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***Moore v. Texas* and the Ongoing National Consensus Struggle Between the Eighth Amendment, the Death Penalty, and the Definition of Intellectual Disability**

Austin Holler

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Moore v. Texas and the Ongoing National Consensus Struggle Between the Eighth Amendment, the Death Penalty, and the Definition of Intellectual Disability

Austin Holler*

In Moore v. Texas, the Supreme Court clarified its categorical ban against the death penalty for intellectually disabled individuals, holding that states cannot disregard current medical diagnostic criteria when making a legal determination of intellectual disability. The Court continued to hone the rules from Atkins v. Virginia and Hall v. Florida and correctly found that the reliance on outdated or subjective criteria creates an unacceptable risk of imposing a cruel and unusual punishment on such individuals. Furthermore, the Court demonstrated the crucial importance of utilizing legitimate and modern clinical standards to reflect a national consensus as well as evolving standards of decency.

In the wake of Moore, states will see many appeals from individuals on the cusp of intellectual disability seeking to overturn their death sentences. Importantly, the Court’s decision to hear any such appeals may very well be colored by fluctuations within the medical community in the interim. The addition of two conservative Justices since Moore was decided, however, means the rules from Moore, Hall, and Atkins will likely cease to expand.

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* JD Candidate, Loyola University Chicago School of Law, 2019.

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INTRODUCTION

The United States was founded on core values and individual protections—embodied in the Constitution and Bill of Rights¹—such as the belief that the government cannot impose “cruel and unusual punishments” on its citizens.² Borrowing from the English Bill of Rights, the framers of the Constitution implemented the Eighth Amendment to create boundaries for criminal punishment.³ The Supreme Court often enforces the Eighth Amendment’s proscription of cruel and unusual punishments in terms of proportionality.⁴ To little surprise, it has

1. See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 57 (1957) (noting the protections provided for the individual in terms of a limitation on the government’s power enforced by the judiciary); Akhil Reed Amar, *The Bill of Rights as A Constitution*, 100 *YALE L.J.* 1131, 1132 (1991) (describing the Bill of Rights as a duality of individual rights and protections combined with a desire for “organizational structure” and majority rule).

2. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); see 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 447–48 (Jonathan Elliot ed., 1891) (“In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. . . . But Congress may introduce the practice of the civil law, in preference to that of the common law. . . . [I]f you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication. A bill of rights may be summed up in a few words. What do they tell us?—That our rights are reserved.”).

3. Peter Lanston Fitzgerald, *An English Bill of Rights? Some Observations from Her Majesty’s Former Colonies in America*, 70 *GEO. L.J.* 1229, 1234–35 (1982); see also Stanley Mosk, *The Eighth Amendment Rediscovered*, 1 *LOY. U. L.A. L. REV.* 4, 5 (1968) (explaining colonial Americans’ concern about the harshness of the English justice system and its growing number of capital crimes); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 *PEPP. L. REV.* 661, 666–67 (2004) (citing wide acceptance of the fact that the Eighth Amendment was pulled directly from the English Bill of Rights).

4. Youngjae Lee, *Federalism and the Eighth Amendment*, 98 *IOWA L. REV. BULL.* 69, 77–78 (2013). See, e.g., *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) (“A punishment out of all proportion to the offense may bring it within the ban against ‘cruel and unusual punishments.’” (quoting *O’Neil v. Vermont*, 144 U.S. 323, 331 (1892))); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding a mandatory life sentence is disproportionate to the defendant’s crime and therefore unconstitutional). *But see Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion) (arguing that *Solem* is incorrect and the Eighth Amendment does not guarantee

frequently operated in death penalty cases,⁵ specifically forbidding capital punishment for rape offenses⁶ as well as for murders committed by minors⁷ or intellectually disabled individuals.⁸

The Eighth Amendment's recent prohibition of the death penalty for intellectually disabled individuals gave rise to the controversy in *Moore v. Texas*.⁹ In *Moore*, the Supreme Court addressed whether a state's reliance on outdated medical standards and its own local precedent rooted in subjectivity complied with the Court's Eighth Amendment precedent.¹⁰ At bottom, does the Eighth Amendment allow a state, in devising a system for determining intellectual disability as a matter of law, to prohibit the use of current medical standards and implement whatever medical standards it wishes?¹¹ Based on two of its recent decisions,¹² the Court held that a state cannot disregard current medical standards or "diminish the force of the medical community's consensus" when determining intellectual disability, and that Texas's use of subjective factors was in direct violation of the Eighth Amendment.¹³

Notwithstanding Chief Justice Roberts's dissenting opinion that Texas actually complied with the Eighth Amendment in creating its own

proportional punishments).

5. In addition to the cases discussed herein, the Supreme Court has dealt with myriad cases surrounding the death penalty and once struck down the death penalty entirely as unconstitutional under the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972). See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361–97 (1995), for a discussion of the Court's death penalty jurisprudence leading up to and following *Furman*.

6. *Coker v. Georgia*, 433 U.S. 584, 592 (1977); see also *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (holding that the death penalty is not a proportional punishment for the rape of a child and is thus barred by the Eighth Amendment).

7. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

8. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). *Atkins* created a categorical ban on the death penalty for intellectually disabled persons. *Id.* See *infra* Part I.B.1 (discussing the holding and rationale of *Atkins*).

9. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017).

10. *Id.*; Amy Howe, *Argument Analysis: Texas Inmate Seems Likely to Prevail in Death-Row Disability Challenge*, SCOTUSBLOG (Nov. 29, 2016, 1:59 PM), <http://www.scotusblog.com/2016/11/argument-analysis-texas-inmate-seems-likely-to-prevail-in-death-row-disability-challenge/>.

11. Amy Howe, *Argument Preview: Court Returns, Again, to the Death Penalty and the Intellectually Disabled*, SCOTUSBLOG (Nov. 22, 2016, 2:31 PM), <http://www.scotusblog.com/2016/11/argument-preview-court-returns-again-to-the-death-penalty-and-the-intellectually-disabled/>.

12. *Hall v. Florida*, 572 U.S. 701 (2014); *Atkins*, 536 U.S. 304.

13. *Moore*, 137 S. Ct. at 1044; see Amy Howe, *Opinion Analysis: A Victory for Intellectually Disabled Inmates in Texas*, SCOTUSBLOG (Mar. 28, 2017, 1:51 PM), <http://www.scotusblog.com/2017/03/opinion-analysis-victory-intellectually-disabled-inmates-texas> (discussing the majority opinion's view that the Texas Court of Criminal Appeals was wrong in three different ways).

standard and that the medical community itself was splintered in terms of diagnosing and defining intellectual disability, Justice Ginsburg's majority opinion correctly applied the Court's rules from *Hall v. Florida*.¹⁴ Without further instruction on the Eighth Amendment's prohibition of capital punishment for the intellectually disabled, as provided by *Moore*, states would be free to craft and retain their own rules—becoming inapposite with current medical standards over time—that create the “unacceptable risk” of executing those who are intellectually disabled.¹⁵

Part I of this Note begins by describing the evolution of the Eighth Amendment and the definition of cruel and unusual punishment in the United States.¹⁶ Part I continues with an account of the Supreme Court's recent Eighth Amendment jurisprudence regarding intellectual disability and the death penalty, as well as Texas's response to the Court's rule from *Atkins v. Virginia*.¹⁷ Next, Part II outlines the factual and procedural history of *Moore* and discusses the Court's decision as well as Chief Justice Roberts's dissent.¹⁸ Part III analyzes why the majority in *Moore* was correct and in line with the Court's Eighth Amendment precedent, discusses the medical community's importance in determinations of intellectual disability, and explains why Texas's legal standard for intellectual disability is irreconcilable with both *Hall* and *Atkins*.¹⁹ Finally, Part IV discusses the possible impact of *Moore*, including how states will now have even more difficulty imposing the death penalty, how this decision will shape future Eighth Amendment and national consensus inquiries, and how the Court might address broader death penalty issues in the future.²⁰

I. THE EVOLVING DEFINITION OF CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment is a safeguard against governmental overreach

14. *Moore*, 137 S. Ct. at 1049 (asserting *Hall* stands for the proposition that current medical standards cannot be disregarded in a legal determination of intellectual disability, and that when an IQ score is near but above seventy, the duly recognized standard error of measurement must be accounted for); see *Hall*, 572 U.S. at 721–22 (clarifying that, although the views of medical experts do not strictly demand adherence during a court's determination of intellectual disability, the determination must be properly informed by the medical community's diagnostic structures and standards).

15. *Moore*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 704).

16. See *infra* Part I.A (discussing the Eighth Amendment generally, and what it means today).

17. See *infra* Part I.B (explaining the categorical ban from *Atkins*, how it was implemented in Texas by *Ex parte Briseno*, and how it was fine-tuned by *Hall*).

18. See *infra* Part II (discussing *Moore v. Texas*, the case at issue in this Note).

19. See *infra* Part III.

20. See *infra* Part IV.

and a protector of human dignity.²¹ Accordingly, the Supreme Court has held that the Amendment itself must continue to mature with society and gather its meaning from “evolving standards of decency.”²² To that end, the Eighth Amendment prohibits punishments that are patently excessive.²³ A punishment is categorically excessive and thus barred when it either makes no discernible contribution to the goals of punishment or is clearly disproportionate to the crime itself.²⁴ Further, discrete categories of individuals may be exempted from specific types of punishment, such as the death penalty, no matter what the circumstance.²⁵ For consistency and clarity, the Court attempts to adjudicate Eighth Amendment cases objectively.²⁶ In doing so, it highlights the importance of decisions not being based on the subjective beliefs of a justice or justices—whether in appearance or actuality—and that the Court can meet this goal by looking to the societal attitude toward a particular punishment, recent legislation, and juries’ sentencing decisions.²⁷ This Part will first discuss the general progression of the Supreme Court’s cruel and unusual punishments jurisprudence and will then focus on recent developments surrounding the prohibition of capital punishment for intellectually disabled persons.

21. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”).

22. *Trop*, 356 U.S. at 101; see also *Roper*, 543 U.S. at 560–61 (“To implement this framework we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” (quoting *Trop*, 356 U.S. at 100–01)).

23. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); see also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 679 (2005) (discussing a line of cases in which otherwise allowable punishments were analyzed for excessiveness in light of the crime committed).

24. *Coker*, 433 U.S. at 592; see also *Gregg*, 428 U.S. at 173 (“[T]he punishment must not involve the unnecessary and wanton infliction of pain.”).

25. See *Enmund v. Florida*, 458 U.S. 782, 798–99 (1982) (finding an individual who did not kill or intend to kill to be categorically different in terms of culpability from those who did so in a felony murder case); Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA’s Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89, 90 (1998) (noting proportionality analysis sometimes presents difficulties in creating categorical exemptions).

26. Lee, *supra* note 23, at 689; Victor L. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 CLEV. ST. L. REV. 363, 379 (1986).

27. *Coker*, 433 U.S. at 592.

A. *Proportionality and National Consensus Review*

Well before the cruel and unusual punishments clause was interpreted to forbid punishments that the Supreme Court deemed excessive or disproportionate, torture and other barbaric punishments were prohibited.²⁸ In fact, because the Amendment was almost wholly copied from England, it appeared, in the early days of the nation, that was all that it disallowed.²⁹ The Supreme Court eventually declared that it meant more, however, in the landmark case *Weems v. United States* in 1910: “The clause of the Constitution . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”³⁰ *Weems* was the earliest Eighth Amendment decision based on proportionality; the Court noted the fundamental “precept of justice” that one’s punishment ought to be proportioned to one’s crime.³¹

Later, in *Trop v. Dulles*, the Supreme Court addressed whether a punishment was contrary to principles of civilized treatment under the Eighth Amendment.³² *Trop* specifically focused on the nature of the punishment itself as excessive, being inherently violative of the dignity of man.³³ In announcing this new protection under the Eighth Amendment, the Court continued its expansion and guaranteed it would not remain static, but rather evolve with the nation’s sensibilities.³⁴ As such, punishments are to be judged not only for proportionality, but also for fairness in light of human dignity and our “evolving standards of decency” under the Eighth Amendment.³⁵

28. See *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (commenting on old forms of punishment now deemed to be barbaric and clearly excessive, such as quartering, burning alive, dissection, and disembowelment).

29. Malcolm E. Wheeler, *Toward A Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 839 (1972); see also *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (noting that Americans at the time may have viewed it the same as the English did).

30. *Weems v. United States*, 217 U.S. 349, 378 (1910). In *Weems*, the Supreme Court held a fifteen-year prison sentence, combined with hard labor while chained from wrist to ankle, to be cruel and unusual for the crime of falsifying an official document. *Id.* at 381.

31. *Id.* at 367; Lee, *supra* note 23, at 687–88; see also Mosk, *supra* note 3, at 10 (highlighting the importance of the *Weems* decision as it relates to a more expansive view of the Eighth Amendment prohibiting “pervasive cruelty” outside the scope of actual torture); Wheeler, *supra* note 29, at 842 (noting that *Weems* stands for the proposition that the Eighth Amendment limits both the amount and nature of punishment; the opinion’s use of cruel and excessive are often conflated with disproportionality).

32. *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

33. *Id.* at 100; see also Wheeler, *supra* note 29, at 841 (noting that the Court did not utilize the inhuman test or the unnecessary test to strike down the punishment in *Trop*).

34. *Trop*, 536 U.S. at 100–01; see also Ronald Turner, *The Juvenile Death Penalty and the Court’s Consensus-Plus Eighth Amendment*, 17 GEO. MASON U. C.R. L.J. 157, 159 (2006) (describing the Court’s “evolving standards of decency” test from *Trop* as still-governing).

35. *Trop*, 536 U.S. at 101; Wheeler, *supra* note 29, at 841–42 (noting the availability of multiple

After broadening its substantive scope, the Court then extended the Eighth Amendment's reach by applying it to the states through the Due Process Clause of the Fourteenth Amendment.³⁶ *Robinson v. California*, decided in 1962, was the first case in which the Court applied the Eighth Amendment to the states,³⁷ and the proverbial floodgates opened afterward.³⁸ Significantly, the Court saw a deluge of cases focusing on capital punishment and the Eighth Amendment.³⁹ Looking both to national consensus⁴⁰ and proportionality,⁴¹ the Court has since prohibited or limited the death penalty for many crimes.⁴²

B. *Intellectual Disability and the Death Penalty*

While the Eighth Amendment and the death penalty were experiencing a proportionality review renaissance, questions relating to the basic principles of culpability, retribution, and deterrence were also at the

tests that have been used by the Court).

36. U.S. CONST. amend. XIV, cl. 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”); see *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (assuming *arguendo*, but not making an actual constitutional holding, that violations of the Fifth and Eighth Amendments also violate the Fourteenth Amendment); *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding California’s law under which the defendant was sentenced to ninety days imprisonment merely for having an illness—being addicted to drugs—cruel and unusual punishment in violation of the Fourteenth Amendment); Rumann, *supra* note 3, at 665 (noting the infrequency with which the Supreme Court wielded the Eighth Amendment throughout the nineteenth and early twentieth centuries, before the Fourteenth Amendment was invoked).

37. Lee, *supra* note 23, at 688 n.42; Rumann, *supra* note 3, at 665 n.27. *But see* Mosk, *supra* note 3, at 8–9 (arguing that the Court in *Robinson* never explicitly held that the Eighth Amendment applies to the States but conceding that it is likely because the case dealt with a state statute, and the Court assumed as much throughout the opinion).

38. Rumann, *supra* note 3, at 666; Arthur B. Berger, Note, *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglia of Eighth Amendment Prisoners’ Rights Standards*, 1992 UTAH L. REV. 565, 570–71; see also Lee, *supra* note 23, at 688–89 (discussing the Court’s significant death penalty jurisprudence under *Weems* that did not occur until after the Court decided *Robinson* in 1962).

39. Lee, *supra* note 23, at 689; see generally Steiker & Steiker, *supra* note 5 (discussing constitutional regulation of capital punishment for the two decades following *Furman v. Georgia*).

40. Lee, *supra* note 23, at 689; see Steiker & Steiker, *supra* note 5, at 375 (asserting that consensus analysis may be a subsection of the overall proportionality analysis).

41. Lee, *supra* note 23, at 689–90; see Steiker & Steiker, *supra* note 5, at 375–78 (explaining that the Court’s proportionality review of death penalty cases has been the most significant part of its narrowing doctrine; that is, limiting capital punishment only to those who are most deserving).

42. *Coker v. Georgia*, 433 U.S. 584 (1977) (disallowing the death penalty for rape); *Enmund v. Florida*, 458 U.S. 782 (1982) (disallowing the death penalty for aiding and abetting under a felony murder statute); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (disallowing the death penalty for murder committed by a defendant under the age of sixteen); *Roper v. Simmons*, 543 U.S. 551 (2005) (disallowing the death penalty for murders committed by a defendant under the age of eighteen); see also *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (stating, in dicta, that the death penalty should not be applied in situations where an individual’s life was not taken).

forefront.⁴³ With several other crimes and classes of individuals considered at this time,⁴⁴ so too did the issue of intellectually disabled persons and capital punishment arise with *Penry v. Lynaugh*.⁴⁵ Notably, intellectual disability was not always granted the same protections and exemptions as mental illness, as they were frequently and improperly conflated.⁴⁶ Although the appeal in *Penry* failed, it set the stage for future cases to address the national consensus regarding whether capital punishment was appropriate for those with an intellectual disability.⁴⁷

In *Penry*, the Supreme Court addressed two separate questions when reviewing the petitioner's death penalty appeal.⁴⁸ The question most pertinent to this Note asked whether it is cruel and unusual punishment in terms of proportionality to execute an intellectually disabled⁴⁹

43. Lee, *supra* note 23, at 689–91. For culpability, courts compare the defendant in question to a quintessential first-degree murderer. *Id.* at 689–90. This degree of culpability is then weighed against a consideration of the retributive and deterrent goals of the punishment as carried out for this individual defendant. *Id.* at 690–91. *See also* Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 101 (2008) (arguing that the Eighth Amendment oftentimes serves as a retributivist constraint on capital punishment by protecting certain groups of offenders from the death penalty because they do not deserve it).

44. *See supra* note 42 (noting several cases in which the Court has prohibited or limited the death penalty for specific crimes).

45. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *see also* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 416–21 (1985). The general existence of intellectual disability, in addition to mental illnesses or disorders, has been recognized by society with varying terminology for centuries. *Id.* at 416–17. However, our country's care and handling of these individuals, both judicially and societally, has not always been in proper accord with their condition. *Id.* at 417–19. Eventually, views of alarmists and supporters of eugenics were quashed by experts, and courts addressed the problem of proper adjudication of cases involving intellectually disabled defendants. *Id.* at 419–21.

46. *See* Ellis & Luckasson, *supra* note 45, at 423–25 (noting various internal and external similarities between intellectual disability and mental illness, but stressing a main overarching point in disability being a permanent impairment and illness more often being cyclical and episodic); *id.* at 432 (noting “idiots,” or those with severe or profound intellectual disability, are not able to be convicted of their criminal acts, but also that authorities have struggled to draw the line of criminal responsibility for those with lesser degrees of disability).

47. Peter K.M. Chan, Note, *Eighth Amendment—The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability, and Death*, 80 J. CRIM. L. & CRIMINOLOGY 1211, 1233 (1990); *see also* Cynthia Han, “Evolving Standards of Decency”: *Legislative and Judicial Developments Leading to Atkins v. Virginia*, 9 GEO. J. POVERTY L. & POL’Y 469, 470 (2002) (noting the possibly strategic mentioning in *Penry* of a putative national consensus against the practice in the future, shortly followed in time by sweeping state legislative action doing just so).

48. *Penry*, 492 U.S. at 313; *see also* Michael P. DeGrandis, Note, *Atkins v. Virginia: Nothing Left of the Independent Legislature Power to Punish and Define Crime*, 11 GEO. MASON L. REV. 805, 828 (2003) (noting that *Penry* also raised an insanity defense at trial, which was rejected).

49. The Court in both *Penry* and *Atkins* utilized the term “mentally retarded,” though the term “intellectually disabled” has replaced it in medical terminology since those cases were decided. *See* Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116 (2007). This Note uses the latter throughout, unless referring to publications or academic institutions, and has

defendant convicted of murder.⁵⁰ The Court, in an opinion by Justice O'Connor, used proportionality review under the evolving standards of decency test to demonstrate there was no national consensus against the death penalty for this class of individuals, and thus it was not cruel and unusual.⁵¹ Importantly, *Penry* was decided by a bare majority.⁵² In his dissent, Justice Brennan argued the majority's holding was incorrect and inappropriate because these individuals "lack[ed] the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty" and that "killing [intellectually disabled] offenders does not measurably further the penal goals of either retribution or deterrence."⁵³ Eventually, the dissenters' concerns, coupled with an increase in state legislation disallowing the practice, were strong enough to sway Justice O'Connor's vote.⁵⁴

1. *Atkins v. Virginia*

The execution of intellectually disabled defendants convicted of capital murder was constitutionally permissible until 2002, when the Supreme Court decided *Atkins v. Virginia*.⁵⁵ In *Atkins*, the Court held that the Eighth Amendment proscribed capital punishment for defendants who were intellectually disabled.⁵⁶ A jury convicted Daryl Renard Atkins of murder and sentenced him to death in 1999,⁵⁷ notwithstanding testimony from a forensic psychologist that he was mildly intellectually disabled.⁵⁸ Following a second sentencing hearing—ordered by the

replaced the outdated term in quoted material.

50. *Penry*, 492 U.S. at 313; DeGrandis, *supra* note 48, at 828–29.

51. DeGrandis, *supra* note 48, at 829; *see also Penry*, 492 U.S. at 331 (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”).

52. Chan, *supra* note 47, at 1221–23. Justices Brennan and Stevens each wrote dissenting opinions, joined by Justices Marshall and Blackmun, respectively. *Penry*, 492 U.S. at 341, 349.

53. *Penry*, 492 U.S. at 343–44, 348 (Brennan, J., dissenting).

54. *See* Chan, *supra* note 47, at 1233–35 (noting Justice O'Connor’s crucial swing vote on a sharply divided Court when dealing with death penalty issues, and correctly predicting that she could be the one to tip the scales in favor of a future defendant); *see also* Han, *supra* note 47, at 470 (noting the increase from one to eighteen in the number of states that specifically outlaw the death penalty for intellectually disabled individuals).

55. *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also* Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 259 (2003) (noting, importantly, that although there was not a categorical exemption, defendants such as *Penry* and others might still present intellectual disability as evidence to mitigate against the death penalty).

56. *Atkins*, 536 U.S. at 322; Mossman, *supra* note 55, at 255–56.

57. *Atkins*, 536 U.S. at 307. On August 16, 1996, *Atkins* and an accomplice abducted Eric Nesbitt, took the money on his person, drove with him to an ATM and withdrew money, then took him to an isolated location and shot him to death. *Id.*

58. *Id.* at 308–09 (“[The psychologist’s] conclusion was based on interviews with people who knew *Atkins*, a review of school and court records, and the administration of a standard intelligence

Virginia Supreme Court due to improper jury instructions—a jury once again sentenced Atkins to death.⁵⁹ Rejecting Atkins’s argument that he could not be executed because he was intellectually disabled, the Supreme Court of Virginia affirmed his sentence, relying on *Penry* to support its holding.⁶⁰ Noting the strong dissenting opinions in the lower court’s decision, as well as the substantial changes in the legislative backdrop in recent years, the Supreme Court granted certiorari to reexamine the issue previously raised in *Penry*.⁶¹

In an opinion by Justice Stevens, the Court held that the Eighth Amendment, once again construed “in the light of our evolving standards of decency,” prohibits the execution of intellectually disabled persons.⁶² The Court found a national consensus existed against the death penalty for such individuals, looking to numerous examples of state laws that were passed to ban the practice.⁶³ The majority stated the consensus was reflected not just by the number of jurisdictions making this change—thirty-three in total, including fourteen that had already banned the death penalty outright—but by the consistency of these changes.⁶⁴ Finally, the Court noted that even among states where the practice was not explicitly disallowed, it had become exceedingly rare.⁶⁵ The Court

test which indicated that Atkins had a full scale IQ of 59.”).

59. *Id.* at 309 (detailing the Commonwealth’s use of its own expert to describe Atkins as having average intelligence and possibly an antisocial personality disorder).

60. *Id.* at 310; *see also* *Atkins v. Commonwealth*, 534 S.E.2d 312, 319–20 (Va. 2000) (noting the Supreme Court’s ruling in *Penry* that the Eighth Amendment does not prohibit the execution of intellectually disabled defendants, but that such disability must be allowed to be considered as a mitigating factor when determining punishment).

61. *Atkins*, 536 U.S. at 310; *see also* *Atkins*, 534 S.E.2d at 325 (Koontz, J., dissenting) (noting the inherent limitations of intellectually disabled persons and that a moral and civilized society must impute an accompanying lessened degree of culpability for those persons as well, such that their execution is inappropriate regardless of their crime).

62. *Atkins*, 536 U.S. at 321 (quotations omitted) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Notably, Justice O’Connor, the author of the *Penry* opinion just thirteen years earlier, joined with the *Atkins* majority to overrule *Penry*. *See also* Timothy S. Hall, *Mental Status and Criminal Culpability After Atkins v. Virginia*, 29 U. DAYTON L. REV. 355, 360 (2004) (addressing the three-pronged analysis undertaken by Justice Stevens in the Court’s opinion: looking to (1) “evolving standards of decency,” (2) proportionality, and (3) whether punitive purposes are satisfied).

63. *See Atkins*, 536 U.S. at 314–15 (noting that, in the years following *Penry*, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina had joined Georgia, Maryland, and the federal legislature in outlawing the death penalty for intellectually disabled individuals).

64. *See id.* at 315–16 (noting the trend of passing such legislation being even more significant due to the usual unpopularity of laws that soften punishments for violent crime).

65. *See id.* at 316 (explaining that two states—New Hampshire and New Jersey—have not executed anyone in decades and that only five states—Alabama, Texas, Louisiana, South Carolina, and Virginia—had executed individuals shown to have an IQ lower than seventy).

noted the only serious disagreement remaining in these cases lied within the actual determination of intellectual disability.⁶⁶ In line with its Eighth Amendment jurisprudence, the Court left to the states the task of creating their own appropriate tests to uphold the constitutional ban it set forth.⁶⁷

Although states may have disagreed about the range of individuals encompassed by this new constitutional prohibition, the Court maintained that the national consensus reflected the view that intellectually disabled individuals are comparatively less culpable than those who are not.⁶⁸ Furthermore, with culpability taken into account, the Court posited that the penological purposes served by the death penalty could not reasonably be met by executing those who are intellectually disabled.⁶⁹ This was, in part, because the punitive concepts of retribution and deterrence cannot apply to those who lack the requisite culpability for and control over their actions, directly harking back to Justice Brennan's dissenting opinion from *Penry*.⁷⁰ Finally, the *Atkins* majority reasoned that a categorical ban in these cases was even more necessary because intellectually disabled defendants—as a result of their reduced capacity—are at an increased risk of being improperly sentenced to death.⁷¹ In sum, the majority did not hesitate to agree with the swath of

66. *Id.* at 317. In this case, Virginia disputed the fact that *Atkins* was, in fact, intellectually disabled. *Id.*

67. *Id.*; see, e.g., *Ford*, 477 U.S. at 427 (prohibiting the execution of the insane or mentally ill under the Eighth Amendment but allowing individual states “substantial leeway” to balance various interests at issue).

68. *Atkins*, 536 U.S. at 317–18; see also Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice-Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY & L. 483, 487–89 (1994) (describing these individuals' basic deficiencies in communication, cognition, problem-solving, logical reasoning, impulse control, and volitional understanding).

69. *Atkins*, 536 U.S. at 317.

70. *Id.* at 319–20 (noting the Court's continually narrowing death penalty jurisprudence—reserving it for the most serious of crimes deserving of such retribution—and the lack of deterrence of future offenders with intellectual disability); *Penry v. Lynaugh*, 492 U.S. 302, 343, 348 (1989) (Brennan, J., dissenting) (requiring that a punishment further the goals of deterrence or retribution); see also *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (describing a death penalty that neither deters nor seeks retribution as an unconstitutional punishment, one which unnecessarily inflicts pain and suffering). *But see* Carol S. Steiker, Panetti v. Quarterman: *Is There A “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 292 (2007) (“[A] better understanding of the Court’s holdings is that retribution alone is a necessary limit on the constitutional use of capital punishment. Indeed, it is hard to make much sense of the Court’s Eighth Amendment jurisprudence without such an understanding.”).

71. See *Atkins*, 536 U.S. at 320–21 (highlighting such defendants' propensity for false confessions, inability to mitigate perceived aggravating factors of their crime, and ineffectiveness as a witness and as a client); Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212–13 (1999) (noting the recent increase in death row exonerations along with the fact that at least one of those was an intellectually disabled individual who confessed to a crime he did not commit).

recent state legislative determinations, and made clear that the Eighth Amendment “places a substantive restriction on the State’s power to take the life of [an intellectually disabled] offender.”⁷²

Professional and medical communities alike praised the *Atkins* decision—indeed, both the former American Association on Mental Retardation (“AAMR,” renamed as the American Association on Intellectual and Developmental Disabilities, or “AAIDD”), and the American Psychiatric Association (APA) contributed to amicus briefs in the case.⁷³ The dissenting opinions, however, lamented the majority’s shift in the way it determined a national consensus existed.⁷⁴ Experts simultaneously opined that *Atkins* left too much latitude for states to circumvent this new Eighth Amendment protection⁷⁵ and also agonized over the new rule “[leaving] nothing to the legislature with regard to the public policy choices of crime and punishment.”⁷⁶ As seen in the cases below, the former analysis turned out to be more prescient than the latter.⁷⁷

2. *Ex parte Briseno*

Faced with a question coming under the Supreme Court’s rule in *Atkins*, the Court of Criminal Appeals of Texas (CCA) created its own rule in *Ex parte Briseno* to comply with the newest Eighth Amendment prohibition.⁷⁸ In *Briseno*, the CCA—the court of last resort for criminal

72. *Atkins*, 536 U.S. at 321 (quotations omitted) (quoting *Ford*, 477 U.S. at 405); see also *Ford*, 477 U.S. at 405 (addressing whether the Constitution places a restriction on the State’s power to take the life of an insane prisoner).

73. Mossman, *supra* note 55, at 263. Senior leaders from the AAMR and APA expressed gratitude and relief at the decision, noting its importance regarding both the dignity of the individual as well as the reliability of objective assessments by experienced professionals. *Id.*

74. *Atkins*, 536 U.S. at 324–26 (Rehnquist, C.J., dissenting); *id.* at 342–44 (Scalia, J., dissenting); see also DeGrandis, *supra* note 48, at 848–50 (discussing Chief Justice Rehnquist’s specific rebuttal of the majority’s use of professional organizations, foreign law, and a misreading of the objective factors for Eighth Amendment analysis, and also discussing Justice Scalia’s broad, scathing rebuke of the majority’s personal beliefs leading to their own predetermined outcome).

75. Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 732 (2008) (pointing out the possibility that *Atkins*’s reliance on *Ford* could in fact result in states assuming “an unfettered license to defeat or marginalize the Eighth Amendment prohibition”).

76. DeGrandis, *supra* note 48, at 874 (discussing the Court’s decision in *Atkins* as an overstepping of its constitutional boundaries).

77. See Steiker & Steiker, *supra* note 75, at 731 (“Procedures dictate the scope of substantive rights, and, in this context, the procedures adopted within various jurisdictions have the effect of redefining the ‘consensus’ the Court identified. . . . Perhaps the Court’s willingness to cede to the states the authority to craft procedures reflects its view that the substantive right extends only so far—that there is no clear consensus beyond a prohibition against executing individuals with severe and demonstrable manifestations of [intellectual disability].”).

78. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Jose Garcia Briseno robbed and

cases in Texas⁷⁹—recognized the Texas legislature’s lack of action in codifying the rule from *Atkins*, so it provided judicial guidelines for dealing with such claims.⁸⁰ The CCA looked to the most current clinical manuals at the time, published by the APA and the AAMR, to evaluate the spectrum of intellectually disabled individuals.⁸¹ The court stated it must decide the “level and degree” of intellectual disability that a consensus of Texans would agree should be exempt from the death penalty.⁸²

Not wishing to establish a hardline rule exempting all classes of intellectually disabled individuals, the CCA opted instead to use current medical definitions to help establish the legal definition of intellectual disability.⁸³ Viewing the medical criteria and standards as exceedingly subjective, however, the CCA also implemented seven factors for the factfinder to consider regarding adaptive behavior and functioning.⁸⁴ Importantly, some of these factors specifically ask the factfinder to consider the facts of the crime during the determination process.⁸⁵ This diverges significantly from standardized criteria used by the professional

murdered a county sheriff, Ben Murray, in his home on January 5, 1991, and was sentenced to death. *Id.* at 3. Shortly after *Atkins*, Briseno filed a habeas petition for relief, alleging he was intellectually disabled. *Id.* After the trial court concluded that Briseno was not eligible for relief based on the evidence presented, the CCA reviewed the record to make a final determination. *Id.* at 3–4.

79. TEX. CONST. art. V, § 5.

80. *Ex parte Briseno*, 135 S.W.3d at 5.

81. *Id.*; see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41–42 (4th ed. 1994) [hereinafter DSM-4] (describing four categories of intellectual disability: mild, moderate, severe, and profound); AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter AAMR-9] (defining intellectual disability as a disability comprising significantly deficient intellectual functioning coupled with related limitations in adaptive functioning, both of which occur before eighteen years old).

82. *Ex parte Briseno*, 135 S.W.3d at 6 (noting, for example, that most of Texas might agree that the character Lennie, from John Steinbeck’s *Of Mice and Men*, should be exempt).

83. *Id.* at 6–7 (asserting that both the CCA and the Texas Health and Safety Code utilized similar definitions based on that from the AAMR-9); see TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2017) (providing medical definitions of many terms, including “intellectual disability”).

84. *Ex parte Briseno*, 135 S.W.3d at 8–9 (“Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] 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?”).

85. *Id.*; see Steiker & Steiker, *supra* note 75, at 727 (discussing how “[s]ome jurisdictions have sought to weave the facts of the crime into the determination” process).

community.⁸⁶ These seven factors would become known as the *Briseno* factors and will be discussed in greater detail later.

3. *Hall v. Florida*

Fourteen years after imposing the categorical ban against executing intellectually disabled individuals, the Supreme Court decided *Hall v. Florida*⁸⁷ which asked whether, under *Atkins*, a state may require a strict IQ threshold score to be met before allowing a defendant to present further evidence of intellectual disability.⁸⁸ In 1978, Freddie Lee Hall was sentenced to death for two murders.⁸⁹ The Court had decided *Atkins* while Hall was awaiting execution, so he filed a motion claiming he could not be executed on account of his intellectual disability.⁹⁰ The State went on to hear Hall's evidence, including his IQ test results that had a range of scores between seventy-one and eighty.⁹¹ The lower court found that Hall could not be intellectually disabled as a matter of law, because Florida required an IQ score of seventy or below before one could present further evidence of intellectual disability.⁹² The Florida Supreme Court then affirmed this seventy-point threshold as constitutional.⁹³

In its holding, the United States Supreme Court found that Florida's rigid IQ threshold disregarded established medical practice and created an unconstitutional, "unacceptable risk" that intellectually disabled individuals would be executed.⁹⁴ Justice Kennedy, writing for the majority, stated that the Florida rule disregarded the accepted margin for the standard error of measurement (SEM) of IQ tests, which is an objective fact in the scientific community.⁹⁵

Applying the Court's rationale from *Atkins*,⁹⁶ Justice Kennedy first

86. See Steiker & Steiker, *supra* note 75, at 727 (noting the tests "depart[] from those employed by professionals in the field"); DSM-4, *supra* note 81, at 46 (discussing the criteria for diagnosing intellectual disability).

87. *Hall v. Florida*, 572 U.S. 701 (2014).

88. *Id.* at 704.

89. *Id.* On February 21, 1978, Hall and an accomplice kidnapped, raped, and murdered Karol Hurst. *Id.* Afterward, in a parking lot of a convenience store they were going to rob, Hall and his accomplice killed sheriff's deputy Lonnie Coburn. *Id.*

90. *Id.* at 707. Hall presented considerable evidence of intellectual disability, including IQ scores and testimony from clinicians as well as his family. *Id.* at 706–07.

91. *Id.* at 707; see also *Hall v. State*, 109 So. 3d 704, 707 (Fla. 2012) (noting that Hall recorded two IQ scores below seventy, but this information was excluded for evidentiary reasons).

92. *Hall*, 572 U.S. at 707; FLA. STAT. ANN. § 921.137(1) (West 2013), *invalidated by Hall*, 572 U.S. 701.

93. *Hall*, 572 U.S. at 707; *Hall*, 109 So. 3d at 707.

94. *Hall*, 572 U.S. at 704.

95. *Id.* at 712–14.

96. See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of

considered how states may define intellectual disability.⁹⁷ The majority deemed it appropriate to discuss professional and psychiatric communities' assessments of IQ scores and their meaning, which would lead to better understanding of state legislation, the lower court decisions, and ultimately whether a national consensus had developed regarding the issue.⁹⁸ Kennedy further asserted that it was "proper" and "unsurprising" for courts both to utilize and to be informed by experts in the medical community when making determinations of intellectual disability.⁹⁹ He also noted Florida's statute on its face was not unconstitutional, and indeed could be in tune with the medical community's consensus.¹⁰⁰ However, the Florida Supreme Court interpreted it far too narrowly, barring individuals with a score above seventy from presenting any additional evidence of intellectual disability.¹⁰¹

The Court held that Florida's application of the rule disregarded established medical practice in two ways: it relied on an IQ score as conclusive evidence of intellectual capacity, and it failed to acknowledge the inherent imprecision of that score.¹⁰² In addition, the Court cited a significant majority of states that do account for the SEM in their own implementations of *Atkins*, thereby providing "objective indicia of society's standards" with regard to the Eighth Amendment.¹⁰³ The majority also recognized the lack of definitive substantive or procedural guides provided by *Atkins*, but averred that this did not grant "unfettered discretion" to the states.¹⁰⁴ Finally, the Court specifically gave credence

the [intellectually disabled] offender surely does not merit that form of retribution."); *Hall*, 572 U.S. at 709 (noting again the importance of the fact that deterrent and retributive goals of capital punishment not being met when levied on intellectually disabled offenders).

97. *Hall*, 572 U.S. at 709–10.

98. *Id.*

99. *Id.* at 710.

100. *Id.* at 711. This is because the statute itself did not explicitly preclude courts from taking the SEM into account. *Id.* See also FLA. STAT. ANN. § 921.137(1) (West 2013) (defining intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18").

101. *Hall*, 572 U.S. at 711–12. Importantly, this goes against the clinical consensus that all information regarding a person's condition is probative of intellectual disability. *Id.*

102. *Id.* at 712–13 ("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. . . . The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score."); see also R. MICHAEL FURR & VERNE R. BACHARACH, *PSYCHOMETRICS: AN INTRODUCTION* 118 (2d ed. 2014) (describing the SEM of a test as a statistical fact and paramount to the theory of measurement itself).

103. *Hall*, 572 U.S. at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). Kennedy's argument took many forms to create this majority. In the end, he cited the fact that every state legislature, other than Virginia, that considered the *Atkins* rule, and every state court that has interpreted those legislatures' laws had taken a stance inapposite to Florida's. See *id.* at 718.

104. *Id.* at 718–19. Indeed, Kennedy argues, if the states could define intellectual disability with

to the medical community, claiming decisions such as this one must be guided by their diagnostic framework and informed assessments.¹⁰⁵

The holding in *Hall* dealt specifically with IQ test scores, which correlate with intellectual functioning, the first prong of analysis for intellectual disability under *Atkins*.¹⁰⁶ Notably, in the time leading up to *Hall*, roughly thirty-one percent of *Atkins* claims were rejected solely on this prong.¹⁰⁷ Contrasting this with only twelve percent of such claims failing on prong two (adaptive functioning) shows that the IQ test problem confronted by *Hall* was of critical importance.¹⁰⁸ Many of these cases involved issues similar to those addressed in *Hall*: strict IQ score cutoffs at seventy,¹⁰⁹ failure to account for widely accepted concepts such as SEM,¹¹⁰ and the use of scores based in clinically unacceptable or scientifically invalid methods.¹¹¹ Critically, the rule in *Hall* opened the

complete autonomy, the protection that *Atkins* guarantees would become null. *Id.* at 720.

105. *Id.* at 723. Simply put, it is not medically sound judgment to use a single test as dispositive when performing a conjunctive analysis of one's intellectual capabilities. *See also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) [hereinafter DSM-5] (“[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.”).

106. *Hall*, 572 U.S. at 710. Both *Hall* and *Atkins* utilized the same three-prong approach to define and analyze intellectual disability. *See Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (discussing the APA's definition of intellectual disability, specifically intellectual functioning); DSM-5, *supra* note 105, at 33 (explaining the diagnostic criteria for intellectual disability).

107. *See* 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, 400–01 (2014) (noting that fifty-two percent of all losing *Atkins* claims failed all three prongs of the test, while thirty-one percent of all losing *Atkins* claims had failed on the first prong alone).

108. *Id.* at 401 (noting the small number of cases that failed on prong two).

109. *Id.* at 402–03 (discussing how certain claimants who lost should have prevailed if not for the strict IQ cutoff of seventy); *see, e.g., Parrish v. Commonwealth*, 272 S.W.3d 161, 168 (Ky. 2008); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *37–38 (Tenn. Crim. App. July 1, 2009).

110. Blume et al., *supra* note 107, at 402 (discussing how the court “failed to account for clinically accepted concepts such as . . . SEM”); *see, e.g., Hall*, 572 U.S. at 712–13.

111. Blume et al., *supra* note 107, at 402–03 (explaining how the court erred in its assessment by “credit[ing] scores derived from clinically unacceptable methods”); *see, e.g., Henderson v. Director*, No. 1:06-CV-507, 2013 WL 4811223, at *9 (E.D. Tex. Sept. 6, 2013) (asserting that the State's expert testified that the highest IQ score is the most reliable based on spurious conjecture), *vacated*, *Henderson v. Davis*, 868 F.3d 314 (5th Cir. 2017); *Anderson v. State*, 163 S.W.3d 333, 355–56 (Ark. 2004) (using a short questionnaire to acquire a rough IQ score and accepting expert testimony that deduced an estimated IQ range from scores on a test that was not explicitly designed to measure IQ); *State v. Were*, 890 N.E.2d 263, 293 (Ohio 2008) (rejecting petitioner's *Atkins* claim, which included an IQ score of sixty-nine, based on expert testimony averring the test scores should be adjusted because minorities' IQ scores are skewed by “cultural bias”); *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *11 (Tex. Crim. App. May 5, 2010) (explaining that the State's expert's IQ scores were properly adjusted higher because Hispanics generally score 7.5 points lower than Caucasians because of cultural differences rather than actual cognitive

door for future litigants to bring Eighth Amendment challenges against outdated methodologies for implementing the death penalty and not only because it was the Court's first direct reconsideration of *Atkins*.¹¹² And so arose the circumstances for the Supreme Court to hear such a challenge in *Moore v. Texas*.¹¹³

II. *MOORE V. TEXAS*

The Supreme Court granted certiorari to the CCA for *Moore v. Texas*, an appeal from the CCA's denial of relief to Bobby James Moore after he challenged his death sentence under *Atkins* and *Hall*.¹¹⁴ This Part proceeds with a summary of the facts and procedural history of Moore's case, as well as with a discussion of the majority opinion and Chief Justice Roberts's dissent.¹¹⁵

A. *Facts and Procedural History in the Lower Courts*

On April 25, 1980, Moore shot and killed James McCarble during a botched robbery in Houston, Texas.¹¹⁶ Two months later, Moore was convicted of capital murder and sentenced to death.¹¹⁷ In 1995, a federal habeas court vacated Moore's sentence based on ineffective trial

deficiencies).

112. See Bidish J. Sarma, *How Hall v. Florida Transforms the Supreme Court's Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISCOURSE 186, 195 (2014) (discussing how the Court's Eighth Amendment approach in *Hall* allows litigants to present new constitutional challenges to outdated methodologies); see also James W. Ellis, *Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 390–91 (2014) (concluding that the Court's new analysis includes a consensus of professionals in the field, not just the states, and that states can no longer freely ignore the scientific community); Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a "Scientific Stare Decisis"*, 23 WM. & MARY BILL RTS. J. 415, 417 (2014) (labeling the *Hall* decision radical in its logical and scientific underpinnings).

113. See Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 764–65, 765 n.132 (2014) (taking note of the *Briseno* factors and the CCA's dubious belief that not all intellectually disabled persons have the requisite diminished culpability to exempt them from the death penalty).

114. See *Moore v. Texas*, 136 S. Ct. 2407 (2016) (mem.) (granting certiorari).

115. See *supra* Part I.A (discussing the Eighth Amendment generally and what it means today); *infra* Part I.B (explaining the categorical ban from *Atkins*, how it was implemented in Texas by *Ex parte Briseno*, and how it was fine-tuned by *Hall*).

116. *Moore v. Texas*, 137 S. Ct. 1039, 1054 (2017) (Roberts, C.J., dissenting). Moore and two others decided to rob a market in Houston for money to make their car payments. The three men entered the store and confronted two employees, prompting one of them to scream. Moore then shot the other employee, killing him instantly. *Id.*

117. *Id.* at 1044 (majority opinion); see also *Ex parte Moore*, 470 S.W.3d 481, 492 (Tex. Crim. App. 2015) (noting that Moore was convicted of capital murder by a jury and sentenced to death based on the jury's answers to special issues in its verdict).

counsel,¹¹⁸ which was upheld on appeal by the Fifth Circuit.¹¹⁹ At resentencing in 2001, however, Moore was again sentenced to death.¹²⁰

After *Atkins*, Moore sought habeas relief from his death sentence once more, this time in state court, by asserting exemption from the death sentence because he was intellectually disabled.¹²¹ In a two-day evidentiary hearing, the habeas court heard evidence detailing Moore's purported intellectual disability.¹²² In its evaluation, the habeas court considered the current medical diagnostic standards, including the fifth edition of the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the eleventh edition of the AAIDD clinical manual (AAIDD-11).¹²³ The court used the three accepted criteria for diagnosing intellectual disability: intellectual functioning deficits, adaptive deficits, and the onset of said deficits while the person was a minor.¹²⁴ Based on Moore's IQ scores and expert testimony, the court determined Moore exhibited below average intellectual functioning as well as significant adaptive deficits, and submitted a recommendation either to reduce Moore's sentence to life in prison or grant him a new trial.¹²⁵

The CCA, as the ultimate factfinder,¹²⁶ rejected the habeas court's recommendations and subsequently denied relief to Moore after its own

118. *Moore*, 137 S. Ct. at 1044–45; *see also Moore v. Collins*, No. H-93-3217, 1995 U.S. Dist. LEXIS 22859, at *34–35 (S.D. Tex. Sept. 29, 1995) (addressing the egregious conduct and gross mishandling of Moore's case by his trial counsel that jeopardized his life and liberty, virtually guaranteeing a death sentence).

119. *Moore*, 137 S. Ct. at 1045; *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999).

120. *Moore*, 137 S. Ct. at 1045; *Moore v. State*, No. 74,059, 2004 WL 231323, at *1 (Tex. Crim. App. Jan. 14, 2004), *cert. denied*, 543 U.S. 931 (2004).

121. *Moore*, 137 S. Ct. at 1044–45.

122. *Id.* at 1045 (including social and mental difficulties, understanding of days of the week, and knowledge of basic math).

123. *Id.*; DSM-5, *supra* note 105 (detailed manual classifying mental disorders); AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter AAIDD-11].

124. *Moore*, 137 S. Ct. at 1045; *see also AAIDD-11, supra* note 123, at 27 (noting intellectual functioning deficits are signified in part by an IQ score of seventy, or two standard deviations from the general population average after adjusting for the standard error of measurement); *Hall v. Florida*, 572 U.S. 701, 710 (2014) (describing adaptive deficits as “the inability to learn basic skills and adjust behavior to changing circumstances”).

125. *Moore*, 137 S. Ct. at 1045–46. The habeas court took six of Moore's IQ scores into its account, resulting in an average score of 70.66. The court also credited expert testimony which led to a determination of significant adaptive deficits. *Id.* *See also AAIDD-11, supra* note 123, at 43 (noting performance in three adaptive skill sets—conceptual, social, and practical—must be two standard deviations below the average to be considered significant).

126. *See Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) (noting Texas's forty years of established jurisprudence with the CCA acting as final finder of fact in habeas proceedings).

review of the record.¹²⁷ The CCA then reaffirmed *Ex parte Briseno*,¹²⁸ which it continued to use to determine intellectual disability for death penalty cases.¹²⁹ Importantly, the CCA also supported the seven subjective evidentiary factors from *Briseno* as compliant with *Hall*'s directive that a court's criteria be adequately informed by the medical community's diagnostic framework.¹³⁰ Accordingly, the CCA utilized *Briseno*'s implementation of terms and definitions from the AAMR-9, published twenty-three years prior in 1992.¹³¹ The CCA went on to reject the results of five out of Moore's seven IQ tests as unreliable and only reviewed his scores of seventy-four and seventy-eight.¹³² Next, the CCA disregarded the lower end of the standard error of measurement for his score of seventy-four, citing adverse circumstances as well as Moore's "withdrawn and depressive behavior."¹³³ With significant intellectual functioning deficits thus not found, the CCA moved on to hold that Moore also did not show sufficient inadequacies in adaptive functioning.¹³⁴ Finally, the CCA looked to the seven *Briseno* factors and determined they also supported a finding of no intellectual disability for Moore.¹³⁵

One judge on the CCA dissented, arguing that the rules from *Atkins* and *Hall* would mandate that they use the most current medical standards

127. *Moore*, 137 S. Ct. at 1046.

128. *See supra* Part I.B.2 for a discussion of the holding and rationale from *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

129. *Moore*, 137 S. Ct. at 1046; *Ex parte Moore*, 470 S.W.3d 481, 486–87 (Tex. Crim. App. 2015) (holding the habeas court in error for using current AAIDD standards in lieu of *Briseno*, which, it ruled, should hold its place as primary guidance for intellectual disability in capital cases unless and until the Texas legislature acts to modify the standards for such cases).

130. *Moore*, 137 S. Ct. at 1047; *Ex parte Moore*, 470 S.W.3d at 487; *see also* *Hall v. Florida*, 572 U.S. 701, 721 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.").

131. *Moore*, 137 S. Ct. at 1046; *Ex parte Moore*, 470 S.W.3d at 486–87; *see also Ex parte Briseno*, 135 S.W.3d at 7.

132. *Moore*, 137 S. Ct. at 1047; *see also Ex parte Moore*, 470 S.W.3d at 518–19 (discrediting four of the IQ tests for being noncomprehensive screening tests, group tests, or neuropsychological tests, and discrediting a fifth due to testimony of "suboptimal effort" on that test).

133. *Moore*, 137 S. Ct. at 1047; *see also Ex parte Moore*, 470 S.W.3d at 519 ("[H]e was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range.").

134. *Moore*, 137 S. Ct. at 1047; *Ex parte Moore*, 470 S.W.3d at 520. The experts agreed that Moore's adaptive-functioning fell well below the mean, but the State's experts discounted these findings because Moore was judged based on tasks he had no prior experience with, such as writing a check. The CCA sided with the State's expert's opinion, giving greater weight to Moore's adaptive strengths exhibited while living on the streets and in prison. *Ex parte Moore*, 470 S.W.3d at 521–25.

135. *Moore*, 137 S. Ct. at 1047–48; *Ex parte Moore*, 470 S.W.3d at 526–27.

to make decisions about intellectual disability.¹³⁶ The dissent also scrutinized *Briseno* as outdated and out of touch with both the medical community and society at large.¹³⁷ Under these circumstances, the Supreme Court granted Moore's petition for certiorari to answer whether the CCA's adherence to superseded medical standards and its reliance on *Ex parte Briseno* were allowed by the Eighth Amendment.¹³⁸

B. The Court's Opinion

Although the Court's rule from *Atkins* left it up to states to create their own guidelines for determining intellectual disability in capital cases, *Hall* clarified that states are not given unfettered discretion to disregard established medical practice when creating those guidelines.¹³⁹ Accordingly, Justice Ginsburg's opinion for the *Moore* majority held that states may not disregard or diminish the force of the medical community's consensus, and that the nonclinical *Briseno* factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed."¹⁴⁰

The Court recalled its Eighth Amendment jurisprudence, noting that it protects and respects the dignity of all people¹⁴¹ and that it must continue to evolve along with the standards of decency in the ongoing development of society.¹⁴² These principles of decency and the maturation of society eventually led to the decision in *Atkins*.¹⁴³ *Hall* built upon the rule from *Atkins*, and the Court in *Moore* continued *Hall*'s trajectory by narrowing the judicial playing field on which states can comply with the Eighth Amendment in death penalty determinations.¹⁴⁴

136. *Moore*, 137 S. Ct. at 1048; *Ex parte Moore*, 470 S.W.3d at 530.

137. *Moore*, 137 S. Ct. at 1048; *Ex parte Moore*, 470 S.W.3d at 529–30.

138. *Moore*, 137 S. Ct. at 1048.

139. *Id.*; *Hall v. Florida*, 572 U.S. 701, 712 (2014); *see also Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (leaving it up to the states to create appropriate means to enforce the ban on the death penalty for intellectually disabled persons).

140. *Moore*, 137 S. Ct. at 1044 (alteration in original) (quoting *Hall*, 572 U.S. at 704).

141. *Id.* at 1048; *see also Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

142. *Moore*, 137 S. Ct. at 1048; *see also Hall*, 572 U.S. at 708 ("To enforce the Constitution's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'" (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

143. *Moore*, 137 S. Ct. at 1048 (noting the national consensus against the practice of executing intellectually disabled individuals).

144. *Id.* at 1049 ("*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. The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*."); *see also Hall*, 572 U.S. at 721 ("In addition to the views of the States and the Court's precedent, this determination is

The majority explained that its precedent required courts to consider the standard error of measurement when evaluating an individual's IQ scores.¹⁴⁵ The CCA's failure to do so put its judgment at odds with *Hall*,¹⁴⁶ because a person's intellectual functioning cannot simply be boiled down to one score.¹⁴⁷ The CCA acknowledged Moore's score of seventy-four and its SEM range of sixty-nine to seventy-nine, but incorrectly credited other factors from the test to reject the lower end of that range.¹⁴⁸ Instead of accepting the SEM range and considering the second prong of intellectual disability—adaptive functioning—the CCA determined that Moore was not intellectually disabled based solely on its analysis of intellectual functioning.¹⁴⁹ Indeed, the recognition and likely existence of person-specific imprecisions with an IQ test cannot be used to limit the SEM range of the test itself.¹⁵⁰ The Court explained it was not drawing a line in the proverbial sand wherein the Eighth Amendment will be invoked at one IQ score and not another.¹⁵¹ Here, as the majority noted, the Court was sharpening the rule from *Hall*, again disallowing the use of IQ score as a strict cutoff.¹⁵² Further, it required courts to proceed

informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments. . . . The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.”).

145. *Moore*, 137 S. Ct. at 1049; *see Hall*, 572 U.S. at 723 (noting that the standard error of measurement of a test is a statistical fact and holding that a defendant must be allowed to present further evidence of intellectual disability when his or her test score falls within that range); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (finding it unreasonable to use an IQ test score of seventy-five to disqualify an individual from being found intellectually disabled).

146. *Moore*, 137 S. Ct. at 1049.

147. *Id.*; *see also Hall*, 572 U.S. at 713 (“For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score.”).

148. *Moore*, 137 S. Ct. at 1049; *see also Ex parte Moore*, 470 S.W.3d 481, 519 (Tex. Crim. App. 2015) (“[Moore's] score range on the WAIS–R [IQ test] is between 69 and 79. As with the WISC [IQ test score], the fact that [Moore] took a now-outmoded version of the WAIS–R might tend to place his actual IQ score in a somewhat lower portion of that 69 to 79 range. However, by the time he took the WAIS–R, [Moore] had a history of academic failure, something that his own expert stated could adversely affect effort. [Moore] also took the WAIS–R under adverse circumstances; he was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range. Considering these factors together, we find no reason to doubt that applicant's WAIS–R score accurately and fairly represented his intellectual functioning as being above the intellectually disabled range.” (citations omitted)).

149. *Moore*, 137 S. Ct. at 1049 (“Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning.”).

150. *Id.*

151. *Id.* at 1050.

152. *Id.*; *see also Hall*, 572 U.S. at 712 (“Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also

with a legitimate inquiry into intellectual disability and adaptive functioning when one's SEM-adjusted score is within the clinically established range for intellectual functioning deficits.¹⁵³

Next, in reviewing the CCA's evaluation of adaptive functioning, the majority found once again that the lower court had strayed from current medical and clinical standards.¹⁵⁴ The CCA erred in giving too much weight to Moore's perceived adaptive strengths, rather than focusing on adaptive deficits as the current literature instructs.¹⁵⁵ The Court also noted its own jurisprudence that has emphasized deficits more than strengths.¹⁵⁶ Moreover, according to the majority, the added importance that the CCA placed on Moore's improvements in prison was also misguided, because the professional community strongly cautions against relying on evidence of adaptive functioning gleaned from such controlled settings.¹⁵⁷

In addition to its overemphasis on adaptive strengths, the Court held that the CCA erred in determining Moore's intellectual and adaptive deficits were unrelated as a result of traumas from his youth.¹⁵⁸ In so doing, the CCA again disregarded the clinical consensus, which notes that experiences such as abuse and academic failure are actually risk factors for intellectual disability.¹⁵⁹ Lastly, the Court found it improper for the CCA to require that Moore show his adaptive deficits were unrelated to

relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.").

153. *Moore*, 137 S. Ct. at 1050.

154. *Id.*

155. *Id.*; see also *Ex parte Moore*, 470 S.W.3d 481, 522–23 (Tex. Crim App. 2015) (noting that Moore was able to adapt to life on the streets by hustling at pool halls and mowing lawns for money, and using these strengths to outweigh factors showing adaptive deficits); AAIDD-11, *supra* note 123, at 47 (asserting that even significant deficits in conceptual, social, and practical skills are not completely offset by potential adaptive strengths); DSM-5, *supra* note 105, at 33 (emphasizing that the inquiry into adaptive skills should center around adaptive deficits).

156. *Moore*, 137 S. Ct. at 1050; see also *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (“[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.’” (quoting AM. ASS’N OF MENTAL RETARDATION, MENTAL RETARDATION, DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002))).

157. *Moore*, 137 S. Ct. at 1050; see also DSM-5, *supra* note 105, at 38 (stressing that adaptive functioning is difficult to accurately gauge in a controlled setting such as prison); AM. ASS’N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER’S GUIDE: TO ACCOMPANY THE 11TH EDITION OF INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 20 (2012) [hereinafter AAIDD-11 USER’S GUIDE] (advising specifically to avoid relying on behavior in prison when assessing adaptive functioning).

158. *Moore*, 137 S. Ct. at 1051; *Ex parte Moore*, 470 S.W.3d at 488.

159. *Moore*, 137 S. Ct. at 1051; see also AAIDD-11, *supra* note 123, at 59–60 (noting that at least one of these risk factors will be present in every case of intellectual disability).

any personality disorder,¹⁶⁰ and again pointed to the current medical consensus, which maintains that these conditions can coexist and oftentimes do.¹⁶¹

Looking next to the CCA's *Briseno* factors, the Court held that they are in stark dissonance with *Hall* and create an unacceptable risk of intellectually disabled persons being executed.¹⁶² *Moore* explained that those who have a mild intellectual disability, whom Texans might believe should not be exempt from the death penalty, are likely to be shut out by *Briseno*'s subjective factors. But, the Court held, those individuals should still be protected by the guarantee of *Atkins* and cannot be scrutinized under rules that wholly invalidate that protection.¹⁶³ According to the Court, the *Briseno* factors comprise the opinions and stereotypes of laypersons and hold no basis in medical or clinical understanding of the intellectually disabled.¹⁶⁴ Furthermore, the factors are out of touch with the rest of the nation: no state legislature had approved anything like them and they had been implemented only twice by other states in twelve years.¹⁶⁵ Finally, Texas itself does not follow *Briseno* or its rationale in

160. *Moore*, 137 S. Ct. at 1051; *Ex parte Moore*, 470 S.W.3d at 488; *see also Ex parte Moore*, 470 S.W.3d at 526 (asserting that Moore's difficulties as a child were probably emotional rather than intellectual).

161. *Moore*, 137 S. Ct. at 1051; *see also* DSM-5, *supra* note 105, at 40 (describing these mental, physical, and medical conditions as frequently coexisting with intellectual disability, with some conditions occurring at a rate four times greater than in the general population); Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner at 19, *Moore*, 137 S. Ct. 1039 (No. 15-797) ("The existence of a personality disorder or other mental health issue is emphatically not evidence that a person does not also have intellectual disability.").

162. *Moore*, 137 S. Ct. at 1051–52; *see also* *Hall v. Florida*, 572 U.S. 701, 704 (2014) (recognizing Florida's "rigid rule" "creates an unacceptable risk that persons with an intellectual disability will be executed").

163. *Moore*, 137 S. Ct. at 1051–52; *see also* *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005) (pointing out that *Atkins* disallowed the death penalty for the entire class of intellectually disabled defendants); *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) ("We, however, must define that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.").

164. *Moore*, 137 S. Ct. at 1051–52; *see also* AAIDD-11 USER'S GUIDE, *supra* note 157, at 25–27 (noting the medical community's constant battle against public perceptions and stereotypes about intellectual disability); Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner at 13, *Moore*, 137 S. Ct. 1039 (No. 15-797) ("These lay assumptions sometimes include an imagined 'list' of things that people with intellectual disability cannot do. The activities that are supposedly inconsistent with intellectual disability can involve, for example, employment, social relationships, reading and writing, and driving a car. But the clinical literature is abundantly clear that many of the people who have been properly diagnosed with intellectual disability can perform one or more of these tasks.").

165. *Moore*, 137 S. Ct. at 1052; *see also* *Commonwealth v. Bracey*, 117 A.3d 270, 286–87 (Pa. 2015) (noting the use of the *Briseno* factors is allowed but not mandated as part of the intellectual disability inquiry); *Howell v. State*, No. W2009-02426-CCA-R3-PD, 2011 WL 2420378, at *18 (Tenn. Crim. App. June 14, 2011) (labeling the adaptive behavior criteria as exceedingly subjective

any context other than death penalty cases—juveniles in the Texas criminal justice system are to be evaluated by the most recent edition of the DSM, and students in Texas’s school systems are not assessed for intellectual disability per the relatedness requirement as they are in *Briseno*.¹⁶⁶

The Court concluded by emphasizing that states do not have complete flexibility to enforce the guarantee of *Atkins*.¹⁶⁷ Indeed, as *Hall* pointed out, if this were true then *Atkins* might as well be void.¹⁶⁸ As such, pointing to the importance of being informed by current medical diagnostic standards, the Court abrogated the rule from *Briseno*, vacated the judgment of the CCA, and remanded for further proceedings.¹⁶⁹

C. Chief Justice Roberts’s Dissent

Chief Justice Roberts, joined by Justices Thomas and Alito, dissented, arguing the CCA did not err in concluding that Moore was not intellectually disabled based on below average intellectual functioning, and therefore would affirm the lower court’s decision.¹⁷⁰ Roberts conceded that the *Briseno* factors are unacceptable for use in analyzing adaptive deficits and cannot be used to implement the protections of *Atkins*.¹⁷¹ However, the use of these factors had no bearing on the CCA’s proper—in his opinion—assessment of intellectual functioning, and so its ruling should remain undisturbed.¹⁷²

Roberts argued that the majority was straying from the Court’s “usual mode of analysis” in cases involving the Eighth Amendment.¹⁷³ Historically, the Court has typically looked to “objective indicia of society’s standards” as reflected by the states to craft new constitutional rules.¹⁷⁴ Here, Roberts was concerned with the majority’s near-total

and listing six of the seven *Briseno* factors for post-conviction habeas courts to use in weighing evidence of intellectual disability).

166. *Moore*, 137 S. Ct. at 1052; 37 TEX. ADMIN. CODE § 380.8751(e)(3) (2018); see also 19 TEX. ADMIN. CODE § 89.1040(c)(5) (2018) (defining students with intellectual disabilities).

167. *Moore*, 137 S. Ct. at 1052–53; see also *Hall*, 572 U.S. at 719 (“*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.”).

168. *Moore*, 137 S. Ct. at 1053; see also *Hall*, 572 U.S. at 720–21 (“If the States were to have complete autonomy to define intellectual disability as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.”).

169. *Moore*, 137 S. Ct. at 1053.

170. *Id.* at 1053 (Roberts, C.J., dissenting).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1054 (quoting *Hall v. Florida*, 572 U.S. 701, 714 (2014)); see also *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (noting that the Court has historically considered that legislative enactments and state practice are expressions of society’s standards); *Hall*, 572 U.S. at 714

dependence on a medical consensus, rather than the national consensus that is traditionally relied upon to suss out the meanings of the Eighth Amendment.¹⁷⁵

Chief Justice Roberts further disagreed with the majority, as he believed the CCA's holding properly construed the rules of both *Atkins* and *Hall*.¹⁷⁶ First, according to Roberts, the CCA appropriately enforced *Atkins* by creating its own intellectual disability guidelines in *Briseno* and following them as binding precedent.¹⁷⁷ Next, the CCA evaluated its three-pronged definition of intellectual disability and applied the rule from *Briseno* in light of the Court's recent decision in *Hall*.¹⁷⁸ To do so, Roberts emphasized, the CCA was forced to square the *Briseno* definition—drawn from the AAMR-9—with the most recent clinical manuals, the AAIDD-11 and DSM-5.¹⁷⁹ However, and quite importantly in Roberts's view, these two manuals include conflicting direction on whether intellectual disability requires that adaptive deficits be related to intellectual functioning.¹⁸⁰ As such, Roberts argued, it was impossible for the CCA to stay in line with both clinical manuals in order to remain “adequately informed by the medical communit[y].”¹⁸¹

(reasoning that “objective indicia” exist when a “significant majority” of states acknowledge error inherent in IQ test scores).

175. *Moore*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting) (“[C]linicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment. Today’s opinion confuses those roles”); see also Stephen McAllister, *Death-Penalty Symposium: A Court Increasingly Uncomfortable with the Death Penalty*, SCOTUSBLOG (June 29, 2017, 4:32 PM), <http://www.scotusblog.com/2017/06/death-penalty-symposium-court-increasingly-uncomfortable-death-penalty> (describing the Court as playing doctor more than it was interpreting the law).

176. *Moore*, 137 S. Ct. at 1054–55 (Roberts, C.J., dissenting).

177. *Id.* at 1054 (noting the habeas court erred by diverging from established precedent and the CCA was right to rebuke it for doing so); see also *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (admonishing the Oklahoma Court of Criminal Appeals for taking it upon itself to assume the Supreme Court’s precedent was outdated).

178. *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015); see also *Moore*, 137 S. Ct. at 1055 (Roberts, C.J., dissenting) (laying out the three facets of intellectual disability from *Briseno*: sub-average intellectual functioning coupled with related deficits in adaptive functioning that begin before the age of eighteen).

179. *Moore*, 137 S. Ct. at 1055 (Roberts, C.J., dissenting).

180. *Id.*; see also AAMR-9, *supra* note 81, at 5 (defining intellectual disability as the combination of below average intellectual functioning accompanied by *related* limitations in adaptive functioning occurring before the individual is eighteen years old); compare AAIDD-11, *supra* note 123, at 5 (defining intellectual disability as the combination of substantial deficits in intellectual functioning and adaptive behavior originating before the age of eighteen), with DSM-5, *supra* note 105, at 38 (stressing one’s adaptive functioning deficits must “*be directly related* to intellectual impairments” in order to satisfy the criteria for intellectual disability (emphasis added)).

181. *Moore*, 137 S. Ct. at 1055 (Roberts, C.J., dissenting) (internal quotations omitted) (quoting

Next, Roberts argued that the CCA correctly and properly analyzed Moore's intellectual functioning based on scores from two IQ tests.¹⁸² In his view, it was within the CCA's authority to consider evidence and testimony surrounding Moore's IQ tests and to use that evidence to discount the lower range of the SEM.¹⁸³ While the majority found this determination by the CCA to be incompatible with *Hall*, Roberts differed, asserting that *Hall* stands against bright-line IQ thresholds for intellectual disability determinations and does not hold that courts must strictly adhere to SEM ranges.¹⁸⁴ Roberts contended that the majority's opinion could only be justified by "absolute conformity" to medical standards, and that by fastening the Eighth Amendment to a one-point difference in IQ scores, the majority here was just as wrong as the Florida Supreme Court was in *Hall*.¹⁸⁵

Finally, by looking to clinical practitioners for guidance, the Chief Justice asserted that the majority had again strongly diverged from the Court's traditional jurisprudence.¹⁸⁶ The determination of what is cruel

Ex parte Moore, 470 S.W.3d at 487); see also *Hall v. Florida*, 572 U.S. 701, 721 (2014) (explaining that the views of medical experts inform, but are not dispositive of, the Court's opinion).

182. *Moore*, 137 S. Ct. at 1055 (Roberts, C.J., dissenting).

183. *Id.* "The court went on to consider additional expert testimony about potential factors affecting that score [of seventy-four]. Based on that evidence, the CCA discounted portions of the SEM-generated range and concluded that Moore's IQ did not lie in the relevant range for intellectual disability." *Id.* at 1060.

184. *Id.* ("*Hall* provided no definitive guidance on this sort of approach [taken by the CCA here]: recognizing the inherent imprecision of IQ tests, but considering additional evidence to determine whether an SEM-generated range of scores accurately reflected a prisoner's actual IQ.>").

185. *Id.* at 1061. Roberts also noted that clinicians would not always hold up the SEM as the only way to determine the range of possible IQ scores for an individual. *Id.* See, e.g., Gilbert S. Macvaugh III & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 147 (2009) ("Error in intellectual assessment is not solely a function [of the SEM]. Other sources of error or assessment imprecision may involve the examinee Such factors include the mental and physical health, mood, effort, and motivation of the examinee during testing"); AAIDD-11, *supra* note 123, at 100-01 ("When considering the relative weight or degree of confidence given to any assessment instrument, the clinician needs to consider . . . the conditions under which the test(s) was/were given [and] . . . the standard error of measurement . . .").

186. *Moore*, 137 S. Ct. at 1057-58 (Roberts, C.J., dissenting) (pointing to the *Hall* decision just three years prior when the Court found it paramount to evaluate state practices and determine whether there was a consensus); see also Brief of the States of Arizona et al. as Amici Curiae in Support of Respondent at 8, *Moore*, 137 S. Ct. 1039 (No. 15-797) ("Viewed correctly, *i.e.*, focusing on Texas' use of intellectual disability criteria consistent with those relied upon by this Court in *Atkins*, it becomes clear that Texas is not an 'outlier,' but rather stands among the overwhelming majority of death penalty States that have declined to adopt medical associations' latest criteria for diagnosing intellectual disability."); Dominic Draye, *Death-Penalty Symposium: Evolving Standards for "Evolving Standards"*, SCOTUSBLOG (June 27, 2017, 2:52 PM), <http://www.scotusblog.com/2017/06/symposium-evolving-standards-evolving-standards/> (pointing out the majority opinion's single mention of state legislatures coupled with its disregard of a sixteen-state amicus brief that argued Moore's request for relief was inconsistent with the

and unusual, and thus forbidden by the Eighth Amendment, is a reflection of “societal standards of decency, not a medical assessment of clinical practice.”¹⁸⁷ Roberts was ultimately troubled by the majority’s seeming refusal to acknowledge the practice of the states in coming to its conclusion.¹⁸⁸

In sum, Chief Justice Roberts opposed the majority’s decision as an unjustified expansion of the rule from *Hall*.¹⁸⁹ Notwithstanding the aptness or clinical accuracy shown by the CCA’s evidentiary conclusion, Roberts maintained that the reasons presented in favor of holding them in error here were not sufficient.¹⁹⁰ The Court could not point to any national legislative consensus justifying this constitutional holding, so Roberts argued there was no support for this ruling other than the subjective views of individual justices.¹⁹¹

III. THE COURT’S CONTINUED DEVELOPMENT OF NATIONAL CONSENSUS REVIEW IN *MOORE* APPROPRIATELY PROTECTS INTELLECTUALLY DISABLED INDIVIDUALS FROM CRUEL AND UNUSUAL PUNISHMENT

By expanding the scope of protection under *Atkins* with its ruling in *Moore*, the Supreme Court continued its recent trend of using national consensus coupled with professional guidance to enable the Eighth Amendment to evolve and mature with national standards of decency. This Part first establishes that the Court’s holding in *Moore* properly followed its own Eighth Amendment precedents.¹⁹² Next, this Part demonstrates the importance of adhering to current medical and clinical guidelines when determining intellectual disability in death penalty cases,¹⁹³ and discusses the flaw in the dissent’s argument that the professional community is splintered.¹⁹⁴ Finally, this Part explains why

states’ consensus).

187. *Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting); *see also* DSM-5, *supra* note 105, at 25 (stating the purpose of the guide is to assist in clinical assessment and treatment planning, while pointing out the information provided does not always perfectly align with questions of crucial importance to the law).

188. *Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting); *see also* *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (holding that the most reliable objective evidence of the nation’s standards of decency is reflected in the states’ practices).

189. *Moore*, 137 S. Ct. at 1061 (Roberts, C.J., dissenting).

190. *Id.*

191. *Id.* (pointing out there was no argument from *Moore* nor any assertion from the majority as to a national consensus on the practices at issue); *see also* *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”).

192. *See infra* notes 196, 203.

193. *See infra* note 212.

194. *See infra* note 227.

the Court was correct in abrogating Texas's rule from *Ex parte Briseno*, which was irreconcilable with both *Hall* and *Atkins*.¹⁹⁵

While clinical determination is indeed not analogous to legal determination, using outdated and nonclinical diagnostic criteria nonetheless disregards the established professional and clinical consensus, and it certainly does not comport with *Hall*.¹⁹⁶ The CCA violated established practice in its reliance on outdated reference materials and its failure to apply the proper and accepted standards.¹⁹⁷ The criteria for evaluating intellectual disability evolve based on academic and clinical progress in science and medicine.¹⁹⁸ Despite these advances and attendant increased understanding, Texas continued to utilize the AAMR-9, published in 1992, to aid in its legal determination of intellectual disability.¹⁹⁹ Next, the CCA ignored professional criteria by effectively shutting off the inquiry into Moore's intellectual disability based solely on his IQ scores.²⁰⁰ *Hall* warned against basing one's determination solely on IQ test results.²⁰¹ The CCA was flawed not only in its sole reliance on IQ score in comparison to clinical consensus, but also in its dismissal of the widely recognized SEM for the test.²⁰²

Clinical determination of intellectual disability hinges on adaptive deficits, which cannot be overshadowed in a legal determination by other

195. See *infra* note 238.

196. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 14; see also *Hall v. Florida*, 572 U.S. 701, 712 (2014) (striking down Florida's rule that "disregard[ed] established medical practice" for the consideration of intellectual functioning).

197. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 14.

198. *Id.*; see also DSM-5, *supra* note 105, at 6–7 (summarizing the revision process and how changes to diagnostic criteria address specific strengths and weaknesses of the old methodology); AAIDD-11, *supra* note 123, at xiv–xvi (articulating the organization's mission to build upon a constantly developing body of knowledge that reflects the changed construct of disability).

199. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 15; AAMR-9, *supra* note 81; see also *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015) (concluding that, in the absence of legislation implementing *Atkins*, the court would continue to follow the 1992 text).

200. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 15–16; see also *Hall*, 572 U.S. at 722 ("An IQ score is an approximation, not a final and infallible assessment of intellectual functioning.").

201. *Hall*, 572 U.S. at 723 ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."); Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 15; see also DSM-5, *supra* note 105, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.").

202. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 16; see also AAIDD-11, *supra* note 123, at 35–36 (discussing how to properly utilize SEM).

factors.²⁰³ *Hall* recognized the importance of this second prong of intellectual disability and how it must be analyzed in conjunction with intellectual functioning.²⁰⁴ In fact, the inclusion of adaptive functioning and deficits in the diagnosis of intellectual disability serves to prevent over-diagnosing and limit it to those persons who are significantly affected and have an impaired capacity to function in society.²⁰⁵ Furthermore, the accepted analysis of adaptive functioning focuses solely on deficits,²⁰⁶ rather than strengths, by looking to everyday activities and functions that one is unable to perform, not those that one does well or better than expected.²⁰⁷ Without deficits, clinical professionals agree that

203. See Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 7 (noting the definition of intellectual disability including analysis of deficits in adaptive functioning has existed for decades); ANNE ANASTASI & SUSANA URBINA, PSYCHOLOGICAL TESTING 248 (Pete Janzow, ed., Prentice-Hall Inc. 7th ed. 1997) (1954) (“[I]ntellectual limitation is a necessary but not a sufficient condition for [intellectual disability].”); AM. ASS’N ON MENTAL DEFICIENCY, MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 1973) (“[Intellectual disability] refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.”).

204. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 8; see also *Hall*, 572 U.S. at 719–20 (“[T]hose persons who meet the ‘clinical definitions’ of intellectual disability ‘by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002))).

205. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 7–8; see also AAIDD-11, *supra* note 123, at 43 (describing adaptive functioning and behavior as the set of skills learned and used throughout one’s daily life); DSM-5, *supra* note 105, at 33 (requiring, for a diagnosis of intellectual disability, adaptive deficits such that a person cannot be reasonably independent or socially responsible and need ongoing support to function capably at home, work, and school).

206. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 14 n.16 (noting myriad guides and diagnostic manuals that focus on limitations, deficits, or impairments).

207. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 15. Importantly, however, experts agree that evaluating adaptive behavior in prison will often yield flawed or stunted results. See DSM-5, *supra* note 105, at 38 (noting adaptive functioning may be harder to analyze in prison); Caroline Everington et al., *Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 201, 201–02 (Edward A. Polloway ed., 2015) (asserting that an accurate look at adaptive behavior is impossible in prison because inmates do not make any independent choices about their daily lives, such as cooking food and dressing themselves); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114, 119 (2009) (describing prisons as artificial environments that do not give enough opportunity to demonstrate adaptive behaviors).

one cannot be diagnosed with intellectual disability. Conversely, deficits should not be counterbalanced with adaptive strengths, as Texas courts have done, to weigh against such a diagnosis.²⁰⁸ Diminished adaptive abilities in everyday life are clinically viewed as manifestations of limitations seen in the first prong of intellectual functioning.²⁰⁹ Finally, the clinical focus on deficits is most important because some relative adaptive strengths almost *always* coexist with adaptive deficits.²¹⁰ A legal determination of intellectual disability must be reflective of the clinical understanding, which recognizes that these commingling characteristics do not preclude diagnosis.²¹¹

Next, states cannot outright ignore established scientific standards when dealing with intellectual disability cases.²¹² These standards change

208. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 17; *see also Ex parte Cathey*, 451 S.W.3d 1, 26–27 (Tex. Crim. App. 2014) (“[S]ound scientific principles require the factfinder to consider *all* possible data that sheds light on a person’s adaptive functioning, including his conduct in a prison society, school setting, or ‘free world’ community.” (emphasis in original)); *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015) (using a test that weighs strengths and weaknesses, contrary to the accepted medical standards); AAIDD-11, *supra* note 123, at 47 (“[S]ignificant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.”).

209. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 17–18; *see also Hall*, 572 U.S. at 723 (“Intellectual disability is a condition, not a number.”).

210. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 19 (“[P]ractically every individual who has intellectual disability also has things that he or she has learned to do, and can do.”); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (“[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.” (internal quotations omitted) (quoting AM. ASS’N OF MENTAL RETARDATION, MENTAL RETARDATION, DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002))); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM. & MARY BILL RTS. J. 467, 471 (2014) (“[T]he presence of a defendant’s strengths in some areas, such as having a history of steady employment or possessing academic skills in the fourth to sixth grade range, is to be expected and does not preclude a diagnosis of [intellectual disability].”).

211. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 19–20; *see also* J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, in *THE HANDBOOK OF HIGH-RISK CHALLENGING BEHAVIORS IN PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES* 229, 233 (James K. Luiselli ed., 2012) (“[P]eople with mild ID [intellectual disability] are a heterogeneous group with individual profiles of relative strengths and weaknesses. One cannot argue that the presence of a particular strength rules out ID, particularly if it is a strength shared with others with ID.”); Ellis & Luckasson, *supra* note 45, at 427 (“[Intellectually disabled] people are individuals. Any attempt to describe them as a group risks false stereotyping and therefore demands the greatest caution.”).

212. *See Hall*, 572 U.S. at 723 (asserting that defendants must have the opportunity to show evidence of adaptive deficits); Brief of Amici Curiae, the American Association on Intellectual and

over time with improved clinical and scientific understanding of intellectual disability, and courts must be able to consider these new and refined guidelines.²¹³ Importantly, the Supreme Court has recognized this fact in other cases involving psychology by considering the current state of the relevant medical or scientific field.²¹⁴ However, the CCA had rejected the accepted scientific principles, in stark contrast to the Court's directive in *Hall*.²¹⁵ Its use of adaptive strengths to support its decision is supported by almost no authority, placing it well outside the medical community's diagnostic framework.²¹⁶ Lastly, the *Briseno* factors are also outside the scope of accepted clinical practice and have been rejected both by scholars as well as practitioners in the field.²¹⁷

Looking to national consensus to formulate a rule, the Court noted that Texas is an outlier among the states in routinely depriving intellectually disabled individuals of constitutional protection under *Atkins*.²¹⁸ When a

Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 27 (noting that scientific and clinical consensus regarding diagnostic standards for deficits is as well established as the standards for intellectual functioning, and is also just as important to the determination of intellectual disability).

213. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 27 (“Clinical understanding cannot, of course, be treated as if it were fixed in amber, and any requirement for courts to willfully blind their eyes to proven advances in scientific understanding is inconsistent with basic Constitutional principles.”).

214. *Id.*; see also *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”); *Miller v. Alabama*, 567 U.S. 460, 472 n.5 (2012) (“The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.”).

215. *Hall*, 572 U.S. at 721 (“The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.”); Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 28.

216. Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 28 n.33.

217. See TEX. HEALTH & SAFETY CODE ANN. § 593.005 (West 2017) (detailing Texas's clinical guidelines for determining the presence of an intellectual disability); Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 28–31 (noting that Texas uses clinical guidelines and definitions of intellectual disability for all legal purposes other than death penalty cases); *Everington*, *supra* note 210, at 481 (“Using these seven [*Briseno*] factors as part of a diagnosis has the potential (if strictly interpreted) to exclude anyone functioning in the mild ID range from the protection of *Atkins*.”).

218. Brief for the American Bar Association as Amicus Curiae in Support of Petitioner at 18, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15-797); see also *Moore*, 137 S. Ct. at 1052 (“The *Briseno* factors are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts.”); see generally Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1 (2011).

state is isolated, as Texas was in this case, it stands as evidence of a national consensus against the practice in question.²¹⁹ In practice, Texas's rule has almost certainly led to individuals being put on death row and has possibly led to executions of individuals who would have been exempt in other jurisdictions.²²⁰

Texas was also the only state to use the *Briseno* factors and to forbid the use of modern clinical standards.²²¹ In recent cases, Oregon, Mississippi, California, and Indiana have all complied with *Hall* in utilizing newly established medical or clinical standards.²²² Furthermore, most courts outside of Texas have either implicitly or directly rejected *Briseno* and Texas's method of analyzing adaptive behavior.²²³ Although most states have not addressed the exact question raised in *Moore*, still

219. Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 18; *see also Hall*, 572 U.S. at 718 (holding that, where a majority of the states have rejected a procedural method for imposing the death penalty, that stands as strong evidence of a national consensus regarding it as improper and inhumane).

220. Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 18–19; *see also Hall*, 572 U.S. at 723 (holding Florida's IQ cutoff rule unconstitutional due to the risk it created of executing intellectually disabled defendants); Brief for Amicus Curiae The Constitution Project in Support of Petitioner at 5–6, *Moore*, 137 S. Ct. 1039 (No. 15-797) (noting that Texas's death penalty decisions involving intellectual disability oftentimes require intervention and correction by the Supreme Court). *See* Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 22–27 for a discussion of three Texas defendants, in addition to *Moore*, whose petitions for relief under *Atkins* were denied because of *Briseno*.

221. Brief for Amicus Curiae The Constitution Project in Support of Petitioner, *supra* note 220, at 10 (claiming that most states require or at least permit the use of modern and up-to-date standards, while Texas actually forbids their use).

222. *Id.* at 10–12; *see also In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005) (citing to and relying on then-current clinical guidelines and manuals to reject a strict IQ cutoff, nine years before *Hall* was decided); *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005) (recognizing that a state's definition of intellectual disability must "generally conform" to that of the national consensus and clinical authorities); *Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015) ("[J]udicial recognition of the new terminology conforms with the directives of *Atkins* and *Hall* and will facilitate legal determinations of intellectual disability by allowing our courts to rely on the newer, generally-accepted definitions most frequently used by modern clinicians. We now adopt the 2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state . . ."); *State v. Agee*, 364 P.3d 971, 989 (Or. 2015) (reversing a trial court's *Atkins* decision that did not have the opportunity to use the most recent DSM-5, thus creating an unacceptable risk that an individual with intellectual disability may be executed).

223. Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 20–21; *see also Van Tran v. Colson*, 764 F.3d 594, 608–12 (6th Cir. 2014) (overturning the Tennessee Court of Criminal Appeals, which had emphasized adaptive strengths in its determination of intellectual disability); *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 212 (D.P.R. 2013) (rejecting the prosecutor's request to use *Briseno* because the factors were not as consistent with *Atkins* as other factors and tests that were available); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 WL 1516147, at *48 (W.D. Tenn. Jan. 28, 2014) (using the approach of other federal courts instead of *Briseno* because they were more adherent to clinical standards).

none have deviated in the way Texas did here.²²⁴ The only state that comes close is Pennsylvania, and even there, the courts still utilize clinical definitions first and foremost, with the *Briseno* factors merely permitted but not required in the analysis.²²⁵ In looking to clear and objective evidence of the practice of states, the Supreme Court was correct in holding that Texas's system was out of touch with societal views and evolving standards of decency.²²⁶

The dissent's argument that the professional community is splintered in its diagnosis of intellectual disability is unpersuasive, as there is professional consensus on the objective diagnostic criteria at issue in *Moore*.²²⁷ Both *Atkins* and *Hall* recognized this consensus and gave authority to definitions used by the APA and the AAIDD.²²⁸ Indeed, both the DSM-5 and the AAIDD-11 recognize the centrality of coexisting intellectual and adaptive functioning deficits to the determination of intellectual disability.²²⁹ Finally, the relatedness inquiry on which the

224. Brief for Amicus Curiae The Constitution Project in Support of Petitioner, *supra* note 220, at 12; *see also* Tobolowsky, *supra* note 218, at 142 (“[T]he Texas Court has clearly taken a path that differs from the other states both in its actions and in its failure to act regarding its *Atkins* definition and procedures.”).

225. Brief for Amicus Curiae The Constitution Project in Support of Petitioner, *supra* note 220, at 12–13; *Commonwealth v. DeJesus*, 58 A.3d 62, 86 (Pa. 2012) (“Because the *Briseno* factors relate directly to considerations in *Atkins* and appear to be particularly helpful in cases of retrospective assessment of [intellectual disability], we approve their use in Pennsylvania. However, we note and emphasize that in *Briseno* the court did not adopt them as presumptions or even as a checklist.”); *see also* *Commonwealth v. Williams*, 61 A.3d 979, 982 n.9 (Pa. 2013) (noting that although the *Briseno* factors may be helpful, they are not to be given any favored or presumptive status in the eyes of the factfinder).

226. Brief for Amicus Curiae The Constitution Project in Support of Petitioner, *supra* note 220, at 13; *see also* *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (asserting the Eighth Amendment draws its meaning from “evolving standards of decency”); *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980) (explaining that the Court must use objective factors as much as possible when undertaking Eighth Amendment analyses); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (noting that the actions of states provide the most clear and objective evidence of national consensus and our society's standards).

227. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 7 n.3 (noting that the definitions of intellectual disability used in the AAIDD-11 and DSM-5 do differ in some respects, but those differences are not relevant to the question presented in *Moore*); *see also* *Hall v. Florida*, 572 U.S. 701, 710–11 (2014) (noting clinical definition of intellectual disability includes three main criteria: limitations in intellectual functioning (as evidenced by IQ scores), limitations in adaptive functioning, and onset of said limitations during developmental years).

228. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 7; *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002); *Hall*, 572 U.S. at 704.

229. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 8; *see also* AAIDD-11, *supra* note 123, at 28 (“[E]qual consideration [must be given] to significant limitations in adaptive behavior and intellectual functioning”); DSM-5, *supra* note 105, at 37 (“The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions.”).

CCA partially relied²³⁰ is only relevant insofar as it precludes other physical ailments from affecting the diagnosis.²³¹

Professionals also agree on the assessment methods of adaptive functioning, stressing the importance of adaptive deficits as measured by standardized tests.²³² An individual must have a significant limitation or deficit in at least one skill area, whereby intellectual disability can and should be diagnosed.²³³ Significantly, again, there is professional consensus that these adaptive deficits are indicative of intellectual disability even when they are concomitant with manifestations of adaptive strengths.²³⁴ Finally, although the CCA in *Briseno* warily asserted that such diagnoses were rooted in subjectivity,²³⁵ the testing methods currently used meet all measurable requirements for standardization, reliability, and validity.²³⁶ When assessed in accordance with clinically accepted tests and guidelines, subjectivity is all but a logical impossibility.²³⁷

Next, the goal of the *Briseno* factors is to limit the scope of protection under *Atkins*—in the midst of a legislative vacuum wherein Texas had not yet implemented it statutorily—such that it unconstitutionally excludes mildly intellectually disabled individuals who are deemed undeserving of that protection.²³⁸ The CCA in *Briseno*, tasked with

230. *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015).

231. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 8–9.

232. *Id.* at 11; *see also* AAIDD-11, *supra* note 123, at 47; DSM-5, *supra* note 105, at 37.

233. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 13; *see also* AAIDD-11, *supra* note 123, at 47 (describing a significant limitation as one that is at least two standard deviations below the mean); DSM-5, *supra* note 105, at 37–38 (asserting that at least one domain of functioning must be impaired so as to require ongoing support for the individual's performance of everyday activities).

234. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 13; *see also* *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (stating in dicta that intellectually disabled individuals are likely to have a mixture of strengths in various social skills or adaptive skills, while exhibiting overall limitations in other adaptive skill areas (citing AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION, DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002))); AAIDD-11, *supra* note 123, at 45 (noting that adaptive strengths are often present along with adaptive limitations).

235. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

236. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 11–12; *see also* J. Gregory Olley, *Adaptive Behavior Instruments*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* *supra* note 207, at 187, 187–89 (noting the ongoing refinement and development of testing methods has resulted in three reliable diagnostic scales).

237. Brief of Amici Curiae American Psychological Association et al. in Support of Petitioner, *supra* note 161, at 12–13.

238. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner at 8, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15-797); *see also* *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005) (“[T]he [*Atkins*] Court ruled that the death penalty constitutes an excessive sanction for the entire category of [intellectually disabled] offenders . . .”);

creating a rule to apply the Eighth Amendment protection of *Atkins*, critically misinterpreted the Supreme Court's mandate that the states prohibit this type of punishment as also allowing states to continue to execute individuals with a mild intellectual disability.²³⁹ After highlighting the high percentage of persons recognized as mildly disabled²⁴⁰ and their ability to improve functional skills with proper assistance over time,²⁴¹ the CCA then extrapolated what it believed to be the professional community's wide diagnosis of intellectual disability as creating a "safety net" for those on the fringe of mild intellectual disability.²⁴² In doing so, the CCA then assumed the responsibility of defining the range of individuals to be exempted in Texas under *Atkins* and enacted a rule that empowers a factfinder to unscientifically determine whether a defendant is mildly intellectually disabled or merely has a personality disorder.²⁴³

In enacting this rule rooted in subjectivity, the *Briseno* court dodged its responsibility under *Atkins* by incorrectly conflating the decision of *who* is intellectually disabled with a decision of *which* intellectually disabled persons should be exempt from the death penalty under the

Ex parte Briseno, 135 S.W.3d at 6 (stating that the capital punishment ban for the intellectually disabled will be extended only to those whom a consensus of Texans believes "should be" exempt from the death penalty); *Ex parte Moore*, 470 S.W.3d 481, 528 n.2 (Tex. Crim. App. 2015) (Alcala, J., dissenting) (arguing that the majority in *Ex parte Moore* cannot shirk its own responsibility to comply with *Atkins* merely because the Texas legislature had not codified the rule from *Atkins*).

239. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 9–10. It is important to note that not only do most intellectually disabled persons fall in the category of mildly disabled persons, but also that those who are "higher" on the scale of intellectual disability are almost completely incapable of committing capital crimes. *Id.* at 9 nn.6–7. See also *Ex parte Briseno*, 135 S.W.3d at 5 (noting the remark in *Atkins* that not all of those who seek protection under the Eighth Amendment will be so disabled as determined by a national consensus (citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002))); Macvaugh & Cunningham, *supra* note 185, at 136 ("The seven criteria of the *Briseno* opinion operationalize an *Atkins* interpretation that only exempts a subcategory of persons with [an intellectually disability] from execution.").

240. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 10; *Ex parte Briseno*, 135 S.W.3d at 5–6; see also DSM-4, *supra* note 81, at 41 (noting that roughly eighty-five percent of diagnoses fall into the mild category).

241. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 10; see also *Ex parte Briseno*, 135 S.W.3d at 6; DSM-4, *supra* note 81, at 44 (explaining that intellectual disability does not necessarily last throughout one's entire lifetime, as persons who exhibited characteristics of mild intellectual disability via academic failure may develop strengths in other adaptive skills if given the right opportunities and training).

242. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 10; *Ex parte Briseno*, 135 S.W.3d at 6.

243. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 10–12; *Ex parte Briseno*, 135 S.W.3d at 6–8.

Eighth Amendment.²⁴⁴ Indeed, the *Atkins* Court handed down its rule in response to a mildly intellectually disabled petitioner,²⁴⁵ and Justice Scalia's dissent in that case was actually focused on the majority's categorical ban being too far reaching.²⁴⁶ If the scope of protection were ever in doubt, the Court recently reprised and confirmed this piece of *Atkins* in *Brumfield v. Cain*.²⁴⁷ In *Brumfield*, the Court held that a petitioner whose IQ score lies in a range of potential mild intellectual disability was improperly denied the chance to acquit himself with evidence of that disability.²⁴⁸ *Brumfield* also explicitly stressed that a personality disorder can accompany the adaptive deficits that signal intellectual disability, discrediting the opposite implication in *Briseno*.²⁴⁹ Ultimately, however, it is the Eighth Amendment itself and the Court's precedent that stands against the CCA's reasoning in *Briseno*.²⁵⁰ States do not have free reign to demarcate the boundaries of the Amendment's protection as they see fit—to do so would contradict the very object and purpose of *Atkins*.²⁵¹

The *Briseno* factors also deprive defendants of their dignity and contravene standards of decency under the Eighth Amendment by relying on stereotypes, which leads to unreliable and arbitrary judgments.²⁵² In

244. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 12; *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

245. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 12; *Atkins*, 536 U.S. at 308.

246. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 12–13; *Atkins*, 536 U.S. at 338–42 (Scalia, J., dissenting).

247. See generally *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 13.

248. *Brumfield*, 135 S. Ct. at 2278; Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 13.

249. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 13; see also *Brumfield*, 135 S. Ct. at 2280 (“[A]n antisocial personality is not inconsistent with any of the above-mentioned areas of adaptive impairment, or with intellectual disability more generally.”); *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

250. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 13–14; see also *Atkins*, 536 U.S. at 316–17.

251. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 14; see also *Hall v. Florida*, 572 U.S. 701, 719 (2014) (“*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.”).

252. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 14; see also *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (requiring imposition of the death penalty to be carried out in a manner that is not arbitrary); *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (noting that the Court will strike down as invalid any procedural rules that render the sentencing process less reliable); *Atkins*, 536 U.S. at 317 (holding that states are limited by the Constitution to create appropriate means of enforcing the Eighth

employing seven subjective, stereotypical, and nondiagnostic factors by which a factfinder may determine intellectual disability, *Briseno* allows judges to define it on a case-by-case basis and inherently tends toward unreliability.²⁵³ Importantly, the CCA utilized the *Briseno* factors to bolster its holding that Moore was not intellectually disabled, emphasizing the very same type of unacceptable subjective and anecdotal evidence as reason to reject the habeas court's recommendation.²⁵⁴

In sum, *Briseno* is wholly nonclinical and thus unconstitutional under both *Atkins* and *Hall*.²⁵⁵ The *Atkins* Court used scientific and medical tools to properly determine whether a defendant was intellectually disabled and protected under the Eighth Amendment.²⁵⁶ In *Hall*, the Court revisited *Atkins* and built upon its holding, stating that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*."²⁵⁷ Under *Atkins*, any approach that disregards established medical practice is flatly out of touch with the Eighth Amendment.²⁵⁸

IV. MOORE WILL PROMPT NUMEROUS APPEALS AND MAKE IT MORE DIFFICULT FOR STATES TO IMPOSE THE DEATH PENALTY, BUT TOTAL ABOLITION IS NOWHERE IN SIGHT

The decision in *Moore* is one that tightens and clarifies the rules of *Atkins* and *Hall* and will thereby give states more reason for pause when deciding capital cases. The decision will also prompt even more death penalty appeals based on intellectual disability, especially in Texas.²⁵⁹

Amendment prohibition of capital punishment for those intellectually disabled persons); *Hall*, 572 U.S. at 724 (holding that states cannot deny individuals of their basic dignity, which is protected by the Constitution).

253. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 28; *see also Atkins*, 536 U.S. at 320–21 (stressing that factfinders oftentimes failed to view intellectual disability as a mitigating factor, in fact frequently leading to harsher punishments). *See Chester v. Thaler*, 666 F.3d 340, 371 (5th Cir. 2011) (Dennis, J., dissenting), *Lizcano v. State*, No. AP–75,879, 2010 WL 1817772, *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring in part and dissenting in part), and *Ex Parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring), for expressions of concern by CCA as well as Fifth Circuit judges about the *Briseno* factors.

254. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Texas, in Support of Petitioner, *supra* note 238, at 29; *see also Ex parte Moore*, 470 S.W.3d 481, 526–27 (Tex. Crim. App. 2015).

255. Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 7.

256. *Id.*; *see also Atkins*, 536 U.S. at 308 n.3 (utilizing the then-current AAMR-9 for the three-pronged definition of intellectual disability).

257. *Hall*, 572 U.S. at 720; Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 8.

258. *Hall*, 572 U.S. at 720–21; Brief for the American Bar Association as Amicus Curiae in Support of Petitioner, *supra* note 218, at 8.

259. Carol Steiker & Jordan Steiker, *Death-Penalty Symposium: Incremental Victories for*

The Houston metropolitan area in Harris County alone saw five appeals between March and October 2017.²⁶⁰ Based on its death row population, the Harris County District Attorney expected six to ten additional appeals by the end of 2018.²⁶¹ The CCA has already stayed several executions and remanded others to state habeas courts for further review of appropriate evidence as required by *Moore*.²⁶² Each case is obviously different, but if the convictions of these defendants were previously upheld based on the rules and framework of *Briseno*, Texas is likely to see a number of death sentences overturned.²⁶³

In fact, the Supreme Court has already vacated the judgment against one San Antonio defendant and remanded that case to the Fifth Circuit.²⁶⁴ More recently, in January 2019, the Supreme Court vacated and remanded *White v. Kentucky* for further consideration in light of *Moore*, even though the Kentucky Supreme Court had upheld the petitioner's death sentence in that case five months after *Moore* was decided.²⁶⁵ And, after the Court remanded Moore's case, the CCA again found that Moore was not intellectually disabled.²⁶⁶ Moore appealed again to the Supreme Court which held, due in part to the CCA's continued reliance on the *Briseno* factors, that the CCA was incorrect in finding Moore had not shown intellectual disability.²⁶⁷ But, rather than take this opportunity to clearly delineate why the CCA's analysis was insufficient, the Court stated that the opinion simply "rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court."²⁶⁸

Capital Defendants but No Sweeping Change, SCOTUSBLOG (June 28, 2017, 10:58 AM), <http://www.scotusblog.com/2017/06/death-penalty-symposium-incremental-victories-capital-defendants-no-sweeping-change/>.

260. See Brian Rogers, *Texas Attorneys Brace for New Death Penalty Appeals After Supreme Court Ruling*, HOUS. CHRON. (Oct. 15, 2017, 3:08 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-attorneys-brace-for-new-round-of-death-12271127.php> (noting the five appeals in Harris County and ten total appeals through all of Texas in the time span from March 28, when *Moore* was decided, to October 15).

261. *Id.*

262. See, e.g., *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018); *Ex parte Long*, No. WR-76,324-02, 2017 WL 3616644 (Tex. Crim. App. Aug. 21, 2017).

263. Rogers, *supra* note 260; Steiker & Steiker, *supra* note 259.

264. *Weathers v. Davis*, 138 S. Ct. 315 (2017); *Weathers v. Davis*, 659 F. App'x 778 (5th Cir. 2016); see also Rogers, *supra* note 260 (noting the remand in the *Weathers* case).

265. *White v. Kentucky*, 139 S. Ct. 532 (2019).

266. *Moore v. Texas*, No. 18-443, slip op. at 5 (U.S. Feb. 2, 2019) (per curiam).

267. *Id.* at 8 ("[D]espite the court of appeals' statement that it would 'abandon reliance on the *Briseno* evidentiary factors,' it seems to have used many of those factors in reaching its conclusion." (citation omitted) (quoting *Ex parte Moore II*, 548 S.W.3d 552, 560 (2018))).

268. *Id.* at 10.

State's attorneys desire clear and stable rules, which the Court does not currently provide.²⁶⁹ The new rule from *Moore* will make the death penalty more difficult to impose than it already was, especially in states that have not imposed legislation to enact the prior rule from *Atkins*.²⁷⁰ Federal habeas reviews, like the one in *Moore v. Texas*, are becoming less predictable, making it even more difficult for attorneys to adequately defend the states' cases.²⁷¹ This is so even though the goal of such habeas cases is to leave convictions alone unless there is glaring and egregious error that is prejudicial to the defendant.²⁷² Of course, it is a difficult job on both sides—fighting for those who are innocent or undeserving of the death penalty and fighting to uphold convictions of those who are rightfully sentenced—and the tug of war will continue unless the Court hands down a broader rule.²⁷³

To that end, the Supreme Court may take more significant steps regarding the death penalty in future terms, as this term mainly dealt with spot-checks rather than broad rule changes.²⁷⁴ Relatedly, four states voted on propositions involving the death penalty, and the result was a resounding victory for supporters of capital punishment.²⁷⁵ For example, in the November 2016 election, Nebraska voters reversed a repeal of the death penalty that the state legislature passed just eighteen months prior.²⁷⁶ California's effort to repeal the death penalty also failed and, conversely, its citizens passed a measure that reduces delay in processes surrounding execution of death row inmates.²⁷⁷ This will not go

269. Joseph Tartakovsky, *Death-Penalty Symposium: In Search of Predictability*, SCOTUSBLOG (June 29, 2017, 11:30 AM), <http://www.scotusblog.com/2017/06/death-penalty-symposium-search-predictability/>.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. See Kent Scheidegger, *Death-Penalty Symposium: Supreme Court Marks Time for a Term on Capital Punishment*, SCOTUSBLOG (June 28, 2017, 4:11 PM), <http://www.scotusblog.com/2017/06/death-penalty-symposium-supreme-court-marks-time-term-capital-punishment> (asserting that the death penalty cases, including *Moore*, were cases that primarily corrected individual errors and did not establish new or far reaching rules).

275. *Id.*

276. *Id.*; Paul Hammel, *Nebraskans Vote Overwhelmingly to Restore Death Penalty, Nullify Historic 2015 Vote by State Legislature*, OMAHA WORLD-HERALD (Nov. 9, 2016), http://www.omaha.com/news/politics/nebraskans-vote-overwhelmingly-to-restore-death-penalty-nullify-historic-vote/article_38823d54-a5df-11e6-9a5e-d7a71d75611a.html.

277. Scheidegger, *supra* note 274; Times Editorial Bd., *California's Supreme Court Should Put Proposition 66 Out of Its Misery*, L.A. TIMES (June 9, 2017, 5:00 AM), <http://beta.latimes.com/opinion/editorials/la-cd-proposition-66-death-penalty-20170609-story.html>; see also Liliana Segura, *The Death Penalty Won Big on Election Day, but the Devil Is in the Details*, THE INTERCEPT (Nov. 11, 2016, 8:20 AM), <https://theintercept.com/2016/11/11/the-death-penalty-won-big-on-election-day-but-the-devil-is-in-the-details/>.

unnoticed if the Supreme Court again addresses national consensus and whether application of the death penalty passes muster under the Eighth Amendment.²⁷⁸

The application of the rule from *Moore* will inevitably involve, as Chief Justice Roberts lamented, an expansion of the rule from *Hall*.²⁷⁹ In the eyes of advocacy groups, this is not necessarily a bad thing. But the accepted clinical and diagnostic criteria and standards change with time, as noted by the arguments of both sides.²⁸⁰ As such, if the criteria for the definition of intellectual disability change in the next iteration of the AAIDD Manual or DSM, defendants who were convicted under the old scheme will raise a new defense that their death sentence now violates the Eighth Amendment.²⁸¹

The looseness of *Moore*'s clarification on *Atkins* and *Hall* still leaves states enough leeway to find themselves in a constitutional dilemma.²⁸² The Court is doing everything it can to find a middle ground that still respects the states' authority over their own justice systems. However, this issue will continue to be litigated as appeals come forth and until the Court makes a more sweeping change.²⁸³ While the Court clearly did not give constitutional authority to professional bodies such as the American

278. Scheidegger, *supra* note 274.

279. *Id.*; see also *Moore v. Texas*, 137 S. Ct. 1039, 1061 (2017) (Roberts, C.J., dissenting) (noting that this rule can be read to require complete rigidity in reading IQ scores with the full SEM range and to disallow any reason for discounting the lower range of an IQ range).

280. Scheidegger, *supra* note 274; see also Brief of Amici Curiae, the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Arc of the United States, in Support of Petitioner, *supra* note 164, at 27 ("Clinical understanding cannot, of course, be treated as if it were fixed in amber, and any requirement for courts to willfully blind their eyes to proven advances in scientific understanding is inconsistent with basic Constitutional principles.").

281. See Draye, *supra* note 186 ("As soon as professional associations revise their thinking in a manner that would expand the boundaries of intellectual disability, death-row inmates who would benefit from the new guidelines will immediately raise Eighth Amendment claims.").

282. Scheidegger, *supra* note 274; see also *Moore*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting) (arguing the majority's use of the word "disregard" is inappropriate—the CCA fully regarded and considered the current clinical standards and chose, as the ultimate factfinder, to lean away); *Ex parte Cathey*, 451 S.W.3d 1, 26–27 (Tex. Crim. App. 2014) ("[C]ourts should not become so entangled with the opinions of psychiatric experts as to lose sight of the basic factual nature of the *Atkins* inquiry: Is this person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior wherever he is? . . . In that inquiry, we should not turn a blind eye to the inmate's ability to use society and his environment to serve his own needs. And sound scientific principles require the factfinder to consider *all* possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or 'free world' community." (citing *United States v. Montgomery*, No. 2:11-CR-20044-JPM-1, 2014 WL 1516147, at *49 (W.D. Tenn. Jan. 28, 2014); *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006)); *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015) (looking to the entire record and considering all functional abilities to make the intellectual disability determination).

283. Scheidegger, *supra* note 274; Steiker & Steiker, *supra* note 259.

Psychiatric Association, their influence is still undeniable.²⁸⁴ In this regard, *Moore* raised as many questions as it answered.²⁸⁵

In 2015, Justice Breyer laid out the argument for abolition of the death penalty in *Glossip v. Gross* with a dissenting opinion that questioned the basic constitutionality of the death penalty.²⁸⁶ Breyer found the geographic clustering of the death penalty to be unusual, and he further argued it was cruel based on evidence of wrongful convictions, delays in executions, and perceived arbitrariness in its administration.²⁸⁷ It is likely, though, that the Court is still not ready to move forward and address Breyer's position in one way or another, as most of the recent merits cases dealing with the death penalty were heard to grant relief and redress gross legal error.²⁸⁸ Even with fewer death sentences and executions, the Court continues to be visible in hearing these cases—though its reviews may be for appearances only.²⁸⁹ In an even more recent denial of certiorari, *Hidalgo v. Arizona*, Justice Breyer noted specifically that Arizona's system of capital punishment may be unconstitutional.²⁹⁰

The makeup of the Court will also determine its next steps in deciding death penalty cases. With Justice Gorsuch replacing the late Justice Scalia and Justice Kavanaugh replacing Justice Kennedy, outcomes of cases involving intellectual disability may or may not change.²⁹¹ *Hall* was

284. Scheidegger, *supra* note 274.

285. *Id.*

286. *Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting); see also Steiker & Steiker, *supra* note 259 (discussing the legislative landscape on the death penalty leading up to *Glossip*). In the decade leading up to *Glossip*, seven states had legislated the death penalty out of existence, executions in other states had decreased by eighty percent, and death sentences had decreased by ninety percent since their peak in the mid-1990s. Steiker & Steiker, *supra* note 259.

287. *Glossip*, 135 S. Ct. at 2755–77; see also Steiker & Steiker, *supra* note 259 (“The latter point has been of particular concern to Breyer, who has noted the suffering caused by prolonged death-row incarceration as well as the ways in which delay undercuts the deterrent and retributive rationales of the death penalty.”).

288. See Steiker & Steiker, *supra* note 259 (describing the cases as very fact specific and the lack of breadth in the Court's opinions).

289. See Steiker & Steiker, *supra* note 259 (noting the trend over the past forty years of the Supreme Court reviewing a disproportionate amount of death penalty cases—four were reviewed in 2016, and there were only thirty death sentences and twenty executions); Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383, 418 (2017) (outlining the two-pronged objective and subjective inquiries that may be considered by the Court, if it addresses the broad question of constitutionality of the death penalty).

290. *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1055 (2018) (denying certiorari). See also Adam Liptak, *Supreme Court Won't Hear Challenges to Arizona's Death Penalty Law*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/supreme-court-death-penalty.html> (discussing the Supreme Court's decision to deny review of the death penalty in *Hidalgo v. Arizona*).

291. See Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html> (noting that although Kavanaugh will likely not extend any additional

decided by a bare majority and *Moore* five to three; all indications point to Justices Gorsuch and Kavanaugh voting with the more conservative bloc of Chief Justice Roberts and Justices Alito and Thomas should this issue arise again.²⁹²

Despite the recent poll and ballot measures that have been passed, research shows overall public support of the death penalty in America is indeed declining along with the rate of actual death sentences and executions.²⁹³ The Court continued a recent trend of general discomfort with the death penalty, reversing most death sentences that it reviewed in the October 2016 term.²⁹⁴ The Court ruled in favor of capital defendants in five of the six cases; in the sixth, the state prevailed on procedural grounds.²⁹⁵ The Court is likely to continue to avoid sweeping decisions and concerns about the death penalty such as those Justice Breyer raised in *Glossip* and *Hidalgo*.²⁹⁶

Although the Court has not addressed it, the administration of the death penalty continues to raise suspicion of uneven and arbitrary implementation.²⁹⁷ The Court in *Moore* has tangentially attempted to curb the arbitrariness by condemning pervasive junk science practices, such as those used by Texas, that began to appear after *Atkins*.²⁹⁸ Justice Ginsburg's opinion addresses issues in many current outstanding *Atkins* claims that are matriculating through the appeals process.²⁹⁹ However, it will remain to be seen what effect, if any, this will have on more recent

protections via categorical exemptions from the death penalty, that does not necessarily mean the Court's recent rulings will be overturned).

292. See Scheidegger, *supra* note 274 (noting Justice Gorsuch's votes after he was confirmed tend to show he will uphold "law and order" as Justice Scalia's replacement); McAllister, *supra* note 175 (noting the four justices comprising the liberal wing—Ginsburg, Breyer, Kagan, and Sotomayor—do not support the way the death penalty is imposed and attaching great import to the effect future shifts in the makeup of the Court may have on possible abolition).

293. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 663–64 (2017); Kenneth Williams, *Why the Death Penalty Is Slowly Dying*, 46 SW. L. REV. 253, 253–54 (2017); Kenneth Williams, *Why and How the Supreme Court Should End the Death Penalty*, 51 U.S.F. L. REV. 271, 272–73 (2017).

294. See McAllister, *supra* note 175 (noting the Supreme Court's frequent lack of deference to state court decisions). The Court reversed four of the six death penalty cases in its 2016 term, with one case affirmed in spite of procedural issues that are not strictly pertinent only in context of the death penalty. *Id.*

295. *Id.*

296. Steiker & Steiker, *supra* note 259.

297. Brian Stull, *Death-Penalty Symposium: The Court Keeps Treating a Fatally Diseased Death Penalty*, SCOTUSBLOG (June 27, 2017, 4:14 PM), <http://www.scotusblog.com/2017/06/death-penalty-symposium-court-keeps-treating-fatally-diseased-death-penalty/>; see *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) (arguing that the Court is just "patch[ing] up the death penalty's legal wounds one at a time").

298. *Stull*, *supra* note 297.

299. *Id.*

death sentences.³⁰⁰ Recently heard appeals come from cases decided in 1980,³⁰¹ 1986,³⁰² and 1997³⁰³—years in which there were 173, 301, and 265 death sentences rendered, respectively.³⁰⁴ These older cases from a bygone era will continue to come up against these new stringencies being placed upon the death penalty.³⁰⁵ The Court, in reviewing and possibly overturning these cases, may find itself forced to confront larger issues that plague the capital punishment system.

As a result of *Moore*, evolving standards will likely become even more difficult to define and determine.³⁰⁶ Indeed, evaluating evolving standards of decency was already troublesome—once a new standard is determined, its precedential value makes it less flexible and more difficult to adjust.³⁰⁷ The Court’s “evolving standards” test will continue to take on more weight, meaning, and guidance from nonlegal sources.³⁰⁸ The Court in *Moore* has come almost full circle from its rule in *Atkins*, which only minimally utilized clinical and professional opinions and primarily focused on state attitude and legislation.³⁰⁹ In *Hall*, the Court more seriously considered the criteria of experts, but still hedged as to the amount of deference to be given.³¹⁰ In addition to relying on professional guidance more heavily, the *Hall* Court appeared to twist the mode in which it relies on state practice as well, by claiming forty-one total states would have disagreed with the Florida Supreme Court.³¹¹ Indeed, this is correct by way of negative inference, but it drew a shaky equivalence between the states that do not have the death penalty at all and those that do have the death penalty but properly interpret IQ scores for the purpose

300. *Id.*

301. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

302. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1793 (2017).

303. *Buck v. Davis*, 137 S. Ct. 759, 767–69 (2017).

304. Stull, *supra* note 297.

305. *Id.* (noting that many states, such as Arkansas last year, are forced to hurriedly administer death sentences due to scarce lethal-injection drugs that are due to expire).

306. Draye, *supra* note 186 (addressing the difficulty with which the Supreme Court has assessed evolving standards of decency).

307. *Id.*

308. *Id.*

309. *Id.* The opinions and standards from the professional and medical communities only appeared in a footnote. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002); *see also id.* at 312 (“We have pinpointed that the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))). *But see generally Moore v. Texas*, 137 S. Ct. 1039 (2017).

310. Draye, *supra* note 186; *see also Hall v. Florida*, 572 U.S. 701, 710 (2014) (“This [i.e., utilizing professional guidelines] in turn leads to a better understanding of how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule.”).

311. *Hall*, 572 U.S. at 716.

of determining intellectual disability.³¹²

If there are more disagreements among professional associations in the future, the Court will likely again confront a changing national consensus.³¹³ Switching from states' practices to the APA's intellectual disability definition does not change the innate paradigm—just like states, experts are not always unanimous³¹⁴—although the proclamation of an official statement or handbook gives the appearance of unanimity.³¹⁵ And again, if these “evolving standards” are ever reconsidered by the professional community, the Court's locking them into a rule of law may prevent them from changing their position.³¹⁶ However, professional organizations such as the APA are not actually bound by the Court's precedent, leaving them free to utilize their expertise to reconsider appropriate standards and criteria drafting new editions of clinical manuals.³¹⁷

CONCLUSION

Moore v. Texas is a continuation and extension of the Supreme Court's recent Eighth Amendment jurisprudence, and it rightfully strengthens its protection for the class of intellectually disabled persons that was originally granted in *Atkins v. Virginia* and further clarified by *Hall v. Florida*. The Court does not require that the Constitution kowtow to professional or medical communities for determinations of a national consensus. Rather, *Moore* mandates that courts are not free to disregard current established medical standards in their legal determination of intellectual disability, as this creates the unacceptable risk that intellectually disabled persons might be executed. The rule from Texas's precedent in *Ex parte Briseno*, with its roots in subjectivity, stereotype, and its logical dismissal of the guarantee of *Atkins*, creates a framework under which intellectually disabled persons can be sentenced to death and is therefore unconstitutional. As such, the Texas Court of Criminal Appeals violated the Eighth Amendment by discounting the proper standard error of measurement for Moore's IQ score and precluding him from presenting additional evidence of intellectual disability.

312. Draye, *supra* note 186.

313. *Id.* (“Deciding which opinion to follow is a task better suited to the legislative process than to the judiciary.”).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*