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Atkins v. Virginia at Twenty: Still Adaptive Deficits, Still in the Developmental Period

Sheri Lynn Johnson, John H. Blume & Brendan Van Winkle*

Abstract

Twenty years ago, in Atkins v. Virginia, the Supreme Court of the United States held that the Eighth Amendment prohibited states from executing persons with intellectual disability. While the Court's decision is laudable and has saved many of the most vulnerable persons from the executioner, its effect has been undermined by recalcitrant states attempting to exploit language in the opinion permitting states to create procedures to implement the (then) new categorical prohibition. In this article, we examine how some states have adopted procedures which are fundamentally inconsistent with the clinical consensus understanding of the disability and how one state, Georgia, has through the use of juries and a crippling burden of proof, rendered Atkins a nullity. Although the Court has intervened to prohibit some of these practices, it has not granted certiorari to consider others, including Georgia's. And due to limits the Court has put on federal habeas corpus relief, many persons who fall within the Court's categorical bar prohibiting persons with intellectual disability from being sentenced to death or executed, have no effective state or federal remedy.

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Table of Contents

I. Introduction 56

II. Atkins v. Virginia: The Creation of the Categorical Ban........ 60

III. State Procedural Obstacles to Realizing Atkins' Protection . 65
A. Jury Decisionmaking 67
B. The Standard of Proof........ 79
1. Georgia's Standard of Proof 79
2. Constitutional Constraints 83
3. Specific Barriers to Finding Intellectual Disability Beyond a Reasonable Doubt........ 85
4. BARD, Atkins, and the Supreme Court 93
C. Rejecting the Ford Analogy 95

IV. Substantive Deviations from the Diagnostic Criteria for Intellectual Disability........ 96
A. IQ Cut-Offs 96
B. Distorted Definitions of Adaptive Functioning Deficits 100
C. Inadequate Federal Habeas Corpus Review 105
1. Giving Undue Deference 106
2. "Rubber Stamping" State Drafted Orders 108
3. Ignoring State Court Deviations From Clinical Consensus 112

V. Conclusion 117

I. Introduction

In 2002, in *Atkins v. Virginia*,[1] the United States Supreme Court held that persons with intellectual disability could not be executed.[2] The Court determined that imposing the ultimate

1. 536 U.S. 304, 321 (2002) (concluding that the execution of intellectually disabled individuals convicted of capital offenses is unconstitutionally cruel and unusual punishment).

2. *See id.* at 310 (describing the rationale the court used to support the holding). At the time of the *Atkins*' decision, intellectual disability was referred to

punishment on individuals with intellectual disability was disproportionate and thus was cruel and unusual punishment barred by the Eighth Amendment.[3] But it continues to happen. This article examines how recalcitrant state courts and legislatures, relying primarily upon a single, ill-advised sentence in the *Atkins* decision, have created procedural and substantive obstacles that often effectively nullify the constitutional ban and how the federal courts, often equally recalcitrant, have, for the most part, refused to intervene.

State pushback against *Atkins* has come in different forms. Some states placed the decision in the hands of juries, which essentially never find a capital defendant to be a person with intellectual disability.[4] One state, Georgia, not only gives the decision to the jury, but it also requires the defendant to prove beyond a reasonable doubt that he (and virtually always, he not she) is a person with intellectual disability.[5] Not surprisingly, no Georgia defendant has been able to do so.[6] Other states have limited *Atkins*'s effect by modifying the definition of intellectual disability to make it more difficult to prove. Florida, for example, established a hard IQ score cutoff of seventy, and if a defendant did not have an IQ score of seventy or below, the intellectual

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as mental retardation. We will use the current term, intellectual disability, unless we are quoting a source that refers to the disability as "mental retardation."

3. *See id.* at 321 ("[T]he Constitution places a substantive restriction on the State's power to take the life of [an individual with intellectual disabilities who is convicted of a capital offense].").

4. *See* John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins*, 23 WM. & MARY BILL RTS. J. 394 (2014) (describing how juries are used as a tool by states to nullify the Atkins decision).

5. *See* Ga. Code Ann. § 17-7-131(c)(3) ("'Mentally ill' means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term 'mental illness' shall not include a mental state manifested only by repeated unlawful or antisocial conduct.").

6. *See Disability Rights Groups, Legal Experts, and Conservative Advocates Urge Supreme Court to Strike Down Georgia's Uniquely Harsh Proof Requirements in Death-Penalty Intellectual Disability Cases*, DEATH PENALTY INFO. CTR. (Jan. 11, 2022) ("Since Georgia adopted the standard in 1988, neither Young nor any other defendant tried for intentional murder has ever been able to satisfy it.") [https://perma.cc/59B7-JEK9].

disability assertion failed as a matter of law.[7] Similarly, Texas established additional factors (beyond the clinical criteria) that a person claiming intellectual disability would have to prove to prevail.[8] Neither Florida's nor Texas's deviation from the agreed upon, long-standing definition of intellectual disability had any support in the scientific and medical understanding of the disorder.[9] Their only purpose was to defeat otherwise meritorious claims. The Supreme Court intervened to fix some of these state deviations, but it has refused to apply them to cases decided before the high court's intervention.[10]

After having their claims rejected by the state courts, these same persons turn to the federal courts for redress. And there, many strong claims of intellectual disability also lose, most often do so as a result of 28 U.S.C. § 2254(d)'s "limitation on relief,"[11] which requires federal courts to defer to even clearly erroneous state court decisions unless they are so unreasonable that no "fairminded jurist" would agree with the state court's decision rejecting the death sentenced inmate's claim of intellectual disability.[12] This "extreme malfunction" requirement and other aspects of habeas corpus law, including that the state court decision must be objectively unreasonable under "clearly

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7. *See* Cherry v. State, 959 So.2d 702, 712–13 (Fla. 2007) (declining to find that a defendant with an IQ of 72 and "subveraverage intellectual functioning" was intellectually disabled).

8. *See Ex parte* Briseno, 135 S.W.3d 1, 4–9 (Tex. Crim. App. 2004) (denying the applicant's contention that he was entitled to a jury determination of intellectual disability; finding instead, that IQ tests of 72 and 74 did not meet the preponderance of evidence standard required for the applicant to assert an intellectual disability).

9. *See id.* (underscoring that Texas and Florida both utilized IQ metrics in a manner not in accordance with the recommendations of the scientific and medical community).

10. *See* Shoop v. Hill, 139 S. Ct. 504, 509 (2019) (explaining that *Atkins* did not provide an explicit mechanicsm for determining intellectual disabilities and that the defendant may not use *Moore* as clearly established law because it decided after the court decided the defendant's claim).

11. *See* 28 U.S.C. § 2254(d)(1) ("An application for a writ of habeas corpus on behalf of a person . . . shall not be granted . . . unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . .").

12. *See* Harrington v. Richter, 562 U.S. 86, 101 (2011) (providing the standard for limitation on relief) (quoting Yarborough v. Alvarado, 541. U.S. 652, 664 (2004)).

established" Supreme Court law at the time of the state court decision, both encourage state recalcitrance and have doomed many meritorious claims of intellectual disability.[13]

By no means are we saying that *Atkins* has been a complete failure; far from it. A significant number of people with intellectual disability have been removed from death row or spared the death penalty because of *Atkins* categorical ban.[14] Those numbers continue to rise. However, the glass is only half-full, as many other persons that should be ineligible for the death penalty have had their assertions of intellectual disability rejected.[15] Without greater judicial or legislative commitment to enforcing the underlying *Atkins* right, which currently seems unlikely, the uneven enforcement of the prohibition against executing persons with intellectual disability will continue rendering the death penalty, at least for this category of offenders, arbitrary and capricious.

After describing the *Atkins* decision in Part I,[16] we will examine in more detail some of the procedural roadblocks that states use to limit *Atkins*' reach in Part II.[17] Part III will explore several significant substantive deviations from the clinical consensus definition of intellectual disability which have resulted in the execution of persons with intellectual disability, and describe how continued state recalcitrance after corrective Supreme Court decisions.[18] We finish our review of the roadblocks to *Atkins* implementation in Part IV by explaining why federal

13. *See id.* at 102–03 ("Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.") (quoting Jackson v. Virginia, 443 U.S. 307, 332, n5 (1979) (Stevens, J., concurring).

14. *See* Blume et al., *supra* note 4 (explaining that the *Atkins* categorical ban successfully spared a number of intellectually disabled individuals from capital punishment).

15. *See id.* at 399 (articulating that the *Atkins* categorical ban falls short of complete success because it leaves room for states to modify their definitions of intellectual disability making it more difficult for individuals who are typically considered to have intellectual disabilities to successfully assert Eighth Amendment claims).

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

habeas corpus has been an inadequate backstop for state recalcitrance.[19]

II. Atkins v. Virginia*: The Creation of the Categorical Ban*

More than twenty-five years ago, Daryl Atkins was charged with capital murder in the Commonwealth of Virginia.[20] Because of an initial state appellate reversal, he was twice convicted and twice sentenced to death.[21] At both trials and in both appeals to the Virginia Supreme Court, Atkins maintained that he could not be sentenced to death because he was a person with intellectual disability and that the execution of any person with intellectual disability violated the Eighth Amendment's ban on cruel and unusual punishment.[22] There was, however, one significant obstacle to Atkins' legal arguments: the United States Supreme Court's decision in *Penry v. Lynaugh*.[23]

Johnny Paul Penry, a Texas death row inmate, had made the same claim more than a decade earlier.[24] When his case reached the Supreme Court, a majority of its members surveyed state practices, identified only a handful of death penalty jurisdictions that barred capital punishment for persons with mental retardation, and concluded there was no national consensus barring the practice.[25] Because the identification of such a consensus was a necessary prerequisite to finding that the execution of a particular category of offenders was cruel and

19. *See infra* Part IV.

20. *See* Atkins v. Virginia, 536 U.S. 304, 307 (2002) (describing key facts related to the *Atkins* case).

21. *See* Lauren Brasher, *Constitutional Law-Eighth Amendment-Constraints on the Execution of the Mentally Incompetent. Madison v. Alabama, 139 S. Ct. 718 (2019)*, 50 CUMB. L. REV. 249, 254–55 (2020) (providing a brief summary of the procedural facts associated with Atkins' claim).

22. *See* Mark E. Olive, *The Daryl Atkins Story*, 23 WM. & MARY BILL RTS. J. 363, 365 (2014) (stating that Daryl Atkins was charged with murder in 1996).

23. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (concluding that the Eighth Amendment does not categorically bar death sentences for individuals with intellectual disabilities).

24. *See id.* at 306–07 (describing the circumstances surrounding Penry's conviction).

25. *See id.* at 335 (explaining the status of national consensus for barring capital punishment for the individuals with intellectual disabilities).

unusual, the Court rejected Penry's claim.[26] Thus, both before and after *Penry*, the legal significance of a capital defendant being a person with intellectual disability was left to the states; many of which, in turn, left it to juries to consider in individual cases whether it amounted to a good enough reason to ultimately spare the defendant's life.[27]

Working in Atkins's favor, however, was that after *Penry* state legislatures began banning the death penalty for people with intellectual disability.[28] Thus, after the Virginia Supreme Court rejected Atkins's contention that his death sentence was inconsistent with the "evolving standards of decency" that inform the Eighth Amendment's cruel and unusual punishment ban, the Supreme Court of the United State granted his petition for a writ of certiorari to determine, for a second time, whether persons with intellectual disability could be sentenced to death.[29] A six-to-three majority, in an opinion authored by Justice Stevens, ultimately concluded the Eighth Amendment prohibited doing so.[30]

The Court's decision in *Atkins* has been widely discussed and thus for the purposes of this article, only a relatively brief

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26. *See id.* (explaining that the Court rejected Penry's claim because there was no national consensus on barring capital punishment for individuals with intellectual disabilities).

27. David L. Faigman, Emily V. Shaw, & Nicholas Scurich, *Intellectual Disability, The Death Penalty, and Jurors*, 58 JURIMETRICS J. 437, 441–42 (2018) (explaining how capital cases for people with intellectual disabilities are adjudicated).

28. *See* Atkins v. Virginia 536 U.S. 304, 314–15 (2002) (providing a timeline for when state legislators effectuated bans on the death penalty for people with intellectual disabilities).

29. The Court first granted certiorari in *McCarver v. North Carolina*, 548 S.E.2d 522 (N.C. 2001), cert. granted, 532 U.S. 941 (2001), a North Carolina case that also asked the Court to revisit *Penry* and declare that executing persons with mental retardation violated the Eighth Amendment. Pursuant to long standing Supreme Court practice, Atkins's case was "held" by the Court while it decided the North Carolina case. However, the Court replaced *McCarver* with *Atkins v. Virginia* after North Carolina passed a statute barring the execution of persons with mental retardation thus making the *McCarver* case moot. *See* Olive *supra* note 22, at 365–66 (describing pre-*Atkins* cases).

30. *See Atkins*, 536 U.S. at 321 (2002) (explaining that the culmination of Atkins' second writ of certiorari was a determination that the eighth amendment prohibited capital punishment for the intellectually disabled).

summary of the Court's reasoning is necessary.[31] After reiterating that proportionality, as measured by current standards, was an integral part of any Eighth Amendment analysis, the Court stated that the most "objective" and "reliable" evidence of whether the death penalty was an excessive (and thus disproportionate) punishment for persons with intellectual disability would be found in state legislative enactments and jury verdicts.[32] Then, in the course of reviewing the legislative landscape at the time, the Court observed that while at the time it decided *Penry,* only two death penalty states and the federal government prohibited the death penalty for offenders with intellectual disability, since that time, an additional sixteen states had taken death off the punishment table for this category of persons.[33] Moreover, the Court noted, "i[t] is not so much the number of these States that is significant, but the consistency of the direction of change."[34] Given "the well-known . . . [popularity of] anticrime legislation," the Court believed that this trend was "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[35] The Court also observed that even in those states that retained the death penalty for persons with intellectual disability, only a small handful had actually executed a person with intellectual disability in the post-

31. For a more detailed discussion of *Penry* and *Atkins*, *see* Marc J. Tassé & John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies*, Chapter 2 (2018) (noting the relevance of the *Atkins* decision to this article).

32. According to the *Atkins* majority, the core Eighth Amendment concept is the "dignity of man" and thus, its constitutional content must be informed by "the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311–12 (explaining that the most objective and reasonable evidence of whether the death penality is an excessive punishment for persons with intellectual disability can be found from legislative enactiments and jury verdicts).

33. *See id.* at 314–15 (providing historical background and showing that more and more states are rejecting the death penalty on people who deal with mental illness).

34. *See id.* at 315 (stating that times are changing and that more states are agreeing on being against the death penalty for people who have intellectual disabilities).

35. *See id.* at 315–16 (emphasizing the fact that there is a growing trend in even our society that metnally ill people are shown more sympathy than the average criminal).

Penry era.[36] Taking all of this into account, including the opinions of social and professional organizations with "germane expertise," the Court concluded that "a national consensus has developed" against executing persons with intellectual disability.[37]

As it had done when creating other bars to execution for categories of offenders or offenses, the Court then brought its own judgment to bear as to whether to accept the consensus.[38] It first looked to the "relative culpability of mentally retarded offenders," in view of the penological purposes served by the death penalty.[39] After noting that persons with intellectual disability "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," the Court concluded that neither justification advanced by states in support of the death penalty—retribution and deterrence—were served by permitting their execution.[40] Thus, the Court accepted the consensus as legitimate and held that the Constitution "places a substantive restriction on the State's power to take the life of a mentally retarded offender."[41]

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36. *See id.* at 316 (observing that states that still sentenced the death penalty to people of intellectual disabilities had a difficult time sentencing those people to death).

37. *See id.* at 317 (reiterating the fact that there are growing concern about sentencing people with intelectual disability).

38. *See id.* (explaining that the Court took matters in own hands and made a decision).

39. *See id.* (examining the first step of the consensus that States have developed).

40. *See id.* at 318. Because retribution "depends on the culpability of the offender," the Court found that the death penalty, society's most extreme punishment, was excessive due to the "lesser culpability of the mentally retarded offender." *Id.* at 319. The Court also concluded that deterrence interests are not served by the execution of offenders with intellectual disabilities because "capital punishment can [only] serve as a deterrent when [a crime] is the result of premeditation and deliberation," and the threat of death "will inhibit criminal actors from carrying out murderous conduct," but that this type "of calculus is at the opposite end of the spectrum from [the] behavior of [the] mentally retarded" due to their cognitive and behavioral impairments. *Id.* at 319–320.

41. *See id.* at 321 (emphasizing that the Court and the Constitution accepted the consensus and restricted States from taking the life of a mentally ill offender).

Two other aspects of the *Atkins* decision are worth noting before turning to the Court's more recent decisions in this area. First, on the positive side of the ledger, the Court did, at least implicitly, embrace clinical definitions of intellectual disability and scientific means of assessing intellectual functioning. In footnote three of the majority opinion—in the course of discussing the trial evidence that Atkins was "mildly mentally retarded"—Justice Stevens relied upon both the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association's ("APA") virtually identical definitions of mental retardation set forth in Mental Retardation: Definition, Classification and Systems of Supports 5 (9th Ed. 1992) and the Diagnostic and Statistical Manual of Mental Disorders Forty-One (4th Ed. 2000) respectively.[42] Both definitions included the clinically accepted three prongs: (1) significantly subaverage intellectual functioning; existing concurrently with (2) significant limitations in adaptive functioning; and (3) manifestation or onset prior to the age of eighteen.[43]

Second, the Court observed that "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[44] Noting that the Commonwealth disputed that Atkins "suffers from mental retardation," the Court concluded as it had done in a different death penalty context when it created a categorical bar to the execution of persons who were insane or incompetent at the time of their execution, "'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[45] As

42. *See id.* at 308 n.3 (stating that a Justice Stevens relied on different sources such as the "AAMR" and "APA" to define and classify whether a person was mentally ill).

43. *See id.* at 318 (providing the three prongs that determine whether a person is mentally ill).

44. *See id.* (stating another aspect of the *Atkins* decision where the Court must determine whether a person was actually mentally ill).

45. *See id.* at 317 (stating that it is up to the states to create a system on whether to execute people with mental illness) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

we have previously observed, this was an extremely unfortunate choice of language.[46]

III. State Procedural Obstacles to Realizing Atkins' *Protection*

When the Supreme Court held in *Atkins* that the execution of a person with intellectual disability[47] violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, it could have mandated procedures for implementing this categorial exemption, but did not do so. To what extent the Supreme Court accompanies the announcement of a new constitutional right with a description of mandated procedures states must use to enforce that right has varied significantly. At one extreme lies *Miranda v. Arizona*,[48] where the extension of the Fifth Amendment privilege against compulsory self-incrimination to police interrogation faced obvious and substantial risks misinterpretation and resistance; there, the Court's opinion supplied extraordinarily detailed instructions regarding its implementation.[49] At the other extreme are cases where the application of a right is likely to be so straightforward, and so little open to dispute that opinion

46. *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. OF L. & PUB. POLICY 689, 691 (2009) (acknowledging the fact that using the word "retarded" or any forms of that word is out of date and unprofessional).

47. *Atkins* established a categorical exemption for persons with "mental retardation," the term professionals employed when *Atkins* was decided, but after the professional terminology shifted to "intellectual disability," the Court followed the professional convention. *See* Hall v. Florida, 572 U.S. 701, 704 (2014) ("Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon.").

48. Miranda v. Arizona, 384 U.S. 436, 471 (1966) (holding that "an individual . . . must be clearly informed [of his] right to consult with a lawyer and to have the lawyer with him during interrogation . . . protecting [his] privilege . . . with the warnings of the right to remain silent [as anything] can be used in evidence against him.").

49. *See e.g.*, Batson v. Kentucky, 476 U.S. 79, 99 (1986) (stating that a prosecutor's racially motivated exercise of the peremptory challenge violates the Equal Protection Clause and establishing a three-step process for determining the presence of racial motivation); *see Miranda*, 384 U.S. at 436 (holding that the Fifth Amendment privilege against compulsory self-incrimination extends to police interrogation and setting forth detailed warnings police must give to protect that privilege).

establishing the right doesn't even refer to how that right will be implemented.[50] In between lie cases where the Court insists upon some procedures but leaves others for the states to determine; for example, when the Court held that a prosecutor's racially motivated exercise of the peremptory challenge violates the Equal Protection Clause, it specified a three step procedure for ascertaining whether the challenge was racially motivated, but explicitly declined to dictate what remedial measures a court should take if it found racial motivation.[51] The *Atkins* opinion acknowledges the question of procedures, but, as noted earlier, explicitly declines to specify any at all, stating, "As was our approach in *Ford v. Wainwright* . . . with regard to insanity [at the time of execution] 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[52]

Whether abstaining from imposing implementing procedures in *Ford* was wise is a question for another day (it wasn't), but it should have been obvious to the Court that there were at least two significant differences between *Ford* and *Atkins*. First, one would expect less resistance to the Court's holding in *Ford* because—unlike a bar against executing persons with intellectual disability—"[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded "savage and inhuman."[53] Second, the significance of procedural options available for determination of intellectual disability are much greater; in particular, both the

50. *See e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2004) (concluding that the Eighth Amendment forbids execution for an offense committed before the defendant was eighteen years of age without discussion of implementation).

51. *See Batson*, 476 U.S. at 99 n. 24 ("[W]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case.").

52. *See* Atkins v. Virginia, 536 U.S. 304, 317 (2002) (reiterating the fact that the Supreme Court allows states to create a way to handle the death penalty situation dealing with mentally ill people) (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

53. *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *24–*25) (explaining that the practice of executing a prisoner who has lost his sanity is not only unjust but also different from executing a prisoner with intellectual disability).

timing of the determination and training of the decisionmaker are up for grabs only in the intellectual disability determination.[54] Third, the *Ford* determination is factually much simpler; most notably, it requires an evaluation of *present* capacity, rather than a retrospective assessment of limitations that existed during the developmental period (as the third prong of intellectual disability requires), a period that for some defendants ended decades earlier.[55]

Twenty years of *Atkins* litigation has demonstrated the significance of these differences between *Atkins* and *Ford* determinations.[56] In particular, two procedural choices that stem from these differences—the choice of some states to assign juries the determination of intellectual disability and the decision of one state to impose an impossible-to-satisfy burden of proof—combined with the Supreme Court's disinterest in considering the shortcomings of procedures selected by the states, have thwarted many meritorious *Atkins* claims.[57]

A. Jury Decisionmaking

Whether because *Ford* determinations occur long after the convicting jury has been dismissed, or because of the deep historical roots of the prohibition against the execution of the

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54. *See id.* at 413 (stating that having procedural options available for determining intellectual disability is important because the timing of the determination and training of the decisionmaker may be a violation of the offender's Eighth Amendment right).

55. The determination of intellectual disability, even when made during the developmental period, is also more complicated because the second prong of an intellectual disability diagnosis, significant adaptive functioning deficits, may be demonstrated in a multitude of ways. *See id.* at 414 (describing the difficulties factfinders face in resolving differences in the presentation of disabilities and psychiatric opinions).

56. *See* Cynthia A. Orpen, *Following in the Footsteps of Ford: Mental Retardation and Capital Punishment Post-Atkins*, 65 U. PITT. L. REV. 83, 97 (2003) (explaining the significance of the differences between *Atkins* and *Ford* determinations, such as burden of proof, appellate procedures, classification, and diagnosis).

57. *See id.* at 95–97 (examining procedural inconsistencies and differences between *Atkins* and *Ford* determinations and the Supreme Court's disinterest in the ineffectiveness of the procedures implemented by the states have belittled the outcome of the *Atkins* claims).

insane, no state has ever attempted to relegate *Ford* determinations to juries, and early *Atkins* determinations also were uniformly assigned to judges.[58] Not surprisingly, states that prior to *Atkins* had no prohibition against the execution of person with intellectual disability were soon confronted with significant (albeit not overwhelming)[59] numbers of *Atkins* claims by death row inmates sentenced to death prior to *Atkins*. All states elected to have such claims decided by judges, sometimes on remand from the state supreme court and sometimes in postconviction proceedings.[60] The obvious reason behind this unanimity paralleled one to the reasons for the unanimous selection of judges as the adjudicators of *Ford* claims: It would be expensive and time-consuming to impanel juries solely for the purpose of determining intellectual disability.[61]

But the adjudication of *Atkins* claims for capital defendants not yet tried was a closer question, one more complicated than that posed with respect to *Ford* claims.[62] In capital cases tried after *Atkins*, the savings to be made by assigning the *Atkins* determination to a judge were still significant, but notably smaller than in cases where the trial had already been completed; in such cases, judicial pretrial determination of *Atkins* ineligibility would

58. *See id.* at 100–01 (explaining that the complexity involved in the consideration of whether or not someone facing the death penalty is intellectually disabled has motivated states to rely almost exclusively on judges to make these decisions).

59. Justice Scalia's dissent in *Atkins* warned of a risk that decision would generate an overwhelming number of frivolous claims. It has not done so. Seven percent of all death row inmates have filed Atkins claim. *See* John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628 (2009) (reporting that six years after *Atkins*, approximately seven percent of death row inmates had filed *Atkins* claims); Blume et al., *supra* note 4, at 396 (reporting that twelve years after *Atkins,* less than eight percent of potentially eligible death row inmates had filed *Atkins* claims).

60. *See* Blume et al., *supra* note 4, at 410 (finding that for pre-*Atkins* claims, all states elected to have a judge make the determination).

61. *See id.* (explaining that impaneling of a jury is costly, and there is a likelihood of reversible error inherent in a jury proceeding thus the unanimous choice is not surprising).

62. *See id.* at 400 (analyzing *Atkins* claims to understand how and why claims of intellectual disability are rejected and noting that 52% of all unsuccessful *Atkins* claimants lost on all three prongs of the test for intellectual disability).

avoid waste only in cases where the *Atkins* claim proved to be meritorious, and in such cases, would not save the entire cost of impaneling a jury, but would be limited to saving the enhanced costs of proceeding with a capital trial rather than a noncapital one.[63] In addition to these possible savings, a legislature or court determining whether judges or juries should make *Atkins* decisions might weigh in favor of judicial determinations the likelihood that judges would develop some *Atkins* expertise and therefore make better decisions.[64] On the other hand, a legislature might prefer jury determinations because they elevate common sense over expertise and preserve the community's will over the judiciary;[65] such a preference can be defended as constitutionally-informed, for in our judicial system, jury trials are not "mere[ly a] procedural formality, but a fundamental reservation of power in our constitutional structure."[66] Relatedly, but less admirably, legislators might prefer jury determination of intellectual disability because they predicted that juries would be more hesitant to exempt murderers from the death penalty and more willing to disregard the testimony of experts when that testimony fails to comport with their beliefs.[67] Such a prediction, however, was far from certain, given that previous empirical studies generally found that judges and juries mostly agreed, and when they disagreed, juries were more lenient,[68] a pattern that is

63. *See* Blume et al., *supra* note 4, at 410 ("[J]udicial determination of intellectual disability would have obviated the need for impaneling a jury, or at least permitted the impaneling of a non-capital-jury a much less costly process.").

64. *See id.* at 411 (noting that judges are more able than jurors to set aside their feelings and correctly apply a legal standard).

65. *See* United States v. Haymond, 139 S. Ct. 2369, 2375 (2019) (applying jury determination); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343–44 (1979) (Rehnquist, J., dissenting) (asserting that having the right to a jury trial preserves the people's authority over the government's judicial functions).

66. *See* Blakely v. Washington, 542 U.S. 296, 305–06 (2004) (giving intelligible content to the right of jury trial).

67. *See* Blume et al., *supra* note 4, at 411 (noting that jurors are harsher in determinations of intellectual disability because they typically cannot set aside their feelings when it comes to heinous crimes).

68. *See id.* (finding that when there are disagreements between juries and judges during criminal cases, juries are likely to be more lenient) (citing NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 148–51 (2007)); *see also* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A*

especially pronounced in capital sentencing.[69] Not surprisingly, given both competing predictions and countervailing interests, some states chose to assign *Atkins* determinations to judges and some chose to assign them to juries.[70]

Ten states (Alabama, Arkansas, Georgia, Louisiana, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, and

Partial Replication of Kalven & Zeisel's The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 173 (2005) (noting that juries are more likely to exhibit leniency in criminal cases); *see also* Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 22–23, 33 (2003); *see* Valerie P. Hans, *What Difference Do Juries Make in Empirical Studies of Judicial Systems?* 105 (K.C. Huang ed., 2009).

69. *See* Michael Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793, 828–33 (2011) (reporting 166 judicial overrides of jury life sentences in Florida); *see also* Equal Justice Initiative, *The Death Penalty in Alabama: Judicial Override* (July 2011) ("Since 1976, Alabama judges have overridden jury verdicts 107 times. In 92% of over-rides elected judges have overruled jury verdicts of life to impose the death penalty. Twenty-one percent of the 199 people currently on Alabama's death row were sentenced to death through judicial override.") [https://perma.cc/2PB3-TYNZ].

70. *See* Blume et al., *supra* note 4, at 411 (showing that state legislatures who choose jury determinations are correct in believing that juries will be more reluctant to find intellectual disability).

Virginia) elected juries,[71] two of which (New Mexico[72] and Virginia[73]) have since abolished the death penalty. One (California) gives a choice to the defendant,[74] and one (South Carolina) requires a pretrial judicial determination, and in the event the judge finds no intellectual disability, allows the defendant to argue the issue to the jury in the penalty phase.[75] The remaining seventeen death penalty states (Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Tennessee, and Utah)[76] as well as the federal and military courts,

71. *See* ALA. CODE § 13A-5-45(a) (1975) (giving the option for the sentencing hearing to be conducted before a trial judge without a jury or before a trial judge and a jury); *see* ARK. CODE ANN. § 5-4-618(d)(2)(B)(i) (1993) (permitting the defendant to raise the question of an intellectual disability to the jury for determination de novo during the sentencing phase of the trial); *see* LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2003) (calling for jury to try the issue of intellectual disability of the capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge); *see* N.C. GEN. STAT. ANN. § 15A-2005(e) (2001) (calling for the court to submit a special issue to the jury as to whether the defendant has an intellectual disability); *see* OKLA. STAT. ANN. Tit. 21, § 701.106(E) (2006) (electing for jury determination of intellectual disability); *see* PA. R. CRIM. P. 844(B) (explaining that upon completion of an argument, the jury shall decides the issue of the defendant's intellectual disability); VA. CODE ANN. § 19.2-264.3:1.1(C) (2003) (calling for the jury determination when it comes to deciding intellectual disability); *see also* Rogers v. State, 653 S.E.2d 31 (Ga. 2007) (electing jury to determine whether the defendant was intellectually disabled); *see also* State v. Flores, 93 P.3d 1264 (N.M. 2004) (relying on the jury to determine whether the defendant was intellectually disabled); *see also* Williams v. State, 270 S.W.3d 112 (Tex. Crim. App. 2008) (assigning the jury the responsibility to determine whether the defendant had an intellectual disability).

72. *See* H.B. 285, 49th Leg., 1st Sess., Section 6 (N.M. 2009) (abolishing the death penalty in New Mexico) [https://perma.cc/PXP8-HM29].

73. *See* VA CODE ANN. § 19.2-264.3:1.1, *repealed by* Abolition of the Death Penalty Act of 2021, ch. 344, 345, HB 2263 (abolishing the death penalty in Virginia).

74. *See* CAL. PENAL CODE § 1376(b)(1) (West 2003) (allowing the defendant, at a reasonable time, prior to the start of trial, to apply for an order directing that a hearing to determine intellectual disability be conducted).

75. *See* Franklin v. Maynard, 588 S.E.2d 604, 606 (S.C. 2003) (explaining that the defendant may argue the issue to the jury in the penalty phase if the judge finds that the defendant does not have an intellectual disability).

76. *See* Neil Vigdor, *Colorado Abolishes Death Penalty And Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020) (showing that Colorado, New Jersey, and New York have since abolished the death penalty) [https://perma.cc/9J2A-23EF]); *see also* Death Penalty Information Center*, State*

chose judges, though four of those states (Colorado, Illinois, New Jersey, and New York) have since abolished the death penalty.[77]

If the ten states that opted for jury determination did so betting that juries would minimize the number of defendants found to be Atkins ineligible, they won, and won big.[78] When we counted cases in 2014, we estimated that juries had rejected intellectual disability in 96 percent of the cases; in twenty two of twenty three cases, the claims had failed.[79] Moreover, the only *Atkins* jury win likely succeeded because of the legally incorrect instruction that to sentence the defendant to death, the jury had to find beyond a reasonable doubt that he was not a person with intellectual disability.[80] In the eight years since we wrote that article, there have been *no* cases in which *Atkins* claims have prevailed in front of juries. All told, there are now at least 42 *Atkins* jury losses, and only one win.[81] A closer look is even more discouraging; in Louisiana, where eight *Atkins* claims have been presented to juries, not only have none succeeded, but not a single juror has cast a life vote in a case where intellectual disability was raised under the statute.[82]

While there are a variety of ways to calculate success rates in front of judges (should all judicial determinations be counted? only

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by State (listing the states that retain the death penalty—among them: Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Tennessee, and Utah) [https://perma.cc/YSR8-RVYY].

77. *See* Death Penalty Information Center, *State and Federal Info: New Jersey* (detailing that there is no death penalty in New Jersey) [https://perma.cc/AA6D-4BXS]; *see also* Death Penalty Information Center, *State and Federal Info: New York* (explaining that New York does not have the death penalty) [https://perma.cc/S4ZT-3HEP].

78. *See generally* Blume et al., *supra* note 4.

79. *See id.* at 411 (asserting that juries are more reluctant to find an intellectual disability).

80. *See id.* (highlighting that Georgia requires proof of intellectual disability beyond a reasonable doubt).

81. Although we are almost certainly missing some *Atkins* losses, we are confident that if there were another win, we would know about it, because we monitor several death penalty listserves and because Justice 360, with which the Cornell Death Penalty Project has formal ties, collects data on *Atkins* cases. *See generally* JUSTICE 360 [https://perma.cc/S36N-T57M].

82. *See* Correspondence with Richard Bourke, Director of the Louisiana Capital Assistance Center (on file with author).

pretrial determinations be included? only those found in reported cases?), it is plain that win rates are wildly higher in judge cases; depending on how they are calculated, overall win rates in judge cases range from fourteen to twenty times greater in jury cases—even counting that one idiosyncratic jury win.[83] Or to make a jurisdiction-specific comparison, no Texas jury has ever spared a capital defendant's life based on an *Atkins* claim, but in post-conviction proceedings where judges adjudicate *Atkins* claims, twenty-two people have been removed from Texas's death row because they have been found to have an intellectual disability.[84] Finally, once prosecutors know that juries are reluctant to find an intellectual disability, they may be less likely to accept pleas to life sentences from worthy *Atkins* claimants in jury-determination states than in judge-determination states.[85]

Why are jurors, even in cases where the evidence is crystal clear, so resistant to finding a capital defendant intellectually disabled? In a previous article, two of us offered two hypotheses: Either that "in the context of a horrible crime-judges are more able to set aside their feelings and correctly apply a legal standard than jurors," or that "juries determine intellectual disability after hearing all of the evidence in aggravation, including victim impact evidence as compared to judges, who generally make pretrial rulings of intellectual disability and consequently have been exposed to fewer emotional, retributive triggers."[86] Were the second reason most important, it might be ameliorated by moving the jury determination to a pretrial proceedings, though no state in fact has done so. But as it turns out, subsequent research points to jurors' lesser ability to put aside horrible crime facts to accurately apply a legal standard predominant cause as the

83. *See* Blume et al., *supra* note 4, at 411 (exemplifying all the win-loss data at the end of 2013 which demonstrates that defendants are more likely to win a case for intellectual disability in judge cases than jury cases).

84. *See Intellectual Disability Reversals Under Atkins, DEATH PENALTY INFORMATION CENTER* [https://perma.cc/97C9-FBL4] (noting how Texas courts have adjudicated *Atkins* claims by capital defendants).

85. *See* Blume et al., *supra* note 4, at 410–11 (asserting that since juries are more likely to determine that the defendant does not have an intellectual disability, it will be less likely for prosecutors to have a reason to cooperate with defendants during the plea bargaining stage).

86. *See id.* at 411–12 (determining that judges are more capable of setting aside their feelings and correctly applying the legal standard than jurors).

predominant cause of the gross disparities win-rates before juries and those before judges.[87]

Setting aside the capital trial context for a moment, when lay jurors arbitrate intellectual disability claims, they tend to believe that only persons with extreme impairments are intellectually disabled.[88] For example, upon hearing that a person lived by herself and saw a social worker once a month, only 34 percent of lay persons called for jury service thought this fact was consistent with a claim that the person had intellectual disability, while 69 percent of mental health workers thought so.[89] Similarly, whereas only 31 percent of jurors thought the person's inability to drive supported her intellectual disability claim, 71 percent of mental health workers did;[90] potential jurors with limited exposure to people with intellectual disability were much less likely than mental health professionals to view only severe impairments as evidence of intellectual disability.[91]

The reader may imagine that such prejudice may be cured by information from an expert, but both the broader literature on motivated cognition and our own research on intellectual disability determinations strongly suggests that it will not. The theory of motivated cognition posits that when a decisionmaker has a definite preference for one outcome, where that outcome is implicated by the resolution of an issue, she may evaluate the issue based her outcome preferences and then look for evidence that confirms her judgment, rather that evaluating the evidence independent of those preferences.[92] Such biased processing of

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87. *See id.* (establishing that jurors are more emotional when it comes to cases involving violent crimes).

88. *See generally*, Marcus T. Boccaccini, John W. Clark, Lisa Kan, Beth Caillouet, & Ramona M. Noland, *Jury Pool Members' Beliefs about the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins-*Type Case*, 34 LAW & PSYCH. REV. 1 (2010).

89. *See id.* at 19 (showing the difference between results for mental health workers and jurors when deciding whether someone has an intellectual disability).

90. *Id.* at 22.

91. *See id.* at 21 (explaining that jurors with limited exposure are less likely to view severe impairments as evidence of intellectual disability compared to mental health professionals).

92. *See* GALEN V. BODENHAUSEN & ALAN J. LAMBERT, FOUNDATIONS OF SOCIAL COGNITION: A FESTSCHRIFT IN HONOR OF ROBERT S. WYER, JR.*,* 213 (Galen V.

evidence is not conscious, and only occurs where there is some evidence supporting the preferred outcome, but the pervasiveness of the biased processing where there is mixed evidence is very well-established.[93]

We conducted two studies (publishing the second, which confirmed the results of the first) to explore the influence of motivated cognition on the determination of intellectual disability.[94] In both, we provided all subjects with IQ testing results and a social history that established a moderately strong case of intellectual disability, along with conflicting expert opinions and accurate instructions describing the criteria for determining intellectual disability.[95] Half of the subjects, however, were told that their decision about intellectual disability would determine whether an applicant would receive disability benefits, and half were told that it would determine whether a defendant convicted of a double murder was ineligible for the death penalty.[96]

Bodenhausen, Alan J. Lambert eds., 1st ed. 2004) (discussing the effects of preferred conclusions when it comes to motivated cognition).

93. *See e.g.*, Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 490 (1990) ("[T]hese studies suggest that the evaluation of scientific evidence may be biased by whether people want to believes it conclusions. But people are not at liberty to believe anything they like; they are constrained by their prior beliefs about the acceptability of various procedures.").

94. *See* Sheri Lynn Johnson et al., *Race, Intellectual Disability, and Death: An Empirical Inquiry Into Invidious Influences on Atkins Determination*s, 66 UCLA L. REV. 1506, 1512–13 (2019) ("In each study, we presented participants with a vignette and asked them to determine if the subject was a person with intellectual disability.").

95. *See id.* (explaining the information given to participants of the study all of which could indicate that the subject involved in the benefits or death penalty case could have an intellectual disability).

96. *See id.*

> Participants were either given a death penalty case or a disability benefits case. In both situations, participants were instructed that the criteria for intellectual disability are significant limitations in intellectual functioning, significant limitations in adaptive behavior, and onset prior to the age of eighteen. They were also given the same evidence relating to intellectual disability: the defendant or claimant failed grades in school, had IQ scores within the range of intellectual disabilities (between 62 and 72), was unable to hold a job for more than a few weeks, never had a driver's license or bank account, never lived alone, and was unable to cook or manage money. The scenario also provided other facts about the defendant, including that he played

As would be predicted by motivated cognition theory, subjects told that their decision could exempt a murderer from imposition of the death penalty were significantly less likely to find the existence of intellectual disability; 81 percent of subjects told that a finding of intellectual disability would result in the award of benefits found intellectual disability, but only 50 percent of those told that finding intellectual disability would preclude imposition of the death penalty did so.[97] Moreover, participants in the death penalty condition were far more likely to mention the consequences of their decision in their responses than participants in the disability benefits condition—and persons who favored the death penalty were less likely to find intellectual disability in either condition.[98]

The diminishment of intellectual disability findings revealed by this experiment—about forty percent—almost certainly understates the effects that motivated cognition would have in real capital cases.[99] The motivation in this experimental setting is far smaller than would occur in a real trial for at least two reasons: The experimental subjects knew their decision would have no real

football and had been previously married, that are within the range of behaviors that a person with intellectual disability may demonstrate, but suggest some strengths. Participants were provided with expert testimony on both sides of the question.

In the death penalty context, the defendant was charged with armed robbery and double homicide. Participants read a description of the crime, which included clear evidence of guilt (video footage) and upsetting details like the murder of a child and a motive of pecuniary gain. In the disability benefits context, the subject was fired from his job on his first day. Participants read the benefits available to the subject if diagnosed with an intellectual disability, which included supervision, a job, and a supported living placement.

97. *See id.* at 1513–14 ("In the murder case, only 50 percent of participants found that the person had an intellectual disability, compared to 81 percent in the benefits case. This suggests that either the presence of criminal behavior or consequences of an intellectual disability determination (or both) influence some jurors' determination of intellectual disability . . . .").

98. *See id.* at 1520 (finding that participants in the death penalty study "express more concerns about the consequences of their decision"); *see id.* at 1514 ("Notably, regardless of the context, people who favored the death penalty were significantly less likely to find than an individual had an intellectual disability.").

99. *See id.* (highlighting that the issues surrounding deciding whether someone has an intellectual disability would be "more salient in a real case").

effects, and they were not exposed to nearly as powerful emotional triggers as they would be in a real case, including gruesome crime photographs and weeping victim family members.[100] One might ask whether judges would do better in setting aside their preferences in evaluating the evidence. Judges certainly are not completely immune from the general phenomenon of motivated cognition,[101] but they have vastly more experience dealing with the emotional aspects of violent crime.[102] Unpublished data collected by our colleague Jeffrey Rachlinski from sitting judges reveals no significant differences in their evaluation of intellectual disability in the capital defendant setting as compared to the benefits setting.[103] Moreover, data we have gathered from mental health professionals, another group with professional experience and training relevant to an *Atkins* assessment, albeit with a different expertise, also fail to show differences between capital punishment and benefits settings.[104]

Thus, both the extraordinarily stark statistics from actual jury determinations of intellectual disability determinations in capital cases and mock jury studies lead to the same conclusion: Because jurors are much more influenced by hostility to the capital defendant than are judges, states nearly eliminate the constitutional protection provided by *Atkins* when they make juries the arbiters of categorical exemption from the death penalty based on intellectual disability.[105]

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100. *See id.* at 1512–13 (explaining that the information participants received about the crime committed did not include gruesome crime photographs and participants did not feel the emotional impact of the courtroom).

101. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 812, 814–16 (2001) (discussing circumstances under which the phenomenon of motivated cognition is observed with judges).

102. *See id.* at 782 (explaining that judges are experienced decision-makers).

103. *See* Jeffrey Rachlinski (unpublished data) (on file with author at Cornell Law School) (finding that intellectual disability evaluations do not differ between practice settings).

104. *See* Amelia Courtney Hritz et al., *Death by Expert: Cognitive Bias in the Diagnosis of Mild Intellectual Disability*, 44 L. & PSYCH. REV. 61, 89 (2020) ("We found that experts diagnosed intellectual disability at nearly identical rates in the death penalty context and disability context.").

105. *See* John H. Blume et al., *supra*, note 4, at 411 (finding jurors "harsher in determination of intellectual disability—because—in context of a horrible crime—judges are more able to set aside their feelings and correctly apply a legal

Had the *Atkins* Court consulted the involuntary confession cases for guidance before it gave procedural carte blanche to the states, it could have avoided the debacle of near-universal jury nullification of *Atkins* in the ten states that opted for jury determination of intellectual disability.[106] *Jackson v. Denno*[107] held that New York's procedure, which provided the jury with an instruction to determine the voluntariness of the confession, and one to ignore the confession's probative value should the jury determine it to be involuntary, "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment."[108] Why not? The *Jackson* opinion provides reasons which apply equally to jury determinations of intellectual disability, commenting on what psychologists would now label motivated cognition:

> [T]he jury . . . may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession, a policy which has divided this Court in the past . . . and an issue which may be reargued in the jury room. That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect.[109]

Likewise, a jury charged to determine the defendant's intellectual disability may dispute the policy of exemption the intellectually disabled from the death penalty and feel pressured

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standard than jurors . . . it is obvious that jurors are vastly more reluctant to find intellectual disability than are judges").

106. *See id.* at 410 ("Nonetheless, ten states—Alabama, Arkansas, Georgia, Louisiana, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia—chose to allocate the determination of intellectual disability in the post-*Atkins* cases to juries.").

107. *See* Jackson v. Denno, 378 U.S. 368, 377 (1964) (finding against New York's procedure in determining the voluntariness of a defendant's confession).

108. *See id.* (explaining why New York's procedure violated Jackson's Due Process rights under the Fourteenth Amendment).

109. *Id.* at 381–82.

to find no intellectual disability lest the defendant escape the death penalty, rendering "objective consideration of the conflicting evidence concerning" intellectual disability impossible.[110]

These considerations similarly inform who decides other constitutional rights questions in criminal cases. Juries don't decide whether someone violates the Fourth Amendment; a judge determines whether an unreasonable search or seizure has taken place and then, following applicable exclusionary rule precedents, either permits the introduction of the evidence or suppresses it.[111] Juries don't decide *Miranda* violations either.[112] Nor do they decide whether an identification is so unnecessarily suggestive as to violate the due process clause.[113] To permit juries to make those kinds of decisions—decisions where the impulse to punish will often either override the obligation to follow constitutional constraints, or bias the determination of the application of those constraints—poses so great a threat to those constraints that it cannot be tolerated.

B. The Standard of Proof

1. Georgia's Standard of Proof

The second significant state procedural obstacle to the realization of *Atkins* protection has been employed by only one state, but for the defendants to whom it applies, has proved as

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110. *See id.* at 382 (highlighting the difficulty for jurors to make objective considerations in cases where, without the coerced confession, there is not enough evidence to convict).

111. *See* Bryan H. Ward, *Restoring Causality to Attenuation: Establishing the Breadth of a Fourth Amendment Violation*, 124 W. VA. L. REV. 147, 149 (2021) (explaining that, if there is a Fourth Amendment violation, the judge must "decide what to do about it").

112. *See* John J. Henry, *Criminal Procedure-Application of the Harmless Error Rule to Miranda Violations*, 14 W. NEW ENG. L. REV. 109, 114 (1992) (highlighting that the court, and thus the judge, determines whether a *Miranda* violation has occurred).

113. *See* Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. BALT. L. REV. 53, 64–65 (1981) (explaining that judges determine whether an identification violates the Due Process Clause).

insurmountable as jury determinations.[114] Under Georgia law—before and after *Atkins*—a defendant could "be found 'guilty but with intellectual disability'" if the jury, or court acting as trier of facts, finds "beyond a reasonable doubt" ("BARD") that the defendant is guilty of the crime charged and is with intellectual disability."[115] In the thirty-year history of this statute, no Georgia capital defendant has ever satisfied this standard.[116]

Georgia was the first state to exempt persons with intellectual disability from capital punishment, an exemption born of outrage at the execution of a man with an IQ of fifty-nine who could not count to ten;[117] that this progressive outrage led to a statute that would become the harshest in the nation is both ironic and tragic. Today Georgia is the only state in the nation that requires proof of intellectual disability beyond a reasonable doubt.[118] Only two states, Arizona and Florida, require that an *Atkins* claimant establish intellectual disability by clear and convincing evidence, and all of the others require only proof by a preponderance of the evidence.[119]

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114. *See infra* Part III.B.1.

115. GA. CODE ANN. § 17-7-131(c)(3).

116. From our research, it looks like in fact one defendant – a noncapital defendant -- has satisfied the standard. *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U.L. REV. 553, 555 (2017) ("Only one defendant in Georgia in the statute's nearly thirty-year history has been able to successfully prove before a jury that she is intellectually disabled beyond a reasonable doubt.").

117. Veronica M. O'Grady, *Beyond a Reasonable Doubt: The Constitutionality of Georgia's Burden of Proof in Executing the Mentally Retarded*, 48 GA. L. REV. 1189, 1202 (2014).

118. *See* Lauren Sudeall Lucas, *supra* note 116, at 560–61 nn.22–25 ("Georgia is . . . the only state that requires a determination of intellectual disability in tandem with the jury's consideration of the defendant's guilt.").

119. *Id.* at 561 n.22. Indiana, which like Georgia exempted intellectually disabled capital defendants from the death penalty prior to *Atkins,* and like Georgia then employed a more stringent standard of proof (albeit clear and convincing evidence rather than beyond a reasonable doubt). *Rogers v. State*, 698 N.E.2d 1172, 1175–76 (Ind. 1998), has held that the Supreme Court's determination that the exemption is constitutionally compelled requires replacement of the clear and convincing standard with a preponderance of the evidence standard. Pruitt v. State, 834 N.E.2d 90, 103 (Ind. 2005) (abrogating Rogers' clear and convincing evidentiary requirement).

Since Georgia exempted intellectually disabled defendants from criminal liability, at least twenty-two capital defendants have raised mental retardation as a defense.[120] Prior to *Atkins*, one jury found a female felony murder defendant (a defendant not charged with intentional murder) mentally retarded, and since *Atkins*, no Georgia capital defendant has ever met this burden before a jury.[121] Because Georgia also mandates jury determination of *Atkins* ineligibility, after reading the previous section, one might wonder whether the choice of decisionmaker rather than the choice of the burden of proof that has thwarted all *Atkins* claims. It is both.

When a jury in any other state determines intellectual disability, its finding are reviewable on appeal, and it is possible that appellate review may correct egregious jury errors.[122] But in Georgia, because of the standard of proof, reversal on appeal would only occur if the state supreme court reviewing court found that no reasonable jury could have had a reasonable doubt that the defendant was intellectually disabled.[123] This is not a matter of conjecture; the Georgia Supreme Court has never reversed a jury determination to find *Atkins* ineligibility.[124] Moreover, that court's

120. Hill v. Humphrey, 662 F.3d 1335, 1375–76 (11th Cir. 2011) (Barkett, J., dissenting) ("Although Georgia has ostensibly outlawed the imposition of the death penalty for mentally retarded offenders for over twenty years, of the twenty-two reported capital cases involving mental retardation claims, *only one* defendant has ever successfully established his mental retardation beyond a reasonable doubt.").

121. *See* Lauren Sudeall Lucas, *supra* note 116, at 584 (reviewing all cases that went to jury verdict and establishing that the 11th Circuit's claim in *Hill v. Humphrey*, that there were several jury verdicts of guilty but intellectually disabled, was erroneous).

122. *See, e.g.*, State v. Locklear, 681 S.E.2d 293, 313 (N.C. 2009) (reversing a jury finding that defendant was not intellectually disabled); Commonwealth v. Flor, 259 A.3d 891, 910–24 (Pa. 2021) (reviewing a jury determination where the standard of proving intellectual disability is preponderance of the evidence).

123. *See* United States v. White, 663 F.3d 1207, 1213 (11th Cir. 2011) (quoting United States v. Hill, 643 F.3d 807, 856 (11th Cir. 2011)). ("We review *de novo* the sufficiency of the evidence presented at trial, and "we will not disturb a guilty verdict unless, given the evidence in the record, no trier of fact could have found guilt beyond a reasonable doubt.").

124. There is only one *Atkins* win in Georgia, and it occurred in a case where intellectual disability was not raised at trial, and the post-conviction court found the defendant intellectually disabled, a finding that the State did not challenge on appeal, and therefore was not reviewed by the Georgia Supreme Court. *See*

reasoning in its most recent *Atkins* case makes plain both that the burden is an insurmountable barrier even in starkly meritorious cases and that state court itself will not strike down or ameliorate that burden. [125]

The evidence in Rodney Young's case that he has intellectual disability is so direct and so unimpeached that if it did not satisfy the BARD standard, it is hard to imagine a case where the evidence would.[126] His evidence is both simpler and more straightforward than is possible in many cases because Mr. Young was classified as "educable mentally retarded" as a child.[127] Mr. Young's lawyers put on extensive evidence of his qualifying IQ test scores, of the New Jersey public schools classification of Mr. Young as intellectually disabled when he was still very young, and of an academic performance throughout high school that corroborated that classification.[128] *No* expert concluded that Mr. Young was not intellectually disabled. Rather, the only evidence that the state proffered to rebut the evidence of intellectual disability was the testimony of two witnesses who had worked with Mr. Young in a factory applying labels to canned goods, and who reported Mr. Young was skilled at applying labels. Neither had any experience teaching or assessing people with intellectual disability.[129] Nonetheless, the jury found Mr. Young had failed to prove his intellectual disability beyond a reasonable doubt, a finding that

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Hill, 662 F.3d at 1376 (Barkett, J., dissenting) (stating that only one defendant has ever successfully established "mental retardation"); *see also* Hall v. Lewis, 692 S.E.2d 580, 592 (Ga. 2010) ("[T]he habeas court found that Lewis established that he is mentally retarded beyond a reasonable doubt" (citing Turpin v. Hill, 498 S.E.2d 52 (1998) (authorizing habeas courts to address belated mental retardation claims under the "miscarriage of justice" exception) "and the Warden has not appealed that finding.").

125. *See* Young v. State, 860 S.E.2d 746, 776–78 (Ga. 2021) (rejecting the defendant's contention that he was intellectually disabled).

126. *See id.* at 759 (discussing Young's extensive evidence of intellectual disability).

127. *See id.* (elaborating that Young presented evidence in support of findings of intellectual disability by the jury including testimony from staff members at his former high school).

128. *See id.* ("Young . . . had been in special education, had been classified as "educable mentally retarded" and therefore must have been tested with an IQ of between 60 and 69, and had struggled intellectually in academics and in sports.").

129. *See id.* at 782 (failing to mention any psychological training on the part of any of the canning employees).

the Georgia Supreme Court upheld (over several dissents) because "considering the conflicting testimony on the subject, Young had failed to prove beyond a reasonable doubt that he was 'mentally retarded.'"[130] Thus, lay testimony that a defendant has skills *that no competent professional would deem inconsistent with intellectual disability* is sufficient to create reasonable doubt as to intellectual disability.[131] Because it would be easy to adduce such testimony regarding virtually any defendant able to commit a homicide, it is hard to see what protection *Atkins* offers to Georgia defendants.

2. Constitutional Constraints

The Georgia Supreme Court's *Young* opinion also upheld the BARD standard against a constitutional challenge.[132] A detailed consideration of the constitutional constraints on imposition of a higher burden of proof may be found in the Young petition for certiorari and the briefs of amici supporting the petition.[133] For our purposes, it is enough to summarize why consideration of the harshness of the BARD standard and its interaction with the nature of the *Atkins* determination should make it plain why its

130. *See* Petition for a Writ of Certiorari, Rodney Renia Young, Petitioner, v. State of Georgia, Respondent., 2021 WL 5513974 (U.S.), 9 (explaining that while the jury found that he did not have an intellectual disability, jurors continued to ask questions about intellectual disability in the sentencing phase to use it as potential mitigation).

131. *See id.* at 3 ("In every other State in the Union, if a capital defendant shows by either a preponderance of the evidence or clear and convincing evidence that he has intellectual disability, he cannot be executed. Yet in Georgia, the same defendant will be executed.").

132. *See* Young v. State, 860 S.E.2d 746, 776 (Ga. 2021) ("[W]e hold that the standard of proof for intellectual disability claims presently chosen by Georgia's General Assembly is not unconstitutional.").

133. *See generally* Petition for a Writ of Certiorari, Rodney Renia Young, Petitioner, v. State of Georgia, Respondent, 2021 WL 5513974 (U.S.); Brief for the Rutherford Institute et al. as Amici Curiae Supporting Petitioner, Young v. Georgia, 2021 WL 6205944 (2021) (No. 21-782); Brief for Disability Legal Rights Center et al. as Amici Curiae Supporting Petitioner, Young v. Georgia, 2021 WL 6205945 (2021) (No. 21-782); Brief for Charles Fried and Seth P. Waxman as Amici Curiae Supporting Petitioner, Young v. Georgia, 2021 WL 6140210 (2021) (No. 21-782); Brief for Elsa R. Alcala et al. As Amici Curiae Supporting Petitioner, Young v. Georgia, 2021 WL 6140216 (2021) (No. 21-782).

use in *Atkins* determinations is inappropriate. The standard of proof beyond a reasonable doubt is the most demanding known to Anglo-American jurisprudence, one that developed to protect the innocent from wrongful conviction and with very few exceptions, its application has been limited to the government's obligation to produce enough evidence to convict an individual charged with an alleged crime.[134] In that application, the standard reflects the judgment that it is "better that ten guilty persons escape, than that one innocent suffer."[135] Moreover, it is a burden that, at least in the run of the mill criminal case, can be satisfied, both because of the nature of the factual inquiry and because the jury is *disposed* to find it satisfied.[136]

In contrast, the function of the BARD standard in Georgia *Atkins* cases is to assure punishment even in the face of strong evidence that it is constitutionally forbidden.[137] The *Young* majority cited no case—because there is no case—upholding the imposition of the BARD standard on proof of a constitutional violation.[138] The closest parallel is *Cooper v. Oklahoma*,[139] in which the Supreme Court unanimously held that due process precludes a state from requiring a criminal defendant to prove by clear and convincing evidence that he is mentally incompetent to stand trial.

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134. *See In re* Winship, 397 U.S. 358, 363 (1970) ("The [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (citing Coffin v. United States, 156 U.S. 432, 453 (1895))).

135. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see Winship*, 397 U.S. at 372 (1970) ("[It is] a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.").

136. *See, e.g.*, *Winship*, 397 U.S. at 364 (1970) ("Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.").

137. *See* Hill v. Humphrey, 662 F.3d 1335, 1371–72 (11th Cir. 2011) (Barkett, J., dissenting) ("[T]he burden Georgia places on a capital offender to prove the ultimate fact on which his Eighth Amendment right depends allocates almost the entire risk of error to the offender while leaving virtually none of it with the State.").

138. The majority relied upon *Leland v. Oregon*, 343 U.S. 790 (1952), which did uphold a BARD standard on the affirmative defense of insanity. The difference, however, as the dissent in *Young v. State,* 860 S.E.2d 746 (2021), and the petition for certiorari point out, is that the insanity defense is not constitutionally mandated.

139. 517 U.S. 348 (1996).

The reasoning in Cooper is plainly applicable here: The heightened standard offends a "principle of justice that is deeply rooted in the traditions and conscience of our people,"[140] one that is fundamentally unfair in operation because the consequences of error for the defendant were "dire,"[141] and would mean that a person who was more likely than not incompetent would nonetheless be forced to stand trial.[142]

3. Specific Barriers to Finding Intellectual Disability Beyond a Reasonable Doubt

Moreover, given the nature of scientific and clinical understanding of intellectual and developmental disability, Georgia's requirement of proof beyond a reasonable doubt cannot be met in most cases in which competent clinicians would agree that the defendant is a person with intellectual disability.[143] "All diagnoses of mental retardation are potentially challenging,"[144] and even in ideal settings, qualified experts ordinarily diagnose mental retardation only to a reasonable degree of medical (or professional) certainty.[145] This divergence between the clinical standard and the BARD standard alone will stymie many *Atkins* claims, for it provides the opportunity to argue that the professional testimony fails to satisfy the standard. Of equal importance are the ways in which capital cases are far from ideal settings, and further impede determinations with the level of

140. *Id.* at 360–62 (internal quotation marks omitted).

141. *Id.* at 364.

142. *Id.* at 366–67.

143. *See Hill*, 662 F.3d at 1375 (Barkett, J., dissenting) ("Georgia limited this constitutionally guaranteed right to only those individuals who could establish mental retardation beyond any reasonable doubt, a standard that cannot be met when experts are able to formulate even the slightest basis for disagreement."); *see id.* at 1381 (Wilson, J., dissenting) ("I am struck by the gross disparity between the certainty communicated to the factfinder by that type of expert opinion—a reasonable degree of medical certainty—and that required by Georgia's Atkins burden of proof—proof beyond any reasonable doubt.").

144. AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *User's Guide: Mental Retardation Definitions, Classification and Systems of Support* 14 (10th ed. 2007) [hereinafter AAIDD, 10th ed].

145. *See id.* (detailing how a diagnosis is provided and the clinical signs and behaviors that characterize a diagnosis).

certainty required in Georgia. Capital trials often pose one or more of four clinically recognized obstacles to the diagnoses of intellectual disability—co-morbidity, mild mental-retardation, retrospective assessment, and sub-optimal assessment conditions—and simultaneously increase the salience of possible malingering.[146]

The first significant barrier to proving intellectual disability beyond a reasonable doubt is the prevalence of comorbid psychiatric conditions, "which are much more prevalent among individuals with intellectual disability than the general population."[147] In theory, comorbidity should not influence the diagnosis of intellectual disability, but given the adversarial context of *Atkins* proceedings, comorbidity creates the opportunity to argue that low IQ scores, which are necessary to meet prong one, are not accurate measures of intellectual functioning, but are artificially depressed by mental illness.[148] Extreme mental illness may preclude the administration of a standard IQ test, and other mental illnesses, particularly depression, may diminish performance on an IQ test;[149] any ethical expert would have to acknowledge the impact that depression tends to have on performance—and the *possibility* that a defendant with comorbid depression and mild intellectual disability would, absent the depression, score in the borderline range.[150] Although such questioning is possible even when the burden of proof is less draconian, satisfying an ordinary burden of proof is possible by

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146. *See generally* Jennifer LaPrade & John L. Worrall, *Determining Intellectual Disability in Death Penalty Cases: A State-by-State Analysis*. 3 J. CRIM. JUST. & L. 1 (2020) (underscoring the lack of consensus by various states on the definition of intellectual disability).

147. AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *User's Guide: Mental Retardation Definitions, Classification and Systems of Support* 15 (9th ed. 2002) [hereinafter AAIDD, 9th ed.].

148. *See* Atkins v. Virginia, 536 U.S. 304, 317 (2002) ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.").

149. *See generally* Harold A. Sackeim et al., *Effects of Major Depression on Estimates of Intelligence,* 14 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 268 (1992).

150. *See* Grant L. Iverson et al. *Predictive Validity of WAIS-R VIQ-PIQ Splits in Persons with Major Depression.* 55 J. CLINICAL PSYCH. 519, 519–24 (1999) ("Persons with psychiatric dis-orders, and depression in particular, may show PIQ decrements.").

considering the consistency of earlier scores or previous academic records, or the corroborating value of poor adaptive functioning across the life span.[151] In Georgia, however, such evidence would still likely not satisfy the burden of proof because a reasonable doubt may remain as to whether the defendant was depressed at the earlier point in time.

Similarly, comorbid personality or behavioral disorders may cast doubt on the proof of significant adaptive functioning deficits necessary to satisfy prong two; although the concepts of adaptive functioning deficits and the criteria for behavioral and personality disorders are distinct, the overlap between *behaviors* that reflect adaptive functioning deficits and *behaviors* that permit an inference of criteria for other psychiatric disorders, the prosecution may argue that apparent adaptive functioning deficits are "really" attributable to conduct and/or personality disorders rather than to intellectual disability. In Oklahoma, where the burden of proof is preponderance of the evidence, the Court of Criminal Appeals rejected the state's argument that admitted multiple deficits were better attributed to antisocial personality disorder, schizophrenia, and/or drug abuse, finding that "[a]n alternative explanation for an agreed condition is not a negation of that condition."[152] But even an educated, conscientious factfinder might would be thwarted in finding *beyond a reasonable doubt* that a defendant with a comorbid psychiatric disorder also has intellectual disability.

A second clinically recognized obstacle to reliable diagnosis in *Atkins* cases is the overwhelming predominance of persons with "mild" intellectual disability.[153] Mild intellectual disability is

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151. *See* Clemons v. Comm'r, Alabama Dep't of Corr., 967 F.3d 1231, 1245 (11th Cir. 2020) (giving an example of a state that requires the defendant to prove that they have been dealing with developmental issues prior to reaching the age of eighteen).

152. *See* Lambert v. State, 126 P.3d 646, 653 (Okla. Ct. Crim. App. 2005) (noting the Oklahoma court's recognition that findings of alternative explanations other than a diagnosis of intellectual disability does not negative the possibility of an intellectual disability).

153. Almost all of the capital defendants whom *Atkins* exempts from imposition of the death penalty are persons in the "mild" range, both because approximately 75 percent of person with intellectual disability fall into the "mild" category, and because persons who are more impaired rarely function well enough to be subject to criminal proceedings. *See Atkins*, *supra* note 148 and accompanying text.

characterized by an IQ between fifty-five and seventy (or, as tested, seventy-five, taking into account the standard error of measurement, as discussed below).[154] But all IQ scores, like all psychometric measurements, are imprecise and vary to some degree due to the circumstances of the test administration, examiner behavior, cooperation of the test taker, and other personal and environmental factors.[155] The "standard error of measurement" quantifies this variability and provides a confidence interval within which the person's true score falls."[156] The standard error of measurement on the commonly used IQ tests is about five points, which means that for a measured score of sixty-six, for example there is a strong likelihood that the true score is between sixty-one and seventy-one, a strong likelihood that will satisfy prong one in a jurisdiction with a preponderance of the evidence standard.[157] But it can be argued that for a persons with a measured scores of sixty-six (or even sixty-three), that there is a still some "reasonable doubt" as to their subaverage intellectual functioning. [158]

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154. *See* Peter J.G. Nouwens et al., *Identifying Classes of Persons with Mild Intellectual Disability or Borderline Intellectual Functioning: A Latent Class Analysis*, 17 BMC PSYCH. 1 (2017) ("Persons with a mild intellectual disability (MID); intelligence quotient (IQ) range 50–69.").

155. *See* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, *User's Guide: Intellectual Disability Definitions, Classification and Systems of Support* 36 (11th ed. 2010) [hereinafter AAIDD, 11th ed.] (explaining the variations in scores due to environmental factors).

156. *See id*. (defining the "standard error of measurement").

157. *See* Simon Whitaker*, Error in the estimation of intellectual ability in the low range using the WISC-IV and WAIS-III,* UNIV. OF HUDDERSFIELD REPOSITORY ("[T]here is a margin of error, usually considered to be about five points either side of the obtained IQ, which should be taken into account when making a diagnosis of ID [intellectual disability].") [https://perma.cc/XD9Z-K7P6].

158. More scores—all consistent—increase the clinician's confidence that the measurement is accurate and would permit him or her to so testify. But there is no formula that aggregates probabilities over numerous scores to which a clinician could testify. Moreover, for some defendants, multiple scores may not be feasible for reasons including practice effects, the willingness of a court to fund multiple tests, and the unavailability of more than one reliable test for a person with the defendant's language. *See* AAIDD, 11th ed., *supra* note 155 and accompanying text.

The third obstacle to finding proof beyond a reasonable doubt is the difficulty posed by retrospective diagnoses.[159] In many *Atkins* cases, either the defendant did not receive an official diagnosis of intellectual disability as a child, or the records of that diagnosis unavailable by the time of trial.[160] The factfinder's immediate reaction to the absence of a juvenile diagnosis of intellectual disability may be that the defendant did not have the disability. In fact, the clinical literature, however, recognizes that the absence of such a diagnosis may stem from other factors, such as the person's lack of a full school experience, parental opposition, the desire to protect the person from stigma or teasing, avoidance of claims of racial discrimination, unavailability of programs or funding, or the lack of entry into the referral process due to cultural or linguistic reasons.[161] Most dramatically, court orders have precluded IQ testing or classification in some school districts based on prior discrimination.[162] Thus, there may be good reasons for the absence of a diagnosis during the developmental period, reasons that competent counsel can present, but existence of such reasons is not likely to dispel a reasonable doubt created by the absence of an earlier diagnosis.

Moreover, there are no obvious fixes for other difficulties created by retrospective diagnosis. If a prosecutor asks an expert the reliability of retrospective diagnosis, he or she would have to admit that the phenomenon of "[m]emory degradation is [a] real issue, and [that] there is no solid research regarding the forgetting curve . . . regarding someone's recollection of another person's adaptive behavior." [163] Nor is there a fix for the fact that with retrospective diagnoses, often the only informants who can recall

159. *See* United States v. Candelario-Santana, 916 F. Supp. 2d 191, 214 (D.P.R. 2013) ("[R]etrospective diagnosis may be necessary to determine whether a[n] . . . individual suffered from mental retardation before the age of eighteen.").

160. *See id.* (presenting an example of defendant who was never given a diagnosis).

161. *See id.* at 220 (providing an example of a defendant who dropped out of school and came from a poor economic background).

162. *See* Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967) ("As to the remedy with respect to the [IQ] track system, the track system simply must be abolished. In practice, if not in concept, it discriminates against the disadvantaged child.").

163. *See* Marc J. Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,* 16 APPLIED NEUROPSYCH. 114, 119 (2009).

the defendant's functioning during the development period are family members and friends, and such "retrospective reports are frequently challenged because of the potential biases of the family member or friend who knows that their accounts will be used in determining whether the individual will be . . . protected from the death penalty . . . ." [164] Although there are detailed guidelines for retrospective diagnosis[165] to which an expert can adhere and describe, it is unlikely that adherence to those guidelines will overcome every reasonable doubt argued by a prosecutor to arise from memory degradation or from reliance on the reports of biased family members or the lack of a diagnosis during the developmental period.[166]

The fourth condition which the clinical literature identifies as rendering assessment of mental retardation particularly challenging is a catchall: "situations that preclude formal assessment or impair its validity, reliability or utility."[167] These include legal restrictions that hinder assessment; incarceration makes access to the individual himself more difficult, limits time, often results in distracting testing conditions, and frequently makes interviews less conducive to self-disclosure, a factor that may be important in evaluating adaptive functioning.[168] Additionally, the capital charges the defendant faces may make others reluctant to "help" him by providing evidence of his adaptive functioning deficits, and it may produces unreliable evidence designed to ensure his death sentence. Although the clinical

164. *See* D.J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation,* 16 APPLIED NEUROPSYCH. 124, 132 (2009). Ironically, those reports may be biased towards minimizing adaptive functioning deficits rather than exaggerating them, either because family and friends themselves are intellectually impaired, or because they are ashamed that they did not seek services for the defendant when he was a child.

165. *See* AAIDD, 9th ed., *supra* note 147, at 18–22 (detailing the guidelines for diagnosis).

166. *See* United States v. Candelario-Santana, 916 F. Supp. 2d 191 (D.P.R. 2013) (providing an example of a defendant who failed to show that he suffered from significant behavior limitations).

167. *See* AAIDD, 9th ed., *supra* note 147, at 22 (outlining the fourth condition that makes assessment of intellectual disability challenging).

168. *See* KiDeuk Kim et al., *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, URB. INST. (detailing effects of inadequate care that prisoners receive in relation to their mental health) [https://perma.cc/FK4P-3XKH]

literature warns that "Correctional Officers and other prison personnel should probably never be sought as respondents to provide information regarding the adaptive behavior of an individual that they observed in a prison setting . . . [because t]he prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior,"[169] testimony by prison personnel is often permitted, and may be another source of "reasonable doubt" even when there is no valid evidence contradicting intellectual disability.[170]

The fourth risk of error that threatens *Atkins* determinations, and is compounded by a BARD standard, is the necessity for cross-cultural competence.[171] One extreme cultural barrier to assessment lies in cases involving foreign nationals, particularly those from countries in which English is not the native language; logistical barriers to collecting records and informants are exacerbated by cultural barriers to communication, correct interpretation of information, and overlooking important sources of misinterpreted information.[172] Beyond that, some "experts" have dismissed evidence of disability as simply a product of minority group membership, making upward adjustments of IQ scores based on minority group membership[173] or testifying that behavior that would otherwise qualify as demonstrating adaptive functioning deficits should be disregarded because it is normal for

169. Tasse, *supra* note 163, at 119.

170. *See* United States v. Smith, 790 F. Supp. 2d 482, 517 (E.D. La. 2011) (giving an example of how correctional officers' testimonies were used to determine whether a Defendant had an intellectual disability).

171. *See* ELLIS CRAIG & MARC TASSE, CULTURAL AND DEMOGRAPHIC GROUP COMPARISONS OF ADAPTIVE BEHAVIOR, IN ADAPTIVE BEHAVIOR AND ITS MEASUREMENT: IMPLICATIONS FOR THE FIELD OF MENTAL RETARDATION 134 (Robert Schalock & David Braddock eds., 1999) ("Cross-cultural skills include understanding of one's own values, knowledge of the other culture(s), and the ability to interact and communicate in a sensitive fashion with members of other cultures.").

172. *See* Ai Ohtani et al., *Language Barriers and Access to Psychiatric Care: A Systematic Review*, PSYCH. ONLINE (highlighting several studies that address the linguistic barrier to psychiatric care) [https://perma.cc/YEL3-UUTR]

173. *See* Lizcano v. State, No. AP-75879, 2010 WL 1817772 (Tex. Ct. Crim. App. May 5, 2010) (demonstrating experts dismissing evidence of intellectual disability as a product of minority group status).

the individuals' ethnic group.[174] Even when such "expert" testimony is countered by the testimony of other experts that such biased evaluation is contrary to professional norms,[175] its presentation may nonetheless create "reasonable doubt" of either subaverage intellectual functioning, or significant adaptive functioning deficits, or both.[176]

A final obstacle to a determination of *Atkins* ineligibility under a BARD standard is the spectre of malingering, "the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives."[177] Malingering, even in the *Atkins* context, is not common, in part because there are both instruments that measure malingering and clinically recognized methods for detecting it, and in part because the social barriers to feigning intellectual disability are substantial, rendering it more common to try to conceal intellectual disability than to feign it.[178] Nonetheless, the possibility of malingering will be salient in a capital case because a jury is likely to perceive the defendant's incentive to be found intellectually disabled as enormous. Any rational factfinder would have to consider that possibility, and though clinical judgment together with malingering tests may be

174. *See, e.g.*, Hernandez v. Thaler, No. SA-08-CA-805-XR, 2011 WL 4437091, at *24 (W.D. Tex. Sept. 23, 2011) (finding that two experts' belief that "consideration of a subject's cultural group was essential to accurately evaluating the subject's adaptive functioning . . . was objectively reasonable and fully consistent with the evidence before that state court").

175. *See* AAIDD, 10th ed., *supra* note 144, at 23 ("Do not allow cultural or linguistic diversity to overshadow or minimize actual disability.").

176. *See, e.g.*, *Hernandez*, 2011 WL 4437091, at *24 (affirming appellate court's rejection of defendant-petitioner's *Atkins* claim upholding appellate court's conclusion that "petitioner failed to establish through credible evidence . . . significant limitations in adaptive functioning").

177. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 739 (4th ed. 2000) (defining "malingering").

178. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430–31 (1985) (explaining that because of the powerful stigma attached to mental illness or developmental disabilities, affected individuals and their families will go to great lengths to hide those disabilities); Sean D. O'Brien, 36 HOFSTRA L. REV. 693, 739 (2008) ("Because of the powerful stigma attached to mental illness or developmental disabilities, afflicted individuals and their families will take extreme measures to hide those disabilities."); *see generally* ROBERT B. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED (Univ. of California Press 1967).

informative and even quite persuasive, in many cases, a reasonable doubt as to malingering could persist.[179]

4. BARD, Atkins*, and the Supreme Court*

Thus, the absence of any Supreme Court case upholding the imposition of the BARD standard on proof of a constitutional violation, the particular barriers to proving intellectual disability beyond a reasonable doubt, the empirical evidence that the BARD standard is impossible to satisfy in *Atkins* decisions, and the unmixed evidence in Rodney Young's case all weighed in favor of a grant of certiorari. *Young* also met an established criterion for certiorari: conflict with other state court decisions. Indeed, five state supreme courts have concluded that the BARD standard cannot be imposed upon *Atkins* claimants; two have invalidated statutes requiring clear and convincing evidence for *Atkins* claims under the Due Process Clause, and three, in the absence of a state statute, held that only the preponderance standard satisfies the Due Process Clause.[180] Nonetheless, the Supreme Court denied certiorari,[181] as it repeatedly did with respect to other states'

179. Mandi W. Musso et al., *Development and Validation of the Stanford Binet-5 Rarely Missed Items-Nonverbal Index for the Detection of Malingered Mental Retardation*, 26 ARCHIVES CLINICAL NEUROPSYCH. 756, 758–59 (2011) ("[T]he limited empirical research available indicates that current tests of neurocognitive and psychiatric feigning designed to detect malingering do not adequately assess feigned MR."). Thus, an ethical clinician cannot testify to certainty that the defendant's effort on an I.Q. test was optimal based upon a malingering instrument, but must rely in part on clinical judgment, judgement that a prosecutor can argue is mistaken. *See id.*

180. *See* Petition for a Writ of Certiorari at 11–16, Young v. Georgia, 142 S. Ct. 1206 (2022) (No. 21-782) (demonstrating the standard used by all other lower courts is lower than that is articulated in *Young*). Additionally, several amici have filed briefs in support of the petition. *See generally* Brief for Charles Fried & Seth P. Waxman as Amici Curiae Supporting Petitioner, *Young*, 142 S. Ct. 1206 (No. 21-782); Brief for Elsa R. Alcala et al. as Amici Curiae Supporting Petitioner, *Young*, 142 S. Ct. 1206 (No. 21-782); Brief for Disability Rights Legal Center et al. as Amici Curiae Supporting Petitioner, *Young*, 142 S. Ct. 1206 (No. 21-782); Brief for Rutherford Institute et al. as Amici Curiae Supporting Petitioner, *Young*, 142 S. Ct. 1206 (No. 21-782).

181. *See* Young v. Georgia, 142 S.Ct. 1206 (Mem.) (2022) (denying cert).

substantive deviations from clinical definitions of intellectual disability (and as we further discuss in Part II).[182]

Moreover, Young's petition was not the first to ask the Court to address the permissibility of Georgia's burden of proof; Warren Hill's was.[183] In that petition, the prior litigation posed the issue with extraordinary clarity.[184] Because Hill's trial lawyer did not raise the intellectual disability issue, the Georgia Supreme Court remanded the issue to a state habeas court to determine it. The lower state court found that though Hill met the BARD standard with respect to the first prong, intellectual functioning, he did not meet it with respect to the second, adaptive functioning.[185] When *Atkins* was decided shortly thereafter, Hill moved for reconsideration.[186] The state habeas court then ruled that that *Atkins* compelled the rejection of the statutory standard in favor of a preponderance of the evidence standard, and that Hill met the criteria for intellectual disability under that standard.[187] Then Georgia Supreme Court rejected the habeas court's premise, affirming both its pre-*Atkins* holding that the beyond a reasonable doubt standard applied to all defendants tried after passage of the statute and Hill's death sentence. It did not, however, dispute the lower court's view that the burden of proof was dispositive.[188]

Hill initially prevailed on his claim that Georgia's beyond a reasonable doubt standard of proof violated *Atkins* before a divided

182. *See supra* Part II (analyzing how states deviate from clinical definitions of intellectual disability).

183. *See* Turpin v. Hill, 498 S.E.2d 52, 53–54 [hereinafter Hill I] (arguing in a post-conviction appeal that defense counsel was ineffective for failing to raise defendant's alleged mental retardation claim at trial).

184. *See* Sudeall, *supra* note 116, at 562–63 (providing a more detailed description of the *Hill* litigation).

185. *See* Order at 4–6, Hill v. Head, No. 94-V-216 (Ga. Super. Ct. May 13, 2002) (demonstrating a court's finding that the second prong of BARD was not met).

186. *See* Sudeall, *supra* note 116, at 562–63 (noting petitioner moved for reconsideration).

187. *See* Order on Petitioner's Motion for Reconsideration of Denial of Habeas Corpus Relief at 9, Hill v. Head, No. 94-V-216 (Ga. Super. Ct. Nov. 19, 2002) (noting petitioner met criteria for intellectual disability under a preponderance of the evidence standard).

188. *See Hill v. Head*, 587 S.E.2d 613, 620–21 (Ga. 2003) [hereinafter Hill II] (noting the Georgia Supreme Court's recognition of the importance of the burden of proof).

panel of the Eleventh Circuit, which reasoned that the standard "necessarily will result in the deaths of mentally retarded individuals."[189] However, the *en banc* Eleventh Circuit reversed, holding that under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Georgia court's holding was not "contrary to, or an unreasonable application of, the controlling Supreme Court precedent."[190] We discuss AEDPA's role in diminishing *Atkins*' protection in Part IV,[191] but whether because of AEPDA or the merits of Hills's claim, or both. the Supreme Court denied certiorari.[192] Then, before Georgia could execute Hill, one of state's psychiatrist retracted his opinion that Hill was not intellectually disabled, which led the other two state experts to reconsider their prior opinion, and to agree that Hill was in fact intellectually disabled.[193] After successive petitions in state and federal court, and despite attempts a clemency campaign that included statements from former President Jimmy Carter, the American Bar Association, and mental health advocacy groups, the Georgia Board of Pardons and Parole denied clemency, and Georgia executed Warren Hill.[194] Given the denial of certiorari in Young, more such executions should be expected.

C. Rejecting the Ford *Analogy*

The Supreme Court was wrong to apply *Ford*'s indifference to implementing procedure to *Atkins*. The Court's selection of *Ford* as the hands-off model for *Atkins* was a mistake from the outset because of differences between the two kinds of claims, as

189. *See* Hill v. Schofield, 608 F.3d 1272, 1277 (11th Cir. 2010) [hereinafter Hill III] (quoting trial court order), *rev'd en banc*, Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011) [hereinafter Hill IV] (noting the Eleventh Circuit's recognition that a beyond a reasonable doubt standard violated *Atkins*).

190. *See* Hill IV, 662 F.3d at 1360 (reversing the Eleventh Circuit opinion *en banc* due to the AEDPA).

191. *See infra* Part IV (analyzing the role of the AEDPA in diminishing protections of intellectually disabled offenders under *Atkins*).

192. *See* Hill v. Humphrey, 566 U.S. 1041 (2012) [hereinafter Hill V] (announcing the denial of certiorari).

193. *See* Sudeall, *supra* note 116, at 564–65 (recounting the events that led to a diagnosis of intellectual disability for Hill).

194. *See id.* at 654–65 (addressing the execution of Warren Hill).

discussed above, but its continued disengagement is even less defensible, given some of the procedures states have selected and how those procedures have doomed meritorious *Atkins* claims. The appropriate correction, we think, is to reject viewing the question of regulating procedure as a binary one. Rather, the Court should have taken the approach it did in *Batson v. Kentucky,*[195] mandating some aspects of the procedures while leaving others to the states; doing some would have precluded the states from "implementing" *Atkins* through procedures that effectively nullify it.[196]

IV. Substantive Deviations from the Diagnostic Criteria for Intellectual Disability

A. IQ Cut-Offs

In *Cherry v. State*,[197] the Florida Supreme Court, relying on language in *Atkins* permitting states to come up with "appropriate ways" to enforce the categorical exclusion, held that an IQ score above seventy, even one that fell within the seventy-one to seventy-five standard error of measurement ("SEM") present in all tests of intelligence, precluded a claim of intellectual disability.[198] The court read the post-*Atkins* Florida statute, which defined significantly subaverage intellectual functioning as an IQ of "70 or

195. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986) (reversing conviction of a Black defendant after the trial court "flatly rejected" the defendant's timely objection to the prosecutor's removal of all Black jurors from the venire without explanation, and remanding case to determine whether the facts support a *prima facie* showing of purposeful race discrimination).

196. *See id.* at 89 (explaining that prosecutors are generally entitled to exercise peremptory challenges to potential jurors at will, but prosecutors are forbidden from excluding potential jurors *on account of* their race or the assumption that Black jurors will categorically be unable to impartially consider the State's case against a Black defendant).

197. *See* Cherry v. State, 959 So. 2d 702, 714 (Fla. 2007) (affirming circuit court's determination that "Cherry's IQ score of 72 does not fall within the statutory range for mental retardation" and thereby precluding a defense of intellectual disability).

198. *See id.* at 713–14 (demonstrating the court's standard as to what is considered a diagnosis of intellectual disability based on IQ score).

below" as establishing a strict cutoff.[199] Thus, because Roger Cherry had proffered an IQ score of seventy-two at his state court intellectual disability hearing, his claim failed as a matter of law.[200] The Florida Supreme Court justified this as a matter of interpreting the "plain language" of the statute.[201] Although this reading of the statute was inconsistent with both of the definitions of intellectual disability the Supreme Court referenced in *Atkins* because they accounted for the SEM by noting an IQ of "approximately 70,"[202] the state court did not deem those definitions binding because Atkins "left to the states the task of setting specific rules in their "determination statutes."[203] Florida courts rejected several other claims of intellectual disability on this same basis.[204] Alabama, Kentucky, Idaho, and Tennessee adopted similarly strict IQ cutoffs of seventy.[205] Ohio took the slightly more moderate position that a score above seventy created rebuttable presumptions that an *Atkins* claimant did not have intellectual disability.[206] Challenges to this type of deviation from clinical consensus were rejected for more than a decade while the Supreme Court of the United States repeatedly chose not to intervene.

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199. *See id.* (providing more details on the standard as to who can be defined as intellectually disabled).

200. *See id.* at 714 (recounting why Cherry's claim of intellectual disability failed).

201. *See* Cherry v. State, 959 So. 2d 702, 713 (Fla. 2007) (explaining the reasoning of the Florida court for its ruling).

202. *See id.* at 713 (noting the Supreme Court's acknowledgement of IQ as a factor in determining intellectual disability and how they wanted states to analyze it); *see also* Atkins v. Virginia, 536 U.S. 304, 308, n.3 (2002) (demonstrating the nuance used by the Florida court to meet the *Atkins* standard).

203. *See Cherry*, 959 So. 2d at 713 (showing the tactics that the Florida courts used to avoid strict *Atkins* interpretation).

204. *See*, *e.g.*, Jones v. State, 966 So. 2d 319, 329 (Fla. 2007); Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005) (demonstrating the Florida courts history of rejecting claims along these lines).

205. *See*, *e.g.*, Perkins v. State, 144 So. 3d 457 (Ala. Crim. App. 2012) (demonstrating that this standard is not limited to Florida but has been used in a number of states); Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005) (same); Pizzuto v. State, 484 P.3d 823 (Idaho 2021) (same); Howell v. State, 151 S.W.3d 450, 456 (Tenn. 2004) (same).

206. *See* State v. Elmore, No. 2005-CA-32, 2005 WL 2981797, at *8 (Ohio Ct. App. Nov. 3, 2005) (explaining the different approach adopted by Ohio courts).

Thus, when Freddie Lee Hall, a Florida death row inmate for more than thirty years, sought the benefit of *Atkins*, his claim was rejected by the Florida Supreme Court solely because he had previously scored above seventy on an IQ test.[207] As they had done in other cases, the state courts applied this bright line rule despite strong evidence Hall met all three prongs necessary for an intellectual disability diagnosis: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before age eighteen.[208] After denying certiorari to consider whether Florida's rule was consistent with *Atkins* in several other cases, including *Cherry*, the Court decided to review Hall's case.[209]

Justice Kennedy, writing for a six-to-three majority, concluded that Florida's rigid rule refusing to acknowledge the SEM inherent in any IQ test "disregards established medical practice" both because it "takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity" and also because it "relies on a purportedly scientific measurement of the defendant's abilities, his IQ scores, while failing to recognize that score is, on its own terms, imprecise."[210] His opinion further states that "Florida's rule misconstrues the Court's statement in *Atkins* that intellectual disability is characterized by an I.Q. of approximately 70."[211] The decision in *Hall*—a no-brainer as a matter of clinical practice — was significant because the Court at several points referred to the "views of the medical community," "established medical practice," the "professional community," "medical experts," and the "medical community's diagnostic framework."[212] The Court's holding that Florida's refusal to take the SEM into account was inconsistent with those views, practices and opinions signaled that states are not free to define intellectual disability in a manner at odds with

207. *See* Hall v. Florida, 572 U.S. 701, 707 (2014) (explaining the reasoning behind rejecting Hall's appeal).

208. *See id.* at 710 (elaborating on the criteria used to show mental disability).

209. *See id.* (showing that cases granted certiorari to review the Florida rule's consistency with the *Atkins* rule).

210. *See id.* at 712–13 (providing Justice Kennedy's opinion on the flaws of Florida's system).

211. *See id.* at 724 (providing Justice Kennedy's assessment on Florida's interpretation of *Atkins*).

212. *See id.* at 707, 710, 712, 714 (demonstrating the inconsistency within the *Hall* opinion from the Florida court).

clinical consensus.[213] To rule otherwise, Justice Kennedy wrote, would allow states to "deny the basic dignity the Constitution protects."[214] The bottom line was that the Court agreed "with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[215]

While the decision was a win for Hall, resistance by the Florida courts cabined its potential to correct other *Atkins* claims that were wrongly adjudicated prior to *Hall*.[216] Initially, the Florida Supreme Court held that *Hall v. Florida* was retroactive and that claimants who were out of court would be granted another opportunity to bring *Atkins* claims previously rejected because of an IQ score above seventy.[217] Some defendants[218] managed to do so before the Florida Supreme Court changed course and overturned the decision that permitted retroactive application of *Hall*.[219] The Court justified its retraction of retroactivity as necessary to protect the State's "reliance on *Cherry*," and to eliminate the "ongoing threat of major disruption to application of the death penalty" that would occur if *Hall* applied retroactively.[220] Some death row inmates who initially were permitted to bring an *Atkins*-plus-*Hall* claim ultimately had the claim barred when the Florida Supreme

213. *See id.* at 723 (explaining the implications of the *Hall* decision).

214. *See id.* at 724 (providing Kennedy's reasoning on the implications if ruling in the alternative).

215. *See id.* at 723 (summarizing the opinion and noting what more a defendant must show in order to prove intellectual disability).

216. *See id.* (explaining judicial resistance to re-adjudicating cases following the *Hall* decision).

217. *See* Walls v. Florida, 213 So. 3d 340, 346 (Fla. 2016) (outlining the circumstances under which a case could be tried retroactively).

218. *See*, *e.g.*, Haliburton v. Florida, No. SC19-1858, 2021 WL 2460806 (Fla. 2021); Foster v. State, 260 So. 3d 174 (Fla. 2018) (elaborating that the ability to trigger retroactivity was not afforded to all potential inmates).

219. *See* Phillips v. State, 299 So. 3d 1013, 1015 (Fla. 2020) (clarifying that some were able to trigger retroactivity before the Florida courts reversed their stance).

220. *See id.* at 1021 (explaining the reasoning of the Florida courts for reversing the retroactivity of *Hall*).

Court reversed Hall's retroactive status[221] while others who were originally barred by the IQ cut-off and therefore filed no Atkins claim now are barred by the statute of limitations.[222]

B. Distorted Definitions of Adaptive Functioning Deficits

Another notable deviation from clinical consensus occurred, not surprisingly, in the capitol of capital punishment, Texas. Although the general definition of intellectual disability found in the Texas Health and Safety Code was in line with the clinical consensus, the Texas Court of Criminal Appeals ("TCCA") did not apply that definition to *Atkins* cases.[223] Instead, in *Ex Parte Briseno*, it created out of whole cloth a bizarre (at least from a clinical standpoint) gloss on the adaptive functioning deficits required by intellectual disability's second prong.[224] The court's disdain for the new categorical bar was clear for it began by noting that—in its view—it was required to determine what "level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty."[225] It then questioned whether every capital defendant in Texas who met the clinical definition of intellectual disability should be spared from the executioner.[226] To make what it described as the "exceedingly subjective" judgment about adaptive functioning, the state court directed fact-finders to focus

221. *See* Nixon v. State, 327 So. 3d 780, 783 (Fla. 2021) (demonstrating the implications for some prisoners who were unable to see through their *Hall* retroactivity).

222. *See* Freeman v. Florida, 300 So. 3d 591, 594 (Fla. 2020) (showing how the case impacted statute of limitations claims).

223. *See* Moore v. Texas, 137 S. Ct. 1039 (2017) (elaborating on inconsistency in application within Texas).

224. *See Ex parte* Briseño, 135 S.W.3d 1, 2 (Tex. Crim. App. 2004) (explaining the method taken by Texas courts).

225. *See id.* at 6 (describing the standard the courts aimed to ascertain). Indeed, the court suggested that Lennie from Steinbeck's *Of Mice and Men* was a figure that "[m]ost Texas citizens might agree" lived with intellectual disability.

226. *See id.* (revealing some of the rhetorical questions presented by the Texas court).

on a list of "other evidentiary factors" that were, in the court's estimation, "indicative of mental retardation,"[227] including:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[228]

Even a casual review of these factors, known as the *Briseño*[229] factors for the case in which the TCCA announced them, reveals both that they were steeped in stereotype and that they had no grounding in the clinical definition of intellectual disability.[230] For example, the first *Briseño* factor asks whether those who knew the person "best" thought he was "mentally retarded."[231] This assumes that persons with intellectual disability look and act in a way that laypeople can easily recognize, an assumption not borne out by the clinical literature.[232] Other *Briseño* factors assume that persons

227. *See id.* at 8 (explaining the instructions from the court).

228. *See id.* at 8–9 (enumerating the questions compiled by the Texas courts).

229. *See id.* (elaborating on the broad term for the factors the Texas court uses while showing the flaws with these factors).

230. *See id.* (explaining the flaws within the questions formulated by the Texas courts).

231. *Id.* at 8.

232. Blume et al., *supra* note 4, at 707–14.

with intellectual disability are "impulsive" and "wander" in conversation from topic to topic, cannot lie and cannot make plans, generalizations not at all supported by the clinical literature.[233] Rather, that literature establishes that the overwhelming majority of persons with an intellectual disability "can . . . acquire the vocational and social skills necessary for independent living."[234] Relying upon these factors, the Texas courts rejected many very strong claims of intellectual disability, including some where not a single expert challenged the defense expert's diagnosis,[235] yet the Supreme Court refused to hear numerous challenges to the legitimacy of the *Briseño* factors, including many where the factors were outcome-determinative.[236]

The Court finally got around to cleaning up the *Briseño* mess in *Moore v. Texas*,[237] a case that is a cameo of the TCCA's recalcitrance.[238] In state habeas, the trial court found that Moore had intellectual disability. Even though on appeal to the Texas Court of Criminal Appeals, the county prosecutor agreed with Moore and trial court that Moore should be removed from death

233. *See id.* (explaining that the *Briseño* factors are not based on scientific literature).

234. *See id.* (explaining that persons with intellectual disability "can drive, hold jobs, make money, and operate heavy machinery").

235. *See, e.g.*, Petetan v. State, No. AP-77,038, 2017 WL 915530, at *76 (Tex. Crim. App. Mar. 8, 2017) (upholding a finding of no intellectual disability even though "[n]o psychological expert testified definitively . . . that appellant was *not* mentally retarded" and three psychological experts diagnosed that appellant *was*); Lizcano v. Texas, No. AP-75,879, 2010 WL 1817772, at *35 (Tex. Crim. App. May 5, 2010) (noting, in relation to a jury's finding that the defendant had no intellectual disability, the State did not introduce its own expert witness, but citing *Ex parte Briseño* to reject the contention that the "State had a burden . . . to introduce expert witnesses" to disprove intellectual disability); *cf. id.* at *101 (Price, J., dissenting) (arguing that it is not for the jury to decide "what the Eighth Amendment standard for determining mental retardation is in the first place").

236. *See, e.g.*, *Lizcano*, No. AP-75,879, 2010 WL 1817772, *at 32 (denying petition for writ of certiorari); Hernandez v. Stephens, 572 U.S. 1036 (2014) (denying petition for writ of certiorari on the state court decision that the incarcerated person did not have an intellectually disability).

237. *See* Moore v. Texas, 137 S. Ct. 1039, 1060–62 (2017) (Roberts, C.J., dissenting) (discussing *Briseño* factors in CCA's approach as incompatible with Eighth Amendment).

238. *See id.* at 1060–61 (relating *Hall*'s lack of guidance to CCA's approach).

row,[239] the Texas Court of Criminal Appeals reversed, using the *Briseno* factors as justification for rejecting the agreement.[240] The Supreme Court granted certiorari, and the entire Court agreed that, "by design and in operation," the *Briseño* factors created a constitutionally intolerable risk that persons with intellectual disability would be wrongfully executed.[241] The majority noted that the adoption of these evidentiary factors was an outlier both because only one other state had adopted them and because even in Texas they were used only death penalty cases.[242] More specifically, the majority disapproved of how the TCCA focused on Moore's strengths to discount his weaknesses, used his weaknesses to discount IQ scores, and pointed to comorbidities to explain away clear evidence of intellectual disability.[243] Thus *Moore* reaffirmed *Hall*'s holding that *Atkins* adjudications must be informed by medical diagnostics to alleviate the risk that a person with intellectual disabilities will be executed,[244] this time applying that principle to the second prong.

However, on remand from the Supreme Court's decision in *Moore,* the Texas Court of Criminal Appeals again found that Moore's claim failed.[245] Although it refrained from using the phrase *Briseño* factors, its analysis repeated *Briseño*'s deviations from clinical standards.[246] Moore appealed to the Supreme Court, asking for summary reversal with no opposition from the

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239. *See Ex parte* Moore, 548 S.W.3d 555, 573 (Tex. Crim. App. 2018) (Alcala, J., dissenting) (describing applicant meeting burden of intellectual disability under established medical standards).

240. *See Ex parte* Moore, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015) (noting role of court as ultimate factfinder after habeas court failed to resolve *Briseno* test).

241. *See Moore*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting) (explaining that even the justices in dissent agreed that the *Briseño* factors ran afoul of the Eighth Amendment).

242. *See id.* at 1052 (describing use of medical standards in Texas for juveniles and absence in other contexts).

243. *See id*. at 1049–51 (explaining TCCA's departure through case history and prevailing medical standards).

244. *See id*. at 1048, 1051 (emphasizing the importance of medical standards for determining intellectual disability with regard to execution).

245. *See Ex parte* Moore, 548 S.W.3d 552, 555 (Tex. Crim. App. 2018) (finding that Moore failed to demonstrate intellectual disability).

246. *See* Moore v. Texas 139 S. Ct. 666, 670–72 (2019) [hereinafter Moore II] (noting same considerations from appeals court in discussion of Moore's capacity).

respondent, the county prosecutor. When the Texas Solicitor General moved to intervene to defend the TCCA's decision, the Supreme Court denied the motion, and summarily reversed the Texas court's decision[247] Noting that the TCCA's opinion on remand "rests upon analysis too much of which too closely resembles what we previously found improper,"[248] the Court agreed with Moore, the trial court, and the prosecutor that Moore had shown he is a person with intellectual disability. On the second remand, the TCCA finally gave up, grudgingly stating: "There is nothing left for us to do but to implement the Supreme Court's holding."[249] The TCCA then modified Moore's sentence to life imprisonment.[250] Rather remarkably, less than a year later, the Texas Board of Pardons and Paroles granted Moore parole.[251]

Moore II ended matters well for Moore himself, and it seems to have at least somewhat diminished TCCA resistance to *Atkins*. In the time between *Moore I* and the start of 2022, the Court of Criminal Appeals granted at least seven people *Atkins* relief[252] and in at least eleven other cases, the petitioner's Atkins claim was reheard, but he has since lost or not yet received a final decision.[253]

247. *Id*. at 672.

248. *Id*.

249. *Ex parte* Moore, 587 S.W.3d 787, 789 (Tex. Crim. App. 2019).

250. *See id*. (explaining that the TCCA lessened Moore's sentence).

251. *See* Jolie McCullough, *Bobby Moore's Supreme Court Case Changed How Texas Defines Intellectual Disabilities. After 40 Years in Prison, He's Just Been Granted Parole*, TEXAS TRIBUNE **Error! Hyperlink reference not valid.**(June 8, 2020) [https://perma.cc/NFE9-CMVH] (explaining that Moore was granted parole less than a year after his sentence reduction).

252. *See Ex parte Moore*, 587 S.W.3d at 788–89 (granting *Atkins* relief); *Ex parte* Guevara, NO. WR-63,926-03, 2020 WL 5649445 (Tex. Crim. App. Sept. 23, 2020) (granting *Atkins* relief); *Ex parte* Gutierrez, NO. WR-70,152-032020, WL 6930823 (Tex. Crim. App. Nov. 25, 2020) (granting *Atkins* relief); *Ex parte* Lizcano, NO. WR-68,348-03, 2020 WL 5540165 (Tex. Crim. App. Sept. 16, 2020) (granting *Atkins* relief); *Ex parte* Williams, NO. WR-71,296-03, 2020 WL 7234532 (Tex. Crim. App. Dec. 9, 2020) (granting *Atkins* relief); *Ex parte* Henderson, NO. WR-37,658-03, 2020 WL 1870477 (Tex. Crim. App. Apr. 15, 2020) (granting *Atkins* relief); *Ex parte* Sosa, NO. AP–76,674, 2017 WL 2131776 (Tex. Crim. App. May 3, 2017) (granting *Atkins* relief).

253. *Ex parte* Milam, NO. WR-79,322-02, 2020 WL 3635921 (Tex. Crim. App. July 1, 2020); Ex parte Wood, 568 S.W.3d 678 (Tex. Crim. App. 2018); *Ex parte* Davis, NO. WR-40,339-09, 2020 WL 1557291 (Tex. Crim. App. Apr. 1, 2020); Ex parte Cathey, WR-55,161-02, 2021 WL 1653233 (Tex. Crim. App. Apr. 28, 2021); Ex parte Jean, NO. WR–84,327–01, 2017 WL 2859012 (Tex. Crim. App. June 28,

This of course does nothing to ameliorate the wrong done to Atkins claimants executed before *Moore II*; between the Supreme Court decisions in *Atkins* and *Moore II*, Texas executed more than three hundred people,[254] at least thirteen of whom lost *Atkins* claims under the standard held to be unconstitutional in *Moore*.[255] And among those eleven cases that went back to court after *Moore I*, in one of them, the trial court held a hearing, found that the habeas petitioner lived with intellectual disability, and the TCCA—as the "ultimate factfinder"—nevertheless reversed and found that he did not.[256] In another case, the TCCA used the same record that was made under *Briseno* to find that the client was not entitled to relief after Moore.[257] It remains to be seen how well the other cases will fare once in front of the TCCA again.

C. Inadequate Federal Habeas Corpus Review

Some readers are likely thinking: "Ok, some state courts have been bad on *Atkins,* but can't a death sentenced inmate file a petition for writ of habeas corpus in federal court and have the federal courts resolve the claim?" Sadly, the answer is for the most part no.

2017); *Ex parte* Bridgers, NO. WR-45,179-05, 2021 WL 2346539 (Tex. Crim. App. June 9, 2021); *Ex parte* Lewis, NO. WR- 86,572-01, 2020 WL 5540550 (Tex. Crim. App. Sept. 16, 2020); *Ex parte* Escobedo, NO. WR-86,572-01, 2020 WL 3469044 (Tex. Crim. App. Sept. 16, 2020); *Ex parte* Butler, NO. WR-41,121-03, 2019 WL 4464270 (Tex. Crim. App. Sept. 18, 2019); *Ex parte* Segundo, NO. WR-70,963-02, 2018 WL 4856580 (Tex. Crim. App. Oct 5, 2018); *Ex parte* Long, NO. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018).

254. *See Execution Database*, DEATH PENALTY INFO. CTR. [https://perma.cc/KL8W-EPLF].

255. Joseph Margulies, John Blume, & Sheri Johnson, *Dead Right: A Capital Punishment Cautionary Tale*, 53.1 COL. HUM. RTS. L. REV. 59, 72 (2021).

256. *See Ex parte* Storey, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019) (stating that in habeas, the TCCA views the trial court as the "original factfinder" and itself—despite being an appellate court—as the "ultimate factfinder."); *see*, *e.g.*, *id*. (stating authority to enter contrary findings); *see also Ex parte* Barnaby, 475 S.W.3d 316, 321, 327 (Tex. Crim. App. 2015) (reconsidering habeas court findings of fact); *Ex parte* Weinstein, 421 S.W.3d 656, 659 (Tex. Crim. App. 2014) (describing remand to trial court to ascertain truth of facts).

257. *See Ex parte* Wood, 568 S.W.3d 678, 679–80 (Tex. Crim. App. 2018) (concluding that no further record development or fact findings are needed and applicant is not entitled to relief).

1. Giving Undue Deference

The reality is that strong, sometimes objectively unassailable claims of intellectual disability rejected by hostile state courts often fare no better when reviewed by the federal courts in habeas corpus proceedings. The most common culprit on federal review is 28 U.S.C. § 2254(d), which is part of the Anti-Terrorism and Effective Death Penalty Act of 1996 or "AEDPA."[258] As a predicate to federal habeas relief, § 2254(d) requires a petitioner to show not only that the underlying claim has constitutional merit but also that the state court decision rejecting the assertion of intellectual disability was either "contrary to or an unreasonable application of clearly established law as determined by the Supreme Court of the States," or was "an unreasonable determination of the facts in light of the evidence presented in state court proceedings."[259] So, in this context, a habeas petitioner must show that his *Atkins* claim is meritorious and show that the state court decision rejecting his claim was objectively unreasonable.[260]

Making matters worse, the Supreme Court of the United States has interpreted § 2254(d) as imposing a nearly insurmountable bar. Federal courts must let a state court ruling stand so long as "fairminded jurists could disagree' on the correctness of the state court's decision."[261] The Court has made it clear that this standard is highly deferential to state courts: "If this standard is difficult to meet, that is because it was meant to be . . . It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."[262] It goes no further. Section 2254(d) reflects the view that habeas corpus is a "'guard against extreme malfunction in the state criminal justice systems,' not a substitute for ordinary error correction through

258. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996).

259. 28 U.S.C. § 2254(d)(1),(2) (2018).

260. *See id.* (explaining the burden of what the habeas petitioner must show).

261. *See* Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)) (explaining the standard of review).

262. *See id.* at 102 (explaining the difficultly in meeting this standard of review).

appeal . . . ."[263] Indeed, some courts have gone decades without a single habeas grant.[264]

The Supreme Court and the lower federal courts have used this crimped view of habeas to let erroneous state court rulings rejecting *Atkin*s claims stand.[265] Several examples will suffice to make the point. *Reeves v. Commissioner, Alabama Department of Corrections*,[266] a decision rendered by the United States Court of Appeals for the Eleventh Circuit, provides one illustration. The Alabama Court of Appeals concluded that Reeves's claim failed on prong one—despite measured IQ scores of sixty-eight, seventy-one, and seventy-three—because the judge hearing the claim, after observing Reeves in court, concluded that his intellectual functioning was not significantly subaverage.[267] As for prong two, the Court of Appeals again rejected objective test scores finding deficits in adaptive functioning on the basis that his alleged

263. *See id.* (explaining that the statute intentionally sets a very high burden of proof to receive relief via a habeas petition).

264. *See* John Blume, *The Dance of Death or (Almost) No One Here Gets out Alive: The Fourth Circuit's Capital Punishment Jurisprudence*, 61 S.C. L. REV. 3 (2010); David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000–2020*, 68 UCLA L. REV. DISC. 3 (2020) (explaining that due to the stringent burden, courts rarely grant such motions).

265. *See, e.g.,* Wetzel v. Lambert*,* 565 U.S. 520, 524 (2012) ("Under 2254(d) [habeas relief is precluded if] it is possible fairminded jurists could disagree that [the state court's] arguments or theories are inconsistent with the holding in a prior decision of this Court." (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011)); Virginia v. LeBlanc, 137 S.Ct. 1726 (2017) ("[On Habeas] even clear error will not suffice . . . In other words, a litigant must 'show that the state court's ruling . . . was so lacking in justification that was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."); Mays v. Hines*,* 141 S.Ct. 1145, 1149 (2021) ("The term 'unreasonable' refers not to 'ordinary error' or even to circumstances where the petitioner offers 'a strong case for relief,' but rather to 'extreme malfunctions in the state criminal justice syste[m].'" (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011)); Larry Yackle, *A Primer on the New Habeas Statute*, 44 BUFF. L. REV. 381, 398 (1996) (explaining that when then Senator Biden pressed Senators Specter and Hatch on § 2254(d), they made clear in no uncertain terms that the statute did not require federal courts to defer to state court decisions that were not unreasonable, calling the assertion "absolutely false").

266. Reeves v. Comm'r, Alabama Dep't of Corr. 836 Fed. App'x 733 (11th Cir. 2020).

267. *See id*. at 740 (stating that defendant's intellectual functioning was not significantly subaverage based on all evidence and observation).

adaptive strengths outweighed his deficits.[268] Though the United States Supreme Court would eventually reject both practices in *Hall v. Florida*[269] and *Moore v. Texas*,[270] the Eleventh Circuit, which acknowledged that it was inclined to agree with Reeves on prong one, determined that the claim failed on prong two because *Moore* was decided after the state court ruling and therefore not "clearly established" for AEDPA purposes.[271] The court also concluded that while there was evidence of significant deficits in adaptive functioning, the state court decision finding strengths, which relied on behavior in prison and other supposed evidence of strengths, i.e., he sold drugs, was not unreasonable.[272] The Court said, "we are not sitting as initial triers of fact or determining whether [Reeves] is in fact [intellectually disabled] . . . We are reviewing the state habeas court through the prism of AEDPA," and thus concluded that Reeves claim could not meet its heavy standard.[273]

2. "Rubber Stamping" State Drafted Orders

What makes decisions like this more galling, and more tragic for the persons with intellectual disability that will likely ultimately be executed despite the Eighth Amendment categorical

268. *See id*. (describing that other evidence was presented that called into question the validity of the scores).

269. *See* Hall v. Florida, 572 U.S. 701, 724 (2014) (finding exploration of capital defendant's intellectual disability unconstitutional).

270. *See* Moore v. Texas, 139 S. Ct. 666, 672 (2019) (holding that the petitioner showed that he had intellectual disabilities where the opinion of the appeals court rests upon analysis too much of which too closely resembles what was previously found improper).

271. *See Reeves*, 836 Fed. App'x at 741-42 (explaining that in other cases, the Eleventh Circuit has held that Hall was not clearly established federal law for habeas purposes, and thus it was not unreasonable for the state court to reject a claim using Florida's 70 IQ cut off); *see, e.g.,* Kilgore v. Secretary, Florida Department of Corrections, 805 F.3d 1301, 1310 (11th Cir. 2015) (finding that *Hall* also was not clearly established federal law for habeas purposes, and thus it was not unreasonable for the state court to reject a claim using Florida's strict 70 IQ cut off).

272. *See id.* at 743 (finding that although Reeves had some intellectual disabilities, he was still able to care for himself).

273. *Id.*

bar, is that many of the state court decisions to which federal courts give such heavy deference were written by counsel for the state.[274] In Alabama, for example, attorneys from the capital division of the State Attorney General's office represent the State at post-conviction hearing where most *Atkins* claims are raised.[275] At the conclusion of the hearing, the State typically presents a "draft" proposed order rejecting the claim for the state post-conviction judge's consideration.[276] These orders often contain highly slanted, and in some cases patently false,[277] "findings of fact," and, in numerous cases, judges sign these orders verbatim often without even reading them.[278] Similarly, one study found that Harris County judges, responsible for more executions than all states besides Texas, adopted the prosecution's findings of fact and conclusions of law verbatim ninety-five percent of the time.[279] Thus the deference given is often not even to a supposedly neutral finder of fact, but to an advocate for the State.

Several other cases with strong claims that failed under AEDPA are worth noting. John Matamoros challenged his Texas death sentence on the basis that he was a person with intellectual disability.[280] At his initial state court habeas *Atkins* hearing, the State's expert, who testified that Matamoros was not a person with intellectual disability was Dr. George Denkowski.[281] After the

274. *See* Jordan M. Steiker, James W. Marcus, & Thea J. Posel, *The Problem of Rubber Stamping in State Capital Habeas Proceedings: A Harris County Case Study*, 55 HOUS. L. REV. 889, 900 (2018) ("Harris County post-conviction prosecutors have authored and proposed 21,275 separate findings of fact and conclusions of law and the Harris County courts have adopted 20,261 of the prosecutors' proposed findings verbatim: an adoption rate of 95%.").

275. ALA. ATT'Y GEN. OFF.: DIV. [https://perma.cc/P3QW-QL95].

276. *See* Steiker et al., *supra* note 274, at 898–99 ("Trial courts routinely sign the prosecution's proposed orders in their entirety, notwithstanding the presence of significant factual disagreements.").

277. *See Ex parte* Ingram, 51 So.3d 1119, 1125 (Ala. 2010) (reversing the denial of the Court of Criminal Appeals where the State lied in their statements to the court).

278. *See* Clemons v. Comm'r, Ala. Dep't of Corr., 967 F.3d 1231, 1249 (11th Cir. 2020) (rejecting intellectual disability despite having test scores which demonstrated him having a mental disability).

279. Steiker, *supra* note 274, at 900.

280. *See generally* Matamoros v. Stephens, 783 F.3d 212 (5th Cir. 2015).

281. *See* John Floyd & Billy Sinclair, *"Junk Science" Once Again Puts Texas in National Forefront*, JOHN T. FLOYD L. FIRM (Jan. 5, 2012) (explaining that

initial hearing, and rejection of Matamoros' claim, Denkowski was officially reprimanded by the Texas State Board of Examiners of Psychologists due to his highly questionable and unscientific diagnostic practices which included randomly, and with absolutely no scientific basis, adding points to the IQ scores of Black and Hispanic death row inmates. As part of his settlement with the Board, Denkowski agreed not to engage in any forensic work. Matamoros' case was pending in federal court at the time, and the federal courts stayed the federal proceeding and allowed him to bring these developments to the state court's attention.[282] Rather than grant a new hearing, or consider additional evidence, the state court signed verbatim an order prepared by the Attorney General's office, one that purported to completely disregard Denkowski's testimony, but which denied relief and in all other respects was just like the original order.[283] The Texas Court of Criminal Appeals affirmed with two judges dissenting.[284] This was particularly disingenuous given that Denkowski was the only expert to testify for the State or render an opinion that Matamoros was not a person with intellectual disability (and given a rich record, including a prior diagnosis of intellectual disability when Matamoros was a teenager that supported all three prongs of the diagnostic criteria).[285]

Despite the apparent disingenuity of the state court's order, both the district court and the Fifth Circuit concluded that Matamoros had not shown that the Court of Criminal Appeals was "unreasonable in concluding that [he] did not meet his burden" of

Denkowski was a "go to" expert witness, and he was retained by Texas prosecutors and attorneys general in numerous capital cases where death sentenced inmates asserted they were persons with intellectual disability and in every case he determined that the death row inmate did not meet the criteria for intellectual disability) [https://perma.cc/LSG5-KLZK].

282. *See* Matamoros v. Stephen, 783 F.3d 212, 214 (5th Cir. 2015) (stating that the federal court stayed the proceedings so Matamoros could exhaust his Atkins claim in state court).

283. *See id.* (stating that the state trial court signed and order adopting the state's Amended Proposed Findings of Fact and Conclusions of Law).

284. *Id.*

285. *See id.* at 219 (describing Denkowski's testimony).

proving intellectual disability."[286] Although the court of appeals acknowledged that the "only competent scientific evidence in the record" supported a finding of intellectual disability, it concluded that under AEDPA's highly deferential regime, the state courts were free to weigh "observational evidence," (i.e., that Matamoros could respond appropriately to external stimuli, lied to protect his own interests and committed crimes requiring forethought) "more heavily than it weighed the scientific and expert reports presented by Matamoros."[287] The Court of Appeals noted that while the standard of review often has little effect on the outcome of a case, Matamoros' was "not one of those cases" and his claim failed because of AEDPA's strict limitations on habeas relief.[288]

It is true that the majority of the egregious cases arise in the Fifth and Eleventh Circuits (which is where most of the cases are given that the states in those circuits are in the heart of America's death belt),[289] but AEDPA's perceived limits on federal review of state court judgments has led to losses in meritorious *Atkins* claims in other federal courts of appeal as well. *Pizzuto v.*

286. *See id.* at 226 (holding that law will only grant Matamoros relief if he was able to prove that the Court of Criminal Appeals was unreasonable in concluding that he did not show that he is intellectually disabled).

287. *See id.* (explaining what the state court was permitted to do under the Briseno framework).

288. *See id.* at 226 (explaining why Matamoros failed to prove that he was intellectually disabled as the term defined by *Briseno*).

289. Two more cases, one from Florida and one from Texas, are worth briefly mentioning (and many others would be as well space permitting). *See* Arbelaez v. Florida Dep't of Corr., 662 Fed. App'x 713 (11th Cir. 2016) (rejecting a strong claim of intellectual disability because of state expert who based testimony on interview rather than information provided by the defendant's family, friend, teachers and employers); Hernandez v. Stephens, 537 Fed. App'x 531 (5th Cir. 2013) (sentencing inmate to death despite several IQ measures that showed his IQ was below 70 and stating that he could not count money, could not use public transportation, could not follow directions, did not maintain his personal hygiene, never lived independently, and could not perform even many menial jobs); *see also* Sheri L. Johnson, *A Legal Obituary for Ramiro*, 50 U. MICH. J.L. REFORM 291 (2016) (providing examples of the Fifth Circuit pushing the ethical bounds of the law).

Blades,[290] is a noteworthy example.[291] Gerald Pizzuto was convicted of murder and sentenced to death in Idaho. In state collateral proceedings he raised a claim of intellectual disability and proffered an expert report indicating he had a measured IQ score of seventy-two, but the state court dismissed the claim without even granting him a hearing on the basis that his IQ was above Idaho's cutoff of seventy.[292] A panel of the Ninth Circuit rejected his claim on the basis that no "clearly established" Supreme Court precedent at the time of the state court adjudication of his claim forbade the type of IQ cutoff the Idaho courts invoked in Pizzuto's case.[293] The circuit court stated that although it is now clear that the Idaho state courts' treatment of his claim was irreconcilable with Supreme Court precedent (and clinical standards), it was not "beyond fairminded disagreement in 2008," and was "not so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[294]

3. Ignoring State Court Deviations From Clinical Consensus

But perhaps the case that "takes the cake" so to speak, is that of Danny Hill, an Ohio death row inmate.[295] Prior to the *Atkins*'

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290. *See* Pizzuto v. Blades, 933 F.3d 1166, 1189 (9th Cir. 2019) (holding that habeus relief could not be granted because the record did not establish that the court's adjudication of the inmate's *Atkins* claim resulted in a decision that met the contrary and unreasonable standard).

291. *See id.* (stating that the district court was correct in denying habeas relief).

292. *Se id.* (explaining that the minimal IQ for a mental disability is seventy).

293. *See id.* at 1184 (stating that there is no clearly established Supreme Court precedent that shows that Idaho's Supreme Court's decision was "contrary to" or involved an "unreasonable application" to it).

294. *Id.* at 1184; *see also* Smith v. Duckworth, 824 F.3d. 1233, 1247 (10th Cir. 2016) (describing that Oklahoma's failure to apply the Flynn effect was not contrary to or an unreasonable application of clearly established law in light of *Atkins*); Jenkins v. Comm'r, 936 F.3d 1252 (11th Cir. 2019) (same).

295. Indeed, in the aftermath of *Atkins*, Ohio Attorney General Betty Montgomery said, "Each case is going to have to be scrutinized to see if it's legitimate or just a ruse to buy more time by the inmate." Dan Horn, *Claims of Retardation Likely: Execution Ban Opens New Appeals*, THE CINCINNATI ENQUIRER, Cincinnati, Ohio, June 21, 2002 at A2. The AG was also confident that none of Ohio's death row prisoners would be affected by the decision. *Id.*

decision itself, there was absolutely no question that Hill was a person with intellectual disability. He had been diagnosed with intellectual disability at least *ten times* over the course of his life.[296] First determined to be a slow learning child at age six, he was placed in special education classes where he remained for the entire time he was a student in the public school system.[297] At age seventeen, he was assessed by an examiner with the juvenile court system after being arrested for sexual assault and was determined to be "mildly retarded with very poor adaptive functioning."[298] At his capital trial, several experts testified he was a person with intellectual disability (and none said he was not), and during his pre-*Atkins* appeals, courts found that he was, in fact, a person with intellectual disability.[299] Hill's case was pending in federal court when *Atkins* was decided and the federal courts remanded the case to the state courts for resolution of what one would have thought would have been a straightforward and very simple question: whether Hill's death sentence should be set aside due to the creation of the new categorical bar.[300]

However, attorneys for the State of Ohio persuaded the judge to order the experts to focus their inquiry solely on whether Hill was a person with intellectual disability at the time of the evaluation.[301] As a result, two of the three evaluating experts largely ignored the detailed, historical record of Hill's intellectual disability, and rendered their opinion based on interviews with prison guards and Hill himself.[302] The third expert, the only one to

296. *See* Hill v. Shoop, 11 F.4th 373, 400 (6th Cir. 2021) (Moore, J., dissenting)(stating that Hill has been diagnosed with a mental disability approximately ten times over the course of his life).

297. *See id.* at 400–01 (describing when Hill was first diagnosed with an intellectual disability and how that effected his classes in public school).

298. *See id.* at 401 (stating that Hill was still intellectually disabled at the age of seventeen when he was assessed again).

299. *See id.* at 417 (listing several times when Hill was found to have an intellectual disability).

300. *See id.* at 383 (majority opinion) (detailing the procedural history).

301. *See id.* at 411 (Moore, J., dissenting) ("Both experts, instead, assessed Hill's adaptive skills as they existed at the time of the hearing' — even though intellectual disability is a static condition.").

302. *See id.* ("Drs. Olley and Huntsman leaned heavily on these prison officials' testimony rather than treating them with the degree of skepticism mandated by the medical literature.").

review and rely upon the records and to conduct collateral interviews, concluded that Hill was in fact a person with intellectual disability.[303] The other two acknowledged that Hill had significantly, subaverage intellectual functioning (thus satisfying prong one), but concluded that there was not sufficient information to say that Hill met prong two at the time of the state court hearing.[304] The state judge presiding over the matter, relying primarily on the testimony of the two experts, testimony from prison correctional officers that Hill was an "average inmate" and his own observations of Hill in court, found that he was not a person with intellectual disability, and the Ohio Court of Appeals affirmed.[305]

A panel of the Sixth Circuit initially granted the writ of habeas corpus, finding that the state court decision was objectively unreasonable.[306] In the panel's view, the state courts: a) overemphasized Hill's adaptive strengths (as opposed to his deficits, as required by clinical consensus); and, b) relied too heavily on his prison behavior.[307] The Sixth Circuit opinion cited *Moore v. Texas*,[308] which criticized the TCCA's judgment for doing both of those things, and held that Ohio Court of Appeals decision in Hill—like the TCCA's decision in Moore—was inconsistent with Atkins and the clinical consensus understanding of intellectual disability.[309] However, the United States Supreme Court reversed and remanded, finding that *Atkins* itself did not "definitively resolve" how the adaptive functioning prong was to be assessed,

303. *See id.* at 412 ("[D]r. Nancy Schmidtgoessling, one of the psychologists who testified during the mitigation phase of Hill's trial, assessed Hill's adaptive behavior when she diagnosed him as intellectually disabled.").

304. *See id.* at 409 ("Dr. Olley described borderline intellectual functioning as "no mental retardation but it is the . . . functioning that is . . . between one standard deviation below the mean and two standard deviations below the mean," i.e., an IQ range between '71 to 85.'").

305. *See id.* at 415 (explaining that the records and experts support the trial court's conclusion that the second prong was not met).

306. *See* Hill v. Anderson, 881 F.3d 483, 487 (6th Cir. 2018) (reversing the judgment of the district court in respect to Hill's *Atkins* claim).

307. *See id.* at 493 (describing the trial court's mistake by disregarding accepted medical practices and relying too heavily on behavioral observations).

308. 137 S.Ct. 1039 (2017).

309. *See Anderson,* 881 F.3d at 486–87 (reversing the judgment of the district court).

and that it was improper for the court of appeals to "lean so heavily on *Moore*" because it was not "clearly established" at the time of the state court decision.[310] The remand instructed the panel to "determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time, "[311] thus leaving the possibility that the Sixth Circuit would affirm its holding, albeit with reasoning independent of *Moore*.

On remand, the Sixth Circuit panel once more determined that Hill was a person with intellectual disability.[312] This time, the panel focused almost exclusively on defects in the state court fact-finding process and the state courts factual determinations in concluding that Hill was (still) a person with intellectual disability, and that the state court's decision to the contrary was an "unreasonable determination of the facts" in light of the evidence before the state courts.[313] The Ohio Attorney General's office petitioned for rehearing *en banc*, which was granted. The *en banc* court, voting strictly along ideological lines, then reinstated Hill's death sentence.[314] The *en banc* majority concluded that it was not objectively unreasonable for the state court to order the experts to evaluate Hill's intellectual abilities at the time of the *Atkins'* hearing "given the discretion *Atkins* left to the states."[315] When evaluating the state court factual determination under § 2254(d)(2), the majority admitted that there was evidence in the record that showed Hill had deficits in "adaptive skills such as self-care, functional academics and self-directions," and acknowledged that "another judge could have reached the opposition conclusion"

310. *See* Shoop v. Hill, 139 S.Ct. 504, 507–08 (2019) (explaining that *Atkins* did not completely resolve the issue and such reliance on *Moore* was inappropriate).

311. *Id.* at 509.

312. *See* Hill v. Anderson, 960 F.3d 260, 265 (6th Cir. 2020), *vacated,* 964 F.3d 590 (6th Cir. 2021) ("We hold that Hill is intellectually disabled and that he cannot be sentenced to death.").

313. *See id.* at 282–83 (concluding that the state court's decision amounted to an incorrect application of general *Atkins* standards).

314. *See* Hill v. Shoop, 11 F.4th 373, 381 (6th Cir. 2021), *petition for cert. filed*, (U.S. Nov. 24, 2021) (No. 21-6428) (affirming the district court's denial of Hill's petition for a writ of habeas corpus).

315. *See id.* at 386 (describing the majority's rationale in affirming the district court's opinion in light of *Atkins*).

and found Hill to be a person with intellectual disability, but held that because the "determination of the Ohio Court of Appeals was not unreasonable . . . Hill cannot succeed on his *Atkins* claim."[316] The dissenting judges meticulously documented the decades of evidence of Hill's disability, including the multiple prior diagnoses and judicial findings all finding Hill to be a person with intellectual disability and concluded that that "the evidence that Hill is intellectually disabled is overwhelming."[317] After deconstructing the state court opinion and exposing the factual cherry-picking and reliance on stereotypes of persons with intellectual disability, the dissenters objected that "[n]o person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*."[318]

In sum, while federal habeas review has resulted in some persons with intellectual disability being spared execution or given another opportunity to present their claim to the state courts,[319] overall, it has been a woefully inadequate check on recalcitrant state courts. The restrictions on the habeas remedy created by the Supreme Court, especially in the hands of many members of the federal judiciary who will adjudicate the cases and who are all to willing to overlook a state court's rejection of a clearly meritorious claim, ensures that a not insignificant number of persons with intellectual disability will be executed.

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316. See *id.* at 394–95 (conceding that there were facts and circumstances present that could lead to a different outcome in favor of Hill).

317. *See id.* at 418 (Moore, J, dissenting) (identifying the large amount of evidence that supported Hill's claims that he was intellectually disabled).

318. *Id.* at 400.

319. *See* Brumfield v. Cain, 576 U.S. 305, 307 (2015) (granting habeas relief because the state court's refusal to fully consider an *Atkins* claim was an unreasonable determination of fact); Van Tran v. Colson, 764 F.3d 594, 597 (6th Cir. 2014) (granting relief because the state court's application of *Atkins* was contrary to federal law); Pruitt v. Neal, 788 F.3d 248, 270 (7th Cir. 2015) (holding that the state court's finding that petitioner did not live with intellectual disability was an unreasonable determination of fact); Smith v. Sharp, 935 F.3d 1064, 1083 (10th Cir. 2019) (granting habeas relief because the state court either made unreasonable determinations of fact or unreasonably applied *Atkins*).

V. Conclusion

We have applauded and continue to applaud the Court for creating a categorical bar to the execution of persons with intellectual disability. *Atkins* has spared many lives. But it was never intended to apply only in some states, or to some persons with intellectual disability; the purpose of the rule was to protect all persons with intellectual disability in all states that retain the death penalty, from the "risk of wrongful execution."[320] But, for the reasons we have discussed in this article, twenty years after *Atkins*, there is not just the risk, but the certainty of continued wrongful executions. Those wrongful executions will continue to happen as long as legislatures and courts, including the Court that created the bar, tolerate the procedural and substantive obstacles created by state courts, and the parsimonious federal habeas review of state court decisions rejecting very strong claims of intellectual disability.

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320. *See* Atkins v. Virginia, 536 U.S. 304, 321 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").