Protecting Intellectually-Disabled Criminal Defendants: Proposing a Federally-Mandated Threshold Procedure to Determine Death Penalty Eligibility

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I. INTRODUCTION

People with intellectual disabilities are ineligible for the death penalty because executing them is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[1] A serious problem arises, however, when criminal defendants seek to declare themselves ineligible for the death penalty under this exception.[2] The Supreme Court has declined to outline specific procedures States must follow in determining intellectual disabilities for death penalty purposes.[3] Thus, the outcome of efforts by defendants to assert an intellectual disability defense during a trial varies state by state.[4] Therefore, whether a defendant is correctly found ineligible for the death penalty due to intellectual disability is highly arbitrary.[5] To ensure consistent case outcomes, Congress should enact a federally mandated threshold procedure that States must meet or exceed when determining an intellectual disability in capital cases. This procedure should not only mirror the current clinical standards for determining an intellectual disability but also mandate a review of the science every five years to ensure the procedure is evolving as clinical standards advance.

Part II of this Note will first examine the history of IQ tests from conception to their use in both clinical and legal settings today. It will then define what an intellectual disability is and analyze the criteria the American Psychiatric Association (APA) dictates regarding intellectual disabilities. Part III of this Note will trace the evolution of intellectual disability and death penalty case law, beginning with *Penry v. Lynaugh* and ending with a survey of recent cases. Part IV will outline a proposal for a federally mandated threshold procedure that all states would need to comply with in updating their intellectual disability and death penalty legislation. This proposal will synthesize portions of the best state statutes with current clinical standards defined in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders. The proposal is designed so the relevant sections of the bill can evolve as the clinical standards change and improve, thus eliminating the need for various legislatures to go through the lengthy and burdensome process of proposing

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[1] *See generally* Atkins v. Virginia, 536 U.S. 304 (2002).

[2] The cases of *Hall v. Florida* and *Moore v. Texas*—in addition to the cases covered in the Current Cases section of this note—show the disparate application of the intellectual disability exception between states. *See* Hall v. Florida, 572 U.S. 701 (2014); Moore v. Texas, 137 S. Ct. 1039 (2017). *See also* Section III.E.

[3] *See* Christin Grant, *The Texas Intellectual Disability Standard in Capital Murder Cases: A Proposed Statute for a Broken Method*, 54 S. TEX. L. REV. 151, 151 (2012).

[4] *See* Ruthie Stevens, *Are Intellectually Disabled Individuals Still at Risk of Capital Punishment After* Hall v. Florida*? The Need for a Totality-of-the-Evidence Test to Protect Human Rights in Determining Intellectual Disability*, 68 OKLA. L. REV. 411, 411 (2016) (quoting James Welsh, *Medicine, Mental Health, and Capital Punishment*, *in* MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 264, 274 (Michael Dudley et al. eds. 2012)).

[5] *See* Noah Cyr Engelhart, *Matching the Trajectory of the Supreme Court on the Intellectual Disability Defense: A Recommendation for the States*, 79 AL. L. REV. 567, 579–82 (2016).

amendments. Instead, the statute will only require Congress and state legislatures to review the language to incorporate any new clinical standards and vote to approve changes.

II. BACKGROUND

America's understanding of intellectual disabilities has drastically improved over the last decade, yet our treatment of people with such disabilities within the criminal justice system has failed to reflect that change. For example, within the Crimes and Criminal Procedure section of the U.S. Code, there is still language in the Federal Death Penalty Act referring to "a person who is mentally retarded" despite society's transition to the use of the term "intellectually disabled" to describe a person with a diminished intellectual capacity.[6] While our laws may recognize the fundamental moral injustice perpetrated by sentencing a person with an intellectual disability to death, our justice system has not progressed so far as to truly understand what an intellectual disability is or how it affects a person's mental processes.

A. History of IQ Tests

Although the concept of intelligence has been recognized throughout history, it was not until the early twentieth century that there was any standardized method to assess intelligence.[7] In 1905, the French government asked renowned educational psychologist, Alfred Binet, to create a test that would identify children who would need additional assistance in school.[8] Binet worked with another educational psychologist, Theodore Simon, to develop "questions that focused on areas not explicitly taught in school, such as attention, memory, and problem-solving skills."[9] While the Binet-Simon Test was revolutionary, Binet often highlighted the fact that "his test was not a measure of 'innate' intelligence and should be used chiefly to identify children who need help in school."[10] He explained that intelligence cannot be measured by a single intellectual quotient (IQ) score because intelligence was influenced by various factors—IQ scores were and are still known to evolve

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[6] Federal Death Penalty Act, 18 U.S.C. § 3596(c) (2018); *see also* Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. AND DEVELOPMENTAL DISABILITIES 116, 117–18 (2007); Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010). Society and the medical community have both ceased to refer to an intellectual disability as mental retardation, so this Note will do the same. In addition, the only times this note will use the term "mental retardation" will be either when it is included in court language or in highlighting the differences between the two versions of the diagnostic manual.

[7] *See* Kendra Cherry, *Alfred Binet and the History of IQ Testing*, VERYWELL MIND (July 2, 2019), [https://perma.cc/U3TN-6CDA].

[8] *Id.*; Nancy Haydt et al., *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in* Atkins *(Death Penalty) Cases,* 82 UMKC L. REV. 359, 379 (2014).

[9] Cherry, *supra* note 7.

[10] Maurice Chammah & Dana Goldstein, *The Life-or-Death Test*, THE MARSHALL PROJECT (Jan. 29, 2015, 11:22 AM), [https://perma.cc/H2R7-Q8NN].

and should only be compared between people with similar backgrounds.[11] Instead, Binet's idea for the test was that a person's score would only be one component used to assess that person's intelligence level.[12]

Stanford professor Lewis Terman and eugenicist Henry H. Goddard brought the Binet-Simon Test to the United States in 1916.[13] After Terman and Goddard translated and edited the Binet-Simon so it would better assess Americans, the test became known as the Stanford-Binet Test.[14] It was not long after, however, that people began to abuse its application and the results. American eugenicists touted the Stanford-Binet Test as a mechanism to identify "people supposedly predisposed to crime, promiscuity, and low achievement in school and in life."[15] Low IQ scores were even used by courts and state agencies as a justification to sterilize people.[16]

By the end of World War II, the Stanford-Binet Test was used as a screening method for immigrants at Ellis Island, leading to "sweeping and inaccurate generalizations about entire populations."[17] In fact, American eugenicists, such as Henry Goddard, capitalized on these fallible characterizations to advocate for stricter immigration policies.[18] Goddard was specifically known for exploiting the Stanford-Binet Test and "its underlying construct of intelligence to argue for a number of popular policy initiatives."[19] These recommendations ranged from "placing people with mild [intellectual disabilities] into gender-segregated large institutions" to "adoption of enforced sterilization laws."[20] Goddard and other eugenicists sought to advance the white race by separating white people from other races they considered genetically inferior.[21] Unsurprisingly, several of Goddard's books were utilized by the Nazis.[22]

Dissatisfied with the Stanford-Binet Test, David Wechsler produced a new type of intelligence test in 1955—the Wechsler Adult Intelligence

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[11] Cherry, *supra* note 7.

[12] *Id.*

[13] *Id.*; Haydt et al., *supra* note 8, at 362.

[14] Haydt et al., *supra* note 8, at 362.

[15] Chammah & Goldstein, *supra* note 10 (citing JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE: THE DEFINITIVE STUDY OF THE CAUSES OF CRIME (1985)) ("some criminals, such as forgers and embezzlers, tended to have higher IQs than the larger prison population, but murderers and rapists typically had low IQs.").

[16] *Id.*

[17] Cherry, *supra* note 7.

[18] *Id.*; Haydt et al., *supra* note 8, at 363.

[19] Haydt et al., *supra* note 8, at 363.

[20] *Id.* at 363.

[21] *Id.*

[22] *Id.*

Scale.[23] Emulating Binet's original beliefs regarding intelligence and IQ tests, Weschler believed intelligence was more than a number and was influenced by multiple different aspects of people's lives.[24] While the Stanford-Binet Test scored test takers based on their chronological age and mental age, Weschler "compar[ed] the test taker's score[s] to the scores of others in the same age group."[25] Thus, test scores were averaged to a fixed score of one hundred, with roughly two-thirds of the scores making up the normal range of eighty-five to one hundred and fifteen.[26]

Today, IQ scores are a largely irrelevant measure of intelligence in education and medicine due to their inherent biases. [27] However, these tests remain extremely pervasive in the criminal justice system.[28] In our courts, a capital defendant's IQ score is often the basis for the decision of whether that person has an intellectual disability and is, therefore, ineligible for the death penalty.[29] To adjust for these known biases, such as race, courts and prosecutors employ ethnic adjustments.[30] These adjustments are designed to "adjust[] IQ scores upward for people of color convicted of capital crimes."[31] The underlying argument is that because IQ tests are inherently biased against minorities, causing IQ scores of minority defendants to be lower than they would normally be, ethnic adjustments raise the scores of minority defendants to the level they would most likely be without any bias.[32] Prosecutors all over the country—from "Florida, Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio"—have all used ethnic adjustments to raise the IQ scores of minority capital defendants so they are no longer exempt from the death penalty.[33]

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[23] Cherry, *supra* note 7.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] David M. Perry, *How IQ Tests Are Perverted To Justify the Death Penalty,* PACIFIC STANDARD (Jan. 25, 2018), [https://perma.cc/D88U-R7LD].

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* (citing Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87 (2015)).

[32] Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87, 111 (2015).

[33] Perry, *supra* note 27 (citing Sanger, *supra* note 32, at 109).

B. Clinical Opinion of IQ Tests Under DSM-IV & DSM-V

Awareness of intellectual disabilities has been documented as far back as the ancient Egyptian and Greek civilizations.[34] Our modern understanding of the neurodevelopmental disorder began with universal public education and, ironically, the invention of IQ tests.[35] However, clinicians' efforts in the most recent decades have been focused on "mov[ing] the field of [intellectual disabilities] beyond its excessive reliance on IQ."[36]

1. Defining Intellectual Disability

An intellectual disability is defined in the fifth version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) as "a [neurodevelopmental] disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[37] This means a person diagnosed with an intellectual disability has trouble with the skills needed to be successful in school, such as abstract thinking and problem-solving. Additionally, intellectually-disabled persons usually have an inability to or difficulty accomplishing everyday tasks like personal hygiene or following rules. All of these developmental difficulties must also emerge during childhood or young adolescence.[38]

Three criteria must be met for a person to be diagnosed with an intellectual disability: (A) intellectual functioning deficiency, "such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience," (B) adaptive functioning deficiency "that result[s] in failure to meet developmental and sociocultural standards for personal independence and social responsibility," and (C) the deficiencies in both intellectual functioning and adaptive functioning begin during the developmental period.[39] Intellectual disabilities are classified by severity based on the deficit of adaptive functioning—mild, moderate, severe, and profound.[40] Notably, a diagnosis no longer requires the use of "IQ scores to determine the presence or severity of intellectual disability."[41]

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[34] Haydt, et al., *supra* note 8, at 362.

[35] *Id.*

[36] *Id.* at 363.

[37] AM. PSYCHIATRIC ASS'N, DIAGNOSTICAL AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-V].

[38] MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 1–2 (2018).

[39] DSM-V, *supra* note 37, at 33.

[40] *Id.*

[41] Richard L. Frierson, *DSM-5 and Psychiatric Evaluations of Individuals in the Criminal Justice System*, *in* DSM-5 AND THE LAW: CHANGES AND CHALLENGES 77, 94 (Charles Scott ed., 2015).

As outlined above, intellectual disability diagnoses are based on three criteria: intellectual functioning deficits ("Criterion A"), adaptive functioning deficits ("Criterion B"), and early onset during the developmental period ("Criterion C").[42] Criterion A is measured in a clinical setting through "individually administered and psychometrically valid[43], comprehensive, culturally appropriate, psychometrically sound tests of intelligence."[44] In previous versions of the DSM, significant weight was placed on the results of IQ tests.[45] However, major issues with IQ test results, such as the Flynn Effect,[46] made assessments based on one score highly unreliable.[47] Instead, DSM-V recommends clinicians use neuropsychological testing because this type of testing eliminates IQ test biases caused by different socioeconomic or cultural backgrounds, languages, communication levels, motor functioning, and/or sensory functioning.[48]

Criterion B encompasses "adaptive reasoning in three domains: conceptual, social, and practical."[49] The conceptual domain is likened to the academic setting and evaluates "memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations."[50] The social domain refers to a person's interpersonal skills, such as communication, awareness of others, ability to develop friendships, and social judgment.[51] Finally, the practical domain measures self-care abilities in everyday life, "including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work

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[42] DSM-V, *supra* note 37, at 37–38.

[43] Psychometrics is "the branch of psychology concerned with the quantification and measurement of mental attributes, behavior, performance, and the like, as well as with the design, analysis, and improvement of the tests, questionnaires, and other instruments used in such measurement." Psychometrics, *APA Dictionary of Psychology*, AM. PSYCHOL. ASS'N, [https://perma.cc/9799-DGNQ] (last visited May 9, 2021). A test is psychometrically valid if it is found to test what it is purported to test (construct validity), if the results accurately predict future uses of the same test (criterion validity), if the content of the test accurately predicts a person's performance level on a related task (predictive validity), and if it sufficiently encompasses all aspects of the thing being tested for (content validity). *Test Validity*, PSYCHOMETRIC TESTS, [https://perma.cc/7V2A-UCFL] (last visited May 9, 2021).

[44] DSM-V, *supra* note 37, at 37–38.

[45] *See* Haydt et al., *supra* note 8, at 379.

[46] *See* Stephen J. Ceci et al., *The Difficulty of Basing Death Penalty Eligibility om IQ Cutoff Scores for Mental Retardation*, 13 ETHICS & BEHAVIOR 11, 12 (2003) (defining the Flynn Effect as a "pronounced improvement in intelligence test performance over time [because] IQ test norms . . . become obsolete within a generation or so"); *see also infra* Section IV.A.1.

[47] DSM-V, *supra* note 37, at 37–38.

[48] *Id.*

[49] *Id* at 37.

[50] *Id.*

[51] *Id.*

task organization."[52] Evaluation of all three domains involves clinical assessment and interviewing "knowledgeable informants" such as parents, siblings, other family members, teachers, etc.[53] Fulfillment of Criterion B requires that, at minimum, "one domain . . . is sufficiently impaired [so] that ongoing support is needed in order for the person to perform adequately in one or more life settings."[54]

Criterion C simply requires both intellectual and adaptive functioning deficits developed or were present during childhood or adolescence.[55] A qualified clinician must identify each element in the definition of intellectual disability through different, but approved, procedures to confirm a diagnosis. Unlike the previous version of the Diagnostic and Statistical Manual of Mental Disorders, DSM-V does not provide a specific cutoff age that would disqualify someone from a diagnosis of intellectually-disabled.[56]

2. Diagnostic Elements of Identifying an Intellectual Disability

There have been several advances in recent years concerning our understanding of intellectual disabilities and how to accurately diagnose them.[57] Most recently, in 2013, the American Psychiatric Association (APA), the organization responsible for drafting and updating the DSM, made some major changes to the field of intellectual disability diagnosis.[58] These changes undoubtedly have had and will continue to have significant effects on the intersection of intellectual disability diagnostic criteria and the legal system.[59]

a. DSM-IV

To best understand the significance of the changes made to the diagnostic framework for intellectual disabilities, it is important to outline the earlier version that was used in both clinical and legal settings. In the DSM-IV, an intellectual disability was still referred to as "mental retardation."[60] The principal description of "mental retardation" was a disorder primarily diagnosed

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[52] *Id.*

[53] DSM-V, *supra* note 37, at 37–38.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Natalie Cheung, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317, 321–26 (2013).

[58] Haydt et al., *supra* note 8, at 367.

[59] Frierson, *supra* note 41, at 77, 94.

[60] AM. PSYCHIATRIC ASS'N, DIAGNOSTICAL AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 1994) [hereinafter DSM-IV]. As this version of the manual officially refers to intellectual disability as "mental retardation," this will be the only part of the Note that uses this classification. *Id*

in infancy, childhood, or adolescence and "characterized by significantly subaverage intellectual functioning (an IQ of approximately 70 or below) with onset before age 18 years and concurrent deficits or impairments in adaptive functioning."[61] According to the DSM-IV, the three diagnostic features of intellectual disabilities are:

> [S]ignificantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before 18 years (Criterion C).[62]

In the definition of Criterion A, general intellectual functioning referred to "the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests" and was classified as significantly subaverage when a person's IQ was at or below seventy.[63] A caveat on this requirement was the standard measurement of error range, roughly five points above and below a person's IQ score, to account for the inherent biases in the test.[64] Thus, as the manual points out, "it is possible to diagnose Mental Retardation in individuals with IQs between [seventy] and [seventy-five] who exhibit significant deficits in adaptive behavior."[65] However, there was a limit on this flexibility—"mental retardation" could not be diagnosed if a person's IQ score did not fall lower than seventy and there were no identifiable deficits in adaptive functioning.[66] This procedure was improved considerably in the DSM-V, beginning with an important change in terminology.

b. DSM-V

The first and most significant change to this disorder was its reclassification from "mental retardation" to an intellectual disability.[67] This alteration resulted from public pressure and the APA's desire to unify their definition of this disorder with the rest of the medical community.[68] Within the

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*, Hall v. Florida, 572 U.S. 701, 712 (2014).

[65] DSM-IV, *supra* note 60, at 39–40.

[66] *Id.* at 40.

[67] Cheung *supra* note 57, at 325.

[68] DSM-V, *supra* note 37, at 33 (citing Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010)); Cheung, *supra* note 57, at 325.

definition itself, DSM-V no longer mentions IQ concerning intellectual functioning deficits.[69] Additionally, the structure of the definition implies a definitive link between intellectual and adaptive functioning,[70] whereas DSM-IV focused mainly on intellectual functioning deficits with only a passing mention of adaptive functioning deficits.[71]

Within the intellectual functioning deficit element, DSM-V eliminated the strict reliance on IQ in delineating between average functioning and the level of functioning that would warrant a diagnosis of an intellectual disability.[72] In fact, "the DSM-[V] carries an explicit statement that intellectual functioning may be assessed more reliably with comprehensive neuropsychological measures of 'executive functioning' (planning, reasoning, inhibiting responses, reflecting, and other processes poorly tapped by IQ tests)."[73] DSM-V makes it very clear that a diagnosis of an intellectual disability should no longer rely so heavily on a person's IQ score.[74] Moreover, when or if there is an IQ score present in someone's assessment for an intellectual disability, clinical judgment is absolutely necessary to place the IQ score within the context of that person's life.[75]

III. CASE LAW ON INTELLECTUAL DISABILITIES AND THE DEATH PENALTY

At the foundation of every case dealing with the death penalty and intellectual disabilities is the Eighth Amendment's prohibition of cruel and unusual punishment,[76] but how far exactly can the constitutional prohibition reach into state legislatures' death penalty statutes?[77] Moreover, what is the extent of the influence that the medical community—in conjunction with the Eighth Amendment prohibition—can have on the criminal justice system?[78] The search for answers to these questions and the construction of a workable framework to guide legislatures and courts alike in the field of intellectual disabilities spans nearly three decades.[79]

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[69] DSM-V, *supra* note 37, at 33.

[70] Haydt, et al., *supra* note 8, at 379.

[71] DSM-IV, *supra* note 60, at 37.

[72] DSM-V, *supra* note 37, at 37.

[73] Haydt, et al., *supra* note 8, at 367.

[74] *Id.*

[75] DSM-V, *supra* note 37, at 37.

[76] *See* Penry v. Lynaugh, 492 U.S. 302, 313 (1989); Atkins v. Virginia, 536 U.S. 304, 310 (2002); Hall v. Florida, 572 U.S. 701, 707 (2014); Moore v. Texas, 137 S. Ct. 1039, 1048 (2017).

[77] Stevens, *supra* note 4, at 412.

[78] William G. Buss, *Measures of Intelligence: Legal Issues*, *in* 5 ENCYCLOPEDIA OF PSYCHOLOGY 151 (Alan E. Kazdin ed., 2000).

[79] *See* Moore v. Texas, 137 S. Ct. 1039 (2017).

Intellectual disability case law began in 1989 with *Penry v. Lynaugh*, but the country's limited understanding of intellectual disabilities was reflected throughout the Court's opinion.[80] Roughly thirteen years later, the Court got the chance to review the precedent it set in *Penry* with *Atkins v. Virginia*.[81] During the interim between *Penry* and *Atkins*, a less accepting consensus evolved throughout the country regarding intellectual disabilities and the death penalty and the Court's analysis mirrored the country's change of opinion.[82] However, as is the case with any revolution in criminal law, states differed in their approaches to how a defendant could prove an intellectual disability. The diverse state approaches also differed in varying degrees from the current clinical standards.[83] The Court confronted these disparities in *Hall v. Florida*.[84] In the most recent case to cover intellectual disabilities and the death penalty, *Moore v. Texas*, the court sought to solidify the parameters within which the states must work when drafting legislation.[85]

A. Penry v. Lynaugh

The Supreme Court first addressed intellectual disabilities regarding the death penalty in 1989 with *Penry v. Lynaugh*. In this case, Johnny Paul Penry was convicted and sentenced to death for raping, beating, and stabbing a woman in her home.[86] After his conviction, Penry filed a *habeas corpus* petition claiming his execution would constitute "cruel and unusual punishment" in violation of the Eighth Amendment due to his intellectual disability.[87] Throughout the trial, a clinical psychologist, a psychiatrist, and Penry's mother all testified that Penry had an intellectual disability "which made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law."[88] The Court rejected his claim, citing several reasons why it would be constitutional for Penry to be sentenced to death.[89]

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[80] Courtney Johnson, Note, "Moore" *Than Just a Number: Why IQ Cutoffs Are an Unconstitutional Measure for Determining Intellectual Disability*, 91 S. CAL. L. REV. 754, 757 (2018).

[81] *Id.* at 758.

[82] *Id.*

[83] Sanger, *supra* note 32, at 98–100.

[84] Leigh D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability: Not So Simple*, 32 CRIM. JUST. 21, 22–23 (2017).

[85] Alexander H. Updegrove & Michael S. Vaughn, *Evaluating Intellectual Disability After the* Moore v. Texas *Redux*, 47 J. AM. ACAD. OF PSYCHIATRY & L. 486, 490 (2019); 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, 533 (2018).

[86] Penry v. Lynaugh, 492 U.S. 302, 307 (1989).

[87] *Id.* at 312.

[88] *Id.* at 307–09.

[89] *Id.* at 330–40.

First, the Court pointed out that the jury had already found Penry competent to stand trial and rejected his insanity defense, which necessarily meant—the Court surmised—that the jury believed Penry understood the nature of his actions and the wrongfulness of the conduct.[90] The Court then rejected Penry's argument that there was a national consensus against executing persons with intellectual disabilities that reflects an evolving standard of decency.[91] Finally, the Court held the two goals of punishment for the death penalty—retribution and deterrence—were still furthered by the execution of people similar to Penry.[92] The Court found it unlikely every person with a verifiable intellectual disability would lack the necessary moral judgment required under death penalty law.[93] Ultimately, the Court held that an intellectual disability could mitigate a defendant's culpability, but could not eliminate the death penalty.[94]

Penry was eventually given three life sentences in 2008 after suffering through two additional trials following the Supreme Court's rejection of his argument.[95] However, to accept this plea deal, Penry had to stipulate he did not have an intellectual disability, contrary to the history of this case.[96] After *Penry*, it was not until 2002 that the Court would again consider the constitutionality of sentencing a person with an intellectual disability to death.

B. Atkins v. Virginia

In *Atkins v. Virginia*, the Court set a new precedent by ruling that intellectually-disabled defendants could not be sentenced to death, definitively overruling *Penry*.[97] Daryl Atkins was sentenced to death for armed robbery, abduction, and murder.[98] During sentencing, Atkins presented testimony from a forensic psychologist indicating Atkins had an intellectual disability which impeded his ability to understand the consequences of his actions.[99] Nevertheless, the jury sentenced Atkins to death.[100]

The Supreme Court granted certiorari "in light of the dramatic shift in the state legislative landscape" regarding intellectual disabilities and the death

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[90] *Id.* at 333.

[91] *Id.* at 334.

[92] *Penry*, 492 U.S. at 338.

[93] *Id.*

[94] *Id.* at 340.

[95] Mike Tolson, *Deal Keeps Death Row Inmate Penry Imprisoned for Life*, HOUS. CHRON. (Feb. 16, 2008), [https://perma.cc/K64M-L3HQ].

[96] *Id.*

[97] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

[98] *Id.*

[99] *See id.* at 308–09.

[100] *Id.* at 309.

penalty.[101] In its analysis, the Court "first review[ed] the judgment of legislatures that ha[d] addressed the suitability of imposing the death penalty on the [intellectually-disabled]."[102] Then, the Court decided if there was enough consensus amongst the states to rule for or against the application of the death penalty to criminal defendants with proven intellectual disabilities.[103] The Court concluded enough state legislatures were restricting the death penalty based on intellectual disability to rule in favor of Atkins.[104]

Turning to whether legal rationale supported the state consensus, the Court enumerated two major justifications to hold sentencing people with intellectual disabilities to death unconstitutional.[105] First, and in a complete reversal from the *Penry* Court, the Court doubted whether the justifications for the death penalty—retribution and deterrence—applied to cases involving criminal defendants with intellectual disabilities.[106] Concerning retribution, the Court believed "the severity of the appropriate punishment necessarily depend[ed] on the culpability of the offender," and since a person with an intellectual disability is less culpable, "an exclusion for the [intellectually-disabled] [was] appropriate."[107] As for deterrence, the Court found "'it seem[ed] likely that 'capital punishment [could] serve as a deterrent only when murder is the result of premeditation and deliberation.'"[108] However, just as with retribution, potential offenders with intellectual disabilities would be unlikely to successfully learn from watching others' experiences and therefore be less culpable.[109]

Second, the Court feared the significant intellectual functioning deficits of these defendants would lead to a death sentence when the actual circumstances of the case may not warrant such a severe punishment.[110] The Court noted that the increased prospect of false confessions paired with "the lesser ability of [intellectually-disabled] defendants to make a persuasive showing of mitigation" created an unacceptable chance the application of the death penalty would be out of proportion with the crime.[111] Moreover, criminal defendants with intellectual disabilities may be competent enough to stand trial,

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[101] *Id.* at 310.

[102] *Id.* at 313.

[103] *Atkins*, 536 U.S. at 314–15.

[104] *Id.* at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change").

[105] *Id.* at 318.

[106] *Id.* at 318–19.

[107] *Id.* at 319.

[108] *Id.* (citing Enmund v. Florida, 458 U.S. 782, 799 (1982)).

[109] *Atkins*, 536 U.S. at 320.

[110] *Id.*

[111] *Id.*

the Court explained, but that does not mean they will be able to provide meaningful assistance to their counsel.[112] The Court stated they often are capricious witnesses which gives the jury the impression they lack remorse for any wrongdoing.[113] All of this analysis led the Court to rule in favor of Atkins and find the death penalty inapplicable to persons with intellectual disabilities.[114] Again, this area of death penalty law went untouched by the Supreme Court for a number of years until, in 2014, *Hall v. Florida* was brought to the Court's attention.

C. Hall v. Florida

Freddie Lee Hall was convicted of kidnapping, beating, raping, and murdering a pregnant woman and murdering a sheriff deputy in 1978.[115] At the time Hall's case was decided, which was years before the *Penry* case, he was not allowed to introduce any evidence relating to an intellectual disability to serve as a mitigating factor in sentencing.[116] After the *Penry* decision, however, Hall was resentenced and therefore allowed to present evidence of his intellectual disability as a mitigating factor.[117] Despite the extensive amount of evidence Hall provided, the jury affirmed the death sentence.[118] Then, in 2004, after the *Atkins* case, Hall filed an appeal to reevaluate his sentence of the death penalty due to his intellectual disability.[119] He presented the same evidence used in his resentencing to show he had an intellectual disability, including the range of IQ scores from nine IQ tests Hall had taken throughout his life.[120] The Florida Supreme Court denied his appeal, finding Hall failed to fall below Florida's strict seventy-point maximum for an intellectual disability determination.[121]

The Supreme Court then granted certiorari to determine if Florida's bright-line test was constitutional.[122] Ultimately, the Court sided with Hall and struck down Florida's cut-off rule.[123] The Court found Florida, and all other states that had similar rules, misconstrued *Atkins*' characterization of

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[112] *Id.*

[113] *Id.* at 321.

[114] *Id.*

[115] Hall v. Florida, 572 U.S. 701, 704 (2014).

[116] *Id.* at 705.

[117] *Id.*

[118] *Id.* at 706.

[119] *Id.* at 707.

[120] *Id.* The scores ranged from sixty to eighty, but only the range of seventy-one to eighty was presented because the sentencing court excluded the two lower scores for evidentiary reasons.

[121] *Hall*, 572 U.S. at 707.

[122] *Id.* at 707–10.

[123] *Id.* at 723–24.

an intellectual disability as requiring an IQ of seventy or less.[124] This strict bright-line test, the Court explained, was "in direct opposition to the views of those who design[ed], administer[ed], and interpret[ed] the IQ test."[125] Moreover, the Court noted that such a rule completely disregards an essential part of the intellectual disability diagnosis—the adaptive functioning element.[126] The Court went on to state that because "the death penalty is the gravest sentence society may impose," a determination of an intellectual disability must include adaptive functioning deficits present throughout a defendant's life in addition to the IQ score.[127]

D. Moore v. Texas

With still a fair amount of trepidation amongst courts on how to proceed when faced with a claim of an intellectual disability defense, the Court took up the case of *Moore v. Texas* to solidify lower courts' analysis structure. In the Spring of 1980, Bobby Moore, along with two others, robbed a grocery store.[128] During the commission of the robbery, Moore fatally shot the store clerk, resulting in Moore's conviction for murder and death sentence.[129] Moore's first sentence was vacated by a federal habeas court and that decision was later affirmed by the Fifth Circuit due to ineffective legal assistance.[130] In 2001, Moore was sentenced to death again with the Texas Court of Criminal Appeals (CCA), highest criminal court in Texas, affirming on direct appeal.[131] Moore petitioned for habeas relief in 2014 and a two-day hearing was held in a state habeas court regarding Moore's status as a person with an intellectual disability.[132] The habeas court cited many of Moore's mental and social deficits that arose during his young adolescence.[133] Beyond an evaluation of Moore's life, the habeas court sought guidance from the medical community

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[124] *Id.* at 724 (citing Atkins v. Virginia, 536 U.S. 304, 308 (2002)).

[125] *Id.* at 724.

[126] *Id.*

[127] *Hall*, 572 U.S. at 724.

[128] Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

[129] *Id.*

[130] *Id.* at 1044–45 (citing Moore v. Collins, No. H-93-3217, 1995 U.S. Dist. Lexis 22859, at *35 (S.D. Tex. 1995); Moore v. Johnson, 194 F.3d 589, 622 (5th Cir. 1999)).

[131] *Moore*, 137 S. Ct. at 1045 (citing Moore v. State, No. 74,059, 2004 WL 231323 at *1 (Tex. Crim. App. Jan. 14, 2004)).

[132] *Id.* at 1039, 1045.

[133] *Id.* (citing Appeal to Petition for Certiorari at 183a–187a, *Ex parte* Moore, No. 314483-C (185th Jud. Dist., Harris Cty., Tex. Feb. 6, 2015) (No. 129a)) ("At 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. . . Often, [Moore] was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him 'stupid' for his slow reading and speech.").

for "current medical diagnostic standards."[134] In conjunction with the consensus of the medical community, the habeas court found Moore's IQ scores to be indicative of intellectual functioning deficits and expert testimony sufficiently proved adaptive functioning deficits.[135] All of this led the habeas court to recommend either a sentence reduction to life in prison or a full trial on Moore's intellectual disability defense.[136]

Citing its own previous decision as precedent, the CCA overruled the habeas court's findings and affirmed the second death sentence.[137] As an initial matter, the CCA reaffirmed the precedent it set in *Ex parte Briseno* regarding the death penalty and intellectual disability—the questions the CCA outlined in *Briseno* became known as the "Briseno factors."[138] The CCA then rejected the habeas court's decision, citing one of the Supreme Court's positions in *Atkins* which "'left [final judgment] to the States to develop appropriate ways to enforce the constitutional restriction' on the execution of the intellectually-disabled."[139] The CCA went on to explicitly rebuff the guidance of the medical community regarding intellectual disabilities "because of 'the subjectivity surrounding the medical diagnosis of intellectual disability and because the Texas Legislature had not displaced *Briseno*.'"[140]

The CCA explained that according to the *Briseno* factors, Moore's evidence was insufficient to prove significantly below-average intellectual functioning.[141] The CCA reduced the seven IQ test scores Moore accumulated throughout his life down to two scores, claiming the other five were "unreliable."[142] Those two scores, seventy-eight and seventy-four, were above the

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[134] *Moore,* 137 S. Ct. at 1045.

[135] *Id.* at 1045–46.

[136] *Id.* at 1046.

[137] *Id.* (citing *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015)).

[138] *Id.* at 1046–47. The *Briseno* factors are seven questions comprising Texas' standards for assessing intellectual disability claims: (1) "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually-disabled] at that time, and, if so, act in accordance with that determination?"; (2) "Has the person formulated plans and carried them through or is his conduct impulsive?"; (3) "Does his conduct show leadership or does it show that he is led around by others?"; (4) "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?"; (5) "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?"; (6) "Can the person hide facts or lie effectively in his own or others' interest?"; (7) "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

[139] *Id.* at 1046 (citing *Ex parte Moore,* 470 S.W.3d 486).

[140] *Moore*, 137 S. Ct. at 1047.

[141] *Id.*

[142] *Id.*

significantly subaverage intellectual functioning cutoff IQ score of seventy;[143] therefore, the CCA rationalized, Moore's intellectual functioning level was high enough to eliminate the possibility of an intellectual disability.[144] Moreover, the CCA explained that Moore's actions before and after being imprisoned revealed adaptive functioning strengths.[145] Finally, the CCA concluded the culmination of the *Briseno* "factors 'weigh[ed] heavily' against finding that Moore had satisfied" an intellectual disability defense.[146]The Supreme Court "granted certiorari to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* compl[ied] with the Eighth Amendment and [the] Court's precedent."[147] After outlining intellectual disability death penalty case law—*Atkins v. Virginia*[148] and *Hall v. Florida*[149]—the Court concluded the CCA's holding was "irreconcilable" with both the Eighth Amendment's evolving standards of decency and *Hall*'s rejection of states' strict observance of the IQ score cutoff of seventy.[150] Including the standard error of measurement advocated for by the medical community,[151] Moore had an IQ score range of sixty-nine to seventy-nine.[152] Thus, the Court rationalized, the fact that the lower end of Moore's IQ range fell below seventy required the CCA to consider any evidence of Moore's adaptive functioning deficits.[153]

Moving on to the CCA's analysis of Moore's adaptive functioning, the Court declared the analysis deviated from current clinical criteria and from the "older clinical standards the court claimed to apply."[154] The CCA erroneously focused its analysis on what it perceived to be evidence of Moore's adaptive functioning strengths.[155] Rather, the Court clarified, the CCA should have followed the clinical guidance that advised a survey of a person's

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[143] *Id.* at 1042.

[144] *Id.*

[145] *Moore*, 137 S. Ct. at 1042.

[146] *Id.*

[147] *Id.* at 1048.

[148] Atkins v. Virginia, 536 U.S. 304 (2002) (finding intellectually-disabled defendants ineligible for the death penalty under Eighth Amendment's cruel and unusual punishment clause).

[149] Hall v. Florida, 502 U.S. 701 (2014) (striking down Florida's bright-line rule for determining when a defendant's IQ score renders him intellectually-disabled for death penalty purposes).

[150] *Moore*, 137 S. Ct. at 1048–49.

[151] *See* DSM-V, *supra* note 37, at 37 ("Individuals with intellectual disability have scores approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ±5 points).").

[152] *Moore*, 137 S. Ct. at 1048–49.

[153] *Id.* at 1049 (citing Hall v. Florida, 572 U.S. 701, 724 (2014)).

[154] *Id.* at 1050.

[155] *Id.*

adaptive functioning deficits instead of strengths.[156]Furthermore, the Court highlighted the fact clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting'" when discussing the CCA's decision on Moore's apparent adaptive functioning strengths in prison.[157]

Lastly, the Court admonished the CCA's use of its own superseded precedent in *Briseno*.[158] Looking again to its decision in *Hall*, the Court determined that "[b]y design and in operation, the *Briseno* factors 'creat[e] an unacceptable risk that a person with intellectual disability will be executed.'"[159] The Court found persuasive that the *Briseno* factors were inconsistent with every other states' legislation or case law regarding intellectual disability and Texas's treatment of intellectual disabilities in other contexts—such as assessment of students for school benefits or diagnosis of juveniles in the criminal justice system—required conformity with the most recent version of the DSM.[160] The Court ultimately held "Texas [could not] satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake."[161] With its decision in *Moore*, the Court commanded to all states that any capital proceeding involving intellectual disability must reflect current medical community standards.[162]

E. Current Cases

The landscape of death row inmates with claims for death penalty exemptions due to intellectual disability is extremely varied.[163] But one thing

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[156] *Id.* (quoting DSM-V, *supra* note 36, at 33, 38). *See also Brumfield v. Cain*, 576 U.S. 305, 320 (2015) (quoting AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (Ruth Luckasson et al. eds.,10th ed. 2002) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'").

[157] *Moore*, 137 S. Ct. at 1050 (citing DSM-V, *supra* note 37, at 38).

[158] *Id.* at 1051.

[159] *Id.* (citing Hall v. Florida, 572 U.S. 701, 724 (2014)).

[160] *Id.* at 1052.

[161] *Id.*

[162] *Id.* at 1053.

[163] *See Continuing Issues: Determining Intellectual Disability after* Atkins, DEATH PENALTY INFO. CTR., [https://perma.cc/P37Y-AC7D] (last visited May 9, 2020); *Judge Finds Federal Death-Row Prisoner Bruce Webster Intellectually Disabled, Vacates Death Sentence*, DEATH PENALTY INFO. CTR. (July 4, 2019), [https://perma.cc/WN5N-8UJR]; *NEW PODCAST: He May Be Innocent and Intellectually Disabled, But Rocky Meyers Faces Execution in Alabama*, DEATH PENALTY INFO. CTR. (Feb. 13, 2020), [https://perma.cc/7C2G-KU5H]; *No Court Has Reviewed the Evidence that Gary Bowles May Be Intellectually Disabled; Florida Plans to Execute Him Anyway,* DEATH PENALTY INFO. CTR. (Aug. 22, 2019), [https://perma.cc/W2ND-8XXL]; *Stay of Execution Granted for Brain-Damaged and Intellectually Impaired Texas Man Who Was Eighteen at Time of Crime*, DEATH PENALTY

remains consistent throughout all of the cases: the lack of clinically sound and constitutionally valid procedures to protect these individuals.[164] This fact remains constant despite the extent to which the Supreme Court has emphasized the importance of needing to protect intellectually-disabled defendants.[165]

Intellectually-disabled "defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crime they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes."[166] Since last year, there have been several examples that show the battle intellectually-disabled defendants face when asserting this death penalty exception.[167]

In June 2019, a federal district judge vacated the death sentence of Bruce Carneil Webster after finding previously inaccessible evidence corroborated his intellectual disability claim.[168] Webster was sentenced to death in 1996 for participating in the kidnapping, rape, and killing of a sixteen-year-old girl.[169] At his original trial, Webster's attorneys submitted some evidence suggesting Webster was intellectually-disabled, but this was before the decision in *Atkins* and the evidence was not considered much of a mitigating factor, so "only

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INFO. CTR. (Aug. 15, 2019), [https://perma.cc/AYK6-J66N]; *Tennessee Sets Execution Dates for Two Men with Issues of Innocence, Intellectual Disability, and Competency*, DEATH PENALTY INFO. CTR. (Feb. 26, 2020), [https://perma.cc/LFZ7-WUCV].

[164] *See* John H. Blume, et al., *A Tale of Two (And Possibly Three)* Atkins*: Intellectual Disability and Capital Twelve Years After the Supreme Court's Creation of Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014); *States Evidentiary Burdens for Proving Intellectual Disability*. DEATH PENALTY INFO. CTR., [https://perma.cc/NKE2-XJFW] (citing Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U.L. REV. 553, 607 (2017)).

[165] Atkins v. Virginia, 536 U.S. 304, 305 (2002).

[166] *Id.*

[167] *Judge Finds Federal Death-Row Prisoner Bruce Webster Intellectually Disabled, Vacates Death Sentence*, DEATH PENALTY INFO CTR. (July 4, 2019), [https://perma.cc/TU6M-9EM8]; *Stay of Execution Granted for Brain-Damaged and Intellectually Impaired Texas Man Who Was Eighteen at Time of Crime*, DEATH PENALTY INFO. CTR. (Aug. 15, 2019), [https://perma.cc/UR9U-XY5H]; *No Court Has Reviewed the Evidence that Gary Bowles May Be Intellectually Disabled; Florida Plans to Execute Him Anyway,* DEATH PENALTY INFO. CTR . (Aug. 22, 2019), [https://perma.cc/FA6G-XRP3]; *He May Be Innocent and Intellectually Disabled, But Rocky Meyers Faces Execution in Alabama*, DEATH PENALTY INFO. CTR. (Feb. 13, 2020), [https://perma.cc/636B-BCHF]; *Tennessee Sets Execution Dates for Two Men with Issues of Innocence, Intellectual Disability, and Competency*, DEATH PENALTY INFO. CTR. (Feb. 26 2020), [https://perma.cc/5794-YXAJ].

[168] Juan A. Lozano, *Judge Vacates Federal Death Sentence in 1994 Texas Case*, ASSOCIATED PRESS (June 20, 2019), [https://perma.cc/HU3Q-DY44].

[169] *Id.*

four of the twelve jurors believed he was intellectually-disabled."[170] After spending fourteen years on death row, Webster's appellate lawyers discovered new evidence in government records further confirming Webster's intellectual disability.[171] His lawyers brought this evidence to the court, but the "federal appeals court said he had exhausted his appeals and new evidence could be considered only if it related to innocence of the crime."[172] That decision was ultimately overturned and Webster was allowed to submit the evidence in a new trial before a federal district court.[173] The federal district judge who presided over the case, Judge William Lawrence, determined that the scores "consistently demonstrate that Webster has an IQ that falls within the range of someone with intellectual deficits."[174] The federal prosecutors assigned to Webster's case appealed this decision in June of 2019,[175] but on September 22, 2020, the Seventh Circuit affirmed the judgment and vacated Webster's death sentence.[176]

More recently, an execution date was set for Byron Lewis Black, who is on death row in Tennessee for killing his girlfriend and her two daughters in 1988.[177] Attorneys for Black state that he currently has an IQ of sixty-seven in addition to brain damage and schizophrenia.[178] Black first attempted to assert an intellectual disability defense in his post-trial appeal, but the court ruled he was unable to meet the burden of proof.[179] Black then took his claim to the federal courts, but the Court of Appeals for the Sixth Circuit affirmed

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[170] *Judge Finds Federal Death-Row Prisoner Bruce Webster Intellectually Disabled, Vacates Death Sentence*, DEATH PENALTY INFO. CTR. (July 4, 2019), [https://perma.cc/PQ5R-QN4V].

[171] *Id.* ("The Social Security records included an application for benefits predating the time of the murder in which Webster was deemed eligible for benefits because of disability. The records contained a statement by a psychologist that described Webster's intellectual functioning as 'quite limited,' noting that a form he filled out was 'rife with errors in syntax, spelling, punctuation, grammar, and thought.'").

[172] *Id.*

[173] *Id.*

[174] *Webster v. Lockett*, No. 2:12-cv-86-WTL-MJD, 2019 WL 2514833, at *6, (S.D. Ind. June 18, 2019). *See also* Juan A. Lozano, *Judge Vacates Federal Death Sentence in 1994 Texas Case*, ASSOCIATED PRESS (June 20, 2019), [https://perma.cc/7HZN-PPLQ] ("In the past 26 years, Webster has had IQ scores as low as 51 and 53.").

[175] *Judge Finds Federal Death-Row Prisoner Bruce Webster Intellectually Disabled, Vacates Death Sentence,* DEATH PENALTY INFO. CTR. (July 4, 2019), [https://perma.cc/V4EU-XPB3].

[176] Katie Stancombe, *7th Circuit Vacates Intellectually Disabled Killer's Death Sentence*, THE INDIANA LAWYER (Sept. 22, 2020), [https://perma.cc/V45N-7QV9].

[177] Adam Tamburin, *Tennessee Supreme Court Sets Two New Execution Dates for 2020*, TENNESSEAN (Feb. 24, 2020, 6:07 PM), [https://perma.cc/T4SY-LAWN].

[178] Response in Opposition to Motion to Set Execution Date; Notice that Defendant Is Incompetent to Be Executed and Request for a Hearing; and Request for Certificate of Commutation at 1, *Tennessee v. Byron Lewis Black*, No. M2000-00641-SC-DPE-CD (Tenn. 2019).

[179] Black v. State, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 at *1 (Tenn. Crim. App. Oct. 19, 2005).

the district court's denial of post-conviction relief on intellectual disability grounds.[180] When the Supreme Court denied his petition for writ of certiorari,[181] prosecutors for Tennessee applied to set an execution date.[182] Black's attorneys filed a response in opposition of his execution, again citing Black's intellectual disability.[183] In their response, Black's attorneys note that Black has been diagnosed by six different experts as intellectually-disabled, and to execute him would be contrary to "the medical community's consensus" and federal law.[184] Nevertheless, the Tennessee Supreme Court found that Black "ha[d] presented no extenuating circumstances warranting issuance of a certificate of commutation."[185]Black's execution is scheduled for October 8, 2020, but in April 2020, his attorneys filed another extension in response to the COVID-19 pandemic.[186] One of Black's attorneys was able to successfully convince the Tennessee Supreme Court to postpone the execution of "another death row inmate, Oscar Franklin Smith," just two weeks prior.[187] Black's attorney cited many of the same arguments from her previous motion and "also pointed to the presence of COVID-19 inside Riverbend Maximum Security Institution, where death row inmates are housed."[188] In December 2020, the Tennessee Supreme Court approved an indefinite stay of execution for Black given the current state of the pandemic.[189]

In another case, which will later serve as the case study for this Note's proposed bill, Dexter Johnson was granted two stays of execution in 2019—the first due to questions regarding the quality of representation from his first attorney and the second to investigate Johnson's intellectual disability claim.[190] Just a few days after his eighteenth birthday, in June 2006, Johnson

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[180] Black v. Carpenter, 866 F.3d 734, 736 (6th Cir. 2017).

[181] Black v. Mays, 138 S. Ct. 2603, (2018).

[182] Motion to Set Execution Date at 3, Tennessee v. Black, No. 88-S-1479 (Tenn. 2019).

[183] Response in Opposition to Motion to Set Execution Date; Notice that Defendant Is Incompetent to Be Executed and Request for a Hearing; and Request for Certificate of Commutation at 1, Tennessee v. Byron Lewis Black, No. M2000-00641-SC-DPE-CD (Tenn. 2019).

[184] *Id.* at 19 (citing Moore v. Texas, 137 S. Ct. 1039, 1044 (2017)).

[185]Tennessee v. Black, No. 88-S-1479 (Tenn. Feb. 24, 2020) (order granting motion to set an execution date).

[186] *Tennessee Sets Execution Dates for Two Men with Issues of Innocence, Intellectual Disability, and Competency*, DEATH PENALTY INFO. CTR. (Feb. 26, 2020), [https://perma.cc/3PMR-S9EF]; Jason Lamb, *Death Row Attorneys Want Another Execution Postponed Due to COVID-19*, NEWS CHANNEL 5 NASHVILLE (Apr. 29, 2020, 2:17 PM), [https://perma.cc/M959-8HPB].

[187] Lamb, *supra* note 186.

[188] *Id.*

[189] Order, Tennessee v. Byron Lewis Black, No. 88-S-1479 (Tenn. filed Dec. 3, 2020).

[190] *Stay of Execution Granted for Brain-Damaged and Intellectually Impaired Texas Man Who Was Eighteen at Time of Crime*, DEATH PENALTY INFO. CTR. (Aug. 15, 2019), [https://perma.cc/3BTB-BEHX]; Johnson v. Davis at 4, No. 4:11-CV-2466 (S.D. Tex. 2019).

and four others kidnapped and killed two people.[191] In his petition for the second stay of execution, Johnson's attorneys claimed he had an IQ of 70 and was diagnosed with schizophrenia.[192] In support of this claim, his attorneys explained that Johnson's intellectual disability symptoms occurred at a young age "which [was] marked by instability, violence, and abuse."[193] Moreover, evidence showed that "Johnson struggled to perform basic tasks, like remembering to bathe, following a bus route, and counting change."[194] Johnson repeated many grades while in school and it is suggested he still cannot read beyond a sixth-grade level.[195] Johnson's attorneys stressed that the new guidelines in the DSM-V, which were not in place during Johnson's first habeas petition, would affirm an intellectual disability diagnosis.[196]

IV. ANALYSIS

This Part will first explain how the use of IQ tests in the determination of whether a criminal defendant has an intellectual disability leads to different outcomes in different states. Then, this Part will highlight those differences through a state comparison. Next, this Part will argue that this unequal application throughout the states is unconstitutional while explaining why the uniform procedure in the proposed bill—found in Appendix A—is constitutional. Further, this Part will highlight how the ability of the proposed bill to evolve as clinical standards change and improve prevents the legal standards for intellectual disability from falling too far behind clinical standards. Finally, this Part will apply the proposed legislation to a current death row case as a case study to exemplify how one uniform procedure is superior.

A. Using IQ Tests Leads to Unequal Results

The current method of determining death penalty ineligibility due to intellectual disability among the states still relies too heavily on IQ test results.[197] This procedure generates arbitrary results where, all too often, defendants who would have been diagnosed with an intellectual disability in the clinical setting are found to not have an intellectual disability for the purposes

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[191] Elizabeth Weill-Greenberg, *Harris County D.A. Seeks Execution of Intellectually Disabled Man, Lawyer Says*, THE APPEAL (Sept. 10, 2019), [https://perma.cc/WU89-CCNE].

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Stay of Execution Granted for Brain-Damaged and Intellectually Impaired Texas Man Who Was Eighteen at Time of Crime*, DEATH PENALTY INFO. CTR. (Aug. 15, 2019), [https://perma.cc/TM9F-PZJ2].

[197] Johnson, Note, *supra* note 80, at 780–82.

of the death penalty.[198]Such a finding also often goes against the testimony of medical professionals because so much weight is still placed on the IQ score, which is extremely unreliable.[199] As the examples in Part III show, the effects of these inequalities can be contrary to tremendous amounts of evidence proving an intellectual disability.[200] The disparate outcomes in different states are likely due to the Flynn Effect, variable procedures, or a combination of both.

1. The Flynn Effect

As our understanding of intellectual disabilities grew, so too did the realization that IQ tests were not an accurate assessment of a person's intellectual or adaptive functioning.[201] For example, a major discrepancy in the results, known as the Flynn Effect, was discovered by James Flynn in 1987.[202] The Flynn Effect refers to the phenomenon where a person scores higher on an IQ test from one year than they would on a test from another year.[203] Due to the fast-paced nature of our society, IQ tests quickly become out-of-date, yet tests are only normalized, or updated, roughly every twenty years.[204] This effect disproportionately affects persons of color and women because IQ tests are inherently biased towards white males.[205]

Awareness of the Flynn Effect spans nearly the same amount of time as death penalty law dealing with intellectual disabilities does.[206] *Atkins* was the first case to acknowledge the Effect's significance on a person's score in the legal sense. Because the phenomenon caused a person's score to be artificially raised, the Flynn Effect became the basis for several arguments by defendants to adjust IQ scores down.[207] One issue with this, however, is academic communities have failed to reach a consensus regarding a standard amount of error to indicate how much a test score should be lowered.[208] Scholars point

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[198] James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 PSYCHOLOGY, PUB. POL'Y, & L. 170, 185–86 (2006).

[199] *Id.*

[200] *See supra* Part III.

[201] *See supra* Section II.B.2.b.

[202] Ceci et al., *supra* note 46, at 12.

[203] Hagan & Guilmette, *supra* note 84, at 23.

[204] Ceci et al., *supra* note 46, at 13.

[205] *See* Sanger, *supra* note 32 at 108–12.

[206] Hagan & Guilmette, *supra* note 84 at 23–24.

[207] *Id.* at 23.

[208] *Id. See also* LaJuana Davis, *Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 309 (2003) (pointing out the fact that "no definitive explanation for the Flynn Effect has been discovered").

to studies that show "[t]he size of the Flynn effect . . . varies across different IQ tests and different editions or iterations of the same IQ test."[209]

Whether someone has an intellectual disability and is thus ineligible for the death penalty should not be something open for argument or interpretation. States may seek to overcome this issue by having the defendant retake a new test during the trial instead of using any old scores.[210] Regardless, this method is not capable of accurately accounting for the Flynn Effect.[211] In one iteration of this idea, the defendant would take the same test he or she previously took. This, however, reflects the very issue at the center of the Flynn Effect controversy. If the defendant were to take the older version, he or she is practically guaranteed to score higher than he or she had the first time—likely placing him or her in an IQ range too high to be considered intellectually-disabled.[212] This increase could be attributed to either the idea the defendant gained experience from the previous test administration or the fact that such a significant amount of time passed between the two evaluations to render the older test statistically irrelevant.

The second possible iteration of the idea is to have the defendant take a new test, the defendant would take a test from a different manufacturer and any previous scores on a test from another manufacturer wouldn't carry much weight. The main concern with this example is that the new test may not have been renormed recently, thus subjecting the score to the Flynn Effect yet again. Another concern is that the test by the different manufacturers may not sufficiently account for the defendant's socioeconomic or cultural background.[213] Here too, the score is not an accurate representation of the individual's intellectual functioning.

Moreover, this problem cannot be solved by having the defendant take the same version of the test repeatedly during a set period.[214] This would subject the IQ score to the "practice effect."[215] This is a phenomenon related to the Flynn Effect "where a person is given the same or an equivalent IQ test in a short span of time [resulting in] higher scores. . . on the later tests, but those increased scores do not reflect improved intelligence or even greater effort."[216] Whatever increases the defendant achieved on the later tests are more likely to result from the experience of taking the test

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[209] Hagan & Guilmette, *supra* note 84 at 24.

[210] Davis, *supra* note 208, at 309.

[211] *Id.*

[212] Ceci et. al., *supra* note 46, at 12–13.

[213] Sanger, *supra* note 32, at 103–04.

[214] Davis, *supra* note 208, at 309.

[215] *Id.* at 309–10.

[216] *Id.* at 309.

recently.[217] The anxiety of taking a new test in a new environment would be gone, so the defendant would be more comfortable and able to think more clearly.

These concerns are highlighted in an example included by James Flynn in one of his articles about the Flynn Effect.[218] Flynn utilizes the story of a man—renamed John Doe for confidentiality reasons—whose unfortunate experience shows the real-world consequences that can be attributed to the Flynn Effect.[219] After being sentenced to death for committing murder, John sought to overturn that sentence due to his intellectual disability.[220] In 1975, during his developmental years, John took an intelligence test as part of an assessment regarding his difficulties in school.[221] The problem, however, was that his school had not purchased the most recent version of the intelligence test, which had just been renormed to provide more accurate results.[222] John was given a version of a test that had last been normed in 1947.[223]

Despite clear issues in reading and math coupled with extra tutoring, the school psychologist who administered the test "rejected a diagnosis of [an intellectual disability] on the basis of a[n] . . . IQ score of 75."[224]As Flynn points out, the test John took was off by about eight points from what an accurate score would be.[225] This means John actually should have been assessed for an intellectual disability with an IQ score of sixty-seven in 1975.[226] Fast-forwarding to the present trial, John was again tested for an intellectual disability by the prosecution and his defense.[227] This time he was given a recently normed test, resulting in a score of seventy for the prosecution and seventy-two for the defense.[228] The problem, Flynn claims, is that the test John took gives a bonus of 2.34 points, so John actually scored roughly sixty-seven and sixty-nine, respectively.[229] Moreover, Flynn argues, the test's norms were ten years old, producing an arbitrary increase of roughly three

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[217] *Id.* at 310.

[218] Flynn, *supra* note 198, at 185–86.

[219] *Id.* at 185.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] Flynn, *supra* note 198, at 185–86.

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *Id.*

points.[230] Thus, for his assessment for death penalty ineligibility, John should have been attributed IQ scores of sixty-four and sixty-six, well within the range considered to be indicative of an intellectual disability.[231]

2. State Comparison

One of the most unconstitutional aspects of the current landscape of intellectual disability state legislation is its arbitrability.[232] States differ in who has the burden of proof and what standard of proof a party is held to,[233] who the fact-finder is,[234] and at what point in the trial the intellectual disability determination is made.[235] Thus, whether a capital defendant is successful with an intellectual disability claim is highly dependent on where the crime is committed.[236]

The first way states can differ is the burden of proof.[237] No state statute places the burden on the Government to disprove a defendant's intellectual disability assertion.[238] Thus, a defendant must prove an intellectual disability by either 1) preponderance of the evidence, 2) clear and convincing proof, or 3) proof beyond a reasonable doubt.[239] This presents a unique challenge for defendants because state courts have already shown their reluctance to accept a claim of intellectual disability. Additionally, this structure places older defendants in the difficult position of having to prove the disability emerged before they turned eighteen. In Byron Black's case, the court was unpersuaded by diagnoses from six different experts proving Black suffers from an intellectual disability.[240] Courts may also be looking at IQ scores from tests that haven't been normed in a significant amount of time, making the scores largely unrepresentative of the defendant's actual intellectual abilities.

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230 Flynn, *supra* note 198, at 185–86.

231 *Id.* Flynn also points out that the two tests were given about a week apart and that is likely the reason for the two-point difference. *Id.*

232 PEGGY M. TOBOLOWSKY, EXCLUDING INTELLECTUALLY DISABLED OFFENDERS FROM EXECUTION: THE CONTINUING JOURNEY TO IMPLEMENT ATKINS 119–32 (2014).

233 *Id.* at 79–83. *See also* DEATH PENALTY INFO. CTR., *supra* note 161; Kathryn Raffensperger, Note, Atkins v. Virginia: *The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 748 (2012).

234 TOBOLOWSKY, *supra* note 232, at 83–86.

235 *Id.*

236 Cheung, *supra* note 57, at 319.

237 *See* Raffensperger, *supra* note 233, at 748–49; TOBOLOWSKY, *supra* note 232, at 87–89.

238 Raffensperger, *supra* note 233, at 748.

239 *Id.*

240 *See supra* Section III.E.; Response in Opposition to Motion to Set Execution Date; Notice that Defendant Is Incompetent to Be Executed and Request for a Hearing; and Request for Certificate of Commutation at 19, Tennessee v. Black, No. M2000-00641-SC-DPE-CD (Tenn. Dec. 30, 2019).

Moreover, the basic fact that a fact-finder could determine a defendant intellectually-disabled in a state using a preponderance of the evidence standard, and not intellectually-disabled in another state requiring proof beyond a reasonable doubt, is not only extremely inconsistent but also raises some serious constitutional questions.[241]

Another difference in state procedures is who the fact-finder is and when the intellectual disability determination occurs.[242] An intellectual determination can occur at any time in a trial—"from the pretrial to the post-punishment phase of the proceeding."[243] When the judge is the fact-finder, then the intellectual disability determination will generally occur during a pretrial hearing.[244] This means all the evidence proving the defendant is intellectually-disabled is presented before the trial starts and without potential jury consideration. The evidence is not necessarily prevented from being reintroduced during the main trial portion, but the breadth of the evidence may not be the same. Therefore, the jury may not be given the chance to truly comprehend the effect the intellectual disability has on the defendant's mental capacity. This problem is exacerbated by the fact that the defendant may have been found competent to stand trial, which suggests some form of comprehension of morality and right and wrong that may not have been present at the time the defendant committed the crime.

B. Solution

The ultimate solution to this problem would be to finally make persons with intellectual disabilities exempt from the death penalty completely, but as this has only happened in one state,[245] the likelihood is slim at best. Thus, the solution is to utilize concurrent planning—work to pass legislation such as this proposed bill while also continuing the fight to end the death penalty. To often, death penalty abolitionists are preoccupied with eliminating the death penalty to consider efforts that would make things safer for defendants already stuck in the criminal justice system. Making the system safer does not undermine the argument to end the death penalty; the overarching illegality argument[246] for the death penalty still stands.

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[241] Raffensperger, *supra* note 233, at 749.

[242] *Id.* at 747–48; TOBOLOWSKY, *supra* note 232, at 90–94.

[243] TOBOLOWSKY, *supra* note 232, at 91.

[244] Raffensperger, *supra* note 233, at 748.

[245] Aurélie Tabuteau Mangels, *Should Individuals with Severe Mental Illness Continue to be Eligible for the Death Penalty?*, 32 CRIM. JUST. 9, 10 (2017) ("Connecticut is the only state to have had an explicit severe mental illness exemption.").

[246] Death penalty abolitionists argue that the government should not be able to take a life because it violates the Eighth Amendment's prohibition of cruel and unusual punishment. Even with the safest procedures, that is still possible.

1. The Procedure Should Evolve as Clinical Standards Change

The convergence of intellectual disability and death penalty case law highlights the slow pace at which the criminal justice system adopts modern clinical understandings of intellectual disability diagnoses.[247] Creating a law that matches the clinical standards as they are today would be a vast improvement, but it would also necessarily result in an insufficient procedure in the future. As science advances our knowledge about intellectual disabilities, so too should our criminal justice system benefit from such knowledge.[248] Therefore, the law creating a threshold procedure should also include a federal procedure for a mandated review of the field to occur every five years. This review would allow lawmakers to identify and analyze improvement in the clinical setting and apply them to death penalty law. Moreover, this review simply creates a more formal analysis of the evolving standards of decency the Eighth Amendment already imposes.

The procedure advanced in the proposed bill reduces the likelihood the Flynn Effect will compromise the intellectual disability determination because the emphasis on the IQ scores is no longer present. Instead, the bill relies more on the guidelines advanced by current clinical understanding, which instructs clinicians to use neuropsychological tests because those types of tests better assess intellectual deficits than IQ tests. IQ scores are not entirely ignored, but their inclusion in the analysis of a defendant's case is purely supplementary. IQ scores can neither wholly disprove nor affirm the determination of an intellectual disability. Furthermore, any analysis that relies on IQ scores must be done with the defendant's socioeconomic and cultural background in mind. This is the best way to reduce any chances that the test was biased against a defendant due to race, gender, or status in life.

This approach significantly improves the current landscape of intellectual disability procedures throughout the states because many, if not most, states do not have any mechanisms that allow their procedures to improve as the medical community gains a greater understanding. Even more important, many states have procedures that reflect the old and outdated assumption that IQ scores are the determinative factor in an intellectual disability diagnosis. The bill not only updates those procedures but also ensures that that situation will not become a problem again.

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[247] *See infra* Part III.

[248] Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM. & MARY BILL RTS. J. 467, 479 (2014) ("The lack of recognition of expertise in this area has resulted in legislation and court rulings that establish precedence or guidelines of diagnosis of [intellectual disabilities] that have little or no basis in the scientific literature on [intellectual disabilities], making a just finding in an *Atkins* case very difficult.").

2. Application Case Study: Dexter Johnson

Dexter Johnson is currently sitting on death row in Texas for his part in a double murder committed by Johnson and four others in 2006.[249] Although he still maintains his innocence, Johnson has repeatedly argued an intellectual disability defense to vacate his death sentence.[250] As Johnson has yet to receive an official determination regarding his status as intellectually-disabled,[251] his case presents a unique opportunity to demonstrate the proposed procedure.

Under this bill, Johnson's burden of proof to establish his intellectual disability is by a preponderance of the evidence, meaning "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[252] Johnson could present any and all IQ tests he has taken over his life, the neuropsychological testing that showed intellectual deficits, and testimony from friends, family, and teachers regarding his adaptive deficits. Under the new standards outlined in the DSM-V, Johnson's average IQ score of seventy[253] would no longer be an automatic bar to finding an intellectual disability. Sufficient evidence of his schizophrenia diagnosis[254] will also bear significant weight on the court's analysis. Stories from his childhood showing that he was bullied for being "slow" and his reactions in class when he said the wrong answer[255] will have more influence. In addition, Johnson could take the stand himself to show the court his pronounced stutter and significantly impaired language skills.

Johnson would also have to undergo additional testing from a psychologist chosen by the prosecution—those findings would then need to be read into the record during the hearing. Evidence from either side will be presented to the judge, followed by rebuttal evidence if necessary. The judge will then make a determination, again, using the preponderance of the evidence standard. If Johnson was not in an appellate phase, this pre-trial determination would dictate the nature of the trial to come. If the judge found Johnson to have an intellectual disability, then the death penalty would no longer be an option. Regardless of the determination, Johnson could use the evidence presented at the hearing during the sentencing phase of his trial—if found guilty—to attempt to mitigate his sentence.

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[249] Jolie McCullough, *Federal Court Stops Execution of Dexter Johnson Within 24 Hours of His Scheduled Death*, TEX. TRIBUNE (Aug. 14 2019), [https://perma.cc/JW53-GJ3Z].

[250] *Id.*

[251] *Id.*

[252] *Preponderance of the Evidence,* BLACK'S LAW DICTIONARY (8th ed. 2004).

[253] Weill-Greenberg, *supra* note 191.

[254] *Id.*

[255] *Id.*

Overall, it is likely that Johnson would be successful under this proposed bill because his evidence would fulfill the elements needed to prove an intellectual disability and he could present different types of evidence for each element. Additionally, the guidelines from the DSM-V and not the DSM-IV, which placed more emphasis on the IQ score, would assess the evidence. This proposed bill reflects the significance of the decision and the consequences if the determination does not bode well for Johnson. The bill was written in an attempt to protect defendants like Johnson who, although they committed a crime and must accept some sort of punishment, should not be punished because they think differently than the average person.

V. CONCLUSION

The current reliance on IQ tests to determine intellectual disabilities for death penalty eligibility is unconstitutional for many reasons. First, IQ scores are highly arbitrary due to the Flynn Effect and the practice effect. This opens up the scores to an argument from both the prosecution and defense regarding the scores' accuracy, making the main portion of the current intellectual disability assessment reliant on interpretation by non-experts. Second, there is a significant disparity between the states regarding the procedure to prove an intellectual disability defense. Defendants in one state could have a completely different legal outcome in another state. This denies anyone seeking to claim exemption from the death penalty on account of intellectual disability equal application of the laws. Finally, the legal standards used to determine intellectual disabilities are often behind what the current clinical standards require. The DSM-V, one of the most respected manuals for mental disorders, no longer recommends assessment using IQ scores and cautions that even if a score is to be included, it must be interpreted by a professional according to the context of the person's life experiences. States need to reconcile their death penalty statutes to reflect clinical understanding.

To address this abhorrent state of our union, Congress should pass a law creating a federally-mandated threshold procedure—such as the one proposed in this note— that reflects current clinical standards. Making the law a threshold procedure will bolster the states that currently have the more insufficient procedures up to clinical standards, while also allowing those states who have adopted more stringent standards to keep their procedure the same. In addition, this law should require a review every five years to determine if any advancements have occurred that would make the threshold procedure invalid. Together, it will create a more constitutional application of the intellectual disability exception to the death penalty, helping inch along the long path toward finding the death penalty unconstitutional as a whole.

VI. APPENDIX A

A BILL

Capital Defendants with Intellectual Disabilities Act

AN ACT

To amend the Federal Death Penalty Act of 1994 to define a uniform procedure for determining whether a capital defendant has an intellectual disability, thus making that defendant ineligible for the death penalty.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress Assembled,

Section 1

This act may be cited as the "Capital Defendants with Intellectual Disabilities Act".

Sec. 2: PROCEDURE TO DETERMINE AN INTELLECTUAL DISABILITY

(a) ***IN GENERAL. —*** *The Federal Death Penalty Act of 1994 (18 U.S.C. § 3591-3598) is amended by inserting after Section C the following new section:*

*"**Sec. D: PROCEDURE TO DETERMINE AN INTELLECTUAL DISABILITY***

(a) PROCEDURE TO DETERMINE WHETHER A CAPITAL DEFENDANT HAS AN INTELLECTUAL DISABILITY — *In any case in which the prosecution files a notice of intent to seek the death penalty, a person who is found to have an intellectual disability pursuant to this section shall not be sentenced to death.*[256]

(1) As used in this section:

(A) "Intellectual disability" means a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in the conceptual, social, and practical domains.[257]

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[256] *See* ARIZ. REV. STAT. ANN. § 13-753(A) (2020).

[257] DSM-V *supra* note 37, at 33.

(i) Intellectual functioning deficits include functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience.[258]

(ii) Adaptive functioning deficits include functions that result in the failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.[259]

(iii) The age that will satisfy the onset of intellectual and adaptive functioning deficits during the developmental period element shall be determined by medical community consensus.[260]

(B) "examination by a licensed psychological, psychiatric, or medical expert" means a standard clinical assessment conducted in a professional setting using methods approved by the most recent Diagnostic and Statistical Manual of Mental Disorders.

(i) Any and all methods employed must be individually administered and psychometrically valid, comprehensive, and culturally appropriate.[261] *Instruments must be normed for the defendant's socio-cultural background and native language.*[262]

(b) Upon a motion by the defendant, supported by appropriate affidavits, or if the court raises it as an issue sua sponte, the court may stay all proceedings to determine whether the defendant has an intellectual disability.[263]

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[258] *Id.*

[259] *Id.*

[260] *See id.*

[261] *Id.* at 37.

[262] *Id.*

[263] *See* NEV. REV. STAT. § 174.098(2)(a) (2020); N.C. GEN. STAT. § 15A-2005(c) (2020); UTAH CODE ANN. § 77-15a-103 & § 77-15a-104(2) (LexisNexis 2020).

(1) If the defendant makes a motion for a pretrial hearing on the defense of intellectual disability, it must be presented to the court at least ninety (90) days prior to trial.[264]

(2) The hearing must be held within a reasonable amount of time before the trial and once a determination has been made, the court shall enter specific findings of fact and conclusions of law on the determination of intellectual disability into the record.[265]

(c) At the hearing, the defendant must prove the defense of intellectual disability by a preponderance of the evidence.[266]

(1) The defendant must provide evidence which demonstrates that the defendant is intellectually disabled not less than thirty (30) days before the date set for a hearing conducted pursuant to subsection 2.[267] *By filing a notice relative to a claim of intellectual disability under this Section, the defendant waives all claims of confidentiality and privilege to, and is deemed to have consented to the release of, any, and all medical correctional educational, and military records, raw data, tests, tests scores, notes, behavioral observations, reports, evaluations, and any other information of any kind or other records relevant or necessary to an examination or determination under this Article.*[268]

(2) The defendant must also undergo examination by a licensed psychological, psychiatric, or medical expert selected by the prosecution on the issue of whether the defendant is intellectually disabled at least fifteen (15) days before the date set for the pretrial hearing.[269]

(3) No statement made by the defendant in the course of any examination provided for by this Section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.[270]

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[264] *See* IDAHO CODE § 19-2515A(2) (2020); OKLA. STAT. tit. 21, § 701.10b(D) (2020); S.B. 118, 2018 Ala. S., Reg. Sess. (Ala. 2018).

[265] *See* COLO. REV. STAT. § 18-1.3-1102(3) (2020); IDAHO CODE § 19-2515A(2) (2020); NEV. REV. STAT. § 174.098(2)(b) (2020).

[266] *See* ARK. CODE ANN. § 5-4-618(c) (2020); CAL. PENAL CODE § 1376(3) (West 2020); IDAHO CODE § 19-2515A(3) (2020); LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (2020); NEV. REV. STAT. § 174.098(5)(b) (2020).

[267] *See* NEV. REV. STAT. ANN. § 174.098(3)(a) (2020).

[268] *See* LA. CODE CRIM. PROC. ANN. Art. 905.5.1(E) (2020).

[269] *See* NEV. REV. STAT. ANN. § 174.098(3)(b) (2020).

[270] *See* KAN. STAT. ANN. §21-6622(c) (2020).

(4) The defendant shall present evidence in support of the claim that he or she is a person with an intellectual disability.[271] *Then the prosecution shall present its case regarding the issue of whether the defendant is a person with an intellectual disability.*[272] *Each party may offer rebuttal evidence.*[273]

(5) At the close of evidence, the prosecution shall make its final argument, and the defendant shall conclude with his or her final argument.[274]

(6) Nothing in this Section shall prohibit the court from making orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is a person with an intellectual disability, including, but not limited to, the appointment of, and examination of the defendant by, qualified experts.[275]

(d) The pretrial determination of the court shall not preclude the defendant from offering evidence of the defendant's intellectual disability,[276] *nor shall it preclude the defendant from raising any legal defense during any phase of the trial.*[277]

(e) If the court does not find that the defendant has an intellectual disability in the pretrial proceeding, upon the introduction of evidence raising the issue of intellectual disability during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant has an intellectual disability as defined in this Section.[278]

(1) This special issue shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence.[279]

(2) If the jury determines that the defendant has an intellectual disability, the court shall declare the case noncapital.[280] *The jury may then*

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[271] *See* CAL. PENAL CODE § 1376(b)(2) (2020).

[272] *See id.*

[273] *See id.*

[274] *See id.* § 1376(b)(3).

[275] *See id.* § 1376(b)(2).

[276] *See* ARIZ. REV. STAT. ANN. § 13-753(B) (2020).

[277] *See* N.C. GEN. STAT. § 15A-2005(d) (2020).

[278] *See* N.C. GEN. STAT. § 15A-2005(e) (2019).

[279] *See id.*

[280] *See id.*

consider the defendant's intellectual disability when determining aggravating or mitigating factors and the defendant's sentence.[281]

(3) If the jury determines that the defendant does not have an intellectual disability as defined by this Section, the jury may consider any evidence of intellectual disability during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence.[282]

(f) A defendant who is found guilty but has an intellectual disability shall be committed to an appropriate penal facility and shall be evaluated then treated, if indicated, within the funds appropriated therefore, in such a manner as is psychiatrically indicated for his or her intellectual disability.[283]

(g) If a defendant who is found guilty but has an intellectual disability is placed on probation, the court may require that the defendant undergo available medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation.[284]

(h) The provisions of this Section shall be retroactively applied to defendants who have been convicted of capital murder and sentenced to death.[285]

(i) The provisions of this Section are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains."[286]

(b) ***CONFORMING AMENDMENTS.*** *— The Federal Death Penalty Act of 1994 (18 U.S.C. §§ 3591-3598) is further amended—*

(1) In Section C, by inserting, "intellectually disabled" for "mentally retarded."

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[281] *See* N.C. GEN. STAT. § 15A-2005(g) (2019).

[282] *See id.*

[283] *See* GA. CODE ANN. § 17-7-131(g)(1) (2020).

[284] *See* GA. CODE ANN. § 17-7-131(h) (2020).

[285] *See* S.B. 118, 2018 Ala. S., Reg. Sess. (Ala. 2018).

[286] *See id.*