

DEATH AND DISABILITY: THE NEED FOR A FEDERAL STANDARD

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INTRODUCTION

The Eighth Amendment prohibits cruel and unusual punishment.¹ Under the Eighth Amendment, the Supreme Court held that it is unconstitutional to execute a defendant with intellectual disabilities,² yet the Court fell short of imposing nationwide diagnostic criteria to assess such disabilities. Because identifying intellectual disability is a state determination, diagnostic outcomes for de-

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1 U.S. CONST. amend. VIII.

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

defendants vary across jurisdictions.³ Whether a defendant is intellectually disabled can be a matter of life or death, and different states applying different diagnostic standards leads to an arbitrary application of the death penalty.⁴ The connection between race and the death penalty results in the haphazard diagnosis of intellectual disability largely affecting people of color.⁵

A federal standard to diagnose intellectual disability will provide more certainty in the capital sentence determination.⁶ The federal standard should mirror current medical diagnostic standards and be reviewed regularly as medical knowledge advances.⁷ This will ensure that a defendant's neurodevelopmental disorder is diagnosed consistently across jurisdictions and the death penalty is uniformly applied.⁸ The purpose of this Note is to address the current discretionary nature of diagnosing intellectual disability in capital punishment cases and to encourage lawyers, legislators, and courts to include the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) standards in their constitutional analysis as the DSM-5 becomes more expansive.

Part I of this Note will trace intellectual disability and death penalty Supreme Court jurisprudence. Part II will provide background on the DSM. It will review the history of IQ tests that are used to diagnose intellectual disability and explain the current diagnostic features of intellectual disability found in the DSM. Part III will outline the consequences of an inconsistent intellectual disability standard and present case illustrations from circuit courts to illuminate the varying tests currently in place. Part IV will propose a federal standard to uniformly diagnose intellectual disability in capital defendants.

I. SUPREME COURT JURISPRUDENCE

Intellectual disability shares a historic relationship with the death penalty. As early as the 1700s, courts exempted defendants with profound intellectual disability from criminal liability.⁹ Yet it was not until 1989 that the Supreme Court first heard arguments on the execution of an intellectually disabled de-

³ Mikayla Anne Bennett, *Protecting Intellectually-Disabled Criminal Defendants: Proposing a Federally-Mandated Threshold Procedure to Determine Death Penalty Eligibility*, 24 J. GENDER RACE & JUST. 171, 172 (2021).

⁴ *Id.*

⁵ *DPIC Analysis—Intellectually Disabled Defendants of Color, Foreign Nationals Disproportionately Subject to the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 4, 2020), <https://deathpenaltyinfo.org/news/dpic-analysis-intellectually-disabled-defendants-of-color-foreign-nationals-disproportionately-subject-to-the-death-penalty> [<https://perma.cc/N2BQ-7DE8>].

⁶ Bennett, *supra* note 3, at 172.

⁷ *Id.*

⁸ *See id.*

⁹ Jill V. Feluren, *Moving the Focus Away from the IQ Score Towards the Subjective Assessment of Adaptive Functioning: The Effect of the DSM-5 on the Post-Atkins Categorical Exemption of Offenders with Intellectual Disability from the Death Penalty*, 38 NOVA L. REV. 323, 326 (2014).

fendant.¹⁰ In *Penry v. Lynaugh*,¹¹ Jonny Paul Penry scored between fifty and sixty-three on an IQ test,¹² which classified him as mild to moderately intellectually disabled.¹³ Notwithstanding his IQ score, the jury sentenced Penry to death after he confessed to raping and murdering the victim, Pamela Carpenter.¹⁴ After granting certiorari, the Court held that executing an intellectually disabled defendant did not rise to the level of cruel and unusual punishment as prescribed under the Eighth Amendment.¹⁵ Intellectual disability could only be viewed as a mitigating factor at sentencing; it could not eliminate the death penalty entirely.¹⁶ This decision spurred eighteen states to enact legislation that exempted intellectually disabled defendants from capital punishment.¹⁷

With a 6-3 majority, *Atkins v. Virginia* is the pivotal case that overturned *Penry* and recognized it is unconstitutional to execute a defendant with an intellectual disability.¹⁸ In *Atkins*, the Supreme Court found it notable that a number of states passed legislation categorically exempting intellectually disabled defendants from the death penalty.¹⁹ Georgia, Kentucky, Tennessee, Arkansas, Indiana, Kansas, Arizona, and Texas, among others, all passed bills prohibiting the execution of intellectually disabled defendants.²⁰ The Court found that a national consensus was developing against the execution of defendants with intellectual disabilities.²¹ This consensus suggested a relatively widespread agreement that defendants with intellectual disabilities do not act with the level of moral culpability necessary to justify capital punishment.²² The Court held that executing intellectually disabled defendants constituted cruel and unusual punishment and violated the Eighth Amendment.²³

¹⁰ *Id.*

¹¹ *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹² *Id.* at 307. An IQ score of 100 is the population mean. Jacob A. Burack et al., *Developmental Perspectives on the Study of Persons with Intellectual Disability*, 17 ANN. REV. CLINICAL PSYCH., 339, 339 (2021). A score of 70 represents two or more standard deviations below the mean and “reflects substantially slower-than-typical development.” *Id.* at 341.

¹³ *See* Feluren, *supra* note 9, at 326.

¹⁴ *Id.*

¹⁵ *Id.* at 327; *Penry*, 492 U.S. at 333–35 (finding that the insanity defense sufficiently protected intellectually disabled defendants from cruel and unusual punishment and that there was no national consensus against executing intellectually disabled defendants convicted of capital crimes).

¹⁶ Feluren, *supra* note 9, at 327.

¹⁷ *See id.*

¹⁸ *Atkins v. Virginia*, 536 U.S. 304, 305–07, 321 (2002); Feluren, *supra* note 9, at 324.

¹⁹ *Atkins*, 536 U.S. at 315–16 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

²⁰ *Id.* at 313–15.

²¹ *Id.* at 316.

²² *Id.* at 317, 319 (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution.”).

²³ *Id.* at 320–21.

Atkins created a per se rule that exempted intellectually disabled defendants from capital punishment no matter the severity of their disorder.²⁴ The question then became whether the defendant was in fact intellectually disabled, a decision the Court left to the states.²⁵ Although the Court utilized current clinical definitions to analyze intellectual disability,²⁶ it stopped short of providing states with a framework to identify and evaluate the disability. With the intellectual disability definition left entirely to the states, it became possible for a defendant to be considered intellectually disabled in one jurisdiction but not another.²⁷ Some states put more emphasis on a defendant's IQ score while other states were more vague about the specific quantifiable score.²⁸

Additionally, many states differed in their intellectual disability procedural determination.²⁹ Most states with established procedures required an intellectual disability assessment before trial, but some states left the determination to a jury.³⁰ Juries are more reluctant than judges to label a defendant intellectually disabled.³¹ From 2002 to 2014, 96 percent of juries that analyzed intellectual disability in capital defendants found that the defendant was not intellectually disabled.³² Yet the overall success rate on an *Atkins* claim for the same time period was 43 percent.³³ States also decide what burden of proof is required to prove intellectual disability.³⁴ These variations between states are problematic. With multiple ways to assess intellectual disability and no set rule on how to administer tests or interpret results, *Atkins* can be implemented inconsistently across jurisdictions.³⁵

Twelve years after *Atkins*, the Court held in *Hall v. Florida* that states must follow current medical standards to define intellectual disability.³⁶ Prior to *Hall*, some states implemented a rigid IQ score cutoff to identify intellectually disabled defendants.³⁷ Florida, for example, used a bright-line test that required a defendant to have an IQ score of seventy or lower to be considered intellectual-

²⁴ *Id.*; Feluren, *supra* note 9, at 340.

²⁵ *Atkins*, 536 U.S. at 317.

²⁶ *Id.* at 308 n.3, 317 n.22.

²⁷ Feluren, *supra* note 9, at 342.

²⁸ *Id.*

²⁹ *Id.*; *see infra* Section III.E.

³⁰ Feluren, *supra* note 9, at 342.

³¹ John H. Blume et al., *A Tale of Two (And Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 410 (2014).

³² *Id.*

³³ *Id.*

³⁴ *See infra* Section III.D.

³⁵ Bennett, *supra* note 3, at 196.

³⁶ *Hall v. Florida*, 572 U.S. 701, 723 (2014).

³⁷ *Id.* at 724.

ly disabled.³⁸ Freddie Lee Hall was convicted of kidnapping, beating, raping, and murdering Karol Hurst, a twenty-one-year-old pregnant newlywed, and murdering Lonnie Coburn, a sheriff's deputy.³⁹ Hall attempted to use an *Atkins* defense to claim he was intellectually disabled.⁴⁰ But because Hall scored a seventy-one instead of a seventy on an IQ test, the Florida court found that Hall failed to meet the intellectual disability standard.⁴¹

The Supreme Court found that Florida's IQ cutoff was contrary to clinical definitions cited in the DSM.⁴² The medical community uses three criteria to assess intellectual disability: subaverage intellectual functioning (Criterion A), deficits in adaptive functioning (Criterion B), and age of onset (Criterion C).⁴³ The Court held in *Hall* that intellectual disability "is a condition, not a number" and that IQ tests alone are not determinative.⁴⁴ *Hall* established the understanding that medical standards are constantly evolving, and courts need to evolve with them.

However, the Court again fell short of requiring states to follow the three-prong test outlined in the DSM-5. Citing its decision in *Atkins*, the Court held that it is a state's responsibility to develop appropriate measures to determine intellectual disability.⁴⁵ Although the Court afforded states the freedom to define intellectual disability, it did outline specific guidelines employed by medical professionals that states are required to follow.⁴⁶ The Court reasoned that "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity."⁴⁷

Three years after *Hall*, the Court struck down Texas's intellectual disability diagnostic criteria, finding that Texas used a definition disconnected from current medical standards.⁴⁸ In *Moore v. Texas*, Bobby James Moore was convicted of robbing a store and fatally shooting the store clerk.⁴⁹ Moore took seven IQ tests over his lifetime, and the Texas court found all but two unreliable.⁵⁰

³⁸ *Id.* at 704; Kentucky, Alabama, and Virginia implemented similar fixed-score cutoffs. *Id.* at 714–15. Arizona, Delaware, Kansas, North Carolina, and Washington had similar provisions as well, but the Court found that although "these state laws might be interpreted to require a bright-line cutoff does not mean that they will be so interpreted . . ." *Id.* at 715.

³⁹ *Id.* at 704.

⁴⁰ *Id.* at 707.

⁴¹ *Id.*

⁴² *Id.* at 720.

⁴³ *Id.* at 710.

⁴⁴ *Id.* at 723.

⁴⁵ *Id.* at 719.

⁴⁶ 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, 531 (2018) (indicating that states are now required to acknowledge the standard error of measurement inherent in IQ scores).

⁴⁷ *Hall*, 572 U.S. at 720.

⁴⁸ *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

⁴⁹ *Id.*

⁵⁰ *Id.* at 1047.

Between the two IQ tests, Moore's lowest score was seventy-four.⁵¹ However, the Texas court did not account for the standard error of measurement (SEM) that medical professionals attach to each score.⁵²

The Court held in *Hall* that due to its imprecision, an IQ score should be thought of as a range.⁵³ Adjusted for the standard error of measurement, Moore's IQ score of seventy-four established an IQ range of sixty-nine to seventy-nine.⁵⁴ Because Moore's score fell below seventy, the Court held that the Texas court was required to move on to the adaptive functioning analysis.⁵⁵

Texas argued that Moore exhibited adaptive strengths that discounted Moore's adaptive deficits.⁵⁶ But the Court discouraged the use of adaptive strengths over adaptive deficits when analyzing intellectual disability and similarly disfavored the use of stereotypes when analyzing adaptive functioning.⁵⁷ The Court in *Moore* reaffirmed its decision in *Hall* that all states must follow current medical standards when identifying intellectual disability.⁵⁸ Although the Court clarified specific features of diagnostic criteria, it again fell short of identifying a uniform definition of intellectual disability.

II. DEFINING INTELLECTUAL DISABILITY

A. Background on the DSM and IQ Tests

The American Psychiatric Association (APA) produces the DSM, a diagnostic manual that catalogs mental disorders and provides criteria used for diagnosis.⁵⁹ Psychologists, psychiatrists, and mental health professionals in the United States use the DSM as their primary resource to diagnose patients and establish treatment strategies.⁶⁰ The DSM is so ubiquitous that insurance companies use it to determine reimbursement sums for psychological treatment.⁶¹ Although the DSM was not designed for legal practice, the Court utilizes it across several areas of law, including personal injury litigation to analyze emotional distress claims;⁶² medical malpractice cases to evaluate improper diagnoses or prescribed medications and the dereliction of duty;⁶³ disability law and

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Hall v. Florida*, 572 U.S. 701, 712–13 (2014).

⁵⁴ *Moore*, 137 S. Ct. at 1049.

⁵⁵ *Id.* at 1050.

⁵⁶ *Id.* at 1047.

⁵⁷ *Id.* at 1050, 1052.

⁵⁸ *Id.* at 1053.

⁵⁹ AM. PSYCHIATRIC ASS'N, DSM-5: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5].

⁶⁰ *See id.*

⁶¹ Feluren, *supra* note 9, at 331.

⁶² Charles Scott et al., *DSM-5 and Personal Injury Litigation*, in *DSM-5 AND THE LAW: CHANGES AND CHALLENGES* 177, 177–78 (Charles Scott ed. 2015).

⁶³ *Id.* at 178–79.

diagnoses for workers' compensation or Social Security Disability Insurance claims;⁶⁴ and questions of mental capacity in contract law or civil litigation.⁶⁵

Legislators, governmental agencies, and state governments also utilize the DSM as a guideline to analyze intellectual disability in capital defendants.⁶⁶ The DSM-IV-TR contained a warning in its introduction to caution against heavily relying on the DSM for legal determinations: "dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."⁶⁷ This cautionary statement re-occurs in the DSM-5.⁶⁸

The DSM-5 categorizes intellectual disability in the neurodevelopmental disorder section of the manual.⁶⁹ Intellectual disability is an intellectual developmental disorder that requires deficits in mental ability and adaptive behavior⁷⁰ beginning in the developmental period.⁷¹ Intellectual disabilities affect around 1 percent of the population in the United States, approximately three million people.⁷²

The DSM-5 definition of intellectual disability is not the sole definition. The American Association on Intellectual and Developmental Disabilities (AAIDD), a leading nonprofit in the area of intellectual and developmental disabilities, defines intellectual disability as a "condition characterized by significant limitations in both intellectual functioning and adaptive behavior that originates before the age of 22."⁷³ The AAIDD and DSM intellectual disability definitions are very similar;⁷⁴ yet the DSM is more well-known because the

⁶⁴ Josh Greene & Charles Scott, *DSM-5 and Disability Evaluations*, in *DSM-5 AND THE LAW: CHANGES AND CHALLENGES* 201, 201 (Charles Scott ed. 2015).

⁶⁵ Robert Weinstock et al., *DSM-5 and Civil Competencies*, in *DSM-5 AND THE LAW: CHANGES AND CHALLENGES* 152, 152 (Charles Scott ed. 2015).

⁶⁶ Feluren, *supra* note 9, at 331–32.

⁶⁷ *Id.* at 331 (quoting AM. PSYCHIATRIC ASS'N, *DSM-IV-TR: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41 (4th ed., text rev. 2000).

⁶⁸ DSM-5, *supra* note 59, at 25.

⁶⁹ *Id.* at 31, 33. The DSM-5 is the first edition of the DSM to use Arabic Numeration instead of traditional Roman Numerals. Feluren, *supra* note 9, at 346. It is hypothesized that because the DSM is intended to be a living document and may now be updated more frequently online, future editions can be labeled with a decimal. *Id.*

⁷⁰ Adaptive behavior is "the ability to function in the community." Burack et al., *supra* note 12, at 340.

⁷¹ DSM-5, *supra* note 59, at 33. The developmental period consists of childhood or adolescence. *Id.* at 38.

⁷² Aimilia Papazoglou et al., *To ID or Not to ID? Changes in Classification Rates of Intellectual Disability Using DSM-5*, 52 *INTELL. & DEVELOPMENTAL DISABILITIES* 165, 165 (2014).

⁷³ *Defining Criteria for Intellectual Disability*, AAIDD, <https://www.aidd.org/intellectual-disability/definition> [<https://perma.cc/LDH9-SC8Y>]. The AAIDD was previously known as the American Association on Mental Retardation (AAMR). Chris Nash et al., *What's in a Name? Attitudes Surrounding the Use of the Term 'Mental Retardation'*, 17 *PAEDIATR CHILD HEALTH* 71, 71 (2012) (indicating that the AAMR was renamed in 2007).

⁷⁴ *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

manual contains the taxonomic classification of most mental disorders and is widely used across different areas of study.

The general definition of intellectual disability has gone through many iterations.⁷⁵ It once included offensive labels such as idiot, imbecile, and moron.⁷⁶ “Mental retardation” was used in the DSM-IV and was only recently changed to “intellectual disability” in the DSM-5.⁷⁷ The APA claimed the new term more adequately reflected current terminology used in the medical and educational fields.⁷⁸ Because the phrase was widely used, the term “intellectual disability” was universally understood.⁷⁹ The DSM-IV-TR also used an IQ of seventy or below to characterize subaverage intellectual functioning.⁸⁰ The DSM-5, released in May 2013, deemphasizes IQ score and weighs an individual’s adaptive functioning equally with IQ score.⁸¹

The IQ test was introduced in America in 1916 by Lewis Terman, a Stanford professor and eugenicist, and Henry H. Goddard, a eugenicist.⁸² The test was used to identify individuals thought to be “predisposed to crime, promiscuity, and low achievement in school and in life.”⁸³ IQ tests were used as the sole measurement of intellectual disability until 1959.⁸⁴ Then, the American Association on Mental Deficiency (now the AAIDD) instituted the dual-criterion approach that included mental ability in the form of IQ tests alongside an adaptive functioning analysis.⁸⁵

Today, IQ tests are understood as imperfect measures of intelligence with significant methodological flaws.⁸⁶ The DSM-5 notes that IQ scores are only approximations of intellect and generally require clinicians to interpret the results in order to achieve a holistic understanding of an individual’s intellectual disability.⁸⁷ IQ is a quantifiable score that can provide a clear and concise measurement of intellect.⁸⁸ A calculable score makes it easy for states to analyze and process intellectual disability as a defense to capital punishment.

⁷⁵ Papazoglou et al., *supra* note 72, at 165.

⁷⁶ Burack et al., *supra* note 12, at 341.

⁷⁷ Bennett, *supra* note 3, at 178–79.

⁷⁸ Feluren, *supra* note 9, at 347.

⁷⁹ *See id.*

⁸⁰ *Id.* at 332.

⁸¹ *See* Bennett, *supra* note 3, at 180.

⁸² *Id.* at 174; JENNIFER L. JOLLY, A HISTORY OF AMERICAN GIFTED EDUCATION 82 (2018).

⁸³ Bennett, *supra* note 3, at 174 (citing Maurice Chammah & Dana Goldstein, *The Life-or-Death Test*, MARSHALL PROJECT (Jan. 29, 2015, 11:22 AM), <https://www.themarshallproject.org/2015/01/29/the-life-or-death-test> [<https://perma.cc/H2R7-Q8NN>]).

⁸⁴ Burack et al., *supra* note 12, at 341.

⁸⁵ *Id.*

⁸⁶ Bennett, *supra* note 3, at 193.

⁸⁷ *See* DSM-5, *supra* note 59, at 37 (“For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”).

⁸⁸ *See* Burack et al., *supra* note 12, at 340.

However, IQ tests are highly sensitive to external factors.⁸⁹ They blur the variety of individuals with intellectual disability and intellectual disabilities' fluctuation and development over time.⁹⁰ IQ tests devalue diversity and simplify nuances of intellectual disability, diluting immense differences to a single diagnostic score.⁹¹

Consider the Flynn Effect, a phenomenon whereby American IQ scores increase every year.⁹² Because the societal norm changes annually, it is dangerous to rely on the societal mean and comparisons between test takers to develop a score.⁹³ Often when a court accounts for the Flynn Effect on the subaverage intellectual functioning prong of an intellectual disability analysis, it will decrease the IQ score of a defendant.⁹⁴ However, not all courts consider the Flynn Effect in the *Atkins* analysis.⁹⁵

Unlike the DSM-IV, the DSM-5 does not include a specific IQ score in the diagnostic criteria. But the DSM-5 does mention IQ in the explanation of Criterion A, the subaverage intellectual functioning prong.⁹⁶ An IQ score of one hundred is generally thought to be the population mean, so a score of seventy represents two or more standard deviations below the mean.⁹⁷ Many states latched onto seventy as a bright-line rule to determine whether a defendant possessed an intellectual disability.⁹⁸ Although an IQ score of seventy or below generally reflects substantially slower development and lower levels of functioning compared to people with higher IQ scores in a similar age group, seventy is an arbitrary number with no particular scientific importance.⁹⁹ Scores immediately above and below seventy do not carry statistically significant differences.¹⁰⁰

The transition away from IQ score as the objective measurement of intellectual disability allows for a more subjective understanding of the disability with adequate focus on functioning levels.¹⁰¹ The DSM-5 maintained the four degrees of intellectual disability originally outlined in the DSM-IV that include mild, moderate, severe, and profound.¹⁰² However, these degrees are now based

⁸⁹ Feluren, *supra* note 9, at 353.

⁹⁰ Burack et al., *supra* note 12, at 340.

⁹¹ *Id.*

⁹² Bennett, *supra* note 3, at 193.

⁹³ For example, a defendant that retakes the same IQ test a few years later 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.” *Id.* at 194.

⁹⁴ *See, e.g.*, *Sasser v. Payne*, 999 F.3d 609, 616 (8th Cir. 2021).

⁹⁵ *See, e.g.*, *Richardson v. Thomas*, 930 F.3d 587, 592 (4th Cir. 2019); *see also infra* Part IV.

⁹⁶ DSM-5, *supra* note 59, at 37.

⁹⁷ Burack et al., *supra* note 12, at 339, 341.

⁹⁸ *See Hall v. Florida*, 572 U.S. 701, 714–15 (2014).

⁹⁹ Burack et al., *supra* note 12, at 341.

¹⁰⁰ *Id.* at 342.

¹⁰¹ Feluren, *supra* note 9, at 325, 347.

¹⁰² Feluren, *supra* note 9, at 348; DSM-5, *supra* note 59, at 33.

on adaptive functioning instead of IQ score.¹⁰³ This is because “adaptive functioning . . . determines the level of support[] required . . . [and IQ scores] are less valid in the lower end of the IQ range.”¹⁰⁴ These changes collectively underscore the importance of the adaptive functioning prong in the intellectual disability analysis.

B. Current Diagnostic Features of Intellectual Disability

The DSM-5 defines intellectual disability as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.”¹⁰⁵ Medical practitioners diagnose intellectual disability using three criteria: intellectual functioning, adaptive functioning, and age of onset.¹⁰⁶ The current definition for the diagnostic features of intellectual disability is as follows:

The essential features of intellectual disability (intellectual developmental disorder) are deficits in general mental abilities (Criterion A) and impairment in everyday adaptive functioning, in comparison to an individual’s age-, gender-, and socioculturally matched peers (Criterion B). Onset is during the developmental period (Criterion C). The diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual and adaptive functions.¹⁰⁷

Criterion A, intellectual ability, encompasses “problem solving, planning, [and] abstract thinking,” and it is often measured with standardized tests.¹⁰⁸ Test takers with intellectual disabilities often score between a sixty-five and seventy-five; however, it is necessary to account for a margin of error, which is generally plus or minus five points.¹⁰⁹ The DSM-5 still generally labels individuals with a score of seventy or below as intellectually disabled¹¹⁰ even though it interprets IQ scores as only approximations of intellect.¹¹¹ The Flynn Effect and practice effects can affect Criterion A test scores.¹¹²

Criterion C, age of onset, requires that Criterion A and Criterion B are present during the developmental period that generally spans childhood and adolescence.¹¹³ The DSM-IV explicitly defined the developmental period as before

¹⁰³ Feluren, *supra* note 9, at 348.

¹⁰⁴ DSM-5, *supra* note 59, at 33.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 37.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (“For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”).

¹¹² *Id.*

¹¹³ *Id.* at 38.

the age of eighteen, but the DSM-5 does not require this.¹¹⁴ Bright-line rules promote rigidity and lack the flexibility required to diagnose nuanced disabilities. Consequently, the lack of a specific age in the DSM-5 permits more flexibility into the intellectual disability analysis and allows defendants to show evidence of intellectual disability that manifests after the age of eighteen.¹¹⁵ However, some jurisdictions still use eighteen as the cutoff age despite the DSM-5's shift.¹¹⁶

C. Current Diagnostic Features of Criterion B, Adaptive Functioning

Adaptive functioning deficits “refer to how well a person meets community standards of personal independence and social responsibility.”¹¹⁷ Adaptive functioning involves an individual’s capacity to perform daily activities that contribute to personal independence and social sufficiency compared to others of a similar age.¹¹⁸ Prior to the introduction of IQ tests in the early 1900s, adaptive behavior was the only criterion that identified intellectual disability.¹¹⁹ When IQ tests were invented in the early 1900s, they became the sole predictor of intellectual disability.¹²⁰ The two diagnostic features were taken together for the first time in 1959.¹²¹ The American Association of Mental Deficiency (now AAIDD) instituted the dual-criterion approach to diagnose intellectual disability, and it has remained the standard for the past six decades.¹²²

Adaptive behavior can manifest differently throughout the lifetime of an individual,¹²³ and there are many methods to assess adaptive behavior.¹²⁴ But these methods are often more suited to diagnosing individuals with severe and profound intellectual disability because adaptive functioning measures “do not have adequate norms and reliability needed to diagnose [intellectual disability] in individuals with mild [intellectual disabilities] or those with cognitive functioning between standard scores of 60 and 80.”¹²⁵ Adaptive behavior is difficult to evaluate. Clinicians need to consider “not only general competencies across relevant domains but also the level, quality, and fluency of those behaviors.”¹²⁶

¹¹⁴ See Feluren, *supra* note 9, at 350.

¹¹⁵ See *id.*; *infra* Part IV.

¹¹⁶ See, e.g., *Apelt v. Ryan*, 878 F.3d 800, 837 (9th Cir. 2017).

¹¹⁷ DSM-5, *supra* note 59, at 37.

¹¹⁸ *Id.*

¹¹⁹ Burack et al., *supra* note 12, at 343.

¹²⁰ CELINE A. SAULNIER & CHERYL KLAIMAN, *ESSENTIALS OF ADAPTIVE BEHAVIOR ASSESSMENT OF NEURODEVELOPMENTAL DISORDERS 1* (2018).

¹²¹ Burack et al., *supra* note 12, at 341.

¹²² *Id.*

¹²³ *Id.* at 344.

¹²⁴ “[A]t various times in the United States, there have been more than 200 adaptive behavior measures in use.” SAULNIER & KLAIMAN, *supra* note 120, at 17.

¹²⁵ *Id.*

¹²⁶ *Id.* at 19.

The DSM-IV-TR outlined around eleven adaptive skill areas and required an individual to be deficient in at least two.¹²⁷ The skill areas included communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.¹²⁸ The DSM-5 created three adaptive functioning domains: conceptual, social, and practical.¹²⁹ The conceptual domain is academic.¹³⁰ It involves “competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgement in novel situations.”¹³¹ The social domain “involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment.”¹³² And the practical domain “involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization.”¹³³ The DSM-5 stipulates that to satisfy Criterion B, an individual must be deficient in at least one domain, which requires that the individual need continual support with that function.¹³⁴

The DSM-5 definition of intellectual disability was updated in March 2022.¹³⁵ The diagnosis is still based on both clinical assessment and standardized testing, but it is changed slightly to include “standardized neuropsychological tests, and standardized tests of adaptive functioning” as a basis for clinical assessment.¹³⁶ However, this specific change is not significant to the argument of this Note.

Conversely, the adjustment to the adaptive functioning definition is material to this Note. The italicized language below was removed from the DSM-5 in March 2022.

Criterion B is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. *To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.* Criterion C, onset

¹²⁷ Papazoglou et al., *supra* note 72, at 165 (“[T]here is some debate about whether there are 10 or 11 adaptive skill areas.”).

¹²⁸ *Id.*

¹²⁹ DSM-5, *supra* note 59, at 37.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 38.

¹³⁵ See Mark Moran, *Updated DSM-5 Text Revisions to Be Released in March*, AM. PSYCHIATRIC ASS’N: PSYCHIATRIC NEWS, (Dec. 28, 2021), <https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2022.1.20> [https://perma.cc/L66H-8HUD].

¹³⁶ AM. PSYCHIATRIC ASS’N, DSM-5: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION (5th ed. 2022), [hereinafter DSM-5-TR].

during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.¹³⁷

The definition also designates settings where ongoing support is needed, and the wording changed slightly there as well. This is the updated version that was included in the DSM-5 in March 2022:

Criterion B is met when at least one domain of adaptive functioning— conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across ~~in~~ *multiple environments*, such as ~~one or more life settings at home, school, at work, at home, or in the~~ and community.¹³⁸

The prior DSM-5 definition implied there was a fourth criterion that unintentionally changed the definition. A defendant's intellectual impairments had to be directly related to their adaptive functioning, meaning Criterion A had to be directly related to Criterion B.¹³⁹ This relation required a connection that was not intended and is not needed to diagnose intellectual disability. The current definition notifies courts that the connection between Criterion A and Criterion B is unnecessary.

III. CONSEQUENCES OF AN ILL-DEFINED STANDARD

The prior DSM definition of intellectual disability carried significant impacts for defendants with mild to moderate intellectual disabilities. Individuals with higher cognitive levels, such as defendants with mild to moderate intellectual disabilities, are more likely to have capricious and tenuous correlations between adaptive functioning and intellectual functioning.¹⁴⁰ If experts cannot find the connection between these two criteria, they may decline to diagnose a disability in a defendant with mild to moderate intellectual disabilities. And the decision to forego diagnosis can be fatal.

Mild intellectual disabilities are the most prevalent form of intellectual disabilities, affecting close to 85 percent of intellectually disabled individuals.¹⁴¹ Mild intellectual disability is also the most difficult to correctly identify.¹⁴² Individuals with mild disability can blend into society and effectively mask their disability.¹⁴³ Mild intellectual disability is also more likely to be overlooked in disadvantaged communities where resources for appropriate diagnoses are scarce.¹⁴⁴

¹³⁷ DSM-5, *supra* note 59, at 38.

¹³⁸ DSM-5-TR, *supra* note 136.

¹³⁹ DSM-5, *supra* note 59, at 38.

¹⁴⁰ SAULNIER & KLAIMAN, *supra* note 120, at 60–61.

¹⁴¹ *Id.* at 63.

¹⁴² *See id.* at 61.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Intellectually disabled defendants of color and intellectually disabled foreign nationals are more likely to receive a death sentence.¹⁴⁵ In a review of cases in which intellectually disabled defendants' death sentences were overturned as unconstitutional, intellectually disabled defendants of color made up 80 percent of all intellectually disabled defendants sentenced to death, and intellectually disabled foreign nationals made up 8.4 percent.¹⁴⁶ The arbitrary nature of the intellectual disability analysis puts vulnerable populations at an "elevated risk" of receiving the death penalty.¹⁴⁷ Thus, the DSM-5's prior definition of adaptive functioning unintentionally put mild to moderate intellectually disabled defendants from disadvantaged communities at risk of being unnoticed and undiagnosed, making these defendants more vulnerable to a capital sentence.

Consider *Jackson v. Payne*, where Alvin Jackson was a prisoner on death row in Arkansas.¹⁴⁸ Jackson appealed his petition for federal habeas relief four times, arguing that he was ineligible for the death penalty under *Atkins* because he was intellectually disabled.¹⁴⁹ During Jackson's first petition for federal habeas relief, the district court found that Jackson's adaptive deficits were not related to his intellectual functioning.¹⁵⁰ Jackson failed to prove that his deficits in adaptive functioning were due to his intellectual disability and not to the personality disorders Jackson was diagnosed with when he was child, such as Attention-Deficit/Hyperactivity Disorder (ADHD) or anti-social personality disorder.¹⁵¹ But the Eighth Circuit held that per *Moore*, Jackson was not required to find a specific connection between the two criteria to the exclusion of other mental disorders, he was only required to show that his adaptive functioning deficits *related* to his intellectual functioning.¹⁵² Although the decision fell in Jackson's favor, the court conducted an unnecessary analysis to determine intellectual disability.

The prior DSM-5 definition not only required defendants to prove subaverage intellectual functioning, adaptive deficits, and age of onset, it required them to demonstrate a connection between the first and second prongs. In *Jackson*, the court conducted this connection analysis that created another hurdle for

¹⁴⁵ *DPIC Analysis—Intellectually Disabled Defendants of Color, Foreign Nationals Disproportionately Subject to the Death Penalty*, *supra* note 5.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Jackson v. Payne*, 9 F.4th 646, 648 (8th Cir. 2021). For a photo of Alvin Bernal Jackson, see Max Brantley, *8th Circuit Upholds Decision Sparing Inmate from Death Penalty*, ARK. TIMES, (Aug. 13, 2021, 12:05 PM), <https://arktimes.com/arkansas-blog/2021/08/13/8th-circuit-upholds-decision-sparing-inmate-from-death-penalty> [<https://perma.cc/AMC7-VMUH>] (indicating that Jackson was deemed intellectually disabled and ineligible for the death penalty).

¹⁴⁹ *Jackson*, 9 F.4th at 648.

¹⁵⁰ *Id.* at 650.

¹⁵¹ *Id.* at 649–50.

¹⁵² *Id.* at 651, 656–57.

the defendant to clear in order to prove his disability. The APA's March 2022 revision dispels any presumption that intellectual ability and adaptive functioning are connected.¹⁵³ Unfortunately, because there is no national standard in place, it remains unclear if courts will be required to abide by this revision. Some courts may remove the extra analysis while others may not. The inconsistency between jurisdictions establishes a haphazard subjectivity to the intellectual disability analysis. But this is not the only discrepancy between jurisdictions.

A. Definition Fluctuation

Some courts switch between intellectual disability definitions outlined in the DSM-5 and the DSM-IV. Consider *Sasser v. Payne*, where Arkansas prisoner Andrew Sasser¹⁵⁴ challenged his capital murder sentence under the Eighth Amendment and the rule in *Atkins*.¹⁵⁵ Sasser argued that the district court incorrectly considered his academic functioning after the age of eighteen when it should only be considered prior to eighteen.¹⁵⁶ But the court cited the DSM-5, which stated that there should be evidence of onset during childhood or adolescence and evidence of a deficit of adaptive behavior where “ongoing support is needed . . . to perform adequately.”¹⁵⁷ Because there must be proof of a deficit in childhood and presently, the court properly considered evidence of adaptive behavior after the age of eighteen.¹⁵⁸

Despite the court's reference to the DSM-5, the court held that there was no legal error when the district court analyzed Sasser's *Atkins* claim under the DSM-IV-TR.¹⁵⁹ The district court justified this decision by concluding that it would have reached the same result under the DSM-IV-TR or the DSM-5.¹⁶⁰ When Sasser argued that using an old edition was not consistent with *Moore v. Texas*, the Eighth Circuit concluded that “[t]o be ‘informed by the medical community does not demand adherence to everything stated in the latest medical guide’” so long as the court does not ignore current medical standards.¹⁶¹

But using the DSM-IV in an intellectual disability analysis effectively ignores current medical standards. The definition of intellectual disability in the

¹⁵³ DSM-5-TR, *supra* note 136.

¹⁵⁴ For a photo of Andrew Sasser, see Lynn Larowe, *Resentence Death-Row Inmate Who Fatally Stabbed Clerk at Arkansas Gas Station, Ruling Says*, ARK. DEMOCRAT GAZETTE, (Mar. 9, 2019, 9:49 AM), <https://www.arkansasonline.com/news/2018/mar/09/resentence-death-row-inmate-ruling-says/> [<https://perma.cc/5EU9-VNTZ>] (indicating that Sasser's case is still pending).

¹⁵⁵ *Sasser v. Payne*, 999 F.3d 609, 612 (8th Cir. 2021).

¹⁵⁶ *Id.* at 620–21.

¹⁵⁷ *Id.* at 621 (emphasis added) (quoting DSM-5, *supra* note 59, at 38).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 618.

¹⁶⁰ *Id.* at 617–18.

¹⁶¹ *Id.* at 618 (quoting *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017)).

DSM-IV is functionally different from the definition in the DSM-5.¹⁶² The fluctuation between intellectual disability definitions adds an arbitrary element to the court's analysis. Although the DSM-5 is not elevated to the status of law, the Court required states to follow current medical standards because they "offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'"¹⁶³ A defendant forms and prepares their evidence of intellectual disability according to state definitions that need to reflect current medical standards. Current medical standards provide a fair and predicable way to evaluate intellectual disability. But when a court abandons current standards or alternates between standards, defendants cannot adequately defend their case.

B. Adaptive Strengths and Deficits

The Court in *Moore v. Texas* cautioned against relying on adaptive strengths during the adaptive functioning analysis, instead recommending solely the use of adaptive deficits.¹⁶⁴ Although some courts adhere to the recommendation,¹⁶⁵ only allowing adaptive deficits in the adaptive functioning analysis to the exclusion of adaptive strengths, the Eighth Circuit modified the decision in *Moore*. In *Sasser v. Payne*, Sasser argued that the district court used adaptive strengths as part of the analysis, contrary to *Moore v. Texas*.¹⁶⁶ For example, the district court reviewed Sasser's work skills, and although Sasser had worked in low-level positions performing basic and repetitive tasks, there was evidence he worked independently on a farm with varying levels of supervision before the age of eighteen.¹⁶⁷ Despite Sasser blankly responding during conversations and laughing inappropriately at jokes, his social and interpersonal skills were evidenced by a number of personal friendships in high school and intimate relationships with girlfriends.¹⁶⁸ He was also purportedly a good story teller.¹⁶⁹ The Eighth Circuit found that it was not inconsistent with *Moore* for the district court to balance adaptive strengths with adaptive deficits "in the same area."¹⁷⁰ The appropriateness of this balancing approach remained an "open question."¹⁷¹

Conversely, the Tenth Circuit does not allow any consideration of adaptive strengths in the adaptive functioning analysis. In *Smith v. Sharp*, only one expert conducted an adaptive functioning analysis; the State offered no adaptive

¹⁶² See *supra* Part II.

¹⁶³ *Moore*, 137 S. Ct. at 1053 (quoting DSM-5, *supra* note 59, at xli).

¹⁶⁴ *Id.* at 1050.

¹⁶⁵ See, e.g., *Smith v. Sharp*, 935 F.3d 1064, 1086–88 (10th Cir. 2019).

¹⁶⁶ *Sasser*, 999 F.3d at 619–20.

¹⁶⁷ *Id.* at 617.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 619–20.

¹⁷¹ *Id.* at 620.

functioning assessment.¹⁷² The expert concluded that Roderick Smith had deficits in five out of the nine adaptive functioning areas.¹⁷³ On appeal, the State used Smith's adaptive strengths to refute the adaptive functioning prong and relied on stereotypes of the intellectually disabled.¹⁷⁴ The Tenth Circuit found that the State's argument carried little weight because *Moore* discouraged the use of adaptive strengths over adaptive deficits and similarly disfavored the use of stereotypes when analyzing adaptive functioning.¹⁷⁵ Because the State put undue emphasis on adaptive strengths and stereotypes in judging Smith's adaptive functioning, the court found that a reasonable jury could conclude that Smith satisfied the adaptive functioning prong.¹⁷⁶ The varied use of adaptive strengths in the intellectual disability analysis establishes an inconsistent application of *Atkins*.

C. SEM and The Flynn Effect

The Flynn Effect, a phenomenon whereby American IQ scores increase every year, is a flaw of IQ tests.¹⁷⁷ If a court accounts for the Flynn Effect, it will adjust a defendant's score downwards. However, not all courts follow this standard. The Fourth Circuit held that courts are not required to adjust IQ scores downwards to account for the Flynn Effect or the SEM.¹⁷⁸ In *Richardson v. Thomas*, Timothy Richardson attempted to challenge the denial of his *Atkins* claim, arguing that the district court failed to apply a downward variance to his IQ scores of seventy-three and seventy-four, which would account for the Flynn Effect or the SEM.¹⁷⁹ He also argued that the bright-line IQ score cutoff of seventy was "overly restrictive" and unconstitutional.¹⁸⁰ But the court held that Richardson was procedurally barred from bringing these claims because they were already adjudicated on the merits in his first application for federal habeas relief.¹⁸¹ Even if they had been substantively new claims, the court was not required to adjust IQ scores for the Flynn Effect or the SEM.¹⁸² The court held that *Hall v. Florida* simply required evidence of current medical standards

¹⁷² *Smith v. Sharp*, 935 F.3d 1064, 1085–86 (10th Cir. 2019).

¹⁷³ *Id.* at 1085. For a photo of Roderick Smith, see Nolan Clay, *Oklahoma City Man Who Killed His Family No Longer Facing Death Penalty*, THE OKLAHOMAN, (Feb. 17, 2020, 1:03 AM), <https://www.oklahoman.com/article/5655202/oklahoma-city-man-who-killed-his-family-no-longer-facing-death-penalty> [<https://perma.cc/JC6N-MNRK>] (indicating that Smith was deemed intellectually disabled and ineligible for the death penalty).

¹⁷⁴ *Smith*, 935 F.3d at 1086–87.

¹⁷⁵ *Id.* at 1086; *see also Moore v. Texas*, 137 S. Ct. 1039, 1050, 1052 (2017).

¹⁷⁶ *Smith*, 935 F.3d at 1088.

¹⁷⁷ Feluren, *supra* note 9, at 336.

¹⁷⁸ *Richardson v. Thomas*, 930 F.3d 587, 592 (4th Cir. 2019).

¹⁷⁹ *Id.* at 590–91.

¹⁸⁰ *Id.* at 590.

¹⁸¹ *Id.* at 593.

¹⁸² *Id.* at 592.

be admitted, and the court allowed Richardson to present evidence on the SEM and its effects.¹⁸³

The Sixth Circuit uses the SEM when adjusting IQ scores, but does not account for the Flynn Effect.¹⁸⁴ In *Black v. Carpenter*, Bryon Black's IQ scores decreased over the years: during his school years, Black's IQ score ranged from eighty-three to ninety-seven; he scored a seventy-six before he stood trial for murder; he scored a seventy-three and seventy-six post-conviction; and he scored sixty-nine after his death sentence was upheld.¹⁸⁵ The district court relied on the IQ tests from Black's childhood, holding that even if they were adjusted for the SEM, they would still fall above the threshold score of seventy.¹⁸⁶ Black argued that the court should adjust his scores for the Flynn Effect, but the court held that Supreme Court precedent did not require scores to be adjusted using the Flynn Effect.¹⁸⁷ The SEM "accounts for the possibility that an individual's true IQ score is *either higher or lower* than the reported score."¹⁸⁸ A court is also not required to make a downward variation based on the SEM in every IQ score.¹⁸⁹

The Eleventh Circuit allows state courts to average IQ scores together and decide when to use the Flynn Effect.¹⁹⁰ "Without clear guidance from *Atkins*, the state court's refusal to . . . account for certain statistical adjustments was not an unreasonable application of clearly established federal law."¹⁹¹ Under Eleventh Circuit precedent, averaging IQ scores and adjusting for the Flynn Effect are permitted but never required.¹⁹² Conversely, the Eighth Circuit considers the Flynn Effect and the SEM. In *Jackson v. Payne*, the court used Jackson's childhood IQ scores of seventy-two, seventy-three, seventy-four, and eighty-one.¹⁹³ The court declined to accept the State's argument that Jackson's scores required the application of a smaller margin of error, which would place them above seventy.¹⁹⁴ Although the DSM-5 and the Supreme Court stated the margin of error is "generally" plus or minus five, meaning it may be smaller, the

¹⁸³ *Id.* at 593.

¹⁸⁴ *Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017).

¹⁸⁵ *Id.* at 744–45. For a photo of Bryon Black, see Mariah Timms, *Tennessee Execution Delayed a Second Time After Attorneys Catch COVID-19*, TENNESSEAN, (Dec. 3, 2020, 4:33 PM), <https://www.tennessean.com/story/news/crime/2020/12/03/byron-black-execution-delayed-death-row-tennessee-attorneys-catch-covid-19/3815763001/> [<https://perma.cc/UFM8-3A6X>] (indicating that Black's execution delayed due to COVID-19).

¹⁸⁶ *Carpenter*, 866 F.3d at 745.

¹⁸⁷ *Id.* at 745–46.

¹⁸⁸ *Id.* at 746.

¹⁸⁹ *Id.*

¹⁹⁰ *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1342 (11th Cir. 2019).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Jackson v. Payne*, 9 F.4th 646, 653 (8th Cir. 2021).

¹⁹⁴ *Id.* at 654.

court found that the Flynn effect would mitigate any smaller margin of error.¹⁹⁵ Because the lower end of Jackson's score range fell at or below seventy using the Flynn Effect and the SEM, the court moved to the adaptive functioning analysis.¹⁹⁶

Similarly, in *Sasser v. Payne*, the Eighth Circuit accounted for the Flynn Effect and concluded that Sasser's IQ scores fell between seventy-eight to eighty-eight for a 2010 test and seventy to eighty for a 1994 test, which put him on the border of intellectual disability.¹⁹⁷ The court acknowledged that IQ scores are not "conclusive evidence of subaverage intellectual functioning," so it accounted for additional tests, including a military entrance exam, academic standardized tests, school grades, and a driver's license test.¹⁹⁸ Despite the cumulative evidence to the contrary, the district court did not find that Sasser had subaverage intellectual abilities.¹⁹⁹ Sasser argued that using other criteria to determine intellectual ability invited an adaptive functioning analysis, tying the two prongs together.²⁰⁰ However, the district court recognized that IQ scores are inconclusive, and "impairments in adaptive functioning, rather than an IQ score, are the clearest indicators of intellectual disability."²⁰¹

D. Burden of Proof

The burden of proof to establish intellectual disability varies between jurisdictions.²⁰² Twenty of the thirty-one death penalty states require a preponderance of the evidence, while three states require clear and convincing evidence.²⁰³ Two states require clear and convincing evidence before trial and a preponderance of the evidence at sentencing.²⁰⁴ Five states do not identify a burden of proof at all.²⁰⁵ Georgia remains the only state that requires intellectual disability be proven beyond a reasonable doubt.²⁰⁶

The beyond a reasonable doubt standard is not consistent with current medical standards. Practitioners in the mental health field are never required to diagnose an individual with intellectual disability beyond any reasonable

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 655.

¹⁹⁷ *Sasser v. Payne*, 999 F.3d 609, 616 (8th Cir. 2021).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 617–18.

²⁰⁰ *Id.* at 618.

²⁰¹ *Id.* at 616–17 (internal quotation marks omitted).

²⁰² See Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. STATE U. L. REV. 553, 607–08 (2017).

²⁰³ *Id.*

²⁰⁴ *Id.* at 607.

²⁰⁵ *Id.* at 607–08.

²⁰⁶ *Id.* at 607.

doubt.²⁰⁷ Practitioners and clinicians diagnose patients “to a reasonable degree of medical or professional certainty.”²⁰⁸ A reasonable degree of certainty provides an inherent margin of error that is also available in the preponderance of the evidence standard. Thus, the preponderance of the evidence standard more closely aligns with the medical expert standard of reasonable degree of certainty.

Georgia’s high standard of proof led to dismal consequences. From the *Atkins* decision in 2002 to 2014, no defendant in Georgia was able to prove to a jury that they were intellectually disabled, including a man named Warren Hill.²⁰⁹ In post-conviction proceedings, Hill argued he was intellectually disabled and should be spared the death penalty.²¹⁰ Although the habeas court held that Hill was entitled to a jury that would assess his intellectual disability claim using a preponderance of the evidence standard, the Georgia Supreme Court rejected this finding and reaffirmed that a defendant must prove intellectual disability beyond a reasonable doubt.²¹¹ Hill appealed to the Eleventh Circuit, which found that Georgia’s beyond a reasonable doubt standard violated the Eighth Amendment.²¹² Yet on rehearing en banc, the court found that the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) required strict deference to state court decisions, and thus upheld the Georgia Supreme Court’s decision.²¹³ The United States Supreme Court denied certiorari.²¹⁴

After Hill’s appeals were exhausted, his execution was scheduled.²¹⁵ An expert psychologist for the prosecution, who previously testified that Hill was not intellectually disabled, began to rethink his diagnosis.²¹⁶ On re-evaluation, the psychologist found that Hill was, in fact, intellectually disabled.²¹⁷ This prompted other expert psychologists for the state to reassess their diagnosis.²¹⁸ Together, the three expert psychologists for the state found that Hill was intellectually disabled.²¹⁹ Hill attracted many advocates.²²⁰ The American Bar Asso-

²⁰⁷ *Id.* at 599.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 605. For a photo of Warren Hill, see *The Case of Warren Hill*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/the-case-of-warren-hill> [<https://perma.cc/4JMF-NFFM>] (indicating that Hill was executed on January 27, 2015).

²¹⁰ Lucas, *supra* note 202, at 562.

²¹¹ *Head v. Hill*, 587 S.E.2d 613, 617, 621 (Ga. 2003), *disapproved of by* *Young v. State*, 860 S.E.2d 746 (Ga. 2021); Lucas, *supra* note 202, at 562–63.

²¹² *Hill v. Schofield*, 608 F.3d 1272, 1277–78 (11th Cir. 2010); Lucas, *supra* note 202, at 563.

²¹³ *Hill v. Humphrey*, 662 F.3d 1335, 1338 (11th Cir. 2011); Lucas, *supra* note 202, at 563.

²¹⁴ *Hill v. Humphrey*, 566 U.S. 1041, 1041 (2012).

²¹⁵ Lucas, *supra* note 202, at 564.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 564–65.

²¹⁹ *Id.* at 565.

²²⁰ *Id.*

ciation, former President Jimmy Carter, the Vatican, the US delegation of the European Union, and mental health advocates all campaigned on his behalf.²²¹ But the Georgia Board of Pardons and Paroles denied Hill clemency.²²² Hill was executed on January 27, 2015, despite widespread belief that he was intellectually disabled.²²³

Rodney Young, a capital defendant in Georgia, recently challenged the beyond a reasonable doubt standard.²²⁴ Young was found guilty of murdering his ex-fiancée's son, Gary Jones.²²⁵ Young attempted to prove he was intellectually disabled but failed under the high burden of proof and was subsequently sentenced to death.²²⁶ Young appealed, arguing the beyond a reasonable doubt statutory requirement was unconstitutional because the harsh standard created a substantial risk that intellectually disabled defendants could be executed.²²⁷ But in an 8-1 ruling, the Georgia Supreme Court denied Young's claim and reaffirmed his conviction and death sentence.²²⁸ The court found no compelling reason to overturn its "well established precedent."²²⁹

From 2002 to 2013, post-*Atkins*, an intellectually disabled defendant in the United States had a 55 percent chance of success on an *Atkins* claim.²³⁰ However, each state did not contribute to this national average equally. An intellectually disabled defendant in Alabama during the same time period had a 12 percent chance of success on an *Atkins* claim, while a defendant in North Carolina had an 80 percent chance of success.²³¹ Georgia's beyond a reasonable doubt standard was a large contributor to a defendant's 11 percent chance of success

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Young v. State*, 860 S.E.2d 746, 768 (Ga. 2021). For a photo of Rodney Young, see Bill Rankin, *Georgia Supreme Court Reaffirms Conviction, Sentence for Death Row Inmate*, THE ATLANTA J.-CONSTITUTION (June 1, 2021), <https://www.ajc.com/news/georgia-news/high-court-to-be-asked-to-overturn-intellectual-disability-threshold/ZB6RYRIDFBCVHAEPYSZ17L7TCU/> [<https://perma.cc/45XY-XCGB>].

²²⁵ *Young*, 860 S.E.2d. at 758–59.

²²⁶ *Id.* at 759; *Georgia Supreme Court Upholds 'Uniquely High and Onerous' Burden of Proving Intellectual Disability in Death Penalty Cases*, DEATH PENALTY INFO. CTR. (June 11, 2021), <https://deathpenaltyinfo.org/news/georgia-supreme-court-upholds-uniquely-high-and-onerous-burden-of-proving-intellectual-disability-in-death-penalty-cases> [<https://perma.cc/45XY-XCGB>].

²²⁷ *Georgia Supreme Court Upholds 'Uniquely High and Onerous' Burden of Proving Intellectual Disability in Death Penalty Cases*, *supra* note 226.

²²⁸ *Id.*

²²⁹ *Young*, 860 S.E.2d at 796.

²³⁰ Blume et al., *supra* note 31, at 397.

²³¹ *Id.* at 412. This disparity was due in part to the availability of post-conviction funds each state sets aside for litigation. The more funds a state had, the likelier a defendant was to succeed. *Id.* The disparity is also due in part to whether the state applied a strict IQ cutoff. *Id.*

on an *Atkins* claim in Georgia.²³² On average, 7.7 percent of death row defendants bring *Atkins* claims.²³³

E. Judges and Jurors

States have different definitions and procedures for identifying intellectual disability.²³⁴ Most states with established judicial procedures make the determination prior to trial, while some states allow jurors to identify intellectual disability in defendants.²³⁵ However, unqualified lay-people with no medical expertise attempting to diagnose defendants is problematic. Jurors often understand intellectual disability through stereotypes of what they believe a typical person with an intellectual disability may look or act like.²³⁶ And individuals with a mild intellectual disability often do not meet stereotypical assumptions.²³⁷ This makes death more likely for defendants with mild intellectual disabilities who reside in a jurisdiction where jurors control the *Atkins* determination.²³⁸

Yet there is also uncertainty when a judge conducts the intellectual disability analysis. If a defendant has varying levels of intellectual ability and adaptive functioning and experts disagree on a diagnosis, a judge may be forced to rely on her own discretion to make the determination.²³⁹ But judges are not trained clinicians and are categorically unqualified to make such conclusions. “The assessment of intellectual disability is a complicated task—one for which the typical judge, no more than an educated layperson in these matters, is perhaps not best equipped. But it is one that the law assigns us.”²⁴⁰

The consequences of an ill-defined intellectual disability standard are glaring. Circuit courts fluctuate between DSM editions, interpret Supreme Court precedent differently, apply the SEM and the Flynn Effect variably, establish distinct burdens of proof, and utilize different criminal procedures. The inconsistent application of this standard adds an arbitrary element to capital punishment. Intellectually disabled defendants in specific jurisdictions are more likely

²³² See Lucas, *supra* note 202, at 604.

²³³ *Id.*

²³⁴ Feluren, *supra* note 9, at 342.

²³⁵ *Id.*

²³⁶ *Id.* at 354.

²³⁷ *Id.* at 354–55.

²³⁸ See *id.*

²³⁹ *Id.*; see also *Apelt v. Ryan*, 878 F.3d 800, 837 (9th Cir. 2017) (finding that state courts are permitted to find one expert more credible over another). In *Apelt v. Ryan*, the court found that Apelt had a strong showing of subaverage intellectual functioning: he maintained IQ scores of 61 and 65 with little suggestion of malingering. *Id.* And the court found age of onset occurred before the age of 18. *Id.* However, Apelt’s expert and the State’s expert disagreed on whether Apelt displayed sufficient deficits in adaptive functioning. *Id.* Because the court found that the state court was permitted to “credit one expert over another,” and the state court credited the State’s expert, Apelt’s *Atkins* claim failed. *Id.* at 837–38.

²⁴⁰ *United States v. Pervis*, 937 F.3d 546, 558 (5th Cir. 2019).

to be executed. This subjectivity violates the cruel and unusual punishment clause of the Eighth Amendment.

IV. A FEDERAL STANDARD TO EVALUATE INTELLECTUAL DISABILITY

Atkins provided states with authority to identify intellectual disability.²⁴¹ Although the *Atkins* Court created guideposts for states to follow, including abiding by clinical standards to diagnose intellectual disability, the Court must go further.²⁴² To avoid ill-begotten scenarios, the Court must create a federal standard to identify intellectual disability that would establish more certainty and diminish discrepancies from state to state.²⁴³

I recommend the Court adopt a five-factor standard to guide the constitutionally required intellectual disability determination. All states should abide by the following criteria:

- (1) courts must adopt medical standards embodied in the most current version of the DSM;
- (2) courts must pay close attention to assess the disability's nuances because mild intellectual disability may present covertly in defendants;
- (3) the intellectual disability determination will be made by a judge by the preponderance of the evidence;
- (4) courts are required to account for statistical adjustments like the standard error of measurement (SEM) and the Flynn Effect but are reminded not to rely heavily on IQ score;
- (5) courts may never weigh adaptive strengths in the intellectual disability analysis.

The proposed federal standard is flexible and can accommodate changes in clinical standards. The first factor allows the intellectual disability determination to fluctuate as diagnostic standards change. The DSM is revised and updated regularly, so the federal standard implicitly incorporates review periods where medical knowledge is reassessed. The reliance on the DSM effectively allows clinicians and the APA to guide the intellectual disability analysis. Although following current medical standards is advisable and required by law per *Moore v. Texas*, the first factor goes further and requires specific adherence to the most recent DSM definition. The specificity will prevent courts from relying on prior versions of the DSM.

However, the DSM-5 intellectual disability definition is not without critique. Some critics profess that the DSM-5 definition is too rigid.²⁴⁴ Intellectual disability can manifest in a variety of ways, yet the DSM-5 seems to quantify such a diverse and multiplicitous disability that can morph and change over a

²⁴¹ *Hill v. Shoop*, 11 F.4th 373, 381 (6th Cir. 2021) (citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

²⁴² *See id.*

²⁴³ Feluren, *supra* note 9, at 357.

²⁴⁴ *See* Burack et al., *supra* note 12, at 340, 344.

lifetime.²⁴⁵ The intellectual disability definition involves the “artificial grouping of a wildly etiologically heterogeneous population based on amorphous concepts, arbitrary behavioral criteria, and ever-evolving nomenclature and societal values[.]”²⁴⁶ The idea of the intellectual disability definition as a “single monolithic diagnostic entity” obscures the variability inherent in neurodevelopmental conditions.²⁴⁷

Some scientists argue that the definition of intellectual disability is arbitrary.²⁴⁸ They argue for the deconstruction of current methodological approaches that assess intellectual disability.²⁴⁹ They opine how the etiology, genotype, and phenotype associated with intellectual disability create a heterogeneous group that should not be researched or diagnosed as a single monolithic entity.²⁵⁰ And some scientists contend that the current DSM-5 definition of intellectual disability cannot accurately capture the nuances and diversity of intellectually disabled individuals.²⁵¹ These scientists recommend more cutting-edge genomic techniques that allow for the appropriate differentiation and accurate identification of etiologies associated with intellectual disability.²⁵² Because these scientists reject the current DSM-5 definition of intellectual disability, it follows that they would reject an identical federal standard to identify intellectual disability in defendants convicted of capital crimes. The courts, however, need the guidance that the most authoritative source, the DSM, can provide, without requiring unanimity within the scientific community. By linking the Eighth Amendment protection to the latest authoritative scientific and medical judgment about intellectual disability, the proposed standard makes the Eighth Amendment guaranty meaningful while building in room for future changes in scientific consensus.

The second factor of the proposed federal standard, which requires nuanced treatment of defendants, includes enough flexibility to accommodate all types of intellectually disabled defendants. Because mild intellectual disability is often overlooked in lower-income disadvantaged communities,²⁵³ the proposed federal standard is inclusive and captures the nuances of the disability. This reduces the possibility that a defendant’s residence or economic status will implicitly be used as an element in a death sentence. The factor calls attention to the diversity inherent in the disability and puts courts on notice that intellectual disability may present differently in defendants.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 340.

²⁴⁷ *Id.* at 344.

²⁴⁸ *Id.* at 356.

²⁴⁹ *Id.* at 340.

²⁵⁰ *Id.* at 339, 344.

²⁵¹ *Id.* at 344.

²⁵² *See id.* at 355.

²⁵³ SAULNIER & KLAIMAN, *supra* note 120, at 61.

The third, fourth, and fifth factors, which reference the burden of proof, the SEM and Flynn Effect, and adaptive strengths, are specific to avoid a wide range of interpretation and preempt conflicts with federal habeas law. Unusual precision is necessary to provide clarity to both state and federal courts, particularly because there is strong deference to state court determinations required under current federal habeas procedures. Although federal appellate courts review district court legal analysis de novo and district court factual findings for clear error,²⁵⁴ the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) restricts appellate review of federal habeas claims and requires a “highly deferential standard for evaluating state-court rulings.”²⁵⁵ Federal appellate courts apply this weighty deference to state court determinations when the state court proceedings are adjudicated on the merits.²⁵⁶ However, according to 28 U.S.C. § 2254(d), federal appellate courts may review state court decisions de novo if the adjudicated claim involved an unreasonable application of federal law or was based on an unreasonable determination of fact.²⁵⁷

When applying § 2254(d)(1), the unreasonable determination requires a “state court’s application of clearly established federal law [to be] objectively unreasonable.”²⁵⁸ An unreasonable application of federal law occurs when a state court identifies an established legal principle but unreasonably applies it to the facts of the case.²⁵⁹ “[A]n unreasonable application of federal law is different from an incorrect application of federal law.”²⁶⁰ The state court ruling must be “objectively unreasonable, not merely wrong; even clear error will not suffice.”²⁶¹ It is an intentionally difficult standard to meet.²⁶²

Establishing a federal standard to identify intellectual disability in defendants requires state and district courts to abide by the pertinent Supreme Court holding. But because appellate courts are extremely deferential to state court decisions when they are adjudicated on the merits, state courts will have wiggle room to maneuver around a federal standard, unless the standard is sufficiently specific. A federal standard applied incorrectly may still not be enough to overcome deference. A state court ruling must be objectively unreasonable.

To avoid a wide range of reasonable interpretations, the third, fourth, and fifth factors of the proposed federal standard are specific. The factors address

²⁵⁴ See *Smith v. Sharp*, 935 F.3d 1064, 1071 (10th Cir. 2019).

²⁵⁵ *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). The AEDPA was codified as 28 U.S.C. § 2254. *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, CORNELL L. SCH.: LEGAL INFO. INST. (June 2022), [https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_\(aedpa\)](https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_(aedpa)) [<https://perma.cc/LU7E-TL78>].

²⁵⁶ 28 U.S.C. § 2254(d).

²⁵⁷ *Id.* § 2254(d)(1)–(2).

²⁵⁸ *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

²⁵⁹ *Id.* at 413.

²⁶⁰ *Id.* at 410 (emphasis omitted).

²⁶¹ *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)).

²⁶² *Id.*

existing discrepancies between circuit courts to provide clarity. The third factor requires a judge, not a jury, to conduct the intellectual disability analysis and identifies the burden of proof as a preponderance of the evidence. Georgia's high burden of proof will thus be eliminated. This will allow Georgia defendants to practically pursue *Atkins* claims. And because juries are substantially less likely to identify intellectual disability in a defendant,²⁶³ the third factor puts the determination to a judge.

The fourth factor is also exceedingly specific. The factor requires the court to incorporate the SEM and the Flynn Effect in its analysis of the subaverage intellectual functioning prong. But it warns against relying too heavily on IQ and encourages courts to move on to the adaptive functioning prong. Circuit courts vary widely in the use of the SEM and the Flynn Effect. Some courts account for neither, other courts account for one of the two, while other courts require both. The fourth factor will streamline the approach across all jurisdictions.

The fifth factor eliminates the use of adaptive strengths in the intellectual disability analysis. The Court in *Moore v. Texas* discouraged the use of adaptive strengths over adaptive deficits when analyzing intellectual disability.²⁶⁴ Some courts, however, do not abide by the ruling and instead consider adaptive strengths with adaptive deficits in the same skill area.²⁶⁵ The fifth factor dispels any confusion and entirely removes discussion of adaptive strengths. The specificity of factors three, four, and five leave little room for interpretation and will allow federal habeas courts to adequately address unreasonableness.

Although some cases may slip through cracks in the criminal justice system, a federal standard will impede the arbitrary identification of intellectually disabled defendants. There is also a sense of urgency to this determination that cannot be understated. New constitutional rules generally only apply to future cases and cases pending at the time of the ruling.²⁶⁶ A new federal standard would not retroactively apply to closed cases, such as capital habeas cases.²⁶⁷

The recommendation of a federal standard also does not undermine arguments to entirely eliminate the death penalty. Since the *Atkins* decision in 2002, eleven states abolished the death penalty, making the total number of states without the death penalty twenty-three.²⁶⁸ Virginia, the most recent state to abolish the death penalty, did so in 2021.²⁶⁹ Three states have gubernatorial

²⁶³ Blume et al., *supra* note 31, at 410.

²⁶⁴ *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017).

²⁶⁵ *Sasser v. Payne*, 999 F.3d 609, 619–20 (8th Cir. 2021).

²⁶⁶ See ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 28–29 (3d ed. 2018) (discussing effects of new Supreme Court criminal procedure rules).

²⁶⁷ *See id.*

²⁶⁸ *State by State*, DEATH PENALTY INFO. CTR. (2021), <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/5KFM-FL2W>].

²⁶⁹ *Id.*

moratoria on the death penalty,²⁷⁰ and the death penalty abolition movement is only growing.²⁷¹ Advocating for a federal standard to identify intellectual disability limits the current reach of capital punishment in the hopes that, one day, the death penalty will be abolished entirely.

CONCLUSION

The Supreme Court of the United States recognized that capital sentences for intellectually disabled defendants are unconstitutional. But the Court fell short of establishing a controlling definition of intellectual disability. The Court placed guidelines around the disability determination when it held that courts must abide by medical standards, but this did not stop large discrepancies from forming between jurisdictions. Now, a defendant may be found intellectually disabled in one state but not another, and this leads to an arbitrary application of the death penalty that largely affects people of color. A federal standard will rectify this injustice. The standard should be inclusive yet flexible to capture all the disability's nuances to avoid overlooking defendants with mild symptoms. In light of evolving medical knowledge and the inherent complexities of intellectual disability, no standard will be perfect. Nonetheless, the added clarity of a federal standard will reduce the number of people with intellectual disabilities who are executed in violation of the Eighth Amendment.

²⁷⁰ *Id.*

²⁷¹ John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 11 (2018).

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