

**Judicial Understanding of Intellectual Disability and
Correlates of Judicial Decision-Making in *Atkins* Claims**

A Dissertation Defense

Submitted to the Faculty

of

Drexel University

by

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in partial fulfillment of the

requirements for the degree

of

Doctor of Philosophy

May 2011

DEDICATIONS

To my Parents, Patricia and Richard. I am so proud to call you my parents. You have always believed in me and my dreams, and provided the love and support to achieve them.

To my Grandfather and best friend, Robert J. Mulvaney. I love and miss you, and I know you are always by my side.

To my Goddaughter, Elora Granger, and her soon-to-arrive Baby Sister. May you always dream big and know that you can achieve anything and everything you put your mind to.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank God, my parents, and my sister. I have been very blessed with a strong faith and supportive family. Without these two things, I would not be who I am, and I never would have been able to pursue my dreams and reach the goals I have set over the years. Thank you for believing in me and for always being there through the good and bad. Thank you for all of your words and acts of love and encouragement, and thank you for always being willing to lend an ear or a hand in times of need. I hope you always know how much I appreciate you. Thank you also to my whole family – my Grandma, Godparents, Goddaughter, Aunts, Uncles, and Cousins – you have always motivated and inspired me to do my best and for that I am most grateful.

I would also like to thank all of my dear friends and colleagues. To my best friend, Heather B. Nelson, words cannot express how grateful I am for our friendship. I have learned so much from you. You helped me believe in and respect myself, and you taught me what it really means to be a “friend.” You are a blessing and a true friend for life. To Myrtho Gardiner, Earl Skinner, and my colleagues at Haven and New Haven – thank you for always letting me be myself and sharing in the silliness, for your genuine kindness and concern for the social good, and for creating the space to develop and discuss brilliant ideas. Your creativity and dedication to your work and craft will inspire me always. To Stephan Reeves, Rachel Green, my bowling squad, and all of my companions who made my time in Philadelphia special and somehow transformed your city into my second home. I will always appreciate your friendships and the impact you have had on my life. To my dear friend Brian Allen and his family – you truly are family. Thank you for being who you are and for being there through all the years.

I must also thank all of the wonderful mentors and supervisors I have been fortunate enough to work with over the years. To my mentors and professors at Villanova Law, to Robert Alston, and to my colleagues at the Defender Association and Federal Community Defender Office – thank you for all of your guidance and encouragement over the years. You helped me to grow as a person and as an attorney, you provided me with excellent opportunities, and you made my time in law school a wonderful experience I will never forget. To all of my clinical supervisors, I learned so much from you. Thank you for always challenging me, and for providing the training, guidance, and support needed to become a skilled psychologist. You helped me develop and focus my professional goals, and provided the tools and opportunities to reach them. I would like to thank Dr. Kirk Heilbrun for being willing to take me on as an advisee so late in my doctoral training and for providing excellent guidance as my Dissertation Chair. I would also like to thank my Dissertation Committee – Dr. Donald Bersoff, Dr. Dave DeMatteo, Dr. Joel Dvoskin, and Robert Dunham, Esq. I greatly appreciate your feedback and participation on my committee and for helping me realize my goal of becoming a clinical psychologist. Also, I would like to thank Dr. Greg Olley for your great expertise on this subject, your generous feedback and advice, and for sharing your wisdom with me during our work together on internship.

Finally, I would like to acknowledge and thank the American Psychology-Law Society (AP-LS), the American Academy of Forensic Psychology (AAFP), and Psi Chi, the International Honor Society of Psychology for believing and investing in my dissertation study, and providing three individual grant awards, without which this study would not have been possible.

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Abstract

Judicial Understanding of Intellectual Disability and
Correlates of Judicial Decision-Making in *Atkins* Claims

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In *Atkins v. Virginia* (2002), the Supreme Court found persons with mental retardation (MR), or intellectual disability (ID), exempt from capital punishment. Since the decision, ID assessment practices and outcomes have varied significantly across cases, and little is known about how judges decide *Atkins* claims. Using a case vignette survey, this was the first study to sample federal and state judges to examine the relationship between defendant's ID history, ID assessment practices, and judicial decisions in *Atkins* claims. This study also evaluated the relationship between judges' understanding of ID, demographic characteristics, attitudes about mental illness and the death penalty, and ID decisions. Results indicated that severity of ID and history of ID significantly predicted judicial ID decisions, but testimony about a defendant's prison behavior and role in the alleged capital offense did not. Judicial understanding of ID did not significantly predict ID decisions. Judges' race and current jurisdiction were significantly related to ID decisions. Only one attitudinal variable, opinion about the culpability of intellectually disabled offenders, was related to judges' decisions. Certain variables were significantly related to judges' commitment to their ID decisions. Results suggest certain factors may significantly influence judicial decision-making in *Atkins* claims, but remind us that much remains unknown about how judges make these decisions and which evidence or assessment practices are most effective in this context. These findings may help explain judicial decisions in actual cases, highlight areas for judicial education and training, and suggest new ways to improve expert testimony and legal strategy.

1. Background and Literature Review

In 2002, the United States Supreme Court decided the landmark case of *Atkins v. Virginia*, holding mentally retarded (“MR”), or intellectually disabled (“ID”),¹ individuals categorically exempt from capital punishment. Relying upon the “evolving standards of decency” reflected in public sentiment, state legislation prohibiting the execution of the intellectually disabled, and the reasoning that individuals with ID should be held less culpable for their offenses, the Court found that the execution of these individuals violates the cruel and unusual punishment clause of the Eighth Amendment. In turn, the Court ruled that any defendant found to qualify for a diagnosis of ID must be excluded from the death penalty. However, the Court invited individual states to develop their own legislation defining ID, the assessment practices that could and should be used in an ID assessment, the evidentiary standard needed for a finding of ID, and other procedural rules in *Atkins* claims (Fabian, 2005; Libell, 2007; White, 2009).

Although the *Atkins* Court outlined the different aspects of and general criteria necessary for a diagnosis of ID, it provided limited guidance to death penalty states that (1) had legislation in place excluding individuals with ID from the death penalty, but needed to modify these statutes post-*Atkins*; or, (2) needed to develop appropriate legislation and procedures for *Atkins* claims. In turn, many of the state statutes defining ID for purposes of the death penalty are vague and inconsistent across states, and many

¹ As of 2007, the terms “mentally retarded” and “mental retardation” have been formally replaced with the terms “intellectually disabled” and “intellectual disability.” Although the *Atkins* decision and most legal and scientific literature discussing the issue use the terms “mentally retarded” and “mental retardation,” this proposal will use the present terminology. For a greater discussion on the change from mental retardation to intellectual disability, see (Schalock, et al., 2007).

differ from the psychological understanding and diagnosis of ID (Blume, Johnson, & Seeds, 2009, 2009a, 2010; Libell, 2007; White, 2010). In addition, very few states have adopted standardized procedures for the evaluation of ID in an *Atkins* claim, or identified the kind of experts who are most appropriate and qualified for conducting these assessments. As a result, ID assessment practices and case outcomes in *Atkins* claims vary significantly across states, experts, capital defendants, and death row inmates (Blume, Johnson, & Seeds, 2009, 2009a, 2010; DeMatteo, Marczyk, & Pich, 2007; Fabian, 2005; Orpen, 2003; Salekin & Olley, 2008).

Although the reliable assessment of ID has become quite important in capital cases (where accurate outcomes are crucial), very little is known about post-*Atkins* assessments and how they affect case outcomes. Since the 2002 *Atkins* decision, few empirical studies have examined ID and the death penalty, or the various issues related to ID assessments and outcomes in *Atkins* claims. Moreover, the available research has focused on mental health professionals' opinions regarding which assessment practices should be used, or are most commonly used, in the evaluation of ID in *Atkins* claims (Salekin, 2007; Salekin, unpublished; Salekin & Olley, 2008; Young et al., 2007); the review of court transcripts and/or decisions in which mental retardation or an *Atkins* claim was raised (Blume, Johnson, & Seeds, 2009, 2009a, 2010; Kan, et. al., 2009); and, the factors affecting mock jurors' verdicts in favor of mental retardation (Reardon, O'Neil, & Levett, 2007). Whereas these empirical studies are significant as the first research to investigate ID assessment practices in pre- and post-*Atkins* capital cases and mock juror decision-making in *Atkins* claims, they have been fairly limited in their scope, with respect to both sampling and the *Atkins* issues they address. This research is

informative and provides us with a better understanding of post-*Atkins* ID assessments from the perspective of mental health professionals, and based on the information provided in trial transcripts and published case decisions. This research also sheds some light on the various factors which may affect jury ID decisions. Still, far less is known about how judges receive and use information about capital defendants and ID assessment practices when deciding whether an individual qualifies for a finding of ID in the *Atkins* context.

The present study expands on current knowledge by investigating a different perspective of *Atkins* claims—the relationship between ID assessment practices and related testimony and judicial ID decisions. *First*, this dissertation examined the assessment practices most commonly used in ID evaluations and how these assessment practices and defendant histories affected judicial decision-making in hypothetical *Atkins* claims. *Second*, the study evaluated judges’ understanding of the diagnosis and assessment of ID, and how this understanding affected judicial ID decision-making. *Third*, this study also examined the relationship between judges’ personal characteristics and attitudes regarding certain mental health issues and the death penalty, and their respective decisions in hypothetical *Atkins* claims.

1.1. Relevant Capital Punishment Jurisprudence

1.1.1. *Trop v. Dulles* (1958)

In *Trop v. Dulles*, the United States Supreme Court delineated the standard by which all Eighth Amendment challenges against the death penalty must be evaluated. In this case, the Court found that a form of capital punishment violates the cruel and unusual punishment clause of the Eighth Amendment if the “evolving standards of decency . . .

that mark the progress of a maturing society” and contemporary societal values do not support or condone such punishment. In general, the “evolving standards of decency” are most commonly represented by or inferred from the common law, public sentiment, and legislative enactments. If the common law, public sentiment, and/or legislation are of the type and magnitude to suggest that the “evolving standards of decency” in the United States do not support a particular form of punishment, a court may find the punishment to be an unconstitutional violation of the Eighth Amendment.

1.1.2. *Ford v. Wainwright* (1986)

In *Ford v. Wainwright*, the Court implemented a similar analysis when considering the constitutionality of executing the mentally incompetent. In its analysis, the Court relied upon the extensive historical underpinnings and contemporary values exemplified by the common law and the nationwide use of statutory provisions and executive discretion to prohibit the execution of the mentally incompetent. Accordingly, the Court held that the Eighth Amendment ban on cruel and unusual punishment prohibits the states from executing incompetent persons. The *Ford* Court did not define the standard for incompetence, but noted that due process requires that defendants receive full and fair procedures when determining their competency for execution.

More than twenty years later, the Supreme Court clarified the *Ford* decision and standard for incompetence with its ruling in *Panetti v. Quarterman* (2007). In *Panetti*, the Court concluded that for an individual to be found competent for execution, the person must not only be aware of the fact that he or she will be put to death and the reason for this punishment, but the person must also have a rational understanding of the

reason(s) why he or she will be executed. The Court reasoned that executing a person who does not rationally understand why he or she will be executed as a result of his or her mental illness violates the Eight Amendment ban on cruel and unusual punishment, and fails to serve the retributive purposes of punishment. The Court, however, did not provide a standard by which an individual's "rational understanding" of the reasons for his or her execution could be determined (Appelbaum, 2007; Bonnie, 2007-2008; *Panetti*, 2007).

1.1.3. *Penry v. Lynaugh* (1989)

In *Penry v. Lynaugh*, the Supreme Court first addressed the issue of whether the execution of the mentally retarded, now referred to as the intellectually disabled ("ID"), violates the cruel and unusual punishment clause of the Eighth Amendment. Again turning to the "evolving standards of decency" approach, the Court relied on state legislative enactments and public sentiment to determine whether the application of capital punishment to these individuals was unconstitutional. Finding only two states with statutes prohibiting the execution of intellectually disabled persons and fourteen states banning the death penalty entirely, the Court held that this was not enough of a societal and legislative consensus to support the exemption of persons with ID from capital punishment. As a result, the *Penry* Court held that the execution of the intellectually disabled was *not* cruel and unusual punishment and, thus, did not violate the Eighth Amendment.

1.1.4. *Atkins v. Virginia* (2002)

In *Atkins v. Virginia*, the Supreme Court again addressed the issue of whether the execution of the intellectually disabled violates the cruel and unusual punishment clause

of the Eighth Amendment. Departing from *Penry*, the Court found that persons with ID should not be held as culpable for their offenses as other offenders, and held the Eighth Amendment categorically prohibits the execution of these individuals.

Implementing the “evolving standards of decency” analysis, the Court once again turned to state legislative enactments and public sentiment to determine this issue. First, observing a trend in state statutes banning the execution of the intellectually disabled, the Court found that eighteen states had enacted new legislation prohibiting the execution of persons with ID since the *Penry* decision thirteen years earlier. Second, the Court also noted that following *Penry*, states already prohibiting the death penalty in general and the execution of the intellectually disabled specifically did not introduce or reinstate this practice, and these executions were extremely rare. Third, the Court considered polling data, which indicated Americans were against this practice, as well as various foreign laws, and religious, professional, and scientific organizations advocating the exemption of the intellectually disabled from capital punishment.² The Court concluded that these factors reflected “widespread judgment about the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty.”

The Supreme Court also considered the nature of ID and the purposes of punishment, specifically capital punishment, when deciding *Atkins*. First, the Court identified and emphasized intellectually disabled offenders’ deficiencies in logical and abstract reasoning, communication skills, information processing, impulse control, and

² Scientific organizations advocating against the execution of persons with intellectual disability included the American Psychological Association, which submitted an amicus brief in the *Atkins* case.

understanding of others as reasons to categorically exempt them from the death penalty. Second, the Court reasoned that the intellectual limitations presented by individuals with ID pose a great risk of wrongful execution, as these persons may be less able to assist counsel and participate in their own defense, make poor witnesses, and give the impression of a lack of remorse. Finally, the Court asserted that the death penalty would not serve a deterrent or retributive purpose if imposed on intellectually disabled persons.

In response to the majority of the Court, the dissent asserted that the issue should be left to states and juries, and that significant weight should not be given to foreign laws, professional organizations, or national polls, where the scientific methodology used to conduct them was unclear. In addition, the dissent also opined that the execution of persons with intellectual disability would not have been considered cruel and unusual punishment when the Eighth Amendment was adopted, the factors relied upon by the majority of the Court were not enough for a national consensus, and the death penalty would still serve deterrent and retributive purposes, regardless of whether an offender was intellectually disabled.

Whereas the *Atkins* Court described the reasons why individuals with ID should not be executed and banned their execution, the Court did not adopt a standard definition of ID, the procedures necessary for evaluating and reaching this diagnosis, and the evidentiary standard needed for a legal finding of ID. Acknowledging and outlining the general criteria used to clinically diagnose ID, the Court instructed the states to develop definitions in accordance with these general criteria, and to provide a process to determine ID that is procedurally reliable and individualized; however, it provided very

limited guidance on how to do so.³ In turn, the Court left it open for individual states to define ID and to develop procedures for ID assessments in capital cases, which has resulted in vague and inconsistent statutory definitions of ID across states, which often differ from the psychological understanding and diagnosis of ID (Annas 2002; Blume, Johnson, & Seeds, 2009, 2009a, 2010; DeMatteo, Marczyk, & Pich, 2007; Duvall & Morris, 2006; Fabian, 2005; Orpen, 2003; Salekin & Olley, 2008; Weithorn, 2008). In addition, very few states have adopted standardized procedures for the assessment of ID (DeMatteo, Marczyk, & Pich, 2007; Duvall & Morris, 2006; Fabian, 2005; Salekin & Olley, 2008). For example, as of December 2006, only four states had established a procedure for the assessment of ID in capital cases (Arizona, Nevada, California, and Virginia), and seven states had provided guidance as to which intelligence tests should be used (DeMatteo, Marczyk, & Pich 2007; Duvall & Morris, 2006). States have been similarly inconsistent with respect to the kinds of experts who are most appropriate and qualified to conduct these kinds of assessments. Some states require a psychologist, while others allow psychiatrists and social workers to provide them. Some require that experts have a background in mental retardation or intellectual disability, while others require only licensure. Moreover, some only require that a judge make the determination (DeMatteo, Marczyk, & Pich 2007; Duvall & Morris, 2006; Salekin & Olley, 2008). The various procedural rules guiding *Atkins* claims and determinations (timing at which claim

³ The Court discussed the definition of mental retardation offered by the American Association on Mental Retardation (AAMR) (Now the American Association on Intellectual and Developmental Disabilities (AAIDD)) in 1992 and the 2000 DSM-IV-TR definition, but it did not adopt or endorse these definitions for the states. The Court noted, however, that state definitions should include the three core requirements for ID recognized by the AAMR/AAIDD and the DSM-IV-TR: (1) significant limitations in intellectual functioning; (2) significant limitations in adaptive functioning; and (3) onset of the disorder before age 18.

may be brought, fact finder who will determine claim, burden of proof for claim, etc.) also vary significantly across states (Blume, Johnson, & Seeds, 2009, 2009a, 2010; Ellis, 2003). As a result, ID assessment practices and case outcomes have varied significantly across states, experts, capital defendants, and death row inmates (Blume, Johnson, & Seeds, 2009, 2009a, 2010; Weithorn, 2008). Moreover, the variety and inconsistency in both the substantive understanding and procedural application of *Atkins* across states may not only contribute to arbitrary ID decisions and capital sentencing determinations, but also undermine the overall protection afforded by the *Atkins* decision (Steiker, & Steiker, 2008).

1.2. State Statutes Defining Intellectual Disability for Purposes of the Death Penalty

As noted above, when deciding *Atkins*, the Supreme Court left it to the individual states to develop their own legislation defining ID and delineating the assessment practices, evidentiary standard, and other procedural rules for *Atkins* claims. As a result, although the majority of statutes addressing *Atkins* claims and ID assessments share some general criteria, many of these statutes lack specificity in their definitions of ID and procedural requirements and are inconsistent across states (DeMatteo, Marczyk, & Pich, 2007; Duvall & Morris, 2006; Orpen, 2003).

In general, the majority of state statutes defining intellectual disability for purposes of the death penalty contain some similar criteria. First, most statutes require significantly sub-average general intellectual functioning, most commonly reflected by an IQ score falling two standard deviations below the mean, or an IQ score of 70 or below. Second, the majority of statutes also require some kind of significant impairment in adaptive behavior and related skills. Third, most state statutes require proof of both

intellectual and adaptive deficits during the appropriate developmental period, which is most commonly defined as before the age of eighteen (Death Penalty Information Center, 2011; DeMatteo, Marczyk, & Pich, 2007; Duvall & Morris, 2006; Fabian, 2005; Human Rights Watch, 2011).

State statutes primarily differ with respect to the specificity of their ID definitions and requirements for an assessment and finding of ID. As demonstrated by Table 1, some state statutes require strict cut-off scores with respect to intellectual ability and IQ, while others require a certain number of new ID assessments and assessments by the prosecution (Death Penalty Information Center, 2011; DeMatteo, Marczyk, & Pich, 2007). In addition, some state statutes stipulate that only certain kinds of professionals are qualified to conduct a post-*Atkins* ID assessment, while other statutes remain silent on this issue (Death Penalty Information Center, 2011; DeMatteo, Marczyk, & Pich, 2007). For example, Arizona requires the trial court to appoint a licensed psychologist to conduct an ID assessment. However, states such as Georgia, North Carolina and South Dakota allow psychologists, psychiatrists, or psychiatric social workers to perform these assessments (Death Penalty Information Center, 2011). Finally, state statutes also differ with respect to their time of enactment: some statutes existed prior to the *Atkins* decision and have remain unchanged, other statutes existed prior to the *Atkins* decision and have since been modified, and still others were developed and adopted in response to the Supreme Court's decision in 2002 (Ellis, 2003). See Table 1.

Table 1. State Statutory Requirements for Intellectual Disability and Atkins Claims*

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
Alabama	3 general criteria**	70 or below	No
Arizona	3 general criteria with 1 or 2 elements defined	Any score above 70 disqualifies defendant	New assessment every 60-90 days by court-appointed licensed psychologist
Arkansas	3 general criteria	Rebuttable presumption if IQ=65	No
California	3 general criteria with 1 or 2 elements defined	No	No
Colorado	3 general criteria AND ID is documented before age 18, unless extreme circumstances	No	New assessment required
Connecticut	3 general criteria based on AAMR (2002) criteria	IQ specified as > 2 standard deviations below the mean	No
Delaware	3 general criteria based on DSM-IV-TR criteria	70 or lower	1 new assessment required
Florida	3 general criteria based on AAMR (2002) criteria	IQ specified as > 2 standard deviations below the mean	2 new assessments required Court-appointed experts ID must evaluate

Table 1 (continued). State Statutory Requirements for Intellectual Disability and Atkins Claims

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
Georgia	3 general criteria	No	Court-appointed, licensed psychologists, psychiatrists, or physicians or clinical psychologists chosen by defendant perform evaluation
Idaho	3 general criteria based on DSM-IV-TR criteria; requires adaptive deficits in 2 areas	70 or lower	1 new assessment required and examination of defendant by state expert upon request
Illinois	3 general criteria demonstrated by low IQ score and adaptive deficits in at least 2 areas	75 or below creates rebuttable presumption of ID	Experts in field of ID must evaluate
Indiana	3 general criteria and onset before age 22	No	1 new assessment required
Kansas	3 general criteria based on AAMR (2002) criteria AND impairment in capacity to appreciate wrongfulness of conduct	IQ specified as > 2 standard deviations below the mean	2 new assessments required
Kentucky	3 general criteria with 1 or 2 elements defined	70 or lower	No

Table 1 (continued). State Statutory Requirements for Intellectual Disability and Atkins Claims

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
Louisiana	3 general criteria with examples of adaptive skills provided	No	1 new assessment required and state has right to independent evaluation and must be performed by licensed psychologist
Maryland	3 general criteria according to 1996 APA definition and onset before 22	70 or lower	No
Mississippi	3 general criteria with continual, extensive adaptive deficits in at least 2 areas	No	No
Montana	N/A	N/A	N/A
Nebraska	3 general criteria with 1 or 2 elements defined	70 or lower creates rebuttable presumption of ID	No
Nevada	3 general criteria with 1 or 2 elements defined	No	1 new assessment by expert chosen by prosecution
New Hampshire	3 general criteria with 1 or 2 elements defined	No	No
New Mexico	3 general criteria with 1 or 2 elements defined	70 or lower creates rebuttable presumption of ID	No

Table 1 (continued). State Statutory Requirements for Intellectual Disability and Atkins Claims

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
New York	3 general criteria with 1 or 2 elements defined	No	No
North Carolina	3 general criteria from DSM-IV-TR criteria, with 10 adaptive skills provided	70 or lower	Licensed psychologist or psychiatrist may evaluate
Ohio	3 general criteria with none defined	No	No
Oklahoma	3 general criteria using DSM-IV-TR, with continual, extensive adaptive deficits in at least 2 areas	70 or lower	No
Oregon	3 general criteria based on AAMR (2002) criteria	Different IQ cut-offs for different tests	No
Pennsylvania	3 general criteria with adaptive deficits defined as impairment in “maturation, learning, and social adjustment”	No	No
South Carolina	3 general criteria with none defined	No	No

Table 1 (continued). State Statutory Requirements for Intellectual Disability and Atkins Claims

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
South Dakota	3 general criteria documented before age 18	IQ above 70 creates rebuttable presumption that defendant does NOT have sub-average intellectual functioning	Psychiatrist, licensed psychologist, or licensed psychiatric social worker chosen by state's attorney performs evaluation
Tennessee	3 general criteria with 1 or 2 elements defined	70 or lower	No
Texas	3 general criteria based on AAMR (2002) criteria	No	No
Utah	3 general criteria defining adaptive deficits as impairment in either or both reasoning and impulse control, and requiring onset before age 22	No	2 new assessments by 2 different mental health experts
Virginia	3 general criteria based on AAMR (2002) criteria and provides areas of adaptive skills	IQ specified as > 2 standard deviations below the mean	Intellectual functioning test must be administered according to professional guidelines, and psychiatrist, clinical psychologist or person with a doctorate degree in clinical psychology meeting certain additional requirements may perform evaluation

Table 1 (continued). State Statutory Requirements for Intellectual Disability and Atkins Claims

<u>State</u>	<u>ID Definition</u>	<u>IQ Cut-off</u>	<u>Assessment Requirements</u>
Washington	3 general criteria based on AAMR (2002) criteria	70 or lower	1 new assessment required and court-appointed psychologist or psychiatrist experienced in ID must perform evaluation
Wyoming	3 general criteria with 1 or 2 elements defined	No	No
<u>Federal Government</u>		Statute does not define ID	

* The information contained in this table was taken from: **Death Penalty Information Center. (last visited May 18, 2011).** <http://www.deathpenaltyinfo.org/article.php?scid=28&did=138> and <http://www.deathpenaltyinfo.org/article.php?scid=28&did=668>; **DeMatteo, D., Marczyk, G., & Pich, M. (2007).** A national survey of state legislation defining mental retardation: Implications for policy and practice after *Atkins*. *Behavioral Sciences and the Law*, 25, 781-802; **Duvall, J.C., & Morris, R.J. (2006).** Assessing mental retardation in death penalty cases: Critical issues for psychology and psychological practice. *Professional Psychology: Research and Practice*, 37(6), 658-665; and individual state statutes.

** The three “general criteria” for intellectual disability (ID) as outlined in the AAIDD and DSM-IV-TR definitions, as well as by the *Atkins* court are: (1) significantly subaverage general intellectual functioning, (2) significant impairment in adaptive behavior, and (3) manifestation of ID during the appropriate developmental period.

1.3. Legal Understanding of Intellectual Disability

The legal understanding of intellectual disability, as reflected by state statutes and the theories, evidence, and legal strategies relied upon by both attorneys and judges, is quite different from the clinical understanding and psychological assessment of intellectual disability. Many state statutory definitions of and requirements for ID in capital cases do not align with a diagnosis and assessment of ID. For example, some state definitions extend the developmental period in which ID must manifest from before the age of 18 to before the age of 22, while others do not define the developmental period at all. Furthermore, some states delineate certain IQ scores that create a rebuttable presumption of ID (i.e., an IQ of 65), and other states provide IQ cut-off scores below 70, which ignore the standard error of measurement which must be considered when interpreting IQ scores (Libell, 2007; Olley, 2009). Moreover, some statutes have listed psychiatrists and psychiatric social workers, in addition to psychologists, as qualified examiners for ID testing and assessments. In addition, at least Kansas requires that sub-average intellectual functioning result in an individual's inability to understand the criminality of his or her acts, or to conform his or her conduct to the law for a finding of ID. As a result, there is limited consistency in the ID definitions, IQ cut-off scores, adaptive behavior, and developmental period relied upon across states and the respective fields of law and psychology (Death Penalty Information Center, 2008; DeMatteo, Marczyk, & Pich, 2007; Duvall & Morris, 2006; Libell, 2007; Weithorn, 2008).

1.3.1. Use of a Per Se Diagnosis to Determine Culpability

The legal understanding of ID, which relies solely on the finding, or diagnosis of ID to determine an individual's culpability and resultant sentence, is also significantly

different from the legal understanding of other mental health conditions, as the law rarely imposes a per se diagnosis to determine a legal decision.⁴ The adoption of a per se diagnosis, or a genetically or biologically caused condition, to excuse or diminish criminal responsibility is unusual and often problematic, as this practice tends to confuse and threaten the legal concept and model of criminal responsibility (ABA Task Force, 2006; DeMatteo, Marczyk, & Pich, 2007; Heilbrun, Dvoskin, & Marsh, in press; Morse 1978, 1994, 1999, 2006; Mossman, 2003). According to Morse (1999):

[D]iagnoses ... tend to encourage the mistaken impression that the conduct of crazy people is just a mechanism, rather than action for reasons. Diagnoses tend to encourage question-begging about the foundational, nonresponsibility criterion that authorizes special mental health treatment. Diagnoses are therefore prejudicial and misleading. In addition, there is often dispute about the appropriate diagnosis, if any, which wastes time and distracts the fact finder from the essential question.

...

Morse (1994, 2006) also noted that “[c]riminal responsibility involves [an] evaluation of intentional, conscious, and potentially rational human action.” Thus, although a per se diagnosis or genetically or biologically caused condition may determine an individual’s capabilities and level of functioning, it is the individual’s functional capacities and ability or inability to act rationally and intentionally, which actually determine his or her level of culpability (ABA Task Force, 2006; Bersoff, 2002; Bonnie & Gustafson, 2007; Heilbrun, Dvoskin, & Marsh, in press; Morse, 1978, 1994, 2006). As a result, the law rarely views a genetically or biologically caused condition as a per se excusing condition (ABA Task Force, 2006; Bonnie & Gustafson, 2007; Heilbrun, Dvoskin, & Marsh, in press;

⁴ One of the only other legal contexts in which a “per se definition” is relied upon is the area of juvenile capital crimes, where an age cut-off is used to exclude a category of individuals from the death penalty (Heilbrun, Dvoskin, & Marsh, in press; *Roper v. Simmons*, 2005). This was delineated by the Supreme Court in *Roper v. Simmons* (2005), when it held that the execution of individuals who were less than 18-years old at the time of their alleged capital crime is unconstitutional.

Mossman, 2003; Weithorn, 2008). Rather, in the eyes of the law, an “abnormal physical variable,” such as severe mental illness, may result in a “genuine excusing condition,” such as the lack of rational capacity, but it is the lack of rational capacity and *not* the underlying, severe mental illness that creates the excusing condition (Morse, 1978, 1994, 2006). Moreover, and as noted by Morse (1994, 2006), “[i]f causation were an excuse, no one would be responsible for any action.” In turn, the law more commonly utilizes a model of criminal responsibility in which there is the consideration of different symptoms, an individual’s functional legal capacities, and the causal connection between the two, when determining one’s culpability and resultant punishment (ABA Task Force, 2006; Bersoff, 2002; DeMatteo, Marczyk, & Pich, 2007; Heilbrun, Dvoskin, & Marsh, in press; Morse, 1978). This model is designed to allow for flexibility in decision-making in individual cases, despite the inconsistency that may result across cases (Bersoff, 2002; Morse, 1978).

Therefore, the approach used in *Atkins* claims is unique, as the identification and diagnosis of any level of ID is the sole criterion used to render a legal decision and to exempt an individual from a sentence of death (Mossman, 2003; Weithorn, 2008). Straying from the standard model of criminal responsibility in the *Atkins* case, Justice Stevens stated that because of the impairments inherent to a diagnosis of ID, persons with ID, “by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others” (*Atkins*, 2002). In other words, the *Atkins* decision assumes that all persons diagnosed with intellectual disability, regardless of severity or actual impairment in various areas, are not

fully culpable and are unable to accept complete responsibility for their criminal behavior, and thus should be exempt from the most extreme form of punishment (Mossman, 2003).

There are three general assumptions underlying the successful application of *Atkins* and the unique, legal understanding of ID. First, a qualified, mental health expert will be able to objectively assess and diagnose ID based on presented symptoms and clearly defined diagnostic criteria. Second, attorneys will be able to identify and present evidence relevant to ID, and use this evidence to develop and execute the most compelling and effective legal arguments and strategy for their client (or the government) to reach their respective goals of either a finding or no finding of ID. Third, judges will be able to interpret and utilize the available, and often times conflicting, objective and subjective evidence to render a decision regarding the presence of ID in an individual case that is accurate and aligns with the clinical diagnosis of ID (Blume & Leonard, 2002; Davis, 2003; Harvard Law Review, 2003; Human Rights Watch, 2011).

1.3.2. Legal Misconceptions about the Assessment and Presentation of ID

The legal understanding and finding of ID is further complicated by several inaccurate assumptions and misconceptions about ID -- particularly regarding how ID may be reliably assessed and diagnosed, and how an individual with ID will present (Human Rights Watch, 2011; Reschly, 2007). First, the legal approach to ID appears to embrace the idea that anyone may recognize and identify ID, despite having a limited background in and understanding of ID and a lack of historical evidence, which is often not the case (Mossman, 2003). For example, many state statutes fail to delineate the kinds of experts and expertise knowledge that are necessary for performing these kinds of

assessments, while others indicate that non-psychologists may conduct these assessments and reach an ID diagnosis.

In addition, legal strategy and judicial decisions in this area appear to assume that even if a defendant's ID history is not known and prior records are not available, adaptive behavior skills and deficits can still be reliably assessed in a correctional setting, and a valid finding of ID can still be made. From a clinical and psychological assessment standpoint, however, this is problematic -- an ID diagnosis requires proof of intellectual and adaptive deficits prior to the age of 18 and the current adaptive behavior measures have not been normed on correctional populations (Brodsky & Galloway, 2003; Duvall & Morris, 2006; Fabian, 2005; Salekin & Olley, 2008).

The legal approach of ID also appears to adopt the misconception that ID must not only be biologically based, but also comprehensive in that it affects all areas of a person's life and functioning, and is permanent in nature across all contexts (Human Rights Watch, 2011; Reschly, 2007). As a result, attorneys and judges may not fully understand the continuum nature of ID (i.e., mild, moderate, severe, profound) and believe that all ID is comparable, so a defendant's presentation of ID must be severe or significantly distinguishable for a finding of ID (Mossman, 2003; Reschly, 2007). Moreover, attorneys and judges may also believe that the presence of certain skills or accomplishments precludes a finding of ID when, in actuality, the defendant could meet the criteria for a diagnosis of mild ID (Olley, 2009). In turn, individuals who can marry, work periodically, be involved in the planning of a crime, hold and use a driver's license, live independently, and develop and use marginal coping skills may not be found to qualify for a legal finding of ID, although individuals with clearly diagnosable cases of

mild ID often present with all or some of these adaptive behaviors and skills (Reschly, 2007; Salekin & Olley, 2008). In addition, in the legal approach to ID, an individual's abilities and skills are often overemphasized and used to outweigh other influences (e.g., the presence of a benefactor, limited degree of self-support, additional supports in adult years, and marginal functioning) that are relevant to the management of the person's adaptive deficits (Olley, 2009). Often courts may not recognize that ID, and particularly mild ID, is not a stable condition, and all aspects of an individual's intellectual and adaptive functioning must be considered in the context of the person's environment (Salekin & Olley, 2008; Weithorn, 2008).

Finally, courts and attorneys may misunderstand that intellectual disability and other forms of mental illness are not mutually exclusive (Olley, 2009). Individuals who meet the criteria for a diagnosis of intellectual disability are commonly diagnosed with other mental disorders as well. It is important in these situations that (1) the presence of an additional mental illness is not used to automatically refute a finding of ID, and (2) the symptoms and functioning which are indicative of and define ID are not confused with or misattributed to another, present mental health problem (Olley, 2009).

1.4. Psychological Understanding of Intellectual Disability

1.4.1. *American Association on Intellectual and Developmental Disabilities (AAIDD) Definition*

In 1992, the *American Association on Mental Retardation (AAMR)* (now the *American Association on Intellectual and Developmental Disabilities* or *AAIDD*) provided:

[M]ental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18.

AAIDD further defined “significantly sub-average intellectual functioning” as an IQ score of 70-75 or below. This was a change from the prior definition because it recognized the “unreliability of intelligence tests and the tendency of IQ scores to rise with repeated assessments” as well as the evaluator’s need for flexibility when interpreting test data (AAMR, 1999, 2002; Bonnie, 2004; Ellis, 2003; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2003, 2006; Salekin & Olley, 2008; Stevens & Price, 2006; Watt & MacLean, 2003).

Following the *Atkins* decision in 2002, the *AAIDD* definition of mental retardation, now intellectual disability, changed to: “a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills.” This definition omits numerical IQ scores and range, and instead uses an IQ score that is “approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations” as the criterion for diagnosis (AAMR, 2002; Bonnie, 2004; Ellis, 2003; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Stevens & Price, 2006; Watt & MacLean, 2003).

In addition, adaptive behavior is defined as “the collection of conceptual, social and practical skills that have been learned by people in order to function in their everyday

lives.” Conceptual skills include language (expressive and receptive), reading and writing, money concepts, and self-direction skills. Social skills include interpersonal skills, responsibility, self-esteem, gullibility/vulnerability to being tricked, following rules, being obedient to laws, and being avoidant of victimization. Practical skills include daily living skills, instrumental activities of daily living, occupational skills, and the maintenance of safe environment(s) (AAMR, 2002; Bonnie, 2004; Ellis, 2003; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Stevens & Price, 2006; Watt & MacLean, 2003).

1.4.2. *American Psychiatric Association (APA) Definition*

In the *DSM-IV-TR* (2000), the *American Psychiatric Association (APA)* defines mental retardation, now intellectual disability, using the following diagnostic criteria:

1. Significantly sub-average intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly sub-average intellectual functioning);
2. Concurrent deficits or impairments in present adaptive functioning⁵ in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety;
3. Onset before age 18.

In addition, the *DSM-IV-TR* (2000) also defines different gradations, or levels of severity, of intellectual disability. Mild ID corresponds with an IQ score of 50-55 to 70;

⁵ Adaptive functioning is defined as the person’s effectiveness in meeting the standards expected for his or her age by his or her cultural group.

moderate ID corresponds with an IQ score of 35-40 to 50-55; severe ID corresponds with an IQ score of 20-25 to 35-40; and, profound ID corresponds with an IQ score below 20 or 25 (APA, 2000; Bonnie, 2004; Ellis, 2003; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003).

1.4.3. Comparison of *AAIDD* and *APA* Definitions

The *AAIDD* definition of mental retardation, or intellectual disability (“ID”), covers several significant aspects of ID. First, it sets forth the criteria for a psychological diagnosis of ID. Second, it provides the necessary qualifications for the professional performing the evaluation and reaching the diagnosis. Third, it discusses the use of interdisciplinary diagnostic teams in making this kind of diagnosis, and notes that teams should consider all information, such as tests, interviews, parent and teacher reports, behavioral observations, and any functional analyses they perform. Fourth, it removes the requirement of specific adaptive skills. Specific skills were reportedly removed because of the lack of assessment tools to measure each area. Instead, the definition now recognizes three general areas of adaptive behavior, or deficits, and outlines the various standardized tests available to assess adaptive skills. Finally, the *AAIDD* definition also recommends that standardized tests provide normative data on people with and without intellectual disability (AAMR, 2002; Duvall & Morris, 2006; Salekin & Olley, 2008).

The *APA* or *DSM-IV-TR* definition also covers multiple aspects of ID. First, it sets forth the criteria for a diagnosis of ID. Second, it uses different levels of ID (mild, moderate, severe, profound) to further specify the diagnosis. Third, it provides specific areas of adaptive skills for assessment, which could contribute to more consistent

evaluations and diagnoses across individuals being assessed and evaluators (APA, 2000; Duvall & Morris, 2006; Salekin & Olley, 2008).

1.4.4. Criticisms of *AAIDD* and *APA* Definitions

Commentators and practitioners have noted several concerns and criticisms of the *AAIDD* and *APA*, or *DSM-IV-TR*, definitions and related assessment practices for ID. First, it has been said, with respect to the measurement of IQ, that the requirement and use of a numerical score is often arbitrary and over-relied on in practice. Second, critics have noted the significant sources of bias and error in the measurement of IQ, such as cultural and linguistic effects, practice effects, and the Flynn effect. Third, it is recognized that there is commonly great variation across tests and evaluators when assessing both IQ and adaptive skills. Fourth, the evaluation and measurement of adaptive skills is often problematic, whether generally or specifically defined. Fifth, some have argued that the *AAIDD* criteria for adaptive deficits undermines a diagnosis of mild ID, as individuals with mild ID may present with many adaptive skills, which overshadow their actual adaptive deficits, and which can undermine an accurate diagnosis of ID (Duvall & Morris, 2007; Flynn, 2006; Greenspan, 2007; Reschly, 2007; Salekin & Olley, 2008).

In general, the *AAIDD* and *DSM-IV-TR* set out to provide clear operational definitions and descriptions of intellectual disability; however, these definitions and their relative components cannot always be reliably or validly measured in practice. This is particularly true in the area of adaptive behavior. Many reasons have been advanced to explain why the currently available adaptive behavior measures fail to fully capture the essence of ID as depicted by the *AAIDD* and the *DSM-IV-TR* (e.g., social cognition

problems, gullibility, social comprehension deficit). First, these measures often rely on more subjective approaches to assessment, such as interviewing, observation and clinical judgment. Second, adaptive behavior measures are often based on third party reporting and observations and indirect assessment, which may introduce bias. Third, the measures offer limited precision, as testing outcomes often depend on and vary according to the testing environment, assessment, and evaluator. Thus, although the psychological understanding of ID has been operationally defined, it remains difficult to assess this condition across cases (AAMR, 2002; Bonnie, 2004; Bonnie & Gustafson, 2007; Ellis, 2003; Fabian, 2005; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Stevens & Price, 2006; Watt & MacLean, 2003).

1.5. Raising an *Atkins* Claim: State Procedural Requirements and Common Scenarios

1.5.1. Timing of *Atkins* Claims

Capital defendants and death row inmates may raise an *Atkins* claim at five distinct times in the legal process. First, the claim may be raised in pre-trial proceedings, which appears to be the approach favored by both state and federal jurisdictions with the death penalty (Blume, Johnson, & Seeds, 2010; Ellis, 2003). Pre-trial *Atkins* claims must meet the specific burden of proof and burden of persuasion requirements established for the state in which the claim is being raised (Ellis, 2003). Second, an *Atkins* claim may be raised and related evidence may be presented during the guilt phase of a capital trial, particularly in states which require juries to determine both ID and guilt at the same time (Blume, Johnson, & Seeds, 2010; Reardon, O'Neil, & Levett, 2007). Third, an *Atkins* claim may be raised and related evidence may be presented during the penalty phase of a capital trial (Blume, Johnson, & Seeds, 2010; Reardon, O'Neil, & Levett, 2007). Fourth,

an *Atkins* claim may be raised in post-appellate proceedings (Ellis, 2003). Post-appellate *Atkins* claims must also meet the state-specific burdens of proof and persuasion, as well as the applicable statute of limitations, if any, placed on appeals based on this kind of claim (Ellis, 2003). Finally, a death row inmate who has exhausted his or her appeals, but maintains a claim of intellectual disability, may raise his or her *Atkins* claim in a clemency hearing. These hearings are not typical legal proceedings, as quite often, no formal evidentiary standard or rules apply. Once an *Atkins* claim has been raised, the capital defendant or death row inmate is subject to an ID assessment by his or her own expert and, most commonly, by a state or court-appointed expert. Whereas the timing of an individual *Atkins* claim or who raised it should not change the kind of assessment that is conducted, it may significantly affect the kind of information that is available and may be used to inform an assessment and to reach a finding of ID. Timing of an *Atkins* claim may also affect case outcome (Blume, Johnson, & Seeds, 2010). The various state rules as to the time at which an *Atkins* claim may be raised are outlined in Table 2.

Table 2. State Procedural Requirements for *Atkins* Claims*

<u>State</u>	<u>Timing</u>	<u>Burden of Proof</u>	<u>Factfinder</u>
Alabama	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Arizona	Pretrial	Clear and Convincing Standard	Judge
Arkansas	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
California	Sentencing Phase	Preponderance of the Evidence/ Burden on Defense	Jury (unless waived)
Colorado	Pretrial	Clear and Convincing Standard	Judge
Connecticut	Sentencing Phase	Burden of Proof not decided	Jury (unless waived)
Delaware	Sentencing Phase	Clear and Convincing Standard	Judge
Florida	Pretrial	Clear and Convincing Standard	Judge
Georgia	Guilt Phase	Beyond a Reasonable Doubt until recently overturned court decision	Jury (unless waived)
Idaho	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Illinois	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Indiana	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Kansas	Guilt or Innocence Phase	Burden of proof not decided	Judge
Kentucky	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge

Table 2 (continued). State Procedural Requirements for *Atkins* Claims

<u>State</u>	<u>Timing</u>	<u>Burden of Proof</u>	<u>Factfinder</u>
Louisiana	Pretrial (if parties consent)	Preponderance of the Evidence/ Burden on Defense	Judge; jury option after adverse judicial pretrial determination
Maryland	Sentencing Phase	Preponderance of the Evidence/ Burden on Defense	Jury (unless waived)
Mississippi	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Montana	Procedures and Burden of Proof Not Decided		
Nebraska	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Nevada	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
New Hampshire	Procedures and Burden of Proof Not Decided		
New Mexico	Procedures and Burden of Proof Not Decided		
New York	Procedures and Burden of Proof Not Decided		
North Carolina	Pretrial	Clear & Convincing Standard	Judge with jury option after adverse pretrial judicial decision
Ohio	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge

Table 2 (continued). State Procedural Requirements for *Atkins* Claims

<u>State</u>	<u>Timing</u>	<u>Burden of Proof</u>	<u>Factfinder</u>
Oklahoma	Pretrial	Preponderance of the Evidence/ Burden on Defense	Jury (unless waived)
Oregon	Procedures and Burden of Proof Not Decided		
Pennsylvania	No formal rule; could be judge pretrial, or jury at sentencing		
South Carolina	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
South Dakota	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Tennessee	Not determined	Preponderance of the Evidence/ Burden on Defense	Judge
Texas	No formal rule; could be judge pretrial, or jury at sentencing		
Utah	Pretrial	Preponderance of the Evidence/ Burden on Defense	Judge
Virginia	Sentencing Phase	Preponderance of the Evidence/ Burden on Defense	Jury (unless waived)
Washington	Not determined	Preponderance of the Evidence/ Burden on Defense	Judge
Wyoming	Procedures and Burden of Proof Not Decided		
<u>Federal Government</u>	No formal rule; could be judge pretrial, or jury at sentencing		

* The information contained in this table was taken from **Blume, J. H., Johnson, S. L., & Seeds, C.** (2010). Implementing (or nullifying) *Atkins*?: The impact of state procedural choices on outcome in capital cases where intellectual disability is at issue. Available at SSRN: <http://ssrn.com/abstract=1670108>.

1.5.2. Burden of Proof Required for *Atkins* Claims

The overwhelming majority of jurisdictions with the death penalty place the burden of proof on the defendant or claimant in *Atkins* claims (Blume, Johnson, & Seeds, 2010). Only one state, Pennsylvania, places the burden on the prosecution. With respect to evidentiary standards, some states utilize a preponderance of the evidence standard, while others require the more onerous clear and convincing evidentiary standard. In addition, only recently was Georgia's requirement that ID be proven beyond a reasonable doubt ruled unreasonable by the Eleventh Circuit Court of Appeals (Blume, Johnson, & Seeds, 2010). The evidentiary standards required by different death penalty states are outlined in Table 2.

1.5.3. Factfinders Deciding *Atkins* Claims

According to Blume, Johnson, and Seeds (2010), a review of state statutes revealed that most jurisdictions with the death penalty require judicial fact finders, while about one-third of death penalty jurisdictions allow the claim to be decided by a jury. In some states, a jury will decide the claim, unless the parties agree to a judicial hearing and determination. Other states allow either judges or juries to decide *Atkins* claims, and, in the federal jurisdiction, the fact finder question is answered on a case-by-case basis. A few remaining states have not yet determined their procedural requirements for *Atkins* claims.

With respect to jury determinations of ID, some state procedures call for juries to simultaneously make an ID determination when either rendering a verdict, or during the sentencing phase of a capital trial. Others allow claimants to request a jury determination of ID later in the proceedings, after receiving an adverse result in a judicial hearing.

Only one state, Oklahoma, allows the use of “pretrial jury” for the sole purpose of determining ID (Blume, Johnson, & Seeds, 2010). These procedures are outlined according to state in Table 2.

1.5.4. Defendants Raising *Atkins* Claims

In the majority of *Atkins* claims, fact finders are presented with evidence regarding whether a defendant or claimant qualifies for a finding of *mild* intellectual disability (“ID”) (Olley, 2009a; Salekin and Olley, 2008; Salekin, Olley, & Hedge, 2010). As of 2003, mild ID cases were said to compose 85% of all cases of ID in the general population (Mossman, 2003). By extension, mild ID cases have also been overrepresented in *Atkins* claims (Olley, 2009a; Salekin and Olley, 2008; Salekin, Olley, & Hedge, 2010).

Cases involving the assessment and diagnosis of mild ID are particularly challenging for various reasons. One main reason, however, is because an individual with mild ID does not necessarily reflect the common stereotypes associated with mental retardation (Olley, 2009a; Salekin and Olley, 2008; Salekin, Olley, & Hedge, 2010). In addition, these individuals may be difficult to distinguish from non-intellectually disabled persons without adequate information (Olley, 2009). Typically, individuals with mild ID do not display any physical stigmata and present with superficially intact communication and motor skills. Individuals with mild ID have also been associated with the idea of a “cloak of competence,” which suggests that they will deny any deficits and often appear and try to appear as “normal” (Olley, 2009a; Salekin and Olley, 2008; Salekin, Olley, & Hedge, 2010; Weithorn, 2008).

According to some experts, from a clinical or diagnostic perspective, individuals with mild ID typically present with a mental age of 8 to 11 years. In the area of self-help, they often function with full skills and limited assistance. Their language skills are usually superficially intact and adequate for everyday purposes. In addition, they can typically read simple materials and perform basic math skills, such as simple addition and subtraction. It is unlikely that they enjoy reading as a hobby. Individuals with mild ID are capable of employment in various unskilled and trade jobs with supervision. They can also fulfill various adult roles, such as maintaining friendships, marrying, and having children. Individuals with mild ID often have limited community involvement and need significant assistance making complicated decisions, and with money and finance management (Mossman, 2003; Olley, 2009a; Salekin & Olley, 2008; Salekin, Olley, & Hedge, 2010). In addition, these persons often present as particularly naïve, gullible, and suggestible, which places them at greater risk as criminal offenders (Salekin, Olley, & Hedge, 2010; Weithorn, 2008). It is important to note that mild ID is not a stable condition, however, and an individual's intellectual and adaptive functioning should always be considered in the context of the person's environment (Mossman, 2003; Salekin & Olley, 2008; Weithorn, 2008).

1.5.5. Common Post-*Atkins* Case Scenarios

Three different scenarios are commonly observed in post-*Atkins* cases. First, there is the case in which a defendant or inmate received a formal diagnosis of mental retardation or intellectual disability⁶ in high school or during the appropriate developmental period. Second, there is the case in which a defendant or inmate was

⁶ The term "mental retardation" is used here, as the majority of defendants and inmates raising *Atkins* claims would have received a diagnosis of mental retardation, rather intellectual disability.

evaluated at school during the appropriate developmental period without a formal diagnosis of ID, but various factors were present at the time, such as proof of adaptive deficits or test data inaccuracy, which suggest that ID was diagnosable and should have been diagnosed. Third, and perhaps most difficult, is the case in which the defendant or inmate raising an *Atkins* claim did not undergo a formal evaluation or receive a formal diagnosis of ID during the appropriate developmental period, rendering a current, pre-trial or prison evaluation critical (Duvall & Morris, 2006; Flynn, 2006).

1.6. Post-*Atkins* Assessments of Intellectual Disability

To the extent that it is possible, a comprehensive assessment of ID should include the following:

1. A comprehensive review of available records;
2. Documentation of prior IQ and adaptive behavior testing during the appropriate developmental period;
3. Multiple collateral sources and extensive historical information;
4. A reliable and validated measure of intellectual ability;
5. Multiple, reliable and valid measures of adaptive ability; and
6. A valid and reliable measure of malingering

(AAMR, 2002; APA, 2000; Bonnie, 2004; Duvall & Morris, 2006; Ellis, 2003; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003).

1.6.1. Assessing Intellectual Functioning

Many different measures have been developed and used in the assessment of intellectual ability and IQ. Adult measures include the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), the Stanford Binet Intelligence Scales-Revised-Fifth Edition, and the Kaufman Scales (AAMR, 2002; APA, 2000; Bonnie, 2004; Blume & Leonard, 2002; Duvall & Morris, 2006; Ellis, 2003; Fabian, 2005; Flynn, 2006; Greenspan & Switzky, 2006; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003). When assessing ID, and particularly in the context of a capital case, the use of short forms of these measures is not recommended. In addition to the administration and interpretation of an adult measure of intellectual ability, prior IQ scores from different intellectual ability measures for children (i.e. – the Wechsler Intelligence Scale for Children, or WISC-III or IV; the Wechsler Preschool and Primary Scale of Intelligence – Revised or WPPSI-R; or the Kaufman Assessment Battery for Children, or K-ABC) may also be reviewed and considered in the evaluation.

When assessing intellectual ability, it is important for evaluators to be aware of the relationship between general intellectual functioning and each specific measure. For example, does the measure define and interpret intellectual ability as a general factor or a group of factors? Can this factor or these factors be measured using narrow ability tests? In addition, evaluators must understand the differences between different measures and different versions of the same measure of intellectual ability to be able to reconcile scores across measures (Kanaya, Scullin, & Ceci, 2003). It is also important for evaluators to be aware of and cautious about the dominance of and often over-reliance on the Wechsler scales, and the recent changes in the scales used in the WISC-IV, which may affect its

use as an accurate measure of general intelligence (Reschly, 2007; Scarano & Liang, 2004; White, 2009). Moreover, evaluators also should be aware of the Flynn effect and practice effects, and how these phenomena affect individual IQ scores and IQ scores across different test administrations and different versions of the same measure of intellectual ability (Bonnie & Gustafson, 2007; Ceci, Scullin, & Kanaya, 2003; Flynn, 2006; Kanaya, Scullin, & Ceci, 2003; Olley, 2009; Ray, 2009).

1.6.2. Assessing Adaptive Functioning

The assessment of adaptive behavior, skills and deficits is even more complex. According to some of the literature, there are approximately 200 adaptive skills and behavior measures currently available (Bonnie & Gustafson, 2007; Duvall & Morris, 2006; Reschly, Myers, & Hartel, 2002; Olley, 2009; Stevens & Price, 2006; Weithorn, 2008). Unfortunately, many of these measures focus on different adaptive skills and demonstrate limited reliability and validity, and none have been normed on correctional populations (AAMR, 2002; APA, 2000; Bonnie, 2004; Bonnie & Gustafson, 2007; Duvall & Morris, 2006; Ellis, 2003; Fabian, 2005; Greenspan & Switzky, 2003, 2006; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003). Nonetheless, the most commonly used adaptive behavior measure is the Vineland Adaptive Behavior Scales (VABS), which has 297 items and covers four main domains: communicative skills, daily living skills, socialization and motor skills. The VABS requires both direct and collateral sources of information, and one of the collateral sources is typically the primary caretaker (AAMR, 2002). Other commonly used measures include the Adaptive Behavior Assessment System-II (ABAS-II), Scales of Independent Living-Revised, the *AAIDD* Adaptive Behavior Scales, and the

Comprehensive Test of Adaptive Behavior-Revised (AAMR, 2002; Duvall & Morris, 2006; Olley & Cox, 2008; Scarano & Liang, 2004; Stevens & Price, 2006). When assessing adaptive behavior, evaluators must determine whether all of the domains of adaptive behavior noted by the *DSM-IV-TR*, or the skills and activities falling into the broader categories delineated by the *AAIDD* definition should be assessed and using which measures. Evaluators are also faced with the task of deciding who should be interviewed for purposes of these measures, and which collateral information should be relied upon in the assessment (AAMR, 2002; APA, 2000; Bonnie, 2004; Duvall & Morris, 2006; Ellis, 2003; Everington & Olley, 2008; Fabian, 2005; Greenspan, 2007; Olley & Cox, 2008; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003).

In addition to administering formal measures of intellectual and adaptive functioning, evaluators should also interview the defendant or inmate, as well as family members, friends, employers, and those who have had extended exposure to the individual over time and across settings, and, if possible, during the appropriate developmental period (AAMR, 2002; APA, 2000; Bonnie, 2004; Duvall & Morris, 2006; Ellis, 2003; Everington & Olley, 2008; Fabian, 2005; Greenspan, 2007; Olley & Cox, 2008; Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003; White, 2009). All other records, reports and available data must also be reviewed. This may include pregnancy records, birth records, pediatric records, school records, hospital records, substance abuse records, and state records (AAMR, 2002; APA, 2000; Bonnie, 2004; Duvall & Morris, 2006; Ellis, 2003; Fabian, 2005; Greenspan, 2007;

Salekin & Olley, 2008; Scarano & Liang, 2004; Stevens & Price, 2006; Watt & MacLean, 2003).

1.6.3. Additional Areas of Assessment

Although not required in ID assessments, evaluators should consider administering a malingering test, but also must be aware of the drawbacks and weaknesses of these measures in this context (Salekin & Doane, 2009; Salekin & Olley, 2008). Most malingering measures have not been developed or normed for correctional, intellectually disabled, or intellectually disabled correctional populations (Salekin and Doane, 2009; Salekin & Olley, 2008). In addition, research has shown that many of the malingering tests commonly used have limited validity and reliability (Salekin and Doane, 2009). It is also important to consider whether any other kind of testing or assessment (e.g., neuropsychological assessment) is indicated, which may further inform the ID assessment and resultant diagnosis (Davis, 2003; Orpen, 2003; Salekin & Olley, 2008). Finally, evaluators must also review and be aware of the statutory definition and requirements for ID in the state in which they are performing the assessment.

1.7. Criticisms and Concerns about Post-*Atkins* Assessments of Intellectual Disability

Many criticisms and concerns surround post-*Atkins* assessments of ID. Some of these concerns relate to the inconsistent definitions of ID, the unreliable assessment procedures used across states and evaluators, and the inconsistent evaluations and diagnoses across evaluators and individual cases. Other criticisms concern the over-reliance on IQ scores and certain types of intelligence tests in ID assessments, and the expansive definition and unreliable measures of adaptive behavior. In addition, some scientific literature has addressed the problem of practice effects, which are associated

with the repeated administration of certain intelligence tests that have been found to positively correlate with an increase in IQ scores in death row inmates over time (Duvall & Morris, 2006; Flynn, 2006; Ray, 2009). Other research has expressed similar concern over the issue of the Flynn effect, or the gradual, population-wide improvement in intelligence test performance that causes IQ test norms to become obsolete approximately every 20 years, as this could have a significant effect on persons whose IQ scores are close to 70 or a state's cut-off score, and thus most at a risk for miscalculation and misinterpretation (Ceci, Scullin, & Kanaya, 2003; Duvall & Morris, 2006; Flynn, 2006; Kanaya, Scullin, & Ceci, 2003).

Further criticisms relate to the cultural bias of intellectual and adaptive behavior testing, the potential biases of different evaluators, and the effects of the testing environment on the ID assessment. In addition, a variety of problems with retrospective assessments and diagnoses has been identified in the literature and provokes significant concerns. These problems include the unavailability of collateral information and interviews, a lack of a prior ID diagnosis or testing during the appropriate developmental period, and the absence of records dating back to the appropriate developmental period (Everington & Olley, 2008; Olley, 2009; Olley & Cox, 2008; Ray, 2009). Moreover, several issues also surround the assessment of adaptive behavior and deficits. These issues include the use of correctional staff interviews and offense-related information in the assessment of adaptive behavior, the use of offense-related information as evidence of an individual's planning ability and adaptive skills, the use of an individual's adaptation to prison life as evidence of no adaptive deficits, and the lack of IQ and adaptive behavior measures with normative data for correctional and death row populations (AAMR, 1999,

2002; Duvall & Morris, 2006; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Harvard Law Review, 2003; Olley, 2009; Salekin & Olley, 2008; Stevens & Price, 2006; White, 2009).

1.8. Post-*Atkins* Procedural Considerations and Ethical Controversies

Several practical questions and ethical controversies also surround the assessment and diagnosis of ID in capital cases. First, questions remain as to how ID should be defined for purposes of capital cases and whether a uniform procedure and assessment battery should be used to assess ID in all death penalty cases, both within and across states (DeMatteo, Marczyk, & Pich, 2007; Ellis, 2003). Should there be one national definition or individual state definitions? Which definition should be used considering the pros and cons of the *AAIDD* and *DSM-IV-TR* definitions? What are the advantages and disadvantages of a uniform definition and procedure? How could it be implemented? What would compose the standardized assessment? How would this conflict with the idea of an individualized, idiographic assessment of ID in defendants and inmates? At what cost could these changes be made? Who should conduct these assessments?

Second, it remains unclear whether ID can be accurately and reliably diagnosed in death row inmates, particularly when prior ID testing and relevant records are not available. For example, practitioners continue to disagree over whether adaptive deficits can be measured in a correctional setting and without prior records, and how these deficits should be assessed (AAMR, 1999, 2002; Brodsky & Galloway, 2003; Everington & Olley, 2008; Fabian, 2005; Greenspan, 2007; Greenspan & Switzky, 2006; Harvard Law Review, 2003; Olley, 2009; Stevens & Price, 2006). There are also disagreements regarding whether correctional staff should be interviewed, or offense-related information

should be used when assessing adaptive behavior and to establish adaptive skills (Young et al., 2007). In addition, practitioners disagree over the use of malingering tests when assessing for ID. It is important to identify feigning, but malingering measures have not been normed on correctional or intellectually disabled populations, and little is known about how malingering of intellectual disability may be accurately assessed (Brodsky & Galloway, 2003; Salekin & Doane, 2009; Salekin & Olley, 2008). Thus, it remains questionable whether current procedures and the procedures used in the absence of certain important information and testing are reliable and valid.

In turn, evaluators are left faced with numerous ethical considerations and dilemmas (Olley, Greenspan, & Switzky, 2005). When considering whether they should participate in these kinds of assessments, evaluators must examine their respective backgrounds, training and experience to determine if they are competent to perform these kinds of assessment and, if not, decline to participate (APA, 2002; Committee on Ethical Guidelines for Forensic Psychologists, 1991; Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2006). Evaluators must also determine whether the available measures of adaptive behavior and malingering are appropriate and ethical to use, considering their respective limitations and problems in the *Atkins* context, and whether it is their responsibility and ethical obligation to report the problems and weaknesses with their ID assessments to the court (APA, 2002; Brodsky & Galloway, 2003; Committee on Ethical Guidelines for Forensic Psychologists, 1991; Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2006). Furthermore, evaluators should examine their objectivity, potential biases and personal beliefs, as well as any conflicts surrounding their role as evaluator before, during and after an ID

assessment (APA, 2002; Brodsky & Galloway, 2003; Committee on Ethical Guidelines for Forensic Psychologists, 1991; Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2006). This is particularly important in this context, as the conclusion or diagnosis reached in an ID assessment may automatically render a defendant eligible for the death penalty. In addition to being aware of their role in these kinds of cases and assessments, evaluators must also be able to clearly communicate their role and the purpose of the assessment to the capital defendant or inmate being evaluated in a way that ensures informed consent, but does not jeopardize or undermine a reliable assessment with valid results (APA, 2002; Committee on Ethical Guidelines for Forensic Psychologists, 1991; Committee on the Revision of the Specialty Guidelines for Forensic Psychology, 2006). Finally, evaluators must also address and manage the conflict between the clinical understanding and psychological assessment of ID, and the legal understanding and definition of ID in the state where they are conducting the assessment and submitting an expert report (Brodsky & Galloway, 2003; Knauss & Kutinsky, 2004; Olley, Greenspan, & Switzky, 2005).

In addition to the ethical issues surrounding the procedures and evaluators involved in ID assessments and *Atkins* claims, several other controversies also emerge from the *Atkins* decision. First is the slippery-slope issue: If individuals with intellectual disability, as well as persons who were younger than 18 years of age at the time they committed a capital offense, are exempt from capital punishment, why are other mentally-disordered and impaired persons not (*Atkins*, 2002; *Panetti*, 2007; *Roper*, 2005)? For example, individuals with schizophrenia and other forms of severe mental illness may have difficulties and limitations similar to those listed for intellectually

disabled persons in the *Atkins* decision, as well as those listed for juveniles in the *Roper* decision (e.g., they are unable to effectively participate in their defense or assist counsel, they appear to lack remorse, they make poor witnesses, they exercise poor judgment, they are less culpable), so why should they not be exempt from capital punishment (*Panetti*, 2007)? Moreover, what about individuals with acquired traumatic brain injury, who may present with similar intellectual and adaptive deficits as those qualifying for a diagnosis of ID, but who acquired these deficits after the required developmental period (DeMatteo, Marczyk, & Pich, 2007; Greenspan & Switzky, 2003; Mossman, 2003; Slobogin, 2000, 2003, 2004, 2007)? Whereas the American Bar Association (“ABA”) has passed a resolution discussing and delineating the standards under which severely mentally ill persons and individuals with intellectual and adaptive deficits resulting from either intellectual disability, dementia or acquired brain injury should be exempt from capital punishment, and the American Psychiatric and Psychological Associations (“APA”) have endorsed this resolution, it is not clear whether state laws and practices actually reflect and implement this resolution (ABA Task Force, 2006; Heilbrun, Dvoskin, & Marsh, in press).

The second issue concerns the equal protection and treatment of persons with ID (Bersoff, 2002, 2004; Greenspan & Switzky, 2003; Mossman, 2003; Slobogin, 2000, 2003, 2004, 2007). How does the *Atkins* decision reconcile with all of the strides made by intellectually disabled individuals in terms of their civil rights and equal treatment? Some take the position that exemption from the death penalty serves to “degenerate” individuals with ID, as the *Atkins* decision largely mischaracterized the abilities and capacities of the intellectually disabled (Bersoff, 2002, 2004; Slobogin, 2003, 2004). In

addition, the *Atkins* decision may undermine the rights and ability of intellectually disabled persons to make their own choices and be held accountable for these choices (Bersoff, 2002, 2004; Mossman, 2003; Slobogin, 2003, 2004). For example, if intellectually disabled individuals are not “fit” for execution, do they remain fit for citizenship, voting, marriage, or having children?

1.9. Empirical Research Addressing Pre- and Post-*Atkins* Claims and Assessments of Intellectual Disability

The distinct legal and psychological perspectives, procedural considerations, and ethical controversies involved in *Atkins* claims and post-*Atkins* assessments of intellectual disability (“ID”) suggest multiple areas ripe for empirical research. However, since the 2002 decision, few studies examining *Atkins* claims, post-*Atkins* assessments of ID, and related issues have emerged. The limited research that is available provides useful descriptive information about pre- and post-*Atkins* practices and ID assessments, as well as mock juror decision-making. More specifically, current research has addressed (1) the role of experts and expert opinions as to which procedures should be used in ID assessments in *Atkins* claims, (2) how attorneys, experts, and witnesses presented information about mental retardation in pre-*Atkins* capital cases, (3) the different case factors and outcomes observed in post-*Atkins* cases addressing intellectual disability, and (4) the various factors affecting mock jurors’ ID findings in hypothetical capital cases.

1.9.1. The Role of Experts and Expert Opinions on ID Assessment Procedures

Since 2002, a great debate has emerged within the psychological community regarding which measures, procedures, and information are most appropriate for ID assessments in *Atkins* claims (Kan, et al., 2009). A few empirical studies have recently investigated this debate, addressing (1) the role of experts in *Atkins* claims, (2)

professional opinions as to which experts are most qualified to conduct post-*Atkins* ID assessments, and (3) professional opinions as to which procedures are most recommended and relied upon when conducting this kind of assessment (Salekin, 2004; Salekin, unpublished; Stevens & Price, 2006; Young et al., 2007).

A comprehensive literature review has identified two empirical studies examining mental health professionals' opinions regarding the procedures that should be used to assess ID in *Atkins* claims. First, in one 2004 study, more than 300 psychologists who had been involved in death penalty cases were surveyed to investigate the current and common practices being used in the assessment of adaptive behavior in capital cases (Salekin, 2004). Results of this study revealed that 80% of participants believed that the currently available adaptive behavior measures were appropriate for use in correctional settings, psychometric measures of adaptive behavior are always necessary, and a detailed defendant history is required in an assessment of ID (Salekin, 2004). This study also found that 50% of participants believed using correctional staff as informants was helpful (Salekin, 2004). Furthermore, participants were almost evenly split on the issues of whether having more informants, or raters, is more advantageous, and whether high school teachers, previous employers, or correctional staff should be used as informants in this kind of assessment (Salekin, 2004). In addition, the majority of participants reported a belief that using middle school teachers, caseworkers and probation officers as informants was inappropriate for the assessment of adaptive behavior (Salekin, 2004). Finally, participants differed in their selection of informants, or raters, as mental health professionals specializing in intellectual disability were more likely to use family and friends as informants, while forensic evaluators were not (Salekin, 2004).

In a second study, Salekin (unpublished)⁷ surveyed 944 licensed members of the APA whose major field of practice was described as “Clinical Psychology,” and whose areas of interest were reported as “Assessment/Diagnosis/Evaluation,” “Mental Retardation,” “Forensic Psychology,” and/or “Intelligence.” The study yielded several interesting results. First, results indicated that 81% of sampled professionals did not believe an IQ estimate is good enough for diagnosing mental retardation, or intellectual disability (Salekin, unpublished). Second, 75% of sampled professionals reported a belief that current adaptive behavior measures are sufficient for use in a correctional setting (Salekin, unpublished). Third, 82.6% of participants believed that conducting tests of adaptive functioning with persons who know the inmate less well and only in restrictive settings is a drawback to the assessment (Salekin, unpublished). Finally, findings showed that 47.6% of sampled professionals believed more raters are always better than fewer when using adaptive behavior measures (Salekin, unpublished).

At least one other study has also examined mental health professionals’ opinions regarding the roles of experts and the procedures used in post-*Atkins* assessments of ID (Young et al., 2007). This study investigated and reported how twenty experienced evaluators in the state of Texas approached post-*Atkins* ID assessments and related issues (Young et al., 2007). To understand their respective approaches, Texas evaluators were asked four questions:

⁷ These 2004 data were presented as part of a continuing education workshop entitled, “*Conducting an ‘Atkins’ Evaluation’: What We Know, What We Don’t Know, and What We Need to Find Out,*” which was conducted by K. L. Salekin and G. Olley at the annual conference of the American Psychology-Law Society in Jacksonville, FL in March, 2008. These results will be published in coordination with a follow-up study that is currently being conducted by K. L. Salekin.

- (1) What methods are appropriate for evaluating adaptive functioning in this context?
- (2) Should information about criminal behavior be used as evidence of adaptive functioning?
- (3) Should correctional officers serve as informants regarding adaptive behavior?
- (4) How should the Flynn effect influence the interpretation of intelligence test scores?

Results of this 2007 study revealed a mix of both similar and significantly different assessment practices across evaluators. First, the most common assessment practices reported by sampled participants included use of intelligence measures (95.0%), the review of educational records (90.0%), interviews of family members (70.0%), the review of mental health records (65.0%), and an interview of defendant/inmate (65.0%) (Young et al., 2007).

Second, evaluators were found to differ in their approaches toward the issue of including information about an individual's criminal behavior in an assessment of adaptive functioning. Only 1 evaluator (5.0%) reported using information about a defendant's/inmate's criminal behavior when assessing adaptive functioning (Young et al., 2007). However, when directly asked whether a defendant's past criminal behavior should be considered in the assessment of adaptive functioning, sixteen evaluators (80.0%) responded, "Yes;" three evaluators (15.0%) responded, "It depends;" and only one evaluator (5.0%) responded, "No" (Young et al., 2007).

Third, evaluators also differed in their approaches toward the issue of whether correctional officers (“C/Os”) should be used as informants in the assessment of adaptive behavior. When asked to identify “the essential components of a complete capital MR evaluation,” two evaluators (10.0%) discussed interviewing C/Os (Young et al., 2007). Eight evaluators (40.0%) discussed interviewing C/Os when asked about how they assess adaptive functioning in death row inmates (Young et al., 2007). In addition, two evaluators (10.0%) discussed interviewing C/Os in pre-trial *Atkins* evaluations (Young et al., 2007). Moreover, eighteen of the sampled evaluators (90.0%) provided that they interview C/Os “to gain insight” into an inmate’s adaptive functioning (Young et al., 2007).

Finally, with respect to the issue of the Flynn effect and intelligence test scores, participants also differed in their understanding and approach. First, nine sampled psychologists (69.2%) knew the Flynn effect by name, while one psychologist (7.7%) knew of the effect, but not the name, and three psychologists (23.1%) were completely unaware of the effect and name (Young et al., 2007). Second, seven sampled psychiatrists did not know the Flynn effect by name, and only two (28.6%) were familiar with the effect or trend in IQ scores, while seven (71.4%) were unfamiliar with effect or trend (Young et al., 2007). Furthermore, five sampled psychologists and two sampled psychiatrists reported that the Flynn effect was an issue in at least one of their *Atkins* evaluations (Young et al., 2007). When asked to elaborate, these participants provided that the Flynn effect was introduced as one of the ways to explain varying IQ test scores (Young et al., 2007).

1.9.2. Evidence Presented in Support of Mental Retardation in Pre-*Atkins* Capital Cases

One study recently examined pre-*Atkins*, trial transcripts from the state of Texas in an effort to identify the different kinds of information and evidence presented to capital jurors when attempting to demonstrate mental retardation (Kan, et al., 2009). The study posed four main questions:

- (1) What areas of adaptive functioning are focused on in trials and what areas are unaddressed;
- (2) Is information about adaptive behavior presented by expert or lay witnesses;
- (3) Are standardized tests used in the assessment of adaptive behavior; and
- (4) Are criminal behaviors used in support of or against adaptive skills?

To answer these questions, Kan et al. (2009) reviewed 19 transcripts of sentencing phase testimony, in which various forms of evidence were presented either in support of or against a finding of mental retardation. The transcripts were drawn from pre-*Atkins* trials which occurred between 1987 and 2002 in the state of Texas. Overall, results showed that most of the information presented about mental retardation pertained to adaptive behavior and functioning (71.5% , SD = 11.98), rather than intelligence (14.58%, SD = 10.99) or general comments about mental retardation (13.85%, SD = 9.06). Intelligence was mentioned at least once in eighteen of the nineteen transcripts, however (94.7%).

With respect to the first research question -- what adaptive functioning areas and related skills were addressed in the transcripts -- 78.95% of transcripts addressed at least

five of the ten adaptive functioning areas identified by the 1992 AAMR guidelines,⁸ while 42.11% addressed at least seven areas. None of the reviewed transcripts addressed skills from all ten adaptive functioning areas, but defendant's functional academic skills were addressed in every transcript. In addition, defendant's self-direction, communication, social, and work skills were addressed in many of the cases. Areas of adaptive functioning that were unlikely to be addressed included health and safety, leisure, and community use.

With respect to the second research question – whether expert or lay witnesses presented information about adaptive functioning – results indicated that at least one expert witness was used in 78.9% of cases, and the defense was more likely to call an expert, particularly regarding the defendant's mental retardation. In addition, 53.2% of information about adaptive functioning was presented by lay witnesses, as opposed to the 26.46% of information presented by experts; this difference was not statistically significant.

With respect to the third research question – whether standardized tests were used to measure adaptive functioning – results revealed that only five of the nineteen reviewed cases presented standardized testing results for at least one area of adaptive functioning. Functional academics was the adaptive skill most commonly assessed using standardized testing; however, this testing was used in only four cases. Moreover, the instruments used to assess adaptive functioning varied for each case, and none of the instruments used were typical measures of adaptive functioning or skills.

⁸ The ten adaptive functioning skill areas outlined by the 1992 AAMR guidelines are: (1) communication, (2) self care, (3), home living, (4) social/interpersonal skills, (5) community use, (6) self direction, (7) health and safety, (8) functional academics, (9) leisure, and (10) work.

With respect to the fourth research question – whether criminal behavior was used to assess adaptive functioning and skills – results suggested that a defendant’s criminal behavior was linked to his adaptive functioning in 68.4% of cases. These cases included an average of nine pieces of information about the individual’s criminal behavior, and most information presented about criminal behavior related to the adaptive skill of self-direction. None of the cases relied exclusively on criminal behavior to prove or disprove adaptive skills, but the emphasis placed on testimony about criminal behavior and adaptive functioning varied across cases.

1.9.3. Post-*Atkins* Capital Cases Involving an ID Determination

1.9.3.1. Overall Patterns in Cases Addressing ID

In 2009, Blume, Johnson, and Seeds collected and reviewed 234 capital cases addressing *Atkins* claims between the time of the *Atkins* decision (2002) and 2008. Preliminary data provided useful information on the general patterns observed across the 234 cases. First, results suggested that *Atkins* did not open “the floodgates of non-meritorious litigation,” as was hypothesized by Justice Scalia’s dissent in the *Atkins* decision (Blume, Johnson, & Seeds, 2009). The investigators concluded the 234 published decisions addressing *Atkins* claims represented about 7% of the death row population, and found that, of the 234 claims, about 40% were successful.⁹ It was noted that this success rate was substantially higher than the success rates of defendant claims of incompetence to stand trial, ineffective assistance of counsel, or any other claims

⁹ The 234 published case decisions reviewed by Blume and colleagues (2009) represent a small fraction of the thousands of *Atkins* claims raised since 2002.

(Blume, Johnson, & Seeds, 2009). Second, results showed the success of *Atkins* claims varied significantly across states (Blume, Johnson, & Seeds, 2009).

Blume and colleagues (2009) also analyzed the success or failure of the 234 *Atkins* claims according to the three requirements for an ID diagnosis: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive functioning, and (3) onset before age 18. Most failed claims failed to satisfy more than one requirement. Results indicated that 56% of losing *Atkins* claims failed the IQ and adaptive deficit requirements, 17% failed the IQ requirement, 17% failed the adaptive deficits requirement, and 1.4% failed the age of onset requirement. Sixty percent of *Atkins* claims that were successful on the IQ requirement involved individuals who did not have any reported IQ scores over 70. With respect to the adaptive deficits requirement, the most successfully proven adaptive deficit was in functional academics, which occurred in 57% of cases. This was followed by deficits in communication skills, which were proven in 36% of cases, deficits in social skills, proven in 33% of cases, and deficits in work skills, proven in 19% of cases. Only two of the 234 cases lost on the age of onset requirement alone. Additional results indicated about 30% of losing *Atkins* claims involved information about the individual's functioning in prison, and 15% of losing claims relied on the testimony of correctional or law enforcement officers (Blume, Johnson, & Seeds, 2009).

Blume, Johnson, and Seeds (2009) also examined the potential effects of race on *Atkins* claims. Results suggested more *Atkins* claims were filed and won by African American (57%) than Caucasian (22%) defendants and claimants, and, in most states, the percentage of *Atkins* claims raised by African American defendants and claimants

surpassed the percentage of African Americans on death row. In addition, results showed African American defendants' *Atkins* claims were more successful than Caucasian defendants in certain states (e.g., Florida, Georgia, Indiana, and Tennessee), and less successful than Caucasian defendants in other states (e.g., Alabama and Missouri).

1.9.3.2. Procedural Issues Affecting ID Determinations

Relying on the slightly larger dataset of 244, published, post-*Atkins* legal determinations of intellectual disability (ID), Blume, Johnson, and Seeds (2010) continued their examination of actual *Atkins* claims decided since 2002. Specifically, the investigators sought to examine the impact of different state procedural rules – such as jury vs. judicial determinations of ID claims, pre-trial vs. later phase determinations of ID, and different burdens of proof – on case outcomes. Two research questions were initially posed for this particular study. First, Blume and colleagues sought to investigate whether the type of fact finder in an ID determination made a difference in case outcome. Second, they sought to examine whether the relative significance of type of fact finder compared to the point in the proceedings at which the *Atkins* claims were determined.

Reported preliminary results suggested juries rarely determine ID in capital cases. Of the 244 cases included in the dataset, only 28 cases were determined by juries, while 216 cases were determined by judges. In addition, even more rarely did juries render a verdict in favor of ID. Three of the 28 cases decided by juries resulted in a finding of ID, compared to the 91 of 216 cases decided by judges. The investigators were unable to answer the second research question due to the extremely small number of jury verdicts in favor of a finding of ID. It was also noted that the small number of positive jury

verdicts prevented an additional examination of the impact of burden of proof on case outcomes (Blume, Johnson, & Seeds, 2010).

Blume, Johnson, and Seeds (2010) indicated future examination of the 244 cases will include (1) a comparison of the evidence presented on IQ scores and adaptive functioning in jury and judge cases in which ID was not found; (2) a comparison of the evidence presented on IQ scores and adaptive functioning in cases in which ID was and was not found, according to the point at which the *Atkins* claim was determined; (3) a comparison of the evidence presented and verdicts returned in states in which non-death-qualified and death-qualified juries determine ID; (4) an evaluation of whether jury determinations of ID are affected by race or ethnicity; and (5) an evaluation of whether appellate reviews correct and/or mitigate jury findings of no ID.

1.9.4. Factors Affecting Mock Jurors ID Decisions in Capital Cases

Guided by prior research addressing the different factors affecting juror decision-making in capital cases, Reardon, O'Neil, & Levett (2007) implemented the first and only two studies thus far to empirically examine the various procedural, evidentiary, and attitudinal factors affecting mock jurors' decisions about whether a capital defendant qualifies for mental retardation (MR). In the first study, 260 participants responded to an online questionnaire that contained death qualification questions and a capital case summary, which included the presentation of evidence on MR. Manipulated variables included (1) whether the defendant had or lacked a practical adaptive skill, (2) whether the defendant had or lacked a social adaptive skill, and (3) whether the MR occurred before or after age 18. Half of the participants received a case which included information on aggravating and mitigating factors, which was designed to simulate the

information jurors would receive if asked to determine MR during the sentencing phase. The other half did not receive this information, in an effort to simulate the information jurors would receive if asked to determine MR after the guilt phase of the trial. In addition, half of the sample's cases also included expert testimony that the presented crime could be attributed to the defendant's MR and related inability to appreciate his acts and susceptibility to suggestion. Participants were then asked to rate their agreement with five statements concerning whether the defendant presented with "serious intellectual deficits," "serious practical adaptive skill deficits," and "serious social adaptive deficits," and whether the defendant committed a "heinous crime" and his mental problems caused him to commit the crime. Participants then received "jury instructions," in which (1) the party carrying the burden of proof, (2) the burden of proof, and (3) the definition of MR were manipulated. Participants were asked to make their decision; half of the participants were also asked if they believed the defendant's MR contributed to the crime. Next, those participants who received information on aggravating and mitigating factors were asked to provide a sentencing decision if they did not find the defendant qualified for a finding of MR. The remaining participants were provided with the aggravating and mitigating factors and asked to provide a sentence decision (Reardon, O'Neil, & Levett, 2007). Finally, participants were asked 32 attitudinal questions regarding their beliefs surrounding capital punishment.

Five attitudinal factors – general opposition to the death penalty, belief that murderers are dangerous, belief that "mentally disturbed" do not deserve to be punished, belief that sometimes a murderer does not deserve all the blame for his or her crime, and belief that the death penalty is not a deterrent – and the nine manipulated variables (see

above) were first analyzed to determine the probability that a mock juror would find the defendant to have MR. Results indicated that 30.7% of participants found the defendant qualified for a finding of MR. Participants were less likely to find MR when the defense was carrying the burden of proof, or if they believed murderers are dangerous.

Participants were slightly more likely to find MR when the defendant demonstrated a social adaptive deficit. Participants who believed the defendant exhibited serious intellectual deficits or that it was the defendant's mental issues which led to the crime were more likely to make a finding of MR. Results also indicated that participants asked to determine MR as if at the end of the guilt phase were more likely to find MR when there was testimony that the defendant's MR contributed to the crime. Participants asked to determine MR as if in the sentencing phase were more likely to find MR without such testimony (Reardon, O'Neil, & Levett, 2007).

Additional analyses and results revealed that 22.9% of mock jurors made a finding of MR and believed there was a connection between the defendant's MR and criminal offense. In cases where participants were asked whether the defendant's MR contributed to the offense, participants were less likely to find MR. Participants were more likely to find MR when the state had the burden of proof (and they were not asked whether MR contributed to the crime), the proof was required beyond a reasonable doubt, the decision was made as if during the sentencing phase (and participants were asked whether MR contributed to the crime), and the participant believed the defendant had serious intellectual deficits and that his mental issue contributed to his commission of the crime. In addition, a significant interaction was found between MR decisions, the presence of evidence that indicated the defendant's MR contributed to the crime, and

participants being asked whether they believed MR contributed to the crime. Participants who were not asked this question were more likely to find MR when presented with evidence that MR contributed to the crime, while participants who were asked this question were less likely to find MR when presented with evidence that MR contributed to the crime (Reardon, O'Neil, & Levett, 2007).

With respect to sentencing decisions, only 27.5% of participants sentenced the defendant to death after not finding MR. Results indicated mock jurors were more likely to give a death sentence when a preponderance of the evidence standard was used to prove MR. Participants who believed murderers are dangerous or that the defendant committed a heinous crime were also more likely to give a death sentence. Mock jurors who were generally opposed to the death penalty, did not view the death penalty as a deterrent, and believed the mentally ill do not deserve to be punished were less likely to render a death sentence. In addition, participants who believed the defendant had serious intellectual deficits were also less likely to give a death sentence. Overall, participants were more likely to sentence the defendant to death when the state disproved MR.

In the second study, Reardon, O'Neil, and Levett (2007) administered an online questionnaire to 230 participants. Half of the participants were initially asked a series of 20 attitudinal questions. Mock jurors were then provided with a case summary, which included evidence regarding whether the defendant was either mentally ill or MR. The four variables manipulated in the case were (1) whether the defendant was mentally ill or MR, (2) the severity of the mental problem, (3) heinousness of the crime, and (4) timing of the decision. Participants were provided "jury instructions" requiring a finding by a preponderance of the evidence and asked to make a decision. If participants found that

their respective defendant was not mentally ill or MR, they were asked to review instructions about aggravating and mitigating factors and provide a sentence. Those who had not received the attitudinal questions, were asked to complete them at the end of the survey (Reardon, O'Neil, & Levett, 2007).

Three attitudinal variables – support of death penalty, belief that mentally ill persons do not deserve to be punished, and belief that mental illness can affect one's ability to make decisions – and the four variables noted above were examined. Results revealed that 41.7% of participants decided the defendant was either MR or mentally ill. Mock jurors were more likely to make a finding of mental illness than MR. Participants who supported the death penalty and believed the defendant was offering excuses were less likely to find a mental illness; participants who believed the defendant suffered from mental problems and deserved mercy were more likely to find a mental illness. In addition, mock jurors felt less sympathy for defendants presenting with mental illness as opposed to MR.

Numerous interactions were also found to be significant. Participants who received a case summary presenting less severe mental problems and a more heinous crime were more likely to find a mental disorder; while participants who received a case summary presenting more severe mental problems and a more heinous crime were less likely to find a mental disorder. Other interactions existed among the belief that the mentally ill do not deserve punishment, the belief that mental illness can affect one's ability to make decisions, and participants' findings of mental illness and MR. A final interaction suggested that mock jurors who strongly believed the mentally ill should not be punished and who were presented with a more heinous crime were more likely to find

the defendant qualified for a mental disorder, while participants who weakly believed the mentally ill should not be punished and who were presented with a more heinous crime were less likely to find a mental disorder (Reardon, O'Neil, & Levett, 2007).

Additional results indicated 20.7% of the mock jurors returned a death sentence. Those who supported capital punishment and weakly believed mental illness could affect one's ability to make decisions were more likely to sentence the defendant to death. Participants who were presented with a case with less severe mental problems and a more heinous crime were less likely to return a death sentence, while participants who received a case with more severe mental problems and a more heinous crime were more likely to sentence the defendant to death (Reardon, O'Neil, & Levett, 2007).

1.10. Areas in Need of Further Empirical Research

Although recent research has begun to address some of the issues surrounding *Atkins* claims and post-*Atkins* assessments, there remain several areas and questions in need of further empirical research. These questions include:

- (1) Who is most qualified to conduct and who most frequently conducts these assessments?
- (2) What measures are most commonly used and relied upon in post-*Atkins* assessments of intellectual disability?
- (3) What measures are most valid and reliable for formulating a post-*Atkins* ID diagnosis?
- (4) What measures are most valid and reliable for detecting malingering?
- (5) Do the available tools translate to correctional and death row populations?

- (6) Can the existent tools be re-normed or can new, comparable tools be developed for correctional populations for these kinds of assessments?
- (7) Do current procedures adhere to ethical guidelines and reflect ethical, competent practice?

1.11. Areas in Need of Original Empirical Research

In addition to the various areas and questions in need of further research, there are several other aspects of *Atkins* claims and post-*Atkins* assessments of intellectual disability that have yet to be empirically investigated. Specifically, there remains a significant need for empirical research addressing how different experts, ID assessment practices and defendant histories are perceived, understood and relied upon by other key players in *Atkins* claims. These key players include prosecuting attorneys, defense attorneys, and, perhaps most importantly, fact finders such as jurors and judges. Currently, there are no empirical studies examining the types of experts, ID assessment practices and legal strategies preferred and relied upon by the prosecuting and defense attorneys involved in *Atkins* claims. In addition, and most relevant for purposes of the present study, a comprehensive review of the scientific literature reveals an absence of empirical research addressing the relationship between ID assessment procedures, defendant histories, and judicial decision-making in *Atkins* claims.

2. Current Study

2.1. Rationale and Goals of Study

The purpose of the present study was to expand on the limited empirical research examining intellectual disability (“ID”) and the death penalty, by addressing a different perspective and varying aspects of *Atkins* claims, ID assessments in capital cases, and

case outcomes. More specifically, as the first study of its kind, this study intended to examine the relationship between ID assessment practices, defendant history, and individual federal and state judges' ID decisions in hypothetical, pre-trial, *Atkins* claims. This study also sought to evaluate judicial understanding of both the clinical assessment and psychological/psychiatric diagnosis of intellectual disability. Finally, this study also addressed the relationship between judges' personal characteristics and attitudes, and their decision-making in hypothetical *Atkins* claims.

The present study differs from the current empirical research addressing *Atkins* claims and post-*Atkins* assessments in capital cases in three significant ways. First, up until this point, empirical research in this area has sampled only mental health professionals and mental health experts conducting ID assessments in capital cases or mock jurors. To the best of my knowledge, and based on a comprehensive literature review, no study to date has sampled fact finders, such as judges, when examining issues relating to *Atkins* claims and post-*Atkins* assessments of ID in capital cases. Moreover, although post-*Atkins* cases addressing ID have been reviewed by some legal researchers, no studies to date have empirically examined the ID findings made by judges in actual or hypothetical *Atkins* claims. This is quite significant, as the majority of death penalty states require judges to determine whether a capital defendant qualifies for a finding of ID before trial, but, clearly, little is known about these judicial decisions. Thus, this study expands on the current research by examining a different perspective -- the judicial perspective -- of *Atkins* claims and ID assessments in a capital case.

Second, many of the existing studies have focused on professional and expert opinions regarding the appropriate assessment practices to use when conducting an ID

evaluation in a capital case. The present study builds on this research by examining a different aspect of *Atkins* claims and ID assessments. Rather than examine expert opinions regarding current assessment practices, this study sought to examine how judges interpret, understand and weigh a defendant's history and the assessment practices commonly used by an expert in a pre-trial, ID evaluation when determining whether a hypothetical defendant qualifies for a finding of ID and exemption from the death penalty. This also is significant, as it is first study to not only address current ID assessment practices, but also how these practices affect judicial decision-making in hypothetical *Atkins* claims.

Third, unlike the available research examining expert opinions and assessment practices, reviewing post-*Atkins* cases involving ID claims, and evaluating the factors affecting mock jurors' ID decisions, this study examined individual judges' level of understanding of ID, and how judges' personal characteristics, attitudes, and knowledge about ID affected their findings of ID in hypothetical capital cases. This is important, as results may inform not only how judges make decisions in hypothetical and actual capital cases involving *Atkins* claims, but also the areas in which judges may benefit from further education and training in order to more fully understand ID and make more accurate decisions. Moreover, this study may also inform prosecuting and defense attorneys, as well as their respective legal strategies, as judges with certain personal characteristics, attitudes and knowledge about ID may be found to weigh certain evidence more heavily, or be more likely to render a finding of ID when presented with certain information. Finally, exploring these factors may also provide explanations for the different processes and outcomes seen in *Atkins* claims across both states and judges.

2.2. Overview of Procedure and Design

To accomplish these objectives, a 2x2x2 between-subjects design was used, in which 1200 federal and state judges were presented with one of eight different, randomly-selected hypothetical case vignettes describing a pre-trial *Atkins* claim and ID assessment, and asked to provide an ID decision in response to the case vignette. Hypothetical case vignettes were used and simulated judicial decision-making were examined in this study for various reasons. First, when examining actual cases and corresponding judicial decisions, it is difficult to ensure that (1) different judges have heard similar kinds of cases with similar issues, and (2) the different cases heard by judges are actually comparable across the issues and variables of interest (Van Koppen & Kate, 1984). As a result, an examination and comparison of actual cases and case outcomes could introduce significant error variance, which could confound or invalidate study results (Van Koppen & Kate, 1984). Second, evaluating judicial decisions in response to hypothetical case vignettes may be more manageable and yield more useful information, as it allows for the assessment of various factors and conditions, which may not be readily available and could be too complicated to assess across actual cases and decisions (Lind & Walker, 1979; Van Koppen & Kate, 1984). Third, although hypothetical in nature, the case vignettes in this study have been constructed to reflect realistic cases, which were varied and randomly assigned to ensure that judges were presented with cases that are unique, but also representative of the kinds of conditions that are typically seen in *Atkins* claims and ID assessments, and require the same kind of decision-making judges must engage in when hearing actual *Atkins* claims (Taylor, 2006). It is important to note, however, that the use of hypothetical case vignettes and

simulated decision-making may oversimplify or neglect some of the factors and conditions present in actual cases and case outcomes, which could affect the comparability and generalizability of simulated judicial decisions to actual decisions. However, this approach remains comprehensive and effective, as it will examine and compare judicial decision-making across hypothetical, but realistic *Atkins* claims, as well as different judges, states, and jurisdictions, which will enhance the generalizability of the results and would be difficult to achieve using actual cases and judicial decisions.

Eight different versions of the case vignette were required to manipulate three independent variables, which have been either hypothesized or shown to be associated with the assessment and a finding of ID in capital cases. Multiple variables were considered for manipulation in the vignettes and statistical analysis. Guided by the available empirical research, and in order to maintain an efficient and manageable research design, the following three independent variables were selected for manipulation: (1) the severity of ID demonstrated by the defendant (mild vs. moderate ID); (2) the defendant's history and prior diagnosis of ID (formal diagnosis of ID vs. no formal diagnosis of ID); and (3) the type of collateral information considered in the assessment of adaptive behavior (inclusion of correctional staff interviews about the defendant's prison behavior and information about the defendant's role in the alleged offense vs. exclusion of correctional staff interviews and information about the alleged offense). The two dependent variables of interest were judges' ID decisions ("yes" vs. "no") and commitment to ID decision (8-point Likert scale ranging from "not committed" to "extremely committed").

Individual judges received only one version of the vignette to review. After reading the vignette, they were asked to (1) provide a ruling as to whether the defendant qualified for a finding of ID and (2) rate their commitment to their decision. To guard against the confounding of different procedural variables and the noted independent variables, the vignettes and questionnaire controlled for the timing of and the burden of proof necessary for the *Atkins* claim presented by the vignette. After providing their decision, judges were then asked to respond to a series of follow-up questions and five true or false questions designed to evaluate their understanding of the clinical assessment and psychological/psychiatric diagnosis of ID. For some follow-up questions, participants responded using a Likert-scale response system. Finally, judges were presented with a separate demographic and attitudinal questionnaire, which requested information regarding their gender, race/ethnicity, age, occupational background, length of time on the bench, number of capital cases over which they have presided, number of *Atkins* claims heard and decided, political orientation and affiliation, opinion about the culpability of offenders with ID, opinion about mental illness as a mitigating factor in capital cases, and opinion about the exemption of persons with acquired brain injury from the death penalty.

2.3. Hypotheses

The following hypotheses were made:

- *Hypothesis 1:* Severity of ID will be positively related to judges' ID decisions in response to the case vignettes.
- *Hypothesis 2:* History and a prior, formal diagnosis of ID will be positively related to judges' ID decisions in response to the case vignettes.

- *Hypothesis 3*: Inclusion of C/O interviews and information about the alleged offense in the assessment of adaptive behavior will be negatively related to judges' ID decisions in response to the case vignettes.
- *Hypothesis 4*: The interaction effects of severity of ID, history of ID, and type of collateral information used in assessment will significantly affect judges' ID decisions in response to the case vignettes.
- *Hypothesis 5*: Judicial understanding of the diagnosis and assessment of ID will be positively related to judges' ID decisions in response to the case vignettes.
- *Hypothesis 6*: Judicial demographic characteristics and attitudes about certain mental health issues will be significantly related to judges' ID decisions in response to the case vignettes.

3. Method

3.1. Participants

Twelve hundred surveys were mailed to 600 federal and 600 state court judges sitting in jurisdictions with the death penalty. These jurisdictions included Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. A 20% response rate was anticipated. A power analysis suggested that for a between-subjects, 2x2x2 ANOVA, with an alpha of .05 and a medium effect size ($f=.25$) for all main effects and interactions, a sample size of

at least 160 participants would be necessary (8 conditions with at least 20 participants per condition = 160).

Two hundred and four surveys were returned, resulting in a 17% response rate. Of the 204 surveys, 121 were completed by state court judges (59.3%) and 83 were completed by federal court judges (40.7%). The majority of judges were male (n=171, 83.8%); 31 judges were female (15.2%). Two judges did not report their gender (1.0%). The majority of judges reported their race as “Caucasian” (n=180, 88.2%), while 11 judges reported “African American” (5.4%), seven reported “Hispanic” (3.4%), five reported “Other” (2.5%), and one reported “Native American” (.5%). Most judges reported they were 56 to 65 years old (n=109, 53.4%). Thirty-six judges were 66 to 75 years old (17.6%); 31 judges were 46 to 55 years old (15.2%); 11 judges were 76 to 85 years old (5.4%); 6 judges were 36 to 45 years old (2.9%); and, 4 judges were 86 to 95 years old (2.0%). Seven judges did not report their age (3.4%) (see Table 3).

With respect to occupational history, 114 judges reported having one occupation prior to becoming a judge (55.9%). A total of 68 of these judges reported working as private attorneys (non-defense) (33.4%), 17 worked as prosecuting attorneys (8.3%), 17 worked as defense attorneys (8.3%), and 12 reported working in other positions (5.9%). A total of 90 judges reported having more than one occupation prior to becoming a judge (44.1%), half of whom worked as prosecuting, defense and private attorneys over the course of their careers (n=46, 22.6%). Two judges did not report their occupational history (1.0%) (see Table 4).

Information regarding individual participants’ judicial experience was also collected. As noted above, 121 participants were currently serving as state court judges

(59.3%) and 83 were currently serving as federal court judges (40.7%). Participants reported varying years of service as a judge, with the majority of participants serving more than 10 years as a judge ($n=137$, 67.2%). A total of 39 participants reported serving 16 to 20 years as a judge (19.1%), followed by 6 to 10 years ($n=36$, 17.6%), 21 to 25 years ($n=34$, 16.7%), 0 to 5 years ($n=28$, 13.7%), 11 to 15 years ($n = 26$, 12.7%), 26 to 30 years ($n=17$, 8.3%), 31 to 35 years ($n=10$, 4.9%), more than 40 years ($n=6$, 2.9%), and 36 to 40 years ($n=5$, 2.5%) (see Table 5). Preliminary correlation analyses revealed jurisdiction, age, and years of service as a judge were strongly correlated, suggesting that participants who were federal court judges were also older ($r = .33$, $p=.01$) and had served longer as a judge ($r= .41$, $p= .01$) (see Table 6).

About half of the judges reported that they preside over or have had the opportunity to preside over capital cases ($n=103$, 50.5%), while roughly the other half did not ($n=98$, 48.0%). Three judges did not respond to the question (1.5%). The majority of judges reported they do not or have not had the opportunity to preside over an *Atkins* claim ($n=164$, 80.4%). Only 37 judges reported they preside over or have had the opportunity to preside over an *Atkins* claim (18.1%). Three judges did not answer the question (1.5%) (see Table 5). Preliminary correlation analyses indicated capital cases and *Atkins* claims presided over by judges were strongly correlated, $r = .26$, $p=.01$. (see Table 6).

With respect to questions about political orientation and affiliation, participant responses reflected a spectrum of political beliefs. Some 50 judges ranked their political orientation as “Independent Leaning Conservative” (24.5%); 43 judges ranked it as “Independent Leaning Liberal” (21.1%); 43 judges ranked it as “Somewhat

Conservative” (21.1%); 27 judges ranked it as “Somewhat Liberal” (13.2%); 16 judges ranked it as “Conservative” (7.8%); 12 judges ranked it as “Liberal” (5.9%); four judges ranked it as “Very Conservative” (2.0%); and three judges ranked it as “Very Liberal” (1.5%). Six judges did not rank this question (2.9%). With respect to political affiliation, 43 judges reported they were “Strong Democrat” (21.1%); 30 judges reported they were “Independent Leaning Republican” (14.7%); 29 judges reported they were “Independent” (14.2%); 25 judges reported they were “Independent Leaning Democrat” (12.3%); 24 judges reported they were “Weak Republican” (11.8%); 23 judges reported they were “Strong Republican” (11.3%); and 15 judges reported they were “Weak Democrat” (7.4%). Fifteen judges did not answer this question (7.4%) (see Table 7). Correlation analyses indicated political orientation and affiliation were strongly correlated, $r = .75$, $p = .01$.

3.2. Materials

The study utilized a mail questionnaire, which included several materials for judges to review and rate. First, each individual mailing contained an introductory letter and one of eight randomly-selected case vignettes depicting a hypothetical capital case involving a defendant’s pre-trial *Atkins* claim and ID assessment. Second, each vignette was then followed by a short series of questions designed to elicit judges’ (1) ID decision in response to the case vignette, (2) commitment to this decision, (3) perception of the severity of ID presented in the vignette, (4) self-reported understanding of ID, and (4) objective understanding of the clinical assessment and psychological/psychiatric diagnosis of ID. Third, judges were presented with a demographic survey, which asked judge to report their gender, race/ethnicity, age, occupational background, current

jurisdiction (state or federal court), length of time on the bench, number of capital cases over which they have presided, number of *Atkins* claims heard as a judge, political orientation, and political affiliation. Finally, judges' were asked to rate their agreement with three attitudinal statements about (1) the culpability of criminal offenders with ID, (2) mental illness as a mitigating factor in death penalty cases, and (3) the exemption of persons with acquired brain injury from the death penalty.

3.2.1. Introductory Letter and Survey Instructions

All judges were sent an introductory letter in which the *Atkins* decision was briefly discussed, the present study was described, and the judges were invited to participate anonymously in the study. The letter highlighted the importance of (1) understanding ID, particularly in the context of capital cases, (2) recognizing and developing valid, reliable, and ethical procedures for the assessment of ID in capital cases, and (3) reaching sound and reliable decisions in *Atkins* claims. The letter also gave judges the option to receive the results of the study, and assured participants that all reported information would be kept anonymous and confidential (see Appendix A). After the letter, judges were provided with specific survey instructions which requested that they not write their name on any materials, read the case vignette, and answer all of the questions in the survey in the order in which they were asked (see Appendix A).

3.2.2. Case Vignettes

Eight brief case vignettes were developed for purposes of this study. Each vignette described a hypothetical capital case involving a defendant's pre-trial *Atkins* claim and ID assessment. The vignettes presented eight different conditions using a 2 x 2 x 2 between-subjects design, in which the following three independent variables were

manipulated: (1) severity of ID presented by defendant (mild vs. moderate ID); (2) prior history and ID diagnoses (prior formal diagnosis of ID vs. no prior formal diagnosis of ID); and (3) type of collateral information used in the assessment of adaptive behavior (inclusion of correctional staff interviews about the defendant's prison behavior and information about the defendant's role in the alleged offense vs. exclusion of correctional staff interviews and information about the alleged offense). Although these conditions were varied, the vignettes were also designed to provide consistent similarities (i.e., the defendant's age, charged capital offense, intellectual assessment measures, and malingering measure) and differences (i.e., certain procedures used in defendant's adaptive behavior assessment, defendant's severity of ID, defendant's history of ID), so that the judges' personal characteristics, knowledge and understanding of ID, and attitudes toward the death penalty and related issues could be examined and compared with their respective ID decisions (see Appendices B – I).

3.2.3. Follow-Up Questionnaire

Each vignette was followed by a brief series of follow-up questions. First, judges were first asked to provide an ID decision (“yes” or “no”) in response to the case vignette. Second, judges were asked to rate their commitment to this decision using an 8-point Likert scale ranging from “Not Committed” to “Extremely Committed.” Next, judges were asked their opinion as to the level of ID presented in the vignette; they were asked to choose from the following options: None, Mild, Moderate, Severe, and Profound. Using an 8-point Likert scale ranging from “Limited” to “Very Good,” judges were then asked to report their level of understanding of ID. Next, judges answered a series of five true or false questions designed to evaluate judges' objective understanding

of the clinical assessment and psychological/psychiatric diagnosis of ID. Finally, judges were offered the option of providing any additional information about their decision-making in the vignette, if they chose to do so (see Appendix J).

3.2.4. Survey of Participant Demographic and Attitudinal Characteristics

Participant judges were asked to complete a final survey requesting both demographic information and information about individual judge's attitudes toward certain issues. The requested demographic information included gender, race/ethnicity, age, occupational history, jurisdiction (state or federal), length of time on the bench, experience with capital cases, experience with *Atkins* claims, political orientation, and political affiliation. Attitudinal variables included judge's beliefs about the culpability of persons with ID, mental illness as a mitigating factor in capital cases, and acquired brain injury and the death penalty. Each of the attitudinal variables was evaluated using an 8-point Likert scale in which judges were asked to rate their level of agreement with a specific statement. The scale ranged from "Strongly Agree" to "Strongly Disagree" (see Appendix K).

3.3. Procedures

3.3.1. Sampling Procedure

The following procedure was used to obtain the desired sample. First, in addition to the federal government, states with the death penalty were identified. These states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota,

Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Second, judges sitting at the trial level of the state and federal courts of these states were identified using BNA's Directory of State and Federal Courts, Judges, and Clerks (Kitchell, 2010). Third, for each included state and federal jurisdiction, the number of listed judges was divided by eight, so that each condition would be equally represented by the case vignettes presented to judges across each respective jurisdiction. For example, if an included state had a listing of eighty judges, ten judges would be sent the vignette representing Condition 1, ten judges would be sent the vignette representing Condition 2, ten judges would be sent the vignette representing Condition 3, and so on, until Condition 8. Next, each judge was randomly assigned a vignette, selected from one of the eight available conditions and varied according to the number of judges listed for each state, so that each condition would be equally represented among judges.

3.3.2. Survey Procedure

An introductory letter describing the study and study materials, survey instructions, a randomly assigned case vignette, a brief follow-up questionnaire, and a participant demographic and attitudinal questionnaire were sent directly to each judge to introduce the study and to request and enable their participation. Participant judges were provided with a pre-paid, self-addressed stamped envelope, to return their completed, de-identified survey materials. Judges were also provided with contact information so they could indicate whether they would like to receive a copy of the results upon the completion of the study. Efforts were made to maximize the response rate of federal and state court judges by sending reminder postcards to all judges within approximately one month of the initial mailing. After approximately two and a half months of data

collection, returned surveys were reviewed, and each participant's respective data were coded and entered into a secure and password protected SPSS database.

4. Results

4.1. Descriptive Statistics and Preliminary Analyses

Overall, 204 of 1200 mailed surveys were returned, resulting in a 17% response rate. A power analysis revealed that for between-subjects, 2x2x2 ANOVA, with an alpha level of .05 and medium effect size ($f=.25$), a sample of 204 participants yielded a power of .72 for the corrected model. The preferred level of power for this study would be .80, which would indicate that there was significant chance that a result would be detected if it existed. A power of .72 will also detect a result should one exist, but not with as much certainty as was hoped. Results of a chi square analysis demonstrated the eight case vignettes, or conditions, were equally represented across returned surveys, $X^2(7, N=183) = 3.816, p > .05$.

Although the diagnostic criteria necessary for a finding of ID were met in all eight vignettes, or conditions, judicial decisions were not unanimous in favor of a finding of ID. The majority of judges decided the defendant met the criteria for a finding of ID ($n=124, 60.8\%$), but 37.7% of judges decided the defendant did not ($n=77$). One judge explicitly noted she did not feel there was enough information to render a decision (.5%). Two judges did not answer this question (1.0%) (see Table 9).

Judges also varied in their reported commitment to their ID decisions. Twenty-three judges were "Extremely Committed" (11.3%), 26 judges were "Very Committed" to "Extremely Committed" (12.7%), 71 judges were "Very Committed" (34.8%), and 45 judges were "Committed" (22.1%) to their decisions. Twenty-three judges were

“Somewhat Committed” (11.3%), ten judges were “Slightly Committed” (4.9%), four judges were “Slightly Committed” to “Not Committed” (2.0%); and one judge was “Not Committed” (.5%). One judge did not report this information (.5%) (see Table 9).

With respect to the level of ID present in the vignettes, 51.9% of returned vignettes clearly met the clinical criteria for a diagnosis of moderate ID ($n=95$), and 48.1% clearly met the clinical criteria for a diagnosis of mild ID ($n=88$). (Twenty-one surveys were not included in the analyses because participants removed or did not return the portions of the survey which identified the type of vignette they received.) See Table 8. Judges’ perceptions of the level of ID present in the vignettes were slightly different. More than half of the judges believed the ID level presented in the vignette was “Moderate” ($n=106$, 52%) and 29.9% of judges believed ID level was “Mild” ($n=61$). In addition, 26 judges believed the ID level was “Severe” (12.7%), while 6 others believed no ID was present (2.9%). Five judges did not answer this question (2.5%) (see Table 10). Correlation analyses revealed perceived ID level and vignette type, or condition, were strongly correlated, $r=.32$, $p=.00$.

Judges’ self-reported understanding of ID ranged from “Limited” ($n=12$, 5.9%) to “Very Good” ($n=11$, 5.4%). Most judges reported having an average understanding of ID ($n=86$, 42.1%), while 44 judges reported having an “Above Average” understanding of ID (21.6%), and 29 judges reported having a “Good” understanding of ID (14.2%). Twenty judges reported having a “Low” understanding of ID (9.8%), while 12 judges had a “Limited” understanding of ID (5.4%). Two judges did not answer this question (1.0%) (see Table 11).

To assess judges' objective understanding of ID, judges were asked to answer five true or false questions addressing the clinical assessment and psychological/psychiatric diagnosis of ID. The five questions were:

- (1) A low IQ score is sufficient for a psychological diagnosis of intellectual disability. (Correct Answer: False)
- (2) More than 1 adaptive deficit is necessary for a psychological diagnosis of intellectual disability. (Correct Answer: True)
- (3) A psychologist must conduct the testing used in an assessment of intellectual disability. (Correct Answer: True)
- (4) In some cases, intellectual disability may develop in adulthood, after the age of 18. (Correct Answer: False)
- (5) A malingering test must be used in the assessment of intellectual disability. (Correct Answer: False)

According to judges' responses, the majority of the sample understood a low IQ score is *not* sufficient for a psychological/psychiatric diagnosis of ID (n=164, 80.4%), while 33 judges did not (16.2%). Seven judges did not answer the question (3.4%). Similarly, the majority of judges understood more than one adaptive deficit is necessary for a psychological/psychiatric ID diagnosis (n=136, 66.7%); 58 judges did not (28.4%) and 10 judges did not answer the question (4.9%). Roughly half of the sampled judges understood that a psychologist must perform the testing used in the clinical assessment of ID (n= 103, 50.5%); 89 judges did not (43.6%) and 12 judges did not answer the question (5.9%). The majority of judges misunderstood the third requirement for the psychological/psychiatric diagnosis of ID – onset of ID before the age of 18. A total of

138 judges believed ID could manifest after the age of 18 (67.6%), while 56 recognized it does not (27.5%). Ten judges did not answer this question (4.9%). Similarly, more than half of sampled judges incorrectly believed a malingering test is a required part of a clinical assessment of ID (n=119, 58.3%), while 75 recognized it is not (36.8%). Ten judges did not answer this question (4.9%) (see Table 12).

Judges' scores on the true or false questions were then used to calculate 3 levels of understanding of ID. Judges who answered four or five questions correctly fell into the "Good" understanding category. Judges who answered two or three questions correctly fell into the "Some" understanding category. Judges who answered one or zero questions correctly fell into the "Limited" understanding category. Overall, most judges fell into the "Some" understanding category (n=142, 69.6%). Fewer judges fell into the "Good" understanding category (n=35, 17.2%), and only 9.8% fell into the "Limited" understanding category (n=20). Seven judges did not provide enough information to calculate their objective understanding of the clinical assessment and psychological/psychiatric diagnosis of ID (n=7, 3.4%) (see Table 11).

At the end of the follow-up survey, judges were given the opportunity to note any additional information that may have affected their decision-making in response to the vignettes. The majority of judges did not provide this information. For the 44 judges who did respond (n=204, 21.57%), the comments varied. A few judges expressed their confusion or misunderstanding about the criteria needed for a diagnosis of ID, while others commented on their lack of experience in this area and with the issue of intellectual disability. One judge noted that he "never had a case involving this issue in [more than] 20 years on the bench." Other judges issued a caveat that their answers were

“speculative” due to a lack of familiarity with the issue. Another judge indicated she would take time to prepare and research the issue if asked to preside over this kind of case in “real life,” while another indicated having more time and some sort of guidelines would have been helpful to understanding and familiarizing oneself with this kind of case. In addition, one judge noted that because of her lack of education on the subject, her decisions may have been more personal as opposed to “judicial.” At least one other judge also noted his unfamiliarity with the issue and acknowledged that his beliefs about capital punishment would likely factor into his decision-making.

Judges also commented on the information they relied upon in the vignette when making their decisions, as well as the information they would typically use or look for in these kinds of claims. Several judges pointed to the defendant’s demonstrated intellectual deficits in support of their ID decisions and noted they would rely primarily on intellectual functioning and intelligence testing and/or scores when deciding these claims. In addition, at least one judge noted that the defendant’s “social interactions and daily activities” would be more persuasive to her decision than “standard test scores,” while another judge indicated he would rely on IQ score alone to determine the presence of ID. One federal judge commented that the IQ score in the vignette he reviewed was suggestive of ID, but the other factors demonstrated the defendant’s “adaptive ability and understanding of rules.” Other judges commented that they could not find evidence of onset before age 18 in the vignette, which affected their overall decision. Three judges focused on the defendant’s participation in the crime and relative culpability; one noted the defendant’s “moral culpability should transcend intellectual ability.” Still others noted the importance of school records, expert testimony, and the use of the Adaptive

Behavior Scale in the assessment of adaptive functioning. In addition, some judges also commented that their personal biases, either based on their experiences with persons with ID, their belief that persons with ID are just as culpable, or their beliefs about capital punishment, may have also affected their decisions. One judge aptly described the various factors and challenges involved in *Atkins* claims:

Without more information or a more in depth understanding of mental disabilities and their effects, symptoms, etc. decision making is flawed [when] based solely on [the] results of a test. For example, depending on the individual, he/she may be able to function at a higher level in a structured environment, which, on the surface might be erroneously interpreted as a lack of disability, whereas the same person, without structure and with stressors, may collapse under different circumstances. There is not a neat formula.

Several judges indicated that they needed more information and time to review the case. For example, one judge provided, “[t]he last case I had on this issue required four days of testimony.” Other judges named the type of additional information they would have liked to consider in the case. This information included additional medical, employment, and psychiatric records and medical tests, information on when the defendant’s adaptive deficits began, additional information about the crime, information and testimony about the defendant’s functioning close in time to the crime, information on co-morbid disorders or ruled out explanations for defendant’s deficits, information about how the defendant “reacted at other times when he had a choice under stress,” and additional interviews and testing by other mental health professionals.

Judges’ responses to attitudinal statements about intellectual disability (“ID”) and defendant culpability, mental illness as a mitigating factor in capital cases, and the execution of persons with acquired traumatic brain injury varied. When asked whether individuals with ID should be held less culpable for criminal behavior, the majority of

judges agreed: thirteen judges “Strongly Agreed” (6.4%), 26 judges “Agreed” (12.7%), 50 judges “Somewhat Agreed” (24.5%), and 34 judges “Slightly Agreed” (16.7%). Conversely, 24 judges “Slightly Disagreed” (11.8%), 31 judges “Somewhat Disagreed” (15.2%), 16 judges “Disagreed” (7.8%), and seven judges “Strongly Disagreed” (3.4%). Three judges did not offer an opinion (1.5%).

When asked whether mental illness should be treated as a significant mitigating factor in capital cases, 34 judges “Strongly Agreed” (16.7%), 50 judges “Agreed” (24.5%), 58 judges “Somewhat Agreed” (28.4%), 19 judges “Slightly Agreed” (9.3%), 14 judges “Somewhat Disagreed” (6.9%), 11 judges “Slightly Disagreed” (5.4%), nine judges “Disagreed” (4.4%), and seven judges “Strongly Disagreed” (3.4%). Two judges did not offer an opinion (1.0%).

When asked whether individuals with acquired brain injury resulting in intellectual deficits should be exempt from capital punishment, 30 judges “Strongly Agreed” (14.7%), 34 judges “Agreed” (16.7%), 39 judges “Somewhat Agreed” (19.1%), 31 judges “Slightly Agreed” (15.2%), 22 judges “Slightly Disagreed” (10.8%), 17 judges “Somewhat Disagreed” (8.3%), 16 judges “Disagreed” (7.8%), and six judges “Strongly Disagreed” (2.9%). Nine judges did not offer an opinion (4.4%) (see Table 13).

Although responses across judges were mixed, preliminary correlation analyses suggested judges’ opinions about the three attitudinal statements were strongly correlated. More specifically, individual judges’ opinions about the culpability of persons with ID were strongly correlated with treating mental illness as a mitigating factor ($r = .55, p=.01$); judges’ opinions about the culpability of persons with ID were strongly correlated with exempting individuals with acquired brain injury from capital punishment ($r = .55, p=.01$); and judges’ opinions about treating mental illness as a

mitigating factor and exempting individuals with acquired brain injury from capital punishment also were strongly correlated ($r = .62, p = .01$) (see Table 14).

Correlation analyses revealed political orientation was significantly related to judges' opinions about the culpability of persons with ID ($r = .29, p < .01$), treating mental illness as a mitigating factor ($r = .33, p < .01$), and exempting offenders with acquired brain injury from capital punishment ($r = .37, p < .01$). Political affiliation also was found to strongly correlate with judges' opinions about the culpability of persons with ID ($r = .16, p = .027$), treating mental illness as a mitigating factor ($r = .14, p = .05$), and exempting offenders with acquired brain injury from capital punishment ($r = .27, p < .01$) (see Table 15).

4.2. Statistical Design and Analyses for Hypotheses 1 through 4

4.2.1. Severity of ID, History of ID, Type of Collateral Information Used in ID Assessment, and ID Decision

For the first part of this study (Hypotheses 1-4), a between-subjects design was used, in which three independent variables, each with two levels, were manipulated and subject to data analyses. The first independent variable was "severity of ID" (mild ID vs. moderate ID). The second independent variable was "history of ID" (no prior, formal diagnosis of ID vs. a prior, formal diagnosis of ID). The third independent variable was "type of collateral information used in assessment" (inclusion of correctional staff interviews about the defendant's prison behavior and information about the defendant's role in the alleged offense vs. exclusion of correctional staff interviews and information about alleged offense). This resulted in eight separate vignettes, or conditions, being presented to judges. The primary dependent variable subject to analysis was judges' ID decision in response to the case vignettes ("yes" or "no"). A second dependent variable,

judges' commitment to their ID decisions (measured using an 8-point Likert scale), was examined in secondary analyses.

To examine the relationship between severity of ID, history of ID, type of collateral information used in ID assessment, and the first dependent variable, ID decision, a logistic regression analysis was conducted. Results were fourfold. First, results indicate severity of ID significantly predicted ID decision ($B = 1.533$, $SE = .383$, $p < .01$). This finding supports Hypothesis 1, and suggests judges were more likely to make a finding of ID when presented with a more severe case of ID. Second, results revealed defendant history of ID significantly predicted ID decision ($B = .848$, $SE = .384$, $p = .027$). This finding supports Hypothesis 2, and suggests judges were more likely to make a finding of ID when a presented with a defendant with a documented history and prior diagnosis of ID. Third, results indicate type of collateral information used in the ID assessment was negatively related to ID decision as predicted, but this relationship was not significant ($B = -.178$, $SE = .358$, $p = .619$). Fourth, the interaction effect of severity of ID, defendant history of ID, and type of collateral information used in the ID assessment did not significantly predict ID decision ($B = .690$, $SE = .639$, $p = .280$), so Hypothesis 4 was not supported (see Table 16). Although no interaction effect was detected, a logistic regression analysis revealed case type or condition (alone) significantly predicted ID decision ($B = .243$, $SE = .067$, $p < .01$).

4.2.2. Severity of ID, History of ID, Type of Collateral Information Used in ID Assessment, and Commitment to ID Decision

To examine the relationship between ID severity, history of ID, type of collateral information used in assessment, and judges' commitment to their respective ID decisions, a between-subjects, 2x2x2 factorial ANOVA was conducted. The results from this

analysis suggested a main effect existed for defendant ID history ($F(1, 182) = 5.51, p = .020$, partial $\eta^2 = .031$ (small)) with an observed power of .646. This suggests judges were more committed to their ID decisions in cases where the defendant had a documented history and prior diagnosis of ID. Results did not reveal a main effect for severity of ID on judges' commitment to their decisions ($F(1, 181) = .30, p = .586$, partial $\eta^2 = .002$ (small)), when the observed power was equal to .084. Results also did not reveal a main effect for type of collateral information used in ID assessment on judges' commitment to their decisions ($F(1, 181) = 1.21, p = .272$, partial $\eta^2 = .007$ (small)), when the observed power was equal to .195. Results revealed no significant interaction effect for severity of ID, history of ID, and type of collateral information used in assessment on judges' commitment to their ID decisions ($F(7, 181) = 1.44, p = .232$, partial $\eta^2 = .008$ (small)), when the observed power was .222 (see Table 17). A one-way ANOVA indicated the relationship between vignette type, or condition, and commitment to ID decision was not significant ($F(7, 181) = 1.82, p = .87$, partial $\eta^2 = .068$ (small)) with an observed power of .72 (see Table 18).

4.3. Statistical Design and Analyses for Hypothesis 5

4.3.1. Judicial Subjective and Objective Understanding of ID and ID Decision

For the second part of this study (Hypothesis 5), a between-subjects design was used, in which two independent variables, one with eight levels and another with three levels, were manipulated and subject to data analysis. The first independent variable, self-reported understanding of ID, was measured using an 8-point Likert scale ranging from "Limited" to "Very Good." The second independent variable, objective understanding of the clinical assessment and psychological/psychiatric diagnosis of ID,

had three levels: “Limited,” “Some,” and “Good” understanding. The primary dependent variable subject to analysis was ID decision. A second dependent variable, judges’ commitment to their ID decisions, was examined in secondary analyses.

To examine the relationship between judges’ self-reported understanding of ID, objective understanding of ID, and ID decision, a logistic regression analysis was conducted. Results indicate that judges’ self-reported understanding of ID did not significantly predict ID decision ($B = .393$, $SE = .296$, $p = .096$). In addition, results show judges’ objective understanding of ID, as measured by their performance on five true and false questions about the clinical assessment and psychological/psychiatric diagnosis of ID, did not significantly predict ID decision ($B = 1.32$, $SE = 1.15$, $p = .254$). Finally, results showed no significant interaction between judges’ self-reported understanding, objective understanding of ID, and ID decision ($B = -.293$, $SE = .203$, $p = .150$). Overall, contrary to what was proposed in Hypothesis 5, judges’ understanding of ID did not significantly predict ID decision (see Table 19).

4.3.2. Judicial Subjective and Objective Understanding of ID and Commitment to ID Decision

To examine the relationship between judges’ self-reported understanding of ID, objective understanding of ID, and judges’ commitment to their respective ID decisions, a 3x8 factorial ANOVA was conducted. This analysis revealed a significant main effect for self-reported understanding of ID ($F(7, 195) = 5.81$, $p < .01$, partial $\eta^2 = .188$ (medium)), with an observed power of .999. This suggests judges’ self-reported understanding of ID was significantly related to their level of commitment to their ID decisions. Additional results from the analysis suggested no main effect existed for judges’ objective understanding of ID ($F(2, 195) = .114$, $p = .892$, partial $\eta^2 = .001$

(small)), with an observed power of .67; and, there was no significant interaction between judges' self-reported and objective understanding of ID ($F(10, 195) = .961, p = .479$, partial $\eta^2 = .052$ (small)), with an observed power of .497 (see Table 20).

4. 4. Statistical Design and Analyses for Hypothesis 6

4.4.1. Judicial Demographic Characteristics, ID Decision, and Commitment to ID Decision

To examine the relationship between various judicial demographic factors and ID decision, a logistic regression analysis was conducted. Results revealed that two demographic variables significantly predicted ID decision. First, jurisdiction (state vs. federal) significantly predicted ID decision ($B = -1.195, SE = .395, p = .002$), which suggested that judges sitting in state courts were more likely than judges sitting in federal courts to find ID. Second, race also significantly predicted ID decision ($B = -1.07, SE = .506, p = .035$), which suggested there was a significant difference in case outcomes for judges who self-identified as African American and judges who self-identified as Caucasian, with more African American judges finding ID. A closer examination of the data revealed 8 of the 11 African American judges in the sample made a finding of ID; none of the judges who self-identified as Hispanic made a finding of ID. The relationship between years served as a judge and ID decision was found to be marginally significant ($B = .189, SE = .107, p = .079$), which suggested judges serving longer on the bench may have been more likely to find ID. Additional results indicated the following demographic variables were not significantly predictive of ID decision: gender ($B = -.193, SE = .496, p = .698$), age ($B = .040, SE = .219, p = .857$), experience with capital cases ($B = -.108, SE = .365, p = .766$), experience with *Atkins* claims ($B = .181, SE = .454, p = .690$), political

orientation ($B = -.178$, $SE = .173$, $p = .301$), and political affiliation ($B = .037$, $SE = .125$, $p = .770$). These findings provide partial support for Hypothesis 6 (see Table 21).

Correlation analyses were then used to examine the relationship between the same demographic variables and judges' commitment to ID decision. Results revealed a significant relationship between race and commitment to ID decision ($r = -.142$, $p = .047$). In addition, results indicated judicial experience with capital cases was strongly correlated with commitment to ID decision ($r = -.143$, $p = .043$). The remaining variables were not significantly correlated with commitment to ID decision (see Table 22).

4.4.2. Judicial Attitudes about Intellectual Disability, Mental Illness and the Death Penalty, ID Decision, and Commitment to ID Decision

To examine the relationship between judges' attitudes about the culpability of ID offenders, mental illness as a mitigator, exempting offenders with acquired traumatic brain injury from capital punishment, and ID decision and commitment to ID decision, a between-subjects design was used, in which two analyses were conducted. First, a logistic regression analysis was used to examine the dependent variable, ID decision. Results indicated judges' opinions about the culpability of persons with ID significantly predicted ID decision ($B = -.219$, $SE = .110$, $p = .046$). However, judges' opinions about mental illness as a mitigator ($B = .050$, $SE = .140$, $p = .723$) and exempting persons with acquired traumatic brain injury from the death penalty ($B = .102$, $SE = .123$, $p = .407$) did not significantly predict ID decision. In addition, no significant interaction between the three attitudinal variables was observed ($B = -.002$, $SE = .003$, $p = .574$). This provides partial support for Hypothesis 6, which predicted a significant relationship between judicial attitudes and ID decisions (see Table 23).

To examine the relationship between the three attitudinal variables and commitment to ID decision, correlation analyses were used. (An 8x8x8 ANOVA could not be used due to sample size.) Results indicated judicial opinion about the culpability of defendants with ID ($r = .115, p = .106$), mental illness as a mitigator ($r = .083, p = .241$), and exempting offenders with acquired traumatic brain injury from capital punishment ($r = .087, p = .227$) were not significantly related to commitment to ID decision (see Table 24).

4.5. Exploratory Analyses

Exploratory analyses were also conducted to examine three additional research questions: (1) How does perceived level of ID in the vignette compare to the actual level of ID presented in the vignette?; (2) Is there a significant relationship between judges' perceived level of ID in the vignette and ID decision?; and (3) Is there a significant relationship between judges' perceived level of ID in the vignette and commitment to ID decision?

To examine the first question, correlation analyses were conducted. Results revealed a strong relationship between perceived ID level and actual ID level presented in the vignettes ($r = .352, p < .01$). To examine the second question, a logistic regression analysis was conducted. Results indicated perceived ID level significantly predicted ID decision, ($B = 1.840, SE = .297, p < .01$). This suggests judges who believed the ID level presented in the vignette was more severe were more likely to decide in favor of ID. To examine the third question, a one-way ANOVA was conducted. The results indicated that there was a main effect for perceived ID level ($F(3, 198) = 7.509, p < .01$, partial $\eta^2 = .104$ (medium)), with an observed power of .985 (see Table 25). This finding suggests

judges who believed the ID level presented in the vignette was more severe were more committed to their ID decisions.

5. Discussion

In *Atkins v. Virginia* (2002), the Supreme Court held individuals with intellectual disability (“ID”) exempt from capital punishment. Relying upon the “evolving standards of decency” reflected in public sentiment, state legislation prohibiting the execution of persons with ID, and the reasoning that individuals diagnosed with ID should be held less culpable for their offenses, the Court found that the execution of these individuals violates the cruel and unusual punishment clause of the Eighth Amendment. Providing limited guidance, the Court invited individual states to develop their own legislation defining ID, the assessment practices that could and should be used in an ID assessment, the evidentiary standard needed for a finding of ID, and other procedural rules in *Atkins* claims (Blume, Johnson, & Seeds, 2009, 2009a, 2010; DeMatteo, Marczyk, & Pich, 2007; Fabian, 2005; Orpen, 2003; Salekin & Olley, 2008).

Since the ruling, hundreds of death row inmates and capital defendants have raised the issue of ID (Blume, Johnson, & Seeds, 2009, 2009a, 2010). Although *Atkins* claims have become increasingly common, the definitions of ID, ID assessment procedures, and procedural rules used in this context vary significantly across states and individual cases, and often produce very different results (Blume, Johnson, & Seeds, 2009, 2009a, 2010; DeMatteo, Marczyk, & Pich, 2007; Fabian, 2005; Orpen, 2003; Salekin & Olley, 2008). In addition, very little is known about fact-finders’ level of understanding of ID, and even less is known about the factors they rely upon when deciding *Atkins* claims.

Very few empirical studies have examined *Atkins* claims, post-*Atkins* ID assessments, and related forensic issues. Moreover, the available research has focused on mental health professionals' opinions regarding which assessment practices should be used, or are most commonly used, in the evaluation of ID (Salekin, 2007; Salekin, unpublished; Salekin & Olley, 2008; Young et al., 2007); the review of court transcripts and/or published decisions in which mental retardation or an *Atkins* claim was raised (Blume, Johnson, & Seeds, 2009, 2009a, 2010; Kan, et. al., 2009); and, the factors affecting mock jurors' verdicts in cases addressing the issue of mental retardation (Reardon, O'Neil, & Levett, 2007). In addition, a review of the research on judicial decision-making in cases involving mental health issues revealed that, currently, no study has been designed to empirically examine judicial decision-making in *Atkins* claims (Redding & Murrie, 2007). Whereas the available empirical studies are significant as the first research to investigate ID assessment practices and mock juror decision-making in *Atkins* claims, they have been fairly limited in their scope, with respect to both sampling and the *Atkins* issues they address. In addition, none of these studies have addressed how judges receive and use information about capital defendants and ID assessment practices when deciding whether an individual qualifies for a finding of ID.

The current study sought to examine the relationship between ID assessment practices, defendant histories, and judicial decision-making in hypothetical *Atkins* claims based on a subset of the population of federal and state judges sitting at the trial court level in jurisdictions with the death penalty. The study also sought to examine judges' level of understanding of the clinical assessment and psychological/psychiatric diagnosis of ID, and its potential impact on their ID decisions. Finally, the study also set out to

evaluate the relationship between judges' demographic characteristics and various attitudes about mental illness and the death penalty, and their ID decisions.

The study results present several interesting findings – both expected and unanticipated – which may significantly inform this area of research. Further, they may prove particularly useful for judges, legislators, attorneys, psychologists, and other mental health practitioners.

5.1. Judicial Ability and Willingness to Make a Finding of ID

In this study, judges reviewed one of eight case vignettes, in which the variables of ID severity, defendant ID history, and collateral information included in the assessment of adaptive functioning were manipulated. Despite the variation, each of the vignettes depicted a defendant who clearly met the clinical criteria for a psychological/psychiatric diagnosis of ID. Roughly half of the returned surveys depicted a defendant with mild ID,¹⁰ while the other half depicted a case of moderate ID.¹¹

¹⁰ Defendants with mild ID presented with an IQ of 68, and a history of some adaptive deficits in the areas of conceptual, social, and practical skills. Adaptive deficits depicted in the mild ID vignettes included: a history of problems with functional academics and special education, some difficulties managing money and financial concepts, some ability for self-care but only with the assistance of a guardian, a limited work history of two unskilled and supervised jobs, a tendency to behave in an “immature and silly” manner, and limited social skills and social and community involvement.

¹¹ Defendants with moderate ID presented with an IQ of 55, and a history of more severe adaptive deficits in the areas of conceptual, social, and practical skills. According to the DSM-IV-TR, moderate ID corresponds with an IQ score of 35-40 to 50-55, and mild ID corresponds with an IQ of 50-55 to 70. Thus, an IQ of 55 could arguably support a diagnosis of either moderate or mild ID. An IQ of 55 and multiple adaptive deficits were used to depict a case of moderate ID in the vignettes, so that judges would be presented with proof of more severe intellectual deficits, without dropping the IQ score so low that judges would render their ID decisions on this factor alone. Adaptive deficits depicted in the moderate ID vignettes included: a history of significant problems with functional academics, a longer history of special education, completion of a structured vocational program because defendant was unable to complete high school, an inability to manage money and understand finances and related concepts, an inability to manage self-care and self-direction without the significant assistance of a guardian, a very limited work history of one, unskilled and supervised job that the defendant was unable to maintain, a tendency to behave in an “immature” manner and to be “obedient” and “responsive to direction and supervision,” very limited social involvement, and demonstrated problems in community use skills.

Despite the presence of either mild or moderate ID in all of the vignettes, more than one-third of sampled judges did not render a finding of ID. As suggested by some judges' comments, some judges may have believed they needed more information before they could render a finding of ID and, as a result, decided against a finding of ID. In the alternative, judges may have incorrectly believed that the information provided in the vignettes did not satisfy the definition of ID or the requisite burden of proof (preponderance of the evidence). Still, other judges may have engaged in some kind of judicial nullification, where they identified ID in the vignette, but decided against a finding of ID for other reasons. Judges' refusal to find ID in the vignettes also may have reflected judges' tendency to mistrust or reject social science research, particularly on controversial issues, which has been observed in other studies of judicial decision-making (Redding & Reppucci, 1999).

Recent studies have shown even greater disparity in fact finders' ability and/or willingness to recognize and render a finding of ID. In their review of 234 actual *Atkins* claims, Blume, Johnson, and Seeds (2009) found that only about 40% of published cases were successful,¹² and they noted that this success rate was high when compared to the success of other claims involving mental health issues (i.e., competency to stand trial). This finding does not suggest that all of the actual claims rejected by judges would have properly qualified for a finding of ID, as was the case in this study, but it does highlight the discrepancies in judicial decisions across cases and states. In addition, at least one study of mock juror decision-making in cases involving ID demonstrated an even greater

¹² The 234 published case decisions reviewed by Blume, Johnson, and Seeds (2009, 2009a, 2010) reflect only a small portion of the thousands of *Atkins* claims raised since the 2002 decision. Blume and colleagues (2009) noted that 234 claims or claimants represent about 7% of the death row population.

disparity in ID decisions, as only 30.7% of 260 mock jurors found a defendant to qualify for a finding of ID when presented with evidence necessary for the diagnosis, compared to the almost 62% of 204 judges who correctly decided ID in the present study (Reardon, O'Neil, & Levett, 2007).

Interestingly, although about 38% of judges decided against a finding of ID in this study, only 2.9% judges responded there was no level of ID presented in the vignette when asked to choose the specific level of ID from a range of choices. All other judges assigned a level of ID, with the majority over-identifying a "moderate" level of ID, and 26 judges incorrectly assigning a "severe" level of ID in the vignettes. In addition, judges' perceived level of ID and actual level of ID in the vignette were strongly related. These results suggest that judges were able to correctly recognize ID and distinguish more severe cases of ID, regardless of their ultimate ID decisions. These results may also suggest that some judges refused to render a finding of ID even when they recognized ID was present, or when they believed that the defendant exhibited a more severe level of ID than was actually present, and, in turn, engaged in some form of judicial nullification.

These findings may reflect judges' misunderstanding about the severity and presentation of ID, or the kinds and threshold of proof needed for a finding of ID. These findings may also reflect the unwillingness or reluctance of judges to find a defendant intellectually disabled, and suggest that additional factors outside of perceived severity of ID may have affected judges' ID decisions in these vignettes. Additionally, these findings may suggest that judges are more likely to recognize and acknowledge ID when asked to choose from a continuum of ID levels, as opposed to providing a yes or no response. This information may be particularly useful for attorneys and experts, as it

provides new information about how judges may best recognize ID, and how evidence may be presented so that judges are more likely to identify ID when it exists in a case.

5.2. Case Variables Affecting Judicial Decision-Making in *Atkins* Claims

Results provided support for the *first* hypothesis that severity of ID would be positively related to judges' ID decisions. More specifically, results indicated that ID severity was a significant predictor of ID decision, as judges who were presented with a defendant with more a severe case of ID were more likely to render a finding of ID. Results also provided support for the *second* hypothesis that history of ID would be positively related to ID decisions. Defendants' ID history was observed to significantly predict judges' decisions, as judges were more likely to render a finding of ID in cases in which the defendant presented with a prior history and documented diagnosis of ID before age 18.

These findings suggest that judges were more likely to correctly identify and render a finding of ID when presented with a defendant who exhibited greater deficits associated with ID (lower IQ and more adaptive deficits), or documented evidence of a prior history and diagnosis of ID. These findings are consistent with the results of other studies examining the impact of different factors on ID decisions, which have also found severity of ID to significantly affect fact finders' decision-making in *Atkins* claims. For example, Blume and colleagues' (2009, 2009a) examination of 234 actual *Atkins* claims found that ID claims were more successful in cases where the defendant presented with a low IQ score, no IQ scores above 70, and multiple adaptive deficits. In addition, Reardon, O'Neil, and Levett's (2007) study of mock jurors found that participants were

more likely to render a finding of ID when the defendant exhibited serious intellectual deficits and social adaptive deficits.

The present findings are important because they highlight the kinds and quality of evidence judges may be most comfortable relying upon when determining ID, as well as the severity of ID judges may look for or expect when finding a defendant meets the criteria for ID. However, these findings also underscore a chronic problem, or challenge, in *Atkins* claims. Whereas judges were more likely to find ID when a defendant presented with either one IQ score significantly lower than 68 and several adaptive deficits, or a documented history of ID before the age of 18, most individuals who claim intellectual disability and raise *Atkins* claims do not present this way or with this kind of evidence (Blume, Johnson, & Seeds, 2009; Ellis, 2003; Salekin & Olley, 2008). As noted earlier, the majority of *Atkins* claimants allege *mild* ID, which is reflected by subaverage intellectual functioning and some deficits in different areas of adaptive functioning, but typically does not present with the more severe level of impairment people may expect or have come to associate with ID. As a result, these are the cases that run the greatest risk of going unidentified and failing an *Atkins* claim, even when a claimant qualifies for the psychological/psychiatric diagnosis and evidence supporting the diagnosis exists and has been presented—as was observed in the present study. The present results suggest that judges face a considerable challenge when asked to distinguish persons who genuinely qualify for a finding of mild ID from non-intellectually disabled defendants. Thus, it would be worthwhile to identify the kinds of information judges need, as well as the kinds of evidence that can be effectively be presented, so that judges will not only gain a better understanding of ID, but also be better prepared to accurately identify and

discriminate amongst mild ID and non-ID cases, as opposed to mild ID and more severe ID cases.

In addition, as noted by many mental health practitioners and attorneys in the field, the likelihood that defendants or death row inmates will have had school, medical, or other records substantiating a diagnosis of ID in their childhood – or that these records will still exist at the time of the claim – is quite low (Ellis 2003; Salekin & Olley, 2008). Furthermore, the very factors which place individuals at risk for the development of ID – poverty, limited access to health care, impairment of family members, chronic illness in the family, neglect and abuse, and parental cognitive disability – are often the same factors which impede a defendant’s ability to prove the existence and onset of ID (White, 2009). Thus, although judges may rely heavily on these records and the information they contain when they are available, as was seen in this study and Blume and colleagues’ (2009) examination of actual *Atkins* claims, the real problem arises when they are not, and particularly, when judges interpret and rely on the lack of proof of a prior diagnosis or documented history of ID as a deciding factor when denying an *Atkins* claim. This highlights the importance of not only educating judges about the various situational and systemic reasons why certain records or evidence in support of ID are often not available, but also the importance of having the resources and systems in place that would allow for the development, long-term maintenance, and discovery of these kinds of records.

Results did not support the *third* hypothesis that the inclusion of correctional officer (C/O) interviews about the defendant’s prison behavior and information about the defendant’s role in the alleged offense in the assessment of adaptive functioning would have a significant, negative relationship with judges’ ID decisions. The inclusion of C/O

interviews and offense-related information was negatively related to ID decision, but this relationship was not significant. One possible explanation for this non-significant finding may have been the nature of the collateral information provided in the vignettes. Case vignettes that included information about C/O interviews and the alleged offense provided the following:

In addition, interviews also were conducted with correctional officers who have supervised [the defendant] in the prison where he is being held. These officers provided [the defendant] is respectful, obedient, and follows the rules and regulations of the prison without problem. They indicated he has acclimated well to the prison environment and works in the laundry area. The evaluator also considered the facts surrounding [the defendant's] alleged offense, which suggest he provided the weapon used in the killing to a co-defendant and played an active role in the commission of the offense.

This collateral information was initially designed to be suggestive of adaptive skills, and to reflect the kinds of collateral information that are commonly offered and interpreted by prosecuting attorneys and judges to refute a finding of ID. For example, in actual *Atkins* claims, prosecuting attorneys often present this kind of information to refute adaptive deficits in the areas of self-direction, responsibility, and daily living skills. It is important to note, however, that the information provided by C/Os in the vignettes do not necessarily contradict a finding of ID, and may also be suggestive of and used to prove certain adaptive deficits. This too has been observed in actual cases, in which defense attorneys have presented similar information on a defendant's prison behavior as proof of the defendant's social adaptive deficits, or to demonstrate that a defendant's adaptive deficits cannot be adequately or reliably assessed in the structured and controlled, prison environment. Thus, because judges were presented with collateral information that may have been interpreted and used to either prove or refute ID, their reliance on this information in their decisions appears mixed and remains unclear.

This is similar to other research addressing the use of C/O testimony and information about the alleged offense in the assessment of adaptive functioning for purposes of an *Atkins* claim. Preliminary examinations of actual cases involving ID claims have revealed that other fact finders' reliance on C/O testimony and information about a defendant's criminal history or role in the alleged offense has been mixed. According to one study, which reviewed 19 pre-*Atkins* cases addressing the issue of ID, a defendant's criminal behavior was linked to adaptive functioning in about 68% of cases, and criminal behavior was most often used to prove the adaptive skill of self-direction (Kan et al., 2009). In addition, Blume and colleagues (2009) found that 30% of unsuccessful, published *Atkins* claims involved testimony about a defendant's behavior in prison, and 15% of unsuccessful claims involved correctional officer testimony. Similar to the present study, these findings suggest that judges' reliance on this information is mixed, and certain kinds of collateral information may be used to disprove certain adaptive deficits, but more research is needed (Blume, Johnson, & Seeds, 2009; Kan et al., 2009).

Furthermore, just as judges' reliance upon C/O testimony and information about the alleged offense appears to vary when rendering ID decisions, expert opinions about and actual use of this information in ID assessments have also varied. Some experts have reported that using correctional officers as informants is helpful, while others believe that they should not be relied upon as collateral sources of information about a defendant's adaptive functioning and behavior (Salekin, 2004; Young et al., 2007). In addition, other experts reported that correctional officer information is not an essential part of their ID assessments (Young et al., 2007). Experts have also expressed mixed opinions about

relying on offense-related information when assessing adaptive functioning. Some experts reported using information about a defendant's role in an alleged offense and prior criminal history in their evaluations of adaptive functioning, while others have not (Young et al., 2007).

The use of C/O testimony and information about a defendant's criminal behavior or history in the assessment of adaptive functioning provokes concerns and has been cautioned against for various reasons. In many cases, it appears courts have used evidence about a defendant's role or participation in an alleged offense, or the facts surrounding an alleged offense, to incorrectly refute a finding of adaptive deficits. For example, in some situations, this information has been used to prove practical adaptive skills, when it was actually more reflective of deficits in the defendant's judgment and other areas of conceptual or social adaptive functioning. In addition, it has also been suggested that judges may give improper weight to a defendant's role in or the facts surrounding an alleged offense and, in turn, neglect or fail to balance other evidence that is suggestive of adaptive deficits. Moreover, the inclusion of this information may also further complicate and confuse the issue in *Atkins* claims, as it may provoke judgments about the defendant's relative culpability, as opposed to whether he actually meets the criteria for a finding of ID.

Clearly, many questions remain about the use of C/O testimony and information about an alleged offense in the assessment of ID, and the role this information plays in judicial ID decisions. Continued research in this area is essential, so that we may investigate and better understand (1) how prosecutors, defense attorneys, and experts present C/O testimony and offense-related information to either prove or refute adaptive

deficits, and (2) how judges interpret and rely upon these kinds of collateral information when determining whether a defendant qualifies for a finding of ID. Until we gain a better understanding of these issues, it is recommended that, if these kinds of collateral information are included in an ID assessment, judges, experts, and attorneys should be made aware of the potential misuse of this information and its potential effects on case outcomes.

Results did not support the *fourth* hypothesis that the interaction effect of severity of ID, history of ID, and inclusion of correctional officer interviews and information about the alleged capital offense would be significantly related to ID decisions. This suggests that, although severity of ID and history of ID independently, significantly predicted ID decisions, the combined effects of these variables and the collateral information used in the adaptive functioning assessment did not. These findings suggest that although the three manipulated case variables are commonly seen in most *Atkins* claims, they are not the only or most significant factors – either independently or collectively – affecting judges’ ID decisions. These findings also confirm that the formula for a successful *Atkins* claim is not straightforward and cannot be easily defined with a few variables.

Results also revealed that defendant history of ID had a significant effect on judges’ commitment to their decisions, but severity of ID and type of collateral information used in the assessment did not. In addition, no significant interaction was detected for the severity of ID, history of ID, and collateral information used in the assessment, which indicates that the combined effects of these variables did not significantly account for judge’s commitment to their decisions. These findings provide

additional support for the hypothesis that a prior history and documented diagnosis of ID would be positively related to ID decisions, as prior ID history was found to not only significantly predict judges' ID decisions, but also the extent to which judges stood by their decisions.

One interpretation of this finding may be that judges were more comfortable with and committed to a finding ID when there was a history of ID and documented diagnosis prior to the alleged offense and the time the *Atkins* claim was raised. Judges may have also believed that a long, documented history of ID reflected the severity and chronicity of the defendant's level of impairment, and interpreted this information as fulfilling the age of onset requirement for ID. In turn, these findings may suggest that evidence which addresses and documents the severity, duration, and appropriate age of onset of ID may be significantly influential in positive ID decisions. These findings also suggest that, although severity of ID significantly influenced ID decisions, judges' commitment to their ID decisions were not based on whether the defendant had mild or moderate ID, or whether he behaved well in prison and played a significant role in the offense. Again, this may have indicated that other factors either within the context of the vignette or external to the study were at work and may help explain judges' ID decisions and commitment to their decisions.

Interestingly, most judges reported being "Committed" to "Extremely Committed" to their ID decisions, regardless of their relevant experience and understanding of ID. Judges' level of commitment to their ID decisions was particularly surprising because the majority of sampled judges reported having no experience with *Atkins* claims. Nonetheless, these findings were consistent with the results of other

studies examining judicial decisional-making in other kinds of legal claims, which have suggested that judges report high levels of confidence in and commitment to their decisions, particularly when asked to make a decision based on a simulated case (Dhami, 2002; Dhami, 2005; Dhami & Ayton, 2001).

5.3. Judicial Understanding of the Clinical Assessment and Psychological Diagnosis of ID and Its Limited Impact on Judicial ID Decisions

Based on their performance on the five true or false questions composing the scale used to measure objective understanding of ID, most judges appeared to exhibit a moderate understanding of the clinical assessment and psychological/psychiatric diagnosis of ID. This finding, along with judges' responses to the true or false questions, may not be subject to meaningful interpretation, however, because of different problems with the construct and content of the scale. First, many questions were removed from the final measure to allow for a more time-effective and manageable survey, and which resulted in a scale composed of five, somewhat ambiguous, true or false questions. Asking more – and particularly more specific – questions relating to the clinical assessment and diagnosis of ID may have resulted in a more valid and reliable measure of judges' objective understanding of ID, as well as different judicial responses and more interpretable results. Second, in addition to having more, less ambiguous questions, the scale and judicial responses would have also benefitted from more specific instructions. Third, because the true or false questions used in this scale were intended to screen judges' understanding of the clinical assessment and psychological/psychiatric diagnosis of ID, clinical criteria and assessment procedures were used to formulate the questions and determine the correct answers. However, the clinical criteria and procedures used to diagnose ID clearly differ from some states' statutory definitions of ID and related

procedures, which may have affected judges' responses. As a result, some judges' responses may have been correct according to their respective state's ID statute, and thus demonstrated a good understanding of their state's legal standard, but simultaneously reflected a misunderstanding of the clinical criteria and diagnosis of ID. For these reasons, results concerning judges' responses to the true or false questions and judges' objective understanding of the clinical assessment and psychological/psychiatric diagnosis of ID are subject to limited – if any – interpretation.

Results provided partial support for the *fifth* hypothesis that judicial understanding of the assessment and diagnosis of ID would be positively related to ID decisions. Judicial understanding of ID was measured using two variables: (1) objective understanding of ID (which was calculated using judges' correct responses to the true or false questions about the clinical assessment and psychological diagnosis of ID), and (2) self-reported level of understanding of ID (measured using an 8-point scale). Both variables were positively related to ID decision, but judges' objective understanding of ID did not significantly predict ID decision, and judges' self-reported understanding of ID only marginally, significantly predicted ID decision. Again, the finding that judges' objective understanding of the clinical assessment and diagnosis of ID did not significantly predict ID decisions cannot be subject to any meaningful interpretation due to problems with the true or false questions and resultant scale used to measure this independent variable. However, the finding of a marginally significant, positive relationship between judges' self-reported level of understanding of ID and ID decisions may be subject to limited interpretation. This finding may suggest that judges' perceptions of their own knowledge about ID played a limited role in their ability to

correctly find ID, or that judges may have overestimated their self-reported understanding of ID. In addition, this finding may also suggest that even with a high self-reported understanding of ID, judges may have lacked the requisite level or amount of knowledge needed to fully understand ID and to render more accurate decisions.

Interestingly, most judges reported having an “Average” or “Very Good” understanding of ID, although more than 80% of judges reported having no experience presiding over *Atkins* claims, and several judges specifically commented on their limited understanding and familiarity with the *Atkins* decision and the issue of ID. Additionally, a significant relationship between judges’ self-reported understanding of ID and commitment to ID decisions was found, which suggests that judges who believed they were more knowledgeable about ID were more committed to their decisions. Judges’ objective understanding of ID, and the interaction of self-reported understanding and objective understanding of ID did not significantly relate to judges’ commitment to their decisions. These findings may suggest that judges’ perceptions of their own knowledge on the subject of ID significantly affected how invested they were in their decisions. Whereas we want judges to be confident in their competence and committed to their decision-making, these results could prove quite troublesome in situations where judges have been misguided by incorrect or incomplete information about a subject matter, or have applied correct information improperly, but firmly believe their understanding is correct and follow through with inaccurate and potentially faulty decisions.

Clearly, additional research is necessary to determine which information can and should be used to validly and reliably measure judges’ objective understanding of the

assessment and diagnosis of ID, and to examine the relationship between judges' level of objective understanding of ID and their respective, ID decisions.

5.4. Judicial Demographic Variables, ID Decisions, and Commitment to ID Decisions

Results provided partial support for the *sixth* hypothesis that judicial demographic variables would be significantly related to judges' ID decisions. Two demographic factors were found to significantly predict ID decisions: jurisdiction and race. Results revealed that ID decisions varied according to jurisdiction, as state judges were more likely than federal judges to render a finding of ID. This finding is comparable to the observations of Blume and colleagues (2009), who found that ID decisions in published cases addressing *Atkins* claims varied significantly across state jurisdictions. The current study's finding expands on the current literature by suggesting that ID decisions may also vary between state and federal jurisdictions, and that defendants' raising an *Atkins* claim in certain state courts may be more successful than defendants who attempt to raise similar claims in federal court.

This finding is significant and may be subject to various interpretations. First, it may suggest that ID decisions are affected by differences in how state and federal jurisdictions define ID and their procedures for *Atkins* claims. Almost all state jurisdictions with the death penalty define ID and related procedures for purposes of *Atkins* claims, while the federal government does not (Blume, Johnson, & Seeds, 2009, 2010; DeMatteo, Marczyk, & Pich, 2007; Winick, 2009). Due to limited statutory guidance, federal judges may be unaware of the appropriate evidence to consider and rely upon when deciding these cases, and, in turn, be less likely to render a finding of ID. Federal judges may also inconsistently apply or vary the procedural rules for *Atkins*

claims, which could undoubtedly affect, if not undermine, ID decisions. Second, the significant relationship between jurisdiction and ID decision could also reflect individual and collective differences between federal and state court judges. For example, although both state and federal court judges are predominately male and white (Chew & Kelley, 2009), federal judges are often older and have served longer periods of time on the bench, which could potentially affect their decision-making (Goldstein, 2011; Manuto and O'Rourke, 1991; Redding & Murrie, 2007).

Judges' race was also found to significantly predict ID decisions. More specifically, results suggested that African American judges were more likely than Caucasian judges to correctly render a finding of ID. This finding is significant because it suggests case outcomes may vary according to the race of the presiding judge, and, as a result, defendants with viable *Atkins* claims may be more likely to succeed if their claims are decided by an African American judge. Whereas this finding provides new, pertinent information about the way a judge's race may influence his or her ID decisions, it may be of limited utility and consequence for *Atkins* claimants and the attorneys litigating these claims, as African American judges are largely underrepresented in the federal and state judiciaries, which renders the chances of actually having a black judge preside over and decide an *Atkins* extremely low.

The present findings add to the current research examining the effects of race on judicial decision-making in different legal cases, which has yielded mixed results. For example, some studies have indicated that the sentencing practices of African American and Caucasian judges are significantly different in certain criminal cases, while others have found little to no difference (Chew & Kelley, 2009; Spohn, 2002). In addition,

several studies have found that race significantly affected judicial decisions in sexual and racial discrimination cases, as African American judges were significantly more likely to decide in favor of plaintiffs bringing the claims (Chew & Kelley, 2009)

Clearly, questions remain about the role a judge's race plays in *Atkins* claims, as this was the first study to examine this issue and to find that judges' race significantly predicted ID decisions. Furthermore, although African American judges are significantly underrepresented in the federal and state judiciary, a preliminary examination of published *Atkins* claims and ID decisions revealed that African American defendants and inmates have been overrepresented in *Atkins* claims, as they have been more likely to both raise and win claims of ID in capital cases (Blume, Johnson, & Seeds, 2009, 2010). Thus, it is important for future research to continue to investigate the role of race in *Atkins* claims by examining the impact of judges' race on actual ID decisions, the impact of defendant's race on judicial ID decision-making in hypothetical cases, and the relationship between judges' and defendants' race and its effect on actual and hypothetical ID decisions.

Interestingly, gender did not significantly predict ID decisions. Female judges were slightly underrepresented in this study's sample, which may have affected the study's ability to detect a difference between male and female judges' ID decisions. However, in the alternative, gender may not have exercised a significant influence in this area of judicial decision-making. This is somewhat consistent with available research, which has yielded mixed results when examining the effects of gender on judicial decisions in different legal claims (Chew & Kelley, 2009; Massie, Johnson, & Gubala, 2002; Peresie, 2005). For example, some studies have found that gender did not

significantly influence judicial decisions in certain federal cases, such as outcomes in racial discrimination cases; while others found that female, federal judges tended to vote more conservatively on criminal procedure issues and more liberally on civil liberty issues when compared to male, federal judges (Chew & Kelley, 2009; Massie, Johnson, & Gubala, 2002; Peresie, 2005). In addition, the present findings may also be consistent with studies that have found that gender may significantly affect judicial decision-making, but primarily in cases in which gender was a main issue, such as sexual discrimination cases (Chew & Kelley, 2009).

Judges' political orientation and affiliation did not significantly predict ID decisions, although it was expected that judges with a more liberal orientation and Democrat affiliation would be more likely than judges with a more conservative and Republican affiliation to render a finding of ID. This finding was particularly surprising, as numerous studies have suggested that judges' political beliefs and ideology significantly affect their decision-making in a variety of cases, and particularly criminal or capital cases (Chew & Kelley, 2009; Massie, Johnson, & Gubala, 2002; Peresie, 2005).

Judges' experience with capital cases and/or *Atkins* claims also did not predict ID decisions. This too was surprising, as judges who reported having experience with capital cases, and particularly *Atkins* claims, were expected to be more likely to render accurate ID findings. This finding may suggest that judges' prior experience with certain kinds of cases or claims did not necessarily improve the accuracy of their subsequent decisions in similar cases; or, that judges did not have enough prior experience with these kinds of cases for it to significantly affect their ID decisions. In the alternative, these

findings may also suggest that judges' prior experiences with capital cases and/or *Atkins* claims may have negatively affected their ability to render accurate ID decisions, or may have contributed to a misunderstanding of ID or a misapplication of the *Atkins* decision. Finally, this finding may also suggest that even with prior, relevant experience, judges determine cases on an individual basis, which may result in different outcomes across very similar cases.

Interestingly, results revealed that judges' experience with capital cases was significantly related to their commitment to their ID decisions. This may indicate that although judges' with prior capital case experience were not more likely to correctly render a finding of ID, they were more confident in and committed to their decision-making in response to the vignette. This is generally consistent with other studies of judicial behavior and decision-making, which have found that judges often report high levels of confidence in their decisions after responding to simulated cases (Dhimi, 2005).

5.5. Judicial Attitudes about the Culpability of Different Offenders and ID Decisions

Judges' responses to the attitudinal questions in this study covered a range of opinions. Overall, judges generally agreed with treating intellectual disability, mental illness, and acquired brain injury as mitigating factors when considering an individual's culpability for criminal behavior. More specifically, almost 80% of judges either agreed or strongly agreed that mental illness should be treated as a *significant* mitigator in capital cases; while 65% of judges either agreed or strongly agreed that individuals with acquired brain injury resulting in intellectual deficits should be exempt from capital punishment, and approximately 60% of judges either agreed or strongly agreed that persons with intellectual disability should be held less culpable for criminal behavior.

Interestingly, although ID is the only mental health condition or diagnosis that has been ruled to exempt persons from execution, of the three attitudinal statements, judges were least likely to agree that persons with ID should be treated as less culpable. This could have significant implications in individual cases, particularly if judges' ID decisions are guided more by their beliefs about a defendant's relative culpability, as opposed to whether he or she actually meets the criteria for a diagnosis of ID.

In addition, judges' attitudes about all three issues were significantly related, which suggested that if they agreed one group of persons was less culpable, they were more likely to agree that the other two groups were also less culpable. Participants' political orientation and affiliation were also significantly related to their opinions about different offenders' relative culpability, which suggests that judges who reported a more liberal orientation and Democrat affiliation were more likely to agree, while judges who reported a more conservative orientation and Republican affiliation were less likely to agree that persons with intellectual disability, mental illness, and traumatic brain injury are less culpable in capital cases. This finding was interesting, as judges' political beliefs did not significantly predict ID decisions, but they were significantly related to judges' opinions about the level of culpability that should be assigned to offenders with different mental health problems.

These results were slightly different from the results of at least one recent study which examined mock jurors' attitudes and decision-making in hypothetical cases involving the issues of ID and mental illness. In that study, 599 mock jurors responded to a survey about the mitigating impact of different factors in capital cases (Barnett, Brodsky, & Price, 2007). Results revealed that 64% of participants treated mental

retardation as a significant mitigating factor, which resulted in more lenient sentences for these individuals (Barnett, Brodsky, & Price, 2007). Fewer participants agreed that other mental health issues serve to mitigate culpability, as 41% of mock jurors treated prior psychiatric hospitalizations, 37% treated major head injuries, and 35% treated a diagnosis of schizophrenia as significant mitigating factors (Barnett, Brodsky, & Price, 2007).

The present findings suggest that there may be a difference in the way judges perceive and conceptualize intellectual disability, brain injury, and mental illness, as well as the weight they assign these conditions when considering individual culpability in capital cases. These findings also may reflect some judges' earlier misunderstanding that individuals who suffered a brain injury outside of the appropriate developmental period (before age 18) still meet the criteria for ID and, as such, should be exempt from execution. In the alternative, these findings may reflect growing support amongst judges for the prohibition of the death penalty for individuals with traumatic brain injury who do not meet the clinical diagnosis of ID because of age of onset, and for individuals with severe mental illness. This is consistent with the position of several professional organizations, including the American Bar Association and the American Psychological Association, which have recently advocated for the prohibition of capital punishment for persons with traumatic brain injury resulting in intellectual and adaptive deficits after the developmental period and persons with severe mental illness (American Bar Association Task Force on Mental Disability and the Death Penalty, 2006; Winick, 2009). This is also consistent with the arguments advanced by some legal scholars and mental health practitioners, which assert that severe mental illness reduces the blameworthiness and culpability of persons to the same extent as and in ways similar to ID, and the execution

of persons with severe mental illness does not satisfy the retributive and deterrent purposes of punishment, and, as a result, the differential treatment of these groups in the context of the death penalty constitutes an equal protection violation (Slobogin, 2000, 2003, 2004, 2007).

Results provided partial support for the *sixth* hypothesis that judges' attitudes about certain mental health issues, offender culpability, and the death penalty would be significantly related to ID decisions. Only judges' attitudes about the culpability of persons with ID were significantly related to ID decisions, as judges who believed persons with ID should be held less culpable for criminal behavior were more likely to render a finding of ID. Judges' attitudes about mental illness serving as a significant mitigator in capital cases and the execution of persons with traumatic brain injury did not significantly predict ID decisions. In addition, judges' level of agreement with the three attitudinal statements was not significantly related to their level of commitment to their ID decisions.

These findings are significant and may explain some of the additional variation observed in judicial decisions in response to the vignettes. One possible interpretation is that judges' ID decisions were not only affected by the evidence presented in the vignette, but also by judges' beliefs about the defendant's relative culpability. This is particularly important, as ID decisions that are based on judicial beliefs about one's relative culpability and the culpability of persons with ID in general, as opposed to whether the individual actually meets the clinical or statutory criteria for a diagnosis of ID, would represent a form of judicial nullification that would serve to undermine the

correct application of the *Atkins* decision.¹³ These findings may also suggest that judges viewed ID, mental illness, and traumatic brain injury as three distinct conditions, and did not allow their stronger opinions about mental illness and brain injury affect their decision about ID in the case vignette.

These findings are somewhat consistent with the results of one recent study that examined the effects of mock jurors' attitudes about the culpability of persons with mental illness and ID on their decisions regarding whether a defendant presented with a mental illness or with ID. In that study, results indicated that participants were more likely to find that a defendant had a mental illness if they believed the defendant suffered from mental problems and deserved mercy. Participants were also more likely to find that a defendant had a mental illness, despite evidence of a more heinous crime, if they strongly believed that an individual with mental illness should not be punished. In addition, participants were less likely to sentence an individual to death if they believed that the mentally ill do not deserve to be punished (Reardon, O'Neil, & Levett, 2007).

5.6. Additional Influences on Judicial ID Decisions

While the present findings revealed significant information about the variables hypothesized to affect judicial ID decisions, they also confirm that the formula for a successful *Atkins* claim is not straightforward and cannot be easily defined with a few factors. Moreover, when considered in light of research addressing non-case specific

¹³ Judicial ID decisions based on defendant culpability rather than ID diagnosis may also go against the Supreme Court's ruling in *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, the Court found that a defendant's proof of intellectual disability may be offered and considered by jurors as mitigating evidence during the penalty phase of a capital trial, even if there is no proof of a connection or nexus between the disability and the alleged crime. By extension, this holding suggests that it would be improper, if not unconstitutional, for judges to refuse to consider evidence or render a finding of ID because of a belief that the disability was not linked to the alleged crime and/or did not affect the defendant's relative culpability for the alleged criminal conduct.

factors affecting judicial decision-making, the present findings may suggest that additional influences played a role in judicial ID decisions, and, thus, are in need of further empirical investigation.

First, judges' comments about the information they relied upon, or would have relied upon, when rendering an ID decision shed light on additional factors, which may influence judges' ID decisions and are in need of further research. For example, some judges reported that they specifically relied on or would rely on expert testimony about standardized measures, assorted medical and mental health records, particularly low IQ scores, deficits in social adaptive functioning, and facts about the alleged capital crime when determining an *Atkins* claim. As a result, some judges may have weighed these factors more heavily than others in their decision-making. These findings suggest that it may be beneficial to identify the kinds of expert testimony, specific standardized measures, kinds of collateral records, particular deficits in adaptive functioning, and facts about criminal behavior that judges are more likely to rely upon, and the extent to which they do rely on these factors, when rendering ID decisions. Some judges also reported that having more experience with or knowledge of ID, or having the time to research and learn about ID and *Atkins* claims would have affected their decisions. Thus, it may be of great benefit to add a learning, or tutorial, component to surveys to evaluate whether this would actually influence judges' decision-making in hypothetical *Atkins* claims. In addition, some judges noted that their understanding of, or lack of familiarity with, their respective ID statutes may have affected their decisions. As a result, it would also be useful to evaluate judges' hypothetical decisions in relation to their state jurisdiction, or

to assess judges' ID decisions after providing them with a specific statutory definition to guide their findings.

Second, research has shown that the various procedural rules involved in *Atkins* claims may also significantly affect ID decisions (Blume, Johnson, & Seeds, 2010; Reardon, O'Neil, & Levett, 2007). The present study attempted to control for these factors by providing judges with information about the timing of the claim, as well as the standard of proof to use when making their decisions, in an effort to avoid overwhelming the study design with too many variables. However, it would be useful to examine these procedural factors, as well as their potential effects on judges' decisions in hypothetical *Atkins* claims. It may have also been more useful to assess judges' level of commitment to – or confidence in – their ID decisions using a more familiar concept and measure of certainty, such as a scale reflecting the different standards of proof (e.g., preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt) by which the judge could render a finding of ID. This may have yielded different results and allowed for a more relevant understanding of judges' commitment to their decisions.

Third, exploratory analyses revealed that judges' perception of the level of ID presented by the vignette significantly predicted their ID decisions, as well as their commitment to their decisions. This may suggest that judges' subjective beliefs about the level of ID, rather than the objective proof of ID in the vignette, were more likely to influence their decision-making. In other words, judges may have been more likely to render decisions based on what they believed was present in the case, rather than what the evidence actually demonstrated. This is consistent with the judicial decision-making approach described by Redding and Murrie (2007) and Lurigio et al. (1994), which

suggested that judges create their own narratives about cases, and then attempt to fit the various evidence presented into their personal or pre-existing understanding of what the particular case or defendant should look like. In turn, one might infer that judges' subjective beliefs or personal attitudes and expectations about other information presented in the vignette – as opposed to the evidence itself – may have also influenced their decisions.

This hypothesis is consistent with scholarly literature which has recognized that judges do not always engage in more formalist, law or fact-guided decision-making, and may be more likely to consider and incorporate their own experiences, preferences, and attitudes in their decisions, particularly when the statutes and precedents guiding their decisions are unclear or conflicting (Chew & Kelley, 2009; Redding & Murrie, 2007; Sanders, 2011). This is also consistent with the findings of other studies addressing judicial decision-making, which have noted a tendency for some judges to disregard objective facts and scientific evidence in favor of their own beliefs, biases, and assumptions about an issue or evidence (Chew & Kelley, 2009; Cross, 2007; Redding & Murrie, 2007; White, 2009). This is particularly problematic when judges substitute expert opinion with their own, uninformed judgments – a practice which has been highly cautioned against, but is commonly seen in cases. An example of this in an *Atkins* claim would be if a judge relied solely upon evidence of an individual's role and involvement in a capital offense to disprove adaptive deficits or ID, without considering or balancing other evidence, such as the results of standardized testing or an expert's clinical judgment, which actually proved a defendant's adaptive deficits. In this situation, judges' substitution of their own judgment to circumvent expert findings and opinions

about intellectual or adaptive deficits would not only contribute to inaccurate or arbitrary decisions, but it would also contradict and distort the clinical understanding of ID (White, 2009). Thus, because of judges' tendency to use a more realist, or subjective approach, as opposed to a more formalist approach in their decision-making, it is particularly important to educate judges about the potential effects of their personal beliefs, as well as the significance of clinical judgment in ID assessments (White, 2009).

In addition to judges' reliance on their own judgments instead of scientific evidence and expert opinion, judges' decisions may also be affected by their personal biases and assumptions about intellectual disability, the social sciences, and social science evidence. Several studies have shown that judges' various sociopolitical attitudes influenced their decision-making in cases involving mental health issues and their receptivity to mental health evidence (Chew & Kelley 2009; Cross, 2007; Redding & Murrie, 2007). In addition, other studies revealed a general tendency of judges to either distrust or ignore social science research and evidence (Chew & Kelley 2009; Cross, 2007; Redding & Murrie, 2007). For example, one study of 165 federal court judges found that the majority of the sample believed knowledge of social science methods, statistical procedures, and related evidence was not essential (Manuto & O'Rourke, 1991). In addition, the results of another study found that judges' bias against social science evidence was not diminished by increased experience with or knowledge about social science research and methods (Redding & Reppucci, 1999). This finding is particularly troubling, as it suggests that judges who have an understanding of and experience with certain social science issues may still decide cases according to their own personal biases or other irrelevant factors (Englich, Mussweiler, & Strack, 2006). This

may have occurred in the present study as well, as some judges' individual comments suggested that factors external to *Atkins* and the diagnosis of ID, such as their personal biases, experience with intellectually disabled persons, beliefs about persons with ID, and beliefs about capital punishment, may have factored into their decision-making.

Based on the present findings, current literature, and observed trends in judicial decision-making, it would be beneficial for future research to continue to evaluate the evidence that is presented in *Atkins* claims and may be predictive of case outcomes, and to also examine how this evidence is presented to judges, what judges' subjective understanding of the evidence is, and how judges actually use and rely upon certain pieces of information when deciding *Atkins* claims. Research examining the potentially confounding role of offender culpability and judicial beliefs about offender culpability in ID decisions would be particularly useful and further assist our understanding of judges' approaches to and decisions in these kinds of claims. In addition, the relationship between judicial assumptions about intellectual disability, judicial attitudes about social science evidence, mental health experts, and the kinds of evidence frequently seen in ID assessments, and judicial ID decisions should also be evaluated.

5.7. Generalizability of Results

Before interpreting these findings and evaluating their significance, it is important to first consider the generalizability of this study's results. Overall, the sample was composed predominately of older, white, male judges with considerable education, and professional and legal experience; females and non-dominant races appeared largely underrepresented. The demographics of the sample do not raise generalizability concerns,

however, as they are largely reflective of the general population of federal and state court judges, who are predominately male and white.

In this study, about 84% of sampled federal and state trial-level judges were male and about 15% were female. This is consistent with at least one 2009 report on the demographics of the federal judiciary, which indicated that about 80% of federal, trial-level judges are male and 19% are female. More recent articles have reported slightly higher percentages for female judges, which have ranged from 20 to 22% of all federal court judges and 26% of all state court judges; it is unclear how many these female judges serve on the trial-level (Woman's Law Project, 2010).

In addition, in the present study, about 88% of sampled judges were Caucasian, slightly more than 5% were African American, slightly more than 3% were Hispanic, and no judges were Asian American. This also is consistent with recent reports on the demographics of the federal judiciary, which indicate that about 81% to 84% of federal, trial-level judges are Caucasian, 9% to 11% are African American, and 6% to 7% are Hispanic (Chew & Kelley, 2009; Wheeler, 2009). This is also consistent with the demographics reported for state court judges, which revealed that about 90% of state, trial-level judges are Caucasian, about 6% are African American, about 3% are Hispanic, and 1% are Asian American (Chew & Kelley, 2009). Interestingly, the racial characteristics of the present sample of federal and state judges almost perfectly matched a 2009 report of combined demographics for federal and state judges, which suggested that about 89% of combined judges are Caucasian, 6% are African American, 3% are Hispanic, and 1% are Asian American (Chew & Kelley, 2009).

This study's sample was also composed primarily of older, more experienced judges, the majority of whom were over 55 years of age and had served more than ten years as a judge. Further, analyses revealed jurisdiction, age, and years of service as a judge were strongly related, which suggests that participants who were federal court judges were also older and had served longer as a judge. This too is reflective of the population of federal and state court judges, particularly federal court judges, who are typically older and appointed to their judgeship later in their professional careers, and who serve extremely long terms due to lifetime judicial appointments. For example, one recent article provided that, as of 2010, about 12% of sitting federal district and circuit court judges were over the age of 80, and eleven judges were in their 90s (Goldstein, 2011). This is somewhat consistent with the present sample, as 6.4% of participants reported being between over the age of 75. An alternative explanation of participant demographics may be that older and more experienced federal judges were more likely to respond to the survey, which caused this group to be overrepresented in the sample.

The professional and legal experiences reported by participant judges also were consistent with recent demographic reports about the federal judiciary. One recent article indicated that federal judges are commonly recruited from public service positions and, to a lesser extent, the private practice sector (Wheeler, 2009). In the present study, the majority of judges who reported having only one prior occupation worked in the private sector; however, most judges reported having more than one prior occupation, and these judges commonly worked in both the public and private sector as attorneys.

The variety of political orientations and affiliations reported by judges in this study may also represent those seen in the federal and state judiciary. This is supported

by the fact that federal judges on the trial-level have been appointed (1) by various presidents with different political orientations and affiliations and (2) because of their own presumed, political orientations and affiliations. In addition, state judges have campaigned and been elected according to their espoused political orientations and affiliations, which vary significantly across different areas of the country and states.

Thus, one may conclude that the findings of this study are generalizable to the larger population of federal and state trial-level judges, as several of the characteristics of this study's sample were consistent with that seen in the larger population of judges.

5.8. Limitations

There were several limitations to this study, which should be considered when interpreting and before generalizing these results. First, the study relied upon a hypothetical case vignette, which was carefully modeled after actual cases and according to available empirical research, but, at the same time, could not possibly capture all of the factors potentially affecting ID decisions or the same experience a judge would have if presiding over an actual capital case as a federal or state court judge. That being said, the vignettes still should have effectively presented an *Atkins* claim and provoked genuine responding from judges, as they are quite similar in nature to a condensed legal brief or case decision, which judges often must review as part of a hearing, or, sometimes, as the only part of a hearing. In addition, simulated cases or case vignettes have been found to be particularly effective in the study of judicial decision-making, as this approach can control for various case factors, as well as the amount and type of information considered by judges, while also evaluating judicial agreement and disagreement (Dhami, 2005; Redding & Murrie, 2007).

Second, the sample size was limited and the study would have benefitted from greater power. Twelve hundred surveys were mailed to judges, with a response rate of only 17%. This is somewhat low, but not too unexpected considering the nature of the study (mailed correspondence), the topic of the study (capital punishment and mental health issues), and the targeted sample (federal and state trial court judges). With a larger sample, the results would have been even more representative of the federal and state court judge population, and it would have provided increased power, which would assure us that had a result existed, it would have been detected in our analyses.

In addition, had the expected sample been larger and had greater power, additional variables could have been manipulated, which would have allowed a more comprehensive evaluation of judicial decision-making in response to the vignettes. The variables examined in this study were based on the current, scientific literature addressing ID and the death penalty, and some of issues or factors that have been identified as potentially affecting ID assessments and judicial decision-making in *Atkins* claims. These variables and the related findings are significant, as they are the first factors to be empirically studied in relation to judicial decision-making in *Atkins* claims; however, they are only a small sampling of many important factors that have been identified and should be evaluated when looking at judicial-decision making in these cases.

Improvements could also be made on the survey's construction. Again, with a larger sample and more power, more variables could have been manipulated in the vignettes, allowing for the examination of additional factors implicated in *Atkins* claims and judicial ID decisions, such as the level of culpability of the defendant, the criteria used to define ID, the timing of the *Atkins* claim, and the burden of proof required for a

finding of ID. Next, based on prior research and our own findings that jurisdiction (federal or state) significantly predicted ID decisions, it would have been helpful to also examine the relationship between the state in which a participant was a judge and ID decision. This was initially considered, but then left out in an effort to keep the study design manageable, and to preserve anonymity and potentially enhance response rates. It also would have been more informative to request information about judges' religious beliefs and attitudes towards capital punishment to evaluate whether these factors predicted ID decisions or attitudes about mental health issues and the death penalty. In addition, judges' objective understanding of ID and individual attitudes about different mental health issues and the death penalty would have been more accurately assessed with more and varied questions. Including additional questions was considered, and some questions were removed in order to present judges with a manageable, time-effective survey that would assess the issues proposed and that judges would be likely to return.

5.9. Implications

The present study is significant for various reasons. First, this was the first empirical study to examine the different factors influencing judges' decisions in hypothetical *Atkins* claims. Second, this study also contributed to the limited, but growing number of studies examining the decision-making of federal and state judges sitting on the trial-level -- the judicial population which is responsible for the majority of legal decisions, and thus offers a more reliable reflection of overall judicial attitudes and decision-making behavior, but has been less subject to empirical evaluation than judges sitting in the higher courts (Cross, 2007). Third, the findings of this study have several

implications for future research addressing *Atkins* claims, and for federal and state court judges, experts, and attorneys who may find themselves involved in these cases.

Results of this study provide a snapshot of how federal and state court judges decide *Atkins* claims, how well they understand (or misunderstand) ID, and how their personal characteristics and attitudes affect their decisions. Findings revealed new information and useful data about the various factors that significantly predict judicial decision-making in simulated *Atkins* claims, which may explain some of the trends and outcomes seen in actual *Atkins* claims. In addition, with this data, we can begin to determine whether the factors considered and relied upon by judges when rendering a finding of ID are appropriate, and the extent to which they are consistent with the factors typically used by practitioners in the assessment and diagnosis of ID. Furthermore, by understanding the various factors that judges may expect or rely upon in these cases, we can better inform experts and attorneys about the kinds of evidence, testimony, and legal strategies that may be most effective in these claims and within certain jurisdictions.

For example, results revealed that judges' decisions may have been influenced by their subjective beliefs about defendant culpability and the culpability of persons with ID, rather than their belief that the defendant met the requirements for a finding of ID. This may have resulted in judicial nullification and goes against the spirit and correct application of the *Atkins* decision, as well as what many experts believe is appropriate to consider and rely upon in these evaluations and decisions. These results also suggest that some judges may determine *Atkins* claims in accordance with the procedure espoused by Justice Scalia's dissent in *Atkins*, namely, a case-by-case consideration of an individual's ID and culpability, as opposed to the application of a per se ban.

In addition, results indicated that judicial ID decisions are significantly influenced by evidence documenting a prior history and diagnosis of ID during the appropriate developmental period, or before age 18. This finding highlights the important role psychological and educational records play in these cases, and suggests that the existence, maintenance, discovery, review, and presentation of these records and related information is essential for a successful *Atkins* claim. This finding also underscores the importance of (1) educational evaluations, services, and resources, (2) investigative resources for capital defendants, and (3) the prolonged, if not indefinite, maintenance of school and related records containing this information.

Results also suggested that judges are more likely to find ID in more severe cases, but are less effective at recognizing mild cases of ID. This is particularly important as most *Atkins* claims allege mild ID, and judges may easily miss a case of mild ID due to an incorrect or misguided held belief that ID must be severe or fulfill certain stereotypes for it to be found and used to exempt one from execution. Further, results indicated that judges' race, as well as their respective jurisdiction and beliefs about the culpability of persons with ID, significantly affected ID decisions, which may explain some of the variation seen across states, courts, and cases, and may have significant consequences for *Atkins* claimants. Finally, results also suggested that a variety of non-case specific factors, such as sociopolitical beliefs, personal bias, decision-making style, and attitudes about the social sciences and related evidence may also influence judicial decisions in *Atkins* claims, and should be subject to further empirical study.

This study also provides new information about how well judges understand the construct, presentation, and assessment of ID, and highlights the areas in which

additional education and training would be beneficial for judges, as well as attorneys and experts handling these claims. Although most judges exhibited some understanding of ID, *Atkins* claims are not particularly common, and the majority of judges have not been exposed to these kinds of cases or specifically trained in this area of law (or psychology). In addition, judges' current level of understanding of ID did not significantly predict or improve their ability to correctly identify and find ID in the vignettes. A cursory review of the relevant literature, and state and federal court training programs, showed an absence of continuing education and training for judges, as well as attorneys and experts, on this topic. As a result, the development of a continuing education course or training program, which addresses the concept and construct of ID, the criteria used to diagnose ID, relevant statutory definitions, accepted and effective assessment techniques, the importance of clinical judgment in the assessment of ID, theoretical and empirical literature on the issue, common pitfalls in ID assessments, and common misconceptions about ID – particularly mild ID – would be particularly useful. Training should also highlight the types of cases and *Atkins* claims, which have provoked the most judicial disagreement and run the greatest risk of erroneous findings. In addition, judges should also be educated about the different extralegal factors, and personal attitudes and characteristics that have been found to or may potentially influence *Atkins* claims and outcomes, as judicial awareness of these factors may lead to greater self-scrutiny and more objective decision-making. Finally, because of the inconsistencies in statutes and precedent guiding this area of law, it is especially important to equip judges with the requisite knowledge and guidance to accurately decide these claims. Thus, in addition to continued education and training, judges handling *Atkins* claims may also benefit from

the development of well-defined, structured guidelines, which would allow for individualized ID assessments and, at the same time, guard against the judges' reliance on irrelevant or inappropriate factors, reduce arbitrary and erroneous decision-making, and increase the accountability and transparency of pretrial ID decisions.

This study is informative and significant as the first study to examine judicial decision-making in hypothetical *Atkins* claims; however, there remains much to be done. This study highlights the need for continued empirical research in this area, where the stakes are especially high, but the accuracy and reliability of ID decisions are not. Many questions remain as to the different factors affecting *Atkins* claims and how well these claims will be presented, assessed, and decided in the future. More research is needed on the intellectual ability and adaptive functioning measures used in these assessments, the reliability of these measures – particularly those lacking norms and those used retrospectively – expert testimony about these measures and related evidence in *Atkins* claims, the records typically available and commonly used to prove ID, and the kinds of collateral information used in the assessment of adaptive functioning. In addition, a comparison of the evidence presented in actual cases in which defendants were and were not successful on their *Atkins* claims, as well as a comparison of defendants diagnosed and not diagnosed with ID would be particularly useful. Many questions also remain as to how well judges who are responsible for determining these cases understand the construct and concept of ID. Results reveal areas not only ripe for continued research, but also education, as training on the issue of ID would benefit fact finders and advocates alike, and lead to more reliable and accurate decisions. In addition, the results also have important policy implications, as most judges supported the exemption of persons with

traumatic brain injury from capital punishment and believed that mental illness should be a significant mitigator in capital cases, which may reflect a growing consensus amongst the judiciary against the execution of persons with severe mental illness or cognitive impairments. The growing consensus against the execution of these populations has also been seen across different professional organizations, including the American Bar Association and the American Psychological Association, and amongst legal scholars and mental health practitioners, who have asserted that the same reasoning exercised by the Supreme Court in *Atkins* when excluding persons with ID from capital punishment also applies to persons with severe mental illness or intellectual/cognitive impairments (Slobogin, 2000, 2003, 2004, 2007). More specifically, it has been argued that severe mental illness reduces the blameworthiness and culpability of persons to the same extent as and in ways similar to ID, and the execution of persons with severe mental illness does not satisfy the retributive and deterrent purposes of punishment, and, as a result, the differential treatment of these groups in the context of the death penalty constitutes an equal protection violation (Slobogin, 2000, 2003, 2004, 2007).

6. Conclusion

The *Atkins* decision has clearly added a new layer of complexity and confusion to capital cases involving mental health issues. In this context, it is essential that the behavioral sciences and law continue to work together to better understand this complicated psychological construct and diagnosis, and to render more accurate decisions for a vulnerable population faced with the possibility of death. It is also important for judges to evaluate their own biases and understanding of *Atkins* and the assessment of ID to ensure that their decisions in these kinds of cases are individualized and

comprehensive, but also consistent and guided by the appropriate diagnostic criteria, reliable evidence, and an accurate and sufficient knowledge of ID. It is also important for mental health practitioners, evaluators, and researchers to continue to examine the effects of the *Atkins* decision and the practices involved in these claims. With additional quantitative and qualitative research, we may continue to identify the various factors influencing judicial decision-making in *Atkins* claims, which will not only inform this area of practice, but also improve the methods by which ID can be reliably assessed and effectively presented to judges, who, in these cases, must depend on the findings and testimony of mental health experts to make life or death decisions.

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Appendix A: Introductory Letter and Survey Instructions

[DATE]

Dear Judge:

In 2002, the United States Supreme Court decided *Atkins v. Virginia*, holding mentally retarded persons exempt from capital punishment. The Court did not establish a definition of mental retardation (“MR”), now referred to as intellectual disability (“ID”), or a procedure for determining this condition, but rather, left these determinations to the discretion of the states. As a result, the definition of and assessment procedures for MR/ID vary across states and little is known about how MR/ID determinations are made.

Understanding MR/ID in the context of capital cases and how *Atkins* claims are decided is important for several reasons. First, by understanding the diagnosis and assessment of MR/ID, judges will be better equipped to make accurate and reliable decisions in *Atkins* claims. Second, by understanding how courts determine MR/ID in *Atkins* claims, mental health experts can learn how to best present complex scientific information to judges in new, meaningful ways. Third, by understanding which factors affect judicial decision-making in *Atkins* claims, prosecuting and defense attorneys will be able to develop more effective legal strategies.

Currently, there are no empirical studies investigating the factors affecting judicial understanding and decision-making in *Atkins* claims. The goals of this study are to gather information about judicial decision-making in *Atkins* claims and to evaluate judicial understanding of the diagnosis and assessment of MR/ID in capital cases. **You were selected to participate in this study because of your specialized knowledge as a judge.** Even if you rarely hear or have never heard *Atkins* claims or capital cases, we are interested in your educated judicial insights.

Your participation is critical to this study’s success. The greater the number of responses we receive, the richer and more valid our data will be. The study is voluntary and you need not answer any questions that you do not feel comfortable answering. However, in order that the results will truly represent the thinking of judges, it is important that each questionnaire be **completed and returned**. Our goal is to publish the results in legal and scientific journals. It will also satisfy the doctoral dissertation requirement of one of the study’s investigators.

Enclosed is a survey, which we hope you will complete and return in the enclosed self-addressed, stamped envelope. It should take approximately 10-15 minutes to complete. All responses are completely anonymous. **Your name cannot be connected in any way to your responses.** Should one of your colleagues also receive this survey, please avoid discussing it until both of you have been able to complete and return the materials.

We will be happy and available to answer any questions you may have. We also will provide you with the results upon request. Please contact us at 610-316-0091 or via email, at kbhensl@aol.com. We also recognize how busy you are as a judge and greatly appreciate your participation and assistance in this important project.

Sincerely,

Kirk Heilbrun, Ph.D.
Primary Investigator
Head of the Department of Psychology
Drexel University

Kursten B. Hensl, M.S., J.D.
Co-Investigator
Project Coordinator
Drexel University
Villanova School of Law

JUDICIAL DECISION-MAKING IN *ATKINS* CLAIMS



Survey Instructions

- Please do not write your name anywhere on the questionnaire.
- Read the case vignette and answer the questions that follow. Take some time to think about the case and your answers, but do not spend an undue amount of time doing so.
- Answer the questions to the best of your ability. There are no right or wrong answers, as the questions ask you to make a judgment based on your experience and opinions. The vignettes and questions are meant to be self-explanatory. We cannot provide any additional information.
- Once you have answered the questions about the vignettes, please answer the demographic and attitudinal questions that follow.
- Please do NOT skip ahead in the questionnaire or look at subsequent pages or questions. Read and answer all the questions in the order they are asked.
- We would appreciate it if you could answer all questions throughout the questionnaire. Please do not skip any questions.

THANK YOU!

Your participation in this study is very valuable and greatly appreciated.

Appendix B: Case Vignette for Condition 1 = MT**(Mild ID, No Formal Diagnosis of ID, No C/O Interviews or Criminal History)**

M.T. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, M.T. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

M.T. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, M.T. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 68.**

To assess his adaptive behavior, first, M.T.'s available medical and school records were reviewed. A review of the records revealed M.T. was a poor to average student, who attended special education from third to sixth grade, and later graduated from the 12th grade. According to earlier intellectual testing results and related school records, **M.T. never received a formal diagnosis of mental retardation/intellectual disability as a child.**

M.T. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from collateral interviews suggest **M.T. is able to care for himself and has lived with his single mother his entire life. He has worked as a stock person in a local grocery store, and performed odd jobs for people in his neighborhood to earn an income. M.T. holds a driver's license, but does not own a car. He has been described as "silly and immature." M.T. has few neighborhood friends and spends most of his free time alone or with his mother. He displays some problems with reading and writing, and has some difficulty managing money and his spending.**

M.T. also was administered a malingering test to examine whether he is attempting to feign mental retardation/intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix C: Case Vignette for Condition 2 = TJ**(Mild ID, Formal Diagnosis of ID, No C/O Interviews or Criminal History)**

T.J. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, T.J. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

T.J. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, T.J. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 68**.

To assess his adaptive behavior, first, T.J.'s available medical and school records were reviewed. A review of the records revealed T.J. was a poor to average student, who attended special education from third to sixth grade, and later graduated from the 12th grade. According to earlier intellectual testing results and related school records, T.J. **received a formal diagnosis of intellectual disability as a child**.

T.J. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend**. Results on the VABS and the information gained from collateral interviews suggest that **T.J. is able to care for himself and has lived with his single mother his entire life. He has worked as a stock person in a local grocery store, and performed odd jobs for people in his neighborhood to earn an income. T.J. holds a driver's license, but does not own a car. He has been described as "silly and immature."** T.J. **has few neighborhood friends and spends most of his free time alone or with his mother. He displays some problems with reading and writing, and has some difficulty managing money and his spending.**

T.J. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix D: Case Vignette for Condition 3 = RM**(Mild ID, No Formal Diagnosis of ID, C/O Interviews and Criminal History)**

R.M. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, R.M. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

R.M. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, R.M. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 68.**

To assess his adaptive behavior, first, R.M.'s available medical and school records were reviewed. A review of the records revealed R.M. was a poor to average student, who attended special education from third to sixth grade, and later graduated from the 12th grade. According to earlier intellectual testing results and related school records, R.M. **never received a formal diagnosis of intellectual disability as a child.**

R.M. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from these collateral interviews suggest that **R.M. is able to care for himself and has lived with his single mother his entire life. He has worked as a stock person in a local grocery store, and performed odd jobs for people in his neighborhood to earn an income. R.M. holds a driver's license, but does not own a car. He has been described as "silly and immature."** R.M. has few neighborhood friends and spends most of his free time alone or with his mother. **He displays some problems with reading and writing, and has some difficulty managing money and his spending.**

In addition, interviews also were conducted with correctional officers who have supervised R.M. in the prison where he is being held. These officers provided R.M. is respectful, obedient and follows the rules and regulations of the prison without problem. They indicated he has acclimated well to the prison environment and works in the laundry area. The evaluator also considered the facts surrounding R.M.'s alleged offense, which suggest he provided the weapon used in the killing to a co-defendant and played an active role in the commission of the offense.

R.M. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix E: Case Vignette for Condition 4 = KD**(Mild ID, Formal Diagnosis of ID, C/O Interviews and Criminal History)**

K.D. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, K.D. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

K.D. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, K.D. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 68.**

To assess his adaptive behavior, first, K.D.'s available medical and school records were reviewed. A review of the records revealed K.D. was a poor to average student, who attended special education from third to sixth grade, and later graduated from the 12th grade. According to earlier intellectual testing results and related school records, **K.D. received a formal diagnosis of intellectual disability as a child.**

K.D. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from these collateral interviews suggest that **K.D. is able to care for himself and has lived with his single mother his entire life. He has worked as a stock person in a local grocery store, and performed odd jobs for people in his neighborhood to earn an income. K.D. holds a driver's license, but does not own a car. He has been described as "silly and immature."** K.D. has few neighborhood friends and spends most of his free time alone or with his mother. **He displays some problems with reading and writing, and has some difficulty managing money and his spending.**

In addition, interviews also were conducted with correctional officers who have supervised K.D. in the prison where he is being held. These officers provided K.D. is respectful, obedient and follows the rules and regulations of the prison without problem. They indicated he has acclimated well to the prison environment and works in the laundry area. The evaluator also considered the facts surrounding K.D.'s alleged offense, which suggest he provided the weapon used in the killing to a co-defendant and played an active role in the commission of the offense.

K.D. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix F: Case Vignette for Condition 5 = NG**(Moderate ID, No Formal Diagnosis of ID, No C/O Interviews or Criminal History)**

N.G. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, N.G. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

N.G. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, N.G. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 55.**

To assess his adaptive behavior, first, N.G.'s available medical and school records were reviewed. A review of the records revealed N.G. was a poor to average student, who attended **special education from third to eighth grade. He did not complete high school, but completed a structured vocational program in his community.** According to earlier intellectual testing results and related school records, N.G. **never received a formal diagnosis of intellectual disability as a child.**

N.G. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from collateral interviews suggest that **N.G. is able to care for his personal needs and has lived with his single mother his entire life. He briefly worked at a low-level factory job, which he lost after approximately 4 months. N.G. does not drive or hold a driver's license. He relies on his mother or public transportation, but, at times, has become lost when using the local bus system. He has been described as "immature, but obedient and responsive to direction and supervision."** N.G. **has few neighborhood friends and spends most of his free time alone or with his mother. He displays significant problems with reading and writing, and his mother manages his money and spending.**

N.G. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix G: Case Vignette for Condition 6 = JD**(Moderate ID, Formal Diagnosis of ID, No C/O Interviews or Criminal History)**

J.D. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, J.D. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

J.D. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, J.D. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 55**.

To assess his adaptive behavior, first, J.D.'s available medical and school records were reviewed. A review of the records revealed J.D. was a poor to average student, who attended **special education from third to eighth grade. He did not complete high school, but completed a structured vocational program in his community.** According to earlier intellectual testing results and related school records, J.D. **received a formal diagnosis of intellectual disability as a child.**

J.D. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from collateral interviews suggest that J.D. **is able to care for his personal needs and has lived with his single mother his entire life. He briefly worked at a low-level factory job, which he lost after approximately 4 months. J.D. does not drive or hold a driver's license. He relies on his mother or public transportation, but, at times, has become lost when using the local bus system. He has been described as "immature, but obedient and responsive to direction and supervision."** J.D. **has few neighborhood friends and spends most of his free time alone or with his mother. He displays significant problems with reading and writing, and his mother manages his money and spending.**

J.D. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix H: Case Vignette for Condition 7 = SW**(Moderate ID, No Formal Diagnosis of ID, C/O Interviews or Criminal History)**

S.W. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, S.W. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

S.W. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, S.W. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 55.**

To assess his adaptive behavior, first, S.W.'s available medical and school records were reviewed. A review of the records revealed S.W. was a poor to average student, who attended **special education from third to eighth grade. He did not complete high school, but completed a structured vocational program in his community.** According to earlier intellectual testing results and related school records, S.W. **never received a formal diagnosis of intellectual disability as a child.**

S.W. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from these collateral interviews suggest that S.W. **is able to care for his personal needs and has lived with his single mother his entire life. He briefly worked at a low-level factory job, which he lost after approximately 4 months. S.W. does not drive or hold a driver's license. He relies on his mother or public transportation, but, at times, has become lost when using the local bus system. He has been described as "immature, but obedient and responsive to direction and supervision."** S.W. has few neighborhood friends and spends most of his free time alone or with his mother. He displays significant problems with reading and writing, and his mother manages his money and spending.

In addition, interviews also were conducted with correctional officers who have supervised S.W. in the prison where he is being held. These officers provided S.W. is respectful, obedient and follows the rules and regulations of the prison without problem. They indicated he has acclimated well to the prison environment and works in the laundry area. The evaluator also considered the facts surrounding S.W.'s alleged offense, which suggest he provided the weapon used in the killing to a co-defendant and played an active role in the commission of the offense.

S.W. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix I: Case Vignette for Condition 8 = BP**(Moderate ID, Formal Diagnosis of ID, C/O Interviews or Criminal History)**

B.P. is a 35-year old male defendant charged with capital murder in relation to his involvement in the shooting death of a convenience store clerk. While awaiting trial, B.P. raised an *Atkins* claim, arguing he qualifies for a diagnosis of mental retardation (or intellectual disability) and, thus, should be exempt from capital punishment.

B.P. was referred for a mental health evaluation for mental retardation/intellectual disability. In the course of his evaluation, B.P. was administered a measure of intellectual ability, a measure of adaptive behavior, and a malingering test. To assess his intellectual ability, he was administered the Wechsler Adult Intelligence Scale, Third Edition, Revised (WAIS-III-R). His scores on this measure indicate an **overall IQ of 55**.

To assess his adaptive behavior, first, B.P.'s available medical and school records were reviewed. A review of the available records revealed B.P. was a poor to average student, who attended **special education from third to eighth grade. He did not complete high school, but completed a structured vocational program in his community.** According to earlier intellectual testing results and related school records, B.P. received a **formal diagnosis of intellectual disability as a child.**

B.P. also was administered the Vineland Adaptive Behavior Scales (VABS) and **interviews were conducted with his mother, uncle, two former teachers, and a neighborhood friend.** Results on the VABS and the information gained from these collateral interviews suggest that **B.P. is able to care for his personal needs and has lived with his single mother his entire life. He briefly worked at a low-level factory job, which he lost after approximately 4 months. B.P. does not drive or hold a driver's license. He relies on his mother or public transportation, but, at times, has become lost when using the local bus system. He has been described as "immature, but obedient and responsive to direction and supervision."** B.P. has few neighborhood friends and spends most of his free time alone or with his mother. He displays significant problems with reading and writing, and his mother manages his money and spending.

In addition, interviews also were conducted with correctional officers who have supervised B.P. in the prison where he is being held. These officers provided **B.P. is respectful, obedient and follows the rules and regulations of the prison without problem. They indicated he has acclimated well to the prison environment and works in the laundry area. The evaluator also considered the facts surrounding B.P.'s alleged offense, which suggest he provided the weapon used in the killing to a co-defendant and played an active role in the commission of the offense.**

B.P. also was administered a malingering test to examine whether he is attempting to feign intellectual disability. Results were not significant for malingering and without further information no definitive conclusion regarding malingering may be reached.

Appendix J: Follow-up Questionnaire



1. BASED ON THE INFORMATION PROVIDED AND USING A PREPONDERANCE OF THE EVIDENCE STANDARD, DOES THE DEFENDANT QUALIFY FOR A FINDING OF INTELLECTUAL DISABILITY?

_____ *YES*
_____ *NO*

2. PLEASE INDICATE YOUR COMMITMENT TO THIS DECISION USING THE SCALE BELOW.

1 2 3 4 5 6 7 8
Not Committed —————→ *Extremely Committed*

3. IN YOUR OPINION, WHAT LEVEL OF INTELLECTUAL DISABILITY – IF ANY – IS PRESENTED IN THE VIGNETTE?

_____ *NONE*
_____ *MILD*
_____ *MODERATE*
_____ *SEVERE*
_____ *PROFOUND*

4. PLEASE INDICATE YOUR LEVEL OF UNDERSTANDING OF INTELLECTUAL DISABILITY USING THE SCALE BELOW.

1 2 3 4 5 6 7 8
Limited Average *Very good*

PLEASE GO TO BACK OF PAGE

5. **TRUE OR FALSE:** A LOW IQ SCORE IS SUFFICIENT FOR A PSYCHOLOGICAL DIAGNOSIS OF INTELLECTUAL DISABILITY.

_____ *TRUE*
_____ *FALSE*

6. **TRUE OR FALSE:** MORE THAN 1 ADAPTIVE DEFICIT IS NECESSARY FOR A PSYCHOLOGICAL DIAGNOSIS OF INTELLECTUAL DISABILITY.

_____ *TRUE*
_____ *FALSE*

7. **TRUE OR FALSE:** A PSYCHOLOGIST MUST CONDUCT THE TESTING USED IN AN ASSESSMENT OF INTELLECTUAL DISABILITY.

_____ *TRUE*
_____ *FALSE*

8. **TRUE OR FALSE:** IN SOME CASES, INTELLECTUAL DISABILITY MAY DEVELOP IN ADULTHOOD, AFTER THE AGE OF 18.

_____ *TRUE*
_____ *FALSE*

9. **TRUE OR FALSE:** A MALINGERING TEST MUST BE USED IN THE ASSESSMENT OF INTELLECTUAL DISABILITY.

_____ *TRUE*
_____ *FALSE*

10. IF YOU WOULD LIKE TO PROVIDE ANY ADDITIONAL INFORMATION OR COMMENTS ABOUT YOUR DECISION-MAKING IN THIS CASE VIGNETTE, PLEASE DO SO BELOW:

GO TO NEXT PAGE

Appendix K: Demographic and Attitudinal Survey



INSTRUCTIONS:

Please provide the following information. **All responses will remain anonymous.** There is no way to connect your name with any of your responses.

1. GENDER:

Male _____
Female _____

2. RACE/ETHNICITY:

African American _____
Asian _____
Caucasian _____
Hispanic _____
Native American _____
Other (please specify): _____

3. AGE: _____

4. OCCUPATIONAL HISTORY BEFORE BECOMING A JUDGE. (PLEASE CHECK ANY AND ALL THAT APPLY):

Prosecutor _____
Defense Attorney _____
Private Attorney _____
Probation Officer _____
Other (please specify) _____

5. HOW MANY YEARS HAVE YOU SERVED AS A JUDGE?

GO TO BACK OF PAGE



6. IN WHICH JURISDICTION DO YOU SERVE AS A JUDGE?

_____ *STATE*
_____ *FEDERAL*

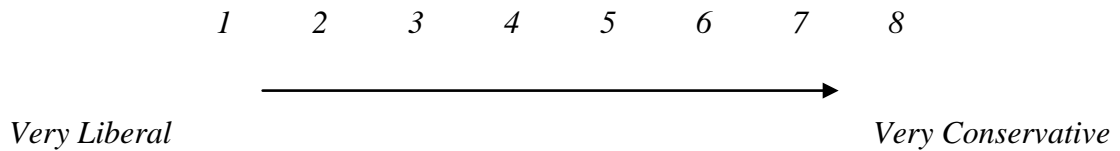
7. DO YOU OR HAVE YOU HAD THE OPPORTUNITY TO PRESIDE OVER A CAPITAL CASE OR CASES?

_____ *YES*
_____ *NO*

8. DO YOU OR HAVE YOU HAD THE OPPORTUNITY TO PRESIDE OVER AN *ATKINS* CLAIM OR CLAIMS?

_____ *YES*
_____ *NO*

9. PLEASE CIRCLE THE NUMBER THAT MOST ACCURATELY DESCRIBES YOUR POLITICAL ORIENTATION:



10. PLEASE INDICATE YOUR POLITICAL AFFILIATION:

Strong Democrat _____
Weak Democrat _____
Independent Leaning Democrat _____
Independent _____
Independent Leaning Republican _____
Weak Republican _____
Strong Republican _____

PLEASE GO TO LAST PAGE

INSTRUCTIONS: Using the corresponding scales, please circle the number that most accurately describes your opinion.

1. INDIVIDUALS WITH INTELLECTUAL DISABILITY SHOULD BE HELD LESS CULPABLE FOR CRIMINAL BEHAVIOR.

1 2 3 4 5 6 7 8
Strongly Agree —————→ *Strongly Disagree*

2. MENTAL ILLNESS SHOULD BE TREATED AS A SIGNIFICANT MITIGATING FACTOR IN CAPITAL CASES.

1 2 3 4 5 6 7 8
Strongly Agree —————→ *Strongly Disagree*

3. INDIVIDUALS WITH ACQUIRED BRAIN INJURY RESULTING IN INTELLECTUAL DEFICITS SHOULD BE EXEMPT FROM CAPITAL PUNISHMENT.

1 2 3 4 5 6 7 8
Strongly Agree —————→ *Strongly Disagree*

**THIS COMPLETES THE SURVEY.
THANK YOU FOR YOUR PARTICIPATION!**

Table 3. Participants' (N = 204) Personal Demographic Characteristics

	<u>N</u>	<u>%</u>
Gender		
Male	171	83.8
Female	31	15.2
Missing	2	1.0
Race/Ethnicity		
African American	11	5.4
Asian	0	0
Caucasian	180	88.2
Hispanic	7	3.4
Native American	1	.5
Other	11	5.4
Age		
36 to 45 years old	6	2.9
46 to 55 years old	31	15.2
56 to 65 years old	109	53.4
66 to 75 years old	36	17.6
76 to 85 years old	11	5.4
86 to 95 years old	4	2.0
Missing	7	3.4

Table 4. Participants' (N=204) Occupational History According to Number and Type of Prior Occupations

	<u>N</u>	<u>%</u>
One Prior Occupation	114	55.9
Prosecuting Attorney	17	8.3
Defense Attorney	17	8.3
Private Attorney	68	33.4
Other	12	5.9
More Than One Prior Occupation	90	44.1
3 Prior Occupations	54	27.1
3 Most Common		
Prosecuting, Defense, and Private Attorney	46	22.6
2 Prior Occupations	35	17.1
2 Most Common		
Defense and Private Attorney	11	5.4
Prosecuting and Private Attorney	10	4.9
Missing	2	1.0

Table 5. Participants' (N=204) Judicial Experience

	<u>N</u>	<u>%</u>
Current Jurisdiction		
State	121	59.3
Federal	83	40.7
Years as a Judge		
0 to 5 years	28	13.7
6 to 10 years	36	17.6
11 to 15 years	26	12.7
16 to 20 years	39	19.1
21 to 25 years	34	16.7
26 to 30 years	17	8.3
31 to 35 years	10	4.9
36 to 40 years	5	2.5
Over 40 years	6	2.9
Missing	3	1.5

Table 5 (continued). Participants' (N=204) Judicial Experience

	<u>N</u>	<u>%</u>
Experience with Capital Cases		
No	98	48.0
Yes	103	50.5
Missing	3	1.5
Experience with <i>Atkins</i> Claims		
No	164	80.4
Yes	37	18.1
Missing	3	1.5

Table 6. Correlations between Age, Jurisdiction, Years as Judge, Capital Cases, and Atkins Claims

Participant Characteristics					
	<u>Age</u>	<u>Jurisdiction</u>	<u>Years as Judge</u>	<u>Capital Cases</u>	<u>Atkins Claims</u>
Age	1.00	.328	.519**	.069	.092
Jurisdiction	.328**	1.00	.406**	-.122	.024
Years as Judge	.519**	.406**	1.00	.253**	.599
Capital Cases	.069	-.122	.253**	1.00	.258**
<i>Atkins</i> Claims	-.092	.024	.038	.258**	1.00

** p = .01

Table 7. Participants' (N=204) Political Orientation and Affiliation

	<u>N</u>	<u>%</u>
Political Orientation		
Very Liberal	3	1.5
Liberal	12	5.9
Somewhat Liberal	27	13.2
Independent Leaning Liberal	43	21.1
Independent Leaning Conservative	50	24.5
Somewhat Conservative	43	21.1
Conservative	16	7.8
Very Conservative	4	2.0
Missing	6	2.9
Political Affiliation		
Strong Democrat	43	21.1
Weak Democrat	15	7.4
Independent Leaning Democrat	25	12.3
Independent	29	14.2
Independent Leaning Republican	30	14.7
Weak Republican	24	11.8
Strong Republican	23	11.3
Missing	15	7.4

Table 8. Conditions Represented in Returned Surveys

	<u>N</u>	<u>%</u>
Distribution of Case Vignettes in Returned Surveys (N= 183)*		
Condition 1 (MT)	26	14.2
Condition 2 (TJ)	21	11.5
Condition 3 (RM)	21	11.5
Condition 4 (KD)	20	10.9
Condition 5 (NG)	22	12.0
Condition 6 (JD)	20	10.9
Condition 7 (SW)	24	13.1
Condition 8 (BP)	29	15.8
Severity of ID in Returned Surveys (N=183)		
Mild	88	48.1
Moderate	95	51.9

* 21 returned surveys did not indicate case type received. These were excluded from the analyses.

Table 9. Judges' ID Decision and Commitment to ID Decision

	<u>N</u>	<u>%</u>
Judges' ID Decision		
No	77	37.7
Yes	124	60.8
Missing	3	1.5
Commitment to ID Decision		
Not Committed	1	.5
Not Committed to Slightly Committed	4	2.0
Slightly Committed	10	4.9
Somewhat Committed	23	11.3
Committed	45	22.1
Very Committed	71	34.8
Very Committed to Extremely Committed	26	12.7
Extremely Committed	23	11.3
Missing	1	.5

Table 10. Actual Level and Judges' Perceived Level of ID in Case Vignettes

	<u>N</u>	<u>%</u>
Actual Level of ID		
Mild	88	43.1
Moderate	95	46.6
Missing	21	10.3
Judges' Perceived Level of ID		
None	6	2.9
Mild	61	29.9
Moderate	106	52.0
Severe	26	12.7
Profound	0	0.0
Missing	5	2.5

Table 11. Judges' Self-Reported and Objective Understanding of ID

	<u>N</u>	<u>%</u>
Judges' Self-Reported Understanding of ID		
Limited	12	5.9
Low	20	9.8
Low Average	27	13.2
High Average	59	28.9
Above Average	44	21.6
Good	29	14.2
Very Good	11	5.4
Missing	2	1.0
Judges' Objective Understanding of ID*		
Limited	20	9.8
Some	142	69.6
Good	35	17.2
Missing	7	3.4

* Calculated using judges' number of correct responses to True or False questions addressing the clinical assessment and psychological/psychiatric diagnosis of ID.

Table 12. Judges' Responses to True or False Questions Addressing ID

	<u>N</u>	<u>%</u>
Low IQ Score Alone is Sufficient for Diagnosis		
True	33	16.2
False	164	80.4
Missing	7	3.4
More Than 1 Adaptive Deficit Is Needed		
True	136	66.7
False	58	28.4
Missing	10	4.9
Psychologist Must Conduct Testing		
True	103	50.5
False	89	43.6
Missing	12	5.9
Onset of ID After Age 18		
True	138	67.6
False	56	27.5
Missing	10	4.9

Table 12 (continued). Judges' Responses to True or False Questions Addressing ID

	<u>N</u>	<u>%</u>
Malingering Testing is Required		
True	119	58.3
False	75	36.8
Missing	10	4.9

Table 13. Judges' Responses to Attitudinal Questions

	<u>N</u>	<u>%</u>
Individuals with ID Should Be Less Culpable		
Strongly Agree	13	6.4
Agree	26	12.7
Somewhat Agree	50	24.5
Slightly Agree	34	16.7
Slightly Disagree	24	11.8
Somewhat Disagree	31	15.2
Disagree	16	7.8
Strongly Disagree	7	3.4
Missing	3	1.5
Mental Illness Should Be a Significant Mitigator		
Strongly Agree	34	16.7
Agree	50	24.5
Somewhat Agree	58	28.4
Slightly Agree	19	9.3
Slightly Disagree	11	5.4
Somewhat Disagree	14	6.9
Disagree	9	4.4
Strongly Disagree	7	3.4
Missing	2	1.0

Table 13 (continued). Judges' Responses to Attitudinal Questions

	<u>N</u>	<u>%</u>
No Death Penalty for Persons with Acquired Brain Injury		
Strongly Agree	30	14.7
Agree	34	16.7
Somewhat Agree	39	19.1
Slightly Agree	31	15.2
Slightly Disagree	22	10.8
Somewhat Disagree	17	8.3
Disagree	16	7.8
Strongly Disagree	6	2.9
Missing	9	4.4

Table 14. Correlations between Judges' Opinions about the Culpability of Persons with ID, Treating Mental Illness as a Mitigator, and Exempting Persons with Acquired Brain Injury from the Death Penalty

Judicial Attitudes			
	<u>ID Culpability</u>	<u>Mental Illness</u>	<u>Brain Injured and DP</u>
ID Culpability	1.0	.55**	.55**
Mental Illness	.55**	1.0	.62**
Brain Injured and DP	.55**	.62**	1.0

** Correlation is significant at the .01 level.

Table 15. Correlations between Judges' Political Orientation, Political Affiliation, and Attitudes about Mental Health Issues and the Death Penalty

Political and Attitudinal Variables			
<u>Political Beliefs</u>	<u>ID Culpability</u>	<u>Mental Illness</u>	<u>Brain Injured and DP</u>
Political Orientation	.29***	.33***	.37***
Political Affiliation	.16*	.14**	.27***

*** Correlation is significant at .01 level.

** Correlation is significant at .05 level.

* Correlation is significant at < .05 level.

Table 16. Logistic Regression Analysis for Severity of ID, History of ID, Collateral Information Used in Assessment, and ID Decision

Predictor Variables	B	S.E. B	e ^B
Severity of ID	1.53**	.383	4.631
History of ID	.848*	.384	2.335
Collateral Information Used	-.178	.358	.837
Severity of ID x History of ID x Collateral Info Used	-.690	.639	.501

** p < .01

* p < .05

Table 17. Factorial Analysis of Variance for Severity of ID, History of ID, Collateral Information Used in Assessment, and Commitment to ID Decision

Source	df	F	partial η^2	p
Severity of ID	1	.297	.002	.586
History of ID	1	5.508	.031	.020*
Collateral Info Used	1	1.212	.007	.272
Severity of ID x History of ID	1	.328	.002	.568
Severity of ID x Collateral Info Used	1	3.415	.019	.066
History of ID x Collateral Info Used	1	1.124	.006	.290
Severity of ID x History of ID x Collateral Info Used	1	1.440	.008	.232
Error	174	(1.838)		

Note: Values enclosed in parentheses represent mean square errors.

* $p < .05$

Table 18. One-way Analysis of Variance for Case Vignette Type and Commitment to ID Decision

Source	df	F	partial η^2	p
Case Vignette Type	7	1.818	.068	.087
Error	174	(1.838)		

Note: Values enclosed in parentheses represent mean square errors.

Table 19. Logistic Regression Analysis for Judges' Self-Reported Understanding of ID, Objective Understanding of ID, and ID Decision

Predictor Variables	B	S.E. B	e ^B
Self-Reported ID Understanding	.393	.236	1.481
Objective ID Understanding	1.316	1.153	3.728
Self-Reported ID x Objective ID	-.293	.203	.746

Table 20. Factorial Analysis of Variance for Judges' Self-Reported Understanding of ID, Objective Understanding of ID, and Commitment to ID Decision

Source	df	F	partial η^2	p
Self-Reported ID Understanding	7	5.814	.188	.000**
Objective ID Understanding	2	.114	.001	.892
Self-Reported ID x Objective ID	10	.961	.052	.479
Error	176	(1.547)		

Note: Values enclosed in parentheses represent mean square errors.

** p <.01

Table 21. Logistic Regression Analysis for Demographic Variables Predicting ID Decision

Predictor Variables	B	S.E. B	e ^B
Gender	-.193	.496	.825
Race/Ethnicity	-1.070*	.506	.343
Age	.040	.219	1.040
Jurisdiction	-1.195**	.395	.303
Years as Judge	.189	.107	1.207
Capital Cases	-.108	.365	.897
<i>Atkins</i> Claims	.181	.454	1.199
Political Orientation	-.178	.173	.837
Political Affiliation	.037	.125	1.037

** p < .01

* p < .05

Table 22. Correlation Analysis for Judges' Demographic Variables and Commitment to ID Decision

	ID Decision
<u>Demographic Variable</u>	
Gender	-.044
Race/Ethnicity	-.142*
Age	-.050
Jurisdiction	.041
Years as a Judge	-.022
Capital Cases	-.143*
<i>Atkins</i> Claims	-.017
Political Orientation	-.087
Political Affiliation	-.070

* $p < .05$

Table 23. Logistic Regression Analysis for Judicial Attitudes about Mental Health Issues and the Death Penalty and ID Decision

Predictor Variables	B	S.E. B	p
ID Less Culpable	-.219*	.110	.803
Mental Illness as Mitigator	.050	.140	1.051
Brain Injured and DP	.102	.123	1.107
ID Less Culpable x Mental Illness x Brain Injured and DP	-.002	.003	.998

* $p < .05$

Table 24. Correlation Analysis for Judicial Attitudes about Mental Health Issues and the Death Penalty and Commitment to ID Decision

	Commitment to ID Decision
<hr/>	
<u>Attitudinal Variable</u>	
ID Less Culpable	-.115
Mental Illness as Mitigator	.083
Brain Injury and DP	.087

Table 25. One-Way Analysis of Variance for Perceived Level of ID and Commitment to ID Decision

Source	df	F	partial η^2	p
Perceived ID Level	3	7.509	.104	.000**
Error	195	(1.848)		

Note: Values enclosed in parentheses represent mean square errors.

** p < .01

Vita

Kursten Brooke Hensl was born and raised in New York. She graduated *summa cum laude* from Fordham University with a B.A. in Psychology in 2001. She later attended the joint, J.D./Ph.D. Program in Law and Psychology at Villanova School of Law and Drexel University. In 2005, she received her M.S. in Clinical Psychology, *summa cum laude*. Dr. Hensl served as an editor on the *Villanova Law Journal* and received her J.D., *magna cum laude*, in 2006. In 2007, she was admitted to the New York State Bar. She is also admitted to practice in the federal courts of the Southern District of New York. While completing her doctoral training, Dr. Hensl worked as an attorney for the largest international law firm in the world. As an associate, she worked primarily on a pro bono Georgia death penalty case, and was recognized by the Association of the Bar of the City of New York for her contributions with the Thurgood Marshall Award for Capital Representation. She completed her pre-doctoral internship in clinical and forensic psychology at the University of North Carolina, School of Medicine and the Federal Bureau of Prisons, Federal Correctional Complex in Butner, North Carolina in 2010. Dr. Hensl received three grant awards from two national and one international organization for her doctoral dissertation study. She received her Ph.D. in Clinical Psychology, *summa cum laude*, with a forensic specialization in 2011.

During graduate and law school, Dr. Hensl's training and interests focused on various aspects of clinical and forensic psychology and the intersection of psychology and the law. She served as an adjunct instructor of statistics at Drexel University, Goodwin College of Professional Studies, a teaching assistant in the Legal Writing Program at Villanova School of Law, and a research assistant for various law and psychology professors. Dr. Hensl also gained invaluable clinical and forensic assessment experience with diverse populations over the course of several clinical practica, professional positions, and internship. She has provided psychological and forensic assessment, prevention, treatment, and consultation services in numerous contexts, including psychiatric hospitals, outpatient mental health clinics, community prevention and outreach programs, private practice, a medical hospital, and forensic settings, such as forensic inpatient hospitals, a juvenile detention facility, county jails, and state and federal prison facilities. Dr. Hensl also worked with the Defender Association of Philadelphia for several years, where she performed competency evaluations and assisted with civil commitment hearings and juvenile cases. Dr. Hensl has provided in-service trainings on various forensic and treatment issues, presented her research at several state and national conferences, and published works in both psychological and legal, scholarly journals. Her interests include forensic assessment, criminal law and psychology, mental health issues and the death penalty, legal competencies, judicial decision-making, the treatment needs of juvenile and adult offenders, juvenile risk assessment, and mental health law and related public policy. Dr. Hensl currently holds a clinical research position on a federally-funded, national study of mental illness and substance abuse.