicated that because the defendant was able to contribute to the criminal process, the defendant was competent and therefore had the ability to understand both the wrongfulness and the consequences of his actions. *Id.*

[110] *See id.* (explaining that the jury had concluded the defendant "knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law" and therefore the death sentence was acceptable under the Eighth Amendment).

[111] *Id.* at 333–34. The defendant argued that because both the federal Anti-Drug Abuse Act of 1988 and the state of Georgia prohibited executing defendants with intellectual disabilities, "there

federal government and a single state had passed an act prohibiting individuals with intellectual disabilities from being sentenced to death, so there was no indication that society no longer classified the death penalty as cruel and unusual punishment for that category of defendants.[112] Therefore, the Court concluded, it could not categorically ban the death penalty for defendants with intellectual disabilities.[113]

In 2002, in *Atkins v. Virginia*, the Supreme Court revisited whether executing defendants with intellectual disabilities constituted cruel and unusual punishment in violation of the Eighth Amendment.[114] In *Atkins*, the Court considered the case of a defendant who had robbed a store with a weapon, abducted and killed one victim, and was subsequently sentenced to death.[115] The defense argued that the defendant was ineligible for the death penalty because he had an intellectual disability.[116] At trial, the defense offered expert testimony that the defendant had a low IQ score and a mild intellectual disability.[117] The

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[wa]s objective evidence . . . of an emerging national consensus against execution of" defendants with intellectual disabilities. *See id.* (rejecting the defendant's argument of a national consensus).

[112] *See id.* at 334 (concluding that there were no "evolving standards of decency . . . [to] mark the progress of a maturing society" regarding the death penalty and intellectual disability) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Court compared the defendant's evidence of a national consensus concerning defendants with intellectual disabilities to the evidence offered regarding defendants with insanity in *Ford v. Wainwright*. *Id.* at 334; *see* 477 U.S. 399, 408 & n.2 (1986). In 1986, in *Ford*, the Supreme Court held that executing defendants deemed insane violated the Eighth Amendment because such defendants do not possess the requisite moral culpability justifying the death penalty and therefore a death sentence would constitute cruel and unusual punishment. *See* 477 U.S. at 410 (remarking that whatever the reason, the Eighth Amendment undoubtedly prohibited the execution of defendants with insanity). The *Ford* Court found evidence of a consensus based on the fact that not one state permitted executing defendants who were insane, and that twenty-six states "ha[d] statutes explicitly requiring the suspension of a prisoner who meets the legal test for incompetence." *Id.* at 408 & n.2.

[113] *Penry*, 492 U.S. at 335. The Court noted that evidence of two laws prohibiting execution of defendants with intellectual disabilities and fourteen states prohibiting the death penalty did not constitute "sufficient evidence . . . of a national consensus." *Id.* at 334. The Court also concluded that although the defendant presented public polls that indicated public opposition to executing defendants with intellectual disabilities, "[t]he public sentiment expressed in th[ose] and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values." *Id.* at 335.

[114] 536 U.S. 304, 321 (2002).

[115] *Id.* at 307. The defendant, along with one other individual, abducted the victim and brought him to an automated teller machine where they forced him to take out cash. *Id.* The defendant then took the victim to an "isolated location" and shot him eight times, killing him. *Id.*

[116] *Id.* at 310.

[117] *Id.* at 308–09. The defense's forensic psychologist testified that he believed the defendant had an intellectual disability after interviewing people familiar with the defendant, reading educational and legal documents relating to the defendant, and considering the defendant's IQ score of fifty-nine. *Id.* The forensic psychologist explained that the defendant's IQ score "would automatically qualify for Social Security disability income." *Id.* at 309 n.5 (citations omitted). Additionally, the expert testified that the defendant had consistently demonstrated limitations in intellectual functioning during his life and that the defendant's IQ score of fifty-nine was an accurate score. *Id.* The forensic psychologist concluded that the defendant had the "mental age of a child between the ages of 9 and 12." *See* Atkins

state then presented contrasting expert testimony that the defendant had average intelligence and no intellectual disability.[118]

In *Atkins*, the Court ruled that sentencing defendants with intellectual disabilities to death violated the Eighth Amendment.[119] The Court noted that determining whether a punishment is cruel and unusual requires an objective review of "the evolving standards of decency" according to society.[120] The Court cited numerous statutes banning the death penalty for defendants with intellectual disabilities, passed in many states following the Court's 1989 decision in

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v. Commonwealth, 534 S.E.2d 312, 323, 324 (Va. 2000) (Hassel, J., concurring in part and dissenting in part) ("I believe that the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive, considering both the crime and the defendant."), *rev'd*, 536 U.S. 304. Despite the forensic psychologist's conclusion that the defendant had a mild intellectual disability, the expert "admitted that [the defendant's] capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that [the defendant] understood that it was wrong to shoot [the victim] and that [the defendant met] the general criteria for the diagnosis of antisocial personality disorder." *Id.* at 319 (majority opinion).

[118] *Atkins*, 534 S.E.2d at 319. At trial, the state's forensic clinical psychologist testified that the defendant demonstrated his average intelligence during two interviews via his vocabulary and knowledge of world events. *Id.* The expert witness described how the defendant could use "sophisticated words," including "orchestra," "decimal," and "parable," repeat aloud particular facts at the psychologist's request, and craft a narrative using "cause and effect." *See id.* (recounting the expert witness's conclusion that the defendant had the ability to reason at an average level); *Definition of Intellectual Disability*, *supra* note 28 (detailing that examples of conceptual skills associated with adaptive functioning include "language and literacy"). Additionally, the state's forensic psychologist testified that the defendant "knew that John F. Kennedy was the president in 1961" and "also correctly identified the last two presidents, as well as Virginia's current governor." *Atkins*, 534 S.E.2d at 319.

[119] *Atkins*, 536 U.S. at 321.

[120] *See id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 78 (1958)) ("Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.'" (citing Harmelin v. Michigan, 501 U.S. 957, 1000 (1991) (quoting Rummel v. Estelle, 445 U.S. 263, 274–75 (1980)))). In 1991, in *Harmelin v. Michigan*, the Supreme Court evaluated the constitutionality of a mandatory life sentence for a defendant convicted of possession of cocaine. 501 U.S. at 961. The defendant argued that his sentence constituted cruel and unusual punishment because it was disproportionate to the crime that he had committed. *See id.* (considering the defendant's appeal of his life sentence for possessing nearly seven hundred grams of cocaine). The Court noted that although mandatory life imprisonment may be a severe punishment, it is not necessarily an unconstitutionally unusual punishment. *See id.* at 994–95 (acknowledging that severe but not unusual punishments were common throughout history). The defendant also objected to the lower courts' refusal to consider the mitigating circumstance that he did not have any prior felony convictions at sentencing. *Id.* at 994. Considering this, the Court recognized that its death penalty jurisprudence did lend some support to the defendant's "required mitigation claim" in the life imprisonment context. *See id.* at 995 (internal quotation omitted) (citing Woodson v. North Carolina, 428 U.S. 280, 301 (1976)) (acknowledging that in *Woodson*, the Court held that the death penalty is a cruel and unusual punishment when it is mandatorily imposed). The Court reiterated that it had previously held that "a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that punishment is 'appropriate'—whether or not the sentence is 'grossly disproportionate.'" *Id.* The Court declined to extend that reasoning to the context of life sentences, however, because the "cases creating and clarifying the 'individualized capital sentencing doctrine' ha[d] repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." *Id.*

Penry.[121] More significant than the sheer number of states that had exempted defendants with intellectual disabilities from the death penalty was the fact that each state had adopted nearly identical legislation.[122] The Court acknowledged, however, that the objective evidence of the evolving standard was not dispositive because the appropriateness of a sentence also depends on the individual defendant's culpability.[123] Nonetheless, the Court acknowledged that defendants with limitations in intellectual and adaptive functioning have less culpability due to their deficits.[124] In light of objective evidence that society no longer subscribed to the death penalty as an appropriate punishment for defendants with intellectual disabilities, and that executing defendants without the requisite moral culpability would not serve the goals of retribution or deterrence, the Court ultimately concluded that such a practice was unconstitutional.[125]

II. DEFYING DISABILITY: COURTS CONTINUE TO SENTENCE DEFENDANTS WITH INTELLECTUAL DISABILITIES TO DEATH POST-*ATKINS V. VIRGINIA*

In *Atkins v. Virginia*, in 2002, the Supreme Court ruled that states may not execute defendants with intellectual disabilities, but left to the states the task of

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[121] *Atkins*, 536 U.S. at 314–15. Between 1990 and 1998, Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, Tennessee, and Washington enacted statutes exempting defendants with intellectual disabilities from the death penalty. *Id.* In 2000 and 2001, Arizona, Connecticut, Florida, Missouri, South Dakota, North Carolina, and Texas did the same. *Id.* Thus, between the Court's decisions in *Penry* and *Atkins*, seventeen states created legislative categorical exceptions from the death penalty for defendants with intellectual disabilities. *Id.*

[122] *See id.* at 315, 316 (emphasizing that the state legislation prohibiting the death penalty for defendants with intellectual disabilities had passed with substantial support, reinforcing the notion that society no longer believed that defendants with intellectual disabilities had the requisite moral culpability to justly impose the death penalty). The Court offered various objective reasons as evidence that society now perceived defendants with intellectual disabilities "as categorically less culpable than the average criminal" and that sentencing such offenders to death had become unusual in practice. *Id.* First, the Court noted that a greater amount of legislation intended to prevent or discourage crime than to protect people who had committed crimes. *Id.* at 315. Second, no state with anti-death penalty statutes for defendants with intellectual disabilities had passed subsequent legislation to restore the court's power to sentence such defendants to death. *Id.* at 315–16. Third, some states that did authorize the death penalty for such defendants did not often carry out such executions. *Id.* at 316. Fourth, only five states that frequently executed defendants with intellectual disabilities did so to defendants with IQ scores lower than seventy. *Id.*

[123] *See id*. at 312 ("We also acknowledged in *Coker* that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977))).

[124] *Id.* at 318.

[125] *Id.* at 319–21. The Court pointed out that the retribution theory of punishment does not justify the death penalty for defendants with intellectual disabilities because such defendants' limitations render them underserving of execution. *Id.* at 319. The Court also explained that executing defendants with intellectual disabilities does not deter similar potential defendants from committing crimes because such defendants are unable to understand how criminal conduct could result in the death penalty. *Id.* at 320.

constructing definitions of intellectual disability for the purpose of death penalty eligibility.[126] Numerous post-*Atkins* cases reveal, however, that states continue to sentence death penalty exempt defendants to death despite evidence that those defendants likely have intellectual disabilities.[127] Section A reviews *Hall v. Florida*.[128] Section B discusses *Ex parte Briseno*.[129] Section C explores *Moore v. Texas* (*Moore I*).[130] Finally, Section D examines *Moore v. Texas* (*Moore II*).[131]

A. Hall*: Intellectual Disability Is More Than an IQ Score*

In 2014, in *Hall*, the Supreme Court considered whether Florida's definition of intellectual disability properly included considerations from the medical community in accordance with *Atkins*.[132] The Court decreed that states should define intellectual disability based on the medical community's judgments.[133] The Court acknowledged that, at first glance, Florida's statute appeared to be in compliance with the medical community and *Atkins*.[134] In practice, however, Florida's statutory requirement that defendants demonstrate intellectual function-

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[126] 536 U.S. 304, 317, 321 (2002).

[127] *See infra* notes 132–183 and accompanying text (discussing cases in which defendants with intellectual disabilities were found eligible for the death penalty).

[128] *See infra* notes 132–139 and accompanying text.

[129] *See infra* notes 140–146 and accompanying text.

[130] *See infra* notes 147–168 and accompanying text.

[131] *See infra* notes 169–183 and accompanying text.

[132] Hall v. Florida, 572 U.S. 701, 710, 711 (2014). At the time, Florida courts interpreted the state's definition of intellectual disability to require defendants to provide initial evidence of an IQ score of no greater than seventy in order to be allowed to provide further evidence of intellectual disability. *Id.* at 711.

[133] *See id.* at 710, 719 (noting that, following *Atkins*, "it is proper for [courts] to consult the medical community's opinions" regarding intellectual disability). The Florida Supreme Court observed that although the Supreme Court in *Atkins* gave states discretion to define intellectual disability, states do not have "unfettered discretion to define the full scope of the constitutional protection." *See id.* at 719 (acknowledging that it is essential for states to facilitate protections for defendants and guide courts' understanding of how to evaluate intellectual disability); *see also* Atkins v. Virginia, 536 U.S. 304, 317 (2002). Consulting the work of health care professionals is crucial to the determination of intellectual disability because, unlike the legal community, health care professionals utilize their expertise to research intellectual disability and propose methods of diagnosis. *See Hall*, 572 U.S. at 710 (discussing how health care professionals use their scientific backgrounds to study and diagnose intellectual disability and subsequently explain the intricacies of the disability to society and other professions, such as the legal profession). Moreover, the scientific community's expertise extends to situations beyond the death penalty because how professionals define intellectual disability affects individuals' "education, access to social programs, and medical treatment plans." *Id.* Courts should "not disregard informed assessments" of defendants' intellectual abilities, though the scientific community's opinions "do not dictate [courts'] decision[s]." *Id.* at 721.

[134] *Hall*, 572 U.S. at 711. Florida defined intellectual disability as significant deficits in intellectual functioning and adaptive functioning that developed within the first eighteen years of life. *Id.* The Florida statute further explained that an IQ score at least two standard deviations below the mean was evidence of significantly deficient intellectual functioning. *Id.* Such a qualifying IQ score, as the Court noted, would be seventy or below. *See id.* (explaining that because the mean score is one hundred and the standard deviation is fifteen, a score of seventy is two standard deviations below the mean).

ing deficits was undermined by Florida's highest court's narrow interpretation of the statute.[135] Under this reading, Florida courts precluded defendants from presenting additional evidence of deficits in intellectual functioning, or of intellectual disability in general, unless the defendants first introduced evidence of an IQ score of seventy or below.[136] In *Hall*, the Supreme Court elaborated that the Florida standard addressed IQ scores as exclusive evidence of disability, even though the clinical community takes other indicators into account.[137] The Court suggested that Florida's rule thus conflicted with the clinical diagnostic framework mandated by *Atkins* because it prevented defendants from offering otherwise admissible evidence.[138] Consequently, the Court ruled that states may not stipulate a fixed IQ cutoff in its definition of intellectual disability such that a defendant's IQ score is the sole determiner of intellectual disability.[139]

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[135] *Id.* Previously, in 2007, in *Cherry v. Florida*, the Supreme Court of Florida held that Florida's statute clearly required a finding of intellectual disability only if the defendant scored seventy or below on an IQ test. 959 So. 2d 702, 712–13 (Fla. 2007) (per curiam), *abrogated by Hall*, 572 U.S. 701. In direct opposition to the Supreme Court's later decision in *Hall*, the defendant, whose IQ was seventy-two, was barred from presenting other evidence that he had an intellectual disability. *Id.* at 713.

[136] *Hall*, 572 U.S. at 711–12. In *Hall*, the lower court precluded the defendant from presenting additional evidence of intellectual disability because he had an IQ score of seventy-one. *Id.* at 707. If the defendant had satisfied Florida's IQ cutoff requirement, the defendant would have had the opportunity to offer additional evidence of disability, including school records suggesting that his teachers believed he had an intellectual disability, a prior prosecution for an unrelated crime during which his attorney stated he was unable to understand him, and his trial attorney's opinion that the defendant's mental capacity was no greater than that of the attorney's four-year-old daughter. *Id.* at 705. Additionally, had the defendant met the IQ threshold, the court would have had to consider testimony regarding the defendant's abusive upbringing, which impacted his adaptive functioning. *Id.* at 706.

[137] *Id.* Clinicians consider other factors when attempting to detect intellectual disability, such as an individual's performance on previous IQ tests and upbringing, even if the individual scored above seventy on an IQ test because one IQ score is not determinative of the presence of an intellectual disability. *Id.* at 714. Additionally, it is standard practice for professionals to interpret one IQ score to indicate a possible range of scores rather than as one fixed number. *See id.* at 712 (explaining that a "score of 71, for instance, is generally considered to reflect a range between 66 and 76"). A single IQ score does not definitively indicate whether an individual has an intellectual disability because IQ tests have standard errors of measurement (SEM) that indicate the inaccuracies innate to intelligence tests. *Id.* at 713. Individuals may receive different IQ scores as they take multiple IQ tests, and such fluctuation can occur for multiple reasons. *See id.* (observing that reasons for variable scores include "the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing"). Because IQ scores alone cannot reliably indicate whether an individual has an intellectual disability, clinicians must also consider other factors in their evaluations. *Id.* at 714.

[138] *See id.* at 712 (noting that the clinical diagnostic framework for evaluating whether an individual has an intellectual disability consists of measuring both intellectual functioning and adaptive functioning). Because of the Florida Supreme Court's narrow interpretation, "sentencing courts [could not] consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Id.*

[139] *See id.* at 721 (stating that Florida's interpretation of its statute is unconstitutional); *supra* note 134 (explaining that Florida interpreted its standard for intellectual disability to require proof of an IQ

B. Ex parte Briseno*: The Factfinder's Role in Diagnosing Intellectual Disability*

In 2004, in *Ex parte Briseno*, Texas's highest criminal court, the Court of Criminal Appeals, reviewed a defendant's eligibility for the death penalty based on intellectual disability.[140] At the time, Texas had yet to enact a statutory framework for determining intellectual disability in accordance with *Atkins*, prompting the court to establish a judicial standard instead.[141] The court enumerated seven evidentiary factors for the factfinder to consider when evaluating a defendant's adaptive skills: (1) whether those most familiar with the defendant during the defendant's developmental period believed that the defendant had an intellectual disability; (2) whether the defendant could prepare and execute plans, or acted impulsively; (3) whether the defendant displayed quali-

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score of seventy or below before defendants are allowed to offer additional evidence of an intellectual disability). Similar to the Supreme Court's reasoning in *Atkins*, the *Hall* Court noted that only one other state interpreted its definition of intellectual disability for the purpose of death penalty eligibility as Florida did. *See Hall*, 572 U.S. at 718 (indicating that Virginia's interpretation of its IQ score provision mirrored that of Florida's). The majority of states recognized that enacting a strict IQ cutoff without considering SEM was neither "proper [n]or humane." *Id.* Moreover, the Court acknowledged that its prior decision in *Atkins* was premised on the fact that "clinical definitions of intellectual disability . . . take into account that IQ scores represent a range, not a fixed number, . . . [and that] those clinical definitions have long included the SEM." *Id.* at 720. In September 2016, "[t]he Florida Supreme Court vacated Hall's death sentence for killing and raping" his victim, who had been twenty-one years old and pregnant. *2016: Death Sentence Set Aside in Case of Freddie Lee Hall*, TAMPA BAY TIMES (Dec. 28, 2016), https://www.tampabay.com/news/courts/criminal/2016-death-sentence-set-aside-in-case-of-freddie-lee-hall/2307662/ [https://perma.cc/SJE6-B45E]. Instead, the defendant received a life sentence. *See id.* (indicating that the defendant was imprisoned for life).

[140] 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas (*Moore I*), 137 S. Ct. 1039 (2017). The police arrested the defendant for murdering a sheriff's officer inside the officer's home. *Id.* While the defendant was in jail awaiting trial, he organized and executed an escape plan with other inmates. *Id.* at 3. After being recaptured, the trial court convicted the defendant and sentenced him to death. *Id.* at 4. He then filed three writs of habeas corpus—the third on the date of his execution—claiming that his death sentence was unconstitutional under *Atkins* because he had an intellectual disability. *Id.*; *see Habeas Corpus*, BLACK'S LAW DICTIONARY, *supra* note 99 (explaining that a habeas court evaluates the legality of a defendant's sentence or imprisonment). The Texas Court of Criminal Appeals issued a stay of execution and ordered "the convicting court to conduct an evidentiary hearing on [the defendant's] *Atkins* claim." *Ex parte Briseno*, 135 S.W.3d at 4. After a five-day evidentiary hearing, the trial court found that the defendant did not have an intellectual disability and was eligible for the death penalty. *Id.* The court then "forwarded the habeas record to [the Texas Court of Criminal Appeals] for a final determination on whether to grant or deny relief under *Atkins*." *Id.*

[141] *Ex parte* Briseno, 135 S.W.3d at 5. In 2001, the Texas legislature introduced a bill to define intellectual disability as deficits in intellectual functioning and adaptive functioning that manifested during the developmental period. *Id.* at 6. The governor vetoed the bill, however, claiming that Texas already refrained from executing "murderers" with disabilities. *Id.*; *see* Gov. Rick Perry, Veto Proclamation of H.B. 236, 77th Leg., Reg. Sess. (June 17, 2001) (asserting that the legislature's proposal was misleading and was actually about "who determines whether a defendant [has an intellectual disability] . . . in the Texas justice system"). Thus, the Texas Court of Criminal Appeals recognized that although it "does not, under normal circumstances, create law," the issue in *Ex parte Briseno* required it to create guidance to avoid delaying justice. 135 S.W.3d at 4–5.

ties of leadership, or was a follower; (4) whether the defendant could react logically to stimulation, even if those reactions were not socially acceptable; (5) whether the defendant's responses to oral or written questions were rational and intelligible, or rambling; (6) whether the defendant could successfully lie; and (7) whether the defendant's capital offense necessitated advance planning and complex implementation.[142]

The court identified various concerns justifying its composition of the *Briseno* factors.[143] First, the court noted that Texas citizens might not believe that defendants with clinical diagnoses of intellectual disability are less morally accountable than people without professional diagnoses.[144] Second, the court suggested that because a defendant's eligibility for the death penalty is an issue of fact, the factfinder's understanding of the evidence holds more weight than an expert's clinical assessment of intellectual disability.[145] For these rea-

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[142] *Ex parte Briseno*, 135 S.W.3d at 8–9. The Court of Criminal Appeals cited neither legal nor clinical authority to support these factors. *See id.* at 9 n.30 (citing only cases noting that scientific research and expert testimony do not control the legal determination of intellectual disability). Although the court referred to the fourth edition of the *DSM* (*DSM-4*) at the start of its opinion, the court did not rely on the *DSM-4* to construct the *Briseno* factors other than to highlight an aspect of intellectual disability that, according to the medical community, is insignificant for the purpose of diagnosis. *Compare id.* at 5–6 (noting that the *DSM-4* characterizes intellectual disability as a disorder that may not be lifelong because "those who are at the margin . . . might well become mentally-unimpaired citizens if given additional social services support"), *with Definition of Intellectual Disability*, *supra* note 28 (defining intellectual disability as a disorder characterized by deficits in intellectual functioning and adaptive functioning that developed by twenty-two years of age), *and* DSM-5, *supra* note 29, at 33 (explaining that intellectual disability consists of limitations in intellectual and adaptive functioning that manifested during the developmental period), *and Intellectual Disability*, *supra* note 29 (characterizing intellectual disability as involving subaverage intellectual and adaptive functioning that began during the developmental period). Rather, the court concluded that it was compelled to define the "level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseno*, 135 S.W.3d at 6.

[143] *Ex parte Briseno*, 135 S.W.3d at 6–9 (using fictional literature, a vetoed bill that would have exempted defendants with intellectual disabilities from the death penalty, and the roles of experts and factfinders in criminal trials to substantiate the legitimacy of the *Briseno* factors); *see infra* notes 144–145 and accompanying text (explaining what information the court considered when establishing its judicial standard of intellectual disability).

[144] *Ex parte Briseno*, 135 S.W.3d at 6–9. The court suggested that Texas citizens may not believe that all defendants with intellectual disabilities should be exempt from the death penalty. *Id.* at 6. Rather, the court explained that Texas citizens may agree that an individual with an intellectual disability qualifies for assistance from social services, but not be morally exempt from "an otherwise constitutional penalty." *Id.* Continuing this line of reasoning, the court pointed out 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." *Id.* at 6 (citing JOHN STEINBECK, OF MICE AND MEN (1937)) (citations omitted).

[145] *See id.* at 9 ("Although experts may offer insightful opinions [regarding] whether a particular person meets the psychological diagnostic criteria for [intellectual disability,] . . . the ultimate issue of [death penalty eligibility] . . . is one for the finder of fact, based upon all of the evidence and determinations of credibility."). The court concluded that because the scientific community's assessment of adaptive deficits is subjective and expert witnesses would likely offer opposing opinions, the factfind-

sons, the court deferred to the trial court's finding that the defendant had failed to prove by a preponderance of the evidence that he suffered from an intellectual disability.[146]

C. Moore I*: Current Medical Standards, not Stereotypes, Define Intellectual Disability*

Until the Supreme Court reconsidered the *Briseno* factors in 2017, fact-finders were permitted to utilize Texas's judicially-imposed standard to determine whether a defendant had an intellectual disability.[147] In 2017, in *Moore I*, the Court reviewed the Texas Court of Criminal Appeals' rejection of a habeas court's recommendation to reduce the defendant's death sentence to a life sen-

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er would benefit from the *Briseno* factors to determine whether the evidence was indicative of an intellectual disability or another mental disorder, such as a personality disorder. *Id.* at 8–9.

[146] *Id.* at 18. The court noted that the defendant's tendency to run away after being abused by his great-grandmother could indicate either "poor decision-making" or "good survival skills," and qualified as a symptom of conduct disorder and antisocial personality disorder. *See id.* at 14, 15 & n.56 (recounting how the defendant's great-grandmother would tether him to the bed and whip him). The defense argued that running away, as opposed to asking an adult for help, demonstrated deficient adaptive functioning. *Id.* at 15. The prosecution countered that running away illustrated adaptive skills because "stay[ing] and accept[ing] the beatings . . . would show less intelligence and less adaptive conduct." *Id.* The court also acknowledged the defense and state experts' differences of opinion regarding whether the defendant's impulsive acts were indicative of intellectual disability or a conduct disorder. *Id.* at 15, 16. The court emphasized, however, that there was no suggestion in the record that anyone familiar with the defendant believed that he had an intellectual disability. *Id.* at 16–17. Thus, although the court recognized that the expert testimony could support a finding of intellectual disability, the court denied the defendant's claim that it would be unconstitutional to carry out his death sentence. *Id.* at 4, 18. Just days before the state was set to execute the defendant in 2009, a judge called for new sentencing trial. Diane Jennings, *Death Sentence of Man Who Killed Sheriff Changed to Life*, DALL. MORNING NEWS (May 3, 2013), https://www.dallasnews.com/news/crime/2013/05/03/death-sentence-of-man-who-killed-sheriff-changed-to-life [https://perma.cc/J6V5-3YUB]. The jurors in the original sentencing trial had not been adequately instructed on the relevance of the defendant's possible intellectual disability as a mitigating factor for sentencing. *Id.* During the new sentencing phase, the defendant agreed to a life sentence in a plea bargain. *Id.*

[147] *See* Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1044 (2017) (abrogating *Ex parte Briseno*). *Compare* Lizcano v. State, No. AP-75879, 2010 WL 1817772, at *15 (Tex. Crim. App. May 5, 2010) (unpublished table decision) (noting that the jury could rely on the *Briseno* factors for its intellectual disability finding that the defendant did not have an intellectual disability), *with Ex parte* Lizcano, No. WR-68348-03, 2020 WL 5540165, at *1 (Tex. Crim. App. Sept. 16, 2020) (per curiam) (unpublished table decision) (explaining that reducing the defendant's death sentence without parole was proper because on remand, the convicting court revisited the intellectual disability issue without using the *Briseno* factors and recommended granting the defendant relief). The *Briseno* factors functioned as a mechanism for juries to set aside expert opinions and find defendants who likely had intellectual disabilities eligible for the death penalty, despite the Supreme Court's ruling to the contrary. *See* Hensleigh Crowell, Note, *The Writing Is on the Wall: How the* Briseno *Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 754 (2016) (contending that the court could rely on jurors' application of the *Briseno* factors to overcome expert testimony that the defendant did have an intellectual disability).

tence or grant a new trial on the intellectual disability issue.[148] The court denied the defendant relief despite the habeas court's recommendation because the habeas court had relied on the most recent clinical standards rather than the *Briseno* factors.[149] Even though the scientific community had reformed its analysis of intellectual disability since the court's decision in *Ex parte Briseno*, the court concluded that it was proper to rely on the *Briseno* factors.[150]

Because the court upheld the *Briseno* factors as appropriate, the court also determined that the habeas court had erred by focusing on the defendant's adaptive weaknesses rather than strengths, as dictated by clinical standards.[151] By failing to evaluate the defendant's adaptive deficits in relation to the defendant's intellectual functioning deficits, the court concluded that the habeas court had also erred.[152] The court paid special attention to the fact that the defendant's adaptive behaviors had improved while he was in prison as proof that any adaptive weaknesses were not due to deficits in intellectual functioning.[153] The court also noted that the defendant's adaptive deficits could be due to ei-

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[148] *Moore I*, 137 S. Ct. at 1046; *see Habeas Corpus*, *supra* note 140 (explaining that habeas courts determine whether a defendant's imprisonment is legal). When the defendant was twenty years old, he fatally shot a grocery store clerk while robbing the store. *Moore I*, 137 S. Ct. at 1044. On a habeas petition, the court found that the defendant had deficits in intellectual functioning and adaptive functioning. *Id.* at 1045, 1046. Because the age at which the defendant's deficits had developed was not at issue in the case, the habeas court subsequently found that the defendant had an intellectual disability for the purpose of death penalty eligibility. *Id.* at 1044, 1045 n.3.

[149] *Id.* at 1046. Specifically, the habeas court used the eleventh edition of the AAIDD Definition Manual, published in 2010, and the *DMS-V*, published in 2013. *Id.* at 1045. Significantly, the habeas court relied on current clinical standards of intellectual disability to assess the defendant's claim. *See id.* at 1048, 1049 (taking issue with the court's use of outdated standards of intellectual disability).

[150] *See id.* at 1046–47 (concluding that the *Briseno* factors continued to be "adequately 'informed by the medical community's diagnostic framework'" despite the contemporary changes to the referenced sources (quoting Hall v. Florida, 572 U.S. 701, 721 (2014))). The court stated that it could continue to require courts to use the *Briseno* factors because the Supreme Court, in *Atkins*, instructed the states to develop standards of intellectual disability for the purpose of death penalty eligibility. *Id.* at 1046; *see* Atkins v. Virginia, 536 U.S. 304, 317, 321 (2002). Based on the *Briseno* factors, the court determined that the defendant had failed to prove deficits in intellectual functioning and adaptive functioning. *Moore I*, 137 S. Ct. at 1047.

[151] *Moore I*, 137 S. Ct. at 1047. The court stressed that the defendant displayed his adaptive strengths "by living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills at prison." *Id.* The court concluded that such strengths "undercut the significance of [the defendant's] adaptive limitations." *Id.*

[152] *Id.* Specifically, the court noted that the habeas court did not consider that the defendant's adaptive deficits were caused not by his deficits in intellectual functioning, but by other issues. *Id.* These issues included being abused as a child, having "undiagnosed learning disorders," transferring from numerous elementary schools, suffering "racially motivated harassment and violence" while at school, and consistently failing in school and using drugs. *See id.* (adopting the position that none of these issues constituted an intellectual disability rendering the defendant ineligible for the death penalty).

[153] *Id.* The court took the defendant's "significant improvement in prison" as confirmation "that his academic and social difficulties were not related to intellectual-functioning deficits." *Id.*

ther his intellectual functioning deficits or his traumatic past experiences, the latter of which would not qualify as an intellectual disability.[154]

In *Moore I*, the Supreme Court held that the Texas Court of Criminal Appeals had violated the Eighth Amendment and Supreme Court precedent by relying on outdated medical standards.[155] The Court found fault with the court's emphasis on the defendant's adaptive strengths to determine that he did not have an intellectual disability.[156] By doing so, the court explicitly contradicted the clinical community's guideline that the adaptive functioning inquiry focus on adaptive deficits.[157] The Court also took issue with the court's reliance on the defendant's improvement in adaptive functioning while he was imprisoned.[158] The clinical community explicitly warns against evaluating people's behaviors in a controlled setting rather than in a natural environment.[159] Furthermore, the Court determined that the court erroneously concluded that the defendant's adaptive functioning deficits could have been due to previous traumatic experiences rather than intellectual functioning deficits, despite medical guidance to the contrary.[160] The clinical community considers traumatic experiences as *risk factors* that may lead to intellectual disability, rather than a separate source of limitations.[161] In response to the various ways in which the court erred, the Court reiterated that although *Atkins* left it to the states to establish standards to determine intellectual disability for the purpose of death penalty eligibility, the states did not have unrestrained discretion and were required take the scientific community's "diagnostic framework" into account.[162]

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[154] *Id.* By failing to consider the defendant's previous traumatic experiences as alternative causes of his adaptive functioning deficits, the court concluded that the habeas court erred in its intellectual disability determination. *Id.*

[155] *Id.* at 1048, 1049.

[156] *Id.* at 1050.

[157] *Id.* The eleventh edition of the AAIDD's classification system manual (*AAIDD-11*) specifies that "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." *Id.* (quoting ROBERT L. SCHALOCK ET AL., AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 47 (11th ed. 2010) [hereinafter AAIDD-11]). The *DSM-5* instructs that the deficit-centered adaptive functioning inquiry is satisfied when there are "deficits in only one of the three adaptive-skills domains." *Id.* (citing DSM-5, *supra* note 29, at 33, 38).

[158] *Id.*

[159] *Id.* The scientific community instructs that changes in behavior occurring in controlled settings, such as a prison, are unreliable for diagnostic purposes because such settings are tightly regulated and are not conducive toward assessment of adaptive functioning. DSM-5, *supra* note 29, at 38; *see Moore I*, 137 S. Ct. at 1050 (noting that the diagnostic frameworks caution clinicians to not rely on behavior-related data collected from controlled settings).

[160] *Moore I*, 137 S. Ct. at 1051.

[161] *Id.* The Court indicated that the court misconstrued the role of traumatic experiences for clinical diagnoses. *Id.* ("Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination.").

[162] *Id.* The Supreme Court recognized that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Id.* at 1049. The Court acknowl-

The Court in *Moore I* also held that the court's reliance on the *Briseno* factors violated the Eighth Amendment and prior Court precedent.[163] The Court pointed out that the court incorrectly considered Texas citizens' potential perception that a defendant with a mild intellectual disability should still receive the death penalty when creating the *Briseno* factors.[164] The Court emphasized that *Atkins* prohibits states from executing anyone who qualifies as having an intellectual disability, regardless of public opinion.[165] Moreover, the Court found that the *Briseno* factors themselves inappropriately promoted a perception of intellectual disability that was not grounded in expert knowledge.[166] Instead, the Court indicated, state standards of intellectual disability should mirror the clinical profession's efforts to resist stereotypes about individuals with intellectual disabilities.[167] Thus, the Court vacated the court's judgment and remanded the case.[168]

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edged, however, that the Court's precedent does not "license disregard of current medical standards." *Id.* Rather, if the medical community adjusts its standards of intellectual disability, courts' analyses must also adjust to conform to those updates. Alexander H. Updegrove, Michael S. Vaughn & Rolando V. del Carmen, *Intellectual Disability in Capital Cases: Adjusting State Statutes After* Moore v. Texas, 32 NOTRE DAME J.L. ETHICS, & PUB. POL'Y 527, 541 (2018).

[163] *Moore I*, 137 S. Ct. at 1048, 1053. Additionally, the Court took issue with Texas courts' tendency to "appl[y] current medical standards for diagnosing intellectual disability in other contexts, yet cling[] to superseded standards when an individual's life is at stake." *Id.* at 1052. To determine intellectual disability in the death penalty context, Texas courts often applied the outdated *Briseno* factors, whereas the juvenile justice system and education system applies current medical standards. *See id.* (observing that Texas courts instruct the juvenile justice system to determine whether a juvenile has an intellectual disability "based on 'the latest edition of the DSM'" (citing 37 TEX. ADMIN. CODE § 380.8751(e)(3) (2016))). Texas Administrative Code § 380.8751(e)(3) provides methods by which the state's Juvenile Justice Department is to assess juveniles for "specialized treatment," including for intellectual disability. 37 ADMIN. § 380.8751(e)(3).

[164] *Moore I*, 137 S. Ct. at 1051. The Court emphasized that the *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed" despite the prohibition on capital punishment for such individuals. *Id.* (quoting Hall v. Florida, 572 U.S. 701, 704 (2014)).

[165] *Id.* The Court declared that "[m]ild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities." *Id.*

[166] *Id.* The Court commented that in *Briseno*, the court advocated for a nonscientific understanding of intellectual disability due to the court's skepticism that the scientific community's standards of intellectual disability were "exceedingly subjective." *Id.* (quoting *Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), *abrogated by Moore I*, 137 S. Ct. 1039). The Court was particularly concerned about the first *Briseno* factor, regarding the opinions of those most familiar with the defendant's adaptive skills and deficits, because those familiar with the defendant would base their opinions on stereotypes of intellectual disability rather than clinical standards. *Id.* at 1051–52. The Court was also troubled that the court placed "undue emphasis on adaptive strengths" and interpreted "risk factors for intellectual disability" as indicative that the defendant did not have an intellectual disability. *Id.* at 1052 n.9.

[167] *See id.* at 1052 ("Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.").

[168] *Id.* at 1053.

D. Moore II*: Using Adaptive Deficits Rather Than Strengths to Measure Adaptive Functioning*

In 2019, in *Moore II,* the Supreme Court once again assessed the Texas Court of Criminal Appeals' methods of determining whether a defendant had an intellectual disability rendering him ineligible for the death penalty.[169] Following *Moore I*, the court reconsidered the defendant's appeal, and, even after claiming to discard the *Briseno* factors and relying on current clinical standards, found once again that the defendant had failed to prove that he had an intellectual disability.[170] Following this decision, the defendant petitioned for certiorari, arguing that evidence in the trial court record reflected his intellectual disability.[171]

On review, the Supreme Court detailed how the lower court essentially repeated the analysis that the Court had rejected in *Moore I*.[172] Specifically, the court once again focused improperly on the defendant's adaptive skills rather

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[169] Moore v. Texas (*Moore II*), 139 S. Ct. 666, 667 (2019) (per curiam).

[170] *Id.* at 670. The court declined to find that the defendant had an intellectual disability despite the abundance of evidence from the defendant's family, previous attorneys, and court-appointed mental health professionals supporting a finding of intellectual disability. *See id.* at 667–68 (detailing the evidence presented at trial of the defendant's condition, including trouble with telling time, difficulty writing, and dropping out of school, that led the trial court to find that the defendant had an intellectual disability). The trial court noted that the defendant had significant limitations in intellectual functioning and adaptive functioning when he was young. *Moore I*, 137 S. Ct at 1045. Additionally, the defendant was unable to grasp the concept of time, such as days and seasons, when he was thirteen years old. *Id.* At that age, the defendant could not tell time, understand units of measurement, or comprehend the relationship between subtraction and addition. *Id.* While the defendant was in school, he was unable to follow lessons because he could not read or write at the necessary level. *Id.* The defendant's teachers often removed him from class, instructing him to draw pictures instead. *Id.* Many people—including the defendant's classmates, teachers, and own father—branded him as "stupid" because of his limitations. *Id.* The defendant ultimately dropped out from school after he failed the entire ninth grade. *Id.* "Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning." *Id.*

[171] *Moore II*, 139 S. Ct. at 670. Even the prosecutor agreed that the defendant had an intellectual disability and should not be executed. *Id.* (citing Brief in Opposition at 9, *Moore*, 139 S. Ct. 666 (No. 18-443)). Additionally, the American Psychological Association (APA), American Bar Association, and concerned individuals submitted briefs in support of the defendant and prosecutor. *Id.* The Attorney General of Texas, however, wrote to the Supreme Court opposing the defendant's petition. *Id.*

[172] *Id.* The court's decision was inconsistent with the Court's decision in *Moore I* for two reasons. *Id.*; *Moore I*, 137 S. Ct. at 1048, 1053. First, the court employed the same analysis that the Court had previously rejected in *Moore I*. *Compare Moore I*, 137 S. Ct. at 1048, 1053 (holding that the court's intellectual disability inquiry was improper because it relied on outdated medical standards and the *Briseno* factors), *with Moore II*, 139 S. Ct. at 670 (reviewing the court's analysis using outdated medical standards and the *Briseno* factors). Second, the court's conclusion that the defendant did not have an intellectual disability was largely dependent on its use of the previously rejected analysis, and thus its conclusion could not be separated from the improper analysis. *Compare Moore I*, 137 S. Ct. at 1048, 1053 (evaluating the court's finding that the defendant was eligible for the death penalty, which was based on application of outdated medical standards and the *Briseno* factors), *with Moore II*, 139 S. Ct. at 670 (holding that the court's conclusion that the defendant was eligible for the death penalty was predicated upon utilizing outdated medical standards and the *Briseno* factors).

than his deficits.[173] Disregarding the defendant's adaptive deficits, the court inadequately referenced the defendant's *pro se* papers and comprehensible testimony to support the ill-founded conclusion that the defendant was skilled in communication, reading, and writing.[174] Additionally, the court erroneously emphasized for a second time that the defendant's adaptive skills improved while he was in prison.[175] Finally, the court determined that the defendant failed to prove that his adaptive deficits were tied to intellectual deficits rather than to past trauma, ignoring the Supreme Court's declaration that requiring such a determination was impermissible.[176]

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[173] *Moore II*, 139 S. Ct. at 670. The court discussed the defendant's communication skills without reference to the evidence on which the trial court had relied. *Id.* Consequently, the court failed to consider, for example, that the defendant was unable to understand or respond to his family members even when they used his own name. *Id.* In addition, the court did not consider evidence supporting a finding of intellectual disability, including testimony that the defendant was required to draw pictures in school while the other students read, and that the defendant could barely read at a second-grade level when he was in sixth grade. *Id.* at 670–71.

[174] *Id.* at 671. Although pro se papers and coherent testimony do weigh in support of a finding that the defendant did not have an intellectual disability, the Supreme Court took issue with the court's failure to consider that the defendant had help from others to produce those papers. *Id.* The court did not discuss whether the defendant wrote his pro se papers without assistance. *Id.* Instead, the court concluded that "[e]ven if other inmates 'composed' [the defendant's pro se] papers . . . [the defendant's] 'ability to copy such documents by hand' was 'within the realm of only a few [individuals with an intellectual disability].'" *Id.* (quoting *Ex parte* Moore (*Ex parte* Moore II), 548 S.W.3d 522, 565 (Tex. Crim. App. 2018), *rev'd*, *Moore II*, 139 S. Ct. 666). Additionally, although the court recognized that the defendant often had the assistance of a lawyer in court proceedings, the court emphasized that the defendant was able to "read letters into the record 'without any apparent difficulty,'" identifying one proceeding without any assistance. *Id.* (quoting *Ex parte Moore II*, 548 S.W.3d at 564 & n.95). Because the court's analysis of the defendant's pro se papers and testimony without legal assistance was incomplete, the Court determined that such evidence was not convincing enough to support a conclusion that the defendant did not have an intellectual disability. *Id.*

[175] *Id.*; *see supra* note 159 and accompanying text (explaining that professionals caution against assessing intellectual disability using behavior observed in controlled settings, such as prisons). The court determined that the defendant had mastered elementary math skills based on the defendant's ability to purchase items at the prison commissary on his own. *Moore II*, 139 S. Ct. at 671 (citing *Ex parte Moore II*, 548 S.W.3d at 566–69). In addition, the court concluded that the defendant demonstrated leadership skills in prison because he had refused "'to mop up some spilled oatmeal,' shave, get a haircut, or sit down." *Id.* (quoting *Ex parte Moore II*, 548 S.W.3d at 570–71 & n.149). Significantly, the court found that the defendant had improved his reading and writing skills by writing correspondences in prison. *Id.* (citing *Ex parte Moore II*, 548 S.W.3d at 565). In *Moore II*, the Supreme Court emphasized that "[t]he length and detail of the [Appeals] court's discussion on these points [was] difficult to square with [the Court's previous] caution against relying on prison-based development." *Id.*

[176] *Moore II*, 139 S. Ct. at 671. The Court noted that requiring defendants to demonstrate a connection between observed adaptive deficits and intellectual deficits "departed from clinical practice." *See id.* (quoting *Ex parte* Moore (*Ex parte* Moore I), 470 S.W.3d 481 (Tex. Crim. App. 2015), *vacated*, *Moore I*, 137 S. Ct. 1039) (explaining that it was unnecessary for the defendant to differentiate between the problems with his social behavior when he was younger as resulting from an intellectual disability and not from "emotional problems")). Moreover, the Court emphasized that the APA has "explained that a personality disorder or mental-health issue is 'not evidence that a person does not also have an intellectual disability.'" *Id.* (quoting *Moore I*, 137 S. Ct. at 1051).

Despite the Court's previous ruling, the court covertly and improperly employed the *Briseno* factors, such as planning ahead, having rational communications with others, and improving one's behavior in prison.[177] According to the court, the defendant's crime demonstrated premeditation incongruous with a finding of intellectual disability.[178] Additionally, the court claimed that the defendant's testimony and pro se pleadings confirmed that he had the ability to provide rational and coherent responses to questions.[179] The court once again cited the defendant's time in prison as proof that the defendant demonstrated leadership skills.[180] Admittedly, health care professionals may ask questions similar to the court's analysis of the defendant's abilities upon remand.[181] Nevertheless, the substance and style of the court's conclusions, the Supreme

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[177] *Id.*

[178] *Id.* at 667, 671. The defendant used a wig and a weapon during the crime and then ran from the scene. *Id.* at 671. The state's expert witness testified that these actions demonstrated that the defendant had the capacity to determine that he needed a disguise and to flee from law enforcement. *Ex parte Moore II*, 548 S.W.3d at 572. The court noted, however, that the defendant had limited executive functioning capacity, including defects in "planning, strategizing, priority setting, and cognitive flexibility," based on a test that evaluated his ability to create plans. *Id.* at 572. In fact, the professional who assessed the defendant's planning abilities concluded that he "lived so well in prison because [prison] 'leaves little room for independent decision-making' and that practical food, shelter, job, and bill-paying activities outside of prison 'would in all likelihood perplex him.'" *Id.* at 572 n.160. Nevertheless, the court found that the defendant's use of a wig, concealment of his weapon, and flight from the authorities were indicative of a plan to execute the commission of the crime. *Id.* at 572. Such reasoning by the court mirrored the seventh *Briseno* factor, prompting factfinders to consider whether the defendant's capital offense was complex and necessitated planning in advance. *Moore II*, 139 S. Ct. at 671 (citing *Ex parte* Briseno, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017)).

[179] *Moore II*, 139 S. Ct. at 671. For example, the state's expert witness testified that the defendant responded adequately to questions at trial and used abstract thought by providing answers in support of his legal defense. *Ex parte Moore II*, 548 S.W.3d at 564. Additionally, the defendant filed a pro se motion to request a new appellate attorney and presented exhibits to the court, including his written letters to his attorneys, "several of which he read aloud at the hearing without any apparent difficulty." *Id.* Therefore, the court determined that the defendant "responded rationally and coherently to questions." *Id.* This analysis resembled too closely the fifth *Briseno* factor, which encouraged factfinders to decide whether the defendant's responses to oral or written questions were rational and intelligible, or rambling. *Moore II*, 139 S. Ct. at 671 (citing *Ex parte Briseno*, 135 S.W.3d at 8).

[180] *Moore II*, 139 S. Ct. at 672. The defendant refused to comply with certain orders while he was in prison. *See Ex parte Moore II*, 548 S.W.3d at 570–71 (detailing the defendant's refusal to cooperate in prison). Ignoring both the Court's admonition and professionals' advice against relying on individuals' behaviors in controlled settings, the court interpreted the defendant's noncompliance as evidence that the defendant "influences others and stands up to authority." *Id*. As with the court's other lines of reasoning, this paralleled the third *Briseno* factor that led factfinders to establish whether the defendant had displayed qualities of leadership, or was a passive follower. *Moore II*, 139 S. Ct. at 672 (citing *Ex parte Briseno*, 135 S.W.3d at 8).

[181] *Moore II*, 139 S. Ct. at 672. For example, clinicians may ask questions regarding how an individual complies with rules and laws to reveal the strengths and limitations of that individual's social skills. *Id.*

Court decided, were too similar to the *Briseno* factors to go unnoticed.[182] Moreover, although the court's reasoning in *Moore II* differed in some degree from its analysis in *Moore I*, the second opinion erroneously relied yet again on stereotypes about intellectual disabilities and placed unwarranted emphasis on adaptive skills.[183]

III. Expanding the Scope of Protections for Defendants with Intellectual Disabilities

Numerous post-*Atkins v. Virginia* cases highlight additional guidelines for states to consider when interpreting their respective intellectual disability and death penalty statutes.[184] In 2014, in *Hall v. Florida*, the Supreme Court concluded that it is impermissible for states to require defendants to provide evidence of a particular IQ score before being permitted to offer any additional evidence of intellectual disability.[185] Before the Supreme Court clarified how

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[182] *See id.* ("[T]he similarity . . . suggests that *Briseno* continues to 'pervasively infec[t] the [courts'] analysis.'" (quoting Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1053 (2017)).

[183] *Id.* at 670, 672; *see also id.* at 672 (Roberts, C.J., concurring) (commenting that, after dissenting in *Moore I*, Justice Roberts now concurs with the Court that a court's emphasis on adaptive strengths rather than weaknesses is impermissible). For example, the court in *Ex parte Moore II* found that because the defendant had a girlfriend and a job, the defendant likely did not have an intellectual disability. 548 S.W.3d at 570–71. This conclusion is in direct conflict with the scientific community's warning against reliance on stereotypes of intellectual disability. *See Moore II*, 139 S. Ct. at 672 (contrasting "the 'incorrect stereotypes' that persons with intellectual disability 'never have friends, jobs, spouses, or children" with the statistic that "between nine and forty percent of persons with intellectual disability have some form of paid employment" (first quoting AAIDD-11, *supra* note 157, at 151; then quoting Brief for American Psychological Ass'n et al., as Amici Curiae Supporting Petitioner, *Moore II*, 139 S. Ct. 666 (2019) (No. 15-797), 2016 WL 4151451). In light of this inapposite stereotyping and the court's other improper analyses, the Court found that the defendant did, in fact, show that he had an intellectual disability. *Id.* Moore was released from prison on August 6, 2020, after being granted parole that June. *Intellectually Disabled Man Who Spent 40 Years on Death Row Released from Prison*, NBC DALL.-FORT WORTH (Sept. 30, 2020), https://www.nbcdfw.com/news/local/texas-news/intellectually-disabled-man-who-spent-40-years-on-death-row-released-from-prison/2452888/ [https://perma.cc/9TG8-NPPB].

[184] *See* Moore v. Texas (*Moore II*), 139 S. Ct. 666, 670 (2019) (per curiam) (providing states with additional guidance regarding the adaptive deficits prong of intellectual functioning); Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1050 (2017) (instructing that statutory definitions of intellectual disability must conform to current medical standards); Hall v. Florida, 572 U.S. 701, 711–12 (2014) (supplying states with guidance regarding IQ scores and intellectual functioning); *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (creating a judicial standard of intellectual disability that resulted in subsequent clarification of proper definitions of intellectual disability), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017) .

[185] *Hall*, 572 U.S. at 711–12, 721. In *Hall*, the Supreme Court addressed the lack of consistency among state intellectual disability standards as well as how states might incorporate nonclinical standards of intellectual disability in their definition or interpretation of intellectual disability. *See id.* at 712 (explaining that conditioning a defendant's opportunity to offer additional evidence of an intellectual disability upon a specific IQ score goes against the clinical understanding that a determination of intellectual disability is multifaceted and must include a measurement of both intellectual functioning and adaptive functioning).

states may use IQ scores to determine death penalty eligibility, in 2004, the Texas Court of Criminal Appeals in *Ex parte Briseno* utilized its *Atkins*-approved state discretion to advance seven evidentiary factors for the intellectual disability inquiry.[186] Thus, the court in *Ex parte Briseno* set the stage for the Supreme Court in 2017, in *Moore v. Texas* (*Moore I*), to conclude that although states have discretion to evaluate whether a defendant has an intellectual disability, no state may rely on a standard that does not conform to current medical standards.[187] Additionally, the Court stressed that the factfinder may not rely on stereotypes to determine whether a defendant has an intellectual disability.[188] Shortly after, in 2019, the Supreme Court emphasized in *Moore v. Texas* (*Moore II*) that state courts' analyses of adaptive functioning must focus on intellectual deficits rather than strengths.[189]

A uniform model rule is needed because states continue to avoid using definitions of intellectual disability suited to current medical standards and, as a result, courts continue to find that defendants who likely have intellectual disabilities are eligible for the death penalty.[190] Compared to the current state

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[186] *Ex parte Briseno*, 135 S.W.3d at 8–9. In *Ex parte Briseno*, the Texas Court of Criminal Appeals promulgated seven evidentiary factors to identify intellectual disability based on a lay person's understanding of the disability and moral culpability rather than a professional's understanding of these concepts as mandated by *Atkins*. *Id.* at 6. To the court, the role of the jury as a factfinder was more dispositive on the issue of intellectual disability than the expertise of psychiatrists and psychologists. *See id.* at 9 (concluding that a finding of death penalty eligibility depends on the jury's evaluation of the credibility of all evidence, including expert testimony).

[187] *Moore I*, 137 S. Ct. at 1048, 1049. The Supreme Court in *Moore I* indicated that the *AAIDD* and *DSM* are not only useful clinical guidance for professionals to diagnose patients, but are also necessary instructions to courts when determining whether a defendant has an intellectual disability and is therefore ineligible for the death penalty. *See id.* at 1050 (quoting AAIDD-11, *supra* note 157, at 47) (citing the DSM-5, *supra* note 29, at 33, 38) (instructing that the adaptive functioning prong of the intellectual disability inquiry centers around deficits, and that deficits in "one of the three adaptive-skills domains," conceptual, social, or practical, "suffice to show adaptive deficits").

[188] *Id.* at 1052. The Court singled out two stereotypes in particular as improper metrics to measure intellectual disability. *Id.* at 1051–52. First, the misconception that an individual does not have an intellectual disability if they have sufficient adaptive skills. *Id.* at 1052 n.9. Second, the incorrect idea that an individual's friends and family are qualified and able to judge whether that individual has an intellectual disability. *Id.* at 1051–52. The Court took issue with stereotypes of intellectual disability enshrined in the Texas judicial standard because reliance on such stereotypes increases the likelihood that a defendant with an intellectual disability will be found eligible for the death penalty, in violation of the Constitution. *See id.* at 1051–52 & n.9 (pointing out the various stereotypes of intellectual disability that the court in *Ex parte Briseno* relied on to determine the defendant's eligibility for the death penalty).

[189] *Moore II*, 139 S. Ct. at 670. The Court's decision in *Moore II* demonstrates that some states may require explicit instructions from courts for determining defendants' death penalty eligibility based on intellectual disability. *See id.* (reviewing the Texas Court of Criminal Appeals' second decision that the defendant was eligible for the death penalty because he did not qualify as having an intellectual disability).

[190] *See, e.g.*, *id.* (instructing that adaptive deficits, and not adaptive strengths, should be the focus of evaluation for determining a defendant's adaptive functioning); *Moore I*, 137 S. Ct. at 1049 (clarifying that even though states have discretion to define intellectual disability, current medical standards

statutes and rules, a uniform model rule would provide more comprehensive guidance for state courts to determine whether a defendant is eligible for the death penalty.[191] Section A suggests general guidelines that states should incorporate into their statutes.[192] Section B proposes rules to govern how states assess a defendant's intellectual functioning.[193] Section C offers standards to regulate how states evaluate a defendant's adaptive functioning.[194] Finally, Section D recommends a rule regarding the age by which states require defendants' intellectual disabilities to have developed.[195]

A. General Guidelines

As the scientific community continues to conduct research and improve its diagnostic frameworks, medical standards of intellectual disability evolve.[196] Therefore, it is imperative that states rely on the most current medical standards to determine whether a defendant has an intellectual disability and is consequently ineligible for the death penalty.[197] In doing so, states will not only avoid violating the Eighth Amendment and Supreme Court precedent, but also

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must be at the core of all state definitions); *Hall*, 572 U.S. at 711–12, 721 (explaining that states may not bar defendants from presenting evidence of intellectual disability based on the absence of a specific IQ score); *Ex parte Briseno*, 135 S.W.3d at 8–9 (advancing seven nonscientific factors to assess whether a defendant has an intellectual disability). Kentucky courts, for example, continued to determine death penalty eligibility based on whether defendants had IQ scores no higher than seventy as recently as 2018, despite the Supreme Court's ruling four years prior in *Hall* that such a practice is unconstitutional. *See* Woodall v. Commonwealth, 563 S.W.3d 1, 2, 3, (2018) (concluding that Kentucky's statutory definition of intellectual disability was medically outdated and therefore unconstitutional); *Hall*, 572 U.S. at 710, 711 (setting forth that courts may not use fixed IQ score cutoffs in the death penalty eligibility inquiry).

[191] *See supra* notes 49–83 and accompanying text (discussing the numerous ways in which states differ in their definitions and interpretations of intellectual disability).

[192] *See infra* notes 196–201 and accompanying text.

[193] *See infra* notes 202–209 and accompanying text.

[194] *See infra* notes 210–216 and accompanying text.

[195] *See infra* notes 217–221 and accompanying text.

[196] Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1048 (2017). As the Court in *Moore I* suggested, as medical standards change, so too should state standards for determining intellectual disability. *See id.* at 1049 (noting that states violate the Eighth Amendment when they "disregard[] established medical practice[s]" (quoting Hall v. Florida, 572 U.S. 701, 712 (2014))).

[197] *See* Updegrove et al., *supra* note 162, at 541 (suggesting that a state standard violates Supreme Court precedent if it operates outside of "the medical community['s] [consensus] that clinical understandings of psychological disorders have advanced enough to warrant revisions to the old manual"). In his dissenting opinion in *Hall*, Justice Alito claimed that "'the medical community's current medical standards' function as a 'constraint' on states' freedom to define intellectual disability." *Id.* at 541–42 (quoting *Hall*, 572 U.S. at 731–32 (Alito, J., dissenting)). Rather than constrain states, however, current medical standards serve to direct states toward the proper clinical analysis for determining a defendant's eligibility for the death penalty based on intellectual disability. *Compare Hall*, 572 U.S. at 731–32 (Alito, J., dissenting) (characterizing current medical standards as a limitation upon states), *with Moore I*, 137 S. Ct. at 1049 (recognizing that the Court in *Atkins* did not give states the power to "disregard . . . current medical standards").

reduce the risk of unjustifiably sentencing defendants with intellectual disabilities to death.[198] Because even the scientific community has not come to a consensus regarding the definition of intellectual disability, states should employ a combination of the AAIDD and *DSM-5* definitions to govern state courts' determinations.[199] States should stipulate, however, that their statutes are subject to revision in accordance with current medical standards because, as the AAIDD and American Psychiatric Association (APA-MD) release new editions of their guidelines to diagnose intellectual functioning, state standards will also have to change.[200] With these alterations reflected in each state's definition of intellectual disability, defendants will be afforded greater protections because the Court will then recognize these guidelines as part of the national consensus.[201]

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[198] *See Moore I*, 137 S. Ct. at 1048, 1049 (noting that states adhere to the Eighth Amendment and Court precedent by employing current medical standards of intellectual disability). Under these proposed guidelines and rules, the defendants in *Ex parte Briseno*, *Hall*, and *Moore I* and *Moore II* each would not have had to undergo as much litigation to convince their respective courts and factfinders that they had intellectual disabilities and were therefore ineligible for the death penalty. *See id.* (resolving a defendant's death penalty eligibility); Moore v. Texas (*Moore II*), 139 S. Ct. 666, 670 (2019) (per curiam) (addressing a defendant's death penalty eligibility); *Hall*, 572 U.S. 701, 707 (reviewing a defendant's death penalty eligibility); *Ex parte* Briseno, 135 S.W.3d 1, 18 (Tex. Crim. App. 2004) (finding the defendant eligible for the death penalty), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017).

[199] *See* Updegrove et al., *supra* note 162, at 542 (noting that in *Moore I*, the Supreme Court "reaffirmed the position that the DSM-5 and AAIDD-11 are the 'leading' sources for defining intellectual disability" (quoting *Moore I*, 137 S. Ct. at 1044)). *Compare Definition of Intellectual Disability*, *supra* note 28 (defining intellectual disability as significant limitations in intellectual and adaptive functioning that develop "during the developmental period, which is" by twenty-two years), *with* DSM-5, *supra* note 29, at 33 (defining intellectual disability as significant limitations in intellectual and adaptive functioning that manifest during the developmental period).

[200] *See Moore I*, 137 S. Ct. at 1052 (noting that the Texas Court of Criminal Appeals erroneously relied on outdated medical standards to the detriment of the defendant); Updegrove et al., *supra* note 162, at 542 (proposing that states ensure compliance with the Supreme Court's decision in *Moore I* by relying on the most recent versions of the *AAIDD* and *DSM*). As of this Note's publication the most recent version of the *AAIDD* was the twelfth version (*AAIDD-12*), announced in early 2021. *AAIDD Announces the Publication of the 12th Edition of Its Manual*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES (Jan. 15, 2021), https://www.aaidd.org/news-policy/news/2021/01/15/aaidd-announces-the-publication-of-the-12th-edition-of-its-manual [https://perma.cc/84A4-9AF7]. The most recent *DSM*, the fifth version (*DSM-5*), was released in 2013. DSM-5, *supra* note 29.

[201] *See* Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (declining to create a categorical exception from the death penalty for defendants with intellectual disabilities because there was not "sufficient evidence . . . of a national consensus," as only two state legislatures had eliminated the death penalty for this class of people), *abrogated by Atkins* 536 U.S. 304. If each state allowing the death penalty were to include these guidelines in its definition of intellectual disability, it would demonstrate to the Supreme Court that society values such guidelines. *See id*. at 334, 335 (noting that "legislation . . . is an objective indicator of contemporary values").

B. Proposed Standards for Evaluating Intellectual Functioning

Providing examples of specific deficits in intellectual functioning abilities will allow courts to interpret their state's definition of intellectual functioning accurately without primarily relying on IQ scores.[202] Thus, states should specify that significantly subaverage intellectual functioning may include deficiencies in areas such as evaluating problems to arrive at solutions, forethought, thinking about complex ideas in novel ways, making decisions, and experiential learning in school.[203] Because the scientific community considers IQ scores as relevant to intellectual functioning, IQ scores may comprise part of courts' evaluations, but not to the exclusion of other indicators.[204] Specifically, a range of IQ scores, rather than a discrete score, may indicate that a defendant has an intellectual disability.[205] An IQ score of seventy or below should create a presumption of intellectual disability because the scientific community agrees that such a low score can establish significantly subaverage intellectual functioning on its own.[206] An IQ score above seventy should not, however, create a presumption that the defendant does not have an intellectual disability.[207] Rather, courts must pay particular attention to defendants' adaptive defi-

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[202] *See* Hall v. Florida, 572 U.S. 701, 711–12, 721 (2014) (prohibiting Florida courts from narrowly interpreting the state's statute to require defendants to present evidence of an IQ score below a particular value taken from a single test prior to presenting other evidence of intellectual disability).

[203] *See* LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2021) (identifying "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience" as features of intellectual functioning). The majority of states—twenty-four—do not specify in what ways significant deficits in intellectual functioning may manifest in a defendant's behavior. *See supra* notes 52 accompanying text (listing statutes that only generally address intellectual functioning).

[204] *See supra* notes 59–67 and accompanying text (surveying states statutes that incorporate IQ scores into their definitions of intellectual disability); *Definition of Intellectual Disability*, *supra* note 28 ("One way to measure intellectual functioning is an IQ test."); *Diagnostic Criteria for Intellectual Disabilities: DSM-5 Criteria*, *supra* note 30 (explaining that IQ tests measure mental processes such as "[p]roblem solving" and "[a]bstract thinking"). *But see infra* note 209 and accompanying text (elaborating on why a single IQ score is not the best indicator of deficits in intellectual functioning or intellectual disability in general).

[205] *See Hall*, 572 U.S. at 712 ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." (citing DAVID WECHSLER, THE MEASUREMENT OF ADULT INTELLIGENCE 133 (3d ed. 1994))).

[206] *See* NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 61, at 169 (explaining that intellectual disability is defined in part by significant limitations in intellectual functioning, which can be demonstrated by an IQ score of seventy or below). Such a provision mirrors Nebraska's current approach to intellectual disability and IQ scores. *See* NEB. REV. STAT. § 28-105.01(3) (2021) (instructing that courts are to presume that a defendant with an IQ score of seventy or below has an intellectual disability). Additionally, such a presumption reflects the current medical understanding of IQ scores around seventy. *See Definition of Intellectual Disability*, *supra* note 28 (maintaining that an IQ score around seventy suggests presence of an intellectual disability); *Diagnostic Criteria for Intellectual Disabilities: DSM-5 Criteria*, *supra* note 30 (same).

[207] *See Hall*, 572 U.S. at 711–12, 721 (rejecting Florida's statutory scheme, which prevented defendants from presenting evidence of an intellectual disability if they had an IQ score of seventy or above). The Court emphasized that IQ scores above seventy do not create a presumption against intel-

cits if they have IQ scores of seventy or above.[208] Keeping the usefulness of IQ scores in mind, it is essential that courts do not place undue emphasis on a defendant's IQ score because a defendant's executive functioning—and not IQ score—is the best indicator of their intellectual functioning.[209]

C. Proposed Standards for Evaluating Adaptive Functioning

Providing examples of adaptive skills in which defendants may have deficiencies will benefit states and defendants alike by steering courts away from stereotypes about intellectual disability, such as those upon which the Texas Court of Criminal Appeals erroneously relied in *Ex parte Briseno*.[210] Adaptive skills may include communicating with others, functioning independently, and living safely.[211] Although these examples are not exhaustive, emphasizing in

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lectual disability, and incorporating this into statute will enable compliance with current medical standards, which evaluate an individual's deficits in intellectual and adaptive functioning regardless of IQ scores. *Id.* at 712.

[208] *See id.* at 712 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score") (quoting DSM-5, *supra* note 29, at 38). Even if a defendant has a slightly higher IQ score than is typical of most defendants with intellectual disabilities, current medical standards require that courts continue the intellectual disability inquiry. *Id.* A defendant with a score closer to the average score could still have significant deficits in adaptive functioning, which would then result in a proper diagnosis of an intellectual disability. *Id.*

[209] *See* Nancy Haydt, Stephen Greenspan & Bhushan S. Agharkar, A*dvantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, 82 UMKC L. REV. 359, 367 (2014) (advocating for reduced judicial reliance on IQ scores as indicative of intellectual disability because, as the *DSM-5* advises, executive functioning is a more reliable gauge of intellectual functioning than IQ). Executive functioning is reflected in one's ability to use forethought, remain focused, and accomplish tasks in daily life. *See Executive Function & Self-Regulation*, HARV. UNIV. CTR. ON THE DEVELOPING CHILD, https://developingchild.harvard.edu/science/key-concepts/executive-function/ [https://perma.cc/48J8-9ZAF] (analogizing executive functioning to air traffic control systems' oversight of the flight schedules of multiple planes at once). IQ is not a particularly reliable signal of whether someone has an intellectual disability because although IQ scores may reveal how well an individual can think about concepts, an IQ score may fail to accurately represent an individual's ability to reason and navigate the real world. *See* DSM-5, *supra* note 29, at 37 (providing an example of an individual who has an IQ score greater than seventy but whose overall functioning is tantamount to having an IQ score less than seventy due to particularly extreme impairments in adaptive functioning).

[210] *See* Moore v. Texas (*Moore I*), 137 S. Ct. 1039, 1050, 1051–52, 1052 n.9 (2017) (recounting the court's improper reliance on stereotypes present in the *Briseno* factors, including the improper assumption that an individual with sufficient adaptive skills does not have an intellectual disability, and that friends and family are in a position to determine whether a person has an intellectual disability).

[211] *See supra* note 72 and accompanying text (listing statutes that specify "communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety" as relevant adaptive skills areas). The AAIDD also identifies these adaptive behaviors as potential areas of limitation for individuals with intellectual disabilities. *Definition of Intellectual Disability*, *supra* note 28. It should be unnecessary for defendants to present evidence of deficits in more than one of the three adaptive functioning domains, as that is not an area of concern in the medical community. *See id.* (declining to set a minimum requirement

state statutes that courts may not focus on defendants' adaptive strengths to counterbalance the demonstrated deficits will avoid unintentional and unconstitutional results.[212] Similarly, states may not permit prosecutors to undermine the relationship between defendants' intellectual and adaptive deficits by arguing that certain adaptive deficits were actually caused by the defendant's past traumatic experiences.[213] Additionally, states must prohibit courts from citing improvement in a defendant's adaptive functioning while in prison, or any controlled setting, as evidence of normal functioning without corroborating information.[214] Finally, it is important for courts to consider that clinicians may have difficulties in accurately assessing whether incarcerated defendants have intellectual disabilities because of the controlled setting.[215] Therefore, clinicians should be permitted to evaluate retroactively defendants' adaptive functioning when in natural environments.[216]

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of areas in which patients must demonstrate adaptive deficits); DSM-5, *supra* note 29, at 33, 38 (providing that the adaptive functioning prong of the intellectual disability inquiry may be satisfied with proof of limitations in one domain). Rather, it is important for clinicians to obtain information about the patient's adaptive behavior from a variety of sources in order to make a comprehensive, individualized assessment of the patient. DSM-5, *supra* note 29, at 37.

[212] *See Moore I*, 137 S. Ct. at 1050 (holding that the lower court erred by overemphasizing the defendant's adaptive strengths to outweigh their weaknesses). Compared to adaptive strengths, adaptive deficits are more indicative of subaverage adaptive functioning. *Id.*; *see also* DSM-5, *supra* note 29, at 38 (specifying that the second prong of intellectual disability is satisfied when a patient has "*impaired*" adaptive functioning (emphasis added)).

[213] *See supra* note 154 (explaining that clinicians' analyses of patients' traumatic experiences supplement their intellectual disability evaluations, rather than conflict with or negate an intellectual disability diagnosis).

[214] *See Moore I*, 137 S. Ct. at 1050 (first citing SCHALOCK ET AL., *supra* note 157; then citing DSM-5, *supra* note 29, at 33, 38) (explaining that because it is difficult to accurately analyze changes in behavior that occur in controlled settings, clinical determinations of adaptive functioning in those settings are less reliable). In a controlled setting, it is unclear if a defendant's changed behavior is of their own accord or is a result of external factors. *See id.* (noting that it is difficult to accurately assess adaptive functioning in controlled settings, such as prisons, because there is minimal room for defendants to act independently). In court, additional assessments of adaptive behaviors occurring outside of a controlled setting must accompany any evidence that a defendant's adaptive functioning improved while in prison. *See* DSM-5, *supra* note 29, at 38 (suggesting that "corroborative information reflecting functioning outside those settings be obtained" by an evaluating professional).

[215] *See* Crowell, *supra* note 147, at 782 (commenting that adaptive functioning involves an assessment of how an individual behaves as a member of society and of a community). It is difficult to assess a defendant's adaptive functioning in a controlled setting such as a prison because the inquiry concerns "behaviors that an incarcerated person may be barred from doing," such as playing sports, acquiring hobbies, or cooking, "or may have no choice but to do," such as bathing. *Id.* Thus, "[t]he highly restrictive and regimented environment of death row simply does not easily allow for a realistic and comprehensive assessment of adaptive behavior." *Id.*

[216] *See* Stephen Greenspan & Harvey N. Switzky, WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 279, 290 (Harvey N. Switzky & Stephen Greenspan eds., 2006) (explaining that clinicians may retroactively evaluate individuals' adaptive functioning and that researchers have approved this method as a "legitimate practice" in a study in 2006). Completing an accurate retroactive evaluation of a defendant on death row is challenging because the clinician must interview more than one person who has had a close relationship with the defendant

D. Proposed Age at Onset of Intellectual Disability

Age at onset of intellectual disability is perhaps the most crucial prong of the intellectual disability inquiry.[217] If a defendant fails to satisfy the statutory age at onset requirement, a court will find that the defendant is eligible for the death penalty—even if the defendant has current deficits in intellectual and adaptive functioning.[218] State statutory definitions of intellectual disability should specify that defendants' deficits in intellectual and adaptive functioning must have originated during the developmental period, no later than twenty-two years old.[219] Additionally, states should allow for the retroactive evaluation for intellectual disability.[220] Rooting the age at onset of disability prong in the developmental period without requiring that defendants were diagnosed before they were twenty-two years old offers the most protection for defendants with intellectual disabilities and aligns with current clinical understand-

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throughout the defendant's life, including when the defendant committed the crime and during the defendant's incarceration. *See id.* at 291 (suggesting that retroactive assessments are as reliable as contemporaneous evaluations if clinicians can speak with enough of these "adaptive informants").

[217] *See* Updegrove et al., *supra* note 162, at 558 tbl. 5 (setting forth a hypothetical in which individuals would have qualified for an intellectual disability diagnosis under recent editions of the *AAIDD* and *DSM* if not for "experiencing the onset of limitations in intellectual [and adaptive] functioning" outside of the statutory age requirement).

[218] *Id.* Because current state standards of age at onset of intellectual disability have five variations, there is a disparity among states in which a defendant with an intellectual disability may receive the death penalty in one jurisdiction even though the same defendant would be ineligible in another state. *See, e.g.*, OR. REV. STAT. § 427.005(10)(a) (2021) (setting the age at onset requirement as before eighteen years old); GA. CODE ANN. § 17-7-131(a)(2) (2021) (requiring a defendant's deficits to have manifested during the developmental period without specifying when the development period ends); ARK. CODE. ANN. § 5-4-618(a)(1)(A) (2021) (instructing that a defendant must offer evidence of deficits during the developmental period but before eighteen years); 50 PA. CONS. STAT. § 4102 (2021) (establishing the age at onset requirement as before twenty-two years); NEB. REV. STAT. § 28-105.01 (2021) (staying silent on by when a defendant's deficits must have developed).

[219] *See* SCHALOCK, *supra* note 35, at 4 (proposing that twenty-two years old is the proper age for the onset of disability prong because "recent research . . . has shown that important brain development continues into our 20s," or early adulthood); *see also Diagnostic Criteria for Intellectual Disabilities: DSM-5 Criteria*, *supra* note 30 (noting that the developmental period includes childhood and adolescence). Under current medical guidelines, there is no specific age at which adolescence definitively ends. *See* Canadian Paediatric Soc'y, *supra* note 30, at 577 ("Adolescence begins with the onset of physiologically normal puberty, and ends when an adult identity and behaviour are accepted. This period of development corresponds roughly to the period between the ages of 10 and 19 . . . .").

[220] *See* Crowell, *supra* note 147, at 783 (contending that because defendants with intellectual disabilities may not have evidence of exactly when their disabilities developed, courts may improperly find certain defendants eligible for the death penalty by prohibiting retroactive assessment); SCHALOCK, *supra* note 35, at 2 (explaining that retrospective evaluations help clinicians establish whether a patient had an undiagnosed intellectual disability during the developmental period). Many defendants did not have "the resources for proper identification and assessment" during childhood, and this lack of access resulted in never receiving a diagnosis. Crowell, *supra* note 147, at 783. Similarly, defendants' families may have been reluctant to obtain a diagnosis due to the negative beliefs that people associate with having an intellectual disability. *Id.* In addition, adults in defendants' lives may have attributed defendants' impaired behavior to trauma rather than to intellectual disability. *Id.*

ings of the developmental period.[221] These guidelines will enable courts to find accurately that defendants with significant impairments in intellectual and adaptive functioning are ineligible for the death penalty.[222]

CONCLUSION

Atkins v. Virginia is a landmark decision establishing a new category of defendants exempt from the death penalty under the Eighth Amendment. This case reflects a transformation in the way that people, state legislatures, and courts view intellectual disabilities in the United States. *Atkins* paved the way to greater protections for defendants with intellectual disabilities. Despite its positive impact, however, the Supreme Court created a conundrum in *Atkins* by giving states unguided discretion to determine whether a defendant has an intellectual disability, and is therefore ineligible for the death penalty. Cases following *Atkins*—such as *Ex parte Briseno*, *Hall v. Florida*, and *Moore v. Texas* (*Moore I*) and *Moore v. Texas* (*Moore II*)—demonstrate how variable state statutory definitions of intellectual disability and judicial standards fraught with nonclinical considerations allow some courts to issue death sentences to defendants who should have been found ineligible for the death penalty. As a solution, a uniform model rule would guide states toward accurately determining a defendant's eligibility for the death penalty. More importantly, a uniform model rule would prevent states from violating the Eighth Amendment and Supreme Court precedent, and erroneously sentencing defendants with intellectual disabilities to death.

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[221] *See* SCHALOCK, *supra* note 35, at 4 (observing that the clinical community agrees that intellectual disability manifests during the developmental period, but that there is disagreement regarding when the developmental period specifically ends); Crowell, *supra* note 147, at 783 (explaining that retroactive evaluations enable clinicians to examine a defendant's deficits when the defendant was an adolescent and when the defendant committed the offense).

[222] *See* SCHALOCK, *supra* note 35, at 4; *see* Crowell, *supra* note 147, at 783 (offering reasons why a defendant may not have been able to receive a diagnosis of intellectual disability during their developmental period).