

**“Man is Opposed to Fair Play”: An Empirical Analysis of  
How the Fifth Circuit Has Failed to Take Seriously *Atkins*  
*v. Virginia*\***

Michael L. Perlin, Esq.  
Professor Emeritus of Law  
Founding Director, International Mental Disability Law Reform Project  
Co-founder, Mental Disability Law and Policy Associates  
New York Law School  
185 West Broadway  
New York, NY 10013  
Adjunct Professor of Law, Emory University School of Law  
Instructor, Loyola University New Orleans, Department of Criminology and  
Justice  
michael.perlin@nyls.edu  
mlperlin@mdlpa.net

Talia Roitberg Harmon, PhD.  
Niagara University  
Chair and Professor  
Department of Criminal Justice and Criminology  
Timon Hall Room 12  
Niagara University, NY 14091  
(716) 286-8093 (o)  
(716) 286-8079 (fax)  
tharmon@niagara.edu

Sarah Wetzel, B.S; B.A.  
Niagara University  
Niagara University, NY, 14109  
[swetzel@mail.niagara.edu](mailto:swetzel@mail.niagara.edu)

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- I. **Introduction**
- II. **The caselaw**
- III. **The data, and what it tells us**
  - a. **Methodology used in research**
  - b. **An overview**
    - i. **On malingering**
    - ii. **The *Flynn* effect**
    - iii. **The different IQ tests**
  - c. **The successes: The “trifecta” of factors making actual relief more likely: the rebuttal of malingering, the mention of the *Flynn* effect and the use of the WAIS test.**
  - d. **The failures: The Fifth Circuit’s global errors**
    - i. **Failure to rebut malingering**
    - ii. **Use of WISC test**
    - iii. **Use of ethnic adjustments**
    - iv. **Alleged lack of remorse**
    - v. **Issues related to effectiveness of counsel**
- IV. **Therapeutic jurisprudence & other jurisprudential filters**
  - a. **TJ in general**
  - b. **TJ and the cases before us**
- V. **Conclusion**

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## I. Introduction

In 2002, for the first time, in *Atkins v. Virginia*,<sup>1</sup> the United States Supreme Court found that it violated the Eighth Amendment to subject persons with intellectual disabilities<sup>2</sup> to the death penalty.<sup>3</sup> Since that time, it has returned to this question multiple times, clarifying that inquiries into a defendant's intellectual disability (for purposes of determining whether he is potentially subject to the death penalty) cannot be limited to a bare numerical "reading" of an IQ score,<sup>4</sup> and that

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<sup>1</sup> 536 U.S. 304 (2002).

<sup>2</sup> At the time of the *Atkins* case, the phrase "mental retardation" was used. Twelve years later, in the case of *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court chose to use the phrase "intellectual disability" rather than "mental retardation" in all future cases to conform with changes in the U.S. Code and in the most recent version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5). *Id.* at 1990.

<sup>3</sup> *Atkins*, 536 U.S. at 321:

Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

This decision came only 16 years after the Court rejected similar arguments in *Penry v. Lynaugh*, 477 U.S. 399 (1986). For a spell-binding account of how advocates and advocacy groups persuaded state legislatures to outlaw the death penalty in such cases (one of the major reasons the Supreme Court did an about face after *Penry*), see James W. Ellis, *Disability Advocacy and the Death Penalty: The Road From Penry to Atkins*, 33 N.M. L. REV. 173 (2003).

<sup>4</sup> *Hall*, 134 S. Ct. at 1990. See also, *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015), holding that a state postconviction court's determination that prisoner's IQ score of 75

state rules based on superseded medical standards created an unacceptable risk that a person with intellectual disabilities could be executed in violation of the Eighth Amendment.<sup>5</sup>

*Atkins* and its progeny have spawned a cottage industry of commentary on multiple related issues, including, but not limited to, these:

- the ability of counsel and judges to understand the meaning of intellectual disabilities,<sup>6</sup>

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demonstrated that he could not possess subaverage intelligence reflected an unreasonable determination of the facts.

<sup>5</sup> *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (*Moore I*). Two years later, the Supreme Court returned to *Moore*'s case once again, restating its decision, and criticizing the Texas Court of Criminal Appeals (that had reinstated the death penalty in *Moore*'s case in the interim) for relying on "lay stereotypes of the intellectually disabled." *Moore v. Texas*, 139 S. Ct. 666 (2019). (*Moore II*). Those stereotypes emerged from the Texas court's decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Ct. Crim. App. 2004), that included seven evidentiary factors that it had articulated without any citation "to any authority, medical or judicial." *Moore I*, 137 S. Ct. at 1046. These factors were largely based on the depiction of a character in John Steinbeck's novel, *Of Mice and Men*. See Adam Liptak, *Supreme Court to Consider Legal Standard Drawn From "Of Mice and Men,"* N.Y. TIMES (Aug. 22, 2016), accessible at [https://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html?\\_r=0](https://www.nytimes.com/2016/08/23/us/politics/supreme-court-to-consider-legal-standard-drawn-from-of-mice-and-men.html?_r=0). We discuss the implications of the *Briseno* factors extensively *infra* note 101.

<sup>6</sup> James Ellis, *Disability Advocacy and Atkins*, 57 DEPAUL L. REV. 653 (2008). On judicial comprehension, see e.g., Andrea Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia*, 57

- the importance of cultural competency in the process of litigating on behalf of capital defendants with intellectual disabilities,<sup>7</sup>
- the ways that failure to develop evidence of intellectual disability is treated in effectiveness-of-counsel cases,<sup>8</sup>

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DEPAUL L. REV. 701 (2008); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM. & MARY BILL RTS. J. 467 (2014).

<sup>7</sup> Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855 (2012). On why *expert witnesses* also need this cultural competency, see Michael L. Perlin & Valerie R. McClain, “Where Souls Are Forgotten”: *Cultural Competencies, Forensic Evaluations and International Human Rights*, 15 PSYCHOL., PUB. POL’Y & L. 257 (2009).

<sup>8</sup> Rebecca Klaren & Irene Merker Rosenberg, *Splitting Hairs in Ineffective Assistance of Counsel Cases: An Essay on How Ineffective Assistance of Counsel Doctrine Undermines the Prohibition Against Executing the Mentally Retarded*, 31 AM. J. CRIM. L. 339 (2004). On how the Fifth Circuit has dealt with effectiveness of counsel claims – per *Strickland v. Washington*, 466 U.S. 668 (1984) – see Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, “A World of Steel-Eyed Death”: *An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J. L. REF. 261, 296-97 (2020).

- the underlying sanism<sup>9</sup> of jurors in assessing intellectual disabilities,<sup>10</sup>
- the pretextuality of so many judges in assessing such cases,<sup>11</sup>

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<sup>9</sup> Sanism is “an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry.” See Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J. L., ETHICS & PUB. POL’Y 239, 257 (1994). On sanism in the context of persons with intellectual disabilities, see Keri K. Gould, *And Equal Participation For All ... The Americans With Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123, 140-41 (1994). On sanism and the death penalty in general, see John W. Parry, [\*The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness\*](#), 29 MENTAL & PHYSICAL DISABILITY L. REP. 667 (2005);

<sup>10</sup> Lyon, *supra* note 6.

<sup>11</sup> See Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1506 n. 19 (2016) (Perlin, *Merchants and Thieves*), discussing the “consistently pretextual positions of four current Supreme Court judges in all matters dealing with the overlap between mental disability and criminal behavior, culminating in Justice Alito’s bizarre dissent in *Hall [v. Florida]*.” On Justice Alito’s dissent, see *infra* text accompanying notes 96-97. On pretextuality generally, see Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEG. ISS. 3 (1999). We define “pretextuality” as “the ways in which courts accept testimonial dishonesty--especially by expert witnesses--and engage similarly in dishonest (and frequently meretricious) decision-making.” Perlin, Harmon & Chatt, *supra* note 8, at 280., citing Michael L. Perlin & Naomi Weinstein, “*Said I, ‘But You Have No Choice’*”: *Why a Lawyer Must Ethically Honor a Client’s Decision About Mental Health Treatment Even If It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L. POL’Y & ETHICS J. 73, 85 (2016).

- the capacity of jurors to empathize with persons with intellectual disability,<sup>12</sup>
- the role of experts in explaining
  - the meanings of IQs,<sup>13</sup> functional abilities, capacity for moral development, etc., of persons with intellectual disability,<sup>14</sup>
  - the potential for misuse of “ethnic adjustments” so as to make certain persons with lower IQs eligible for the death penalty,<sup>15</sup> and
  - the extent to which judges can adequately understand such expert testimony,<sup>16</sup>
- the willingness of trial judges to enforce *Atkins*,<sup>17</sup> and

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<sup>12</sup> See Denise Paquette Boots et al., *Death Penalty Support for Special Offender Populations of Legally Convicted Murderers: Juveniles, the Mentally Retarded, and the Mentally Incompetent*, 22 BEHAV. SCI. & L. 223 (2004).

<sup>13</sup> Daniel B. Kessler, *Atkins v. Virginia: Suggestions for the Accurate Diagnosis of Mental Retardation*, 43 JURIMETRICS J. 415 (2003).

<sup>14</sup> See John Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 LAW & PSYCHOLOGY 73 (2003)

<sup>15</sup> Robert Sanger, *IQ Intelligence Tests, “Ethnic Adjustments,” and Atkins*, 65 AM. U. L. REV. 87 (2015); David L. Shapiro et al, *Ethnic Adjustment Abuses in Forensic Assessment of Intellectual Abilities*, 4 PRACTICE INNOVATIONS 265 (2019); Michael L. Perlin, “Your Corrupt Ways Had Finally Made You Blind”: *Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U. L. REV. 1437 (2016).

<sup>16</sup> James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1305 (2018); Everington, *supra* note 6.

<sup>17</sup> Joseph A. Miglizzo, Jr & Ashley Hughes, *Atkins Test for Excluding Intellectually Disabled Persons from Execution Withstands Barrage of Challenges by State Courts*, 30

- the extent to which the fear-of-faking on which Justice Scalia focused in his *Atkins* dissent concerns are valid,<sup>18</sup>

*Atkins*' victory – and the victories of other defendants with intellectual disabilities in subsequent Supreme Court cases<sup>19</sup> -- may be illusory unless we look carefully at these issues and a constellation of other legal, social, and behavioral issues that have combined to poison this area of the law for decades. *Atkins* gives us a blueprint, but the question remains as to whether it will, in the long run, be more than a “paper victory.”<sup>20</sup> Until these issues are carefully considered, the true legacy of *Atkins* and its progeny will not be at all clear, and it will similarly not be clear if the case's “revolutionary potential”<sup>21</sup> will be fulfilled.

In a recent article, two of the co-authors (MLP & TRH) and another colleague

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REGENT U. L. REV. 135 (2017–2018). On trial judges' failure/refusal to implement other Supreme Court decisions in cases involving defendants with mental disabilities facing the death penalty, see Perlin, Harmon & Chatt, *supra* note 8.

<sup>18</sup> Bridget M. Doane & Karen L. Salekin, *Susceptibility of Current Adaptive Behavior Measures to Feigned Deficits*, 33 LAW & HUM. BEHAV. 329 (2009). See generally, MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 17-4.2.2 (3d ed. 2016) (2019 update).

<sup>19</sup> See *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (*Moore I*); *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*).

<sup>20</sup> Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N. MEX. L. REV. 315, 315 (2003).

<sup>21</sup> See Scott Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 487 (2014).



considered all the death penalty cases involving defendants with mental disabilities that were decided by the Fifth Circuit in the 36 years since *Strickland*, in an effort to assess its empirical impact on this population.<sup>22</sup> We concluded that the Fifth Circuit's corpus in this area of the law was "bizarre and frightening,"<sup>23</sup> noting that, "in virtually all cases, *Strickland* errors – often egregious errors - - were ignored, and in over a third of the cases in which they *were* acknowledged, defense counsel had confessed error,"<sup>24</sup> concluding that this cohort of cases was "an embarrassment to our system of criminal law and procedure."<sup>25</sup>

Here, we shift focus but stay with a related data base: to what extent has the Fifth Circuit<sup>26</sup> given meaningful life to *Atkins* and its progeny? Besides globally considering the effectiveness of counsel, we will focus primarily on decisions

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<sup>22</sup> See Perlin, Harmon & Chatt, *supra* note 8.

<sup>23</sup> *Id.* at 308.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 309.

<sup>26</sup> We have limited our analysis to cases from this Circuit (cases originating from Texas, Mississippi, and Louisiana), because of the frequent use of the death penalty in states in this Circuit (especially Texas), because a significant number of the most important death penalty cases that have reached the Supreme Court have come from this circuit, because this circuit has shown a stunning disregard of mitigation evidence in *all* sorts of death cases, and because, in a parallel area (competency to be executed), the Fifth Circuit has demonstrated an "equally-stunning disregard for constitutional law." *Id.* at 285.

revolving about the specter of malingering,<sup>27</sup> the so-called “Flynn effect,”<sup>28</sup> the type of IQ test given,<sup>29</sup> what are now known as ethnic adjustment cases,<sup>30</sup> and to a lesser extent, issues involving adequacy of counsel<sup>31</sup> and the alleged lack of remorse.<sup>32</sup> As we will discuss subsequently, most of the few “victories” at this level were pyrrhic; cases were remanded or vacated, but the initial determination was eventually reinstated.<sup>33</sup>

In the universe of 70 “*Atkins* cases” (that is, cases in the Fifth Circuit in which colorable *Atkins*-based arguments had been raised by defendants on *habeas corpus* applications), in only *nine* cases (12%) was any *actual and meaningful* relief granted to defendants (their sentences being commuted to life in prison, with one of

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<sup>27</sup> See Ellis, Everington & Delpha, *supra* note 16.

<sup>28</sup> See e.g., Geraldine Young, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 VAND. L. REV. 615 (2012).

<sup>29</sup> See e.g., James Flynn, *Tethering the Elephant*, 12 PSYCHOL. PUB. POL'Y & L. 170 (2006).

<sup>30</sup> See e.g., Shapiro, et al, *supra* note 15.

<sup>31</sup> See generally, Perlin, Harmon & Chatt, *supra* note 8.

<sup>32</sup> See e.g., William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-53 (1988). One of the co-authors (MLP) discusses this in Perlin, *Merchants and Thieves*, *supra* note 11, at 1531.

<sup>33</sup> See *infra* note 136.

those defendants having a parole hearing scheduled).<sup>34</sup> In 40 of the 70 cases (57%), the Circuit affirmed a decision below, in most cases, denying applications for writs of habeas corpus.<sup>35</sup> Eight cases (11%) are still pending, that is, there was a remand from the Fifth Circuit or a grant of a certificate of appealability, and further proceedings are currently taking place or being scheduled.<sup>36</sup> In 13 cases (18.5%), although preliminary relief had been granted, defendants were ultimately unsuccessful; as of the writing of this paper, ten have been executed, one defendant's execution has been stayed because of Covid-related reasons, one died in prison and one remains on death row.<sup>37</sup> In short, if *every* one of the defendants in pending cases is successful (an outcome that, based on the Fifth Circuit's global track record, is certainly not likely), that will mean that *Atkins'* claims were successful in just 24% of all cases.<sup>38</sup>

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<sup>34</sup> See *infra* notes 134-35. In two of these nine cases in which preliminary relief was granted, the defendant died in prison before there was a final disposition of the case (which is why we cannot characterize that relief as "meaningful"). Thus, there was *bona fide* relief in just seven. See Appendix B, listing cases.

<sup>35</sup> See *id.*

<sup>36</sup> In all cases in which defendants had *bona fide* success, the authors have written to counsel listed on Westlaw as having represented the defendant in the last reported case, seeking further developments. In some instances, counsel did respond; in others, they did not. See Appendix C.

<sup>37</sup> See *infra* notes 178-79.

<sup>38</sup> This (9/70) includes the two cases in which clients died before the relief could be implemented.

Our findings also revealed important patterns of *why* certain defendants were successful,<sup>39</sup> and the majority were unsuccessful. It was more likely that at least preliminary relief was granted in those cases in which defendants were able to rebut allegations that they were “malingering,”<sup>40</sup> in which effort to raise the so-called “Flynn effect”<sup>41</sup> were prevalent, and in which the WAIS IQ test<sup>42</sup> was relied upon; if all *three* were present, that seemed to heighten the likelihood of success. On the other hand, the findings also revealed that it was *less* likely that a defendant would be successful if the WISC IQ test<sup>43</sup> were used or there was no rebuttal for malingering claims. It also appeared that partial cases turned into failures when there was no rebuttal provided for malingering claims, when prima facie cases were made and evidentiary hearings ordered, or when Dr. George Denkowski’s discredited testimony was the initial reason for the limited success.<sup>44</sup>

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For an earlier (national) empirical evaluation of *Atkins* claims, see John Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625, 627 (2009), concluding that “*Atkins* has not opened floodgates of non-meritorious litigation”.

<sup>39</sup> Here the word “successful” is being used in a broader context. It means that, at the least, there was some *preliminary relief* granted under *Atkins*, mostly cases in which certificates of appealability were granted. *See infra* Part III (c)

<sup>40</sup> *See infra* text accompanying notes 140-54.

<sup>41</sup> *See infra* text accompanying notes 141-50, and sources cited *supra* at notes 28-29.

<sup>42</sup> *See infra* text accompanying notes 161-74. The WAIS test is explained *infra* text accompanying notes 156-58.

<sup>43</sup> *See infra* text accompanying note 161.

<sup>44</sup> *See infra* text accompanying notes 217-30.

Our roadmap is this: First, we discuss the *Atkins* case and the significance of the post-*Atkins* cases of *Hall*, *Moore I*, and *Moore II*, focusing on that trilogy's modification of *Atkins* and its reinforcement of some of *Atkins*' most salient points.<sup>45</sup> Following this, we will examine the universe of Fifth Circuit cases applying (often, misapplying) *Atkins*, explaining our methodology and revealing our findings.<sup>46</sup>

We then consider this entire area of law and policy through the lens and filter of therapeutic jurisprudence,<sup>47</sup> and subsequently apply that doctrine's principles to the database of the cases in question.<sup>48</sup> We conclude by offering some modest suggestions focusing on how we can finally, some 17 years after one of us used this phrase in a title of another law review article about *Atkins*, "giv[e] life"<sup>49</sup> to this case.<sup>50</sup>

Our title comes, in part, from Bob Dylan's song *License to Kill*,<sup>51</sup> a song, at

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45 See *infra* Part II.

46 See *infra* Part III. It is important to note that, in nearly a majority of those cases in which there was some *initial* relief offered by the Fifth Circuit, it appeared that the state argued that the defendant was malingering intellectual disability (something that virtually every expert in the world tells us is impossible to accurately do) . See *infra* text accompanying notes 152-54.

47 See *infra* Part IV (a)

48 See *infra* text accompany Part IV (b).

49 See Perlin, *supra* note 20.

50 See *infra* Part V.

51 <https://www.bobdylan.com/songs/license-kill/>. One of the co-authors (MLP) has relied on another lyric from this song once previously. See Michael L. Perlin, [Error! Main Document Only.](#) "His Brain Has Been Mismanaged with Great Skill": How Will Jurors

its base, that is about corruption and “the havoc man wreaks upon himself.”<sup>52</sup> Through its interpretation of *Atkins* cases, the Fifth Circuit has “wreak[ed] havoc” on both the litigants before it and the legal system itself. In an earlier article, I discuss the malevolent use of “ethnic adjustments” to improperly – and corruptly – make certain defendants with intellectual disabilities inappropriately eligible for the death penalty.<sup>53</sup> This entire database of cases – and the decision-making of the Fifth Circuit -- is a reflection of such corruption.

## II. The caselaw

The significance of *Atkins* is crystal-clear from Justice Stevens’ opening paragraph:

Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious

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*Respond to Neuroimaging Testimony in Insanity Defense Cases?* 42 AKRON L. REV. 885 (2009).

52 OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA 376-77 (2004).

53 See e.g., Perlin, *supra* note 15, at 1440, discussing how the use of “ethnic adjustments ... endor[s] and sanction[s] the use of this ‘corrupt science.’”

adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry*,<sup>54</sup> the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Federal Constitution.<sup>55</sup>

. In the penalty phase of Atkins’ capital murder trial, the defense called a forensic psychologist, who had testified that Atkins was -- per the language used at

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<sup>54</sup> In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court had dismissed *Penry*'s argument that there was an “emerging national consensus” against execution of persons with retardation, noting that only one state had legislatively banned such executions and rejected *Penry*'s evidence on this point of public opinion surveys as an “insufficient basis” upon which to ground an Eighth Amendment prohibition. *Id.* at 334.

<sup>55</sup> *Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002).

that time -- “mildly mentally retarded.”<sup>56</sup> After Atkins’ death sentence was set aside (for reasons unrelated to the subject of this article), the same witness testified at the rehearing. However, the state’s rebuttal witness testified that the defendant was not retarded, that he was “of average intelligence, at least” and that his appropriate diagnosis was antisocial personality disorder.<sup>57</sup> The jury resented Atkins to death, and the Virginia Supreme Court affirmed, over a dissent that characterized the state’s expert’s testimony “incredulous as a matter of law,” and argued that the imposition of the death sentence on one “with the mental age of a child between the ages of 9 and 12 [was] excessive.”<sup>58</sup>

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<sup>56</sup> *Id.* at 308. Atkins’s IQ was 59. *Id.* For a full discussion of the case and the roles of the important “players,” see Mark E. Olive, *The Daryl Atkins Story*, 23 WM. & MARY BILL RTS. J. 363 (2014).

<sup>57</sup> *Atkins*, 536 U.S. at 309 (testimony of Dr. Stanton Samenow). In other contexts, this witness has publicly stated that criminals are a “different breed of person,” who seek to manipulate the system for their own ends. “He has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that “most diagnoses of mental illness [in criminals] resulted from the criminal's fabrications.” See *Ramdass v. Angelone*, 187 F.3d 396, 410-11 n.1 (4<sup>th</sup> Cir. 1999) (Murnaghan, J., concurring, citing, in part, trial transcript), as discussed in Paul C. Giannelli, *Ake v. Oklahoma: The Right To Expert Assistance In A Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1415 (2004).

<sup>58</sup> *State v. Atkins*, 534 S.E.2d 312, 323–324 (Va. 2000).



The Supreme Court underscored that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>59</sup> It stressed, on this point, the significant changes in the 13 years since its *Penry* decision, during which time, at least 16 states (and the federal government) had enacted laws banning such executions.<sup>60</sup> This about-face provided “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal,”<sup>61</sup> a finding leading it to conclude that “it is fair to say that a national consensus has developed against it.”<sup>62</sup>

Especially important, given the Court’s subsequent decisions in *Hall* and the two opinions in *Moore*, it added that a determination as to whether *Atkins* applies involved a finding more nuanced than simply a recitation of IQ scores: mental retardation also involved, rather, “not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”<sup>63</sup>

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<sup>59</sup> *Atkins*, 536 U.S. at 312, quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>60</sup> *Id.* at 313-15. See Ellis, *supra* note 3, at 175-76.

<sup>61</sup> *Atkins*, 536 U.S. at 316.

<sup>62</sup> *Id.* at 315-16. The court added that this consensus “unquestionably reflects 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.” *Id.* at 317.

<sup>63</sup> *Id.* at 318.

The Court concluded that this cohort of defendants should be “categorically excluded from execution.”<sup>64</sup> The retribution and deterrence rationales that underlay the decision sanctioning the death penalty in *Gregg v. Georgia*<sup>65</sup> did not apply to mentally retarded offenders<sup>66</sup>; such application would be nothing more than “the purposeless and needless imposition of pain and suffering,” and hence an unconstitutional punishment.<sup>67</sup> The Court also rejected both retribution and deterrence rationales for allowing such executions.<sup>68</sup>

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Writing after the Court’s subsequent decision in *Moore v. Texas II*, requiring a far broader picture of the defendant’s mental capabilities to be painted than was typically done in the pre-*Atkins* years, Professors Alexander H. Updegrave, and Michael S. Vaughn stressed: “Although it is difficult to find these sources, it is preferable to conduct interviews with people who have had long-term interactions with the defendant during different developmental stages, including family members, teachers, neighbors, acquaintances, employers, and religious counselors.” *Evaluating Intellectual Disability after the Moore v. Texas Redux*, 47 J. AM. ACAD. PSYCHIATRY & L. 486, 493 (2019).

<sup>64</sup> *Atkins*, 536 U.S. at 318.

<sup>65</sup> 428 U.S. 153, 183 (1976).

<sup>66</sup> *Atkins*, 536 U.S. at 319.

<sup>67</sup> *Id.* at 318–19, quoting, *in part*, *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

<sup>68</sup> On retribution: “if the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” *Id.* at 319.

The Court also concluded there was an “enhanced” risk of improperly-imposed death penalty in cases involving defendants with mental retardation because of the possibility of false confessions, as well as “the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.”<sup>69</sup>

The Court expressed concern that “reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury,”<sup>70</sup> raising the specter that “mentally retarded defendants in the aggregate face a special risk

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On deterrence: “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,” quoting *Enmund*, 458 U.S. at 799, a “cold calculus” that was at the opposite end of the spectrum from behavior of mentally retarded offenders. *Atkins*, 536 U.S. at 319.

<sup>69</sup> *Id.* at 320. The Court also stressed several additional interrelated issues: the difficulties that persons with mental retardation may have in being able to give meaningful assistance to their counsel, their status as “typically poor witnesses,” and the ways that their demeanor “may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 320-21. See generally, Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court’s Mandate*, 13 BERKELEY J. CRIM. L. 215, 222-26 (2008) (discussing this aspect of *Atkins*).

<sup>70</sup> *Atkins*, 536 U.S. at 320, citing *Penry v. Lynaugh*, 492 U.S. 302, 323–25 (1989).

of wrongful execution.”<sup>71</sup> This reality led the Court to conclude that such was “excessive” and thus barred by the Constitution.<sup>72</sup>

There were two dissents, by the Chief Justice and Justice Scalia.<sup>73</sup> Importantly, for the purposes of this paper, Justice Scalia expressed his “fear of faking”:

One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned. And ... the capital defendant who feigns mental retardation risks nothing at all.<sup>74</sup>

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<sup>71</sup> *Id.* at 321. On wrongful convictions in general, see Talia Harmon et al, *Post-Furman Death Row Exonerations and Publicity in the News*, 52 CRIM. L. BULL. ART. 3 (Issue 6, 2016).

<sup>72</sup> *Atkins*, 536 U.S. at 321.

<sup>73</sup> The Chief Justice (dissenting for himself, Justice Thomas and Justice Scalia) criticized that part of the majority’s methodology that had relied upon public opinion polls, the views of professional and religious organizations, and the status of the death penalty in other nations as part of the basis for its decision. *Id.* at 328. Justice Scalia also dissented (for himself, the Chief Justice, and Justice Thomas), flatly rejecting the notion that there was a “consensus” against the execution of persons with mild mental retardation. *Id.* at 344.

<sup>74</sup> *Id.* at 353. See generally, Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1408–16 (1997) (Perlin, *Borderline*). On how Scalia’s opinion is a “pathetic recapitulation of [a] dreary myth,” see Perlin, *supra* note 20, at 344,

“Nothing has changed,” he concluded, in the nearly 300 years since Hale wrote his PLEAS OF THE CROWN:

[Determination of a person’s incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability ... and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses.<sup>75</sup>

*Atkins* was first clarified, modified, and expanded upon in *Hall v. Florida*,<sup>76</sup> which made clear that inquiries into a defendant’s intellectual disability (for these

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as discussed in Michael L. Perlin, “Simplify You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 635 n. 123 (2009) (Perlin, *Simplify*).

A recent exhaustive empirical analysis has found this fear “unfounded.” See John H. Blume, Sheri Lynn Johnson & Katherine E. Ensler, *Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation*, 82 UMKC L. REV. 335, 354 (2014); see also, John H. Blume et al, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after The Supreme Court’s Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014) (same). See also sources cited *infra* notes 146-51

<sup>75</sup> *Atkins*, 536 U.S. at 354, quoting 1 HALE, PLEAS OF THE CROWN 32–33 (1736). Justice Scalia cited no source more recent than this pre-Revolutionary War Treatise,

<sup>76</sup> 134 S. Ct. 1986 (2014). See generally, James Ellis, *Hall v. Florida: The Supreme Court’s Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383 (2014); Blume et al, *supra* note 34.

purposes) of determining whether he is potentially subject to the death penalty) cannot be limited to a bare numerical “reading” of an IQ score.<sup>77</sup> Under Florida law, if a defendant’s IQ was 70 or under, he had been deemed to be intellectually disabled; if, however, if his IQ measured at 71 or above, all further inquiries into intellectual disability<sup>78</sup>—on the question of the application of *Atkins*—were barred.<sup>79</sup> *Hall* declared this rule unconstitutional for creating an “unacceptable risk” that persons with intellectual disabilities would be executed.<sup>80</sup>

In his majority opinion in *Hall*, Justice Kennedy reiterated a major point of *Atkins*:<sup>81</sup> that this population in question faced “a special risk of wrongful execution” because “they are more likely to give false confessions, are often poor

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<sup>77</sup> *Hall*, 134 S. Ct. at 1995. Prior to the decision in *Hall*, the Fifth Circuit had ordered *Atkins* to be applied retroactively. See *Bell v. Cockrell*, 310 F.3d 330 (5<sup>th</sup> Cir. 2002). On the other hand, that court declined to apply *Hall* retroactively, while pointing out that *Hall* dealt with “a formulaic IQ standard that had been used by the state of Florida but never in Texas,” *Weathers v. Davis*, 915 F.3d 1025, 1028 (5<sup>th</sup> Cir. 2019).

<sup>78</sup> On this issue and the implications of changes in the American Psychiatric Association’s then-recent version of the Diagnostic and Statistical manual (DSM-5), see e.g., Jill V. Feluren, *Moving the Focus Away From the IQ Score Towards the Subjective Assessment of Adaptive Functioning: The Effect of The DSM-5 on the Post-Atkins Categorical Exemption of Offenders with Intellectual Disability from the Death Penalty*, 38 NOVA L. REV. 323 (2014); Kate Janse van Resnburg, *The DSM-5 and Its Potential Effects on Atkins v. Virginia*, 3 MENTAL HEALTH L. & POL’Y 61 (2013); Octavia Gory, *Safeguarding the Constitutional Rights of the Intellectually Disabled: Requiring Courts to Apply Criteria That Do Not Deviate from the Current Edition of the DSM*, 24 WIDENER L. REV. 155 (2018).

<sup>79</sup> *Hall*, 134 S. Ct. at 1994.

<sup>80</sup> *Id.*

<sup>81</sup> See 536 U.S. at 320-21.

witnesses, and are less able to give meaningful assistance to their counsel.”<sup>82</sup> This led to specific question before the Court: how was intellectual disability to be defined for purposes of executability?<sup>83</sup>

Here, he turned to the “medical community’s opinions” on this issue,<sup>84</sup> noting that that community defined intellectual disability according to *three* criteria: “significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.”<sup>85</sup> The first two of these criteria were central, he said, as they had “long been” the defining characteristic of intellectual disability.<sup>86</sup>

State law thus forbade Florida sentencing courts from considering “even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant’s failure or inability to adapt to his social and cultural

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<sup>82</sup> *Hall*, 134 S. Ct. at 1993, *quoting*, in part, *Atkins*, 536 U.S. at 320–21.

<sup>83</sup> In ruling that *Hall* had no impact on Texas’s use of the *Briseno* factors (later discredited in *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), the Fifth Circuit further noted that “Texas has never adopted the bright-line cutoff at issue in *Hall*.” *Mays v. Stephens*, 757 F.3d 211, 218 (5<sup>th</sup> Cir. 2014), *cert. den.*, 574 U.S. 1082 (2015). Although that is true, there is much more in *Hall* than merely a repudiation of a bright-line standard. *See text infra* accompanying notes 89-95.

<sup>84</sup> *Hall*, 134 S. Ct. at 1993.

<sup>85</sup> *Id.* at 1994, *citing Atkins*, 536 U.S. at 308 n.3, and *amicus curiae* brief of the American Psychological Association (APA Brief).

<sup>86</sup> *Hall*, 134 S. Ct. at 1994, *quoting* APA Brief, *supra* note 85, at 11.

environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances,”<sup>87</sup> notwithstanding the fact that the medical community accepts all of this evidence as probative of intellectual disability, whether or not an individual’s score is over or below 70.<sup>88</sup>

Florida law contradicted all professional judgment. “The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.”<sup>89</sup> Stressed the Court: “*An individual’s intellectual functioning cannot be reduced to a single numerical score.*”<sup>90</sup> It was thus error to use such a test score “without necessary adjustment.”<sup>91</sup> As the “vast majority” of states had rejected a strict 70 cutoff, and as the trend to recognize the significance of the SEM was “consisten[t],” this was, to

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<sup>87</sup> *Hall*, 134 S. Ct. at 1994.

<sup>88</sup> *Id.*, citing APA Brief, *supra* note 85, at 15–16.

<sup>89</sup> *Id.* at 1995. See Courtney Johnson, “*Moore*” Than Just a Number: Why IQ Cutoffs Are an Unconstitutional Measure for Determining Intellectual Disability, 91 S. CAL. L. REV. 753, 791 (2018), quoting *Coleman v. State*, 341 S.W.3d 221, 230 n.7 (Tenn. 2011), quoting MICHAEL B. FIRST & ALLAN TASMAN, CLINICAL GUIDE TO THE DIAGNOSIS AND TREATMENT OF MENTAL DISORDERS 17 (2d ed. 2010): “The term ‘intellectual disability’ does not refer to a single disorder or disease, but rather to a heterogeneous set of disabilities that affect the level of a person’s functioning in defined domains.”

<sup>90</sup> *Hall*, 134 S. Ct. at 1995 (emphasis added). Also, the Court added, “because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.” *Id.* at 1995-96.

<sup>91</sup> *Id.* at 1996.



the Court, “strong evidence of consensus that our society does not regard this strict cutoff as proper or humane.”<sup>92</sup>

The Court also stressed that neither Florida nor its supporting *amici* could point to “a *single* medical professional who supports this cutoff,” and that the state’s rule went against “unanimous professional consensus.”<sup>93</sup> Intellectual disability, Justice Kennedy underscored, “is a condition, not a number.”<sup>94</sup> He concluded:

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.<sup>95</sup>

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<sup>92</sup> *Id.* The Court also considered post-*Atkins* legislative developments, concluding that “every state legislature to have considered the issue after *Atkins*—save Virginia’s—... whose law has been interpreted by its courts has taken a position contrary to that of Florida.” *Id.* at 1998.

<sup>93</sup> *Id.*, at 1999, quoting in part, APA Brief, *supra* note 85, at 15 (emphasis added).

<sup>94</sup> *Id.* at 2001.

<sup>95</sup> *Id.*

An important commentary on *Hall* has underscored: “Disproportionate reliance on IQ cutoffs not only fails to capture an individual’s adaptive functioning and various sources of test error, but also ignores the necessity of comprehensive neuropsychological testing in assessing a defendant’s potential for rehabilitation.” Brian K. Cooke, Dominique Delalot & Tonia L. Werner, *Hall v. Florida: Capital Punishment, IQ, and Persons with Intellectual Disabilities*, 43 J. AM. ACAD. PSYCHIATRY & L. 230, 234 (2015).

In his dissent, Justice Alito disagreed, arguing that the positions of professional associations “at best, represent the views of a *small professional elite*,”<sup>96</sup> concluding that Florida’s standard was “sensible,” comporting with the “longstanding belief that IQ tests are the best measure of intellectual functioning.”<sup>97</sup>

The Court returned to this issue soon after its decision in *Hall*, holding, in *Brumfield v. Cain*,<sup>98</sup> that a state postconviction court’s determination that prisoner’s IQ score of 75 demonstrated that he could not possess subaverage intelligence reflected an unreasonable determination of the facts.<sup>99</sup> Then, it held in

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<sup>96</sup> *Hall*, 134 S. Ct. at 2006 (emphasis added).

<sup>97</sup> *Id.* Justice Alito cited no source to support the adjective “longstanding.”

The Chief Justice, Justice Scalia and Justice Thomas joined in this dissent.

<sup>98</sup> 135 S. Ct. 2269 (2015).

<sup>99</sup> The *Brumfield* court acknowledged that “[I]ntellectually disabled persons may have ‘strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.’” *Id.* at 2281. *Brumfield* also held that a defendant needs “only to raise a ‘reasonable doubt’ as to his intellectual disability to be entitled to an evidentiary hearing.” *Id.* see also *People v. Woodruff*, 235 Cal. Rptr. 3d 513 (2018) (hearing that defendant received after guilty verdict for capital murder to determine whether he was intellectually disabled under *Atkins* did not deny his constitutional rights to due process and equal protection of the law, where jury trial devised by trial court was essentially identical to procedures stated in *Atkins* and statute governing hearings to determine intellectual disabilities). *Brumfield* is the only Fifth Circuit case that the Supreme Court has decided on this question.

*Moore v. Texas*,<sup>100</sup> that state rules—based on superseded medical standards<sup>101</sup>—created an unacceptable risk that a person with intellectual disabilities could be

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<sup>100</sup> 137 S. Ct. 1039 (2017) (*Moore I*)

<sup>101</sup> Texas had adhered, in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Ct. Crim. App. 2004), to a standard that included seven evidentiary factors that it had articulated without any citation “to any authority, medical or judicial.” *Moore I*, 137 S. Ct. at 1046. These factors had become known as the “Of Mice and Men” factors as they were, apparently, taken from John Steinbeck’s novel of that name. See Liptak, *supra* note 5. The seven “*Briseno* factors” were these:

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

*Moore I*, 137 S. Ct. at 1046 n.6, *citing Briseno*, 135 S.W.3d, at 8–9.

executed in violation of the Eighth Amendment.<sup>102</sup> In vacating the Texas state opinion, the Supreme Court rearticulated its finding in *Hall* that “adjudications of intellectual disability should be “informed by the views of medical experts,”<sup>103</sup> and that the *Briseno* standards was “an invention ... untied to any acknowledged source.”<sup>104</sup>

After quoting its language in *Hall* that “[t]he Eighth Amendment is not fastened to the obsolete,”<sup>105</sup> the Court in *Moore I* noted:

*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.<sup>106</sup>

The state court erred, the Supreme Court concluded, by mistakenly “over-emphasiz[ing the defendant’s] perceived adaptive strengths,” rather than focusing on his “adaptive deficits.”<sup>107</sup> Further the lower court’s “attachment” to the

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<sup>102</sup> *Moore I*, 137 S. Ct. at 1044.

<sup>103</sup> *Id.*, quoting *Hall*, 135 S. Ct. at 2000.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1048, quoting *Hall*, 134 S. Ct. at 1992.

<sup>106</sup> *Id.* at 1049.

<sup>107</sup> *Id.* at 1050.

*Briseno* factors “further impeded its assessment of Moore’s adaptive functioning” as they “advanced lay perceptions of intellectual disabilities,” noting that the medical profession “has endeavored to counter [such] lay stereotypes.”<sup>108</sup> Although the Texas court had said it would abandon reliance on the *Briseno* evidentiary factors,<sup>109</sup> the Supreme Court concluded that “it seems to have used many of those factors in reaching its conclusion.”<sup>110</sup> The state court continued – in spite of the Court’s admonition in *Moore I* – to rely on “lay stereotypes of the intellectually disabled.”<sup>111</sup> Some important strains emerge from the post-*Atkins* opinions in *Hall* and *Moore*. The focus on dignity in *Hall* – mentioned at least eight times in the course of the majority opinion -- is of major significance.<sup>112</sup> This followed up its focus on

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<sup>108</sup> *Id.* at 1051-52.

<sup>109</sup> *Ex parte Moore*, 548 S.W. 2d at 560, *reversed & remanded*, 139 S. Ct. 666 (2019).

<sup>110</sup> *Moore II*, 139 S. Ct. at 671.

<sup>111</sup> *Moore I*, 137 S. Ct. at 1052. By way of example, in rejecting the intellectual disability claim, the Texas court had stressed that Moore “had a girlfriend” and a job. *Ex parte Moore*, 548 S.W. 2d at 570–71, *reversed & remanded*, 139 S. Ct. 666 (2019). The Supreme Court contrasted these stereotypes with legal criteria articulated by the American Association on Intellectual and Developmental Disabilities, criticizing the “incorrect stereotypes” that persons with intellectual disability “never have friends, jobs, spouses, or children.” *Moore II*, 139 S. Ct. at 672, quoting AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 151 (11th ed. 2010).

<sup>112</sup> See generally, Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383 (2017). Prof. Carol Sanger has suggested that dignity means that people “possess an intrinsic worth that should be recognized and respected,” and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth. Carol

dignitarian values in *Atkins*, in which it cited *Trop v. Dulles*<sup>113</sup> for the proposition that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>114</sup> Its strong focus in *Hall* underscores its commitment to these principles.<sup>115</sup>

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Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009). Treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement’s actions as well-meaning. Tamara Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1474 (2009). A notion of individual dignity-- generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference--was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions. Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J. L. & PUB. POL’Y 291, 301-02 (2017). On the relationship between dignity and therapeutic jurisprudence, see *infra* text accompanying notes 278-83.

<sup>113</sup> 356 U.S. 86, 100–01 (1958).

<sup>114</sup> *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002).

<sup>115</sup> It is important to consider Justice Alito’s curious dissent in *Hall*. His *faux* populist charge that the professional associations relied upon by the majority reflect nothing but a “small, professional elite,” *Hall*, 134 S. Ct. at 2005, flies in the face of reality. At this point in time, there is not a shred of expert support that suggests that a strict numerical cutoff can or should be the “be all and end all” of assessing intellectual disability. Yet, he adheres to his rejection of *all* professional opinion (supported by *all* the valid and reliable research).

*Moore* is significant for multiple reasons. First, as it follows on the (more distant) heels of *Atkins*, and the (more recent) heels of *Hall* and *Brumfield*, it makes clear that the Supreme Court takes very seriously the potential peril of subjecting a person with intellectual disability to execution. Second, again, it reaffirms the Court's embrace of the most up-to-date professional standards in support of its constitutional discourse. Third, its focus on the way the *Briseno* factors "advanced lay perceptions of intellectual disabilities" and how the medical profession "has endeavored to counter [such] lay stereotypes"<sup>116</sup> tells us that the Court truly does take these issues seriously.<sup>117</sup> As we note below, 21 failures in the Fifth Circuit are the direct result of that Court's use of the since-discredited *Briseno* factors.<sup>118</sup>

Importantly, for the purposes of this paper, *Moore* was relied upon by the Supreme Court in remands of four of the cases to the Fifth Circuit. Of these four,

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<sup>116</sup> *Moore I*, 137 S. Ct. at 1052; *Moore II*, 139 S. Ct. at 672.

<sup>117</sup> See PERLIN & CUCOLO, , *supra* note 18, § 17-4.2.4 at 17-125: "The Court (implicitly, to be sure) acknowledged how sanism—based predominantly upon stereotype, myth, superstition, and deindividualization, and sustained and perpetuated by our use of alleged "ordinary common sense" (OCS)—permeates the death penalty fact-finding process." On sanism in general, see *supra* note 9. On false "ordinary common sense" in general, see *infra* note 193.

<sup>118</sup> See *supra* note 101.

one resulted in actual relief,<sup>119</sup> two are still being litigated,<sup>120</sup> and one resulted in an execution.<sup>121</sup>

### III. The data and what it tells us

#### A. Methodology used in research

In order to conduct the necessary data analysis, the authors searched Fifth Circuit cases invoking *Atkins* claims on both the Lexis Nexis and Westlaw databases. The search consisted of the following steps: First, we conducted a general search of *Atkins* claims made within that on both databases. Of these, only cases in which defendants relied upon *Atkins* for the purpose of seeking reversal or vacation of their death sentence due to an intellectually disability were included in the analysis. Likewise, cases that sought to expand *Atkins* to cover conditions other than intellectual disability, such as fetal alcohol syndrome,<sup>122</sup> brain damage,<sup>123</sup> or

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<sup>119</sup> *Henderson v. Davis*, 868 F. 3d 314 (5<sup>th</sup> Cir. 2017). For earlier decisions, in *Henderson*, see *In re Henderson*, 462 F. 3d 413 (5<sup>th</sup> Cir. 2006); *Henderson v. Thaler*, 626 F. 3d 773 (5<sup>th</sup> Cir. 2010), and *Henderson v. Stephens*, 791 F. 3d 567 (5<sup>th</sup> Cir. 2015).

<sup>120</sup> *Long v. Davis*, 706 Fed. Appx. 181 (5<sup>th</sup> Cir. 2017); *Weathers v. Davis*, 659 Fed. Appx. 778 (5<sup>th</sup> Cir. 2016).

<sup>121</sup> *Martinez v. Davis*, 653 Fed. Appx. 308 (5<sup>th</sup> Cir. 2016).

<sup>122</sup> E.g., *In re Soliz*, 938 F. 3d 200 (5<sup>th</sup> Cir. 2019), *Soliz v. Davis*, 750 Fed. Appx. 282 (5<sup>th</sup> Cir. 2018)

<sup>123</sup> E.g., *Mays v. Stephens*, 757 F. 3d 211 (5<sup>th</sup> Cir. 2014); *Shore v. Davis*, 845 F. 3d 627 (5<sup>th</sup> Cir. 2017); *Tamayo v. Stephens*, 740 F. 3d 991 (5<sup>th</sup> Cir. 2014), *cert. den.*, 571 U.S. 1171 (2014) For other litigation in the *Tamayo* case, see e.g., *Tamayo v. Perry*, 553 Fed. Appx. 395 (5<sup>th</sup> Cir. 2014); *In re Tamayo*, 552 Fed. Appx. 371 (5<sup>th</sup> Cir. 2014); *Tamayo v. Thaler*, 5<sup>th</sup> Cir. 2011 U.S. App. LEXIS 26665, and *Tamayo v. Thaler*, 5<sup>th</sup> Cir. 2011 U.S. App. LEXIS 26671.



mental illness,<sup>124</sup> were also included in the collective analysis.<sup>125</sup> Cases that raised *Penry* mitigation-based claims, competency claims, non-capital cases, and cases that only referred to *Atkins* to discuss rules for raising retroactive claims were omitted.<sup>126</sup>

Through this process, 70 defendants' cases were determined to involve *Atkins* claims. Inspired by the previously referred to *Atkins* "pressure points,"<sup>127</sup> a coding sheet made up of 20 variables was created (Appendix A). Each case was coded to determine which variables were present or absent. After reading through each case, it was possible to code the variables, and data were entered to develop frequency tables to determine the prevalence of these variables among the *Atkins* claims. An exploratory analysis was conducted to determine whether specific factors were related to successful, unsuccessful, and partially successful cases.

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<sup>124</sup> See e.g., *Johnson v. Davis*, 935 F. 3d 284 (5<sup>th</sup> Cir. 2019); *In re Neville*, 440 F. 3d 220 (5<sup>th</sup> Cir. 2006); *Ripkowski v. Thaler*, 438 Fed. Appx. 296 (5<sup>th</sup> Cir. 2011); *Turner v. Epps*, 460 Fed. Appx. 322 (5<sup>th</sup> Cir. 2012); *Rockwell v. Davis*, 853 F. 3d 758 (5<sup>th</sup> Cir. 2017); *Ward v. Stephens*, 777 F. 3d 250 (5<sup>th</sup> Cir. 2015), and *Shisinday v. Quarterman*, 511 F. 3d 514 (5<sup>th</sup> Cir. 2007). For other cases involving defendants with fetal alcohol syndrome or mental illness, see *infra* note 248..

<sup>126</sup> See also e.g., *Adams v. Quarterman*, 324 Fed. Appx. 340 (5<sup>th</sup> Cir. 2009); *Panetti v. Davis*, 863 F. 3d 366 (5<sup>th</sup> Cir. 2017); *In re Hunt*, 835 F. 3d 1277 (5<sup>th</sup> Cir. 2016); *United States v. Torres*, 717 Fed. Appx. 450 (5<sup>th</sup> Cir. 2018); *In re Williams*, 806 F. 3d 322 (5<sup>th</sup> Cir. 2015); *Vasquez v. Thaler*, 389 Fed. Appx. 419 (5<sup>th</sup> Cir. 2010).

<sup>127</sup> See Perlin, *supra* note 20, at 331-32; PERLIN & CUCOLO, *supra* note 18, § 17-4.2.2, at 17-102 to 17-109.

B. An overview

When we consider the entire universe of cases in which the Fifth Circuit has considered *Atkins* claims,<sup>128</sup> some major findings emerge:

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<sup>128</sup> See *supra* Part III (a) for a description of the methodology employed in this analysis.

As we noted above, there was actual relief granted in only nine (12.9%) of the cases,<sup>129</sup> and eight cases (11.5%) are still pending.<sup>130</sup> In short, in only 17 (24%) of

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Bell v. Cockrell, 310 F. 3d 330 (5<sup>th</sup> Cir. 2002); Brumfield v. Cain, 808 F. 3d 1041 (5<sup>th</sup> Cir. 2015), *cert. den.*, 136 S. Ct. 2411 (2016); *In re Campbell*, 750 F. 3d 523 (5<sup>th</sup> Cir. 2014); Moore v. Quarterman, 342 Fed. Appx. 65 (5<sup>th</sup> Cir. 2009); Pierce v. Thaler, 604 F. 3d 197 (5<sup>th</sup> Cir. 2010); Henderson v. Davis, 868 F. 3d 314 (5<sup>th</sup> Cir. 2017); Thomas v. Quarterman, 335 Fed. Appx. (5<sup>th</sup> Cir. 2009); Martinez v. Davis, 653 Fed. Appx. 308 (5<sup>th</sup> Cir. 2016), and Wiley v. Epps, 625 F. 3d 199 (5<sup>th</sup> Cir. 2010). It is difficult to characterize the latter two as “successes,” as Martinez died in prison and Wiley died on death row.

Campbell’s case was ultimately resolved in federal court without an evidentiary hearing. The Attorney General hired an expert to review the extensive documentary evidence concerning Campbell’s background, and apparently advised counsel that the defendant was likely to prevail on his *Atkins* claim; the state thus agreed to a stipulated order finding that the defendant had an intellectual disability.

See *Campbell v. Davis*, Civil No. 4:00-cv-03844 (S.D. tex., May 10, 2019), Joint Advisory Concerning Campbell’s Intellectual Disability Claim (on file with authors)..

Campbell was subsequently re-sentenced to life in prison with the possibility of parole. He was reviewed in early 2018 for possible release on parole, and parole was officially denied on March 2, 2018, and was given a seven-year “set-off,” meaning that his next parole review was scheduled for February 2025.

See <https://offender.tdcj.texas.gov/OffenderSearch/reviewDetail.action?sid=04286378&tdcj=02141630&fullName=CAMPBELL%2CROBERT+JAMES>. His counsel believes the likelihood that Campbell will ever be released on parole is “very small.” Email from Robert Owen, Campbell’s appellate counsel, to the authors (June 8, 2020) (on file with authors).

<sup>130</sup> *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015); *Cathey v. Davis* (*In re Cathey*), 857 F. 3d 221 (5<sup>th</sup> Cir. 2017); *In re Chase*, 804 F. 3d 738 (5<sup>th</sup> Cir. 2015); *In re Johnson*, 334

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F. 3d 403 (5<sup>th</sup> Cir. 2003); Long v. Davis, 706 Fed. Appx. 181 (5<sup>th</sup> Cir. 2017); Rivera v. Quarterman, 505 F. 3d 349 (5<sup>th</sup> Cir. 2007); Sorto v. Davis, 716 Fed. Appx. 366 (5<sup>th</sup> Cir. 2018), and Weathers v. Davis, 659 Fed. Appx. 778 (5<sup>th</sup> Cir. 2016).

After the Fifth Circuit entered a stay of execution and authorized the successor petition, Johnson's case was remanded to the district court. His counsel filed a new habeas petition raising the *Atkins* claim, asking for a new hearing, and arguing that the defendant's intellectual disability is relevant to tolling (on the question of his diligence in pursuing his rights). See Johnson v. Davis, Civil Action No. 4:19-CV-03047 (S.D. Tex., Nov. 12, 2019), Amended Second or Successive Petition for Writ Of Habeas Corpus (on file with authors). His lawyer believes the odds are "pretty good" that such a hearing will be scheduled. Email from Jessica Graf, Johnson's appellate counsel, to the authors (June 8, 2020) (on file with authors).

Long recently had a state habeas evidentiary hearing; there has been no decision as of yet. Email from Scott Smith, Moore's appellate counsel, to the authors (June 8, 2020) (on file with authors). Counsel notes that Long's last four IQ tests were scored at 62, 63, 64 and 63, an "amazing consistency."

Appellate counsel has had no contact with Moore since that defendant's sentence was commuted. Email from Scott Smith, Moore's appellate counsel, to the authors (June 8, 2020) (on file with authors). See Moore v. Dretke, 2005 WL 1606437 (E.D.Tex. 2005).

Pierce is currently serving a life sentence, his death sentence having been vacated after a determination of a *Strickland v. Washington* violation, see Perlin, Harmon & Chatt, *supra* note 8, at 296. Email from David Dow, Pierce's appellate counsel, to the authors ((June 8, 2020) (on file with authors).

The post-litigation history of the *Rivera* case is the most complex of any in this cohort. The district court agreed to abate the case so that counsel could seek a commutation of the defendant's sentence. Counsel filed a request with the Texas Board of Pardons and Paroles,

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and that board unanimously agreed that defendant's sentence should be commuted to life without parole based on his intellectual disability. Counsel asked Governor Rick Perry to commute his sentence (as part of the commutation process in Texas, the Governor must agree to commutation). Over a six-year period, this was never acted upon by then-Governor Perry. Although the trial judge administratively abated the case in 2014, since Governor Abbott took office in 2015, the defendant has remained on death row (but without an execution date since 2003).

The district judge recently issued an Order on May 11, 2020 asking whether we should go forward with a hearing on equitable tolling. Counsel then (1) sent a letter to Governor Abbott on May 23, 2020, asking to have Mr. Rivera's sentence commuted to life without parole, and (2) filed a Joint Advisory with the district court, informing the court of these proceedings, and asking the court to give the Governor time to act.

In light of the decision of the Texas Court of Criminal Appeals in *Ex Parte Moore*, 587 S.W.3d 787 (Tex. Ct. Crim. App. 2019), counsel remains "hopeful" that Governor Abbott will commute Rivera's sentence. Email from Cathy Smith, Rivera's appellate counsel, to the authors (June 8, 2020) (on file with authors).

In the *Sorto* case, counsel has obtained funding to do additional testing on the question of intellectual disability. Email from David Dow, Pierce's appellate counsel, to the authors ((June 8, 2020) (on file with authors).

In *Weathers*, counsel is working on a state successor petition, following remand from Supreme Court on basis of that Court's decisions in *Moore v. Texas*. Email from John "Bud" Ritenour, Weathers' current counsel, to the authors (July 13, 2013) (on file with authors).

For all communication with counsel, see Appendix C.

the cases did *Atkins* matter at all to the defendants in question.<sup>131</sup> And, importantly, in 13 cases, nearly 18.5% of all, in which some preliminary relief had been granted, defendants were, nonetheless executed or awaiting execution.<sup>132</sup> In the context of the universe of “total failures,” two factors stand out: of the 40 “total failures,” 21 turned, at least in significant part, on the Fifth Circuit’s use of the subsequently-discredited *Briseno* factors,<sup>133</sup> and, in the 22 cases in which claims

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The authors of this article sought to contact the lawyers for this entire cohort, as well as for those in the “actual relief” category where matters were still pending. See Appendix D for the responses (We did not hear from all to whom we wrote).

<sup>131</sup> In addition to cases discussed on the merits elsewhere in this paper, see also, e.g., *Hearn v. Thaler*, 669 F. 3d 265 (5<sup>th</sup> Cir. 2012) (relying on *Briseno*); *Ladd v. Stephens*, 748 F. 3d 637 (5<sup>th</sup> Cir. 2014) (same); *Lewis v. Thaler*, 701 F. 3d 783 (5<sup>th</sup> Cir. 2012) (same); *Wilson v. Thaler*, 450 Fed. Appx. 369 (5<sup>th</sup> Cir. 2011) (same); *Woods v. Quarterman*, 493 F. 3d 580 (5<sup>th</sup> Cir. 2007) (same); *Rosales v. Quarterman*, 291 Fed. Appx. 558, 562-63(5<sup>th</sup> Cir. 2008) (*Atkins*-based COA granted out of “abundance of caution”; subsequently dismissed as defendant did not submit sufficient evidence to court). This entire cohort of cases reflect cases that appeared first to be “partial successes,” but eventually were failures.

<sup>132</sup> See *supra* note 121.

<sup>133</sup> See *Moore v. Texas*, 137 S. Ct. 1039, 1044-46 (2017) (*Moore I*). On retroactivity, in the Fifth Circuit, see *Hill v. Anderson*, 881 F.3d 483, 492 (6<sup>th</sup> Cir. 2018), *vacated and remanded sub nom.* *Shoop v. Hill*, — U.S. —, 139 S. Ct. 504 (2019) (*Moore* is not to be applied retroactively); see also, *Smith v. Comm’r, Alabama Dep’t of Corr.*, 924 F.3d 1330 (11<sup>th</sup> Cir. 2019), *cert. den.*, 2020 WL 3578738 (2020) (rule of constitutional law announced in *Moore v. Texas* that states could not disregard current clinical and medical standards in assessing whether capital defendant was intellectually disabled did not apply retroactively).

under *Strickland v. Washington* were raised, there were partial success in only three.<sup>134</sup>

When we look more closely at the universe of ostensible “successes,” important findings emerge. If a defense expert had adequately explained why malingering could be ruled out, if an expert who explained the significance of the so-called “Flynn effect,” or if the WAIS III and WAIS-R tests were used in evaluating

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The 21 cases were: *Blue v. Thaler*, 665 F. 3d 647 (5<sup>th</sup> Cir. 2011) *cert. den.*, 568 U.S. 828 (2012), *supplemented on other grounds, sub. nom.*, *Blue v. Thaler (In re Blue)*, 514 Fed. Appx. 441 (5<sup>th</sup> Cir. 2013); *In re Brown*, 457 F. 3d 392 (5<sup>th</sup> Cir. 2006); *Chester v. Thaler*, 666 F. 3d 340 (5<sup>th</sup> Cir. 2011), *cert den.*, 568 U.S. 978 (2012); *supplemented on other grounds, sub. nom.*, *Chester v. Thaler*, 671 F. 3d 494 (5<sup>th</sup> Cir. 2012); see also, *Chester v. Cockrell*, 62 Fed. Appx. 556 (5<sup>th</sup> Cir. 2003); *Clark v. Quarterman*, 457 F. 3d 441 (5<sup>th</sup> Cir. 2006), *cert den.*, 549 U.S. 1254 (2007) *Eldridge v. Davis*, 661 Fed. Appx. 253 (5<sup>th</sup> Cir. 2016); *Esparza v. Thaler*, 408 Fed. Appx. 787 (5<sup>th</sup> Cir. 2010); *Garcia v. Stephens*, 757 F. 3d 220 (5<sup>th</sup> Cir. 2014); *Guevara v. Davis*, 577 Fed Appx. 364 (5<sup>th</sup> Cir. 2014), *cert. den.*, 575 U.S. 986 (2019), further proceedings at *Guevara v. Davis*, 679 Fed. Appx. 332 (5<sup>th</sup> Cir. 2019), *cert. den.*, 138 S. Ct. 554 (2019); *Harris v. Thaler*, 464 Fed. Appx. 301 (5<sup>th</sup> Cir. 2012); *Henderson v. Davis*, 868 F.3d 314 (5<sup>th</sup> Cir. 2017), *vacated*, 137 S. Ct. 1450 (2017), on remand, 868 F.3d 314 (5<sup>th</sup> Cir. 2017); *Hines v. Thaler*, 456 Fed. Appx. 357 (5<sup>th</sup> Cir. 2011); *Mays v. Stephens*, 757 F. 3d 211 (5<sup>th</sup> Cir. 2014); *Moore v. Quarterman*, 517 F. 3d 781 (5<sup>th</sup> Cir. 2008); *Moreno v. Dretke*, 450 F. 3d 158 (5<sup>th</sup> Cir. 2006); *Perkins v. Quarterman*, 254 Fed. Appx. 366 (5<sup>th</sup> Cir. 2007); *In re Salazar*, 443 F. 3d 430 (5<sup>th</sup> Cir. 2006); *Segundo v. Davis*, 831 F. 3d 345 (5<sup>th</sup> Cir. 2016); *Taylor v. Quarterman*, 498 F. 3d 306 (5<sup>th</sup> Cir. 2007), *cert. den.*, 552 U.S. 1298 (2008); ; *United States v. Webster*, 421 F. 3d 308 (5<sup>th</sup> Cir. 2005), *cert. den.*, 549 U.S. 828 (2006), further proceedings *sub. nom. In re Webster*, 605 F. 3d 256 (5<sup>th</sup> Cir. 2010); *Williams v. Stephens*, 761 F. 3d 561 (5<sup>th</sup> Cir. 2014), *cert. den.*, 575 U.S. 952 (2015).

<sup>134</sup> *Pierce v. Thaler*, 604 F. 3d 197 (5<sup>th</sup> Cir. 2010); *Busby v. Davis*, 925 F. 3d 699 (5<sup>th</sup> Cir. 2019), and *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015).

the defendant, it is more likely that there would be “success” at the Fifth Circuit level.<sup>135</sup> On the other hand, if the WISC test were used, or if defense counsel failed to introduce expert testimony to rebut the notion that the defendant malingered on IQ tests, it was less likely that there would be “success” at the Fifth Circuit level (or at the district court level).<sup>136</sup>

Next, we first discuss the key variable factors – malingering, the *Flynn* effect and the various IQ tests – and then consider that small universe of cases in which defense counsel dealt with each of these effectively, a strategy leading in some cases to actual relief.

(1) On malingering

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<sup>135</sup> Defense counsel was “successful” in 4 of 9 (44.4%) cases in which s/he presented rebuttal to state-introduced evidence of “malingering,” in 5 of the 9 cases (55.5%) in which s/he presented evidence on the “Flynn effect,” and in 8 of 9 (88.9%) in which s/he presented evidence that the WAIS IQ test was used. Here, we use “successful” to denote cases in which actual relief was granted or ordered.

<sup>136</sup> Thus, where *Strickland v. Washington* claims were raised, defendants were successful only in two of 22 cases, or 9%. (only successful in 2/22—9% of cases). On the Fifth Circuit and *Strickland* claims in general, see Perlin, Harmon & Chatt, *supra* note 8. In cases in which the WAIS IQ test, rather than the WISC IQ test, was used, defendants have yet been successful in *none* of the 13 cases. There is one case in this category in which litigation is still ongoing in which the defendant remains potentially successful. See *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015), discussed in Appendix C. On the other hand, where the WAIS test was used, defendants were successful in 13/39—33% of cases.



It is important to first consider how allegations of malingering are construed.<sup>137</sup> In spite of the unanimity of the valid and reliable evidence that malingering is (1) ultra-rare in cases involving intellectual disability, and (2) easy to detect,<sup>138</sup> allegations of malingering persist in the data base of the cases we have studied, and the Fifth Circuit has – perhaps with “willful blindness”<sup>139</sup> – accepted these allegations,<sup>140</sup> in almost all cases (except, as we have noted, where it is

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<sup>137</sup> See generally, PERLIN & CUCOLO *supra* note 18, § 2-3.3.1 at 2-29 to 2-31.

<sup>138</sup> See e.g., RICHARD ROGERS, R. MICHAEL BAGBY & S.E. DICKENS, SIRS: STRUCTURED INTERVIEW OF REPORTED SYMPTOMS: PROFESSIONAL MANUAL. (1992). See also, e.g., Richard Rogers et al., *Explanatory Models of Malingering*, 18 LAW & HUM. BEHAV. 543 (1994); Richard Rogers et al., *Feigning Neuropsychological Impairment: A Critical Review of Methodological and Clinical Considerations*, 13 CLINICAL PSYCHOLOG. REV. 255 (1993) (cited in William Wilkinson, *Therapeutic Jurisprudence and Workers' Compensation*, 30 ARIZ. ATT'Y 28, 29 n.12 (April 1994)); Shayna Gothard et al., *Detection of Malingering in Competency to Stand Trial Evaluations*, 19 LAW & HUM. BEHAV. 493 (1995) (cited in, inter alia, David R. Katner, *Raising Mental Health Issues-Other than Insanity-in Juvenile Delinquency Defense*, 28 AM. J. CRIM. L. 73, 90 n.101 (2000), as cited in Perlin, *supra* note 74, at 635 n. 123. See also, Michel L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 715–16 nn.556–58 (1989–90), *citing sources*..

<sup>139</sup> There is “willful blindness” when individuals “deliberately shield... themselves from clear evidence of critical facts that are strongly suggested by the circumstances.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2012).

<sup>140</sup> On how courts / decisions to not concern themselves with such underlying issues in the criminal trial process is a prime example of such willful blindness, see Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 658-59 (1993) . Further, on how this sort of willful blindness is the result of “courts' succumbing to the vividness heuristic,” see Michael L. Perlin, Deborah A. Dorfman & Naomi M.

rebutted by expert testimony, and that rebuttal is combined with discussion of the *Flynn* effect and the use of the WAIS IQ test.<sup>141</sup>

As noted above, in his *Atkins* dissent, Justice Scalia direly warned that “the symptoms of this condition can readily be feigned, [and that] the capital defendant who feigns mental retardation risks nothing at all.<sup>142</sup> This fear – a close relation to the fear of faked insanity defenses<sup>143</sup>-- continues to “paralyze the legal system.”<sup>144</sup>

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Weinstein, “*On Desolation Row*”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, 24 TEX. J. ON CIV. LIBS. & CIV. RTS. 59, 86-87 (2018). The “vividness heuristic” is a cognitive-simplifying device through which a “single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.” Perlin, *Borderline*, *supra* note 74, at 1417.

<sup>141</sup> See *infra* Part II (c).

<sup>142</sup> *Atkins*. 504 U.S. at 353. Here, Scalia cited merely to Hale’s *PLEAS OF THE CROWN* 32–33 (1678). As noted above, see *supra* note 74, an earlier exhaustive empirical analysis has found this fear to be “unfounded.” See Blume, Johnson & Ensler, *supra* note 34, at 354.

<sup>143</sup> See e.g., Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 236 (2000); Perlin, *supra* note 51, at **Error! Main Document Only**, 907.

<sup>144</sup> Perlin, *Borderline*, *supra* note 74, at 1423. Again, Professors John Blume and his colleagues state bluntly – and accurately – “Justice Scalia was wrong.” Blume et al, *supra* note 43, at 396, and see *id.* at 396-98, noting that, in calculating the filing rate “n the manner most generous to Justice Scalia’s floodgates concern ... only approximately 7.7% of persons whose lives could potentially be spared by a determination of intellectual disability have raised such claims.”

Strikingly, in a parallel area—that of incompetency to stand trial cases -- courts continue to focus, almost obsessively, on testimony that raises the specter of malingering,<sup>145</sup> notwithstanding other evidence that such feigning is *attempted* in less than 8% of all such cases.<sup>146</sup> There is no evidence whatsoever that such feigning “has ever been a remotely significant problem of criminal procedure,” especially in cases of defendants with intellectual disabilities.<sup>147</sup>

Importantly, valid and reliable instruments that expose feigned malingering have been available to researchers for years, and have been written about extensively in articles in databases that are readily available to Supreme Court justices.<sup>148</sup> As of twenty years ago, over 90% of all subjects were correctly classified

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<sup>145</sup> See, e.g., *State v. Evans*, 586 N.E.2d 1042 (Ohio 1992), *cert. denied*, 506 U.S. 886 (1992); *State v. Sharkey*, 821 S.W.2d 544, 546 (Mo. Ct. App. 1991)

<sup>146</sup> Dewey Cornell & Gary Hawk, *Clinical Presentation of Malingerers Diagnosed by Experienced Forensic Psychologists*, 13 LAW & HUM. BEHAV. 375, 381–83 (1989). On the potential role of racial bias in such determinations, see *id.* at 382 (clinicians may overdiagnose malingering in black defendants); see generally, Michael L. Perlin & Heather Ellis Cucolo, “*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed*”: *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. GENDER, RACE & JUSTICE 431 (2017); James Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?*, 32 J. AM. ACAD. PSYCHIATRY LAW 21 (2004).

<sup>147</sup> See e.g., Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 276-77 (2003), concluding that mental retardation (as it was then known) was “hard to fake successfully, because the criteria require evidence that retardation began during childhood-evidence, that is, that the condition existed years before the defendant committed a capital crime”).

<sup>148</sup> See sources cited *supra* note 74.

as either faking or not faking.<sup>149</sup> As Professor James Ellis and his colleagues have noted:

Successfully feigning a lower level of intelligence on IQ tests is more difficult than jurors and, apparently, judges on the Fifth Circuit, imagine. A major reason is the structure of the tests themselves. „,“During IQ testing, malingerers will frequently miss ‘easy’ questions but answer more difficult questions correctly. Their test results often show wide ‘scatter’ and inconsistent responding.”<sup>150</sup>

**(2) The Flynn effect.**<sup>151</sup>

The “Flynn effect” refers to a theory in which the intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations. The accepted increase in scoring is approximately three points per decade or 0.33 points per year.<sup>152</sup> As many courts have already recognized, *Hall* does not mention

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<sup>149</sup> David Schretlen & Hal Arkowitz, *A Psychological Test Battery to Detect Prison Inmates Who Fake Insanity or Mental Retardation*, 8 BEHAV. SCI. & L. 75 (1990).

<sup>150</sup> Ellis, Everington & Delpha, *supra* note 16, at 1370 n. 261, quoting, in part, Philip J. Resnick & Michael R. Harris, *Retrospective Assessment of Malingering in Insanity Defense Cases*, in RETROSPECTIVE ASSESSMENT OF MENTAL STATES IN LITIGATION: PREDICTING THE PAST 101, 126 (Robert I. Simon & Daniel W. Shuman eds., 2002).

<sup>151</sup> See generally, PERLIN & CUCOLO, *supra* note 18, § 17=4.2.2 n. 688.01, at 17-104.

<sup>152</sup> See *Quince v. State*, 241 So.3d 58, 58 n. 2 (Fla. 2018). On the implications of the so-called “Flynn effect”—referring to observed gains in IQ scores over time, see, e.g., James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 PSYCHOL. BULL. 171,

the Flynn effect and does not require its application to all IQ scores in *Atkins* cases.<sup>153</sup> Although the American Association on Intellectual and Developmental Disabilities' publication, *The Death Penalty and Intellectual Disability*<sup>154</sup> may now advocate the adjustment of all IQ scores in *Atkins* cases that were derived from tests with outdated norms to account for the Flynn effect, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide."<sup>155</sup> The Fifth Circuit has never endorsed the use of the Flynn effect in death penalty cases.<sup>156</sup>

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172–77 (1987)—on determinations of intellectual disability in death penalty cases, see Young, *supra* note 23.

<sup>153</sup> *E.g.*, Black v. Carpenter, 866 F.3d 734, 746 (6th Cir. 2017) (noting that *Hall* does not even mention the Flynn effect and does not require that IQ scores be adjusted for it), *cert. den.*, 138 S. Ct. 2603 (2018); Smith v. Duckworth, 824 F.3d 1233, 1246 (10th Cir. 2016), *cert. den.*, 137 S. Ct. 1333 (2017) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability"); Ledford v. Warden, Ga. Diagnostic & Classification Prison, 818 F.3d 600, 639 (11th Cir. 2016), *cert. den.*, 137 S. Ct. 1432 (2017) ("*Hall* did not mention the Flynn effect. ... There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of *Hall* wholly inapposite").

<sup>154</sup> (Edward A. Polloway, ed. 2015). See *Quince*, 241 So.3d at 61-62.

<sup>155</sup> Moore v. Texas, 137 S. Ct. 1039, 1049 (2017).

<sup>156</sup> See *In re Cathey*, 857 F. ed 221, 227 n. 33 (5<sup>th</sup> Cir. 2017):

This Court has routinely declined to address Flynn Effect arguments, typically reciting some version of the following: "the Flynn Effect 'has not been accepted in this Circuit as scientifically valid.'" *E.g.*, *Gray v. Epps*, 616 F.3d 436, 446 n.9 (5<sup>th</sup> Cir. 2010) (quoting *In re Mathis*, 483 F.3d at 398 n.1). Importantly, however, nor has the Flynn Effect been rejected. ... We also note the Eleventh Circuit's recent

### (3) The different IQ tests

The IQ test that most commonly used in these 70 cases was the Wechsler Adult Intelligence Scale (III or IV). While over half (55.7%) of cases used the full-scale form of this test, fewer than one-quarter (22.9%) of cases analyzed either used the WAIS-R concurrently or used this shortened form instead. These tests have often been considered to be the “gold standard” for testing intellectual capacity in both clinical settings and criminal courts.<sup>157</sup> However, a 2011 study found that the

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conclusion that district courts, upon their consideration of the expert testimony, may apply or reject the Flynn Effect, which is a finding of fact reviewed for clear error. See *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016); see also *Walker v. True*, 399 F.3d 315, 322–23 (4th Cir. 2005) (directing district court to consider Flynn Effect evidence).

<sup>157</sup> David E. Hartman, *Wechsler Adult Intelligence Scale IV (WAIS IV): Return of the Gold Standard*, 16 APPLIED NEUROPSYCHOLOGY 86 (2009). See John Matthew Fabian, William W. Thompson & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 413 (2011) (“the WAIS-IV is the most current version of the WAIS tests and should be used in *Atkins* evaluations”). On the differences between the WAIS-R and the WAIS-III tests, see, see Suzanne Fitzgerald, Nicola S. Gray & Robert J. Snowden, *A Comparison of WAIS-R and WAIS-III in the Lower IQ Range: Implications for Learning Disability Diagnosis*, 20 J. APPL. RES. IN INTELLECT. DISAB. 323 (2007).

In death penalty cases, expert witnesses invariably refer to this test as the “gold standard”. See e.g., *United States v. Roland*, 281 F.Supp.3d 470, 504 n. 49 (D.N.J. 2017) (“See, e.g., D.E. No. 386, Tr. at 54 (Dr. Hunter testifying that there is very little dispute that the WAIS

Stanford-Binet (SB5) IQ test scores are consistently lower than full scale scores given by the WAIS, with a mean difference of 16.7 points.<sup>158</sup> Silverman and his colleagues believed that this difference may be due to the WAIS underestimating intellectual impairment.<sup>159</sup>

Strikingly, only one of the defendants whose cases are reviewed in this article that proffered evidence of the Wechsler Adult Intelligence Scale for Children (WISC) was potentially successful.<sup>160</sup> Also developed by David Wechsler, this IQ test is supposed to deliver a score that is comparable to the WAIS tests, with the only key difference being that the WISC is created to measure childhood intelligence scores. However, prior research has found scores on the WISC-IV to be,

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is the “gold standard” IQ test); D.E. No. 422, Tr. at 178 (Dr. Bigler testifying that WAIS is the “gold standard”); United States v. Smith, 790 F. Supp. 2d. 482, 490 (E.D. La. 2011) (“the WAIS–III is a gold standard for [intelligence] testing”); compare United States v. Montgomery, 2014 WL 1516147, \*26 (W.D. Tenn. 2014) (“Expert witnesses for both Defendant and the Government described the Wechsler family of IQ tests—including the Wechsler Intelligence Scale for Children, Revised (“WISC–R”) and the Wechsler Adult Intelligence Scale, Fourth Edition (“WAISIV”)—as the “gold standard” in intelligence testing.).

<sup>158</sup> Wayne Silverman et al, *Stanford-Binet and WAIS IQ Differences and Their Implications for Adults with Intellectual Disability (aka Mental Retardation)*, 38 INTELLIGENCE 242, 242 (2010).

<sup>159</sup> *Id.* at 248

<sup>160</sup> *Butler v. Quarterman*, 576 F.Supp.2d 805, 811-12 (E.D. Tex. 2008), *aff'd in part & vacated in part on other grounds sub. nom.*, *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015), *cert. den.*, 136 S. Ct. 1656 (2016)

on average, 11.82 points lower than scores on the WAIS-III in a sample of 16 year old special education students.<sup>161</sup> Other studies have contrastingly found the WAIS to consistently produce lower IQ scores than the WISC.<sup>162</sup>

The reason WISC scores are often used in cases involving *Atkins* claims is that this test is a well-accepted method for gauging a defendant's IQ prior to the age of 18. This is important because in order for defendants to prove that the existence of an intellectual disability that would qualify for death penalty exemption, they must be able to prove that their disability had its onset before the age of 18.<sup>163</sup> Since the WISC, as suggested by Gordon and her colleagues and by Hannon and Kicklighter., does not have consistent findings that can be compared to a defendant's current IQ score, one may conclude that despite popular belief, the WISC would be an inadequate measures of juvenile IQ.<sup>164</sup>

Even though the WISC was used in 18.6% of the cases considered in this article, only one of these cases may turn out to be successful.<sup>165</sup> Furthermore, five

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<sup>161</sup> Shirley Gordon et al, *Comparison of the WAIS-III and WISC-IV in 16-Year-Old Special Education Students*, 23 J. APPL. RES. IN INTELLECTUAL DISABILITIES 197 (2010).

<sup>162</sup> John E. Hannon. & Richard Kicklighter, *WAIS versus WISC in Adolescents*, 35 J. CONSULT. & CLIN. PSYCHOL. 179 (1970).

<sup>163</sup> See *Atkins*, 536 U.S. at 308 n.3.

<sup>164</sup> Gordon et al, *supra* note 161; Harmon & Kicklighter, *supra* note 162.

<sup>165</sup> *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015); *Chester v. Thaler*, 666 F. 3d 340 (5<sup>th</sup> Cir. 2011); *Garcia v. Stephens*, 757 F. 3d 220 (5<sup>th</sup> Cir. 2014); *Hall v. Quarterman*, 534 F. 3d 365 (5<sup>th</sup> Cir. 2008); *Hines v. Thaler*, 456 Fed. Appx. 357 (5<sup>th</sup> Cir. 2011); *In re Lewis*, 484 F. 3d 793 (5<sup>th</sup> Cir. 2007); *Matamoros v. Stephens*, 783 F. 3d 212 (5<sup>th</sup> Cir. 2015); *Mathis v. Thaler*, 616 F. 3d 461 (5<sup>th</sup> Cir. 2010); *Moore v. Quarterman*, 517 F. 3d 781 (5<sup>th</sup> Cir. 2008);



of these defendants actually had higher WISC scores than their WAIS scores.<sup>166</sup> All other defendants had similar scores between these two tests, or did not have these scores reported.

Although, as already noted, the WAIS is considered to be the “golden standard” for testing a defendant’s IQ, Silverman and his colleagues have suggested that “the WAIS might systematically underestimate severity of intellectual impairment”<sup>167</sup> These researchers compared 74 adults diagnosed with intellectual disability and found that, in every participant tested, their WAIS Full Scale IQ was higher than their Stanford-Binet Composite IQ.<sup>168</sup> The mean difference between the scores achieved on the WAIS and the scores achieved on the Stanford-Binet was an astonishing 16.7 points. In order to determine which of these tests had a more accurate measure of intelligence, Silverman and his colleagues compared their results to the results of other tests aimed at assessing intelligence, such as the Vineland Adaptive Behavior Scale, the WISC, the Leiter, and the Slosson tests of

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Simpson v. Quarterman, 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009); *In re Taylor*, 298 Fed. Appx. 385 (5<sup>th</sup> Cir. 2008); Williams v. Thaler, 602 F. 3d 291 (5<sup>th</sup> Cir. 2010), and Woods v. Quarterman, 493 F. 3d 580 (5<sup>th</sup> Cir. 2007). *Butler* was the only one of these cases that may, potentially, be a success. See Appendix C.

<sup>166</sup> Garcia v. Stephens, 757 F. 3d 220 (5<sup>th</sup> Cir. 2014); Hall v. Quarterman, 534 F. 3d 365 (5<sup>th</sup> Cir. 2008); Mathis v. Thaler, 616 F. 3d 461 (5<sup>th</sup> Cir. 2010); *In re Taylor*, 298 Fed. Appx. 385 (5<sup>th</sup> Cir. 2008), and Woods v. Quarterman, 493 F. 3d 580 (5<sup>th</sup> Cir. 2007).

<sup>167</sup> Silverman et al, *supra* note 157, at 242

<sup>168</sup> *Id.* at 246

intelligence.<sup>169</sup> Despite having a more limited data set, it was determined that the Stanford-Binet was consistently more comparable to the scores achieved on these tests than the WAIS. For instance, Silverman et. al concluded that “while there was no difference between Stanford-Binet and Vineland scores,  $t(14) = 0.22, p > 0.8$ , WAIS scores were significantly higher than their Vineland counterparts,  $t(16) = 6.74, p < .00001$ ” (2010).<sup>170</sup> Therefore, according to this research, the WAIS seems to produce consistently higher IQ scores than other tests aside from the WISC.

In sum, the introduction of the WAIS test (in numerous versions) was significantly related to a successful outcome, and contrarily, the introduction of the WISC test almost always produced an unsuccessful outcome in these cases.<sup>171</sup>

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<sup>169</sup> *Id.* See Cameron R. Pepperdine & Adam W. McCrimmon, *Test Review: Vineland Adaptive Behavior Scales, Third Edition (Vineland-3)* by Sparrow, S. S., Cicchetti, D. V., & Saulnier, C. A., 33 CAN. J. SCH. PSYCHOL. 157 (2018), (describing and reviewing the Vineland test); Isaac L. Woods Jr. et al., *What Is in a Name? A Historical Review of Intelligence Test Score Labels*, 37 J. PSYCHOEDUC. ASSESS. 692 (2019), discussing the Leiter and Slosson intelligence examinations. Also, see Sheri Lynn Johnson et al, *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1120 n.63 (2018), characterizing the Slosson test as *not* a reliable measure of IQ.

<sup>170</sup> Silverman et al, *supra* note 154, at 246

<sup>171</sup> See *supra* note 136 (discussing *Butler v. Stephens*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015)),

**c. The successes: The “trifecta” of factors making actual relief more likely: the rebuttal of malingering, the mention of the “Flynn effect” and the use of the WAIS test. \_\_**

These three factors were significantly related to a successful outcome. If these three factors were all present,<sup>172</sup> it was more likely that defendants would prevail. There were seven cases in which all three were present; in those, two defendants were re-sentenced to life in prison,<sup>173</sup> in one, execution was barred,<sup>174</sup> three are

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<sup>172</sup> We are here using the word “present” broadly. Thus, whereas there is no mention of malingering or the Flynn effect in the Fifth Circuit opinion in *In re Chase*, 804 F. 3d 738 (5<sup>th</sup> Cir. 2015), the opinion appears to adopt, for these purposes, the reasoning of an earlier state case, *Chase v. State*, 171 So.3d 463 (Miss. 2015), in which the latter court had stressed that “a circuit court should not rely on unsupported testimony of malingering at variance with the results of malingering tests,” noting that “Chase met his burden of proof of subaverage intellectual functioning.” *Id.* at 480-81. Similarly, the District Court in *Butler v. Quarterman*, 576 F.Supp.2d 805, 812 (S.D. Tex. 2008), *certificate of appealability granted*, 600 Fed. Appx. 246 (5<sup>th</sup> Cir. 2015), *aff’d*, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015), *cert den.*, 136 S. Ct. 1656 (2016), had noted there was no evidence of malingering. Also, in an earlier proceeding in *Weathers v. Davis*, 659 Fed. Appx. 778 (5<sup>th</sup> Cir. 2016), the court had noted that there was testimony that a defense witness did not believe that the defendant was malingering. *Weathers v. Stephens*, 2015 WL 5098872, \* 14 (E.D. Tex. 2015).

<sup>173</sup> *Moore v. Quarterman*, 342 Fed. Appx. 65 (5<sup>th</sup> Cir. 2009); *Brumfield v. Cain*, 808 F. 3d 1041 (5<sup>th</sup> Cir. 2015), *cert. den.*, 136 S. Ct. 2411 (2016).

<sup>174</sup> *Wiley v. Epps* 625 F. 3d 199 (5<sup>th</sup> Cir. 2010). This defendant, however, died in prison awaiting further proceedings. See <http://www.prisontalk.com/forums/showthread.php?t=552638>.

pending further developments,<sup>175</sup> In just one, has an execution been scheduled.<sup>176</sup> Although these findings do not reflect either causation or correlation, they prove that a significant relationship exists between the independent factors and case outcomes..

Thus, by way of example, in *Brumfield v. Cain*,<sup>177</sup> an expert “ruled out malingering as a possible explanation for Brumfield's IQ scores”<sup>178</sup> (on WAIS tests administered by both the defense and state experts),<sup>179</sup> and the opinion discusses

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<sup>175</sup> In re Chase, 804 F. 3d 738 (5<sup>th</sup> Cir. 2015); Weathers v. Davis, 659 Fed. Appx. 778 (5<sup>th</sup> Cir. 2016); Butler v. Stephens, 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015), *on remand from* 600 Fed. Appx. 246 (5<sup>th</sup> Cir. 2015). *Chase* had demonstrated that he met the statutory requirements to file a successive habeas application (cite); Weathers’ case has been remanded to state trial court for a new hearing in light of *Moore II*, email from John “Bud” Ritenour, Weathers’ current counsel, to the authors (July 13, 2013) (on file with authors), and in *Butler*, the District Attorney’s office has agreed to new IQ testing (now postponed because of prison closure due to Covid), and agrees that, if Butler’s score is 75 or below, he will agree to a resentencing, *Ex parte* Butler, No. WR-41, 121-03 (Tex. Crim. Ct. App., Sept. 18, 2019), on Application for Writ of Habeas Corpus, Cause No. 511112 in the 185<sup>th</sup> District Court, Harris County (on file with authors).

<sup>176</sup> Busby v. Davis, 925 F. 3d 699 (5<sup>th</sup> Cir. 2019), *supplementing* 892 F. 3d 735 (5<sup>th</sup> Cir. 2018), and 677 Fed. Appx. 884 (5<sup>th</sup> Cir. 2017). The execution had been scheduled for May 6, 2020, but was postponed because of Covid. See <https://www.kwtx.com/content/news/Execution-of-Texas-inmate-convicted-of-killing-professor-77-delayed-570014061.html>

<sup>177</sup> 808 F. 3d 1041 (5<sup>th</sup> Cir. 2015).

<sup>178</sup> *Id.* at 1047 n. 8.

<sup>179</sup> *Id.* at 1047-48.

the possible impact of the *Flynn effect as well*.<sup>180</sup> In *Wiley v. Epps*,<sup>181</sup> where defendant was given WAIS tests,<sup>182</sup> an expert explained the significance of the *Flynn* effect,<sup>183</sup> the court concluded that “each of the experts who testified at the evidentiary hearing conducted testing to probe for malingering. Dr. O'Brien, Dr. Swanson, and Dr. Macvaugh each indicated that there was no evidence that Wiley was feigning or malingering intellectual or adaptive functioning deficits.<sup>184</sup> And, in *Busby v. Davis*,<sup>185</sup> in which defendant had been given the WAIS test,<sup>186</sup> the court considered the impact of the *Flynn* effect and the fact that the defense expert found no malingering,<sup>187</sup> in holding that reasonable jurists could debate whether the district court had properly denied habeas petitioner's *Atkins* claim, that he was intellectually disabled and thus ineligible for execution, so that a certificate of appealability was warranted.<sup>188</sup>

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<sup>180</sup> *Id.* at 1060 n. 27 (noting that it “was not necessary to decide whether to recognize the Flynn effect in this case, however, as Brumfield's scores satisfy the first prong of the intellectual disability test without a Flynn effect adjustment”).

<sup>181</sup> 625 F. 3d 199 (5<sup>th</sup> Cir. 2010).

<sup>182</sup> *Id.* at 202-03.

<sup>183</sup> *Id.* at 203.

<sup>184</sup> *Id.* at 221-22.

<sup>185</sup> 677 Fed. Appx. 884 (5<sup>th</sup> Cir. 2017).

<sup>186</sup> *Id.* at 889.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

#### A. The failures: The Fifth Circuit's global errors

It is important here to specifically consider cohorts of cases in which the Fifth Circuit – clearly and beyond doubt – relied on false science<sup>189</sup> and false “ordinary common sense”<sup>190</sup> to reject defendants’ *Atkins* claims: These cases reflect its obsessive fear of defendants successfully malingering intellectual disability,<sup>191</sup> its

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<sup>189</sup> On how “junk science” improperly influences how a criminal defendant is treated in the judicial system, see Michael L. Perlin & Alison J. Lynch, “*Mr. Bad Example*”: *Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299, 312 (2016), and Michael L. Perlin, “*Deceived Me into Thinking/I Had Something to Protect*”: *A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Fact-finders Rely on Heuristic Reasoning and “Ordinary Common Sense*,” 13 LAW J. SOC’L JUST. 88, 118-19 (2020).

<sup>190</sup> “Ordinary common sense” is “a powerful unconscious animator of legal decision making that reflects “idiosyncratic, reactive decisionmaking,” and “is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities.” Perlin, Harmon & Chatt, *supra* note 8, at 281, citing, inter alia, Michael L. Perlin, *Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning*, 69 NEB. L. REV. 3, 22-23, 29 (1990), and Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737-38 (1988).

<sup>191</sup> See e.g., Mossman, *supra* note 144, at 276-77. One of the authors (MLP) wrote this just months after the decision in *Atkins*:

Dr. Dorothy Lewis documented that juveniles imprisoned on death row were quick to tell her and her associates, “I’m not crazy,” or “I’m not a retard.” Moreover,

rejection of the validity of the WISC test,<sup>192</sup> its reliance on so-called ethnic adjustments,<sup>193</sup> its failure to understand how most of us *misunderstand* expressions of remorse,<sup>194</sup> and, as discussed extensively in our previous article, its failures to implement *Strickland v. Washington* in cases involving defendants with mental disabilities.<sup>195</sup>

### 1. Failure to rebut malingering

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a person with mental retardation will often attempt to conceal his condition from lawyers, not realizing that his condition could constitute a major part of his defense. Especially in a case in which counsel is substandard, this could-again-be fatal to a defendant who ought otherwise come under the *Atkins* umbrella.

Perlin, *supra* note 20, at 342, citing, *inter alia*, Joseph A. Nese, Jr, *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 383 (2002), and ROSA EHRENREICH & JAMIE FELLNER, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 4 (Malcolm Smart & Cynthia Brown eds., Human Rights Watch) (2001)).

<sup>192</sup> See *infra* Part III (d)(2).

<sup>193</sup> On how such us reflects a corruption of the criminal justice system, see Perlin, *supra* note 15.

<sup>194</sup> See *infra* Part III (d) (4).

<sup>195</sup> See Perlin, Harmon & Chatt, *supra* note 8 (Chatt, the third author of that paper, is not a co-author of this paper).

As we have already noted, if defense counsel did not rebut allegations of malingering, *Atkins* claims were practically universally unsuccessful.<sup>196</sup> Thus, in *Simpson v. Quarterman*,<sup>197</sup> the Court concluded that Simpson “had a very strong incentive to malingering in light of *Atkins* and *Briseno* when being tested by [the examining psychologists] in 2008,” some eight years after his conviction and death sentence.<sup>198</sup> Interestingly, the Court noted that the state’s expert “admitted he has tested many defendants for the State of Texas, but could not name one he found not to be malingering.”<sup>199</sup> It does not appear that this issue was ever dealt with by trial counsel. In *Ladd v. Stephens*,<sup>200</sup> the Court found that the defendant was properly

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<sup>196</sup> *Clark v. Quarterman*, 457 F. 3d 441 (5<sup>th</sup> Cir. 2006); *Ibarra v. Davis*, 786 Fed. Appx. 420 (5<sup>th</sup> Cir. 2019); *Ladd v. Livingston*, 777 F. 3d 286 (5<sup>th</sup> Cir. 2015); *Ladd v. Stephens*, 748 F. 3d 637 (5<sup>th</sup> Cir. 2014), *cert. den.*, 574 U.S. 880 (2014); *Moreno v. Dretke*, 450 F. 3d 158 (5<sup>th</sup> Cir. 2006); *Perkins v. Quarterman*, 254 Fed. Appx. 366 (5<sup>th</sup> Cir. 2007); *Rockwell v. Davis*, 853 F. 3d 758 (5<sup>th</sup> Cir. 2017); *Simpson v. Quarterman*, 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009), *dismissing appeal from* 593 F.Supp.2d 922 (E.D. Tex. 2009); *Taylor v. Quarterman*, 498 F. 3d 306 (5<sup>th</sup> Cir. 2007), *cert. den.*, 552 U.S. 1298 (2008), for subsequent developments on other grounds, see *In re Taylor*, 298 Fed. Appx. 385 (5<sup>th</sup> Cir. 2008); *Williams v. Stephens*, 761 F. 3d 561 (5<sup>th</sup> Cir. 2014). Although no version of the root word “malingering” appears in the litigation in *Woods v. Quarterman*, 493 F. 3d 580, 586 (5<sup>th</sup> Cir. 2007), the court there concluded that “Woods’ lowest IQ score *was attained when he had an incentive to perform poorly*, but Woods’ IQ scores were higher when he had no such incentive” (emphasis added).

<sup>197</sup> 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009), *cert. den.*, 558 U.S. 1039 (2009).

<sup>198</sup> 593 F. Supp. 2d 922, 936 (E.D. Tex. 2009), *appeal dismissed*, 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009), *cert. den.*, 558 U.S. 1039 (2009),

<sup>199</sup> *Id.* at 937

<sup>200</sup> 748 F. 3d 637 (5<sup>th</sup> Cir. 2014), *cert. den.*, 574 U.S. 880 (2014). For later proceedings, see *Ladd v. Livingston*, 777 F.3d 286 (5<sup>th</sup> Cir. 2015), *cert. den.*, 135 S. Ct. 1197 (2015).



denied habeas relief, notwithstanding the testimony of his expert witness that he had “significantly sub-average intellectual functioning,”<sup>201</sup> accepting a state expert’s opinion that the defendant had a propensity for ‘prevarication’ and low motivation,” and that defendant’s subsequent IQ score of 60 was “unreliable because of malingering.”<sup>202</sup> And, in *Woods v. Quarterman*,<sup>203</sup> a case in which the defendant’s IQ scores fluctuated from 68 to 86,<sup>204</sup> in finding that the state court’s decision that he failed to demonstrate that he suffered from sub-average general intellectual functioning was not unreasonable,<sup>205</sup> the court concluded that “Woods’ IQ scores were higher when he had no ...incentive to perform poorly,” suggesting that he was malingering.<sup>206</sup> No effort from the defense to refute this suggestion was mentioned in the opinion.<sup>207</sup>

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<sup>201</sup> *Id.* at 641. This conclusion was based on an IQ score of 67 that Ladd received at age 13, as well as an opinion from the Texas Youth Commissions psychiatrist that “Ladd appeared mentally retarded.” *Id.*

<sup>202</sup> *Id.* at 643

<sup>203</sup> 493 F. 3d 580 (5<sup>th</sup> Cir. 2007). For subsequent proceedings, see *In re Woods*, 296 S.W.3d 587 (Tex. Ct. Crim. App. 2009), *cert. den.*, 558 U.S. 1073 (2009).

<sup>204</sup> *Id.* at 586.

<sup>205</sup> *Id.*

<sup>206</sup> *Woods v. Quarterman*, 493 F3d 580 (2007) at 586

<sup>207</sup>

Litigation is continuing in *Long v. Davis*, 706 Fed. Appx. 181 (5<sup>th</sup> Cir. 2017). See Appendix C.

## 2. Use of WISC test

Also, in those cases in which the defendant relied upon the WISC IQ test, his efforts on appeal were uniformly thwarted. Thus, in *Taylor v. Quarterman*,<sup>208</sup> the doctor who administered the WISC test when Taylor was a child (ten years old) had stated that Taylor “was capable of performing better than a 75, had he tried.”<sup>209</sup> Also, a WAIS-III score of 65 was discounted by the state habeas court “due to the incentive to malingering.”<sup>210</sup> Similarly, in *In re Mathis*,<sup>211</sup> although the defendant had been scored at 64 and 62 in WAIS tests, his WISC score of 79 led – in part -- to the Court rejecting his claims.<sup>212</sup> And, in *Simpson v. Quarterman*,<sup>213</sup> where the defendant had received scores of 71 on the WISC test (in sixth grade) and 78 (at age 15), the fact that he achieved a full-scale score of 71 on the WAIS-III in 2000, resulted in part in the rejection of Simpson’s claims.<sup>214</sup>

## 3. Use of “ethnic adjustments”

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<sup>208</sup> 498 F. 3d 306 (5<sup>th</sup> Cir. 2007).

<sup>209</sup> *Id.* at 307.

<sup>210</sup> *Id.* at 308.

<sup>211</sup> *In re Mathis*, 483 F. 3d 395 (5<sup>th</sup> Cir. 2007)

<sup>212</sup> *Id.* at 397-98.

<sup>213</sup> 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009).

<sup>214</sup> *Id.*, 593 F.Supp.2d 922, 934 (E.D. Tex. 2009), *appeal dismissed*, 341 Fed. Appx. 68 (5<sup>th</sup> Cir. 2009), *cert. den.*, 558 U.S. 1039 (2009).

Some prosecution experts have endorsed the use of what have been characterized as “ethnic adjustments” in death penalty cases--artificially adding points to the IQ scores of minority death penalty defendants--so as to make such defendants, who would otherwise have been protected by *Atkins* and, later, by *Hall v. Florida*, eligible for the death penalty.<sup>215</sup> In his comprehensive discussion of this issue, Prof. Robert Sanger accurately concluded that “ethnic adjustments” are not appropriate, clinically or logically, when calculating a defendant's IQ score for *Atkins* purposes.”<sup>216</sup> Further, he relied on epigenetics<sup>217</sup> to demonstrate that environmental factors--such as childhood abuse, poverty, stress, and trauma--can result in lower IQ scores, and that “ethnic adjustments” make it *more* likely that such individuals--authentically “intellectually disabled”-- will be sentenced and put to death.<sup>218</sup>

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<sup>215</sup> Sanger, *supra* note 15. On how some prosecutors “suggest that although a capital defendant may ‘technically’ be considered retarded, he nonetheless has ‘street smarts’--and hence should receive the highest penalty,” see Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 12 (2002).

<sup>216</sup> Sanger, *supra* note 15, at 146.

<sup>217</sup> “The causal interactions between genes and their products, which bring the phenotype into being.” See Conrad H. Waddington, *The Basic Ideas of Biology*, in *THE ORIGIN OF LIFE* 1, 9-10 (Conrad H. Waddington ed., 1968).

<sup>218</sup> Sanger, *supra* note 15, at 145-46; see also Fabian, Thompson & Lazarus, *supra* note 153 (noting that the steady increase of the general population's IQ scores over time could be attributed to cultural changes, improved nutrition, testing experience, changes in schooling and child-rearing practices, and improved technology).

In three cases, the Fifth Circuit affirmed death sentences in cases in which the discredited “ethnic adjustment” theory was used.<sup>219</sup> Thus, in *Hernandez v.*

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Some of the forensic psychologists who have employed such adjustments in their testimony are named and criticized in Shapiro et al, *supra* note 15 (discussing ethical issues raised by such testimony).

On how the use of such fraudulent testimony may rise to the level of prosecutorial misconduct, see Perlin, *supra* note 15. See *id.* at 1453, quoting, in part, James K. McAfee & Michele Gural, *Individuals with Mental Retardation and the Criminal Justice System: The View from States' Attorneys General*, 26 MENTAL RETARDATION 5, 5 (1988):

There has never been any “pushback” against the argument that prosecutors regularly minimize the existence of intellectual disability. Tellingly, a survey of state attorneys general revealed that the identification of persons with intellectual disability in the criminal justice system “is neither systematic nor probable.”

<sup>219</sup> Two cases involving Dr. Denkowski’s testimony had different ultimate dispositions. In *Pierce v. Thaler*, 604 F. 3d 197, 212 (5<sup>th</sup> Cir. 2010), where the witness “opined that Pierce’s IQ might actually be slightly higher than this score suggested because Pierce suffered from moderate anxiety and mild depression, which may have suppressed the score,” the defendant was ultimately resentenced to life without parole. See Allan Turner, *DA’s Office Plans to Not Seek Execution of Man on Death Row Since 1978*, Chron (Aug. 30, 2012, 3:00 AM), <https://www.chron.com/news/houston-texas/article/DA-s-office-plans-to-not-seek-execution-of-man-on-3825169.php>. In *Butler v. Stephens*, 625 Fed. Appx. 641, 644 (5<sup>th</sup> Cir. 2015), where the district court had found Denkowski to be “credible,” four years later, the District Attorney’s office agreed to new IQ testing, and will agree to a resentencing if Butler’s score is 75 or below. *Ex parte Butler*, No. WR-41, 121-03 (Tex. Crim. Ct. App., Sept.

*Stephens*,<sup>220</sup> the defendant's appeal was denied. "Although the inmate's IQ scores were generally within the range of mental retardation."<sup>221</sup> There, where defendant's IQ scores ranged from 52 to 57, to, on one occasion, 87,<sup>222</sup> a state's witness resolved the ambiguities by giving defendant a score of 70 when "his results were scaled to Mexican norms."<sup>223</sup> Significantly, the Circuit concluded that "IQ tests below 70 may not be mentally retarded"<sup>224</sup> Again, it emphasized that "When

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18, 2019), on Application for Writ of Habeas Corpus, Cause No. 511112 in the 185<sup>th</sup> District Court. Harris County (on file with authors).

Denkowski was also a witness in *Hall v. Quarterman*, 534 F.3d 365, 371 n. 27 (5<sup>th</sup> Cir. 2008), a case in which "the trial court relied [on Denkowski's affidavit] in finding that Hall was not mentally retarded, [an affidavit that] *indicated incorrectly that Dr. Church's examination of Hall produced an IQ score of 72; the score was in fact a 67*" (emphasis added).

<sup>220</sup> 537 Fed. Appx. 531 (5<sup>th</sup> Cir. 2013).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 537.

<sup>223</sup> *Id.* at 536.

In this case, it appears that a "suggestion of malingering" or at least "intentional underperforming" of the defendant was accused and may partially explain one witness's opinion that the defendant "was not mentally retarded," and that that the defendant's "motivational variables likely played a role in the below-average scores." *Id.* at 537 (witness did not interview defendant himself).

<sup>224</sup> *Id.* at 539. Here, pointedly, the Circuit relied on its prior opinion in *Lewis v. Thaler*, 701 F.3d 783, 792 (5<sup>th</sup> Cir.2012). which quoted the since-discredited case of *Briseno*, 135 S.W.3d at 7 n. 24),

scaled to Mexican norms, Hernandez scored exactly 70 on the one full-scale WAIS-III test.”<sup>225</sup> The district court further found evidence that “Hernandez’s motivation to score lower could have been a factor in the test results.”<sup>226</sup>

In *Maldonado v. Thaler*,<sup>227</sup> the state’s expert, Dr. George Denkowski, was a clinical psychologist who had been severely criticized and discredited based on his methodology and testing protocols and “evaluation and scoring of Maldonado’s intellectual functioning.”<sup>228</sup> Although the Circuit conceded that the Texas Board of Psychological Examiners had found that “the adjustments [Dr. Denkowski used] were not scientifically valid,”<sup>229</sup> it nonetheless found that the defendant “cannot

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<sup>225</sup> *Id.* at 539.

<sup>226</sup> *Id.*

<sup>227</sup> 625 F.3d 229 (5<sup>th</sup> Cir. 2010).

<sup>228</sup> *Id.* at 234. See Shapiro et al, *supra* note 15, at 266-67, discussing complaints filed with the Board of Psychological Examiners in 2009 in Texas, noting that that Dr. Denkowski had used “unscientific methods that artificially inflated intelligence scores in order to make defendants eligible for the death penalty.” See also, Perlin, *supra* note 15, at 1451-52, discussing how District Attorneys in Texas “continued to use Dr. Denkowski as an expert witness even *after* he was judicially rebuked,” quoting Brandi Grissom, *County Used Doctor After Methods Challenged*, TEX. TRIB. (Apr. 26, 2011), <https://www.texastribune.org/2011/04/26/county-used-doctor-after-methods-challenged/> (reporting that Harris County continued to pay Denkowski to examine defendants for intellectual disabilities “even after a judge harshly rebuked his work”). In 2011, Denkowski had entered into a settlement agreement in which his license was “reprimanded.” See *Ex parte Matamoros*, 2012 WL 4713563, \*1 (Tex. Ct. Crim. App. 2012)..

<sup>229</sup> *Maldonado*, 625 F. 3d at 234.

meet his burden of showing that the state court's finding that he is not mentally retarded was either an unreasonable application of *Atkins* or an unreasonable determination of the facts in light of the evidence presented in state court."<sup>230</sup>.

Although noting that the "upward adjustments that Dr. Denkowski made to Maldonado's WAIS-III score" were of greater concern" because they "did not result from any statistical formula or established methodology and [because] Dr. Denkowski lacked the cultural knowledge to properly and accurately adjust for the effects of Maldonado's impoverished upbringing in rural Mexico,"<sup>231</sup> the court concluded that, even if "Dr. Denkowski's testimony is completely disregarded, with the remaining evidence, [defendant] could not meet his burden for obtaining federal habeas relief."<sup>232</sup>.

Finally, in *Rivera v. Quarterman*,<sup>233</sup> where the court ultimately found that the defendant was intellectually disabled, suffering from "significant sub-average

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<sup>230</sup> *Id.* at 236. Denkowski administered the WAIS III test with the assistance of an interpreter who was licensed in Spanish/English translation, but who did not have a background in psychology and had no previous experience translating a "psychological instrument before Maldonado's examination." *Id.* at 237.

<sup>231</sup> *Id.* at 238.

<sup>232</sup> *Id.* The defendant also argued unsuccessfully that Dr. Denkowski did not take the "Flynn Effect" into consideration.

<sup>233</sup> 505 F. 3d 349 (5<sup>th</sup> Cir. 2007).

intellectual functioning,”<sup>234</sup> the state had argued for the use of ethnic adjustments, claiming that defendant’s “verbal IQ score of 66 [was] unreliable and dragged down his overall result.”<sup>235</sup>

Here, the state also argued that the district court erred in rejecting four pre-Atkins IQ scores of 70, 85, 92 and 80; these were rejected because “they were not from full-scale Wechsler tests,”<sup>236</sup> Because, in part, of expert testimony that “IQ tests given in the criminal justice system don’t hold much weight because of the wide variation,”<sup>237</sup> the court ultimately found “no clear error in the district court’s determination that Rivera has significantly sub-average intellectual functioning,” affirming the finding that “Rivera is mentally retarded.”<sup>238</sup>

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<sup>234</sup> *Id.* at 361.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 362

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 362-63.

In yet another case involving Dr. Denkowski’s testimony, the defendant had presented evidence that that witness had “entered into a settlement agreement with the Texas State Board of Examiners of Psychologists in which he agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings.” *Matamoros v. Stephens*, 539 Fed. Appx. 487, 489 (5<sup>th</sup> Cir. 2013), *aff’d*, 783 F. 3d 212 (5<sup>th</sup> Cir. 2015). In subsequent proceedings, however, the court concluded that, even after excluding Dr. Denkowski’s testimony, the defendant has not shown “clearly and convincingly that the court of Criminal Appeal’s decision that the defendant did not meet his burden of proof—was unreasonable.” 783 F. 3d at 220.



#### 4. Alleged lack of remorse

The Supreme Court is cognizant of how the assessment of remorse and compassion might be the dispositive factor to jurors in death penalty cases.<sup>239</sup> Concurring in *Riggins v. Nevada*, in which the Supreme Court held that competent insanity-pleaders had a qualified right to refuse medication at trial,<sup>240</sup> Justice Kennedy underscored that “[a]ssessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.”<sup>241</sup> In that case, Riggins had been medicated with 800 milligrams of the drug Mellaril, considered to be within the “toxic range”;<sup>242</sup> an expert in the case testified that that was sufficient dosage with which to “tranquilize an elephant.”<sup>243</sup> Justice Kennedy relied on research by William Geimer and Jonathan Amsterdam, whose research demonstrated that assessment of remorse might be the dispositive factor to jurors in death penalty cases.<sup>244</sup>

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<sup>239</sup> See generally Michael L. Perlin & Heather Ellis Cucolo, “*Something’s Happening Here/But You Don’t Know What It Is*”: *How Jurors (Mis)Construe Autism in the Criminal Trial Process* (manuscript in progress).

<sup>240</sup> 504 U.S. 127 (1992).

<sup>241</sup> *Id.* at 144.

<sup>242</sup> *Id.* at 137.

<sup>243</sup> *Id.* at 143.

<sup>244</sup> *Id.* (citing Geimer & Amsterdam, *supra* note 32, at 51-53); see also, Perlin, *Merchants and Thieves*, *supra* note 32, at 1531.

Subsequently, in *Atkins*, it held that demeanor of such defendants may create an unwarranted impression of a lack of remorse for their crimes.<sup>245</sup> This impression, of course, in the death penalty context, could “enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger.”<sup>246</sup>

In particular, judges must explain to jurors that they cannot rely on their false “ordinary common sense”<sup>247</sup> about what remorse “looks like” or what an empathetic person “looks like.”<sup>248</sup> Again, judges must make clear that jurors’

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<sup>245</sup> *Atkins*, 536 U.S. at 321. The Court here also noted the difficulties that persons with intellectual disabilities (then characterized as mental retardation) may have in being able to give meaningful assistance to their counsel as well as their status as “typically poor witnesses.” *Id*

<sup>246</sup> See John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty* 55 S.C. L. REV. 93, 108 (2003).

<sup>247</sup> See *supra* note 190, citing Perlin, Harmon & Chatt, *supra* note 8, at 281, explaining the meaning of “ordinary common sense” in this context, citing Sherwin, *supra* note 190, at 737-38, and , and Perlin, *supra* note 190, at 29.

OCS presupposes two “self-evident” truths: first, everyone knows how to assess an individual’s behavior; and second, everyone knows when to blame someone for doing wrong. Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 17 (1996). It is self-referential and non-reflective; “I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is.” Perlin & Weinstein, *supra* note 11, at 88 .

<sup>248</sup> This, of course, presupposes that judges do not fall prey to the same sort of false OCS. See e.g. Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism*, 5 J. INTELLECT. DISAB. & OFFENDING BEHAV. 97 (2014) (interviewed judges believed that the behavior of persons with autism was not under their control).

“ordinary common sense” is simply wrong – that it is premised on media stereotypes or, perhaps, the heuristic of one person they may know, and that it cannot be left unchecked or guide their decisions in reaching a verdict.<sup>249</sup>

In cases in which *Atkins* claims were rejected, in cases where they were successful, and in cases involving other mental disability issues beyond those

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<sup>249</sup> See e.g., Colleen Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT'L J. CRIMINOL SOCIOLOG. 46 (2014). On how OCS is supported by cognitive-simplifying heuristics, see. Perlin & Cucolo, *supra* note 146, at 453.

related specifically to intellectual disability, the Fifth Circuit decisions reveal no reflection on the remorse-related issues just discussed.<sup>250</sup>

#### 5. Issues related to effectiveness of counsel

As discussed above, in *Strickland v. Washington*, the Supreme Court had found that counsel would be ineffective if his or her “conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.”<sup>251</sup> The Court there established a two-part test to assess whether counsel’s assistance was “so defective as to require reversal”:<sup>252</sup>

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<sup>250</sup> See e.g., *Mathis v. Davis*, 124 Fed. Appx. 865 (5<sup>th</sup> Cir. 2005) (jailhouse informant testified that “Mathis confessed to the killings and expressed no remorse”) (*Atkins* claim failed); *Williams v. Stephens*, 761 F. 3d 561, 568 (5<sup>th</sup> Cir. 2014) (state experts testified as to defendant’s “lack of remorse” (*Atkins* claim failed); *Martinez v. Davis*, 653 Fed. Appx. 308, 313 (5<sup>th</sup> Cir. 2016) (family members testified that defendant “showed little remorse”) (case remanded in light of *Moore*, see 137 S. Ct. 1432 (2017); defendant subsequently died in prison before remand proceedings could take place); *Sells v. Stephens*, 536 Fed. Appx. 483, 486 (5<sup>th</sup> Cir. 2013) (state’s witness testified that defendant “displayed no remorse”) (defendant’s case excluded from sample of cases studied because his diagnosis was fetal alcohol syndrome); *Sigala v. Quarterman*, 338 Fed. Appx. 388, 395 (5<sup>th</sup> Cir. 2009) (quoting favorably state court opinion, see *Ex parte Sigala*, No. 62,283-01, slip op. at 21 (Tex. Crim. App., Aug. 31, 2005), that defendant “did not express remorse”) (defendant’s case excluded from sample of cases studied because his diagnosis was mental illness); *Coble v. Quarterman*, 496 F.3d 430, 438 (5<sup>th</sup> Cir. 2007) (immediately following the murders, “Coble made comments that indicated his lack of remorse”) (same reason for exclusion).

<sup>251</sup> 466 U.S. 668, 686 (1984).

<sup>252</sup> *Id.* at 687.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

This "objective," "reasonably effective assistance" standard was to be measured by "simply reasonableness under prevailing professional norms."<sup>253</sup> As part of this measurement, the Court would "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>254</sup> We must keep this "pallid" standard<sup>255</sup> in mind throughout this investigation.<sup>256</sup>

Thus, efforts by *Atkins* defendants to come under the umbrella of the standard of adequacy of counsel announced in *Strickland* were nearly uniformly

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<sup>253</sup> *Id.* at 687-88

<sup>254</sup> *Id.*, at 689.

<sup>255</sup> See e.g., Michael L. Perlin, "And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact Of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial Process, 2009 STANFORD TECHNOL. L. J. 1, \*24 n. 88 .

<sup>256</sup> See generally, Perlin, Harmon & Chatt.,*supra* note 8, at 264 (on how "the charade of 'adequacy of counsel law' fails miserably" in the Fifth Circuit.

unsuccessful, Of the 22 cases in which Strickland was raised,<sup>257</sup> there was partial success in only three: *Pierce v. Thaler*,<sup>258</sup> *Butler v. Stephens*,<sup>259</sup> and *Busby v.*

*Davis*.<sup>260</sup>

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<sup>257</sup> *United States v. Bourgeois*, 537 Fed. Appx. 604 (5<sup>th</sup> Cir. 2013), *cert. den.*, 574 U.S. 827 (2014). *supplemented on other grounds, sub. nom.*, *In re Bourgeois*, 902 F. 3d 446 (5<sup>th</sup> Cir. 2018); *Butler v. Stephens*, 745 Fed. Appx. 528 (5<sup>th</sup> Cir. 2018);

*In re Chase*, 804 F. 3d 738 (5<sup>th</sup> Cir. 2015); *Esparza v. Thaler*, 408 Fed. Appx. 787 (5<sup>th</sup> Cir. 2010); *Guevara v. Davis*, 679 Fed. Appx. 332 (5<sup>th</sup> Cir. 2017); *Guevara v. Stephens*, 577 Fed. Appx. 364 (5<sup>th</sup> Cir. 2014); *Ibarra v. Davis*, 786 Fed. Appx. 420 (5<sup>th</sup> Cir. 2019); *Ladd v. Cockrell*, 311 F.3d 349 (5<sup>th</sup> Cir. 2002), *supplemented*, *Ladd v. Livingston*, 777 F. 3d 286 (5<sup>th</sup> Cir. 2015); *Mathis v. Dretke*, 124 Fed. Appx. 865 (5<sup>th</sup> Cir. 2005), *supplemented*, *Mathis v. Thaler*, 616 F. 3d 461 (5<sup>th</sup> Cir. 2010) *Martinez v. Davis*, 653 Fed. Appx. 308 (5<sup>th</sup> Cir. 2016); *Mays v. Stephens*, 757 F. 3d 211 (5<sup>th</sup> Cir. 2014); *Perkins v. Quarterman*, 254 Fed. Appx. 366 (5<sup>th</sup> Cir. 2007); *Pierce v. Thaler*, 604 F. 3d 197 (5<sup>th</sup> Cir. 2010); *Pierce v. Thaler*, 355 Fed. Appx. 784 (5<sup>th</sup> Cir. 2009); *Ripkowski v. Thaler*, 438 Fed. Appx. 296 (2011); *Rockwell v. Davis*, 853 F. 3d 758 (5<sup>th</sup> Cir. 2017); *Segundo v. Davis*, 831 F. 3d 345 (5<sup>th</sup> Cir. 2016); *Shore v. Davis*, 845 F. 3d 627 (5<sup>th</sup> Cir. 2017); *Smith v. Cockrell*, 311 F. 3d 661 (5<sup>th</sup> Cir. 2002); *Tamayo v. Stephens*, 740 F. 3d 991 (5<sup>th</sup> Cir. 2014); *United States v. Webster*, 392 F. 3d 787 (5<sup>th</sup> Cir. 2004), *supplemented* *In re Webster*, 605 F. 3d 256 (5<sup>th</sup> Cir. 2010); *Williams v. Stephens*, 761 F. 3d 561 (5<sup>th</sup> Cir. 2014). Although *Strickland* is not cited in the litigation in the *Thomas* case, it is clear from one of the opinions that the issue was raised. See *Thomas v. Cockrell*, 54 Fed. Appx. 591, 2002 WL 31730148 \*4 (5<sup>th</sup> Cir. 2002) (rejecting Thomas's argument that his "counsel was ineffective for failing to place Thomas's mental condition in issue during the guilt/innocence phase of trial").

<sup>258</sup> 355 Fed. Appx. 784 (5<sup>th</sup> Cir. 2009), *on remand*, 604 F3d 197 (5<sup>th</sup> Cir. 2010). *Pierce* is discussed in Perlin, Harmon & Chatt, *supra* note 8, at 333.

<sup>259</sup> 625 Fed. Appx. 641 (5<sup>th</sup> Cir. 2015)

<sup>260</sup> 925 F3d 699 (5<sup>th</sup> Cir. 2019), *cert. den.*, 140 S.Ct. 897 (2020).

In *Pierce*, the Fifth Circuit initially ruled that the defendant was entitled to a certificate of appealability (COA) on his ineffectiveness of counsel claim.<sup>261</sup> Subsequently, however, the same court ruled that the defendant was not entitled to an evidentiary hearing in the federal district court on his claim under *Atkins*, that his intellectual disability estopped the state from executing him.<sup>262</sup> Eventually, after thirty-five years on death row, the defendant was resentenced to life without parole.<sup>263</sup> In *Busby*, the Fifth Circuit granted a COA on the questions of whether the defendant received ineffective assistance of direct appeal counsel, and whether trial counsel was ineffective by failing to conduct an adequate sentencing investigation or to present an adequate mitigation case during the penalty phase of trial.<sup>264</sup> On rehearing, the Fifth Circuit held that Busby did not establish ineffectiveness by counsel, and again affirmed the conviction., concluding that the defendant was not prejudiced by trial counsel's allegedly deficient mitigation investigation.<sup>265</sup>

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<sup>261</sup> 355 Fed. Appx. at 796-97. Pierce's trial lawyer was subsequently suspended. See *In re Ronald G. Mock*, Bd. Disciplinary App., Tex. (Dec. 8, 2004), <http://txboda.org/cases/ronald-g-mock>.

<sup>262</sup> *Pierce v. Thaler*, 604 F.3d 197 (5th Cir. 2010).

<sup>263</sup> See Allan Turner, *DA's Office Plans to Not Seek Execution of Man on Death Row Since 1978*, Chron (Aug. 30, 2012, 3:00 AM), <https://www.chron.com/news/houston-texas/article/DA-s-office-plans-to-not-seek-execution-of-man-on-3825169.php>.

<sup>264</sup> 677 Fed Appx. 884, 889 (5th Cir. 2017).

<sup>265</sup> 925 F.3d 699, 726 (5th Cir. 2019).

In *Butler*, the court granted a COA on the ineffective assistance of trial counsel in failing to investigate and raise Butler's mental state regarding his competence to stand trial and as mitigation evidence during sentencing,<sup>266</sup> and, in a subsequent opinion, vacated the dismissal of his ineffective-assistance-of-trial-counsel claim, remanding for further consideration."<sup>267</sup> Then, in a later case on remand to the district court, his claims were ultimately rejected.<sup>268</sup>

In short, the conclusion reached by one of the co-authors some seven years ago – “*Atkins* [has] failed to prevent the execution of persons with serious mental disabilities”<sup>269</sup> – is still a valid one.

## 1. Therapeutic Jurisprudence & other jurisprudential filters

### a. TJ in general<sup>270</sup>

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<sup>266</sup> 600 Fed. Appx. 246, 247 (5<sup>th</sup> Cir. 2015).

<sup>267</sup> 625 Fed. Appx. 641, 660 (5<sup>th</sup> Cir. 2015).

<sup>268</sup> 745 Fed Appx. 528 (5<sup>th</sup> Cir. 2018). *Busby* is discussed in Perlin, Harmon & Chatt, *supra* note 8, at 299-300.

<sup>269</sup> MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 153 (2013).

<sup>270</sup> This section is largely adapted from Perlin, Harmon & Chatt, *supra* note 8, at 305.



Therapeutic jurisprudence (TJ) recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences.<sup>271</sup> It asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.<sup>272</sup> Professor David Wexler clearly identifies how the inherent tension in this inquiry must be resolved: “the law’s use of “mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.”<sup>273</sup> As one of the authors (MLP) has written elsewhere, “An inquiry into therapeutic outcomes does *not* mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”<sup>274</sup> Therapeutic jurisprudence “look[s] at law as it actually impacts people’s lives,”<sup>275</sup> and TJ supports “an ethic of care.”<sup>276</sup> It emphasizes psychological wellness over adversarial

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It also distills the work of one of the authors over the past twenty-seven years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

272. Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).

273. David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

274. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000).

275. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

276. Michael L. Perlin, “*I’ve Got My Mind Made Up*”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARD. J. EQUAL RTS. & SOC’L JUST. 81, 94 (2018) (quoting, in part, Bruce J. Winick & David B.

triumphalism.”<sup>277</sup> As one of the authors has previously noted in an article with two other co-authors, “The *perception* of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously.”<sup>278</sup>

Professor Amy Ronner describes the “three Vs”<sup>279</sup> as:

- voice: litigants must have a sense of voice or a chance to tell their story to a decisionmaker;<sup>280</sup>
- validation: the decision maker needs to take seriously the litigant's story; and

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Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006).

<sup>277</sup> Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001).

<sup>278</sup> Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 114 (1995).

<sup>279</sup> See, e.g., Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

<sup>280</sup> On the importance of “voice,” see Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 588 (2008).

- voluntariness: in general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.<sup>281</sup>

In discussing these “3 V’s,” Professor Ronner underscores: “In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.”<sup>282</sup> The question we need to consider here is the extent to which the Fifth Circuit’s post-*Atkins* decisions that are discussed in this paper comport with therapeutic jurisprudence principles.

#### B. TJ and the cases before us

There is very little in the TJ literature about these issues. In an earlier paper, one of the authors (MLP) has asked whether we can “remotely speak of voice, validation, or voluntariness in the context of cases in which persons with intellectual disability inappropriately face the death penalty based on fraudulent testimony premised on spurious ‘ethnic adjustments’?”<sup>283</sup> Elsewhere, in an article with other colleagues, the same co-author noted that “psychological testing and a comprehensive review of relevant contributing developmental factors can yield critical information that can provide mitigation and potential solutions consistent

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<sup>281</sup> Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002).

<sup>282</sup> *Id.*

<sup>283</sup> Perlin, *supra* note 15, at 1457.

with the goals of therapeutic jurisprudence.”<sup>284</sup> In an article with other colleagues, one of the co-authors has noted – speaking specifically of issues related to malingering -- how “social science that enables judges to satisfy predetermined positions is privileged.”<sup>285</sup> David Wexler has wisely suggested that, in some cases, an expert witness might be called “to counter any claim of malingering.”<sup>286</sup> And Monica Miller and her colleagues have argued that “expressions of remorse are central to the idea of ... therapeutic jurisprudence.”<sup>287</sup> But otherwise, there is virtually nothing in the TJ literature on this topic.

In writing about the Fifth Circuit *Strickland* decisions in cases involving mentally disabled defendants facing the death penalty, two of the authors of this article (MLP & TRH) concluded on this point:

It is fatuous to even consider whether the therapeutic principles to which the creators of TJ have aspired are part of either the trials of the defendants in this cohort of cases or the actions by counsel. Certainly, “socio-

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<sup>284</sup> Michael L. Perlin, Alison J. Lynch & Valerie R. McClain, “*Some Things are Too Hot to Touch*”: *Competency, the Right to Sexual Autonomy, and the Roles of Lawyers and Expert Witnesses*, 35 *TOURO L. REV.* 405, 422 (2019).

<sup>285</sup> Perlin, Dorfman & Weinstein, *supra* note 140, at 94 n. 222.

<sup>286</sup> David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 *ST. THOMAS L. REV.* 743, 755 n. 60 (2005).

<sup>287</sup> Monica K. Miller et al, *How Emotion Affects the Trial Process*, 92 *JUDICATURE* 56, 61 (Oct.-Nov. 2008). Compare Perlin, *supra* note 9, at 279 (“If jurors continue to ‘translate’ a defendant’s medicated state into evidence of non-remorse (thus enhancing the chances that a death penalty will be meted out), what impact should this have on the right of criminal defendants to refuse such treatment?”).

psychological insights into the law and its application”<sup>288</sup> are utterly lacking, as is any shred of evidence of a commitment to dignity. The caselaw is totally bereft of ... TJ-required fair process norms...<sup>289</sup>

The countenancing of the use of ethnic adjustments, the tiresome and threadbare allegations of malingering,<sup>290</sup> the sanist demands that remorse be exhibited in a way that comports with fact-finders’ false “ordinary common sense,” the failure to employ accurate science in considering the potential impact of the *Flynn* effect or the type of IQ test used all basely –and disgracefully -- violate the most minimal standards of therapeutic jurisprudence, and any notion of “dignity.” As the Circuit’s interpretation of the *Strickland* standard “failed miserably as an aspirational bulwark” of due process,<sup>291</sup> so has the Circuit similarly failed miserably in its inability to bring “socio-psychological insights into [this area of] the law and its application.”<sup>292</sup> Do court procedures remotely “ensure that the defendant has a

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<sup>288</sup> Freckelton, *supra* note 280, at 576.

<sup>289</sup> Perlin, Harmon & Chatt, *supra* note 8, at 307.

<sup>290</sup> On the role of prosecution experts in this context, see Fellner, *supra* note 215, at 12, on how prosecutors regularly “vigorously challenge the existence of mental retardation[and] minimize its significance.”

<sup>291</sup> *Id.* at 304.

<sup>292</sup> Freckelton, *supra* note 280, at 576. See also, Perlin, *supra* note 276, at 81 (“Courts are, and have always been, teleological in cases involving litigants with mental disabilities. By ‘teleological,’ I refer to outcome-determinative reasoning; social science that enables judges to satisfy predetermined positions is privileged, while data that would require judges to question such ends are rejected”).

`voice?’”<sup>293</sup> Are defense expert witnesses able to “disentangle meanings of reports, to contextualize IQ scores, to explain acts that might seem to be otherwise inexplicable and contrary to jurors’ `ordinary common sense?’”<sup>294</sup> In the vast majority of cases, fair process norms are totally absent.<sup>295</sup>

## VI. Conclusion

The database we have considered here is infinitely depressing. There was only actual relief in 12.4% of the cases that raised *Atkins* issues, and this grouping of nine cases includes two in which the defendant died before the final relief could be implemented. What it reveals is a Court with little or no interest in the thoughtful opinions of Justice Stevens in *Atkins* and of Justice Kennedy in *Hall*. The science is ignored, and the jurisprudence is ignored. Baseless fears of undetected malingering, the mindless use of lay stereotypes of what “looks like” remorse, and the corrupt employment of “ethnic adjustments” to lawlessly raise IQ scores making certain minority defendants improperly eligible for execution all are reflected in the cases decided by the Fifth Circuit. Certainly, the earlier conclusion reached by Professor John Blume and his colleagues (in their empirical study of *all Atkins* claims) – that “*Atkins* is not evenhandedly protecting those it was designed to protect”<sup>296</sup>—rings as true today as it did when written eleven years ago.

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<sup>293</sup> PERLIN, *supra* note 269, at 67.

<sup>294</sup> *Id.* On the potential need for multiple experts in such cases, see Perlin, *supra* note 189.

<sup>295</sup> Perlin, Harmon & Chatt, *supra* note 8, at 307.

<sup>296</sup> Blume, Johnson & Seeds, *supra* note 38, at 639.

On the other hand, the cases reveal important potential strategies for defense counsel: (1) It is *essential* that allegations of malingering be vigorously rebutted through expert testimony; (2) even though the Fifth Circuit has not yet acknowledged its scientific validity, the *Flynn* effect must be brought to the Court's attention, (3) the defendant should be given a WAIS test, and the WISC test must be avoided, (4) the use of lay stereotypes of "showing remorse" must be firmly discredited. If these are all done, then there is at least *some* chance that *Atkins* and its progeny will be given life in subsequent cases.

As we noted earlier, the song, *License to Kill*, upon which we have drawn in part for our title, is about corruption and "the havoc man wreaks upon himself."<sup>297</sup> In another lyric in the song, Dylan sings, "Man has invented his doom." In cases in which no expert was offered to rebut allegations of malingering, or in which the "wrong" IQ test was relied upon, counsel has "invented .. doom" for the client.<sup>298</sup> And sadly, there is no conclusion for us to reach other than the Fifth Circuit – through its meretricious decision-making —has bestowed on state departments of corrections a license to kill.

Seven years ago, one of the co-authors of this article (MLP) wrote a book he titled *MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES*.<sup>299</sup>

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<sup>297</sup> TRAGER, *supra* note 52, at 376-77.

<sup>298</sup> On the Fifth Circuit and adequacy of counsel generally, see Perlin, Harmon & Chatt, *supra* note 8.

<sup>299</sup> See *supra* note 269.

An alternative title for this article could have been *Mental Disability and the Death Penalty: The Shame of the Fifth Circuit*.

**Appendix A: Coding Sheet**

Successful Atkins Claim?	Y/N
Numerical IQ Score provided)	Y/N and actual IQ score number (if
Not English Speaking	Y/N
“Borderline” ID Case	Y/N



Retroactive application	Y/N
Costs to identify ID	Any mention y/n what is cost?
Lack of Remorse	Y/N
Strickland Claim	Y/N
ID used as an aggravation	Y/N
Ake Claims	Y/N
Experts in case	Y/N
Expert who Explained IQ?	Y/N
Did expert use/argue ethnic adjustments	Y/N
Did expert use/argue Flynn Effect	Y/N
Fake Claims mentioned	Y/N
Mental illness?	Y/N
Expanding Atkins?	Y/N
Use Briseno?	Y/N
Mention Hall?	Y/N
Mention Moore?	Y/N

**Appendix B: List of Defendants**

Defendant Name	Cases in the Fifth Circuit COA	Success?
Bell, Walter Jr.	Bell v. Cockrell, 310 F. 3d 330 (5 <sup>th</sup> Cir. 2002).	Yes (SCR) Success-life
Blue, Carl Henry	Blue v. Thaler, 665 F. 3d 647 (5 <sup>th</sup> Cir. 2011), <i>cert. den.</i> , 568 U.S. 828 (2012), <i>supplemented</i> <i>on other grounds, sub. nom.</i> , Blue v. Thaler (In re Blue), 514 Fed. Appx. 441 (5 <sup>th</sup> Cir. 2013).	No Failure
Bourgeois, Alfred	United States v. Bourgeois, 537 Fed. Appx. 604 (5 <sup>th</sup> Cir. 2013), <i>cert. den.</i> , 574 U.S. 827 (2014), <i>supplemented on other grounds,</i> <i>sub. nom.</i> , In re Bourgeois, 902 F. 3d 446 (5 <sup>th</sup> Cir. 2018).	No Failure
Brown, Mauriceo Mashawn	In re Brown, 457 F. 3d 392 (5 <sup>th</sup> Cir. 2006).	No Failure
Brumfield, Kevan	Brumfield v. Cain, 740 F. 3d 946 (5 <sup>th</sup> Cir. 2014), <i>cert den.</i> , 576 U.S. 305 (2015). For earlier litigation in the <i>Brumfield</i> case, see e.g., Brumfield v. Cain, 808 F. 3d 1041 (5 <sup>th</sup>	Yes Success-life

	Cir. 2015) and <i>Brumfield v. Cain</i> , 744 F. 3d 918 (5 <sup>th</sup> Cir. 2014).	
Busby, Edward Lee	<i>Busby v. Davis</i> , 925 F. 3d 699 (5 <sup>th</sup> Cir. 2019), <i>cert den.</i> , 140 S. Ct. 897 (2020). For earlier litigation in the <i>Busby</i> case, see e.g., <i>Busby v. Davis</i> , 892 F. 3d 735 (5 <sup>th</sup> Cir. 2018) and <i>Busby v. Davis</i> , 677 Fed. Appx. 884 (5 <sup>th</sup> Cir. 2017).	Partial Partial turn fail-to be executed
Butler, Steven Anthony	<i>Butler v. Stephens</i> , 625 Fed. Appx. 641 (5 <sup>th</sup> Cir. 2015), <i>cert den.</i> , 136 S. Ct. 1656 (2016). For earlier litigation in the <i>Butler</i> case, see e.g., <i>Butler v. Stephens</i> , 600 Fed. Appx. 246 (5 <sup>th</sup> Cir. 2015).	Maybe a success
Campbell, Robert James	<i>In re Campbell</i> , 750 F. 3d 523 (5 <sup>th</sup> Cir. 2014) For earlier litigation in the <i>Campbell</i> case, see e.g., <i>Campbell v. Dretke</i> , 117 Fed. Appx. 946 (5 <sup>th</sup> Cir. 2004), <i>cert den.</i> , 546 U.S. 1015 (2005) and <i>In re Campbell</i> , 82 Fed. Appx. 349, 350 (5 <sup>th</sup> Cir. 2003).	Yes Success- life-eligible for parole
Cathey, Eric Dewayne	<i>Cathey v. Davis (In re Cathey)</i> , 857 F. 3d 221 (5 <sup>th</sup> Cir. 2017).	Yes

		Maybe a success
Chase, Ricky R	In re Chase, 804 F. 3d 738 (5 <sup>th</sup> Cir. 2015).	Yes Maybe a success
Chester, Elroy	Chester v. Thaler, 666 F. 3d 340 (5 <sup>th</sup> Cir. 2011), <i>cert den.</i> , 568 U.S. 978 (2012), <i>supplemented on other grounds, sub. nom.</i> , Chester v. Thaler, 671 F. 3d 494 (5 <sup>th</sup> Cir. 2012). For earlier litigation in the <i>Chester</i> case, see e.g., Chester v. Cockrell, 62 Fed. Appx. 556 (5 <sup>th</sup> Cir. 2003).	No failure
Clark, James Lee	Clark v. Quarterman, 457 F. 3d 441 (5 <sup>th</sup> Cir. 2006), <i>cert den.</i> , 549 U.S. 1254 (2007).	No Failure
Eldridge, Gerald Cornelius	Eldridge v. Davis, 661 Fed. Appx. 253 (5 <sup>th</sup> Cir. 2016), <i>cert den.</i> , 137 S. Ct. 2215 (2017). For earlier litigation in the <i>Eldridge</i> case, see e.g., Eldridge v. Stephens, 599 Fed. Appx. 123 (5 <sup>th</sup> Cir. 2015); Eldridge v. Stephens 608 Fed. Appx. 289 (5 <sup>th</sup> Cir. 2015); and Eldridge v. Quarterman, 325 Fed. Appx. 322 (5 <sup>th</sup> Cir. 2009).	No failure

Esparza, Guadalupe	Esparza v. Thaler, 408 Fed. Appx. 787 (5 <sup>th</sup> Cir. 2010), <i>cert den.</i> , 563 U.S. 992 (2011).	No failure
Garcia, Juan Martin	Garcia v. Stephens, 757 F. 3d 220 (5 <sup>th</sup> Cir. 2014), <i>cert den.</i> , 574 U.S. 1193 (2015).	No Failure
Guevara, Gilmar Alexander	Guevara v. Davis, 679 Fed. Appx. 332 (5 <sup>th</sup> Cir. 2017), <i>cert den.</i> , 138 S. Ct. 554 (2015).  For earlier litigation in the <i>Guevara</i> case, see e.g., Guevara v. Stephens, 577 Fed. Appx. 364 (5 <sup>th</sup> Cir. 2014).	No failure
Hall, Michael Wayne	Hall v. Quarterman, 534 F. 3d 365 (5 <sup>th</sup> Cir. 2008 <i>on remand to</i> , <input type="checkbox"/> Hall v. Quarterman, 2009 WL 612559 (N.D. Tex. 2009), <i>certificate of appealability den. sub. nom.</i> , <input type="checkbox"/> Hall v. Thaler  597 F.3d 746 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 562 U.S. 981 (2010).  For earlier litigation in the <i>Hall</i> case, see e.g., Hall v. Quarterman, 236 Fed. Appx. 10 (5 <sup>th</sup> Cir. 2007).	Partial Partial turned failure- executed

Harris, Robert Wayne	Harris v. Thaler, 464 Fed. Appx. 301 (5 <sup>th</sup> Cir. 2012), <i>cert den. and stay den.</i> , 567 U.S. 966 (2012).	No Failure
Hearn, Yokamon Laneal	Hearn v. Thaler, 669 F. 3d 265 (5 <sup>th</sup> Cir. 2012), <i>cert den.</i> , 576 U.S. 954 (2012). For earlier litigation in the <i>Hearn</i> case, see e.g., <i>In re Hearn</i> , 418 F. 3d 444 (5 <sup>th</sup> Cir. 2005); <i>Hearn v. Dretke</i> ( <i>In re Yokamon Laneal Hearn</i> ), 376 F. 3d 447 (5 <sup>th</sup> Cir. 2004); and <i>Hearn v. Dretke</i> , 389 F. 3d 122 (5 <sup>th</sup> Cir. 2004).	Partial Partial turned failure- executed
Henderson, James Lee	<i>Henderson v. Davis</i> , 868 F. 3d 314 (5 <sup>th</sup> Cir. 2017). For earlier litigation in the <i>Henderson</i> case, see e.g., <i>Henderson v. Stephens</i> , 791 F. 3d 567 (5 <sup>th</sup> Cir. 2015); <i>Henderson v. Thaler</i> , 626 F. 3d 773 (5 <sup>th</sup> Cir. 2010); and <i>In re Henderson</i> , 462 F.3d 413 (5 <sup>th</sup> Cir. 2006).	Yes (SCR) Success-life
Hernandez, Ramiro	<i>Hernandez v. Stephens</i> , 537 Fed. Appx. 531 (5 <sup>th</sup> Cir. 2013), <i>cert den.</i> , 572 U.S. 1036 (2014).	No Failure
Hernandez, Rodrigo	<i>Hernandez v. Thaler</i> , 398 Fed. Appx. 81 (5 <sup>th</sup> Cir. 2010), <i>cert den.</i> , 563 U.S. 940 (2011).	No Failure

Hines, Bobby Lee	Hines v. Thaler, 456 Fed. Appx. 357 (5 <sup>th</sup> Cir. 2011), <i>cert den.</i> , 566 U.S. 997 (2012). For subsequent litigation, see <i>Ex parte Hines</i> , 2012 WL 4928863 (Tex. Crim. App., Oct. 15, 2012) (dismissing writ of habeas corpus, and denying stay of execution).	No failure
Ibarra, Ramiro Rubi	Ibarra v. Davis, 786 Fed. Appx. 420 (5 <sup>th</sup> Cir. 2019), <i>cert den.</i> , 207 L. Ed. 2d 174 (2020). For earlier litigation in the <i>Eldridge</i> case, see e.g., Ibarra v. Davis, 738 Fed. Appx. 814 (5 <sup>th</sup> Cir. 2018); Ibarra v. Stephens, 723 F. 3d 599 (5 <sup>th</sup> Cir. 2013); Ibarra v. Thaler, 687 F. 3d 222 (5 <sup>th</sup> Cir. 2012); and Ibarra v. Thaler, 691 F. 3d 677 (5 <sup>th</sup> Cir. 2012).	No failure
Johnson, Derrick Lamone	In re Johnson, 325 Fed. Appx. 337 (5 <sup>th</sup> Cir. 2009).	No Failure
Johnson, Dexter	Johnson v. Davis (In re Johnson), 935 F. 3d 284 (5 <sup>th</sup> Cir. 2019), <i>cert. den.</i> , 140 S.Ct. 2521 (2020). For earlier litigation in the <i>Johnson</i> case, see e.g., Johnson v. Stephens, 617 Fed.	Yes Maybe a success

	Appx. 293 (5 <sup>th</sup> Cir. 2015), <i>cert den.</i> , 136 S. Ct. 980 (2016).	
Johnson, Kia Levoy	In re Johnson, 334 F. 3d 403 (5 <sup>th</sup> Cir. 2003).	No failure
Ladd, Robert Charles	Ladd v. Livingston, 777 F. 3d 286 (5 <sup>th</sup> Cir. 2015), <i>cert. den.</i> , 574 U.S. 1144 (2015). For earlier litigation in the <i>Ladd</i> case, see e.g., Ladd v. Stephens, 748 F. 3d 637 (5 <sup>th</sup> Cir. 2014), <i>cert. den.</i> , 574 U.S. 880 (2014).	Partial Partial turned failure- executed
Lewis, David Lee	In re Lewis, 484 F. 3d 793 (5 <sup>th</sup> Cir. 2007), <i>cert. den.</i> , 552 U.S. 1141 (2008).	No failure
Lewis, Rickey Lynn	Lewis v. Thaler, 701 F. 3d 783 (5 <sup>th</sup> Cir. 2012), <i>cert. den.</i> , 569 U.S. 910 (2013). For earlier litigation in the <i>Lewis</i> case, see e.g., Lewis v. Quarterman, 541 F. 3d 280 (5 <sup>th</sup> Cir. 2008) and Lewis v. Quarterman, 272 Fed. Appx. 347 (5 <sup>th</sup> Cir. 2008).	Partial Partial turned failure- executed
Long, Steven Lynn	Long v. Davis, 706 Fed. Appx. 181 (5 <sup>th</sup> Cir. 2017), <i>supplemented on other grounds, sub. nom.</i> , Long v. Davis, 138 S. Ct. 72 (2017). For earlier litigation in the <i>Long</i> case, see e.g., Long v. Davis, 663 Fed. Appx. 361 (5 <sup>th</sup> Cir. 2016).	Yes (SCR) Maybe a success



Maldonado, Virgilio	Maldondao v. Thaler, 625 F. 3d 229 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 565 U.S. 829 (2011). For earlier litigation in the <i>Maldonado</i> case, see e.g., Maldonado v. Thaler, 5 <sup>th</sup> Cir. 2010 U.S. App LEXIS 17735 and Maldonado v. Thaler, 389 Fed. Appx. 399 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 565 U.S. 829 (2011). .	Partial Partial turned failure On death row
Martinez, Raymond Deleon	Martinez v. Davis, 653 Fed. Appx. 308 (5 <sup>th</sup> Cir. 2016), <i>supplemented on other grounds, sub. nom.</i> , Martinez v. Davis, 137 S. Ct. 1432 (2017).	Yes (SCR) Success died in prison
Matamoros, John Reyes	Matamoros v. Stephens, 783 F. 3d 212 (5 <sup>th</sup> Cir. 2015). For earlier litigation in the <i>Matamoros</i> case, see e.g., Matamoros v. Stephens, 539 Fed. Appx. 487 (5 <sup>th</sup> Cir. 2013).	Partial Partial turned failure-died in prison
Mathis, Milton Wuzael	Mathis v. Thaler, 616 F. 3d 461 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 562 U.S. 1257 (2011). For earlier litigation in the <i>Mathis</i> case, see e.g., In re Mathis, 483 F. 3d 395 (5 <sup>th</sup> Cir. 2007) and Mathis v. Dretke, 124 Fed. Appx. 865	Partial Partial turned failure-- executed

	(5 <sup>th</sup> Cir. 2005), <i>cert. den.</i> , 545 U.S. 1131 (2005).	
Mays, Randall Wayne	Mays v. Stephens, 757 F. 3d 211 (5 <sup>th</sup> Cir. 2014), <i>cert. den.</i> , 574 U.S. 1082 (2015).	No failure
Moore, Curtis	Moore v. Quarterman, 517 F. 3d 781 (5 <sup>th</sup> Cir. 2008), <i>cert. den.</i> , 555 U.S. 842 (2008).	No failure
Moore, Eric Lynn	Moore v. Quarterman, 342 Fed. Appx. 65 (5 <sup>th</sup> Cir. 2009), <i>cert. den.</i> , 559 U.S. 998 (2010).  For earlier litigation in the <i>Moore</i> case, see e.g., Moore v. Quarterman, 533 F. 3d 338 (5 <sup>th</sup> Cir. 2008); Moore v. Quarterman, 520 F. 3d 504 (5 <sup>th</sup> Cir. 2008); Moore v. Quarterman, 491 F. 3d 213 (5 <sup>th</sup> Cir. 2007); Moore v. Quarterman, 454 F. 3d 484 (5 <sup>th</sup> Cir. 2006); Moore v. Dretke, 369 F. 3d 844 (5 <sup>th</sup> Cir. 2004); and In re Moore, 67 Fed. Appx. 25 (5 <sup>th</sup> Cir. 2003).	Yes Success-life
Moreno, Jose Angel	Moreno v. Dretke, 450 F. 3d 158 (5 <sup>th</sup> Cir. 2006), <i>cert. den.</i> , 549 U.S. 1120 (2007).	No Failure
Morris, Kenneth Wayne	Morris v. Quarterman, 275 Fed. Appx. 292 (5 <sup>th</sup> Cir. 2008), <i>cert. den.</i> , 555 U.S. 904 (2008), <i>supplemented on other grounds, sub.</i>	Yes Partial turned

	<i>nom.</i> , <i>Morris v. Dretke</i> , 413 F. 3d 484 (5 <sup>th</sup> Cir. 2005); <i>Morris v. Dretke</i> , 379 F. 3d 199 (5 <sup>th</sup> Cir. 2004); and <i>In re Morris</i> , 328 F. 3d 739 (5 <sup>th</sup> Cir. 2003).	failure-executed
Nealy, Charles Anthony	<i>In re Nealy</i> , 223 Fed. Appx. 366 (5 <sup>th</sup> Cir. 2007).	No failure
Neville, Robert James	<i>In re Neville</i> , 440 F. 3d 220 (5 <sup>th</sup> Cir. 2006), <i>supplemented on other grounds, sub. nom.</i> , <i>Neville v. Johnson</i> , 440 F. 3d 221 (2006), <i>cert. den.</i> , 546 U.S. 1161 (2006).	No failure
Perkins, Reginald	<i>Perkins v. Quarterman</i> , 254 Fed. Appx. 366 (5 <sup>th</sup> Cir. 2007), <i>cert. den.</i> , 553 U.S. 1067 (2008).	No failure
Pierce, Anthony L	<i>Pierce v. Thaler</i> , 604 F. 3d 197 (5 <sup>th</sup> Cir. 2010). For earlier litigation in the <i>Moore</i> case, see e.g., <i>Pierce v. Thaler</i> , 355 Fed. Appx. 784 (5 <sup>th</sup> Cir. 2009).	Success-life
Ripkowski, Britt Allen	<i>Ripkowski v. Thaler</i> , 438 Fed. Appx. 296 (2011), <i>cert. den.</i> , 565 U.S. 1205 (2012).	No—failure
Rivera, Jose Alfredo	<i>Rivera v. Quarterman</i> , 505 F. 3d 349 (5 <sup>th</sup> Cir. 2007), <i>cert. den.</i> , 555 U.S. 827 (2008).	Yes—maybe a success

Rockwell, Kwame A	Rockwell v. Davis, 853 F. 3d 758 (5 <sup>th</sup> Cir. 2017), <i>cert. den.</i> , 138 S. Ct. 215 (2017).	No-failure
Rosales, Michael	Rosales v. Quarterman, 565 F. 3d 308 (5 <sup>th</sup> Cir. 2009), <i>cert. den.</i> , 556 U.S. 1176 (2009). For earlier litigation in the <i>Rosales</i> case, see e.g., Rosales v. Quarterman, 291 Fed. Appx. 558 (5 <sup>th</sup> Cir. 2008).	Partial Partial turned failure- executed
Salazar, Robert Madrid	In re Salazar, 443 F. 3d 430 (5 <sup>th</sup> Cir. 2006). For earlier litigation in the <i>Salazar</i> case, see e.g., Salazar v. Dretke, 419 F. 3d 384 (5 <sup>th</sup> Cir. 2005), <i>cert. den.</i> , 547 U.S. 1006 (2006).	No Failure
Segundo, Juan Ramon Meza	Segundo v. Davis, 831 F. 3d 345 (5 <sup>th</sup> Cir. 2016), <i>cert. den.</i> , 137 S. Ct. 1068 (2017).	No failure
Shisinday, Shozdijiji	Shisinday v. Quarterman, 511 F. 3d 514 (5 <sup>th</sup> Cir. 2007), <i>cert. den.</i> , 555 U.S. 815 (2008).	No Failure
Shore, Anthony	Shore v. Davis, 845 F. 3d 627 (5 <sup>th</sup> Cir. 2017), <i>cert. den.</i> , 138 S. Ct. 88 (2017).	No failure
Simpson, Danielle	Simpson v. Quarterman, 341 Fed. Appx. 68 (5 <sup>th</sup> Cir. 2009), <i>cert. den.</i> , 558 U.S. 1039 (2009). For earlier litigation in the <i>Simpson</i> case, see e.g., Simpson v. Quarterman, 291 Fed. Appx. 622 (5 <sup>th</sup> Cir. 2008).	Partial— Partial turned failure- executed

Smith, Robert	Smith v. Cockrell, 311 F. 3d 661 (5 <sup>th</sup> Cir. 2002), <i>cert. granted in part</i> , 539 U.S. 986 (2003), <i>cert. dismissed</i> , 541 U.S. 913 (2004).	No failure
Soliz, Mark Anthony	In re Soliz, 938 F. 3d 200 (5 <sup>th</sup> Cir. 2019). For earlier litigation in the <i>Soliz</i> case, see e.g., Soliz v. Davis, 750 Fed. Appx. 282 (5 <sup>th</sup> Cir. 2018), <i>cert. den.</i> , 139 S. Ct. 1447 (2019).	No failure
Sorto, Walter Alexander	Sorto v. Davis, 716 Fed. Appx. 366 (5 <sup>th</sup> Cir. 2018). For earlier litigation in the <i>Sorto</i> case, see e.g., Sorto v. Davis, 881 F. 3d 933 (5 <sup>th</sup> Cir. 2018); Sorto v. Davis, 859 F. 3d 356 (5 <sup>th</sup> Cir. 2017); and Sorto v. Davis, 672 Fed. Appx. 342 (5 <sup>th</sup> Cir. 2016).	Yes Maybe a success
Sparks, Robert	In re Sparks, 939 F. 3d 630 (5 <sup>th</sup> Cir. 2019).	No failure
Tamayo, Edgar Arias	Tamayo v. Stephens, 740 F. 3d 991 (5 <sup>th</sup> Cir. 2014). For earlier litigation in the <i>Tamayo</i> case, see e.g., Tamayo v. Perry, 553 Fed. Appx. 395 (5 <sup>th</sup> Cir. 2014); In re Tamayo, 552 Fed. Appx. 371 (5 <sup>th</sup> Cir. 2014); Tamayo v. Thaler, 5 <sup>th</sup> Cir. 2011 U.S. App. LEXIS 26665, and Tamayo v. Thaler, 5 <sup>th</sup> Cir. 2011 U.S. App. LEXIS 26671.	No failure

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Taylor, Elkie Lee	In re Taylor, 298 Fed. Appx. 385 (5 <sup>th</sup> Cir. 2008). For earlier litigation in the <i>Taylor</i> case, see e.g., Taylor v. Quarterman, 498 F. 3d 306 (5 <sup>th</sup> Cir. 2007), <i>cert. den.</i> , 552 U.S. 1298 (2008).	No failure
Thomas, Kenneth Dewayne	Thomas v. Quarterman, 335 Fed. Appx. 386 (5 <sup>th</sup> Cir. 2009), <i>cert. den.</i> , 558 U.S. 1117 (2010). For earlier litigation in the <i>Thomas</i> case, see e.g., In re Thomas, 225 Fed. Appx. 222 (5 <sup>th</sup> Cir. 2007) and Thomas v. Cockrell, 54 Fed. Appx. 591 (2002), <i>cert. den.</i> , 538 U.S. 965 (2003).	Success-life or possibly less
Turner, Edwin Hart	Turner v. Epps, 460 Fed. Appx. 322 (5 <sup>th</sup> Cir. 2012).	No failure
Ward, Adam Kelly	Ward v. Stephens, 777 F. 3d 250 (5 <sup>th</sup> Cir. 2015), <i>cert. den.</i> , 136 S. Ct. 86 (2015).	No failure
Weathers, Obie D	Weathers v. Davis, 659 Fed. Appx. 778 (5 <sup>th</sup> Cir. 2016), <i>vacated and remanded</i> , Weathers v. Davis, 138 S. Ct. 315, 199 L. Ed. 2d 203 (2017).	Yes (SCR) Maybe a success

Webster, Bruce Carneil	In re Webster, 605 F. 3d 256 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 562 U.S. 1091 (2010). For earlier litigation in the <i>Webster</i> case, see e.g., United States v. Webster, 421 F. 3d 308 (5 <sup>th</sup> Cir. 2005), <i>rehearing en banc den.</i> , 174 Fed. Appx. 863 (5 <sup>th</sup> Cir. 2006), <i>cert. den.</i> , 549 U.S. 828 (2006) and United States v. Webster, 392 F. 3d 787 (5 <sup>th</sup> Cir. 2004).	No Failure
Wiley, William	Wiley v. Epps, 625 F. 3d 199 (5 <sup>th</sup> Cir. 2010).	Yes success but died on death row
Williams, Clifton Lamar	Williams v. Stephens, 761 F. 3d 561 (5 <sup>th</sup> Cir. 2014), <i>cert. den.</i> , 575 U.S. 952 (2015).	No--failure
Williams, Jeffrey Demond	Williams v. Thaler, 602 F. 3d 291 (5 <sup>th</sup> Cir. 2010), <i>cert. den.</i> , 131 S. Ct. 506 (2010). For earlier litigation in the <i>Williams</i> case, see e.g., Williams v. Quarterman, 293 Fed. Appx. 298 (5 <sup>th</sup> Cir. 2008).	No--failure
Wilson, Marvin Lee	Wilson v. Thaler, 450 Fed. Appx. 369 (5 <sup>th</sup> Cir. 2011), <i>cert. den. and stay den.</i> , 567 U.S. 958 (2012). For earlier litigation in the <i>Wilson</i> case, see e.g., In re Wilson, 442 F.	Partial Turned failure-- executed

	3d 872 (5 <sup>th</sup> Cir. 2006) and In re Wilson, 433 F. 3d 451 (5 <sup>th</sup> Cir. 2005).	
Wood, David Leonard	In re Wood, 648 Fed. Appx. 388 (5 <sup>th</sup> Cir. 2016).	No failure
Woods, Bobby Wayne	Woods v. Quarterman, 493 F. 3d 580 (5 <sup>th</sup> Cir. 2007). For earlier litigation in the <i>Woods</i> case, see e.g., In re Woods, 155 Fed. Appx. 132 (5 <sup>th</sup> Cir. 2005).	Partial turned failure executed

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## Appendix C

### Butler

Texas Court of Criminal Appeals remanded to habeas court “to consider evidence in light of the *Moore I* and *II* opinions and to make a recommendation to this Court on the issue of intellectual disability.”<sup>300</sup> According to counsel, the district attorney is seeking to bring in a new expert in to test Butler, and has said that if his full-scale IQ is 75 or below, he will settle.<sup>301</sup>

### Campbell

Case was ultimately resolved in federal court without an evidentiary hearing. The Attorney General hired an expert to review our extensive documentary evidence concerning Campbell’s background, and he apparently advised them that the defendant was likely to prevail on his *Atkins* claim, so they agreed to a stipulated order finding that the defendant had an intellectual disability.<sup>302</sup> Campbell was

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<sup>300</sup> *Ex parte* Butler, No. WR-41, 121-03 (Tex. Crim. Ct. App. , Sept. 18, 2019), on Application for Writ of Habeas Corpus, Cause No. 511112 in the 185<sup>th</sup> District Court. Harris County(on file with authors).

<sup>301</sup> E-mail from Richard Burr, Burr’s appellate counsel, to the authors (June 8, 2020) (on file with authors).

<sup>302</sup> See *Campbell v. Davis*, Civil No. 4:00-cv-03844 (S.D. tex., May 10, 2019), Joint Advisory Concerning Campbell’s Intellectual Disability Claim (on file with authors).

subsequently re-sentenced to life in prison with the possibility of parole.<sup>303</sup> His counsel believes the likelihood that Robert will ever be released on parole is “very small.”<sup>304</sup>

Cathey

No response from counsel.

Chase

No response from counsel

Johnson

After the Fifth Circuit entered a stay of execution and authorized the successor petition, Johnson’s case was remanded to the district court. His counsel filed a new habeas petition raising the *Atkins* claim, asking for a new hearing, and arguing that the defendant’s intellectual disability is relevant to tolling (on the question of his

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<sup>303</sup> He was reviewed in early 2018 for possible release on parole, and parole was officially denied on March 2, 2018, and was given a seven-year "set-off," meaning that his next parole review was scheduled for February 2025.

See <https://offender.tdcj.texas.gov/OffenderSearch/reviewDetail.action?sid=04286378&tdcj=02141630&fullName=CAMPBELL%2CROBERT+JAMES>.

<sup>304</sup> Email from Robert Owen, Campbell’s appellate counsel, to the authors (June 8, 2020) (on file with authors).

diligence in pursuing his rights).<sup>305</sup> His lawyer believes the odds are pretty good” that such a hearing will be scheduled.<sup>306</sup>

#### Long

Defendant has recently had a state habeas evidentiary hearing; there has been no decision as of yet.<sup>307</sup>

#### Moore

Appellate counsel has had no contact with defendant since sentence commuted.<sup>308</sup>

#### Pierce

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<sup>305</sup> See Johnson v. Davis, Civil Action No. 4:19-CV-03047 (S.D. Tex., Nov. 12, 2019), Amended Second or Successive Petition for Writ Of Habeas Corpus (on file with authors).

<sup>306</sup> Emails from Jessica Graf and Jeremy Schepers, Johnson’s appellate counsel, to the authors (June 8, 2020 & June 15, 2020) (on file with authors).

<sup>307</sup> Email from Scott Smith, Moore’s appellate counsel, to the authors (June 8, 2020) (on file with authors). Counsel notes that Long’s last four IQ tests were scored at 62, 63, 64 and 63, an “amazing consistency.”

<sup>308</sup> Email from Scott Smith, Moore’s appellate counsel, to the authors (June 8, 2020) (on file with authors). See Moore v. Dretke, 2005 WL 1606437 (E.D. Tex. 2005).

Currently serving life sentence.<sup>309</sup>

### Rivera

The district court agreed to abate the case so that counsel could seek a commutation of the defendant's sentence. Counsel filed a request with the Texas Board of Pardons and Paroles, and that board unanimously agreed that defendant's sentence should be commuted to life without parole based on his intellectual disability. Counsel asked Governor Rick Perry to commute his sentence (as part of the commutation process in Texas, the Governor must agree to commutation). Over a six-year period, this was never acted upon by then-Governor Perry. Although the trial judge administratively abated the case in 2014, since Governor Abbott took office in 2015, the defendant has remained on death row (but without an execution date since 2003).

The district judge recently issued an Order on May 11, 2020 asking whether we should go forward with a hearing on equitable tolling. Counsel then (1) sent a letter to Governor Abbott on May 23, 2020, asking to have Mr. Rivera's sentence commuted to life without parole, and (2) filed a Joint Advisory with the district

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<sup>309</sup> Email from David Dow, Pierce's appellate counsel, to the authors ((June 8, 2020) (on file with authors).

court, informing the court of these proceedings, and asking the court to give the Governor time to act.

In light of the decision of the Texas Court of Criminal appeals in *Ex Parte Moore*, 587 S.W.3d 787 (Tex. Ct. Crim. App. 2019), counsel remains “hopeful” that Governor Abbott will commute Rivera’s sentence.<sup>310</sup>

#### Sorto

Counsel has obtained funding to do additional texting on question of intellectual disability.<sup>311</sup>

#### Thomas

No response from counsel

#### Weathers

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<sup>310</sup> Email from Cathy Smith, Rivera’s appellate counsel, to the authors (June 8, 2020) (on file with authors).

<sup>311</sup> Email from David Dow, Pierce’s appellate counsel, to the authors ((June 8, 2020) (on file with authors).

Counsel is working on a state successor petition, following remand from Supreme Court on basis of *Moore* case.<sup>312</sup>

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<sup>312</sup> Email from John “Bud” Ritenour, Weathers’ current counsel, to the authors (July 13, 2013) (on file with authors).