

## The Development of Intellectual Disabilities in United States Capital Cases and the Modern Application of Moore v. Texas to State Court Decisions

Dr. Alexander Updegrave

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### Recommended Citation

Updegrave, Dr. Alexander () "The Development of Intellectual Disabilities in United States Capital Cases and the Modern Application of Moore v. Texas to State Court Decisions," *University of Massachusetts Law Review*. Vol. 16 : Iss. 1 , Article 1.

Available at: <https://scholarship.law.umassd.edu/umlr/vol16/iss1/1>

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# The Development of Intellectual Disabilities in United States Capital Cases and the Modern Application of *Moore v. Texas* to State Court Decisions

Dr. Alexander Updegrove

16 U. MASS. L. REV. 2

## ABSTRACT

Although in 1989 the Supreme Court of the United States initially held that the Eighth Amendment did not prohibit executing persons with intellectual disabilities in *Penry v. Lynaugh*, in 2002 it subsequently reversed this decision in *Atkins v. Virginia*, citing changing state legislation. Since the *Atkins* decision, state courts have interpreted the Court's *Atkins* provisions in a variety of ways, some more faithfully than others. As a result, the Court provided additional clarification in its 2014 and 2015 *Hall v. Florida* and *Brumfield v. Cain* decisions, ruling that states must apply a Standard Error of Measurement of +5/-5 to all capital defendant IQ test scores. Despite this requirement, some state courts still delivered opinions contrary to the Court's *Atkins* and *Hall* holdings, prompting the Court to offer yet more guidance in 2017. In *Moore v. Texas I*, the Court established that states must evaluate intellectual disabilities in capital defendants according to current medical standards, which include: (1) using the diagnostic criteria outlined in the DSM-5 or AAIDD-11; (2) focusing on adaptive deficits, not strengths; and (3) prohibiting determinations of intellectual disability from being based on functioning in prison. In 2019 the Court determined in *Moore v. Texas II* that the analysis undertaken by the Texas Court of Criminal Appeals continued to offend Court precedent. Given the long history of some state courts disregarding clear holdings of the Supreme Court, this Article examines how state courts have interpreted *Moore I* and *Moore II*.

## AUTHOR'S NOTE

Alexander H. Updegrove is an Assistant Professor in the Department of Criminal Justice at the University of North Texas. His scholarship focuses on the death penalty and public perceptions of criminal justice issues. This Article is dedicated to Rolando V. del Carmen and Michael S. Vaughn. This Article is also dedicated to Peggy M. Tobolowsky, for her incredible legal scholarship on intellectual disability among persons sentenced to death.

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## I. INTRODUCTION

Although the Supreme Court of the United States held that the Eighth Amendment's protection against cruel and unusual punishment prohibited executing persons with intellectual disabilities in *Atkins v. Virginia*,<sup>1</sup> subsequent state court interpretations of the case have compelled the Court to revisit aspects of the intellectual disability analysis on numerous occasions. One reason for this could be that the state courts must interpret the written opinions of the Court. This creates the possibility for errors as, inevitably, some state court opinions will adhere more closely to the Supreme Court's principles in their interpretations than others. Misinterpretations by state courts may occur, sometimes due to genuine confusion, other times due to bad faith motivated by conflicting ideologies. When confronted with especially egregious interpretations from state courts, the Supreme Court is forced to intervene and provide clarification. Such was the case in *Moore v. Texas I*,<sup>2</sup> where the Court ordered Texas to evaluate capital defendants for intellectual disabilities using current medical criteria rather than the nonmedical *Briseno* factors.<sup>3</sup> The Texas Court of Criminal Appeals (CCA) introduced the *Briseno* factors in 2004 based on the character Lennie Small from John Steinbeck's fictional novel *Of Mice and Men*.<sup>4</sup>

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<sup>1</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>2</sup> *Moore v. Texas (Moore I)*, 137 S. Ct. 1039 (2017).

<sup>3</sup> *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), *overruled by Moore I*, 137 S. Ct. 1039 (2017). The *Briseno* factors aid the factfinders' assessment with guiding questions such as: "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?" *Id.* at 8. "Has the person formulated plans and carried them through or is his conduct impulsive?" *Id.* "Does his conduct show leadership or does it show that he is led around by others?" *Id.* "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" *Id.* "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" *Id.* "Can the person hide facts or lie effectively in his own or others' interests?" *Id.* And finally, "[p]utting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Id.* at 8–9.

<sup>4</sup> *See* JOHN STEINBECK, *OF MICE AND MEN* (Penguin Books 1993) (1937) (Throughout the novel, Lennie Small is portrayed as a simple-minded person who enjoys petting soft materials. Being a large person, Lennie unintentionally kills several animals as a result of petting them. Toward the end of the novel, Lennie finds himself in a situation where he is provided a chance to pet the hair of his boss's daughter-in-law. As with the animals, Lennie's strength proves fatal.); *see*

After the Court remanded the case to the Texas CCA with instructions to reassess Moore's intellectual ability in a manner consistent with *Moore I*, the Texas CCA again found him intellectually able, and therefore eligible for execution.<sup>5</sup> On February 19, 2019, the Supreme Court determined that the Texas CCA had misinterpreted its earlier ruling.<sup>6</sup> In order to prevent further misinterpretations, the Court held that Moore was intellectually disabled, and therefore entitled to execution relief.<sup>7</sup>

This Article begins by reviewing relevant Supreme Court rulings on intellectual disabilities in capital cases. Part III then identifies state court cases from the twenty-eight death penalty states<sup>8</sup> that have cited *Moore v. Texas I* or *Moore v. Texas II* to examine how state courts are interpreting and applying these Supreme Court cases. Special attention is given to state court cases that appear inconsistent with clear instructions from the Court on intellectual disabilities. Finally, this Article concludes by summarizing the issues raised by state courts post-*Moore I* and classifying them in two categories: (1) issues the Court has clearly ruled on; and (2) issues requiring additional clarification from the Court.

## II. SUPREME COURT CASES ON INTELLECTUAL DISABILITIES IN CAPITAL CASES

### A. *Penry v. Lynaugh* (1989)

In *Penry v. Lynaugh*, the Supreme Court ruled that the Eighth Amendment does not prohibit states from executing persons with

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also Julia Barton, *Judging Steinbeck's Lennie*, LIFE OF THE LAW (Sept. 3, 2013), <http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie/> [<https://perma.cc/TD2Q-5TJL>].

<sup>5</sup> *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018), *rev'd*, *Moore v. Texas*, 139 S. Ct. 666 (2019).

<sup>6</sup> *Moore v. Texas* (*Moore II*), 139 S. Ct. 666 (2019) (per curiam).

<sup>7</sup> *Id.* at 668.

<sup>8</sup> See Death Penalty Information Center, *States with and Without the Death Penalty*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/P5ZP-BB78?type=image>]. (The 28 states that still retain the death penalty are: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.)

intellectual disabilities.<sup>9</sup> Penry exhibited “an IQ between 50 and 63,” and the evidence presented suggested “that Penry suffered from organic brain damage” originating from either birth or “beatings and multiple injuries to the brain” experienced in his early childhood.<sup>10</sup> State experts disputed some of the conclusions drawn by the defense, but conceded “that Penry was a person of extremely limited mental ability.”<sup>11</sup> In its decision, the Court observed that a “rational juror” might “conclude that Penry was less morally” responsible for the crime in question because of his intellectual disability.<sup>12</sup> The Court found that the jurors in Penry’s case lacked an opportunity to incorporate “the mitigating evidence of Penry’s mental retardation”<sup>13</sup> into their sentencing decision.<sup>14</sup> Thus, the case was remanded with instructions to hold a new sentencing hearing.<sup>15</sup>

The Court proceeded to address whether it was cruel and unusual punishment to execute persons who have intellectual disabilities. In its opinion, the Court granted that “the common law prohibition against punishing ‘idiots’ for their crime suggests” that executing “profoundly or severely retarded” persons constitutes a cruel and unusual punishment.<sup>16</sup> Nevertheless, the Court thought that “the protections afforded by the insanity defense” rendered the possibility of conviction or punishment “[un]likely.”<sup>17</sup> Additionally, the Court had previously determined that states must afford “the insane” execution relief.<sup>18</sup> The Court reasoned that because the trial court found Penry competent to stand trial,<sup>19</sup> he did not meet the criteria for insanity detailed in *Ford v.*

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<sup>9</sup> *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>10</sup> *Id.* at 307–09.

<sup>11</sup> *Id.* at 309.

<sup>12</sup> *Id.* at 322.

<sup>13</sup> *Id.* at 323. Based on a rule cited in the Federal Register by the Social Security Administration on August 1, 2013, the term “mental retardation” has now been changed to “intellectual disability.” Change in Terminology: “Mental Retardation” to “Intellectual Disability,” 78 Fed. Reg. 46499 (Aug. 1, 2013) (to be codified at 20 C.F.R. pts. 404, 416). The change took effect on September 3, 2013. *Id.*

<sup>14</sup> *Penry*, 492 U.S. at 323.

<sup>15</sup> *Id.* at 340.

<sup>16</sup> *Id.* at 333.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 334 (citing *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986)).

<sup>19</sup> *Id.* at 333.

*Wainwright*.<sup>20</sup> Furthermore, the trial jury did not deem Penry's insanity claim credible.<sup>21</sup> The Court declined to recognize a national consensus against executing persons with intellectual disabilities because at the time only two states had legislation outlawing the practice.<sup>22</sup> In contrast, when the Court decided *Ford*, twenty-six states had legislation prohibiting the execution of insane persons.<sup>23</sup>

In *Penry*, the Court considered whether executing persons with intellectual disabilities "would be cruel and unusual because it is disproportionate to [their] degree of personal culpability."<sup>24</sup> In doing so, the Court acknowledged that "[i]t is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act."<sup>25</sup> The Court, however, held that while "the sentencing body must be allowed to consider mental retardation" as a mitigating circumstance, "the record before the Court" precluded a finding that all persons with intellectual disabilities "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."<sup>26</sup> The Court arrived at this decision because intellectual disabilities vary from person to person, and the current medical consensus at the time suggested that some of the adaptive deficits caused by intellectual disabilities could be improved in select individuals.<sup>27</sup> While the Court described intellectual disability as "a factor that may well lessen a defendant's culpability," it declined to hold executing capital defendants with intellectual disabilities as

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<sup>20</sup> *Ford v. Wainwright*, 477 U.S. 399, 412 (1986). When Justice Powell concurred with the plurality in *Ford* that the Eighth Amendment forbid executing "the insane," he proposed defining insanity as "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring).

<sup>21</sup> *Penry*, 492 U.S. at 310.

<sup>22</sup> *Id.* at 334. (Georgia and Maryland. Georgia's law was already in effect at the time of *Penry v. Lynaugh*, while Maryland's law was set to take effect on July 1, 1989.)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 336.

<sup>25</sup> *Id.* at 337.

<sup>26</sup> *Id.* at 337–38.

<sup>27</sup> *Id.* at 338 ("[T]he consequences of a retarded person's mental impairment, including the deficits in his or her adaptive behavior, 'may be ameliorated through education and habilitation.'" (quoting James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 n.54 (1985))).

unconstitutional “by virtue of [a defendant’s] mental retardation alone.”<sup>28</sup>

Justice Brennan concurred that states must provide jurors with an opportunity to consider “all mitigating evidence,” including claims of intellectual disability, before issuing a death sentence.<sup>29</sup> Brennan disagreed with the majority in part because he thought that the Eighth Amendment required the Court to prohibit states from executing persons with intellectual disabilities. Specifically, Brennan contended that the Court had previously established the standard for determining whether a punishment is cruel and unusual in *Solem v. Helm*.<sup>30</sup> In that case, the Court ruled that “the gravity of the offense and the harshness of the penalty” must be weighed against each other when determining punishments.<sup>31</sup> Alternatively, these two factors can be understood as “the harm caused or threatened to the victim or society, and the culpability of the offender[,]” respectively.<sup>32</sup> Since people with intellectual disabilities possess a lower degree of culpability, Brennan reasoned that the Court’s standard for assessing whether a punishment is cruel and unusual compelled a finding that intellectually disabled defendants must receive a sentence lighter than the ultimate punishment, death.<sup>33</sup>

Brennan acknowledged that “[f]or many purposes, legal and otherwise, to treat the mentally retarded as a homogeneous group is inappropriate” because that classification creates “the risk of false stereotyping and unwarranted discrimination.”<sup>34</sup> Nevertheless, the definition of intellectual disability supplied by then-current clinical manuals applied equally to whoever satisfied the qualifying criteria. Citing the clinical manual’s definition of intellectual disability, Brennan asserted that anyone who met the qualifying criteria exhibited subaverage intellectual functioning and adaptive deficits. Based on this “clinical definition of mental retardation,” Brennan argued that the observed variation in intellectual disabilities cited by the majority was irrelevant because each still satisfied the criteria for intellectual

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<sup>28</sup> *Id.* at 340.

<sup>29</sup> *Id.* at 341 (Brennan, J., concurring and dissenting in part).

<sup>30</sup> *Solem v. Helm*, 463 U.S. 277, 292 (1983).

<sup>31</sup> *Id.* at 290–91.

<sup>32</sup> *Id.* at 292.

<sup>33</sup> *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“death is different in kind from any other punishment imposed under our system of criminal justice.”).

<sup>34</sup> *Penry*, 492 U.S. at 344 (Brennan, J., concurring and dissenting in part).

disability.<sup>35</sup> Additionally, while some individuals with a milder form of intellectual disability may “be quite capable of overcoming” adaptive deficits, clinical understandings of intellectual disabilities clarified that those individuals are still limited in their ability to operate in society.<sup>36</sup> With this in mind, Brennan concluded that:

[t]he impairment of a mentally retarded offender’s reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.<sup>37</sup>

Beyond this, Brennan argued that allowing jurors to consider defendants’ intellectual disabilities during the sentencing phase would not adequately protect them from death sentences.<sup>38</sup> Worse yet, the practice of executing people with intellectual disabilities “does not measurably further the penal goals of either retribution or deterrence.”<sup>39</sup> Brennan expressed his view in light of the Court’s previous determination that, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>40</sup> Exempting from execution those who—by the very nature of their diagnosis—are unlikely to be deterred would not detract from the deterrent effect that the punishment has on the general population.<sup>41</sup>

Justice Stevens wrote separately, agreeing with the majority that an Eighth Amendment prohibition against executing persons with intellectual disabilities, if ever established, should be applied retroactively.<sup>42</sup> Stevens was ultimately persuaded by the brief submitted

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<sup>35</sup> *Id.* at 345.

<sup>36</sup> *Id.* at 345–46.

<sup>37</sup> *Id.* at 346.

<sup>38</sup> *Id.* at 347.

<sup>39</sup> *Id.* at 348.

<sup>40</sup> *Tison v. Arizona*, 481 U.S. 137, 149 (1987). *See also* *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (“As for retribution as a justification for executing [defendant], we think this very much depends on the degree of [defendant’s] culpability—what [defendant’s] intentions, expectations, and actions were.”).

<sup>41</sup> *Penry*, 492 U.S. at 347–49 (Brennan, J., concurring and dissenting in part).

<sup>42</sup> *Id.* at 349 (Stevens, J., concurring and dissenting in part).

by the American Association on Mental Retardation (AAMR).<sup>43</sup> In their brief, the AAMR addressed then-current medical understandings of intellectual disabilities and argued that according to those standards, it was “unconstitutional” to execute defendants with intellectual disabilities.<sup>44</sup>

Justice Scalia agreed with the majority’s basic description of the case facts but rejected their reasoning for declining to exempt persons with intellectual disabilities from execution.<sup>45</sup> Specifically, Scalia asserted that to trigger Eighth Amendment protections a punishment must be both “cruel *and* unusual.”<sup>46</sup> Because the Court determined there was no national consensus against executing persons with intellectual disabilities, consideration of the issue should have stopped there.<sup>47</sup> Additionally, Scalia disagreed with the Court’s requirement that states provide jurors with an opportunity to consider a defendant’s alleged intellectual disabilities as a mitigating factor during the sentencing phase.<sup>48</sup>

### **B. *Atkins v. Virginia* (2002)**

In *Atkins v. Virginia*, the Supreme Court again considered whether the Eighth Amendment prohibited executing persons with intellectual disabilities. Justice Stevens wrote the majority opinion and noted that, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses,” persons with intellectual disabilities “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>49</sup> When discussing the details of the case, the Court noted that an expert for the defense reported Atkins’ IQ to be 59, therefore indicating an intellectual disability.<sup>50</sup> In contrast, the state’s expert found Atkins intellectually able and suggested that he was actually suffering from antisocial personality disorder.<sup>51</sup> This juxtaposition of diagnoses illustrates the Court’s finding that

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<sup>43</sup> The American Association on Mental Retardation (AAMR) is now the American Association on Intellectual and Developmental Disabilities (AAIDD).

<sup>44</sup> *Penry*, 492 U.S. at 350 (Stevens, J., concurring and dissenting in part).

<sup>45</sup> *Id.* at 350–51 (Scalia, J., concurring and dissenting in part).

<sup>46</sup> *Id.* at 351 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 351–52.

<sup>49</sup> *Atkins v. Virginia*, 536 U.S. 304, 306 (2002).

<sup>50</sup> *Id.* at 308–09.

<sup>51</sup> *Id.* at 309.

“impairments [of intellectually disabled individuals] can jeopardize the reliability and fairness of capital proceedings against” them.<sup>52</sup>

To determine whether a punishment is “excessive” the Court looks to “those [societal standards] that currently prevail” rather than those in existence at the enactment of the Bill of Rights.<sup>53</sup> Therefore, the Court’s “proportionality review” must take place “under those evolving standards.”<sup>54</sup> In the thirteen years since deciding *Penry*, the Court found that “the state legislative landscape” had experienced a “dramatic shift.”<sup>55</sup> The shift was characterized by “the consistency of the direction of change” instead of the total number of states prohibiting the execution of intellectually disabled people.<sup>56</sup> The Court considered “anticrime legislation” as “far more popular than legislation providing protections for persons guilty of violent crime.”<sup>57</sup> Accordingly, the legislative shift was interpreted as “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”<sup>58</sup> Therefore, the Court concluded that “the practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.”<sup>59</sup>

Having firmly established a constitutional protection for those with intellectual disabilities, the Court suggested that the dilemma faced by many states stemmed from “serious disagreement” over “which offenders [were] in fact” intellectually disabled.”<sup>60</sup> Considering precedent on this issue, the Court saddled the states with “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”<sup>61</sup> The Court further interpreted the national shift against executing persons with intellectual disabilities as evidence “that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”<sup>62</sup> Given the fact that people with intellectual

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<sup>52</sup> *Id.* at 306–07.

<sup>53</sup> *Id.* at 311.

<sup>54</sup> *Id.* at 312.

<sup>55</sup> *Id.* at 310.

<sup>56</sup> *Id.* at 315.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 316.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 317.

<sup>61</sup> *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

<sup>62</sup> *Id.*

disabilities “by definition” exhibit adaptive deficits, the Court determined that “[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”<sup>63</sup>

Pursuant to the Court’s reasoning, deterrence and retribution are two justifications for capital punishment, and according to retributive principles, “the severity of the appropriate punishment necessarily depends on the culpability of the offender.”<sup>64</sup> Because these principles are only served if less culpable capital defendants, such as those with intellectual disabilities, are given a sentence less severe than the death penalty, the Court found “an exclusion [from death] for the mentally retarded [to be] appropriate.”<sup>65</sup> Similarly, regarding deterrence as a justification for capital punishment, the Court wrote that:

it is the same cognitive and behavioral impairments that make [intellectually disabled] defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.<sup>66</sup>

For this reason, the Court found that “executing the mentally retarded [would] not measurably further the goal of deterrence.”<sup>67</sup>

Finally, the Court recognized an “enhanced” likelihood of people with intellectual disabilities receiving the death penalty rather than life imprisonment without the possibility of parole (LWOP) during sentencing.<sup>68</sup> This is largely due to the:

possibility of false confessions, [and] . . . the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.<sup>69</sup>

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<sup>63</sup> *Id.* at 318.

<sup>64</sup> *Id.* at 319.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 320.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 320–21.

Some jurors may assume that people with intellectual disabilities pose a greater risk of reoffending in the future and are therefore more deserving of death.<sup>70</sup> In reality, intellectual disability lessens a defendant's culpability and supports the argument for LWOP instead of death.<sup>71</sup>

Chief Justice Rehnquist dissented, and framed the issue before the Court as “whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants” like Atkins.<sup>72</sup> Contrary to the majority, Rehnquist did not acknowledge a national consensus against executing people with intellectual disabilities.<sup>73</sup> Rehnquist argued that, rather than deciding the case according to *stare decisis*, the majority sought to justify “a *post hoc* rationalization for [its] subjectively preferred result . . . .”<sup>74</sup> When deciding if a punishment is cruel and unusual, Rehnquist asserted that the Court should only consider “the work product of legislatures and sentencing jury determinations[.]”<sup>75</sup> Therefore, he objected to instances where the Court relied upon public “opinion poll data”<sup>76</sup> and international opposition to capital punishment.<sup>77</sup> According to Rehnquist, the Court’s reasoning should have been informed by “comprehensive statistics” on “whether juries routinely consider death a disproportionate punishment for mentally retarded offenders.”<sup>78</sup> Similarly, Rehnquist criticized the Court for relying on opinions expressed by professional organizations, since those views did not reflect “the workings of normal democratic processes.”<sup>79</sup>

Echoing Rehnquist’s reasoning, Justice Scalia began his dissent by contending that, “[s]eldom has an opinion of this Court rested so

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<sup>70</sup> *Id.* at 321 (“As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S. 302, 323–25 (1989). Mentally retarded defendants in the aggregate face a special risk of wrongful execution.”).

<sup>71</sup> *Id.* at 319–21.

<sup>72</sup> *Id.* at 321 (Rehnquist, C.J., dissenting).

<sup>73</sup> *Id.* at 321–22.

<sup>74</sup> *Id.* at 322.

<sup>75</sup> *Id.* at 324.

<sup>76</sup> *Id.* at 322.

<sup>77</sup> *Id.* at 324.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 326.

obviously upon nothing but the personal views of its Members.”<sup>80</sup> He argued that a punishment is cruel and unusual only if: (1) it violates the standards that existed when Congress enacted the Bill of Rights; or (2) it violates contemporary understandings of decency, as primarily determined by state statutes.<sup>81</sup> From Scalia’s perspective, the majority failed to demonstrate that executing people with intellectual disabilities violated 18th century standards of decency in the United States.<sup>82</sup> He wrote that the majority “[paid] lipservice” to previous Court decisions while “miraculously extract[ing] a ‘national consensus’ forbidding execution of the mentally retarded” from state statutes in eighteen of the thirty-eight death penalty states.<sup>83</sup> Scalia was critical of the majority’s ruling based on statutes that were “still in [their] infancy.”<sup>84</sup> For him, the majority’s opinion rested on “embarrassingly feeble evidence.”<sup>85</sup>

Historically, all states permitted the execution of people with intellectual disabilities. In 1988—14 years prior to *Atkins*—Georgia became the first state to prohibit executing citizens who were intellectually disabled.<sup>86</sup> Scalia therefore discounted the majority’s conclusion that states were trending toward prohibiting the practice, writing, “in what *other* direction *could we possibly* see change?”<sup>87</sup> Instead, he felt the Court was “thrashing about for evidence of ‘consensus’ . . . .”<sup>88</sup> and argued that the majority relied on a “grab bag of reasons” to justify its categorical ban against executing defendants with intellectual disabilities.<sup>89</sup> Therefore, he refuted both the majority’s claim that retribution and deterrence would not be served by executing such individuals, and its assertion of an increased likelihood of intellectually disabled defendants receiving a sentence of death rather

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<sup>80</sup> *Id.* at 338 (Scalia, J., dissenting).

<sup>81</sup> *Id.* at 339–40.

<sup>82</sup> *Id.* at 340.

<sup>83</sup> *Id.* at 342.

<sup>84</sup> *Id.* at 344.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (referencing GA. CODE ANN. § 17-7-131(j) (2017)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 346.

<sup>89</sup> *Id.* at 352. As a result of their efforts, and for basing the opinion on the consensus of professional organizations, Scalia awarded the majority the “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’” *Id.* at 347. Absent what he considered compelling evidence, Scalia accused the majority of manufacturing a “contrived consensus.” *Id.* at 349.

than LWOP.<sup>90</sup> Scalia concluded that tying the definition of intellectual disabilities to medical diagnostic criteria was problematic because “the symptoms of this condition can readily be feigned.”<sup>91</sup>

### C. Hall v. Florida (2014)

In *Hall v. Florida*, the Court addressed whether the definition of intellectual disability that Florida used in capital cases was unconstitutional.<sup>92</sup> Florida’s statute stipulated that if a defendant scored above 70 on every IQ test, “all further exploration of intellectual disabilit[ies] [was] foreclosed.”<sup>93</sup> For the majority, Justice Kennedy noted that Hall “presented substantial and unchallenged evidence of intellectual disabilit[ies]”<sup>94</sup>—specifically, he demonstrated several “deficits in adaptive functioning.”<sup>95</sup> Hall’s scores from nine IQ tests, administered over a forty-year period, were submitted as further proof of his intellectual disabilities.<sup>96</sup> The scores ranged between 60 and 80, and two results fell below 70.<sup>97</sup> The trial court rejected the IQ scores below 70 for “evidentiary reasons,” leaving Hall with seven IQ scores ranging from 71 to 80.<sup>98</sup> Because Hall’s minimum IQ score of 71 surpassed the statutory floor of 70, Florida law classified him as a person without intellectual disabilities and eligible for execution.<sup>99</sup>

At the outset of the opinion, the Court reaffirmed that: (1) “[n]o legitimate penological purpose is served by executing a person with intellectual disabilit[ies]”; and (2) “to impose the harshest of punishments on an intellectually disabled person violates his or her

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<sup>90</sup> *Id.* at 351–52.

<sup>91</sup> *Id.* at 353.

<sup>92</sup> *Hall v. Florida*, 572 U.S. 701, 704 (2014).

<sup>93</sup> *Id.* (referencing FLA. STAT. § 921.137 (2013) *invalidated by* *Hall v. Florida*, 572 U.S. 701 (2014)).

<sup>94</sup> *Id.* at 705.

<sup>95</sup> *Id.* at 706 (“[A]n individual’s ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disabilit[ies].”). The Court noted that Hall’s adaptive deficits were exasperated by a rough home life, where his mother repeatedly subjected him to physical abuse for displaying symptoms that originated from those adaptive deficits. *Id.*

<sup>96</sup> *Id.* at 707.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

inherent dignity as a human being.”<sup>100</sup> Moreover, the Court reasoned that deterrence is not effectuated because “those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale.”<sup>101</sup> Similarly, “[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.”<sup>102</sup> The Court highlighted a third reason for prohibiting the execution of intellectually disabled people: “to protect the integrity of the trial process.”<sup>103</sup> As the Court recognized, those with intellectual disabilities “are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.”<sup>104</sup> Accordingly, these individuals “may not . . . receive the law’s most severe sentence.”<sup>105</sup>

When deciding *Hall*, the Court observed that “it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores . . . .”<sup>106</sup> These sources serve as the starting point of consideration, as the Court “must express its own independent determination reached in light of the instruction found in those sources and authorities.”<sup>107</sup> To that end, the Court is “informed by the work of medical experts” when “determining intellectual disabilit[ies].”<sup>108</sup> Consequently, when a court is “determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”<sup>109</sup> Given that the average IQ test score is 100, a standard deviation is “approximately 15 points,” and two standard deviations below the average is considered abnormal, an abnormal score is defined as “a score of approximately 70 points.”<sup>110</sup> According to the Court, Florida’s statute erred by interpreting IQ scores above 70 as absolute proof that a defendant was not intellectually disabled.<sup>111</sup> In contrast, “the

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<sup>100</sup> *Id.* at 708.

<sup>101</sup> *Id.* at 709.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 710.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 711.

<sup>111</sup> *Id.* at 712.

medical community” required evaluating defendants for signs of adaptive deficits even in cases where they “ha[d] an IQ test score above 70.”<sup>112</sup>

The Court considered Florida’s statute to have “disregard[ed] established medical practice in two interrelated ways.”<sup>113</sup> First, the statute viewed “an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence.”<sup>114</sup> Second, “[t]he professionals who design, administer, and interpret IQ tests [contend] that IQ test scores should be read not as a single fixed number but as a range.”<sup>115</sup> This range, known as the Standard Error of Measurement (SEM), is “a reflection of the inherent imprecision of the [IQ] test itself.”<sup>116</sup> Proper administration of IQ testing, therefore, recognizes “that an individual’s score is best understood as a range of scores on either side of the recorded score.”<sup>117</sup> Florida’s statute posed a problem because the evaluators who diagnose intellectual disabilities in Florida did not “consider factors indicating whether [a defendant] had deficits in adaptive functioning” after “the SEM [was] applie[d] and the individual’s IQ score [was] 75 or below.”<sup>118</sup> In its rationale, the Court noted, “every state legislature to have considered the issue after *Atkins*—save Virginia’s—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.”<sup>119</sup> This fact was “strong evidence of consensus that our society does not regard this strict cutoff [of a score of 70 or lower on an IQ test in order to qualify as intellectually disabled] as proper or humane.”<sup>120</sup>

In one of its most instructive statements, the Court wrote that “*Atkins* did not give the States unfettered discretion to define the full scope” of the prohibition against executing intellectually disabled defendants.<sup>121</sup> Referencing then-current medical diagnostic criteria, “[t]he *Atkins* Court twice cited definitions of intellectual disability which, by their

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 713.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 714.

<sup>119</sup> *Id.* at 718.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 719.

express terms, rejected a strict IQ test score cutoff at 70.”<sup>122</sup> Consequently, “[t]he clinical definitions of intellectual disabilit[ies], which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*.”<sup>123</sup> If this were not the case, and “the States were to have complete autonomy to define intellectual disabilit[ies] as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.”<sup>124</sup>

Based on this reasoning, the Court held that Florida’s “rigid rule . . . create[d] an unacceptable risk that persons with intellectual disabilit[ies] would] be executed, and thus [was] unconstitutional.”<sup>125</sup> In reaching its holding, the Court “placed substantial reliance on the expertise of the medical profession.”<sup>126</sup> According to the Court, “this determination [was] informed by the views of medical experts [whose] views do not dictate the Court’s decision, yet the Court does not disregard these informed assessments.”<sup>127</sup> Thus, “[t]he legal determination of intellectual disabilit[ies] is distinct from a medical diagnosis, but it is informed by the medical community’s diagnostic framework.”<sup>128</sup> Within a legal context, this means “when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be [given the opportunity] to present additional evidence of intellectual disabilit[ies], including testimony regarding adaptive deficits.”<sup>129</sup> The *Hall* Court asserted that “[i]ntellectual disability is a condition not a number” and cautioned against finding “a single factor as dispositive of a conjunctive and interrelated assessment.”<sup>130</sup> The Court asserted “[t]he death penalty is the gravest sentence our society may impose,” and the Florida statute was arbitrary in that “Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test.”<sup>131</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 720.

<sup>124</sup> *Id.* at 720–21.

<sup>125</sup> *Id.* at 704.

<sup>126</sup> *Id.* at 722.

<sup>127</sup> *Id.* at 721.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 723.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 724.

Justice Alito dissented, interpreting *Atkins* as “not mandat[ing] the use of a single method for identifying” people with intellectual disabilities.<sup>132</sup> Alito accused the majority as now requiring a single method for assessing intellectual disabilities that was “largely [based] on the positions adopted by private professional associations.”<sup>133</sup> Many of his objections concerned the distinction between evolving “standards of *American society as a whole*” and “evolving standards of *professional societies*.”<sup>134</sup> Alito believed that Eighth Amendment considerations hinged on the former, while the majority relied on the latter to invalidate Florida’s statute.<sup>135</sup> He also understood the *Atkins* Court to have established a strict three-prong definition of intellectual disability based on then-current medical diagnostic criteria.<sup>136</sup> According to Alito, the failure to meet even one of those criteria, such as an IQ score at or below 70, should prohibit the state from finding that a defendant has an intellectual disability regardless of whether they satisfied the other two prongs.<sup>137</sup>

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<sup>132</sup> *Id.* (Alito, J., dissenting).

<sup>133</sup> *Id.* at 725. He argued that this approach was “most unwise” and “likely to result in confusion.” *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Alito contended that the majority failed to demonstrate a national consensus among state statutes requiring the use of the SEM for IQ tests. *Id.* at 728–29. Instead, Alito thought that “[t]he fairest assessment of the current situation is that the States have adopted a multitude of approaches to a very difficult question.” *Id.* at 730. He elaborated: “[u]nder our modern Eighth Amendment cases, what counts are our society’s standards—which is to say, the standards of the American people—not the standards of professional associations, which at best represents the views of a small professional elite.” *Id.* at 731.

<sup>136</sup> *Id.* at 727.

<sup>137</sup> *Id.* He also dissented because when defendants presented IQ scores above 70 but at or below 75, the majority did not require additional evidence of the first prong (as assessed by IQ score), but instead required evidence aimed at the second prong (adaptive deficits). *Id.* at 735–36. Alito interpreted this to mean that “even when a defendant has failed to show that he meets the first prong . . . evidence of the second prong . . . can establish intellectual disabilit[ies].” *Id.* at 736. According to Alito, this approach was flawed because “[s]trong evidence of a deficit in adaptive behavior does not necessarily demonstrate a deficit in intellectual functioning [the first prong]. And without the latter, a person simply cannot be classified as intellectually disabled.” *Id.* at 737. Furthermore, prioritizing evidence of adaptive deficits, he warned, would “produce inequities in the administration of capital punishment” because no two individuals would have the same degree of adaptive deficits. *Id.*

The dissent identified several problems created by the majority's approach which require "legislative judgments, not judicial resolution."<sup>138</sup> First, "because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation."<sup>139</sup> Second, the post-*Hall* landscape will become substantially more difficult to navigate because the Court is subsequently forced to "follow every new change in the thinking of these professional organizations or to judge the validity of each new change."<sup>140</sup> Third, in the event that they disagree, the Court must now "determine which professional organizations are entitled to special deference."<sup>141</sup> Fourth, the aspects of intellectual disabilities that are relevant to the capital punishment context are not the same as those relevant to non-criminal evaluations.<sup>142</sup>

In conclusion, Alito asserted that "[t]here are various ways to account for error in IQ testing" and Florida's practice of allowing defendants to submit scores from multiple IQ tests represented one such acceptable method.<sup>143</sup> Levying one last criticism, Alito faulted the majority for "unjustifiably assum[ing] a blanket (or very common) error measurement of 5" points on IQ tests.<sup>144</sup> By "blindly import[ing] a 5-point margin of error" the majority failed to recognize that "every test has a different SEM."<sup>145</sup>

#### **D. *Brumfield v. Cain* (2015)**

Shortly after *Hall*, the Court in *Brumfield v. Cain* considered whether a person on Louisiana's death row had met the required threshold to receive a hearing on his alleged intellectual disabilities.<sup>146</sup> In this case, the Court recognized that *Brumfield* presented preliminary

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<sup>138</sup> *Id.* at 733.

<sup>139</sup> *Id.* at 731–32.

<sup>140</sup> *Id.* at 732.

<sup>141</sup> *Id.* at 733.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 738. Alito opined that Florida did not need to consider the SEM because it allowed defendants to submit scores from as many IQ tests as they wished. *Id.* at 733–34. The Court had "been presented with no solid evidence that the longstanding reliance on multiple IQ test scores as a measure of intellectual functioning is so unreasonable or outside the ordinary as to be unconstitutional." *Id.* at 735.

<sup>144</sup> *Id.* at 740.

<sup>145</sup> *Id.* at 740–41.

<sup>146</sup> *Brumfield v. Cain*, 576 U.S. 305 (2015).

evidence of an intellectual disability, including “an IQ score of 75.”<sup>147</sup> However, Louisiana’s trial court denied Brumfield “an evidentiary hearing [and refused] granting funds” so he could further establish evidence of his intellectual disability.<sup>148</sup> Following Louisiana’s Supreme Court’s denial to review the trial court’s decision, Brumfield submitted a habeas corpus petition in the United States District Court for the Middle District of Louisiana.<sup>149</sup> That court observed that Brumfield scored 70, 70, 72, and 75 on four separate IQ tests administered between 1995 and 2009.<sup>150</sup> These scores constituted “unadjusted, full scale scores,” meaning that they did not take the SEM into account.<sup>151</sup> During the highest appeal review, the Supreme Court similarly highlighted Brumfield’s scores, stating that “the results . . . when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70.”<sup>152</sup>

Writing for the majority, Justice Sotomayor established that the Court “presume[d] that a rule according an evidentiary hearing only to those capital defendants who raise a ‘reasonable doubt’ as to their intellectual disability[ies] is consistent with [the Court’s] decision in *Atkins*.”<sup>153</sup> Nevertheless, the Court criticized Louisiana’s trial court for interpreting a raw IQ score of 75 as evidence that Brumfield did not have an intellectual disability. As the Court noted, “an IQ test result cannot be assessed in a vacuum,” and a raw score of 75 “equate[s] to a score of 70 or less” when accounting for the SEM.<sup>154</sup> Additionally, the Court considered “the evidence in the state-court record [to provide] substantial grounds to question Brumfield’s adaptive functioning.”<sup>155</sup> Thus, the Court held that the state court erred when it found that Brumfield did not meet the minimum threshold showing required to grant an evidentiary hearing on his alleged intellectual disability.<sup>156</sup> Furthermore, while “the underlying facts of Brumfield’s crime might

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<sup>147</sup> *Id.* at 310.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 311.

<sup>150</sup> *Brumfield v. Cain*, 854 F. Supp. 2d 366, 389–90 (M.D. La. 2012) *rev’d by* *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014).

<sup>151</sup> *Id.* at 389.

<sup>152</sup> *Brumfield*, 576 U.S. at 311.

<sup>153</sup> *Id.* at 313.

<sup>154</sup> *Id.* at 314.

<sup>155</sup> *Id.* at 319.

<sup>156</sup> *Id.* at 320.

arguably provide reason to think that Brumfield possessed certain adaptive skills,” the Court cited medical standards to demonstrate that the proper focus is on adaptive *deficits*, not strengths.<sup>157</sup> Finally, the Court stipulated that “[i]t is critical to remember . . . that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much.”<sup>158</sup> Instead, Brumfield was required to satisfy the burden of proof necessary to trigger an evidentiary hearing on the issue. Having met this burden of proof, the Court held that Brumfield was “entitled to a hearing to show that he so lacked the capacity for self-determination that [the State, by taking his life,] would violate the Eighth Amendment.”<sup>159</sup>

Justice Thomas dissented and painstakingly described the facts surrounding the murder Brumfield committed, since “the majority devote[d] a single sentence” to the issue.<sup>160</sup> He contrasted the philanthropy of one of the victim’s sons, who played professional football, with Brumfield’s “ceaseless campaign of review proceedings.”<sup>161</sup> Thomas also contended that the Antiterrorism and Effective Death Penalty Act (AEDPA) precluded federal courts, including the Supreme Court, from accepting habeas corpus petitions under most circumstances.<sup>162</sup> In his dissent, Thomas appeared to

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 324.

<sup>160</sup> *Id.* at 325 (Thomas, J., dissenting).

<sup>161</sup> *Id.* at 332.

<sup>162</sup> *Id.* at 334. Thomas argued that AEDPA only allowed the Supreme Court to accept habeas corpus petitions if a State court unreasonably applied a Federal law, as identified in previous Supreme Court decisions, or issued an unreasonable ruling given the evidence available to the State court during trial proceedings. *Id.* Because Thomas did not think either criteria applied, he did not consider Brumfield to have the proper standing required to bring his habeas corpus petition before the Supreme Court. Moreover, Thomas alleged that the Majority opposed “the state court’s *conclusion* that Brumfield had not made a sufficient threshold showing of mental retardation to be entitled to an evidentiary hearing on his claim,” but this conclusion rested on “the application of law to fact, not on the determination of the facts themselves.” *Id.* at 338. In other words, Thomas argued that the Majority reversed the state court’s decision because it perceived the state court to have misapplied the law. AEDPA, however, only permitted the Court to reverse state court decisions if the facts of the case had been improperly decided. *Id.* at 342. As a result, Thomas objected because the Majority took “a meritless state-law claim” and presented “it as two factual determinations” in order to achieve its desired outcome. *Id.* According to Thomas, “*Atkins* . . . did not imply—let alone hold—that a prisoner is entitled to a hearing on an *Atkins* claim.”

entirely disregard the Majority's stipulation that states must add an SEM of +5/-5 to raw IQ scores.<sup>163</sup> Instead, he found that "the record justified a finding that Brumfield's IQ is 75, if not a bit higher."<sup>164</sup> With this statement, Thomas implied that Brumfield, having scored above 70, was not intellectually disabled. To support his position, Thomas emphasized Brumfield's adaptive strengths and concluded that "[t]he record . . . supports the state court's finding that Brumfield is not impaired in adaptive skills."<sup>165</sup>

### E. Moore v. Texas I (2017)

In *Moore v. Texas I*, the Supreme Court considered whether states could assess intellectual disabilities in a way that ran afoul of current medical standards or relied on outdated standards. After the Court decided *Atkins*, the Texas legislature failed to define intellectual disabilities or how they should be evaluated in capital cases. Seeking to fill that void, the Texas CCA provided a definition in its 2004 *Ex parte Briseno* decision which was based on medical diagnostic criteria published in 1992.<sup>166</sup> In addition to the medical criteria, the Texas CCA also introduced the *Briseno* factors, derived from character traits displayed by the fictional character Lennie from John Steinback's novel *Of Mice and Men*.<sup>167</sup> By the time the Texas CCA delivered its *Ex parte Moore*<sup>168</sup> ruling, the medical diagnostic criteria that the *Briseno* court utilized had been updated with revised standards.<sup>169</sup> Nevertheless, the

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*Id.* at 344. Finally, Thomas perceived the Court to have "concede[d] that the record includes evidence supporting [the state] court's factual findings." *Id.* at 349. For this reason, Thomas thought "that concession should bar relief for Brumfield." *Id.*

<sup>163</sup> *Id.* at 340–41.

<sup>164</sup> *Id.* at 336 (Brumfield obtained raw IQ scores of 70, 70, 72, and 75 on four separate tests. Applying an SEM of +5/-5 to these scores would have produced scores of 65, 65, 67, and 70, respectively.).

<sup>165</sup> *Id.* "Brumfield lived independently before his arrest, often staying with his pregnant girlfriend and had been able to maintain a job for approximately three months before quitting . . ." *Id.* at 337.

<sup>166</sup> *Ex parte Briseno*, 135 S.W.3d 1, 1 (Tex. Crim. App. 2004). See also Alexander H. Updegrove et al., *Intellectual Disability in Capital Cases: Adjusting State Statutes After Moore v. Texas*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527, 535 (2018).

<sup>167</sup> See *supra* text accompanying note 4.

<sup>168</sup> *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015).

<sup>169</sup> See Updegrove et al., *supra* note 166, at 535. See also *supra* text accompanying note 45.

Texas CCA relied upon both the 1992 medical diagnostic criteria and the *Briseno* factors to determine that Moore was not intellectually disabled.<sup>170</sup>

This set the stage for Justice Ginsburg to write in *Moore I* that the Court's *Hall* "instruction[s] cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus."<sup>171</sup> Additionally, "the several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source."<sup>172</sup> Because the *Briseno* factors were neither "aligned with the medical community's information" nor given "strength from [the Court's] precedent[s]," the Court held that "they may not be used . . . to restrict qualification of an individual as intellectually disabled."<sup>173</sup> The Court summarized testimony on Moore's limited intellectual capacity, writing "[a]t 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition."<sup>174</sup>

The Court then identified "the generally accepted, uncontroversial intellectual-disability diagnostic definition" located in the most recent version of the AAIDD as the appropriate standard for evaluating capital defendants for intellectual disabilities.<sup>175</sup> The Court observed that the Texas CCA relied on the *Briseno* factors without "citation to any authority, medical or judicial . . ."<sup>176</sup> The Court also felt the Texas CCA focused on Moore's adaptive strengths, including "living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison."<sup>177</sup> All of these perceived strengths influenced the Texas CCA to disregard "the significance of Moore's adaptive limitations."<sup>178</sup>

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<sup>170</sup> *Moore I*, 137 S. Ct. 1039, 1044 (2017).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1045.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1046.

<sup>177</sup> *Id.* at 1047.

<sup>178</sup> *Id.*

The *Moore I* Court reaffirmed *Hall*: “a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70.”<sup>179</sup> Furthermore, the Court highlighted that in *Hall* their analysis “relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD-11[.]”—as the authorities on intellectual disabilities.<sup>180</sup> Expanding on its position, the Court wrote that “*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”<sup>181</sup> Because “Moore’s score of 74, adjusted for the standard error of measurement, yield[ed] a range of 69 to 79,” and “the lower end of Moore’s score range [fell] at or below 70,” the Texas CCA erred in concluding that Moore could not be intellectually disabled.<sup>182</sup> Such a ruling would be “irreconcilable with *Hall*.”<sup>183</sup> *Hall* required state courts to “continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.”<sup>184</sup>

Upon review, the Court found the Texas CCA to have “overemphasized Moore’s perceived adaptive strengths” while “the medical community [instead] focuses the adaptive-functioning inquiry on adaptive *deficits*.”<sup>185</sup> Likewise, the CCA erred when it “stressed Moore’s improved behavior in prison,” since “[c]linicians . . . caution against reliance on adaptive strengths developed ‘in a controlled setting,’ as a prison surely is.”<sup>186</sup> Moreover, Texas incorrectly suggested that childhood trauma precludes a finding of intellectual disabilities when in fact “[c]linicians rely on such factors as cause to explore the

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<sup>179</sup> *Id.* at 1048.

<sup>180</sup> *Id.* The Court is referring to the manuals published by the American Psychiatric Association, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM–5], and the American Association on Intellectual and Developmental Disabilities, AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter AAIDD–11].

<sup>181</sup> *Moore I*, at 1049.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1050.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (quoting DSM–5, *supra* note 180, at 38).

prospect of intellectual disability further, not to counter the case for a disability determination.”<sup>187</sup> Furthermore, the lower court “departed from clinical practice by requiring Moore to show that his adaptive deficits” did not originate from another cause, such as a different psychological disorder, that would not entitle Moore to execution relief.<sup>188</sup> The Court criticized this tactic because professionals acknowledge that “many intellectually disabled people also have other mental or physical impairments.”<sup>189</sup> Therefore, the presence of an additional disorder is not justification for ruling that a person is not intellectually disabled.<sup>190</sup>

The Court reasoned that there was an increased likelihood that states would execute people with intellectual disabilities because “[b]y design and in operation, the *Briseno* factors” “advanced lay perceptions of intellectual disability.”<sup>191</sup> This was worrisome because “the medical profession has endeavored to counter lay stereotypes” of people with intellectual disabilities, which the Texas practice contradicted.<sup>192</sup> Therefore, these lay stereotypes, “much more than medical and clinical appraisals, should spark skepticism.”<sup>193</sup> The Court also highlighted that even looking within Texas’ own practices “[t]he *Briseno* factors [were] an outlier[.]”<sup>194</sup> “Texas itself [did] not follow *Briseno* in contexts other than the death penalty.”<sup>195</sup> Emphasizing this point, the court stressed that “Texas cannot satisfactorily explain why it applie[d] current medical standards for diagnosing intellectual disabilit[ies] in other contexts, yet clings to superseded standards when an individual’s life is at stake.”<sup>196</sup> While *Atkins* did afford states freedom to define intellectual disabilities, *Hall* limited the scope of that freedom.<sup>197</sup> Notably, the Court

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<sup>187</sup> *Id.* at 1051.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1052.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* When issuing rulings on questions other than capital punishment, and where an assessment of the individual’s mental acuity was necessary, Texas courts would require the assessment be conducted in conformity with the requirements of current clinical practices.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1052–53.

established the DSM-5 and the AAIDD-11 as offering an “improved understanding” over older versions of those same manuals.<sup>198</sup> Consequently, “[t]he medical community’s current standards supply one constraint on States’ leeway in this area.”<sup>199</sup> The Court remanded the case because Texas “failed adequately to inform” its decision with current medical understandings of intellectual disabilities and instead insisted on “clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors[.]”<sup>200</sup>

Chief Justice Roberts conceded in his dissent that the *Briseno* factors were “an unacceptable method” of protecting the intellectually disabled from execution in light of *Atkins*, but he did not find that the Texas CCA “erred as to Moore’s intellectual functioning.”<sup>201</sup> His primary objection was that the majority “abandon[ed] the usual mode of analysis . . . employed in Eighth Amendment cases.”<sup>202</sup> According to Roberts, “clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment.”<sup>203</sup> He claimed the majority “craft[ed] a constitutional holding based solely on what it deem[ed] to be medical consensus about intellectual disability,” thereby confusing the roles of clinician and judge.<sup>204</sup>

Roberts also considered the lower court to be justified in refusing “to modify the legal standard it had previously set out[.]” despite the medical community updating the diagnostic criteria upon which that standard was based on.<sup>205</sup> Roberts argued further that Texas’ ruling did not contradict *Hall*. Although calculating Moore’s IQ test score with the SEM resulted in a range that “placed [him] within the parameters for significantly subaverage intellectual functioning[.]” the true score “was unlikely to be in the lower end of the error-generated range because he was likely exerting poor effort and experiencing depression at the time the test was administered . . . .”<sup>206</sup> For Roberts, Moore scored too high to meet the first prong for intellectual disability and therefore he “could

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<sup>198</sup> *Id.* at 1053.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* (Roberts, C.J., dissenting).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1054.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1055.

<sup>206</sup> *Id.*

not be found intellectually disabled” at all.<sup>207</sup> Furthermore, Roberts rejected the argument that it was problematic to conclude that Moore’s adaptive deficits resulted “not from low intellectual abilities, but instead from outside factors like the trauma and abuse he suffered as a child and his drug use at a young age.”<sup>208</sup>

Ultimately, the Chief Justice found that the majority “depart[ed] from [the] Court’s precedents, followed in *Atkins* and *Hall*.”<sup>209</sup> He considered determinations of “cruel and unusual” to hinge on “judicial judgment about societal standards of decency, not a medical assessment of clinical practice.”<sup>210</sup> Therefore, the majority erred when it ruled “without any consideration of the state practices” it referenced in *Hall*.<sup>211</sup> Roberts stated the majority opinion was “based solely on what the Court views to be departure from typical clinical practice” instead of focusing on state statutes.<sup>212</sup> This approach was problematic because the purpose of medical diagnostic criteria is not to “describe who is morally culpable.”<sup>213</sup> The *Moore I* opinion “[was] not compelled by *Hall*; it [was] an expansion of it.”<sup>214</sup>

#### **F. Moore v. Texas II (2019)**

After the *Moore I* Court remanded the case, the Texas CCA once again determined that Moore was not intellectually disabled.<sup>215</sup> The Court reaffirmed both the DSM-5 and AAIDD-11 definitions of intellectual disabilities as “valid” and representing “the three underlying legal criteria” that states must use when evaluating capital defendants for intellectual disabilities.<sup>216</sup> According to the Court, *Moore I* established that Moore “had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning.”<sup>217</sup> Similarly, the Court observed that, “[w]ith respect to the third criterion, we found general agreement that any onset

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<sup>207</sup> *Id.* at 1056.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1057–58.

<sup>210</sup> *Id.* at 1058.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1061.

<sup>215</sup> *Ex parte Moore*, 548 S.W.3d 552 at 573 (Tex. Crim. App. 2018).

<sup>216</sup> *Moore II*, 139 S. Ct. 666, 668 (2019).

<sup>217</sup> *Id.*

took place when Moore was a minor.”<sup>218</sup> All that remained, therefore, was to determine whether Moore displayed adaptive deficits. An answer in the affirmative would satisfy the diagnostic criteria for intellectual disability and qualify him for execution relief.

In summary of the *Moore I* ruling, the Court had “identified at least five errors” committed by the Texas CCA.<sup>219</sup> First, the court cited Moore’s alleged adaptive strengths to justify disregarding his adaptive deficits.<sup>220</sup> Second, the court cited Moore’s functioning in prison as evidence of adaptive strengths.<sup>221</sup> Next, the Texas court found that Moore could not have an intellectual disability because his adaptive deficits were caused by childhood trauma.<sup>222</sup> Fourth, the CCA attributed Moore’s adaptive deficits to a personality disorder instead of intellectual disability.<sup>223</sup> Fifth, and finally, the court relied on the *Briseno* factors to conclude that Moore was not intellectually disabled.<sup>224</sup> This analysis was problematic in light of the current medical consensus.<sup>225</sup>

In *Moore II*, the Court reviewed the Texas CCA’s ruling and found that it could not be reconciled with *Moore I* because there were “too many instances in which, with small variations, it repeat[ed] the analysis [the Court had] previously found wanting, and [those] same parts [were] critical to its ultimate conclusion.”<sup>226</sup> For example, the Texas CCA “again relied less upon the adaptive *deficits* . . . than upon Moore’s

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 669.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* Current medical consensus required examining adaptive deficits, not strengths. *Id.* at 668–69. Clinicians also cautioned against drawing conclusions about a person’s adaptive deficits based on how they functioned in highly structured environments that poorly approximated life in the community at large. *Id.* at 669. Furthermore, it is recognized that trauma increases, not decreases, the likelihood of intellectual disabilities. Current medical practice did not consider the existence of one psychological disorder to preclude a second diagnosis of intellectual disabilities since comorbidity is common. *Id.* Finally, and importantly, the medical community discredited the *Briseno* factors, which “had no grounding in prevailing medical practice” and encouraged basing intellectual disabilities diagnoses on popular misconceptions. *Id.*

<sup>226</sup> *Id.* at 670.

apparent adaptive *strengths*.”<sup>227</sup> Additionally, the lower court “relied heavily upon adaptive improvements made [by Moore] in prison.”<sup>228</sup> The Court found that “[t]he length and detail of the [CCA’s] discussion on these points [was] difficult to square with our caution against relying on prison-based development[s].”<sup>229</sup> Furthermore, and in direct contrast to *Moore I*, the Texas CCA found Moore intellectually able because he failed to demonstrate that his adaptive deficits were directly attributable to intellectual disabilities rather than another psychological disorder.<sup>230</sup> Finally, the Court observed that although the Texas CCA’s “opinion [was] not identical to the opinion [the Court] considered in *Moore I*,” it still contained “sentences here and there suggesting reliance upon” common misconceptions about intellectual disabilities.<sup>231</sup> As a result, the Court held that the CCA’s ruling

when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court.<sup>232</sup>

The Court concluded that “Moore has shown he is a person with intellectual disabilit[ies],” effectively exempting him from execution.<sup>233</sup>

In dissent, Justice Alito argued that the ruling of the Texas CCA complied with the court’s precedent because it “adopted the leading contemporary clinical standards for assessing intellectual disabilit[ies],”

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 671.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 672. The Court arrived at this conclusion based on “the similarity of language and content between *Briseno*’s factors and the [CCA’s] statements . . . .”  
*Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* Chief Justice Roberts concurred, acknowledging that, although he could foresee “difficulties . . . applying *Moore I* in other cases, it [was] easy to see that the Texas [CCA] misapplied it here.” *Id.* (Roberts, C.J., concurring). Once again, the state court “repeated the same errors that [the] Court previously condemned,” including “improper reliance on the [*Briseno*] factors” and focusing on “Moore’s adaptive strengths rather than his deficits.” *Id.* Roberts noted that the prior approach “did not pass muster under [the] Court’s analysis last time,” and “still doesn’t.” *Id.*

as required by *Moore I*.<sup>234</sup> Alito accused the majority of engaging in “factfinding” rather than addressing “a legal error . . . .”<sup>235</sup> For the dissenting Justice, this approach constituted “an unsound departure from our usual practice,” and stemmed from the Court’s “own failure to provide a coherent rule of decision in *Moore I*.”<sup>236</sup>

### III. STATE COURT CASES CITING EITHER *MOORE I* OR *MOORE II*

Following Colorado’s repeal of the death penalty in March 2020,<sup>237</sup> the total number of states that retain the death penalty fell to twenty-eight.<sup>238</sup> Of these twenty-eight states, nine do not have any cases citing *Moore I* or *Moore II*.<sup>239</sup> The remaining nineteen states cite to *Moore I* or *Moore II* in forty-five cases, collectively.<sup>240</sup> This Section details state court applications and interpretations of *Moore I* and *Moore II* and gives special attention to the usages which appear suspect given the U.S. Supreme Court’s direction.

#### A. Current Medical Standards

Courts from thirteen different states cite *Moore I* or *Moore II* to demonstrate that the Supreme Court of the United States requires states to use current medical diagnostic criteria when evaluating capital defendants for intellectual disabilities.<sup>241</sup>

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<sup>234</sup> *Id.* at 673 (Alito, J., dissenting).

<sup>235</sup> *Id.* at 674.

<sup>236</sup> *Id.*

<sup>237</sup> See Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html> [<https://perma.cc/4G4P-LJMS>].

<sup>238</sup> See Death Penalty Information Center, *supra* note 8.

<sup>239</sup> See *infra* Appendix Table I. As of the date of this Article these nine states are: Idaho, Indiana, Louisiana, Montana, Oklahoma, South Dakota, Utah, Virginia, and Wyoming.

<sup>240</sup> See *infra* Appendix Table 1, which shows that as of the date of this Article Alabama courts cited *Moore I* or *Moore II* in five cases; Arkansas in one; Arizona in one; California in two; Florida in four; Georgia in one; Nevada in two; North Carolina in one; Ohio in three; Oregon in one; Pennsylvania in three; South Carolina in one; Tennessee in one; and Texas in seventeen (excluding *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018), which the United States Supreme Court overturned in *Moore II*).

<sup>241</sup> See *infra* Appendix Table 2.

For example, in *Callen v. State*, the Alabama Criminal Court of Appeals (“CCA”) recognized that *Moore I* criticized the Texas CCA for having “erroneously applied decades-old standards and fail[ing] to consider” current medical diagnostic criteria.<sup>242</sup> Similarly, in *Carroll v. State*, the state court found *Moore I* to be a direct response to the Texas CCA, which “ignored prevailing medical standards and applied its own definition of [intellectual disability] to determine that a death-row inmate was not exempt from the death penalty under *Atkins*.”<sup>243</sup> The Alabama court also interpreted *Moore I* as precluding the use of definitions of intellectual disabilities “that substantially deviate from prevailing clinical standards.”<sup>244</sup> In *Ex parte Carroll* the Alabama Supreme Court stated that *Moore I* addressed “whether states may define intellectual disability in a manner that is (1) uninformed by the medical community or (2) based on outdated medical standards.”<sup>245</sup> For its part, that court understood *Moore I* to “clearly [require] states to assess intellectual disabilit[ies] using the most current medical standards[.]”<sup>246</sup>

When deciding *Ex parte Lane*, the Supreme Court of Alabama referred to *Moore I* to establish that current medical standards associate childhood trauma with an increased likelihood of intellectual disabilities.<sup>247</sup> Although the trial court ruled that Lane was not intellectually disabled, *Moore I* convinced the prosecution that the trial court had erred in reaching that conclusion.<sup>248</sup> Consequently, “the State filed a brief acknowledging that the trial court had failed to make findings regarding the relevant adaptive-skill areas and conceding that the trial court” did not use the appropriate diagnostic criteria for intellectual disabilities.<sup>249</sup> The court was struck by the unusual circumstances, observing that, “the State has indicated that it concedes that the evidence established that Lane is intellectually disabled and that the trial court simply substituted its own standards for intellectual

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<sup>242</sup> *Callen v. State*, 284 So. 3d 177, 197 n.6 (Ala. Crim. App. 2017).

<sup>243</sup> *Carroll v. State (Carroll I)*, 300 So. 3d 51, 54 (Ala. Crim. App. 2017).

<sup>244</sup> *Id.* at 55.

<sup>245</sup> *Carroll v. State (Carroll II)*, 300 So. 3d 59, 63 (Ala. 2019).

<sup>246</sup> *Id.* at 63–64.

<sup>247</sup> *Ex parte Lane*, 286 So. 3d 61, 66 (Ala. 2018).

<sup>248</sup> *Id.* at 68–69.

<sup>249</sup> *Id.* at 68. “[T]he State went further in its concessions, joining Lane in requesting that [Alabama’s Supreme Court] remand the matter so that the trial court [could] sentence Lane to life imprisonment without the possibility of parole.” *Id.* at 69.

disabilit[ies] for those accepted by the medical community.”<sup>250</sup> Given the agreement that the wrong standard was used, the court remanded the case with instructions to commute Lane’s sentence to LWOP.<sup>251</sup>

The Florida Supreme Court in *Glover v. State*, found that *Moore I* admonished the Texas CCA because it “relied upon superseded medical standards to conclude that the defendant was not intellectually disabled.”<sup>252</sup> The Florida court argued in a subsequent case that “*Moore [I]* does not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an [intellectual disability] determination.”<sup>253</sup> Instead, *Moore I* prohibited states from relying on outdated medical diagnostic criteria.<sup>254</sup> As a result, the Florida court considered itself blameless, because neither the state statutory scheme “nor this Court’s interpretation of the statute [had] been superseded by medical standards.”<sup>255</sup> The court observed that *Moore I* explained how Texas “also erred by concluding that the defendant’s academic failures and childhood abuse detracted from an adaptive deficit finding . . . [when] medical experts would consider those ‘risk factors’ for [intellectual disability] rather than a basis to counter an [intellectual disability] determination.”<sup>256</sup>

In *State v. Thurber*, the Supreme Court of Kansas summarized *Moore I* to mean that: “states cannot restrict an individual’s qualification as intellectually disabled by using outdated medical standards; these adjudications should be informed by the medical community’s current

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Glover v. State*, 226 So. 3d 795, 811 n.13 (Fla. 2017). *See also* *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018) (When deciding *In re Lewis*, the California Supreme Court understood *Moore I* to stipulate that “the determination [of intellectual disability] must be an individualized one, informed by the views of medical experts.”).

<sup>253</sup> *Wright v. State*, 256 So. 3d 766, 770 (Fla. 2018).

<sup>254</sup> *Id.* at 774.

<sup>255</sup> *Id.* at 775.

<sup>256</sup> *Id.* (quoting *Moore I*, 137 S. Ct. 1039, 1051 (2017)). Justice Pariente concurred with the result, but felt it bore mentioning that “the two medical diagnostic standards relied on in *Moore [I]* [were] the DSM and the AAIDD, current editions.” *Id.* at 780 n.13 (Pariente, J., concurring). Interestingly, and to Justice Pariente’s point, Georgia’s Court of Appeals has interpreted *Moore I* as requiring adherence to a definition of intellectual disabilities that, for all intents and purposes, appeared consistent with the definition listed in the DSM–5 and AAIDD–11, although the court neglected to reference either manual by name. *Cawthon v. State*, 830 S.E.2d 270, 275 n.18 (Ga. Ct. App. 2019).

consensus reflecting its improved understanding over time.”<sup>257</sup> Simply put, *Moore I* rejected the use of “outdated” and “archaic” diagnostic criteria.”<sup>258</sup> The Kansas court found “significance in [*Moore I*’s] holding that current medical standards would further restrict a state’s discretion in defining intellectual disabilit[ies] for purposes of enforcing the Eighth Amendment categorical prohibition on executing the intellectually disabled.”<sup>259</sup> In light of the endorsement of current medical criteria, the Kansas Supreme Court reviewed the state statute governing the evaluation of intellectual disabilities among capital defendants.<sup>260</sup> Specifically, “since the medical community does not treat capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law as conclusively demonstrating the absence of an intellectual disability, Kansas cannot statutorily require courts to disregard other relevant medical standards.”<sup>261</sup>

Satisfied with its interpretation of the statute’s requirements, the court went on to elaborate how *Moore I* “recognize[d] in the death penalty context that states are constrained at least to some extent by the clinical definition of intellectual disabilit[ies] used in the medical community, i.e., states must be informed by—and cannot disregard—current medical community standards on this subject.”<sup>262</sup> Because current medical standards identified three separate criteria that patients

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<sup>257</sup> *State v. Thurber*, 420 P.3d 389, 402 (Kan. 2018).

<sup>258</sup> *Id.* at 447.

<sup>259</sup> *Id.*

<sup>260</sup> The statute defined intellectual disabilities in capital cases as “having significantly subaverage general intellectual functioning . . . to an extent which substantially impairs one’s capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law.” KAN. STAT. ANN., § 21-6622(h) (2016). The statute was “further suspect . . . because it applie[d] to death penalty defendants, but not to noncriminal individuals when making intellectual disability determinations for noncriminal purposes.” *Thurber*, 420 P.3d at 450. The court could not “discern how this incapacity limitation safeguards Kansans’ Eighth Amendment rights, and the State provide[d] no justification for applying a different standard in the death penalty context.” *Id.* Consequently, and consistent with this reasoning, the court removed the problematic condition from the statute by deleting the phrase “to an extent which substantially impairs one’s capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements of law.” *Id.* at 451. The statute now defines intellectual disabilities within the capital context as “having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01, and amendments thereto.” *Id.*

<sup>261</sup> *Thurber*, 420 P.3d at 450.

<sup>262</sup> *Id.* at 452.

must meet, the Kansas Supreme Court held that the state must evaluate intellectual disabilities in accordance with those three prongs.<sup>263</sup>

The Kentucky Supreme Court, in *Woodall v. Commonwealth*, considered *Moore I* to contain “better, but not much clearer, guidance as to how courts should evaluate” capital defendants for intellectual disabilities.<sup>264</sup> Despite finding the *Moore I* court to have “not provided crystal-clear guidance,” the Kentucky court nevertheless judged as “clear” the fact that “prevailing medical standards should be the basis for a determination as to a defendant’s intellectual disability to preclude the imposition of the death penalty.”<sup>265</sup> In *Carr v. State*, the Mississippi Supreme Court held a similar view, pronouncing that “*Moore I* reiterated *Atkins* and did not alter the *Atkins* landscape,” although, the court did note that *Moore I* required some deference to medical standards.<sup>266</sup>

In *Johnson v. State*, the Missouri Supreme Court reviewed a case where “uncontested evidence showed [that Johnson’s] IQ was between 53 and 63, which uncontestably put him in the category of those considered intellectually disabled by clinicians.”<sup>267</sup> Unfortunately, the defendant’s attorney never informed him that he satisfied the criteria for intellectual disabilities and could be ineligible for execution.<sup>268</sup> Deprived of this “critical additional information,” Johnson entered a guilty plea to ensure that he would not receive a sentence of death.<sup>269</sup> On appeal, Johnson argued a theory of ineffective assistance of counsel, which the Missouri Supreme Court disagreed with.<sup>270</sup> Additionally:

[b]ecause the trier of fact never adjudicated Johnson to be intellectually disabled . . . not only was Johnson’s counsel correct to advise him he could receive the death penalty if he took his case to trial, but Johnson’s counsel also had a duty to so inform him because he was not categorically ineligible to receive the death penalty.<sup>271</sup>

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<sup>263</sup> *Id.*

<sup>264</sup> *Woodall v. Commonwealth*, 563 S.W.3d 1, 4 (Ky. 2018).

<sup>265</sup> *Id.* at 4–5.

<sup>266</sup> *Carr v. State*, 2017-CA-01481-SCT, ¶ 16 (Miss. 2019).

<sup>267</sup> *Johnson v. State*, 580 S.W.3d 895, 908 (Mo. 2019) (en banc) (Stith, J., dissenting).

<sup>268</sup> *Id.* at 924 (provided that the jury believed the evidence and found Johnson intellectually disabled).

<sup>269</sup> *Id.* at 908.

<sup>270</sup> *Id.* at 905 (majority opinion).

<sup>271</sup> *Id.* at 903.

The Missouri Supreme Court reasoned that “no amount of additional investigation [from Johnson’s counsel] would have changed the fact that Johnson had not yet been adjudicated as intellectually disabled.”<sup>272</sup> This led the court to conclude that “[i]f Johnson’s ultimate reason for pleading guilty was to avoid receiving the death penalty, as he testified it was, then any additional investigation and advice from counsel regarding his eligibility for the death penalty would not have affected his decision to accept the State’s offer and plead guilty.”<sup>273</sup> Accordingly, “[a]ccepting the State’s plea offer . . . was the only way for Johnson to definitively ensure he would not receive the death penalty.”<sup>274</sup>

Confusingly, the Missouri Supreme Court simultaneously conceded that “Johnson introduced evidence establishing he had an IQ of 63” and held that “it was not clear error to find Johnson was competent to enter a guilty plea.”<sup>275</sup> This decision is hard to square with *Atkins*, which exempted everyone with intellectual disabilities from execution precisely because their “impairments can jeopardize the reliability and fairness of capital proceedings against” them.<sup>276</sup> The majority charged the criticism in the dissent as being “misplaced” for relying on *Moore I* and *Moore II*, because “there has never been a finding at any stage in this case as to whether Johnson is—or is not—intellectually disabled.”<sup>277</sup> Accordingly, while the court agreed that *Moore I* and *Moore II* represented the most recent precedent on intellectual disabilities in capital cases, it declined to hold that those cases had any bearing on whether Johnson received ineffective assistance of counsel or was competent to enter a guilty plea.<sup>278</sup>

Unlike the majority, the dissent deemed *Moore I* and *Moore II* as compelling the states to define intellectual disabilities in a manner consistent with the DSM–5 and AAIDD–11.<sup>279</sup> Moreover, Justice Stith

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 903.

<sup>274</sup> *Id.* at 904.

<sup>275</sup> *Id.*

<sup>276</sup> *Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002). For an in-depth discussion of *Atkins*, see *supra* Part II.

<sup>277</sup> See *Johnson v. State*, 580 S.W. 3d 895, 913 (Mo. 2019) (Stith, J., dissenting). The Missouri Supreme Court alleged that the dissent improperly “divert[ed] attention from the issues actually presented by this case.” *Id.* at 906 n.9.

<sup>278</sup> *Id.* at 907–08.

<sup>279</sup> *Id.* at 916. The dissent interpreted the *Moore* cases to mean:

*Atkins*, as clarified by *Hall*, *Moore I*, and *Moore II*, set out clearly how states are limited by clinical guidance in determining

found the *Moore* cases to specifically require clinicians to assess capital defendants for adaptive deficits.<sup>280</sup> Honing in on the asserted ineffective assistance of counsel theory, the dissent highlighted that:

[d]espite having no familiarity with the definition of intellectual disability, and despite testifying that he has no relevant medical or clinical experience, [Johnson's counsel] testified he did not believe Mr. Johnson was intellectually disabled. Counsel's first grave error, therefore, was totally failing to familiarize himself with the legal standard of who is eligible to be executed before giving Mr. Johnson advice about how to avoid execution.<sup>281</sup>

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intellectual disabilit[ies]. To determine whether there is evidence of low intellectual functioning, clinicians give multiple IQ scores and account for a standard error of measurement (five points) when an IQ score is close to, but above 70. Then, to determine whether this low IQ is accompanied by adaptive behavior deficits, *clinicians*, preferably using standardized instruments, should examine records from childhood and interview those who knew the defendant, looking only at whether the defendant, when in a non-penal environment, exhibited deficits in conceptual, social, or practice skills. Finally, some evidence of the deficits should be available before age 18.

*Id.* (citations omitted).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 920. The dissenting Justice highlighted the following exchange between the court and Johnson's counsel:

Q. Are you familiar with *Atkins vs. Virginia*?

A. Vaguely.

Q. **Do you know the whole *Atkins vs. Virginia*?**

A. **Not offhand.**

Q. **Are you familiar with *Hall vs. Florida*?**

A. **No.**

Q. Is someone who suffers from mental retardation eligible for the death penalty?

A. I do not believe so.

Q. Did you discuss this with Mr. Johnson?

A. I did not believe that Mr. Johnson was found to be mentally—have mental retardation. Close to it, but not mental retardation.

Q. What is the definition of mental retardation?

A. I'm not a doctor. I don't know. I just know that in my—my relationship with Mr. Johnson and in speaking with him, that I did not believe that he suffered from mental retardation.

In conjunction with other evidence, this neglect supported a conclusion that “[c]ounsel’s deficient performance stemmed from his incompetence in failing to familiarize himself with relevant law surrounding the eligibility for the death penalty and his inability to recognize the difference between competency and intellectual disability.”<sup>282</sup> When reviewing the full extent of the attorney’s shortcomings, Justice Stith felt that Johnson had satisfactorily “shown [that] his defense counsel’s performance was far outside the degree of skill, care, and diligence of a reasonably competent attorney given counsel’s complete failure to inform Mr. Johnson of a possible defense to the death penalty.”<sup>283</sup>

In *State v. Vela*, the defendant made a similar argument before the Nebraska Supreme Court, stating “that his counsel’s performance was deficient because counsel failed to adequately present” evidence of his intellectual disabilities.<sup>284</sup> The trial court applied an SEM of +5/-5 to Vela’s raw IQ test score of 75, as required by *Hall*, and ruled that he met the first prong for finding intellectual disability.<sup>285</sup> Having satisfied the first criteria, the trial court proceeded to focus on whether Vela possessed any adaptive deficits, also keeping in line with *Hall*. As part of this adaptive functioning evaluation, the state-appointed expert requested access to Vela, which Vela’s counsel denied.<sup>286</sup> Unable to visit Vela, the state expert conducted his assessment based on other available information, and ultimately testified that Vela was not intellectually disabled.<sup>287</sup> Informed by “testing done by several experts,

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**Q. Are you familiar with the standards that have been used by the U.S. Courts?**

**A. I don’t know what—I don’t understand the question.**

**Q. What standard of the definition of mental retardation was used?**

**A. I don’t know.** If you provide me with it, I could tell you.

**Q. Did you know at the time?**

**A. I did not believe he was mentally retarded.**

**Q. But you did not know what the definition was?**

**A. It was—just never even occurred to me to look.**

*Id.* at 919–20.

<sup>282</sup> *Id.* at 928.

<sup>283</sup> *Id.*

<sup>284</sup> *State v. Vela*, 900 N.W.2d 8, 20 (Neb. 2017).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

including those retained at Vela's request and those retained at the State's request," the trial court found that Vela failed to provide evidence of adaptive deficits.<sup>288</sup>

The Nebraska Supreme Court saw no issue with Vela's counsel in 2010, since the state-appointed expert "was able to use alternative means to evaluate Vela's adaptive behavior."<sup>289</sup> Testimony from the state expert in 2010 revealed that, "while Vela had limitations in certain adaptive skill areas, his overall adaptive behavior was appropriate for his age."<sup>290</sup> Without access to Vela, however, the state expert had to formulate his opinion based on "two third-party informants who were acquainted with Vela for 2 to 3 months prior to his arrest."<sup>291</sup> The defense-appointed expert also assessed Vela for adaptive deficits using "Vela's older sister" as the third-party source of information.<sup>292</sup> The expert for the defense concluded that "Vela had significant impairment in the adaptive behavior areas of communication, home living, social/interpersonal skills, self-direction, and functional academic skills."<sup>293</sup> When justifying the decision to afford greater weight to the state's expert, the Nebraska Supreme Court explained that, "[t]he State presented evidence of Vela's ability to adapt to procedures and conditions within the prison system," which suggests that the court interpreted this testimony as additional evidence that Vela had no adaptive deficits.<sup>294</sup> Both Vela's father and sister provided the trial court with extensive evidence that he was intellectually disabled.<sup>295</sup> Nonetheless, the Madison County District Court "found that the evidence did not establish at least two significant limitations in adaptive behavior," and therefore "Vela was not a person with mental retardation."<sup>296</sup>

In its 2010 opinion, the Nebraska Supreme Court observed that the state expert "met with Vela and Vela's attorneys on two occasions[.]" both of which ended in Vela's counsel denying the expert's "request to

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 21.

<sup>290</sup> *State v. Vela*, 777 N.W.2d 266, 299 (Neb. 2010).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 295.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 299.

<sup>295</sup> *See infra* pp. 42–43 and note 312.

<sup>296</sup> *Vela*, 777 N.W.2d at 299.

administer a test designed to measure adaptive behavior.”<sup>297</sup> When reviewing the case again in 2017, the same court considered the lack of access to Vela irrelevant since “even if Vela’s allegation that his counsel prevented [the expert] from performing adaptive testing on Vela is true, such action by counsel did not prejudice Vela, because [the expert] was able to use alternative means to evaluate Vela’s adaptive behavior[.]”<sup>298</sup> Despite recognizing that *Moore I* criticized the Texas CCA for relying “on superseded medical standards” this court reasoned that:

Vela challenged the effectiveness of counsel based on his allegation that counsel completely prevented an evaluation of his adaptive functioning. Vela did not challenge the appropriateness of specific standards or methods that were used to evaluate his adaptive functioning, and therefore, consideration of that question is not before us in this appeal.<sup>299</sup>

The decision of the Nebraska Supreme Court is notable for several reasons. First, the court ruled that Vela’s counsel’s denial of state expert testing “did not prejudice Vela[.]”<sup>300</sup> Yet denial restricted the expert’s evaluation of his adaptive functioning to information gleaned from “third-party informants”<sup>301</sup> Contrary to the court’s claim, *Moore I* is undeniably relevant here because on review, a court cannot “diminish the force of the medical community’s consensus” when evaluating capital defendants for intellectual disabilities.<sup>302</sup> The consensus amongst clinicians reveals that, “[t]he most common approach to assessment of adaptive skills [in the capital context] has been the administration of a standardized adaptive behavior scale with information provided by a person who knows the individual well.”<sup>303</sup>

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<sup>297</sup> *Id.* at 297.

<sup>298</sup> *See Vela*, 900 N.W.2d at 21.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 20 (quoting *Vela*, 777 N.W.2d at 299).

<sup>302</sup> *Moore I*, 137 S. Ct. 1039, 1044 (2017).

<sup>303</sup> Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. FORENSIC PSYCHOL. PRAC. 1, 8 (2008).

The most fundamental difference between IQ tests and adaptive behavior scales is that IQ instruments are administered directly to the person whose intellectual functioning is being evaluated. By contrast, adaptive behavior scales most frequently involve obtaining

While both the state and defense experts completed a standardized instrument based on third-party testimony, “[t]he choice of informants is critical for accurate assessment. [Specifically, t]he informant must have had the opportunity to observe the defendant perform a variety of tasks in community settings over a period of time.”<sup>304</sup> For this reason, informants are often “family members, teachers, employers, neighbors, and friends.”<sup>305</sup> Current medical standards, therefore, would appear to require affording greater weight to the defense expert’s testimony compared to that of the state expert.

The medical community recognizes that not all third parties are equally qualified to serve as informants, and the identity of the informant directly influences the accuracy of the assessment. When determining which expert’s testimony is more credible, the relationship between the individual interviewed and the individual being evaluated matters greatly. In *Vela*, the exact nature of the relationship between Vela and the informants used by the state expert is unclear, but the phrase “acquainted with Vela for 2 to 3 months” does not suggest a close, personal relationship.<sup>306</sup> This is concerning because the informants might not have known Vela well enough for the state expert to gather an accurate understanding of Vela’s adaptive deficits. For example, the defense expert interviewed Vela’s older sister, who knew Vela since birth and constituted an unmistakably appropriate informant. Moreover, current medical standards recognize that “[i]nformation from adaptive skill assessments should be supplemented with additional direct measures of client functioning.”<sup>307</sup> By refusing to allow the state expert access to Vela, his counsel, albeit unknowingly, forced the expert

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information from other individuals who know or have known the person and who have observed his functioning in everyday life.

James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessment in Atkins Cases*, 46 HOFSTRA L. REV. 1305, 1376 (2018); Gilbert S. Macvaugh II & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 168 (2009) (“[I]nformation regarding adaptive function is most reliably obtained through the descriptions of third parties who have had the opportunity to closely observe the examinee in the community. The individual under evaluation is not the most reliable source of information regarding his own adaptive functioning.”).

<sup>304</sup> Everington & Olley, *supra* note 303, at 13.

<sup>305</sup> *Id.*

<sup>306</sup> *Vela*, 777 N.W.2d at 299.

<sup>307</sup> Everington & Olley, *supra* note 303, at 13.

to rely on “alternative means” which the Nebraska Supreme Court deemed adequate to determine Vela’s adaptive deficits, but nevertheless likely violated the standard set out in *Moore I*.<sup>308</sup>

Second, the decision in *Vela* is notable because when “[t]he State presented evidence of Vela’s ability to adapt to procedures and conditions within the prison system” the court took that as evidence that he did not possess adaptive deficits.<sup>309</sup> In *Moore I*, however, the Supreme Court admonished the court for using evidence of adaptive deficits displayed in prison as evidence against intellectual disabilities.<sup>310</sup> Interestingly, in the face of such precedent, the Nebraska Supreme Court neglected to mention that *Moore I* forbid both prioritizing defendants’ functioning while in prison and citing adaptive strengths to justify disregarding adaptive deficits.

Finally, there are portions of testimony delivered by Vela’s father and sister which shared striking similarities to evidence that the *Moore I* Court found compelling in conducting an adaptive deficit determination, including the defendants’ inability to tell time.<sup>311</sup> The Nebraska Supreme Court reproduced the following account of the testimony from Vela’s father and sister:

Vela needed assistance bathing until he was approximately 10 years old. He needed help dressing until after age 12, and was older than 12 before he could tie his own shoes. He learned to ride a bike at age 10, and he never learned to tell time. Vela never learned to drive a car, never had a checking or savings account, and never learned to budget money. As a teenager, he could not buy his own clothes or food, and had no chores in the household because he was incapable of performing them.<sup>312</sup>

Given that the *Moore I* Court highlighted the “significant mental and social difficulties”<sup>313</sup> described by the trial court record, which the *Moore II* Court subsequently relied upon to affirm the adaptive deficit

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<sup>308</sup> State v. Vela, 900 N.W.2d 8, 21 (Neb. 2017).

<sup>309</sup> Vela, 777 N.W.2d at 299.

<sup>310</sup> Moore I, 137 S. Ct. 1039, 1050 (2017).

<sup>311</sup> Compare Vela, 777 N.W.2d at 298 (“he never learned to tell time”), with Moore I, 137 S. Ct. at 1045 (“he could scarcely tell time”).

<sup>312</sup> Vela, 777 N.W.2d at 298. See *supra* text accompanying note 174 to compare the summary of Moore’s adaptive deficits.

<sup>313</sup> Moore I, 137 S. Ct. at 1045.

determination,<sup>314</sup> the Nebraska Supreme Court appears to have erred by ruling that Vela did not possess the requisite adaptive deficits.<sup>315</sup>

According to the Pennsylvania Supreme Court in *Commonwealth v. Cox*, *Moore I* signified that “the *Briseno* factors impermissibly substitute a political consensus on who should be exempt from the death penalty for objective medical standards.”<sup>316</sup> The court also interpreted *Moore I* to require adherence to current medical standards, and noted that *Moore I* “disapproved of the Texas court’s conclusion that Moore’s traumatic childhood contraindicated a finding of [intellectual] disability when . . . clinicians identify traumatic experiences as a risk factor for intellectual disability.”<sup>317</sup> While conducting its review on appeal, the court emphasized the unusual development that had taken place in the case before it.

[T]he Commonwealth states it has changed its position on Appellant’s *Atkins* claim in light of recent United States Supreme Court precedent. The Commonwealth notes that the [Post-Conviction Relief Act (PCRA)] court’s written opinion borrows significantly from its post-hearing legal memorandum, including the Commonwealth’s urging of consideration of the *Briseno* factors, notwithstanding the United States Supreme Court decision in *Moore I* several months earlier.<sup>318</sup>

Additionally, the Commonwealth “highlight[ed] the similarities between the facts and expert opinion evidence in this case with facts and expert opinion evidence in *Moore I*.”<sup>319</sup> It “concede[d] that the PCRA

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<sup>314</sup> *Moore II*, 139 S. Ct. at 672.

<sup>315</sup> Other jurisdictions would agree. In an unpublished disposition, Nevada’s Supreme Court considered whether “*Hall* invalidates this court’s prior decision that [capital defendant] had not met the requirements for [exclusion from execution] because his intellectual disabilities presented after the developmental period (birth to 18 years of age).” *Mulder v. State*, 422 P.3d 1231, at \*4 (Nev. July 26, 2018) (unpublished table decision). The court responded in the negative, relying on the *Moore I* Court’s endorsement of a three-prong definition of intellectual disabilities, of which the age of onset requirement was the third prong and “a core element” of the diagnostic criteria. *Id.*

<sup>316</sup> *Commonwealth v. Cox*, 204 A.3d 371, 378 (Pa. 2019) (citing *Moore I*, 137 S. Ct. at 1051).

<sup>317</sup> *Id.* (citing *Moore I*, 137 S. Ct. at 1051).

<sup>318</sup> *Id.* at 386. An “*Atkins* claim” involves a capital defendant alleging that they have intellectual disabilities and are therefore ineligible for execution.

<sup>319</sup> *Id.* at 386–87. “[T]he adaptive strengths focused on by the PCRA court are comparable to those focused on by the court in *Moore I* . . .” *Id.* at 387.

court's reliance on the *Briseno* factors compels reversal."<sup>320</sup> Due to the ruling in *Moore I*, the Commonwealth changed its position and "now contends Appellant met his burden in this case, and urges [the Pennsylvania Supreme Court] to grant *Atkins* relief."<sup>321</sup>

Although the Pennsylvania Supreme Court appeared sympathetic toward the prosecution's request, it nevertheless explained "that confessions of error by the Commonwealth are not binding on a reviewing court but may be considered for their persuasive value."<sup>322</sup> The court then identified that "the chief import of [*Moore I* was] the central role of the societal consensus to rely on medical and professional expertise in defining and diagnosing intellectual disabilit[ies]."<sup>323</sup> *Moore I*, the court said, criticized Texas because its "law and practices . . . deviated from that central principle by engrafting arbitrary or extraneous considerations into the analysis."<sup>324</sup> Further, in *Moore I*, the Court "particularly disapproved [sic] reliance on the *Briseno* factors as an attempt to impose a consensus of the citizenry about who should be eligible for the death sentence rather than criteria accepted in the professional and medical community."<sup>325</sup> Ultimately, the Pennsylvania Supreme Court agreed with the Commonwealth's position, holding that the PCRA court improperly "relied on the *Briseno* factors."<sup>326</sup> Although the court found that "the PCRA court made [its] findings and determinations, in part, on improper considerations," the case was remanded because the court could not "conclude what credibility and factual determinations the PCRA court would have found, applying a correct *Atkins* analysis."<sup>327</sup>

In *State v. Blackwell*, the Supreme Court of South Carolina upheld the trial court's ruling that Blackwell was not intellectually disabled "[b]ecause the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony[.]"<sup>328</sup> The court reached this conclusion despite admitting that "it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in

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<sup>320</sup> *Id.* at 387.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* (citing *Commonwealth v. Brown*, 196 A.3d 130, 146–49 (Pa. 2018)).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 388.

<sup>325</sup> *Id.* (citing *Moore I*, 137 S. Ct. at 1053).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 388–89.

<sup>328</sup> *State v. Blackwell*, 801 S.E.2d 713, 720 (S.C. 2017).

preparation of the *Atkins* hearing.”<sup>329</sup> The trial court denied that Blackwell possessed adaptive deficits even while “acknowledg[ing] evidence that Blackwell had difficulty living independently after the dissolution of his marriage[.]”<sup>330</sup> Although unsettling, the trial court did not “find this [difficulty adapting] translated into deficits in Blackwell’s adaptive behavior.”<sup>331</sup> Instead, the lower court underscored Blackwell’s adaptive strengths and offered alternate explanations for why he struggled, including depression.<sup>332</sup> On appeal, the Supreme Court of South Carolina determined that “Blackwell ha[d] not shown the trial court committed an error of law or that its decision [was] unsupported by the evidence[.]”<sup>333</sup> In a footnote, the court explained that it did not consider the trial court to have erred, even though the decision preceded *Moore I*, because “the court’s analysis comports with [*Moore I*].”<sup>334</sup> The court asserted that *Moore I* prohibited reliance on outdated medical standards and the *Briseno* factors, which were created without reference to any authority.<sup>335</sup> Accordingly, *Moore I* did not compel a reversal of the decision before the Supreme Court of South Carolina because the trial court’s ruling did not rest on either of those two prohibitions.

*Battaglia v. State* asked the Texas CCA to consider whether the trial court properly determined that Battaglia was competent for execution.<sup>336</sup> Traditionally, competency for execution has been treated as a separate legal matter from intellectual disabilities.<sup>337</sup> Accordingly,

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<sup>329</sup> *Id.* at 721.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 721–22.

<sup>334</sup> *Id.* at 721 n.11.

<sup>335</sup> *Id.*

<sup>336</sup> *Battaglia v. State*, 537 S.W.3d 57, 60 (Tex. Crim. App. 2017).

<sup>337</sup> The issue of competency for execution focuses on how a capital defendant is functioning in “the present moment” when “execution is imminent.” Ellis, Everington & Delpha, *supra* note 303, at 1388 & n.322. Given the often long wait times on death row from conviction to execution, many capital defendants develop symptoms while on death row that raise questions of their competency for execution. *Id.* at 1334 n.127.

By contrast, intellectual disability is a condition manifested either at birth or during childhood (most frequently early in childhood), and which essentially remains throughout the individual’s life. As a result, the mental *illness* concerns about substantial changes or

the Texas CCA did not cite *Moore I* in the majority opinion. The dissent, however, asserted that *Moore I* established the need for states to rely on current medical standards when conducting evaluations of any kind within the capital context.<sup>338</sup> As a result, the dissent advocated “to the extent that a competency determination requires an assessment of whether a defendant is suffering from a severe mental illness, it is appropriate to consider the current medical framework in making such a determination.”<sup>339</sup>

In 2018, the Texas CCA issued an unpublished opinion, *Ex parte Cathey*, observing that *Moore I* “rejected the use of the *Briseno* factors to analyze adaptive deficits[.]”<sup>340</sup> Given that *Moore I* expounded upon previous precedents in this manner, the Texas CCA “exercise[d] [their] authority to reconsider this case on [their] own initiative.”<sup>341</sup> Subsequently, the court wrote:

This cause is remanded to the habeas court to consider all of the evidence in light of the *Moore v. Texas [I]* opinion and make a new recommendation to this Court on the issue of intellectual disabilit[ies]. If the habeas court deems it necessary, then it may receive evidence from mental health experts and any witnesses whose evidence the court determines is germane to the question of intellectual disabilit[ies]. The habeas court shall then make findings of fact and conclusions of law regarding the issue of intellectual disabilit[ies].<sup>342</sup>

Several other unpublished opinions from the Texas CCA echo this ruling almost word for word.<sup>343</sup> Additional unpublished cases decided

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fluctuations in mental state over time do not have a direct analogue regarding intellectual disability.

*Id.* at 1389 (footnote omitted). Additionally, issues of intellectual disability are usually raised at trial, while issues of competency for execution are typically raised on appeal once an execution date has been announced. *Id.* at 1388 n.322.

<sup>338</sup> *Battaglia*, 537 S.W.3d at 103 (Alcala, J., dissenting).

<sup>339</sup> *Id.*

<sup>340</sup> *Ex parte Cathey*, WR-55,161-02, 2018 WL 5817199, at \*1 (Tex. Crim. App. Nov. 7, 2018) (per curiam).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at \*2.

<sup>343</sup> See *Ex parte Henderson*, WR-37,658-03, 2018 WL 4762755 (Tex. Crim. App. Oct. 3, 2018) (per curiam); *Ex parte Lizcano*, NO. WR-68,348-03, 2018 WL 2717035 (Tex. Crim. App. Jun. 6, 2018) (per curiam); *Ex parte Davis*, NO. WR-40,339-09, 2017 WL 6031852 (Tex. Crim. App. Dec. 6, 2017) (per curiam) (Newell, J., not participating).

by the Texas CCA contain similar phrasing but the CCA ordered the relevant court to hold “a live hearing.”<sup>344</sup>

In its unpublished *Petetan v. State* decision, also from 2017, the Texas CCA noted that *Moore I* detailed how “this Court’s failure to consider current medical standards and reliance on *Briseno* failed to comply with the Eighth Amendment and Supreme Court precedents.”<sup>345</sup> These errors, the Texas CCA ruled, warranted “grant[ing] rehearing” of the case.<sup>346</sup> Justice Newell concurred, agreeing that *Moore I* “clearly invalidate[d] portions of our *Briseno* standard,” while also recognizing that “*Moore [I]* appears to [have gone] further than that[.]”<sup>347</sup> Justice Keller dissented and did not perceive *Moore I* to have any bearing on Petetan’s case, despite the opinion appearing after the Texas CCA’s ruling in the case in March of 2017.<sup>348</sup> Keller adopted this view because the court “made a point of saying that appellant’s mental retardation claim would fail even without considering the *Briseno* factors.”<sup>349</sup> Keller reduced *Moore I*’s significance to a simple rejection of the *Briseno* factors, whereas Newell recognized that the case held broader implications, showcasing the Justices’ divergent interpretations of *Moore I*.

In *Ex parte Sosa*, the Texas CCA acknowledged that *Moore I* “held that the *Briseno* factors, based upon superseded medical standards, create an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment.”<sup>350</sup> The Texas CCA “determine[d] that the trial court’s findings [were] supported by the record,” and *Sosa* was intellectually disabled.<sup>351</sup> Thus, the Texas CCA pronounced that “[r]elief is granted on Applicant’s intellectual

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<sup>344</sup> See *Ex parte Guevara*, NO. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. Jun. 6, 2018) (per curiam); *Ex parte Williams*, NO. WR-71,296-03, 2018 WL 2717039 (Tex. Crim. App. Jun. 5, 2018) (per curiam); *Ex parte Jean*, NO. WR-84,327-01, 2017 WL 2859012 (Tex. Crim. App. Jun. 28, 2017) (per curiam) (Newell, J., not participating).

<sup>345</sup> *Petetan v. State*, NO. AP-77,038, 2017 WL 4678670, at \*1 (Tex. Crim. App. Oct. 18, 2017) (per curiam).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* (Newell, J., concurring).

<sup>348</sup> *Id.* at \*2 (Keller, J., dissenting).

<sup>349</sup> *Id.*

<sup>350</sup> *Ex parte Sosa*, NO. AP-76,674, 2017 WL 2131776, at \*1 (Tex. Crim. App. May 3, 2017) (per curiam) (citing *Moore I*, 137 S. Ct. 1039, 1044 (2017)).

<sup>351</sup> *Id.*

disability claim. Applicant's sentence is reformed to a term of life imprisonment."<sup>352</sup>

In its 2018 *Ex parte Wood* decision, the Texas CCA concluded that Wood was "not entitled to relief" despite the fact that many of the habeas court's findings hinged on "the *Briseno* factors and possible alternate causes of any adaptive deficits," which the Texas CCA conceded "[were] no longer viable after the *Moore* cases."<sup>353</sup> Perhaps sensing its decision's strained credibility, even for a judiciary as notoriously insubordinate as the Texas CCA,<sup>354</sup> the court rationalized that, "[t]he *Moore* decisions changed the legal analysis for reviewing intellectual-disability claims in Texas, but Applicant's evidence relating to intellectual disability is already in the record."<sup>355</sup> Consequently, the court denied Wood "the opportunity to further develop the evidence[.]"<sup>356</sup> Justice Newell concurred, and interpreted *Moore I* as "rejecting our reliance upon the infamous '*Briseno* factors'" in favor of "current diagnostic standards."<sup>357</sup> He perceived the *Moore I* opinion to be problematic, however, because:

to the extent that Applicant can build a claim of intellectual disability upon the shifting sands of clinical psychological standards detailed in *Moore I*], this case demonstrates that the determination

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<sup>352</sup> *Id.*

<sup>353</sup> *Ex parte Wood*, 568 S.W.3d 678, 680 (Tex. Crim. App. 2018).

<sup>354</sup> See Michael Hall, *And Justice for Some*, TEX. MONTHLY (Nov. 2004), <https://www.texasmonthly.com/politics/and-justice-for-some/> [<https://perma.cc/WP5P-6ZKJ>].

[T]ime and again over the past decade, whenever [Texas CCA] judges have had a choice between tolerating bad behavior by prosecutors and police or enforcing the due process rights of criminals, they have sided with the state. For some judges it has been a conscious choice, a turning away from the court's previous technicality-based, defense-oriented decisions. For others it has been merely a reflection of their prosecutorial backgrounds. For all, it is politics: The judges on the CCA are elected politicians and are careful to paint themselves as tough on crime and criminals, whatever the cost. And so they have developed an overriding concern with preventing further hearings, appeals, and new trials . . . . [O]ver and over before the CCA, finality has trumped everything else, especially fairness.

*Id.*

<sup>355</sup> *Wood*, 568 S.W.3d at 681.

<sup>356</sup> *Id.* at 682.

<sup>357</sup> *Id.* at 685, 686 (Newell, J., concurring).

of intellectual disability has become untethered from the original rationale for the exception to the imposition of the death penalty announced in *Atkins*. Applicant is not intellectually disabled. He is a serial killer.<sup>358</sup>

Justice Alcala dissented, insisting that Wood’s “intellectual disability claim . . . must be reconsidered in light” of *Moore I* because it “failed to conform with the diagnostic framework endorsed by the Supreme Court in *Moore I*.”<sup>359</sup> Alcala also alleged that the “Court’s majority opinion employs the same type of incorrect intellectual disability analysis that it has been conducting mistakenly for over a decade since issuing its opinion in *Ex parte Briseno*.”<sup>360</sup> Expounding further, Alcala declared “[t]he instant majority opinion continues to selectively focus on only the IQ scores and adaptive strengths that would support a determination that applicant is not intellectually disabled, despite current medical standards suggesting that this is an inappropriate approach to intellectual-disability determinations.”<sup>361</sup> Alcala concluded by asserting that Wood should receive the opportunity “for further evidentiary development and factual findings under the proper standard[,]” because the trial court’s “fact findings and conclusions fail to comport with the current medical diagnostic framework[.]”<sup>362</sup>

In its unpublished 2018 *Thomas v. State* decision, the Texas CCA conveyed that *Moore I* “reject[ed] the use of the factors this Court set out in *Ex parte Briseno* to evaluate a defendant’s adaptive functioning,” because their “application . . . departs from current medical standards and clinical practice[.]”<sup>363</sup> The court emphasized that, while the defense expert evaluated Thomas according to the DSM-5, the state-appointed expert “conflated the old and the current standard” by allowing “his opinion [to be] guided by the *Briseno* factors.”<sup>364</sup> Equally concerning, the state “sought examples of adaptive abilities which fell within the

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<sup>358</sup> *Id.* at 686. The original rationale that Newell mentions is, presumably, that persons with intellectual disabilities are less morally culpable for their crimes, and therefore undeserving of the criminal justice system’s most severe punishment—death.

<sup>359</sup> *Id.* (Alcala, J., dissenting).

<sup>360</sup> *Id.* at 687.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 688.

<sup>363</sup> *Thomas v. State*, NO. AP-77,047, 2018 WL 6332526, at \*3 (Tex. Crim. App. Dec. 5, 2018) (citing *Moore I*, 137 S. Ct. 1039, 1049–51 (2017)).

<sup>364</sup> *Id.* at \*17.

*Briseno* factors.”<sup>365</sup> As a result, the Texas CCA determined, that it “cannot ignore [the state expert’s] obvious adherence to the *Briseno* factors in forming the basis for his opinions that he presented to the jury.”<sup>366</sup> The court reasoned, “it would be a violation of Thomas’s due process rights if the jury’s determination of intellectual disabilit[ies] was based on misleading expert testimony” and therefore “Thomas [was] entitled to a new punishment hearing.”<sup>367</sup>

Finally, in 2019, the Texas CCA granted a stay of execution in *Ex parte Milam*, due to “recent changes in the law pertaining to the issue of intellectual disabilit[ies]” triggered by that decision in *Moore I.*<sup>368</sup> The purpose of this stay was to provide the trial court with sufficient time to conduct “a review of the merits of [Milam’s] claims.”<sup>369</sup> Justice Richardson concurred, commenting, “[t]here was no legal basis upon which to challenge the use of the *Briseno* factors as the proper diagnostic standard for evaluating claims of intellectual disabilit[ies]” prior to *Moore I.*<sup>370</sup> Therefore, Milam clearly “did not forfeit *then* his right to a stay of execution *now* simply because his trial and writ attorneys lacked clairvoyance.”<sup>371</sup> Justice Yeary dissented, remarking that “it does not appear that [Milam] has challenged *Briseno* at any earlier stage in these capital murder proceedings. If there was any trial objection, it was not reiterated and pursued on direct appeal.”<sup>372</sup> According to Yeary, “[a]t least as of 2010, it is clear enough that an argument could reasonably have been fashioned . . . that *Briseno* should be overruled.”<sup>373</sup> For this reason, Yeary believed that Milam “should therefore have raised his intellectual disability claim in his initial writ application.”<sup>374</sup> Moreover, Yeary objected to the Majority opinion because:

to authorize the convicting court to entertain [Milam’s] claim now, although raised for the first time in a subsequent writ application

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<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at \*19.

<sup>368</sup> *Ex parte Milam*, NO. WR-79,322-02, 2019 WL 190209, at \*1 (Tex. Crim. App. Jan. 14, 2019) (per curiam).

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* (Richardson, J., concurring).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* (Yeary, J., dissenting).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

when the argument was readily available to be raised in his initial writ application, would violate both the letter and certainly the spirit of our codified abuse-of-the-writ provision[.]<sup>375</sup>

## B. The Standard Error of Measurement

Courts from ten different states cited *Moore I* or *Moore II* to address aspects of IQ testing, including the SEM. The Alabama CCA, for example, interpreted *Moore I* to require states to evaluate defendants for adaptive deficits when their IQ score, adjusted for the SEM, showed evidence of subaverage intellectual functioning according to current medical standards.<sup>376</sup> In a separate case, the Alabama CCA interpreted *Moore I* as supporting the use of a universal “standard error of measurement of 5” that must be applied to every defendants’ IQ score, with adjusted scores of 70 or lower satisfying the first prong for intellectual disabilities.<sup>377</sup> Similarly, the Supreme Court of Alabama observed in another case that *Moore I* criticized the Texas CCA for “disregarding the defendant’s lower IQ scores and failing to consider ‘the standard error of measurement.’”<sup>378</sup> Subsequently, the court acknowledged that

[i]t is undisputed that Carroll’s IQ score of 71, adjusted for the standard of measurement, yields a range of 66 to 76. Indeed, the Court of Criminal Appeals found that [the] lower end of Carroll’s score range falls at or below 70. Thus, there is no dispute that Carroll has [satisfied the first prong for intellectual disabilities].<sup>379</sup>

In the 2019 *Graham v. State* case, the Alabama CCA considered *Moore I* to reiterate *Hall*’s stipulation that states must examine all evidence of intellectual disabilities, even in instances where a defendant fails to meet the first prong for intellectual disabilities by scoring above 70 on all IQ tests, properly adjusted for the SEM.<sup>380</sup>

The California Supreme Court explained that *Moore I* “dictates that [this court] must also consider petitioner’s adaptive functioning” because: (1) “[p]etitioner has two IQ scores that fall at or below 70 without adjustment for the standard error of measurement”; and (2) “[h]is score of 73 on the WAIS-R yields a range of 68 to 78 or, if

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<sup>375</sup> *Id.*

<sup>376</sup> *Callen v. State*, 284 So. 3d 177, 197 n.6 (Ala. Crim. App. 2017).

<sup>377</sup> *Carroll I*, 300 So. 3d, 51, 55 (Ala. Crim. App. 2017).

<sup>378</sup> *Carroll II*, 300 So. 3d, 59, 63 (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

<sup>379</sup> *Id.* (citations omitted).

<sup>380</sup> *Graham v. State*, 299 So. 3d 273, 331 (Ala. Crim. App. 2019).

rescored as 71, produces a range of 66 to 76.”<sup>381</sup> In Kansas, the state’s supreme court noted that *Moore I* deemed the Texas CCA’s “analysis of Moore’s IQ scores” unacceptable in light of *Hall*

because it failed to account for the standard error of measurement; and because Moore had an IQ of 74, when adjusted for the standard error of measurement he had an IQ range of 69-79. This meant the lower end of the range fell below 70, so the Texas Court was required under *Hall* to consider Moore’s adaptive functioning.<sup>382</sup>

The Florida Supreme Court claimed that “*Moore [I]* generally embodies a simple affirmation of the principles announced in *Hall* in *Wright v. State*.”<sup>383</sup> The Florida Supreme Court did not take issue with how the post-conviction court handled the case because it “acknowledged that Wright’s IQ score range—adjusted for the SEM—fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70; therefore, Wright was allowed to offer evidence of adaptive functioning.”<sup>384</sup> Accordingly, Florida permitted defendants who scored 70 or lower on an IQ test, after incorporating the SEM, to present evidence of their alleged adaptive deficits.<sup>385</sup> Contrary to current medical standards, however, the court argued that “[n]either *Hall* nor *Moore [I]* requires a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range.”<sup>386</sup> The court rejected the proposition that an IQ test score at or below 70, once adjusted for the SEM, necessarily qualified a defendant as having met the first criteria for intellectual disabilities.

While this interpretation is clearly an outlier, the Florida Supreme Court sought to conceal its departure from Supreme Court precedent by claiming that its decision did, in fact, comport with *Hall* and *Moore I*. The court asserted it did “not employ a strict cutoff, and consider[ed] other evidence of ID when clinical experts would do the same.”<sup>387</sup> This assertion is dubious, however, because the *Moore II* Court ruled that Moore met the first criteria for intellectual disabilities on the basis that “Moore’s intellectual testing indicated his was a borderline case, but that he had demonstrated sufficient intellectual-functioning deficits to

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<sup>381</sup> *In re Lewis*, 417 P.3d 756, 766 (Cal. 2018).

<sup>382</sup> *State v. Thurber*, 420 P.3d 389, 447 (Kan. 2018).

<sup>383</sup> *Wright II*, 256 So. 3d 766, 771 (Fla. 2018).

<sup>384</sup> *Id.* at 772.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

require consideration of the second criterion—adaptive functioning.”<sup>388</sup> Here, the Supreme Court is likely referencing *Moore I*, where it noted: (1) “Moore’s score of 74, adjusted for the standard error of measurement, yield[ed] a range of 69 to 79”; and (2) “[b]ecause the lower end of Moore’s score range falls at or below 70, the CCA had to move on to consider Moore’s adaptive functioning.”<sup>389</sup> Moreover, the *Moore II* Court described the first prong as “primarily a test-related criterion.”<sup>390</sup> The proper way to understand the Court’s instructions, therefore, is that an IQ score at or below 70, once the SEM has been incorporated, satisfies the first prong, but does not qualify the defendant as intellectually disabled unless they also meet the adaptive deficit criteria. Indeed, the *Moore I* Court said as much when it wrote:

we do not end the intellectual-disability inquiry, one way or the other, based on Moore’s IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.<sup>391</sup>

The Florida Supreme Court offered no explanation as to why Wright’s IQ score of 69 did not meet the first prong for intellectual disabilities, and it erroneously reached its conclusion only after disregarding clear Court instructions and current medical standards.<sup>392</sup>

Discussing *Moore I*, the Supreme Court of Kentucky remarked that “the prevailing tone of the U.S. Supreme Court’s examination of this issue suggests that a determination based solely on IQ score, even after

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<sup>388</sup> *Moore II*, 139 S. Ct. 666, 668 (2019).

<sup>389</sup> *Moore I*, 137 S. Ct. 1039, 1049 (2017).

<sup>390</sup> *Moore II*, 139 S. Ct. at 668 (citing DSM–5 *supra* note 180, at 37).

<sup>391</sup> *Moore I*, 137 S. Ct. at 1050.

<sup>392</sup> The United States Supreme Court recognized that the DSM–5 represented current medical standards, *id.* at 1048. The standard states that

Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence. Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65–75 ( $70 \pm 5$ ). Clinical training and judgment are required to interpret test results and assess intellectual performance.

DSM–5 *supra* note 180, at 37.

proper statistical-error adjustments have been made, is highly suspect[.]”<sup>393</sup> The Kentucky court arrived at this understanding despite saying, “[i]t is also true that the U.S. Supreme Court seems to suggest that a defendant’s IQ score, after adjusting for statistical error, acts as the preliminary inquiry that could foreclose consideration of other evidence of intellectual disabilit[ies], depending on the score.”<sup>394</sup> Nevertheless, the Supreme Court of Kentucky proclaimed that “routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility.”<sup>395</sup> Thus, the court held “that any rule of law that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional.”<sup>396</sup> Accordingly, the court struck down “KRS 532.130(2), a statute with an outdated test for ascertaining intellectually [sic] disability[.]”<sup>397</sup>

In *State v. Russell*, the Mississippi Supreme Court overturned the lower court’s finding that Russell was intellectually disabled.<sup>398</sup> While incarcerated, Russell incurred two separate charges: (1) capital murder for killing a corrections officer, for which he was convicted and sentenced to death;<sup>399</sup> and (2) aggravated assault of a corrections officer while on death row.<sup>400</sup> During the aggravated assault case, Russell was evaluated by two state experts and a defense expert for a total of “three psychological tests” to determine whether “he was competent to confess voluntarily and to stand trial” and whether he “was not insane” during

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<sup>393</sup> *Woodall v. Commonwealth*, 563 S.W.3d 1, 5 (Ky. 2018).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 6.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 2. The statute at issue provided that “[a] defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a defendant with a serious intellectual disability. ‘Significantly subaverage general intellectual functioning’ is defined as an intelligence quotient (I.Q.) of seventy (70) or below.” KY. REV. STAT. ANN. § 532.130(2) (West 2012), *invalidated by Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018) (statute language enabling a “bright-line” IQ score finding was counterintuitive to the diagnostic framework of the medical community).

<sup>398</sup> *State v. Russell*, 2015-KA-00245-SCT (¶ 27) (Miss. 2017).

<sup>399</sup> *Id.* at (¶ 6).

<sup>400</sup> *Id.* at (¶ 8).

the commission of the offense.<sup>401</sup> Years later, the state requested access to Russell so that it could evaluate him for intellectual disabilities in conjunction with the capital case.<sup>402</sup> The defense objected to the state's request because the state had already evaluated Russell during the aggravated assault case.<sup>403</sup> When asked why he sought access, the state expert testified that he desired to "administer the most up-to-date" version of the IQ test Russell had previously taken, and to "test Russell for adaptive-functioning deficits—something that he and his colleagues did not assess" during the initial evaluation.<sup>404</sup>

The trial judge "decided no further testing was needed to form an expert *Atkins* opinion," and subsequently "ruled the State had not shown good cause to administer any further tests."<sup>405</sup> From the trial court's perspective, allowing the state expert to evaluate Russell on a second occasion would place the defense at a disadvantage.<sup>406</sup> During the *Atkins* hearing, the defense expert presented evidence that Russell was "intellectually disabled, based on Russell's prior IQ scores, his adaptive-functioning deficits, and his placement in special-education classes, indicating onset prior to age eighteen."<sup>407</sup> When given the chance, "the State announced it would not present any witnesses."<sup>408</sup> Accordingly, the trial court found sufficient evidence of Russell's intellectual disabilities and "entered an order vacating Russell's death sentence."<sup>409</sup>

Upon appeal, the Mississippi Supreme Court held that "the trial court abused its discretion when it ruled the State had 'adequate opportunity' and information to evaluate Russell's *Atkins* claim."<sup>410</sup> The court based its holding on the fact that "the State doctors were not ordered to and did not evaluate Russell's claim that he was intellectually disabled[]" during their interviews with Russell in association with the aggravated assault case.<sup>411</sup> The state, therefore, "was not seeking a

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<sup>401</sup> *Id.* at (¶ 12).

<sup>402</sup> *Id.* at (¶ 13).

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at (¶ 15).

<sup>405</sup> *Id.* at (¶ 17).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* at (¶ 18).

<sup>408</sup> *Id.* at (¶ 19).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at (¶ 21).

<sup>411</sup> *Id.* at (¶ 22).

second, duplicate *Atkins* evaluation. It was requesting *the Atkins* evaluation.”<sup>412</sup> The court further explained, “[t]he State made this request not to redo what had already been done[.]”<sup>413</sup> but, rather, its expert sought to adhere to current medical standards by: (1) gathering data to assess the issue at hand rather than repurposing old data collected for a different reason; (2) assessing Russell’s adaptive deficits for the first time; and (3) administering the most recent version of the IQ test previously taken by Russell.<sup>414</sup> By ruling as it did, the trial court erred because “instead of being informed by the medical expert on what assessments are necessary, it was the trial judge who informed the expert what assessments were sufficient.”<sup>415</sup> As a result, the Mississippi Supreme Court found that “the trial court not only improperly stepped into the role of a forensic psychologist, but it also broke with this Court’s precedent recognizing that the medical expert is in the best position to determine what testing is sufficient to form an opinion on the petitioner’s intellectual disability.”<sup>416</sup> In concluding its reasoning, the Mississippi Supreme Court declared that, “[b]ecause our *Atkins* procedures clearly contemplate the State responding to the petitioner’s evidence with its own expert opinion, the trial court abused its discretion when it restricted the State in this way.”<sup>417</sup>

Chief Justice Waller dissented, pointing out that “[t]he State, aware of Russell’s *Atkins* claim, requested that Russell be evaluated at one time for the purposes of both cases[.]”<sup>418</sup> He explained that “Russell agreed to this procedure on the condition that, to the extent possible, the results of his mental evaluation in the assault case would serve the State’s purposes for the *Atkins* claim and that he would not be subjected to additional testing.”<sup>419</sup> Waller also recognized that “the reports from Russell’s [initial] psychological evaluations were not rendered meaningless in the *Atkins* context simply because they did not contain conclusions on Russell’s intellectual disability.”<sup>420</sup> Moreover, Waller quoted the state’s expert who, in a previous case, declined to administer

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<sup>412</sup> *Id.* at (¶ 23).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at (¶ ¶ 23, 24, 25).

<sup>415</sup> *Id.* at (¶ 26).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at (¶ 27).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at (¶ 33).

tests assessing adaptive functioning because he considered the practice unsound given how long the defendant had spent in prison.<sup>421</sup> Waller concluded that if the state expert truly sought to assess Russell's adaptive deficits, he could have used acceptable methods that did "not require direct contact with or testing of the defendant."<sup>422</sup>

In his dissent, Waller also observed that the *Moore I* Court considered Moore to have met the first prong for intellectual disabilities "based solely on the results of an IQ test administered to the defendant in 1989, even though the defendant's *Atkins* hearing was held in 2014 and the defendant had taken more recent IQ tests."<sup>423</sup> In other words, Waller thought *Moore I* signified that an IQ score of 70 or below, once adjusted for the SEM, satisfied the first prong for intellectual disabilities regardless of how long ago that IQ test had been administered—provided that the test in question was consistent with the current medical standards at the time of administration. Waller noted that the state and defense experts agreed that Russell's scores should be adjusted for the Flynn Effect,<sup>424</sup> which decreased his scores to "66 and 72."<sup>425</sup> Additionally, the state expert had "testified that the [tests] were the most up-to-date IQ tests available at the time they were administered to Russell."<sup>426</sup> Therefore, Waller considered "the psychological testing already available to the trial court [to have] established that Russell satisfied" the first prong for intellectual disabilities.<sup>427</sup> Furthermore,

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<sup>421</sup> *Id.* at (¶ 35).

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at (¶ 37) (citing *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

<sup>424</sup> The Flynn Effect refers to the fact that, over time, individuals have been scoring higher on IQ tests compared to the population that the test was normed on. Thus, comparing a recent score with the average score obtained by an outdated population artificially inflates the recent score. In death penalty cases, this increases the risk that persons with intellectual disabilities will be incorrectly assessed as intellectually able and subsequently executed. In order to counteract the Flynn Effect, IQ scores are lowered according to set practices. See DSM-5, *supra* note 180 at 37 (defining the Flynn effect as "overly high scores due to out-of-date test norms"). See also Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 INTELL. & DEVELOPMENTAL DISABILITIES 131 (2011); John H. Blume, Sheri Johnson & Christopher W. Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009).

<sup>425</sup> *Russell*, 2015-KA-00245-SCT at (¶ 37).

<sup>426</sup> *Id.* at (¶ 38).

<sup>427</sup> *Id.* at (¶ 37).

“[t]he state presented no evidence suggesting that those scores were invalid or that they could not be used in an *Atkins* analysis[,]” and the State’s expert himself testified that “Russell probably would produce a lower score on the [most recent version of the IQ test] than he did on the [now-outdated version that he took].”<sup>428</sup> Waller concluded

the trial court correctly weighed the need for additional intelligence testing against the existing evidence of Russell’s intellectual functioning, along with the risk of testing error, and determined that the State had not shown good cause to conduct additional testing. Under these facts, I would not find that the trial court abused its discretion in denying the State’s request to have its own expert administer the [newest version of the IQ test] to Russell.<sup>429</sup>

In *Johnson v. State*, Justice Stith dissented from the majority’s finding that Johnson’s counsel was not ineffective despite his failure to: (1) recognize that Johnson’s IQ, which was “between 53 and 63,” would have likely exempted him from the death penalty during an *Atkins* hearing; and (2) familiarize himself with intellectual disabilities diagnostic criteria and relevant Supreme Court cases.<sup>430</sup> According to Stith, *Moore I* demonstrated that if a defendant’s IQ score, adjusted for the SEM, is 70 or lower, courts must assess defendants for evidence of adaptive functioning.<sup>431</sup> Stith expounded upon what she perceived to be the correct procedures for evaluating capital defendants’ intellectual disabilities, writing,

[t]o determine whether there is evidence of low intellectual functioning, clinicians give multiple IQ scores and account for a standard error of measurement (five points) when an IQ score is close to, but above 70. Then, to determine whether this low IQ is accompanied by adaptive behavior deficits, *clinicians*, preferably using standardized instruments, should examine records from childhood and interview those who knew the defendant, looking only at whether the defendant, when in a non-penal environment, exhibited deficits in conceptual, social, or practice skills. Finally, some evidence of the deficits should be available before age 18.<sup>432</sup>

In *State v. Ryan*, the Oregon Supreme Court considered a non-capital case involving sexual abuse perpetrated by an intellectually

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<sup>428</sup> *Id.* at (¶ 39).

<sup>429</sup> *Id.*

<sup>430</sup> *Johnson v. State*, 580 S.W.3d 895, 908–09 (Mo. 2019) (Stith, J., dissenting).

<sup>431</sup> *Id.* at 915.

<sup>432</sup> *Id.* at 916 (internal citations omitted).

disabled defendant.<sup>433</sup> Extensive evidence, accepted by both the state and defense, demonstrated that Ryan was intellectually disabled.<sup>434</sup> The Oregon Supreme Court cited *Moore I* to support its claim that, “even for offenders who test above that cut-off IQ score [of 70–75], deficits in the offender’s adaptive functioning are relevant to a determination of intellectual disability.”<sup>435</sup> Because the Supreme Court “in *Atkins* repeatedly emphasized the relevance of intellectual disability in determining both the gravity of an offense and the severity of its penalty,” the Oregon Supreme Court found that “[e]vidence of an offender’s intellectual disability . . . is relevant to a proportionality determination where sentencing laws require the imposition of a term of imprisonment without consideration of such evidence.”<sup>436</sup> Similarly, the court affirmed that “the undisputed evidence at sentencing showed that defendant is an intellectually disabled offender who has an IQ score between 50 and 60, a full ten to twenty points below the cutoff IQ score for the intellectual function prong of the intellectual disability definition recognized in *Hall*.”<sup>437</sup> As a result, the Oregon Supreme Court held that “the trial court erred . . . because [it] failed to consider evidence of defendant’s intellectual disability when that evidence, if credited, would establish that the sentence would be arguably unconstitutional because it shows that defendant’s age-specific intellectual capacity fell below the minimum age level of criminal responsibility for a child.”<sup>438</sup> The

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<sup>433</sup> State v. Ryan, 396 P.3d 867, 868 (Or. 2017).

<sup>434</sup> A total of four mental health professionals conducted evaluations and [a]ll the evaluators diagnosed defendant with intellectual disabilities. The first evaluator reported an IQ score of 50 for defendant, the most recent IQ test scored defendant at 60, and each evaluator found significant impairment in his adaptive functioning. Defendant represented to the court that he functioned at an approximate mental age of 10, and the state did not dispute that representation.

*Id.* at 869.

<sup>435</sup> *Id.* at 875. In other words, even if a defendant failed to obtain IQ test scores at or below 70, once adjusted for the SEM, and therefore was considered to have not met the first prong of the intellectual disabilities diagnostic criteria, Oregon’s Supreme Court understood *Moore I* to still require the state courts to provide the defendant the opportunity to present evidence of adaptive deficits. *Id.*

<sup>436</sup> *Id.* at 877.

<sup>437</sup> *Id.* at 879.

<sup>438</sup> *Id.* at 868–69.

court concluded by vacating Ryan’s “75-month prison term”<sup>439</sup> and remanding to the circuit court for a new sentence that considered evidence of his intellectual disabilities.<sup>440</sup>

For the Supreme Court of Pennsylvania, *Moore I* “established that IQ test scores must be considered while accounting for any SEM.”<sup>441</sup> This court recognized *Moore I* provided “the presence of other sources of imprecision in administering the test to a particular individual . . . cannot narrow the test-specific standard error range.”<sup>442</sup> Therefore, it interpreted *Moore I* to prohibit state courts from using a SEM less than +/- 5 points.<sup>443</sup> The court also considered that the *Moore I* Court

held that an IQ score in the ranges present in that case did not end the inquiry, reaffirming *Hall*. [Instead, it was] necessary to consider other evidence of intellectual disability, particularly adaptive deficits, in line with accepted principles of the medical community.<sup>444</sup>

In light of these instructions, the Supreme Court of Pennsylvania criticized the Post Conviction Relief Act (PCRA) court for “discount[ing] the results of the 1987 WAIS-R test based on the possibility that testing conditions affected the result.”<sup>445</sup> Pennsylvania’s Supreme Court concluded that the PCRA court erred when it “argued particular circumstances justified disregarding the lower end of the SEM score.”<sup>446</sup>

The Texas CCA did not share the Supreme Court of Pennsylvania’s interpretation of *Moore I*. In *Ex parte Wood*, the Texas CCA deferred to the habeas court’s judgment in discarding IQ test scores that “ranged

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<sup>439</sup> *Id.* at 869.

<sup>440</sup> *Id.* at 880.

<sup>441</sup> *Commonwealth v. Cox*, 204 A.3d 371, 377 (Pa. 2019).

<sup>442</sup> *Id.* at 377–78 (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

<sup>443</sup> *Id.* at 388.

<sup>444</sup> *Id.* at 387. The court noted that “Moore’s IQ scores included one score of 78 with none under 70.” *Id.*

<sup>445</sup> *Id.* at 388. The test in question “yielded an overall [IQ] score of 69[,]” which is below the threshold required to qualify a capital defendant as a person with intellectual disabilities. *Id.* at 379.

<sup>446</sup> *Id.* at 388. In *Moore I*, for example, the Supreme Court noted that the Texas CCA relied on Moore’s poor academic performance and the depressive symptoms he was experiencing when he took the IQ test to justify disregarding the lower bound of the test, which was 69 after subtracting the SEM of 5 from the initial score of 74. 137 S. Ct. 1039, 1047 (2017).

from 64 to 111[.],” ultimately retaining a single “test [that] yielded a full scale IQ score of 75 . . . .”<sup>447</sup> Based on this test, the habeas court ruled that Wood failed to meet the first criteria for intellectual disabilities.<sup>448</sup>

The Texas CCA affirmed the habeas court’s decision, writing:

Because the only test with any validity yielded an IQ score that, even accounting for standard measurement error, is not within the range for intellectually disabled persons and because even that score appears to understate Applicant’s intelligence due to the strong evidence of malingering, Applicant has failed the first prong of the intellectual-disability framework, and there is no need to conduct an adaptive-deficits inquiry.<sup>449</sup>

The Texas CCA’s decision is suspect on multiple fronts. First, the *Hall* Court observed that “an individual with an IQ test score ‘between 70 and 75 or lower’ may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.”<sup>450</sup> As such, Supreme Court precedent definitively established that defendants who scored 75 on an IQ test satisfied the first criteria for intellectual disabilities, and courts should proceed to the second prong and assess them for adaptive deficits. Second, the broader significance of *Hall* is that the Court ruled “[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment[;]” however,

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<sup>447</sup> *Ex parte* Wood, 568 S.W.3d 678, 680 (Tex. Crim. App. 2018).

<sup>448</sup> *Id.* The IQ test in question had an ascribed “measurement error range of 71 to 80 (-4, +5).” *Id.*

<sup>449</sup> *Id.* at 680–81.

<sup>450</sup> *Hall v. Florida*, 572 U.S. 701, 722 (2014) (quoting *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002)). Meaning, the *Hall* Court explicitly adopted this aspect of current medical standards as its own, removing doubt as to whether states had discretion to use a stricter cutoff score. *Id.* at 723. This language superseded that of the *Atkins* Court, which declared that “an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002). While the *Atkins* Court may have left some doubt as to whether states could justify using a cutoff score other than 75, the *Hall* Court clearly closed this loophole by removing the word “typically.” In *Atkins*, the Supreme Court referenced a psychiatry textbook to note that current medical standards “typically” considered scores ranging between 70 and 75 as meeting the first criteria for establishing intellectual disabilities despite referencing typical current medical standards. *Id.* However, the *Atkins* Court did not explicitly require states to use this cutoff, on the contrary, the Court left it to the states to decide how to assess intellectual disabilities. *Id.* at 317.

that is exactly what the Texas CCA did in *Wood*.<sup>451</sup> Third, by upholding the habeas court's highly suspect SEM of minus four but plus five IQ points, the Texas CCA adopted a position that even dissenting Justice Alito identified as incompatible with the majority's decision.<sup>452</sup> *Ex parte Wood*, therefore, is not a product of the Texas CCA misinterpreting unclear or ambiguous instructions from the Supreme Court, but rather a blatant, calculated, and harmful expression of defiance against the Court's unmistakable ruling. The fourth reason Texas's decision is suspect is that even if it was permissible for states to use SEM's smaller than five, the Supreme Court may have rendered disputes over SEM's immaterial by stating that, "[i]n *Hall v. Florida*, we held that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70."<sup>453</sup> Fifth, the *Hall* Court highlighted the absurdity of "Florida seek[ing] to execute a man because he scored a 71 instead of 70 on an IQ test."<sup>454</sup> By upholding the habeas court's SEM of minus four but plus five that produced a range of 71 to 80, the Texas CCA's opinion differs from the decision overturned by the *Hall* Court only in semantics.<sup>455</sup> Finally, the *Moore I* Court rejected

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<sup>451</sup> *Hall*, 572 U.S. at 723. Expounding upon this principle, the *Hall* Court indicated that "[i]ntellectual disability is a condition, not a number," and that "an IQ test score represents a range rather than a fixed number." *Id.*

<sup>452</sup> Although Alito dissented, he recognized that the Court had instituted "a five-point margin of error" in order to produce "the number 75 in this case." *Id.* at 740 (Alito, J., dissenting). Alito's *Hall* interpretation appears sound given that the *Moore I* Court applied a five-point SEM when it observed that "Moore's score of 74, adjusted for the standard error of measurement, yield[ed] a range of 69 to 79." *Moore I*, 137 S. Ct. 1039, 1049 (2017). The *Moore I* Court explicitly denounced the Texas CCA for "discount[ing] the lower end of the standard-error range associated with [Moore's IQ] scores." *Id.* at 1047. In doing so, the Supreme Court unequivocally rejected any attempt to shrink the SEM from the five-point margin that *Hall* required.

<sup>453</sup> *Moore I*, 137 S. Ct. at 1048. On its face, the *Moore I* Court appears to be endorsing the view that no IQ score is too high to justify prohibiting defendants from submitting evidence of adaptive deficits for consideration. Critics, however, may point out that the *Moore I* Court also wrote "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050.

<sup>454</sup> *Hall*, 572 U.S. at 724.

<sup>455</sup> Both rulings manufactured a scenario where a single point difference on an IQ test determined whether the defendant qualified as intellectually disabled and exempt from the death penalty. Therefore, despite taking the suspect SEM into account, the Texas CCA's affirmation of the habeas court's ruling is hard to

the *Briseno* factors partially because they were “an outlier” relative “to other States’ handling of intellectual-disability pleas.”<sup>456</sup> Therefore, the Texas decision in *Ex parte Wood* is also an outlier because it: (1) used a standard error of measurement less than five; and (2) prohibited an investigation into adaptive deficits based solely on an IQ score.<sup>457</sup> In contrast to Texas, other states have overwhelmingly relied on a standard measurement error of +/- five points and allowed inquiries into adaptive deficits even if a capital defendant’s IQ score failed to fall below the cutoff.<sup>458</sup>

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square with the Hall Court’s de-emphasis of specific IQ scores in favor of evidence of adaptive deficits.

<sup>456</sup> *Moore I*, 137 S. Ct. at 1052.

<sup>457</sup> *Ex parte Wood* may also be an outlier relative to other Texas CCA cases. In its unpublished *Thomas v. State* opinion, the court noted that the state-retained expert testified that, “the numbers attributable to Thomas’s IQ score is a range of 68 to 75, and that his ‘full scale’ IQ is 71.” NO. AP-77,047, 2018 WL 6332526, at \*12 (Tex. Crim. App. Dec. 5, 2018). Thus, according to the state expert, Thomas’ IQ score conveniently fell a single point short of meeting the first prong for intellectual disabilities. During cross-examination, however, the state expert acknowledged that he did, in fact, consider Thomas to meet the first criteria for intellectual disabilities, although his earlier testimony framed the issue as if Thomas did not. *Id.* at \*16. For its part, the Texas CCA recognized that

[a]ccording to the Supreme Court, Bobby Moore’s IQ score of 74, adjusted for the standard error of measurement, yielded a range of 69 to 79, and so, because the lower end of Moore’s score range fell at or below 70, this Court had to move on to consider Moore’s adaptive functioning.

*Id.* at \*3. Thus, in this case, the Texas CCA appeared to interpret *Moore I* as requiring an SEM of +/- 5 and prohibiting states from narrowing this range for any reason.

<sup>458</sup> In *Carroll v. State*, Alabama’s CCA acknowledged that the *Moore I* Court required “a standard error of measurement of 5.” 300 So. 3d 51, 55 (Ala. Crim. App. 2017). Likewise, in *Graham v. State*, Alabama’s CCA understood *Moore I* as requiring states to consider evidence of adaptive deficits even when defendants scored above 70 in IQ tests. 299 So. 3d 273, 331 (Ala. Crim. App. 2019). Moreover, the Supreme Court of Kentucky deemed “the prevailing tone of the U.S. Supreme Court’s examination of this issue [to suggest] that a determination based solely on IQ score, even after proper statistical-error adjustments have been made, [to be] highly suspect.” *Woodall v. Commonwealth*, 563 S.W.3d 1, 5 (Ky. 2018). The Supreme Court of Kentucky pronounced that “[w]e now conclude and hold that any rule of law that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional.” *Id.* at 6. The Oregon Supreme Court expressed the same opinion, finding “the Court has made clear that, even for offenders who test above

In summary, the Texas CCA erred in its *Ex parte Wood* decision because citing an SEM of minus four from a base IQ test score of 75 in order to conclude that Wood “failed the first prong of the intellectual-disability framework, and there [was] no need to conduct an adaptive-deficits inquiry[.]”<sup>459</sup> is patently unconstitutional in light of *Hall* and *Moore I*. Justice Alcala said as much in her dissent when she asserted,

[t]his Court’s majority opinion cherry picks certain IQ scores and treats those scores as dispositive evidence of a lack of intellectual disability. This Court’s majority opinion acknowledges that applicant’s IQ scores range from 64 to 111, but it dismisses low IQ scores that would indicate subaverage general intellectual functioning as the product of malingering. It uncritically assumes the validity of applicant’s higher IQ scores without addressing whether the methods used to obtain those scores would still comport with current medical diagnostic criteria. And perhaps more importantly, this Court’s cherry-picked IQ score of 75 provides a worst-case scenario IQ score of 71 based on the ‘measurement error range.’ This score is only one point above the cutoff score that would place someone in the range of intellectual disability, when the low end of the IQ score error range is 70 or below. Under the current medical diagnostic framework, it is inappropriate to decide that someone is not intellectually disabled by using a strict cutoff score taken from a cherry picked IQ test.<sup>460</sup>

By failing to rein in the habeas court, Alcala contended that:

this Court’s majority opinion employs the same type of incorrect intellectual disability analysis that it has been conducting mistakenly for over a decade since issuing its opinion in *Ex parte Briseno*. The instant majority opinion continues to selectively focus on only the IQ scores . . . that would support a determination that applicant is not intellectually disabled[.]<sup>461</sup>

### C. Highlighting Adaptive Deficits

Courts from nine different states relied on *Moore I* or *Moore II* to address how they should treat aspects of capital defendants’ adaptive deficits. For example, in *Carroll v. State*, the Alabama CCA correctly

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the cut-off IQ score [of 70-75], deficits in the offender’s adaptive functioning are relevant to a determination of intellectual disability.” *State v. Ryan*, 396 P.3d 867, 875 (Or. 2017). Lastly, Pennsylvania’s Supreme Court perceived *Moore I* to prohibit reliance on SEM’s less than the five points described in *Hall*. *Commonwealth v. Cox*, 204 A.3d 371, 377–78 (Pa. 2019).

<sup>459</sup> *Ex parte Wood*, 568 S.W.3d 678, 681 (Tex. Crim. App. 2018).

<sup>460</sup> *Id.* at 687 (Alcala, J., dissenting).

<sup>461</sup> *Id.* at 686–87 (citation omitted).

interpreted *Moore I* to mean that “courts should not use adaptive strengths to negate adaptive deficits.”<sup>462</sup> Additionally, that court considered *Moore I* to stipulate “that States may not create their own factors for accessing [sic] adaptive deficits if those factors deviate from clinical standards.”<sup>463</sup> The Supreme Court of Alabama, in turn, acknowledged that *Moore I* required evaluating defendants for adaptive deficits, not adaptive strengths.<sup>464</sup> Nevertheless, that court appears to have focused on Carroll’s adaptive strengths rather than deficits, including his ability to read, operate a baking mixer, and make some basic foods.<sup>465</sup>

The defense expert, on the other hand, found that Carroll displayed evidence of adaptive deficits.<sup>466</sup> According to the Supreme Court of Alabama, “[t]he circuit court’s primary reason for rejecting the defense expert’s opinion was that [he] was the only psychologist to conclude that Carroll suffered from significant adaptive deficits.”<sup>467</sup> Therefore, “[b]ecause the experts’ opinions regarding Carroll’s level of adaptive functioning . . . were conflicting, it was reasonable for the circuit court to look to other evidence of Carroll’s adaptive functioning to reconcile the experts’ competing opinions regarding his abilities [and functional limitations].”<sup>468</sup> Moreover, the circuit court relied on testimony from the police officer that interviewed Carroll, who attested

that Carroll was able to read his Miranda rights before questioning him. He stated that Carroll read a sentence on the form out loud to him and that, during questioning, he appeared to understand his questions. [The officer] also testified that Carroll had eight or nine

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<sup>462</sup> *Carroll I*, 300 So. 3d at 55.

<sup>463</sup> *Id.*

<sup>464</sup> *Carroll II*, 300 So. 3d 59, 63 (Ala. 2019).

<sup>465</sup> *Id.* at 65.

Dr. Ford found that the defendant reads novels, self-help books, and the sports page of the newspaper. Dr. Ford found that the defendant is able to write letters. The defendant, who has served as a cook in a prison kitchen, was able to correctly describe to Dr. Ford: (1) how to bake food items such as biscuits; (2) how to use a large mixer, and (3) ingredients that were used in some of the food items he made as a cook.

*Id.*

<sup>466</sup> *Id.*

<sup>467</sup> *Id.* at 67.

<sup>468</sup> *Id.* at 72 (citation omitted).

books in his prison cell, as well as a newspaper clipping about his prior conviction and two Jet magazines.<sup>469</sup>

Based on this information, the Supreme Court of Alabama found that after “weighing the evidence presented, the circuit court discredited the opinion of [the defense expert], which was within its discretion to do.”<sup>470</sup>

Despite the Supreme Court of the United States’ criticism of the state expert in *Moore I* for “emphasiz[ing] Moore’s adaptive strengths in school, at trial, and in prison”<sup>471</sup> and the Texas CCA for “overemphasiz[ing] Moore’s perceived adaptive strengths,”<sup>472</sup> the Supreme Court of Alabama held that it could not “conclude that the circuit court exceeded its discretion in concluding that Carroll did not have significant or substantial deficits in adaptive functioning.”<sup>473</sup> Given that the circuit court prioritized evidence of Carroll’s reported adaptive strengths over testimony from his relatives demonstrating numerous adaptive deficits, it is difficult to reconcile the ruling from the Supreme Court of Alabama with the principles established in *Moore I*. It is even more challenging to square the Alabama holding with the subsequent Supreme Court decision in *Moore II*, which found that the Texas CCA “again relied less upon the adaptive *deficits* . . . than upon Moore’s apparent adaptive *strengths*.”<sup>474</sup> Because the Supreme Court of Alabama decided *Ex parte Carroll* on April 5, 2019, and the Supreme Court of the United States decided *Moore II* on February 19, 2019, it is telling that the Supreme Court of Alabama’s opinion makes no reference to *Moore II*.

In *In re Lewis*, the California Supreme Court noted that, “[the Attorney General] urges a focus on [Lewis Jr.’s] adaptive strengths, including successful gambling in Las Vegas, supporting himself through illegal activities, maintenance of lasting relationships, and [his]

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<sup>469</sup> *Id.* at 73.

<sup>470</sup> *Id.*

<sup>471</sup> *Moore I*, 137 S. Ct. 1039, 1047 (2017).

<sup>472</sup> *Id.* at 1050.

<sup>473</sup> *Carroll II*, 300 So. 3d at 74. The circuit court, however, reached its conclusion largely based on Carroll’s alleged adaptive strengths rather than his deficits. Additionally, the circuit court discounted the defense expert’s testimony even though the expert provided evidence collected from “interviews of [Carroll’s] relatives . . . that [indicated] he had significant deficits in 7 of the 10 areas of adaptive functioning.” *Id.* at 76.

<sup>474</sup> *Moore II*, 139 S. Ct. 666, 670 (2019).

ability to banter with police when questioned.”<sup>475</sup> The court recognized, however, that the “United States Supreme Court has cautioned against overemphasizing perceived adaptive strengths to counter evidence of intellectual disability.”<sup>476</sup> The California court observed that the “*Moore I*” court rejected the view that adaptive strengths constitute evidence adequate to overcome considerable objective evidence of adaptive deficits, noting the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.<sup>477</sup> As a result, the California Supreme Court concluded that evidence of Lewis’s “adaptive behaviors [was] substantially supported,” and therefore “[b]ecause he is intellectually disabled, [he] is ineligible for execution.”<sup>478</sup>

The Florida Supreme Court recognized that *Moore I* criticized the Texas CCA for improperly relying on Moore’s alleged adaptive strengths.<sup>479</sup> In a revealing statement, however, the Florida Supreme Court wrote, “[i]t is uncertain exactly where *Moore I* drew the tenuous line of ‘overemphasis’ on adaptive strengths.”<sup>480</sup> This comment established the groundwork for the Florida Supreme Court to remark that, “[a]s lawyers, it seems counterintuitive that courts cannot consider connected adaptive strengths because the existence of certain connected strengths necessarily illustrates the absence of certain deficits.”<sup>481</sup> The court expounded: “[f]or example, common sense dictates that if a defendant excels in algebra, then that fact demonstrates a lack of connected adaptive deficits in math reasoning (i.e., the conceptual domain).”<sup>482</sup> Therefore, the Florida Supreme Court adopted a narrow interpretation of *Moore I*, holding it to prohibit citing adaptive strengths in one domain to refute evidence of adaptive deficits in *another* domain. It also asserted that it “did not ‘overemphasize’ Wright’s adaptive strengths to an extent that ran afoul of *Moore I*.”<sup>483</sup>

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<sup>475</sup> *In re Lewis*, 417 P.3d 756, 767 (Cal. 2018).

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Wright II*, 256 So. 3d 766, 774 (Fla. 2018).

<sup>480</sup> *Id.* at 776.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* Florida’s Supreme Court further quoted *Moore I* adding emphasis: “even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the *arbitrary offsetting of deficits against*

Despite the Florida Supreme Court proclaiming itself in compliance with *Moore I*, it still considered relevant that

Wright gave extensive testimony at his trial, withstood cross-examination, and understood the ramifications of waiving his penalty phase jury during a waive colloquy. Also, [the court] recounted that lay witnesses who knew Wright throughout his life—including his cousin and aunt—testified that he learned to work in a fast-paced shelving job at a grocery store, did not have problems understanding them, and knew how to use the city bus system.<sup>484</sup>

Subsequently, the court decided, “[a]ll of that evidence cuts against a finding of adaptive deficits in the conceptual domain.”<sup>485</sup> For this reason, the Florida Supreme Court argued that, “Wright’s position is less about *Moore [I]* than it is a mere reassertion that his expert . . . was more reliable than the State’s[.]”<sup>486</sup> Ultimately, the court “conclude[d] that the overemphasis issue, as identified by the Supreme Court in *Moore [I]*, is not present here because we did not arbitrarily offset deficits with unconnected strengths[.]”<sup>487</sup> The Florida Supreme Court brazenly adopted this view even though the *Moore I* Court clearly communicated that “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.”<sup>488</sup>

This Florida ruling evokes the Supreme Court’s words in *Moore II*, where the Court criticized the Texas CCA’s decision for “rest[ing] upon analysis too much of which too closely resembles what we previously found improper.”<sup>489</sup> The Florida Supreme Court may be correct that its reliance on Wright’s adaptive strengths technically differs from the Texas CCA’s focus on Moore’s adaptive strengths, because Florida aimed to refute adaptive deficits with related strengths, whereas the Texas CCA discounted deficits based on *unrelated* strengths. Nevertheless, the end result of both courts’ analyses is effectively the same: compelling evidence of adaptive deficits is blatantly ignored in favor of adaptive strengths which, the courts argue, would support a

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*unconnected strengths* in which the [Texas Court of Criminal Appeals] engaged.” *Id.* (quoting *Moore I*, 137 S. Ct. 1039, 1050 n.8 (2017)).

<sup>484</sup> *Id.* at 778 (citation omitted).

<sup>485</sup> *Id.*

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 777.

<sup>488</sup> *Moore I*, 137 S. Ct. 1039, 1050 (2017).

<sup>489</sup> *Moore II*, 139 S. Ct. 666, 672 (2019).

finding that the defendant is intellectually able, and therefore eligible for execution.<sup>490</sup>

The Mississippi Supreme Court understood the United States Supreme Court, in *Moore II*, to have “reiterated its warning from *Moore I*, specifically pointing out that trial courts should rely on adaptive-skill deficits rather than adaptive skill strengths.”<sup>491</sup> One of the issues surrounding *Carr v. State* is that the trial court found “Carr ha[d] demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas[.]”<sup>492</sup> The Mississippi Supreme Court took issue because “the trial court did not find *significant* adaptive-skill deficits.”<sup>493</sup> Justice King dissented, calling attention to the “overwhelming evidence that [Carr] had significant deficits in several domains of adaptive functioning.”<sup>494</sup> According to King

[t]his is not even a case of opposing experts. The evidence showed that one expert stated Carr *could* be intellectually disabled but that he was not certain. Yet Carr presented evidence from two experts stating that he was intellectually disabled, presented school records that showed significant academic deficits, presented testimony indicating that Carr had to be told when to tie his shoes and when to bathe, and presented IQ tests showing significant intellectual deficits.<sup>495</sup>

Consequently, King opined, “clearly the greater weight of the evidence showed that Carr was intellectually disabled within the meaning of *Atkins*.”<sup>496</sup>

When dissenting from the Supreme Court of Missouri’s majority opinion in *Johnson v. State*, Justice Stith interpreted *Moore I* as criticizing the Texas CCA’s focus on Moore’s alleged adaptive

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<sup>490</sup> When reading the Florida Supreme Court’s ruling in *Wright v. State (II)*, one could be forgiven for mistaking it for the Texas CCA’s opinions in either *Ex parte Moore I* or *Ex parte Moore II*, because of the similarities in both tone and intent of those decisions. It would be puzzling indeed, therefore, if this decision passed constitutional muster.

<sup>491</sup> *Carr v. State*, 2017-CA-01481-SCT (¶16 n.5) (Miss. 2019).

<sup>492</sup> *Id.* at (¶34). The trial court described how the defense expert “found deficits in all three domains and in 8 of the 10 adaptive skills.” *Id.* at (¶31).

<sup>493</sup> *Id.* at (¶34). In *Chase v. State*, Mississippi’s Supreme Court wrote that “significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean[.]” 2013-CA-01089-SCT (¶70) (Miss. 2015) (quoting AAIDD–11, *supra* note 180, at 43).

<sup>494</sup> *Carr*, 2017-CA-01481-SCT at (¶48) (King, J., dissenting).

<sup>495</sup> *Id.* at (¶64).

<sup>496</sup> *Id.*

strengths rather than his adaptive deficits.<sup>497</sup> Similarly, she argued that *Moore II*, held that “it was inappropriate for the Texas courts to look at Moore’s supposed *skills* through anecdotal evidence from counsel regarding Moore’s ability to talk and communicate, rather than focusing on the evidence of his *deficits* in [those] areas.”<sup>498</sup>

In its unpublished *State v. Covington* opinion, the Supreme Court of Nevada drew attention to the fact that both the defense and state experts “agreed that Covington had significant adaptive deficits.”<sup>499</sup> The difference, however, was that the defense expert “attributed [those] deficits to intellectual disability,” whereas the state expert “insisted that they could have resulted from gaps in instruction, antisocial personality traits, or chronic substance abuse.”<sup>500</sup> The Supreme Court of Nevada cited *Moore I* when determining that

[the state expert’s] conclusion is infirm because it does not recognize that people with intellectual disabilit[ies] often have comorbid psychological disorders and such a disorder should not be considered evidence that a defendant does not have an intellectual disability, nor is a defendant required to show that his adaptive deficits are specifically caused by an intellectual disability.<sup>501</sup>

Additionally, the court found that “[t]he State’s arguments also improperly rely on Covington’s adaptive strengths to compensate for any asserted deficits,” when the *Moore I* Court stipulated that “the focus is on adaptive deficits rather than any perceived adaptive strengths.”<sup>502</sup> As proof of Covington’s adaptive deficits, the Supreme Court of Nevada articulated the following:

Family members acknowledged that Covington had generally lower comprehension than his siblings or peers; was oblivious to the consequences of his actions; was unable to follow movie plots,

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<sup>497</sup> Johnson v. State, 580 S.W.3d 895, 915 (Mo. 2019) (Stith, J., dissenting).

<sup>498</sup> *Id.*

<sup>499</sup> State v. Covington, No. 71914, 2019 WL 368915, at \*2 (Nev. Jan. 22, 2019) (unpublished table decision).

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* The United States Supreme Court wrote that “many intellectually disabled people also have other mental or physical impairments . . . . The existence of a personality disorder or mental-health issue, in short, is ‘not evidence that a person does not also have intellectual disability.’” *Moore I*, 137 S. Ct. 1039, 1051 (2017) (quoting Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioner, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15-797), 2016 WL 4151451, at \*19.).

<sup>502</sup> *Covington*, 2019 WL 368915, at \*3 (citing *Moore I*, 137 S. Ct. at 1050).

literature, or conversations; and was gullible, lacked insight into others' emotions, and generally did not engage in the typical behaviors of an independent adult, including consistent employment, budgeting, and parental problem solving.<sup>503</sup>

In *Commonwealth v. VanDivner*, the Supreme Court of Pennsylvania recognized *Moore I* as confirming that when “assessing an individual’s adaptive functioning for the purpose of determining whether the individual is intellectually disabled under *Atkins*, the focus should be on the individual’s adaptive deficits, rather than his or her adaptive strengths.”<sup>504</sup> At VanDivner’s *Atkins* hearing, an expert for the defense testified that VanDivner “was incapable of reading a newspaper, managing a checkbook, or finding a name in a telephone directory.”<sup>505</sup> The expert for the State, however, considered the fact that VanDivner wrote the sentence “I love you” as evidence that he did not possess adaptive deficits, since a witness had previously “testified that [he] was unable to write a sentence.”<sup>506</sup> The expert “suggested that [VanDivner’s] limitations in adaptive functioning in the areas of personal care and home-living were the result of [his] substance abuse.”<sup>507</sup>

At the PCRA hearing, an expert for the State also testified that VanDivner could not be intellectually disabled because he possessed a Commercial Driver’s License (CDL).<sup>508</sup> In response, a witness

testified that, because she was concerned that [VanDivner] would not be able to pass the test on his own, she obtained a copy of the CDL manual and quizzed [him] for approximately 2 hours every day for a period of two months by reading each question contained in the CDL manual, giving [him] the answer, and repeating the process until [he] was able to answer each question.<sup>509</sup>

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<sup>503</sup> *Id.*

<sup>504</sup> *Commonwealth v. VanDivner*, 178 A.3d 108, 117 (Pa. 2018).

<sup>505</sup> *Id.* at 118. During a subsequent PCRA hearing, an expert for the defense recalled asking VanDivner the number of siblings he had which he answered “[by giving] the name of two of his siblings.” *Id.* at 119. His ex-wife also testified how, “during their marriage, Appellant did not work, and was unable to dial the telephone, prepare a meal, do laundry, shop, use simple tools, read a map, or make simple home repairs.” *Id.*

<sup>506</sup> *Id.* at 118.

<sup>507</sup> *Id.* at 120.

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

VanDivner only passed the CDL test because it was administered orally, rather than in a written fashion, and the witness traveled with him when he was trucking in order to maintain his logs and handle money at tolls.<sup>510</sup> Despite this evidence, the PCRA court found that VanDivner was not intellectually disabled.<sup>511</sup>

The Supreme Court of Pennsylvania disagreed, citing

testimony that [VanDivner] was unable to read, write, or perform arithmetic; he was at a second-grade reading level; he was unable to manage his finances; he worked at a sausage factory and as a disc jockey, but required supervision at the sausage factory because he had difficulty remembering what spices to include in the sausage mix, and assistance in reading song titles when working as a disc jockey; he neglected his health by refusing treatment for his diabetes; and, although he had several relationships with women and eventually was married, all of the relationships ultimately failed.<sup>512</sup>

The court further reasoned that, “the mere fact that [VanDivner] was married several times and maintained relationships with his family does not support the conclusion that [he] does not suffer from limited adaptive functioning in the area of social skills.”<sup>513</sup> The Pennsylvania court also criticized the PCRA court for “conclud[ing] that [VanDivner’s] ability to learn the content of the CDL study guide and pass an oral version of the exam, as well as his ability to maintain employment” as a truck driver, implied that he did not have adaptive deficits.<sup>514</sup> The Supreme Court of Pennsylvania concluded that “the evidence presented at [VanDivner’s] pretrial and PCRA hearings . . . clearly demonstrate[d] that he suffers from significant adaptive limitations in the areas of conceptual, practical, and social skills[.]”<sup>515</sup> Therefore, the court commuted his sentence from death to life without parole.<sup>516</sup>

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<sup>510</sup> *Id.* at 120–21.

<sup>511</sup> *Id.* at 121–22.

<sup>512</sup> *Id.* at 122–23.

<sup>513</sup> *Id.* at 123.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 125.

<sup>516</sup> *Id.* at 130. Contrary to the PCRA’s characterization, the Supreme Court of Pennsylvania observed that VanDivner “earned approximately 9 percent of what the average American worker earned at the time, and was not able to hold a job for a long period of time . . . [Furthermore, he] was always accompanied by a friend or family member on his trucking trips because Appellant could not read

In its subsequent *Commonwealth v. Cox* decision, the Supreme Court of Pennsylvania contended that *Moore I* “faulted the Texas court’s focus on Moore’s adaptive strengths.”<sup>517</sup> During the *Atkins* hearing an expert for the defense “testified that the fact [Cox] achieved his GED in prison did not disprove the diagnosis of intellectual disability . . . [because Cox] only passed on his second try after 14 years of preparation in a structured supportive setting.”<sup>518</sup> The same expert attested “that the failure of [Cox’s] schools to designate him as in need of special education did not negate a diagnosis of intellectual disability[.]”<sup>519</sup> In contrast, the expert for the state referenced Cox’s Department of Correction “records that reflected Appellant with normal intelligence and adaptations, such as maintaining a job involving an 18-step protocol, and passing a GED exam.”<sup>520</sup> In its opinion, the PCRA court “found significant the fact that school authorities never identified Appellant as possessing learning disabilities despite a system in place to do so.”<sup>521</sup> The PCRA court also “found that [the Department of Corrections] records do not support a showing of significant deficits in adaptive functioning.”<sup>522</sup> Following *Moore I*, the Commonwealth of Pennsylvania acknowledged that, “in assessing an individual’s adaptive behavior, courts should focus on the existence of any adaptive deficits and not rely on adaptive strengths to deny relief.”<sup>523</sup> Moreover, the Commonwealth asserted that “its witnesses’ overemphasis on Appellant’s strengths, including passing a GED exam, and maintaining prison employment,” paralleled the expert testimony that the *Moore I* Court forbid.<sup>524</sup> After reviewing the case, the Supreme Court of

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the maps, count the money for the tolls, and had difficulty keeping up with the logs.” *Id.* at 125.

<sup>517</sup> *Commonwealth v. Cox*, 204 A.3d 371, 378 (Pa. 2019).

<sup>518</sup> *Id.* at 380–81.

<sup>519</sup> *Id.* at 381.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 382.

<sup>522</sup> *Id.* at 383 (“The court noted that [Cox] navigated the procedure for numerous grievances while in prison. The court found that [Cox’s] ability to perform a job cleaning up blood and bodily fluid spills, which entails a specific multi-step protocol, belied any deficit in adaptive functioning.”).

<sup>523</sup> *Id.* at 386. “[The Commonwealth acknowledged] that the adaptive strengths focused on by the PCRA court are comparable to those focused on by the court in *Moore I*, including the fact Appellant was never placed in a special needs class, and his ability to perform menial labor.” *Id.* at 387.

<sup>524</sup> *Id.* at 387.

Pennsylvania agreed with the Commonwealth, ruling that “the PCRA court misplaced its focus on [Cox’s] adaptive strengths as negating the evidence of his adaptive deficits.”<sup>525</sup>

In a case with strikingly similar facts to *VanDivner*, the Supreme Court of South Carolina found differently than Pennsylvania and maintained that “the trial court did not base its decision [that Blackwell was intellectually able] solely on the fact that Blackwell was able to successfully obtain a commercial driver’s license and be employed as a truck driver.”<sup>526</sup> The trial court had summarized the relevant evidence as demonstrating that Blackwell “was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage.”<sup>527</sup> The expert for the defense “found the [adaptive deficit test] results, other records, and additional information, demonstrated that Blackwell had adaptive behavior deficits[.]”<sup>528</sup> Contrarily, the expert for the state “relied instead on Blackwell’s vocational history after the age of 18, his ability as an adult to obtain a Commercial Driver’s license, and the fact that Blackwell was ‘on track’ to graduate when he dropped out of high school” in making the determination that he did not have adaptive behavior deficits.<sup>529</sup> Faced with conflicting expert testimony, the trial court found that Blackwell was not intellectually disabled because, among other things, “he attended school regularly and did not fail a grade until high school, and that he was able to earn high school credits before dropping out.”<sup>530</sup> Dissenting Justice Pleicones alleged that the trial court “ignore[d] the details which demonstrate[d] Blackwell’s significant limitations, such as an inability to manage a household and live alone, to pay bills, etc.”<sup>531</sup> In his dissent, Pleicones wrote, “I fear that the trial judge’s reliance on Blackwell’s ‘perceived adaptive strengths’ will be found to have

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<sup>525</sup> *Id.* at 392.

<sup>526</sup> *State v. Blackwell*, 801 S.E.2d 713, 720 (S.C. 2017) *cert. denied* 138 S. Ct. 985 (2018).

<sup>527</sup> *Id.* at 721.

<sup>528</sup> *Id.* at 739 (Pleicones, J., dissenting).

<sup>529</sup> *Id.*

<sup>530</sup> *Id.*

<sup>531</sup> *Id.* at 740. The majority did not perceive the trial court to have erred because, “as required by *Moore [I]*, [it] carefully considered and weighed Blackwell’s adaptive strengths against his adaptive deficits.” *Id.* at 721 n.11 (majority opinion).

unconstitutionally skewed his view of the evidence,” since *Moore I* requires examining adaptive deficits rather than adaptive strengths.<sup>532</sup>

In his concurring opinion for the Texas CCA in *Ex parte Wood*, Justice Newell described the habeas court as relying on “evidence [that] shows how [Wood] has many adaptive strengths.”<sup>533</sup> Newell considered this emphasis problematic because the *Moore I* Court “required [states] to focus upon adaptive deficits without placing ‘undue emphasis’ upon adaptive strengths.”<sup>534</sup> Although Newell conceded that “the habeas court noted a great amount of evidence showing [Wood’s] adaptive strengths, but a dearth of evidence demonstrating adaptive deficits,” he nevertheless rejected the claim that “the habeas court, or this Court, . . . placed undue emphasis on [Wood’s] adaptive strengths.”<sup>535</sup> Moreover, Newell asserted that “[i]f we completely ignore the existence of evidence demonstrating adaptive strengths, then this aspect of the inquiry becomes nothing more than a legal choice to credit only mitigation evidence” supporting LWOP instead of death.<sup>536</sup> Newell concluded that “[u]ltimately, *Moore I* does not prohibit courts from considering adaptive strengths; it only prohibits placing ‘undue’ emphasis upon them.”<sup>537</sup> Justice Alcalá dissented, alleging that “[t]he instant majority opinion continues to selectively focus on only the . . . adaptive strengths that would support a determination that applicant is not intellectually disabled[.]”<sup>538</sup> Contrary to the majority’s approach, “clinical experts have counseled against viewing the presence of adaptive strengths as evidence of the absence of adaptive weaknesses.”<sup>539</sup> Alcalá interpreted *Moore I* as prohibiting states from: (1) relying on adaptive strengths to disprove intellectual disabilities or refute adaptive deficits; and (2) disregarding evidence of adaptive deficits by attributing those deficits to another disorder or cause.<sup>540</sup>

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<sup>532</sup> *Id.* at 740 n.45 (Pleicones, J., dissenting).

<sup>533</sup> *Ex parte Wood*, 568 S.W.3d 678, 685 (Tex. Crim. App. 2018) (Newell, J., concurring).

<sup>534</sup> *Id.* (quoting *Moore I*, 137 S. Ct. 1039, 1052 n.9 (2017)).

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> *Id.* at 687 (Alcalá, J., dissenting).

<sup>539</sup> *Id.* at 688.

<sup>540</sup> The habeas court suggested, for example, “that [Wood’s] troubles in school could be due to factors other than intellectual disability,” even though *Moore I* “expressly recognized that other mental or physical impairments are common comorbidities in intellectually disabled persons and are ‘not evidence that a person

The Texas CCA, in its unpublished *Thomas v. State* opinion, recounted evidence of Thomas' adaptive deficits reported by the expert for the defense:

[e]ssentially, he didn't learn to drive. He had problems in school being able to read and write and perform math. He had problems making change, such that others would take advantage of him. Because, when he would go to the store, he wouldn't know the amount of change to get back.

During those days, there were rotary telephones. He had difficulty looking up phone numbers in the phone book, which we don't have to do anymore. But looking that up and making phone calls, he had to have assistance doing that type of thing.<sup>541</sup>

The expert for the state also testified and the Texas CCA determined that “[s]ome of the indicators of Thomas’s adaptive skills were books that were found in Thomas’s cell that were seventh grade reading level, Thomas’s ability to use money, and his ability to read a clock, a thermometer, a calendar, etc.”<sup>542</sup> The court commented on how the expert for the state “concluded that Thomas ha[d] traits and features consistent with an anti-social personality,” rather than intellectual disabilities.<sup>543</sup> The Texas CCA declared, “we find that [the expert for the State’s] testimony improperly ‘overemphasized’ Thomas’s ‘perceived adaptive strengths,’ rather than focusing on adaptive deficits.”<sup>544</sup> The Texas CCA found that “the State’s position that Thomas’s adaptive behaviors stemmed from a personality disorder rather than intellectual disability . . . deviate[d] ‘from [the] prevailing

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does not also have intellectual disability.” *Id.* at 688 (quoting *Moore I*, 137 S. Ct. 1039, 1051 (2017)).

<sup>541</sup> *Thomas v. State*, NO. AP-77,047, 2018 WL 6332526, at \*10 (Tex. Crim. App. Dec. 5, 2018).

<sup>542</sup> *Id.* at \*15.

<sup>543</sup> *Id.*

<sup>544</sup> *Id.* at \*17 (quoting *Moore I*, 137 S. Ct. 1039, 1050 (2017) (“In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore’s perceived adaptive strengths . . . Moore’s adaptive strengths, in the CCA’s view, constituted evidence adequate to overcome the considerable objective evidence of Moore’s adaptive deficits. But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.”)). Similarly, when Justice Newell concurred in *Petetan v. State*, he summarized *Moore I* as “noting that the medical community focuses adaptive-functioning inquiry on adaptive deficits rather than adaptive strengths and that [the Texas CCA] overemphasized the defendant’s adaptive strengths.” No. AP-77,038, 2017 WL 4678670 at \*1 n.4 (Tex. Crim. App. Oct. 18, 2017).

clinical standards.”<sup>545</sup> Accordingly, it held that “Thomas [was] entitled to a new punishment hearing.”<sup>546</sup>

#### **D. Highlighting Behavior While Incarcerated**

Courts from four different states interpreted *Moore I* as discouraging a focus on defendants’ functioning while in prison. The Supreme Court of Alabama in *Ex parte Carroll*, for example, recognized that *Moore I* “criticized the Texas court for its emphasis on Moore’s improved behavior in prison.”<sup>547</sup> The Alabama court found that the lower court’s decision was reliant upon the testimony of the state’s expert, which detailed how “[t]he defendant, who has served as a cook in a prison kitchen, was able to correctly describe . . . (1) how to bake food items such as biscuits; (2) how to use a large mixer, and (3) the ingredients that were used in some of the food items he made as a cook.”<sup>548</sup> A corrections officer also attested that Carroll “was able to follow directions, complete tasks, and never had any problems with communicating” while working in the prison kitchen.<sup>549</sup>

During its review of the case, the Supreme Court of Alabama observed that “the circuit court placed great emphasis on the fact that Carroll had passed the GED examination while in prison.”<sup>550</sup> Additionally, the circuit court found the correctional officer’s testimony to be “compelling” when he “stated that Carroll followed directions and was a good kitchen worker and that he did not have problems communicating with Carroll.”<sup>551</sup> The investigator associated with the case also presented “compelling” evidence when he “testified that Carroll had eight or nine books in his prison cell, as well as a newspaper clipping about his prior conviction and two Jet magazines.”<sup>552</sup> Finally, the circuit court found the state expert “to be persuasive” when she relayed that Carroll told her:

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<sup>545</sup> *Thomas*, 2018 WL 6332526, at \*18 (quoting *Moore I*, 137 S. Ct. 1039, 1050 (2017) (“The CCA’s consideration of Moore’s adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply.”)).

<sup>546</sup> *Id.* at \*19 (quoting *Moore I*, 137 S. Ct. 1039, 1051 (2017)).

<sup>547</sup> *Carroll II*, 300 So. 3d 59, 63 (Ala. 2019).

<sup>548</sup> *Id.* at 65.

<sup>549</sup> *Id.* at 66.

<sup>550</sup> *Id.* at 72.

<sup>551</sup> *Id.* at 73.

<sup>552</sup> *Id.*

although he had never owned an automatic-teller-machine (“ATM”) card, he understood how a card worked because, on one occasion, he was disciplined for using an ATM card number in violation of prison rules. In addition, Carroll reported to her that he had completed the eighth grade and that he had passed the GED examination while in prison.<sup>553</sup>

Based on these testimonies, the circuit court “discredited” the defense expert’s testimony that Carroll possessed adaptive deficits.<sup>554</sup> The Supreme Court of Alabama affirmed the decision of the circuit court, ruling it could not find “that the circuit court exceeded its discretion.”<sup>555</sup> Given that the circuit court overwhelmingly relied on testimony about Carroll’s functioning in prison to conclude that he did not have adaptive deficits, the Supreme Court of Alabama’s affirmation of the circuit court appears at odds with its description of *Moore I* as “criticiz[ing]” this practice<sup>556</sup> and the subsequent *Moore II* decision.<sup>557</sup> The Supreme Court of Alabama failed to find that the circuit court erred by prioritizing testimony of Carroll’s alleged adaptive strengths while incarcerated over the testimony of the expert for the defense, who properly focused on Carroll’s adaptive deficits.

The Florida Supreme Court interpreted *Moore I* to forbid an “overemphasis on adaptive strengths and improper focus on prison conduct.”<sup>558</sup> Although the Florida Supreme Court conceded that its opinion in *Wright v. State* “discussed some of Wright’s adaptive strengths and behavior in prison” and that “*Moore I*, the DSM-5, and AAIDD-11 all caution against overemphasis on that type of evidence,” the court nevertheless perceived its ruling to comport with *Moore I* because, “the crux of [its] decision rested on the competing expert

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<sup>553</sup> *Id.* at 73–74.

<sup>554</sup> *Id.* at 74.

<sup>555</sup> *Id.*

<sup>556</sup> *Id.* at 63. Of relevance here, the *Moore I* Court wrote, “the [Texas] CCA stressed Moore’s improved behavior in prison. Clinicians, however, caution against reliance on adaptive strengths developed ‘in a controlled setting,’ as a prison surely is.” 137 S. Ct. 1039, 1050 (2017) (citation omitted) (quoting DSM–5, *supra* note 180, at 38).

<sup>557</sup> *Moore II*, which had already been decided but was never cited by the Supreme Court of Alabama, even more clearly reprimanded the Texas CCA for “rel[ying] heavily upon adaptive improvements made in prison.” 139 S. Ct. 666, 671 (2019). At the end of its *Moore II* opinion, the Court declared, “[t]he length and detail of the court’s discussion on these points is difficult to square with our caution against relying on prison-based development.” *Id.*

<sup>558</sup> *Wright II*, 256 So. 3d 766, 775–76 (Fla. 2018).

medical testimony of [the state expert] and [the defense expert] instead of independently weighing strengths and deficits or focusing on prison conduct.”<sup>559</sup> Thus the court did not consider itself to have “detrimentally rel[ied] on strengths that Wright developed in prison to justify [its] conclusion.”<sup>560</sup> This ruling is concerning, however, because much of the evidence that the state’s expert relied on to refute that Wright possessed adaptive deficits consisted of alleged adaptive strengths he demonstrated in prison. The Florida Supreme Court summarized this evidence as follows:

Wright: (1) rewrites draft blog entries in his own words; (2) fully communicates with other prisoners and prison staff; (3) listens to others and takes advice, as evidenced by his brief period requesting Kosher meals; (4) understands numbers and time; (5) knows the time allocated for prison activities; (6) manages his prison canteen fund and pays attention to his monthly statements; (7) managed his own funds as an adolescent to buy necessities; (8) conducted basic transactions before he was incarcerated; (9) was attentive to time and number issues during the examination; (10) identifies his attorneys by name and estimates the amount of time they have represented him; (11) knows the difference between legal mail and regular mail in the prison system; (12) understands that he needs his attorneys because he has no legal training; (13) is receptive to the suggestions of his attorneys; (14) wants his attorneys to prove that he did not commit the crimes for which he was convicted; (15) knows that he was sentenced to death and understands the reasoning for his sentence; and (16) has performed some work on his case.<sup>561</sup>

The state expert’s testimony creates the impression that, in order to rule as it did in light of *Moore I*, the Florida Supreme Court simply refused to show proper deference to the Supreme Court of the United States precedent.

Justice Pariente, who concurred in the result, identified “[t]he important holding” in *Moore I* as “conduct in prison, a structured environment, should not be relied on in assessing adaptive functioning.”<sup>562</sup> In Pariente’s view, “[w]hile there is nothing wrong with mentioning either adaptive strengths or conduct in prison, it is improper to rely on either factor to overcome the evidence of adaptive deficits to

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<sup>559</sup> *Id.* at 777. When discussing the 2017 case, Florida’s Supreme Court alleged that “[t]he only portion of *Wright* that touched on prison conduct was [its] recitation of [the state expert’s] findings.” *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Wright I*, 213 So. 3d at 899.

<sup>562</sup> *Wright II*, 256 So. 3d at 780 (Pariente, J., concurring).

deny a defendant's intellectual disability claim."<sup>563</sup> Pariente recommended applying the *Moore I* Court's analysis by "focus[ing] on the adaptive deficits and not . . . analyzing either adaptive strengths or deficits in the context of a prison environment."<sup>564</sup> Nevertheless, Pariente agreed with the holding of the majority because, "[r]egardless of how this Court explained Wright's intellectual disability claim in its prior opinion, it is clear that the postconviction court properly analyzed Wright's claim."<sup>565</sup> Thus, Pariente ultimately "concur[red] in result but [did] not agree with the unnecessary discussion of adaptive strengths and prison behavior."<sup>566</sup>

Justice Alcala, in her *Ex parte Wood* dissent, considered the "majority opinion [to] improperly focus on applicant's adaptive strengths and his abilities in a controlled prison setting."<sup>567</sup> Alcala observed that "clinical experts . . . caution against considering adaptive strengths arising in controlled settings like a prison."<sup>568</sup> She dissented because the majority affirmed a flawed analysis that "fail[ed] to comport with the current medical diagnostic framework" required by *Moore I*.<sup>569</sup>

### **E. Discretion Afforded to State Courts**

Initially, in *Atkins*, the Supreme Court of the United States professed to "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."<sup>570</sup> However, after witnessing some courts treat this freedom as a license to act in bad faith, the Court clarified in *Hall* that "*Atkins* did not give the States unfettered discretion to define the full scope of

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<sup>563</sup> *Id.* at 781.

<sup>564</sup> *Id.* Expounding upon this proposal, Pariente noted "as the AAIDD correctly explains, much of the clinical definition of adaptive behavior is much less relevant in prisons, and in fact, a person with [intellectual disability] is likely to appear to have stronger adaptive behavior in a structured environment such as a prison than in society." *Id.* at 782.

<sup>565</sup> *Id.* at 782–83.

<sup>566</sup> *Id.* at 783.

<sup>567</sup> *Ex parte Wood*, 568 S.W. 3d 678, 687 (Tex. Crim. App. 2018) (Alcala, J., dissenting).

<sup>568</sup> *Id.* at 688.

<sup>569</sup> *Id.*

<sup>570</sup> *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

the constitutional protection.”<sup>571</sup> Indeed, “[i]f the States were to have complete autonomy to define intellectual disabilit[ies] as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.”<sup>572</sup> Consequently, the *Hall* Court considered “*Atkins* to provide substantial guidance on the definition of intellectual disabilit[ies].”<sup>573</sup>

In the post-*Moore I* era, courts from five different states have cited *Hall* to address the degree of discretion that states retain to choose their own definitions and procedures for evaluating intellectual disabilities in capital cases.<sup>574</sup> The Supreme Court of Alabama, for example, alleged that *Moore I* “did not specifically limit states to the definitions set forth in the AAIDD-11 and DSM-5.”<sup>575</sup> This interpretation is suspect because the *Moore I* Court specifically referred to the DSM-5 and AAIDD-11 as “the leading diagnostic manuals” on intellectual disabilities.<sup>576</sup> The Supreme Court of Alabama may be correct in semantics given that the *Moore I* Court also declared, “being informed by the medical community does not demand adherence to everything stated in the latest medical guide[,]”<sup>577</sup> but this statement should not be construed to imply

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<sup>571</sup> *Hall v. Florida*, 572 U.S. 701, 719 (2014).

<sup>572</sup> *Id.* at 720–21.

<sup>573</sup> *Id.* at 721. Nevertheless, following *Hall*, the Texas CCA remained undeterred in its commitment to the fictitious *Briseno* factors. In response, the *Moore I* Court pronounced that “[t]he medical community’s current standards supply one constraint on States’ leeway in this area[,]” before directing states to the DSM–5 and AAIDD–11 as appropriate current medical standards. 137 S. Ct. 1039, 1053 (2017).

<sup>574</sup> In *Moore I*, the Supreme Court described the DSM–5 and the AAIDD–11 as the “leading diagnostic manuals,” thereby establishing them as the current medical standards to be applied by state courts. 137 S. Ct. 1039, 1048 (2017). The Court also stipulated that “[t]he medical community’s current standards supply one constraint on States’ leeway in this area.” *Id.* at 1053. Based on these principles, states clearly cannot find someone intellectually able when the practices outlined in the DSM–5 or the AAIDD–11 would consider them intellectually disabled. What is less clear is whether the Court intended to grant other materials published by the APA or AAIDD a similar status as the DSM–5 and AAIDD–11, or whether it perceived a difference between the clinical manuals published by the organizations and their other views, as expressed in written publications. In other words, do other publications besides the DSM–5 and AAIDD–11 from the APA and AAIDD qualify as current medical standards or is this designation reserved solely for the clinical manuals?

<sup>575</sup> *Carroll II*, 300 So. 3d 59, 65 (Ala. 2019).

<sup>576</sup> *Moore I*, 137 S. Ct. at 1048.

<sup>577</sup> *Id.* at 1049.

that states may find someone intellectually able when current medical diagnostic criteria would label them intellectually disabled. Instead, it is more reasonable to assume that the Court's holding in *Moore I* suggests that states may find someone intellectually disabled who does not satisfy current medical diagnostic criteria for intellectual disabilities. In other words, states may depart from current medical standards for intellectual disabilities in order to be more lenient, but they may not add additional restrictions beyond the diagnostic criteria outlined in the DSM-5 or AAIDD-11, which would reduce the number of people who qualify as intellectually disabled according to current medical standards.

Some legal scholars argue that regardless of the state the case is in, capital defendants should not have to provide evidence that their intellectual disabilities existed before age eighteen.<sup>578</sup> The Supreme Court's original rationale for exempting people with intellectual disabilities from execution in *Atkins* supports this assertion. In *Atkins*, the Court stated that intellectually disabled defendants are especially likely to receive the death penalty during the sentencing phase due to the

possibility of false confessions, but also . . . the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.<sup>579</sup>

All defendants with subaverage intellectual functioning and adaptive deficits, "by definition,"<sup>580</sup> face these limitations at trial, regardless of whether they can demonstrate that their intellectual disabilities existed before adulthood. Accordingly, it is counterintuitive for the Court to have only intended for *Atkins* to protect a subset of the people identified as having an "enhanced" risk of execution.<sup>581</sup> Based upon the *Atkins* Court's rationale, the most reasonable interpretation of the *Moore I*

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<sup>578</sup> See Updegrave et al., *supra* note 166 at 544–45. See also James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13–14 (2003). See generally Steven J. Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in Atkins Claims*, 37 VT. L. REV. 591 (2013).

<sup>579</sup> *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

<sup>580</sup> *Id.* at 318.

<sup>581</sup> *Id.* at 320.

Court's statement is that states may only depart from current medical standards if doing so is necessary in order to ensure the "reliability and fairness of capital proceedings against" them.<sup>582</sup> As such, disregarding the age of onset requirement—established by the DSM-5 and AAIDD-11—would seem to fall within this exception.

The Alabama CCA quoted *Moore I* to note that "[t]he medical community's current standards supply one constraint on States' leeway" in defining intellectual disability because States must adhere to those standards.<sup>583</sup> The Arizona Supreme Court, in *State v. Gates*, also recognized the *Moore I* Court as "holding that states do not have unfettered discretion to reject medical community standards in defining [intellectual disabilities]."<sup>584</sup> Similarly, the California Supreme Court acknowledged that "[t]he legal determination of intellectual disability is, of course, distinct from a medical diagnosis[.]"<sup>585</sup> Moreover, the California Court wrote, "both our decisions and those of the United States Supreme Court [in *Hall* and *Moore I*] contemplate that the determination must be an individualized one, informed by the views of medical experts."<sup>586</sup> Thus, the California Supreme Court rejected the State's argument that the factfinder had erred in evaluating Lewis for adaptive deficits "according to 'the most current authority on [the] subject,'" instead of the now-outdated clinical manual originally used by the *Atkins* Court.<sup>587</sup> In its holding, the California Supreme Court asserted that *Moore I* did not eliminate all ability for states to define intellectual disabilities, however, it noted that in creating those definitions states were prevented from disregarding current medical standards, as detailed in the most up to date clinical manuals.

In *Quince v. State*, the Florida Supreme Court cited the *Moore I* Court's reasoning that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide" in order to justify ignoring the Flynn effect.<sup>588</sup> The Florida Supreme Court contended that it was immaterial that the

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<sup>582</sup> *Id.* at 307.

<sup>583</sup> *Carroll I*, 300 So. 3d 51, 55 (Ala. Crim. App. 2017) (quoting *Moore I*, 137 S. Ct. 1039, 1053 (2017)).

<sup>584</sup> *State v. Gates*, 410 P.3d 433, 435 (Ariz. 2018).

<sup>585</sup> *In re Lewis*, 417 P.3d 756, 766 (Cal. 2018).

<sup>586</sup> *Id.* at 766–67.

<sup>587</sup> *Id.* at 766.

<sup>588</sup> *Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018) (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

AAIDD organization had recently published a book that “now advocate[s] the adjustment of all IQ scores in *Atkins* cases that were derived from tests with outdated norms to account for the Flynn effect.”<sup>589</sup> When the Florida Court disregarded the Flynn effect in this case, Quince’s IQ scores were rendered above 70 even after accounting for the SEM.<sup>590</sup> Thus, the Florida Supreme Court concluded that he did not meet the first prong for intellectual disabilities.<sup>591</sup> Moreover, the Florida Supreme Court had previously held, “[i]f the defendant fails to prove any one of these [three] components, the defendant will not be found to be intellectually disabled.”<sup>592</sup> The Court, therefore affirmed that, “because Quince failed to meet the significantly subaverage intellectual functioning prong (even when the SEM [was] taken into account), he could not have met his burden to demonstrate that he is intellectually disabled.”<sup>593</sup>

The issue of state discretion is further complicated due to the fact that the DSM-5 itself recognizes the Flynn effect as one of the “[f]actors that may affect test scores,” which could reasonably be construed as confirming that the Flynn effect is indeed part of current medical standards.<sup>594</sup> Critics who oppose the ramifications of adopting this view will likely justify their position by noting, as the Florida Supreme Court did, that the *Moore I* Court “indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide.”<sup>595</sup> Whether APA and AAIDD publications—apart from the clinical manuals themselves—qualify as current medical standards is undoubtedly gray and requires clarification from the Court. Nevertheless, the Florida Supreme Court evidently considered the publication in question, which recommended adjusting IQ scores to

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<sup>589</sup> *Id.* The book in question, notes that “Not only is there a scientific consensus that the Flynn effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases.” AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, *THE DEATH PENALTY AND INTELLECTUAL DISABILITIES*, 160 (Edward A. Polloway ed., 2015). Florida’s Supreme Court noted the defense based its argument on this passage by partially quoting it in its opinion. *Quince*, 241 So. 3d at 61.

<sup>590</sup> *Quince*, 241 So. 3d at 60–61.

<sup>591</sup> *Id.* at 62.

<sup>592</sup> *Id.* (quoting *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016)).

<sup>593</sup> *Id.*

<sup>594</sup> See DSM–5, *supra* note 180, at 37.

<sup>595</sup> *Quince*, 241 So. 3d at 62 (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

account for the Flynn effect, to be part of current medical standards since it cited *Moore I*'s caveat that states do not need to follow everything written in the manuals.<sup>596</sup> Consequently, the Florida Supreme Court must have erred when it disregarded what it seemingly recognized as part of current medical standards to determine that Quince was not intellectually disabled.<sup>597</sup>

In *Rodriguez v. State*, the Florida Supreme Court observed that the circuit court considered the expert for the state the “most credible” when he “testified that according to his tests, Rodriguez was malingering and that none of his IQ scores below 70 were reliable.”<sup>598</sup> Consequently, the circuit court discounted evidence presented by the expert for the defense, including “an IQ [test] score of 64.”<sup>599</sup> Because the circuit court prioritized the state expert’s opinion over the defense expert’s, Rodriguez alleged that the “credibility findings made by the circuit court contradict medical standards detailed in a publication of the [AAIDD].”<sup>600</sup> The Court disagreed that “credibility findings are improper when they conflict with medical standards,”<sup>601</sup> because *Moore I* indicated that “being informed by the medical community does not demand [state] adherence to everything stated in the latest medical guide.”<sup>602</sup>

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<sup>596</sup> The *Moore I* Court appears to have given the states discretion to broaden Atkins protections so that they may find capital defendants intellectually disabled even if they do not fully satisfy current medical standards. This discretion, however, does not permit states to find capital defendants intellectually able when current medical standards would consider them intellectually disabled. See Updegrave et al., *supra* note 166, at 542 (“[A]ny state that found a capital defendant intellectually able who would meet the criteria for intellectual disability under the DSM-5 or AAIDD-11 would contradict the current medical consensus.”).

<sup>597</sup> *Quince*, 241 So. 3d at 63 (“For these reasons, we affirm the trial court’s order denying Quince’s renewed motion for a determination of intellectual disability as a bar to execution.”).

<sup>598</sup> *Rodriguez v. State*, 219 So. 3d 751, 757 (Fla. 2017).

<sup>599</sup> *Id.* at 754.

<sup>600</sup> *Id.* at 756. Specifically, Rodriguez argued that “[m]edical standards indicate that experts cannot accurately evaluate adaptive functioning in a prison setting[.]” *id.* at 757, and that the Florida Supreme Court was wrong to assess “both long-term and current adaptive functioning” because it “encourages the unreliable practice of evaluating defendants in prison.” *Id.* Florida’s Supreme Court disagreed, noting that “the circuit court considered more than just adaptive functioning testing conducted in prison.” *Id.* at 758.

<sup>601</sup> *Id.* at 756.

<sup>602</sup> *Id.* (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

Finally, the Supreme Court of Pennsylvania acknowledged that states retained some degree of discretion when it quoted the *Moore I* Court as saying, “*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”<sup>603</sup> Thus, the Supreme Court of Pennsylvania understood *Moore I* to signify that “[the] medical community’s current standards supply one constraint on State’s leeway [in enforcing *Atkins*].”<sup>604</sup>

## F. Lay Stereotypes

Courts from six different states have interpreted *Moore I* to mean that they may not rely on lay stereotypes about intellectual disabilities. The Alabama CCA, for example, understood the *Moore I* Court to have “held that States may not create their own factors for accessing [sic] adaptive deficits if those factors deviate from clinical standards and, instead, rely on ‘lay perceptions of intellectual disabilit[ies].”<sup>605</sup> The Court did not, however, allege that the circuit court relied on lay stereotypes about intellectual disabilities when deciding the case.<sup>606</sup>

In *People v. Woodruff*, the California Supreme Court considered whether the state attorney engaged in misconduct when he informed jurors of the following:

[the defense] counsel told you that your opinion or people’s opinion of whether or not Mr. Woodruff is mentally retarded doesn’t matter. But that’s not true. If it didn’t matter, you wouldn’t be asked to make this finding. If we only wanted professionals to come in here and make the decision, there would be no need for a jury. Your opinion does matter. That’s what we’re asking you to do . . . . And I submit this to you: If a person doesn’t look retarded or act retarded, it’s because they’re not retarded. It doesn’t take any professional to let you know that.<sup>607</sup>

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<sup>603</sup> Commonwealth v. Cox, 204 A.3d 371, 377 (Pa. 2019) (quoting *Moore I*, 137 S. Ct. 1039, 1049 (2017)).

<sup>604</sup> *Id.* at 378 (quoting *Moore I*, 137 S. Ct. 1039, 1053 (2017)).

<sup>605</sup> *Carroll I*, 300 So. 3d 51, at 55 (Ala. Crim. App. 2017) (quoting *Moore I*, 137 S. Ct. 1039, 1051 (2017)).

<sup>606</sup> The Alabama CCA was not considering the issue of whether the circuit court relied on lay stereotypes when assessing intellectual disabilities. The CCA merely raised the issue as one factor that limits states’ discretion.

<sup>607</sup> *People v. Woodruff*, 421 P.3d 588, 649 (Cal. 2018).

In reviewing the case on appeal, the California Supreme Court noted that the *Moore I* Court wrote, “the medical profession has endeavored to counter lay stereotypes of the intellectually disabled . . . . Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.”<sup>608</sup> Nevertheless, the California Supreme Court stated, “[a]ssuming without deciding that the comment was erroneous, we conclude the error was harmless because it was said in passing and the prosecutor went on to review the evidence, including the experts’ findings, to support his contention that defendant was not intellectually disabled.”<sup>609</sup> Because the California Supreme Court did not consider “the prosecutor’s comments as a whole” to be problematic, it ruled that the “defense counsel was not ineffective for failing to object.”<sup>610</sup>

The Florida Supreme Court considered *Moore I* to forbid using the *Briseno* factors because they “had no medical or legal authority to support them, and they reflected a misinformed layperson’s understanding of [intellectual disabilities].”<sup>611</sup> The court did not, however, judge the post-conviction court to be in violation of *Moore I*, because “current medical understanding served as the basis for the rejection of Wright’s claim, which differentiates this case from *Moore I* where the [Texas] CCA relied on outdated medical standards and lay perceptions of [intellectual disabilities].”<sup>612</sup>

As part of her dissent from the Supreme Court of Missouri’s majority opinion in *Johnson v. State*, Justice Stith summarized the *Briseno* factors as “ask[ing] counsel and family members to give anecdotal impressions of whether the person, essentially, has behaved how they would expect an intellectually disabled person to behave.”<sup>613</sup> *Moore I*, Stith asserted, “rejected this sanctioned use of anecdotal impressions of lay individuals,” and instead “held [that] states should require *clinical* evaluations of adaptive behaviors[.]”<sup>614</sup> The majority found that Johnson alleged that he received incompetent legal representation because his counsel did not realize, based upon his interactions with Johnson, that Johnson was intellectually disabled.<sup>615</sup>

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<sup>608</sup> *Id.* at 649 (quoting *Moore I*, 137 S. Ct. 1039, 1052 (2017)).

<sup>609</sup> *Id.*

<sup>610</sup> *Id.* at 649–50.

<sup>611</sup> *Wright II*, 256 So. 3d 766, 774 (Fla. 2018).

<sup>612</sup> *Id.* at 775.

<sup>613</sup> *Johnson v. State*, 580 S.W.3d 895, 916 (Mo. 2019) (Stith, J., dissenting).

<sup>614</sup> *Id.*

<sup>615</sup> *Id.* at 905 (majority opinion).

Stith, in turn, argued that “[t]he issue is not that his counsel should have recognized his intellectual disabilities through his interactions with Mr. Johnson – as previously discussed, *Moore I* and *Moore II* reject use of lay perceptions as a permissible basis for determining intellectual disability.”<sup>616</sup> Accordingly, Stith contended that the majority failed to properly understand Johnson’s claim, which in reality focused on his counsel’s woeful ignorance of capital punishment law, as it pertained to intellectual disabilities, and his inattention to expert testimony suggesting Johnson was intellectually disabled.<sup>617</sup>

In *Commonwealth v. Cox*, the Commonwealth of Pennsylvania conceded that, in light of *Moore I*, the PCRA court erred because “courts should be guided by the prevailing diagnostic and assessment tools and principles rather than lay perceptions of what constitutes intellectual disability.”<sup>618</sup> The court qualified the Commonwealth’s reasoning, noting “[t]hat is not to say that lay testimony about factual observations of an individual’s behavior is not relevant to an expert’s assessment of behavioral deficits.”<sup>619</sup> The Pennsylvania court determined that “the PCRA court relied on the apparent failure of the lay witnesses to act on their asserted perceptions of Appellant’s deficits to discount the existence of those deficits. This is squarely at odds with *Moore I*’s admonition against focusing on non-clinical lay perceptions.”<sup>620</sup> In other words, because lay people around Cox did not treat him as intellectually disabled, the PCRA court regarded this as evidence that he was, in fact, not actually intellectually disabled. The Supreme Court of Pennsylvania then highlighted how the *Moore I* Court “particularly disproved reliance on the *Briseno* factors as an attempt to impose a

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<sup>616</sup> *Id.* at 922. (Stith, J., dissenting).

<sup>617</sup> Justice Stith also wrote that “[t]he United States Supreme Court [in *Moore I* and *Moore II*] has twice reversed a death penalty conviction when a court based its determination of lack of intellectual disability on the court’s personal observations of the defendant rather than on scientific and medical criteria.” *Id.* at 909. Here, Stith appears to be implying that Johnson’s attorney committed a glaring error by assuming, based solely on their personal interactions, and despite medical evidence to the contrary, that Johnson was not a person with intellectual disabilities. Stith thought this error violated *Moore I* and *Moore II*. Thus, even attorneys who are “professionals” cannot substitute their own judgment and forego an examination when determining whether their client is intellectually disabled. This is also an example of relying on lay stereotypes rather than current medical standards. *Id.* at 910–11.

<sup>618</sup> *Commonwealth v. Cox*, 204 A.3d 371, 386 (Pa. 2019).

<sup>619</sup> *Id.* at n.14.

<sup>620</sup> *Id.* at 387.

consensus of the citizenry about who should be eligible for the death sentence rather than criteria accepted in the professional and medical community.”<sup>621</sup> Ultimately, the Supreme Court of Pennsylvania concluded that the PCRA court:

relied on the *Briseno* factors to conclude the absence of intervention by the lay witnesses was a reason to conclude an absence of any deficits. This reliance is clearly erroneous in light of *Moore I*. The ability of lay persons to recognize intellectual disability, let alone know what steps to take to secure a diagnosis for supportive services, is not a part of the professional diagnostic criteria that courts have been directed to employ.<sup>622</sup>

Justice Alcala, in her dissent from the Texas CCA’s Majority opinion in *Battaglia v. State*, wrote *Moore I* taught that, when evaluating capital defendants for intellectual disabilities, “courts should not resort to stereotypes about the intellectually disabled, but should instead look to current medical/clinical appraisals to determine whether a particular person meets the diagnostic criteria for intellectual disability.”<sup>623</sup> This same principle, she advocated, should apply with equal force to competency-for-execution evaluations, because on remand the *Panetti* Court ordered the trial court to show deference to the “conclusions of physicians, psychiatrists, and other experts in the field[.]”<sup>624</sup>

Lastly, when concurring with the Texas CCA’s Majority opinion in *Ex parte Wood*, Justice Newell described *Moore I* as, “not[ing] that we are supposed to avoid lay perceptions and stereotypes regarding intellectual disability.”<sup>625</sup> Newell did not, however, allege that the Majority opinion relied on lay stereotypes about intellectual disabilities.

### G. Miscellaneous

Courts from four different states cited *Moore I* in a context other than previously discussed. In *State v. Rodriguez*, for example, the Supreme Court of North Carolina’s observed that it was “not persuaded . . . that *Moore I* has any bearing on the intellectual disability issue that defendant has actually raised, which is whether the trial court abused its discretion by refusing to set the jury’s verdict with

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<sup>621</sup> *Id.* at 388.

<sup>622</sup> *Id.*

<sup>623</sup> *Battaglia v. State*, 537 S.W.3d 57, 103 (Tex. Crim. App. 2017) (Alcala, J., dissenting) (citing *Moore I*, 137 S. Ct. 1039, 1052 (2017)).

<sup>624</sup> *Id.* (quoting *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007)).

<sup>625</sup> *Ex parte Wood*, 568 S.W.3d 678, 685 (Tex. Crim. App. 2018).

respect to the intellectual disability issue aside.”<sup>626</sup> As a result, although the Supreme Court of North Carolina admitted that the “defendant did present sufficient evidence to support a determination that he should be deemed exempt from the imposition of the death penalty on intellectual disability grounds,” it refused to overturn the jury’s finding that Rodriguez was not intellectually disabled because the state expert’s testimony “tend[ed] to support a contrary determination,” and the issue ultimately “was a matter for the jury rather than for this Court.”<sup>627</sup>

The Supreme Court of Pennsylvania, in *Commonwealth v. Batts*, cited *Moore I* to establish that the term “mental retardation” used in *Atkins* held the same meaning as the term “intellectual disabilit[ies]” used in subsequent Supreme Court cases.<sup>628</sup> In *Dellinger v. State*, Dellinger contended that, because “determinations of intellectual disabilit[ies] [had] expanded greatly, requiring consideration of many more factors than those considered at the time of his trial in 1996[.]” he was entitled to a new ruling on his intellectual disabilities.<sup>629</sup> The Tennessee CCA acknowledged that *Moore I* motivated Dellinger’s petition, since it was the Supreme Court’s latest ruling on intellectual disabilities at the time he filed the petition.<sup>630</sup> The court, however, dismissed the argument, declaring that the cases Dellinger cited, including *Atkins*, *Hall*, and *Moore I*, constituted “changes in the law that occurred several years after his trial.”<sup>631</sup>

In its *Ex parte King* decision, the Texas CCA denied King’s petition for a stay of execution. Justice Keasler dissented, and proclaimed that

[i]n light of this Court’s recent earnest, but ultimately unsuccessful, attempts to implement new Supreme Court precedent in death-penalty cases [(*Moore II*)], and especially in light of the horrible stain this Court’s reputation would suffer if King’s claims of innocence are one day vindicated . . . I think we ought to take our time and decide this issue unhurriedly.<sup>632</sup>

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<sup>626</sup> *State v. Rodriguez*, 814 S.E.2d 11, 28 n.5 (N.C. 2018).

<sup>627</sup> *Id.* at 28.

<sup>628</sup> *Commonwealth v. Batts*, 163 A.3d 410, 448 n.20 (Pa. 2017).

<sup>629</sup> *Dellinger v. State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701, at \*3 (Tenn. Crim. App. Apr. 17, 2019).

<sup>630</sup> Although the Tennessee Court of Criminal Appeals issued its ruling on April 17, 2019, Dellinger presumably filed his petition prior to the United States Supreme Court ruling in *Moore II* on February 19, 2019.

<sup>631</sup> *Dellinger*, 2019 WL 1754701, at \*3.

<sup>632</sup> *Ex parte King*, No. WR-49,391-03, 2019 WL 1769023, at \*2 (Tex. Crim. App. Apr. 22, 2019) (Keasler, J., dissenting).

As part of an unpublished opinion, *Ex parte Long I*, the Texas CCA “determined that applicant’s execution should be stayed pending further order of this Court” due to *Moore I*, which represented “new law.”<sup>633</sup> The Texas CCA ruled again in *Ex parte Long II* ordering the trial court to convene “a live hearing to further develop evidence and make a new recommendation to this Court on the issue of intellectual disability” following its previous suspension of Long’s sentence after *Moore I*.<sup>634</sup> Beyond this, the Texas CCA cited *Moore I* to justify a stay of execution in several other unpublished opinions, including *Ex parte Segundo*,<sup>635</sup> and *Ex parte Williams*,<sup>636</sup> where the court also ordered a live hearing on the issue of William’s alleged intellectual disabilities.

In *Ex parte Wood*, the Texas CCA noted that *Moore I* prompted its review of Wood’s case, but “conclude[d] that no further record development or fact findings [were] needed and that Applicant [was] not entitled to relief.”<sup>637</sup> As the Texas CCA explained, “[t]he *Moore* decisions changed the legal analysis for reviewing intellectual-disability claims in Texas, but Applicant’s evidence relating to intellectual disability is already in the record.”<sup>638</sup> When dissenting from the Texas CCA’s unpublished opinion in *Petetan v. State*, Justice Keller asserted that Petetan’s petition failed to “raise a claim based upon *Moore v. Texas* [I], and it [did] not make any claim relating to the *Briseno* factors—despite the fact that *Moore* [I] was decided shortly after we handed down our opinion in this case.”<sup>639</sup>

#### IV. CONCLUSION

In the time since the Supreme Court of the United States delivered its *Moore I* decision in 2017, and follow-up *Moore II* decision in early 2019, state courts have cited these opinions to address a variety of issues

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<sup>633</sup> *Ex parte Long*, NO. WR-76,324-02, 2017 WL 3616644, at \*1 (Tex. Crim. App. Aug. 21, 2017).

<sup>634</sup> *Ex parte Long*, NO. WR-76,324-02, 2018 WL 3217506, at \*1 (Tex. Crim. App. June 27, 2018).

<sup>635</sup> *Ex parte Segundo*, NO. WR-70,963-02, 2018 WL 4856580, at \*1 (Tex. Crim. App. Oct. 5, 2018).

<sup>636</sup> *Ex parte Williams*, NO. WR-71,296-03, 2018 WL 2717039, at \*2 (Tex. Crim. App. June 5, 2018).

<sup>637</sup> *Ex parte Wood*, 568 S.W.3d 678, 679–80 (Tex. Crim. App. 2018).

<sup>638</sup> *Id.* at 681.

<sup>639</sup> *Petetan v. State*, NO. AP-77,038, 2017 WL 4678670, at \*2 (Tex. Crim. App. Oct. 18, 2017) (Keller, J., dissenting).

related to evaluating intellectual disabilities in capital cases. Some of these issues are relatively straightforward, with state courts either properly applying *Moore I* or *Moore II* or willfully disregarding their instruction under the guise of misunderstanding. Other issues, however, highlight gray areas that require further clarification from the Court. Table 4 presents a list of issues raised by state courts post-*Moore I* broken down according to whether: (1) the Supreme Court has already provided clear guidance on the issue; or (2) additional clarification is required from the Court. Until such a time as the Supreme Court addresses the issues listed in the latter category, they are likely to continue requiring state courts' attention with some regularity.

## V. APPENDIX

Table 1. List of State Court Cases in the Twenty-Eight Death Penalty States Citing *Moore I* or *Moore II*.

State	Number of Cases	Case Citations
Alabama	5	<i>Callen v. State</i> , 284 So. 3d 177 (Ala. Crim. App. 2017) <i>Carroll v. State</i> , 300 So. 3d 51 (Ala. Crim. App. 2017) <i>Ex parte Lane</i> , 286 So. 3d 61 (Ala. 2018) <i>State v. Carroll</i> , 300 So. 3d 59 (2019) <i>Graham v. State</i> , 299 So. 3d 273 (Ala. Crim. App. 2019)
Arizona	1	<i>State v. Gates</i> , 410 P.3d 433 (Ariz. 2018)
Arkansas	1	<i>Lard v. State</i> , 2020 Ark. 110, 595 S.W.3d 355
California	2	<i>In re Lewis</i> , 417 P.3d 756 (Cal. 2018) <i>People v. Woodruff</i> , 421 P.3d 588 (Cal. 2018)
Florida	4	<i>Glover v. State</i> , 226 So. 3d 795 (Fla. 2017) <i>Rodriguez v. State</i> , 219 So. 3d 751 (Fla. 2017) <i>Quince v. State</i> , 241 So. 3d 58 (Fla. 2018) <i>Wright v. State</i> , 256 So. 3d 766 (Fla. 2018)
Georgia	1	<i>Cawthon v. State</i> , 830 S.E.2d 270 (Ga. Ct. App. 2019)
Idaho	0	
Indiana	0	
Kansas	1	<i>State v. Thurber</i> , 420 P.3d 389 (Kan. 2018)
Kentucky	1	<i>Woodall v. Commonwealth</i> , 563 S.W.3d 1 (Ky. 2018)
Louisiana	0	
Mississippi	2	<i>State v. Russell</i> , 2015-KA-00245-SCT (Miss. 2017) (en banc) <i>Carr v. State</i> , 2017-CA-01481-SCT (Miss. 2019)
Missouri	1	<i>Johnson v. State</i> , 580 S.W.3d 895 (Mo. 2019)
Montana	0	
Nebraska	1	<i>State v. Vela</i> , 900 N.W.2d 8 (Neb. 2017)
Nevada	2	<i>Mulder v. State</i> , 422 P.3d 1231 (Nev. 2018) (unpublished table decision) <i>State v. Covington</i> , 433 P.3d 1252 (Nev. 2019) (unpublished table decision)
North Carolina	1	<i>State v. Rodriguez</i> , 814 S.E.2d 11 (N.C. 2018)
Ohio	3	<i>State v. Ford</i> , 158 Ohio St. 3d 139, 2019-Ohio-2284, 140 N.E. 3d 616 <i>State v. Jackson</i> , 2020-Ohio-4015, 157 N.E. 3d 240 <i>State v. Jackson</i> , 2020-Ohio-4914, No. 108558, 2020 WL 6075698 (Ohio Ct. App. Oct. 15, 2020)
Oklahoma	0	
Oregon	1	<i>State v. Ryan</i> , 396 P.3d 867 (Or. 2017)
Pennsylvania	3	<i>Commonwealth v. Batts</i> , 163 A.3d 410 (Pa. 2017) <i>Commonwealth v. VanDivner</i> , 178 A.3d 108 (Pa. 2018) <i>Commonwealth v. Cox</i> , 204 A.3d 371 (Pa. 2019)

South Carolina	1	<i>State v. Blackwell</i> , 801 S.E.2d 713 (S.C. 2017)
South Dakota	0	
Tennessee	1	<i>Dellinger v. State</i> , No. E2018-00135-CCA-R3-ECN, slip op. (Tenn. Crim. App. Apr. 17, 2019)
Texas	17	<i>Battaglia v. State</i> , 537 S.W.3d 57 (Tex. Crim. App. 2017) <i>Ex parte Davis</i> , No. WR-40,339-09, 2017 WL 6031852 (Tex. Crim. App. Dec. 6, 2017) <i>Ex parte Jean</i> , No. WR-84,327-01, 2017 WL 2859012 (Tex. Crim. App. June 28, 2017) <i>Ex parte Long</i> , No. WR-76,324-02, 2017 WL 3616644 (Tex. Crim. App. Aug. 21, 2017) <i>Ex parte Sosa</i> , No. AP-76,674, 2017 WL 2131776 (Tex. Crim. App. May 3, 2017) <i>Petetan v. State</i> , No. AP-77,038, 2017 WL 4678670 (Tex. Crim. App. Oct. 18, 2017) <i>Ex parte Cathey</i> , WR-55,161-02, 2018 WL 5817199 (Tex. Crim. App. 2018) <i>Ex parte Guevara</i> , No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018) <i>Ex parte Henderson</i> , WR-37, 658-03, 2018 WL 4762755 (Tex. Crim. App. Oct. 3, 2018) <i>Ex parte Lizcano</i> , No. WR-68,348-03, 2018 WL 2717035 (Tex. Crim. App. June 6, 2018) <i>Ex parte Long</i> , No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018) <i>Ex parte Segundo</i> , No. WR-70,963-02, 2018 WL 4856580 (Tex. Crim. App. Oct. 5, 2018) <i>Ex parte Williams</i> , No. WR-71,296-03, 2018 WL 2717039 (Tex. Crim. App. June 5, 2018) <i>Ex parte Wood</i> , 568 S.W.3d 678 (Tex. Crim. App. 2018) <i>Thomas v. State</i> , No. AP-77,047, 2018 WL 6332526 (Tex. Crim. App. Dec. 5, 2018) <i>Ex parte King</i> , No. WR-49,391-03, 2019 WL 1769023 (Tex. Crim. App. Apr. 22, 2019) <i>Ex parte Milam</i> , No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019)
Utah	0	
Virginia	0	
Wyoming	0	
<b>Total Cases</b>	<b>45</b>	

Table 2. Interpretations of *Moore I* and *Moore II* by State Courts in the Twenty-Eight Death Penalty States.

State	1. Current Medical Standards	2. Standard Error of Measurement	3. Highlighting Adaptive Deficits	4. Highlighting Behavior While Incarcerated
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Alabama	Yes	Yes	Yes	Yes
Arizona	No	No	No	No
Arkansas	- <sup>1</sup>	-	-	-
California	Yes	Yes	Yes	No
Florida	Yes	Yes	Yes	Yes
Georgia	Yes	No	No	No
Idaho	-	-	-	-
Indiana	-	-	-	-
Kansas	Yes	Yes	No	No
Kentucky	Yes	Yes	No	No
Louisiana	-	-	-	-
Mississippi	Yes	Yes	Yes	No
Missouri	Yes	Yes	Yes	Yes
Montana	-	-	-	-
Nebraska	Yes	No	No	No
Nevada	Yes	No	Yes	No
North Carolina	No	No	No	No
Ohio	-	-	-	-
Oklahoma	-	-	-	-
Oregon	No	Yes	No	No
Pennsylvania	Yes	Yes	Yes	No
South Carolina	Yes	No	Yes	No
South Dakota	-	-	-	-
Tennessee	No	No	No	No
Texas	Yes	Yes	Yes	Yes
Utah	-	-	-	-
Virginia	-	-	-	-
Wyoming	-	-	-	-
<b>Total Number of States</b>	<b>13</b>	<b>10</b>	<b>9</b>	<b>4</b>

<sup>1</sup>Indicates state courts have not cited *Moore I* or *Moore II* or have issued opinions after submission of this Article.

Table 3. Additional Interpretations of *Moore I* and *Moore II* by State Courts in the Twenty-Eight Death Penalty States.

State	5. Discretion Afforded to State Courts	6. Lay Stereotypes	7. Miscellaneous
Alabama	Yes	Yes	No
Arizona	Yes	No	No
Arkansas	-	-	-
California	Yes	Yes	No
Florida	Yes	Yes	No
Georgia	No	No	No
Idaho	-	-	-
Indiana	-	-	-
Kansas	No	No	No
Kentucky	No	No	No

Louisiana	-	-	-
Mississippi	No	No	No
Missouri	No	Yes	No
Montana	-	-	-
Nebraska	No	No	No
Nevada	No	No	No
North Carolina	No	No	Yes
Ohio	-	-	-
Oklahoma	-	-	-
Oregon	No	No	No
Pennsylvania	Yes	Yes	Yes
South Carolina	No	No	No
South Dakota	-	-	-
Tennessee	No	No	Yes
Texas	No	Yes	Yes
Utah	-	-	-
Virginia	-	-	-
Wyoming	-	-	-
<b>Total # States</b>	<b>5</b>	<b>6</b>	<b>4</b>

Table 4. Summary of Issues Raised by State Courts Post-*Moore I* that are Either Clear or Require Additional Clarification from the U.S. Supreme Court.

<b><i>U.S. Supreme Court Has Already Provided Clear Guidance</i></b>
1. Courts may not require a defendant to meet additional criteria to prove their intellectual disabilities beyond the diagnostic criteria found in the most recent versions of the DSM and AAIDD manuals (currently the DSM-5 and AAIDD-11).
2. Clinicians may interview lay persons such as family members, friends, neighbors, teachers, employers, and others who knew the defendant as part of an intellectual disabilities evaluation, but courts may not rely on the testimony or opinions of non-clinicians to justify determining that a defendant is not intellectually disabled.
3. Courts may not base determinations of a defendant's intellectual disabilities on their alleged adaptive strengths, even if those strengths are perceived to be directly related to a specific, relevant adaptive deficit. Courts may only focus on the defendant's adaptive deficits, not their strengths, when evaluating their adaptive functioning.
4. Courts may not rely on the defendant's functioning while in prison to justify determining that they are not intellectually disabled.
5. Courts may not prohibit defendants from presenting evidence of their adaptive deficits, regardless of how high their IQ score(s) is/are.

6. Courts may not disregard evidence of adaptive deficits by attributing those deficits to another cause besides intellectual disabilities.

7. Courts may not, under any circumstances for any reason, use a standard error of measurement less than  $+5/-5$  for a defendant's IQ test scores, or narrow the range provided by this standard error of measurement after applying it to the actual IQ test score.

8. Courts may not disregard IQ test scores based on how long ago the test was administered if the test in-question was considered to meet current medical standards at the time it was administered.

9. Courts may not rely on lay stereotypes about intellectual disabilities.

10. Courts may not interpret the failure of the defendant's family members, friends, neighbors, teachers, employers, or others who knew the defendant to treat them as intellectually disabled as evidence that the defendant is, in fact, not intellectually disabled.

***Requires Additional Clarification from the U.S. Supreme Court***

1. Does the Court consider the Flynn effect to be part of current medical standards? If the Court does, do states have to adjust defendants' IQ scores to account for the Flynn effect?

2. Do defendants who demonstrate subaverage intellectual functioning and adaptive deficits, but cannot provide evidence that these existed before age 18 or during the developmental period, qualify for *Atkins* protections?

3. Do courts have to rely on current medical standards when evaluating defendants for competency-to-be-executed?

4. What does the Court mean when it says that states do not have to follow everything written in the most recent clinical manuals?

5. Does the Court consider other publications from the American Psychiatric Association (APA) and the American Association on Intellectual and Developmental Disabilities (AAIDD), besides the DSM-5 and AAIDD-11, respectively, to be part of current medical standards? If the Court does, do states have to abide by these current medical standards as well?