ATKINS V. VIRGINIA: THE NEED FOR CONSISTENT SUBSTANTIVE AND PROCEDURAL APPLICATION OF THE BAN ON EXECUTING THE INTELLECTUALLY DISABLED*

ABSTRACT

In 2002, the Supreme Court changed the landscape of Eighth Amendment jurisprudence in deciding *Atkins v. Virginia*. In *Atkins*, the Court prohibited the execution of intellectually disabled individuals. In doing so, however, the Court provided the states with very little guidance and left the implementation of the ban to the discretion of the states. Providing the states such discretion has resulted in *Atkins* standards with inconsistencies in the following areas: (1) the definitional framework, (2) the definitional components, (3) the identity of the fact finder and the timing of the determination, and (4) the allocation of and standard for the burden of proof.

To highlight the inconsistencies in the *Atkins* standards among various states, this Comment will survey the *Atkins* standards in three of the Tenth Circuit states: Oklahoma, Colorado, and Kansas. This Comment will then examine how such inconsistency violates the Eighth Amendment and the doctrine of incorporation. To remedy these violations, it is vital that the states implement a consistent *Atkins* standard to implement the Supreme Court's ban on executing the intellectually disabled. Consequently, this Comment will sum up by recommending the standard that the states should implement. This recommendation provides a consistent standard and incorporates the mandates provided by the Supreme Court in *Atkins* along with mandates of the mental health sciences. Implementing this standard will allow the states to remedy the aforementioned constitutional violations and uphold the law laid down in *Atkins v. Virginia*.

TABLE OF CONTENTS

* There has been a recent trend in replacing the term "mental retardation" with "intellectual disability." *See, e.g.*, Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116–17 (2007). Accordingly, this author has chosen to use the term "intellectually disabled" throughout this Comment despite the fact that the Supreme Court itself and much of the current legal literature uses the phrase "mental retardation."

INTRODUCTION

In *Atkins v. Virginia*,[1] a landmark Eighth Amendment case, the Supreme Court of the United States held that executing intellectually disabled defendants falls within the constitutional ban on cruel and unusual punishment.[2] In its opinion, however, the Court provided very little guid-

1. 536 U.S. 304 (2002).
2. *Id.* at 321. The Court explains that the Eighth Amendment prohibits categories of "excessive" sanctions and that the concept of excessiveness is to be determined by reference to society's

ance on how to define and enforce this new ban and instead left the task up to the states.[3] As a result, the *Atkins* standard has been applied inconsistently among the states allowing the death penalty.[4] These inconsistencies, discussed in Part II and III of this Comment, can be found in several areas, including the definitional framework for intellectual disability, the assessment of the components of the definition, the appropriate fact finder and timing for the intellectual disability determination made during an *Atkins* hearing, and the standard and allocation of the burden of proof.[5]

These inconsistencies, in turn, have lent themselves to two principal constitutional issues discussed in Part IV of this Comment. First, the inconsistent and arbitrary application of the *Atkins* standard among the states violates the Eighth Amendment due to the resultant unequal treatment of intellectually disabled defendants based solely on their state of residence. Second, for similar reasons, the inconsistent application of the standard also violates the doctrine of incorporation of the Bill of Rights.

These constitutional violations call for a remedy, and that remedy can be found in consistent use of the *Atkins* standard and procedures that this Comment recommends in Part V. The recommended standard for intellectual disability includes utilization of the definitional framework advocated by the American Association on Intellectual Disabilities (AAIDD) (formerly the American Association on Intellectual Disability) and its concomitant definitions of each component thereof. To ensure consistent application across the states, it is important to have a consistent procedure for implementing the *Atkins* ban. Accordingly, this Comment recommends that prior to trial, a judge make the intellectual disability determination. It is further recommended that defendants have the burden of proving that they are intellectually disabled by a preponderance of the evidence based on the findings of a qualified expert. Consistent utilization of this standard will remedy the constitutional violations posed by the various *Atkins* standards and will help to fairly and consistently implement the ban mandated by the *Atkins* Court.

I. *ATKINS V. VIRGINIA*: THE CREATION OF THE *ATKINS* STANDARD

In *Atkins*, defendant Daryl Atkins was tried and convicted of capital murder.[6] During the sentencing phase of trial, a forensic psychologist for the defense testified that based on interviews with Atkins's associates,

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"evolving standards of decency." *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (internal quotation marks omitted).

3. *Id.* at 317.

4. Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L REV. 685, 686 (2009).

5. *See* Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77 *passim* (2003).

6. *Atkins*, 536 U.S. at 307.

his school, medical, and court records, and an intellectual quotient (IQ) test, Atkins was "mildly"[7] intellectually disabled. The State then presented evidence from the trial record and from victim impact statements to prove Atkins's future dangerousness and the "vileness of the offense."[8] After deliberations, the jury chose to impose the death penalty on Atkins.[9] Due to errors in the verdict form, however, the Supreme Court of Virginia ordered a second sentencing hearing.[10] At that hearing, the State put on its own rebuttal expert (apart from the original defense expert), who testified that Atkins was of "average intelligence, at least."[11] Again, the jury chose to impose the death penalty.[12] Relying on the Supreme Court precedent of *Penry v. Lynaugh*,[13] the Supreme Court of Virginia upheld the sentence.[14] Atkins appealed to the Supreme Court of the United States and due to "the dramatic shift in the state legislative landscape" since the *Penry* decision, the Court granted certiorari.[15]

In its decision on the merits, the Court held that executing intellectually disabled offenders violates the Eighth Amendment.[16] At the outset, it noted that Eighth Amendment jurisprudence depends on society's "evolving standards of decency."[17] With that in mind, the Court began by surveying the various state legislative declarations concerning execution of intellectually disabled offenders.[18] Because over thirty-four states had enacted legislation either exempting intellectually disabled criminals from the death penalty or eliminating the death penalty entirely since the *Penry* decision, the Court surmised that modern society now viewed intellectually disabled offenders as "categorically less culpable" than other criminals.[19] Consequently, the Court concluded that a national consensus had developed against the execution of intellectually disabled offenders.[20]

In considering the issue, the Court utilized the AAIDD's definition of "intellectual disability": subaverage intellectual functioning, significant limitations in adaptive skills, and onset prior to the age of eighteen.[21] It listed a number of characteristics often associated with this defi-

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7. *Id.* at 308.
8. *Id.*
9. *Id.* at 309.
10. *Id.*
11. *Id.*
12. *Id.*
13. 492 U.S. 302, 335 (1989) (holding that the Eighth Amendment does not categorically ban the execution of intellectually disabled offenders).
14. *Atkins*, 536 U.S. at 310.
15. *Id.*
16. *Id.* at 316.
17. *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (internal quotation marks omitted).
18. *Id.* at 318.
19. *Id.* at 316.
20. *See id.*
21. *Id.* at 318. Note that the *Atkins* Court used the term "mental retardation."

nition, including diminished capacity for processing information, communicating, abstracting and learning from mistakes, engaging in logical reasoning, controlling impulses, and understanding the reactions of others.[22] The Court stated that such characteristics negated the major purposes underlying imposition of the death penalty—retribution and deterrence.[23] The Court reasoned that the national consensus that had developed likely reflected the judgment that the characteristics accompanying intellectual disability made intellectually disabled offenders less culpable and consequently less deserving of retribution.[24] Similarly, these same characteristics made it less likely that intellectually disabled offenders consider the potential for execution when carrying out crimes, thereby negating the death penalty's deterrent effect.[25] The Court further opined that these characteristics might also undermine the procedural safeguards inherent in capital proceedings because intellectually disabled offenders may be less able to assist their lawyers, act as good witnesses, or appear to juries to have remorse for their crimes.[26] Consequently, the Court held that the execution of intellectually disabled offenders violates the Eighth Amendment.[27] However, it left open to the states the task of properly defining the scope of and enforcing this new prohibition.[28]

II. INCONSISTENCIES AMONG THE STATES

Because of the Supreme Court's deference to the states in defining and implementing the ban on intellectually disabled offenders, different standards have arisen. These inconsistencies can be divided into four general categories: the definitional framework, the assessment of the definitional components, the fact finder and timing for the intellectual disability determination, and the standard and allocation of the burden of proof. Variations in each area will be reviewed in turn.

A. Inconsistencies in the Definitional Framework

In general, states have utilized three definitional frameworks in defining "intellectual disability": the AAIDD's definition, the American Psychological Association's definition, and state-created definitions. The most common of these definitions, and the one referred to in the *Atkins* case,[29] is the definition provided by the AAIDD.[30] The AAIDD defines "intellectual disability" as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as ex-

22. *Id.*
23. *Id.* at 319.
24. *Id.*
25. *Id.*
26. *Id.* at 316–317.
27. *Id.* at 316.
28. *Id.* at 317.
29. *Id.* at 318.
30. Tcbolowsky, *supra* note 5, at 87–89.

pressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[31] This definition can be broken into three distinct components: (1) the "intellectual functioning" component, (2) the "adaptive behavior" or "adaptive functioning" component, and (3) the manifestation during the developmental period (commonly referred to as "early onset") component.[32] According to the AAIDD, the intellectual functioning component includes characteristics such as learning, reasoning, and problem solving.[33] The AAIDD states that an IQ score of two standard deviations below the mean for the IQ test used is the upper threshold for meeting the intellectual functioning component.[34] The adaptive behavior component requires limitations in the following three skill sets: conceptual, social, and practical skills.[35] A score of two standard deviations below the mean for the adaptive behavioral assessment used qualifies an individual as having limitations in adaptive functioning.[36] The early onset component requires that the disability originate before the age of eighteen.[37]

Other states choose to follow the similar three-pronged definition from the American Psychiatric Association (APA).[38] The APA's current definition, included in the Diagnostic and Statistical Manual IV (DSM-IV), is as follows:

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below[39] on an individually administered IQ test.
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> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
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> C. The onset is before age 18 years.[40]

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31. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES 1 (Jan. 2008), http://www.aaidd.org/media/PDFs/AAIDDFAQonID.pdf [hereinafter *AAIDD Definition*].

32. *See* Tobolowsky, *supra* note 5, at 87, 89.

33. *AAIDD Definition*, *supra* note 31, at 2.

34. *Id.* (noting that generally a score two standard deviations below the mean will fall in the range of a score of 70 to 75 depending on the IQ test used).

35. *Id.*

36. *Intellectual Disability: Definition, Classification, and Systems of Support*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES 20 (2010), http://www.aaidd.org/media/PDFs/CoreSlide.pdf [hereinafter *Intellectual Disability*].

37. *AAIDD Definition*, *supra* note 31.

38. *See* Tobolowsky, *supra* note 5, at 88.

39. The word "approximately" in the definition indicates that a score of 70 is an approximation of a score that is two standard deviations below the mean for the IQ test being used. Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. AM. ACAD. PSYCHIATRY & LAW 304, 306 (2004).

The APA definition also categorizes an individual's level of intellectual disability based on IQ score into one of the following categories: mild, moderate, severe, and profound.[41]

Generally, states use either the AAIDD's or the APA's definition of "intellectual disability" due to the clinical nature of each.[42] However, despite the general similarities between the two definitions, obvious differences exist. For example, the APA sets an approximate cutoff score, whereas the AAIDD allows for a wider variation of scores depending on the IQ test used. Furthermore, the two definitions differ as to the adaptive functioning areas in which an individual must have behavioral limitations to be deemed intellectually disabled. Consequently, utilization of the different definitions results in states measuring the intellectual functioning component and defining the adaptive functioning component in divergent manners.[43]

In a wholly separate category are states that adopt their own independent definitions of "intellectual disability." Some of these states adopt terms from the AAIDD or APA definitions and then rely on judicial interpretation to fill in the meanings of those terms.[44] For example, California defines "intellectual disability" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."[45] The lack of further definition requires judicial interpretation of the meaning of each definitional component. Other states define "intellectual disability" as at or below a certain IQ score and then shift the burden to the prosecution to prove the defendant is not intellectually disabled.[46] For example, Illinois's criminal procedure statute provides for a presumption of intellectual disability when an individual scores 75 or below on an IQ test.[47] Although the statute also requires concurrent deficits in adaptive behavior, the presumption accompanying the IQ score causes the adaptive behavior component to carry far less weight because the presumption automatically shifts the burden of proof to the other side.

B. Inconsistencies in the Assessment of the Definitional Component

In addition to variations in the definitional framework of the intellectual disability standard, states vary in how they define and assess each

40. ROBERT L. SPITZER ET AL., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS CASEBOOK 366 (4th ed. 1994).

41. *Id.* at 549.

42. Tobolowsky, *supra* note 5, at 92.

43. *Id.* at 92–93.

44. Brooke Amos, Note, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use When Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 482 (2011).

45. CAL. PENAL CODE § 1376(a) (West 2012).

46. *See* Amos, *supra* note 44.

47. 725 ILL. COMP. STAT. § 5/114-15 (West 2012).

component of the "intellectual disability" definition. Because the three-pronged clinical definition is the most popular,[48] only variations in assessment of that definition's components will be analyzed. First, states vary widely in the instrument they use to measure intellectual functioning. Second, states vary in how adaptive behavior limitations are assessed, especially due to the varying definitions of this component. Third, states differ in how they determine whether an individual's intellectual disability originated prior to eighteen years of age.

Although states widely agree that the intellectual functioning component should be measured by a standardized IQ test,[49] the options for such a test are many. Some of these variations include the Wechsler Adult Intelligence Scale (assessing verbal comprehension, perceptual reasoning, working memory, and processing speed),[50] the Stanford–Binet Intelligence Scale (assessing verbal reasoning, quantitative reasoning, and short-term memory),[51] the Kaufman Adolescent and Adult Intelligence Test (assessing sequential reasoning, induction, long-term memory, word knowledge and language development, language comprehension, listening ability, visual processing, cultural knowledge, and delayed memory),[52] and the Cognitive Assessment System (assessing planning, attention, integration of separate stimuli, and the ability to serially order things).[53] Although each test purports to measure intelligence, each does so on a different basis. The consequences of this divergence become apparent when considering that the scientific community generally agrees that intellectually disabled individuals have limitations that exist concurrently with their strengths.[54] Consequently, one test might highlight an individual's strengths, whereas another test might highlight that same individual's weaknesses and therefore provide a vastly different score.[55] These discrepancies could mean the difference between being classified as intellectually disabled or not and consequently being spared or sentenced to death.[56]

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48. Tobolowsky, *supra* note 5, at 87, 89.

49. Amos, *supra* note 44, at 490.

50. John Fabian et al., *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, 406 (2011).

51. Richard Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudication of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 827 (2007).

52. *Kaufman Adolescent and Adult Intelligence Test*, ENCYCLOPEDIA MENTAL DISORDERS, http://www.minddisorders.com/Kau-Nu/Kaufman-Adolescent-and-Adult-Intelligence-Test.html#ixzz29xNOC4bW (last visited Feb. 24, 2013).

53. ESTHER STRAUSS ET AL., A COMPENDIUM OF NEUROPSYCHOLOGICAL TESTS: ADMINISTRATION, NORMS, AND COMMENTARY 133 (3d ed. 2006).

54. *AAIDD Definition*, *supra* note 31.

55. *See* Fabian et al., *supra* note 50, at 414 (explaining that test scores are not expected to be the same across different tests).

56. *See infra* Part II.D.

Variations in assessing the adaptive behavior component are even greater than those in assessing intellectual functioning due to the adaptive behavior component's relatively new addition to the scientific definition of "intellectual disability."[57] Consequently, over 200 different assessments of adaptive behavior currently exist.[58] Typical adaptive behavior assessments involve mental health professionals interviewing or providing questionnaires to third parties, such as teachers and parents, who are involved in an intellectually disabled individual's life.[59] Some of these tests depend solely on accounts provided by third parties such as caregivers, some depend on a wider variety of third-party accounts, and some incorporate observation of the individual being assessed.[60] The existence of these divergent approaches to assessment of the adaptive behavior component highlights the lack of one uniform and reliable method and the consequent need to choose an assessment with proven scientific reliability and validity.[61]

Despite its seemingly clear definition, the early onset component of intellectual disability is also measured in varied ways. Measurement can include diagnoses made before the age of eighteen, IQ tests administered before the age of eighteen, or any variety of evidence indicating the onset of intellectual disability prior to the age of eighteen.[62] Allowing for various forms of evidence to indicate the onset of intellectual disability prior to eighteen is appropriate because problems can arise when states require formal diagnoses or test results from before an individual turned eighteen.[63] Such requirements can result in discrimination against persons whose mental health needs were not appropriately addressed during their adolescence.[64] For example, some intellectually disabled offenders may not have had adequate access to mental health services as a child, resulting in their mental health needs being overlooked.[65]

C. Inconsistencies in the Identity of the Fact Finder and the Timing of the Determination

In addition to these definitional variances, states differ as to who determines the existence of intellectual disability and when during the trial that determination is made. States may select the judge, the jury, or an expert to make the intellectual disability determination.[66] The *Atkins* determination is very similar to criminal competency and criminal insanity

57. Bonnie & Gustafson, *supra* note 51, at 846.
58. *Id.*
59. *Id.* at 847.
60. WILLIAM COOK, DETERMINING ELIGIBILITY FOR SERVICES TO PERSONS WITH DEVELOPMENTAL DISABILITIES IN MONTANA: A STAFF REFERENCE MANUAL 14–16 (5th ed. 2011).
61. Tobolowsky, *supra* note 5, at 97.
62. *See* Bonnie & Gustafson, *supra* note 51, at 855.
63. *Id.*
64. *Id.*
65. *See id.*
66. Tobolowsky, *supra* note 5, at 85; *see also* Amos, *supra* note 44, at 495.

determinations. Consequently, for purposes of determining the appropriate fact finder, this Comment will treat the role of the fact finder in *Atkins* determinations as identical to that in competency and insanity proceedings.[67] When a judge is used as the fact finder, the judge generally makes a pretrial determination during an *Atkins* proceeding about whether the facts presented by the party with the burden satisfy the relevant legal standard.[68] This, in turn, dictates how the ensuing prosecution will proceed.[69] For example, if the judge decides that the defendant is not intellectually disabled, then the prosecution will pursue a capital trial. On the other hand, when the jury acts as fact finder, the *Atkins* determination generally occurs after the guilt phase of trial.[70] Typically, the determination will involve some consideration of the individual's culpability in the charged crime.[71] Finally, when the court selects and utilizes an expert as fact finder, the expert can acts as a neutral party wholly separate from the adversarial process.[72] The experts make their determinations based on their interpretations of facts relevant to diagnosing intellectual disability.[73] The experts then present their opinions via testimony as part of the defense's mitigation theories.[74]

D. Inconsistencies in the Allocation of and Standard for the Burden of Proof

The final area of inconsistency among the states is the allocation of and standard for the burden of proof at an *Atkins* hearing. States can allocate the burden of proof on either the defendant or the Government.[75] No states, however, have chosen to place the burden on the Government.[76] This procedural aspect therefore requires little discussion. On the other hand, states do vary in the standard they impose for the burden of proof.[77] Three categories for this burden exist: (1) preponderance of the evidence, (2) clear and convincing proof, and (3) beyond a reasonable doubt.[78] Because states consistently allocate the burden to the defendant, oftentimes the standard alone will ultimately determine whether a de-

67. *See* Tobolowsky, *supra* note 5, at 105.

68. *Id.* at 106. Alternatively, a judge may make the intellectual disability determination during the sentencing phase of trial. However, if a defendant is determined pre-trial not to be intellectually disabled, a less involved sentencing phase may be required. Therefore, generally the judge will make the determination during the pre-trial phase to increase judicial efficiency. *See id.* at 105–06, 110.

69. *Id.* at 105.

70. *See id.*

71. *Id.*

72. Amos, *supra* note 44, at 495.

73. *Id.*

74. *See* Bonnie & Gustafson, *supra* note 51, at 857.

75. Tobolowsky, *supra* note 5, at 114.

76. *See id.* at 118.

77. Justin Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1289–90 (2008).

78. *Id.*

fendant is found intellectually disabled.[79] A defendant who could be found intellectually disabled in a state whose burden is preponderance of the evidence may not be found intellectually disabled in a state whose burden is beyond a reasonable doubt. This disparity exemplifies the inconsistency resulting from differing burdens of proof among the states.[80]

III. INCONSISTENCIES IN THE *ATKINS* STANDARD IN THE TENTH CIRCUIT

Because of these discrepancies among the states, modern death penalty jurisprudence regarding the prohibition on executing the intellectually disabled has proven incapable of producing a consistent standard.[81] This lack of consistency is exemplified by surveying the *Atkins* standards applied in some of the state trial courts comprising the Tenth Circuit. A comparison of the standards in Oklahoma, Colorado, and Kansas is telling. In Oklahoma, the relevant standard utilizes the three-pronged clinical definition but adds a requirement that the defendant have an IQ of no more than 70.[82] Colorado also adheres to the three-pronged definition, and although it does not implement additional requirements as Oklahoma does, it does not provide any definitional guidance as to each of the three prongs.[83] Conversely, Kansas's utilization of the three-pronged standard includes precise definitional components and implements a precondition[84] that defendants must meet before they can even attempt to prove their intellectual disability.[85] A detailed comparison of the *Atkins* standard in these three states follows. This comparison shows that even among states adhering to the three-pronged definition, wide variation abounds regarding the definitions and processes by which these states implement the *Atkins* ban.

A. Oklahoma

Application of the *Atkins* standard in Oklahoma is exemplified in the recent Tenth Circuit case of *Hooks v. Workman*,[86] in which an *Atkins* hearing resulted in a determination that the defendant was not intellectually disabled.[87] In *Hooks*, the defendant was convicted of first-degree murder and first-degree manslaughter for the beating death of his preg-

79. *Id.* at 1289.

80. *Id.* at 1289–90.

81. Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 578 (2011).

82. Murphy v. State, 54 P.3d 556, 567–68 (Okla. Crim. App. 2003), *overruled on other grounds by* Blonner v. State, 127 P.3d 1135 (Okla. Crim. App. 2006).

83. *See* COLO. REV. STAT. § 18-1.3-1101 (2012).

84. *See* KAN. STAT. ANN. § 21-6622 (2012) (requiring the court to determine that there is "sufficient reason to believe" that the defendant has an intellectual disability prior to allowing an *Atkins* proceeding).

85. *Id.*; KAN. STAT. ANN. § 76-12b01 (2012).

86. 689 F.3d 1148 (10th Cir. 2012).

87. *Id.* at 1173.

nant common law wife.[88] At the defendant's *Atkins* hearing, both parties agreed that the defendant's disabilities had manifested themselves before the age of eighteen but disagreed as to whether the defendant had limitations in his intellectual and adaptive functioning.[89] At the *Atkins* hearing, nine IQ tests taken over a thirty-four-year period were presented to the jury with scores ranging from 53 to 80.[90] The jury also heard evidence about the defendant's limited functioning in the adaptive skill areas of communication and academics.[91] Considering the range of IQ scores and the strengths the defendant had in other areas of adaptive functioning, the jury concluded that the defendant had not proven his intellectual disability by a preponderance of the evidence and his conviction was upheld.[92]

Thereafter, the defendant filed two habeas petitions, addressing, among other matters, the shortcomings of the procedure and result of his *Atkins* hearing.[93] The defendant claimed that despite the jury's finding, he had proven with sufficient evidence that he was intellectually disabled based on his IQ scores and his limitations in two areas of adaptive functioning.[94]

To resolve the defendant's sufficiency challenge and determine whether the lower court had reasonably applied *Atkins*, the Tenth Circuit began by reciting Oklahoma's *Atkins* standard as laid out in *Murphy v. State*.[95] The *Murphy* court held that a defendant is intellectually disabled if he or she has significantly subaverage intellectual functioning, the intellectual disability manifested prior to the age of eighteen, and the defendant concurrently suffers from significant limitations in adaptive functioning.[96] The *Murphy* court provided a list of areas in which the limitations of the defendant's intellectual functioning must be apparent and a list of nine skill areas in which limitations in adaptive functioning could be manifest.[97] These limitations can be proven through IQ tests, along with other evidence.[98] The court held that defendants must establish their intellectual disability by a preponderance of the evidence during trial.[99] The court also imposed a precondition that a defendant must have an IQ of no greater than 70 to even be allowed an *Atkins* hearing.[100]

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88. *Id.* at 1161.
89. *Id.* at 1167.
90. *Id.* at 1168.
91. *See id.* at 1171.
92. *See id.* at 1171.
93. *Id.* at 1161–62.
94. *See id.* at 1164.
95. 54 P.3d 556, 567–68 (Okla. Crim. App. 2002), *overruled on other grounds by* Blonner v. State, 127 P.3d 1135 (Okla. Crim. App. 2006).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 658.
100. *Id.*

In considering whether the defendant had presented sufficient evidence to meet the intellectual functioning prong of this test, the Tenth Circuit agreed with the lower court's reasoning that the lower IQ scores reflected Hooks's refusal to cooperate during a period of trauma in his life rather than limitations in intellectual functioning.[101] The two test scores that the lower court found reliable included a 72 and a 76.[102] The court held that because these scores fell above the threshold score of 70 required by *Murphy*, a rational trier of fact could have found that the defendant was not eligible to be considered intellectually disabled and that the court had not unreasonably applied *Atkins*.[103]

The court then moved on to consider whether the defendant presented sufficient evidence to meet the significant limitations in the adaptive functioning prong.[104] Contrary to the defendant's argument, and noting that the Supreme Court had left "the precise contours of the definition" to the states, the court reasoned that it was not necessary to focus on the defendant's limitations at the exclusion of his strengths.[105] After listing various evidence regarding Hooks' strengths in many of the adaptive functioning skill sets, the court concluded that a rational fact finder could have found that Hooks did not satisfy this prong of the test.[106] The court also reasoned that all of the evidence presented by the defendant regarding his adaptive functioning had come from witness testimony and therefore should be appraised based on witness credibility.[107] It cited the rational fact finder standard as further reason to deny the defendant's sufficiency of the evidence challenge and to find that the lower court had reasonably applied the *Atkins* standard.[108]

B. Colorado

The application of the *Atkins* standard in Oklahoma can be contrasted with that in Oklahoma's Tenth Circuit sister state of Colorado. The Colorado Supreme Court upheld the constitutionality of Colorado's statute banning the execution of intellectually disabled defendants in *People v. Vasquez*.[109] In *Vasquez*, the defendant, Jimmy Vasquez, was charged with first-degree murder.[110] He filed a motion indicating his intent to establish that he was intellectually disabled, and subsequently asked the court to find Colorado's *Atkins* statute unconstitutional because it re-

101. Hooks v. Workman, 689 F.3d 1148, 1168 (10th Cir. 2012).
102. *Id.*
103. *Id.*
104. *Id.* at 1171.
105. *Id.* at 1171–72.
106. *Id.* at 1172–73.
107. *Id.* at 1173.
108. *Id.*
109. 84 P.3d 1019, 1020–21 (Colo. 2004).
110. *Id.* at 1020.

quired defendants to prove their intellectual disability by clear and convincing evidence.[111]

The Colorado Supreme Court began its analysis by referencing Colorado's statute banning the execution of intellectually disabled individuals.[112] The statute defines "intellectually disabled defendant" as "any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period."[113] The statute also requires that the intellectual disability determination be made prior to trial and that the defendant have the burden of proving his intellectual disability by clear and convincing evidence.[114] Because of the timing of the determination, the statute designates the court as the fact finder.[115] Regarding the intellectual functioning and adaptive behavior evaluations themselves, the statute also requires that if more than one evaluation is ordered, at least one must be performed by a psychologist recommended by the executive director of the Department of Human Services.[116] The statute allows for evidence of statements made by the defendant, of the circumstances surrounding the commission of the crime, and of the defendant's medical and social history to be included in the evaluation.[117]

After its review of the relevant intellectual disability standard, the court reviewed the *Atkins* decision and noted that it implemented a substantive, rather than procedural, rule.[118] The Colorado Supreme Court then held that both the allocation of the burden and the burden itself were constitutional because *Atkins* had left it up to the states to determine how to implement the ban and nothing in *Atkins* bars a state from enacting a process by which to exclude intellectually disabled defendants from capital punishment.[119]

C. Kansas

The *Atkins* standard implemented in Oklahoma and Colorado contrasts sharply with the *Atkins* standard implemented in Kansas. According to Kansas's relevant statutory scheme, when defendants wish to establish that they are intellectually disabled, the court must initially determine whether there is sufficient evidence to believe that the defendant

111. *Id.*
112. *Id.* at 1021.
113. COLO. REV. STAT. § 18-1.3-1101(2) (2012). Note that the statute uses the term "mentally retarded defendant."
114. *Id.* § 18-1.3-1102.
115. *Id.*
116. *Id.* § 18-1.3-1104.
117. *Id.*
118. People v. Vasquez, 84 P.3d 1019, 1022 (Colo. 2004).
119. *Id.* at 1021.

is intellectually disabled.[120] If the court finds evidence for this belief, in order to make its final determination, the court must appoint two professionals to perform an evaluation on the defendant: either two psychologists, two physicians, or one of each.[121] The professionals must be "qualified by training and practice" in order to be appointed by the court.[122]

The Kansas statutory scheme defines "intellectual disability" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18."[123] The statute requires that the defendant have significant subaverage general intellectual functioning "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."[124] For defendants to fulfill the subaverage intellectual functioning prong of the test, they must score at least two standard deviations below the mean score on a standardized test that is specified by the secretary of social and rehabilitation services.[125] The statute also provides a definition of "adaptive behavior": "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community."[126] At the *Atkins* hearing, defendants may present any evidence they wish to convince the judge that they are intellectually disabled.[127]

D. Comparison of the Tenth Circuit States

To further highlight the inconsistent ways in which the *Atkins* standard is applied among the states, Table 1 below presents a side-by-side comparison of the three Tenth Circuit states just discussed. For each state, the table compares the definitional framework, the assessment of the definitional components, the fact finder and timing for the determination, the allocation of and standard for the burden of proof, and types of evidence allowed in an *Atkins* hearing. The comparison presented by the table highlights the obvious lack of a consistent *Atkins* standard.

120. KAN. STAT. ANN. § 21-6622 (2012).
121. *Id.*
122. *Id.*
123. KAN. STAT. ANN. § 76-12b01 (2012).
124. *Id.* § 21-6622.
125. *Id.* § 76-12b01.
126. *Id.*
127. *Id.* § 21-6622.

Table 1. Comparison of *Atkins* Standards Among Selected Tenth Circuit States

	Oklahoma	Colorado	Kansas
Definitional Framework	• *Pre-condition:* Defendant must have an IQ of no greater than 70 • Significantly subaverage intellectual functioning • Manifestation prior to the age of eighteen • Concurrent suffering from significant limitations in adaptive functioning (consisting of nine skill areas)	• Significantly subaverage general intellectual functioning • Concurrent existence with substantial deficits in adaptive behavior • Manifested and documented during the developmental period	• *Pre-condition:* Sufficient reason to believe that the defendant is intellectually disabled • Significantly subaverage general intellectual functioning that significantly impairs the defendant's capacity to appreciate the criminality of his or her conduct • Deficits in adaptive behavior • Manifestation during the period from birth to 18
Assessment of the Definitional Components	• IQ tests may be used, but there is no guidance as to which are acceptable	• No guidance provided	• The defendant must score two standard deviations below the mean on a standardized test specified by the secretary of social and rehabilitation services
Fact Finder and Timing for the Determination	• *Timing: Atkins* trial prior to guilt trial • *Fact finder:* Not specified	• *Timing:* Prior to trial • *Fact finder:* Judge	• No guidance provided
Allocation of and Standard for Burden of Proof	• Preponderance of the evidence on the defendant	• Clear and convincing evidence on the defendant	• No guidance provided

	Oklahoma	Colorado	Kansas
Allowable Types of Evidence	• IQ tests and other evidence	• Statements made by the defendant • Circumstances surrounding the crime • Defendant's medical and social history • One evaluation must be performed by a psychologist recommended by the executive director of the department of human services	• Court must appoint two mental health officials, qualified by training and experience, to conduct an evaluation of the defendant

Source: COLO. REV. STAT. § 18-1.3-1101, -1102, -1104 (2012); KAN. STAT. ANN. §§ 21-6622, 76-12b01 (2012); Murphy v. State, 54 P.3d 556, 567–68 (Okla. Crim. App. 2002).

IV. CONSTITUTIONAL ISSUES ARISING FROM INCONSISTENT *ATKINS* STANDARDS

The inconsistencies among states in the application of the *Atkins* standard lend themselves to a number of constitutional issues. These issues stem from the fact that the Supreme Court left it to state discretion to decide how to define and implement the *Atkins* ban. This decision, and the consequent varying standards that states have promulgated since, lead to violations in two areas of the Constitution: the Eighth Amendment and the incorporation doctrine.

A. Eighth Amendment Issues

Ironically, although *Atkins* was intended to remedy violations of the Eighth Amendment in light of "evolving standards of decency,"[128] the fact that the Court deferred to the states the decision about how to implement the new ban has resulted in a different violation of the Eighth Amendment: arbitrariness. In *Furman v. Georgia*,[129] the Supreme Court held in a plurality opinion that an arbitrarily applied punishment falls into the category of "cruel and unusual punishment."[130] Justice Douglas, in concurrence, reasoned that the Eighth Amendment's predecessor in the English Bill of Rights was aimed at preventing "selective or irregular

128. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
129. 408 U.S. 238 (1972).
130. *Id.* at 239–40.

application of harsh penalties."[131] He noted that this now contemporary recognition of "the basic theme of equal protection" implicit in the Eighth Amendment is violated when a punishment is applied arbitrarily or discriminatorily.[132] As aptly stated by Justice Stewart, "where the ultimate punishment of death is at issue[,] a system of standardless jury discretion violates the Eighth . . . Amendment[]."[133]

The Supreme Court left the *Atkins* decision vulnerable to arbitrary application in violation of the Eighth Amendment by deferring the definition and implementation processes to the states. By not providing a precise definition, process, or designated fact finder, the Court provided for an increased likelihood of arbitrary results.[134] When juries without backgrounds in psychology or health care are allowed to determine whether a defendant is intellectually disabled, it is far more likely that extrinsic, individualized factors will weigh in their decisions, causing the decisions to be highly subjective and potentially baseless.[135] To be sure, these dangers are present in all capital murder cases; however, the dangers are especially apparent in *Atkins* hearings due to the clinical underpinnings of the *Atkins* standard.[136]

B. Doctrine of Incorporation Issues

The other constitutional issue brought about by the inconsistencies in the implementation of the *Atkins* standard involves violations of the doctrine of incorporation. The doctrine of incorporation refers to the process by which the fundamental rights provided in the Bill of Rights are applied to the individual states.[137] The doctrine places particular importance on the uniform application of the Bill of Rights across the several states, specifically prohibiting the states from applying "watered-down" versions of the rights.[138] This leaves almost no room for deference to the states when it comes to defining the incorporated rights.[139]

In *Robinson v. California*,[140] the Supreme Court noted that the Eighth Amendment's ban on cruel and unusual punishment was applicable to the states through the Due Process Clause of the Fourteenth Amendment.[141] According to the doctrine of incorporation, therefore, the Eighth Amendment must be applied "consistently and with equal force"

131. *Id.* at 242 (Douglas, J., concurring).
132. *Id.* at 249.
133. Gregg v. Georgia, 428 U.S. 153, 195 n. 47 (1976).
134. Amos, *supra* note 44, at 484.
135. *Id.* at 485.
136. *See id.* at 493.
137. Marceau, *supra* note 77, at 1242.
138. *Id.* at 1242–43 (quoting Mallory v. Hogan, 378 U.S. 1, 24 (1964) (internal quotation marks omitted).
139. *Id.*
140. 370 U.S. 660 (1962).
141. *Id.* at 675 (Douglas, J., concurring).

across the several states.[142] However, even a quick glance at the Tenth Circuit summary table shows that the *Atkins* ban has certainly not been applied in any consistent manner.[143] States vary in how they define, assess, and procedurally implement the ban. Such disparity directly violates the doctrine of incorporation.[144]

V. RECOMMENDATION FOR A CONSISTENT STANDARD

Constitutional concerns such as these justify the need for a consistent *Atkins* standard among the states. To comport with the mandates of the doctrine of incorporation, and to avoid further violation of the Eighth Amendment, there must be at least a minimum baseline level of consistency in the *Atkins* standard.[145] The most appropriate standard is one that takes account of three important considerations: the general guidelines provided by the Supreme Court in *Atkins*, current scientific research regarding the definition and diagnosis of intellectual disability,[146] and the mandates of the Constitution.[147] Implementation of the consistent standard recommended by this Comment will remedy the noted constitutional violations because those violations derive from the inconsistent application of the standard itself. Focusing on the remaining two considerations, the guidance of the *Atkins* court and the principles of science, will supply the needed consistent standard.

This Comment recommends the following: when implementing the *Atkins* ban, courts should adhere to the AAIDD definition of "intellectual disability" for both their definitional frameworks and for the definitions of the components of that framework. In regard to assessing the components of this definition, the intellectual functioning component should be assessed by either the Wechsler Adult Intelligence Scale (WAIS) or the Stanford–Binet Intelligence Scale (Stanford–Binet), the adaptive functioning component should be assessed by Scales of Independent Behavior (SIB-R), AAIDD Adaptive Behavior Scale (ABAS-II), or Inventory for Client and Agency Planning (ICAP), and the early onset component should be a holistic assessment. It is further recommended that procedurally the judge should make the intellectual disability determination prior to trial and defendants should bear the burden of proving intellectual disability by a preponderance of the evidence. Adherence to this standard

142. Marceau, *supra* note 77, at 1242.

143. *See supra* Part III.D.

144. Marceau, *supra* note 77, at 1292 ("These divergent standards as to a federal constitutional right are in tension with the general dictates of federal supremacy and the specific mandates of constitutional incorporation. There is simply no federal oversight, much less uniformity.").

145. *See id.* at 1302.

146. *See* Parham v. J.R., 442 U.S. 584, 609 (1979).

147. Use of a consistent standard in and of itself will ensure that the third consideration is met. Therefore, in justifying this Comment's various recommendations, only the other two considerations will be explicitly addressed.

will remedy the problems created by the current lack of a consistent standard.[148]

A. Recommended Definitional Framework: The AAIDD Definition

The AAIDD's definition of "intellectual disability" should be used consistently at all *Atkins* hearings. The *Atkins* decision supports the use of this definition. Although the Supreme Court in *Atkins* did not mandate a definition for use by the states, it did provide some general guidelines.[149] According to the Court, "clinical definitions of [intellectual disability] require 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."[150] In providing this definitional framework, the Court referenced two separate definitions—those of the AAIDD and the APA.[151] Although these two definitions are nearly the same in substance, the goals underlying each are different. The goal of the APA is to promote education, research, and patient care in the field of psychiatry.[152] The AAIDD's stated mission, on the other hand, is to "promote[] progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities."[153] As a matter of policy and for the sake of consistency, the AAIDD's definition should be used because it incorporates evolving policy, research, practice, and human rights of the intellectually disabled, rather than the more general concern with the field of psychiatry found in the APA's definition. The underlying policies of the AAIDD also contribute to the alignment of the AAIDD definition with the guidance provided by the Supreme Court in *Atkins* and with the ever-evolving scientific standards behind intellectual disability. Consequently, this Comment recommends that the appropriate definitional framework for use in an *Atkins* hearing is as follows: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive behavior, and (3) onset or origination before the age of eighteen.[154]

In keeping with the need for consistency, each component of the definitional framework should align with the well-developed corresponding AAIDD definition of the component. Accordingly, "subaverage intellectual functioning" should be defined as limitations in one's "general mental capability that include[] the ability to reason, solve problems, think abstractly, plan, and learn from experience, [and] comprehend[]

148. *See* Entzeroth, *supra* note 81, at 578.
149. Atkins v. Virginia, 536 U.S. 304, 318 (2002).
150. *Id.*
151. *Id.* at 308 n.3.
152. *About APA & Psychiatry*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/about-apa—psychiatry (last visited Jan. 25, 2013).
153. *Mission*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aamr.org/content_443.cfm?navID=129 (last visited Jan. 25, 2013).
154. *AAIDD Definition*, *supra* note 31, at 5–6.

one's surroundings."[155] Subaverage intellectual functioning is reflected by a score at least two standard deviations below the mean score on the IQ test being used, taking into account the standard error of measurement for the test as well.[156] "Adaptive behavior" should be defined as performance in three categories of skill sets: conceptual skills,[157] social skills,[158] and practical skills.[159] Like subaverage intellectual functioning, limitations in adaptive behavior are also reflected by a score at least two standard deviations below the mean score on the behavioral assessment being used, taking into account the standard error of measurement for the assessment.[160] The AAIDD's definitions for these individual components align with the guidance provided by the *Atkins* Court and are based on the most up-to-date clinical science.

B. Recommended Assessment of the Definitional Components

Because the AAIDD provides a clinical definition of "intellectual disability," it is most appropriate to assess each component according to modern clinical research and standards.[161] This ensures utilization of the most modern science. It is important, however, to also align these clinical principles with the policy considerations behind the prohibition on executing the intellectually disabled, as noted by the *Atkins* Court.

1. Recommended Assessment of the Subaverage "Intellectual Functioning" Component

Choosing an assessment standard is complicated due to the various available options for IQ tests.[162] In deciding the appropriate test, one must seek to maintain consistency without mandating one single test because no test is one-size-fits-all.[163] In its manual, the AAIDD does provide some guidance as to what type of test is most appropriate by stating that "[u]ntil more robust instruments based upon one or more of the multifactorial theories of intellectual functioning are developed and demonstrated to be psychometrically sound, we will continue to rely on a

155. Amos, *supra* note 44, at 474 (quoting AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 55 (10th ed. 2002)) (internal quotation mark omitted).

156. *Intellectual Disability*, *supra* note 36, at 8.

157. Conceptual skills include language and literacy; money, time, and number concepts; and self-direction. *AAIDD Definition*, *supra* note 31, at 2.

158. Social skills include interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules or obey laws and to avoid being victimized. *Id.*

159. Practical skills include activities of daily living (personal care), occupational skills, healthcare, travel or transportation, schedules or routines, safety, use of money, and use of the telephone. *Id.*

160. *Intellectual Disability*, *supra* note 36.

161. *See* Bonnie & Gustafson, *supra* note 51, at 815–16.

162. *See supra* Part II.B.

163. Bonnie & Gustafson, *supra* note 51, at 827–28.

global (general factor) IQ as a measure of intellectual functioning."[164] Additionally, these tests should be generally accepted by the scientific community and utilize the most up-to-date diagnostic procedures.[165] Choosing tests that fit these standards will therefore satisfy the consideration of utilizing up-to-date scientific research and methods.

At the outset, it should be noted that due to the inclusion of defendants with mild intellectual disability in the *Atkins* prohibition,[166] the IQ test used must adequately include these individuals within the intellectual disability definition to comport with the guidance provided by the *Atkins* Court. Although there are many tests available, this Comment recommends that subaverage intellectual functioning be assessed using either the WAIS or the Stanford–Binet intelligence quotient test.

The WAIS is considered exceptionally reliable, valid, organized, and easy to use.[167] It measures vocabulary, arithmetic, and visual–spatial skills on both a verbal and performance basis.[168] Likewise, the Stanford–Binet is highly representative of the general population and is considered highly reliable overall.[169] It measures five different categories: fluid reasoning (the ability for complex problem solving), knowledge, quantitative reasoning (the ability to complete mathematical word problems), visual–spatial processing (interpretation of figures and diagrams), and working memory (short-term memory).[170] The test assesses these factors both verbally and non-verbally.[171] Both IQ tests, when used in their full form as they should be, utilize various subtests to create a composite IQ score based on a range of intellectual functioning components.[172] This comports with the guidance provided by the AAIDD. Furthermore, both of these tests are normed on the general population, thereby including individuals with intellectual capacities ranging from severely intellectually disabled to genius level.[173] Consequently, they sufficiently account for the *Atkins* Court's mandate that the definition of "intellectual disability" include those individuals with only mild intellectual disability who may not be accounted for in tests focusing only on more obviously intellectually disabled individuals.

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164. AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 41 (11th ed. 2010).

165. Bonnie & Gustafson, *supra* note 51, at 829–30.

166. *Id.* at 822.

167. Alexis K. Dowling, Comment, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 799 (2003).

168. *Id.* at 798 n.230.

169. *Id.* at 800.

170. *Tips to Encounter a Stanford Binet IQ Test*, PERSONALITY-AND-APTITUDE-CAREER-TESTS.COM, http://www.personality-and-aptitude-career-tests.com/stanford-binet-iq-test.html (last visited Jan. 25, 2013).

171. *Id.*

172. *See id.*

173. Dowling, *supra* note 167, at 799–800.

To promote consistency and ensure that tests are not chosen arbitrarily, Virginia's model for available choices of IQ test should be utilized by all states. Virginia's statutory scheme "requires the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services [to] maintain an 'exclusive list'" of appropriate tests for use in courts during *Atkins* hearings.[174] An analogous official in each state should be appointed or required to carry out this same responsibility. Initially, only the WAIS and Stanford–Binet should be included in such a list of tests. However, formalized procedures should be provided for any litigant wishing to add additional tests to this list.[175] Although the exact contours of such a procedure are beyond the scope of this Comment, the procedure should serve the dual purpose of providing a screening mechanism that would help ensure that only the highest quality tests are allowed into the courtroom and allowing the list to be updated as newer and more scientifically sound tests are produced.[176]

2. Recommended Assessment of the Limitations in "Adaptive Functioning" Component

Limitations in adaptive functioning should be assessed with one of the three following tests: the SIB-R, the ABAS-II, or the ICAP. As with IQ tests, an exclusive list of appropriate tests should be maintained by a designated authority, along with a formalized procedure for the addition of new tests to ensure that up-to-date science is being utilized.

The SIB-R, ABAS-II, and ICAP are the three most commonly used adaptive behavior assessments for adults.[177] The SIB-R is a comprehensive assessment that provides a score based on a combination of an individual's adaptive and maladaptive behaviors.[178] It measures these behaviors in the categories of motor skills, social interaction and communication skills, personal living skills, and community living skills.[179] The SIB-R can be administered either as a questionnaire or as a structured interview.[180] Developed by the AAIDD, the ABAS-II is used to assess how individuals cope with the demands of their natural and social environments.[181] The test can be administered in a school or in a community setting.[182] The ICAP is an assessment tool that, like the SIB-R, measures

174. Bonnie & Gustafson, *supra* note 51, at 832 (quoting VA. CODE ANN. § 19.2-264.3:1.1 (2012)).

175. *See id* at 832–33.

176. *See id.* at 833.

177. Brad Hill, *Adaptive and Maladaptive Behavior Scales*, ASSESSMENT PSYCH. ONLINE, http://www.assessmentpsychology.com/adaptivebehavior.htm (last updated Aug. 15, 2012).

178. *Id.*

179. *Scales of Independent Behavior—Revised*, NELSON EDUC., http://www.assess.nelson.com/test-ind/sib-r.html (last visited Feb. 1, 2013).

180. Hill, *supra* note 177.

181. *Id.*

182. *Id.*

an individual's adaptive and maladaptive behaviors.[183] It also takes into account an individual's demographics, diagnoses, support services, and leisure activities.[184] Each of these tests comport with the AAIDD's recommendation that adaptive behavior be assessed "through the use of standardized test measures normed on the general population, including people with disabilities and people without disabilities."[185] However, each of these tests also has drawbacks: the SIB-R does not incorporate observation of the individual being assessed, the ABAS-II is somewhat confusing and "unidimensional" because it only measures one dimension of behavior, and the ICAP is limited in scope due to its short length.[186]

However, the adaptive behavior component is a relatively new addition to the intellectual disability definition.[187] Consequently, new and improved adaptive behavior assessments are on the horizon. For example, in 2013 the AAIDD will release the Diagnostic Adaptive Behavior Scale, which will directly assess the skill sets included in the AAIDD's definition of "adaptive behavior."[188] This makes the recommendation for a formalized procedure for adding new tests especially important for adaptive behavior assessments. Some of the standards that should be included in this procedure include tests that consider each adaptive behavior skill set in the context of the individual's peer group, social environment, and cultural environment.[189] In addition, assessments must include third-party input from individuals who have regular, substantial contact with the defendant.[190] This procedure will ensure that the most modern and scientifically sound assessments are utilized to measure adaptive behavior for an *Atkins* hearing.

3. Recommended Assessment of the "Early Onset" Component

The onset of intellectual disability prior to the age of eighteen should be a holistic assessment. This means that as much information as possible should be gathered about the defendant's past adaptive behaviors and intellectual functioning.[191] This information can be gathered from an individual's past test scores, medical records, school records, juvenile court records, etc.[192] There is a general consensus among mental health organizations that intellectual disability need not be formally diagnosed before the age of eighteen, but rather that there be evidence

183. *Id.*
184. *Id.*
185. Bridget M. Doane & Karen L. Salekin, *Susceptibility of Current Adaptive Behavior Measures to Feigned Deficits*, 33 LAW & HUM. BEHAV. 329, 331 (2009).
186. *See* Hill, *supra* note 177.
187. Bonnie & Gustafson, *supra* note 51, at 846.
188. *Diagnostic Adaptive Behavior Scale*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_106.cfm?navID=23 (last visited Feb. 26, 2013).
189. *Id.*
190. *See* Bonnie & Gustafson, *supra* note 51, at 847.
191. Fabian et al., *supra* note 50, at 410.
192. *Id.* at 408.

from sources such as these that it originated prior to that age.[193] Allowing for a variety of evidence is important because many defendants will not have a formal diagnosis of intellectual disability that occurred prior to the age of eighteen[194] and the mental health needs of many of these individuals are not properly met during their adolescence.[195] By allowing various forms of evidence to show early onset of intellectual disability, this recommendation will ensure that the *Atkins* ban is properly applied to individuals suffering from intellectual disability since adolescence, as the *Atkins* Court intended, regardless of the presence of a prior formal diagnosis.

4. Policy Considerations in the Assessment of Intellectual Disability

In addition to aligning with the guidance provided by the *Atkins* Court and keeping pace with current scientific standards, the above recommended definitions and assessments comport with the policy considerations noted by the *Atkins* Court when mandating the prohibition. In *Atkins*, the Supreme Court based part of its reasoning for the ban on the idea that the characteristics underlying the clinical definition of "intellectual disability" negate the purposes behind the death penalty: deterrence and retribution.[196] The Court explained that the goal of deterrence is only served in situations in which the crime at issue is the product of premeditation and deliberation.[197] However, the cognitive and behavioral impairments associated with IQ test scores two standards deviations below the mean, as the AAIDD and this Comment recommend, negate the goal of deterrence.[198] For example, significant limitations in planning and the ability to think abstractly severely limit one's ability to premeditate complex crimes like homicide and to therefore be deterred by a potential death penalty sentence.[199]

Regarding retribution, the *Atkins* Court stated that the purposes of the death penalty are only served when the offender is highly culpable.[200] Philosophers such as Aristotle have long indicated a number of characteristics that a moral agent (i.e., a person who can be morally culpable) possesses.[201] Some such characteristics include the ability to care for others, be self-reflective, formulate plans of action, and exercise self-

193. *Id.* at 407.
194. *Id.*
195. Bonnie & Gustafson, *supra* note 51, at 855.
196. Atkins v. Virginia, 536 U.S. 304, 319 (2002). Note that the *Atkins* Court used the term "mental retardation."
197. *Id.*
198. *See* Tobolowsky, *supra* note 5, at 83–84.
199. *Atkins*, 536 U.S. at 318.
200. *Id.* at 319–20.
201. Peggy Sasso, *Implementing the Death Penalty: The Moral Implications of Recent Advances in Neuropsychology*, 29 CARDOZO L. REV. 765, 774–76 (2007).

control.[202] The skill sets listed in the adaptive functioning component of the AAIDD definition address these characteristics.[203] Significant limitations in self-reflection and the ability to care for others restrict individuals' capacity for moral culpability and cognizance of their "deserving of execution."[204]

C. *Recommended Procedural Components for Implementing the* Atkins *Standard*

In addition to having one standardized framework for definition and assessment, the procedures for implementing the *Atkins* ban must be consistent. As reflected by the comparison of three Tenth Circuit states, differing procedural processes may be the sole determination of whether a defendant is found to be intellectually disabled.[205] The first two suggested procedural aspects are interconnected; they are the timing of the determination and the fact finder. In this regard, a judge, prior to the guilt phase of trial, should make the *Atkins* determination. Furthermore, defendants should carry the burden of proving their intellectual disability by a preponderance of the evidence. Finally, this Comment recommends that proper utilization of expert testimony by the defendant will further assist in accurate and consistent determinations of whether a defendant is found to be intellectually disabled.

1. Recommended Fact Finder and Timing for the Determination: The Judge, and Prior to the Guilt Phase of Trial

The *Atkins* determination should be made by a judge, prior to the guilt phase of trial. Because the *Atkins* Court provided no guidance on these procedural aspects of the ban, general policy considerations in implementing the ban will be examined for the justification of each recommendation. Preliminarily, and contrary to the views of some legal scholars, using the jury as the fact finder is not required in *Atkins* hearings.[206] The *Atkins* Court mentioned no such requirement, and prior Supreme Court precedent only requires that juries make determinations of fact in situations in which there is a potential for a defendant's punishment to be increased beyond the statutory maximum.[207] The purpose of an *Atkins* determination is to determine whether the defendant can be removed from the purview of the death penalty, thereby potentially decreasing the punishment rather than increasing it.[208] Therefore, using the judge as the fact finder is not only allowable, it is preferable for the following reasons.

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202. *Id.* at 775–76.
203. *AAIDD Definition*, *supra* note 31, at 2–3.
204. *Atkins*, 536 U.S. at 319.
205. *See supra* Part III.D.
206. Tobolowsky, *supra* note 5, at 107.
207. *Id.* at 106–07.
208. *Id.* at 107.

As previously mentioned, when the judge is used as the fact finder, the relevant determination is made prior to trial based on a legal standard of intellectual disability.[209] A requirement that the determination occur in this manner is a vital aspect of protecting the *Atkins* ban.[210] It is far more difficult for defendants to make an adequate showing of intellectual disability after the prosecution has presented all of its evidence, especially if the crime committed was a heinous one.[211] This difficulty is heightened when the jury is the fact finder because jurors might confuse the trial phase and sentencing phase as being interrelated or improperly consider the details of the defendant's crime in their determinations.[212] By using judges, who are more familiar with making objective determinations based on complicated legal standards (such as the clinical definition of "intellectual disability"), such risks of inaccuracy and bias are significantly reduced.[213] Of course, judges are humans too and still may be susceptible to some of these same biases. Therefore, having the determination occur before the guilt phase of trial will help to further insulate the judge's decision from improper influences (e.g., knowing the gruesome details of the crime), thereby decreasing the arbitrariness of *Atkins* determinations. Furthermore, holding the *Atkins* determination first will, at least in some cases, prevent the need for costly and unnecessary capital proceedings.[214]

2. Recommended Allocation of and Standard for the Burden of Proof: On the Defendant, and by a Preponderance of the Evidence

For comprehensive procedural consistency in *Atkins* determinations, defendants should bear the burden of proving their intellectual disability by a preponderance of the evidence. The allocation of and standard for the burden of proof, like the fact finder and timing issues, are best justified with reference to general policy considerations due to the lack of guidance from the *Atkins* Court.

The proper allocation of and standard for the burden of proof are best determined with reference to two landmark Supreme Court decisions regarding mental competency hearings: *Medina v. California*[215] and *Cooper v. Oklahoma*,[216] respectively. In *Medina*, the Court held that placing the burden of proof on a defendant in a criminal competency

209. *See supra* Part II.C.
210. *See* Tobolowsky, *supra* note 5, at 109–10.
211. *Id.* at 109.
212. *Id.*
213. *See id.* at 110.
214. *Id.*
215. 505 U.S. 437 (1992).
216. 517 U.S. 348 (1996).

proceeding did not violate any principles of fundamental fairness.[217] The Court reasoned that access to the proceeding in the first place allowed the defendant "a reasonable opportunity" to prove incompetence.[218] In that case, the Court upheld the placement of the burden on the defendant to prove his incompetence by a preponderance of the evidence.[219] In *Cooper*, on the other hand, the Court held that requiring a defendant to prove his incompetence by clear and convincing evidence did violate principles of fundamental fairness.[220] This was so, the Court reasoned, because it meant that even if defendants could prove that they were more likely than not incompetent, they still might not satisfy the clear and convincing evidentiary burden.[221] The significant risk of this occurring could pose dire consequences for defendants.[222]

Considering that the Supreme Court and a majority of states have accepted the preponderance of the evidence standard, this is the most appropriate standard for use in proving a defendant's intellectual disability.[223] Contrary to the clear and convincing standard, which the Supreme Court critiques, the preponderance of the evidence standard allows defendants a reasonable opportunity to prove their intellectual disability and lessens the risk of an excessively high burden, which would allow the execution of defendants who would otherwise fall within the *Atkins* ban. Therefore, the standard of proof for an *Atkins* determination should be a preponderance of the evidence. Because it is permissible to place the burden on the defendant and defendants are in the best position to prove their own mental health, the burden of proof should be allocated to the defendant.[224]

3. Other Recommendations to Ensure Constitutionality

One last related issue that has received scant attention is how evidence of intellectual disability should be presented. All evidence presented at an *Atkins* hearing should be presented through a uniquely qualified expert to ensure that an *Atkins* hearing comports with the most up-to-date scientific research and standards. This recommendation also aligns with the *Atkins* Court's utilization of a clinical definition.[225] There has been some argument that not only should the evidence be presented via an expert, but that the same expert should also act as the fact finder and make the final decision as to whether a defendant is intellectually disa-

217. *Medina*, 505 U.S. at 448–49 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)) (internal quotation marks omitted).
218. *Id.* at 451.
219. *Id.* at 453.
220. *Cooper*, 517 U.S. at 363–64.
221. *Id.* at 364.
222. *Id.* at 363–64.
223. Tobolowsky, *supra* note 5, at 118.
224. *See id.* at 117–18.
225. Atkins v. Virginia, 536 U.S. 304, 318 (2002).

bled.[226] However, it is common knowledge that "[t]he law is the ultimate arbiter of criminal responsibility."[227] The criminal trial process decides the moral guilt or innocence of an individual and imposes sanctions based on that individual's culpability.[228] An individual may not receive these sanctions unless he or she is morally culpable, and this determination hinges on whether a person is deemed intellectually disabled under the law.[229] Consequently, an appropriate legal fact finder—a judge, as advocated in this Comment—needs to make the intellectual disability determination based on sound scientific evidence provided by an appropriate expert.

To ensure the accuracy of information brought forth during the *Atkins* hearing and to protect against arbitrariness, a consistent set of guidelines must be in place for choosing an expert to present testimony on a defendant's intellectual disability. Virginia's statute provides a model for what should be required of an expert: (1) the expert should be either a psychologist or a psychiatrist; (2) the expert should have training and experiencing in assessing, scoring, and interpreting intelligence and adaptive behavior measures; and (3) the expert should be trained and experienced in the performance of forensic evaluations.[230] The Supreme Court has previously noted that "the determination of 'whether a person is mentally ill turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.'"[231] However, as noted previously, the ultimate decision must lay with the fact finder—the judge. These suggested standards simply help judges determine whether an expert is qualified to provide information relevant to an intellectual disability determination. Qualified experts, in turn, support the provision of reliable and consistent information during *Atkins* proceedings.

CONCLUSION

Atkins brought forth an important change in Eighth Amendment jurisprudence. The prohibition on the execution of the intellectually disabled was a pivotal step in protecting less culpable offenders from excessive punishment. This important protection, however, has been diluted through its inconsistent application among the several states. A comparison of only three states within the Tenth Circuit demonstrates such inconsistencies. States vary in how they define, assess, and procedurally implement the ban on executing the intellectually disabled. These inconsistencies pose serious threats to the constitutional rights of intellectually disabled capital defendants.

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226. *See* Amos, *supra* note 44, *passim*.
227. Sasso, *supra* note 201, at 806.
228. *Id.* at 807.
229. *Id.* at 808.
230. Bonnie & Gustafson, *supra* note 51, at 856.
231. Parham v. J.R., 442 U.S. 584, 609 (1979) (quoting Addington v. Texas, 441 U.S. 418, 449 (1979)).

To resolve such threats, it is important that there be a level of consistency in the application of the ban. This Comment recommends that such consistency be realized through the utilization of the AAIDD's definitional framework because the AAIDD is referenced by the *Atkins* Court and is the leading authority on intellectual disability. It is further recommended that the AAIDD definitions of each component of that framework be adopted. Next, utilizing tools consistent with the most up-to-date scientific research and methods to assess each component of the AAIDD definition will help to ensure consistent application of the definitional framework. For IQ tests, either the WAIS or Stanford–Binet should be used as the method of assessment. For adaptive behavior assessments, the SIB-R, ABAS, or ICAP should be utilized until more advanced tests become available.

To avoid further arbitrariness, this definitional framework and assessment must be consistent in its procedural application. The most appropriate fact finder for an intellectual disability determination is a judge, who is less likely to be improperly swayed than is a layperson jury. To further insulate the judge from improper outside influences, the *Atkins* determination should be made prior to trial, before any gruesome details of the crime have been brought forth. Relatedly, judges must base their decisions on information provided by an appropriate and qualified expert, thereby ensuring the reliability of judicial determinations as well as procedural consistency. Lastly, the burden and standard of proof demand procedural consistency. Placing a preponderance of evidence burden on the defendant comports with precedent and historical practice while still allowing defendants a reasonable opportunity to prove their intellectual disability. Requiring the states to implement these policies will ensure that the ban on execution of the intellectually disabled is not implemented arbitrarily, thereby protecting the rights of intellectually disabled capital defendants just as the Supreme Court intended in *Atkins v. Virginia*.

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* J.D. Candidate, 2014. The author would like to thank Professor Justin Marceau for his guidance in writing this Comment and her husband, Nick Raffensperger, for his support throughout the publication process.