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## Texas, the Death Penalty, and Intellectual Disability

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## COMMENT

### TEXAS, THE DEATH PENALTY, AND INTELLECTUAL DISABILITY

MEGAN GREEN\*

I.	The Death Penalty in Texas .....	1030
II.	Framing the Issue: The Supreme Court’s Failure to Provide Guidance to the States to Determine Intellectual Disability .....	1031
	A. <i>Hall v. Florida</i> : Florida’s Attempt at <i>Atkins</i> Compliance .....	1035
	B. <i>Ex Parte Briseno</i> : Texas Responds to <i>Atkins</i> .....	1037
III.	What Now?: Factors the Texas Legislature Should Consider When Formulating an <i>Atkins</i> -Compliant Method for Evaluating Claims of Intellectual Disability .....	1045
	A. Abolishing the Death Penalty Is Not the Answer to the Texas Problem .....	1045
	B. A Proposed Method Should Employ the Use of Current Definitions .....	1047
	C. A Proposed Method Should Rely on Current Diagnostic Standards Established by Medical and Psychological Experts .....	1050

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1. Current Diagnostic Standards Require Equal Assessment of All Three Prongs to Determine Intellectual Disability .....	1051
2. Current Diagnostic Standards for Adaptive Deficits .....	1052
D. A Proposed Method Should Include Only Definitions and Standards Utilized by Professionals and Exclude Any Stereotypes Associated with Intellectual Disability .....	1055
E. When Formulating a Proposed Method, Mental Health Professionals Should Be Consulted .....	1056
IV. Conclusion .....	1057

### I. THE DEATH PENALTY IN TEXAS

It feels as though local Texas news is constantly reporting on a new death sentence being handed down, an execution that has taken place, or a death row inmate fighting for his life. Over the course of a month in the fall of 2017, six death row inmates were the focus of reporting by major Texas media outlets.<sup>1</sup> Why does Texas embrace capital punishment so strongly?

In 1972, the Supreme Court issued an opinion that effectively put a halt

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1. See generally Keri Blakinger, *Judge Sets Execution Date for Sugar Land Man Who Had Family Killed for \$1 Million Inheritance*, HOUS. CHRON. (Nov. 7, 2017, 11:20 AM), <http://www.chron.com/news/houston-texas/article/Judge-sets-execution-date-for-Sugar-Land-man-12336728.php> [perma.cc/JV6H-99WU] (covering the setting of an execution date for a Fort Bend County murder); Jolie McCullough, *Houston Serial Killer Faces Execution This Week*, TEX. TRIB. (Oct. 17, 2017, 12:00 AM), <https://www.texastribune.org/2017/10/17/houston-serial-killer-faces-execution-week/> [perma.cc/NCL5-E3X8] (describing a Texas serial killer's crimes and announcing his date of execution); Jolie McCullough, *Texas Executes Mexican National Despite International Ire*, TEX. TRIB. (Nov. 8, 2017, 11:00 PM), <https://www.texastribune.org/2017/11/08/planned-execution-mexican-national-draws-international-ire/> [perma.cc/E6VX-9AAM] (reporting on the execution of a Mexican national in Huntsville on November 8, 2017); Jolie McCullough, *Texas Executes Robert Pruett, Who Insisted on Innocence in Prison Guard's Murder*, TEX. TRIB. (Oct. 12, 2017, 7:00 PM), <https://www.texastribune.org/2017/10/12/texas-executes-robert-pruett-who-insisted-innocence-prison-guards-murd/> [perma.cc/3XVB-F25G] (providing an account of an execution that took place on October 12, 2017); *San Antonio Man Set for March Execution for Lubbock Slaying*, ASSOCIATED PRESS (Nov. 9, 2017), <https://apnews.com/ba017961e9644857a5c9b16037d6e50a> [https://perma.cc/YP3C-5T53] (announcing an execution date for a Texas inmate); Stephen Young, *Dallas Child Killer John Battaglia's Execution Set—For the Third Time*, DALL. OBSERVER (Nov. 2, 2017, 4:00 AM), <http://www.dallasobserver.com/news/dallas-killer-john-battaglia-set-to-die-feb-1-10029868> [perma.cc/L93B-H3HS] (noting the execution date of a Texas inmate for February of 2018).

on all executions nationwide.<sup>2</sup> This moratorium lasted until 1976 when the Court ruled a death sentence can be constitutional if the procedure with which it was obtained was within the guidelines of the Court.<sup>3</sup> Since then, Texas has repeatedly led the nation in the number of executions carried out each year.<sup>4</sup> Of the 1,465 executions in the United States since 1976, Texas is responsible for 545, nearly five times as many as the next leading state.<sup>5</sup>

## II. FRAMING THE ISSUE: THE SUPREME COURT'S FAILURE TO PROVIDE GUIDANCE TO THE STATES TO DETERMINE INTELLECTUAL DISABILITY

In recent years, the nation's growing disapproval of the death penalty can be seen through Supreme Court opinions narrowing the scope of capital punishment,<sup>6</sup> a number of states abolishing the practice,<sup>7</sup> decreased number

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2. See *Furman v. Georgia*, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring) (determining the way in which the presented death sentences were arbitrarily obtained constituted cruel and unusual punishment, essentially creating a moratorium on the death penalty in the United States).

3. See *Gregg v. Georgia*, 428 U.S. 153, 191–92 (1976) (ruling not all death sentences are unconstitutional as long as they follow the guidelines set out by the court, including a bifurcated trial and sufficient jury instructions).

4. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 2 (2016), <https://deathpenaltyinfo.org/documents/2016YrEnd.pdf> [<http://perma.cc/VY3H-WUBU>] (providing basic facts about the death penalty in the United States, including number of executions, races of executed offenders, and number of exonerations by state); David Von Drehle, *Bungled Executions. Backlogged Courts. And Three More Reasons the Modern Death Penalty is a Failed Experiment*, TIME, June 8, 2015, at 26, 28 (“Even in Texas, which leads the nation in executions since 1976[,] . . . the wheels are coming off the bandwagon.”). But see Jolie McCullough, *In an Unusual Year, Texas Didn't Lead the Nation in Executions*, TEX. TRIB. (Dec. 15, 2016, 12:00 AM), <https://www.texastribune.org/2016/12/15/unusual-year-death-penalty-texas-didnt-have-most-e/> [[perma.cc/HZC5-GCP5](http://perma.cc/HZC5-GCP5)] (“Texas—the state that has executed the most people by far since the death penalty was reinstated in the United States [forty] years ago—had the nation's second-busiest death chamber this year for the first time since 2001. Georgia's nine executions in 2016 surpassed the Lone Star State's record-low number of seven.”).

5. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 14, 2017), <https://deathpenaltyinfo.org/documents/FactSheet.pdf> [[perma.cc/XDR6-XXLN](http://perma.cc/XDR6-XXLN)] (showing the number of executions in Texas since 1976 was 545, with the next leading state, Virginia, at 113 total executions).

6. See *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002) (detailing the change in the country's attitude since the Court's *Penry* decision, which upheld the death penalty for intellectually disabled, apparent through a number of states enacting statutes explicitly prohibiting execution of intellectually disabled in response to the *Penry* opinion). See generally *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (declaring the death penalty an unconstitutional punishment for the rape of a child where the child did not die and the offender did not intend to cause death to the child); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (abrogating the death penalty for defendants under the age of eighteen at the time the offense was committed).

7. According to the Death Penalty Information Center, since 2007, seven states—Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, and New York—have abolished

of executions,<sup>8</sup> and the number of death sentences imposed.<sup>9</sup> In 2002, the Supreme Court opined *Atkins v. Virginia*,<sup>10</sup> their first opinion categorically prohibiting the death penalty in relation to intellectually disabled offenders.<sup>11</sup> Atkins and co-defendant, Jones, kidnapped Eric Nesbitt, robbed him, drove him to an ATM to withdraw more money, then drove him to a final location where they proceeded to shoot Mr. Nesbitt eight times, killing him.<sup>12</sup> Ultimately, the Virginia state court sentenced Atkins to death despite testimony by a forensic psychologist that Atkins was “mildly mentally retarded.”<sup>13</sup> Upon granting certiorari, the Supreme Court analyzed Atkins’ claim under the Eighth Amendment.<sup>14</sup> Justice Stevens’

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the death penalty. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), <https://deathpenaltyinfo.org/states-and-without-death-penalty> [perma.cc/5DCP-WDXX]. Three additional states—Colorado, Pennsylvania, and Washington—have gubernatorial moratoria in place. *Id.*

8. “Executions continued their historic decline in 2016, with [twenty] executions carried out by just five states. It was the fewest number of executions in the [United States] since 1991 and the fewest number of states carrying them out since 1983.” DEATH PENALTY INFO. CTR., *supra* note 4, at 5.

9. According to the Death Penalty Information Center,

Fewer death sentences will be imposed in 2016 than in any other year since the Supreme Court declared [United States] death penalty statutes unconstitutional in *Furman v. Georgia* in 1972. . . . The [thirty] death sentences expected to be imposed in 2016 represent a [thirty-nine percent] decline from last year’s [forty-two]-year low, and are down more than [ninety percent] from the 315 death sentences imposed during the peak death-sentencing year of 1996.

*See id.* at 3 (highlighting the changes in the death penalty in the year 2016); *see also* Drehle, *supra* note 4, at 27 (explaining several reasons why the United States has seen a decline in the death penalty); Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP NEWS (Oct. 26, 2017), <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx> [perma.cc/8KBR-3W6M] (“Americans’ support for the death penalty has dipped to a level not seen in [forty-five] years. Currently, [fifty-five percent] of [United States] adults say they favor the death penalty for convicted murderers.”).

10. *Atkins v. Virginia*, 536 U.S. 304 (2002).

11. *See id.* at 320–21 (holding a death penalty sentence would violate the Eighth Amendment as applied to intellectually disabled criminals).

12. *Id.* at 307.

13. *Id.* at 308–09. The term “mentally retarded” is quoted in some materials included in this comment because that was the medically acceptable term at the time it was used. Now, however, the accepted term is “intellectually disabled.” *See Use of Mental Retardation on this Website*, AM. ASS’N ON INTELL. & DEV. DISABILITIES, <http://aidd.org/intellectual-disability/historical-context> [perma.cc/938U-CDW6] (explaining that while the term used to define intellectual disability has changed, the essential elements in a diagnosis have not); *see also* Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (changing the term “mental retardation” to “intellectual disability” in all federal laws).

14. *See Atkins*, 536 U.S. at 311 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” (quoting U.S. CONST. amend. VIII)); *see also* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

majority opinion makes clear that execution of the intellectually disabled does not further any policy purposes for which capital punishment was intended.<sup>15</sup> As the Court states, the difficulty lies in determining whether an individual qualifies as intellectually disabled for purposes of removing the death penalty as a possible punishment.<sup>16</sup> However, instead of providing guidance on how to answer the more difficult question, the Court side-steps the issue and simply states: “[W]ith regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.’”<sup>17</sup> The only direction provided by the Court was that intellectual disability had to be a clinically defined disorder “requir[ing] not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age [eighteen].”<sup>18</sup> The states were then entrusted with the task of determining the appropriate methods in order to arrive at the clinical definition.<sup>19</sup> While, theoretically, the *Atkins* ruling was a step in the right direction for opponents of capital punishment, the Court’s declination to establish guidelines and allowing the states to enact their own procedures on how to determine intellectual disability for purposes of removing the death penalty led to difficulty in the implementation of the ruling.<sup>20</sup> As a result, states have adopted varying

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15. See *Atkins*, 536 U.S. at 321 (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”).

16. *Id.* at 317.

17. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986)).

18. *Id.* at 318. See generally Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High Is Too High*, 20 BERKELEY J. CRIM. L. 163, 174–78 (2015) (expounding on the *Atkins* Court’s failure to provide any guidance on how to comply with its ruling).

19. See *Atkins*, 536 U.S. at 317 (leaving the task of developing appropriate procedure to deal with this issue to the states).

20. See John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 689 (2009) (addressing the shortfalls of the *Atkins* ruling, including the effects stereotypes have had on improperly excluding some individuals from the *Atkins* exemption); Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 811–18 (2007) (recognizing the difficulties states have in implementing the ruling of *Atkins* and proposing methods states could use to cohesively define intellectual disability); Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 256 (2003) (“In contrast to the overarching aim of the majority’s opinion in *Atkins*—making the administration of capital punishment more equitable—the Supreme Court’s latest prescription of psychiatric help may only add a new layer of complexity and confusion to the already capricious process through which the [United States] criminal justice system imposes death sentences.”); Natalie A. Pifer, *The Scientific and the Social in Implementing Atkins v. Virginia*, 41 LAW & SOC. INQUIRY 1036, 1037–38 (2016) (exploring the difficulty the *Atkins* ruling presents to

methods of determining intellectual disability resulting in “state capital systems that are worlds apart.”<sup>21</sup> In the years following the *Atkins* ruling, trial-and-error was obvious: states would enact a statute<sup>22</sup> and construe the statute through case law,<sup>23</sup> which would subsequently be overruled by the Supreme Court.<sup>24</sup>

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courts in navigating the social and scientific aspects of intellectual disability); Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders And Excluding Them From Execution*, 30 J. LEGIS. 77, 77–78 (2003) (expounding on the different ways in which states define mental retardation and the way in which it effects the procedures they impose for determining which offenders to exclude from capital punishment).

21. Deborah W. Denno, *Courting Abolition*, 130 HARV. L. REV. 1827, 1836 (2017) (reviewing CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT*); see IDAHO CODE ANN. § 19-2515A (West 2017) (defining intellectual disability as “significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two . . . of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.”); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2017) (outlining Louisiana’s procedure for determining intellectual disability and characterizing the disability as a combination of intellectual and adaptive deficits which manifested during the individual’s developmental period); UTAH CODE ANN. § 77-15a-101 (West 2017) (outlawing imposition of a death sentence on an individual with “significantly subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning” and the limited functioning has presented itself prior to age twenty-two); VA. CODE ANN. § 19.2-264.3:1.1 (West 2017) (characterizing intellectual disability as a combination of limited intellectual functioning as determined by current psychological exams and deficits in adaptive behavior presented before the age of eighteen), *declared unconstitutional* by *Hall v. Florida*, 572 U.S. 701 (2014); see also *States That Have Changed Their Statutes to Comply With the Supreme Court’s Decision in Atkins v. Virginia*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia> [perma.cc/3P5H-DTKW] (detailing the differing methods some states have formulated to evaluate claims of intellectual disability in response to the *Atkins* ruling).

22. See FLA. STAT. ANN. § 921.137 (West 2013) (codifying Florida’s method to determine intellectual disability for purposes of abrogating the death penalty), *declared unconstitutional* by *Hall v. Florida*, 572 U.S. 701 (2014).

23. See *Cherry v. State*, 959 So. 2d 702, 712 (Fla. 2007) (construing FLA. STAT. § 921.137 as establishing a bright-line cut off for intellectual disability at an intelligence quotient of seventy), *abrogated* by *Hall*, 572 U.S. 701; *Hall v. State*, 109 So. 3d 704, 708–10 (Fla. 2012) (affirming the statutory construction from *Cherry*), *rev’d*, 572 U.S. 701 (2014); *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (creating seven common law factors to determine intellectual disability for purpose of abrogating the death penalty because Texas lawmakers had failed to enact a statutory method), *abrogated* by *Moore v. Texas*, 137 S. Ct. 1039 (2017).

24. See generally *Moore*, 137 S. Ct. at 1052–53 (rejecting Texas’ attempt to comply with *Atkins* and the *Briseno* factors as unconstitutional because of the high risk they create of executing an offender with an intellectual disability); *Hall*, 572 U.S. at 723–24 (striking down Florida’s statute defining intellectual disability enacted for the purposes of complying with *Atkins v. Virginia*).

A. Hall v. Florida: *Florida's Attempt at Atkins Compliance*

The state most notably attempting to comply with the Supreme Court's ruling in *Atkins* was Florida.<sup>25</sup> Florida enacted a pre-*Atkins* statute prohibiting a penalty of death on an intellectually disabled defendant.<sup>26</sup> In *Cherry v. State*,<sup>27</sup> the Florida Supreme Court construed the three prong statute to establish a bright-line cut off for establishing an intellectual disability at an intelligence quotient (IQ) of seventy.<sup>28</sup> If the defendant failed to satisfy the first prong by proving an IQ of seventy, they were barred from presenting evidence of the second and third prong.<sup>29</sup> Florida believed the imposition of a strict cutoff satisfied the statutory definition of "significant subaverage general intellectual functioning."<sup>30</sup> The seemingly arbitrary score of seventy was arrived at by interpreting "subaverage general intellectual functioning" as two standard deviations below the average IQ score of 100.<sup>31</sup> The Supreme Court admits that Florida is not precluded from including standard deviations in their calculations.<sup>32</sup> However, a serious problem arises when a strict cutoff is construed—the defendant is precluded from presenting any other mitigating evidence of his disability.<sup>33</sup> As a result, in *Cherry*, a death sentence was upheld for a defendant because

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25. See *Cherry*, 959 So. 2d at 714 (construing section § 921.137 of the Florida Statute as establishing a bright-line cut off for intellectual disability at an IQ of seventy). Two other states also enacted a post-*Atkins* statute with a strict IQ cutoff at seventy: Delaware and Virginia. *Hall*, 572 U.S. at 717.

26. See FLA. STAT. ANN. § 921.137 (defining intellectual disability as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age [eighteen]. The term 'significantly subaverage general intellectual functioning,' for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term 'adaptive behavior,' for the purpose of this definition, 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. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection").

27. *Cherry v. State*, 959 So. 2d 702 (Fla. 2007).

28. *Id.* at 712–13.

29. See *id.* at 714 ("Because we find that *Cherry* does not meet the first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination.").

30. See *id.* at 712–13 (explaining the plain language of the statute supported the court's finding of a strict IQ cutoff).

31. *Hall v. Florida*, 572 U.S. 701, 711–12 (2014) (citing FLA STAT. ANN. § 921.137(1)).

32. *Id.*

33. *Id.*; see also *Cherry*, 959 So. 2d at 714 (ruling an offender with an IQ of seventy-two failed to meet the state's definition of intellectually disabled and thus was eligible for the death penalty).



he had an IQ of seventy-two and was consequently barred from presenting other evidence of disability.<sup>34</sup>

A similar result was reached in *Hall v. State*,<sup>35</sup> where the death sentence of an offender was upheld based on his IQ scores ranging between sixty-seven and seventy-five,<sup>36</sup> and the court's subsequent refusal to admit other evidence of his intellectual disability, including a doctor's report determining his IQ score to be sixty-nine.<sup>37</sup> Because the Supreme Court considered this to be unacceptable, it granted certiorari to review Hall's sentence and Florida's method.<sup>38</sup> Ultimately the Court ruled the Florida method failed to meet current medical standards because it viewed an IQ score as conclusive evidence of intellectual disability, or lack thereof, and refused to take into consideration the factors experts would consider when making a diagnosis.<sup>39</sup> For example, medical professionals decline to consider the IQ score as conclusive evidence because many factors contribute to fluctuating scores.<sup>40</sup> In essence, the Supreme Court took the opportunity in *Hall v. Florida*,<sup>41</sup> to narrow the broad ruling of *Atkins*.<sup>42</sup> The Court highlights the importance in relying on medical professionals and experts when seeking a diagnosis of intellectual disability.<sup>43</sup> The Supreme Court is explicit in *Hall* that current medical standards should be relied on and a myriad of factors should be considered when determining whether an

34. See *Cherry*, 959 So. 2d at 712–14 (refusing to consider evidence introduced by offender to satisfy the second and third prongs of section 921.137 of the Florida Statute because he failed to satisfy the first prong by proving his IQ is seventy or below).

35. See *Hall v. State*, 109 So. 3d 704 (Fla. 2012) (affirming the statutory construction from *Cherry*), *rev'd*, 572 U.S. 701, 704 (2014).

36. See *id.* at 706 (“While there is no doubt that [Hall] has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that [Hall] was competent at the resentencing hearings.” (quoting *Hall v. State*, 742 So. 2d 255, 229 (Fla. 1999))).

37. *Id.* at 710.

38. See *Hall*, 572 U.S. at 704 (“This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.”).

39. *Id.* at 712–16.

40. See *id.* (describing how medical professionals use many factors to determine intellectual disability).

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

42. See James W. Ellis, *Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 390 (2014) (“One clear message is that the states are not free to define intellectual disability in any way they choose but must act consistently with the consensus of professionals in the field.”).

43. See, e.g., *Hall*, 572 U.S. at 710 (“In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.”).

offender has an intellectual disability.<sup>44</sup> This focus “calls into question the approach by a few courts that rest heavily on stereotypes about people with intellectual disability rather than on the scientific knowledge and experience accumulated by professionals in the field[.]”<sup>45</sup> including the post-*Atkins* approach developed by Texas: the *Briseno* Factors.<sup>46</sup>

#### B. Ex Parte *Briseno*: *Texas Responds to Atkins*

As *Atkins* ascended to the Supreme Court, Jose Garcia Briseno awaited execution on Texas’s death row after being convicted and sentenced to death for the robbing and murdering of a Texas sheriff in his home in 1991.<sup>47</sup> Briseno filed multiple state and federal appeals, all of which were denied, and he was scheduled to be executed.<sup>48</sup> The Supreme Court issued their *Atkins* opinion on June 20, 2002 and Briseno filed a writ of habeas corpus with the Texas Court of Criminal Appeals (CCA) on July 10, 2002—the same day he was scheduled to be executed.<sup>49</sup> Briseno argued he was “mentally retarded” and thus, ineligible for execution under *Atkins*.<sup>50</sup> The CCA stayed his execution and ordered the original trial court to hold an evidentiary hearing to determine whether Briseno was in fact intellectually disabled under the *Atkins* standard.<sup>51</sup> The habeas court ultimately found he did not qualify as intellectually disabled under *Atkins* and upheld his death sentence.<sup>52</sup>

In their opinion affirming the trial court’s death sentence, the CCA acknowledged that it is the job of the Texas Legislature, not theirs, to create

44. *Id.*; see also Ellis, *supra* note 42, at 390–91 (“[T]he Court’s emphasis on scientific and clinical understanding of intellectual disability calls into question the approach by a few courts that rest heavily on stereotypes about people with intellectual disability rather than on the scientific knowledge and experience accumulated by professionals in the field.”).

45. Ellis, *supra* note 42, at 390–91.

46. See Blume, Johnson & Seeds, *supra* note 20, at 702–03 (criticizing the methods utilized by some states, including Texas, for including stereotypical factors in their definition of intellectual disability); Mia-Carré B. Long, *Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the Briseno Factors*, 26 GEO. J. LEGAL ETHICS 859, 865 (2013) (connecting the *Briseno* factors based on stereotypical attributes of an intellectually disabled individual, such as the character Lennie from the popular novel *Of Mice and Men*).

47. *Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017).

48. *Id.* at 4.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

laws.<sup>53</sup> However, since the legislature failed to enact any post-*Atkins*<sup>54</sup> statutes to comply with the Supreme Court's ruling, and the CCA had been inundated with habeas corpus applications in the two years following *Atkins*, they created the law governing when an individual qualifies as intellectually disabled for purposes of abrogating a death sentence: the *Briseno* factors.<sup>55</sup> In developing these factors, the court states that medical professionals are more likely to broadly define and diagnose intellectual disability, but they must narrow that definition to only include individuals that the majority of Texas residents would agree should be exempt from the death penalty, individuals such as the character Lennie from *Of Mice and Men*.<sup>56</sup> The CCA applied the definition of "mental retardation" created by the American Association on Mental Retardation (AAMR)<sup>57</sup> and stated: "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of [eighteen]."<sup>58</sup> Because the court found the "adaptive behavior criteria [to be] exceedingly subjective" they established seven nonclinical factors they believe demonstrate intellectual disability:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

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53. *Id.* at 5.

54. The Texas Legislature had attempted to pass a pre-*Atkins* statute in 2001, house bill 236, prohibiting the execution of the intellectually disabled defined as "significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id.* at 6. (quoting Tex. H.B. 236, 77th Leg., R.S. (2001)). The bill was vetoed by then-Governor Rick Perry. *See* Tex. H.B. 236, 77th Leg., R.S. (2001) (proposing to prohibit imposition of a death sentence on the intellectually disabled; vetoed by Governor); *see also* Persons with Mental Retardation Act of Sept. 1, 1991, 72nd Leg., R.S., ch. 76, § 1, sec. 591.003(13), 1991 Tex. Sess. Law Serv. (amended 1993) (codified at Tex. Health & Safety Code Ann. § 591.003(13)) (providing the definition of "mental retardation" that was current at the time of the *Briseno* opinion).

55. *Briseno*, 135 S.W.3d at 5.

56. *Id.* at 6. *See generally* JOHN STEINBECK, *OF MICE AND MEN* (1937) (chronicling the story of a stereotypically intellectually disabled man, Lennie).

57. In 2007, the AAMR formally changed its name to American Association on Intellectual and Developmental Disabilities (AAIDD). Press Release, Am. Ass'n on Intellectual and Developmental Disabilities, Mental Retardation is No More—New Name is Intellectual and Developmental Disabilities (Mar. 2, 2007) (on file with author).

58. *Briseno*, 135 S.W.3d at 7 (footnotes omitted) (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEM OF SUPPORT 5 (9th ed. 1992)).

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense did the commission of that offense require forethought, planning, and complex execution of purpose?<sup>59</sup>

After considering facts such as Texas Department of Criminal Justice officers' testimony that Briseno seemed "normal" while in custody, none of his juvenile records indicated any sign of intellectual disability, and that Briseno's testimony was coherent, the CCA upheld Briseno's death sentence.<sup>60</sup>

The *Briseno* factors were the law in Texas for thirteen years, though many in the medical and legal communities questioned their grounds and substance.<sup>61</sup> However, consistent with the trial-and-error approach

59. *Id.* at 8–9.

60. *Id.* at 16–18. Following this opinion, Briseno filed another habeas corpus petition and the CCA ordered a new punishment hearing based on an improper jury charge. *See Ex parte Briseno*, No. AP-76132, 2010 WL 2332150, at \*1 (Tex. Crim. App. June 9, 2010) (not designated for publication) (remanding for a new punishment hearing because the instruction given to the jury violated the Eighth Amendment for failing to sufficiently apprise the jury of the lesser available punishments). After negotiating a plea deal, Briseno's death sentence was commuted to a life sentence. Diane Jennings, *Death Sentence of a Man Who Killed Sheriff Changed to Life*, DALL. NEWS (May 2013), <https://www.dallasnews.com/news/crime/2013/05/03/death-sentence-of-man-who-killed-sheriff-changed-to-life> [perma.cc/2EX2-KLJT]; *see also Offenders No Longer on Death Row*, TEX. DEPT. CRIM. JUST. (Nov. 10, 2017), [https://www.tdcj.state.tx.us/death\\_row/dr\\_offenders\\_no\\_longer\\_on\\_dr.html](https://www.tdcj.state.tx.us/death_row/dr_offenders_no_longer_on_dr.html) [perma.cc/V7GH-SEAY] (listing "Jose Briseno" as "Sentence commuted to life, #1853416").

61. *See generally* Blume, Johnson & Seeds, *supra* note 20, at 712 (criticizing the multiple ways in which the *Briseno* factors deviate from the clinically accepted methods of diagnosing intellectual disability); Hannah Brewer, Note, *The Briseno Factors: How Literary Guidance Outsteps the Bounds of Atkins in the Post-Hall Landscape*, 69 BAYLOR L. REV. 240, 241 (2017) (predicting the *Briseno* factors will be ruled unconstitutional after *Hall v. Florida* because they "differ from the clinical definitions of adaptive behavior deficits created by the same professional organizations whose opinions were relied on in *Hall*"); Hensleigh Crowell, Note, *The Writing Is on the Wall: How the Briseno Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 744 (2016) (analyzing the

observed in the Florida courts, Texas's attempt to comply with *Atkins* was also held to "create an unacceptable risk that persons with intellectual disability will be executed."<sup>62</sup> Bobby Moore was convicted and sentenced to death for the capital murder of a Houston store clerk during an attempted robbery and, on appeal, sought to abrogate his sentence by arguing intellectual disability.<sup>63</sup> After multiple state and federal appeals, including a grant of federal relief which only led to another affirmation of his sentence by a state trial court, Moore was granted a hearing to present evidence of his intellectual disability.<sup>64</sup> The habeas court, choosing to adopt the current, clinical definition of "intellectual disability,"<sup>65</sup> as defined by the AAIDD, instead of the *Briseno* factors, found Moore to qualify for an *Atkins* exemption.<sup>66</sup> However, the CCA disregarded the recommendation of the habeas court, applied the *Briseno* factors, and denied relief.<sup>67</sup> At the habeas hearing, Moore presented strong evidence which the court relied on in determining his intellectual disability including: testimony of friends, family

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problems resulting from implementation of the *Briseno* factors); Long, *supra* note 46, at 859 (addressing the fact that the *Briseno* factors were derived from stereotypical attributes of an intellectually disabled individual, such as the character Lennie from the popular novel *Of Mice and Men*).

62. See *Moore v. Texas*, 137 S. Ct. 1039, 1044, 1053 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)) (rejecting Texas's application of the *Briseno* factors because of their reliance on outdated medical guidelines, deviation from clinically accepted standards, and consideration of stereotypical characteristics).

63. *Ex parte Moore*, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015), *vacated*, 137 S. Ct. 1039 (2017).

64. *Id.*

65. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 31 (5th ed. 2013) [hereinafter DSM-5] (detailing current medical standards on diagnosing intellectual disability); *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. & DEV. DISABILITIES, <http://aaidd.org/intellectual-disability/definition#.WuF-hNSxE4> [perma.cc/24HM-MYYY] (providing the currently accepted definition of intellectual disability as "characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of eighteen"). The *Briseno* factors were based on the outdated "1992 (ninth) edition of the American Association on Mental Retardation (AAMR) manual, predecessor to the current AAIDD-11 manual." *Moore*, 137 S. Ct. at 1046 (citing *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004)). The habeas court adopted the definition employed by the AAIDD, not the American Psychiatric Association (APA), which "omits the requirement that an individual's adaptive behavior deficits must be 'related to' significantly sub-average general intellectual functioning." GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE, CRIMINAL PRACTICE AND PROCEDURE § 49:35 (3d ed. Supp. 2017).

66. *Ex parte Moore*, 470 S.W.3d at 485.

67. See *id.* at 486–87 ("[T]he habeas court concluded that it should use the most current position, as espoused by AAIDD, regarding the diagnosis of intellectual disability rather than the test we established in *Briseno*. . . . The decision to modify the legal standard for intellectual disability in the capital-sentencing context rests with this Court unless and until the Legislature acts . . . ." (citing *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010))).

and medical professionals, that Moore was unable to comprehend concepts of days of the week or months of the year until after the age of thirteen, and Moore's inability to read and write which led to his dropping out of school in the ninth grade and being forced to live on the street.<sup>68</sup> Despite these indications of an intellectual disability, the CCA, in their "glass half-full perspective"<sup>69</sup> was able to support a death sentence by shifting their focus from Moore's adaptive deficits to his adaptive strengths.<sup>70</sup> For instance, the court viewed Moore becoming homeless in order to avoid abuse at home as a strength because it indicated "good survival skills."<sup>71</sup>

Upon Moore's petition and a plea by the medical, scientific, and legal communities,<sup>72</sup> the Supreme Court granted certiorari to evaluate whether the *Briseno* framework is constitutional under the Eighth Amendment and *Atkins v. Virginia*.<sup>73</sup> For multiple reasons, the Court ultimately held the *Briseno* factors unconstitutional for "creat[ing] an unacceptable risk that persons with intellectual disabilit[ies] will be executed."<sup>74</sup> First, the Court

68. *Moore*, 137 S. Ct. at 1045.

69. See Blume, Johnson & Seeds, *supra* note 20, at 710 (describing the perspective adopted by the CCA in *Ex parte Briseno* as shifting the focus from limitations in adaptive behavior, as instructed by the clinical standard, to strengths in adaptive behavior which can invalidate claims of intellectual disability and increase the difficulty of establishing unvarying clinical definitions).

70. See *Moore*, 137 S. Ct. at 1047 ("The habeas court, the CCA concluded, had erred by concentrating on Moore's adaptive weaknesses." (citing *Ex parte Moore*, 470 S.W.3d at 489)).

71. *Ex parte Briseno*, 135 S.W.3d 1, 15 (Tex. Crim. App. 2004), *abrogated by Moore*, 137 S. Ct. 1039.

72. See Brief for The American Ass'n on Intellectual & Developmental Disabilities (AAIDD) & The Arc of the United States as Amici Curiae Supporting Petitioner at 29–30, *Moore*, 137 S. Ct. 1039 (No. 15-797), 2016 WL 4151447 [hereinafter AAIDD Amici Curiae Brief Supporting Petitioner] (arguing the Supreme Court should reverse the CCA sentence because the *Briseno* framework deviates from the current, clinically accepted definition of intellectual disability); Brief for The American Bar Ass'n as Amicus Curiae Supporting Petitioner at 4, *Moore*, 137 S. Ct. 1039 (No. 15-797), 2016 WL 4151449 (urging the Supreme Court to reverse the CCA judgment because the *Briseno* factors lack any scientific or clinical basis); Brief for The American Civil Liberties Union & The ACLU of Texas as Amici Curiae Supporting Petitioner at 7, *Moore*, 137 S. Ct. 1039 (No. 15-797), 2016 WL 4151448 (advocating for the reversal of Moore's sentence because the *Briseno* factors are under-inclusive and based on stereotypes of intellectual disability); Brief for American Psychological Ass'n (APA) et al. as Amici Curiae Supporting Petitioner at 16–17, *Moore*, 137 S. Ct. 1039 (No. 15-797), 2016 WL 4151451 [hereinafter APA Amici Curiae Brief Supporting Petitioner] (requesting the Court hold the Texas method unconstitutional based on several ways in which it deviates from the methods accepted by mental health professionals).

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

74. *Id.* at 1051 (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)); see Adam Liptak, *Texas Used Wrong Standard in Death Penalty Cases, Justices Rule*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/28/us/politics/texas-death-penalty-supreme-court-ruling.html> [<https://perma.cc/WS4C-ZF8M>] (reporting Texas's failure to stay current on medical standards). *But*

reiterated their reasoning from *Hall v. Florida* that, although *Atkins* gave the power to the states to develop an appropriate method for determining intellectual disability, that power does not extend to a total disregard of the current medical standards.<sup>75</sup> As with any area of medical or scientific study, greater knowledge and understanding is gained over time through research and study by experts in the area.<sup>76</sup> Texas's use of the *Briseno* factors, based on a 1992 definition of intellectual disability, disregards current medical standards by failing to include the mental health advancements made in the preceding fifteen years.<sup>77</sup> The CCA's refusal to comply is further evidenced by their criticism of the habeas court for applying the current medical standard instead of the *Briseno* factors.<sup>78</sup> The most critical deviation was the court's shift in focus from Moore's adaptive deficits to his adaptive strengths, contrary to the focus utilized by medical professionals, which allowed those strengths to counteract the weight of his deficits.<sup>79</sup> The AAIDD stresses the purpose of focusing solely on an individual's deficits and excluding any consideration of any strengths is to aid a professional in

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*see* Emily Taft, *Moore v. Texas: Balancing Medical Advancements with Judicial Stability*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 115, 126 (2017) (presenting support for Texas and the *Briseno* factors and explaining why the Supreme Court should have ruled them constitutional).

75. *Moore*, 137 S. Ct. at 1048–49.

76. AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 27 (“As is the case in other fields, clinical science advances with new discoveries and, more frequently, with refined understanding of established principles. Our clinical understanding of intellectual disability is no exception.”).

77. *See id.* at 28 (“[T]he larger constitutional issue presented by this case is the choice by the Texas Court of Criminal Appeals to ignore scientific principles altogether, even those that have been clearly accepted and established for decades.”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 15 (“Texas continues to rely on an outdated diagnostic manual from 1992. This reliance is not justified by scientific or medical practice and risks the misdiagnosis of persons with intellectual disability.” (citation omitted)); *accord Ex parte Moore*, 470 S.W.3d 481, 486–87 (Tex. Crim. App. 2015) (acknowledging that, although medical standards have changed since *Atkins* and *Briseno*, the power to determine intellectual disability for an *Atkins* claim rests with the CCA), *vacated*, 137 S. Ct. 1039 (2017).

78. *See Ex parte Moore*, 470 S.W.3d at 486 (“The habeas judge therefore erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD . . .”).

79. *Moore*, 137 S. Ct. at 1050. *But see* AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 14–17 (“The clinical definition of adaptive behavior has long focused exclusively on adaptive *deficits*. . . . The clinician’s diagnostic focus does not—and cannot—involve any form of ‘balancing’ deficits against the abilities or strengths which the particular individual may also possess.”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 13 (“[M]ental health professionals agree that intellectual disability can and should be diagnosed where there are sufficient *deficits* in adaptive functioning. That remains true even if the individual has relative strengths in other areas. The presence of relative strengths in some spheres of behavior is *not* evidence that a person does *not* have intellectual disability.”).

diagnosing disability by showing whether the individual's intellectual deficiencies are accompanied by any functioning deficiencies.<sup>80</sup> This shift creates an unacceptable risk that individuals with a mild disability will not be considered intellectually disabled for purposes of an *Atkins* claim in Texas.<sup>81</sup> Finally, the Court criticized Texas's consideration of who a majority of its citizens would consider to be intellectually disabled for purposes of avoiding capital punishment when developing the *Briseno* factors instead of developing scientifically or clinically-based factors.<sup>82</sup> By including citizens' opinions, individuals with a mild intellectual disability could face different treatment, and potentially even execution, by Texas than they would by other states' standards.<sup>83</sup> As the Court emphasizes, an individual with a mild disability is still clinically considered disabled and "[s]tates may not execute anyone in the 'entire category of [intellectually disabled] offenders.'"<sup>84</sup> Thus, based on the subjective nature of the *Briseno* factors, and because they lack a basis in current clinical or medical standards, the Court essentially strikes them down.<sup>85</sup>

However, amongst all their criticisms, nowhere did the Court provide express guidance on how the states should correctly evaluate an *Atkins*-claim.<sup>86</sup> Texas is again stuck in the same trial-and-error method observed

80. AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 19.

81. The CCA appeared to realize the *Briseno* factors created such a risk for individuals with a mild intellectual disability and thus stated their goal was to establish factors that would only exempt individuals that the majority of Texas residents would deem exempt. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004); *accord Moore*, 137 S. Ct. at 1051 ("After observing that persons with 'mild' intellectual disability might be treated differently under clinical standards than under Texas'[s] capital system, the CCA defined its objective as identifying the 'consensus of Texas citizens' on who 'should be exempted from the death penalty.'" (quoting *Briseno*, 135 S.W.3d at 6)).

82. *Moore*, 137 S. Ct. at 1051; see DIX & SCHMOLESKY, *supra* note 65, at § 49:35 ("The Court noted that the constitutional prohibition against capital punishment for those with a sufficient intellectual disability is not a matter for democratic vote but a protection based on a constitutional protection that cannot be taken away by majoritarian prerogative.").

83. *Moore*, 137 S. Ct. at 1051.

84. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005)).

85. See *id.* at 1044, 1051–52 ("[T]he several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent . . ."); see also DIX & SCHMOLESKY, *supra* note 65, at § 49:35 ("In light of the criticism of *Briseno* from both sides of the Supreme Court in *Moore*, it seems certain that *Briseno* cannot remain the guidepost for establishing the standards for *Atkins* immunity from the death penalty much longer in Texas.").

86. See *Moore*, 137 S. Ct. at 1058 (Roberts, J., dissenting) ("A second problem with the Court's approach is the lack of guidance it offers to States seeking to enforce the holding of *Atkins* . . . . Neither the Court's articulation of this standard nor its application sheds any light on what it means."); see also Clinton M. Barker, Note, *Substantial Guidance Without Substantive Guides: Resolving the Requirements of*



in the years immediately following the *Atkins* ruling: a state-developed method to evaluate an intellectual disability claim is put into place, the Supreme Court holds it unconstitutional but declines to outline a compliant method, placing the state back where they started—attempting to develop an *Atkins*-compliant method.

Without any guidelines from the Supreme Court, the Texas Legislature should take it upon themselves to devise a constitutional method for trial courts to utilize when presented with an *Atkins* claim.<sup>87</sup> However, despite multiple pleas from the CCA, the Texas Legislature has declined to take any action in the fifteen years since *Atkins*.<sup>88</sup> The CCA, whose job is to interpret the law, is left in a difficult position—the same position they found themselves when creating the *Briseno* factors.<sup>89</sup> The CCA is continuously presented with a high volume of habeas applications and under the maxim of “justice delayed is justice denied,” the Court was forced to act and create law where there was none.<sup>90</sup> The *Briseno* factors were, thus, intended to be merely temporary guidelines until the legislature acted.<sup>91</sup> With the abrogation of the *Briseno* factors and the legislature’s continued reluctance to act, the Texas standard has been left in a legal flux.<sup>92</sup> In light of the

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Moore v. Texas and Hall v. Florida, 70 VAND. L. REV. 1027, 1036 (2017) (outlining the lack of guidance provided by the Supreme Court in defining “intellectually disabled” in *Atkins v. Virginia*).

87. See *Petetan v. State*, No. AP-77,038, 2017 WL 915530, at \*59 (Tex. Crim. App. Mar. 8, 2017) (Alcala, J., dissenting) (“The best scenario, of course, would be for the Texas Legislature to formulate a standard for deciding intellectual-disability determinations in the context of capital murder cases, as long as it acted in accordance with Supreme Court precedent.”).

88. See *Ex parte Moore*, 470 S.W.3d 481, 487 (Tex. Crim. App. 2015) (“The decision to modify the legal standard for intellectual disability in the capital-sentencing context rests with this Court unless and until the Legislature acts, which we have repeatedly asked it to do.”), *vacated*, 137 S. Ct. 1039 (2017); DIX & SCHMOLESKY, *supra* note 65, at § 49:35 (“The majority’s rejection of *Briseno* [in *Moore*] heightens the need for the long-unheeded request of the Court of Criminal Appeals for legislative guidance in this difficult area.”).

89. See *Ex parte Briseno*, 135 S.W.3d 1, 4 (Tex. Crim. App. 2004) (“This Court does not, under normal circumstances, create law. We interpret and apply the law as written by the Texas Legislature or as announced by the United States Supreme Court.”), *abrogated by Moore*, 137 S. Ct. 1039.

90. *Id.*

91. See *Petetan*, 2017 WL 915530, at \*53 (Alcala, J., dissenting) (“In all fairness to the *Briseno* Court, the standard announced in that case was intended to be a temporary solution until the Legislature could act to implement a permanent standard, and it made its decision thirteen years ago.”).

92. See *id.* at \*3–5, 22 (rejecting the court’s ruling upholding the death penalty while the Texas standard to determine an “intellectual disability is in flux”); Tommy Witherspoon, *Court Affirms Conviction, Death Penalty for Petetan*, WACO TRIBUNE-HERALD (Mar. 8, 2017), [http://www.wacotrib.com/news/courts\\_and\\_trials/court-affirms-conviction-death-penalty-for-petetan/article\\_1c0ded48-1f23-5ab7-9be5-cc4c4e4c3b52.html](http://www.wacotrib.com/news/courts_and_trials/court-affirms-conviction-death-penalty-for-petetan/article_1c0ded48-1f23-5ab7-9be5-cc4c4e4c3b52.html) [perma.cc/WGX6-ADQ2] (“Judge Elsa

number of habeas applications received constantly by the CCA and the number of offenders sentenced to death each year in Texas,<sup>93</sup> the state needs the legislature to step-up and take on the arduous task of developing an *Atkins*-compliant standard to evaluate claims of intellectual disability. The Supreme Court's ruling in *Moore* has set the stage and provided a perfect opportunity for them to do so.

### III. WHAT NOW?: FACTORS THE TEXAS LEGISLATURE SHOULD CONSIDER WHEN FORMULATING AN *ATKINS*-COMPLIANT METHOD FOR EVALUATING CLAIMS OF INTELLECTUAL DISABILITY

#### A. *Abolishing the Death Penalty Is Not the Answer to the Texas Problem*

Until the Supreme Court provides states with express guidelines on how to determine when an offender is exempt from capital punishment, the states will continue to grapple with this issue. However, opponents of the death penalty believe the answer to be much simpler: abolition.<sup>94</sup> While abolishment would be an ideal scenario, until capital punishment is abolished nationwide, it is unlikely the Texas Legislature would allow such legislation to be enacted into law.<sup>95</sup> Year after year, Texas politicians

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Alcala dissented, saying she preferred not to rule on Petetan's case while the Texas standard for determining whether someone is intellectually disabled is in legal flux.").

93. See Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 224 (2007) ("Of the 411 initial habeas applications filed during the combined period encompassed by the *Lethal Indifference* study and the current study (September 1, 1995 through September 1, 2006) . . . . Article 11.071 fails to consistently fulfill its role as the vital safety net protecting the innocent and undeserving from execution.").

94. See William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 801–02 (1998) (reasoning abolition of the death penalty should be the goal of all industrialized countries); see generally *About Us*, TEX. COAL. TO ABOLISH DEATH PENALTY, <http://tcadp.org/about/about-us/> [perma.cc/K9JV-FWT4] (characterizing TCADP as a "statewide grassroots advocacy organization dedicated solely to ending the death penalty in Texas"); *About Us*, TEX. MORATORIUM NETWORK, <http://www.texasmoratorium.org/about-us> [perma.cc/NE7A-CW77] (describing the non-profit organization's main goal of "mobilizing statewide support for a moratorium on executions in Texas").

95. See Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 525 (2017) (delineating the nationwide decline of a death sentences and highlighting that the vast majority of imposed sentences come from four southern states: Georgia, Florida, Missouri, and Texas); accord Lyn Suzanne Entzerth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 834 (2012) ("No state in the Deep South has abolished the death penalty, and as demonstrated recently in Texas and Georgia, these states have no qualms about carrying out executions.").

introduce legislation proposing to abolish the death penalty.<sup>96</sup> As predicted, the proposed bills fail to make it out of committee.<sup>97</sup> In a more realistic approach, some members of the Texas Legislature seek to introduce bills that would not completely bar the state's ability to employ capital punishment, but would limit its implementation.<sup>98</sup> These lawmakers, recognizing the difficulty in effectuating any significant change in the Texas death penalty, strive to make incremental limitations<sup>99</sup> such as: prohibiting a death sentence for offenders convicted of capital crimes under the law of parties or offenders suffering from a mental illness at the time of the

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96. Two Texas State Representatives, Harold Dutton, of District 142, and Jessica Farrar, of District 148, seek to introduce abolishment legislation at every session. Andrew Schneider, *Texas House Committee Considers Bills to Abolish Death Penalty*, HOUS. PUB. MEDIA (Apr. 18, 2017), <https://www.houstonpublicmedia.org/articles/news/2017/04/18/196638/texas-house-committee-considers-bills-to-abolish-death-penalty/> [perma.cc/QZ76-6YBW] (“Dutton has proposed a bill to eliminate the death penalty in every legislative session since 2003. Farrar has offered one of her own every two years since 2007.”). See generally Tex. H.B. 64, 85th Leg., R.S. (2017) (seeking to abolish the death penalty, introduced by Representative Harold Dutton, left pending in committee since 2017). See Tex. S.B. 597, 85th Leg., R.S. (2017) (seeking to make the maximum sentence for conviction of a capital felony life imprisonment, introduced by Senator Eddie Lucio, left pending in committee since 2017); Tex. H.B. 1537, 85th Leg., R.S. (2017) (introducing legislation to end capital punishment, introduced by Representative Jessica Farrar, left pending in committee since 2017); see also Press Release, Tex. Coal. To Abolish the Death Penalty, Texas House Committee to Hear Death Penalty Repeal Bill (Apr. 17, 2017) (on file with author) (announcing the Texas legislature's holding of a public hearing over a proposed bill to abolish the death penalty); Jolie McCullough, *Five Death Penalty Reform Bills Heard in Texas House Committee*, TEX. TRIB. (Apr. 18, 2017), <https://www.texastribune.org/2017/04/18/multiple-death-penalty-reform-bills-heard-texas-legislature/> [https://perma.cc/6645-MVX9] (highlighting death penalty legislation during the 2017 Texas legislative session).

97. See Tex. H.B. 1032, 84th Leg., R.S. (2015) (intending to advance legislation maximizing a sentence for capital punishment at life or life without parole, introduced by Representative Harold Dutton, left pending in committee since 2015); Tex. H.B. 1703, 83rd Leg., R.S. (2013) (introducing legislation to abolish capital punishment by Representative Jessica Farrar, left pending in committee since 2013); Tex. H.B. 819, 82nd Leg., R.S. (2011) (introducing legislation to abolish capital punishment by Representative Jessica Farrar, left pending in committee since 2011).

98. See generally Jolie McCullough, *Bill to Bar Death Penalty for Mentally Ill Faces Uphill Battle*, TEX. TRIB. (Mar. 8, 2017, 12:00 PM), <https://www.texastribune.org/2017/03/08/texas-bill-would-eliminate-death-penalty-mentally-ill/> [perma.cc/3FPS-NCKJ] (detailing Representative Toni Rose's efforts to limit the use of capital punishment on the mentally ill); Jolie McCullough, *Texas Lawmakers Aim to Eliminate Death Penalty for Convicts Who Didn't Kill*, TEX. TRIB. (Feb. 1, 2017, 12:00 AM), <https://www.texastribune.org/2017/02/01/texas-lawmakers-seek-reform-death-penalty-those-wh/> [perma.cc/YF7U-KPZW] [hereinafter McCullough, *Texas Lawmakers Aim*] (citing efforts by Texas Representatives to limit use of capital punishment under the law of parties).

99. “We’ve got to start somewhere when it comes to reforming the death penalty, and there’s no better place to start than the law of parties,” said state Rep. Terry Canales . . .” McCullough, *Texas Lawmakers Aim*, *supra* note 98.

crime.<sup>100</sup> However, even seeking to enact any limitations is an arduous task as Texas is unlikely to impose any restrictions on their use of the death penalty until compelled to do so. In 2001, Texas lawmakers introduced a bill seeking to prohibit the imposition of a death sentence upon an intellectually disabled offender.<sup>101</sup> The bill was passed by the House and the Senate, only to be vetoed by Governor Rick Perry.<sup>102</sup> The following year, in *Atkins*, the Supreme Court categorically prohibited the execution of intellectually disabled offenders nationwide.<sup>103</sup> Thus, Texas was forced to impose the limitation they sought to avoid by vetoing H.B. 236.

Establishing this legislative landscape is important to understand that the Texas Legislature and judiciary are reluctant to impose any limitations on their use of the death penalty unless federally mandated. Similarly, Texas is unlikely to expound on any mandated limitations. In simpler terms, in regard to the death penalty, Texas is likely to only enact the bare minimum to comply with federal law. Therefore, in suggesting guidelines to the legislature to replace the *Briseno* factors in light of *Moore*, the most effective proposition is the bare minimum. The bare minimum would be constitutional but also impose the fewest restrictions upon Texas. Drafting a *Moore*-compliant statute begins with the Court's criticisms of the *Briseno* factors: failure to be informed of current medical standards, reliance on outdated medical information, and deviation from accepted clinical standards.<sup>104</sup>

#### B. *A Proposed Method Should Employ the Use of Current Definitions*

The first step in creating a *Moore*-compliant method is simple: use current, medically-accepted definitions. The definition utilized by the CCA required an offender to prove:

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100. See Tex. H.B. 147, 85th Leg., R.S. (2017) (introducing legislation that would abolish the death penalty for coconspirators convicted of capital crimes, introduced by Representative Harold Dutton, currently pending in committee); Tex. H.B. 316, 85th Leg., R.S. (2017) (seeking to have capital punishment abolished as to those convicted of capital crimes under the law of parties, introduced by Representative Terry Canales, currently pending in committee); Tex. H.B. 3080, 85th Leg., R.S. (2017) (introducing legislation to prohibit the use of capital punishment on offenders suffering from a serious mental illness at the time of the crime).

101. See Tex. H.B. 236, 77th Leg., R.S. (2001) (proposing to prohibit imposition of a death sentence on the intellectually disabled; vetoed by Governor).

102. Veto Message of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001).

103. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“[D]eath is not a suitable punishment for a mentally retarded criminal.”).

104. *Moore v. Texas*, 137 S. Ct. 1039, 1042–43 (2017).

(1) he suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of [seventy] or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen.<sup>105</sup>

This definition was based on a 1992 definition by the AAIDD.<sup>106</sup>

The definition of intellectual disability is dynamic—changing with developments in research—and crafted by the two leading organizations in diagnosing and treating mental illness, intellectual disability, and developmental disorders: American Psychiatric Association and American Association on Intellectual and Developmental Disabilities.<sup>107</sup> Both organizations utilize a three-prong definition: deficits in intellectual functioning and adaptive behavior presented during an individual's developmental period, typically age eighteen.<sup>108</sup>

The first prong, limited intellectual functioning, is a measurement of one's mental abilities, such as “reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding.”<sup>109</sup> One way of measuring limitations in intellectual functioning is an IQ score.<sup>110</sup> Typically, a score between sixty-five and seventy-five will be an indication of disability.<sup>111</sup> However, the APA advises, since an IQ score is merely an approximation, a professional clinician is needed to interpret the score.<sup>112</sup> The problem with using an IQ score as an indication of intellectual disability arises when an individual's

105. *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015), *vacated*, 137 S. Ct. 1039 (2017).

106. *Moore*, 137 S. Ct. at 1055.

107. See AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 1–2 (explaining the interests of the AAIDD as “the nation’s oldest and largest organization of professionals in the field of intellectual disability”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 1–2 (detailing the interest of the APA, “the world’s largest professional association of psychologists”).

108. See *Definition of Intellectual Disability*, *supra* note 65 (“This condition is one of several developmental disabilities—that is, there is evidence of the disability during the developmental period, which in the US is operationalized as before the age of [eighteen].”). *But see* DSM-5, *supra* note 65, at 38 (“Criterion C, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are presented during childhood or adolescence.”).

109. DSM-5, *supra* note 65, at 37.

110. *Definition of Intellectual Disability*, *supra* note 65.

111. DSM-5, *supra* note 65, at 37.

112. *Id.*

score is above seventy.<sup>113</sup> Typically, an individual with an intellectual disability will have an IQ score below seventy.<sup>114</sup> However, some individuals can have a score above seventy but still be diagnosed disabled because more severe limitations in their adaptive behaviors could result in a lower overall functioning than an individual with an IQ score below seventy.<sup>115</sup>

This leads to the second prong, limitations in adaptive behavior, which is “how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.”<sup>116</sup> This prong encompasses three different arenas of adaptive reasoning: “conceptual, social, and practical.”<sup>117</sup> Conceptual reasoning is the academic arena and includes areas such as “memory, language, reading, writing, [and] math reasoning.”<sup>118</sup> The social arena measures an individual’s “awareness of others’ thoughts, feelings, and experiences” as well as their own ability to communicate with others.<sup>119</sup> The third arena encompassed by the second prong, an individual’s practical adaptive reasoning, is measured by his ability to maintain a job, financial responsibility, and his own self-care.<sup>120</sup> The second prong of an intellectual disability diagnosis will be satisfied when an individual is deficient in any one of these three arenas.<sup>121</sup>

For a proper diagnosis under the APA standards, all three prongs must be satisfied and “the deficits in adaptive functioning must be directly related to the intellectual impairments” under the first prong.<sup>122</sup> Therefore, the

113. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2003).

114. *Id.*

115. See DSM-5, *supra* note 65, at 37 (“[A] person with an IQ score above [seventy] may have such severe adaptive behavior problems . . . that the person’s actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.”).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See *id.* at 38 (“Criterion B is met when at least one domain of adaptive functioning . . . is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community.”).

122. *Id.* The CCA refers to this as the “relatedness requirement.” See *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015) (“In making a relatedness determination, the factfinder may consider the seven evidentiary factors that we developed in *Briseno* . . .”), *vacated*, 137 S. Ct. 1039 (2017).

CCA reasoned the *Briseno* factors, although based on an outdated diagnostic manual, were still “adequately ‘informed by the medical community’s diagnostic framework.’”<sup>123</sup> However, under the current standards employed by the AAIDD, this relatedness is no longer required.<sup>124</sup> In their criticism of the CCA, the Court never explicitly instructs states to employ the AAIDD standard in place of the APA standard and omit the requirement of relatedness between the first and second prong. However, the Court goes on to emphasize the absence of the relatedness requirement from Texas statutes establishing standards for determining intellectual disability in areas other than capital punishment.<sup>125</sup> Therefore, in drafting a *Moore*-compliant statute, the Texas Legislature should utilize this current three-prong definition of intellectual disability without the relatedness requirement.

C. *A Proposed Method Should Rely on Current Diagnostic Standards Established by Medical and Psychological Experts*

In *Atkins*, the Supreme Court gave the states the authority to establish their own method to enforce their rulings.<sup>126</sup> Twelve years later, in *Hall*, the Court narrowed the authority given to the states by holding that such authority did not allow the states to disregard current medical standards.<sup>127</sup> The Court’s criticism of the *Briseno* factors focused on multiple ways in which the factors failed to follow current standards in diagnosing intellectual disability.<sup>128</sup> Therefore, in order to be *Moore*-compliant, a proposed method should, at a minimum, utilize current diagnostic standards.

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123. *Ex parte Moore*, 470 S.W.3d at 487 (quoting *Hall v. Florida*, 572 U.S. 701, 722–23 (2014)).

124. *See Moore*, 137 S. Ct. at 1055 (Roberts, J., dissenting) (“By the time *Moore*’s case reached the CCA, the AAIDD no longer included the requirement that adaptive deficits be ‘related’ to intellectual functioning.”).

125. *See id.* at 1052 (“[I]he relatedness requirement Texas defends here is conspicuously absent from the standards the State uses to assess students for intellectual disabilities.” (citation omitted)); accord 19 TEX. ADMIN. CODE § 89.1040(c)(5) (providing guidelines for determining intellectual disability of a student); 37 TEX. ADMIN. CODE § 380.8751(e)(3) (outlining the standard for diagnosing intellectual disability for juvenile offenders).

126. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

127. *Hall v. Florida*, 572 U.S. 701, 712, 723 (2014).

128. *See Moore*, 137 S. Ct. at 1053 (“By rejecting the habeas court’s application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the ‘medical community’s diagnostic framework[.]’” (quoting *Hall*, 572 U.S. at 721 (2014))).

### 1. Current Diagnostic Standards Require Equal Assessment of All Three Prongs to Determine Intellectual Disability

As explained above, in Section B, individuals with an IQ score above seventy can still be diagnosed intellectually disabled due to more severe limitations in their adaptive functioning.<sup>129</sup> This is the point where states attempting to comply with *Atkins* have gone awry. A few states, including Florida, refused to allow any evidence of limitations in adaptive behavior, the second prong of the intellectual disability determination, if an individual had an IQ score above seventy.<sup>130</sup> The Supreme Court invalidated this bright-line cut off because it considered an IQ score as conclusive evidence of intellectual disability contrary to professional standards.<sup>131</sup> Similarly, the Supreme Court criticized Texas for failing to comply with *Hall*, and proceeded to the second prong of diagnosis when Moore's score was "close to, but above, [seventy][.]"<sup>132</sup> Factoring in the five points of standard measurement error into Moore's score of seventy-four produces a score below seventy.<sup>133</sup> Thus, because Moore's IQ range was below seventy, the CCA was required to proceed to the second prong and evaluate his adaptive behavior.<sup>134</sup>

In order to comply with the current medical and professional standards, the proposed Texas method should embody a more holistic approach by

129. See DSM-5, *supra* note 65, at 33 ("The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required.")

130. *E.g.*, *Cherry v. State*, 959 So. 2d 702, 712, 714 (Fla. 2007) (construing section 921.137 of the Florida Statute as establishing a bright-line cut off for intellectual disability at an IQ of seventy and refusing to allow the defendant to present evidence of the second prong of the intellectual disability determination because of an IQ score of seventy-two), *abrogated by*, *Hall*, 572 U.S. 701.

131. See *Hall*, 572 U.S. at 712 ("Florida's rule disregards established medical practice . . . . It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence.")

132. See *Moore*, 137 S. Ct. at 1049 ("The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*. *Hall* instructs that, where an IQ score is close to, but above, [seventy], courts must account for the test's 'standard error of measurement.'" (quoting *Hall*, 572 U.S. at 724)).

133. *Id.*; see also Leigh D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability: Not So Simple*, 23 CRIM. JUST. 21, 23 (2017) (explaining the standard error of measurement generally accepted by psychologists is five IQ points).

134. See *Moore*, 137 S. Ct. at 1050 ("[I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.")



evaluating all evidence of intellectual disability equally.<sup>135</sup> Current standards used by mental health professionals still use an IQ score, not as conclusive proof of a disability or lack thereof, but as one of multiple factors to consider when making a diagnosis.<sup>136</sup> Therefore, a proposed method should instruct trial courts to allow defendants making an *Atkins* claim to present evidence of their IQ score *and* evidence of their adaptive behaviors to be considered as a whole.<sup>137</sup> Including such an instruction would ensure the proposed method was informed by current mental health standards and in compliance with *Hall* and *Moore*.<sup>138</sup>

## 2. Current Diagnostic Standards for Adaptive Deficits

At his habeas hearing, Moore presented strong evidence of limitations in his adaptive behaviors, such as inability to conform to social norms and low levels of reading, writing, and mathematical skills.<sup>139</sup> The habeas court focused solely on the deficiencies in Moore's adaptive behaviors and thus found him to be intellectually disabled and exempt from execution.<sup>140</sup> In their denial of relief, the CCA faulted the habeas court for failing to also consider Moore's adaptive strengths.<sup>141</sup> The CCA then proceeded to catalog the "adaptive strengths" Moore had developed "by living on the street, playing pool and mowing lawns for money" and through the

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135. See APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 8 ("A comprehensive assessment must be 'based on multiple data points' that 'include giving equal consideration to significant limitations in adaptive behavior and intellectual functioning.'" (quoting ROBERT L. SCHALOCK ET AL., INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 28 (11th ed. 2010))).

136. *Id.*

137. See *id.* ("The criteria to diagnose intellectual disability are not evaluated separately, in disjunctive inquiries, but are rather considered together during a clinical evaluation by a mental health professional." (citing DSM-5, *supra* note 65, at 37)); see also *Ex parte Moore*, 470 S.W.3d 481, 535 (Tex. Crim. App. 2015) (Alcala, J., dissenting) (declining to join the majority because their determination of Moore not being intellectually disabled based solely on in IQ score was contrary to the holding in *Hall*), *vacated*, 137 S. Ct. 1039 (2017).

138. See *Moore*, 137 S. Ct. at 1049 (ruling the Texas method in violation of *Hall* for their view of IQ score and for their failure to be aligned with current medical standards); *Hall v. Florida*, 572 U.S. 701, 721 (2014) (holding a determination of intellectual disability must be "informed by the views of medical experts" and courts may not consider an IQ score as conclusive evidence of intellectual disability); see also DSM-5, *supra* note 65, at 37 ("The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive function.").

139. *Ex parte Moore*, 470 S.W.3d at 520, 522.

140. *Id.* at 484, 489.

141. See *id.* at 489 ("The habeas court therefore additionally erred to the extent that it . . . considered only weaknesses in applicant's functional abilities.").

knowledgeable way in which he committed the instant offense.<sup>142</sup> The CCA used Moore's adaptive strengths to counteract his deficits and, as a result, held he failed to prove "he [had] significant . . . limitations in adaptive functioning."<sup>143</sup> The Supreme Court opined the CCA erred in considering any adaptive strengths Moore had, especially those developed in prison.<sup>144</sup> These considerations are contrary to current diagnostic standards.<sup>145</sup>

In diagnosing intellectual disability, mental health experts focus only on an individual's limitations in their adaptive behaviors— "things that an individual *cannot* do in everyday life."<sup>146</sup> Similarly, current diagnostic standards disregard any adaptive behaviors acquired while incarcerated.<sup>147</sup> Those adaptive behaviors, because developed in such a controlled environment, are not accurate assessments of the individual's limitations in everyday life.<sup>148</sup>

The CCA further deviated from current "clinical practice by requiring Moore to show that his adaptive deficits were not related to 'a personality disorder.'"<sup>149</sup> The CCA employed the *Briseno* factors to make the "relatedness determination"—that the individual's limitations in adaptive behaviors was related to the first prong, their limited intellectual functioning.<sup>150</sup> Under this method, an individual failing to prove his deficits in adaptive functioning were not related to another cause, like a personality disorder, would not be considered intellectually disabled and thus exempt from execution.<sup>151</sup> Mental health experts condemn this

142. *Moore*, 137 S. Ct. at 1047 (citing *Ex parte Moore*, 470 S.W.3d at 522–23).

143. *Ex parte Moore*, 470 S.W.3d at 520, 524–25.

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

145. *See id.* ("Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits[.] But the medical community focuses on the adaptive-functioning inquiry on adaptive *deficits*." (citations omitted)).

146. AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 15; accord APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 13 ("[M]ental health professionals agree that intellectual disability can and should be diagnosed where there are sufficient *deficits* in adaptive functioning. That remains true even if the individual has relative strengths in other areas.").

147. *See Moore*, 137 S. Ct. at 1050 ("Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as prison surely is." (quoting DSM-5, *supra* note 65, at 38)).

148. *See* AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 16 n.17 ("Clinicians agree that prison behavior is not a valid measure of an individual's real-life functioning.").

149. *Moore*, 137 S. Ct. at 1051 (2017) (quoting *Ex parte Moore*, 470 S.W.3d 481, 488 (Tex. Crim. App. 2015), *vacated*, 137 S. Ct. 1039 (2017)).

150. *Ex parte Moore*, 470 S.W.3d at 489.

151. *See id.* at 488 ("[I]t is not sufficient for an applicant to establish by a preponderance of the evidence that he has significantly sub-average general intellectual functioning and significant limitations in adaptive functioning. An applicant must also demonstrate . . . that his adaptive behavior deficits are

relatedness requirement based on a longstanding understanding that individuals diagnosed with intellectual disability are likely to also be afflicted with other physical or mental conditions.<sup>152</sup> Therefore, the presence of any other cause or disorder should not preclude a finding of intellectual disability.<sup>153</sup>

Based on the above criticisms and accepted standards, a proposed Texas method should include the following instructions for trial courts assessing the second prong of intellectual disability: (1) the fact-finder should only consider an individual's limitations in adaptive functioning, no consideration of adaptive skills should be made; (2) the fact-finder should consider only adaptive deficits developed outside of a controlled environment; and (3) the fact-finder should not require the individual to prove his adaptive deficits are not related to any other co-occurring disorder.<sup>154</sup> Including these instructions ensures compliance with *Moore* and accepted standards

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related to significantly sub-average general intellectual functioning rather than some other cause.” (citations omitted) (citing *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010)); see also *Ex parte Blue*, 230 S.W.3d 151, 163–65 (Tex. Crim. App. 2007) (denying applicant's claim of intellectual disability because he failed to prove his limitations in adaptive functioning were related to impaired intellectual ability and not to other causes, like poverty).

152. See *Moore*, 137 S. Ct. at 1051 (“As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments . . . .” (citing DSM-5, *supra* note 65, at 40)); see also AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 20 (“Many individuals who have intellectual disability also have other mental or physical disabilities. Co-existing conditions . . . can arise in the evaluation process in some *Atkins* cases. This phenomenon has long been recognized by clinicians and mental health professionals.”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 19 (“[P]ersons with intellectual disability are three to four times more likely to have co-occurring mental disorders—with personality disorders being one type of many such disorders—than the general population.” (citing DSM-5, *supra* note 65, at 40)).

153. See AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 22 (“The fact that an individual who has intellectual disability also has another mental condition or mental illness does not alter the diagnostic process.”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 19 (“The existence of a personality disorder or other mental health issue is emphatically not evidence that a person does not also have an intellectual disability.” (citing Jannelien Weiland et al., *The Prevalence of Personality Disorders in Psychiatric Outpatients with Borderline Intellectual Functioning: Comparison with Outpatients from Regular Mental Health Care and Outpatients with Mild Intellectual Disabilities*, 69 NORDIC J. PSYCHIATRY 599, 602 (2015); NATIONAL ASS'N FOR THE DUALY DIAGNOSED, *DIAGNOSTIC MANUAL—INTELLECTUAL DISABILITY: A TEXTBOOK OF DIAGNOSIS OF MENTAL DISORDERS IN PERSONS WITH INTELLECTUAL DISABILITY* 248–49 (Robert J. Fletcher et al. eds., 2007); *Lambert v. State*, 126 P.3d 646, 655 (Okla. Crim. App. 2005))).

154. This third instruction would be unnecessary if the proposed method included the currently accepted definition of intellectual disability as suggested in Part III, Section B, which does away with the relatedness requirement.

employed by the AAIDD and the APA.<sup>155</sup>

D. *A Proposed Method Should Include Only Definitions and Standards Utilized by Professionals and Exclude Any Stereotypes Associated with Intellectual Disability*

In order for intellectually disabled offenders to be exempt from execution in Texas, the *Briseno* court required those offenders to meet the standards that the majority of its citizens would consider to be disabled.<sup>156</sup> Consideration of these nonprofessional opinions resulted in the *Briseno* factors including stereotypes of the intellectually disabled.<sup>157</sup> Texas's inclusion of stereotypes has received criticism from both the Supreme Court and mental health experts.<sup>158</sup> Inclusion of subjective, non-medical factors could lead to the execution of an individual with an intellectual disability.<sup>159</sup> Therefore, a proposed method should avoid including any considerations or opinions of stereotypes or non-professionals when making a determination of intellectual disability.<sup>160</sup> The suggestions to a proposed method included above strictly follow current diagnostic standards. Thus, following the suggestions would ensure a new method would exclude any stereotypes.

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155. See *Moore*, 137 S. Ct. at 1052–53 (abrogating Texas's *Briseno* factors for multiple reasons, including their failure to follow diagnostic standards utilized by mental health professionals); AAIDD Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 19–20, 28 (presenting to the Supreme Court the current, clinically accepted standards in diagnosing intellectual disability and addressing the ways in which the Texas method deviates from those standards); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 16–17 (detailing to the Supreme Court the ways in which the *Briseno* factors fail to be informed by experts or have any basis in science or medicine).

156. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004), *abrogated by Moore*, 137 S. Ct. 1039.

157. *Moore*, 137 S. Ct. at 1051; see *Briseno*, 135 S.W.3d at 8 (providing all seven, nonclinical factors, the first being: “Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?”).

158. See *Moore*, 137 S. Ct. at 1051–52 (explaining the risk of execution presented to mildly intellectually disabled offenders by the subjectivity of the *Briseno* factors); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 16–17 (“[T]he factors Texas allows factfinders to use to determine eligibility for relief under *Atkins* distort the assessment of adaptive functioning by . . . relying on stereotypes of intellectual disability . . .”).

159. APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 17, 26.

160. *Ex parte Moore*, 470 S.W.3d 481, 539–40 (Tex. Crim. App. 2015) (Alcala, J., dissenting), *vacated*, 137 S. Ct. 1039 (2017); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 26.

E. *When Formulating a Proposed Method, Mental Health Professionals Should Be Consulted*

The suggestions provided above are the bare minimum which would ensure a new method is in compliance with *Atkins*, *Hall*, and *Moore*.<sup>161</sup> As explained, the most vital aspect of crafting a new method to determine intellectual disability is ensuring it is aligned with current diagnostic standards utilized by mental health professionals.<sup>162</sup> The *Briseno* factors were judge-made law, formulated by the judges at the CCA, who are experts in law but not necessarily experts in diagnosing intellectual disability.<sup>163</sup> Lawmakers have greater access to those experts through advisory committees and advocacy groups comprised of professionals in the field providing the most up-to-date information.<sup>164</sup> Therefore, the Texas Legislature is better positioned to create new law to replace the *Briseno* factors. In order to ensure a new method is in compliance with the most current standards, the Texas Legislature should utilize these resources when formulating a new method for courts to follow when determining exemption from capital punishment.

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161. See *Moore*, 137 S. Ct. at 1044 (abrogating the *Briseno* factors and outlining the ways in which they are unconstitutional); *Hall v. Florida*, 572 U.S. 701, 722–23 (2014) (rejecting a bright-line IQ cutoff method and requiring the states' methods to be informed by currently accepted medical standards); *Atkins v. Virginia*, 536 U.S. 304, 317, 321 (2002) (prohibiting the execution of all intellectually disabled persons but leaving to the states to determine which offenders qualify).

162. See *Petetan v. State*, No. AP-77,038, 2017 WL 915530, at \*50 (Tex. Crim. App. Mar. 8, 2017) (Alcala, J., dissenting) (detailing why a new Texas method should be based on current diagnostic standards in order to comply with *Hall v. Florida*); *Ex parte Moore*, 470 S.W.3d at 531–34 (explaining why, based on precedence, “[t]he Supreme Court [r]equires a [c]ourt to [c]onsider [c]urrent [m]edical [s]tandards in [e]valuating [w]hether the [e]vidence [e]stablishes the [t]here-[p]ronged [g]eneral [s]tandard for [i]ntellectual [d]isability”); APA Amici Curiae Brief Supporting Petitioner, *supra* note 72, at 26 (imploing the Supreme Court to strike down the *Briseno* factors for failing to align with current diagnostic standards).

163. See *Moore*, 137 S. Ct. at 1054 (Roberts, J., dissenting) (“[C]linicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment.”).

164. See *Intellectual and Developmental Disability System Redesign Advisory Committee*, TEX. HEALTH & HUM. SERVS., <https://hhs.texas.gov/about-hhs/leadership/advisory-committees/intellectual-developmental-disability-system-redesign-advisory-committee> [perma.cc/2UDA-HBSN] (providing information on a committee which advises governmental agencies on the support needed by the intellectually disabled to effectively implement a new senate bill); *Mission, History, and Achievements*, ARC TEX., <https://www.thearcoftexas.org/who-we-are/> [perma.cc/E7WQ-NLU9] (detailing the goals and achievements the advocacy group has had for the intellectually disabled through the Texas Legislature).

## IV. CONCLUSION

Since its statehood, the death penalty has had deep roots in Texas, causing it to be the deadliest state in the Union.<sup>165</sup> The strong support capital punishment finds in Texas makes abolishment unlikely, unless federally mandated. However, in recent years, Texas has been forced to narrow their scope of capital punishment as a result of limitations imposed by the Supreme Court, including exclusion of the intellectually disabled. Through their prohibition, the Supreme Court left to the states the authority to develop their own methods for determining intellectual disability without providing any guidance to ensure the developed methods were constitutional. As a result, the states developed a myriad of methods, some of which were later declared unconstitutional, including Texas's. The Supreme Court's opinion in *Moore v. Texas* was a call to the Texas Legislature to formulate a new, constitutional method. In their formulation of a new method to determine intellectual disability, the Texas Legislature should consider the following suggestions: utilize current definitions, rely on current diagnostic standards, including equally considering evidence of all three prongs, focus only on adaptive deficits developed outside of a controlled environment, and not requiring the deficits be independent of any other disorders. By following these suggestions, the Texas Legislature can ensure their method will comply with *Moore*, *Hall*, and *Atkins*.

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165. *Facts About the Death Penalty*, *supra* note 5.