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INTELLECTUAL DISABILITY IN CAPITAL CASES: ADJUSTING STATE STATUTES AFTER MOORE v. TEXAS

ABSTRACT

In Atkins v. Virginia *(2002), the U.S. Supreme Court ruled that the execution of intellectually disabled inmates violates the cruel and unusual punishment clause of the Eighth Amendment. Twelve years later in* Hall v. Florida *(2014), the Court revisited its* Atkins *decision to provide further clarification on how states should assess intellectual disability. This article examines* Moore v. Texas *(2017), the latest development in the Court's rulings on capital determinations of intellectual disability. It also reviews state statutes and court cases from the thirty-one death penalty states to determine how they comport with the Court's* Moore *ruling. These statutes and cases shed light on issues with respect to intellectual disability in capital trials that the Court has yet to address. The article concludes with model language to help states make their capital punishment protocols constitutional, so that the intellectually disabled remain free from execution*.

INTRODUCTION

In *Atkins v. Virginia*, the U.S. Supreme Court ruled that intellectually disabled individuals are protected from execution under the Eighth Amendment.[1] Although the Court issued a categorical exemption ***528** from execution, it declined to provide states guidance on how they should define intellectual disability.[2] In the absence of instruction, states introduced their own definitions through legislation and court cases,[3] with the resulting effect that an individual considered intellectually disabled in one state might not be considered intellectually disabled in another.[4] One practice states varied on was whether they included the standard error of measurement when calculating an individual's IQ in accordance with common practices in the psychological community. Thus, the Court revisited the issue of intellectual disability in *Hall v. Florida* and ruled that states must consider the standard error when assessing IQ.[5] Most recently, the Court addressed the question of whether states can define intellectual disability in a manner that is uninformed by the medical community or based on outdated understandings in *Moore v. Texas*.[6] In its decision, the Court ruled that states cannot contradict current clinical standards.[7]

This article begins by exploring the Court's rationale for exempting the intellectually disabled from execution in *Atkins* and the subsequent clarifications of this protection provided in *Hall* and *Moore*. Special attention is given to *Moore* because it is the Court's most recent explanation of the categorical ban first established in *Atkins*. The article then examines capital punishment statutes from the thirty-one death penalty states to investigate how well their definitions of intellectual disability comport with the *Moore* ruling.[8] It proposes a model statute that states can adopt to bring their definitions of intellectual

disability into compliance with the *Moore* decision. Finally, the article breaks down issues associated with identifying intellectual disability during capital trials that have yet to be addressed by the Court. The article concludes by suggesting language that states can incorporate into their ***529** statutes to shed light on these gray areas, ensuring that they are constitutionally protecting intellectually disabled individuals, as defined by the Court, from execution.

II. SUPREME COURT CASES ON INTELLECTUAL DISABILITY

A. Atkins v. Virginia *(2002)*

In the landmark case, *Atkins v. Virginia*, the U.S. Supreme Court concluded that intellectually disabled capital defendants bear "lesser culpability" for their actions.[9] The Court also recognized intellectually disabled individuals are especially at risk for delivering false confessions due to their limited understanding and suggestible nature, which frequently renders them "followers rather than leaders."[10] This vulnerability, combined with the "consistency of the direction of change" in states away from executing the intellectually disabled, led the Court to find the practice "cruel and unusual" under the Eighth Amendment.[11] The decision marked a significant shift away from the Court's previous ruling in *Penry v. Lynaugh* that the execution of intellectually disabled inmates did *not* violate the Eighth Amendment.[12] Instead of requiring states to follow a universal standard for defining intellectual disability, however, the *Atkins* Court gave states freedom to implement appropriate measures for protecting intellectually disabled individuals from execution.

Chief Justice Rehnquist dissented, arguing that only the (in)actions of legislators and death-qualified juries should be considered when determining whether an "across-the-board consensus" had developed against executing intellectually disabled inmates.[13] As he saw it, many state legislatures did not consider arguments against executing the intellectually disabled "persuasive enough to prompt legislative action."[14] In a separate dissent, Justice Scalia questioned the number of states the majority considered to oppose the execution of the intellectually disabled. Specifically, he alleged it was unfair for the majority to count states that had completely abolished the death penalty as though they were states *with* the death penalty that opposed the execution of intellectually disabled individuals. The former states did ***530** not necessarily recognize intellectually disabled individuals as a class deserving special protection, while the latter did. Justice Scalia also noted:

> [I]n what *other* direction *could we possibly* see change? Given that 14 years ago *all* the death penalty statutes included the [intellectually disabled], *any* change (except precipitate undoing of what had just been done) was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus.[15]

When it comes to the death penalty, many states strive to preserve their autonomy by passing legislation that pays "lipservice" to the letter of Court decisions while ignoring their spirit.[16] This is accomplished by relying on the narrowest interpretation of the Court's decision possible, or as has been Texas' practice, through court decisions that, at least on the surface, appear at odds with the Court's ruling.[17] Thus, the Court was again forced to confront the issue of how states identify intellectual disability in capital defendants years later in *Hall v. Florida*.

B. Hall v. Florida *(2014)*

In *Atkins*, the Court drew upon medical understandings of intellectual disability that were current at the time to inform its ruling, although as previously noted, it did not require states to adopt a specific set of standards, medical or otherwise.[18] According to the Court, intellectual ***531** disability consisted of, "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[19] At the time of *Hall v. Florida*,[20] several states considered IQ scores of seventy-one and above as proof that capital defendants were not intellectually disabled.[21] Consequently, these states cited IQ scores above seventy as justification for prohibiting the defense from presenting additional evidence of their client's intellectual disability.[22] This practice occurred despite medical professionals testifying that IQ scores have room for error, and the most recent clinical definitions explicitly requiring *all* evidence of intellectual disability to be considered rather than just a numerical value.[23]

In *Hall*, the Court recognized that although *Atkins* largely affords states freedom to determine how intellectual disability is assessed, categorical protections necessarily dictate some uniformity in identifying who belongs to the protected category. Otherwise, states could simply ignore constitutional protections by defining category membership in such a way as to exclude

most candidates. In the Court's words:

> If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads Atkins to provide substantial guidance on the definition of intellectual disability.[24]

The Court added, "[w]hen a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[25]

While "the *Hall* court did not reject all IQ cut-offs as unconstitutionally rigid," in practice, *Hall v. Florida* prevented the execution of defendants with an IQ score of seventy-five or below.[26] Its more lasting ***532** significance, however, rested in reaffirming the role "the medical community's diagnostic framework" plays in defining intellectual disability.[27] The Court recognized that medical standards had changed between *Atkins* and *Hall*, and consciously relied on the updated definitions, finding that when deciding "who qualifies as intellectually disabled, it is proper to consult the medical community's opinions."[28] Compared to 2002 standards, diagnoses of intellectual disability in 2014 focused more heavily on "an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so" rather than strict IQ scores.[29] In its most instructive passage, the majority wrote:

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.[30]

In dissent, Justice Alito argued that the Court relied solely on "the evolving standard of *professional societies*" rather than "the standards of *American society as a whole*" to understand intellectual disability.[31] He noted, "[s]tates have adopted a multitude of approaches to a very difficult question."[32] Finally, he suggested that requiring states to abide by evolving understandings of intellectual disability in the medical community "will lead to instability and continue to fuel protracted litigation."[33]

533 C. Moore v. Texas *(2017)

In the aftermath of *Hall*, states adhered to a narrow interpretation of the Court's ruling and incorporated the standard error of measurement into scores derived from IQ tests. Thus, states now allowed defendants who scored between seventy and seventy-four on an IQ test to present additional evidence of their intellectual disability.[34] A second, broader interpretation of *Hall* was also possible, however. The letter of *Hall* required consideration of standard errors when reporting IQ scores, but it is particularly instructive that the Court relied on current medical standards to reach this conclusion. The spirit of *Hall* dictated that any practice for assessing intellectual disability is constitutionally suspect if it "disregards established medical practice."[35] More than this, the medical definition of intellectual disability changed between *Atkins* and *Hall*, and the majority explicitly referenced "the most recent publication of the APA" as an authoritative source for identifying intellectual disability.[36] This suggests that the Court not only intended for states to look to the medical community for guidance on how to define and assess intellectual disability, but also to use medical standards that are *current* at the time of assessment. Because the Court failed to elaborate further, however, this remained speculative and subject to interpretation.

In *Moore v. Texas*, the Court received a second chance to hold states to current medical standards when making intellectual disability assessments.[37] After killing a convenience store clerk, Bobby J. Moore was sentenced to death in 1980, twenty-two years before the Court's landmark decision in *Atkins* that intellectually disabled inmates cannot be executed.[38] Moore's attorneys contended their client was found intellectually disabled according to criteria that the Texas Court of Criminal Appeals developed based partially on inaccurate stereotypes about intellectual disability generalized from the fictional novella *Of Mice and Men*.[39] In *Ex Parte Briseno*, the Texas Court of Criminal Appeals created standards for capital determinations of intellectual disability because the legislature had yet to enact any legislation addressing ***534** the subject.[40] The guiding principle for the standards was whether the average Texan would agree that the individual should be protected from execution as a result of his or her intellectual disability. As an example, the Texas Court of Criminal Appeals wrote,

"[m]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt."[41] Consequently, the *Briseno* factors are alternatively referred to as "the Lennie standard."[42]

In their entirety, the *Briseno* factors ask:

> Did those who knew the person best during the developmental stage--his family, friends, teachers, employers, authorities--think he was mentally retarded at that time, and, if so, act in accordance with that determination? Has the person formulated plans and carried them through or is his conduct impulsive? Does his conduct show leadership or does it show that he is led around by others? Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? Can the person hide facts or lie effectively in his own or others' interests? Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[43]

After Texas executed Marvin Wilson[44]--an individual found intellectually able according to the "Lennie standard" but widely regarded as intellectually disabled--in 2012, Steinbeck's son, Thomas, called the events, "insulting, outrageous, ridiculous and profoundly tragic."[45] ***535** Moore's attorneys argued that Texas defined intellectual disability according to "outdated medical standards" and criteria "rooted in stereotypes."[46] The stereotypes referenced are found in the *Briseno* factors, while the "outdated medical standards" refer to the American Association on Mental Retardation's ("AAMR") clinical manual in its 9th edition as published in 1992.[47] The AAMR changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and published its most recent clinical manual (the 11th edition), in 2010.[48]

At the heart of Moore's case was the claim that: "*Atkins* and *Hall* both ... recognized that 'the medical community's diagnostic framework,' in the intellectual disability context, is best found in the current editions of the AAMR/AAIDD's clinical manual and the APA's *Diagnostic and Statistical Manual of Mental Disorders*."[49] Similarly, Moore's attorneys argued that the Court tacitly endorsed the view in *Atkins* and *Hall* that "clinical standards evolve as the medical community seeks improvements and advances in medical understanding," when it "relied on the most current versions" of the AAIDD (11th edition) and the DSM (5th edition, published by the American Psychiatric Association, or "APA").[50] Texas objected to this interpretation of *Hall* by arguing that there is presently a lack of consensus among the states regarding whether the AAIDD's or APA's definition of intellectual disability should be used.[51] Furthermore, Texas argued that only a handful of states rely on the most recent versions of these manuals, and the definition of intellectual disability contained in each manual conflicts with ***536** the other's definition.[52] This set the stage for the Court to address whether states must define intellectual disability strictly according to the most recent definitions found in the AAIDD and APA manuals. At stake was Texas' reliance on the non-clinical *Briseno* factors for assessing intellectual disability.

In a five to three vote, the Court struck down Texas' use of the *Briseno* factors,[53] although it ultimately stopped short of providing clear criteria for how states should assess intellectual disability.[54] The Court did, however, provide some insight into what states cannot do. While states still retain freedom with respect to how they define and assess intellectual disability, they cannot engage in practices that "diminish the force of the medical community's consensus."[55] The Court also affirmed the AAIDD-11 and DSM-5 as "current medical diagnostic standards,"[56] and described them as containing "generally accepted, uncontroversial intellectual-disability diagnostic definition[s]."[57]

The Court also tackled the issue of whether states can use outdated medical standards when it expressly stated, "[w]e relied on the most recent (and still current) versions of the leading diagnostic manuals--the DSM-5 and AAIDD-11."[58] Here, the Court went so far as to single out the DSM-5 and the AAIDD-11 as the "leading" authorities for defining intellectual disability. Similarly, the Court identified "the medical community's current standards" as "one constraint" on states' freedom to define intellectual disability.[59] Thus, while the Court has stopped just short of limiting states to the definitions of intellectual disability contained in the AAIDD-11 and DSM-5, they continue to be the gold standard by which the Court judges all other definitions used by the states. Clearly, *Moore* requires states to define and assess intellectual disability using the most current medical standards.

The Court also drew attention to Texas as the only state that relies on the *Briseno* factors,[60] further cementing its willingness to take on aspects of states' capital punishment systems that are unusual relative to the practices used by the majority of states.[61] The Court noted that ***537** Texas selectively applied the *Briseno* factors when assessing intellectual disability for

capital cases,[62] but adhered to current medical definitions of intellectual disability for all other purposes.[63] The majority opinion concluded by reiterating that "[s]tates have some flexibility, but not 'unfettered discretion,'" when defining or assessing intellectual disability.[64] Throughout the opinion, the majority referred to Texas' standards for defining intellectual disability as the *Briseno* factors rather than the "Lennie Standard."[65]

Chief Justice Roberts was joined in his dissent by Justices Thomas and Alito. They argued, as did Texas, that "judges, not clinicians, should determine the content of the Eighth Amendment."[66] Roberts also highlighted discrepancies between definitions of intellectual disability in the DSM-5 and AAIDD-11, saying that Texas did not err when it relied on outdated medical standards because the AAMR-9 overlapped with the DSM-5 in the relevant areas.[67] Additionally, Roberts noted experts testified that Moore's IQ score could have been a few points higher due to the conditions under which the test was administered, and thus, Moore's score fell outside of the cut-off score of seventy-five.[68] He further argued that current medical standards are not responsible for determining "who is morally culpable" in criminal cases,[69] and that the majority's opinion creates additional confusion on how states should define intellectual disability,[70] overstating the degree of agreement among medical professionals regarding how intellectual disability should be assessed.[71]

*538 III. ALIGNING STATE STATUTES WITH *MOORE V. TEXAS*

This section examines state statutes from the thirty-one death penalty states[72] to investigate how well their definitions of intellectual disability comport with the recent *Moore* ruling. Of the thirty-one death penalty states, twenty-two address intellectual disability in capital cases through statutes, four through court cases, and five through statutes that were later clarified through a court case (see Table 1). Two states (Montana and New Hampshire) do not appear to have any statute or court case providing guidance on how to assess intellectual disability.

TABLE 1. ASPECTS OF STATE INTELLECTUAL DISABILITY DEFINITIONS RELEVANT TO *MOORE V. TEXAS*.

STATE	SOURCE OF DEFINITION[73]	1. CLOSEST CLINICAL DEFINITION[74]	2. RECOGNIZE MEDICAL STANDARDS CHANGE?	3. IMPAIRED UNDERSTANDING OF CRIMINALITY?
Alabama	Statute; Court Case	DSM-IV; AAMR 9	No	No
Arizona	Statute	DSM-III	Yes	No
Arkansas	Statute	DSM-III	No	No
California	Statute; Court Case	DSM-IV; AAMR 9	No	No
Colorado	Statute	AAMD 8	No	No
Florida	Statute	AAMD 8	No	No
Georgia	Statute	DSM-III	No	No
Idaho	Statute	DSM-IV	No	No
Indiana	Statute	AAMR 10	No	No
Kansas	Statute	AAMD 8	No	Yes
Kentucky	Statute	AAMD 8	No	No
Louisiana[a1]	Statute	**DSM-5**	No	No
Mississippi	Statute; Court Case	**DSM-5 OR AAIDD 11**	No	Yes

Missouri	Statute	AAMR 9	No	No
Montana	None	None	No	Yes[75]
Nebraska	Statute	AAMD 8	No	No
Nevada	Statute; Court Case	DSM-IV or AAMR 10	No	No
New Hampshire	None	None	No	Yes[76]
North Carolina	Statute	AAMR 9	Yes	No
Ohio	Court Case	DSM-IV or AAMR 9	No	No
Oklahoma	Statute; Court Case	AAMR 9	No	No
Oregon	Court Case	**DSM-5**	Yes	No
Pennsylvania	Court Case	**DSM-IV or AAIDD 11**	No	No
South Carolina	Statute	AAMD 8	No	No
South Dakota	Statute	AAMR 9	No	No
Tennessee	Statute	AAMD 8	No	No
Texas	Court Case	AAMR 9 or *Briseno*	No	No
Utah	Statute	DSM-IV	No	No
Virginia	Statute	AAMR 10	No	No
Washington	Statute	AAMD 8	No	No
Wyoming	Statute	AAMD 8	No	Yes

Footnotes

a1 States listed in bold use a current clinical definition of intellectual disability.

*539 A. *State Statutes Before* Moore v. Texas

Of the twenty-nine states that address intellectual disability, thirteen use definitions closest to standards established in an edition of the APA *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"),[75] twelve use definitions closest to standards in an edition of the AAIDD manual (formerly the American Association of Mental Retardation, or "AAMR"), and nine use definitions closest to criteria in the 8th edition of the American Association on Mental Deficiency's ("AAMD") manual. Seven states use definitions from two different manuals and allow the defense to establish their client's intellectual disability according to either standard. Six of these states use editions of the DSM and the AAIDD. The seventh state, Texas, allowed the *Briseno* factors to supersede the outdated clinical definition it also employed.[76]

***540** Altogether, twenty states use a definition of intellectual disability most consistent with an edition of the DSM or the AAIDD, with six states using both. Only four of these states, however, rely on the most recent editions of these manuals. Louisiana and Oregon use the DSM-5's definition, while Pennsylvania uses standards found in the eleventh edition of the AAIDD. Mississippi adopted standards from both the DSM-5 *and* the AAIDD-11. Curiously, Pennsylvania's Supreme Court

requires the use of the DSM-IV rather than the DSM-5 in addition to the eleventh edition of the AAIDD.[77] Louisiana is the only state that has codified a current medical definition of intellectual disability in a statute,[78] while Mississippi is the only state that allows the defense to establish their client's intellectual disability using the DSM-5 *or* the AAIDD-11.[79]

Only three states specify that a capital defendant's intellectual disability must be assessed according to modern clinical standards rather than a specific edition of a clinical manual, regardless of how outdated that edition might be (or become). Arizona's statute requires experts to evaluate capital defendants for intellectual disability, "using current community, nationally and culturally accepted physical, developmental, psychological, and intelligence testing procedures."[80] Similarly, North Carolina's statute stipulates that, "accepted clinical standards for diagnosing significant limitation in intellectual functioning and adaptive behavior shall be applied in the determination of intellectual disability."[81] Finally, Oregon's Supreme Court overturned a lower court's ruling because it "did not apply now-current medical standards in determining that [the] defendant had not met his burden of proof to show that he has an intellectual disability."[82]

Three states (Kansas, Mississippi, and Wyoming) interpret a capital defendant's ability to understand the difference between right and wrong as evidence that the defendant cannot be intellectually disabled. Thus, if the prosecution can establish that the defendant differentiated between right and wrong, the defendant is automatically considered eligible for execution.[83] Two additional states, Montana and New Hampshire, include language in their statutes on mitigating circumstances that suggest they would only consider an intellectually disabled defendant ***541** to have diminished culpability if the defendant possessed a limited understanding of right and wrong.[84]

B. *Moving To A Model Statute After* Moore v. Texas

Some changes are necessary for current state statutes to comply with the Court's *Moore* ruling. As the Court recognized in *Hall*, "clinical definitions of intellectual disability ... were a fundamental premise of *Atkins*."[85] Furthermore, the clinical standards used by the Court in *Atkins* "differ markedly from more recent editions ... endorsed by the Court" in *Hall*.[86] In *Moore*, the Court made explicit what had been implicit in *Hall*--although states have freedom to define intellectual disability as they see fit, their definitions cannot "diminish the force of the medical community's consensus."[87] One way states violate this consensus is by relying on outdated clinical manuals when the entire impetus for a newer edition is a consensus from the medical community that clinical understandings of psychological disorders have advanced enough to warrant revisions to the old manual. Thus, the Court acknowledged in *Moore* that "the medical community's current standards" ***542** function as a "constraint" on states' freedom to define intellectual disability.[88]

In *Moore*, the Court also reaffirmed the position that the DSM-5 and AAIDD-11 are the "leading" sources for defining intellectual disability, although they stopped short of forbidding the use of other sources as long as those sources did not contradict accepted practices within the medical profession.[89] Thus, states should model their definitions of intellectual disability after those found in the DSM-5 and AAIDD-11. Mississippi's approach is superior because it allows a capital defendant to establish their intellectual disability according to *either* the DSM-5 or AAIDD-11, in recognition of the Court's reliance on both manuals to define intellectual disability. This approach makes sense, because any state that found a capital defendant intellectually able who would meet the criteria for intellectual disability under the DSM-5 *or* AAIDD-11 would contradict the current medical consensus. Additionally, states should stipulate that the most recent editions of these manuals are to be used when making capital determinations of intellectual disability in anticipation that newer editions will be published in the future.

Finally, states that consider defendants intellectually able when they can distinguish between right and wrong violate the medical community's consensus.[90] The Court has adopted this stance as well, writing, "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial."[91] The Court's opinion is informed by current clinical understandings that, although individuals may demonstrate they understand right from wrong by using deception to cover up wrongdoing, this behavior does not preclude a diagnosis of intellectual disability.[92] Furthermore, states are misguided in assessing intellectual disability based on capital defendants' strengths (i.e., being able to distinguish right from wrong) rather than their limitations.[93] Any additional qualifying criteria for intellectual disability beyond the three prongs identified by the medical community, such as an inability to distinguish between right and wrong, represents an unjustifiable risk of finding intellectually disabled individuals eligible for execution.[94] Thus, states have an obligation "[t]o privilege the best and most reliable information that can be obtained ***543** consistent with best practices in the clinical community--not to add artificial categories to the diagnosis that do not add to the accuracy of the analysis and which ultimately undermine the

existing clinical approach."[95]

C. *A Model Statute*

States seeking to comply with the Court's recent ruling in *Moore v. Texas* should incorporate the following language into their statutes:

> An individual is intellectually disabled for the purposes of capital punishment if they meet the definition of intellectual disability listed in the most recently published edition of either the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) or the American Association on Intellectual and Developmental Difficulties' (AAIDD) manuals. Individuals who understand the criminality of their behavior and the difference between right and wrong may still meet the criteria for intellectual disability, and are to be allowed to present evidence demonstrating their intellectual disability.

IV. MOVING FORWARD FROM *MOORE*

Although the *Moore* Court ruled that states must abide by current clinical understandings of intellectual disability, no single court case can possibly address all facets of how states make capital determinations of intellectual disability. Thus, while *Moore* raises the minimum protections states must afford intellectually disabled individuals, "further safeguards are necessary."[96] Even after states update their statutes to comply with *Moore*, many will still retain laws that serve to fundamentally "narrow"[97] or "alter"[98] who can be found intellectually disabled. These restrictions exist in two different forms. The first class of restrictions seeks to place limitations on the definition of intellectual disability beyond those the Court has imposed. The *Briseno* factors are one example of how this is done. In contrast, the second class of restrictions seeks to limit who is considered intellectually disabled through procedural means.

*544 A. *Issues Unaddressed*

1. Aspects of State Intellectual Disability Definitions Left Unaddressed by *Moore*

The DSM-5 requires evidence that limitations in intellectual ability existed "during the developmental period."[99] The AAIDD-11, however, specifies that such limitations must have been evident "before age 18."[100] In his *Moore* dissent, Chief Justice Roberts argued that the two definitions clash with each other.[101] The Court, however, has consistently affirmed both definitions as acceptable and compatible with each other.[102] Consequently, states using the AAIDD-11's definition run the risk of finding an intellectually disabled defendant eligible for execution if the earliest evidence of that disability is after age eighteen, but before the developmental period has concluded.[103] This raises the question of whether states can constitutionally find a defendant intellectually able (and therefore eligible for execution) if that defendant cannot introduce evidence that their disability had been present prior to their eighteenth birthday.

At face value, this approach aligns with current medical practices, and therefore should pass constitutional muster. The Court has also recognized, however, that the "legal determination of intellectual disability is distinct from a medical diagnosis but it is informed by the medical community's diagnostic framework."[104] This leaves room for the Court to carve out a broader definition of intellectual disability than the medical community currently adheres to if it is warranted. An examination of the Court's original reasoning for protecting the intellectually disabled from execution suggests a broader definition is indeed necessary. In *Atkins*, the Court stated, "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability."[105] In the same paragraph the Court also wrote, "the severity of ***545** the appropriate punishment necessarily depends on the offender's culpability."[106] Because individuals who suffer head injuries after the developmental period exhibit deficits that satisfy every aspect of intellectual disability except age of onset,[107] the Court's reasoning would appear to apply as long as those deficits existed prior to commission of the crime. Consequently, even though fewer than two percent of cases involving intellectual disability claims have been denied because the defendant did not meet the age of onset requirement,[108] executing an individual with diminished culpability is problematic "if it affects even one case."[109]

A second issue relates to the use of cut-off scores for IQ testing as addressed in *Hall*. While the Court ruled that states cannot view "an IQ score as final and conclusive evidence of a defendant's intellectual capacity,"[110] states still rely on cut-off scores that factor in the standard error of measurement as required by *Hall*. This practice is problematic because some states permit "upward, ethnic adjustments to minority IQ scores" in order to render people of color eligible for execution.[111] Thus, in the future, the Court will likely need to determine whether states can make adjustments to an individual's IQ score. If the Court rules in the affirmative, it will also have to decide whether adjustments should be permitted in both directions, or limited to downward adjustments. The latter approach appears most appropriate given the potential for racial factors to influence upward adjustments.[112] Additionally, when an individual's IQ is borderline, it is better to sentence an intellectually able defendant to life without possibility of parole (LWOP) than sentence an intellectually disabled defendant to death in violation of the Eighth Amendment. The Court already moved in this direction ***546** when it ruled, "an individual's intellectual functioning cannot be reduced to a single numerical score."[113] Furthermore, the Court forbade states from using an IQ score by itself, no matter how high, to find a defendant intellectually able "when experts in the field would consider other evidence."[114] Consequently, states should not use IQ cut-off scores to prevent defendants from introducing evidence of adaptive deficits.[115]

A third issue the Court has yet to address is whether defendants should automatically qualify as intellectually disabled for the purposes of capital punishment if they score below a certain IQ score. This is an opposite approach to the one Florida used in *Hall* because it assumes a defendant is intellectually disabled unless they score above a set IQ value (e.g., seventy-five). While it is inappropriate to use high IQ scores as conclusive proof that a defendant is intellectually able, low IQ scores create a "presumption" that a more thorough evaluation would uncover sufficient deficits to satisfy a diagnosis of intellectual disability.[116] When used in this manner, IQ scores serve as a quick screening tool for identifying the likely presence of intellectual limitations. IQ scores also provide a general impression of whether intellectual disability is an issue requiring closer investigation.

The benefits of an automatic qualifier for intellectual disability are at least twofold. First, it embodies the principle that it is better to sentence an intellectually able defendant to LWOP than it is to sentence an intellectually disabled defendant to death. This is important because a defendant's constitutional rights cannot be violated if they receive LWOP, but may be if an intellectually disabled defendant receives death. Thus, deference for the Constitution dictates a cautious approach. Second, assuming a defendant is intellectually disabled if they score below a specified value (e.g., seventy-five) would save courts time and money by taking the death penalty off the table in borderline cases, thereby removing the need to conduct a separate sentencing phase. Because the Court recognized that the standard error of measurement for IQ tests extends up to seventy-five,[117] states would do well to consider defendants scoring below this value intellectually disabled ***547** for the purposes of execution and forego requiring additional evidence.

2. Aspects of State Procedures for Capital Determinations of Intellectual Disability Left Unaddressed by *Moore*

Questions remain over who should make capital determinations of intellectual disability.[118] A second, related question concerns when the determination should be made. Since *Gregg v. Georgia*,[119] capital trials are split into two phases: the guilt-innocence stage and the sentencing stage. During the guilt-innocence phase, the jury determines if the defendant has committed the alleged offense. In cases where the jury convicts the defendant, jurors then listen to mitigating and aggravating evidence during the sentencing phase to determine if the defendant deserves death. Before sentencing a defendant to death, juries must find at least one aggravating circumstance to have been present, and that the mitigating evidence does not outweigh the seriousness of the aggravator. In some jurisdictions, the jury is required to address additional special issues during the sentencing phase before they can return a death sentence.

These issues matter because juries are less likely to find a defendant intellectually disabled than judges.[120] The process of death-qualification in capital trials also produces jurors who view the defendant less favorably,[121] and prosecutors have been known to "consciously misuse mental disability evidence to play on the fears of jurors."[122] Requiring judges to make determinations of intellectual disability during pretrial hearings would conserve court resources.[123] The benefit of cost-savings, however, largely stems from *when* the determination is made (pretrial instead of during sentencing) rather than *who* (judge ***548** instead of jury) is making the determination. This is important because judges are also familiar with the case details, and therefore may make determinations of intellectual disability based on implicit biases.[124] Thus, a medical expert in intellectual disability ignorant of the facts of the criminal case the defendant is facing should serve as a medical fact finder

and determine the defendant's intellectual disability pretrial.[125] However, juries should also make a separate determination of the defendant's intellectual disability as a special issue during the sentencing phase.[126] This model is known as a "hybrid procedure."[127] At the sentencing phase, jurors should be required to find that the defendant did *not* have an intellectual disability before they can issue a death sentence.[128] The hybrid model is ideal because "individuals facing death should have as many opportunities to be evaluated by fact finders as possible."[129]

A third issue regarding procedures that was left unaddressed by *Moore* is the level of proof states require to establish intellectual disability. Because of the danger of violating intellectually disabled individuals' constitutional rights, a low level of proof is recommended. This is because "the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."[130] In criminal prosecutions, our society has long held the belief that when allocating the risk of an erroneous decision, "we believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."[131] Thus, legal standards of proof should not apply to the medical fact finder determining the defendant's intellectual disability pretrial. Instead, the medical fact finder should be guided by practices found in the most recent publications of the DSM and AAIDD manuals. ***549** Because juries are required to find that the defendant is *not* intellectually disabled during the sentencing phase, a high burden of proof is recommended--in this case, proof beyond a reasonable doubt.[132]

Finally, the Court has provided virtually no guidance on the qualifications necessary for experts who evaluate defendants for intellectual disability beyond licensure.[133] Recent attention devoted to improving the qualifications of attorneys representing capital defendants[134]-- attention that has taken forty years to build--suggests states would be unwise to wait another forty years before establishing minimum requirements for capital evaluators. Indeed, this subject is ripe for intervention by the Court.[135] As a starting point, states should require evaluations to be conducted by a minimum of two licensed experts who: (1) have had no previous professional contact with the defendant, (2) are specialists in intellectual disability, and (3) have had at least five years apiece of clinical experience conducting intellectual disability evaluations. These recommendations are partially based on state statutes and partially based on minimum public defender requirements for capital cases.[136] Kansas requires two licensed experts to evaluate the defendant.[137] Similarly, Utah stipulates that the evaluator "may not be ***550** involved in the current treatment of the defendant."[138] No state has specified a minimum amount of clinical experience an evaluator must have, but Texas requires public defenders in capital cases to "have at least five years of criminal law experience."[139] Given the absence of any other guiding research or legislation, this length of time appears to be an appropriate minimum level of experience for expert evaluators. These minimum qualifications should also apply to the medical fact finder responsible for determining the defendant's intellectual disability pretrial.

551 B.** ***State Statutes on Unaddressed Issues

TABLE 2. ASPECTS OF STATE INTELLECTUAL DISABILITY DEFINITIONS LEFT UNADDRESSED BY *MOORE V. TEXAS*

STATE	1. AGE FIRST EXHIBITED DISABILITY	2. CUT-OFF SCORE?	3. AUTOMATIC QUALIFIER?
Alabama	<18	70 or below	No
Arizona[a1]	None	70 or below	**65 or below**
Arkansas	<18	No	**65 or below**
California	<18	No	No
Colorado	Developmental period	No	No

Florida	<18	70 or below	No
Georgia	Developmental period	No	No
Idaho	<18	70 or below	No
Indiana	None	No	No
Kansas	None	70 or below	No
Kentucky	Developmental period	70 or below	No
Louisiana	Developmental period	No	No
Mississippi	<18	No	No
Missouri	<18	No	No
Montana	None	No	No
Nebraska	None	No	**70 or below**
Nevada	<18	75 or below	No
New Hampshire	None	No	No
North Carolina	<18	70 or below[aa1]	No
Ohio	<18	70 or below	No
Oklahoma	<18	75 or below	No
Oregon	<18	No	No
Pennsylvania	<18	No	No
South Carolina	None	No	No
South Dakota	<18	70 or below	No
Tennessee	<18	70 or below	No
Texas	<18	No	No
Utah	<22	No	No
Virginia	<18	70 or below	No

Washington	<18	70 or below	No
Wyoming	Developmental period	No	No

Footnotes

[a1] States listed in bold consider a defendant intellectually disabled if their IQ score falls below a specified threshold.

[aa1] North Carolina has a cut-off score of 70, but it is not a hard cut-off score because the defense can still submit additional evidence of intellectual disability in cases where their client scored above 70.

1. Age First Exhibited Disability

This aspect of disability "can be the easiest or most difficult aspect for the defense team ... if no previous IQ tests are available, the professional would interview individuals from the defendant's past and use ***552** other records to determine the onset of the intellectual disability."[140] As demonstrated in Table 2, eighteen states require evidence that intellectual disability existed before turning eighteen. In contrast, Utah sets the age of onset at under twenty-two.[141] Five states rely on an undefined "developmental period"

> before which deficits must have manifested. However, in Kentucky the death penalty was still an option for a man with an IQ of 61 ... [because a trial court judge] held that in order for a judge to find an individual intellectually disabled, the defendant had to be tested as a child and diagnosed with intellectual disability in the developmental stages.[142]

The state supreme court of a sixth state (Nevada) defined the term "developmental period" to mean under eighteen in their statute.[143] Six of the remaining seven states fail to reference any timeframe.[144] In the seventh state, the Arizona Supreme Court ruled that defendants can submit evidence of their intellectual disability after age eighteen, even though Arizona's statute requires capital defendants to prove their intellectual disability began before adulthood.[145] Thus, only seven out of thirty-one death penalty states (22.6%) acknowledge that capital defendants who exhibit signs of intellectual disability at *any time* throughout their life bear diminished responsibility for their crime.

2. Cut-Off Scores

Fourteen states have IQ cut-off scores that consider defendants intellectually able if they score higher than the cut-off. Of these, twelve states rely on an IQ cut-off score of seventy.[146] The remaining two states set a slightly higher IQ threshold of seventy-five, demonstrating once again that states may follow the letter of Court cases (taking the standard error of measurement into account on IQ tests as required in *Hall*), while ignoring their spirit (that it is inappropriate to erect strict IQ cut-offs to determine who is intellectually disabled). North Carolina's statute is unique because it implies a strict cut-off score of seventy, but later stipulates that, "a higher score resulting from the application of the standard error of measurement to an intelligence quotient of seventy shall not preclude the defendant from being able to present additional evidence of intellectual disability."[147] This phrase was likely added after the Court's ruling in *Hall*. On balance, courts must make an individual determination of intellectual disability and be careful with strict cut-off scores. Engelhart recommends the California approach ***553** because it "provides for highly individualized consideration of a defendant's intellectual disability," even though it "makes the California method much more burdensome on the judicial system, especially when compared to Florida's strict cut-off method."[148]

3. Automatic Qualifiers for Intellectual Disability

Two states (Arizona and Arkansas) accept IQ scores of sixty-five or lower as sufficient proof of the defendant's intellectual disability, unless the prosecution presents compelling evidence to the contrary (see Table 3).[149] Nebraska has a similar law that raises the qualifying IQ score to seventy.[150]

TABLE 3. ASPECTS OF STATE PROCEDURES FOR CAPITAL DETERMINATIONS OF INTELLECTUAL DISABILITY NOT ADDRESSED IN *MOORE V. TEXAS*.

STATE	1. WHO DETERMINES?	2. WHEN DETERMINED?	3. LEVEL OF PROOF	4. SPECIAL ISSUE DURING SENTENCING?	5. EXPERT QUALIFICATIONS BEYOND LICENSURE?
Alabama	Judge	Pretrial	N/A	No	No
Arizona	Judge	Pretrial	Clear and Convincing	No	Yes
Arkansas	Judge or Jury	Pretrial[aa1]	Preponderance	Yes	No
California	Judge or Jury	Sentencing[a1]	Preponderance	No	No
Colorado	Judge	Pretrial	Clear and Convincing	No	No
Florida	Judge	Sentencing	Clear and Convincing	No	No
Georgia	Jury	Guilt	Beyond a Reasonable Doubt	Yes	No
Idaho	Judge	Pretrial	Preponderance	No	No
Indiana	Judge	Pretrial	Clear and Convincing	No	No
Kansas	Judge	Sentencing	N/A	No	Yes
Kentucky	Judge	Pretrial	N/A	No	No
Louisiana	Judge or Jury	Sentencing[aa1]	Preponderance	No	No
Mississippi	Jury	Guilt	Preponderance	No	No
Missouri	Jury	Sentencing	Preponderance	Yes	No
Montana	Judge	Sentencing	N/A	No	No
Nebraska	Judge	Sentencing	Preponderance	No	No
Nevada	Judge	Pretrial	Preponderance	No	No
New Hampshire	Jury	Sentencing	N/A	No	No
North Carolina	Judge or Jury	Pretrial[aa1]	Clear and Convincing[d1]	Yes	No
Ohio	N/A	N/A	N/A	No	No
Oklahoma	Judge or Jury	Pretrial[aa1]	Clear and Convincing[d1]	Yes	No
Oregon	Judge	Pretrial	Preponderance	No	No
Pennsylvania	Judge	Pretrial	Preponderance	No	No

South Carolina	Jury	Sentencing	N/A	No	No
South Dakota	Judge	Pretrial	Preponderance	No	No
Tennessee	Judge	Pretrial	Preponderance	No	No
Texas	Judge	Pretrial	Preponderance	No	No
Utah	Judge	Pretrial	Preponderance	No	Yes
Virginia	Jury	Sentencing	Preponderance	Yes	No
Washington	Judge	Sentencing	Preponderance	No	Yes
Wyoming	Judge	Any Time	N/A	No	Yes

Footnotes

a1 If the defense requests a pretrial hearing on the defendant's intellectual disability, the issue is no longer tried during the sentencing phase.

aa1 Even if the court has ruled that the defendant is not intellectually disabled, jurors must also determine if the defendant is intellectually disabled during the sentencing phase (In Louisiana, the issue is only tried during the sentencing phase unless the defense requests it also be tried during pretrial.).

d1 Clear and convincing evidence is required by the judge during the pretrial hearing, but a preponderance of the evidence is required by juries during the sentencing phase.

***554 4. Who Determines Intellectual Disability?**

As shown in Table 3, in nineteen states the trial judge is solely responsible for determining whether the defense has met the level of proof required to establish their client's intellectual disability. Despite these laws, the Court has not held that a judge or a jury should make the determination about intellectual disability. The Court has held, however, that "prejudicial stereotypes and facts of the crime [should] not enter into the decision making process," which some commentators have interpreted to mean that judges and juries may be biased.[151] Six additional states rely exclusively on juries. Five states require a judge *and/or* a jury to determine whether the defendant is intellectually disabled, ***555** depending on the circumstances. California and Louisiana determine the issue by jury unless the defense requests a hearing by a judge,[152] at which point California law precludes the issue from being heard before a jury. In contrast, Louisiana requires the jury to decide on the issue at a later point if the judge rules against the defendant. Arkansas, North Carolina, and Oklahoma set the issue of intellectual disability before a judge initially, but instruct the jury to consider the issue later if the judge finds no evidence of intellectual disability.[153] Ohio is the only state that does not specify who is responsible for determining intellectual disability.[154] Despite these laws, commentators have argued:

> that [the intellectual disability] decision [should] not be in the jury's hands. Intellectual disability is a difficult medical diagnosis and proves difficult for laypeople to understand, especially with the stereotypes and perceived notions about how an intellectually-disabled individual should act. Juries are more likely to be prejudiced by the aspects of the crime and to allow these prejudices to influence their decision.[155]

Similarly, judges are not properly trained to identify intellectual disability and may display biases based on case details.[156] Thus, medical professionals ignorant of case details are best suited to serve as a medical fact finder and determine the

defendant's intellectual disability.[157]

5. When is Intellectual Disability Determined?

"The *Atkins* hearings need to take place prior to the actual presentation of evidence about the crime in order to ensure that a fair and impartial decision about the intellectual disability diagnosis is made."[158] Moreover, "waiting to make the decision about intellectual disability until after the trial allows people's prejudices and beliefs about how a stereotypical intellectually disabled individual should act to influence their decision instead of making that determination based ***556** solely on medical evidence."[159] Thus, fifteen states require capital determinations of intellectual disability during a pretrial hearing. Two states require the hearing during the guilt phase, and eleven during the sentencing phase. Wyoming permits a hearing at any point during the trial,[160] while Ohio lacks any clear guidance on the issue.

6. Level of Proof Required

A national consensus has emerged among death penalty states that the defense should only have to prove its client's intellectual disability by a "preponderance of the evidence."[161] Sixteen states set the level of proof at a "preponderance of the evidence," six require evidence that is "clear and convincing,"[162] and Georgia stands alone in demanding proof "beyond a reasonable doubt."[163] The eight remaining states have not clarified the level of proof necessary to establish a defendant's intellectual disability.[164]

7. Special Issue During Sentencing

Out of thirty-one death penalty states, only six[165] include intellectual disability as a special issue that jurors must address during the sentencing phase before they can return a death sentence.

8. Expert Qualifications Beyond Licensure

Twenty-six of the thirty-one death penalty states list no minimum qualifications for experts evaluating intellectual disability in capital trials beyond licensure. Of the remaining five states, Arizona limits evaluations to "expert[s] in intellectual disabilities,"[166] Kansas mandates "two licensed physicians or licensed psychologists, or one of each, qualified by training and practice to make such examination,"[167] Utah stipulates ***557** that "two mental health experts ... not ... involved in the current treatment of the defendant" who "have expertise in [intellectual disabilities] assessment" must conduct the evaluation,[168] Washington requires a "psychiatrist" or "psychologist ... who is an expert in the diagnosis and evaluation of intellectual disabilities,"[169] and Wyoming relies on a "licensed psychiatrist, or other physician with forensic training, or a licensed psychologist with forensic training."[170]

Table 4 provides a summary of the total number of states that are following practices recommended in this article for constitutionally protecting intellectually disabled individuals from execution according to the *Moore* ruling, as well as on issues that are left unaddressed by *Moore*.

TABLE 4. TOTAL NUMBER OF STATES FOLLOWING PRACTICES RECOMMENDED IN THIS ARTICLE FOR CONSTITUTIONALLY PROTECTING THE INTELLECTUALLY DISABLED FROM EXECUTION.

VARIABLE	N[A1]	% OF DEATH PENALTY STATES
Has Statute or Court Case Addressing Capital Determinations of Intellectual Disability	29	93.5%
1. Aspects of State Intellectual Disability Definitions Addressed in Moore		

Current Clinical Definition (DSM or AAIDD)	4	12.9%
Recognize Medical Standards Change	3	9.7%
Can Be Considered Intellectually Disabled Even if Understand Right/Wrong	26[1]	83.9%
2. Aspects of State Intellectual Disability Definitions Left Unaddressed in Moore		
Automatic Qualifier for Intellectual Disability	3	9.7%
No Cut-Off Score Prohibiting Presentation of Evidence of Intellectual Disability	17	54.8%
No Age Restriction on When Limitations First Present	7	22.6%
3. Aspects of State Procedures for Capital Determinations of Intellectual Disability Left Unaddressed in Moore		
Intellectual Disability Expert as Fact Finder and Jury Determine if Defendant is Intellectually Disabled	0	0%
Intellectual Disability Determined Pretrial and At Sentencing Phase	4	12.9%
Intellectual Disability Determined Pretrial According to Current Medical Practices Instead of Having to Meet a Legal Standard of Proof	0	0%
Intellectual Disability is a Special Sentencing Issue Juries Must Consider	6	19.4%
Have Qualifications for Evaluation Experts Beyond Licensure	5	16.1%

Footnotes

a1 Number of States with the Death Penalty = 31.

1 Montana and New Hampshire do not explicitly address intellectual disability, but may use a defendant's limited ability to understand the difference between right and wrong as an inadequate proxy measure of his or her intellectual disability. If this is not the case, then 28 (90.3%) states permit a capital defendant to be considered intellectually disabled even if they understand the difference between right and wrong.

558 C. *A Model Statute for Unaddressed Issues

In the absence of Supreme Court cases addressing the issues discussed above, this article proposes model language that states

can incorporate into their statutes to ensure they are constitutionally protecting the intellectually disabled from execution (see Table 5). Such language could also serve as a model for a national standard that courts and/or legislatures could adopt to eliminate "inconsistent application of its holding in *Atkins*" across the various states.[171]

TABLE 5. MODEL LANGUAGE TO GUIDE STATES ON ASPECTS OF INTELLECTUAL DISABILITY LEFT UNADDRESSED IN *MOORE V. TEXAS*.

LEGAL VARIABLE ADDRESSES	RECOMMENDED STATUTE TEXT
No Age Restriction on When Intellectual Limitations First Present	*Individuals who would be classified as intellectually disabled according to the most recent edition of the DSM or AAIDD, except for experiencing the onset of limitations in intellectual functioning or adaptive behaviors after age 18 (or the developmental period), are to be considered intellectually disabled for the purposes of capital punishment as long as the disability originated before the commission of the crime*.
Automatic Qualifier for Intellectual Disability	*An individual shall be presumed intellectually disabled if they scored 75 or lower on at least one IQ test that was considered current by the medical community at the time it was administered. This IQ test may have been administered at any point in the individual's lifetime. Evaluators may not adjust an individual's IQ score upward for any reason, including but not limited to race or culture. Evaluators may adjust an individual's IQ score downward according to current medical consensus*.
No Cut-Off Score Prohibiting Presentation of Evidence of Intellectual Disability	*No IQ score may be used to prevent a capital defendant from introducing any evidence necessary to establish that they are intellectually disabled according to the definitions contained in the most recently published edition of the DSM or AAIDD. A defendant's failure to score 75 or lower on any IQ test is not sufficient evidence to conclude that they are intellectually able or eligible for execution.*
(1) Intellectual Disability Expert as Fact Finder and Jury Determine if Defendant is Intellectually Disabled; (2) Intellectual Disability Determined Pretrial and Sentencing Phase; (3) Intellectual Disability Determined Pretrial According to Current Medical Practices; (4) Intellectual Disability is a Special Sentencing Issue Juries Must Consider	*Capital determinations of intellectual disability must be made no less than 30 days prior to the start of the trial by a medical expert on intellectual disability who will serve as the fact finder on intellectual disability in the case, and who is ignorant of the facts of the crime for which the defendant is to stand trial. This medical fact finder must be a licensed psychologist, psychiatrist, or physician who specializes in assessing intellectual disability and has at least 5 years of clinical experience conducting and interpreting intellectual disability evaluations. In addition to these requirements, the medical fact finder must not have had any contact with the defendant prior to their appointment as the medical fact finder responsible for making the determination of intellectual disability in the case. The medical fact finder is to be appointed by the judge presiding over the capital trial, and may only be appointed after both the defense and the prosecution have agreed to the appointment of the individual in question. The medical fact finder is to rely on current medical practices as defined by the most recent manuals published by the DSM and AAIDD, rather than any legal standard of proof, when making capital determinations of intellectual disability*.

	Upon a finding by the medical fact finder that the defendant is intellectually disabled, the remaining trial shall proceed with a jury that has not been death-qualified and the defendant may not be sentenced to death. If the medical fact finder has found the defendant intellectually able during a pretrial determination, and the jury has subsequently found the defendant guilty of a capital offense, the jury must then address as a special issue during the sentencing phase whether they unanimously find that the defendant has no intellectual disability beyond a reasonable doubt.[174] *The defense and prosecution may introduce evidence to inform jurors on this matter. Unless the jury returns a unanimous finding on this issue, the defendant may not be sentenced to death.*
Have Qualifications for Evaluation Experts Beyond Licensure	*A minimum of two licensed psychologists, psychiatrists, or physicians (or any combination of these) who specialize in assessing intellectual disabilities and individually have at least five years of clinical experience conducting and interpreting intellectual disability evaluations must evaluate the defendant for intellectual disability and present their findings, either orally or in writing, to the medical fact finder responsible for determining the defendant's intellectual dis(ability) prior to the start of the trial. Individuals who have had prior contact with the defendant, as well as the medical fact finder responsible for determining the defendant's intellectual disability in the case, may not count toward the minimum number of two experts required to evaluate the defendant.*
Statute Applies Retroactively	*Any capital inmate who has been found intellectually able according to standards other than those presented here, regardless of the date of that determination, may appeal their death sentence on the grounds that they were improperly evaluated for intellectual disability.*

***560 V. CONCLUSION**

In the years since the Supreme Court first established the intellectually disabled as a special class protected from execution,[175] the Court has offered little guidance on how states should assess intellectual disability.[176] *Moore v. Texas* continues this tradition. Although *Moore* confirms that states cannot contradict current medical understandings, the Court refrained from further elaboration.[177] Of particular importance is whether the Court intends for states to strictly adhere to the definitions of intellectual disability contained in the DSM-5 and AAIDD-11, or whether alternative definitions are permissible as long as they do not contradict the current clinical consensus. This issue is likely to go before the Court in the near future. States looking to comply with the *Moore* Court's ruling should permit defendants to establish their intellectual disability according to either the DSM-5 or the AAIDD-11's definition. States should also explicitly require the most recently published editions, regardless of the specific number, to be used when making intellectual disability assessments. Moreover, states should incorporate language into their statutes recognizing that defendants who can differentiate between right and wrong may still be intellectually disabled.

An additional issue that requires the Court's attention is whether the age of onset specified in current clinical manuals applies within the context of capital punishment. Likewise, clarification is needed regarding who should determine intellectual disability, when this determination should be made, and what level of proof is required. Finally, the Court should establish minimum qualifications for the experts conducting intellectual disability evaluations. In conclusion, *Moore v. Texas* reaffirms the importance for states to avoid contradicting current clinical understandings of intellectual disability in capital cases, but is unlikely to dispel lingering confusion regarding the specific factors that make a definition of intellectual disability constitutionally permissible.

***561 APPENDIX: STATE STATUTES AND COURT CASES ANALYZED**

Alabama:

1. ALA.CODE § 15-24-2 (2015).

2. *Ex parte Perkins*, 851 So. 2d. 453 (Ala. 2002).

Arizona:

1. ARIZ. REVE. STAT. ANN. § 13-753 (2016).

2. *State v. Arellano*, 213 Ariz. 474 (Ariz. 2006).

Arkansas:

1. ARK. Code § 5-4-618 (2015).

California:

1. CAL. PENAL CODE § 1376 (West 2015).

2. *In re Hawthorne*, 105 P.3d. 552 (Cal. 2005).

Colorado:

1. COLO. REV. STAT. §18-1.3-1101-05 (2013).

Florida:

1. FLA. STAT. § 921.137 (2016).

Georgia:

1. GA. CODE ANN. § 17-7-131 (2015).

Idaho:

1. IDAHO CODE § 19-2515A (2016).

Indiana:

1. IND. CODE § 35-36-9-1 (2016).

Kansas:

1. KAN. STAT. ANN. § 21-6622 (2015).

Kentucky:

1. KY. REV. STAT. ANN. § 532.130 (West 2015).

Louisiana:

1. LA. CODE CRIM. PROC. ANN. ART. 905.5.1 (2015).

Mississippi:

1. MISS. CODE ANN. § 99-13-1-11 (2015).

2. *Chase v. State*, 171 So. 3d. 463 (Miss. 2015).

Missouri:

1. MO. REV. STAT. § 565.030 (2015).

Montana:

1. MONT. CODE ANN. § 46-14-311 (2015).

Nebraska:

1. NEB. REV. STAT. § 28-105.01 (2015).

Nevada:

1. NEV. REV. STAT. § 174.098 (2015).

2. *Ybarra v. State*, 247 P.3d. 269 (Nev. 2011).

New Hampshire:

1. N.H. REV. STAT. ANN. § 630.5 (2015).

North Carolina:

1. N.C. GEN. STAT. §15A-2005 (2015).

Ohio:

1. *State v. Lott*, 97 St.3d. 303 (Ohio 2002).

2. *Hill v. Anderson*, WL 2890416 (pet. writ cert. Ohio 2014).

Oklahoma:

1. OKLA. STAT. tit. 21 § 701.10b (2015).

***562** 2. *Blonner v. State*, 127 P.3d. 1135 (Okla. 2006).

3. *Smith v. State*, 245 P.3d. 1233 (Okla. 2010).

Oregon:

1. State v. Agee, 364 P.3d. 971 (Or. 2015).

Pennsylvania:

1. *Commonwealth of Pennsylvania v. Miller*, 585 Pa.144 (Pa. 2005).

2. *Commonwealth of Pennsylvania v Bracey*, 117 A.3d. 270 (Pa. 2015).

South Carolina:

1. S.C. CODE ANN. § 16-3-20 (2015).

South Dakota:

1. S.D. CODIFIED LAWS § 23A-27A-26.1-26.5 (2015).

Tennessee:

1. TENN. CODE. ANN. § 39-13-203 (2015).

Texas:

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

Utah:

1. UTAH. CODE ANN. § 77-15a-101 (West 2016).

Virginia:

1. VA. CODE ANN. § 19.2-264.3:1.1 (2015).

Washington:

1. WASH. REV. CODE § 10.95.030 (2015).

Wyoming:

1. WYO. STAT. ANN. § 8-1-102 (2015).

2. Wyo. Stat. Ann. § 7-11-301-304 (2015).

Footnotes

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[1] Atkins v. Virginia, 536 U.S. 304 (2002); *see generally* Mark E. Olive, *The Daryl Atkins Story*, 23 WM. & MARY BILL RTS. J. 363, 374 (2014) (giving historical and contextual details of the *Atkins* case and emphasizing that intellectually disabled capital defendants do not have the "moral culpability" as do the most reprehensible offenders); *see also* Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 859-60 (2012) ("The intersection between intellectual disability and criminal responsibility has been a subject of debate for centuries. The proposition that "*idiots* were considered 'not to blame' for crimes committed" traces back to 14th-century England (citing Anthony J. Holland,

Criminal Behaviour and Developmental Disability: An Epidemiological Perspective, *in* OFFENDERS WITH DEVELOPMENTAL DISABILITIES 23, 23 (William R. Lindsay et al. eds., 2004))).

[2] *See Atkins*, 536 U.S. at 304.

[3] State v. Williams, 831 So. 2d 835 (La. 2002) (where the Louisiana Supreme Court set out to develop a constitutional way to comply with *Atkins*); *see* Jennifer Youngs, *Supreme Court Upholds Right of Capital Defendant to a Hearing on His Intellectual Disability Claim*, 36 Amicus J. 24 (2015) (discussing the significance of *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), where the Court ruled a capital defendant was entitled to an evidentiary hearing if he/she raised a reasonable doubt about his/her intellectual disability); *cf.* Stesha Turney, Brumfield v. Cain*: Developing a Matter of Disability and Death*, 49 LOY. L. A. L. REV. 503, 529-31 (2016) (stressing that there is debate in the lower courts about whether *Brumfield* applies strictly to Louisiana (*Prieto v. Zook*, 791 F.3d 465 (4th Cir.), *cert. denied*, 136 S. Ct. 28 (2015)) or whether *Brumfield* applies to capital defendants outside of Louisiana (*Smith v. Campbell*, 620 F. App'x 734 (11th Cir. 2015))).

[4] *See* Natalie Cheung, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317 (2013) (pointing out the differing IQ cutoff scores, varying rebuttable presumptions, and divergent standards of proof in each state).

[5] Hall v. Florida, 134 S. Ct. 1986 (2014).

[6] Moore v. Texas, 137 S. Ct. 1039 (2017).

[7] *Id*.

[8] *See States With and Without the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last updated Nov. 9, 2016).

[9] *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002).

[10] *Id*. at 318; *see also* John H. Blume, *Intellectual Disability, Innocence, Race, and the Future of the American Death Penalty*, 42 HUM. RTS. 10 (2016) (highlighting that *Atkins* will only be effective when public defender offices are well-funded and properly staffed).

[11] *Atkins*, 536 U.S. at 315.

[12] Penry v. Lynaugh, 492 U.S. 302 (1989) (holding that the execution of mentally retarded inmates was constitutional, but in the instant case, Texas had violated Penry's rights because the jury instruction did not allow examination of Penry's mental retardation as a mitigating factor to the application of the death penalty); *see also* Aimee D. Borromeo, *Mental Retardation and the Death Penalty*, 3 LOY. J. PUB. INT. L. 175, 176 n. 9 (2002) (discussing Penry v. Johnson, 532 U.S. 782 (2001), where the Supreme Court reversed, for a second time, Penry's death sentence because the judge at the "1990 trial failed to give the jury an opportunity to consider his mental retardation" during the sentencing phase of the trial).

[13] *See Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting).

[14] *Id*. at 326 (Rehnquist, C.J., dissenting).

[15] *Id*. at 344-45 (Scalia, J., dissenting) (emphasis in original).

[16] Lauren A. Ricciardelli & Kevin M. Ayres, *The Standard of Proof of Intellectual Disability in Georgia: The Execution of Warren Lee Hill*, 27 J. DISABILITY POL'Y STUD. 158 (2016) (reporting that the state of Georgia requires the most stringent standard for defining intellectual disability of all the states in the country, "beyond a reasonable doubt"); *cf*. V. Stephen Cohen, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457 (1991) (discussing proposed legislation before the Florida House and Senate that would ban the execution of the mentally retarded upon a showing of a "preponderance of evidence").

[17] *See* Hensleigh Crowell, *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, 746 (2016) (contending that Texas has "underenforced" *Atkins* by using a "more restrictive definition" of intellectual disability because the Court of Criminal Appeals considers some clinically intellectually disabled individuals to still deserve death); *see also* Taylor B. Dougherty, *"Outsmarting" Death by Putting Capital Punishment on Life Support: The Need for Uniform State Evaluations of the Intellectually Disabled in the Wake of* Hall v. Florida, 81 BROOK. L. REV. 1683, 1709 (2016) ("Selective [IQ] score consideration is another problem present in the post-*Atkins* evaluative scheme, putting intellectually disabled capital defendants further at risk" for execution.); *see also Marvin Wilson, Convicted Killer, Executed by Texas Despite Claims of Having Too Low IQ*, CBS NEWS (Aug. 8, 2012), http://www.cbsnews.com/news/marvin-wilson-convicted-killer-executed-by-texas-despite-claims-of-having-too-low-iq/ (last visited Oct. 17, 2017) (saying that it was "outrageous that the state of Texas continues to utilize unscientific guidelines ... to determine which citizens with intellectual disability are exempt from execution .... Texas was trying to skirt the ban by altering the generally accepted definitions of mental impairment to the point where gaining relief for an inmate is 'virtually unobtainable[...]'").

[18] *See* Ashley Sachiko Wong, *Aligning the Criminal Justice System with the Mental Health Profession in Response to* Hall v. Florida, 94 OR. L. REV. 425, 428 (2016) (lamenting the fact that the *Hall* "Court provided little guidance for how state legislatures should reform their intellectual disability statutes to avoid" being unconstitutional).

[19] *Atkins*, 536 U.S. at 318.

[20] *See* Hall v. Florida, 134 S. Ct. 1986 (2014).

[21] *See* Molly Mitchell, *Proposed Amendments to Idaho's Statute Defining Intellectual Disability for Purposes of Death Penalty Preclusion in Light of* Hall v. Florida, 10 IDAHO CRITICAL LEGAL STUD. J. 10, 20 (2016) (criticizing how the Idaho Supreme Court in a pre-*Atkins* and pre-*Hall* case, "rejected accounting for the SEM [standard measure of errors on IQ scores] when determining a defendant's intellectual disability").

[22] *See* Leigh D. Hagan, Eric Y. Drogin & Thomas J. Guilmette, *Assessing Adaptive Functioning in Death Penalty Cases After* Hall *and DSM-5*, 44 J. AM. ACAD. PSYCHIATRY & L. 96, 97 (2016) (arguing that in *Hall v. Florida* the U.S. Supreme Court relied "in part, on the [standard error of measurement on IQ tests] to open the door to evidence regarding adaptive functioning with IQ scores in the controversial range").

[23] *See* Hall v. Florida, 134 S. Ct. at 2001 (referencing the DSM-5, the Supreme Court opined "[i]t is not sound to view a single factor [such as IQ score] as dispositive of a conjunctive and interrelated assessment").

[24] *Id*. at 1999.

[25] *Id*. at 1989.

[26] *See* David H. Kaye, *Deadly Statistics: Quantifying an "Unacceptable Risk" in Capital Punishment*, 16 LAW, PROBABILITY, AND RISK 7, 33 (2017) (explaining the "[f]our procedures for coping with the one aspect of 'measurement error'--namely, random errors in measuring IQ scores--that the Court invoked to invalidate Florida's 'rigid rule.' The four procedures flow from the fundamental distinction between a test-taker's unknown true score and a measured score. They all seek to control the 'unacceptable risk' that an individual with a measured score has a true score that is less than or equal to the maximum true score

consistent with a diagnosis of disability.").

[27] *See Hall*, 134 S. Ct. at 2000.

[28] *Id*. at 1993; *see also* Kellie Manders, *With a Life on the Line, Emerging Technologies Can Contribute in the Determination of Intellectual Disability in Capital Sentencing*, 55 JURIMETRICS 115 (2014) (discussing the use of technology to diagnose intellectual disability).

[29] *Hall*, 134 S. Ct. at 1991.

[30] *Id*. at 1995; *see* Steven D. Schwinn, *Can Texas Use an Older Definition of Intellectual Disability to Determine if a Person Is Ineligible for the Death Penalty?*, 44 PREVIEW U.S. SUP. CT. CASES 80, 81 (2016) (saying that "[c]linical definitions of [intellectual disability] have moved away from a rigid reliance on IQ scores and toward an emphasis on practical abilities and adaptive functioning").

[31] *Hall*, 134 S. Ct. at 2002 (Alito, J., dissenting); *cf*. Michael Clemente, *A Reassessment of Common Law Protections for "Idiots,"* 124 YALE L. J. 2746, 2803 (2015) (arguing that the Supreme Court should extend protections to death row inmates who are not protected by *Atkins* and *Hall* under evolving standards of decency but who are nevertheless intellectually disabled on the basis of 17th-century common law traditions in the colonies: those with a mental age below fourteen, an inability to read and do arithmetic, a community reputation as disabled, and other traits "associated with idiocy").

[32] *Hall*, 134 S. Ct. at 2005 (Alito, J., dissenting).

[33] *Id*. at 2006 (Alito, J., dissenting).

[34] Requires a consideration of the defendant's adaptive functioning.

[35] *See Hall*, 134 S. Ct. at 1995.

[36] *Id*. at 2006 (Alito, J., dissenting).

[37] *See* Moore v. Texas, 137 S. Ct. 1039 (2017).

[38] *See* Atkins v. Virginia, 536 U.S. 304 (2002); *see* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643; *see also* SSR, *Change in Terminology: "Mental Retardation" to "Intellectual Disability,"* 78 Fed. Reg. 46,499 (Aug. 1, 2013) (to be codified at 20 C.F.R. pt. 404, 416) (Per a rule cited in the Federal Register by the Social Security Administration on August 1, 2013, the term "mental retardation" was changed to "intellectual disability." This change went into effect on September 3, 2013.).

[39] Ex Parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004); *see also* JOHN STEINBECK, OF MICE AND MEN (reprint 1993) (In the novella, Lennie Small is a large, intellectually disabled man who experiences tactile joy by touching soft things. Unaware of his strength, Lennie kills a series of animals throughout the novella before accidentally killing his boss's daughter-in-law.); *see also* Julia Barton, *Judging Steinbeck's Lennie*, LIFE L., http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie/ (last visited Oct. 17, 2017) (exploring the "Lennie standard," the creation of Judge Cathy Cochran of the Texas Court of Criminal Appeals).

[40] *See Ex Parte Briseno*, 135 S.W.3d at 1; *see also* Christin Grant, Comment, *The Texas Intellectual Disability Standards in Capital Murder Cases: A Proposed Statute for a Broken Method*, 54 S. TEX. L. REV. 151 (2012) (detailing the history of the Texas legislature's failed attempts to develop a statute post-*Atkins* surrounding intellectual disability in capital cases).

[41] *See Ex Parte Briseno*, 135 S.W.3d at 6.

[42] *See* Adam Liptak, *Supreme Court to Consider Legal Standard Drawn From* 'Of Mice and Men', N.Y. TIMES (Aug. 22, 2016), https://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html (last visited Oct. 17, 2017) ("Texas took a creative approach, adopting what one judge there later called 'the Lennie standard.'"); *see also* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689 (2009) (showing how states attempted to skirt the *Atkins* prohibition and exploring how the Texas Court of Criminal Appeals used the *Briseno* factors to highlight stereotypes, finding intellectually disabled capital defendants outside the protections of *Atkins*).

[43] *See Ex Parte Briseno*, 135 S.W.3d at 8-9.

[44] Wilson v. Thaler, 133 S. Ct. 81 (pet. writ cert. U.S. 2012).

[45] *See* Alison Flood, *John Steinbeck's Son Criticizes Texas Over Use of Fiction in Death Row Cases*, GUARDIAN (Aug. 8, 2012), https://www.theguardian.com/books/2012/aug/08/john-steinbeck-texas-character-death-row; *see also* Nancy Haydt, Stephen Greenspan, & Bhushan S. Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases*, 82 UMKC L. REV., 359, 381 (2014) (While most *Atkins* hearings pertain to mild intellectual disability, the "'Lennie standard' in Texas ... redefine[d] intellectual disability for Atkins purposes as moderate or severe intellectual disabilities," increasing the class of offenders who would be death penalty eligible.).

[46] *See* Adam Liptak, *Justices Hear Texas Death Penalty Case Involving Intellectual Disability*, N.Y. TIMES (NOV. 29, 2016), http://www.nytimes.com/2016/11/29/us/politics/justices-hear-texas-death-penalty-case-involving-intellectual-disability.html?_r=0.

[47] *Ex Parte Briseno*, 135 S.W.3d at 1 ("[U]ntil the Texas Legislature provides an alternate statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR[....]").

[48] *See* ROBERT L. SCHALOCK ET AL., INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010); *see also* Brooke Amos, *Atkins v. Virginia: Analyzing the Correct Standard and Examination Practices to Use When Determining Mental Retardation*, 14 J. GENDER, RACE, & JUST. 469, 471-72 (2011) (There are "two slightly different definitions of intellectual disability ... [but they] basically are the same ...." The AAIDD definition is superior to the APA definition "because the AAIDD focuses exclusively on ascertaining the most recent developments and best methods for diagnosing or defining intellectual disability.").

[49] Brief for Petitioner-Appellant at 29, Moore v. Texas, 137 S. Ct. 1039 (2017) (No. 15-797).

[50] *Id*. at 30*; see* Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L. Q. 1, 37-38 (2011) (pointing out that the use of unscientific *Briseno* factors may have led, in part, to too many unsuccessful *Atkins'* claims in Texas: the national average success rate for *Atkins'* claims was 38%, compared to 17% in Texas); *see also* PEGGY M. TOBOLOWSKY, EXCLUDING INTELLECTUALLY DISABLED OFFENDERS FROM EXECUTION: THE CONTINUING JOURNEY TO IMPLEMENT *Atkins* (2014) (presenting a detailed discussion of post-*Atkins* jurisprudence).

[51] Brief for Respondent at 25, Moore v. Texas, 137 S. Ct. 1039 (2017) (No. 15-797).

[52] *Id*. at 25, 28.

[53] Moore v. Texas, 137 S. Ct. 1039 (2017); *cf*. Wong, *supra* note 18, at 444 (implying that use of the *Briseno* factors, although "nonscientific," may be useful to help clarify "adaptive functioning").

[54] *See* Sheri Lynn Johnson, *A Legal Obituary for Ramiro*, 50 U. MICH. J. L. REFORM, 291, 320-21 (2017) (referring to the execution of Ramiro Hernandez Llanas; claiming that the Texas Court of Criminal Appeals was "chart [ing] its *Atkins* enforcement, or rather, its under-enforcement, path contrary to professional consensus. In *any* other jurisdiction, [the defendant] would have been found to be a person with intellectual disability. He just wasn't dumb enough for Texas." Texas has a "history of flouting the Supreme Court's rulings regarding the significance of intellectual disability.").

[55] *See Moore*, 137 S. Ct. at 1044.

[56] *Id*. at 1045.

[57] *Id*.

[58] *Id*. at 1048.

[59] *Id*. at 1053.

[60] *Id*. at 1052.

[61] See Hurst v. Florida, 136 S. Ct. 616 (2016) (showing another recent example of the Court's willingness to find death penalty practices unconstitutional if they are at odds with the practices employed by a majority of death penalty states); *cf*. Emily Taft, Moore v. Texas*: Balancing Medical Advancements with Judicial Stability*, 12 DUKE J. CONST. L. PUB. POL'Y SIDEBAR 115, 128 (2017) (interpreting the *Briseno* factors in a favorable light, Taft contends in a pre-*Moore* article that the *Briseno* factors are "merely an optimal tool that Texas courts may employ to help assess an individual's adaptive functioning").

[62] *See* Taft, *supra* note 61, at 129 (noting that at the time Moore was sentenced, twenty-four states used older standards to establish a national consensus or an "indicia of society's standards").

[63] *See Moore*, 137 S. Ct. at 1052.

[64] *Id*. at 1052-53*; see* Hannah Brewer, *The* Briseno *Factors: How Literary Guidance Outsteps the Bounds of* Atkins *in the Post*-Hall *Landscape*, 69 BAYLOR L. R. 240, 257 (2017) (saying that according to the AAIDD, the "*Briseno* factors bear little relationship to clinical understandings of intellectual disability").

[65] *See* Adam Liptak, *Texas Used Wrong Standard in Death Penalty Cases, Justices Rule*, N.Y. TIMES (Mar. 28, 2017), https://www.nytimes.com/2017/03/28/us/politics/texas-death-penalty-supreme-court-ruling.html?_r=0;, *see also* Clinton M. Barker, Note, *Substantial Guidance without Substantive Guides: Resolving the Requirements of* Moore v. Texas *and* Hall v. Florida, 70 VAND. L. R. 1027, 1063 (2017) (The Court should not allow the *Briseno* factors to lead "juries [to] misconstrue evidence that should have factored against a death sentence as evidence favoring it." In other words, "because the *Briseno* factors '[by] design and in operation ... create an unacceptable risk,' ... they may not be used ... *to restrict* qualification of an individual as intellectually disabled.").

[66] *See Moore*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting).

[67] *Id*. at 1055.

[68] *Id*.

[69] *Id*. at 1058.

[70] *Id*. at 1058-59.

[71] *Id*. at 1059; *see also* Taft, *supra* note 61, at 128 (pointing out-- what would become Chief Justice Robert's dissenting position in *Moore*--that Texas did use "current medical standards" when it used the testimony of "several experts" to establish Moore's "intellectual and adaptive functioning," concluding that Moore did not qualify for execution exclusion).

[72] *See* Death Penalty Information Center, *supra* note 8.

[73] See appendix for citations.

[74] This column was adapted from the appendix of the respondent's brief (See Brief of Respondent, *supra* note 51 at 1a-5a) submitted in *Moore v. Texas*, 137 S.Ct. 1039 (2017), with minor changes. Nebraska did not have the death penalty at the time the brief was prepared, the *Briseno* factors were omitted for Texas, and *Hill v. Anderson*, WL 2890416 (Ohio 2014) was overlooked for Ohio. DSM = Diagnostic and Statistical Manual of Mental Disorders. AAIDD = American Association on Intellectual and Developmental Difficulties (formerly AAMR, or American Association of Mental Retardation). AAMD = American Association on Mental Deficiency.

[75] Montana does not have a statute addressing intellectual disability. However, M.C. § 46-18-304 (2015) considers it a mitigating factor that "the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired."

[76] New Hampshire does not have a statute addressing intellectual disability. However, N.H.C. § 630.5.VI(a)(2015) considers it a mitigating factor that "the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge."

[77] *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (American Psychiatric Ass'n ed., 5th ed. 2013).

[78] *See* Ex Parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

[79] Commonwealth of Pennsylvania v. Bracey, 117 A.3d. 270 (Pa. 2015).

[80] LA. CODE CRIM. PROC. ANN. ART. 905.5.1 (2015) (Mississippi, Oregon, and Pennsylvania have adopted current medical definitions of intellectual disability as a result of court rulings rather than statutes.).

[81] Chase v. State, 171 So. 3d. 463 (Miss. 2015).

[82] ARIZ. REV. STAT. ANN. § 13-753 (West 2016).

[83] N.C. GEN. STAT. § 15A-2005 (2015).

[84] State v. Agee, 364 P.3d. 971, 989 (Or. 2015) (The court did, however, order the trial court to "consider the evidence presented [during an *Atkins* hearing on intellectual disability] in light of the standards set out in the DSM-5 and discussed in *Hall*" at 1000. The DSM-5 is cited as an authority because it is the latest version of the DSM, which Oregon relies on, not because the court intended for the DSM-5 to remain the authority on intellectual disability even after the DSM has been updated beyond the fifth

edition. This is evident because the court required the trial court to use the DSM-5 instead of the DSM-IV because it is the "now-current" version of the DSM.); *see also* Pia Quimson-Guevarra & Tyler G. Jones, *Post*-Atkins *Determinations of Intellectual Disability in a Death Penalty Case in Oregon*, 44 J. AM. ACAD. PSYCHIATRY L. 394, 395 (2016) ("[E]ven though the trial court ruling was based on medical standards current at the time, the court concluded that new medical standards should be applied").

85 For another way to deny an inmate an intellectual disability claim, *see* Gilbert S. Macvaugh & Mark D. Cummingham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 135-36 (raising the issue, without arguing for it, that under *Atkins* some courts and/or legislatures might adopt the position that intellectually disabled offenders may somehow be "not [mentally] retarded enough to qualify for an exemption from the death penalty." That is, a capital defendant could suffer from an intellectual disability but fail to reach a threshold level that would bar execution. *Atkins* bars such a practice.); *See also*, Amos, *supra* note 48, at 470 (The psychologist who gave Bowden an IQ test (he scored a sixty-five) said "Bowden was [mentally retarded but] not mentally retarded enough to deserve clemency"; thereafter Bowden was executed). The *Moore* Court reemphasized that "in *Atkins v. Virginia*, we held that the Constitution 'restricts the states' power to take the life of' *any* intellectually disabled individual."). Atkins v. Virginia, 536 U.S. 304, 321 (2002); Hall v. Florida, 134 S. Ct. 1986, 1992-93 (2014); Moore v. Texas, 137 S. Ct. 1039, 1048 (2017).

86 *See* MONT. CODE ANN. § 46-18-304 (2015); *see also*, N.H. Rev. Stat. § 630.5.VI(a) (2015). The absence of any statute explicitly exempting the intellectually disabled from execution in Montana and New Hampshire, in conjunction with the omission of intellectual disability as a potential mitigating factor, suggests that these two states may rely on a defendant's limited ability to understand the difference between right and wrong (which *is* listed as a mitigating circumstance) as an inadequate proxy measure of his or her intellectual disability.

87 *See Hall*, 134 S. Ct. at 1999.

88 *Id*. at 2006 (Alito, J., dissenting).

89 *See Moore*, 137 S. Ct. at 1044; *see also*, Noah Cyr Engelhart, *Matching the Trajectory of the Supreme Court on the Intellectual Disability Defense: A Recommendation for the States*, 79 ALB. L. REV. 567 (2016) (recommending that the California statute be adopted as a model for other states to follow).

90 *Id*. at 1053.

91 *Id*. at 1048.

92 Neither the DSM-5 nor the AAIDD-11 lists the inability to appreciate the difference between right and wrong as a criterion for intellectual disability.

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

94 Brief for Am. Psychol. Assoc. et al. as Amici Curiae Supporting Petitioners, at 24, Moore v. Texas, 2016 WL 4151451 (No. 15-797) (U.S. Aug. 4, 2016) ("[T]he ability to deceive has no relevance to the accepted clinical criteria for diagnosing intellectual disability.").

95 *Id*. at 25 ("[I]ntellectual disability is not diagnosed by focusing on abilities or strengths, but instead by identifying deficits in adaptive functioning. The focus on the crime--one event--may come at the expense of other, more typical life events that provide a more accurate assessment of an individual's adaptive functioning.").

96 Brief for The Am. Assoc. on Intellectual and Dev. Disabilities as Amici Curiae Supporting Petitioners, at 4, Moore v. Texas, 2016 WL 4151447 (No. 15-797) (U.S. Aug. 4, 2016) (A deviation "from the basic clinical framework of the definition inevitably leads

to inaccurate and unreliable results, and protects only a sub-set [sic] of defendants with intellectual disability.").

97 *See* Crowell, *supra* note 17, at 744.

98 *See* Ruthie Stevens, *Are Intellectually Disabled Individuals Still at Risk of Capital Punishment After* Hall v. Florida*? The Need for a Totality-of-The-Evidence Test to Protect Human Rights in Determining Intellectual Disability*, 68 OKLA. L. REV. 411, 432 (2016) ("The *Hall* Court expanded the Eighth Amendment protection for intellectually disabled defendants, but further safeguards are necessary.").

99 *See* Blume et al., *supra* note 42, at 693-94 ("[T]he Court gave states authority over the procedures used to implement the categorical exemption [of the intellectually disabled from execution] ... [b]ut the Court did not give states license to narrow the class of persons who fall within the constitutional prohibition.").

100 *See* Crowell, *supra* note 17, at 747 ("Although the Supreme Court gave discretion to states to develop appropriate procedures for implementing *Atkins*, the Court gave no discretion to states to alter the class of people protected--the intellectually disabled.").

101 *See* Am. Psychiatric Assoc. et al., *supra* note 77, at 33.

102 *See* ROBERT L. SCHALOCK ET AL., INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATIONS, AND SYSTEMS OF SUPPORTS 5 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010).

103 *See* Moore v. Texas, 137 S. Ct. 1039, 1055 (2017) (Roberts, C.J., dissenting).

104 *Id*. at 1048 ("[W]e relied on the most recent (and still current) versions of the leading diagnostic manuals--the DSM-5 and AAIDD-11.").

105 *See* Cheung, *supra* note 4, at 326 ("[A] person who has not shown any symptoms before his eighteenth birthday but shows symptoms beginning at the age of nineteen and through the early adult years may still be in a developmental period in his life .... If the APA is in fact promulgating a broader standard for determining who qualifies as intellectually disabled, this could significantly help intellectually disabled defendants making an *Atkins* claim who did not show symptoms prior to the age of eighteen.").

106 *See* Hall v. Florida, 134 S. Ct. 1986, 2000 (2014).

107 *See* Atkins v. Virginia, 536 U.S. 304, 305 (2002).

108 *Id*.

109 *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, MENTAL & PHYSICAL DISABILITY L. REP. 11, 27 (2003); *see also* Lane Williams, *Testimony to the Senate Committee on Corrections and Juvenile Justice*, http://kslegislature.org/li/b2015_16/committees/ctte_s_corrections_and_juvenile_justice_1/documents/testimony/20160209_06.pdf (last visited Dec. 1, 2016); *see also* Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the 'Childhood Onset' Requirement in Atkins Claims,* 37 VT. L. REV. 591, 595 (2013) ("[A] defendant who suffers traumatic brain injury at age seventeen with resulting cognitive and adaptive skill deficits, and a defendant who has the same injury and same deficits at age nineteen, will be treated very differently for purposes of the death penalty. This is the case even though, at the time of the offense, both had the exact same lessened culpability that stems from mental retardation.").

110 *See* John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three)* Atkins*: Intellectual*

Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar, 23 WM. & MARY BILL RTS. J. 393 (2014) (examining post-*Atkins* 2013 determinations of intellectual disability among all 371 U.S. capital defendants who raised the issue of intellectual disability during this period). Of the 204 cases where the defendant was found intellectually able, Blume et al. only found three cases where the defendant lost their claim because they could not prove they experienced intellectual disability before eighteen/the end of the developmental period.

111 *See* Hagan et al., *supra* note 22, at 103.

112 *See* Hall v. Florida, 134 S. Ct. 1986, 1988 (2014).

113 *See* Robert M. Sanger, *IQ, Intelligence Tests, 'Ethnic Adjustments' and* Atkins, 65 AM. UNIV. L. REV. 87, 90, 109 (2015) ("[A]fter increasing [a capital defendant's IQ] test scores, the prosecution argues that the defendant is not eligible for relief from execution under *Atkins v. Virginia*.").

114 *See* Sireci v. Florida, 137 S. Ct. 470, 471 (2016), *cert. denied* (Justice Breyer noted in his dissent to the denial of certiorari that, "[i]ndividuals who are executed are not the 'worst of the worst,' but, rather, are individuals chosen at random, on the basis, perhaps of geography, perhaps of the views of individual prosecutors, or still worse on the basis of race.").

115 *See* Hall, 134 S. Ct. at 1995.

116 *Id*.

117 Officials must be vigilant when presenting information to courts about adaptive deficits; *see* Marcus T. Boccaccini et al., *Correspondence Between Correctional Staff and Offender Ratings of Adaptive Behavior*, 28 PSYCHOL. ASSESSMENT 1608, 1609 (2016) (Correctional staff may be inappropriate "as third-party informants for scoring adaptive functioning because they may ... have never observed the inmate in a community setting.").

118 N.E.C. § 28-105.01 (2015).

119 *See* Hall v. Florida, 134 S. Ct. at 2008.

120 *See* Cheung, *supra* note 4; *see also* Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High is Too High?*, 20 BERKELEY J. OF CRIM. L. 163, 204 (2015) ("[T]he burden of proving a capital defendant is intellectually disabled should fall to the defendant, because the defendant is the party most likely to be in possession of the evidence of intellectual disability.").

121 Gregg v. Georgia, 428 U.S. 153 (1976).

122 *See* Blume et al., *supra* note 110, at 411 (reporting that juries found ninety-six percent (twenty-two of twenty-three cases over a thirteen-year period) of defendants intellectually able. "[J]uries seem to be vastly harsher in their evaluation of intellectual disability claims than judges."); *see also* Khristina L. Nava, *Juror Decisions in a Capital Trial Involving Intellectual Disability* (2016) (unpublished Ph.D. dissertation, Fielding Graduate University) (suggesting capital jurors may stereotypically believe that a defendant with a mild intellectual disability does not look "retarded," thus, ignoring deficiencies in adaptive functioning and erroneously imposing a death sentence; concluding it is critical for juries to properly understand and interpret use of IQ scores, adaptive deficits, and age of onset when assessing intellectual disability in capital proceedings).

123 *See* Alexander H. Updegrove & Rolando V. del Carmen, *An Analysis of State Statutes on Capital Juror Disqualification and a Proposal for an Exploratory Statute*, 1 J. CRIM. JUST. & L. 10 (2016) (reporting that fourteen of the sixteen death penalty states that have statutes specifically addressing capital juror disqualification procedures use language that "makes it clear the

disqualification criteria applies solely to jurors opposed to capital punishment").

124 *See* Michael L. Perlin, *'Power and Greed and the Corruptible Seed': Mental Disability, Prosecutorial Misconduct, and the Death Penalty*, 43 J. AM. ACAD. PSYCHIATRY & L. 266, 269 (2015) (detailing a variety of unethical behaviors prosecutors have perpetrated to obtain a conviction and harsher sentence).

125 *See* Ellis, *supra* note 109.

126 *See* Amos, *supra* note 48, at 485 ("If the people determining whether the defendant suffers from intellectual disability know the circumstances surrounding the case, there is a greater likelihood that jurors will be biased when determining intellectual disability if they believe the individual should be put to death based on the facts of the case. While taking the power out of the hands of a layperson jury and giving it to a learned judge slightly mitigates the issue, the issues of prejudice remain present.").

127 *Id*. at 487 ("A doctor specializing in diagnosing intellectual disability is the most qualified person to make this determination. Instead of forcing a judge or jury to make this purely medical decision, the legislatures should use the *most* effective means of making this decision by utilizing a health care professional.").

128 *See* Cheung, *supra* note 4.

129 *See* Ellis, *supra* note 109 at 16; *see also* Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 UNIV. OF MEM. L. REV. 855, 883 ("[S]ome states have created a hybrid approach in which the defendant essentially gets two opportunities to demonstrate that he or she is intellectually disabled and therefore categorically barred from application of the death penalty. Under such a model, a defendant may have a pre-trial hearing before a judge, but if the defendant does not prevail, he or she may also raise the issue as part of a sentencing determination by the jury.").

130 *See Ellis*, *supra* note 109 at 16.

131 See Cheung, *supra* note 4, at 348.

132 *See* Saviello, *supra* note 120, at 204 (quoting Cooper v. Oklahoma, 517 U.S. 348, 363 (1996)).

133 *See id*. at 204 (quoting Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972)); *see generally* ANATOMY OF INNOCENCE: TESTIMONIES OF THE WRONGFULLY CONVICTED (Laura Caldwell & Leslie S. Klinger, eds., 2017) (highlighting cases of actual innocence and exonerations); *see also* Gumm v. Mitchell, 775 F.3d 345, 373-374 (6th Cir. 2014) (discussing the increased likelihood of false confessions from individuals with intellectual disabilities).

134 *See* ELLIS, *supra* note 109.

135 *See* CHEUNG, *supra* note 4, at 333; *see also* BLUME, *supra* note 10, at 12 ("[T]he types of non-scientific, stereotypical testimony offered by prosecution's 'experts' ... often succeeds in defeating objectively meritorious intellectual disability claims. Thus, persons who any reasonable clinician would conclude are intellectually disabled in any setting other than a capital case are frequently sentenced to death and ultimately executed.").

136 *See Lethally Deficient: Direct Appeals in Texas Death Penalty Cases*, TEXAS DEFENDER (Dec. 12, 2016), http://texasdefender.org/wp-content/uploads/TDS-2016-LethallyDeficient-Web.pdf.

137 *See* Johnson, *supra* note 54, at 303-04 (A Texas prosecutorial expert witness testified that the capital defendant "might be malingering to avoid the death penalty," despite having "never administered or even scored an IQ test, nor could he state the

clinical definition of intellectual disability." The expert was "particularly unqualified to offer an opinion about [the defendant] because he had never spoken to [him] or interviewed a single person who had observed [the defendant's] functioning." Bordering on racist, the expert referred to the defendant's "cultural group" [meaning Latino] as explaining his poor functioning.). On malingering, *see* Saviello, *supra* note 120, at 213 ("Because adaptive deficits must occur prior to age eighteen, and be proven by documentation or observation, no malingering defendant can go back in time and recreate adaptive deficits that did not exist previously, so concerns about malingering are misplaced within the context of intellectual disability."); *see also* Barbara McDermott & Charles R. Scott, *Malingering in Correctional Settings*, CORRECTIONAL HEALTH CARE PRACTICE, ADMINISTRATION AND LAW 18-1 (Fred Cohen ed., 2017) (discussing malingering concerns within correctional health care generally). On experts who are exclusively "prosecution" witnesses, *see* Michael Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U. L. REV. 1437, 1457 (2016) (commenting on prosecutorial expert witnesses using "corrupt science" in "cases in which persons with intellectual disabilities inappropriately face the death penalty based on fraudulent testimony ...").

138 *See* TEX. CODE CRIM. PROC. ANN. art. 26.052 (West 2015)*; see also* ARIZ. REV. STAT. § 13-753 (2016), KAN. STAT. ANN. § 21-6622 (West 2015), UTAH CODE ANN. § 77-15a-101 (West 2013), WASH. REV. CODE § 10.95.030 (2015), and WYO. STAT. ANN. § 7-11-301-304 (2015)*; see also* CHEUNG, *supra* note 4, at 333-34 ("[A]ll states should have a standard for qualifications required of testifying experts because not all psychologists and psychiatrists are accustomed to working with patients with intellectual disabilities. By not implementing a standard for testifying experts, some states risk executing an intellectually disabled individual due to reliance on the testimony of inexperienced 'experts.'").

139 KAN. STAT. ANN. § 21-6222 (West 2015).

140 UTAH CODE ANN, § 77-15a-104 (West 2013).

141 TEX. CODE CRIM. PROC. ANN. art. 26.052 (West 2015).

142 *See* Amos, *supra* note 48, at 492.

143 UTAH CODE §77-15a-101 (West 2013).

144 *See* Amos, *supra* note 48, at 492.

145 Ybarra v. State, 247 P.3d. 269 (Nev. 2011).

146 Indiana, Kansas, Montana, Nebraska, New Hampshire, and South Carolina.

147 State v. Arellano, 143 P.3d 1015, 1020 (Ariz. 2006) ("[E]vidence of any skills or deficiencies in adaptive behavior exhibited by a defendant, even after age eighteen, helps determine whether a defendant has mental retardation.").

148 *See* Ethan A. Wilkinson, *Eighth Amendment Protections in Capital Proceedings Against the Intellectually Disabled: Assessing State Methods of Class Protection Through the Lens of* Hall v. Florida, 40 L. & PSYCHOL. REV. 321, 324 (2016) ("[T]he Court held that Florida's unnecessarily rigid reliance on the numbers on IQ tests--to the exclusion of other evidence--violated the protection established in *Atkins*").

149 *See* N.C. GEN. STAT. § 15A-2005 (2015).

150 *See* Engelhart, *supra* note 89, at 587.

[151] ARK. CODE ANN § 5-4-618 (2015); ARIZ. REV. STAT. § 13-753 (2016).

[152] NEB. REV. STAT. § 28-105.01 (2015).

[153] *See* Amos, *supra* note 48, at 493-95 ("[B]y adopting the test recommended by the AAIDD and using a court-appointed health care professional or a neutral medical professional with intellectual disability training and agreed on by both parties, the decision will be made by a neutral third party who is medically trained and utilizing the newest and best tests available. Utilizing a neutral expert will help to make the diagnosis impartial and more accurate as opposed to an adversarial contest.").

[154] *See* LA. CODE CRIM. PROC. ANN. Art. 905.5.1; *see also* CAL. PENAL CODE § 1376 (West 2015).

[155] *See* N.C. GEN. STAT. § 15A-2005 (2015); *see also* ARK. CODE ANN § 5-4-618 (2015), *and* OKLA. STAT. tit. 21 § 701.10b (2015).

[156] State v. Lott, 97 St.3d 303 (Ohio 2002).

[157] *See* Amos, *supra* note 48, at 495 ("Allowing the jury to determine if an individual is intellectually disabled is different than allowing a jury to determine if the actions of the crime are ... so depraved or elevated that they warrant capital punishment because this determination follows human morality. However, asking a jury to determine if an individual is intellectually disabled is not a question of human morality; it is a question of medical diagnosis, and given the life and death nature of the decision, it is imperative that the correct medical decision is reached.").

[158] *Id*.

[159] *Id*.

[160] *Id*. at 493.

[161] *Id*. at 494.

[162] WYO. STAT. ANN. § 7-11-301-304 (2015).

[163] *See* Cheung, *supra* note 4, at 336; *see also* ELLIS, *supra* note 109, at 14 ("[M]ost of the States merely required the defense to demonstrate mental retardation by a 'preponderance of the evidence"'). For another approach, *see* Peggy L. Moriearty, *Implementing Proportionality*, 50 U. C. DAVIS L. REV. 961, 1026 (2017) (The "Court should, in every capital case, place the burden of proof on the State to prove beyond a reasonable doubt that the defendant does not suffer from 'mental retardation.' Because the capital sentencing process constitutionally requires an exhaustive examination of aggravating and mitigating evidence, such a requirement would not be unduly burdensome.").

[164] Arizona, Colorado, Florida, Indiana, North Carolina, and Oklahoma.

[165] GA. CODE. ANN. §17-7-131 (2015). *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U. L. REV. 553, 605 (2017) (Since *Atkins*, Georgia has never had a capital defendant show he was intellectually disabled under the beyond a reasonable doubt standard. Georgia's high standard of proof is idiosyncratic to all other states and poses an "unreasonable risk" that the state will execute "many mentally retarded offenders").

166 *See* Saviello, *supra* note 120, at 206-17 (discussing Cooper v. Oklahoma, 517 U.S. 348 (1996), and the level of proof in the context of mental health).

167 Arkansas, Georgia, Missouri, North Carolina, Oklahoma, and Virginia.

168 *See* ARIZ. REV. STAT. ANN. § 13-753 (2016).

169 *See* KAN. STAT. ANN. § 21-6622 (2015).

170 *See* UTAH CODE §77-15a-101 (West 2013).

171 WASH. REV. CODE § 10.95.030 (2015)

174 WYO. STAT. ANN. § 7-11-301-304 (2015).

175 Bruce Bongar, Shelley Howell, Wendy Packman & Sarah E. Wood, *A Failure to Implement: Analyzing State Responses to the Supreme Court's Directives in* Atkins v. Virginia *and Suggestions for a National Standard*, 21 PSYCHIATRY, PSYCHOL., & L. 16, 38 (2014) (discussing a model statute prior to *Hall* or *Moore*); *see also* Kathryn Raffensperger, Atkins v. Virginia: *The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 755-57 (2013) (saying that inconsistent application of the *Atkins* standard across states violates the Eighth Amendment and the incorporation doctrine).

176 This recommendation follows Ellis' suggestion that juries answer whether they "unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation" (*see* Ellis, *supra* note 109 at 20).

177 Atkins v. Virginia, 536 U.S. 304 (2002).

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