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Courts' Elusive Search for the Meaning of Intellectual Disability for Evaluating Atkins Claims

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COURTS' ELUSIVE SEARCH FOR THE MEANING OF INTELLECTUAL DISABILITY FOR EVALUATING *ATKINS* CLAIMS

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When the Supreme Court's 2002 *Atkins* decision held that it was unconstitutional to execute defendants with intellectual disability, the ruling was heralded as an important protection for these vulnerable defendants. However, courts have been faced with a number of conceptual and procedural issues because determining who has an intellectual disability has remained elusive, especially for defendants

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whose intellectual disability is considered to be "borderline" (*i.e.*, IQs within the 65-75 range). This Article examines some of these issues from three states (Texas, Florida, and Alabama).

Because the meaning of intellectual disability and attempts to measure it have been elusive, the courts' search for a particular objective measure for determining who should be exempt under *Atkins* will continue to result in arbitrary outcomes. This Article proposes that the focus should shift to a broader conceptualization of intellectual disability embodied within a social construction model to include examining the social context and its relationship to how an individual functions and reasons. Only then can a greater number of defendants who function along the borders of "intelligence" benefit from the Supreme Court's *Atkins* ruling.

I. INTRODUCTION

As public opinion increasingly disfavors execution of defendants with intellectual disabilities (ID) for capital crimes, the ongoing debate regarding for whom such punishment should be permitted continues to raise questions about how society views our criminal justice system for those with ID.[1] The hope was that the Supreme Court's ruling in *Atkins v. Virginia*[2] would end such executions.[3] However, because the Supreme Court left it up to each state to determine who would qualify under this exemption, *Atkins* opened another set of issues: how to determine intellectually disability from a legal perspective.[4]

Each state's statute regarding the death penalty for individuals with ID since the Supreme Court ruling in *Atkins* has varied widely, as state legislatures have passed statutes that would reflect the public's view and courts have interpreted and applied the state statutes to the cases before

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1. Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215 (2008). According to the Death Penalty Information Center, eighteen states have abolished the death penalty for everyone, and six of those have occurred since the Supreme Court's ruling in *Atkins*. *See States with and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 1, 2014).

2. 536 U.S. 304 (2002). In *Atkins*, Justice Stevens noted that because defendants with ID have "disabilities in the areas of reasoning, judgment, and control of their impulses . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. Atkins had a reported IQ of 59. *Id.* at 309.

3. *See* Neva Feldman, Annotation, *Application of Constitutional Rule of* Atkins v. Virginia, *536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of Eighth Amendment*, 122 A.L.R. 5th 145 (2004); Symposium, *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625 (2008).

4. *See* Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203 (2008).

them.[5] Yet the general public has little understanding of ID, especially when the person functions along the borders of average intelligence.[6] There is often a general public perception that these individuals are more capable than they actually are.[7] Furthermore, most individuals have great difficulty understanding the relationship between intelligence and criminal culpability.[8]

This Article explores how the courts in Texas, Florida, and Alabama have addressed post-*Atkins* death penalty cases. These three states were selected because they have had some of the highest number of post-*Atkins* challenges.[9] According to the Death Penalty Information Center, these states also had some of the highest number of executions of individuals with ID prior to the *Atkins* decision.[10]

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5. According to the Death Penalty Information Center, eight states passed statutes following the *Atkins* decision and eighteen states had already had statutes prohibiting the execution of defendants with ID. *States That Have Changed Their Statutes to Comply with the Supreme Court's Decision in* Atkins v. Virginia, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited Apr. 22, 2014).

6. *See generally* Brooke Amos, Note, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use When Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469 (2010); Natalie Cheung, Note, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317 (2013).

7. *See* Nancy Haydt et al., *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. REV. 359 (2014) (noting that individuals with mild disabilities can often appear functional and determining whether the disability is organic or a result of lack of access to opportunities or failure of the public school systems continues to be difficult to determine).

8. Weithorn, *supra* note 4.

9. To do this, a *WestlawNext* search was conducted to identify state cases using *Westlaw*'s key number K1642 (this key number is associated with death penalty for defendants with mental retardation). Only cases after the June 20, 2002 *Atkins* decision were included. Each case was examined to ensure that it related to a defendant who was claiming an exemption from the death penalty because of an intellectual disability. Cases involving the same defendant were also counted as one case. The final list of cases showed that Florida, Texas, and Alabama had the highest number of cases, accounting for 36% of the total cases. For these three states, another *WestlawNext* search was conducted using the advanced search option. The term *retard!* was used for the field "any of these terms" (this term was used because "mental retardation" and "mentally retarded" were the most common terms used prior to the change to "intellectual disability") and the term *death penalty* was used for the field "this exact phrase." Filters were then applied to identify only criminal cases and cases during the post-*Atkins* time period. Both reported and unreported cases were included. These cases were reviewed and only cases that involved a defendant claiming exemption from the death penalty because of an intellectual disability were included for analysis. Cases involving the same defendant were counted only once. Cases included in this manuscript include the combined cases found from *Westlaw's* key number search plus the cases found as a result of the refined *WestlawNext* search. Only cases as of May 8, 2014, which is when the search for this Article was conducted, are included.

10. Prior to *Atkins*, Texas' execution of nine defendants with ID represented 20% of the national total, and Alabama's and Florida's execution of four defendants with ID represented 9% of the total. *See List of Defendants with Mental Retardation Executed in the United States*, DEATH

A. *Background on Death Penalty for Individuals with Intellectual Disabilities*

Overturning its prior holding in *Penry v. Lynaugh* where the Supreme Court had held that it was not unconstitutional to execute defendants with ID,[11] in *Atkins*, the Court held that based on society's "evolving standards of decency,"[12] it would now be unconstitutional to execute individuals with ID.[13] During the period between *Penry* and *Atkins*, forty-four defendants with ID were executed.[14] What was unusual about the *Atkins* ruling was that it exempted an entire class of defendants from a particular form of punishment.[15]

These changing views have been based on the realization that the retributive and deterrent justifications for the death penalty made little sense when applied to those with ID.[16] Proponents seeking abolition of the death penalty for defendants with ID further pointed to a number of longstanding problems for these defendants within the criminal justice system.[17]

PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states (last visited Apr. 30, 2014).

11. 492 U.S. 302 (1989). Justice O'Connor, writing for the majority stated, "The Eighth Amendment does not categorically prohibit the execution of mentally retarded capital murderers of petitioner's reasoning ability." *Id.* at 305. Nevertheless, Justice O'Connor noted that the punishment should be "directly related to the personal culpability of the defendant." *Id.* at 304.

12. *Atkins*, 536 U.S. at 321 (noting that "death is not a suitable punishment" for defendants with ID in light of the number of legislatures that have addressed this issue, and concluding that within this context, such punishment "is excessive").

13. *Id.* at 310. Atkins had a full scale IQ of 59, and the Virginia courts stated that commuting his sentence to life imprisonment would not be justified "merely because of his IQ score." Following this Supreme Court ruling, Atkins' sentence was commuted to life imprisonment. Donna St. George, *Death Sentence Commuted in Va. Case*, WASH. POST, Jan. 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703172.html.

14. *See* Denis Keyes et al., *People With Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, 40 MENTAL RETARDATION 243, 243 (2002).

15. Haydt et al., *supra* note 7, at 362.

16. *See generally* Philip Fougerousse, *The Demise of the Death Penalty for the Mentally Retarded*, 77 FLA. B.J. 11, 63 (2003); Edward Miller, Note, *Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales,* 43 RUTGERS L. REV. 15 (1990); Jamie Fellner & Dorean M. Koenig, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 3 (2001).

17. *See generally* Rosa Ehrenreich & Jamie Fellner, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, 13 HUM. RTS. WATCH 1, 5 (2001) (noting issues with disclosure and testimony during questioning of defendants with ID and difficulty with defendants with ID in participating in their own defenses).

1. Historical Treatment of Individuals with Intellectual Disabilities

Not surprising, how the courts have addressed defendants with ID has paralleled society's historical treatment of individuals with ID based largely on prejudicial views of individuals with ID.[18] During the eugenics and institutionalization movement of the early 1900s, many individuals who did not have ID were sent to institutions for suspected ID based on behaviors such as truancy, promiscuity, or even because of being an orphan.[19] Individuals qualified for removal from society often are based on very little actual evidence of ID.[20] Scholars have noted that much of the institutionalization movement arose out of societal fears and prejudice.[21] Within this context, in 1927, Justice Holmes delivered the famous statement that "three generations of imbeciles are enough," upholding that sterilization of individuals with ID prior to releasing them from institutions was justified.[22]

The issue of how to treat defendants with ID within the criminal justice system was first presented to the courts as society began to question whether these defendants should be held morally culpable within the evolving penal theories based on retribution and deterrence.[23] *Penry* raised the issue of the role of ID as a mitigating factor during the sentencing phase.[24] After being heard twice before the Supreme Court, it

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18. *See generally* Laurence A. French, *Mental Retardation and the Death Penalty: The Clinical and Legal Legacy*, 69 FED. PROBATION 16, 16–20 (2005).

19. *See* Margaret Quigley, *Eugenics and Social Control*, *in* EYES RIGHT! CHALLENGING THE RIGHT WING BACKLASH (Chip Berlet ed., 1995).

20. *See* J. DAVID SMITH & MICHAEL L. WEHMEYER, GOOD BLOOD, BAD BLOOD: SCIENCE, NATURE, AND THE MYTH OF THE KALLIKAKS (2012); Quigley, *supra* note 19.

21. For a history of the eugenics movement and society's response to those deemed to be intellectually disabled, see MICHAEL D'ANTONIO, THE STATE BOYS REBELLION (2004); SMITH & WEHMEYER, *supra* note 20. *See also* Cheung, *supra* note 6, at 342–43 (discussing why jurors tend to have great difficulty with determining intellectual disability for those who have more mild forms because of stereotyped views).

22. Buck v. Bell, 274 U.S. 200, 207 (1927).

23. *See generally* Miller, *supra* note 16.

24. The Supreme Court heard Penry's claim on two separate appeals. Penry v. Johnson, 532 U.S. 782 (2001); Penry v. Lynaugh, 492 U.S. 302 (1989). John Penry's reported IQ scores ranged from 50–63 and his social maturity "was that of a 9 or 10-year-old." *Penry*, 492 U.S. at 307–08. On the first appeal, the Court held that the jury instructions during the sentencing phase failed to allow the jury to give "a moral reasoned response" to the mitigating circumstances in order to consider the possibility of life imprisonment instead of the death penalty because the special issues questions limited how the jury could consider Penry's ID. *Id.* at 320 ("The jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions: Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation?"). Upon remand, the trial court added instructions for how the jury was to respond to the three special issues questions. *Penry*, 532 U.S. at 798. However, the instructions were still held to be confusing and contradictory because the Court noted that when the instructions were provided, there was

became clear that a defendant's evidence of ID should be meaningfully considered by the jury to determine whether imposition of the death penalty is warranted.[25] Yet, it was not until *Atkins* that the Supreme Court held that the death penalty for defendants with ID was unconstitutional.[26] As a result of *Atkins*, there has been an intense focus on how to determine who would qualify as having ID, and thus, be exempt from the death penalty.[27] In many ways, *Atkins* brought before the legal community the inherent issues with which the professional field of ID has struggled: defining the meaning of ID (and/or intelligence),[28] and how an objective measure and procedure could accurately identify ID.[29] As noted by professionals in the field, ID cannot be identified in the same way that the medical profession diagnoses diseases.[30] Instead, professionals must identify suspected ID by noting behavioral patterns and/or observed traits.[31]

2. Continuing Problems with Attempts to Measure Intellectual Disability

Development of a standardized IQ measure was believed to be one way to minimize arbitrary identification of ID.[32] However, actually

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still no clear way for the jury to consider the mitigating factor of Penry's ID while answering truthfully to the three questions despite the additional instructions. *Id.* Again, the Court remanded the case. After this ruling, Penry's sentence was reduced to life imprisonment on February 15, 2008 as a result of a plea bargain. Mike Tolson, *Deal Keeps Death Row Inmate Penry Imprisoned for Life*, HOUS. CHRON., Feb. 16, 2008, http://www.chron.com/news/houston-texas/article/Deal-keeps-death-row-inmate-Penry-imprisoned-for-1578006.php.

25. Tolson, *supra* note 24.

26. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

27. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3.

28. For a chronological history of how intellectual disability has been defined in the past, see DEFINITIONS OF INTELLECTUAL DISABILITY/MENTAL RETARDATION: A CHRONOLOGICAL LIST WITH DATES AND REFERENCES, http://www.eds-resources.com/mrdefinitions2.htm (last updated Feb. 15, 2001).

29. *See* MICHAEL L. WEHMEYER, THE STORY OF INTELLECTUAL DISABILITY: AN EVOLUTION OF MEANING, UNDERSTANDING, AND PUBLIC PERCEPTION (2013).

30. RUTH LUCKASSON ET AL., MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (2002).

31. *See, e.g.*, Edward A. Polloway et al., *Mild Intellectual Disabilities: Legacies and Trends in Concepts and Educational Practices*, 45 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 54 (2010); Stephen Greenspan, *Assessment and Diagnosis of Mental Retardation in Death Penalty Cases: Introduction and Overview of the Special "Atkins" Issue*, 16 APPLIED NEUROPSYCHOLOGY 89 (2009).

32. Stephen Greenspan & Harvey N. Switzky, *Execution Exemption Should Be Based on Actual Vulnerability, Not Disability Label*, 13 ETHICS & BEHAV. 19 (2003); Haydt et al., *supra* note 7, at 363 (noting that starting with the 1961 AAIDD manual, and continuing through subsequent AAIDD and DSM manuals, a consistent theme has been the need to move the field of

identifying who does and does not have ID has continued to be debated and has proved to be far more challenging.[33] Even with increased focus on standardized IQ measures, many individuals were misidentified as having ID.[34] These standardized measures have been fraught with validity and reliability issues.[35] Moreover, use of artificial cut-off scores on such measures was viewed as arbitrary.[36] Even more troubling was continued findings that such measures were often racially biased and often more a measure of poverty than actual intelligence.[37]

Because reliance on measures of IQ had proved problematic, professionals proposed the adaptive behavior skills component to supplement the IQ score.[38] Based on the concept that ID should be diagnosed according to how the individual actually functions within the environment, the purpose of the adaptive behavior measure is to determine whether the IQ score has affected the individual's functional performance such that the performance score falls within the range of ID.[39] These adaptive behavior measures have also proved to be problematic because scores on these measures depend on who completes the interview, and there are many issues with using self-report for completing the assessment.[40]

ID beyond its excessive reliance on IQ, including somewhat arbitrary IQ ceilings).

33. *See, e.g.*, Haydt et al., *supra* note 7, at 362 ("When Justice Stevens wrote the decision in *Atkins*, he and the others in the majority likely assumed that determining the outcomes in ID proceedings would be easier and more straightforward than turned out to be the case. In fact, *Atkins* hearings are often highly disputatious, lengthy, and expensive proceedings, which pose intellectual challenges to judges and attorneys, few of which bring to these hearings a sophisticated understanding of the ID field or of the complex definitions and issues involved in making such a diagnosis.").

34. WEHMEYER, *supra* note 29.

35. Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 APPLIED NEUROPSYCHOLOGY 91 (2009).

36. Haydt et al., *supra* note 7, at 367 (noting that ID differs from virtually all other categories covered in the *DSM* manuals in that it is the only one that has been defined largely on the basis of an arbitrary point in a statistical continuum and should instead be based on judgment by a qualified clinician who would consider a variety of information regarding etiology rather than on a single discrete measure).

37. *See* Larry P. v. Riles, 793 F.2d 969, 981 (9th Cir. 1984) (raising the issue of using IQ scores for placing disproportionate numbers of African American students into classes for the "educable mentally retarded" and holding that the school district had "violated the provisions of the Rehabilitation Act and the Education For All Handicapped Children Act (1) by not insuring that the tests were validated for the specific purpose for which they are used, and (2) by not using the variety of statutorily mandated evaluation tools"). *See also* Donna Y. Ford et al., *The Coloring of IQ Testing: A New Name for an Old Phenomenon*, 13 URB. LEAGUE REV. 99 (1990).

38. *See generally* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114 (2009).

39. *Id.*

40. *Id.*

B. *State Procedures for Addressing Atkins Claims*

When the Supreme Court held that it is a violation of the Eighth Amendment to execute defendants with ID, states sought procedures for determining who would qualify as exempt under *Atkins*. Although there appears to be general agreement across definitions of ID in state statutes, as will be seen, the devil is often in the details.[41] These details have differed in several ways: procedures for raising *Atkins* claims; assigning burden of proof required; and designating whether the judge or the jury would determine whether the defendant qualified as having ID. In addition, special issues have arisen, resulting in variations for identifying legal standards for defining ID.[42]

1. Evaluating Atkins Claims

For the most part, states have applied the 3-prong test based on the AAIDD (American Association of Intellectual and Developmental Disabilities) and the APA's (American Psychiatric Association) *DSM-IV-TR*.[43] However, the ways that each prong (except for the third) is determined varies considerably.[44] Furthermore, states will vary on how much weight to give each of the prongs.[45] The first two prongs have been

41. *See, e.g.*, Anna M. Hagstrom, Note, Atkins v. Virginia: *An Empty Holding Devoid of Justice for the Mentally Retarded,* 27 L. & INEQ. 241 (2009) (comparing the responses of Texas, New Jersey, and Louisiana to the *Atkins* decision and highlighting inconsistencies in the ways courts determine intellectual disability and concluding that *Atkins* failed to ensure protection from death penalty, resulting in states performing unconstitutional executions).

42. *See* Sarah E. Wood et al., *A Failure to Implement: Analyzing State Responses to the Supreme Court's Directives in* Atkins v. Virginia *and Suggestions for a National Standard*, 21 PSYCHIATRY, PSYCHOL. & L. 16 (2014).

43. *See, e.g.*, Haydt et al., *supra* note 7, at 368 (noting that the APA's DSM-IV-TR definition was based on, and similar to, the AAMR's 1992 definition have been adopted in the statutes of most jurisdictions, which specified three criteria: (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive behavior, and (3) onset of disability before eighteen years of age); Cheung, *supra* note 6, at 319 (noting that the definitions of intellectual disability endorsed by the APA and the AAIDD are similar, but not identical, which created confusion among the states concerning which definition to follow, resulting in disparity amongst the states whereby a defendant executed in one state could have been considered intellectually disabled and thus ineligible for execution in another).

44. Amos, *supra* note 6, at 482 (noting that there are three categories of states based on the method they use to determine if an individual is intellectually disabled: (1) states that use an objective standard as proposed by a mental health association such as the AAIDD or APA; (2) states that use the terms used in the APA or AAIDD but decline to objectively define those terms and rely on the judicial branch to interpret the legislation; and (3) states that have a presumption of ID if the measured IQ falls below an objective standard stated in the statute).

45. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 632. In *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014), Justice Kennedy noted that five states allow defendants to present additional evidence even when the defendant's IQ score is

the focus of many *Atkins* claims, because how these two prongs are applied often makes the difference in the outcome of a case.[46]

The first prong focuses on the IQ score. How IQ scores are used to determine ID varies because states may rely more heavily on particular measures, adjust for the Flynn effect,[47] or apply the Standard Error of Measurement (SEM) [48] to identify an IQ score range. One of the more contentious issues has been the use of a strict IQ cut-off score, which is usually at or below an IQ of 70.[49] This is especially problematic for individuals who score within the 65-75 range when application of the SEM can make the difference between whether a defendant will be considered to have or not have ID.[50] Furthermore, how this first prong is

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above 70.

46. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 630 (finding that only 2% of *Atkins* claims failed prong 3).

47. The Flynn effect is based on the premise that IQ scores of the general population is increasing over time, and that because IQ scores are based on population norms at a particular point in time, adjustments to IQ scores should be adjusted to reflect changes to the norm. James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 PSYCHOL. BULL. 29 (1984). *See* Geraldine W. Young, Note, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 VAND. L. REV. 615, 617 (2012) ("To adjust American IQ scores for this inflation, the Flynn Effect calls for a score reduction of 0.3 points for every year that has passed between the year the test publisher standardized the test and the year the subject took the test.").

48. IQ scores are generally reported within what is called a standard error or measurement (SEM) because individual results on these measures can vary from one administration to the other. *See* Gresham, *supra* note 35. The SEM typically results in a score range of a plus or minus five points. Whether the SEM is applied by the court can be especially important for someone who has an IQ score of 70 because the actual score range could be between 65 and 75, or for someone who has an IQ score of 75, the actual score range could be between 70 and 80. Because the APA and the AAIDD has defined ID as an IQ score of 70 or below, which is two standard deviations below the norm, how a court applies the SEM can make the difference between whether a defendant will be considered to have ID. As noted by Justice Cochran, the IQ score can be viewed as the "glass half-empty" or the "glass half-full." *Ex parte* Briseno, 135 S.W.3d 1, 13 (Tex. Crim. App. 2004) (noting that the defense expert focused on the lower score range while the prosecution focused on the upper score range).

49. *See* Holly T. Sharp, Note, *Determining Mental Retardation in Capital Defendants: Using a Strict IQ Cut-off Number Will Allow the Execution of Many That Atkins Intended to Spare*- Ex Parte *State* (Smith v. State), 12 JONES L. REV. 227 (2008); Editorial Board, *Florida's Unconstitutional Death Penalty*, N.Y. TIMES, Mar. 3, 2014, http://www.nytimes.com/2014/03/04/opinion/floridas-unconstitutional-death-penalty.html?_r=0. *See also* Cheung, *supra* note 6, at 327. Cheung noted that because California does not statutorily require a cut-off score, other means for establishing ID are allowed, even if the defendant were to obtain an IQ score of 70 or above. Whereas, Kansas has a cut-off score of 70 or below. On the other hand, Ohio's statute specifies that there is a rebuttable presumption of no ID if a person scores above 70 and the defendant must rebut by proving the other two prongs. *Id.* at 328. Illinois' statute provides for a presumption of ID for an IQ score of 75 or below. *Id.* Kentucky has a strict cut-off score of 70. *Id.* Arkansas' statute specifies a rebuttable presumption for a score of 65 or below, making it one of the strictest statutes in the United States. *Id.* at 329.

50. *See* John Matthew Fabian et al., *Life, Death, and IQ: It's Much More than Just a Score:*

applied and the weight that this prong carries can vary from state to state.[51] Another issue has been how to determine whether a defendant exhibits significant deficits in adaptive behaviors (the second prong).[52]

The legal standards for determining ID generally employ the determinations recommended by professionals in the field of ID; however, in some states, the legal standards can be more restrictive. As Justice Cochran noted in *Briseno*, determinations of ID by mental health professionals and determinations in the criminal context are different because mental health professionals seek a broad definition to ensure that individuals are eligible for social services support in order to minimize the adverse effects of having ID.[53] On the other hand, the courts must determine whether a person should be held morally culpable based on the interests of society's need for justice.[54] Justice Cochran reasoned that most citizens would not support a blanket exemption for individuals with mild ID.[55] In addition, the public may not view individuals who qualify for services for ID as necessarily being automatically less morally culpable, particularly those "who just barely miss meeting those criteria."[56] Similarly, a Tennessee court using the public view as a basis reasoned that the legislature and public did not intend the statute to mean a strict cut-off score above 70, leaving the court to consider other factors for determining whether a defendant should be considered exempt from the death penalty because of ID.[57] Therefore, some courts appear to rely on the public's view for determining whether a defendant should be exempt from the death penalty.

2. Burden of Proof Standards

Courts have varied on whether to apply a rigorous standard for a defense raising an exemption from the death penalty due to ID or whether to apply similar standards as required for an affirmative defense.[58]

Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases, 59 CLEV. ST. L. REV. 399 (2011) (noting that the implications of the inconsistency in IQ tests for individuals who achieve a borderline IQ score results in the difference between life and death).

51. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 635.

52. *Id.*

53. *Briseno*, 135 S.W.3d at 6.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* Thomas Cotton, Case Comment, *State Constitutional Law—Cruel and Unusual Punishment—More than just an I.Q. Test may be Needed to Show Intellectual Disability.* Coleman v. State, *341 S.W.3d 221 (Tenn. 2011)*, 43 RUTGERS L.J. 635 (2013).

58. *See* Hagstrom, *supra* note 41, at 255–58 (noting that preponderance of evidence standard is used in Texas, because the courts view claims of ID as falling under the same criteria

According to Justice Cochrane, in *Briseno*, twelve of the nineteen states prohibiting the execution of defendants with ID used the preponderance of the evidence standard.[59] Five of the nineteen states, including Texas, used the clear and convincing standard, which is the most difficult burden to meet, and two of the states had not set a standard for establishing burden of proof.[60]

3. Who Determines Whether Defendant has Intellectual Disabilities

Who should determine whether a defendant meets the criteria for ID also varies by jurisdictions.[61] Some have argued that experts knowledgeable about ID and procedures for assessing should be given deference in a court proceeding.[62] Others have argued that the judge or the jury is in the best position to determine whether a defendant has ID and should be exempted from the death penalty.[63] Interestingly, Justice Alito's dissent in *Hall* noted that determination of who does or does not have ID should be determined by society and the courts, not professionals.[64] Still, those who have opposed having a jury make the determination have pointed to the inherent biases that can be problematic when juries play the role in determining whether the defendant before

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as any affirmative defense; Louisiana statutorily requires the defendant to prove ID by a preponderance of the evidence and such a claim must be raised in a pre-trial proceeding; and the New Jersey Supreme Court has held that ID should be treated similarly as an insanity defense rather than diminished capacity, meaning that the person's punishment should be reduced even though they may have had the required mental state).

59. *Briseno,* 135 S.W.3d at 12.

60. *Id.* at 12 n.44 (noting that clear and convincing standard was used in Arizona, Colorado, Delaware, Florida, and Indiana).

61. *See* Amos, *supra* note 6, at 482 (noting that States generally fall into three different categories: (1) states that allow the defense, prosecution, or both to choose its own qualified health professional; (2) states that use court appointed health professionals; and (3) states that do not specify who can be a qualified examiner).

62. ROBERT L. SCHALOCK & RUTH LUCKASSON, CLINICAL JUDGMENT (2d ed. 2014). *See also* Amos, *supra* note 6, at 494 (noting that a judge or healthcare professional determines if an individual is intellectually disabled prior to trial in some jurisdictions).

63. *Briseno*, 135 S.W.3d at 9 (noting that the ultimate determination should be made by the fact finder, such as the judge of the convicting court in a post-conviction hearing, "based upon all of the evidence and determinations of credibility").

64. Hall v. Florida, 134 S. Ct. 1986, 2002 (2014).

> In these prior cases, when the Court referred to the evolving standards of a maturing "society," the Court meant the standards of *American society as a whole.* Now, however, the Court strikes down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association.

Id.

them appears to satisfy their preconceived ideas regarding intelligence and whether someone is intelligent enough to appreciate the consequences of their actions.[65]

II. EFFECT OF *ATKINS* IN SELECTED STATES

As seen, state court determinations for determining the standards and procedures for *Atkins* claims can vary considerably. In addition, how the courts apply the statutory requirements affects the outcome of an *Atkins* claim. In this Part, how these applications have influenced outcomes in the three selected states are examined.

A. *Application of Atkins*

Alabama has not yet passed a statute delineating how defendants with ID can be exempt from the death penalty. However, under the "Intellectually Disabled Defendant Act" passed in 1975,[66] Alabama's criminal procedures covering defendants with ID provides the following definition: "(3) Intellectually disabled person. A person with significant subaverage general intellectual functioning *resulting in or associated with* concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments."[67] Although no strict cut-off score is noted, Alabama courts have employed a strict IQ cut-off score for determining ID.[68] As noted earlier, this means that the court does not apply the SEM to calculate a score range. Furthermore, the words "resulting in or associated with" means that a defendant's intellectual functioning must also be associated with deficits in adaptive behavior. For this reason, if a defendant does not satisfy the IQ threshold, it is not likely that he/she will be able to show that any adaptive skill deficits are associated with, or concurrent, with intellectual functioning.

Florida has had a statute barring the death penalty for defendants with ID since before the *Atkins* ruling.[69] The Florida Rules of Criminal

65. *See* Haydt et al., *supra* note 7, at 369 (noting that because the *DSM-IV-TR* made no mention of standardized measurements of adaptive functioning in early cases, such considerations were largely ignored, so that if a defendant showed a low IQ, but "he was able to brush his teeth, to comb his hair, to have sex, and to engage in criminal activity, it was argued that he didn't have adaptive deficits and, thus, could not have Intellectual Disability").

66. ALA. CODE § 15-24-1. (2015).

67. ALA. CODE § 15-24-2 (2015) (emphasis added).

68. *See* Blume et al., *supra* note 3, at 629.

69. *See State Statutes Prohibiting the Death Penalty for People with Mental Retardation*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation?scid=28&d id=138 (last visited Apr. 30, 2014).

Procedure Rule 3.203(b) defines ID as:

> (b) Definition of Intellectual Disability. As used in this rule, the term "intellectual disability" means significantly subaverage general intellectual functioning *existing concurrently* with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this rule, means performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code. The term "adaptive behavior," for the purpose of this rule, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.[70]

Florida courts have also employed a strict IQ cut-off score for determining ID. Similar to Alabama, the defendant must meet the threshold IQ score for a successful *Atkins* claim.[71] This use of a strict cut-off score for determining *Atkins* claims has been recently struck down by the Supreme Court as unconstitutional.[72]

Texas has yet to pass legislation for determining how to qualify a defendant as satisfying an *Atkins* claim.[73] In one of the first cases to address an *Atkins* claim, the Texas court in *Ex parte Briseno*[74] identified a procedure by which a court could determine whether a defendant had ID for the purpose of being exempt from the death penalty.[75] In *Briseno*,

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70. FLA. R. CRIM. P. 3.203(b) (emphasis added), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/0/BDFE1551AD291A3F85256B29004BF892/$FILE/Criminal.pdf?OpenElement.

71. *Briseno*, 135 S.W.3d at 12 n.44 (noting that Florida requires clear and convincing evidence). An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 633 (finding that 50% of the losing *Atkins* claims based on the first prong in Florida were a result of not meeting the state's cut-off score).

72. *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (holding that Florida's requirement that defendants meet an IQ threshold is unconstitutional because it fails to follow established medical practice and creates an unacceptable risk that defendants with intellectual disabilities might be executed).

73. *See* Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1 (2011).

74. *Briseno*, 135 S.W.3d at 1.

75.

> [T]he Briseno court identified a number of other potential factors that factfinders in the criminal context could weigh for determining intellectual disability, such as whether the person who knew the person during the developmental period

Justice Cochran stated that the court would use the AAMR (now known as the AAIDD) definition and that the judge may determine whether the defendant has ID based on clear and convincing evidence.[76] *Briseno* court agreed that the defendant's IQ of 72 and 74 met the first prong.[77] However, there was disagreement on whether the defendant met the second prong for deficits in adaptive behavior.[78] Concluding that the adaptive behavior criteria was too subjective, the court held there must be other evidence for meeting this second prong.[79] As a result, Texas employs the *Briseno* factors delineated by Justice Cochran, allowing the court to determine whether the defendant demonstrates significant deficits in adaptive behaviors.[80]

Because of the wide variations across states in applying *Atkins*, the effect of the *Atkins* decision has predictably varied as well.[81] Yet, there appears to be evidence that the *Atkins* decision has had some positive effect. For example, the Death Penalty Information Center reported that as of July 2012, there have been ninety-six post-conviction reversals of death penalty sentences for defendants with ID because of *Atkins*.[82] Nevertheless, examination of the effect of the *Atkins* claims in Texas,

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> thought the person was intellectually disabled; whether the person formulated plans and carried them through or was impulsive; whether person showed leadership or was led around by others; whether responses to external stimuli was rational and appropriate; whether person responds coherently, rationally, or on point to oral or written questions or wanders from subject to subject; whether the person can hide facts or lie effectively; and whether commission of an offense required forethought, planning, and complex execution of purpose.

Hagstrom, *supra* note 41, at 8–9.

76. *Briseno*, 135 S.W.3d at 8, 12.

77. *Id.*

78. *Id.*

79. *Id.* Scholars have referred to this as the "Lennie standard" because Justice Cochran referred to Steinbeck's novel *Of Mice and Men* to identify ID based on the characteristics portrayed in Lennie, a character in the novel who had moderate to severe ID. *See, e.g.*, Haydt et al., *supra* note 7, at 383; Mia-Carré B. Long, Note, *Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the Briseño Factors*, 26 GEO. J. LEGAL ETHICS 859 (2013); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009).

80. Blume et al., *supra* note 79.

81. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3 (concluding that there were wide variations in outcomes and that *Atkins* has not been evenhandedly applied to protect defendants with intellectual disabilities).

82. *Defendants Whose Death Sentences Have Been Reduced Because of a Finding of "Mental Retardation" since Atkins v. Virginia*, DEATH PENALTY INFO. CENTER (2002), http://www.deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases (last visited Apr. 26, 2014). This source reported that the highest percentage of reversals was from North Carolina, the second highest percentage was from Texas, and the third highest percentage was from Pennsylvania. *Id.*

Florida, and Alabama indicates substantial variation in outcomes, as can be seen in Table 1.

TABLE 1

OVERVIEW OF SELECT STATES POST-*ATKINS*

	Total *Atkins* claims	Total failed *Atkins* claims	Total executions post-*Atkins*	Total successful *Atkins* claims	Ds claiming ID no longer on death row	Ds claiming ID still on death row	Total on death row
AL	35	1 (3%)	32	2 (6%)	5 (15%)	29 (15%)	197
FL	49	3 (9%)	35	1 (2%)	8 (16%)	41 (10%)	396
TX	45	13 (5%)	241	6 (13%)	25 (56%)	20 (7%)	273

In Alabama, 15% (total of 5) of the defendants who had raised *Atkins* claims are no longer on death row; in Florida, 16% (total of 8) are no longer on death row; and in Texas, 56% (total of 25) are no longer on death row.[83] Of those cases no longer on death row, Alabama had executed 1, Florida had executed 3, and Texas had executed 13. This represents 3%, 9%, and 5%, respectively, of the total executions for each state since *Atkins*.[84] Among those no longer on death row, 6% (total of 2) in Alabama, 2% (total of 1) in Florida, and 13% (total of 6) in Texas were successful *Atkins* claims.

Some defendants are no longer on death row not as a result of a successful *Atkins* claim, and these cases are not included as successful *Atkins* claims. In Texas, four of the claims that resulted in removal from death row were the result of a plea bargain after an *Atkins* claim was initiated[85] and two others had died while in custody. In Florida, three of the claims that resulted in removal from death row were the result of trial issues, such as failure of counsel to sufficiently raise mitigating circumstances during the penalty phase, and one defendant who had died in custody. In Alabama, one defendant was removed from death row because he was sixteen years old at the time when he participated in a double murder. Reasons for the other Alabama defendant being removed from death row were not available. However, this latter case involved a

83. To calculate these percentages, each state's department of corrections website was searched for defendants identified from the *WestlawNext* search.

84. Compare this to the estimated 1–3% of the general population who has ID. *See Intellectual Disability*, ARC, http://www.thearc.org/learn-about/intellectual-disability (last visited July 5, 2014).

85. *Briseno*, the case that defined the adaptive behavior criteria for *Atkins* claims in Texas, was one of those cases. Diane Jennings, *Death Sentence of Man Who Killed Sheriff Changed to Life*, DALLAS MORNING NEWS, May 3, 2013, http://crimeblog.dallasnews.com/2013/05/death-sentence-of-man-who-killed-sheriff-changed-to-life.html/. Ironically, Briseno had reported IQ scores of 72 and 74 and the court had denied his *Atkins* claim because it determined that Briseno did not have ID. Briseno, 135 S.W.3d at 14.

female defendant who had hired someone to murder her husband. This was a highly controversial case because the jury had sentenced the defendant to life imprisonment, and the judge had overruled the jury's determination.[86]

These results indicate a substantially lower percentage of overall successful *Atkins* claims from what was reported by Professors Blume, Johnson, and Seeds in their analysis of *Atkins* cases up to 2008.[87] This could be due to the analysis for this paper not including those who had raised an *Atkins* claim but subsequently plea bargained to have their sentence changed to life imprisonment. Nevertheless, their finding that only 12% of the *Atkins* claims in Alabama resulted in success[88] is somewhat closer and could be explained by the six-year difference in time. The percentage of successful *Atkins* claims for Texas is similar Peggy Tobolowsky's finding that 17% of *Atkins* claims in Texas were successful.[89]

B. *Features of Successful Atkins Claims*

Among the select states, successful *Atkins* claims were usually based on a sufficiently low IQ score where the prosecution agreed with the defendant's claim. As can be seen in Table 2, almost all of these successful outcomes were based on IQs below 70.

TABLE 2
SUCCESSFUL *ATKINS* CLAIMS

Defendant	State	Year Sentenced	Reported IQ scores
James Henry Borden[90]	AL	1994	66 (although one score of 79 was reported)[91]

86. *See* William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 1010 (2006).

87. *See* An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 628 n.16 (finding that nearly 38% of *Atkins* claims have been successful). One possible reason for the differences is that the percentages reported here did not include cases that raised an *Atkins* claim but were decided through plea bargaining rather than the merits of the *Atkins* claim. The decision to not count those as successful *Atkins* claims was because the focus of this Article was to examine how the court ruled on them.

88. *Id.* at 629.

89. Tobolowsky, *supra* note 73, at 38.

90. Borden v. State, 769 So. 2d 935, 937 (Ala. Crim. App. 1997). Borden was convicted in 1994 for a second murder within a 20-year period, making it a capital offense. *Id.* Borden had stabbed to death a 61-year old woman. *Id.*

91. *Ex parte* Borden, 769 So. 2d 950, 957 (Ala. 2000).

Defendant	State	Year Sentenced	Reported IQ scores
Jeremiah Jackson[92]	AL	1996	65 (one score above 70)[93]
Donny Crook[94]	FL	1996	62 to low 70s[95]
Timothy Cockrell[96]	TX	1993	31 or 35; scores ranging between 25 and 42[97]
Doil Lane[98]	TX	1994	no reported scores, but "may have possessed a limited IQ"[99]
Willie Mack Modden[100]	TX	1985	58 to 64[101]
Jose Angel Moreno[102]	TX	1987	64[103]

92. Jackson v. State, 963 So. 2d 150 (Ala. Crim. App. 2006). Jackson was convicted in 1996 of murder committed during the course of a robbery.

93. *Jackson*, 963 So. 2d at 156.

94. Crook v. State, 908 So. 2d 350 (Fla. 2005). Donny Crook was convicted in 1996 for first-degree murder, robbery with a deadly weapon, and sexual battery with great force. *Id.* at 352–53.

95. *Id.* at 353.

96. Cockrell v. State, 933 S.W.2d 73, 75 (Tex. Crim. App. 1996). Timothy Cockrell was convicted in 1993 for murdering a woman by strangling her and taking various items of property. *Id.*

97. Brief for Appellate, Cockrell v. Texas, 1994 WL 16057551, at *17 (Tex. Crim. App. 1994).

98. Lane v. State, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996). Doil Lane was convicted in 1994 for the murder, kidnapping, and aggravated sexual assault of an eight-year-old girl. *Id.* at 506-07. Following the June 2002 Supreme Court's *Atkins* ruling, Doil Lane filed for an exemption to execution claiming he had ID. *Ex parte* Lane, No. WR-67161-01, 2009 WL 252623 (Tex. Crim. App. Feb. 4, 2009).

99. *Lane*, 933 S.W.2d at 512.

100. Modden v. State, 721 S.W.2d 859, 860 (Tex. Crim. App. 1986). Willie Mack Modden was convicted in 1985 of intentionally and knowingly causing the death of a woman during the course of committing a robbery. *Id.*

101. *Ex parte Modden*, 147 S.W.3d 293, 295 (Tex. Crim. App. 2004). Based on three different reports by three different mental health experts, the court held that Modden did have ID. *Id.*

102. Moreno v. State, 858 S.W.2d 453, 457 (Tex. Crim. App. 1993). Jose Angel Moreno was convicted in 1987 of "murder in the course of committing or attempting to commit kidnapping." *Id.*

103. Moreno v. Dretke, 362 F. Supp. 2d 773, 789 (W.D. Tex. 2005) *aff'd*, 450 F.3d 158 (5th Cir. 2006).

Defendant	State	Year Sentenced	Reported IQ scores
Daniel Plata[104]	TX	1996	56 to 69[105]
Gregory van Alstyne[106]	TX	1992	56 to 69 on various measures[107]

In the cases that had a reported IQ score above 70, the prosecution did not challenge whether the defendant had ID (*e.g.*, Borden, Jackson, and Crook). Although it was reported that Jeremiah Jackson had one score of over 70, the Alabama court affirmed that the defendant had ID because of deficits in adaptive behavior scores.[108] The court was further swayed because both the defense and prosecution agreed that the defendant had ID.[109] In Donny Crook's case, the prosecution presented no evidence to rebut the defense's reports and conceded that the defendant had brain damage.[110]

In Texas, Doil Lane's successful *Atkins* claim was based on very little evidence of ID being noted. There is only one reference that Lane had ID but no specific scores are reported. Lane's *Atkins* claim was not forwarded, but was instead reviewed by the trial court on the merits, and the court recommended that Lane's sentence be commuted to life imprisonment.[111]

Jose Angel Moreno's successful outcome was the result of a series of appeals under both *Penry* and *Atkins*. Moreno's conviction preceded *Penry* and his initial claim asserted that the charge submitted to the jury was flawed because it failed to empower the jury to give effect to mitigating evidence that had been offered during the penalty phase of his

104. Plata v. Cockrell, No. CIV A H-01-2587, at *1 2002 WL 34176720 (S.D. Tex. May 7, 2002). Daniel Plata, a foreign national from Mexico, was convicted in 1996 of murder that was committed during a robbery of a convenience store. *Id; see also Foreign Nationals, Part III*, DEATH PENALTY INFO. CENTER (July 2, 2013), http://www.deathpenaltyinfo.org/foreign-nationals-part-iii.

105. *Ex parte* Plata, No. AP-75820, 2008 WL 151296 (Tex. Crim. App. Jan. 16, 2008).

106. Alstyne v. Cockrell, 35 F. App'x 386 (5th Cir. 2002). Gregory van Alstyne was convicted in 1992 for the murder of a delivery man by beating and stabbing him and taking $20 cash. *Id.* at *1.

107. *Ex parte* Van Alstyne, 239 S.W.3d 815, 818 (Tex. Crim. App. 2007). Van Alstyne's doctor presented evidence based on a three-hour clinical interview and concluded that Van Alstyne's "thinking was highly concrete, and his ability to reason abstractly" was impaired. *Id.*

108. *Jackson*, 963 So. 2d at 156.

109. *Id.* at 157 (upholding the claim of intellectual disability, stating "[it] is not unusual for defense evidence to support setting aside a death sentence. However, when the State's evidence likewise supports such a finding, this Court is inclined to give deference to that evidence.").

110. Crook v. State, 813 So. 2d 68, 73 (Fla. 2002).

111. *Ex parte* Lane, No. WR-67161-01, 2009 WL 252623 (Tex. Crim. App. Feb. 4, 2009).

trial, which the appeals court denied.[112] In the first round of appeals, the Texas district court noted that although evidence of Moreno's IQ of 64 was presented, Moreno did not have ID based on consideration of other factors.[113] Subsequently, Moreno raised a claim under *Penry II* in 2007 and this time the Texas district court remanded for a new sentencing hearing in which the jury would be provided with instructions that could give effect to Moreno's IQ and childhood experiences as mitigating circumstances.[114] Because the evidence of Moreno's troubled childhood during the sentencing phase of his trial could not be given meaningful effect within the context of the statutory special issues at the time, the district court held that the trial court had erred in failing to give separate jury instructions that would empower the jury to assess a life sentence based on the mitigating evidence.[115] As a result, the district court reconsidered its previous ruling and remanded back to the trial court for a new sentencing hearing.[116] In explaining its changed ruling, the court noted the Supreme Court rulings from *Penry* and *Atkins* along with Moreno's timely applications.[117]

Gregory Van Alstyne presented an IQ score of 69, and the prosecution presented evidence based on scores from the *Vineland* that indicated Van

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112. *Ex parte* Moreno, No. AP-75748, 245 S.W.3d 419, 421 (Tex. Crim. App. Feb. 6, 2008).

113. Moreno v. Dretke, 362 F. Supp. 2d 773, 789 (W.D. Tex. 2005) *aff'd*, 450 F.3d 158 (5th Cir. 2006). The court stated,

> In support of his claim to be mentally retarded, however, petitioner presented the state habeas court with only a report dated June 13, 2003 of a psychological evaluation performed on petitioner that concluded that (1) petitioner had a full scale score of 64 on an IQ evaluation; (2) this score might not be valid and may "somewhat underestimate his true level of intellectual functioning" because petitioner appeared to be poorly motivated and may have exaggerated his deficits; (3) he was a poor personal historian, refusing to furnish any information regarding his offense, and indicating that he received some special education services while in school but failing to furnish any details regarding the specific classes he attended; (4) his motor behavior, level of responsiveness, facial expressions, eye contact, and affect were all within normal limits; (5) his speech was free of articulation errors and he expressed himself appropriately with adequate command of language; (6) his cognitive processing speed was unremarkable; (7) he was oriented to time, place, person, and situation; (8) he displayed no deficits in remote, recent, or intermediate memory; (9) he appeared to have no difficulty concentrating or maintaining a cognitive set; (10) he displayed no indication of organic brain impairment; and (11) he completed only the eighth grade but later earned his GED.

Id.

114. *Moreno*, 245 S.W.3d at 431.

115. *Id.*

116. *Id.*

117. *Id.* at 421.

Alstyne did not manifest adaptive behavior deficits.[118] Van Alstyne's doctor countered that the *Vineland* scores were invalid because the prosecution's doctor had relied on Van Alstyne's self-report and much of the information provided overstated his adaptive abilities.[119]

In summary, although small in number, these cases reflect a positive influence of the Supreme Court's ruling in *Atkins*. The above cases were probably successful because the reported IQ scores fell well below 70, resulting in few disagreements between the prosecution and the defense. It appears that when IQ scores fall within at least a certain range, there are fewer disagreements and greater likelihood of a successful *Atkins* claim.

C. *Features of Failed Atkins Claims Resulting in Execution*

As shown in Table 3, most of the failed *Atkins* claims either did not report an IQ score or reported IQ scores above 70 or there were significant disagreements between the prosecution and defense's IQ scores. The only failed claims despite lower than 70 IQ scores were from Texas. These failed claims appeared to rely heavily on the court's determination of the defendants' adaptive skills.

118. *Ex parte* Van Alstyne, 239 S.W.3d 815, 818 (Tex. Crim. App. 2007).

119. *Id.* at 820 (noting that defendant had reported being an "A" student, that he had spent three months in the Marines, and that he had graduated from high school, which were all untrue).

TABLE 3
FAILED *ATKINS* CLAIMS

Defendant	State	Year Sentenced	Reported Scores	Reason for denial of *Atkins* claim	Date of execution
Linroy Bottoson[120]	FL	1983	*Terman* IQ score of 77 when defendant was twelve; Prosecution presented average *Vineland* score and IQ of 85;[121] IQ score of 84[122]	Court held defendant's scores were insufficient to show ID.[123]	9/20/2006[124]
Clarence Edward Hill[125]	FL	1987	No actual scores were reported, but court indicated that score was "sixteen points above level required."[126]		9/20/2006[127]
Carl Blue[128]	TX	1995	IQ between 75 and 80 presented by defense.[129]	No evidence by defense that poor school performance was due to ID and no other factors; evidence was not clear and convincing.[130]	
Gayland Bradford[131]	TX	1990	None reported in court documents; however, online news source		

120. Bottoson v. State, 443 So. 2d 962, 964 (Fla. 1983). Linroy Bottoson was convicted in 1983 for the murder of a postmistress. *Id.* at 963. The medical examiner reported that the victim had been stabbed multiple times and had been run over by a car. *Id.* at 964.

121. Brief for Respondent, Bottoson v. Florida, (No. SC02-128), 2002 WL 32131377, at *4-6 (Fla. Jan. 28, 2002).

122. *Id.* at *3.

123. *Id.* at *26.

124. *See Execution List: 1976-present*, FLORIDA DEPARTMENT OF CORRECTIONS, http://www.dc.state.fl.us/oth/deathrow/execlist.html (last visited July 21, 2014).

125. Hill v. State, 515 So. 2d 176, 177 (Fla. 1987). Clarence Edward Hill was convicted in 1987 for killing a police officer and wounding another during a robbery of a savings and loan association. *Id.*

126. Hill v. State, 921 So. 2d 579, 584 (Fla. 2006).

127. *See* Execution List: 1976-present, *supra* note 129.

128. Blue v. State, 125 S.W.3d 491, 493 (Tex. Crim. App. 2003). Carl Blue was convicted in 1995 of murder where he broke into a former girlfriend's apartment and threw gasoline on her and set her on fire. *Id.* On July 5, 2005, Blue, filed his Atkins claim. Brief of Petitioner-Appellant at 1, *Ex parte* Blue, (No. AP 75-254) 2006 WL 1221863 (Tex. Crim. App. Apr. 7, 2006).

129. *Ex parte* Blue, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007).

130. *Id.* at 164.

131. Bradford v. State, 873 S.W.2d 15 (Tex. Crim. App. 1993). Gayland Bradford was convicted in 1990 for the murder of a security guard that occurred during a late-night armed robbery. *Id.* at 16. In 2003, Bradford raised the claim that he had ID which the court denied. *Ex Parte* Bradford, No. WR-44526-03, 2010 WL 4010361 (Tex. Crim. App. Oct. 11, 2010).

Defendant	State	Year Sentenced	Reported Scores	Reason for denial of *Atkins* claim	Date of execution
			reported IQ score of 68.[132]		
James Clark[133]	TX	1994	Defense presented IQ score of 65; a *WISC-R* score of 74 when defendant was fifteen; and academic scores for reading at 9.6, spelling at 8.5, and math at 5.6 grade levels.[134]	Because score presented by defense was lower than previous score of 74, the court noted it was possible that defendant deliberately missed questions to get a lower score.[135]	
Elroy Chester[136]	TX	1998	The court acknowledged defendant's *WISC-R* scores of 65 when he was seven, 69 when he was twelve, and 77 when he was thirteen[137]; *Vineland* score of 57.[138]	Defendant failed to satisfy the *Briseno* factors.[139]	
Jaime Elizalde[140]	TX	1997	Defense presented *Revised Beta II* score of 60 and *Fair Culture IQ* score of 96 from when defendant was 18 years old;[141] IQ of 60 and academic skills at the 4th grade level found in disciplinary records from the correctional	Low academic performance was due to frequent absences from school due to asthma.[143] Court also considered that defendant worked as a welder, was married, and	

132. Bill Mears, *Killer on Texas Death Row Gets Stay of Execution*, CNN (Oct. 8, 2010), http://news.blogs.cnn.com/2010/10/08/killer-on-texas-death-row-gets-temporary-stay-of-execution/.

133. Clark v. Johnson, 227 F.3d 273, 276 (5th Cir. 2000). James Clark was convicted in 1994 for murder of two individuals with a shotgun. *Id.* at 277. Ten days before his scheduled execution on November 21, 2002, Clark raised his *Atkins* claim for the first time and the court remanded to the trial court to evaluate the claim. *Ex parte* Clark, No. 37288-02, 2004 WL 885583 (Tex. Crim. App. Mar. 3, 2004).

134. *Ex parte* Clark, No. 37288-02, 2004 WL 885583 (Tex. Crim. App. Mar. 3, 2004).

135. *Id.*

136. Chester v. Quarterman, No. 5:05cv29, 2008 WL 1924245, at *4 (E.D. Tex. Apr. 29, 2008). Chester was convicted in 1998 for murder which was committed during a burglary and rape, and was "the culmination of a six-month spree of criminal activity" in which "he burglarized at least five residences, sexually assaulted two people, murdered at least five people, and fired shots at no fewer than five others." *Id.*

137. *Ex parte* Chester, No. AP-75037, 2007 WL 602607 (Tex. Crim. App. Feb. 28, 2007).

138. *Id.*

139. *Id.* at *4–5.

140. *Ex parte* Elizalde, No. WR-48957-02, 2006 WL 235036 (Tex. Crim. App. Jan. 30, 2006). Jaime Elizalde was convicted in 1997 for the capital murder of two men that he shot in a bar. *Id.* at *1. On January 18, 2006, Elizalde filed an *Atkins* claim. *Id.*

141. *Id.* at *2.

143. *Id.*

Defendant	State	Year Sentenced	Reported Scores	Reason for denial of *Atkins* claim	Date of execution
			department.[142]	supported his wife and two children.[144]	
Yokamon Hearn[145]	TX	1998	*WAIS-III* and *Stanford-Binet* scores of 88 and 93 presented by prosecution.[146] *WAIS-III* score of 74 presented by defense and *Woodcock-Johnson Cognitive Abilities* test score of 87.[147]	Court refused defense expert explanation that defendant had medical diagnosis of brain syndrome as evidence of ID[148]; noted that adaptive functioning deficits must be linked to intellectual functioning to rule out personality disorder.[149]	7/18/2012[150]
Kia Johnson[151]	TX	1995	Prior *WAIS-R* scores as low as 62-65 and as high as 72-75.[152]	Court concluded there was insufficient evidence to show ID.[153]	
Danielle Simpson[154]	TX	2002	Defense presented *WISC* score of 71 and *TONI* score of 72 when defendant was fourteen.[155] Prosecution presented a *TONI* score	Court noted school records showing that defendant had missed large number of days of school but managed to still pass	

142. *Id.*

144. *Id.*

145. Hearn v. Cockrell, No. CIV.A. 3:01-CV-2551-, 2002 WL 1544815 (N.D. Tex. July 11, 2002). Yokamon Hearn was convicted in 1998 of murder when he shot and killed the victim at close range during the commission of a robbery and kidnapping. *Id.* at *1. In March 2004, Hearn filed a motion for stay of execution in order to explore the possibility of raising an *Atkins* claim. *Id.* at *1-2. In October 2008, Hearn raised his *Atkins* claim. *Ex parte* Hearn, 310 S.W.3d 424 (Tex. Crim. App. 2010).

146. *Hearn*, 310 S.W.3d at 427.

147. *Id.* at 429.

148. *Id.* at 431.

149. *Id.* at 429.

150. *See* Death Row Information, *supra* note 141.

151. *Ex parte* Johnson, No. 36139-04, 2003 WL 21715265 (Tex. Crim. App. June 6, 2003). Kia Johnson was convicted in 1995 of robbery and murder of a store clerk. *Id.* at *1. In 2003, Johnson filed an *Atkins* claim. *Id.*

152. *Id.* at *2.

153. *Id.* (noting there was insufficient evidence to support a claim of ID because defendant had not presented the court with the full results from the *WAIS-R* nor any evidence of adaptive skill deficits).

154. *Ex parte* Simpson, 136 S.W.3d 660, 661-62 (Tex. Crim. App. 2004). Danielle Simpson was convicted in 2002 for the robbery and murder of an 84-year-old widow and retired teacher. *Id.* This murder involved severely beating the woman, tying cinder blocks to her legs, and then throwing her into the river to drown. On December 3, 2002, Simpson filed his *Atkins* claim. *Id.* at 662.

155. *Id.* at 664.

Defendant	State	Year Sentenced	Reported Scores	Reason for denial of *Atkins* claim	Date of execution
			of 84 when he arrived on death row.[156]	almost all of his classes.[157]	
Jose Villegas[158]	TX	2002	No reported scores.	Court denied defendant's petition as an "abuse of the writ" and did not consider the merits.[159]	4/16/2014[160]
Bobby Woods[161]	TX	1988	*WAIS-III* score of 65, adjusted for the Flynn effect[162]; *SIB-R* results indicating adaptive skills deficits in the area of money and value.[163] Prosecution presented *WAIS-R* short form score of 83.[164]	Court found that there was sufficient evidence to show that defendant had ID and that he could have manufactured his claim in order to escape punishment.[165]	12/3/2009[166]
Michael Hall[167]	TX	2000	*WAIS-III* score of 67 and 1991 *WISC-R* score of 71.[168] Report by defense expert that defendant had adaptive behavior and academic deficits in seven	Court found defense evidence unpersuasive and possibly biased,[171] but found persuasive testimony by prosecution witnesses, a	2/15/2011

156. *Id.* at 666.

157. *Id.*

158. Villegas v. Quarterman, 274 F. App'x 378, 379 (5th Cir. 2008). Jose Villegas was convicted in 2002 for the capital murder of his girlfriend, her three-year-old son, and her mother following his girlfriend's mother telling him to leave the house after finding him and his girlfriend using cocaine. *Id.* On April 23, 2004, Villegas raised an appeal regarding the sentencing phase of his conviction which was denied. *Ex parte* Villegas, No. WR-62023-02, 2014 WL 1512926 (Tex. Crim. App. Apr. 14, 2014). Then, on April 8, 2014, he raised his *Atkins* claim. *Id.* at *1.

159. *Id.*

160. *See* Death Row Information, *supra* note 141.

161. *Ex parte* Woods, 296 S.W.3d 587, 590, 595 (Tex. Crim. App. 2009). Bobby Woods was convicted in 1988 for the murders of a nine-year-old boy and his eleven-year-old sister with whom he had engaged in "sexual activity." *Id.* at 588, 590. He had killed the boy by severely beating and choking him and the girl by beating and cutting her throat. *Id.* at 590. Woods' first appeal was filed in 1999 and was denied. *Id.* at 595.

162. *Id.* at 596.

163. *Id.*

164. *Id.* at 603.

165. *Id.*

166. *See* Death Row Information, *supra* note 141.

167. Hall v. State, 160 S.W.3d 24, 26 (Tex. Crim. App. 2004). Michael Hall was convicted in 2000 for the abduction and murder of a nineteen-year-old woman with a disability, which was considered to be a thrill killing. *Id.* at 28.

168. Hall v. Quarterman, No. 4:06-CV-436-A, 2009 WL 612559, at *17-18 (N.D. Tex. Mar. 9, 2009).

171. *Id.* at *43.

Defendant	State	Year Sentenced	Reported Scores	Reason for denial of *Atkins* claim	Date of execution
			different areas.[169] On the *WRAT*, "reading score placed him at an IQ of 59, his spelling score at an IQ of 51, and his arithmetic score at an IQ of 55."[170]	videotaped interview of defendant, the hearing on defendant's pro se motion to remove his attorneys, and the circumstances of the crime.[172]	

Unlike the successful *Atkins* claims, these failed *Atkins* claims reflect differing interpretation of test scores between those presented by the defense and those presented by the prosecution. When presented with conflicting scores, court decisions appeared to be swayed by the prosecution. Particularly with the Texas cases, there were strong sentiments expressed regarding defendants' incentive to malinger in order to avoid the death penalty. Several of the Texas cases lost because of reports of the defendant's prison behaviors, behaviors during court, or abilities in daily life prior to prison. These observations were important to the court's assessment that the defendant did not have adaptive skills deficits. This conclusion is similar to what Blume, Johnson, and Seeds found in their 2008 research.[173] During Michael Hall's trial, the Texas court found persuasive a videotaped interview of Hall that did not appear to indicate any adaptive skills deficit, an earlier hearing on Hall's pro se motion to remove his attorneys, and the circumstances of the crime to conclude that Hall did not have ID.[174] During Danielle Simpson's trial, the expert for the prosecution pointed to Simpson's letter-writing campaign from jail asking for contraband, noting that Simpson's behaviors indicated a "lack of empathy" and a "callous disregard for others" which were behaviors consistent with psychopathy, not ID.[175] Although Elkie Taylor scored a 65 on the *WAIS-III* and a 71 on the *Kaufman*,[176] the court was "permitted to discount these scores due to the incentive to malinger."[177] The defense noted deficits in adaptive

169. *Id.*

170. *Id.*

172. *Id.*

173. An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases, *supra* note 3, at 636 (finding that in 30% of the losing cases, the court relied on information about the defendant's prison behavior, and 75% of the Florida cases that had satisfied the IQ requirement but failed on the adaptive behavior prong were based on reports of the defendant's behavior in prison, how the crime was carried out, or in-court behavior).

174. *Hall*, 2009 WL 612559, at *42.

175. Simpson, 136 S.W.3d at 665.

176. *Taylor*, 498 F.3d at 308.

177. *Id.*

behavior,[178] and the prosecution pointed to Taylor's behaviors during the crimes as evidence that he did not have deficits in adaptive functioning.[179] During Holly Wood's trial, the Alabama court noted evidence of Wood's "abilities to drive a fork lift, to manage money, to maintain a relationship with his girlfriend, and other similar evidence" to conclude that Woods did not have ID.[180]

In a few of the Texas cases, the defendants challenged use of the *Briseno* factors for determining adaptive skill deficits. For example, Elroy Chester claimed that the state court's use of the *Briseno* factors to determine his ID was an unreasonable application of *Atkins*.[181] Chester challenged each *Briseno* factor.[182] In support, the AAIDD also submitted an amicus brief asking the court to grant Chester's claim of ID and raising questions with Texas' method for determining ID in *Atkins* claims.[183] Nevertheless, the Texas court found Chester's abilities to converse on a variety of topics, his ability to plan his crimes, and his ability to hide facts and to lie as evidence that he did not have deficits in adaptive behavior skills.[184]

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178. *Id.* ("Taylor purportedly had difficulty maintaining a steady job, got confused using public transportation, had trouble cooking rice well as a child, made poor use of his leisure time by sitting in his apartment and just listening to the radio and talking on the phone").

179. *Id.* The court noted,

> For example, having perceived an opportunity for robbing Otis Flake, he planned and executed Flake's murder. Further, having learned from his experience of murdering Ramon Carrillo, Taylor skipped the use of his hands and went straight to the use of a coat hanger in order to murder Flake. When the policeman questioned him about the television stolen from Flake's apartment, he quickly thought up a lie that worked. Then, when ultimately found, he successfully maneuvered an 18-wheeler cab for over 150 miles and then, when caught, tried to blame someone else for his crimes.

Id.

180. *Wood*, 465 F. Supp. 2d at 1228.

181. *Ex parte* Chester, 2007 WL 602607, at *5.

182. *Id.* at *4 (arguing that people who knew him during his developmental period was not able to accurately diagnose intellectual disability; that although he is capable of some planning, it does not indicate he does not have ID because individuals with ID are capable to some planning; and that although he responds rationally and appropriately to questions, it is not an indication that he does not have ID, because individuals with ID are capable of responding rationally and appropriately to questions and situations).

183. *See* Brief of American Association on Intellectual and Developmental Disabilities as Amicus Curiae in Support of Petitioner, Chester v. Texas, (No. 11-1391), 2012 WL 2371464 (2012).

184. Chester, 2007 WL 602607, at *4–5. The court noted,

> As to whether the applicant responded coherently and rationally to oral or written questions, the trial court considered the testimony of both parties' experts regarding an evaluation of the applicant conducted by Dr. Ed Gripon, the State's

Yokamon Hearn's defense raised the issue of deferring to a medical diagnosis rather than relying on assessment results. The expert for the defense stated that substituting a medical diagnosis for a neuropsychological measure is "justified when there is a medical diagnosis of brain syndrome or lesion, such as Fetal Alcohol Spectrum Disorder . . . because it is well known that such conditions cause a mixed pattern of intellectual impairments that . . . are not adequately summarized" in a full-scale IQ score.[185] However, the Texas court refused to use this method for determining ID.[186]

A couple of the Texas cases raised issues with adjusting IQ scores based on the Flynn Effect. For example, Bobby Woods' district-appointed psychologist reported that Woods' IQ score on the *WAIS–III* was 68, which was an adjusted score for the Flynn Effect.[187] Additionally, this score of 68 would indicate a score range of 63 to 73, taking into

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> expert. The court was more persuaded by Dr. Gripon's testimony that the applicant was able to converse with him coherently on a wide variety of topics, including current politics, the concept of parole violations, and many specific facts of the crimes to which the applicant had confessed. . . .The trial court also found that the applicant was capable of hiding facts and lying to protect his own interests, as demonstrated by the episode in which he told the investigators that he would take them to where he had hidden his gun, all the while apparently planning to get to the gun himself before the investigators could. Finally, the court found that the specifics of the various crimes to which the applicant confessed, including the use of masks and gloves, his practice of cutting exterior phone lines before entering homes to burglarize, and his deliberate targeting of victims like Cheryl DeLeon and his brother-in-law Albert Bolden, showed persuasively that the applicant was capable of forethought, planning, and complex execution of purpose.

Id.

185. Hearn, 310 S.W.3d at 430.

186. *Id.* at 431.

187. Woods, 296 S.W.3d at 596. In explaining the use of the Flynn effect, the expert stated,

> And basically what that effect is saying is that education is getting better, nutrition is getting better, for a variety of reasons, and, also, a lot of items in the norms are—become dated, that people just generally show a slight improvement over time, and for that reason we need to be somewhat careful in using a dated or an older IQ test, because at that three-tenths per year, if we're looking at giving a person a test based on 10-year-old norms, then their IQ score might be three points higher than it would have been had the person been tested when those norms were current 10 years previously. The norms for this test were developed in 2002 and, therefore, there's a 2-year lag. Applying Flynn's criteria of three-tenths of a point per year, six-tenths of a point might be the average expected improvement.

Id.

consideration the 5-point SEM.[188] The prosecution claimed that use of the Flynn Effect was "an unexamined, highly-criticized, and controversial scientific theory not properly used by clinicians for diagnosis."[189] The court held that this new report did not undermine the previously presented evidence that Woods did not have ID and would not rule on whether it was appropriate to apply the Flynn Effect.[190] Carl Blue's defense also sought to apply the Flynn effect.[191] Blue's IQ score fell between 75 and 80, and this score, after applying the Flynn effect, would fall between 64 and 69.[192] The court refused to apply the Flynn Effect, noting that even if there was evidence to "support a strong suspicion" that Blue had ID, the evidence was not clear and convincing.[193]

Another pattern in the Texas cases was how the court determined which side was more credible. The Texas courts appeared to express greater skepticism with defense expert opinions, along with concerns with potential malingering by defendants. In all of these failed *Atkins* claims, the court found the prosecution's argument more persuasive or the experts for the prosecution more credible. For example, during Michael Hall's trial, the psychologist for the defense reported that Hall's IQ of 67 was evidence of ID.[194] Another expert for the defense also concluded that Hall met the criteria for having ID.[195] The prosecution

188. *Id.*

189. *Id.* at 607–08.

190. *Id.* at 613 (noting that even after applying the Flynn effect, Woods' IQ score would be 73).

191. *Ex parte* Blue, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007).

192. *Id.* at 165–66.

193. *Id.* at 164–66.

194. *Hall*, 2009 WL 612559, at *17–18. The court noted,

> Applicant has critical deficits in his adaptive skills and behavior. . . . [B]ased on the reported history and documentation, Applicant has suffered from [intellectual disability] since a very early age, if not from birth. Thus, his condition originated during the developmental period. In addition to her diagnosis that Applicant is [intellectually disabled], Dr. Church notes that Applicant's physical appearance is typical of a person who suffers from Fetal Alcohol Syndrome or Fetal Alcohol Effect. It is entirely possible that Applicant suffers from one of these conditions as there is evidence that Applicant's mother was an alcoholic. Either of these conditions would be a correlate of Applicant's [intellectual disability].

Id. at *18 (alteration in original).

195. Hall v. State, 160 S.W.3d 24, 29 (Tex. Crim. App. 2004). This expert reported Hall's *WAIS-III* IQ score at 67. *Id.* He also noted that a 1991 *WISC–R* had placed his IQ at 71, when Hall was classified as learning disabled but an earlier 1988 evaluation had classified Hall as having an intellectual disability. *Id.* Based upon interviews, the psychologist concluded that Hall exhibited adaptive behavior deficits in seven different areas: "(1) independent functioning (eating, dressing, transportation), (2) economic activity (handling money), (3) language development, (4) self-

presented expert testimony that Hall scored in the low-average range in adaptive skills, but was not intellectually disabled.[196] The court held that although Hall "supported his claim of [intellectual disability] with the testimony of three psychologists, his mother, his brother, his trial attorneys, two private investigators, four teachers, and a fellow death row inmate," the state's presentation of testimonies "from a psychologist, five prison guards, a waitress, appellant's former work supervisor, a former co-worker, and a police detective" were more persuasive.[197] The court also questioned the bias of the defense.[198] Weighing the testimony and evidence presented, the court found that although there was evidence in support of a finding of ID, there was also significant evidence for a finding that Hall did not have ID.[199] In Elroy Chester's case, the court specifically noted the differing qualifications of the expert for the defense and the expert for the prosecution, leading the court to find the prosecution's expert more credible.[200]

For some of the failed *Atkins* claims in Texas, timing of the appeal seemed to have been relevant. The Texas cases appear to indicate that when an *Atkins* claim is raised for the first time just prior to the scheduled

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direction (excessive passivity), (5) socialization (ability to interact with others), (6) social engagement, and (7) functional academics." *Id.* This expert further noted that Hall could not play cards, give directions to his home, identify nearby streets, travel to his workplace on his own, would not brush his teeth or use a table knife. *Id.* at 28.

196. Hall, 2009 WL 612559, at *22.

197. *Id.* at 43.

198. *Id.* The court noted,

> Again, the court's perception is that the experts were advocating a case of [intellectual disability] for the benefit of Hall rather than to make objective presentations to the court. The court finds Dr. Price's testimony [expert for the prosecution] on the subject of adaptive functioning to be the most persuasive. The other experts selectively used information that would support their adaptive functioning theory, and they seem to have disregarded information available to them that put into question their stated findings.

Id. (alteration in original).

199. Hall v. State, 160 S.W.3d 24, 39–40 (Tex. Crim. App. 2004).

200. Chester, 2007 WL 602607, at *4. The court noted,

> The trial court also noted the discrepancy in credentials between the two experts, particularly that, while Dr. Gripon [expert for the prosecution] had been practicing in the field of psychiatry for thirty-two years and had testified in Texas courts on issues of mental retardation numerous times, the applicant's expert had been licensed for six years, in which time he had held a total of seven jobs, none for longer than two years. The trial court found the State's expert's testimony to be more credible.

Id. (alteration in original).

execution, the Texas courts are less likely to grant the defendant's claim of exemption due to ID. This appears to be the case despite a borderline IQ score because a defendant has a heightened motivation to receive a low score. For example, in *Ex parte Hearn*, the court noted that post-*Atkins*, the court had received a number of applications from death row inmates alleging ID.[201] In Richard Williams' case, the court noted the "11th hour" stay request.[202] Furthermore, the court noted that it would give deference to the trial court's conclusion unless there was no support for that determination based on the court records.[203]

III. ISSUES FOR FUTURE *ATKINS* CLAIMS

Understanding ID will continue to be challenging for jurors and judges who have very little to no experience with measurements and the effects of medical conditions and childhood experiences on how ID manifests. Two new issues are likely to complicate this process: the new definitions of ID contained in the *DSM-5*[204] and the recent Supreme Court ruling in *Hall*.[205] Although a step forward because both the *DSM-5* and the *Hall* ruling now require states to use the SEM to arrive at a score range rather than a strict cut-off score, the *Hall* ruling still did not fully address the issues that are inherent in relying solely on standardized measures for determining ID.

A. *Emerging Trends in Defining Intellectual Disability*

Several issues faced by the courts could change with the new 2013 APA's *DSM-5* manual.[206] The APA notes "[b]y removing IQ test scores

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201. Hearn, 310 S.W.3d at 427.

202. Williams, 2003 WL 1787634, at *1.

203. *Id.*

204. Haydt et al., *supra* note 7, at 379.

205. Hall v. Florida, 134 S. Ct. 1986, 1989 (2014). The Court noted,

> When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. This legal determination of intellectual disability is distinct from a medical diagnosis but is informed by the medical community's diagnostic framework, which is of particular help here, where no alternative intellectual disability definition is presented, and where this Court and the States have placed substantial reliance on the medical profession's expertise.

Id.

206. Haydt et al., *supra* note 7, at 379 ("For the most part, these changes are intended to make for greater flexibility in basing diagnoses on clinical judgment, with less emphasis on IQ

from the diagnostic criteria, but still including them in the text description of ID, *DSM-5* ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels."[207] Whether the *DSM-5* will influence the courts remains to be seen. Either way, the public view of ID is likely to continue to be based on inadequate understanding and personal biases because distinguishing between mild ID, learning disability and other mental health conditions, such as autism, can be difficult for nonprofessionals.[208]

B. *Impact of Hall v. Florida*

In summer 2014, the Supreme Court held that Florida's method for determining ID is unconstitutional.[209] Freddie Lee Hall had presented IQ scores ranging from 60 to 80 and exhibited a range of deficits in adaptive behavior skills.[210] However, the Florida courts only considered the test results showing IQ scores in the 71 to 80 range and held that Hall's IQ scores disqualified him as having ID.[211] Florida courts had determined that if a defendant received an IQ score of 70 or higher (without application of either the Flynn Effect or SEM), the *Atkins* claim would fail.[212] Professional organizations had denounced this narrow method because it did not comport with established professional practice.[213]

Although proponents might hail the *Hall* ruling as a step in the right direction, based on a review of how states are implementing *Atkins* claims, it is doubtful that *Hall* will have a substantial effect for many because only nine states currently use a strict IQ cut-off score.[214] Because both Alabama and Florida employ the strict IQ cut-off score, the cases presented in this paper could have had different outcomes. However, in reviewing those cases, it is not likely that the *Hall* ruling would have

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scores, and IQ ceilings. The *DSM-5* links deficits in adaptive functioning with co-occurring deficits in intellectual functioning and requires a careful examination of adaptive behavior for reliable interpretation of IQ scores").

207. Am. Psychiatric Ass'n, INTELLECTUAL DISABILITY FACT SHEET, http://www.dsm5.org/documents/intellectual%20disability%20fact%20sheet.pdf (last visited July 9).

208. *See* Haydt et al., *supra* note 7, at 362 (noting that the term "mild ID" is a twentieth century invention).

209. *Hall*, 134 S. Ct. at 1990.

210. *Id.* at 1992.

211. *Id.*

212. *Id.* at 1990.

213. *See* Fabian et al., *supra* note 50.

214. Lizette Alvarez & John Schwartz, *I.Q. Cutoff Ruling May Spare Some Inmates on Death Row*, N.Y. TIMES, May 28, 2014, http://www. nytimes.com/2014/05/29/us/supreme-court-strikes-down-floridas-strict-iq-cutoff-for-executions.html?_r=0 ("Justice Anthony M. Kennedy's count, there are nine states that, either by law or by court decision, were free to use similar I.Q. cutoffs to sentence someone. The nine are Alabama, Arizona, Delaware, Florida, Kansas, Kentucky, North Carolina, Virginia and Washington.").

changed the outcomes, because the failed *Atkins* claims from those states did not involve IQ scores that were close to 70 or would have been after adjusting for the SEM. Bottoson's IQ score was the closest, with reported IQ scores between 77 and 85. Consequently, it is unlikely that the *Hall* decision would have prevented his execution because the lowest adjusted score after applying the SEM would have been 72. Nevertheless, a number of *Atkins* claims have yet to be decided, and how *Hall* will affect those claims is still unknown.

IV. CONCLUSION

There is a tension between the professional and legal definitions of ID, as was reflected in Justice Cochran's dicta in *Briseno*.[215] As was seen in the Texas failed *Atkins* claims, this tension appears to be rooted in the fear that defendants could be malingering.[216]

Another source of tension appears to be rooted in whether the death penalty should be appropriate for anyone. Those who oppose the death penalty tend to favor a loose definition of ID for purposes of ensuring that fewer defendants are executed.[217] Drs. Greenspan and Switzky propose that because the purpose of *Atkins* was premised on the concept of moral culpability, any individual who exhibits social incompetence or limited social intelligence due to a medical condition should be exempted from execution, regardless of actual IQ score.[218] In other words, individuals with a "brain-based disorder" (*e.g.*, Dandy-Walker syndrome) are often socially vulnerable, even though they may have IQ scores above 70, and *Atkins* claims should apply to them.[219] Others have pointed to the evolving definitions of ID and that reliance on one single definition will continue to be problematic because such definitions are prone to continuous, and often times, arbitrary change and developing objective measures will always be subject to problems with validity.[220]

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215. Briseno, 135 S.W.3d at 6; *see also* Hagstrom, *supra* note 41, at 253–54.

216. *See, e.g.*, Michael D. Chafetz & Alex Biondolillo, *Validity Issues in Atkins Death Cases*, 26 CLINICAL NEUROPSYCHOLOGIST 1358 (2012); Karen L. Salekin & Bridget M. Doane, *Malingering Intellectual Disability: The Value of Available Measures and Methods*, 16 APPLIED NEUROPSYCHOLOGY 105, 106 (2009) (citing Justice Scalia's dissenting opinion in Atkins in which he noted that definitions of ID could be readily feigned and that determinations of ID was highly dependent on accuracy of measures).

217. *See generally* Kenneth Jost, *Death Penalty Debates*19 CQ RESEARCHER 965 (2010), *available at* https://www.unc.edu/~fbaum/teaching/articles/CQResearcher-DeathPenaltyDebates.pdf.

218. Greenspan & Switzky, *supra* note 32, at 23.

219. *Id.* at 24–25 (arguing that presence of actual medical diagnosis would eliminate the arbitrariness of determining who would, and who would not, qualify for exemption from the death penalty).

220. *Id.* at 21 (noting that intellectual disability is a "bureaucratic functional category

Unfortunately, how courts determine which defendants have ID and should be exempted from the death penalty has resulted in arbitrary results. The Court's statements regarding arbitrary imposition of the death penalty in *Furman v. Georgia* seems particularly relevant:

> Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.[221]

A. *Emerging Views of Intellectual Disability*

A new and evolving conception of ID frames the condition under a social construction model.[222] This view takes into account how societal views of disability affect our conceptions as opposed to a medical model where views of disability are determined by some external objective measure based on procedures employed in arriving at a diagnosis.[223] This model of disability requires examining a person's unique circumstances because ID is often associated with psychosocial issues and the interaction of the individual's condition and the environment rather than solely based on an organic cause.[224] Furthermore, under this model, there is a recognition that attempts to label and measure an individual's functioning level is problematic and in many cases invalid.[225] One proposed approach is to examine actual vulnerability of the defendant.[226] In reviewing the cases that have raised *Atkins* claims, it is striking how many of the cases reported significantly troublesome conditions during the defendants' childhood. Scholars have documented that many children

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masquerading as a medical etiological category," and that the diagnostic criteria has been arbitrary where prior to 1973, the criteria for ID was an IQ score below 85, while today, the criteria is at 70 or below).

221. Furman v. Georgia, 408 U.S. 238, 253 (1972).

222. *See* Susan R Jones, *Toward Inclusive Theory: Disability as Social Construction*, 33 NASPA 4, 347 (1996); W.M.L. Finlay & E. Lyons, *Rejecting the label: A Social Constructionist Analysis*, 43 MENTAL RETARDATION 2, 120 (2005).

223. Deborah Marks, *Models of Disability*, 19 DISABILITY & REHABILITATION 3, 85 (1997); Adam M. Samaha, *What Good is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251 (2007) (although Samaha argues against use of the social model of disability, he presents a concise overview of what the model entails).

224. Michael L. Wehmeyer et al., *The Intellectual Disability Construct and Its Relation to Human Functioning*, 46 INTELL. & DEV. DISABILITIES 4, 311 (2008); Samaha, *supra* note 250, at 1251.

225. Wehmeyer et al., *supra* note 251.

226. Greenspan & Switzky, *supra* note 32.

with ID are at increased risk of being abused and mistreated.[227] These childhood experiences tend to exacerbate developmental vulnerabilities due to biological factors that caused the ID. Furthermore, a child with ID who had the benefits of a positive childhood experience may have less negative effects resulting from the ID. This interaction of the individual's biological condition and the social context is important to consider. Educating judges and juries about this is important as they attempt to understand how ID can manifest and how an individual tested on one measure could vary considerably from another individual receiving the exact same score.

B. *Ending the Elusive Search*

Because of the inherent issues with measuring ID, the search for such measures will continue to be elusive and a new approach is needed. Such a new approach could follow Drs. Greenspan and Switzky's recommendation for a more medical definition of ID, or a new approach could be expanded based on an understanding of the social construction of ID. Reliance on standardized measures of ID based on IQ and adaptive skill measures will continue to create problems, especially in the judicial context.[228] An approach based on this view will require special expertise and clinical judgment.[229] Determinations of who has ID cannot be left to the courts and juries because determination of ID using standardized measures will always be imprecise.

Historically, the purpose of determining ID was for allocation of services, benefits, and treatments.[230] Instruments designed and used for these purposes have less potential of harm to the person being evaluated. Using such instruments and procedures for determining whether someone should be executed was never intended. Such a use raises the question of whether this type of high stakes use is ever appropriate and whether an identification procedure based on the least dangerous assumption[231] would be more appropriate, particularly for establishing the standard of proof that a defendant must bear when raising an *Atkins* claim. The

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227. *See* Patricia M. Sullivan & John F. Knutson, *Maltreatment and Disabilities: A Population-Based Epidemiological Study*, 24 CHILD ABUSE & NEGLECT 10, 1257 (2000) (noting that close to 31% of children with disabilities were subject to mistreatment, compared to 9% of children without disabilities).

228. *See generally* Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L. REV. 685 (2008).

229. SCHALOCK & LUCKASSON, *supra* note 62.

230. Weithorn, *supra* note 4, at 1223.

231. *See, e.g.*, Anne M. Donnellan, *The Criterion of the Least Dangerous Assumption*, 9 BEHAV. DISORDERS 141 (1984) (noting that in the absence of knowing whether something is true or not, it is preferable to make the assumption that would cause the least amount of harm, or making assumptions that would be the least dangerous for an individual).

problems with false positives (incorrectly identifying someone as having ID) versus false negatives (incorrectly identifying someone as not having ID) appears to underlie our views of justice. For determining benefits, it appears that society can tolerate false positives, but for determining punishment, society should not tolerate false negatives. As Professor Lois Weithorn states,

> Given that the death penalty is the most severe punishment available in our criminal justice system and—once carried out—is irrevocable, state policies must err on the side of casting a net that is too wide rather than one that is too narrow in defining "[intellectual disability]" for the purpose of death penalty eligibility.[232]

With this in mind, the courts could better reflect the aims of justice by acknowledging that intellectual disability is difficult to define through rigid assessment procedures. High burden of proof standards and over-reliance on standardized measures applied within formulaic procedures unfortunately deny constitutional protections for the defendants that *Atkins* was meant to protect. Understanding the interplay of context (childhood experiences and circumstances) and the individual vulnerability due to a biological condition should be considered. In other words, the effects of intellectual disability are often socially determined. And, to fully understand this, professional and clinical judgment will be critical.

232. Weithorn, *supra* note 4, at 1233.